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

SUBSTITUTE BRIEF OF APPELLANT

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Jurisdictional Statement

This is an appeal from the final order and judgment of the Circuit Court of Cole County entered on November 22, 2017.

Appellant, Jessica Hicklin, filed the underlying petition in May 2016 for declaratory judgment challenging the constitutionality of § 565.020.2, RSMo 1994, as applied to her. Following an order of the trial court, she timely amended to seek a declaration of the effect of Senate Bill 590, 98th General Assembly, if any, on her sentence and whether any such effect of that bill is sufficient to render her sentence constitutional. The circuit court entered judgment in favor of Respondents on November 27, 2017.

Hicklin filed her notice of appeal on December 11, 2017. The Court of Appeals, Western District, in Case No. WD81291, affirmed by written order with an unpublished memorandum on December 18, 2018.

On October 29, 2019, this Court sustained Hicklin's application for transfer, so this Court has jurisdiction under Article V, Section 10 of the Missouri Constitution. Additionally, this Court has jurisdiction because this case involves the constitutionality of a Missouri statute. Mo. Const. art. V, § 3.

Statement of Facts

On September 24, 1995, Jessica Hicklin shot and killed Sean Smith. Following a jury trial, she was convicted on February 3, 1997, of first-degree murder, § 565.020.1, RSMo 1994, and armed criminal action, § 571.015.1, RSMo 1994. (LF p. 29.); *State v. Hicklin*, 969 S.W.2d 303 (Mo. App. W.D. 1998). At the time of Hicklin's trial and sentencing, the statute provided that for a person convicted of first-degree murder, "the punishment shall be either death or imprisonment for life without eligibility for probation or parole." § 565.020.2, RSMo 1994. (LF p. 28.) Although Hicklin was sixteen years old when she committed her crime, the statute did not allow her youth or any sentence less than life without eligibility for parole to be considered. (LF pp. 28, 296) Accordingly, on April 24, 1997, she was sentenced to imprisonment for life without eligibility for parole for first-degree murder and a concurrent sentence of a term of years for armed criminal action. (LF p. 29.)

On May 22, 2014, following the Supreme Court's decision in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), Hicklin filed a petition for writ of habeas corpus in this Court, which was docketed as No. SC94211.[1] *Miller* held that a state sentencing scheme that imposes a mandatory sentence violates the Eighth and Fourteenth Amendments when applied to a defendant who was a child at the time of the offense. *Miller v. Alabama*, 567 U.S. 460, 489 (2012). Hicklin asserted, *inter alia*, that her sentence of imprisonment for

[1] Prior to seeking habeas relief in this Court, Hicklin filed petitions in Washington County on October 16, 2012 (Case No. 12WA-CC00495), and with the Court of Appeals, Eastern District on January 24, 2014 (Case No. ED100986). The petitions were denied.

life without eligibility for parole violates the Eighth and Fourteenth Amendments. On July 19, 2016, this Court denied the petition.

On May 2, 2016, Hicklin filed a petition for declaratory judgment in Cole County circuit court. (LF p. 15.) The petition challenged the constitutionality of the statute under which she was sentenced, § 565.020.2, RSMo 1994. (LF pp. 8-9.)

On May 12, 2016, the Missouri legislature passed Senate Bill 590, 98th General Assembly. Effective August 28, 2016, Senate Bill 590 repealed the version of § 565.020 under which Hicklin was sentenced (§ 565.020.2, RSMo 1994) and enacted a new § 565.020 (§ 565.020.2, RSMo 2016). The new version provides that, "[i]f a person has not reached his or her eighteenth birthday at the time of the commission of the offense [of first-degree murder], the punishment shall be as provided under section 565.033." (LF pp. 151-52.)

Section 565.033, RSMo 2016, is a new statutory provision. Its first subsection, § 565.033.1, RSMo 2016, permits sentences of "a term of life without eligibility for probation or parole as provided in section 565.034, life imprisonment with eligibility for parole, or not less than thirty years and not to exceed forty years imprisonment." (LF p. 156.) Its second subsection, § 565.033.2, RSMo 2016, requires that the sentencer consider ten factors identified by *Miller* that are unique to child offenders. (LF pp. 156-57.) Moreover, another section of Senate Bill 590 mandates that certain findings be made before a juvenile offender may be considered for a sentence of life without eligibility for probation or parole. *See* § 565.034, RSMo 2016. (LF pp. 157-59.) Going forward, offenders who receive a first-degree murder sentence other than life imprisonment

without eligibility for probation or parole may petition the parole board for a sentence review after serving twenty-five years and may submit a subsequent petition for sentence review after serving thirty-five years. § 558.047.1(2), RSMo 2016. (LF pp. 150-51.)

Senate Bill 590 also purports to address those persons—like Hicklin—sentenced under § 565.020.2, RSMo 1994, before its repeal. (LF p. 150.) Senate Bill 590 provides that those individuals sentenced to imprisonment for life without eligibility for parole before the repeal may submit a petition for sentence review to the parole board after serving twenty-five years. § 558.047.1(1), RSMo 2016. (LF p. 150.)

In this case, on October 24, 2016, the trial court signed a proposed order submitted (without prompting from the court) by Respondents on the same date. (LF p. 220.) The order concluded that the passage of Senate Bill 590 rendered Hicklin's claims moot and directed her to file an amended petition. (LF p. 220.)

Hicklin's amended petition reiterated her request for declaratory judgment that the statute under which she was mandatorily sentenced to imprisonment for life without eligibility for probation or parole, § 565.020.2, RSMo 1994, is unconstitutional as applied to her. (LF pp. 224-25, 228-29.) The amended petition also sought clarification of her sentence, asserting reasons that the statutes created by Senate Bill 590 did not change or otherwise remedy her unconstitutional sentence. (LF pp. 221-31.)

Respondents moved for judgment on the pleadings. (LF pp. 296-314.) They asserted, among other things, that declaratory judgment was not available to Hicklin; the enactment of § 558.047, RSMo 2016, cured any *Miller* violation; § 558.047 creates parole eligibility and providing parole eligibility retroactively does not constitute a

change to a sentence that expressly excluded parole eligibility; and § 558.047 does not violate separation of powers because it did not change Hicklin's sentence. (LF pp. 296-314). On November 27, 2017, the trial court held an ex parte hearing with only an attorney from the Attorney General's Office present and signed Respondents' proposed judgment denying Hicklin all relief. (LF p. 390.)

On December 11, 2017, Hicklin filed a notice of appeal. (LF pp. 391-94.) This Court sustained her application for transfer after the Court of Appeals, Western District, affirmed by written order.

Points Relied On

I. The trial court erred in granting Respondents' Motion for Judgment on the Pleadings because Jessica Hicklin's sentence of life without the eligibility of parole under § 565.020.2, RSMo 1994, is void and not constitutionally sound, in that Hicklin was sixteen years old when the crime was committed and there was no individualized consideration of Hicklin or her circumstances (the *Miller* factors) at the time of the sentencing and the 2016 repeal of § 565.020.2 and enactment of a replacement statute does not cure this void and unconstitutional sentence.

Montgomery v. Louisiana, 136 S. Ct. 718 (2016)

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

Miller v. O'Malley, 117 S.W.2d 319 (Mo. banc 1938)

State v. Hart, 404 S.W.3d 232 (Mo. banc 2013)

II. The trial court erred in granting Respondents' Motion for Judgment on the Pleadings because Jessica Hicklin's sentence to life without the eligibility of parole under § 565.020.2, RSMo 1994, is unconstitutional and void despite the passage of § 558.047, RSMo 2016, in that, § 558.047, RSMo 2016, cannot apply retroactively to change a void sentence and therefore the passage of Senate Bill 590 in 2016—adding § 558.047 and repealing and replacing § 565.020—does not change Hicklin's void and unconstitutional sentence.

Ex parte Reed, 100 U.S. 13 (1879)

State ex rel. Dutton v. Sevier, 83 S.W.2d 581 (Mo. banc 1935)

Mitchell v. Phillips, No. SC 97631, 2020 WL 547402 (Mo. banc Feb. 4, 2020)

III. The trial court erred in granting Respondents' Motion for Judgment on the Pleadings because even if § 558.047, RSMo 2016, did change Hicklin's sentence, it did not cure the constitutional defect, in that § 558.047, RSMo 2016, does not make Hicklin eligible for parole, it purports to replace one harshest-possible sentence with another harshest-possible sentence, and it deprives Hicklin of the right to jury sentencing.

§ 558.047, RSMo 2016

Jones v. Mo. Dep't of Corr.,

No. WD 82678, 2019 WL 4418279 (Mo. App. W.D. Sept. 17, 2019)

State ex rel. Carr v. Wallace, 527 S.W.3d 55 (Mo. banc 2017)

IV. The trial court erred in granting Respondents' Motion for Judgment on the Pleadings because § 558.047, RSMo 2016, violates the separation of powers, in that it allows the parole board (an executive agency) to make the final application of the *Miller* factors to Hicklin instead of allowing a sentencer (the judicial branch) to apply the factors thereby stripping this sentencing power from the judicial branch and investing it in an executive agency and removing any new "sentence" from all judicial review.

State v. Hart, 404 S.W.3d 232 (Mo. banc 2013)

Asbury v. Lombardi, 846 S.W.2d 196 (Mo. banc 1993)

O'Brien v. Dep't of Pub. Safety,

No. SC 97656, 2019 WL 6710277 (Mo. banc Dec. 10, 2019)

V. The trial court erred in granting Respondents' Motion for Judgment on the Pleadings because a declaratory judgment action is the appropriate vehicle for relief, in that the trial court erroneously relied on *Charron v. State*, 257 S.W.3d 147 (Mo. App. W.D. 2008), and there is no *adequate* remedy at law—including post-conviction or habeas actions—for Jessica Hicklin's claims related to the constitutionality of a state statute.

J.C.W. ex rel. Webb v. Wyciskalla, 275 S.W.3d 249 (Mo. banc 2009)

McDermott v. Carnahan, 934 S.W.2d 285 (Mo. banc 1996)

Willbanks v. Dep't of Corr., 522 S.W.3d 238, 241 (Mo. banc 2017)

State ex rel. Nixon v. Pennoyer, 36 S.W.3d 767 (Mo. App. E.D. 2000)

Argument

Standard of Review and Preservation of Error[2]

The trial court entered judgment in this matter based on Respondents' motion for judgment on the pleadings. A timely notice of appeal was filed thereby preserving all alleged errors raised below for review. Review of a grant of judgment on the pleadings is de novo. *Seay v. Jones*, 439 S.W.3d 881, 887 (Mo. App. W.D. 2014).

Hicklin challenges the constitutional validity of § 565.020.2, RSMo 1994, as applied to her, as well as the sufficiency of § 558.047, RSMo 2016, to cure the infirmities of § 565.020.2, RSMo 1994. "The constitutional validity of a statute is a question of law, which this Court reviews *de novo*." *Willbanks v. Dep't of Corr.*, 522 S.W.3d 238, 241 (Mo. banc 2017).

[2] The standard of review and preservation of error is the same for each of the points relied on and is therefore not repeated under each separate point. *See* Rule 84.04(e).

I. The trial court erred in granting Respondents' Motion for Judgment on the Pleadings because Jessica Hicklin's sentence of life without the eligibility of parole under § 565.020.2, RSMo 1994, is void and not constitutionally sound, in that Hicklin was sixteen years old when the crime was committed and there was no individualized consideration of Hicklin or her circumstances (the *Miller* factors) at the time of the sentencing and the 2016 repeal of § 565.020.2 and enactment of a replacement statute does not cure this void and unconstitutional sentence.

Hicklin was sentenced to imprisonment for life without eligibility for probation or parole after a jury found her guilty of first-degree murder. Although she was sixteen years old at the time of the offense in 1995, she received a life sentence without eligibility for parole despite no consideration of her youth. There was no individualized consideration of Hicklin and her circumstances because the sentence of life without eligibility for parole was mandatory under Missouri law. § 565.020.2, RSMo 1994.[3] She has not been resentenced. Because it is not constitutionally sound, *see State v. Smiley*, 478 S.W.3d 411, 416 n.3 (Mo. banc 2016), Hicklin's sentence is void.

The trial court avoided reaching this issue by surmising that it was rendered moot by enactment of the new § 565.020.2, RSMo 2016. (LF p. 220.) This was incorrect. The 2016 repeal of § 565.020.2 and enactment of a replacement statute does not change the

[3] "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." § 565.020.2, RSMo 1994.

fact that § 565.020.2, RSMo 1994, is the statute under which Hicklin was sentenced.[4] No subsequent repeal and replacement of the statute cures it from being void as to her.

Because Hicklin was sentenced under § 565.020.2, RSMo 1994, her sentence remains in all respects as if § 565.020.2, RSMo 1994, had remained in force. The sentence is not valid because § 565.020.2, RSMo 1994, does not provide a constitutionally sound punishment for Hicklin.

Section 565.020.2, RSMo 1994, mandated that Hicklin be sentenced to imprisonment for life without eligibility for probation or parole. Mandatory life-without-parole sentences for juveniles convicted of homicide are unconstitutional. *Miller v. Alabama*, 567 U.S. 460, 479 (2012).[5] "[I]mposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." *Id.* at 474. A sentencer that does not consider an offender's youth cannot assess whether the most severe penalty "proportionately punishes a juvenile offender." *Id*. "[Y]outh is more than a chronological fact," *id.* at 476 (quotation and citation omitted), so juvenile offenders convicted of homicide require that a sentencing court consider the child's level of

[4] It is well established that an unconstitutional statute cannot be validated by a subsequent statute, or even "by a subsequent constitutional amendment, except, possibly, where the latter ratifies and confirms it—which was not done in this case." *State ex rel. Miller v. O'Malley*, 117 S.W.2d 319, 324 (Mo. banc 1938).

[5] Although *Miller* addresses the Eighth Amendment prohibition on cruel and unusual punishment, this Court's conclusion should be the same under article I, § 21 of the Missouri Constitution.

maturity, impetuosity, and view of risks and consequences as well as evaluate the child's family and home life and the circumstances of the homicide. *Id.* at 477.[6]

[6] Juvenile offenders must be treated differently from adult offenders because "children are different." *Miller*, 567 U.S. at 481. They are different because "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds." *Graham*, 560 U.S. at 68. The differences are myriad:

> First, children have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking. Second, children are more vulnerable to negative influences and outside pressures, including from their family and peers; they have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child's character is not as well formed as an adult's; his traits are less fixed and his actions less likely to be evidence of irretrievable depravity.

Miller, 567 U.S. at 471 (quotation marks and citations omitted). Indeed, youth "is a time of immaturity, irresponsibility, impetuousness, and recklessness;" "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." *Id*. at 476 (internal quotation marks and brackets omitted).

"Parts of the brain involved in behavior control continue to mature through late adolescence." *Graham*, 560 U.S. at 68. For this reason, "only a relatively small proportion of adolescents who engage in illegal activity develop entrenched patterns of problem behavior." *Miller*, 567 U.S. at 471 (internal quotation marks omitted). The actions of a juvenile "are less likely to be evidence of irretrievably depraved character than are the actions of adults." *Graham*, 560 U.S. at 68 (internal quotation marks omitted). For all of these reasons "a greater possibility exists that a minor's character deficiencies will be reformed," so it "would be misguided" to treat a juvenile offender the same as an adult. *Id*.

Hicklin was sentenced to imprisonment for life without eligibility for probation or parole without consideration of any of the *Miller* factors.[7] The only factor considered was the fact of her conviction for first-degree murder. Thus, § 565.020.2, RSMo 1994, failed to provide a constitutionally sound penalty as to Hicklin, and her sentence is void.

Because Hicklin's penalty remains as if § 565.020.2, RSMo 1994, had remained in force the validity of the sentence must be considered. "'[A]n unconstitutional law is void, and is as no law. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment.'" *Ex parte Smith*, 36 S.W. 628, 629 (Mo. 1896) (quoting *Ex parte Siebold*, 100 U.S. 371, 376–77 (1879)). Consistent with this principle, this Court found the sentence of Laron Hart was unconstitutional because "it was imposed without any opportunity for the sentencer to consider whether this punishment is just and appropriate in light of Hart's age, maturity and the other factors considered in *Miller*." *State v. Hart*, 404 S.W.3d 232, 238–39 (Mo. banc 2013).[8] Hart,

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[7] This Court has recognized that "*Miller*'s substantive rule must be applied retroactively on collateral review of a juvenile offender's mandatory sentence of life without parole." *State ex rel. Carr v. Wallace*, 527 S.W.3d 55, 59 (Mo. banc 2017) (citing *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016)).

[8] A "sentencer is 'require[d] ... to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.' Children are 'constitutionally different from adults for purposes of sentencing' in light of their lack of maturity and under-developed sense of responsibility, their susceptibility to negative influences and outside pressure, and their less well-formed character traits." *Tatum v. Arizona*, 137 S. Ct. 11, 11-12 (Mem)–12 (2016) (Sotomayor, J., concurring in decision to grant, vacate, and remand) (quoting *Miller*, 567 U.S. at 471).

like Hicklin, had been sentenced to life without eligibility for parole for a juvenile homicide.

This Court held that until "the sentencer makes the determination *Miller* requires, Hart's claim that section 565.020 is void is premature," so Hart's case was remanded for resentencing and a determination whether Hart's sentence is void. *Hart*, 404 S.W.3d at 239; *see also State v. Nathan*, 404 S.W.3d 253, 270 (Mo. banc 2013) (same). Under *Hart*'s holding, Hicklin should be resentenced. No sentencer has made the determination *Miller* requires. Without resentencing, it cannot be determined whether Hicklin's sentence is void.

But subsequent Supreme Court decisions reveal that a portion of *Hart* was incorrect. This Court concluded that it was premature to determine whether Hart's sentence was void because a jury had not yet made a *Miller* determination. *Hart*, 404 S.W.3d at 239. However, the Supreme Court recently held that, where a sentencing statute was unconstitutional (there because it was vague), the law is treated as a nullity, and defendants sentenced thereunder were entitled to new sentencing hearings. *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019); *accord United States v. Davis*, 784 F. App'x 277, 278 (5th Cir. 2019) (remanding to the district court for resentencing after remand from Supreme Court). *Montgomery*, which *Hart* pre-dated, squarely addressed the issue of whether imposition of a mandatory life sentence upon a juvenile offender is void. A critical factor to *Montgomery*'s conclusion that *Miller* applies retroactively was that sentences like Hicklin's are void. *Montgomery*, 136 S. Ct. at 730–31. "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 (citing *Siebold*, 100 U.S. at 376). This distinction is significant because "a court has no authority to leave in place a . . . sentence that violates a substantive rule, regardless of whether the . . . sentence became final before the rule was announced." *Id.* Hicklin's sentence is void because it was imposed under a sentencing procedure that is unconstitutional as applied to juveniles. It is not merely the sentence—mandatory life without parole—that is unconstitutional; the sentencing statute does not provide for a constitutionally sound sentence for Hicklin because it prohibited consideration of her youth. The law is a nullity, as applied to Hicklin, and, thus, her sentence is void. For this reason, Hicklin must be resentenced.

Hicklin's sentence "violates the Eighth Amendment because—and only because—it was imposed without any opportunity for the sentencer to consider whether this punishment is just and appropriate in light of [the juvenile's] age, maturity and the other factors discussed in *Miller*." *Hart*, 404 S.W.2d at 238. Her sentence is void, so she must be resentenced. In the alternative, if her sentence is not void as a matter of law, Hicklin is

entitled to have a sentencing court determine whether her sentence is void and resentence her.[9] This Court should enter such judgment as the trial court should give. Rule 84.14.[10]

[9] The conundrum this Court faced when it addressed this issue in *State v. Hart*, 404 S.W.3d 232 (Mo. banc 2013), persists. Hicklin's sentence remains life without eligibility for parole and the statute governing her resentencing, § 565.020.2, RSMo 1994, offers no alternative. Thus, her new sentencing hearing should follow the procedure set forth in *Hart*. *See, e.g.*, *State v. Hartman*, 488 S.W.3d 53, 56 n.7 (Mo. banc 2016); *see also State ex rel. Carr v. Wallace*, 527 S.W.3d 55, 62 (Mo. 2017). Hicklin should be resentenced on both offenses of which she was convicted. *See Pepper v. United States*, 562 U.S. 476, 507 (2011) (observing that a trial court's "original sentencing intent may be undermined by altering one portion of the calculus" such that "an appellate court when reversing one part of a defendant's sentence may vacate the entire sentence so that, on remand, the trial court can reconfigure the sentencing plan." (quotations, citations, and alterations omitted)); *accord State v. Weems*, 840 S.W.2d 222, 228 (Mo. banc 1992).

[10] All Rule citations are to the Missouri Supreme Court Rules (2018), as updated.

II. The trial court erred in granting Respondents' Motion for Judgment on the Pleadings because Jessica Hicklin's sentence to life without the eligibility of parole under § 565.020.2, RSMo 1994, is unconstitutional and void despite the passage of § 558.047, RSMo 2016, in that, § 558.047, RSMo 2016, cannot apply retroactively to change a void sentence and therefore the passage of Senate Bill 590 in 2016—adding § 558.047 and repealing and replacing § 565.020—does not change Hicklin's void and unconstitutional sentence.

Section 558.047, RSMo 2016, does not change Hicklin's sentence because the legislature cannot apply new substantive penal laws to change void sentences retroactively.

Hicklin's penalty was meted out as required by § 565.020.2, RSMo 1994. Section 565.020, RSMo 1994, along with three other sections, was repealed by Senate Bill 590 and seven new sections, including § 558.047, were enacted in lieu of the repealed statutes.[11] Section 558.047, RSMo 2016, purports to alter Hicklin's sentence so that it is no longer what § 565.020.2, RSMo 1994, mandated: "either death or imprisonment for life without eligibility for probation or parole, or release except by act of the governor."

Section 1.160, RSMo 2016, provides that punishment under a statutory provision that is later repealed or amended shall not be affected by the repeal or amendment. Section 1.160 is not necessary here because Hicklin's sentence is final. "When a case has been reduced to final judgment and direct review exhausted . . ., the preservation afforded by section 1.160 is unnecessary because the repeal does not affect final adjudications in

[11] "Sections 565.020, 565.030, 565.032, and 565.040, RSMo, are repealed and seven new sections enacted in lieu thereof, to be known as sections 558.047, 565.020, 565.030, 565.032, 565.033, 565.034, and 565.040." CHILDREN AND MINORS—LIFE IMPRISONMENT—PAROLE, 2016 Mo. Legis. Serv. S.B. 590.

the first instance." *Mitchell v. Phillips*, No. SC 97631, 2020 WL 547402, at *4 (Mo. banc Feb. 4, 2020). The general rule is that because of § 1.160, or, as here, because § 1.160 is not even needed, the legislature cannot make retrospective substantive changes to a sentence already imposed by repealing and replacing a penal statute.

This means that Hicklin's sentence is not affected by Senate Bill 590's repeal of 565.020, RSMo 1994. In place of the repealed § 565.020, RSMo 1994, under which Hicklin was sentenced, the legislature enacted not only a new § 565.020 but also § 558.047. The state relies on § 558.047, RSMo 2016, to claim that Hicklin's unconstitutional mandatory sentence under § 565.020, RSMo 1994, is now constitutional. The State is incorrect.

Under the State's interpretation, § 558.047, RSMo 2016, purports to *change* Hicklin's sentence from life without parole eligibility to life with parole eligibility.[12] The trial court thought that this did not represent a change in Hicklin's sentence. However, this Court recently held that where the statutory permissible penalty for an offense "expressly mandated his term of imprisonment be served without probation or parole[,] . . . ineligibility for probation or parole is part of his sentence," *Mitchell*, 2020 WL 547402 at *1. The statute here purports to allow a sentence review, which might result in parole eligibility, so it addresses *whether* Hicklin is ever eligible to seek parole, not

[12] As explain, infra, § 558.047, RSMo 2016, does not really even purport to change Hicklin's sentence, but rather to permit the parole board at some time later to review her sentence and determine if she should be eligible for parole.

merely *when*. In other words, if the statute is effective, it would impermissibly change Hicklin's sentence.

Section 558.047, RSMo 2016, is not merely a legislative attempt to allow an extrajudicial change to a sentence, it is an attempt by the legislature to alter a *void* sentence. It allows for a sentence review, but, because Hicklin's sentence is void, there is no sentence for the parole board to review. Indeed, Missouri courts have long held that the remedy for a void sentence is resentencing. *See Merriweather v. Grandison*, 904 S.W.2d 485, 487–88 (Mo. App. W.D. 1995) (gathering cases). This is because it is well established that a void sentence is a nullity. *Ex parte Reed*, 100 U.S. 13, 21 (1879). Missouri courts "treat a void judgment as though no judgment had ever been imposed." *State v. Franklin*, 307 S.W.3d 205, 208 (Mo. App. S.D. 2010) (citing *State ex rel. Dutton v. Sevier*, 83 S.W.2d 581, 583 (Mo. banc 1935) (holding that "[a] void judgment is no judgment" and remanding inmate, whose sentence was void, for resentencing)). In the absence of a non-void sentence, a sentence review is meaningless.[13]

Section 558.047, RSMo 2016, is best understood as a stop-gap measure, providing a sentence review to those individuals who have not yet had an opportunity to be resentenced, might slip through the cracks in cases because neither the juvenile

[13] This Court should not interpret § 558.047, RSMo 2016, as imposing a sentence of life with eligibility for parole upon Hicklin. Such a construction is not supported by the text, which purports to grant a one-time sentence review, not to impose a sentence. Moreover, any such construction would render § 558.047, RSMo 2016, a bill of attainder because it would mean the statute singles out a specifically designated group and inflicts punishment on that group. *See State ex rel. Bunker Res. Recycling & Reclamation, Inc. v. Mehan*, 782 S.W.2d 381, 386 (Mo. banc 1990).

offender nor the government presses for a resentencing, or are again sentenced to life without eligibility for parole when resentenced. By affording a right to petition for sentence review to "[a]ny person sentenced to a term of imprisonment for life without eligibility for parole before August 28, 2016, who was under eighteen years of age at the time of the commission of the offense or offenses," the legislature created a class of individuals authorized to file a single petition for sentence review consisting of any juvenile offender who can show that they had been sentenced to life without parole before that date. When it comes to "interpreting statutes, this Court must ascertain the intent of the legislature by considering the plain and ordinary meaning of the terms and give effect to that intent if possible." *Cosby v. Treasurer of State*, 579 S.W.3d 202, 206 (Mo. banc 2019) (alteration, quotation, and citation omitted). But, also as a principle of statutory construction, this Court should reject an interpretation of a statute that would render it unconstitutional when the statute is open to another plausible interpretation by which it would be valid. *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 838–39 (Mo. banc 1991). Certainly, the legislature did not intend for juveniles to wait for twenty-five years to have their unconstitutional sentence reviewed; if the legislature did intend to do so, then it delayed consideration of the *Miller* factors longer than the Constitution permits.

Because § 558.047 cannot and does not change Hicklin's sentence, she remains under the unconstitutional sentence imposed by § 565.020, RSMo 1994, and must be resentenced. *See* fn.9, *supra*.

III. The trial court erred in granting Respondents' Motion for Judgment on the Pleadings because even if § 558.047, RSMo 2016, did change Hicklin's sentence, it did not cure the constitutional defect, in that § 558.047, RSMo 2016, does not make Hicklin eligible for parole, it purports to replace one harshest-possible sentence with another harshest-possible sentence, and it deprives Hicklin of the right to jury sentencing.

Assuming, *arguendo*, § 558.047, RSMo 2016, represents a change to Hicklin's sentence, the change is insufficient to cure the constitutional defect. This is for three reasons: (1) § 558.047, RSMo 2016, does not make Hicklin eligible for parole; (2) § 558.047, RSMo 2016, purports to replace one mandatory harshest-possible sentence with another mandatory harshest-possible sentence, and (3) § 558.047, RSMo 2016, deprives Hicklin of the right to jury sentencing.

Section 558.047, RSMo 2016, purports to change Hicklin's sentence by allowing for a one-time sentence review after twenty-five years have been completed on a sentence of life without eligibility for probation or parole. Even assuming the legislature can retroactively change a void sentence under Missouri law, this change is not enough to provide Hicklin with a constitutional sentence.

A. Section 558.047, RSMo 2016, does not grant parole eligibility.

The trial court's decision was based on the misplaced understanding that § 558.047, RSMo 2016, does what the Supreme Court seemed to approve in *Montgomery*'s dicta. There, the Supreme Court cited to a Wyoming statute and suggested that "[a] State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." *Montgomery*, 136 S. Ct. at

736 (citing Wyo. Stat. Ann. § 6–10–301(c) (2013)).[14] But what the Supreme Court provided was an example of "[e]xtending parole eligibility to juvenile offenders," *id.* at 736, something that Missouri now allows for juvenile offenders sentenced in the *future*, § 565.033.1, RSMo 2016,[15] but does not allow for persons like Hicklin.

Section 558.047, RSMo 2016, does *not* make Hicklin eligible for parole. "This is not an absolute grant of parole eligibility; it is a grant of sentence review." *Jones v. Mo. Dep't of Corr.*, No. WD 82678, 2019 WL 4418279, at *3 (Mo. App. W.D. Sept. 17, 2019), *reh'g and/or transfer denied* (Mo. App. W.D. Oct. 30, 2019), *transfer denied* (Mo. Dec. 24, 2019).[16] Moreover, for Hicklin, it is a *single* sentence review. *Compare*

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[14] Wyoming's statute, which applies after *Miller* and is not retrospective, provides that "[a] person sentenced to life imprisonment for an offense committed before the person reached the age of eighteen (18) years *shall be eligible for parole* after commutation of his sentence to a term of years or after having served twenty-five (25) years of incarceration." Wyo. Stat. Ann. § 6-10-301 (2013) (emphasis added). The Wyoming Supreme Court has not applied that state's statute retroactively to individuals already sentenced to mandatory life without parole, instead allowing a new sentencing in *Davis v. State*, 415 P.3d 666, 667 (Wyo. 2018).

[15] Section 565.033.1, RSMo 2016, provides: "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 shall be sentenced to a term of life without eligibility for probation or parole as provided in section 565.034, life imprisonment with eligibility for parole, or not less than thirty years and not to exceed forty years imprisonment." (emphasis added).

[16] Elsewhere, state officials have argued that Senate Bill 590 *does* make someone like Hicklin eligible for parole. *Saddler v. Pash*, No. 4:16-CV-00363-AGF, 2018 WL 999979, at *3 (E.D. Mo. Feb. 21, 2018) (noting warden's argument); *State ex rel. Davis v. Bowersox*, No. SC96014, *Suggestions in Opposition to Petition for Writ of Habeas Corpus*, 6 (Mo. Apr. 14, 2017). The Western District's characterization of the statute is somewhat in tension with § 558.047.4's direction that the parole board "determine if the defendant shall be granted parole," but the one-shot nature of the

§ 558.047.1(1), RSMo 2016 (allowing persons receiving certain sentence prior to August 28, 2016, to petition for sentence review after serving twenty-five years), *with* § 558.047.1(2), RSMo 2016 (allowing persons receiving certain sentences on or after August 28, 2016, to petition for sentence review after serving twenty-five years and submit "a subsequent petition after serving thirty-five years of incarceration."). Furthermore, and importantly, at a sentence review, the parole board does not allow, much less require, consideration of the *Miller* factors. *See Brown v. Precythe*, No. 17-CV-4082, 2019 WL 3752973, at *5 (W.D. Mo. Aug. 8, 2019), *appeals pending*, Nos. 19-2910, 19-3019 (8th Cir.).[17]

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sentence review is not how parole eligibility operates either. And the same bill that provided "eligibility for parole" as part of a sentence for juvenile offenders in the future, *see* 565.033.1, RSMo 2016, used a different term—"sentence review"—to describe what Hicklin will receive. "When different terms are used in different subsections of a statute, it is presumed that the legislature intended the terms to have different meaning and effect." *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 251–52 (Mo. banc 2003), *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

[17] Hicklin acknowledges that the district court in *Brown* has entered a judgment that would allow for the presentation of evidence related to the *Miller* factors. However, even assuming the judgment is affirmed, the presentation of *Miller* evidence would not be before a sentencer, as that term is used in *Miller* and *Hart*. *Hart*, 404 S.W.3d at 235 n.5 ("The United States Supreme Court uses the term 'sentencer' in *Miller* to refer to whichever entity (i.e., the judge or jury) has the responsibility under state law to determine a defendant's sentence. … This Court uses the same term." (citations omitted)). Furthermore, it would be in an environment ungoverned by the rules of evidence and not suited to have the sentencer not only "ask[] the question *Miller* required them not only to answer, but to answer correctly: whether [a juvenile offender's] crimes reflected 'transient immaturity' or 'irreparable corruption.'" *Adams v. Alabama*, 136 S. Ct. 1796, 1800 (2016) (Sotomayor, J., concurring in decision to grant, vacate, and remand) (quoting *Montgomery*, 136 S. Ct. at 734). And whether the

The ability to file a single petition for sentence review *by the parole board* after twenty-five years is not enough to convert Hicklin's unconstitutional sentence into a constitutional one. *Miller* "imposed a substantive rule that life without parole is only an appropriate punishment for 'the rare juvenile offender whose crime reflects irreparable corruption.'" *Adams v. Alabama*, 136 S. Ct. 1796, 1800 (2016) (Sotomayor, J., concurring in decision to grant, vacate, and remand) (quoting *Montgomery*, 136 S. Ct. at 734). Despite § 558.047, RSMo 2016, Hicklin remains imprisoned without eligibility for parole and her sentence has not been reviewed by anyone. Thus, the *Miller* violation has not been cured.

B. Section 558.047, RSMo 2016, replaced one mandatory sentence with another.

Even if § 558.047, RSMo 2016, could be construed as making Hicklin eligible for parole in a manner anticipated by *Miller* and *Montgomery*, such a new (or newly interpreted) sentence runs into another *Miller* problem. A life-without-parole-but-an-opportunity-to-petition-for-review-after-twenty-five-years-of-incarceration sentence is now the mandatory sentence for those juveniles convicted before August 28, 2016—it is the sentence they each receive. Thus, § 558.047, RSMo 2016, effectively rewrote § 565.020.2, RSMo 1994, so that a life sentence with an opportunity to petition for sentence review later is the harshest punishment available to any juvenile offender. This is no different than when "following *Roper*, section 565.020.2 was 'effectively rewritten'

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parole board correctly answered the question, or even asked it, is not subject to judicial review.

so that the death penalty would not apply to **any** juvenile offenders." *Hart*, 404 S.W.3d at 246. Assuming a petition for sentence review by a parole board constitutes parole eligibility, now neither death nor life without parole eligibility applies to any juvenile offender sentenced under § 565.020.2, RSMo 1994. Hicklin still has the harshest possible penalty she could receive—and she got it without the sentencer having any opportunity to consider the circumstances of her youth as *Miller* requires.

Hicklin's situation post-§ 558.047, RSMo 2016, is like Jason Carr's post-*Roper*. In 1983, Carr was convicted of three counts of capital murder for killing three family members when he was sixteen years old. *Carr*, 527 S.W.3d at 56. He received a mandatory sentence of three terms of life in prison without eligibility for parole for fifty years. *Id*. At the time of his sentencing, this was the only sentence available other than death. *Id*. at 60 (citing § 565.008, RSMo 1978).[18] Over a dissent urging that something-less-than-life-without-parole does not qualify as the harshest penalty available under *Miller*, this Court held that Carr was entitled to resentencing. This was because he was sentenced to the harshest available penalty "without the jury or the judge considering the mitigating factors of his youth, the attendant characteristics of youth, the circumstances of the offense, or his potential for rehabilitation." *Id.* at 63; *accord In re Allen v. Norman*, 570 S.W.3d 601, 605 (Mo. App. S.D. 2018), *transfer denied* (Mo. Mar. 5, 2019), *cert.*

[18] "The state did not seek the death penalty against Mr. Carr; therefore, the only penalty that could be imposed was life without the possibility of parole for 50 years." *Carr*, 527 S.W.3d at 60.

denied sub nom. Buckner v. Allen, 140 S. Ct. 234 (2019) (following and applying *Carr*).[19] To the extent that Hicklin now is construed to have *parole eligibility* in the form of a petition for sentence review made to the parole board, just as Carr had parole eligibility, she nonetheless is serving the harshest punishment available under the statute pursuant to which she could be sentenced. This violates *Miller*. Like *Carr*, the remedy for a sentence that is unconstitutional as imposed is resentencing. *Carr*, 527 S.W.3d at 62.

C. Section 558.047, RSMo 2016, deprives Hicklin of her right to jury sentencing.

Finally, even if § 558.047, RSMo 2016, provides parole eligibility and its mandatory imposition of the harshest available sentence on Hicklin does not violate *Miller*, § 558.047, RSMo 2016, still deprives Hicklin of the right to jury sentencing.[20] "While there is no constitutional right to jury sentencing, Missouri provides a statutory right to jury sentencing unless (1) the defendant requests in writing, prior to voir dire, that the trial court assess punishment, or (2) the State pleads and proves the defendant is a

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[19] *Carr* was correct in concluding that the Supreme Court's juvenile sentencing cases are not limited to life without parole. The Court itself observed that "[b]ecause juveniles have diminished culpability and greater prospects for reform, we explained, 'they are less deserving of the most severe punishments.'" *Miller*, 567 U.S. at 471 (quoting *Graham*, 560 U.S. at 68) (emphasis added). *Miller*'s analysis is applicable whenever there is a harsh mandatory sentence that does not consider an offender's youth. Deterrence, retribution, incapacitation, and rehabilitation simply do not apply in the same way to juveniles because their character and understanding are still developing.

[20] Hicklin was tried by a jury. *State v. Hicklin*, 969 S.W.2d 303, 306 (Mo. App. W.D. 1998).

prior or persistent offender." *State v. Collins*, 290 S.W.3d 736, 744 (Mo. App. E.D. 2009).[21]

Thus, in Missouri, the accused has a statutory right to have a jury "assess and declare the punishment." § 557.036.3, RSMo 2016. The jury declares the maximum punishment; except in limited circumstances, the court cannot impose a sentence harsher than that which the jury selects. § 557.036.5, RSMo 2016. Where the state provides jury sentencing as part of its criminal procedural law, a defendant "has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in an exercise of its discretion." *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980).

In *Hart*, this Court explained what "sentencer" means in the *Miller* context.

> The United States Supreme Court uses the term "sentencer" in *Miller* to refer to whichever entity (i.e., the judge or jury) has the responsibility under state law to determine a defendant's sentence. *Miller*, 132 S.Ct. at 2469 ("a sentencer needed to examine all these circumstances before concluding that life without any possibility of parole was the appropriate penalty"). This Court uses the same term. *See, e.g., Deck v. State*, 381 S.W.3d 339, 344 (Mo. banc 2012) (in first-degree murder cases, the "sentencer must consider the character and record of the defendant and the circumstances of the particular offense"). Under section 557.036.3, the responsibility for "assessing and declaring" a defendant's punishment in Missouri rests with the jury, unless the defendant waives this procedure or the state proves beyond a reasonable doubt that the defendant is a repeat offender in one of the categories excluded by section 557.036.4(2). After the

[21] In the unlikely event that Hicklin could be considered to have somehow waived her right to jury sentencing, that waiver cannot be held against her now for the reasons this Court explained in *Hart*. 404 S.W.3d at 239–41.

> jury makes this determination (and in all cases when jury sentencing is not applicable or the jury is unable to agree), the trial court imposes a sentence (within the statutorily approved range of punishments) that is appropriate under all the circumstances. In doing so, however, the trial court may not impose a greater sentence than the punishment assessed and declared by the jury (provided it was within the authorized range) and, if the jury assesses and declares a punishment below the lawful range, the trial court must impose the minimum lawful sentence.

Hart, 404 S.W.3d at 235 n.5.

Post-*Miller*, the factors that must be considered by the sentencer in determining what punishment a juvenile convicted of murder should receive are: (1) the juvenile's "chronological age and its hallmark features," such as "immaturity, impetuosity, and failure to appreciate risks and consequences"; (2) the family and home environment surrounding the juvenile "from which he cannot usually extricate himself, no matter how brutal or dysfunctional"; (3) 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"; and (4) "the possibility of rehabilitation." *Miller*, 567 U.S. at 477. The legislature recognizes this. It has enacted a statute requiring sentencers to consider these factors and others[22] for offenses occurring after July 13, 2016. § 565.033, RSMo 2016.

[22] The factors listed in § 565.033, RSMo 2016, are: "(1) The nature and circumstances of the offense committed by the defendant; (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

No sentencer has considered the *Miller* factors for Hicklin; under § 558.047, RSMo 2016, no sentencer ever will. Hicklin's sentence is unconstitutional "because—and only because—it was imposed without any opportunity for the sentencer to consider whether this punishment is just and appropriate in light of [the juvenile's] age, maturity and the other factors discussed in *Miller*." *Hart*, 404 S.W.2d at 238. Indeed, because no sentencer will consider the *Miller* factors to determine whether Hicklin should be eligible for parole—a non-reviewable administrative board will—and Hicklin retains the harshest available sentence, § 558.047, RSMo 2016, does not change the circumstances that made Hicklin's sentence unconstitutional.

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the defendant; (6) The extent of the defendant's participation in the offense; (7) The effect of familial pressure or peer pressure on the defendant's actions; (8) The nature and extent of the defendant's prior criminal history, including whether the offense was committed by a person with a prior record of conviction for murder in the first degree, or one or more serious assaultive criminal convictions; (9) The effect of characteristics attributable to the defendant's youth on the defendant's judgment; and (10) A statement by the victim or the victim's family member as provided by section 557.041 until December 31, 2016, and beginning January 1, 2017, section 595.229."

IV. The trial court erred in granting Respondents' Motion for Judgment on the Pleadings because § 558.047, RSMo 2016, violates the separation of powers, in that it allows the parole board (an executive agency) to make the final application of the *Miller* factors to Hicklin instead of allowing a sentencer (the judicial branch) to apply the factors thereby stripping this sentencing power from the judicial branch and investing it in an executive agency and removing any new "sentence" from all judicial review.

Section 558.047, RSMo 2016, violates the separation of powers because a sentencer—a judge or jury in the judicial branch—must make the final application of the *Miller* factors to Hicklin, not an executive agency (i.e., the parole board).[23] In *Hart*, this Court held that a mandatory sentence imposed on a juvenile was unconstitutional "because—and only because—it was imposed without any opportunity for the sentencer to consider whether this punishment is just and appropriate in light of Hart's age, maturity and the other factors discussed in *Miller*." *Hart*, 404 S.W.3d at 238. Similarly, in *Carr*, the sentencing statute "denied the sentencer the opportunity to consider the attendant characteristics of Mr. Carr's youth." 527 S.W.3d at 61. This identification of the issue is in full accordance with *Miller*'s holding that mandatory sentences "prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender." 567 U.S. at 474. Section 558.047, RSMo 2016, strips this power of the sentencer from the judicial branch and invests it in an

[23] In the trial court, Respondents contended there could be no separation of powers violation because, they thought, § 558.047, RSMo 2016, "did not change Hicklin's sentence, life imprisonment, by making it possible for her to be paroled from that sentence." (LF pp. 310-11.) The trial court agreed. But to extent that § 558.047, RSMo 2016, allows parole eligibility where it was before expressly prohibited, it represents a change in sentence. *Mitchell*, 2020 WL 547402, at *3.

executive agency by having the parole board, not a judge or jury, assess the *Miller* factors. The parole board's decision as to the *Miller* factors and whether modification of Hicklin's sentence is required is final—beyond all judicial review.

Missouri's constitution proves that "[t]he powers of government shall be divided into three distinct departments—the legislative, executive and judicial—each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted." Mo. Const. art. II, § 1. While "exercise of judicial functions by executive agencies is consistent with traditional concepts of the separation of powers," it remains "[t]he quintessential power of the judiciary . . . to make *final* determinations of questions of law." *Asbury v. Lombardi*, 846 S.W.2d 196, 200 (Mo. banc 1993). In *Asbury*, this Court held that a statute that provided for decisions of the Personnel Advisory Board to be subject to review by the Administrative Hearing Commission or by the circuit court, but not both, was unconstitutional. "[W]hile the legislature may allow for judicial or quasi-judicial decision-making by legislative or executive (administrative) agencies, it may not preclude judicial review of those decisions. Nor may the legislature alter the principal power of the judiciary to make the *final* review." *Id*., at 200. Moreover, convicting individuals of a criminal offense and subjecting those individuals to criminal punishments applicable to a criminal offense is the exclusive provenance of the courts. *O'Brien v. Dep't of Pub. Safety*, No. SC 97656, 2019 WL 6710277, at *3 (Mo. banc Dec. 10, 2019) ("Only courts can do these things.").

Rather than allow a court to review Hicklin's sentence, as courts do, § 558.047, RSMo 2016, assigns the responsibility for reviewing her mandatory sentence of life without the possibility of parole to the parole board. The parole board is not a part of the judicial branch. *See* § 217.655, RSMo 2016 (establishing parole board); § 217.665, RSMo 2016 (providing for makeup of the parole board). The parole board's consideration of the *Miller* factors, or refusal to consider the *Miller* factors, is not subject to judicial review. Section 217.670.3, RSMo 2016, limits review of parole board decisions to compliance with certain statutory provisions, not including § 558.047, RSMo 2016, and regulations under those statutes.[24] Because this limited review is provided by statute, no other judicial review is available. *Cooper v. Mo. Bd. of Prob. & Parole*, 866 S.W.2d 135, 137 (Mo. banc 1993) (holding that § 217.670.3 precludes judicial review of parole board determinations as noncontested cases). Thus, under the § 558.047, RSMo 2016 scheme, the parole board makes a final determination as to the *Miller* factors and whether Hicklin's sentence will remain life without parole. Moreover, because the parole board is determining what criminal punishment Hicklin will face, it is taking a power that only courts have. The legislature violated the separation of powers when it transferred powers of the judiciary to an administrative agency.

[24] Section 217.670.3, RSMo 2016, provides that "[t]he orders of the board shall not be reviewable except as to compliance with the terms of sections 217.650 to 217.810 or any rules promulgated pursuant to such section."

V. The trial court erred in granting Respondents' Motion for Judgment on the Pleadings because a declaratory judgment action is the appropriate vehicle for relief, in that the trial court erroneously relied on *Charron v. State*, 257 S.W.3d 147 (Mo. App. W.D. 2008), and there is no *adequate* remedy at law—including post-conviction or habeas actions—for Jessica Hicklin's claims related to the constitutionality of a state statute.

The trial court relied on *Charron v. State*, 257 S.W.3d 147 (Mo. App. W.D. 2008), to decide that Hicklin cannot challenge the statutes at issue in a declaratory judgment action. In *Charron*, the Western District affirmed the dismissal of a petition for declaratory judgment for lack of subject matter jurisdiction. 257 S.W.3d at 155. The court held that the trial court lacked jurisdiction to entertain a declaratory judgment action that would have a collateral effect on a criminal sentence. *Id.* at 151–54.

Because *Charron* predated *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249 (Mo. banc 2009), it misunderstood jurisdiction. In *Webb*, this court noted that "the subject matter jurisdiction of Missouri's courts is governed directly by the state's constitution," which "sets forth the subject matter jurisdiction of Missouri's circuit courts in plenary terms, providing that '[t]he circuit courts shall have original jurisdiction over *all* cases and matters, civil and criminal. Such courts may issue and determine original remedial writs and shall sit at times and places within the circuit as determined by the circuit court.'" 275 S.W.3d at 253–54. *Webb*'s application of this principle applies equally to Hicklin's case: "The present case is a civil case. Therefore, the circuit court has subject matter jurisdiction and, thus, has the authority to hear this dispute." *Id.* at 254. Thus, *Charron*'s ruling on whether the trial court could hear the declaratory judgment action at issue was misguided and the decision that the "court had no authority to hear

declaratory judgment actions attacking sentences" should not have been affirmed by the court of appeals. *See Charron*, 257 S.W.3d at 152–53.

Moreover, a declaratory judgment action is an appropriate vehicle to determine what Hicklin's sentence is, which requires an assessment of the constitutionality of § 565.020.2, RSMo 1994; a determination of what effect, if any, § 558.047, RSMo 2016, has on Hicklin's sentence; and an assessment whether any effect of § 558.047, RSMo 2016, is sufficient to cure the constitutional infirmities of § 565.020.2, RSMo 1994. Even if one sets aside the erroneous understanding of subject matter jurisdiction, *Charron* is wrong. Hicklin, like any person alleging an injury, has a state constitutional right to access the courts. Mo. Const. art. I, § 14 ("That the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay"). Additionally, Hicklin is entitled to declaratory judgment because there is no other *adequate* remedy at law.

Hicklin seeks to remove an uncertainty about what her sentence is and whether her sentence comports with *Miller*—this is the type of question for which declaratory judgment is appropriate. Rule 87.02(d) (stating that "anyone may obtain [declaratory] relief in any instance in which it will terminate a controversy or remove an uncertainty"). Indeed, declaratory judgment actions are the regular method by which the constitutionality of statutes is determined. *See, e.g.*, *Priorities USA v. State*, No. SC 97470, 2020 WL 203129, at *2 (Mo. banc Jan. 14, 2020). And the Declaratory Judgment Act "specifically provides that declaratory judgments are a proper vehicle for testing the

validity of statutes." *Northgate Apartments, L.P. v. City of N. Kansas City*, 45 S.W.3d 475, 479 (Mo. App. W.D. 2001); *see also* § 527.020, RSMo 2016 ("Any person . . . whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under . . . the statute . . . and obtain a declaration of rights, status or other legal relations thereunder."). "The [declaratory judgment] act furnishes a particularly appropriate method for the determination of controversies relative to the construction and validity of statutes and ordinances." *City of Joplin v. Jasper Cty.*, 161 S.W.2d 411, 412–13 (Mo. 1942)); *accord Regal-Tinneys Grove Special Road Dist. of Ray Cty. v. Fields*, 552 S.W.2d 719, 722 (Mo. banc 1977).

Nonetheless, the trial court, following *Charron*, dismissed Hicklin's action because, among other things, it seeks declaratory judgment. The trial court did so despite Rule 87.01's admonition that "[n]o action or proceeding is open to objection on the ground that a declaratory judgment or decree is prayed for."

A. This Court implicitly rejected *Charron* in a similarly postured case.

Furthermore, this Court implicitly rejected *Charron*'s reasoning in *Willbanks*. In that case, Timothy Willbanks challenged whether a mandatory minimum parole statute and its associated regulations were constitutional under *Graham v. Florida*, 560 U.S. 48 (2010), insofar as they would render the consecutive sentences imposed for crimes committed in his youth into the functional equivalent of life without parole. *Willbanks v. Dep't of Corr.*, 522 S.W.3d 238, 239 (Mo. banc 2017). The Western District decision, which was vacated when this Court sustained Willbanks's application for transfer, had

concluded, following *Charron*, that his action was improperly brought as one for declaratory judgment under *Charron* and instead considered it as a habeas writ. *Willbanks v. Mo. Dep't of Corr.*, No. WD 77913, 2015 WL 6468489, at *8 (Mo. App. W.D. Oct. 27, 2015). However, this Court considered Willbanks's case on the merits without remarking on it being an action for declaratory judgment. Thus, at a minimum, this Court has not held that a declaratory judgment action in this context is an improper vehicle to obtain relief.

Charron should not apply in any event because this case is more similar to *McDermott v. Carnahan*, 934 S.W.2d 285 (Mo. banc 1996), where declaratory judgment was not construed as an attack on a sentence in a case where an inmate was "asking for an interpretation of part of a statute governing his eligibility for parole." *Id.* at 287. Hicklin, likewise, is asking for an interpretation of § 558.047, RSMo 2016, to determine its effect on her sentence, determine what her sentence *is*, and then determine whether that provision and others in Senate Bill 590 are constitutional as applied to her. Section § 565.020.1, RSMo 1994, is unconstitutional as applied to Hicklin, but reaching that issue requires an interpretation of statutes to ascertain that Hicklin is incarcerated based on a sentence imposed under § 565.020.1, RSMo 1994. Moreover, whether § 558.047, RSMo 2016, can retroactively make Hicklin's sentence constitutional cannot be assessed without first determining what effect, if any, § 558.047, RSMo 2016, had on Hicklin's sentence.

In any event, *Charron*'s holding that declaratory judgment may "not be invoked where an adequate remedy already exists," 257 S.W.3d at 153, does not preclude

declaratory judgment here because there is no other adequate remedy available. Post-conviction relief is not available because the time for Hicklin to file a Rule 29.15 expired long before *Miller*, *Montgomery*, and the enactment of Senate Bill 590.[25] Habeas is also arguably not available, but, even if it is, it is inadequate.

B. Post-conviction and habeas relief are not available.

The Rule 29.15 procedure is unavailable to Hicklin. In ordinary course, Rule 29.15 is the exclusive procedure by which individuals convicted of a felony after a trial can challenge the constitutional validity of their sentence. Rule 29.15;[26] *see Brock v. State*, 242 S.W.3d 430, 433 (Mo. App. W.D. 2007). Hicklin's convictions were affirmed by the Western District in a decision dated June 9, 1998, and the mandate issued on July 1, 1998. *State v. Hicklin*, 969 S.W.2d 303 (Mo. App. W.D. 1998); *State v. Hicklin*, No. WD54270, *Mandate* (Mo. App. W.D. July 1, 1998). Under Rule 29.15, "[i]f an appeal of the judgment or sentence sought to be vacated, set aside or correct is taken"—as was the case here—"the [Rule 29.15] motion shall be filed within 90 days after the date the mandate of the appellate court issues affirming such judgment or sentence." Any Rule 29.15 post-conviction motion for Hicklin was due by September 29, 1998, which was

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[25] Rule 24.035 is inapplicable here because Hicklin was not convicted on a guilty plea.

[26] Although not necessary for resolution of this case, Rule 29.15 should be read in harmony with § 527.020's promise that "[a]ny person" who is "affected by a statute" may bring a declaratory judgment action to determine its construction or validity so that Rule 29.15 is not read to preclude a challenge to the constitutional validity of a sentence where the challenge is premised on the alleged unconstitutionality of a statute.

5,018 days before *Miller*, 6,327 days before *Montgomery*, and 6,497 days before Senate Bill 590 took effect. A Rule 29.15 proceeding is not available to Hicklin.

Moreover, had Hicklin filed this action as a petition for a habeas writ, the state would have argued habeas is unavailable. First, the state routinely argues that habeas is not available if an issue was not raised on direct appeal. The state has done so in opposition to habeas relief by an individual situated like Hicklin—serving a mandatory sentence of life without parole that was imposed for a murder committed as a child. *See, e.g., State ex rel. Davis v. Bowersox*, No. SC96014, *Suggestions in Opposition to Petition for Writ of Habeas Corpus*, 4-5 (Mo. Apr. 14, 2017) (asserting that post-Senate Bill 590 habeas review of sentence that violates *Miller* is barred by default); *see also Steward v. Wallace*, No. 4:16-cv-00407-CDP, *Response to Amended Petition*, ECF No. 21, 10 n.2 (E.D. Mo. Nov. 22, 2016) (arguing that habeas relief on claims like Hicklin's is barred).

Second, the state regularly argues that habeas is not available where the petitioner does not claim a right to immediate release. *See, e.g., Delp v. Lombardi*, No. 15RA-CV00230, *Response to Order to Show Cause Why a Writ of Habeas Corpus Should Not be Granted*, 3-4 (Mo. Cir. Ct. May 26, 2015). This is pertinent here because Hicklin is *not* seeking immediate release; rather, she is seeking a determination that her sentence is unconstitutional such that resentencing is required. For instance, the state will cite *State ex rel. Nixon v. Pennoyer*, 36 S.W.3d 767, 770 (Mo. App. E.D. 2000), for the proposition that habeas is not available to an inmate not claiming entitlement to immediate release. *Pennoyer* says that a complaint about eligibility for *future* release "should be made in declaratory judgment." *Id.* (citing *Goings v. Mo. Dep't of Corr.*, 6 S.W.3d 906, 907 (Mo.

banc 1999) (emphasis added)). This understanding is consistent with this Court's binary direction that "[t]he habeas court may grant relief by ordering the petitioner discharged from unlawful restraint or deny relief by permitting the petitioner to remain in custody." *State ex rel. Zinna v. Steele*, 301 S.W.3d 510, 513 (Mo. banc 2010). By the state's reasoning, habeas is unavailable. It was entirely reasonable for Hicklin to pursue relief by way of declaratory judgment here, as the court directed in *Pennoyer*.

C. Even if habeas were available, it would not be adequate.

Habeas relief, even if available, is *inadequate*. The initial question in this case is what, exactly, is Hicklin's current sentence. Is it, as she contends, the mandatory sentence of life without parole that she received on April 24, 1997? Or is it life without parole but with a right to petition for a sentence review after twenty-five years, as the provisions of Senate Bill 590 might suggest? Or is it life with *eligibility for parole* after twenty-five years like the state contends about the sentences of similarly situated individuals in some other proceedings? These are not questions that can or would be answered in a habeas proceeding, which is "limited to determining the facial validity of confinement." *State ex rel. Simmons v. White*, 866 S.W.2d 443, 445 (Mo. banc 1993). Moreover, habeas is inadequate in an action such as this to address unconstitutional statutes because "[n]o appeal lies from the decision in a habeas corpus proceeding." *Miller v. State*, 615 S.W.2d 98, 98 (Mo. App. S.D. 1981). With no right to appeal, there is no right to access this Court's exclusive appellate jurisdiction in cases where the constitutionality of a state statute is questioned. Mo. Const. art. V, § 3. In contrast, the grant or denial of declaratory judgment may be appealed as any other judgment. *See* Rule 87.11. The inability of an

inmate challenging the constitutionality of a statute impacting her sentence to appeal an adverse trial court decision to this Court is not an exception that the framers of the Constitution included in the text. Hicklin, like other Missourians, ought to be able to utilize declaratory judgment to remove legal uncertainties that affect her, particularly where those uncertainties are caused by constitutionally infirm statutes.

But, if Hicklin is mistaken and this Court determines that habeas relief is the only option available to her while declaratory judgment is not, then a writ of habeas corpus should be issued for her relief. *See* Rule 91.06. Indeed, in a case like this, it is "[a] court's *sua sponte* obligation to issue a writ of habeas corpus 'although no petition be presented for such writ.'" *State ex rel. Koster v. Oxenhandler*, 491 S.W.3d 576, 591 (Mo. App. W.D. 2016) (quoting Rule 91.06). The record in this case is undisputed that Hicklin is confined on a mandatory sentence of life without eligibility for parole for an offense committed when she was sixteen years old. Her pursuit of declaratory judgment was reasonable based both on the state's responses to petitions for habeas and *Pennoyer*. Indeed, at the same time Respondents were arguing declaratory judgment is not available in this case, the Attorney General's office argued in opposition to a similar challenge in federal court that declaratory judgment was not only available but also *the* proper mechanism. There they asserted that a juvenile offender "would be obligated to file a declaratory judgment action under Missouri Supreme Court Rule 87" under the circumstances of these cases. *Williams v. Steele*, No. 4:16-cv-00393-RWS, *Brief on Mootness*, ECF No. 15, 4 (E.D. Mo. Aug. 22, 2016); (LF p. 212). If declaratory judgment is not available, a writ should issue.

The trial court's decision that granted judgment on the pleadings on the basis that Hicklin cannot use declaratory judgment should be reversed. In the alternative, this case should be treated as one seeking a writ of habeas corpus and a writ should issue.

Conclusion

For the foregoing reasons, the judgment of the circuit court should be reversed and this Court should enter such judgment in favor of Hicklin declaring that her sentence is unconstitutional and void, or, in the alternative, a writ of habeas corpus should issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned hereby certifies that on February 7, 2020, the foregoing 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 11,220 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.

/s/ Anthony E. Rothert