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 REPLY BRIEF OF APPELLANT

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Table of Contents

Table of Authorities

Cases

Statutes

Introduction

A constitutional violation occurred at Jessica Hicklin's sentencing hearing. Although she was a juvenile when she committed the crime to which she is sentenced to life without eligibility for parole, her sentence was imposed without any opportunity for the sentencer to consider whether this sentence is a just and appropriate one when considering Hicklin's age and maturity. Respondents fail to take a consistent position on the question of whether her sentence has changed, or not. But, ultimately, what matters is Hicklin's sentence is void, and the original error—identified by this Court in *Hart*—of imposing a mandatory sentence upon a juvenile without consideration of the *Miller* factors has not been purged. Both state and federal law require that a sentence given in violation of a substantive rule of federal constitutional law be corrected by resentencing.

I. A declaratory judgment action is appropriate.

Respondents implore this Court to avoid the merits of Hicklin's claims because she filed her pro se action as one seeking declaratory judgment rather than a writ of habeas corpus.

A declaratory judgment action is an appropriate procedure for Hicklin to determine what her sentence is in light of the repeal of the statute under which she was sentenced as well as the enactment of § 558.047, RSMo 2016. *McDermott v. Carnahan*, 934 S.W.2d 285, 287 (Mo. banc 1996) (finding declaratory judgment appropriate when an inmate is "asking for an interpretation of part of a statute governing his eligibility for parole"). It does not become inappropriate because it requires an assessment of the constitutionality of the statute under which she was sentenced

(§ 565.020.2, RSMo 1994), a determination whether her sentence is void, and consideration of what effect, if any, § 558.047, RSMo 2016, has on her sentence and whether any such effect is sufficient to cure the constitutional infirmities of § 565.020.2, RSMo 1994. Indeed, Respondents have taken inconsistent positions in this litigation (not to mention in other cases) about whether Hicklin's sentence has changed. This is the type of controversy that declaratory judgment is designed to resolve.

Additionally, Hicklin does not have an adequate alternative remedy by law. Respondents acknowledge that Hicklin cannot bring a claim for post-conviction relief under Rule 29.15 because the basis for relief arose long after the time allowed for such a claim by Rule 29.15 expired. They suggest she is required to file a habeas petition but rely on shorthand to imply that declaratory judgment is precluded because habeas is the exclusive remedy. A suit under the Declaratory Judgment Act is only *un*available where a party "'has an adequate remedy *by law*.'" *State ex rel. Schwab v. Riley*, 417 S.W.2d 1, 5 (Mo. banc 1967) (quoting *Gluech Realty Co. v. City of St. Louis*, 318 S.W.2d 206, 211 (Mo. 1958)) (emphasis added). The "by law" designation is significant because "'habeas corpus is, at its core, an equitable remedy.'" *State ex rel. Koster v. McElwain*, 340 S.W.3d 221, 232 (Mo. App. W.D. 2011) (quoting *Schlup v. Delo*, 513 U.S. 298, 299 (1995)). Indeed, like declaratory judgment and other equitable remedies, "[t]he relief available under a writ of habeas corpus has traditionally been very limited, and courts are not required to issue this extraordinary writ where other remedies are adequate and available." *Clay v. Dormire*, 37 S.W.3d 214, 217 (Mo. banc 2000). It makes no more sense to say that Hicklin cannot use declaratory judgment because habeas is available

than to say that she cannot use habeas because declaratory judgment is available. *State ex rel. Nixon v. Pennoyer*, 36 S.W.3d 767, 770 (Mo. App. E.D. 2000) (commenting that claims of eligibility for future release "should be made in declaratory judgment").

Respondents also advance a new argument: that no justiciable controversy exists. But Respondents premise this contention on their other arguments being correct. This argument is unavailing. In every case, there is no controversy after this Court agrees with one side's arguments. This Court should adhere its rule that "'[a] justiciable controversy exists where the plaintiff has a legally protectable interest at stake, a substantial controversy exists between parties with genuinely adverse interests, and that controversy is ripe for judicial determination.'" *S.C. v. Juvenile Officer*, 474 S.W.3d 160, 162–63 (Mo. banc 2015) (quoting *Mo. Health Care Ass'n v. Attorney Gen. of the State of Mo.*, 953 S.W.2d 617, 620 (Mo. banc 1997)). Hicklin was sentenced under an unconstitutional (as applied to her) statute. This Court need not spend much time assessing the constitutionality of her initial sentence because Respondents admit it was unconstitutional, as they must. That, however, is not the final determination to be made in this case. The question in this case is: *now what*? The controversy about whether Hicklin is entitled to a new sentencing hearing turns on whether her sentence is void and, assuming the legislature can retroactively change a sentence (void or not), if the change

attempted by the legislature is effective and sufficient. This case presents justiciable issues.[1]

In any event, habeas relief is neither available nor adequate. Respondents' argument that habeas is available is not sincere. They all but admit their view that habeas is not available to Hicklin. They suggest habeas is necessary because this Court may be required to "overturn the *sentence and judgment* that confines" her, but in every other portion of their brief insist Hicklin is no longer confined on the 1997 sentence and judgment but instead on a legislatively provided sentence. Hicklin ought not be required to futilely pursue an equitable remedy that is not available or adequate in order to invoke declaratory judgment.

II. If declaratory judgment is unavailable, then a writ of habeas corpus should be issued.

Respondents suggest that the record precludes habeas relief because perhaps there is a factual question whether Hicklin was under the age of eighteen at the time of the crime or whether she waived her right to a jury. But Respondents' own records show her date of birth is March 7, 1979, (Appendix to Reply, RA1), and the Western District commented that the crime was committed on September 24, 1995. *State v. Hicklin*, 969

[1] This Court recently explained that "[t]he declaratory judgment is intended to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations." *Rebman v. Parson*, 576 S.W.3d 605, 609 (Mo. banc 2019) (quotation marks omitted). "The interest of being free from the constraints of an unconstitutional law is an interest that is entitled to legal protection." *Id*. (quotation and citation omitted).

S.W.2d 303, 305 (Mo. App. W.D. 1998). Hicklin was sixteen.[2] This is a simple math problem, not a factual dispute that requires remand to a busy circuit judge for resolution. And, although there is no reason to believe that Hicklin waived her right to jury sentencing, even if she had, the waiver could not be enforced against her now. *State v. Hart*, 404 S.W.3d at 232, 240–41 (Mo. banc 2013). Even if Hicklin waived jury sentencing and there was some possibility it could be enforced against her, there is no reason the resentencing court could not assess in the first instance the question whether resentencing should be by jury or judge. But none of these hypothetical concerns arise unless Hicklin elects jury sentencing. This Court ought not indulge Respondents' speculation about issues that might never come up to create an imaginary conundrum designed to prevent issuance of a writ.

Respondents also think a writ would be inappropriate now because they might have defenses. However, they do not identify any such defenses. Choosing not to raise any defenses in response to Hicklin's repeated requests for issuance of a writ as an alternative is a strategic decision. Respondents know that advancing reasons a writ of habeas corpus would not be available tends to undermine their position that habeas is an

[2] Despite their representation to this Court, Respondents do not really doubt that Hicklin was under the age of eighteen at the time of her offense. The opening sentence in the introduction to their substitute brief states: "Jessica Hicklin is a Missouri inmate who is serving a parole-eligible life sentence for a homicide she committed as a juvenile." Elsewhere, they argue that she should lose this appeal because, in their view, she is eligible for parole after twenty-five years—"[a]fter the Board reviews Hicklin's sentence structure to verify that she is eligible for parole." But, in addition to her sentence structure qualifying, she is eligible only if she "was under eighteen years of age at the time of the commission of the offense or offenses." § 558.047.1. Respondents' contention that Hicklin is eligible for parole admits that she was a minor at the time of the crime.

available remedy. Any defenses not now raised should be deemed waived. If Hicklin chose the wrong procedural vehicle, this case should be considered as a request for a writ.

III. Hicklin's sentence is void.

Hicklin was sentenced under § 565.020.2, RSMo 1994, to a mandatory sentence of life without eligibility for parole. That sentence is void because it violates the federal constitution. *Montgomery v. Louisiana*, 136 S. Ct. 718, 731 (2016) (holding that mandatory sentence of life without eligibility for parole imposed upon a juvenile "is not just erroneous but contrary to law and, as a result, void").

While it has long been recognized that "a conviction under an unconstitutional law is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment," *Montgomery* clarifies that "[t]he same logic governs a challenge to a punishment that the Constitution deprives States of authority to impose." 136 S. Ct. at 724. Respondents seek to avoid this conclusion by ignoring *Montgomery* and, should that fail, abandoning their assertion throughout this case that Hicklin's sentence has not changed in favor of a new argument that it has changed and, thus, apparently, it is void no longer.

Montgomery's conclusion that mandatory sentences imposed on juveniles are void is binding on this Court. Respondents ignore this holding and instead urge this Court to adhere to its earlier holding in *Hart*. Absent from this position, however, is any explanation of how *Hart*'s voidness holding can be squared with *Montgomery*. It cannot. Respondents' discussion of *State ex rel Zahnd v. Van Amburg*, 533 S.W.3d 227 (Mo. banc 2017), does not change this. That case, and those it cites, involved sentences that

failed to comply with a statute. *Id.* at 231.[3] A sentence not authorized by statute might indeed be "merely erroneous—not void" as this Court held. This case, in contrast, involves a sentence that violates a substantive rule of federal constitutional law.[4] Sentences that violate a substantive rule of constitutional law, including the substantive rule of constitutional law that Hicklin's sentence violates, are void. *Zahand* and related cases are inapposite.

Respondents' attempt to avoid the voidness question by suggesting her original sentence has been supplanted by the legislature also misses the mark for two reasons: under Missouri law the legislature cannot be the sentencer in the first instance and a mandatory sentence without consideration of an offender's youth remains void.

State law does not permit the legislature to usurp the judicial role and sentence Hicklin. Because her sentence is void there is nothing to modify and she can only be re-sentenced by a sentencer: a judge or jury. The legislature cannot impose a sentence in the first instance. Respondents rely on cases where this Court approved of the legislature retroactively changing sentences to reduce punishment. There is no doubt that future legislatures can remedy overly aggressive sentencing policies by reducing punishment in at least some instances. That is not what happened here. Because Hicklin's sentence was

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[3] These cases are distinguishable for the additional reason that they arose in the context of a judge altering an erroneous sentence after having lost jurisdiction, a time at which "the appropriate remedy is a direct appeal." *Zahnd*, 533 S.W.3d at 231. Hicklin is not eligible for a direct appeal of her sentence.

[4] Respondents cling to the mistaken notion that *Miller* announced a procedural rule. It did not. *Montgomery*, 136 S. Ct. at 734 ("*Miller* is no less substantive than are *Roper* and *Graham*").

void, the "new sentence" replaces a nullity. It is not, therefore, reducing Hicklin's sentence as there was nothing to reduce.

Even if the legislature could sentence Hicklin, it can no more impose a mandatory sentence without consideration of her youth than a judge or jury could. The legislature could have decided what the *range* of punishment Hicklin will face; it simply failed to do so. The legislature has provided a range of punishment *prospectively*, providing that upon consideration of the *Miller* factors, a juvenile convicted of murder may "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." § 565.033. Retroactively, however, rather than provide a range of punishments, the legislature instead replaced one mandatory sentence with another. Assuming the legislature can give Hicklin a new sentence, her new sentence is a mandatory sentence for an offense committed as a juvenile that was imposed without any consideration of her youth and attendant circumstances, which violates the Eighth Amendment. *State ex rel. Carr v. Wallace*, 527 S.W.3d 55, 59 (Mo. banc 2017).[5] If

[5] Respondents' attempt to distinguish *Carr* is based on a misrepresentation of Hicklin's position, overlooking a key fact in *Carr* and this Court's decision in *Hart*, and a circular argument. Hicklin has not, as Respondents assert, "concede[d] that life without parole for twenty-five years is not the highest penalty under the law for her offense." With the repeal of the statute under which she was sentenced, this is the *only* penalty she can receive and, thus, the highest. Respondents' proposition that Hicklin could be sentenced to death or life imprisonment overlooks that neither sentence is available *for Hicklin*. Just as the availability of death as a penalty for non-juveniles in *Hart* and *Carr* did not prevent this Court from concluding that the juveniles in those cases had received the harshest possible sentence they could, the availability of other sentences to non-juveniles does not change the fact that Hicklin received the only sentence available to her. In the end,

eligibility for parole were enough to remove a mandatory sentence from *Miller*'s safeguards, then *Carr* would have had a different result because Mr. Carr was eligible for parole.

It matters whether Hicklin's sentence is void. *Montgomery* mandates a holding that it is void.

IV. The legislature lacks the power to impose a sentence upon Hicklin.

Because Hicklin's sentence is void, she is entitled to have a sentencer, not the legislature, decide her sentence. Section 558.047, RSMo 2016, cannot change Hicklin's sentence because the legislature cannot apply new substantive penal laws to change void sentences retroactively. Respondents ignore that Hicklin's sentence is void, so their entire argument is off point.

Respondents can no longer rely on *State ex rel. Nixon v. Russell*, 129 S.W.3d 867 (Mo. banc 2004). Although dependence on *Russell* worked in the circuit court, that case addresses retroactive applicability of § 1.160. While this appeal has been pending, this Court explained § 1.160 "is inapplicable to sentences in final judgments." *Mitchell v.*

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however, Respondents' suggestion that Hicklin *could* be sentenced to life without parole fails for another reason in addition to the fact that the legislature removed it as a possible penalty for her: it is a permissible penalty only if, after considering the *Miller* factors, Hicklin is found to be "'the rare juvenile offender whose crime reflects irreparable corruption.'" *Miller v. Alabama*, 567 U.S. 460, 479–80 (2012) (quoting *Roper v. Simmons*, 543 U.S. 551, 573 (2005)). She is not constitutionally eligible for that penalty absent a *Miller*-compliant sentencing hearing, without which Respondents' claim that she could be sentenced to life imprisonment without parole is facetious.

Phillips, 596 S.W.3d 120, 126 (Mo. banc 2020). *Russell* is also distinguishable in that it addressed a sentencing statute that "lacked restrictions on parole eligibility." *Id*. at 123.

Respondents do not cite any case from this Court suggesting that the Missouri Constitution authorizes the legislature to impose a sentence in place of a *void* sentence.[6]

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[6] The lack of recent cases is explained by just how foundational the respective roles of the legislative and judicial roles in sentencing are under the Missouri Constitution. Shortly after the initial adoption of Article II, §1 this Court explained the clear constitutional boundaries:

> [W]hat is legislative power? It hardly can be necessary to give much authority as to the meaning of legislative power. Lexicographers define legislative to be, giving laws and law giving. The legislative power then, is that power in a State which gives and makes laws for the people, and the law in a State is defined to be those rules which are ordained and made known by the legislature, for the government of the people in the State, which they are bound to obey.

State ex rel. Gentry v. Fry, 4 Mo. 120, 189 (1835) (citing 1 Blackstone's Com. 44). On the other hand,

> Judicature is defined to be a court, or rather a power which distributes justice. A judicial power can mean nothing more nor less than the power which administers justice to the people, according to the prescribed forms of law--according to their rights as fixed by the law. It will be easily seen that there is a clear distinction between making a law and pronouncing a sentence, in a case brought before a court, that the party who is injured shall have the satisfaction, relief, or damages which the law has previously fixed. Whatever power in a state renders judgments, sentences and decrees, between parties, fixing the damages, compensation and relief, which the injured party shall have of the aggressor, for the injury, is called the judicial power, no matter whether that injury has arisen out of, or because one of the parties has broken his contract with the other, or beat him, taken unlawfully his

State v. Honeycutt involved whether a change to a statute governing which former felons are prohibited from possessing a firearm could be applied retrospectively to a person whose crimes did not disqualify him from having a gun at the time of his conviction but would now. 421 S.W.3d 410, 413 (Mo. banc 2013) ("ban on the passage of any law retrospective in its operation does not apply to criminal laws"). Honeycutt's sentence was not void, and the legislature did not change it.

Ex parte Bethurum raised the issue of whether the legislature could require this Court to correct an erroneous sentence rather than immediately discharge a prisoner simply because his sentence was not authorized by law. 66 Mo. 545, 547 (1877). This Court changed Bethurum's erroneous sentence to what is should have been. His sentence was not void, and the legislature did not change it. *Id.* at 554.

Jones v. Fife challenged a record clerk's calculation of an inmate's parole-eligibility date. 207 S.W.3d 614, 615 (Mo. banc 2006). Like *Russell*, *Jones* involved application of § 1.160, which distinguishes it from this case. *Id.* at 616. Jones was eligible for parole, so the statutes that made him eligible for parole earlier did not "alter a substantive law governing" his offense or sentence. In contrast, § 558.047 is the replacement for § 565.020.2, RSMo 1994, under which Hicklin was sentenced, which was repealed in the same bill that created § 558.047. Section 558.047, RSMo 2016,

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> property, slandered his character, trespassed on his lands or been guilty of deceit and fraud.

Id. at 191. Respondents' insistence that the legislature can impose a sentence upon Hicklin, by way of § 558.047, cannot be reconciled with *Fry*.

substantively changes Hicklin's sentence because "ineligibility for probation or parole is part of h[er] sentence." *Mitchell*, 596 S.W.3d at 125. *Jones* is inapposite because Mr. Jones's sentence was not void, and the legislature did not change it.

This case also differs from the legislature's extension of parole eligibility to victims of domestic violence serving parole-ineligible life sentences. Respondents say that § 217.692 extends parole eligibility retroactively "in the interest of justice." It appears no one has challenged whether parole eligibility can be extended when it changes a sentence retroactively, likely because, among other reasons, prior to *Mitchell*, granting parole eligibility would not have been viewed as a change of sentence. But, unlike Hicklin, the persons to whom § 217.692 applies did not receive a void sentence. Assuming the legislature can lessen a valid sentence, it does not follow that the legislature can replace a void sentence.

Respondents discussion of *Mitchell* misses the mark in a couple of ways. While this case is similar to *Mitchell* in that the legislature repealed a penal statute, § 565.020.2, RSMo 1994, that provided a parole-ineligibility restriction as part of the punishment, the legislature in *Mitchell* was not attempting to impose a sentence in place of a void sentence. More fundamentally, however, Hicklin relies not on *Mitchell*'s retroactivity holding but its other holding: that parole eligibility (or ineligibility) is part of a sentence.

It is the legislature's prerogative to establish the range of sentences to which Hicklin could be sentenced. It has provided a range to apply to juvenile offenders prospectively. § 565.033. However, under Missouri law, it is a judge or jury who imposes a sentence, and, because Hicklin's original sentence is void as a matter of federal

constitutional law, she is entitled to have her sentence imposed by a judge or jury, not the legislature.

V. Section 558.047, RSMo 2016, does not reduce Hicklin's punishment.

When Hicklin was sentenced in 1997, there was no opportunity for a judge or jury to consider the *Miller* factors. It is that lack of opportunity that renders Hicklin's sentence void. Respondents suggest that she is still not entitled to that opportunity because the legislature has sentenced her to a life term with parole eligibility, which they contend reduces her sentence. But the legislature cannot reduce something that no longer exists.

A void sentence is a nullity. *Ex parte Reed*, 100 U.S. 13, 21 (1879). In this state, void judgments are treated "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)). Section 558.047, RSMo 2016, imposed a sentence on Hicklin where none existed; it did not reduce anything.

VI. Section 558.047, RSMo 2016, guarantees only a sentence review, not parole eligibility.

Respondents urge that § 558.047 will really provide Hicklin with a parole hearing and that the statute's "sentence review" is merely a screening tool. Their interpretation is not consistent with the title of the statute—"Persons under eighteen, review of sentence, when, procedure"—which makes no mention of parole eligibility and instead states that the procedures are for a review of sentence. Moreover, Respondents' belief that the

sentence is administratively reviewed and a parole hearing held, not merely a sentence review, if that sentence review is favorable to the petitioner is not reflected in the text.

Pursuant to § 558.047.1(1), a person "may submit to the parole board a petition for review of his or her sentence" only if she was sentenced to life imprisonment without parole eligibility prior to August 28, 2016; was under the age of eighteen at the time of the offense; and has served twenty-five years of incarceration; additionally, the person submitting the petition for review must include a "request[] that his or her sentence be reviewed." § 558.047.2. Reading the statute in its entirety and giving its terms their ordinary and expected meaning, the parole board reviews the sentence, considers the *Miller* factors, and decides whether an individual will be parole eligible. In addition to the text of the statute, Hicklin's interpretation is consistent with the Department of Corrections' assessment that her current sentence remains life without parole. *See Appendix to Reply Brief*, RA 1.

Respondents' alternative interpretation cannot be squared with § 558.047.1(2), which provides *two* sentence reviews for any person sentenced on or after August 28, 2016. If the sentence review is merely a screening to make sure a person is eligible to begin regular consideration for parole, then why would persons sentenced *after* August 28, 2016, need *two* such reviews? After all, Respondents promise that individuals denied parole are scheduled for reconsideration no more than five years later. Resp. Br. 33. (citing 14 C.S.R. 80-2(c)).

Respondents' construction also provides an absurd result: persons with multiple sentences might never get before the parole board. If, as Respondents contend, the

sentence review is simply a gateway to a parole hearing, then those who do not pass this review are left in limbo. The statute permits those sentenced prior to August 28, 2016, to file a petition for review of sentence to be filed after twenty-five years imprisonment; unlike those sentenced on or after August 28, 2016, they are not allowed to file a second one after thirty-five years imprisonment. It would seem, then, that these individuals never appear before the parole board.

Respondents promise that § 558.047.1 is being applied as though it makes Hicklin eligible for parole, despite its text, and that the parole board is regularly setting new hearings for those denied parole. *Miller* and *Montgomery* promise Hicklin the opportunity to demonstrate that she should have a sentence that gives her a real chance at parole. Leaving her at the mercy of *noblesse oblige* is insufficient.

VII. Section 558.047, RSMo 2016, does not remedy Hicklin's void sentence.

The constitutional violation that occurred at Hicklin's sentencing hearing is neither erased nor cured by § 558.047. Her 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. Respondents assume that § 558.047 means Hicklin is eligible for parole, not merely a review of her sentence by the parole board. But, even if § 558.047 constitutes parole eligibility, there is, contrary to Respondents' representation, no controlling precedent that it is an adequate remedy. The error, as identified by *Hart*, was the lack of opportunity for a sentencer to consider

Hicklin's youth, something that still has never happened. Respondents' cases are largely off point.

Respondents' reliance on *LeBlanc* is surprising. The local United States District Court already explained to them that the holding in *LeBlanc* was about restrictions applicable to federal habeas corpus actions, not the underlying question of what the Eighth Amendment requires as Respondents contend. *Brown v. Precythe*, No. 2:17-CV-04082-NKL, 2017 WL 4980872, at *8 (W.D. Mo. Oct. 31, 2017). Indeed, the Supreme Court made clear it was determining only that the case did not meet "AEDPA's high bar for habeas relief," and was expressing "no view on the merits of the underlying Eighth Amendment claim," but instead "waiting until a more substantial split of authority develops." *Virginia v. LeBlanc*, 137 S. Ct. 1726, 1729–30 (2017). *LeBlanc* does not suggest that § 558.047 remedies the mandatory sentence imposed on Hicklin without consideration of her youth; rather, it unequivocally states that this remains an open question of federal law.

Bowling v. Director, Virginia Department of Corrections does not suggest that Missouri has fixed its *Miller* violation either. 920 F.3d 192 (4th Cir. 2019). In that case, the juvenile received a non-mandatory sentence of life *with* parole eligibility, so the Fourth Circuit believed that there was no *Miller* violation in the first place. *Id.* at 197. Indeed, he has been considered for parole every year since 2005. *Id.* at 194–95. In addition to not extending *Miller* to non-mandatory, sentences with parole eligibility, *Bowling* held that *Miller* considerations need not play a role in any parole hearing. *Id.* at

197. *Bowling*'s holding is consistent with Hicklin's position: the time for consideration of her youth is at sentencing.

The juvenile in *State v. Williams-Bey* was not sentenced to life without parole; he received a sentence of thirty-five years. 164 A.3d 9, 12 (Conn. Ct. App. 2016). The Connecticut Court of Appeals held that this sentence did not violate the Eighth Amendment and, thus, he was not entitled to a *Miller* remedy. *Id.* at 13. The remains of that opinion are mere dicta.

Respondents' contention that the Wyoming Supreme Court upheld a legislative *Miller* remedy in *Mares* is puzzling. In that pre-*Montgomery* case, the court held that *Miller* applies retroactively to cases on collateral review. *State v. Mares*, 335 P.3d 487, 508 (Wyo. 2014). Although the court noted that the state's statutes had been amended to provide mandatory parole eligibility for juveniles who did not have it previously, *id.* at 497–98, there was no discussion of whether this was adequate or cured the *Miller* violation. And, as Hicklin has previously explained (and Respondents did not dispute), the Wyoming Supreme Court approved of a new sentencing hearings for juveniles sentenced to life without parole eligibility *after* passage of what Respondents call a *Miller* cure, which guaranteed parole eligibility, and even ordered another resentencing when first resentencing was conducted improperly. *Davis v. State*, 415 P.3d 666, 667 (Wyo. 2018).

VIII. Hicklin has the right to jury sentencing.

Respondents say little to rebut Hicklin's assertion that § 558.047 infringes her right to jury sentencing under Missouri law. They ignore *Carr*. According to

Respondents, the *Miller* factors "are relevant to a sentencer's decision whether to sentence a juvenile offender to life without parole and forever remove their ability to be released into society," Resp. Br., at 50, to the exclusion of other circumstances. Jason Carr was serving three sentences of life with eligibility for parole, *Carr*, 527 S.W.3d at 56, but this Court held that he was entitled to resentencing. Assuming Respondents are correct that Hicklin's sentence is life with the possibility of parole, her pertinent sentence is the equivalent of Carr's former sentence, except she has one life sentence rather than Carr's three. Like Carr, Hicklin is entitled to a correction of error that occurred by not having a sentencer consider her youth as *Miller* requires.

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 June 22, 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) 5,575 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