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No. SC93487

In The Supreme Court of Missouri

STATE OF MISSOURI EX REL. JASON CLAY CARR,

Petitioner,

vs.

IAN WALLACE, SUPERINTENDENT,

Respondent.

PETITIONER'S BRIEF

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(1) Does the imposition of a sentence of life without parole for 50 years on a 16-year-old child convicted of homicide violate the Eighth and Fourteenth Amendments' prohibition against cruel and unusual punishment when it was imposed as a result of a mandatory sentencing scheme that categorically precluded consideration of the child's young age or any other mitigating circumstances, contrary the sentencing procedures set forth in *Miller*?[1]

(2) Does the imposition of a sentence of life without parole for 50 years on a 16-year-old child convicted of homicide violate the Eighth and Fourteenth Amendments' prohibition against cruel and unusual punishment when it was imposed as a result of a mandatory sentencing scheme that categorically precluded consideration of the child's young age or any other mitigating circumstances, contrary the sentencing procedures later set forth in *Miller*, there is a clear national consensus against such a mandatory sentence, and Missouri has recently enacted legislation, § 558.047, RSMo 2016 (effective July 13, 2016), which allows a juvenile, who is sentenced to a term of imprisonment for life without eligibility for parole, to petition the parole board for review of his sentence after serving only 25 years of incarceration on that sentence?

[1] *Miller v. Alabama*, 567 U.S. ___, 132 S.Ct. 2455, 2469 (2012)

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TABLE OF AUTHORITIES

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ISSUES PRESENTED:

(1) Does the imposition of a sentence of life without parole for 50 years on a 16-year-old child convicted of homicide violate the Eighth and Fourteenth Amendments' prohibition against cruel and unusual punishment when it was imposed as a result of a mandatory sentencing scheme that categorically precluded consideration of the child's young age or any other mitigating circumstances, contrary the sentencing procedures set forth in *Miller*?[2]

(2) Does the imposition of a sentence of life without parole for 50 years on a 16-year-old child convicted of homicide violate the Eighth and Fourteenth Amendments' prohibition against cruel and unusual punishment when it was imposed as a result of a mandatory sentencing scheme that categorically precluded consideration of the child's young age or any other mitigating circumstances, contrary the sentencing procedures later set forth in *Miller*, there is a clear national consensus against such a mandatory sentence, and Missouri has recently enacted legislation, § 558.047, RSMo 2016 (effective July 13, 2016), which allows a juvenile, who is sentenced to a term of imprisonment for life without eligibility for parole, to petition the parole board for review of his sentence after serving only 25 years of incarceration on that sentence?

[2] *Miller v. Alabama*, 567 U.S. ___, 132 S.Ct. 2455, 2469 (2012)

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JURISDICTIONAL STATEMENT

A jury found Jason Carr guilty of three counts of capital murder, § 565.001, RSMo (1978), which were committed on March 15, 1983, when he was 16 years of age. *State v. Carr*, 687 S.W.2d 606, 608 (Mo. App. S.D. 1985). He was sentenced to concurrent terms of life imprisonment without eligibility for probation or parole for 50 years, § 565.008.1, RSMo (1978), which was mandatory because it was the only available sentence other than death. *Id*. His convictions were affirmed on direct appeal. *Id*. at 613.

In 2012, the Supreme Court of the United States held that the Eighth Amendment's Cruel and Unusual Punishments Clause forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile homicide offenders. *Miller v. Alabama*, 567 U.S. ___, 132 S.Ct. 2455 (2012).

In response, on June 24, 2013, Jason, who was a prisoner at Southeast Correctional Center in Missouri, filed a petition for a writ of habeas corpus in this Court alleging that his sentence was unconstitutional under *Miller* because it was the functional equivalent of a life without parole sentence. *State ex rel. Carr v. Wallace*, SC93487.[3]

[3] Jason requests that this Court take judicial notice of its file and all its pleadings in this case. According to the Missouri Department of Corrections website, Ian Wallace is no longer the superintendent; Jason Lewis is listed as "warden."

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In January of 2016, the Supreme Court of the United States in *Montgomery v. Louisiana*, 577 U.S. _, 136 S.Ct. 718 (2016), held that *Miller* applied retroactively to those petitioners, whose convictions are final, seeking collateral review; it also held that a state could remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole or by resentencing them.

On March 15, 2016, this Court issued an order, citing *Miller* and *Montgomery*, sustaining Jason's petition in part, and ordering that he was eligible to apply for parole after serving 25 years' imprisonment unless his sentence was otherwise brought into conformity with *Miller* and *Montgomery* by action of the governor or enactment of necessary legislation.

On March 30, 2016, Respondent filed a Motion for Rehearing arguing that Jason's sentence did not fall under *Miller* because he did not receive a life without parole sentence since he was parole eligible after serving 50 years. On July 19, 2016, this Court set aside its order of March 15, 2016, overruled the Motion for Rehearing as moot, and set this case for briefing and argument.

This Court has jurisdiction to "issue and determine original remedial writs," including writs of habeas corpus under Art. V, § 4, subsection 1, of the Missouri Constitution. Further, "a writ of habeas corpus may be issued when a person is restrained of his or her liberty in violation of the constitution or laws of the state or federal government." *State ex rel. Woodworth v. Denney*, 396 S.W.3d 330, 337 (Mo. banc 2013). This matter is presently before this Court pursuant to Supreme Court Rule 91.01 *et seq.*, and § 532.020 *et seq*. RSMo (2000).

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STATEMENT OF FACTS

On March 15, 1983, when Jason Carr was 16 years of age, he killed his stepmother, his stepsister, and his brother. *State v. Carr*, 687 S.W.2d 606, 608 (Mo. App. S.D. 1985). Later that day, Jason attempted to shoot his father, but his father was able to disarm him. *Id*. After Jason was disarmed he told his father, "I killed them all;" he also said that he killed his brother even though he loved him. *Id*. Jason had not "previously been in serious trouble" and he was a "good high school student, generally getting 'A's and B's'." *Id*.

A jury found Jason guilty of three counts of capital murder, § 565.001, RSMo (1978), and he was sentenced to concurrent terms of life imprisonment without eligibility for probation or parole for 50 years, which was the only available sentence other than death, § 565.008.1, RSMo (1978). *Id*.

His convictions were affirmed on direct appeal. *Id*. at 613. One of the issues raised on appeal was that the trial court erred by refusing to submit an instruction submitting to the jury the defense of mental disease and defect excluding criminal responsibility. *Id*. at 609. A state psychiatrist testified that Jason did not suffer from such a disease or defect. *Id*.

But other evidence showed the following. After Jason's parents were divorced, he had lived with his mother and her then husband. *Id*. His mother had "legal custody," but because her husband verbally threatened Jason and physically abused him, Jason left to live with his father. *Id*.

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Following his mother's second divorce, Jason lived with his mother from the fall of 1982, until the last week of January 1983. *Id*. Early in January, Jason received a phone call from his father and afterwards he quit the basketball team. *Id*.[4] After the call, he became moody and would eat little and would not see his friends. *Id*. The last week of January of 1983, Jason's mother took him back to live with his father. *Id*.

About a week or two prior to the homicides, his mother received a phone call from Jason; he was upset and kept saying he was trying to do the right thing, but everything he did was bad and his dad kept telling him he was bad because he wanted to play basketball, and he wanted to drive, and he wanted to date a girl that was not of his father's religious faith; he said he tried to be good, but he was always getting into trouble for something. *Id*. Jason's mother believed that at the time of the phone call, Jason suffered from a mental disease or defect and she had no reason to believe that he changed in the seven to ten days after the phone call when the homicides occurred. *Id*. She did not believe that at the time of the phone call that he had a mental state where he could calmly and coolly reflect on killing someone. *Id*.

[4] Jason, who was six foot seven inches tall, was not allowed to play on the high school basketball team because its schedule conflicted with the family's "home bible study." *Id*. at 608.

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After the shootings, while in jail, Jason had nightmares and an inability to sleep. *Id*. at 610.

In its written opinion, the court of appeals noted, "[o]bviously the defendant's acts were not those of a rational person. No normal person would have done the things with which defendant is charged for the reasons advanced. Those acts, more than [his mother's] testimony, indicate that defendant had severe mental problems." *Id*. Nevertheless, based upon prior decisions of this State, the court "reluctantly" concluded that although Jason's conduct was "abnormal," the killings and the other evidence fell short of being substantial evidence that as a result of mental disease or defect he did not know or appreciate the nature, quality or wrongfulness of his conduct or was incapable of conforming his conduct to the requirements of law. *Id*. at 610-611.

In 2012, the Supreme Court of the United States held that the Eighth Amendment's Cruel and Unusual Punishments Clause forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile homicide offenders. *Miller v. Alabama*, 567 U.S. ___, 132 S.Ct. 2455, 2463-2475 (2012). The Court held that by making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment. *Id*. at 2469. Although the Court did not foreclose a sentencer's ability to make that judgment in homicide cases, the Court required the sentencer to take into account how children are different, and

how those differences counsel against irrevocably sentencing them to a lifetime in prison. *Id*.

In response, on June 24, 2013, Jason filed a petition for a writ of habeas corpus in this Court alleging that his sentence of life without parole for 50 years for homicide offenses committed when he was a juvenile were unconstitutional under *Miller*. *State ex rel. Carr v. Wallace*, SC93487.

In January of 2016, the Supreme Court of the United States in *Montgomery v. Louisiana*, 577 U.S. _, 136 S.Ct. 718 (2016), held that *Miller* applied retroactively to those petitioners, whose convictions are final, seeking collateral review, but also holding that a state could remedy a *Miler* violation by permitting juvenile homicide offenders to be considered for parole or by resentencing them.

On March 15, 2016, this Court issued an order, citing *Miller* and *Montgomery*, and sustained Jason's petition in part, ordering that he was eligible to apply for parole after serving 25 years' imprisonment unless his sentence was otherwise brought into conformity with *Miller* and *Montgomery* by action of the governor or enactment of necessary legislation.

On March 30, 2016, Respondent filed a Motion for Rehearing arguing that Jason's sentence did not fall under *Miller* because the sentence he received made him eligible for parole after 50 years.

On July 13, 2016, the Missouri Governor approved Senate Bill 590 (2016), which provided, in part, that "[a]ny person sentenced to a term of imprisonment for life without eligibility for parole before August 28, 2016, who was under

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eighteen years of age at the time of the commission of the offense or offenses, may submit to the parole board a petition for review of his or her sentence, regardless of whether the case is final for purposes of appeal, after serving twenty-five years of incarceration on the sentence of life without parole." Section 558.047, RSMo 2016 (eff. 7/13/16).

On July 19, 2016, this Court set aside its order of March 15, 2016, overruled Respondent's Motion for Rehearing as moot, and set this case for briefing and argument. Any further facts necessary for the disposition of this case will be set out in the argument portion of this brief.

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POINTS RELIED ON

I.

Jason is entitled to a writ of habeas corpus on his sentence of life without parole for 50 years for the homicide offenses he committed when he was 16 years old, because this sentence is unconstitutional under *Miller v. Alabama*,[5] and the 8th and 14th Amendments to the U.S. Const., and Art. I, § 21 of the Mo. Const., as applied to juveniles, in that Jason's mandatory sentence constituted the functional equivalent of life without parole since he will be ineligible for parole until almost age 67, no matter how much he has matured and been rehabilitated, and thus he will not receive a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation, as required by *Miller*; there is a clear national consensus against a mandatory sentence of life without parole for 50 years for juvenile homicide offenders; and, Missouri recently enacted § 558.047, which allows a juvenile, who was sentenced to life without eligibility for parole, to petition the parole board for review of his sentence after serving only 25 years on that sentence. This Court should conclude that Jason, who has been incarcerated for 33 years, is parole eligible, and that he should be released from prison unless the parole board determines that he is among the very rarest of juvenile offenders whose crimes reflect permanent incorrigibility.

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[5] *Miller v. Alabama*, 567 U.S. ___, 132 S.Ct. 2455 (2012).

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Miller v. Alabama, 567 U.S. ___, 132 S.Ct. 2455 (2012);

Casiano v. Comm'r of Correction, 115 A.3d 1031 (Conn. 2015), *cert. den. sub nom. Semple v. Casiano*, 136 S. Ct. 1364 (2016);

State v. Null, 836 N.W.2d 41 (Iowa 2013);

State v. Ronquillo, 190 Wash.App. 765, 361 P.3d 779 (2015);

U.S. Const., Amends. VIII and XIV;

Article I, § 21, Mo. Const.;

Article V, § 4, Mo. Const.;

§§ 565.001 and 565.008, RSMo (1978);

§ 532.020 *et seq*. RSMo (2000);

§§ 558.047 and 565.033, RSMo (eff. 7/13/16);

11 Del.C. § 4209A;

18 Pa. Stat. and Cons. Stat. Ann. § 1102.1;

Ala. Code § 13A-5-39, 13A-6-2;

Ariz. Rev. Stat. Ann. §§ 13-751, 13-1105;

Ark. Code Ann. §§ 5-4-104(b), 5-10-101;

Cal. Penal Code §§ 3046(c), 3051(b), 4801;

Colo. Rev. Stat. Ann. § 18-1.3-401;

Conn. Gen. Stat. Ann. § 54-125a(f)(1);

Fla. Stat. Ann. §§ 775.082, 921.1402;

Haw. Rev. Stat. Ann. § 706-656;

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La. Stat. Ann. § 15:574.4;

Mass. Gen. Laws Ann. ch. 279, § 24;

Mich. Comp. Laws Ann. § 769.25;

Neb. Rev. Stat. §§ 28-105.02, 83-1,110;

NRS 213.12135;

N.C. Gen. Stat. Ann. § 15A–1340.19A;

Tex. Penal Code Ann. § 12.31;

Tex. Gov't Code Ann. § 508.145;

Utah Code Ann. §§ 76–5–202(3)(e), 76–3–207.7;

Wash. Rev. Code Ann. § 10.95.030;

W. Va. Code Ann. § 61-11-23;

Wyo. Stat. Ann. § 6–10–301(c);

Laurence Steinberg, Give Adolescents the Time and Skills to Mature, and Most Offenders Will Stop, Il: MacArthur Foundation, (2014), www.pathwaysstudy.pitt.edu/documents/MacArthur%20Brie%20Give%20Adolescents%20Time.pdf

United States Department of Health and Human Services, Centers for Disease Control and Prevention, National Vital Statistics Reports, Vol. 62, No. 7 (January 6, 2014), available at http://www.cdc.gov/nchs/data/nvsr/nvsr62/nvsr 62_07.pdf;

Campaign for the Fair Sentencing of Youth, "Michigan Life Expectancy\

Data for Youth Serving Natural Life Sentences," (2012–2015), available at http://fairsentencingofyouth.org/wp content/uploads/2010/02/Michigan-Life-Expectancy-Data-Youth-Serving-Life.pdf; and,

N. Straley, "*Miller*'s Promise: Re–Evaluating Extreme Criminal Sentences for Children," 89 Wn. L.Rev. 963 (2014).

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II.

Jason is entitled to a writ of habeas corpus on his sentence of life without parole for 50 years for the homicide offenses he committed when he was 16 years old, because this sentence is unconstitutional under *Miller v. Alabama*,[6] and the 8th and 14th Amendments to the U.S. Const., and Art. I, § 21 of the Mo. Const., as interpreted by society's evolving standards of decency and as applied to juveniles, in that Jason's mandatory sentence violates the principle of proportionality, and thus the 8th Amendment's ban on cruel and unusual punishment, because there is a national consensus against a mandatory sentence of life without parole for 50 years for juvenile homicide offenders since no state currently, constitutionally, requires a juvenile homicide offender to serve a mandatory sentence of such length; and, Missouri recently enacted § 558.047, which allows a juvenile, who was sentenced to life without eligibility for parole, to petition the parole board for review of his sentence after serving only 25 years of incarceration on that sentence. This Court should conclude that Jason, who has been incarcerated for 33 years, is parole eligible, that the parole board should consider the factors set out in §§ 558.047 and 565.033, and he should be released on parole unless the board determines that he is among the very rarest of juvenile offenders whose crimes reflect permanent incorrigibility.

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[6] *Miller v. Alabama*, 567 U.S. ___, 132 S.Ct. 2455 (2012).

Graham v. Florida, 560 U.S. 48 (2010);

Miller v. Alabama, 567 U.S. ___, 132 S.Ct. 2455 (2012);

Montgomery v. Louisiana, 577 U.S. __, 136 S.Ct. 718 (2016);

Peters v. State, 128 So.3d 832 (Fla. Dist. Ct. App. 2013);

U.S. Const., Amends. VIII and XIV;

Article I, § 21, Mo. Const.;

Article V, § 4, Mo. Const.; and

§§ 558.047 and 565.033, RSMo (eff. 7/13/16).

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ARGUMENTS

I.

Jason is entitled to a writ of habeas corpus on his sentence of life without parole for 50 years for the homicide offenses he committed when he was 16 years old, because this sentence is unconstitutional under *Miller v. Alabama*,[7] and the 8th and 14th Amendments to the U.S. Const., and Art. I, § 21 of the Mo. Const., as applied to juveniles, in that Jason's mandatory sentence constituted the functional equivalent of life without parole since he will be ineligible for parole until almost age 67, no matter how much he has matured and been rehabilitated, and thus he will not receive a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation, as required by *Miller*; there is a clear national consensus against a mandatory sentence of life without parole for 50 years for juvenile homicide offenders; and, Missouri recently enacted § 558.047, which allows a juvenile, who was sentenced to life without eligibility for parole, to petition the parole board for review of his sentence after serving only 25 years on that sentence. This Court should conclude that Jason, who has been incarcerated for 33 years, is parole eligible, and that he should be released from prison unless the parole board determines that he is among the very rarest of juvenile offenders whose crimes reflect permanent incorrigibility.

[7] *Miller v. Alabama*, 567 U.S. ___, 132 S.Ct. 2455 (2012).

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Issue Presented:

The Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole (LWOP) for juvenile offenders.[8] *Miller v. Alabama*, 567 U.S. ___, 132 S.Ct. 2455, 2469 (2012). Cf." *Graham v. Florida*, 560 U.S. 48, 75 (2010) (A state is not required to guarantee eventual freedom, but it must provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.").

Jason was given a mandatory sentence of life without parole for 50 years for homicide offenses committed when he was only 16 years old. On direct appeal, the appellate court noted that "[Jason's] acts were not those of a rational person. No normal person would have done the things with which defendant is charged for the reasons advanced. Those acts … indicate that [Jason] had severe mental problems." *State v. Carr*, 687 S.W.2d 606, 610-611 (Mo. App. S.D. 1985). But because his sentence was mandatory, he was not afforded an individualized sentencing hearing at which either the jury or trial court were allowed to consider these mitigating circumstances as well as his youth in determining his sentence as later required by *Miller*.

[8] "Juvenile" is a child under the age of 18, which is the dividing line chosen by the Supreme Court. *Roper v. Simmons*, 543 U.S. 551, 574 (2005).

Does the imposition of a sentence of life without parole for 50 years on a 16-year-old child convicted of homicide violate the Eighth and Fourteenth Amendments' prohibition against cruel and unusual punishment when it was imposed as a result of a mandatory sentencing scheme that categorically precluded consideration of the child's young age or any other mitigating circumstances, contrary the sentencing procedures set forth in *Miller*?

Standard for Obtaining Habeas Relief:

Article V, § 4 of the Missouri Constitution vests this Court with the authority "to issue and determine original remedial writs," including writs of habeas corpus. *State ex rel. Zinna v. Steele*, 301 S.W.3d 510, 513 (Mo. banc 2010). "Habeas corpus relief is the final judicial inquiry into the validity of a criminal conviction and functions to relieve defendants whose convictions violate fundamental fairness." *Id.* The petitioner has the burden of showing that he or she is entitled to habeas corpus relief. *Id*.

A writ of habeas corpus may be issued when a person is restrained of his or her liberty in violation of the constitution or laws of the state or federal government. *Id*. Questions of law, including constitutional challenges, are reviewed *de novo*. *Earth Island Inst. v. Union Elec. Co.*, 456 S.W.3d 27, 32 (Mo. banc 2015).

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Relevant facts:

On March 15, 1983, when Jason Carr was 16 years of age, he killed his stepmother, his stepsister, and his brother. *State v. Carr*, 687 S.W.2d 606, 608 (Mo. App. S.D. 1985). Later that day, Jason attempted to shoot his father, but his father was able to disarm him. *Id*. After Jason was disarmed he told his father, "I killed them all;" he also said that he killed his brother even though he loved him. *Id*. Jason had not "previously been in serious trouble" and he was a "good high school student, generally getting 'A's and B's'." *Id.*

Included in the evidence at trial was the following. After Jason's parents were divorced, he had lived with his mother and her then husband. *Id*. at 609. His mother had "legal custody," but because her husband verbally threatened Jason and physically abused him, Jason left to live with his father. *Id.*

Following his mother's second divorce, Jason lived with his mother from the fall of 1982, until the last week of January 1983. *Id*. Early in January, Jason received a phone call from his father and afterwards quit the basketball team. *Id*. After the call, he became moody and would eat little and would not see his friends. *Id*. The last week of January of 1983, Jason's mother took him back to live with his father. *Id*.

About a week or two prior to the homicides, his mother received a phone call from Jason; he was upset and kept saying he was trying to do the right thing,

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but everything he did was bad and his dad kept telling him he was bad because he wanted to play basketball, and he wanted to drive, and he wanted to date a girl that was not of his father's religious faith. *Id.*

Jason's mother believed that at the time of the phone call, Jason suffered from a mental disease or defect and she had no reason to believe that he changed in the seven to ten days after the phone call when the homicides occurred. *Id*. She did not believe that at the time of the phone call that he had a mental state where he could calmly and coolly reflect on killing someone. *Id*.

After the shootings, while in jail, Jason had nightmares and an inability to sleep. *Id*. at 610.

A jury found Jason guilty of three counts of capital murder, and he was later sentenced to three concurrent terms of life imprisonment without eligibility for probation or parole for 50 years, which was the only available sentence, § 565.008.1, RSMo (1978).[9] *Id*. at 608.

[9] The only two possible sentences for someone found guilty of capital murder were the death penalty and life imprisonment without eligibility for probation or parole until the defendant had served a minimum of fifty years of his sentence. § 565.008.1, RSMo (1978). Subsequently, the Supreme Court of the United States found that a death sentence for a juvenile was unconstitutional. *Roper v. Simmons*, 543 U.S. 551 (2005).

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On appeal, the court of appeals noted, "[o]bviously [Jason's] acts were not those of a rational person. No normal person would have done the things with which [Jason] is charged for the reasons advanced. Those acts … indicate that [Jason] had severe mental problems." *Id*.

These were clearly mitigating circumstances. So was Jason's age at the time of his crimes, as well as the distinctive attributes of youth, which diminish the penological justification for imposing the "harshest sentences on juvenile offenders." *Miller*, 132 S.Ct. at 2465. Yet, under the Missouri sentencing scheme for capital murder (and later, first-degree murder), Jason's convictions for capital murder mandated a sentence of life without parole for 50 years regardless of the circumstance of the crime or the mitigating factors of youth.

After Jason's convictions and sentences became final, the Supreme Court of the United States decided a trilogy of Eighth Amendment cases that altered the landscape of juvenile sentencing practices (*Roper*, *Graham*, and *Miller*). The Court held that, under the Eighth Amendment to the federal constitution, "children are constitutionally different from adults for purposes of sentencing"; *Miller*, 132 S.Ct. at 2464. "[A] sentencing rule permissible for adults may not be so for children." *Id*. at 2470. Juveniles cannot be sentenced under certain circumstances as if they are adults. See *Roper*, 543 U.S. at 578 (Eighth and Fourteenth Amendments prohibit imposition of death penalty on offenders who were under the age of 18 when their crimes were committed); *Graham*, 560 U.S. at 82 (Eighth Amendment prohibits sentence of life without possibility of parole for juvenile

nonhomicide offenders); *Miller*, 132 S.Ct. at 2463–2464 (Eighth Amendment prohibits sentencing scheme that mandates life in prison without possibility of parole for juvenile homicide offenders, thereby precluding sentencing authority from considering the offender's age and hallmarks of adolescence).

In response, on June 24, 2013, Jason filed a petition for a writ of habeas corpus in this Court alleging that his sentence of life without parole for 50 years for homicide offenses committed when he was a juvenile were unconstitutional under *Miller*. *State ex rel. Carr v. Wallace*, SC93487.

On March 15, 2016, this Court issued an order, which sustained Jason's petition in part, and ordered that he was eligible to apply for parole after serving 25 years' imprisonment, unless his sentence was otherwise brought into conformity with *Miller* by action of the governor or enactment of necessary legislation.

On July 13, 2016, the Missouri Governor approved Senate Bill 590 (2016), which provided, in part, that "[a]ny person sentenced to a term of imprisonment for life without eligibility for parole before August 28, 2016, who was under eighteen years of age at the time of the commission of the offense or offenses, may submit to the parole board a petition for review of his or her sentence, regardless of whether the case is final for purposes of appeal, after serving twenty-five years of incarceration on the sentence of life without parole." Section 558.047, RSMo 2016 (effective 7/13/16). On July 19, 2016, this Court set aside its order of March 15, 2016, and set this case for briefing and argument.

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Constitutional Provisions Involved:

The Eighth Amendment to the U.S. Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Similarly, Article I, § 21 of the Missouri Constitution provides that cruel and unusual punishment shall not be inflicted.

The Fourteenth Amendment to the U.S. Constitution provides, "…nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."[10]

Jason's sentence of life without parole for 50 years is unconstitutional because it is a mandatory, functionally equivalent life without parole sentence, which was imposed without consideration of Miller-type factors; and, there is a national consensus against such a lengthy, mandatory sentence

[10] The Eighth Amendment's guarantee against cruel and unusual punishments is made applicable against the States through the Fourteenth Amendment. *Graham v. Florida*, 560 U.S. 48, 53 (2010).

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Roper, *Graham*, and *Miller* establish that juvenile offenders are entitled to constitutional protections in sentencing that adult offenders are denied. Those cases consistently held that juvenile offenders are constitutionally different from adults and thus are categorically less deserving of the "harshest sentences." *Miller*, 132 S.Ct. at 2465.

Based on medical literature, social science research, and common sense observations, the Court recognized three major differences between juvenile's and adults: a lack of maturity, greater susceptibility to negative influences, and a character not as well-formed as that of an adult. *Roper*, 543 U.S. at 569-570. These mitigating factors of youth "both lessened a child's moral culpability and enhanced the prospect that, as the years go by and neurological development occurs, his deficiencies will be reformed." *Miller*, 132 S.Ct. at 2464, *quoting Roper*, 543 U.S. at 570.[11]

Recognizing juveniles' capacity to mature, the Court held that states must

[11] In a study of juvenile offenders, "even those individuals who were high-frequency offenders at the beginning of the study, the majority had stopped these behaviors by the time they were 25." Laurence Steinberg, Give Adolescents the Time and Skills to Mature, and Most Offenders Will Stop, Il: MacArthur Foundation, p.3 (2014), www.pathwaysstudy.pitt.edu/documents/MacArthur%20Brief%20Give%20Adolescents%20Time.pdf.

provide juvenile offenders "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," but it left the specific mechanism up to each state, such as parole or a judicial review. *Graham*, 560 U.S. at 75.

In *Miller*, the Supreme Court held that mandatory life without parole sentencing schemes violate the Eighth Amendment in that they preclude a jury's or court's consideration of: 1) the juvenile's "chronological age and its hallmark features - … immaturity , impetuosity, and failure to appreciate risks and consequences;" 2) the juvenile's family and home environment; 3) "the circumstances of the homicide offense," including "the way familial and peer pressures may have affected him;" 4) the "incompetencies associated with youth," such as his incapacity to assist his own attorneys; and 5) the juvenile's ability to rehabilitate himself. *Miller*, 132 S.Ct. at 2468. The state is "require[d] … to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id*. at 2469.

Numerous courts have considered whether a sentence for a lengthy term of years should be deemed the functional equivalent of a life without parole sentence subject to *Miller's* juvenile sentencing requirements. Most courts that have considered the issue agree that a lengthy term of years for a juvenile offender will become a *de facto* life sentence at some point, although there is no consensus on what that point is. *Casiano v. Comm'r of Correction*, 115 A.3d 1031, 1045 (Conn. 2015), *cert. denied sub nom. Semple v. Casiano*, 136 S. Ct. 1364 (2016).

For example, in *Casiano*, in accordance with a plea agreement, the trial

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court sentenced the petitioner to a total effective prison term of 50 years: 50 years on a felony murder count, and separate 20 year sentences on counts of attempted robbery in the first degree and conspiracy to commit robbery in the first degree, to run concurrent to the felony murder sentence. *Id*. at 1033-1034. The petitioner was not eligible for parole on the felony murder conviction. *Id*. at 1034.

The Connecticut Supreme Court held that the imposition of a 50-year sentence without the possibility of parole was subject to the sentencing procedures set forth in *Miller*. *Id*. at 1044. In doing so, the *Casiano* court concluded that the Supreme Court's focus in *Graham* and *Miller* "was not on the label of a 'life sentence,'" but rather on whether a juvenile would, as a consequence of a lengthy sentence without the possibility of parole, actually be imprisoned for the rest of his life. *Id*. at 1044-1045, quoting *Moore v. Biter*, 725 F.3d 1184, 1192 (9th Cir. 2013). The *Casiano* court rejected the notion that, in order for a sentence to be deemed "life imprisonment," it must continue until the literal end of one's life. *Id*. at 1045.

In reaching that conclusion, the *Casiano* court observed that recent government statistics indicate that the average life expectancy for a male in the United States is seventy-six years. *Id*. at 1046. United States Department of Health and Human Services, Centers for Disease Control and Prevention, National Vital Statistics Reports, Vol. 62, No. 7 (January 6, 2014), available at http://www.cdc.gov/nchs/data/nvsr/nvsr62/nvsr 62_07.pdf (visited by the *Casiano* court on May 26, 2015). *Id*. at 1045. This means that an average male juvenile offender imprisoned between the ages of 16 and 18, who is sentenced to a 50-year

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term of imprisonment ,would be released from prison between the ages of 65 and 68, leaving only eight to ten years of life outside of prison. *Id*. Additionally, this general statistic did not account for any reduction in life expectancy due to the impact of spending the vast majority of one's life in prison. *Id*. *Also see*, e.g., Campaign for the Fair Sentencing of Youth, "Michigan Life Expectancy Data for Youth Serving Natural Life Sentences," (2012–2015) p. 2, available at http://fairsentencingofyouth.org/wp-content/uploads/2010/02/Michigan-Life-Expectancy-Data-Youth-Serving-Life.pdf (visited by the *Casiano* court on May 26, 2015) (concluding that Michigan juveniles sentenced to natural life sentences have average life expectancy of 50.6 years); N. Straley, "*Miller*'s Promise: Re–Evaluating Extreme Criminal Sentences for Children," 89 Wn. L.Rev. 963, 986 n. 142 (2014) (data from New York suggests that an inmate can suffer a two-year decline in life expectancy for every year locked away in prison); *State v. Null*, 836 N.W.2d 41, 71 (Iowa 2013) (acknowledging that "long-term incarceration [may present] health and safety risks that tend to decrease life expectancy as compared to the general population"). Such evidence suggests that a juvenile offender sentenced to a 50 year term of imprisonment may never experience freedom. *Id*. at 1046.

The *Casiano* court further noted that a juvenile offender is typically put behind bars before he has had the chance to exercise the rights and responsibilities of adulthood, such as establishing a career, marrying, raising a family, or voting. *Id*. "Even assuming the juvenile offender does live to be released, after a half

century of incarceration, he will have irreparably lost the opportunity to engage meaningfully in many of these activities and will be left with seriously diminished prospects for his quality of life for the few years he has left. A juvenile offender's release when he is in his late sixties comes at an age when the law presumes that he no longer has productive employment prospects. Indeed, the offender will be age-qualified for Social Security benefits without ever having had the opportunity to participate in gainful employment." *Id.* Any such prospects will also be diminished by the increased risk for certain diseases and disorders that arise with more advanced age. *Id.* at 1047.

Casiano observed that the Supreme Court viewed the concept of "life" in *Miller* and *Graham* more broadly than biological survival; it implicitly endorsed the notion that an individual is effectively incarcerated for "life" if he will have no opportunity to truly reenter society or have any meaningful life outside of prison. *Id.* See *Graham*, 560 U.S. at 75 (states must provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" for juvenile nonhomicide offender; life imprisonment without parole "means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days," *id.* at 69-70 [Citation omitted; internal quotation marks omitted.].

Casiano concluded that, in light of the foregoing statistics and their practical effect, a 50-year term and its grim prospects for any future outside of

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prison effectively provide a juvenile offender with "no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope." *Id*., quoting *Graham*, 560 U.S. at 79. Thus, the Connecticut Supreme Court agreed with the Iowa Supreme Court that "[e]ven if lesser sentences than life without parole might be less problematic, we do not regard the juvenile's potential future release in his or her late sixties after a half century of incarceration sufficient to escape the rationales of *Graham* or *Miller*." *Id*., *quoting*, *Null*, 836 N.W.2d at 71, which had concluded that prospect of "geriatric release" implicates concerns raised in *Graham*. The *Casiano* court was persuaded that the procedures set forth in *Miller* must be followed when considering whether to sentence a juvenile offender to 50 years imprisonment without parole. *Id*. at 1048.

Like *Casiano*, other courts have concluded that a sentence is properly considered a *de facto* life sentence if a juvenile offender would not be eligible for release until near the expected end of his or her life.

In *Null*, *supra*, the Iowa Supreme Court held that a 52.5 year minimum prison term for a juvenile homicide offender, which was based on the aggregation of mandatory minimum sentences for second-degree murder and first-degree robbery, triggered the protections to be afforded under *Miller* – namely an individualized sentencing hearing to determine the issue of parole eligibility.

The *Null* court noted that while a minimum of 52.5 years imprison was not technically a life-without-parole sentence, such a lengthy sentence imposed on a juvenile was sufficient to trigger *Miller*-type protections. *Null*, 836 N.W.2d at 71.

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The court did not regard the juvenile's potential future release in his or her late sixties after a half century of incarceration sufficient to escape the rationales of *Graham* or *Miller*. *Id*. "The prospect of geriatric release, if one is to be afforded the opportunity for release at all, does not provide a 'meaningful opportunity' to demonstrate the 'maturity and rehabilitation' required to obtain release reenter society as required by *Graham*." *Id*., quoting *Graham*, 560 U.S. at 74-75.

The *Null* court recognized that the evidence in that case did not clearly establish that Null's prison term was beyond his life expectancy. *Id*. While some courts had concluded that whether potential release might occur within a defendant's life expectancy is a key factual issue, the *Null* court did not believe the determination of whether the principles of *Miller* or *Graham* apply in a given case should turn on the niceties of epidemiology, genetic analysis, or actuarial sciences in determining precise mortality dates. *Id*. In coming to that conclusion, the court noted that in the flurry of legislative action that had taken place in the wake of *Graham* and *Miller*, many of the new statutes had allowed parole eligibility for juveniles sentenced to long prison terms for homicides to begin after 15 or 25 years of incarceration. *Id*. at 72.

The *Null* Court concluded that *Miller*'s principles were fully applicable to a lengthy term-of-years sentence because an offender sentenced to a lengthy term-of-years sentence should not be worse off than an offender sentenced to life in prison without parole, who has the benefit of individualized sentencing under *Miller*. *Id*.

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In *Bear Cloud v. State*, 334 P.3d 132 (Wyo. 2014), the Wyoming Supreme Court held that a lengthy aggregate sentence, which would result in the juvenile's release in just over 45 years, or when he was 61 years old, for closely-related crimes, and whose practical effect was that the juvenile offender would spend his lifetime in prison, triggered the Eighth Amendment protections set forth by the *Roper*/*Graham*/*Miller* trilogy, which require sentencing courts to provide individualized sentencing. *Id*. at 141-142. Such a lengthy sentence "means denial of hope; it means that good behavior and character improvement are immaterial." *Id* at 142, quoting *Graham*, 560 U.S. at 70. The court noted that as a practical matter, a juvenile offender sentenced to a lengthy term-of-years sentence will not have a meaningful opportunity for release, a reality recognized by the United States Sentencing Commission, which had equated a sentence of 39.17 years to a life sentence. *Id*. at 142.

In *State v. Ronquillo*, 190 Wash.App. 765, 361 P.3d 779 (2015), the court held that a 51.3 year sentence imposed on a juvenile for murder and other violent crimes was a *de facto* life sentence governed by *Miller*. The Court noted that under the Eighth Amendment, the "imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." *Ronquillo*, 190 Wash.App. at 775, quoting *Miller*, 132 S.Ct. at 2466. Because Ronquillo's sentence contemplated that he would remain in prison until the age of 68, it was a *de facto* life sentence because it assessed Ronquillo as virtually irredeemable. *Id*.

Other cases have determined that term-of-year sentences for homicides,

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which are less than life without parole, are unconstitutional under *Miller*. *People v. Franklin*, 63 Cal.4th 261, 276, 370 P.2d 1053, 1060 (2016) ("[A] juvenile may not be sentenced to the functional equivalent of LWOP for a homicide offense without the protections outlined in *Miller*;" defendant was serving a 50-year-to-life sentence, but the enactment of new legislation requiring Franklin to receive a parole hearing during his 25th year of incarceration mooted the constitutional challenge to his sentence); *State v. Ragland*, 836 N.W.2d 107 (Iowa 2013) (defendant's commuted sentence for first-degree murder of life without the possibility for parole for 60 years was unconstitutional as the functional equivalent of a prohibited mandatory life-without-parole sentence); *State v. Zarate*, -- N.J. Super --, 2016 WL 1079462 (App. Div. 2016): juvenile's life sentence with a 63.75 year parole disqualifier, making him ineligible for parole until he was almost 79 years old, amounted to a *de facto* LWOP sentence (remanded to the trial court to reconsider homicide sentence in light of new life expectancy data and recent case law); *State v. Riley*, 315 Conn. 637, 110 A.3d 1205 (2015), *cert. denied*, 136 S.Ct. 1361 (2016) (juvenile's sentence for homicide and nonhomicide offenses with the total effective sentence of 100 years, with parole ineligibility until at least 94 years were served was the functional equivalent of LWOP; remanded for a new sentencing proceeding); *People v. Ellis*, 2015 COA 108, 2015 WL 4760322 (2015) (juvenile's sentence of life with the possibility of parole after 40 years, together with a mandatory consecutive term of 32 years imprisonment was the equivalent of LWOP; case remanded for a determination of offender's life

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expectancy and first parole eligibility date and whether the sentence leaves him a meaningful opportunity for release; if not, the court must conduct a resentencing hearing).

As noted in *Riley*, 315 Conn. at 653, 110 A.3d at 1213, the Supreme Court's incremental approach to assessing the proportionality of juvenile punishment counsels against viewing its cases through "an unduly myopic lens." The Court's approach in this area suggests that courts examine the logical implications of its reasoning in its decisions. *Id*., 315 Conn. at 654, 110 A.3d at 1214.

As these cases show, a sentence that has parole ineligibility for 50 years, no less than a sentence of life without the possibility of parole, impermissibly prejudges that Jason will not be fit to reenter society at an age at which he will still be able to create a productive life for himself outside of prison walls. Such a sentence, which offers a youthful offender no more than a hope for a geriatric release, is not likely to create an incentive for rehabilitation and character improvement. *Graham*, 560 U.S. at 70. Such a scenario, assuming the offender lives that long, approximates a prison-to-nursing home release where the offender would not experience any substantial period of normal adult life in the community. *Graham*, 560 U.S. at 71.

Additionally, in considering categorical bars to sentencing practices, the Supreme Court asks as part of the analysis whether objective indicia of society's standards, as expressed in legislative enactments and state practice, show a

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national consensus against a sentence for a particular class of offenders. *Miller*, 132 S.Ct. at 2470-2471. There is a national consensus against a mandatory sentence of life without parole for 50 years for juvenile homicide offenders.

At the time of *Miller*, 28 States made life-without-parole mandatory for some juveniles convicted of murder in adult court, which the *Miller* court found to be unconstitutional. *Id*. After *Miller* was decided, many of those 28 States amended statutes or enacted new legislation to make their sentencing practices for juveniles convicted of homicide offenses conform to *Miller*. *None* of those States now require the juvenile to serve *at least 50 years* before first being eligible for parole on homicide offenses:

- Alabama: **30 years**; Ala. Code § 13A-5-39, 13A-6-2;
- Arizona: **25 or 35 years** (depending on victim's age); Ariz. Rev. Stat. Ann. §§ 13-751, 13-1105;
- Arkansas: **28 years**; Ark. Code Ann. §§ 5-4-104(b), 5-10-101;
- Connecticut**: 30 years**; Conn. Gen. Stat. Ann. § 54-125a(f)(1);
- Delaware: **25 years**; 11 Del.C. § 4209A;
- Florida: **25 years**; Fla. Stat. Ann. §§ 775.082, 921.1402;
- Hawaii: (**life with parole; parole varies**: Level 1—**5 to 10** years; Level 2—**10 to 20** years; and Level 3—**20 to 50** years; Haw. Rev. Stat. Ann. § 706-656; *State v. Tran*, No. CAAP-13-0005233, 2016 WL 3768880, at *9 (Haw. Ct. App. July 14, 2016);
- Massachusetts: **30 years**; Mass. Gen. Laws Ann. ch. 279, § 24;

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- Michigan: **25 years**; Mich. Comp. Laws Ann. § 769.25;
- Missouri **25 years** (for LWOP sentences before 8/28/2016); § 565.047, RSMo 2016 (S.B. 590, eff. 7/13/2016);
- Nebraska: **40 years** (but possible parole eligibility after serving one-half the minimum term of sentence); Neb. Rev. Stat. §§ 28-105.02, 83-1,110;
- North Carolina: **25 years**; N.C. Gen. Stat. Ann. § 15A–1340.19A;
- Pennsylvania: **35 years** (juveniles age 15 and older) or **25 years** (under 15); 18 Pa. Stat. and Cons. Stat. Ann. § 1102.1;
- Texas: **40 years**; Tex. Penal Code Ann. § 12.31, Tex. Gov't Code Ann. § 508.145;
- Washington: **25 years**; Wash. Rev. Code Ann. § 10.95.030;
- Wyoming: **25 years**; Wyo. Stat. Ann. § 6–10–301(c);

None of this new legislation requires a juvenile to serve 50 years before being eligible for parole. Only two of these states require more than 35 years. Most states require the juvenile to serve only 25 years before being parole eligible.

More importantly, Missouri passed legislation (SB 590) that allow the approximately 80 juveniles who had been convicted of first-degree murder and received the harsher sentence of life without parole to now be eligible for parole in half that time (25 years) than Jason is eligible (50 years).

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Other States that had prohibited LWOP sentences for juvenile homicide offenders before *Miller* also do not require the juvenile to serve at least 50 years before first being eligible for parole on homicide offenses, e.g.:

- California: **25 years**; Penal Code §§ 3046(c), 3051(b), 4801;
- Colorado: **40 years**; Colo. Rev. Stat. Ann. § 18-1.3-401;
- Louisiana: **35 years**; La. Stat. Ann. § 15:574.4;
- Nevada: **20 years**; NRS 213.12135;
- Utah: **25 years**; Utah Code Ann. §§ 76–5–202(3)(e), 76–3–207.7;
- West Virginia: **15 years**; W. Va. Code Ann. § 61-11-23;

These statutes, along with the cases cited above, reflect a growing national trend or consensus against geriatric release for juvenile offenders.

This Court should find that Jason's sentence is unconstitutional, and determine that he is parole eligible because he has already served 25 years. He is not guaranteed parole, but he must be provided a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. *Miller*, 132 S.Ct. at 2469; *Graham*, 560 U.S. at 75.

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Retroactivity and Procedural Default[12]

Miller v. Alabama applies retroactively

The Supreme Court of the United States recently held that *Miller v. Alabama* is retroactive because *Miller* announced a substantive rule of constitutional law. *Montgomery v. Louisiana*, 577 U.S.___, 136 S.Ct. 718 (2016). The *Montgomery* Court held that when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule. *Id*. at 729. This is because the Constitution requires substantive rules to have retroactive effect regardless of when a conviction became final. *Id*. A court has no authority to leave in place a sentence that violates a substantive rule, regardless of whether the conviction or sentence became final before the rule was announced. *Id*. at 731.

Jason's claim is not procedurally defaulted

Generally, if a defendant fails to raise a claim that could have been raised during direct appeal or post-conviction proceedings, the defendant waives the claim and is barred from raising it in a subsequent petition for writ of habeas corpus. *State ex rel. Koster v. Jackson*, 301 S.W.3d 586, 590 (Mo. App. W.D.

[12] These same arguments apply to Jason's second point on appeal, particularly since Missouri S.B. 590 was not enacted until this year.

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2010). But a habeas petitioner can overcome this procedural default by demonstrating: (1) a claim of actual innocence; (2) a "jurisdictional" or "sentencing" defect;[13] or (3) that the procedural default was caused by something external to the defense and that prejudice resulted from the underlying error that worked to the petitioner's actual and substantial disadvantage (cause and prejudice). *Id*. The second and third exceptions are discussed below. Jason can overcome any alleged procedural default under either of those two exceptions.

Further, as noted above, because *Miller* applies retroactively, the claim is not procedurally defaulted. As noted by this Court in *State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 400-01 (Mo. banc 2003), if a new rule falls under an exception to nonretroactivity, such a rule is applicable to persons whose cases are on collateral review, "and the usual waiver rules will not apply." *In accord*, *State v. Whitfield*, 107 S.W.3d 253, 269, n. 19 (Mo. banc 2003) ("In such a case, the rules regarding preservation of error by raising the error on direct appeal or in authorized post-conviction motions do not apply, for 'those waivers do not affect his objection that the sentence exceeds the maximum allowed by law.'") (Citation omitted). *Miller* falls under the substantive rule exception of *Teague v. Lane*, 489

[13] Because unauthorized sentences subject to review in habeas corpus proceedings do not implicate the subject-matter jurisdiction of the sentencing court, such unauthorized sentences are more properly referred to as "sentencing defects." *Thornton v. Denney*, 467 S.W.3d 292, 296 (Mo. App. W.D. 2015).

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U.S. 288 (1989), so it applies retroactively on collateral review, and thus "the usual waiver rules" do not apply. *State ex rel. Simmons v. Roper*, 112 S.W.3d at 400-01.

The claim falls within the sentencing-defect exception

It is well-settled that the imposition of a sentence in excess of that authorized by law may be raised in a habeas corpus petition and such a claim is not subject to procedural default even if the habeas petitioner failed to timely raise the claim in a direct appeal or post-conviction motion. *State ex rel. Zinna v. Steele*, 301 S.W.3d 510, 515, 517 (Mo. banc 2010). Under these cases, a habeas corpus petitioner is entitled to raise a sentencing defect in a habeas corpus proceeding, and the petitioner need not show that he or she had "cause" for failing to raise the issue at an earlier time. *Id.*

"Cases in which a person received a sentence greater than that permitted by law traditionally have been analyzed under the second of these exceptions." *Zinna*, 301 S.W.3d at 517. "[W]here a court 'imposes a sentence that is in excess of that authorized by law, habeas corpus is a proper remedy.' " *Id.* (quoting *State ex rel. Osowski v. Purkett*, 908 S.W.2d 690, 691 (Mo. banc 1995)).

In *Whitfield*, 107 S.W.3d at 269 n. 19 (Mo. banc 2003), this Court held that habeas relief would be appropriate under a sentencing-defect theory where the defendant, though sentenced in compliance with a Missouri statute, was sentenced in violation of the Eighth Amendment, as interpreted in *Ring v. Arizona*, 536 U.S.

584 (2002), which was handed down after the defendant's direct and post-conviction appeals were final. The same is true here. Jason's sentence complies with the former capital murder statutes, but it violates the Eighth Amendment, as interpreted by *Graham* and *Miller.* This argument falls within the sentencing-defect exception and permits this Court to review the merits of his claim.

Cause and Prejudice ("novelty cause")

A habeas petitioner can also avoid a finding of procedural default by showing "cause" for the failure to timely raise the claim at an earlier juncture and "prejudice" resulting from the error. *Zinna*, 301 S.W.3d. at 517. "Cause" can be shown where a constitutional claim is "so novel that its legal basis is not reasonably available to counsel." *Reed v. Ross*, 468 U.S. 1, 14-16 (1984).

Reed recognized three ways that a claim can be so novel to establish cause for the failure to earlier raise it and avoid a finding of procedural default: (1) the Court explicitly overrules one of its precedents; (2) the Court overturns a longstanding and widespread practice to which the Court has not spoken but which a near-unanimous body of lower court authority has expressly approved; and (3) the Court disapproves a practice of the Court arguably sanctioned in prior cases. *Reed*, 468 U.S. at 17.

Miller relied extensively on *Roper v. Simmons*, which in 2005 overruled prior Supreme Court precedent (*Stanford v. Kentucky*, 492 U.S. 361 (1989)), which had been the law at the time Jason's criminal case was pending at trial and

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on appeal. This "clear break from the past," *Reed*, 468 U.S. at 17, emerged after Jason could have been expected to raise the issue in the normal course of his proceedings. "Consequently, the failure of [Jason's] attorney to have pressed such a clam before a state court is sufficiently excusable to satisfy the cause requirement." *Reed*, 468 U.S. at 17.

Prejudice is established where a petitioner demonstrates that the underlying error worked to his or her actual and substantial disadvantage. *Zinna*, 301 S.W.3d at 517. Jason has been prejudiced because he is serving an unconstitutional sentence. "An unauthorized sentence affects substantial rights and results in manifest injustice." *Drennen v. State*, 906 S.W.2d 880, 882 (Mo. App. E.D. 1995). Jason has established both cause and prejudice to avoid a finding of procedural default.

Conclusion

This Court should grant Jason's petition for habeas corpus, find that Jason's sentence is cruel and unusual, and determine that he is parole eligible after serving 25 years, which would make him immediately parole *eligible*. He is not guaranteed parole, but he must be provided a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. *Miller*, 132 S.Ct. at 2469; *Graham*, 560 U.S. at 75.

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In deciding whether Jason should be granted parole, the parole board should consider the factors set out in §§ 558.047 and 565.033 (*Miller*-type factors), and Jason should be released from prison unless the board determines that he is among the very "rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility" and not just transient immaturity. *Montgomery*, 577 U.S. at ___, 136 S.Ct., at 734; *Adams v. Alabama*, 578 U.S. ___, 136 S.Ct. 1796 (2016) (Sotomayor, J., concurring). If not, he should be granted parole.

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II.

Jason is entitled to a writ of habeas corpus on his sentence of life without parole for 50 years for the homicide offenses he committed when he was 16 years old, because this sentence is unconstitutional under *Miller v. Alabama*,[14] and the 8th and 14th Amendments to the U.S. Const., and Art. I, § 21 of the Mo. Const., as interpreted by society's evolving standards of decency and as applied to juveniles, in that Jason's mandatory sentence violates the principle of proportionality, and thus the 8th Amendment's ban on cruel and unusual punishment, because there is a national consensus against a mandatory sentence of life without parole for 50 years for juvenile homicide offenders since no state currently, constitutionally, requires a juvenile homicide offender to serve a mandatory sentence of such length; and, Missouri recently enacted § 558.047, which allows a juvenile, who was sentenced to life without eligibility for parole, to petition the parole board for review of his sentence after serving only 25 years of incarceration on that sentence. This Court should conclude that Jason, who has been incarcerated for 33 years, is parole eligible, that the parole board should consider the factors set out in §§ 558.047 and 565.033, and he should be released on parole unless the board determines that he is among the very rarest of juvenile offenders whose crimes reflect permanent incorrigibility.

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[14] *Miller v. Alabama*, 567 U.S. ___, 132 S.Ct. 2455 (2012).

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Issue Presented:

Does the imposition of a sentence of life without parole for 50 years on a 16-year-old child convicted of homicide violate the Eighth and Fourteenth Amendments' prohibition against cruel and unusual punishment when it was imposed as a result of a mandatory sentencing scheme that categorically precluded consideration of the child's young age or any other mitigating circumstances, contrary the sentencing procedures later set forth in *Miller*, there is a clear national consensus against such a mandatory sentence, and Missouri has recently enacted legislation, § 558.047, RSMo 2016 (effective July 13, 2016), which allows a juvenile, who is sentenced to a term of imprisonment for life without eligibility for parole, to petition the parole board for review of his sentence after serving only 25 years of incarceration on that sentence?

Standard for Obtaining Habeas Relief:

In order to avoid undue repetition, Jason incorporates by reference the standards set out in the argument section to Point I.

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Relevant facts:

In order to avoid undue repetition, Jason incorporates by reference the facts set out in the argument section to Point I.

Constitutional Provisions Involved:

The Eighth Amendment to the U.S. Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Similarly, Article I, § 21 of the Missouri Constitution provides that cruel and unusual punishment shall not be inflicted.

The Fourteenth Amendment to the U.S. Constitution provides, "…nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."[15]

[15] The Eighth Amendment's guarantee against cruel and unusual punishments is made applicable against the States through the Fourteenth Amendment. *Graham v. Florida*, 560 U.S. 48, 53 (2010).

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Jason's sentence of life without parole for 50 years violates the principle of proportionality, and thus the 8th Amendment's ban on cruel and unusual punishment, because there is a national consensus against such a lengthy, mandatory sentence, and, Missouri recently enacted § 558.047, which allows a juvenile, who was sentenced to life without eligibility for parole, to petition the parole board for review of his sentence after serving only 25 years

The Supreme Court of the United States has recognized that the Eighth Amendment contains a proportionality principle, that is, that "punishment for crime should be graduated and proportioned to both the offender and the offense." (Internal quotation marks omitted.). *Miller v. Alabama*, 567 U.S. ___, 132 S.Ct. 2455, 2463 (2012). "The concept of proportionality is central to the Eighth Amendment." *Graham v. Florida*, 560 U.S. 48, 59 (2010).

The Supreme Court's cases addressing the proportionality of sentences fall within two general classifications: 1) challenges to the length of term-of-years sentences given all the circumstances in a particular case; and, 2) cases in which the Court implements the proportionality standard used by certain categorical restrictions on the death penalty. *Id*.

In the first classification, the Court considers all of the circumstances of the case to determine whether the sentence is unconstitutionally excessive. *Id*. Under

this approach, the Eighth Amendment contains a narrow proportionality principle, which does not require strict proportionality between crime and sentence, but only forbids extreme sentences that are "grossly disproportionate." *Id*. at 59-60, *quoting Harmelin v. Michigan*, 501 U.S. 957, 1000-1001 (1991) (Kennedy, J., concurring in part and concurring in judgment).

In determining whether a sentence for a term of years is grossly disproportionate for a particular defendant's crime, a court must begin by comparing the gravity of the offense and the severity of the sentence. *Graham*, 560 U.S. at 60. If a comparison of the gravity of the offense and the harshness of the penalty raises an "inference of gross disproportionality," then the analysis proceeds to the second and third steps, and the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with sentences imposed for the same crime in other jurisdictions. *Id*.

If the comparative analysis validates an initial judgment that the sentence is grossly disproportionate, then the sentence is cruel and unusual. *Id*. Any one of the three factors can be sufficient to demonstrate that a particular punishment is cruel and unusual. *People v. Mendez*, 188 Cal. App. 4th 47, 64–65, 114 Cal. Rptr. 3d 870, 883–84 (2010). But substantial deference is due to the legislature's determination of proper punishment. *State v. Pribble*, 285 S.W.3d 310, 314 (Mo. banc 2009), *citing Solem v. Helm*, 463 U.S. 277 (1983).

To the maximum extent possible, proportionality review should be guided

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by "objective factors." *Harmelin*, 501 U.S. at 1000. In doing so, a court can consider subsequent amendments to criminal sentencing statutes when conducting proportionality reviews in its determination whether a defendant's sentence is grossly disproportionate. *People v. McRae*, No. 15CA0545, 2016 WL 4249747 (Colo. App. August 11, 2016). This is because, generally, the most recent legislative enactments constitute the most objective evidence of a society's evolving standards of decency and how society views a particular punishment for a particular crime. *Humphrey v. Wilson*, 282 Ga. 520, 527, 652 S.E.2d 501 (Ga. 2007).

In cases adopting categorical rules, however, the Court first considers objective indicia of society's standards, as expressed in legislative enactments and state practice to determine whether there is a national consensus against the sentencing practice at issue. *Graham*, 560 U.S. at 61. The Court also looks to the "consistency of the direction of change." *Atkins v. Virignia*, 536 U.S. 304, 315 (2002).

Next, the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution. *Id*. For categorical challenges, because a sentencing practice itself is in question, a threshold comparison between the severity of the penalty and the gravity of the crime does not advance the analysis. *Id*.

For juveniles, in the context of LWOP sentences for juveniles, the Court has used the categorical proportionality review approach because, for juveniles,

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such sentences share some characteristics with death sentences that are shared by no other sentences since "the sentence alters the offender's life by a forfeiture that is irrevocable." *Graham*, 560 U.S. at 69-70; *Miller*, 132 S.Ct. at 2466. Thus, an offender's juvenile status plays a central role in considering a sentence's proportionality. *Miller*, 132 SCt. at 2466.

When considering objective indicia of society's standards, as expressed in legislative enactments and state practice, as pointed out in the argument section to Point I, it is clear that there is a national consensus against mandatory sentences of life without parole for 50 years for juvenile homicide offenders.

At the time of *Miller*, only 28 States made life-without-parole mandatory for juveniles convicted of murder in adult court -- a practice the *Miller* court found to be unconstitutional. *Id*. After *Miller* was decided, many of those 28 States amended statutes or enacted new legislation to make their juvenile homicide sentencing practices conform to *Miller*. *None* of those States now require a juvenile to serve *at least 50 years* before first being eligible for parole on homicide offenses; and other States similarly do not require juveniles, who have committed homicide offenses, to serve at least 50 years before being parole eligible:

- Alabama: **30 years**;
- Arizona: **25 or 35 years**;
- Arkansas: **28 years**;
- California: **25 years**;
- Colorado: **40 years**;

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- Connecticut**: 30 years**;
- Delaware: **25 years**;
- Florida: **25 years**;
- Hawaii: (**life with parole,** which varies: Level 1—**5 to 10** years; Level 2—**10 to 20** years; and Level 3—**20 to 50** years;
- Louisiana: **35 years**;
- Massachusetts: **30 years**;
- Michigan: **25 years**;
- Missouri **25 years**;
- Nebraska: **40 years** (but possible parole eligibility after serving one-half the minimum term of sentence);
- Nevada: **20 years**;
- North Carolina: **25 years**;
- Pennsylvania: **35 years**;
- Texas: **40 years**;
- Utah: **25 years**;
- Washington: **25 years**;
- West Virginia: **15 years**;
- Wyoming: **25 years**;

This reflects a growing national trend or consensus against mandatory geriatric release for juvenile offenders and shows that there is a national consensus

against the sentencing practice at issue in this case. This is strong – if not determinative – evidence that Jason's mandatory sentence violates the principle of proportionality, and thus the Eighth Amendment's ban on cruel and unusual punishment. *Miller*, 132 S.Ct. at 2475.

More importantly, Missouri recently enacted legislation that allows the approximately 80 juveniles who had been convicted of first-degree murder, and had received the harsher sentence of life without parole, to now be eligible for parole in half that time (25 years) than Jason is eligible (50 years), even though they all committed a deliberated murder; but Jason committed his offenses a few months before the Missouri legislature changed the offense from capital murder to first degree murder and increased the punishment from either death or life without parole for 50 years to death and life without parole.

On July 13, 2016, the Missouri Governor approved Senate Bill 590 (2016), which provided, in part, that "[a]ny person sentenced to a term of imprisonment for life without eligibility for parole before August 28, 2016, who was under eighteen years of age at the time of the commission of the offense or offenses, may submit to the parole board a petition for review of his or her sentence, regardless of whether the case is final for purposes of appeal, after serving twenty-five years of incarceration on the sentence of life without parole." Section 558.047, RSMo 2016 (effective 7/13/16). This is evidence of a legislative judgment that, in order to provide a juvenile with a meaningful opportunity to obtain release through demonstration of rehabilitation and maturation, a first parole hearing for a prior

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deliberated murder must occur no later than the 25th year of imprisonment.

In *Peters v. State*, 128 So.3d 832 (Fla. Dist. Ct. App. 2013), the court determined that *Graham* had created a statutory anomaly in which the maximum penalty for an aggravated first-degree felony (Peters' offense) was more harsh than the sentence a juvenile who commits a "life felony" faces (only 40 years since the life sentence was unconstitutional under *Graham*). Therefore, the Eighth Amendment required that Peters' sentence for an aggravated first-degree felony committed during the time the statutory anomaly existed, not exceed 40 years in prison. *Id*. at 854–855.

In reaching that conclusion, the court noted that Peters would have been better situated had he committed a life felony, a more serious crime under the legislative framework, than the crimes he committed. *Id*. at 855. This was "an affront to the Constitution" that could not stand. *Id*. The fact that Peters, a juvenile at time of commission of armed robbery, was subject, under applicable sentencing scheme, to lengthier sentence as first-degree felony offender than he would have been had he committed a life felony, violated the proportionality principle of the Eighth Amendment. *Id*. at 854–855. *In accord*, *State v. Manuel*, No. 2D15-3573, 2016 WL 4159273, at *1 (Fla. Dist. Ct. App. Aug. 5, 2016) (Manuel, who was serving a 65 year sentence, was entitled to be resentenced to no more than 40 years in prison due to the statutory anomaly).

At issue in *Humphrey*, *supra*, was defendant Wilson's ten-year sentence for having engaged in consensual oral sex with a fifteen-year-old girl when he was

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seventeen. The Georgia Supreme Court held that Wilson's sentence was grossly disproportionate to his crime. In reaching that conclusion, the court relied on a later amendment to the criminal statute involved, which would have afforded Wilson misdemeanor punishment if it had been enacted before he committed his crime.

The *Humphrey* court held that Wilson's punishment, as a matter of law, was grossly disproportionate to his crime and that it constituted cruel and unusual punishment under both the Georgia and United States Constitutions. *Humphrey*, 282 Ga. at 530, 532. The court believed that no one had a better sense of the evolving standards of decency in Georgia than the state's elected representatives, as reflected by the amendment to the statute. *Id*. at 528. The court noted that the legislature apparently felt that a ten-year sentence for the crime was grossly disproportionate. *Id*. The amendment to the statute also appeared to be recognition that teenagers should not be classified among the worst offenders because they do not have the maturity to appreciate the consequence of their conduct. *Id*. at 528-529. Because the minimum punishment for the crime for which the defendant was convicted was cruel and unusual, the Georgia Supreme Court held that his sentence must be set aside and that he must be released from custody. *Id*. at 533.

This Court should find that Jason's sentence is unconstitutionally disproportionate, and allow him to be parole eligible after serving 25 years, which would make him immediately parole *eligible*. He is not guaranteed parole, but he must be provided a meaningful opportunity to obtain release based on

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demonstrated maturity and rehabilitation. *Miller*, 132 S.Ct. at 2469; *Graham*, 560 U.S. at 75.

In deciding whether Jason should be granted parole, the parole board should consider the factors set out in §§ 558.047 and 565.033 (*Miller*-type factors), and Jason should be released from prison unless the board determines that he is among the very "rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility" and not just transient immaturity. *Montgomery v. Louisiana*, 577 U.S., at ___, 136 S.Ct. 718, 734 (2016); *Adams v. Alabama*, 578 U.S. ___, 136 S.Ct. 1796 (2016) (Sotomayor, J., concurring).

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CONCLUSION

This Court should grant Jason's writ of habeas corpus, find that Jason's sentence is cruel and unusual and unconstitutionally disproportionate, and allow him to be parole eligible after serving 25 years, which would make him immediately parole *eligible*. He is not guaranteed parole, but he must be provided a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. *Miller*, 132 S.Ct. at 2469; *Graham*, 560 U.S. at 75.

In deciding whether Jason should be granted parole, the board should consider the factors set out in §§ 558.047 and 565.033 (*Miller*-type factors), and Jason should be released from prison unless the board determines that he is among the very "rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility" and not just transient immaturity. *Montgomery*, 136 S.Ct. at 734; *Adams v. Alabama*, 578 U.S. ___, 136 S.Ct. 1796 (2016) (Sotomayor, J., concurring).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Craig A. Johnston, hereby certify: The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word 2010, in Times New Roman size 13 point font, and includes the information required by Rule 55.03. According to the word-count function of Microsoft Word, excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 13,084 words, which does not exceed the 31,000 words allowed for an appellant's brief. And, on this 22nd day of August, 2016, electronic copies of Petitioner's Brief, and Petitioner's Brief Appendix, were sent through the Missouri e-Filing System to Stephen D. Hawke, Assistant Attorney General, at stephen.hawke@ago.mo.gov.

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