IN THE
MISSOURI SUPREME COURT
SC# 98268

STATE OF MISSOURI,

Respondent,

vs.

DAVID M. BARNETT,

Appellant.

APPEAL FROM THE CIRCUIT COURT OF
ST. LOUIS COUNTY, MISSOURI
21ST JUDICIAL CIRCUIT, DIVISION 17
THE HONORABLE JOSEPH WALSH, PRESIDING

APPELLANT'S REPLY BRIEF

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JURISDICTIONAL STATEMENT

Appellant, David M. Barnett, incorporates the Jurisdictional Statement from page 8-9 of his Opening Brief.

STATEMENT OF FACTS

Mr. Barnett incorporates the Statement of Facts from pages 10-28 of his Opening Brief.

ARGUMENT

The State's claims are erroneous. David's claim is fully preserved. This Court can and should independently apply Eighth Amendment proportionality analysis to David's circumstances, which will lead the Court to conclude that David's mandatory sentences of life without parole are unconstitutional. In this analysis, *Hall v. Florida* is relevant and determinative. Finally, the cases and statutes cited by the State are distinguishable.

I. The Claim is Fully Preserved

The State argues that this issue is not preserved because trial counsel did not object in 1997, when David first went to trial, or in subsequent proceedings, up to his re-sentencing (Resp. Br. 15-16). The State notes that the purpose of the preservation rule is "[t]o prevent surprise to the opposing party and to allow the trial court the opportunity to identify and rule on the issue." (Resp. Br. 16, quoting *Carpenter v. Countrywide Home Loans Inc.*, 250 S.W.3d 697, 701 (Mo. banc 2008)). The State stresses that a criminal defendant waives a constitutional claim raised for the first time on appeal (Resp. Br. 16, citing *State v. Fassero*, 256 S.W.3d 109, 117 (Mo. banc 2008)).

But David is not raising this claim for the first time on appeal.[1] He raised this claim in a sentencing memorandum filed 35 days before the sentencing hearing (D.67). The State

[1] *State v. Martin*, 466 S.W.3d 565, 567-58 (Mo. App. S.D. 2015) (cited at Resp. Br. 17), is completely distinguishable because Martin did not raise his claim at the trial court level, whereas David did (D.67-75; Sent. Tr. 4-23).

was not surprised by the claim at sentencing, and the court below had ample opportunity to identify and rule on the issue.

Miller v. Alabama, 567 U.S. 460 (2012), was decided after David left the Missouri court system. Until David's case got back into circuit court, there was no way to raise the issue. The re-sentencing was David's first opportunity to raise the issue at the trial court level.

The State claims that David should have known to raise the claim because "[c]onstitutional claims concerning mandatory life-without-parole sentences in general or as applied to juvenile offenders were not unknown" in 1997 (Resp. Br. 17). In support, the State cites *Harmelin v. Michigan*, 501 U.S. 957 (1991), and *Stanford v. Kentucky*, 492 U.S. 361 (1989) (Rep. Br. 17). *Harmelin* did not involve juvenile offenders. Moreover, *Harmelin* ***rejected*** a claim that mandatory LWOP sentences for certain drug crimes were cruel and unusual punishments and refused to extend individualized sentencing beyond capital cases. *Harmelin*, 501 U.S. at 994-96. *Stanford* ***rejected*** a claim that imposing the death penalty on 16- and 17-year-olds violated evolving standards of decency under the Eighth Amendment. *Stanford*, 492 U.S. at 380.

Thus, in the mid-1990's, there was no reasonable basis in existing law for David to think his present claim had a chance of success. The rationales set forth in *Miller* evolved much later from a trilogy of cases: *Atkins v. Virginia*, 536 U.S. 304 (2002); *Roper v. Simmons*, 543 U.S. 551 (2005); and *Graham v. Florida*, 560 U.S. 48 (2010). A claim such as that presented here would not have had a basis in the law until after *Graham* was decided in 2010. See *State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 399 (Mo. banc 2003)

(recognizing that "[b]ecause of *Stanford*, [Simmons] did not argue that his age constituted a bar to imposition of the death penalty" when he went to trial in the mid-1990's); see also *Reed v. Ross*, 468 U.S. 1, 16 (1984) ("Where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures.").

Following the State's logic would lead to a highly inefficient, time-consuming process for no good purpose. Counsel would be expected to attempt to foresee future legal developments and raise and re-raise any and all imaginable constitutional claims even if those claims were presently bereft of any legal merit. Bogging down the court system in such a way for such a purposeless requirement makes no sense.[2]

The State incorrectly claims that the claim has not remained the same from the re-sentencing to the appeal (Resp. Br. 18). David's claim, at both the trial and appellate level, is that under the rationales set forth in *Roper*, *Graham*, and *Miller*, David should not be subject to a mandatory sentence of life without parole (D67, p.2-4, 7-9; Sent.Tr. 5-6, 9; App. Br. 32, 35-40). The clear import of David's arguments, at both the trial and appellate levels, was that life without parole was not an appropriate sentence. At re-sentencing, David asked the court to impose a parolable sentence (D67, p.15; Sent.Tr. 7, 11). David cannot ask the appellate court to impose a parolable sentence because the appellate court

[2] Moreover, at the time of trial, the issue for the parties was whether, if David was convicted, he would receive the death penalty or life without parole. Had the trial court considered the constitutionality of mandatory sentences of life without parole at that point, the court's finding would have constituted an impermissible advisory opinion. *Chafin v. Chafin*, 568 U.S. 165, 172 (2013).

does not impose sentences. So David asked the appellate court to remand for a process by which such a sentence could be imposed, *i.e.*, the process set forth in *State v. Hart*, 404 S.W.3d 232, 238 (Mo. banc 2013). This by no means waived appellate review.

The State also argues that David did not present any evidence to attempt to prove he should receive a sentence less than life without parole (Resp. Br. 18). Although no evidence was presented at the resentencing, the sentencing memorandum provided to the court referred extensively to evidence previously presented that would be relevant to the analysis (D.68; D.69, p.1-43; D.70, p.1-36; D71, p.1-25; D.72, p.1-76; D. 73, p.1; D.74, p.1-25). These included the report of Dr. Victoria Reynolds regarding David's early childhood maltreatment, his physical abuse and neglect at the hands of his "father" Robert Biggerstaff, the repeated abandonments and multiple deaths and losses he suffered as a child, violence at the hands of other people, and the physical, verbal and sexual abuse he suffered at the hands of his adoptive father, John Barnett (D.69, p. 1-27). Dr. Reynolds' report details how such abuse affected David psychologically and developmentally (D.69, p.28-43). Defense counsel presented caselaw, the declaration of noted developmental psychologist Lawrence Steinberg, and a deposition of Dr. Steinberg (D. 70, p. 28-31; D. 71, p.2-25). These materials discussed scientific evidence about how brain development continues to at least age 21 (D. 70, p. 28-31; D. 71, p.2-25). Counsel also presented various certificates from classes David had taken and awards and recognitions he had received while incarcerated (D.73, p.1, D.74, p.1-26; D.85, p.1). In addition, counsel also submitted nine letters written by people who vouched for David's good character; acceptance of responsibility; exceptionally good prison behavior (David's "flawless record in prison for

the past 23 years") (D.76, p.9); transformation into a person well able to handle his emotions and defuse tense situations; and his striving to become a better person (D.76, p.1-9; D.78, p.1-2; D.81, p.1-3; D.82, p.1-3; D.83, p.1-3; D84, p.1-2).

In sum, the issue is fully preserved for review. It should be noted, however, that even if considered under plain error review, David would succeed. *Miller* announced a substantive rule. *Montgomery v. Louisiana*, 136 S. Ct. 718, 732 (2016). "A conviction or sentence imposed in violation of a substantive rule is not just erroneous but contrary to law and, as a result, void." *Id*. at 731; see also *State v. Severe*, 307 S.W.3d 640, 642 (Mo. banc 2010) ("Being sentenced to a punishment greater than the maximum sentence for an offense constitutes plain error resulting in manifest injustice"); *State v. Greer*, 348 S.W.3d 149, 153 (Mo. App. E.D. 2011) ("A sentence that exceeds what is authorized by law affects substantial rights and results in manifest injustice").[3]

II. This Court Can and Should Independently Apply Eighth Amendment Proportionality Analysis to David's Circumstances, which Will Lead the Court to Conclude that David's Mandatory Sentences of Life without Parole are Unconstitutional

The State argues that the United States Supreme Court has "unequivocally drawn the line for application of its Eighth Amendment precedents to offenders who were under 18 when they committed their offenses." (Resp. Br. 23). The State also argues that this Court has no power to rule otherwise (Resp. Br. 28-29).

[3] The State argues that the trial court had no choice but to impose a sentence of life without parole given the federal court's order directing the trial court to either sentence David to life without parole or grant a new capital sentencing proceeding (Resp. Br. 19, fn. 5). However, as *Montgomery* noted, "a court has no authority to leave in place a conviction or sentence that violates a substantive rule" as was the situation here. *Id*., 136 S.Ct. at 731.

In *Roper*, the Supreme Court held that 18 was the age 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. Mirroring *Roper*, *Graham* held that because age 18 was the point where society draws the line, "those who were below that age when the offense was committed may not be sentenced to life without parole for a nonhomicide crime." *Graham*, 560 U.S. at 74-75.

Next, in *Miller*, the Court considered whether the Eighth Amendment barred mandatory life-without-parole sentences for two offenders who were under 18 when their crimes occurred. *Id.*, 567 U.S. at 465. The Supreme Court held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on "cruel and unusual punishments." *Id.*

The Court's holding – that such a mandatory sentence was unconstitutional when imposed on someone under 18 – does not mandate the conclusion that such a mandatory sentence would necessarily be constitutional when imposed on an 18- or 19-year-old. Traditionally, the Supreme Court is reluctant to "decide constitutional questions unnecessarily." See *Teague v. Lane*, 489 U.S. 288, 316 (1989). *Miller* dealt with two offenders under the age of 18, so the Court had no need to reach further and assess whether mandatory sentences imposed on 18- or 19-year-olds also violated the Eighth Amendment. The Court was silent as to anyone except those younger than 18. Thus, nothing in *Miller* prevents this Court from applying Eighth Amendment proportionality analysis to David's circumstances, in the manner of *Atkins*, *Roper*, *Graham*, and *Miller*, to hold that the Eighth Amendment prohibits David's mandatory sentence of life without parole.

To explain further, in *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988), the Court barred the death penalty for offenders under the age of 16 at the time of their crimes. The opinion only reached defendants who were under 16. By protecting those under 16, the Court was not saying that those who were 16 and 17 could be executed. It simply was silent as to those who were 16 or 17. Thus, when the Court in *Roper* barred the death penalty for those who were 16 and 17, it overturned *Stanford* (which held that 16 and 17-year-olds could be executed), but did not also overturn *Thompson*. *Roper*, 543 U.S. at 574. The Court held that *Stanford* "should be deemed no longer controlling on this issue," but that "[t]he logic of Thompson extends to those who are under 18." Applying the State's logic here, the Supreme Court would have had to overturn *Thompson* as well as *Stanford*. But instead, by drawing the line at 18, the Court was protecting those under 18 but staying silent as to those 18 and over. Thus, no Supreme Court precedent bars this Court from holding that David's mandatory life-without-parole sentence violates the Eighth Amendment. The Court has not yet had the opportunity to apply Eighth Amendment proportionality analysis, in the manner of *Atkins*, *Roper*, *Graham*, and *Miller*, to assess the constitutionality of a mandatory sentence of life without parole for a mentally and psychologically delayed 19-year-old like David.

Moreover, even if the Supreme Court had implicitly held in *Miller* that those who were 18 and 19 could be subject to mandatory sentences of life without parole, this Court is "authorized and obligated" to determine whether standards of decency have evolved so as to warrant a reconsideration of that age restriction. *State ex rel. Simmons v. Roper*, 112 S.W.3d 397 (Mo. banc 2003). This is precisely what this Court did in *Simmons v. Roper*.

Id. There, the State argued that because the Supreme Court held in *Stanford* that executing 16- and 17-year-olds did not violate the Eighth Amendment, this Court could not re-consider that finding. *Id*. at 406. But this Court disagreed: "This Court clearly has the authority and the obligation to determine the case before it based on current—2003—standards of decency." *Id*. at 407. The Court found that standards of decency had evolved in the fourteen years since *Stanford* was decided. *Id*. at 407-11. It further held that executing people for crimes committee when they were under the age of 18 violates those evolving standards and is prohibited by the Eighth Amendment. *Id*. at 413. This Court's ruling was, of course, the basis for the Supreme Court's later ruling in *Roper*.

So, too, this Court can determine that standards of decency have evolved in the eight years since *Miller* was decided and apply the Eighth Amendment, using the reasoning underlying *Atkins*, *Roper*, *Graham*, and *Miller*, to hold that David's mandatory sentence of life without parole is barred by the Eighth Amendment.[4]

Finally, this Court may also re-examine *Miller*'s claimed age cutoff in light of *Hall v. Florida*, 572 U.S. 701 (2014), in which the Court struck down a rigid rule that created an unacceptable risk that persons with intellectual disability would be executed. See also *Simmons v. Roper*, 112 S.W.3d at 407 (citing *Patterson v. Texas*, 536 U.S. 984, 985 (2002) (Ginsburg, J., dissenting from denial of petition for writ) ("This Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), made it tenable for a petitioner to urge

[4] The State points out several instances when the Court uses the terms "juvenile" and "children" (Resp. Br. 24-25, 27-28), but it does not mention the times when the Court uses the term "teenagers," which of course, would include David. *See, e.g., Miller*, 567 U.S. at 475; see also 493, 498-99 (Roberts, C.J., dissenting).

reconsideration of *Stanford v. Kentucky*, 492 U.S. 361 (1989)...."); *In re Stanford*, 537 U.S. 968 (2002) (Stevens, J., dissenting from denial of petition for writ) ("Court should reconsider *Stanford* in light of *Atkins* because 'even if we were not convinced in 1989 [that juveniles should not be subject to the death penalty] we should be all the more convinced today' because of the additional states barring such executions and because of the growth in scientific knowledge of the less than fully developed nature of the adolescent brain.")). If *Miller* does, in fact, have a rigid cutoff at age 18, it too creates an unacceptable risk of disproportionate sentencing.

III. Hall v. Florida is Relevant and Determinative

The State argues that *Hall* has no relevance in determining whether *Miller*'s cutoff at age 18 is constitutional (Resp. Br. 27-28). *Hall* concerned the constitutionality of Florida's procedure to implement *Atkins*. *Hall*, 572 U.S. at 704. A Florida statute required defendants, as a threshold matter, to prove they had an IQ score of 70 or below. *Hall*, 572 U.S. at 704. If they could not make that showing, they were barred from presenting further evidence of intellectual disability. *Id*. The Court framed the question presented as "how intellectual disability must be defined in order to implement these principles and the holding of *Atkins*." *Id*. at 709.

A similar situation is present here. Defendants must show they are under the age of 18; if they cannot do so, they are barred from presenting further evidence that they share the same characteristics as "juveniles." While the issue in *Hall* was how to define intellectual disability, the issue here is how to define the term "juvenile." In both instances, a rigid adherence – whether it be to Florida's 70 IQ cutoff or *Miller*'s age 18 cutoff – causes

too great a risk of disproportionate sentencing. Just as "[i]ntellectual disability is a condition, not a number," *Hall*, 572 U.S. at 723, adolescence is a time of life, not a specific age. The notion that we must draw the line somewhere, so it might as well be at age 18, does not pass constitutional muster when so much is at stake and the justifications for drawing the line at a higher age, or not having any fixed age at all, are far more substantial.

In assessing whether *Hall* is relevant to David's case, it is important to recall just how fundamental *Atkins*' principles were to *Miller*. In both, the Court stressed that "punishment must be tailored to [the defendant's] personal responsibility and moral guilt." *Atkins*, 536 U.S. at 313; *Miller*, 567 U.S. at 469. In both, the Court stressed that the defendants at issue shared characteristics that diminished their personal culpability;[5] that because of those characteristics, the punishment at issue failed to advance the purposes justifying such a punishment;[6] and that the subject group faced a heightened risk of receiving the most severe forms of punishment possible despite factors calling for a lesser punishment.[7] Just as intellectually disabled people should not be prevented from establishing their disability by a rigid rule regarding IQ scores, a developmentally disabled 19-year-old should not be prevented from proving his diminished personal culpability because of an age cutoff.

The Court should also consider *Moore v. Texas*, 137 S.Ct. 1039 (2017). There, the Supreme Court struck down the defendant's death sentence because the trial court

[5] *Atkins*, 536 U.S. at 318; *Miller*, 567 U.S. at 471, 476.
[6] *Atkins*, 536 U.S. at 319; *Miller*, 567 U.S. at 472-73.
[7] *Atkins*, 536 U.S. at 320; *Miller*, 567 U.S. at 479.

disregarded current medical standards in concluding that the defendant was not intellectually disabled. *Id*. at 1049-51. The Texas court considered outmoded factors that created an unacceptable risk that "persons with intellectual disability will be executed." *Id*. at 1048-49. The Court stressed that adjudications of intellectual disability "should be informed by the views of medical experts" and by "the medical community's diagnostic framework." *Id*. at 1044, 1048.

Hall and *Moore* support David's position because they mandate that the determination of whether a person has diminished personal culpability because of youth, like the determination that someone has reduced personal culpability because of intellectual disability, is one that should be guided by current medical standards. Current scientific standards show, as described in David's opening brief, p. 45-47, that the brain undergoes massive reorganization through the adolescent years (ages 10 to approximately 21) (D72, p.11), making those years a stage of life biologically distinct from childhood and adulthood. Rather than drawing a line at age 18 because society has drawn a line there for other purposes, courts must follow the medical community's established determinations of when the brain becomes fully developed and the characteristic features of youth no longer are evident.

The State argues that *Hall* was immaterial here because *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), was decided after *Hall* yet still noted *Miller*'s prohibition on mandatory life without parole for juvenile offenders (Resp. Br. 27-28). The State's argument is wrong. *Montgomery* was considering one question – whether *Miller* should be applied retroactively. *Montgomery*, 136 S.Ct. at 725. It was not considering whether

the term "juvenile" should include 18- and 19-year-olds. As noted above, the Court does not decide questions not specifically presented to it.[8]

IV. The Cases and Statutes Cited by the State are Distinguishable

The State cites to *State v. Bates*, 464 S.W.3d 257 (Mo. App. E.D. 2015), and *State v. Perdomo-Paz*, 471 S.W.3d 749 (Mo. App. W.D. 2015) (Resp. Br. 29-31). But these decisions are not binding on this Court. Moreover, these decisions failed to apply the Eighth Amendment using the principles set forth in *Atkins*, *Roper*, *Graham*, and *Miller* to assess whether the defendant had lessened personal culpability because of his youth and its attending circumstances. Instead, these courts rejected the defendants' claims because of the same type of rigid rule as was struck down in *Hall*. The characteristics of juveniles that warranted relief under *Miller* do not suddenly disappear at the stroke of midnight when the offender turns 18.

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[8] In a footnote, the State discusses the Supreme Court's denial of a petition for writ of certiorari in which the petitioner asked the Court to extend *Roper* to offenders 18 and over (Resp. Br. 29). But it is beyond dispute and well-settled that a denial of a petition for writ of certiorari is not a merits review. *See Martin v. Blessing*, 571 U.S. 1040, 1045 (2013) ("denial of certiorari does not constitute an expression of any opinion on the merits"); *Boumediene v. Bush*, 549 U.S. 1328, 1329 (2007) (same) (Stevens and Kennedy, JJ., statement respecting denial of certiorari).

In *Willbanks v. State Dep't of Corr.*, 522 S.W.3d 238, 246, n.9 (Mo. banc 2017), this Court echoed *Boumediene* and stressed, "[t]here are numerous factors appellate courts with discretionary review powers consider when deciding whether to review a lower court's decision, and it is inappropriate to extrapolate on a court's opinion when it denies review." For example, in *Hidalgo v. Arizona*, 138 S.Ct. 1054 (2018), four justices wrote to say that, although they believed the Arizona Supreme Court misapplied Supreme Court precedent, they voted to deny the cert petition because the record below was not fully developed. *Id.* at 1057 (Breyer, Ginsburg, Sotomayor, and Kagan, JJ., concurring).

The State cites several Missouri statutes that suggest that Missouri considers 18 as the age of adulthood (Resp. Br. 31-32). It argues that the statutes David cited in his opening brief are irrelevant because all that matters is that Missouri made a policy decision to treat only those under 18 differently for sentencing to first-degree murder (Resp. Br. 37). But these other Missouri and federal statutes demonstrate that someone like David was not an adult at the time of the crimes. These statutes provide objective indicia of society's view that people aged 18 to 21, or even higher, need certain protections and warrant certain limitations because of their youth.

For instance, a 19-year-old cannot buy alcohol.[9] § 311.325. He cannot buy cigarettes.[10] He is not considered mature enough even to serve on a jury. § 494.425. He may not foster or adopt a child before he turns 21 years old. See *Missouri foster and adoption guidelines*.[11] He may not obtain a credit card under the age of 21 unless he has a co-signer aged 21 years or older or can prove he has the means to repay the debt. See, e.g., 15 U.S.C. § 1637(c)(8).

Missouri statutes carve out special protections for those under the age of 21. Missouri provides free public education up to age 21. See *Breitenfeld v. Sch. Dist. of*

[9] The corresponding federal legislative history affirms that the age of 21 was chosen because of their propensity for reckless activities such as drinking and driving. National Minimum Drinking Age: Hearing on HR. 4892 Before the Subcomm. on Alcoholism and Drug Abuse of the S. Comm. on Labor and Human Resources, 98th Cong. 48 (1984).

[10] See *Tobacco 21*, available at https://www.fda.gov/tobacco-products/retail-sales-tobacco-products/tobacco-21 (last viewed March 2, 2020).

[11] Available at https://www.adoptuskids.org/adoption-and-foster-care/how-to-adopt-and-foster/state-information/missouri (last viewed March 2, 2020).

Clayton, 399 S.W.3d 816, 828 (Mo. banc 2013). The juvenile court can retain jurisdiction over a youth until age 21 under certain circumstances. § 211.041. For the purposes of the adoption statutes, a "minor" or "child" is defined as "any person who has not attained the age of eighteen years or any person in the custody of the children's division who has not attained the age of twenty-one." § 453.015(1). People between the ages of 14 and 23 are eligible for the Older Youth Program of the Children's Division.[12]

A 19-year-old is considered too reckless, impulsive, or immature to perform certain jobs. Federal law requires a driver to be at least 21 years of age to drive a commercial vehicle interstate, transport passengers intrastate, or transport hazardous materials intrastate. See, e.g., 49 C.F.R. § 391.1 1(b)(1), 390.3(f), 391.2. The Federal Bureau of Investigation has a minimum age requirement of 23.[13] The Missouri State Highway Patrol imposes a minimum age requirement of 21.[14]

Finally, the United States and Missouri constitutions impose categorical age-of candidacy requirements for public office. For example, the minimum age to run for the U.S. House of Representatives is 25 years. U.S. Const. Art. I § 2 cl. 2. Missouri imposes a minimum age of 24 for state representatives and 30 for state senators. Mo. Const. Art. III, §§ 4, 6.

The State cites a number of cases from other jurisdictions for the proposition that *Miller* should not be expanded to categorically bar mandatory sentences of life without

[12] https://dss.mo.gov/cd/older-youth-program/.
[13] https://www.fbi.gov/about/faqs/how-old-do-you-have-to-be-to-become-an-agent.
[14]https://www.mshp.dps.missouri.gov/MSHPWeb/PatrolDivisions/HRD/Trooper/minRequirements.html.

parole for offenses committed when the defendant was 18 or older (Resp. Br. 32-35). But David is not seeking to expand *Miller*. He is simply asking that his sentence be proportionate under the Eighth Amendment, *i.e.*, that his sentence take into account not just the crime, but also his personal circumstances.

Moreover, the State's cases are distinguishable because they fail to acknowledge, as set forth *supra*, that this Court may re-examine evolving standards of decency. Alternatively, the cases occurred so quickly in the heels of *Miller*, that perhaps it was not yet clear that adolescents over the age of seventeen share the same characteristics and diminished personal culpability as those who were seventeen and younger.

In addition, the State's cases do not take into account the growing trend to offer even more protections to youthful offenders aged 18 and older. For example, since *Miller*, states across the country have raised, or are trying to raise, the youthful offender age to 21. Vermont has in fact raised the age to 21.[15] Bills seeking to raise the age to 21 are pending in California, Connecticut, and Massachusetts.[16] Illinois has signed into law a parole process for most people convicted of offenses committed before the age of 21.[17] The law provides them review after either 10 years or 20 years depending on the offense category.[18]

[15] https://www.bostonglobe.com/metro/2019/07/09/crime-bill-would-redefine-juveniles-age/maHshbBT6QaaX9ooVDVidN/story.html
[16] *Id.*; see also https://sd09.senate.ca.gov/news/20200128-sen-nancy-skinner-announces-bill-raise-age-be-tried-adult.
[17] https://theappeal.org/politicalreport/illinois-reform-parole-age-21/
[18] *Id.*

V. The Court Should Remand for Individualized Sentencing

David Barnett suffered unspeakable neglect and abuse from birth to shortly before his crimes. As a result, although he chronologically was age 19 at the time of the crimes, he was years behind mentally and psychologically. 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) (See App. Br. 51-53). The abuse and neglect put David years behind in maturation and development and placed him squarely in the same category of youthful offenders as in *Miller*.

There is a raw unfairness in concluding that the Eighth Amendment's guarantee of proportionate sentencing ensures individualized sentencing for those under the age of 18 facing mandatory life without parole but not for those who are similarly situated but happen to be 18 or older. Compare, *State ex rel. Carr v. Wallace*, 527 S.W.3d 55 (Mo. banc 2017).[19] The Founding Fathers could not have imagined that the protections of the Eighth Amendment would hinge on such a rigid, arbitrary factor. This Court should conduct Eighth Amendment proportionality review in David's case and reach the same conclusion as in *Carr* and *Miller*, that David's mandatory sentence of life without parole is unconstitutional and cannot stand.

[19] Jason Carr was 16 years old when he shot and killed three family members. *Id.* at 58. The State did not seek the death penalty, so Carr was automatically sentenced to 50 years in prison without parole. *Id.* This Court held that, under *Miller*, Carr was entitled to an individualized sentencing. *Id.* at 61-62. After 36 years in prison, Carr will be released on parole in 2020. See https://www.riverfronttimes.com/newsblog/2019/04/09/at-16-jason-carr-murdered-his-family-now-at-53-hes-leaving-prison.

CONCLUSION

David incorporates the Conclusion from page 57 of his Opening Brief.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I certify that the foregoing brief complies with the limitations contained in Supreme Court Rule 84.06(b). The brief was completed using Microsoft Word, in Times New Roman size 13-point font. The brief includes the information required by Rule 55.03. Excluding the cover page, the signature block, and this certification, the brief contains 5,159 words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

A true and correct copy of the brief was sent through the e-filing system on March 2, 2020, to: Evan Buchheim, Office of the Attorney General, at Evan.Buchheim @ago.mo.gov.

/s/ *Rosemary E. Percival*

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