IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. ED107785
	)	
DAVID M. BARNETT,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
FROM THE CIRCUIT COURT OF
ST. LOUIS COUNTY, MISSOURI
TWENTY-FIRST JUDICIAL CIRCUIT, DIVISION 17
THE HONORABLE JOSEPH WALSH, JUDGE

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

On March 17, 1997, a St. Louis County jury found appellant, David M. Barnett, guilty of two counts of first-degree murder, two counts of armed criminal action, and two counts of first-degree robbery (D96, p.1-4). On May 2, 1997, the court imposed two death sentences (D62, p.33-34).

On August 8, 2015, the United States District Court for the Eastern District of Missouri held that David had been denied the effective assistance of counsel at his initial penalty phase trial (D90, p.179-89). On the murder counts, the court ordered the State to either sentence David to life without parole or hold a new penalty phase trial (D90, p.188-89). The State waived the death penalty (D66, p.1), and on March 15, 2019, the court sentenced David to life without parole (Sent.Tr.23) (Appx.2-6). Notice of appeal was timely filed on March 24, 2019 (D91, p.1-3).

Jurisdiction generally would lie in the Missouri Court of Appeals, Eastern District, Mo. Const. art. V sec 3; Section 477.050, RSMo 2000. But in this appeal, David Barnett alleges that Section 565.020 violates the Eighth Amendment to the United States Constitution and Article I, Section 21 of the Missouri Constitution, in that it allows for the mandatory imposition of a sentence of life without parole for offenders who commit first-degree murder at age nineteen.

Thus, this appeal involves the validity of a statute, a category reserved for the exclusive appellate jurisdiction of the Missouri Supreme Court. Mo. Const. art. V, sec. 3; *Jackson County Sports Complex Authority v. State*, 226 S.W.3d 156, 158 (Mo. banc 2007).

Mr. Barnett has filed a motion to transfer this cause prior to opinion contemporaneously with this brief.

STATEMENT OF FACTS

When David Barnett's mother, Shirley, was pregnant, she told people, "I hate this f'n baby" (D90, p.49). Shirley wanted nothing to do with David, so from the time he was just weeks old, he was shifted from home to home, each one more dysfunctional than the last. He suffered neglect and physical, sexual, and mental abuse throughout his life leading up to the crimes. The only break in the abuse and neglect was when David was placed in two caring foster homes for about a year at the age of six or seven.

David's Early Years

Shirley started drinking alcohol at age fifteen or sixteen (D90, p.48). Her own mother was mean and "a drunk" who had a lot of men (D90, p.40, 47, 60, 67). Shirley was one of eight children (two of whom were given away at birth) (D90, p.45, 62, 67). Her family was plagued with alcoholism and mental illness (D69, p.6; D90, p.64, 67).

Shirley went out drinking four or five times a week (D90, p.48). She would drink anything and even finish other people's unwanted drinks (D90, p.48, 54). People joked that Shirley could drink a man under the table, and in fact, she did so often (D90, p.48).

While dating a married man, Tom Spies, Shirley got pregnant with her first child, Billie, at age seventeen (D90, p.48). During the pregnancy, Shirley regularly got drunk and took diet pills (D90, p.48). Shirley was "cold natured" toward Billie, never behaving like a mother toward him (D90, p.48-49).

After Tom, Shirley dated Joseph Castaldi, another married man (D90, p.49, 55). Joseph and his wife Geneva had three children – Joseph, Jr., Anthony, and Amy (D90, p.39). Geneva recalled that Joseph liked to walk the streets, drinking and picking up

women (D90, p.39-40). He would come home drunk and pass out; other times, he would be gone for days (D90, p.40).

Joseph was a violent man (D90, p.40). When Geneva was six-and-a-half months pregnant, Joseph knocked her to the pavement during an argument; her water broke, and the baby died (D90, p.40). Once, Geneva was hit in the head with a decanter (D90, p.42). Joseph knocked and kicked Joseph, Jr., and he called his daughter Amy (the apple-of-his-eye) a "little blond-headed bitch" and once threw a bag of Reese's Cups at her (D90, p.41).

With Joseph, Shirley got pregnant with her second child, David (D65, p.2; D90, p.41). Although Geneva confronted Joseph about David, Joseph would not say whether David was his child (D90, p.41). But in his wallet, he carried a photograph of a small boy who looked like Joseph Jr.; "David" was written on the back (D90, p.43). For decades, David did not know that Joseph was his father (D65, p.2).

Throughout this pregnancy, like her first, Shirley drank, even participating in drinking contests (D90, p.49). On one occasion, she drank a 400-pound man under the table (D90, p.49). Shirley drank until she was completely drunk and also took diet pills (D90, p.49, 51). Shirley was all about men and alcohol (D90, p.54). She had little, if any, prenatal care while pregnant with David (D90, p.50, 52).

After Shirley gave birth to David, she refused to have anything to do with him (D90, p.50). She did not want to take him home from the hospital or even pick him up. (D65, p.2; D90, p.50).[1] A friend recalled Shirley saying, "Here, take the bastard. I don't want

[1] David Barnett was born May 18, 1976 (D90, p.1).

the fucking kid" (D90, p.124). Although Shirley and David lived with her friend Mary, Mary never saw Shirley hold David, change his diaper, feed him, or show him any affection (D90, p.50,52). So Mary took care of David and put his bed in her room (D90, p.50).

When David was a few months old, Shirley took David to live with Jane Haines, otherwise known as "Crazy Jane" (D90, p.50, 55). Jane was known as a prostitute who was frequently suicidal and fought with the police (D90, p.50, 55). She drank alcohol but mainly used intravenous drugs (D90, p.50, 55).

After a few weeks, Jane called Mary and asked for David's clothes, saying that Shirley gave David to her (D90, p.50). Mary refused (D90, p.50). Either she or Mary's sister Barbara retrieved David from Jane (D90, p. 50, 55). David was dirty and covered with sores from not having his diaper changed (D90, p.50). Shirley did not care and still wanted nothing to do with him (D90, p.50, 55-57). She had four more children, all fathered by married men (D90, p.49, 58, 61).

David's Years with Robert Biggerstaff

After David was returned from Crazy Janie, he lived with Mary's sister Barbara for four months (D90, p.51, 56-57, 124). But Barbara's husband, Robert, was a mean, abusive drinker and a violent man (D90, p.51). When Barbara saw Robert slap David on the back real hard, Barbara "was done" (D90, p.57). She broke up with Robert and returned David to Shirley (D90, p.51, 56). She knew that Mary would take care of David (D90, p.57). At the time, David was nine months old (D90, p.51, 69).

But Shirley then turned around and returned David to Robert (D90, p.56-57).[2] Because Robert was violent, especially when drinking, Barbara feared for David's safety (D90, p.56). Once when Robert saw Barbara on the street, he punched her in the face (D90, p.56). Another time, he choked her until Mary intervened and perhaps saved Barbara's life (D90, p.56). Yet another time, with David in the car, Robert drove full speed into the side of Barbara's car (D90, p.56).

Barbara thought David was "an awesome little boy.… He was a good baby" (D90, p.56). She offered to take David if Shirley did not want him, but Shirley left David with Robert (D90, p.56). Barbara thought that if she tried to take David from Robert, Robert would kill her (D90, p.56). Barbara warned Shirley that Robert was not in his right mind and that she should not leave David with him (D90, p.56-57).

But David stayed with Robert to about age five (D90, p.124). Robert had no parenting skills (D90, p.71). He acted like an aggressive child, and he gave David no structure, predictability, or guidance (D69, p.11). He could be kind and loving or he could be violent (D90, p.71). Robert had a drinking problem and drank around David (D90, p.71). He received psychiatric care, did not know right from wrong, and committed burglaries (D90, p.71). Robert sexually abused his niece when she was young (D90, p.71).

At the age of three or four, David was struck in the nose while in a bathtub (D90, p.125-26). He recalls a woman by the tub, an explosion of pain across his nose, his head going black, and seeing lines of light (D90, p.126). He had two surgeries but his nose

[2] Robert was incorrectly considered to be David's biological father (D69, p.4; D90, p.57).

remained deformed (D90, p.126). He still experiences terror of the bath and drowning (D90, p.126). Another time, one of Robert's girlfriends beat David with a mop handle and poured dishwashing fluid down his throat (D69, p.9; D90, p.126).

When David was five years old, Robert took him to an apartment above a bar, where women walked around naked (D90, p.125). The women touched David sexually (D90, p.125). They tried to get him to drink alcohol and smoke a cigarette (D90, p.125).

Robert did not meet the conditions DFS set for David's care (D90, p.126). Once, when Robert met with DFS, he told David to get his stuff, and he kidnapped David for six months (D90, p.126). For two months of that time, they lived in Robert's car, occasionally staying in houses to sleep and get food (D90, p.126). Sometimes, Robert made him stay in the car's trunk so he would not be seen (D69, p.10). Robert had no place to stay, so he and David would live "with whatever available girl," or his mother or sister (D90, p.71). When Robert was in jail, Robert's niece Betty took David (D90, p.72).

When David was five, Robert's sister Deborah assumed physical custody of David (D69, p.12; D90, p.124-25). DFS tried several times to remove David from Deborah's custody (D90, p.126). Deborah had difficulty giving David structure, effective discipline, or even consistency getting him to school (D69, p.12). David primarily lived with Deborah and Robert's mother, who was physically impaired (D90, p.126-27). Robert's mother relied on David to be her caregiver, and by age 4, he carried her oxygen and ran errands (D90, p.126). Once, when David bought the wrong type of donut, she beat him with her thorny cane; he bled and cried in shock and pain (D69, p.13; D90, p.127). No one registered David for school until well into the school year (D90, p.74).

When David was six-and-a-half, DFS terminated this placement and moved David to a residential facility (D90, p.73-74). Although efforts were made to reunite David and Robert, Robert refused to sign a paternity statement or provide employment history (D90, p.73-74).

David's Short-Term DFS Placements

When David was almost seven, he was placed with the Reames family for six months (D90, p.74). David quickly became part of the family; he enjoyed the family's two children and "being part of the family unit" (D90, p.75). David especially liked reading bedtime stories because they all sat together (D90, p.75).

Sometimes David would flinch as if anticipating being hit (D90, p.75). He was always angry and easily frustrated (D90, p.76). He had trouble expressing his emotions, and his vocabulary was not very good (D90, p.75). But in his weekly counseling sessions, he was cooperative and never complained (D90, p.75).

The six months that David spent with the Reames family was "the safest, healthiest, most contented, and happiest time of his entire life" (D90, p.76).[3] Unfortunately, the Reames family moved to England (D90, p.74). David wanted to go too (D90, p.75). But because Robert had not surrendered his parental rights, David had to move to a new foster home (D90, p.75).

Next, for about a year, David was fostered by the LaRock family (D90, p.77). David was a "very pleasant child" who had limited vocabulary and struggled in school (D90,

[3] Mrs. Reames still visits David once a year (D90, p.76).

p.77). Dr. LaRock regularly heard from the school about David's minor infractions (D90, p.78). When the LaRocks talked to David about these problems, he always had a startled reaction as if he expected to be hit or yelled at (D90, p.78).

David's foster sister Rachael recalled that when David first came to their home, he did not know how to read (D90, p.79). But a teacher helped him after school each day, and he learned to read by the end of the year (D90, p.79). Rachael liked having David as a younger brother, and he did well with other members of the family, although he got overwhelmed and exhausted by large family gatherings (D90, p.77-80). At school, other children made fun of David because he was behind and had a deformed nose (D90, p.79). David was submissive rather than aggressive in response (D90, p.79).

When David was with the LaRocks, he visited Robert with a DFS worker present (D90, p.127). But Robert made many promises to David that he did not keep (D90, p.127). Robert disappointed David many times, but DFS did not terminate the visits (D90, p.127). During this time, when David was seven, Deborah and her mother (who David saw as his grandmother) both died (D90, p.127).

When the LaRocks learned that David was available for adoption, they declined because David needed a lot of focused attention and they did not think they were up to the task (D90, p.78-79). David was disappointed when he learned he would not be staying with the LaRocks; but he did not get angry, just a little upset, wondering, "what's next" (D90, p.79).

David's foster care worker, Jacqueline Thirlkel, looked for a permanent placement for David (D90, p.81). In counseling, David was reported as anxious, fearful, and having

poor self-image; he wanted a place and family where he would belong (D90, p.82). Placement with his mother was inappropriate (D90, p.81-82). Robert was not appropriate, as he had cancelled visits with David and had been diagnosed with alcoholism with drug usage and antisocial personality disorder (D90, p.82). David was ecstatic at the prospect of living with Robert's niece Betty, but that too was ruled out, as the family had concerns that Robert would show up at Betty's house drunk and try to kidnap David (D90, p.82).

The Barnett Years (Age 8-17)

A teacher, John Barnett, wanted to be David's foster parent (D90, p.83,85,100). But Ms. Thirlkel had concerns (D90, p.83). After speaking with Barnett's references, she thought this would not be a good placement for a young boy and that Barnett should not adopt David (D90, p.83). But her supervisor disagreed and chided Ms. Thirlkel for taking the matter "too seriously" (D90, p.84). Ms. Thirlkel was furious, but also scared for David (D90, p.84). Before going to Barnett, David thought of himself as a stuffed bear in a corner that adults moved as they wished (D90, p.127). While David was with Barnett, his "father," Robert, died (D90, p.127).

David was eight years old when he was placed with Barnett (D90, p.85, 128). Later, Barnett adopted David and two other boys, K.B and E.B. (D90, p.111). When he was adopted, David was initially very happy to have a father and a home he could count on (D90, p.94).

David played sports and hung out a lot with friends (D90, p.94). Initially, David and his friend Todd had sleepovers at both their houses (D90, p.94). At the Barnett house, David would leave his bedroom in the middle of the night (D90, p.94-95). One time, when

they were in the fifth grade, Todd looked for David and could not find him in the bathroom, living room, or kitchen (D90, p.94-95). He heard David and Barnett speaking in Barnett's bedroom, and David said, "Dad, it doesn't fit" (D90, p.95). This scared Todd (D90, p.95). Around the sixth grade, the boys started spending more nights at Todd's house (D90, p.94).

During this time frame, David also had a friend nicknamed Duke (D90, p.96). Duke explained that David always tried very hard for acceptance and to fit in but "a lot of times it fell flat" (D90, p.96). David was picked on a lot and was insecure about his deformed nose (D90, p.96). David believed in Cub Scout values like honor and integrity (D90, p.96). He stood up for a child who had mental health disabilities and would tell others to "step off" if they were doing something mean (D90, p.96). But David had behavioral problems and got in a lot of fights; he did not back down much (D90, p.96).

Duke spent a lot of nights at the Barnett house (D90, p.96). Barnett, who was six feet two inches tall and weighed 230 pounds or more, had a mean streak (D90, p.97, 112). Duke stated, "I don't know if I ever saw an adult get angry at a kid the way he did … it was scary" (D90, p.97). Barnett gave David Playboy magazines when David was in the third or fourth grade (D90, p.97). David often left his bedroom in the middle of the night and would not come back (D90, p.97). Until fourth or fifth grade, he would also climb onto Barnett's lap to give him a kiss, which Duke thought was odd (D90, p.97).

David saw a speech teacher twice a week in grade school because he had a moderate to severe lisp, and he saw a research teacher for his behavior disorder (emotional disturbance) (D90, p.120-21). He had impulsive behaviors that were difficult in the classroom setting (D90, p.121). David got impulsively angry and had trouble

distinguishing between actual confrontations and people bumping into him accidentally (D90, p.121). He also had significant trouble reading and severe deficiencies in his writing skills (D90, p.121-22). David's speech teacher described him as a charming, appealing child and a "cute personality" (D90, p.121, 123). She "totally enjoyed" their sessions (D90, p.121).

David showed signs of a physically and emotionally abused child (D90, p.122). At eight years old, he was "a well oriented but emotionally distraught child" (D90, p.122). He had an "agitated depression," manifested largely by acting out and/or difficulties concentrating (D90, p.122). He was "a highly anxious child who has multiple concerns and conflicts regarding himself and his place in his family constellation" (D90, p.122). He had fears of physical harm and abandonment and needed attention and reassurance (D90, p.122). David received counseling at school and outside therapy (D90, p.121).

When David was in middle school, his best friend was John (D90, p. 91). John stated that David was picked on a lot (D90, p.91). Other children made fun of David's nose (D90, p.91,99). David excelled at sports, but Barnett never attended any of his games (D90, p.93).

In middle school, David would run away from home and stay at his friend John's house, a place of safe refuge (D90, p.93). Three times, David came to John's house in the middle of the night with a black eye or fat lip, or just shaking (D90, p.92, 94). One time, David showed John a photograph of the thigh, mid-section of the torso area of a pre-pubescent boy with a man's arm on him and the man's hand on the boy's penis (D90, p.92). David and John went to the police station with the photograph (D90, p.92). After the police

interviewed David, he was very distraught, "completely destroyed" (D90, p.92-93). "We tried and nothing happened" (D90, p.93).

Laura Jones was the mother of some boys who used to play with David starting when David was about eight (D90, p.99). David was "fun loving … he was a good kid, a real good kid" (D90, p.99). Later, when the boys were in their mid-teens, David visited their home several times a week, with increasingly longer stays (D90, p.99). By the time of the crimes, he had lived with the Jones family for a month (D90, p.99). Barnett never came looking for him (D90, p.99).

Mrs. Jones loved David like a son and still does (D90, p.99). David would do the dishes, clean the house, sweep and vacuum, make beds, babysit, and "do absolutely anything he could to make himself welcome there so that he would remain, so he would be welcomed there" (D90, p.99). Mrs. Jones "absolutely trusted" David with her youngest son (D90, p.99-100).

David's high school principal thought Barnett was the worst example of parenting she had ever seen (D90, p.107). He only wanted to talk about how bad David was (D90, p.107). Barnett never said a nice thing about David; he stated he wished David was no longer in his home and believed David caused all their problems (D90, p.108-109).

David wrote a note wondering if his life was worth living (D90, p.109). Three days later, when David was absent from school, the principal learned that David poured lighter fluid on himself and ignited the fumes (D90, p.107). He was placed in a psychiatric center (D90, p.107). When Barnett came to the principal's office to get David's homework assignments, he said, "[w]ell, he's finally done it, he's now the poster child for suicide"

(D90, p.107).[4] Someone tried to explain that David's actions were a cry for help, but Barnett only wanted to talk about David's behavior (D90, p.108-109). Barnett ignored the psychiatric center's recommendation of long-term care placement (D90, p.108).[5]

David talked to the principal about problems at home and expressed his fears regarding the other boys in the household (D90, p.108). After David's suicide attempt, the principal wrote a letter to the Division of Family Services expressing concern for David (D90, p.108). She had never written such a strong letter to DFS (D90, p.109). She received no response (D90, p.109).

E.B.'s Description of the Abuse

E.B. was the last boy adopted by Barnett (D90, p.111). David was his best friend (D90, p.111). When E.B. came to the Barnett household, David immediately took him under his wing and included him in his activities (D90, p.111). David also intervened for him with Barnett and when he or K.B. was bullied at school (D90, p.111).

E.B. explained that almost daily, Barnett grabbed the boys' genitals and squeezed and rubbed their buttocks (D90, p.111). He made them sit on his lap and fondled their genitals and buttocks, both over and under their clothing (D90, p.111-12). He stuck his tongue in their ears (D90, p.112). If they resisted, he told them if they loved him, they

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[4] Barnett told E.B., "[y]our idiot brother tried to light himself on fire with gasoline" (D.90, p.115). E.B. started crying because he thought David was dead (D.90, p.115). Barnett told him, "Don't worry, he didn't succeed. Get in the fucking car" (D.90, p.115).

[5] David struggled with thoughts of suicide starting at age eight (D69, p. 36). However, starting in 1992 when he was sixteen years old, David made at least four known suicide attempts and was hospitalized after at least two of these attempts (D69, p.36). He was diagnosed with depression, bipolar disorder and oppositional defiant disorder (D69, p.37).

would let him do it (D90, p.112). Barnett kissed the boys on the neck and lips, keeping their lips connected until someone pulled away (D90, p.112). For E.B., that occurred about four nights a week (D90, p.112).

If they drove in the car, Barnett backhanded or punched whatever child was sitting in the front seat (D.90, p.112). Once when they went on vacation, David complained that the pool was too small (D.90, p.112). Barnett punched him in the face, stomach and head with his ring, telling David he was "an ungrateful piece of --" (D.90, p.112). The fondling continued on vacation (D.90, p.112). When they returned from vacation, E.B. saw photographs that Barnett had taken of children on the beach (D.90, p.113).

Barnett wore a school ring, his "weapon of choice" (D.90, p.112). Barnett hit the boys in the head and face with the ring, intentionally (D.90, p.112). He hit E.B. with a closed fist in his face, head, stomach, and ribs and kicked him hard in the shins (D.90, p.112). Barnett told the boys they were worthless, would never amount to anything, were just like their "fucked-up biological family," and that their families did not want them (D.90, p.112). Barnett drank scotch every night, and when he got drunk, the abuse intensified (D.90, p.113). Barnett also smoked marijuana and had it stashed around the house (D.90, p.113).

E.B. and K.B. found photographs of nude children. One showed a hand pulling down the underwear of a six or seven year old girl, showing her vaginal area (D.90, p.113). By the unique arm hair and the ring the person wore, E.B. knew it was Barnett (D.90, p.113). They also found five or six photographs, mostly showing the boys showering (D.90, p.113). E.B. found photographs of himself sleeping nude and in the shower,

focusing on his genitalia (D.90, p.113-14). K.B. took the photographs, and E.B. never saw them again (D.90, p.114). The boys also found a book of photographs of naked boys and girls on the beach (D.90, p.113). Barnett kept Playboy and Penthouse magazines at the house; when E.B. was in the fourth grade, Barnett gave him his first Hustler magazine (D.90, p.114). Barnett talked about the relative size of the boys' genitalia (D.90, p.115). E.B. ran away all the time to get away from Barnett (D.90, p.114).

Efforts to Get Help

At least six hotline calls were made regarding Barnett's abuse. When David was fifteen, someone reported that Barnett choked a child and hit the boys in the head with his ring, raising knots (D90, p.86). A previous report indicated David brought a baggie of marijuana to the school counselor (D90, p.86). Three months later, a report was made that Barnett struck David's back with a wooden roller and slapped and punched his face (D90, p.86).

Two months later, the mother of one of David's friends reported that David would stay very late at her home and had bruises inflicted by Barnett (D90, p.86-87). During the investigation of this report, David revealed that either K.B. or E.B. had marks from a beating with a hockey stick (D90, p.87). David revealed he had been physically and sexually abused (D90, p.87). The three boys had been beaten with canes, belts, wood massagers, hangars, and wooden hockey sticks, and one of the boys had his head shoved into a kitchen wall (D90, p.87). The investigator learned that Barnett threatened to beat David to death, called the boys demeaning names, and told David, "[y]ou're going to be a shithead like your father" and "[y]ou're not my son any more, go find your own father"

(D90, p.87). K.B. and E.B. confirmed that Barnett hit them very hard on the back of their heads, yelled and cursed at them, and had a quick temper (D90, p.87). A counselor reported that Barnett was verbally aggressive, demeaning, sarcastic, and condescending (D90, p.87).

The next month, the Children's Division received a report from the police that David, E.B., and K.B. had run away and refused to return home (D90, p.88). The children reported that Barnett put his hand inside their pants, grabbed their buttocks, and forced them to sit on his lap and kiss him (D90, p.88). K.B. reported an incident when Barnett put his hand between K.B.'s belt and his penis and joked about K.B. having an erection (D90, p.88).

Barnett did not deny touching the boys but claimed it was not sexual (D90, p.88). He was warned that if his conduct continued, it would be perceived as sexual (D90, p.88). He was told the boys did not like his conduct, and he had to stop (D90, p.88).[6]

A sixth report, made in November 1993 (David was seventeen), was prompted by E.B. running away from home (D90, p.89). It was the third allegation of sexual abuse (D90, p.88). David, E.B., and K.B. reported that Barnett physically abused them (D90, p.88-89). He photographed them naked and continued to fondle, pet and pinch their buttocks, rub their buttocks, and have long kisses while they sat on his lap (D90, p.89).

Barnett admitted he had the boys sit on his lap and kiss him (D90, p.89). He claimed it was a game where they would kiss each other on the mouth and see who would be the

[6] The next social services report, ten months later, was that David had been locked out of the house (D90, p.88).

first one to break away (D90, p.89). Barnett again denied any sexual intent (D90, p.89). He stated the photographs had existed but he burned them (D90, p.89).

Barnett called the boys liars and said no one would believe them (D.90, p.113). He mocked the boys for making the hotline calls (D.90, p.114). After the boys had reported the abuse for the sixth time or so, E.B. believed no adult would respond (D.90, p.113). E.B. took some of Barnett's marijuana to the police station to try to get the police to take action against Barnett, but the police did nothing (D.90, p.115).

The Children's Division also investigated an allegation that Barnett engaged in a sexual relationship with one of his students, a sixteen-year-old named Secil (D90, p.89). Secil ran away from home at age fourteen or fifteen and lived "different places, different couches, different floors, different friends, people, the Barnetts" (D90, p.100-101). Barnett reached out to Secil, gave her a summer pass to a local pool, and invited her to his house (D90, p.101). When she was fifteen, she started staying at the Barnett house several times a week (D90, p.101). Many nights, Barnett gave Secil oral sex (D90, p.101). Secil would sit on Barnett's lap and do the "kissing game"; Barnett would tickle and touch her (D.90, p.89,114). At the time, Secil lied, denying that anything sexual was taking place; she did not want Barnett to get in trouble and she did not like the police badgering her (D90, p.102,105). The Children's Division investigator concluded it was inappropriate for Secil to be at Barnett's house and for him to be kissing her (D90, p.89).

On November 15, 1993, another hotline call was received concerning Barnett's touching K.B.'s buttocks (D90, p.89). The next day, Barnett confirmed the allegation (D90, p.90). The Children's Division investigator was told not to interview Barnett until

the police department had done so (D90, p.90). Even without the police investigation, the DFS investigator reported to the court that there was reason to suspect physical and sexual abuse of all three boys (D90, p.90). In her final report, after talking to Barnett in 1996, the investigator found child abuse had occurred (D90, p.90).

Officer Robert Catlett also investigated the allegations of physical and sexual abuse (D90, p.118). Catlett asked each of the boys to describe the parts of their bodies Barnett had touched inappropriately; each gave answers consistent with those of the other boys (D90, p.118-19). Officer Catlett concluded there had been some form of abuse and reported it to the Prosecuting Attorney's Office, but no charges were filed (D90, p.120).

DFS still did not remove the children from Barnett's home (D90, p.90). By that time, David and E.B. were living somewhere else, but K.B. was still there (D90, p.90).

David and Secil

When David was seventeen, Secil got pregnant with David's baby (D69, p.33; D90, p.101). David lived with Secil and Sethan over a year (D90, p.102-103, 105). He helped feed and change Sethan, babysat him, and worked two jobs to help out financially (D69, p.33; D90, p.106).

David was never violent toward Secil, but she was violent to him (D90, p.105-106). Once, she smashed his hand in a car door, and another time, she ran over his foot (D90, p.105). Another time, after they had broken up, she had her friends beat David up because she thought he should help pay a deductible after a car accident (D90, p.105-106). When Secil told David their relationship was over, he had no skills to deal with the

disappointment and rejection (D90, p.132). About a month after the breakup, the crimes occurred (D90, p.148).

The Crimes

On February 4, 1996, when David was nineteen years old and homeless, he let himself into the home of Clifford and Leona Barnett, his adoptive grandparents, and waited for them to return from church (Sent.Tr. 21). When they arrived, a confrontation ensued in which David stabbed them to death (D65, p.1; Sent.Tr. 21). Afterwards, he stole their car and cash (D65, p.1; Sent.Tr. 22). The next morning, David approached some police officers and confessed (Sent.Tr.22).

David was indicted on two counts of first-degree murder (Counts I and IV), two counts of armed criminal action, and two counts of first-degree robbery (D96, p.1-4). After a trial, he was convicted on all counts and sentenced to death (D97, p.1-2).

Re-Sentencing

On August 8, 2015, the United States District Court for the Eastern District of Missouri held that David had been denied the effective assistance of counsel at his initial penalty phase trial (D90, p.179-89). The court ordered the State to either sentence David to life without parole or hold a new penalty phase trial (D90, p.188-89). After the United States Eighth Circuit Court of Appeals affirmed the district court order and the case was returned to circuit court, the State waived the death penalty (D66, p.1).

In a sentencing memorandum, David asked the court to impose a sentence less than life without parole because, similar to the rationale of the Supreme Court opinion *Miller v. Alabama*, 567 U.S. 460 (2012), the Eighth Amendment requires that nineteen-year-old

offenders like David be provided individualized sentencing procedures (D67, p.1-14). He argued that he was entitled to a hearing at which he could demonstrate he was not a person whose crimes reflected "irreparable corruption" and deserved a sentence less than life without parole (D67, p.1-14).

In support, David presented newly available scientific evidence to demonstrate that the evolving standard of decency required the requested holding (D71, D72).

In addition, David presented certificates showing he successfully completed college-level coursework in American Politics, Communications, and Psychology, and life skills classes such as Transition Training, Changing Directions, Restorative Justice, and Impact of Crime on Victims (D74, p.1-7;D84, p.3). David completed an apprenticeship as an animal trainer and received certification from the U.S. Department of Labor (D74, p.10). He successfully trained at least six dogs so they were available for adoption through the Puppies for Parole program (D74, p.11-16). David also successfully completed various religious programs and received a certificate of appreciation for his ministry work (D74, p.17-22, 24-26). He won poetry contests and a Christmas Quiz (D74, p.8-9, 23). Multiple people wrote letters supporting David and asking the court to impose a sentence less than life without parole (D76, p.1-9; D78, p.1-2; D81, p.1-3; D83, p.1-2).

The court rejected David's request, finding that because David was over eighteen at the time of the crimes, the only available punishment was life without parole (Sent.Tr.23) (Appx. 2-6). Notice of appeal was timely filed (D91, p.1-3).

POINT RELIED ON

The trial court erred in overruling David's motion to declare Mo. Rev. Stat. §565.020 unconstitutional as applied to David and in sentencing him to two counts of life without parole for offenses committed when he was nineteen years old, because in cases where the State has elected not to pursue a death sentence, the statute mandates a sentence of life without parole for anyone who committed the crime of first-degree murder at the age of nineteen, thereby violating the prohibition against cruel and unusual punishment set forth in the Eighth Amendment to the United States Constitution and Article I, Section 21 of the Missouri Constitution, in that any punishment must be proportioned to both the crime and the offender, and newly available scientific evidence indicates that the justifications that resulted in the banning of mandatory sentences of life without parole for people who commit first-degree murder at age seventeen apply equally to people who commit first-degree murder at age nineteen; the transient, hallmark features of being a teenager (immaturity, impetuosity, and failure to appreciate risks and consequences) apply to all teenagers, not just teenagers up to age eighteen; far too great a risk of disproportionate sentencing exists when a mandatory sentence of life without parole is imposed upon someone who committed first-degree murder at age nineteen.

Hall v. Florida, 572 U.S. 701 (2014);

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

Miller v. Alabama, 567 U.S. 460 (2012);

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

U.S. Const., Amendment VIII;

Mo. Const., Art. I., Sec. 21; and

Section 565.020, RSMo. 1994 and 2016.

ARGUMENT

The trial court erred in overruling David's motion to declare Mo. Rev. Stat. §565.020 unconstitutional as applied to David and in sentencing him to two counts of life without parole for offenses committed when he was nineteen years old, because in cases where the State has elected not to pursue a death sentence, the statute mandates a sentence of life without parole for anyone who committed the crime of first-degree murder at the age of nineteen, thereby violating the prohibition against cruel and unusual punishment set forth in the Eighth Amendment to the United States Constitution and Article I, Section 21 of the Missouri Constitution, in that any punishment must be proportioned to both the crime and the offender, and newly available scientific evidence indicates that the justifications that resulted in the banning of mandatory sentences of life without parole for people who commit first-degree murder at age seventeen apply equally to people who commit first-degree murder at age nineteen; the transient, hallmark features of being a teenager (immaturity, impetuosity, and failure to appreciate risks and consequences) apply to all teenagers, not just teenagers up to age eighteen; far too great a risk of disproportionate sentencing exists when a mandatory sentence of life without parole is imposed upon someone who committed first-degree murder at age nineteen.

David Barnett was a teenager, nineteen years old, when the charged crimes occurred (D90, p.1). Because the State waived the death penalty, the only sentence available for David on the murder counts under Section 565.020.2 was life without parole:

> 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 (1994) (Appx.7).[7] David's mandatory sentences of life without parole violate his right to be free from cruel and unusual punishment. U.S. Const., Amend. VIII; Mo. Const. Art. I sec. 21. The principles underlying *Miller v. Alabama*, 567 U.S. 460 (2012), that justified barring mandatory sentences of life without parole for individuals who committed first-degree murder at age seventeen also justify barring such sentences for individuals who commit first-degree murder at age nineteen. In fact, *Miller*, its progeny, and its predecessors all relied in some greater or lesser degree on the findings and testimony of psychiatrists, such as that provided by Dr. Lawrence Steinberg, when reaching the conclusion that scientific evidence now demonstrates that evolving standards of decency prohibited the mandatory life without parole sentence imposed on the respective defendants. Those same psychiatrists now say "that "if a different version of *Roper*[8] were

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[7] The charged crimes occurred in 1996, so the 1994 version of Section 565.020.2 applies here (Appx.7). However, the current version of Section 565.020.2 also mandates a sentence of life without parole for a nineteen-year-old when the State has waived the death penalty:

> The offense of murder in the first degree is a class A felony, and, if a person is eighteen years of age or older at the time of the offense, the punishment shall be either death or imprisonment for life without eligibility for probation or parole, or release except by act of the governor. If a person has not reached his or her eighteenth birthday at the time of the commission of the offense, the punishment shall be as provided under section 565.033.

[8] *Roper v. Simmons*, 543 U.S. 551, 560 (2005).

heard today, knowing what we know now, one could've made the very same arguments about eighteen (18), nineteen (19), and twenty (20) year olds that were made about sixteen (16) and seventeen (17) year olds in *Roper*." (*Kentucky v. Bredhold*, No. 14-CR-161, at 2 (Fayette Cir. Ct. Aug. 1, 2017) (quoting testimony of Dr. Laurence Steinberg).[9] David is entitled to a hearing at which he can demonstrate that he is not a person whose crimes reflect "irreparable corruption" and therefore should receive a sentence less than life without parole. *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016) (*quoting Roper v. Simmons*, 543 U.S. 551, 573 (2005)).[10]

I. Preservation

To raise a constitutional issue, the party must (1) raise the issue at the first available opportunity; (2) specify the constitutional provision at issue; (3) state the facts showing the violation; and (4) include the issue in its brief. *Mayes v. Saint Luke's Hosp. of Kansas City*, 430 S.W.3d 260, 266 (Mo. banc 2014). The rule is intended "to prevent surprise to the opposing party and permit the trial court an opportunity to fairly identify and rule on the issue." *Id*. (*quoting Winston v. Reorganized Sch. Dist. R–2, Lawrence Cnty., Miller*, 636 S.W.2d 324, 327 (Mo. banc 1982)).

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[9] Available at https://perma.cc/9HG4-6MYN. (Appx.8-21).

[10] David acknowledges that the Court held that *Miller* did not apply to the eighteen-year-old defendants in *State v. Bates*, 464 S.W.3d 257, 268 (Mo. App. E.D. 2015), and *State v. Perdomo-Paz*, 471 S.W.3d 749, 764-66 (Mo. App. W.D. 2015), because, at age eighteen, they were not considered juveniles. To the extent that those cases are applicable here, David requests that the Court reconsider them in light of *Hall v. Florida*, 572 U.S. 701 (2014), and continuing developments in the field of adolescent development, as discussed further herein.

The issue is preserved for review. On October 11, 2018, the Eighth Circuit Court of Appeals issued its mandate affirming the district court's grant of habeas relief (D63, p.1). On January 23, 2019, the court held a scheduling conference and set the sentencing hearing for February 15, 2019 (D62, p.36). On February 8, 2019, David filed a Sentencing Memorandum in which he asked the court to declare Section 565.020 unconstitutional under the Eighth Amendment to the United States Constitution and Article I, Section 28 of the Missouri Constitution[11] (D67, p.15). When David was sentenced on March 15, 2019, he repeated his request (Sent. Tr. 4-12). The court ruled that because David was over the age of eighteen at the time of the crimes, the punishment would be life without parole (Sent. Tr. 23). Thus, each of the *Mayes* requirements was met, opposing counsel had ample opportunity to respond, and the court had ample opportunity to identify and rule on the issue.

II. Standard of Review

When considering the constitutionality of a statute, review is de novo. *Bd. of Educ. of City of St. Louis v. Missouri State Bd. of Educ.*, 271 S.W.3d 1, 7 (Mo. banc 2008). A statute is presumed to be constitutional and will not be invalidated unless it "clearly and undoubtedly" violates a constitutional provision and "palpably affronts fundamental law embodied in the constitution." *Id.*

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[11] Defense counsel mistakenly cited Article I, Section 28, instead of Article I, Section 21. However, it was obvious that David was asserting his right to be free from cruel and unusual punishment under both the federal and state constitutions. In the event that the Court finds this issue is not preserved as to the state constitutional claim, David requests that the Court review that portion of the claim for plain error under Rule 30.20.

III. Youth Matters When Meting out the Law's Most Serious Punishments

The Eighth Amendment of the United States Constitution, applicable to the States through the Fourteenth Amendment, prohibits the imposition of cruel and unusual punishment. *Roper*, 543 U.S. at 560. A central tenet of the Eighth Amendment is that "punishment for crime should be graduated and proportioned to both the offender and the offense." *Miller*, 567 U.S. at 469; *Roper*, 543 U.S. at 560. The question of whether a certain punishment is categorically disproportionate for certain offenders is assessed in terms of the "evolving standards of decency that mark the progress of a maturing society." *Roper*, 543 U.S. at 560-61.

The Court explained this two-part analysis in *Atkins v. Virginia*, 536 U.S. 304, 312 (2002), where it categorically exempted intellectually disabled people from the death penalty. First, the Court must assess whether a national consensus has arisen against the challenged practice, looking primarily to the laws enacted by state legislatures as "the clearest and most reliable objective evidence of contemporary values." *Atkins*, 536 U.S. at 312 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)). Second, if a challenged practice contravenes a clear national consensus, the court then must use its own judgment to determine "whether there is reason to disagree with the judgment reached by the citizenry and its legislatures." *Atkins*, 536 U.S. at 313.

In *Roper*, the Supreme Court applied this two-part analysis in barring the death penalty for another category of offenders – those under the age of eighteen when the crime occurred. *Id.*, 543 U.S. at 568. The Court found that a national consensus had arisen against executing juveniles. *Id*. at 564-67.

The Court then conducted its independent proportionality review. The Court stressed that the death penalty must be limited to the offenders who commit the most serious crimes and whose "extreme culpability make them the most deserving of execution." *Id*. at 568 (quoting *Atkins*, 536 U.S. at 319). But juveniles do not fit within that narrow category. Three areas of difference showed how juveniles are categorically less culpable than adult offenders: (1) juveniles lack maturity and have an underdeveloped sense of responsibility; (2) they are more vulnerable to negative influences and outside pressures and have less control over their environment than adults; and (3) their characters are not fully formed, so they have a greater potential for reform than adults. *Roper*, 543 U.S. at 569-70 (*citing* Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 Developmental Rev. 339 (1992); Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Pen.*, 58 Am. Psychol. 1009, 1014 (2003); Erikson, *Identity: Youth & Crisis* (1968)).

The Court held that, in addition, the societal interests served by the death penalty – retribution and deterrence – are not served by executing juvenile offenders. *Id*. at 571. Because juvenile offenders have diminished blameworthiness, they are less worthy of retribution as extreme as the death penalty. *Id*. Moreover, because of the characteristic features of juveniles, they are less likely to be deterred by the death penalty. *Id*. at 571-72. Thus, neither retribution nor deterrence justified executing juveniles. *Id*. at 572. The Court concluded that all juveniles must be exempted from the death penalty to avoid the risk that a juvenile would be executed even though his or her "objective immaturity, vulnerability, and lack of true depravity" merited a sentence less than death. *Id*. at 573.

In *Graham v. Florida*, 560 U.S. 48 (2010), the Court expanded upon *Roper*'s principles to hold that sentencing a juvenile to life without parole for a non-homicide offence violated the Eighth Amendment. *Id.*, 560 U.S. at 82. Although a majority of states allowed such a sentence, the states imposed the sentence only rarely. *Id*. at 62. Thus the Court concluded that a national consensus existed against this sentencing practice. *Id*.

The Court then considered the relative culpability of juvenile offenders "in light of their crimes and characteristics, along with the severity of the punishment in question." *Graham*, 560 U.S. at 67-68. Citing developments in psychology and brain science, the Court stressed the "fundamental differences between juvenile and adult minds," such as the fact that "parts of the brain involved in behavior control continue to mature through late adolescence." *Id*. at 68 (citing Brief for American Medical Association et al. 16–24; Brief for American Psychological Association et al. 22–27). Because of those differences, juveniles are categorically less culpable and less deserving of the most severe punishments than adult offenders. *Id*. at 68 (citing *Roper*, 543 U.S. at 569).

Moreover, life without parole "is an especially harsh punishment for a juvenile." *Id.* at 70. As the second most severe penalty allowed by law, life without parole "deprives the convict of the most basic liberties without giving hope of restoration." *Id*. at 69-70. It is the "denial of hope" and "means that good behavior and character improvement are immaterial." *Id*. at 70. Moreover, the sentence is much harder on a juvenile, who will serve a greater percentage of his life in prison than an adult offender. *Id*.

Next, the Court considered whether sentencing juveniles to life without parole for non-homicide offenses served legitimate penological goals. *Id*. But the four main

penological purposes for life without parole – retribution, deterrence, incapacitation, and rehabilitation – failed to provide adequate justification for imposing sentences of life without parole on non-homicide juvenile offenders. *Id*. at 71. The case for retribution was not as strong as with an adult offender. *Id*. So too, deterrence did not justify the sentence because the characteristics that make juveniles less culpable also make them less likely to consider the consequences and hence less likely to be deterred. *Id*. at 72. The sentence was not justified on the basis of incapacitation, because only the rare juvenile will "forever be a danger to society" and juveniles should be given the chance to demonstrate their growth and maturity. *Id*. at 72-73. Lastly, such sentences were not justified on the basis of rehabilitation, because life without parole "forswears altogether the rehabilitative goal." *Id*. at 74.

Last, in *Miller v. Alabama,* 567 U.S. 460, 470 (2012), the Court held that the Eighth Amendment barred mandatory sentences of life without parole for juvenile offenders. This was not a categorical ban on a certain sentence or a certain offender, because the punishment could potentially be imposed on a juvenile in the rare case. *Id*. at 479-80.

The Court reiterated its prior reasoning from *Graham* and *Roper* regarding the lessened culpability of juveniles and the severity of a sentence of life without parole. *Id*. at 470-74. It noted that its decisions had rested "not only on common sense—on what 'any parent knows'—but on science and social science as well." *Id*. at 471 (citing *Roper*, 543 U.S. at 569). "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." *Miller*, 567 U.S. at 472 fn 5. The characteristics of juveniles that made imposition of the

death penalty inappropriate – the juvenile's lack of maturity, impulsiveness, risk-taking, and vulnerability to negative influences and pressure, as well as the malleability of their character – also mandated that a juvenile not be sentenced to life without parole except in the rarest case and not without full consideration of the juvenile's characteristics and background. *Id*. at 471-73.

The Court stressed, "youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole." *Id*. at 473. The sentencer must be able to consider the juvenile's characteristics before deciding to impose a sentence of life without parole. *Id*. at 483. Imposition of the harshest punishment upon a juvenile "cannot proceed as though they were not children." *Id*. at 474. The sentencer must be able to consider the "mitigating qualities of youth." *Id*. at 476 (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)).

> [Y]outh is more than a chronological fact. It is a time of immaturity, irresponsibility, impetuousness, and recklessness. It is a moment and condition of life when a person may be most susceptible to influence and to psychological damage. And its "signature qualities" are all transient.

Miller, 567 U.S. at 476 (internal citations omitted). Mandatory sentencing to life without parole fails to take account of relevant factors:

> Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers

> or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys.

Miller, 567 U.S. at 477-78. Because the juvenile's age and its accompanying characteristics are given no consideration, mandatory sentencing of juveniles to life without parole poses "too great a risk of disproportionate punishment" and violates the Eighth Amendment. *Id*. at 479, 489; see also *State v. Hart*, 404 S.W.3d 232 (Mo. banc 2013).

Finally, on the basis of *Miller*, several states have re-examined their harshest penalties as applied to nineteen-year-olds. In *People v. House*, --- N.E.3d ---, 2019 WL 2718457 (5/16/2019), the appellate court held that imposing a mandatory sentence of life on a nineteen-year-old violated the proportionate penalties clause of the Illinois Constitution.[12] In California and other states, special protections have been afforded to offenders under the age of 21. See, *infra* p.43-44.

In *State v. O'Dell*, 358 P.3d 359 (Wash. 2015), the Washington Supreme Court held that the trial court erred in failing to consider an "exceptional sentence below the standard range" for a defendant who committed the crime of child rape shortly after his eighteenth birthday. The court stressed that we now "have the benefit of psychological and neurological studies showing that the parts of the brain involved in behavior control continue to develop well into a person's 20s." *Id*. at 364 (internal quotations omitted). The

[12] The case is not yet final. The opinion issued on May 16, 2019 and the State has filed a petition for leave to appeal to the Illinois Supreme Court. In *Kentucky v. Bredhold*, *supra* p. 33, the Fayette, Kentucky Circuit Court held that the death penalty was a disproportionate punishment for offenders under the age of twenty-one (Appx.8-21).

court recognized that, "[u]ntil full neurological maturity, young people in general have less ability to control their emotions, clearly identify consequences, and make reasoned decisions than they will when they enter their late twenties and beyond." *Id*. at 365 (citing amicus brief). "[A]ge may well mitigate a defendant's culpability, even if that defendant is over the age of 18." *Id*. at 366.[13]

IV. The Principles Recognized in Roper, Graham, and Miller Apply to Nineteen-Year-Olds

Evolving standards of decency mandate that nineteen-year-old offenders facing life without parole receive the same sentencing considerations as seventeen-year-old offenders. The principles set forth in *Roper*, *Graham*, and *Miller* are just as applicable to nineteen-year-old offenders as to those who are seventeen. Science has demonstrated that the adolescent brain continues to develop into the mid-twenties. Moreover, the bright-line cutoff at age eighteen established in *Roper* and echoed by *Graham* and *Miller* should be reconsidered in light of *Hall v. Florida*, 572 U.S. 701 (2014).

[13] See also *United States v. Cruz*, 2018 WL 1541898, at *23-25 (D. Conn. 3/29/2018) (unreported op.) (after reviewing undisputed testimony of Dr. Lawrence Steinberg, nation's leading developmental psychologist, court concluded that eighteen-year-olds display exactly same "transient qualities of youth" as seventeen-year-olds and thus, it is unconstitutional to impose mandatory life sentence on eighteen-year-old).

A. Evolving Standards of Decency Mandate that Nineteen-Year-Olds not be Subject to Mandatory Life without Parole

As discussed above, in assessing whether a punishment violates the Eighth Amendment, we look to "the evolving standards of decency that mark the progress of a maturing society." *Atkins*, 536 U.S. at 312. The Court must assess whether a national consensus has arisen against the sentencing practice. *Id*. If the practice contravenes a clear national consensus, the court then must use its own judgment to determine whether there is reason to disagree with the consensus. *Id*. at 313.

In *Miller*, the Court largely side-stepped the "national consensus" part of the two-step analysis it had applied in *Roper* and *Graham*. *Id*. at 482-87. The Court distinguished those cases on the ground that *Miller* did not involve a categorical ban. *Id*. at 483. It concluded that mandatory sentences of life without parole for juveniles violated the Eighth Amendment even though 28 states plus the federal government allowed such sentences. *Id*. at 483. In doing so, the Court pointed to *Graham*, where a national consensus was found even though 39 states allowed the challenged practice; and to *Atkins* and *Roper*, where more than half the states allowed the challenged practice. *Id*. at 483-84. The Court stressed that "simply counting" statutes may "present a distorted view." *Id*. at 485. It concluded that there was no showing that most states had endorsed mandatory life without parole sentences specifically for juveniles or that the states actually engaged in the practice. *Id*. at 485-87.

As in *Miller*, *Roper*, and *Graham*, the majority of states do not legislatively bar the practice challenged here. But as in those cases, this fact is not dispositive. A number of

states recognize that defendants aged 18-21 should be treated differently than adults and thus provide special treatment for offenders under the age of 21. See, e.g., Cal. Penal Code § 3051(a)(1) (providing a youth offender parole hearing for prisoners under the age of 25); Colo. Rev. Stat. Ann. § 18-1.3-407.5 (a "young adult offender" is a person who is 18-20 at the time of the crime and under twenty-one years of age at the time of sentencing); Fla. Stat. Ann. § 958.04 (defendant may be sentenced as "youthful offender" if found guilty of crime committed before defendant turned 21); Va. Code. Ann. § 19.2-311(B)(1) (permitting persons convicted of nonhomicide offenses under the age of 21 to be committed to a state facility for youthful offenders in lieu of any other penalty provided by law). See also *Cruz*, 2018 WL 1541898, at *19 (noting that 16 states "provide protections, such as expedited expungement, Youth Offender Programs, separate facilities, or extended juvenile jurisdiction, for offenders who are 18 years old up to some age in the early 20s, depending on the state"). In addition, in 2017, the United States Sentencing Commission defined "youthful offenders" as those under 25 years of age. The Commission cited "recent case law and neuroscience research in which there is a growing recognition that people may not gain full reasoning skills and abilities until they reach age 25 on average." Youthful Offenders in the Federal System, Fiscal Years 2010 to 2015, p. 5.

Another factor to consider is the consistency or direction of legislative or societal change. *Atkins*, 536 U.S. at 315. Many federal and state statutes recognize that people aged 18-21 lack the full maturity of adulthood. The Foster Care Act of 2008 permits states to define "child" as "an individual . . . who has not attained 19, 20 or 21 years of age . . . ." 42 U.S.C. § 675(8)(b)(iii) (2008). The Gun Control Act of 1968 prohibits individuals under

age 21 from purchasing handguns. 18 U.S.C. §§ 922(b)(1), (c)(1) (1968). The National Minimum Drinking Age Act of 1984 prohibits those under 21 from purchasing alcohol. 23 U.S.C. § 158. The majority of states now set 21 as the line at which children age out of foster care; Vermont sets it at 22, and the others set it above 18.[14]

B. Science Demonstrates that the Brain is Not Fully Developed at Age Nineteen

Turning to the second step of the "evolving standards of decency" analysis, we consider whether sentencing a nineteen-year-old to life without parole advances the penological purposes of retribution, deterrence, incapacitation, and rehabilitation. It does not. The scientists and social scientists upon whose studies the Court relied in *Roper*, *Graham*, and *Miller* found that brain development continues well past age 18 and into the mid-twenties. Brain development does not stop at the stroke of midnight on a juvenile's

[14] Alabama, Ala. Code § 38-7-2(1); Alaska, Alaska Stat, § 47.10.080(c); Arizona, Ariz. Rev.Stat. Ann. § 8-501(B); California, Cal. Welf. & Inst. Code § 303(a); Colorado, Colo. Rev.Stat. § 19-3-205(2)(a); Connecticut, Conn. Gen. Stat. Ann. § 17a-93(a); Delaware, Del. Code Ann. tit. 10, § 929(a); Washington, D.C., D.C. Code Ann. § 16-2303; Florida, Fla. Stat. Ann. § 39.013(2); Georgia, Ga. Code Ann. § 15-11-2(10)(c); Idaho, Idaho Code Ann. §§39-1202(3) & (9); Illinois, Ill. Comp. Stat. Ann. § 405/2-31(1); Indiana, Ind. Code Ann. §31-28-5.8-5(a); Kansas, Kan. Stat. Ann. § 38-2203(c); Kentucky, Ky. Rev. Stat. § 620.140(1)(d)-(e); Maryland, Md. Code Ann., Cts. & Jud. Proc. § 3-804(b); Michigan, Mich. Comp. Laws Ann. § 772.981-85; Minnesota, Minn. Stat. Ann. § 260C.451; Mo. Rev. Stat. §110.04 (12); Nebraska, Neb. Rev. Stat. Ann. §§ 43-905 & 43-4502; Nevada, Nev. Rev. Stat. Ann. § 432B.594; New Hampshire, N.H. Rev. Stat. Ann. § 169-C:4; New Jersey, N.J. Stat. Ann. § 30:4C-2.3; New York, N.Y. Fam. Ct. Act § 1087(a); Ohio, Ohio Rev. Code Ann. §2151.81; Oregon, Or. Rev. Stat. Ann. § 419B.328; Pennsylvania, 42 Pa. Const. Stat. Ann. §6302; South Dakota, S.D. Codified Laws § 26-6-6.1; Tennessee, Tenn. Code Ann. §§37-1-102(4)(G) & 37-2-417(b); Texas, Tex. Fam. Code Ann. § 263.602; Virginia, Va. Code Ann. § 63.2-905.1; Washington, Wash. Rev. Code Ann. § 74.13.031(16); West Virginia, W. Va. Code Ann. § 49-2B-2(x); and Wyoming, Wyo. Stat. Ann. § 14-3-431(b).

eighteenth birthday. Nineteen-year-olds display the same "transient qualities of youth" as seventeen-year-olds.

As demonstrated by research pioneered by Dr. Laurence Steinberg, Distinguished University Professor of Psychology, Temple University, the human brain undergoes a "massive reorganization" during the teenage years.[15] These structural and functional changes make adolescence (ages 10 to 21) a stage of life biologically distinct from childhood and adulthood. (D72, p.6-7,11, 44); Steinberg, Laurence, *A Behavioral Scientist Looks at the Science of Adolescent Brain Development*, 72 Brain & Cognition 160, 160 (2010) (hereinafter, Steinberg, *Behavioral Scientist*); see Steinberg, Laurence, *Adolescent Development and Juvenile Justice*, 5 Annual Rev. of Clinical Psychol. 459, 465 (2009) (hereinafter, Steinberg, *Adolescent Development*). Although logical capabilities, generally speaking, are fully formed by age sixteen, the systems controlling more complex judgments, *i.e.*, risk/reward evaluations, responses to environmental stressors, and impulse control, do not completely develop until the mid-twenties. *See, e.g.*, Nat'l Research Council, Comm. on Assessing Juv. Just. Reform, *Reforming Juvenile Justice: A Developmental Approach* 132 (Richard J. Bonnie et al., eds., 2013); Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescents: Why Adolescents May Be Less Culpable Than Adults*, 18 Behav. Sci. & the L. 741, 744 (2000).

As the adolescent brain matures, an imbalance forms between the prefrontal cortex, which controls reasoning, planning, and self-regulation, and the limbic system, which

[15] Dr. Steinberg's work was cited by the Supreme Court in *Roper*. *Id.*, 543 U.S. at 569-70, 573.

controls emotions and reward-seeking. (D72, p.8); see also Nat'l Research Council, *supra*, at 2; Gopnik, Alison, *What's Wrong With the Teenage Mind*, Wall St. J., Jan. 28, 2012; Steinberg, *Adolescent Development* at 466-65. The limbic system is like the accelerator, while the prefrontal cortex is the brake (D69, p.8). Until age 17 or 18, the limbic system is very easily aroused but the prefrontal cortex has still not yet fully developed to counteract it, so an imbalance occurs (D69, p.8-9). Steinberg, *Adolescent Development*, at 466; *see, e.g.*, Nat'l Research Council, *supra*, at 92, 96-99; Steinberg, Laurence, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 Dev. Rev. 78, 83 (2008) (hereinafter, Steinberg, *Risk-Taking*). This means that adolescents have a qualitatively higher neurological inclination to engage in risky activity, while at the same time have a qualitatively lower ability to control impulses or accurately assess future consequences. "Adolescents develop an accelerator a long time before they can steer and brake." Gopnik, *supra*. The ability to regulate and assess increases gradually as adolescents age. *See, e.g.*, Steinberg, Laurence, *A Dual Systems Model of Adolescent Risk-Taking*, 52 Developmental Psychobiology 216 (2010).

Other research shows that emotionally-charged situations exacerbate this discrepancy, leaving teenagers—especially young men like David Barnett—even less able to exercise the regulatory functions of the brain in the very contexts when those moderating functions are most needed. While young men may be good at "cold reasoning," their ability to reason at times of stress and excitement – "hot reasoning" – remains undeveloped and immature. (D69, p.11-12); see also Nat'l Research Council, *supra*, at 92-93; Figner,

Bernard et al., *Affective and Deliberative Processes in Risky Choice*, 35 J. Experimental Psychol. 709, 709 (2009).

As Dr. Laurence Steinberg has testified, the ability to regulate one's emotions when angry or excited is not fully mature until the early- or mid-20s (D72, p.10, 70). Late adolescents (those between the ages of 18 and 21) "still show problems with impulse control and self-regulation and heightened sensation-seeking, which would make them in those respects more similar to somewhat younger people than to older people" (D72, p.11, 19). Impulse control is not fully developed until the early- or mid-20s (D72, p. 20). Late adolescents are risk-seekers, "more likely to take risks than either adults or middle or early adolescents" (D72, p. 20). In addition, during late adolescence, the ability to resist peer pressure is still developing (D72, p. 20-21). Finally, like seventeen-year-olds, late adolescents are more capable of change than adults (D72, p. 21). Dr. Steinberg vouched he is "absolutely confident" that development is still ongoing in late adolescence (D72, p. 62).

These principles support David's argument that a mandatory sentence of life without parole for someone convicted of committing homicide at age nineteen violates the Eighth Amendment. Society's interests in retribution and deterrence are not advanced by imposing mandatory sentences of life without parole on nineteen-year-olds. Nineteen-year-olds, like seventeen-year-olds, lack maturity and have an underdeveloped sense of responsibility. They are vulnerable to negative influences and outside pressures; have less control over their environment than adults, and their character is not fully formed. Like seventeen-year-olds, nineteen-year-olds have diminished blameworthiness, and they are

less able to analyze and weigh their options and the consequences, such that they are less susceptible to deterrence than adults.

Because no penological goal is served by sentencing juveniles to mandatory life without parole, and nineteen-year-olds have the same characteristics as those juveniles, no penological goal is served by imposing mandatory life without parole on a nineteen-year-old. In that (1) the sentence does not serve a legitimate penological goal, (2) teenagers are seen as less culpable, and (3) life without parole is an extreme punishment, the imposition of mandatory life without parole on a nineteen-year-old violates the Eighth Amendment.

C. The Missouri Statute's Cutoff at Age 18 Violates *Hall v. Florida*

In *Roper*, the Court held that age eighteen was the cutoff at which a teenager could receive the death penalty because it was "the point where society draws the line for many purposes between childhood and adulthood." *Id.*, 543 U.S. at 574. But the Court recognized the arbitrary nature of setting the cutoff at age eighteen: "Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules." *Id.* The Court also recognized that the bases of its decision – immaturity and potential for redemption – applied with equal force to adolescents eighteen years and older: "The qualities that distinguish juveniles from adults do not disappear when an individual turns 18." *Id.* Nevertheless, the Court concluded that "a line must be drawn." *Id.* Both *Miller* and *Graham* mirrored *Roper* in this respect, adopting the cutoff at age eighteen with no further discussion. *Graham*, 560 U.S. at 74-75; *Miller*, 567 U.S. at 465.

This Court should reconsider the eighteen-year cutoff in light of *Hall v. Florida*, 572 U.S. 701 (2014). In *Hall*, the Supreme Court struck down a Florida law that, as

interpreted by the Florida Supreme Court, set a strict IQ cutoff for determining whether a defendant had an intellectual disability barring imposition of the death penalty. The Florida statute was unconstitutional because it set forth a "rigid rule" that created "an unacceptable risk" that people who were intellectually disabled would be wrongfully executed. *Id*. at 704. Florida failed to consider IQ as a range, instead using an IQ score of 70 as a cutoff. *Id*. at 718-20.

> Pursuant to this mandatory cutoff, sentencing courts cannot consider even substantial and weighty evidence of intellectual disability as measured and made manifest by the defendant's failure or inability to adapt to his social and cultural environment, including medical histories, behavioral records, school tests and reports, and testimony regarding past behavior and family circumstances. This is so even though the medical community accepts that all of this evidence can be probative of intellectual disability, including for individuals who have an IQ test score above 70.

Id. at 712.

The Court noted that its determination that Florida's statute was unconstitutional "was informed by the views of medical experts," and stressed that the "science of psychiatry … informs but does not control ultimate legal determinations ..." *Id*. at 721 (quoting *Kansas v. Crane*, 534 U.S. 407, 413 (2002)). The Court noted that "[i]t is proper to consider the psychiatric and professional studies that elaborate on the purpose and meaning of IQ scores to determine how the scores relate to the holding of *Atkins*." *Id*. at 709-10.

Hall demonstrates the constitutionality infirmity of drawing a rigid line merely because "a line must be drawn." Applying *Hall* to *Miller* requires the conclusion that the mandatory imposition of life without parole violates the Eighth Amendment right to be free

from cruel and unusual punishment where the offender, although over the age of seventeen at the time of the crime, was within the age range that scientists and social scientists accept as still undergoing adolescent development. Insomuch as Section 565.020 mandates a rigid rule based solely on a defendant's chronological age, it is unconstitutional under *Hall*. Just as Florida's IQ cutoff impermissibly prevented the sentencer from considering Hall's substantial and weighty evidence of intellectual disability, Missouri's age cutoff impermissibly prevented a sentencer from considering the transient and mitigating qualities of David's youth and the circumstances of his upbringing.

In rejecting Florida's rigid approach to IQ scores, the Supreme Court wrote, "[t]he flaws in Florida's law are the result of the inherent error in IQ tests themselves. An IQ score is an approximation, not a final and infallible assessment of intellectual functioning." *Hall*, 572 U.S. at 722. This observation is similarly applicable to chronological age and mental maturity, in that chronological age is not a final and infallible assessment of intellectual development. *Roper*, 543 U.S. at 574.[16]

In conclusion, the Court wrote that "Florida seeks to execute a man because he scored a 71 instead of 70 on an IQ test." *Hall*, 543 U.S. at 724. Here, the State of Missouri seeks to imprison David Barnett for the rest of his life without any opportunity for a fact-finder to consider the circumstances of his youth and determine whether life without parole truly was an appropriate sentence, solely because David was nineteen years old, rather than

[16] IQ is not a separate and distinct concept from chronological age or mental age. In fact, a person's IQ is actually a representation of a comparison of a person's mental age with the average mental age of people of the same chronological age. *See State ex rel. Thomas v. Duncan*, 216 P.3d 1194, 1195 (Ariz. Ct. App. 2009) (discussing the IQ formula).

seventeen, when he committed his crimes. Far too great a risk exists that such a sentence is disproportionate.

Moreover, in addition to bucking the views of the scientific and social scientific communities, setting the cutoff at age eighteen has no solid rationale. While eighteen is the age to vote and be on a jury, society still views people who are 18, 19, and 20 as lacking the judgment and maturity of an adult. Thus, as mentioned above, 21 is the age for "purchase, use and possession for alcohol and firearms, fiduciary appointments, or most professional occupational licenses." Cohen & Bonnie, *When Does a Juvenile Become an Adult?: Implications for Law and Policy*, 88 Temp. L. Rev. 769, 776 (2016). In the vast majority of states, a person who is 18, 19, or 20 also cannot run for state legislature. See Ballotpedia, *State Legislature Candidate Requirements by State* (Appx.22-25).[17] Given the views of the scientific and social science communities that the brain continues to develop until the mid-twenties, a cutoff of 21 makes much more sense than 18.

V. David was Even Less Culpable than a Typical Teenager Due to the Effects of Years of Abuse and Neglect on his Maturation and Development

David was nineteen in number of years old, but mentally and psychologically, he was years behind. Prior to the evidentiary hearing conducted in federal court, David was examined by two psychologists. The examination of Dr. Victoria Reynolds focused on the trauma in David's early life and its effect on his maturation and development at the time of the offense (D69, p.3). Dr. Reynolds found that "David Barnett experienced severe

[17] Available at https://ballotpedia.org/State_legislature_candidate_requirements_by_state

childhood abuse and neglect from his caretakers starting in the first weeks of life and continuing through his childhood and adolescence" (D69, p.39). She also noted a genetic history of trauma; his biological parents "came from families devastated by multigenerational substance abuse, violence and child abandonment. . . ." (D69, p.39).

Years of neglect, abandonment, and physical, sexual, and emotional abuse rendered David's brain even less developed than an average nineteen-year-old (which itself is years from being fully developed). The brain of a developing child depends on multiple, daily, caring, human interactions to spark the growth of neural networks in critical areas in the frontal lobes of the brain (D69, p.27). This neural circuitry controls the ability to control impulses, modulate emotions, and reflect upon and temper thoughts and feelings (D69, p.27). It also affects the child's later ability to verbalize and regulate his or her emotions (D69, p.27-28). Although children are resilient, a limit may be reached after which traumatic experiences cause psychiatric symptoms and impairment (D69, p.28).

When a child has chronic exposure to traumatic events, his brain is prevented from developing normally (D69, p.28). The brain undergoes structural and neurochemical changes with profound functional and behavioral consequences on developmental tasks (D69, p.28). Impairments in one stage of development result in adaptations that then disrupt other developmental tasks, creating increasingly severe and cumulative disruptions (D69, p.28).

As a baby and young child, David had no caregiver with whom he could safely attach (D69, p.29). Thus, he had no opportunity to begin the neuro-emotional development so critical for the social processes that teach trust, connection and self-regulation (D69,

p.29). Maternal attachment is critical in teaching a child how to manage, contain, and soothe intense emotions (D69, p.30). Yet David had no maternal figure.

Making matters worse, physical abuse, sexual abuse, and chronic neglect create levels of emotion unmanageable for children (D69, p.30). So not only did David not know how to deal with emotion, but the level of emotion he dealt with daily was extremely high. Moreover, because David was again and again abused by his caretakers, he could not turn to them for help in managing these intensely negative emotions (D69, p.30).

The repeated trauma David suffered from his caregivers caused the parts of his brain responsible for sensing fear and reactions to threat to become over-activated, releasing stress hormones into his brain and body (D69, p.28). Over time, the brain pathways and David's perceptions of external situations were affected (D69, p.28). This in turn caused David, as a child and later, an adolescent, to be highly sensitive to trauma-related reminders; the traumas were intertwined in his memory, sensory, and behavioral system like "psychological shrapnel" (D69, p.28). This abuse, affecting David's brain in so many ways, effectively put him years behind in maturation and development.

In sum, while David was nineteen years old, he was much more like the juveniles discussed in *Roper*, *Graham*, and *Miller* than an adult. The extreme, continuous abuse and neglect David endured from birth caused delayed and impaired brain development. As a result, David had the characteristics of immaturity described in *Roper*, *Graham*, and *Miller*. Because he had no maternal figure or other loving, reliable caregiver in his formative years, the neural networks in the frontal lobes of David's brain did not develop as they should have, negatively affecting his ability to control impulses, modulate emotions, and reflect

upon and temper his thoughts and feelings. He could not form any feelings of trust, because every caregiver abused and terrified him. Even beyond his formative years, he was unable to control his emotions and did not know how to handle emotional situations. David's abuse made him overly eager to fit in and be accepted (D90, p.96), making him much more susceptible to peer pressure, like a seventeen-year-old. *Id*. In addition, *Roper* stressed that juveniles are impetuous and reckless. 543 U.S. at 569. As Dr. Reynolds testified, repeated experiences of fight/flight/freeze over the years results in impulsivity, particularly for boys like David (D69, p.29).

VI. David has Demonstrated Maturity and Rehabilitation

As Dr. Reynolds explained, David has now overcome many of those early disruptions. She observed that David, during the ten years before her evaluation in July of 2014, "has made persistent and successful efforts to learn and utilize emotion regulation skills. He credits a spiritual transformation and the instruction associated with a prison-led program called 'Transition Training' which is based on an approach called 'Creation Therapy' to his reformation." (D69, p.41).

David explained to Dr. Reynolds the strategies he has developed to avoid conflicts in prison, including the realization that "he didn't need to control others' perception of him, or to prove himself," and rehearsing interpersonal interactions for later use. (D69, p.42). "This use of imaginal rehearsal to create different behavioral outcomes is a well-researched and robust strategy for increasing interpersonal effectiveness and creating behavioral change." (D69, p.42).

David has behaved well in prison (D76, p.9) and has taken full advantage of the programs offered (D74, p.1-26). For example, he has participated in a program in which prisoners train shelter dogs, who might otherwise be euthanized, so that they can be adopted as pets (D73, p.1; D74, p.11-16). Not only has he trained at least six dogs so they could be adopted, but he completed a formal apprenticeship, certified by the United States Department of Labor, for the occupation of Animal Trainer (D74, p.10-16).

David has also worked to extend his education. In December, 2016, he completed the equivalent of a 3-credit-hour college course in American Politics, and college-level psychology and communications courses through a prison program (D74, p.1, 4-5). He has also completed courses such as Impact of Crime on Victims, Transition Training, and Changing Directions (D74, p.2-3, 6; D85, p.1). David has completed extensive Bible study courses and participated in various religious programs at the institution (D74, p.17-22, 24-26). He has also participated regularly in the institution's Restorative Justice program (D74, p.7).

Finally, David maintains relationships with family members and friends outside the institution. In letters to the court, they talked about David's meaningful efforts to better himself and described him as a loyal, caring friend, a good man who deserves a second chance (D76, p.6, 8). One vouched, "I believe in him, and I have watched him grow from a scared teenager in prison to a remorsefully, spiritually confident man" (D76, p.9). Another spoke of his contagious optimism, while another stressed his "unlimited capacity" to love and accept others (D76, p.6; D78, p.1). All were confident David would succeed if given a second chance (D76, p.1, 4, 6, 8).

David has demonstrated that the offenses he committed as a teenager do not reflect "'irreparable corruption." Through his conduct and accomplishments in the 23 years since the offenses occurred, David has shown that imprisoning him for the rest of his life is neither necessary to protect the public nor appropriate for a man who has shown the capacity for growth.

VII. Conclusion: David Deserves a Proper Sentencing

Science and social science show that the brain continues to develop into the mid-twenties. The same rationales that justified banning mandatory sentences of life without parole for individuals who commit first-degree murder at age seventeen also justify banning mandatory sentences of life without parole for individuals who commit first-degree murder at age nineteen. Evolving standards of decency mandate that David, a nineteen-year-old offender who had delayed and impaired brain development from years of neglect and abuse, not be sentenced to life without parole without the opportunity to have a sentencer consider his background and emotional and mental development.

Because David Barnett was sentenced to life without parole without any sentencer having considered his substantial history of childhood neglect and sexual, physical, and emotional abuse, too much risk exists that his sentence is disproportionate. David's mandatory sentence of life without parole violates the prohibition against cruel and unusual punishment set forth in the Eighth Amendment to the United States Constitution and Article I, Section 21 of the Missouri Constitution. The Court should transfer this case to the Missouri Supreme Court or remand the case for re-sentencing pursuant to the procedure set forth in *State v. Hart*, 404 S.W.3d 232, 238 (Mo. banc 2013).

CONCLUSION

David respectfully requests that the Court transfer this case to the Missouri Supreme Court, or find that David's mandatory sentences of life without parole violate the Eighth Amendment and Article I, Section 21 and remand the case for re-sentencing where the sentence, as per *Hart*, 404 S.W.3d at 238, would consider his background and mental and emotional development in assessing the appropriate sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I certify that on December 6, 2019, Appellant's Brief and accompanying Appendix were served on counsel for the State, Shaun J. Mackelprang, through the e-filing system of the Missouri Office of the State Courts Administrator.

The brief was completed in compliance with Rule 84.06 and using Microsoft Word, Office 2007, in Times New Roman size 13 point font. Not counting the Table of Contents and the Table of Authorities, the brief contains 13,839 words, which complies with the limit of 15,500 set forth in Rule 360(a)(1)(a).

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