IN THE MISSOURI SUPREME COURT

No. SC97692

Jessica Hicklin,

Appellant,

v.

Eric Schmitt, et al.,

Respondents.

On Appeal from the Circuit Court of Cole County

Case No. 16AC-CC00182

Honorable Daniel R. Green

BRIEF OF *AMICUS CURIAE* JOSEPH P. DANDURAND

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JURISDICTIONAL STATEMENT

Amicus adopts the jurisdictional statement as set forth in Appellant's brief.

INTEREST OF *AMICUS CURIAE* AND AUTHORITY TO FILE

Joseph P. Dandurand served as Circuit Judge of the 17th Circuit of Missouri (Cass and Johnson Counties) from 1986 through 2007. In that capacity, he presided over the trial and sentencing of the appellant, Jessica James Hicklin.

Throughout his legal career spanning four decades, Dandurand has occupied numerous roles, including: private practice, Juvenile Court Guardian ad Litem, Circuit Judge for the 17th Circuit of Missouri, Court of Appeals Judge with the Western District of Missouri, and as Missouri Deputy Attorney General. *Amicus* presently serves as Executive Director for Legal Aid of Western Missouri.

In private practice, Dandurand represented juveniles as an attorney and guardian ad litem and saw firsthand how circumstances of youth impacted their actions and provided indicia of their capacity for rehabilitation. Similarly, as a judge, Dandurand presided over juvenile cases and heard appeals from juveniles; he also navigated strict sentencing statutes which deprived courts of discretion even when required to issue the harshest sentences possible. As Deputy Attorney General, Dandurand helped the state evaluate possible solutions in the wake of the Supreme Court's decision in *Miller v. Alabama*[1] and is aware of the systemic strain involved in complying with retroactive changes in the law of that magnitude.

Dandurand's experience in Hicklin's case and vast other legal experience provide him a unique perspective in the issues present in this appeal.

This *amicus* brief is filed with the consent of the parties.

[1] 132 S. Ct. 2455 (2012).

STATEMENT OF FACTS

Amicus adopts the statement of facts as set forth in Appellant's brief.

ARGUMENT

1. Hicklin's Sentence was Unconstitutional and is Void as a Matter of Law

In *Miller v. Alabama,* the United States Supreme Court declared mandatory life without parole sentences unconstitutional under the Eighth and Fourteenth Amendments when applied to juveniles.[2] As in *Miller*, the Hicklin court was prohibited from evaluating any mitigating factors of youth or any impact those factors may have had on sentencing.[3] The Supreme Court recognized that such a permanent, irreversible punishment as life without parole issued to a juvenile, "reflects an irrevocable judgment about a[juvenile's] value and place in society," ignores the impressionable nature of youth, the impact of youth on decision making, and how, especially for youth, flaws in one's upbringing or horrors at home can create a sense of helplessness or a feeling that crime is the only option. [4]

"[D]istinctive attributes of youth" can play a significant role in the commission of a crime and, as such, "youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole."[5] Juveniles are more likely to be immature, irresponsible, impetuous, reckless, unable to appreciate risks and consequences, susceptible to influence and psychological damage, to feel unable to

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[2] *Id.*

[3] *Id.*; §565.033, RSMo 2016 enumerates the youthful factors that must now be considered. Those relating to a defendant's youth include:

> (2) The degree of the defendant's culpability in light of his or her age and role in the offense; (3) The defendant's age, maturity, intellectual capacity, and mental and emotional health and development at the time of the offense; (4) The defendant's background, including his or her family, home, and community environment; (5) The likelihood for rehabilitation of the defendant; . . . (7) The effect of familial pressure or peer pressure on the defendant's actions; . . . (9) The effect of characteristics attributable to the defendant's youth on the defendant's judgment.

[4] *Miller*, 132 S. Ct. at 2465 (*quoting Graham v. Florida*, 130 S. Ct. 2011, 2030 (2010)).

[5] *Id.*

extricate themselves from a family and home environment, even if it is dysfunctional or even brutal.[6] Because of these characteristics, statutes like §565.020.2, RSMo 1994 that treat juveniles as fully developed adults and fail to take into account distinctive characteristics of youth are unconstitutional. In the wake of *Miller*, courts must conduct an individualized sentencing hearing and evaluate a given defendant's youthful traits before any juvenile life without parole sentence could be valid. [7] The Supreme Court further clarified that *Miller* applies retroactively to defendants in Hicklin's position. [8] It is now clear that "life without parole is excessive for all but 'the rare juvenile offender whose crime reflects irreparable corruption'" including those defendants who, like Hicklin, were sentenced before *Miller* clarified the law. [9]

This *amicus* has seen, as a trial and appellate judge, and as an attorney representing juveniles, countless juveniles whose youthfulness influenced their criminal actions and their interactions with law enforcement, courts, and the system as a whole. Life without parole should rarely be an appropriate sentence for juvenile defendants, even if the circumstances of the offense may require such a sentence for an adult. To be clear, some juvenile conduct may deserve a life without parole sentence but only for the "rarest of children, those whose crimes reflect irreparable corruption."[10] Not only can the characteristics of immaturity, impetuousness, recklessness, and failure to appreciate consequences impact a juvenile's criminal activity, it can also impact decisions youth make during the process that can lead to consequences unforeseen to an under developed mind. §565.020.2, RSMo 1994 forbade the lower court from considering factors relating

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[6] *Id.*

[7] *Id.*

[8] *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016) (clarifying that *Miller* sets forth a substantive rule of law and therefore applies retroactively to defendants such as Hicklin).

[9] *Id.* at 724.

[10] *Id.* at 726 (internal quotations omitted).

to Hicklin's youth and decision making as they related to the circumstances of the offense or likelihood of rehabilitation – both essential factors in determining a just sentence. Hicklin was sentenced for a crime committed at age 16 to the harshest available sentence without an individualized sentencing hearing. As such, Hicklin's sentencing was unconstitutional and a re-sentencing must occur.

2. The Law Requires Hicklin Be Re-sentenced in a Court of Law

In virtually all other instances of criminal law, courts determine appropriate punishment. This is so because courts themselves, the public, and defendants such as Hicklin have an interest in and reliance upon the substantive and procedural rights courts afford defendants. Virtually all legal precedent requires courts determine the appropriate punishment.

a. *Miller* and Its Progeny Require Individualized Sentencing, Which Can Only be Accomplished by a Proper Resentencing Hearing

Miller and subsequent clarifying opinions make clear that Hicklin must be re-sentenced. The Supreme Court has established that juvenile life without parole is only appropriate in the rarest circumstances based on findings from an individualized sentencing hearing.[11] Where a court failed to assess factors of youth, a "*judge or jury* must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles."[12] Indeed, mandatory sentencing precluded the court from assessing "the difficult but essential question whether [Hicklin is] among the very 'rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.'"[13] Because no other choice was permitted by law, this Amicus could not possibly have considered whether life without parole was appropriate. This Court should

[11] *See Miller v. Alabama*, 132 S. Ct. 2455, *Montgomery v. Louisiana*, 136 S. Ct. 718, *Adams v.* Alabama, 136 S. Ct. 1796 (2016).

[12] *Miller*, 132 S. Ct. at 2475 (emphasis added).

[13] *Adams*, 136 S. Ct. at 1801 (2016) (describing specialized sentencing practices *in a court of law* (citing *Montgomery*, 136 S. Ct. at 734).

remand Hicklin's case for resentencing, to ensure Hicklin receives a meaningful opportunity for release like the Supreme Court did with the defendants in *Miller*, *Montgomery*, and *Adams*.[14] The *Miller* cases succeed a long line of Supreme Court precedence in which judicial sentencing is treated as a given. Time and time again, the Supreme Court has articulated that defendants have a due process right to individualized sentencing hearings in court.[15]

b. In Missouri, Sentencing Authority Lies with the Court

Missouri law leaves little doubt that punishment must be assessed in a court of law. Section 557.036.3 describes the jury's role in assessing punishment and the respective roles of judges and counsel in sentencing hearings – under Section 557.036.3, defendants such as Hicklin have a long-established right to have a jury assess their punishment.[16] The Missouri Supreme Court Operating Rules further emphasize that punishment should be meted out in a court of law, primarily by a jury (with certain exceptions) under the judge's guidance.[17] Section 558.047 is the lone instance where Missouri law attempts to place the authority to determine an appropriate sentence in the hands of the parole board. Only where the most vulnerable defendants (juveniles) have

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[14] In passing RSMo § 558.047, the legislature seemingly relied on dicta from *Montgomery v. Louisiana* suggesting that, to conserve resources, a state may remedy *Miller* violations by allowing offenders to be considered for parole in lieu of being resentenced as attempted by the Wyoming legislature in 2013. *See Montgomery*, 136 S. Ct. at 736 *referencing* Wyo. Stat. Ann. §6–10–301(c) (2013). In fact, Wyoming has itself abandoned this approach and requires re-sentencing hearings for defendants in Hicklin's position. *See Davis v. State*, 415 P.3d 666, 677 (Wyo. 2018) (requiring an individualized sentencing hearing where both the state and defendant argued that parole-based solution proposed in dicta in *Montgomery*). Indeed, Montgomery was resentenced himself.

[15] *See, e.g., Gardner v. Florida*, 430 U.S. 349 (1977).

[16] *See* § 557.036.3, RSMo; *see also Hicks v. Oklahoma*, 447 U.S. 343 (1980).

[17] Mo. Sup. Ct. R. 29.02(a): "In all cases of a verdict of conviction for any offense where by law there is an alternative or discretion as to the kind or extent of punishment to be imposed, the jury may assess and declare the punishment in their verdict except as otherwise provided by law."

already been sentenced to the harshest allowable sentence (life without parole), has the law attempted to strip courts of their power to determine punishment.

The Missouri legislature recognized the necessity of in court sentencing hearings for juveniles sentenced after *Miller*. Indeed, RSMo § 565.033 abolished mandatory life without parole sentences for juveniles and mandated that "[w]hen assessing punishment in all first degree murder cases in which the defendant was under the age of eighteen at the time of the commission of the offense or offenses, the **judge in a jury-waived trial shall consider, or the judge shall include in instructions to the jury for it to consider**," youthful factors now required under *Miller*.[18] Relatedly, under RSMo § 565.034 a "person found guilty of murder in the first degree who was under the age of eighteen at the time of the commission of the offense is eligible for a sentence of life without eligibility for probation or parole **only if a unanimous jury, or a judge** [] finds beyond a reasonable doubt that" certain aggravating factors were present.[19] Similarly, where discretion can be exercised in punishment, the Missouri Supreme Court Rules afford defendants convicted of both felonies and misdemeanors the opportunity to have a jury assess their punishment in all cases.[20] Missouri law therefore recognizes the importance of individualized sentencing hearings before a judge or jury when juvenile life without parole is a possible sentence yet deprives Hicklin and others of that right based solely on the date of the offense. The only justification for such a distinction is convenience of avoiding a re-sentencing hearing; however, such convenience cannot outweigh Hicklin's constitutional right to a meaningful opportunity for release given the severity of the sentence at issue.

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[18] *See supra* n.3.

[19] RSMo § 565.034 (emphasis added). The statute sets forth notice requirements for a prosecutor seeking LWOP sentence for persons under 18 and specific findings necessary for such a sentence.

[20] Mo. Sup. Ct. R. 29.02.

The main question and concern in this instance is why? Why would the State take the position that resentencing before a trial judge is not the only appropriate, constitutional manner in which to address the mandate of the Supreme Court? There would seem to be only three possible answers.

(1) Is it to protect and lessen the anguish, fear, frustration and heartache a resentencing hearing will cause the family and friends of the deceased victim? Although this may seem an appropriate consideration at first blush, this *amicus*, having presided over sentencing hearings for over 20 years, knows full well the range of painful emotions family and friends experience at sentencings. He has heard their pain and loss expressed directly to him at those very emotional sentencing hearings. He has read and listened to hundreds of Victim Impact Statements. They are very hard on the victim's families and friends. But the fact remains that those same people are all notified every time there are parole hearings, and are all invited to appear and otherwise express their concerns, and tell the parole board the impact a release of the defendant on parole would have on them. A constitutional re-sentencing hearing, giving the victim the same opportunity to express their pain and concerns to the judge seems no more difficult than the parole hearing process;

(2) Re-sentencing hearings would be too onerous and time consuming for the judge and prosecuting attorney, and would result in "opening of the floodgates." Prosecutors have the right to express themselves at every parole hearing. No prosecutor's office has so many past juvenile life-without-parole cases to be too busy to follow the reasonable constitutional directives of the Supreme Court and prepare for and appear at a re-sentencing hearing. Re-sentencing hearings are even less onerous for the judge. No judge has so many past juvenile life without parole sentencings in their division to be too busy to follow the reasonable constitutional directives of the Supreme Court to preside over a re-sentencing hearing. Justice should not be denied, and the Constitution not followed, especially in life without parole cases, simply

because justice takes time to mete out. If the judge believes he/she is too busy, he/she can ask the Supreme Court of Missouri to assign one of scores of senior judges across Missouri to find an available courtroom and conduct a re-sentencing hearing; or

(3) So much time has passed, people are not available any longer or cannot remember enough to offer pertinent testimony or present evidence at a re-sentencing hearing. That argument is no doubt true, but it absolutely cuts both ways. It is equally true for both the defendant and the prosecutor and family and friends of the victim. The judge has the ability to take those matters into consideration. The passage of time or faded memories should not be a reason to not follow the reasonable constitutional directives of the Supreme Court.

i. The Parole Process is Ill Equipped to Assess whether Hicklin is one of the Rare Individuals who Should Receive the Harshest Punishment Available to Juveniles

Simply allowing Hicklin to apply for parole in 2022 deprives Hicklin of the meaningful opportunity for release required by *Miller*. Defendants sentenced under §565.033, RSMo 2016 receive the benefit of full sentencing hearings in a court of law, with the benefit of counsel, the opportunity to review evidence that will be presented against them, uninhibited in their own presentation of evidence, and in front of a jury of their peers who has received specific instructions on how to consider the youthful factors set forth in *Miller* and a clear directive that life without parole sentences should be rare for juveniles. Conversely, defendants such as Hicklin relegated to post-sentencing relief under 558.047 have review hearings in prison, outside of public view, before a small group of government officials whose expertise in the youthful concerns described by *Miller* is unclear, without a clear right to counsel, limited in their presentation of the evidence, and already saddled with a life without parole sentence.[21]

[21] *See Brown v. Precythe*, No. 17-cv-4082, 2019 WL 3752973 (W.D. Mo. Aug. 8, 2019), appeals pending, Nos. 19-2910, 19-3019 (8th Cir.).

Hicklin's procedural and substantive rights would clearly best be preserved in a true sentencing hearing. However, perhaps more telling than any process-related discussion is the actual punishment handed down to pre-*Miller* juvenile offenders. Through 2019, nearly 85% of juveniles made eligible to request a parole hearing under 558.047 did not receive a release date.[22] According to parole board records, many were denied solely due to the circumstances of the offense and, in most cases, there was no record of any assessment of youthful factors required by *Miller*.[23] These results suggest that parties requesting parole under 558.047 carry a de facto sentence of life without parole. This is so despite the Supreme Court's mandate that such sentence is "excessive [punishment] for all but the rare juvenile offender whose crime reflects irreparable corruption."[24] Though the Supreme Court makes clear how a sentencing court must evaluate juveniles in assessing the appropriateness of life without parole, it remains unclear how a parole board would ensure compliance with *Miller*.

ii. Role of Attorneys and Right to Present and Review Evidence

At a sentencing hearing with the risk of incarceration, possibly for life, Hicklin would have a fundamental right to court-appointed counsel. Although recently, in the wake of *Brown*, it appears that defense counsel can appear with Hicklin at any parole hearing and any pre-hearing interview, the state is unwilling to provide any assistance with counsel.[25] Given that Hicklin has been incarcerated for over 20 years since youth, it is unlikely that Hicklin will be able to afford to retain counsel. Thus, as a practical matter, Hicklin may well be without legal representation during parole proceedings. However, even if Hicklin were to obtain counsel at a parole hearing, defense counsel's

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[22] *Id.* at *4.

[23] *Id.*

[24] *Montgomery*, 136 S. Ct. at 724.

[25] *Brown*, *supra* n.21, at *11.

role is less defined than at a sentencing hearing, where the court has the opportunity to assess whether counsel is ineffective.[26]

Further troubling with respect to the role of attorneys at a parole hearing is that Hicklin's prosecutor can serve as a fact witness. In fact, it is common practice for prosecutors to submit letters when inmates are up for parole.[27] At least at one point, the prosecutor believed Hicklin should serve life without parole. Any such testimony may well argue that Hicklin should not be released based on the circumstances of the offense alone. Given the status prosecutors occupy in our communities and the regard and notoriety the position carries, such testimony would be difficult for Hicklin to dispute even with defense counsel and the opportunity to review all evidence and regardless of whether it is based on the youthful factors dictated by the law. At a sentencing hearing, a prosecutor can make argument but their argument is not evidence.

iii. Right to Review

If Hicklin was denied a meaningful opportunity for release at any sentencing hearing required by this Court, Hicklin would have a plain right to review.[28] In contrast, contesting a parole decision is difficult if not impossible, even in situations where procedural and substantive violations of rights are clear.[29] The plaintiffs in *Brown* were forced to bring a class action lawsuit as a class of juveniles sentenced to life without parole before *Miller* and without any consideration of the impact of their youth in their sentencing proceeding.[30] The class asserted significant concerns with the parole process as applied to juveniles serving life without parole: that they were prohibited from

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[26] Mo. Sup. Ct. R. 29.07(b).

[27] *See generally* The False Hope of Parole https:[ ]//theoutline.com/post/3625/the-false-hope-of-parole?zd=2&zi=e4inuqly (discussing parole board procedures).

[28] Mo. Sup. Ct. R. 29.07(b)(3).

[29] *See Brown*, *supra* n.21.

[30] *Id.*

accessing their parole files – including the presentencing investigation report; that the lone delegate permitted to advocate on their behalf was limited to discuss issues related to community transition; attorney delegates were prohibited from arguing legal issues – including consideration of the *Miller* factors; that victims' presence at hearings was pervasive and they could speak on any topics without notice to defendants; that the decision paper issued by the board was a 2 page boilerplate form solely assessing the circumstances of the offense; and that there was no objective tool for assessing *Miller* factors.[31] Despite these significant concerns, the *Brown* plaintiffs lacked any individual remedy and were forced to bring action as a class. *Brown* is unique in that, typically, the law rarely affords *any* post-parole hearing relief. Should Hicklin be relegated to a parole resolution, 217.670.3 makes clear that parole board orders are not reviewable.[32] Further, while Hicklin would have a clear right to counsel in an appeal of a sentencing hearing, no such right exists for reviews of parole board decisions.[33]

iv. Relative Status of the Decision Maker

Defendants sentenced under 556.033 are sentenced by a jury of their peers, after a rigorous process where defense counsel work tirelessly to ensure the jury is without biases which could negatively impact sentencing. Only after a jury evaluates the *Miller* factors of youth and unanimously determines life without parole is an appropriate

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[31] *Id.*

[32] § 217.670.3, RSMo 2016. The law does allow review where compliance with parole board statutes is at issue but there is no exception due to concerns related to the *Miller* factors. *See also Greenholtz v. Inmates of the Neb. Penal & Corr. Complex*, 442 U.S. 1, 7, 12 (1979) (stating that "there is no constitutional right to parole release, [as] there is no liberty interest in the mere possibility of parole").

[33] *See Douglas v. California*, 372 U.S. 353, 357–58 (1963) ("There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshaling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself."); *State v. Frey*, 441 S.W.2d 11 (Mo. 1969) (recognizing a defendant's right to effective assistance of appellate counsel).

sentence does such a sentence issue. Conversely, a defendant's fate under 558.047 rests with two parole board members and one parole analyst. Defendants seeking parole will be denied parole when two people so decide.

Throughout voir dire, defense counsel can assess potential jurors' ability to absorb and assess *Miller* factors, and any traits or characteristics they may have which would impact their ability to appropriately evaluate youth as a factor in sentencing.[34] In contrast, the two parole board members hearing a given case are selected without input from defendants. While the parole board consists of individuals appointed by the Governor, the only prerequisite to appointment is that "[m]embers must be persons of recognized integrity and honor, known to possess education and ability in decision making through career experience."[35] As such, there is no guarantee that a given panel will possess any legal or social science background sufficient to assess the *Miller* factors. Although parole board members are known to be persons of integrity and honor, the defendant has no right to voir dire, no option to explore any preexisting family history or traits or experiences that may cause them to be biased or prejudiced or to rule in a particular way. The focus of a sentencing hearing should be on the factors of youth, "'significantly associated with release decisions,' but these studies have revealed that prison misconduct – as opposed to good behavior – is the most influential factor in determining release."[36] As made clear in *Brown*, the parole board lacks an appropriate assessment tool to evaluate youthful circumstances. Meanwhile, defendants sentenced

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[34] *See generally State v. Thrift*, 588 S.W.2d 525 (Mo. App. S.D. 1979) (discussing voir dire in jury selection).

[35] "Board of Probation and Parole," https://[ ]boards.mo.gov/userpages/Board.aspx?9.

[36] B. Wheelwright, "Instilling Hope: Suggested Legislative Reform for Missouri Regarding Juvenile Sentencing Pursuant To Supreme Court Decisions in *Miller* and *Montgomery*," 82 MO. L. REV. 267, 292-93 (2017) (explaining that a defendant's behavior during incarceration should be used to determine whether parole is appropriate but that mistakes during incarceration should not deprive a defendant of a meaningful opportunity for release).

under 556.033 are entitled to a jury instruction enumerating the youthful factors in *Miller* and what weight should be given to those factors.[37]

CONCLUSION

This court should grant Hicklin's request for a re-sentencing hearing. Hicklin's original sentence is unconstitutional and the law is clear that the only appropriate venue for meting out punishment is a court of law. A judge or jury is the only appropriate entity to assess the role that Hicklin's youth and life experiences played in the commission of the offense and of Hicklin's capacity for rehabilitation. The parole process is simply inadequate to provide Hicklin a right to a meaningful opportunity for release as required by law.

Respectfully submitted,

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[37] 556.033(2), RSMo 2016.

CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned hereby certifies that on February 7, 2020, the foregoing *amicus* brief was filed electronically and served automatically on counsel for all parties.

The undersigned further certifies that pursuant to Rule 84.06(c), this brief: (1) contains the information required by Rule 55.03; (2) complies with the limitations in Rule 84.06; (3) contains 4,372 words, as determined using the word-count feature of Microsoft Office Word. Finally, the undersigned certifies the electronically filed brief was scanned and found to be virus-free.

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