No. SC93487

In The Supreme Court of Missouri

STATE OF MISSOURI EX REL. JASON CLAY CARR,

Petitioner,

vs.

JASON LEWIS, WARDEN,
SOUTHEST CORRECTIONAL CENTER

Respondent.

On Petition for Writ of Habeas Corpus

PETITIONER'S REPLY BRIEF

Craig A. Johnston, MOBar #32191
Assistant State Public Defender

Woodrail Centre
1000 West Nifong
Building 7, Suite 100
Columbia, Missouri 65203
(573) 777-9977 (telephone)
(573) 777-9963 (facsimile)
Craig.Johnston@mspd.mo.gov

Attorney for Jason Clay Carr

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Jason's mandatory sentence of life without parole for 50 years for the homicide offenses he committed when he was 16 years old is unconstitutional under *Miller v. Alabama,*[1] in that it is the functional equivalent of life without parole since he will not receive a realistic, meaningful opportunity for early release based upon a demonstration of his maturity and rehabilitation. This is shown by cases and legislation from other jurisdictions showing a clear national consensus against a mandatory sentence of life without parole for 50 years for juvenile homicide offenders, as well as a recently enacted Missouri statute, § 558.047, which allows juveniles, who were sentenced to life without eligibility for parole prior to the enactment of that statute, to petition the parole board for review of their sentences after serving only 25 years.

The mere fact that Jason might have the opportunity to appear for a parole hearing in 50 years is not a meaningful opportunity for early release based upon a demonstration of his maturity and rehabilitation, because Section 217.690, RSMo, which governs parole hearings, fails to ensure meaningful hearings for juvenile offenders and uses criteria for release that are inconsistent with *Miller's* mandate since it provides that the parole board, in its discretion, can release an offender if it determines that there is a reasonable probability that the offender "can be released without detriment

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

to the community or to himself," and that "parole shall be ordered only for the best interest of society;" it does not require counsel for inmates, and it does not mandate that the inmate be allowed to present mitigating witnesses or evidence other than what the offender has to say during his or her "personal interview." Thus, it fails to provide special protections required to be expressly afforded to juvenile offenders and no consideration of the diminished culpability of the juvenile is required.

Finally, Jason's argument that his sentence is unconstitutionally disproportionate, which was made in his opening brief, is properly before this Court and it is not procedurally defaulted.

Jason's sentence of life without parole for 50 years is unconstitutional because it was imposed without consideration of Miller-type factors and it does not give him a meaningful opportunity for early release based upon a demonstration of his maturity and rehabilitation

In Jason's opening brief, he asserted that he is entitled to a writ of habeas corpus on his mandatory sentence of life without parole for 50 years for homicide offenses he committed when he was 16 years old, because his sentence is unconstitutional under *Miller v. Alabama*, 567 U.S. ___, 132 S.Ct. 2455 (2012), in

that his sentence is the functional equivalent of life without parole since he will be ineligible for parole until almost age 67, and he will not be provided a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation, as required by *Miller* (Petitioner's Brief at 23).

Respondent complains that Jason "does not define what 'functional equivalent' [of life without parole] might be or how the Court determines if a sentence is the 'functional equivalent' of another sentence" (Respondent's Brief at 10-11).

Miller held that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders because a State must provide "some *meaningful* opportunity for early release based upon a demonstration of his maturity and rehabilitation." *Miller*, 132 S.Ct. at 2469, quoting *Graham v. Florida*, 560 U.S. 48, 75 (2010) (emphasis added). Such a mandatory sentencing scheme poses too great a risk of disproportionate punishment by making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence. *Miller*, 132 S.Ct. at 2469.

Thus, a sentence is the "functional equivalent" of life without parole when it does not give the juvenile offender a meaningful opportunity for early release based upon a demonstration of his maturity and rehabilitation. See *Casiano v. Comm'r of Correction*, 115 A.3d 1031, 1045-1047 (Conn. 2015), *cert. denied sub nom. Semple v. Casiano*, 136 S. Ct. 1364 (2016), which noted that the United States 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."[2]

"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 and reenter society as required by *Graham*." *State v. Null*, 836 N.W.2d 41 (Iowa 2013) (quoting *Graham*, 560 U.S. at 75). "[A] fifty year term and its grim prospects for any future outside of prison effectively provide a juvenile offender with 'no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope.'" *Casiano*, 115 A.3d at 1047, quoting *Graham*, 560 U.S. at 79.

Graham noted the importance of offering offenders a "chance for fulfillment outside prison walls" and a "chance for reconciliation with society." *Graham*, 560 U.S. at 79. This implies that a meaningful opportunity for release

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[2] Some courts have held that a "*de facto*" life sentence is "one that exceeds the defendant's life expectancy." *Adams v. State*, 188 So.3d 849, 851 (Fla. 1st DCA 2012). Jason agrees that such a sentence would be unconstitutional. Additionally, however, for the reasons stated in *Casiano*, *supra*, and other cases set out below, a sentence that does not exceed the juvenile's life expectancy can be unconstitutional if it does not give him a realistic, meaningful opportunity for release based on demonstrated maturity and rehabilitation.

must allow juveniles the opportunity to be released with enough time remaining in their lives to find fulfillment and reconciliation. *Graham* further requires a "realistic" chance of being released in order to render the opportunity meaningful. *Graham*, 560 U.S. at 82.

Courts have been able to apply this "meaningful opportunity" definition or concept and have found that parole eligibility of varying lengths, starting at about age 60 and higher, are unconstitutional and the functional equivalent of life without parole since they do not provide the required "meaningful opportunity" for release. E.g., *Bear Cloud v. State*, 334 P.3d 132 (Wyo. 2014) (aggregate 45 year sentence with parole eligibility at about age 61); *Tyson v. State*, No. 5D15-4050, 2016 WL 4585974 (Fla. Dist. Ct. App. Sept. 2, 2016) (45 year sentence with parole eligibility at about age 62); *Casiano, supra* (50 year sentence with parole eligibility at about age 66); *State v. Ronquillo*, 190 Wash.App. 765, 361 P.3d 779 (2015) (51.3 year aggregate sentence with parole eligibility at about age 68); *Null, supra* (aggregate 52.5 year minimum prison term sentence with parole eligibility at about age 69); *Peterson v. State*, 193 So.3d 1034 (Fla. Dist. Ct. App. 2016) (56 year prison sentence with parole eligibility at about age 74); *State v. Ragland*, 836 N.W.2d 107 (Iowa 2013) (commuted sentence for life without the possibility for parole for 60 years); *State v. Zarate*, -- N.J. Super --, 2016 WL 1079462 (App. Div. 2016) (life sentence with a 63.75 year parole disqualifier); *Gridine v. State*, 175 So. 3d 672 (Fla. 2015), *cert. denied*, 136 S. Ct. 1387 (2016) (70 year sentence); *Henry v. State*, 175 So. 3d 675, 679-680 (Fla. 2015), *cert. denied*, 136

S. Ct. 1455 (2016) (aggregate 90 year sentence); *State v. Riley*, 315 Conn. 637, 110 A.3d 1205 (2015), *cert. denied*, 136 S.Ct. 1361 (2016) (total effective sentence of 100 years, with parole ineligibility until at least 94 years); *State v. Boston*, 131 Nev. Adv. Op. 98, 363 P.3d 453 (2015), as modified (2016) (parole ineligibility for aggregated sentences until about 100 years); *People v. Caballero*, 55 Cal. 4th 262, 282 P.3d 291 (2012) (total sentence of 110 years to life).

As these cases show, contrary to Respondent's assertion, Jason's sentence of life without parole for 50 years does not give him a "meaningful opportunity for early release based upon a demonstration of his maturity and rehabilitation." *Miller*, 132 S.Ct. at 2469, quoting *Graham*, 560 U.S. at 75.

Further evidence of the unconstitutionality of Jason's sentence can be seen by the flurry of legislative action that has taken place in the wake of *Graham* and *Miller*, where many state statutes allow juveniles to have parole eligibility after serving only 25 years in prison for homicides, including Missouri for first-degree murder, and none of them require a juvenile to serve a mandatory 50 years in prison before being eligible for parole: Alabama (30 years); Arizona (25 or 35 years); Arkansas (28 years); California (25 years); Colorado (40 years); Connecticut (30 years); Delaware (25 years); Florida (25 years); Hawaii (different levels, with the lowest being 5-10 years, and the highest, 20-50 years); Louisiana (35 years); Massachusetts (30 years); Michigan (25 years); Missouri (25 years); Nebraska (40 years); 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).[3] In considering categorical bars to sentencing practices, the United States Supreme Court asks whether objective indicia of society's standards, as expressed in legislative enactments and state practice, show a national consensus against a sentence for a particular class of offenders. *Miller*, 132 S.Ct. at 2470-2471. These newly enacted statutes are objective indicia that legislatures throughout these United States understand that a mandatory sentence of life without parole for 50 years would not comply with *Graham* and *Miller*.

Respondent's argument further suggests that the Eighth Amendment is satisfied if there is a possibility that Jason will survive 50 years in prison before finally receiving a limited parole hearing. But simply making a juvenile eligible for parole after spending 50 years in prison under an existing state parole system, which fails to distinguish between juvenile and adult offenders, does not comply with the Eighth Amendment.

Graham and *Miller* do not just require states to give "an opportunity for release." The opportunity must be "realistic," "meaningful," and "based upon a demonstration of [the juvenile's] maturity and rehabilitation." *Miller*, 132 S.Ct. at 2469; *Graham*, 560 U.S. at 75, 82. When a state sentences a juvenile and "imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term." *Graham*, 560 U.S at 82. Therein, the

[3] The statute citations are listed on pages 41-43 of Jason's opening brief.

opportunity must be "meaningful" and "based on demonstrated maturity and rehabilitation." *Id*. at 75.

So not only must the opportunity be "realistic" and "meaningful,"[4] but Jason must be allowed to show that he is entitled to "early release *based upon a demonstration of his maturity and rehabilitation*." *Miller*, 132 S.Ct. at 2469 (emphasis added). Further, Jason must be released from prison unless the parole 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. ___, 136 S.Ct., 718, 734 (2016); *Adams v. Alabama*, 578 U.S. ___, 136 S.Ct. 1796 (2016) (Sotomayor, J., concurring).

But many state parole systems lack procedures that are necessary to ensure meaningful hearings for juvenile offenders. Some states use criteria for release that are inconsistent with *Grahams'* and *Miller's* mandates to provide a realistic and meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.

For instance, in *Atwell v. State*, --- So.3d ---, 41 Fla. L. Weekly S244 (Fla. 2016), the Florida Supreme Court found that Florida's existing parole system, as set forth by statute, was unconstitutional because it did not provide for

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[4] As shown above, requiring Jason to serve 50 years in prison, assuming he lives that long, before having the chance to have a parole hearing is not meaningful. E.g., *Casiano*, 115 A.3d at 1047.

individualized consideration of Atwell's juvenile status at the time of the murder, as required by *Miller*, and his sentence, with a presumptive parole release date 140 years after his crime, was virtually indistinguishable from a sentence of life without parole. *Id*. at *1.[5] The *Atwell* court noted that although a state's remedy to *Miller* could include a system for paroling certain juvenile offenders "whose crimes reflected only transient immaturity – and who have since matured," the parole system would nevertheless still have to afford juvenile offenders individualized consideration and an opportunity for release. *Id*. at *8, quoting *Montgomery*, 136 S.Ct. at 736. The Florida parole system was unconstitutional, in part, because there were no special protections expressly afforded to juvenile offenders and no consideration of the diminished culpability of the youth at the time of the offense. *Id*. at *9.

Similarly, in *Hayden v. Keller*, 134 F.Supp.3d 1000, 1009 (2015), a United States District Court held that 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. The *Hayden* court found that North Carolina had implemented a parole system that wholly failed to provide juveniles with a

[5] Atwell had a parole hearing after he had served 25 years, but there the Commission set a presumptive release date in the year 2130. *Atwell*, at * 3,

meaningful opportunity to make his or her case for parole. *Id*. The parole commissioner and their case analysts did not distinguish parole reviews for juvenile offenders from adult offenders, and thus failed to consider children's diminished culpability and heightened capacity for change in their parole reviews. *Id*. *Also see Hawkins v. New York State Dep't of Corr. & Cmty. Supervision*, 140 A.D.3d 34, 30 N.Y.S.3d 397 (N.Y. App. Div. 2016), which held that New York's parole process for a juvenile serving an indeterminate life sentence for murder failed to provide a meaningful opportunity for release because the Parole Board failed to consider the significance of the juveniles' youth and its attendant circumstances at the time of the crime.

For Jason, a similar problem exits. For persons who were sentenced to life without parole and were under the age of 18 at the time of they committed their offense, recently enacted Senate Bill 590 (2016) requires the parole board to consider *Miller*-type factors such as: the degree of the defendant's culpability in light of his or her age and role in the offense; the defendant's age, maturity, intellectual capacity, and mental and emotional health and development at the time of the offense; the defendant's background, including his or her family home and community environment; the likelihood for rehabilitation of the defendant; the extent of the defendant's participation in the offense; the effect of familial pressure or peer pressure on the defendant's actions; the effect of characteristics attributable to the defendant's youth on the defendant's judgment; efforts made toward rehabilitation since the offense or offenses occurred; the subsequent

growth and increased maturity of the person since the offense or offenses occurred; the person's institutional record during incarceration; and, whether the person remains the same risk to society as he or she did at the time of the initial sentencing. Sections 558.047 and 565.033, RSMo (eff. 7/13/16).[6]

But Respondent argues that Senate Bill 590 cannot be applied to Jason because he was convicted of "capital murder" and not first-degree murder (even though they both involve murders committed after deliberation) and Jason was sentenced to life without parole for 50 years and not life without parole (Respondent's Brief at 17-18).

If Respondent is correct, and Jason cannot receive the benefits of Senate Bill 590, then his parole hearing is guided by Section 217.690, RSMo, which provides that the parole board, in its discretion, can release an offender if it determines that there is a reasonable probability that the offender "can be released without detriment to the community or to himself," and that "parole shall be ordered only for the best interest of society." The statute requires the board to "conduct a personal interview" with the offender, but there is nothing that requires counsel, or that would allow the presentation of mitigating witnesses or evidence other than what the offender has to say during his "personal interview." Nothing in that statute provides special protections expressly afforded to juvenile offenders and no consideration of the diminished culpability of the youth at the time of the

[6] These statutes are set out in the appendix to Jason's opening brief.

offense is required. Cf. *Atwell*, at *9. *Miller* held that "children are constitutionally different from adults for purposes of sentencing," 132 S.Ct. at 2464, and therefore the "imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." *Id*. at 2466. But Section 217.690 does not require the parole board to consider Jason differently than an offender who committed his or her offense as an adult.

Unlike Senate Bill 590, this parole procedure, which will be provided to Jason only after he has served 50 years in prison, fails to provide him a "meaningful opportunity for early release based upon a demonstration of his maturity and rehabilitation." *Miller*, 132 S.Ct. at 2469. "[P]risoners … must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored." *Montgomery*, 136 S.Ct. at 736-737. The parole hearing that will be provided to Jason under Section 217.690 fails to provide what *Miller* and *Montgomery* requires. His sentence is unconstitutional under *Miller* and *Montgomery*.

Jason's sentence of life without parole for 50 years is disproportionate

"Protection against disproportionate punishment is the central substantive guarantee of the Eighth Amendment." *Montgomery*, 136 S.Ct. at 732.

Proportionality is a "precept of justice" that is "[e]mbodied in the Constitution's ban on cruel and unusual punishments." *Graham*, 560 U.S. at 59.

Juveniles represent a special category of offenders for Eighth Amendment proportionality purposes. The heightened proportionality review that began with *Roper v. Simmons*, 543 U.S. 551 (2005) and continued through *Montgomery* marked a shift in the United States Supreme Court's jurisprudence away from the previous line of cases that reserved the most rigorous level of scrutiny for death sentences. See *Graham*, *supra* (the first time that the Court used the Eighth Amendment to categorically ban a sentence other than the death penalty); *Miller*, *supra* (the first time the Court applied protections typically reserved for death penalty cases to a non-death sentence by ruling that life without parole sentence cannot be mandatory for juveniles). Just as "death [was] 'different,' children are different too." *Miller*, 132 S.Ct at 2470 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 994 (1991).

Respondent claims that Jason's proportionality argument is not properly before this Court (Respondent's Brief at 16-17). Jason disagrees. First, arguably, his initial petition is sufficient to present the issue since he claimed that his sentence violated the Eighth Amendment's prohibition against cruel and unusual punishments, citing *Miller*, *supra* (Respondent's Brief at 5), and, as noted above, "[p]rotection against disproportionate punishment is the central substantive guarantee of the Eighth Amendment." *Montgomery*, 136 S.Ct. at 732, and

proportionality is a "precept of justice" that is "[e]mbodied in the Constitution's ban on cruel and unusual punishments." *Graham*, 560 U.S. at 59.

Additionally, it is important to look at Jason's case history in this Court. Jason's petition was filed on June 24, 2013. Neither this Court nor Respondent took any action in this case until March 15, 2016, when this Court issued an order stating that Jason was parole eligible after serving 25 years in prison. Jason had already served 25 years at that time, and since this Court's order made him immediately parole eligible, there was no need for Jason to file any amendments to his habeas petition.

Then on March 30, 2016, Respondent filed a Motion for Rehearing, wherein it complained, for the first time, that Jason's sentence of life without parole for 50 years did not qualify under *Miller*.

On July 13, 2016, Senate Bill 590 was enacted, which had the effect of making about 80 inmates, who had been convicted of first-degree murder as juveniles, eligible for parole after serving 25 years; it is that legislation that principally supports Jason's argument that his sentence is disproportionate since those inmates were in essence convicted of the same offense (a deliberated murder), and seemingly had received a harsher sentence than Jason (life without parole vs. life without parole for 50 years), yet those inmates were parole eligible in half the time than what Jason has to serve (25 years vs. 50 years). *See*, *Peters v. State*, 128 So.3d 832 (Fla. Dist. Ct. App. 2013) (Sentence was unconstitutionally disproportionate because the defendant would have been better situated had he

committed a more serious crime under the new legislative framework, than the crimes he committed).

On July 19, 2016, this Court set aside its order of March 15, 2016, overruled Respondent's rehearing motion as "moot," requested briefing, and docketed the case for oral argument. Jason included the claim in his brief and Respondent has had an opportunity to address the argument regarding whether Jason's sentence is unconstitutionally disproportionate. Thus, this Court should find that the claim is properly before this Court.

Respondent also claims that Jason's argument that his sentence is disproportionate has been procedurally defaulted because he failed to raise it on direct appeal (Respondent's Brief at 17).

Jason's direct appeal was final in 1985. *State v. Carr*, 687 S.W.2d 606 (Mo. App. S.D. 1985). At that time, the United States Supreme Court had not yet ruled that the death penalty was unconstitutional for a sixteen-year-old offender, so an argument that a prison sentence, even as harsh as what Jason received, was disproportionate was not realistically available since if death was constitutional, then a prison sentence of any length would be proportional. A habeas petitioner can avoid a finding of procedural default 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).

The United States Supreme Court did not recognize a categorical proportionality challenge to a non-death juvenile sentence until 2010, when it

decided *Graham*, which was decades after Jason's direct appeal. Before *Graham*, the Supreme Court had not applied categorical bans on a sentence of imprisonment under the Eighth Amendment. The Court did not extend that type of challenge to mandatory life without parole sentence for homicide offenses until 2012 when it decided *Miller*. The legislation relied upon by Jason, showing that there is a national consensus against mandatory sentences of life without parole for 50 years for juvenile homicide offenders, and thus Jason's sentence is disproportionate, did not occur until after *Miller*. And, the enactment of Senate Bill 590, resulting in about 80 juveniles, who had been convicted of first-degree murder and given sentences of life without parole, being eligible for parole in only 25 years, did not occur until 2016, well after Jason's direct appeal had been decided and even after his habeas petition was filed with this Court. For these reasons, and for the reasons set out in pages 46 to 48 of Jason's opening brief concerning procedural default, this claim is not procedurally defaulted and is properly before this court.

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.

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.

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,

/s/ Craig A. Johnston

Craig A. Johnston, MOBar #32191
Assistant State Public Defender

Woodrail Centre
1000 West Nifong
Building 7, Suite 100
Columbia, Missouri 65203
(573) 777-9977 (telephone)
(573) 777-9963 (facsimile)
Email: Craig.Johnston@mspd.mo.gov

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, the brief contains 4,580 words, which does not exceed the 7,750 words allowed for a Petitioner's Reply Brief. And, on this 26th day of September, 2016, an electronic copy of Petitioner's Reply Brief was sent through the Missouri e-Filing System to Stephen D. Hawke, Assistant Attorney General, at stephen.hawke@ago.mo.gov.

/s/ Craig A. Johnston

Craig A. Johnston, MOBar #32191
Assistant State Public Defender

Woodrail Centre
1000 West Nifong
Building 7, Suite 100
Columbia, Missouri 65203
(573) 777-9977 (telephone)
(573) 777-9963 (facsimile)
Email: Craig.Johnston@mspd.mo.gov