IN THE
SUPREME COURT OF MISSOURI
EN BANC

No. SC92927

SHEENA EASTBURN,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

On Appeal From
The Circuit Court of McDonald County,
The Hon. Timothy W. Perigo, Circuit Judge

BRIEF OF AMICUS CURIAE MISSOURI ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Respectfully submitted,

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II. The trial court erred, clearly erred, abused its discretion, exceeded its jurisdiction, or abdicated its jurisdiction in denying the appellant a remedy for its present, unlawful, sentence. The law will not abide a right without a remedy, and under the facts and circumstances of this case, denial to the appellant of a procedural protection the state has tendered for the rights of the accused, especially in respect to punishment, would violate the Due Process Clause of the Fourteenth Amendment. Available remedies exist consistent with the portions of Missouri's sentencing statutes that *Miller* did not render unconstitutional: (1) holding the entire first-degree murder statute unconstitutional, entering a conviction for the lesser-included offense of second-degree murder, a class A felony, and remanding the case for resentencing within the range for class A felonies generally, considering and giving effect to both the individual facts of Ms. Eastburn's case and the constitutionally significant propositions about "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison" set forth in *Graham* and *Miller*, and (2) severing the unconstitutional specific sentences for the class A felony of first-degree murder, and remanding the case for resentencing as a class A felony simpliciter—once more subject to the same range of sentencing and effectual consideration of both the individual facts of

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Statement of Consent

Counsel for both the appellant and the respondent have consented to the filing of this brief.

Statement of Interest

Amicus curiae Missouri Association of Criminal Defense Lawyers (MACDL) is a voluntary association of criminal defense lawyers, organized to pursue justice and due process for persons accused of crime or other misconduct. Membership includes private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors, and judges.

MACDL promotes scholarship in the field of criminal law to disseminate and advance knowledge in the area of criminal practice. The organization seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that public entities handle legal proceedings fairly. An organizational objective is promotion of the proper administration of justice. Accordingly, MACDL supports the provision of resources for the courts, the prosecution, and the defense of indigents (both by the constitutional funding of a robust public defender system, and by the appropriate compensation of appointed counsel where that is the means the relevant sovereign has chosen to meet its obligations under Mo. Const. art. I, §§ 10, 18(a), 26, and 28, and the Fifth, Sixth, and Fourteenth Amendments). Another means to this end is the encouragement of discipline in the employment of the criminal sanction. In furtherance of these objectives, at times the organization files amicus briefs in both state and federal courts.

Among the individual liberties that the United States Constitution and the Missouri Constitution guarantee to all persons within their jurisdictions is the right to be free from cruel and unusual punishments. This Court has been a leader in recognizing that this right takes on special force when the person to be punished is a child. In *State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 411-12 (2003), this Court found that the differences between children and adults mean that the rationales of retribution and deterrence do not apply to persons under the age of 18 as they do to adults. It held that "the execution of persons for crimes committed when they were under 18 years of age violates the 'evolving standards of decency that mark the progress of a maturing society,' and is prohibited by the Eighth Amendment to the United States Constitution as applied to the states through the Fourteenth Amendment." *Id.* at 401, quoting *Thompson v. Oklahoma*, 487 U.S. 815, 821 (1988), *quoting Trop v. Dulles*, 356 U.S. 86, 101 (1958).

Respondent did not agree. In *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005), the United States Supreme Court of the United States followed this Court in recognizing the difference every parent realizes between the maturity, sense of responsibility, ability to make one's own choices, and fixity of character of an adult and those of a child. Once more the respondent needs to be reminded that justice does not consist in piling up as many bodies as it can, dead or alive, in the Department of Corrections.

MACDL's second objective is also at work in its urging of reversal in this case. As this Court's decision in *Simmons*, 112 S.W.3d at 411-13, did in the case of the death penalty, *Miller v. Alabama*, 132 S. Ct. 2455, 2464-66 (2012) , lays out the factual basis why a sentence of life imprisonment without eligibility for probation or parole (LWOP)

against a child is a strong case of overkill. LWOP against juveniles is already categorically unconstitutional (1) where it is mandatory, (2) in all nonhomicide cases, and (3) in all other cases where the accused did not "kill or intend to kill" a person who was in fact killed by someone else.

Because this case falls into the third category, it does not present the question whether, as a matter of Missouri law, a sentence of LWOP is ever constitutional when one cannot know—in such an early time in the individual's development—whether he or she is "the rare juvenile offender whose crime reflects irreparable corruption." *Compare Miller*, 132 U.S. at 2469, *with* Mo. Const. art. I, § 21.

The General Assembly did not amend the first-degree murder sentencing provisions in response to *Simmons*. In the absence of a clear signal from this Court regarding the facts and the law making juvenile LWOP constitutionally suspect where it is not already categorically unconstitutional, the respondent might choose to seek juvenile LWOP pursuant to a new statute under which the jury would have a choice between LWOP and a punishment other than literal death. At the very least, the statute would need to provide for the individualized sentencing—including extraordinary resources and proceedings analogous to those in properly-tried capital cases—without which the courts would in time hold that it, too, is unconstitutional. Given the economic bias of the criminal justice system and the root causes of serious criminal behavior by children, the vast majority of candidates for juvenile LWOP would be clients of the Missouri State Public Defender System. Both the prosecution and the defense would therefore need to spend hundreds of hours and tens of thousands of dollars from the State Treasury to

handle each such case. These funds could otherwise go to prosecuting and defending cases that actually need to be litigated, or possibly even to community policing, mental-health services, and other measures that actually prevent crime.

Miller raises a heavy presumption against the validity of any LWOP sentence against a person under 18 at the time of the offense charged. 132 S.Ct. at 2469. The appeals and collateral-attack proceedings under any new first-degree murder statute that would not be unconstitutional on its face would therefore rival or perhaps surpass capital litigation as a self-inflicted wound on responsible law enforcement. This is a practical reason complementing the data-driven jurisprudential reasons in *Miller* why this Court should not give the political branches judicial cover for casting the first stone.

This case gives the Court an opportunity to stand tall, as it did in *Simmons*. And one can seldom stand taller than when one reaches down to recognize, reaffirm, and redeem the humanity in a child.

Statement of Facts

In November 1992, seventeen-year-old Sheena Renea Eastburn was present when her boyfriend and one of his friends murdered her ex-husband, Tim Eastburn, in the course of an attempted robbery. Trial Transcript at 436-49 & 746. A rural southwest Missouri jury sentenced her to life imprisonment without parole (LWOP) as an accomplice to first-degree murder under then-existing Missouri law. DALF:859-60.

After the United States Supreme Court announced its decision in *Graham v. Florida*, 130 S. Ct. 2011 (2010)—under which LWOP is unconstitutional as applied to a person under the age of 18 such as Ms. Eastburn who on the respondent's own theory of the case did "kill or intend to kill" the decedent—she filed a motion to reopen her prior action under Mo. S. Ct. R. 29.15. LF:5-24.

The motion set forth two grounds for reopening the action: "abandonment of appointed counsel" and "to correct a manifest injustice." LF:5.

The motion pleaded that Ms. Eastburn's appointed post-conviction relief (PCR) counsel had abandoned her within the meaning of *Dudley v. State*, 254 S.W.3d 109 (Mo. Ct. App. W.D. 2008). It went on that "[a]part from reciting the procedural history of the case, the amended 29.15 motion filed by appointed counsel consisted of less than four pages of text," and "[s]uch a motion is 'patently defective' under *Dudley*, particularly in a first degree murder case involving a sentence of life without parole." LF:11-12. The motion to reopen pleaded with particularity a ground for relief absent from the four-page treatment of the ground or grounds in the amended motion. LF:13-17.

Second, the motion to reopen argued that the sentence of LWOP amounted to manifest injustice within the meaning of Mo. S. Ct. R. 29.12(b). LF:12. Appellant brought to the attention of the respondent and the trial court that in *Graham*, the Supreme Court of the United States had held that a sentence of LWOP against a juvenile was unconstitutional because such a severe and irrevocable punishment was not appropriate for a juvenile offender who did not "kill or intend to kill." 130 S. Ct. at 2027 (2010). She pleaded that on the respondent's theory of the case and the only evidence before the trial court, she did not "kill or intend to kill" the decedent; for this reason, she argued, she was categorically immune from LWOP. LF:17-19.

The State agreed to the motion to reopen. LF:25. This action allowed the trial court to address the constitutional issues arising initially under *Graham.* In the companion cases of *Miller v. Alabama* and *Jackson v. Hobbs*, 132 S. Ct. 2455 (2012), the United States Supreme Court made clear the entitlement to relief well after the State had consented to the motion to reopen Ms. Eastburn's case.

In *Miller*/*Jackson*, the Court reasoned that children are categorically different from adults and require individualized consideration to determine whether one might be a legitimate candidate for LWOP, such that a mandatory sentence of LWOP against a person under 18 at the time they actually murdered another person is unconstitutional. *Id.* at 2468-69. In the trial court, Ms. Eastburn argued that Missouri's first-degree murder statute is therefore unconstitutional as applied to her, and that these principles apply retroactively to her case. LF:28-30.

Having initially accepted the respondent's agreement to reopen the original PCR action, the trial court dismissed it, characterizing it sua sponte as a "successive motion." LF:33-34. The order of dismissal did not indicate which of the predicate admissions (abandonment and manifest injustice) the trial court found wanting.

Added facts appear in the argument of the point or points to which they relate.

Points Relied On

I. The trial court erred, clearly erred, abused its discretion, exceeded its jurisdiction, or abdicated its jurisdiction in dismissing the appellant's reopened action for post-conviction relief. Mo. Const. art. I, § 21, and the Eighth and Fourteenth Amendments forbid a sentence of life without parole against a person under the age of 18 at the time of the alleged offense when they did not "kill or intend to kill" the decedent, as well as a *mandatory* sentence of life without parole against them in any event. Children's brains and characters are less formed than those of adults, with the consequence that they are less culpable and more amenable to rehabilitation than adults who have committed the same offenses, and therefore any sentence of life without parole against them must be based on an individualized determination that they fall outside the constitutional model of the juvenile accused.

Point I Leading Authorities

Graham v. Florida, 130 S. Ct. 2011 (2010)

Miller v. Alabama, 132 S. Ct. 2455 (2012)

Roper v. Simmons, 543 U.S. 551 (2005)

State ex rel. Simmons v. Roper, 112 S.W.3d 397 (2003)

II. The trial court erred, clearly erred, abused its discretion, exceeded its jurisdiction, or abdicated its jurisdiction in denying the appellant a remedy for its present, unlawful, sentence. The law will not abide a right without a remedy, and under the facts and circumstances of this case, denial to the appellant of a procedural protection the state has tendered for the rights of the accused, especially

in respect to punishment, would violate the Due Process Clause of the Fourteenth Amendment. Available remedies exist consistent with the portions of Missouri's sentencing statutes that *Miller* did not render unconstitutional: (1) holding the entire first-degree murder statute unconstitutional, entering a conviction for the lesser-included offense of second-degree murder, a class A felony, and remanding the case for resentencing within the range for class A felonies generally, considering and giving effect to both the individual facts of Ms. Eastburn's case and the constitutionally significant propositions about "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison" set forth in *Graham* and *Miller*, and (2) severing the unconstitutional specific sentences for the class A felony of first-degree murder, and remanding the case for resentencing as a class A felony simpliciter—once more subject to the same range of sentencing and effectual consideration of both the individual facts of her case and those of the category of juveniles facing a lifetime in prison.

Point II Leading Authorities

Hicks v. Oklahoma, 447 U.S. 343 (1980)

Miller v. Alabama, 132 S. Ct. 2455 (2012)

National Solid Waste Mgmt. Ass'n v. Director, 964 S.W.2d 818 (Mo. banc 1998)

State ex rel. Simmons v. Roper, 112 S.W.3d 397 (2003)

Argument

Because both of MACDL's points on appeal are entitled to the same standard of review, for the same reasons, MACDL will address the standard before arguing the points.

The standard of review for both of amicus MACDL's points is de novo.

Subdivision (k) of Rule 29.15 says that in general, an appeal from a circuit court's denial of relief shall be for "clear error." But on questions anterior to the merits of the proceeding—such as those relating to the circuit court's jurisdiction—the standard of review is de novo. *E.g.*, *Spencer v. State*, 255 S.W.3d 527, 528 (Mo. Ct. App. E.D. 2008); *Dudley v. State*, 254 S.W.3d at 111; *Simmons v. State*, 240 S.W.3d 166, 170 (Mo. Ct. App. W.D. 2007); *Wise v. State*, 219 S.W.3d 270, 272 (Mo. Ct. App. S.D. 2007); *Simmons v. State*, 190 S.W.3d 558, 560 (Mo. Ct. App. E.D. 2006).

In this case, there was an evidentiary hearing. But the trial court denied relief ***not*** because it made findings of fact and conclusions of law adverse to the appellant on the grounds for relief on the basis of which it accepted the parties' agreement to reopen the action. It is not as if it made findings that the scientific evidence underlying *Graham* was methodologically flawed or the documents tendered as evidence of abandonment were PhotoShopped. Instead it held, sua sponte, that the action reopened with the State's consent was a "successive motion," *i.e.*, a second action. LF:33-34. This erroneous ruling on a pure question of law was anterior to the substance of the proceeding. On this question, the appropriate and established standard of review is de novo.

I. The trial court erred, clearly erred, abused its discretion, exceeded its jurisdiction, or abdicated its jurisdiction in dismissing the appellant's reopened action for post-conviction relief. Mo. Const. art. I, § 21, and the Eighth and Fourteenth Amendments forbid a sentence of life without parole against a person under the age of 18 at the time of the alleged offense when they did not "kill or intend to kill" the decedent, as well as a *mandatory* sentence of life without parole against them in any event. Children's brains and characters are less formed than those of adults, with the consequence that they are less culpable and more amenable to rehabilitation than adults who have committed the same offenses, and therefore any sentence of life without parole against them must be based on an individualized determination that they fall outside the constitutional model of the juvenile accused.

A. Ms. Eastburn's motion to reopen was not a "successive motion," and she was entitled to a judicial determination of the underlying claims in the reopened action under state-created procedural protections for the rights of the accused, arbitrary denial of which, as here, violates the Due Process Clause of the Fourteenth Amendment.

Ms. Eastburn's reopened PCR action was not "successive." But having imposed an unlawful sentence on an accused citizen falls within the core of the "manifest injustice" criterion this Court applied in *State ex rel. Zinna v. Steele*, 301 S.W.3d 510, 516-17 (Mo. banc 2010) , citing *State ex rel. Osowski v. Purkett*, 908 S.W.2d 690, 691 (Mo. banc 1995).

And having been abandoned in the original phase of the same action meets the "cause" criterion for reopening, especially when the question before the trial court is not whether to grant relief but whether to ***consider*** an ineffective assistance of trial counsel issue (LF:13-17) on reopening the action. *Dudley v. State*, 254 S.W.3d at 111. *See also Martinez v. Ryan*, 132 S.Ct. 1309 (2012) (federal habeas corpus standard for "cause" from acts or omissions of PCR counsel). Either criterion is sufficient to reopen the action. Loss of the opportunity to present evidence in support of the ineffective assistance of counsel claim in her motion to reopen (evidence she presented in the consensually reopened phase of the action), the resulting denial of PCR in the initial proceedings, and confinement in the Department of Corrections from 1994 to the present, were patently prejudicial.

This Court has made clear to the lower state courts that it views federal habeas corpus jurisprudence as the template for future consideration of constitutional grievances in addition to direct appeal and initial proceedings in a PCR action. It first indicated its intent to do so in *Reuscher v. State*, 887 S.W.2d 588, 591 (Mo. banc), *cert. denied*, 514 U.S. 1119 (1995), acknowledging its independent power to grant writs of habeas corpus and questioning why Missouri citizens must go to federal court to receive this relief. It has proceeded to employ both the "manifest injustice" and the "cause" and "actual prejudice" standards from federal habeas corpus jurisprudence as means by which convicted persons may challenge the judgments and sentences against them after the expiration of the time limits for direct appeals and PCR actions. *E.g., State ex rel. Griffin*

v. Denney, 347 S.W.3d 73, 76-77 (Mo. banc 2011); *State ex rel. Laughlin v. Bowersox*, 318 S.W.3d 695, 701 (Mo. banc 2010); *State ex rel. Zinna v. Steele*, *supra*.

Part of the federal habeas corpus jurisprudence this Court has adopted is *Trest v. Cain*, 522 U.S. 87, 90 (1997), holding that even admitted procedural defaults are nonjurisdictional, and are subject to waiver by the prosecution. In this case, the prosecution made an ***affirmative*** waiver, and the trial court accepted it. LF:25. Whether it was motivated by the belief that appointed PCR counsel had effectively abandoned Ms. Eastburn in the same action, or that her continued imprisonment for LWOP violated *Graham*, that was a decision for the prosecution to make.

In this case, the prosecution was not an abstraction, but an elected official chosen by the people of McDonald County to make these decisions on behalf of the State of Missouri within their county. He made that decision. If the trial court had a problem with that, it should have denied the motion to reopen. Instead, it granted it. LF:25. The order granting the motion to reopen proceedings is inconsistent with the finding that the motion was successive, and the latter finding is therefore of no lawful consequence.

During the initial years after an earlier Missouri Supreme Court adopted Mo. S. Ct. R. 24.035 and 29.15 in 1987, and until recently, the respondent would have had support for the argument that the successive nature of a motion which was in fact successive—or ran afoul of some other nonsubstantive incident of prescribed PCR procedure—was jurisdictional, and the state could not waive it by acts or omissions of its counsel. As late as 2008, the Missouri Court of Appeals used the term in this sense:

> While the application of the stringent requirements of Rule 29.15 may seem unfair where a movant relies upon incorrect advice of counsel, the late filing deprived the motion court of jurisdiction, and left it with no alternative but to deny Movant's motion. [*Clark v. State*, 261 S.W.3d 565, 573 (Mo. Ct. App. E.D. 2008) (Odenwald, J.).]

See also, e.g., *State v. Davis*, 814 S.W.2d 593, 603 (Mo. banc 1991) (nonverification); *Turpin v. State*, 223 S.W.3d 175, 176 (Mo. Ct. App. W.D. 2007) (successiveness); *Hines v. State*, 83 S.W.3d 108, 108 (Mo. Ct. App. S.D. 2002) (untimeliness).

Missouri law no longer treats such imperfections as jurisdictional. *E.g.*, *State v. Andrews*, 282 S.W.3d 372, 374-75 nn.3-4 (Mo. Ct. App. W.D. 2009), applying *Webb ex rel. J.C.W. v. Wyciskalla*, 275 S.W.3d 249 (Mo. banc 2009). Unless the obstacle to a court's disposition of a case arises from a constitutional limitation on its power, procedural bars are not determinative absent the willingness of the state to assert them in a timely manner. In our adversary system, it is the role of the prosecution to decide when to assert them and when—in the interest of justice—to allow a matter to proceed on the merits. *See* Mo. S. Ct. R. 4-3.8 & Official Comment (special obligations of prosecutor as minister of justice and not naked adversary).

For the elected circuit judge in the same county to outflank the prosecutor was at once an invasion of the province of an elected coordinate magistrate and an abdication of the role of an impartial arbiter. Unlike the United States Constitution, the Missouri Constitution explicitly guarantees Sheena Eastburn and every other resident of this state

the protection of separation of powers. Mo. Const. art. II, § 1. Dismissal of her PCR action resulting in denial of relief on the merits without findings of fact on the disputed issues, or acknowledgment that they were undisputed, on the basis of an assertion of successiveness that the elected prosecutor foreswore (LF:25 & 33-34) invaded the executive's powers as much as it abdicated the judiciary's.

In addition, in adopting Rules 24.035 and 29.15, this Court created a procedural protection for persons accused of crime, especially in relation to sentencing; for the sovereign arbitrarily to deny this protection to a person falling within its terms violates the Due Process Clause of the Fourteenth Amendment. *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980); *Wilkins v. Bowersox*, 933 F.Supp. 1496, 1516 (W.D. Mo. 1996), *aff'd*, 145 F.3d 1006 (8th Cir. 1998), *cert. denied*, 512 U.S. 1094 (1999), *citing Toney v. Gammon*, 79 F.3d 693, 699 (8th Cir. 1996). *See* U.S. Const. art. VI, cl. 2 (Supremacy Clause).

B. Appellant's current sentence of life without parole for an offense to which the jury found her to have been an accomplice when she was under the age of eighteen violates both the Eighth and Fourteenth Amendments, as the United States Supreme Court held in *Miller*, and Mo. Const. art. I, § 21, on the basis of the same underlying law and the same scientific data.

1. The scientific data that the United States Supreme Court relied on categorically distinguishes children from adults.

Based on both scientific consensus and common sense, the United States Supreme Court's recent decisions in *Miller*, *Graham*, and *Roper* establish that children are

categorically different under the Constitution. Thus, the Cruel and Unusual Punishments Clause of the Eighth Amendment forbids any LWOP sentence against a juvenile for a nonhomicide offense and forbids any mandatory LWOP sentence even when the evidence shows that the juvenile killed or intended to kill. It counsels against any LWOP sentence against a juvenile, but requires individualized sentencing analogous to the penalty phase of a capital case if the sovereign insists on seeking LWOP against the juvenile. To the extent that *Miller* leaves any doubt that the United States Constitution's categorical ban on juvenile LWOP applies to cases such as Ms. Eastburn's—in which the overall charge is homicide, but the juvenile did not "kill or intend to kill"—this Court should resolve that doubt within Missouri by holding that Mo. Const. art. I, § 21, forbids it for the same reasons this Court decided *Simmons* and the United States Supreme Court agreed with it in *Roper* and subsequently decided *Graham* and *Miller*.

Drawing on its reasoning in *Simmons*, *Roper*, and *Graham*, the *Miller* Court reiterated "that children are constitutionally different from adults for purposes of sentencing." 132 S.Ct. at 2464. The *Miller* Court recognized three main distinctions between children and adults:

- a "'lack of maturity and an underdeveloped sense of responsibility,' leading to recklessness, impulsivity, and heedless risk-taking";
- more vulnerability "'to negative influences and outside pressures,' including from their family and peers; . . . limited 'contro[l] over their own environment' and lack [of] ability to extricate themselves from horrific, crime-producing settings"; and

- "actions less likely to be 'evidence of irretrievabl[e] deprav[ity]'" due to characters that are not yet "well formed" and "less fixed" traits, such that there is an "enhanced . . . prospect that as years go by and neurological development occurs, [a juvenile's] 'deficiencies will be reformed.'" [132 S.Ct. at 2464-65, quoting *Graham*, 130 S.Ct. 2027, quoting in turn *Roper*, 543 U.S. at 569-70.]

From these three facts, the *Miller* Court drew the conclusion that persons under the age of 18 at the time of an offense are both less blameworthy and more capable of positive reform than adults convicted of same offense:

> *Graham* concluded from this analysis that life-without-parole sentences, like capital punishment, may violate the Eighth Amendment when imposed on children. To be sure, *Graham*'s flat ban on life without parole applied only to nonhomicide crimes, and the Court took care to distinguish those offenses from murder, based on both moral culpability and consequential harm. *See* . . . 130 S.Ct., at 2027. But none of what it said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific. Those features are evident in the same way, and to the same degree, when (as in both cases here) a botched robbery turns into a killing. [132 S.Ct. at 2565.]

Because children are clearly distinguishable from adults, courts must sentence them accordingly.

Due to their "diminished culpability and greater prospects for reform," juveniles "are less deserving of the most severe punishments" than adults. *Miller* 132 S.Ct. at 2464, citing *Graham,* 130 S.Ct., at 2026. Neurobiological and social-science literature regarding childhood development shows significant developmental differences that make age-appropriate sentencing a requirement in light of pre-existing Eighth Amendment jurisprudence. In classifying children as a distinct group, the *Miller* Court relied on findings in *Graham* and *Roper* "of transient rashness, proclivity for risk, and inability to assess consequences," concluding that these natural traits "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.'" 132 S.Ct. at 2464, quoting *Graham*, 130 S.Ct., at 2027, quoting in turn *Roper*, 543 U.S., at 570.

Furthermore, the United States Supreme Court found that the physical and social science backing these decisions continues to expand: "The evidence presented to us in these cases indicates that the science and social science supporting *Roper*'s and *Graham*'s conclusions have become even stronger." *Id.* n.5, citing Brief for American Psychological Association et al. as Amici Curiae at 3 ("[A]n ever-growing body of research in developmental psychology and neuroscience continues to confirm and strengthen the Court's conclusions").

During a person's childhood and into his or her early twenties, the brain develops dramatically. Specific changes to the brain affect a juvenile's iznformation processing;

logical reasoning; weighing of costs, rewards, risks, and benefits of behavior; inhibition; long-term planning; consideration of multiple sources of information; and emotional regulation. The greatest difference between developing child and adult brains is in the frontal lobe, the seat of cognitive processes such as planning, decision-making, and organizing one's thoughts. HUMAN RIGHTS WATCH, AGAINST ALL ODDS: PRISON CONDITIONS FOR YOUTH OFFENDERS SERVING LIFE WITHOUT PAROLE SENTENCES IN THE UNITED STATES 11 (2012), citing Laurence Steinberg et al., *The Study of Developmental Psychopathology in Adolescence: Integrating Affective Neuroscience with the Study of Context*, in DANTE CICCHETTI AND DONALD COHEN, EDS., DEVELOPMENTAL PSYCHOPATHOLOGY (2006).

At least one section of the frontal lobe continues maturing until the mid-twenties. Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, 1021 ANNALS OF THE N.Y. ACAD. OF SCI. 83 (2004). This part of the brain—the dorsolateral prefrontal cortex—affects "the ability to inhibit impulses, weigh consequences of decisions, prioritize, and strategize." *Id.* *See also Miller*, 132 S.Ct. at 2464 ("And in *Graham*, we noted that 'developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds'—for example, in 'parts of the brain involved in behavior control.' 130 S.Ct. at 2026.")

Further supporting the conclusions of *Miller* and its antecedents based on psychology, physical-science research on the brain suggests that brain activity is unique during adolescence. Recent studies based on brain scans summarized in a work funded by the National Institutes of Mental Health lead Drs. Leah H. Somerville and B.J.Casey

to conclude that "adolescents show a unique sensitivity to motivational cues that challenges the less mature cognitive control system, resulting in an imbalance between these systems and ultimately patterns of behavior that are unique to adolescents." *Developmental neurobiology of cognitive control and motivational systems*, 20 CURR. OPIN. NEUROBIOL. 236 (2010), *http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3014528/pdf/nihms174656.pdf* (last visited Jan. 7, 2013) at 2.

2. The foregoing data leads to the conclusion that juveniles are less worthy of retribution, less amenable to deterrence, less in need of incapacitation, and more susceptible to rehabilitation than adults convicted of the same offenses.

These measurable developmental differences and their impacts on behavior lead to two main conclusions.

First, juveniles possess diminished culpability. *Miller*, 132 S.Ct. at 2464, 2469. Scientific work continues on the specific connection between juvenile-committed crimes and the developing brains of the perpetrators: "The decision-making process leading to teen criminal acts is shaped by impulsivity, immaturity, and an under-developed ability to appreciate consequences and resist environmental pressures—attributes characteristic of children and adolescents." Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 BEHAV. SCI. & LAW 741 (2000), cited in HUMAN RIGHTS WATCH, AGAINST ALL ODDS, *supra* at 11. *See also* Lawrence Steinberg, *Should the Science of Adolescent Brain*

Development Inform Public Policy? 64 AM. PSYCHOLOGIST 745, 746 (2009) ("Impulse control, anticipation of future consequences, strategic planning and resistance to peer influence all increase linearly from preadolescence through late adolescence. The compelling and simply stated result of this research? Juveniles are different").

Second, juvenile offenders possess greater prospects for reform than adults. *Miller*, 132 S.Ct. at 2465. Generally, juveniles' extreme negative attributes and attitudes are temporary, as shown by the studies the United States Supreme Court cited in affirming this Court's judgment in *Simmons* and again in *Miller*. "For most teens, these [risky or illegal] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood." Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003).

Particularly due to juveniles' vulnerability to circumstantial situations involving family and friends, escaping from negative home and peer environments may also aid in the transition to a normal adulthood. *Miller*, 132 S.Ct. at 2465 n.5 (Brief for J. Lawrence Aber et al. as Amici Curiae 26-27) ("exposure to deviant peers leads to increased deviant behavior and is a consistent predictor of adolescent delinquency" (footnote omitted)). Juveniles do not choose their parents, their genes, what their mothers ingested while they were in utero, their early-childhood environment, their exposure to violence and other trauma as a child and adolescent, and the training (explicit or implicit) in how they are

supposed to behave. They have radically less opportunity—if any at all—to adjust to the expectations of this society than, for example, an immigrant coming to a new country as an adult.

In *Miller*, the United States Supreme Court concluded that in light of the pre-existing law, the data before it dictated an Eighth Amendment presumption against sentencing juveniles to LWOP. These salient characteristics make it "difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offenders whose crime reflects irreparable corruption." 132 S.Ct. at 2069, quoting *Graham*, 130 S.Ct. at 2026.

None of *Miller*'s analysis is crime-specific. 132 S.Ct. at 2465. The analysis relates to mental traits and environmental vulnerabilities whether or not the resulting physical acts resulted in a homicide or a hangover.

Miller follows this Court's insight in *Simmons* in holding that juveniles are different from adults. The United States Supreme Court concluded that these developmental differences make age-appropriate sentencing a constitutional requirement in light of generations of precedent requiring proportionality, 132 S.Ct. at 2463, and the application of social science and common sense to the exercise of the most severe instances of the criminal sanction, *id.* at 2464-68.

C. Courts and legislatures have long relied on common sense in distinguishing children from adults.

The emerging scientific consensus regarding brain development reflects common sense long engrained in statutes and caselaw. Any parent, and anyone who was once a

child and teenager, already knows what the *Miller* Court reiterated—juveniles are continuously developing. 132 S.Ct. at 2464, quoting *Roper*, 543 U.S. at 569 ("any parent knows"). Many juveniles make poor decisions; but few are absolutely incorrigible. On the basis of the history and science before it, the Supreme Court of the United States found that "'incorrigibility is inconsistent with youth.'" 132 S.Ct. at 2465, quoting *Graham*, 130 S.Ct., at 2029, quoting in turn *Workman v. Commonwealth*, 429 S.W.2d 374, 378 (Ky. Ct. App. 1968).

These simple principles require distinct treatment throughout the law. Like all other states, Missouri statutorily recognizes the need to protect and restrict children based on common knowledge about their mental and physical development, for example:

16 minimum age to live in homeless shelter, Mo. Rev. Stat. § 431.056

16 minimum age for driver's license, Mo. Rev. Stat. § 302.060

17 age of consent for legal sex with person over 21, Mo. Rev. Stat. § 566.034.1

18 voting age, Mo. Rev. Stat. § 115.133

18 consent to medical treatment, Mo. Rev. Stat. § 431.061

18 minimum age to marry without parental consent, Mo. Rev. Stat. § 451.090

18 minimum age to make a will, Mo. Rev. Stat. § 474.310

21 legal drinking age, Mo. Rev. Stat. § 311.325

21 required age to serve on jury, Mo. Rev. Stat. § 494.425

Missouri is not alone. In at least fifty years of cases involving the rights of juveniles, the United States Supreme Court repeatedly held in favor of special treatment for children based mainly on common knowledge of their youthful characteristics. *See, e.g., Johnson v. Texas*, 509 U. S. 350, 368 (1993) (sentencer must consider mitigating qualities of youth, as adolescence is a time of immaturity, irresponsibility, "impetuousness and recklessness," but all of these "signature qualities" are "transient" and "more understandable among the young"); *Eddings v. Oklahoma*, 455 U. S. 104, 115 (1982) (youth is a moment and "condition of life when a person may be most susceptible to influence and psychological damage"); *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (nothing that particularly "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment" expected of adults); *May v. Anderson*, 345 U. S. 528, 536 (1953) (concurring opinion) ("Children have a very special place in life which law should reflect").

When it said that "youth is more than a chronological fact," *Eddings*, 455 U.S. at 115, therefore, the United States Supreme Court was not making anything up out of whole cloth. It applied the practice codified in section after section of Missouri law and consistent with the common knowledge that our society shares with other civilized societies. Common sense dictates distinguishing children.

D. The inherent differences between juveniles and adults require eliminating LWOP as a possibility in all but the most extreme juvenile cases under the Eighth Amendment's and Missouri Constitution's Cruel and Unusual Punishments Clauses, and to make clear that it is categorically impermissible even in homicide cases where, as here, the juvenile did not "kill or intend to kill."

The Eighth Amendment prohibition against cruel and unusual punishment "guarantees individuals the right not to be subjected to excessive sanctions." *Miller*, 132 S.Ct. at 2463, quoting *Roper*, 543 U.S. at 560. Specifically, "proportionality is central to the Eighth Amendment." *Id.*, quoting *Graham*, 130 S.Ct. at 2021. Criminal punishment must be "graduated and proportioned to both the offender and the offense." *Id.*, quoting *Weems v. United States*, 217 U.S. 349, 367 (1910). American law measures proportionality according to "the evolving standards of decency that mark the progress of a maturing society." *Id.*, quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976), quoting in turn *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

Miller concluded that when one considers the "lessened culpability" of a juvenile in light of the greater relative severity of the punishment, LWOP does not meet contemporary standards of decency. Life in prison without parole "alters the offender's life by a forfeiture that is irrevocable," practically constituting a death sentence. *Id.* at 2466-67; *see also Graham*, 130 S.Ct. at 2027 (LWOP is a "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"). "It is especially harsh for a juvenile offender, who will serve

both a greater number of years as well as a greater percentage of his life in prison than an adult." *Id.* at 2466, quoting *Graham*, 130 S.Ct. at 2027; *Roper*, 543 U.S. at 572. Thus, juvenile LWOP is a presumptively excessive and therefore unconstitutional sanction.

Beyond its proportionality analysis, the *Miller* court relied on two strands of precedent in finding that mandatory LWOP sentencing of juveniles violates the Eighth Amendment. *Id.* at 2463. First, the Court analyzed caselaw adopting "categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty"—specifically decisions, including *Roper* and *Graham*, that focused on the lessened culpability of juvenile offenders. *Id.* Second, it relied on precedent prohibiting the mandatory imposition of capital punishment in which the Supreme Court announced the requirement "that sentencing authorities consider the characteristics of a defendant and the details of his offense before sentencing him to death." *Id.* at 2464, citing *Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion); *Lockett v. Ohio*, 438 U.S. 586 (1978). As the Court had in respect to the death penalty, *Miller* both adopted a categorical ban and established new sentencing rules regarding LWOP against juveniles.

At a more systemic level, *Miller* drew, as well, on the principle that a sentence is by its nature grossly disproportionate if lacking any penological justification. *Id.* at 2466, citing *Graham*, 130 S.Ct. at 2028. It covered the four objectives of legitimate punishment for noncapital sentences: retribution, deterrence, incapacitation, and rehabilitation.

First, *Miller* found that deterrence does not support a mandatory LWOP. Like *Graham*, *Miller* has its origins in *Atkins v. Virginia*, 536 U.S. 304, 319-20 (2002), in this Court's decision in *State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 411-12 (2003), and in the United States Supreme Court's affirmance of this Court in *Roper v. Simmons*, 543 U.S. 551, 571-72 (2005). Both Supreme Courts found that by reason of parallel or overlapping deficits in the ability to weigh out consequences before acting, a retarded person and a juvenile are so much less amenable to deterrence that their execution would not serve a penological purpose sufficiently to make it anything but the gratuitous infliction of pain—which *Atkins* characterized as "purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." 536 U.S. at 319, *quoting Enmund v. Oklahoma*, 458 U.S. 782, 798 (1982).

Second, *Miller* addressed retribution, which the Court had previously considered to be acceptable in principle as a legislative purpose for maintenance of death-penalty statutes. *E.g., Gregg v. Georgia*, 428 U.S. 153, 182-86 (1976) (plurality opinion). But the Court found that the same factors making deterrence an insufficient basis for subjecting juveniles and the mentally retarded to the death penalty made mandatory juvenile LWOP disproportionate as a gesture of retribution. *Id.* at 2466-67.

Finally, it addressed both incapacitation and retribution. In *Miller*, the United States Supreme Court found it impossible to say at sentencing that a juvenile possesses the "irretrievable depravity" foreclosing rehabilitation in favor of incapacitation necessary to support these rationales for the irrevocable sanction of LWOP any more than to support the juvenile death penalty. 132 S.Ct. at 2454-65. For the same reasons one

cannot say with factual confidence that a given juvenile is "incorrigible," one cannot say that he or she needs to be confined for the remainder of his or her life in order to protect society, and that he or she is not capable of rehabilitation. 132 S.Ct. at 2465. Both the general experience of humankind and the scientific evidence before the United States Supreme Court point in the opposite direction.

Simmons led the nation in its application of *Atkins* to the analogous situation of juveniles. Whether this Court should once more go beyond what the United States Supreme Court has held—and rule that under Mo. Const. art. I, § 21, LWOP can ***never*** be constitutional if the accused is under 18 at the time of the offense—is a question this Court need not reach in this case. This case presents the narrower fact-pattern of a homicide case in which a juvenile did not "kill or intend to kill." But the Court should acknowledge the scientific authority *Miller* recognized—as it found unnecessary to do in *Simmons*, 112 S.W.3d at 412—and adopt the conclusions in *Miller* as Missouri constitutional law as far as they go. It should also make it clear that in Missouri to be liable to LWOP for acts when one was a juvenile, one must—unlike Ms. Eastburn—have killed or intended to kill.

E. The constitutional prohibition on mandatory LWOP against anyone under the age of 18 at the time of the offense charged and for any LWOP against anyone, like Ms. Eastburn, who did not "kill or intend to kill," applies retrospectively.

In an abundance of caution, the appellant addresses the question of retrospective application of the *Miller* decision and the principle of constitutional law following from the authorities in it.

1. *Miller* included a consolidated companion case arising on collateral review in the state courts, and the Supreme Court of the United States applied its ruling to the case on collateral review.

Miller was not simply about Evan Miller: the Supreme Court of the United States consolidated his Alabama case with the Arkansas case of Kuntrell Jackson. Mr. Jackson's certiorari proceeding arose from a state habeas corpus action arising after his conviction had become final. 132 S. Ct. at 2461-62. In defining the relief *Miller* granted the two petitioners before it, the United States Supreme Court makes no distinction between the procedural postures of the consolidated cases. That Court's own action in the very case Ms. Eastburn invokes shows that it intended that its decision be fully retroactive.

2. This Court's treatment of the analogous issue in *Simmons* demonstrates that under Missouri law, its enforcement of *Miller* and the constitutional principle inherent in it extends to all persons currently liable to the unconstitutional punishment but for judicial action.

No further analysis of the retrospective application of *Miller*is necessary, because one of its constituent cases was on collateral review (state habeas corpus) in the state courts when the Supreme Court of the United States granted certiorari and granted relief.

But this is a plain case for retrospective application on other grounds as well. This Court's analogous decision in *Simmons* demonstrates why both *Miller* and the ruling that the appellant requests under the Missouri Constitution apply retrospectively.

After *Atkins v. Virginia*, the Missouri Supreme Court held that *Atkins* applied retrospectively, because it placed "a certain class of individuals beyond the state's power to punish by death." *State v. Johnson*, 102 S.W.3d 535, 539 n.12 (Mo. banc 2003), citing *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989). Under *Miller*, juvenile LWOP is constitutionally tantamount to death. 132 S.Ct. at 2466-67.

When this Court held the juvenile death penalty unconstitutional in *Simmons*, it held that the decision applied retrospectively to all persons under sentence of death in this state whose death sentences were for alleged conduct occurring before their eighteenth birthday. In the opinion itself, it reasoned that even under the federal habeas corpus doctrine of *Teague v. Lane*, 489 U.S. 288, 311-12 (1989) (plurality opinion), a rule "prohibiting a category of punishment for a class of defendants because of their status or offense" fell within the first exception to the ban on enforcing a "new rule" of constitutional law against a state for the first time on federal collateral attack. This Court quoted *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989), as taking such categorical bans on specific punishments out of the federal habeas corpus bar to relief it had itself fashioned.

And *Teague* does not even apply to state-court relief. In *Danforth v. Minnesota*, 552 U.S. 264, 282 (2008), the United States Supreme Court confirmed the principle this Court recognized in *State v. Whitfield*, 107 S.W.3d 253, 266-67 (Mo. banc 2003), that

Teague's limitations on relief are unique to federal habeas corpus, and do nothing to constrain a state court in affording relief within its own jurisdiction.

In *Whitfield*, *id.* at 266, this Court found that its own jurisprudence counseled the application of the test—originating in the Supreme Court of the United States but not imposed by it—in *Linkletter v. Walker*, 381 U.S. 618 (1965), and *Stovall v. Denno*, 388 U.S. 293 (1967). Under the *Linkletter-Stovall* test, a court deciding whether to apply a rule regarding the rights of the accused retrospectively considers three factors:

- the purpose of the rule;
- the extent that law enforcement has relied on the previous rule or lack of rules; and
- the effect that applying the rule retrospectively will have on the administration of justice.

First, the purpose of the rule in *Miller* is to restrict one of the two harshest punishments known to Anglo-American law to persons who have the faculties the law presumes to exist in the subjects or citizens who are the objects of criminal sanctions. In *Miller*, the Supreme Court of the United States held that as a matter of federal constitutional law, accused persons who are under the age of eighteen at the time of the offenses for which the sovereign seeks to punish them with either death or mandatory LWOP lack the moral culpability, the rational amenability to deterrence, and the "irretrievable depravity" foreclosing rehabilitation in favor of incapacitation that would be required to support these irrevocable sanctions. 132 S.Ct. at 2454-65.

Gregg, *Woodson*, and similar decisions mandated individualized consideration when the sovereign is considering the death penalty against an adult. This Court applied them retrospectively to a post-*Furman*, pre-*Gregg* attempt to re-enact the death penalty in Missouri. *State v. Duren*, 547 S.W.2d 476, 480 (Mo. banc 1977).

In the instant case, the Supreme Court of the United States has made a more definitive ruling about mandatory juvenile LWOP than *Gregg* made about the death penalty: relying on history, jurisprudence, and science, it has authoritatively construed "the highest Law of the land" to be that juvenile LWOP cannot be mandatory at all and cannot be imposed with confidence in any event. 132 S.Ct. at 2469. *Graham* first applied the ban on juvenile LWOP to nonhomicide offenses. *Miller* makes clear that *Graham*'s reasoning "implicates any life-without-parole sentence imposed on a juvenile, even as its categorical bar relates only to nonhomicide offenses." 132 S.Ct. at 2465.

In *Stovall*, 388 U.S. at 297-98, the Supreme Court of the United States explained that one consideration in evaluating the purpose of the rule to be enforced is whether the rule serves to minimize the risk of convicting the innocent or "[t]he extent to which a condemned practice infects the integrity of the truth-determining process." Because the denial of counsel exacerbates the risk of convicting the innocent, the Court explained that its decisions regarding the right to counsel applied retrospectively. *Id.*, citing, *e.g.*, *Gideon v. Wainwright*, 372 U.S. 335 (1963), and *Douglas v. California*, 372 U.S. 353 (1963). Yet the sweep of this concern in *Stovall* extends beyond guilt or innocence to finding the truth more generally. 388 U.S. at 298.

As to the sentence alone, a mandatory LWOP statute means that in at least some cases—more rather than fewer in the reasoning of *Miller*, e.g., 132 S.Ct. at 2469—a person under the age of eighteen "will receive a life without parole sentence for which he or she lacks the moral culpability." *Graham*, 130 S.Ct. at 2031. As that Court recognized in *Atkins*, 536 U.S. at 320-21, and *Miller*, 132 S.Ct. at 2468, and this Court has recognized in *Simmons*, 112 S.W.3d at 412, moreover, people lacking in the executive functions of non-retarded adults are at heightened risk of conviction for crimes they did not commit—because they lack the cognitive and other requisites to benefit from the right to counsel to the extent our legal culture expects. When many Americans would consider LWOP a fate worse than death, the accuracy of convictions that would yield such a sentence is a paramount purpose before which considerations of administrative convenience or glittering generalities about finality pale into insignificance.

Restraining the state to the standards the Supreme Court of the United States has set for the infliction of its two harshest and most irretrievable punishments is a purpose of the highest order, which this Court has found to require retrospective application in respect to *Gregg*, *Woodson*, *Atkins*, and *Simmons*. The dead hand of the erroneous past should fare no better in respect to *Miller*.

Second, can one even say that law enforcement ***has*** relied on the previous rule or lack of rules regarding LWOP against juveniles? It is not as if the prosecution could have gotten the death penalty against Ms. Eastburn, but bargained it away in exchange for LWOP. She is categorically immune from the death penalty for the same reasons that any hypothetical ***constitutional*** attempt to seek LWOP against her would have faced the

hurdles *Miller* establishes even when sentencers have the requisite information on each juvenile accused and on the constitutional facts attendant to their status.

In applying this prong of the *Linkletter-Stovall* test in *Whitfield*, this Court observed that vacatur of the death sentence against Mr. Whitfield would "not invalidate any searches or preclude the admission of any evidence." 107 S.W.3d at 268. The police and prosecution cannot have relied on an LWOP sentence against Ms. Eastburn as a means of solving future crimes or convicting future defendants, unless it is the illegitimate means of threatening them with an unconstitutional punishment.

Third, the effect that applying the rule retrospectively will have on the administration of justice is not as miniscule as in *Whitfield*, 107 S.W.3d at 268; but it will be finite nonetheless. If retrospective application of *Miller* places the state in some kind of jurisprudential jail cell, it has the key in its own pocket—which it will use in the vast majority of cases. Under Missouri law, the respondent cannot constitutionally seek LWOP against anyone retrospectively: the only statute under which LWOP was available made it mandatory. *Miller* counsels that any such an effort would generally be fruitless in any event. 132 S.Ct. at 2465. If some prosecutor somewhere were to attempt to get LWOP against someone who was under eighteen at the time of the offense of which he or she was convicted, that should not count against Ms. Eastburn's right to have "the supreme Law of the land" applied in her case. U.S. Const. art. VI, cl. 2.

To the contrary: even under the more restrictive *Teague* doctrine, "evenhanded justice requires" retroactive application of the ban on mandatory LWOP to all similarly situated defendants. 489 U.S. at 300 (plurality opinion). Like Ms. Eastburn's, Mr.

Jackson's case was on collateral review. All juveniles previously sentenced to life without parole in Missouri, including Ms. Eastburn, are similarly situated to the successful petitioners in *Miller*.

II. The trial court erred, clearly erred, abused its discretion, exceeded its jurisdiction, or abdicated its jurisdiction in denying the appellant a remedy for its present, unlawful, sentence. The law will not abide a right without a remedy, and under the facts and circumstances of this case, denial to the appellant of a procedural protection the state has tendered for the rights of the accused, especially in respect to punishment, would violate the Due Process Clause of the Fourteenth Amendment. Available remedies exist consistent with the portions of Missouri's sentencing statutes that *Miller* did not render unconstitutional: (1) holding the entire first-degree murder statute unconstitutional, entering a conviction for the lesser-included offense of second-degree murder, a class A felony, and remanding the case for resentencing within the range for class A felonies generally, considering and giving effect to both the individual facts of Ms. Eastburn's case and the constitutionally significant propositions about "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison" set forth in *Graham* and *Miller*, and (2) severing the unconstitutional specific sentences for the class A felony of first-degree murder, and remanding the case for resentencing as a class A felony simpliciter—once more subject to the same range of sentencing and effectual consideration of both the individual facts of her case and those of the category of juveniles facing a lifetime in prison.

A. Appellant is entitled to a remedy for her present unlawful confinement.

Although this Court opined sixty years ago—citing only a C.J.S. footnote—that the maxim was "not necessarily of universal application," *Donovan v. Kansas City*, 352 Mo. 430, 447-48, 175 S.W.2d 874, 883 (banc 1943), the Missouri Court of Appeals has more recently held that at least in the context of enforcing rights of the accused under *Batson v. Kentucky*, 476 U.S. 79 (1986), ***the law will not abide a right without a remedy***. *State v. Butler*, 731 S.W.2d 265, 268 (Mo. Ct. App. W.D. 1998) (application for transfer denied). To deny a remedy to a person convicted of LWOP for an offense in which she did not "kill or intend to kill," occurring before she was eighteen, would be an example of the arbitrary denial of a procedural protection that the state has created to vindicate the rights of the accused, and therefore a denial of due process of law. *See Hicks, supra*. This Court has undertaken to provide relief in the state courts rather than forcing these cases into federal habeas corpus. *See* pages 23-25, *supra* (citing cases).

B. Existing law affords options for a strict sentence that is nonetheless constitutional.

1. This Court has the power hold the first-degree murder statute unconstitutional altogether, and to remand the case for resentencing for the lesser-included offense of second-degree murder, the appellant—as a class A felon—facing "a lifetime in prison" for an offense committed as a juvenile and entitled to the sentencer's consideration of her individual case and the constitutional facts set forth in *Miller* and its antecedents.

As it stands, Mo. Rev. Stat. § 565.020 is unconstitutional twice over. It provides for the death penalty for juveniles who were 16 or 17 years old at the time of the offense, in violation of *Simmons* and *Roper*; it says that the penalty shall be either death or LWOP—despite the minority of the accused—in violation of *Miller*:

> Murder in the first degree is a class A felony, and the punishment shall be either death or imprisonment for life without eligibility for probation or parole, or release except by act of the governor; except that, if a person has not reached his sixteenth birthday at the time of the commission of the crime, the punishment shall be imprisonment for life without eligibility for probation or parole, or release except by act of the governor. [Mo. Rev. Stat. § 565.020.2.]

Under Missouri law, a criminal judgment consists of a conviction plus a sentence. *E.g.*, *State v. Stevens*, 208 S.W.3d 893, 894-95 (Mo. banc 2006). As applied to a person under eighteen at the time of the offense charged, section 565.020 is an unlawful predicate for any custody whatsoever. Ms. Eastburn's present sentence is therefore illegal. Under *Simmons* (ruling out death) and *Miller* (ruling out mandatory LWOP), the statute provides for a punishment, all right, but for a binary choice between unconstitutional punishments. A Missouri court will not rewrite a criminal statute with a defective penalty provision to allow the conviction to stand: that would amount to a violation of the separation of powers clause. *State v. Raccagno*, 530 S.W.2d 699, 703-04 (Mo. 1975) (applying general rule to reverse judgment and discharge appellant). Where a

criminal statute is unconstitutional as applied to a particular defendant, the conviction is nugatory. *See, e.g.*, *State v. Molsbee*, 316 S.W.3d 549, 553-54 (Mo. Ct. App. W.D. 2010).

If this Court were to agree that the whole statute is invalid, it may in the interests of judicial economy enter a conviction for the lesser-included charge of second-degree murder. *Cf. State v. O'Brien*, 857 S.W.2d 212, 220 (Mo. banc 1993), citing *Morris v. Mathews*, 475 U.S. 237, 246-47 (1986) (approving resentencing to murder when conviction of aggravated murder was jeopardy-barred); *United States v. Franklin*, 728 F.2d 994, 1000-01 (8th Cir. 1984) (remanding for resentencing for simple possession when evidence was insufficient to support conviction of possession with intent to distribute).

Other than one word on her record, however, this would not result in any diminution of punishment within the constitutional bounds of *Simmons*, *Roper*, *Graham*, *Miller*, even with the clarification this Court would bring to them in respect to a homicide case where the juvenile in the dock did not "kill or intend to kill." Second-degree murder is a class A felony: "For a class A felony, a term of years not less than ten years and not to exceed thirty years, or life imprisonment." Mo. Rev. Stat. § 558.011.

There are specific questions about the resentencing that are not before this Court. Because any new, lawful, sentence would allow Ms. Eastburn to appear before the Board of Probation & Parole within a penologically justifiable time, MACDL does not imply that the full panoply of para-capital protections which would apply to a hypothetical juvenile LWOP sentencing would apply to resentencing as a class A felon.

But *Miller* is explicit that although its holding is limited to mandatory LWOP against juveniles, its findings of constitutional fact about human nature are not limited to the procedural or substantive incidents of the two discrete cases before it. 132 S.Ct. at 2465. *Miller* renders constitutionally suspect any sentence against a juvenile that ignores these findings. Anytime a juvenile faces a lifetime in prison, the Eighth Amendment and Mo. Const. art. I, §21, set a ceiling on the punishment the respondent may exact. *Miller*, 132 S. Ct. at 2467 & 2469.

A constitutional resentencing would therefore require the trial court to take seriously Ms. Eastburn's youth at the time of the incident, and "the wealth of characteristics and circumstances attendant to it." *Miller*, 132 S. Ct. at 2467. In addition to the transactional evidence about the discrete offense, the relevant evidence includes the constitutional facts bearing on a sentence of life imprisonment against a child. *Id*. at 2469.

Even when the punishment of mandatory LWOP to which the ***holding*** in *Miller* was confined was not on the table, *id.* at 2465, the constitutional facts on which the Court ***based*** its holding include several factors that apply to all juvenile cases:

- age;
- hallmark youthful features, such as immaturity, impetuosity, and the failure to appreciate risks and consequences;
- family and home environment, especially when it was brutal or dysfunctional;

- circumstances of the alleged offense, including the extent of participation and possible effects of familial and peer pressures;
- potential of having not been charged or having been charged with a lesser offense but for cognitive deficits and other incompetencies associated with youth, resulting in relative inability to deal with systemic actors, for example, in negotiating plea agreements and interaction with defense counsel; and
- likelihood of rehabilitation.

All of the foregoing factors—and such others as any specific case may also present—are admissible in mitigation, whether or not they relate to the level of criminal liability. Preclusion of them would be reversible error, failure to disclose evidence of them would violate *Brady v. Maryland*, 373 U.S. 83, 87 (1963), and failure to investigate them and (when reasonable counsel would do so) present them would be ineffective assistance of counsel.

2. Missouri statutes authorize this Court to sever the terms of the first-degree murder statute that are unconstitutional as applied to persons under 18 at the time of the offense for which they stand convicted, leaving the appellant subject to sentencing under the general statute for class A felonies.

On its face, the statutory provision setting forth the punishment for first-degree murder allows ***only*** sentences of death or life without the possibility of parole, regardless whether the accused was 18 at the time of the alleged offense. *Simmons* outlawed the

death penalty against offenders under the age of eighteen at the time of the offense charged. 534 U.S. at 578-79. The General Assembly did not amend the statute to track *Simmons*, even after in *Roper* the Supreme Court of the United States made the rule of *Simmons* national.

Now *Miller* has outlawed mandatory LWOP. This means that all of the second independent clause of section 565.020's punishment subsection—everything after "class A felony"—is unconstitutional as applied to persons under 18 at the time of the offense charged. 132 S. Ct. at 2469. After *Simmons*, there was only one available sentence against a person under 18 at the time of the offense: LWOP. After *Miller*, such a mandatory LWOP sentence is also unconstitutional as to defendants under 18 such as Ms. Eastburn was at the relevant time.

Just as the Court continued to affirm first-degree murder sentences after *Simmons* when they did not implicate the already-unconstitutional portion of the statute, the Court has the option of ignoring the remaining part of the statute that is unconstitutional in light of *Miller*. The General Assembly itself has provided for such treatment of its creations:

> The provisions of every statute are severable. If any provision of a statute is found by a court of competent jurisdiction to be unconstitutional, the remaining provisions of the statute are valid unless the court finds the valid provisions of the statute are so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed the legislature would have enacted

> the valid provisions without the void one; or unless the court finds that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent. [Mo. Rev. Stat. § 1.140.]

In applying this legislative direction for handling legislative materials once a court has found them to be defective in part, this Court has reasoned that "all statutes . . . should be upheld to the fullest extent possible." *National Solid Waste Mgmt. Ass'n v. Director*, 964 S.W.2d 818, 822 (Mo. banc 1998) (limiting statute to constitutional applications), quoting *Associated Indus. v. Director of Revenue*, 918 S.W.2d 780, 784 (Mo. banc 1996) (holding entire statute unconstitutional as not amenable to severance). Sometimes this will involve excising unconstitutional blocks of text without respect to their specific objects, when the General Assembly would have passed the remaining parts of the statute without them. *E.g, State ex inf. Barker v. Duncan*, 265 Mo. 26, 175 S.W. 940, 943-35 (1915). But things cannot always be done so neatly:

> where a provision is invalid as to some, but not all, possible applications, and it is not possible to excise part of the text and allow the remainder to be in effect, the language of the provision must be restricted to the valid application. . . . "Stated another way, the statute must, in effect, be rewritten to accommodate the constitutionally imposed limitation, and this will be done as long as it is

> consistent with legislative intent." [*National Solid Waste Mgmt. Ass'n*, 964 S.W.2d at 822, citing and quoting *Assoc. Indus. v. Director*, 918 S.W.2d at 784.]

No one would suggest that the General Assembly would wish to repeal the law against first-degree murder because courts could not constitutionally sentence juveniles to death or to mandatory LWOP. Nothing in *Simmons*, *Roper*, *Graham*, or *Miller* affects the application of section 565.020 or its penalty subsection to adults. Nor does the application within constitutional bounds of the non-death, non-LWOP provisions so divert the statute from the obvious purpose of denouncing first-degree murder as an offense and providing for its punishment that the General Assembly would not have passed the statute if it would not thereby have required unconstitutional punishments against children.

Stripped of its original authorization of a juvenile death penalty and its more recently invalidated provision for mandatory LWOP, 565.020.2 still makes first-degree murder by a person under 18 a class A felony. Both as English and as law, the first independent clause of the subsection stands alone. Neither *Graham* nor *Miller* categorically bars the imprisonment of juveniles for class A felonies as Mo. Rev. Stat. § 558.011(1) provides.

Remand for resentencing as a class A felon is the ***only*** way to "save" the statute as applied to juveniles. This is not a situation like the one in *State v. Duren*, already mentioned in another context at page 44, *supra*. There, the General Assembly understood that federal constitutional law about the death penalty was in flux at a fundamental level

in the 1970's, and ***itself*** enacted an alternative punishment if the courts held its attempt to craft a death penalty that the courts would uphold after *Furman v. Georgia*, 408 U.S. 238 (1972). Mo. Rev. Stat. § 559.011 (Supp.1975) (replaced with changes by Mo. Rev. Stat. § 565.040.1). In *Duren*, it was legitimate for this Court to follow the legislature in holding the legislatively-enacted alternative sentencing provision applicable when it held unconstitutional, in light of *Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976) (plurality opinion), the attempt to remake the death penalty statute that the legislature had adopted without waiting until *Gregg v. Georgia*, 428 U.S. 153 (1976). In *Duren*, this Court held what it should hold here: when a criminal statute fails to provide a constitutional means of sentencing on a verdict of guilty, the statute itself is invalid. *Id.* at 480. What it did ***not*** hold was that it could make up the life-without-parole-for-fifty-years alternative on its own. That would have violated Mo. Const. art. II, § 1, at the very least.

This Court could remand for resentencing as a class A felon consistently with *Miller*'s requirement that juveniles receive individualized sentencing. This alternative remedy would allow the sentencing court to fashion a constitutionally proportionate sentence that considers and gives effect to Ms. Eastburn's youth at the time of the offense and the constitutional facts attendant to that status. Because it would keep LWOP off the table, it would spare the State Treasury the cost of the searching, para-capital proceeding that *Miller* would demand if LWOP were a sentencing option, and if the Prosecuting Attorney did not waive it before the parties began preparing for the penalty-phase trial. But *Miller* would require one if the respondent had the option of seeking LWOP under a

hypothetical statute allowing it, and were heedless to *Miller*'s admonitions of the rarity with which the Eighth Amendment will tolerate juvenile LWOP, 132 S.Ct. at 2469.

Under the relevant statutes and court decisions, therefore, the trial court could, on remand, resentence Ms. Eastburn either to a term of not less than ten and nor more than thirty years, or to life imprisonment with parole eligibility. As would be true under the first remedy, none of the scholarship or common sense that *Miller* expresses would change on remand. *See* pages 51-53, *supra*. It is far easier to divide up a paragraph of text than it is to rip up what we know about human nature: one may ignore the unconstitutional clauses of a multiple-clause sentence in a statute; one may not ignore the jurisprudence, psychology, and penology in *Simmons*, *Roper*, *Graham*, and *Miller*.

Both *Miller*-compliant remedies respect this Court's and the United States Supreme Court's jurisprudence concerning exceptionally severe punishments for persons under 18 at the time of the offense, yet provide meaningful options for retribution and incapacitation to the extent the facts justify them on an individualized basis.

Conclusion

WHEREFORE, this Court should hold that *Miller* bars a mandatory sentence of life without parole against anyone under the age of 18 at the time of the offense charged, and that the same rule is included in the protection of Mo. Const. art. I, § 21; that it bars any sentence of LWOP for any offense in which the accused did not "kill or intend to kill," including the instant case, in which the appellant was convicted as an accessory in a homicide; that the latter specific holding is based on Mo. Const. art. I, § 21; that the foregoing legal conclusions flow from the scientific facts set forth in *Miller*, *Graham*, and *Roper*, viewed in the context of pre-existing law; and that the appellant is subject to resentencing as a class A felon under Mo. Rev. Stat. § 558.011(1), so long as she receives individualized sentencing that considers and gives effect to the constitutional facts the United States Supreme Court found in *Miller* without regard to the offense charged. For these reasons, the amicus prays the Court for its order that the judgment of the court below be vacated, and the cause remanded for proceedings consistent with this Court's opinion.

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Certificate of Compliance and Service

Pursuant to Mo. S. Ct. R. 84.06(c), I certify that this brief complies with the limitations in Mo. S. Ct. R. 84.06(b), includes the information required by Mo. S. Ct. R. 55.03, was prepared with Microsoft Word 2010 (Windows) and 2011 (Mac), and uses Times New Roman 13-point font. The word-processing software indicates that this brief contains 13,520 words excluding the cover, the signature block, and this certificate. I certify that I have scanned the electronic copy of this brief for viruses with AVG 2013, and the program reports "no threat found." I certify that on this 15th day of January 2013, I served a true and correct copy of the foregoing brief via the Office of State Courts Administrator's e-Filing system on:

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