SC 97692

IN THE SUPREME COURT OF MISSOURI

JESSICA HICKLIN,

Appellant,

v.

ERIC SCHMITT, ET AL.,

Respondents.

Reviewing the Decision of the Trial Court - 16AC-CC00182
In the Circuit Court of Cole County
The Hon. Daniel R. Green, Circuit Judge

Following Transfer Grant from Court of Appeals WD Case No. 81291

BRIEF OF *AMICI CURIAE* LAW FACULTY EXPERTS IN THE AREAS OF CRIMINAL, JUVENILE, CIVIL RIGHTS AND PAROLE LAW

SEAN D. O'BRIEN
UMKC School of Law*
500 East 52nd Street
Kansas City, MO 64110
(816) 235-6152
(816) 235-5276 (fax)
obriensd@umkc.edu
Counsel for Amici Curiae

*Institutional affiliation for identification purposes only

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Secondary Sources

STATEMENT OF IDENTITY AND INTEREST[1]

Sean O'Brien, submits this brief on his own behalf and on behalf of the below listed law faculty experts in criminal, juvenile, civil rights and/or parole law as amicus curiae. A Professor of Law at the University of Missouri-Kansas City, Sean O'Brien one of the most respected criminal law experts in the state of Missouri. Professor O'Brien teaches criminal law, criminal procedure, wrongful convictions, and post-conviction remedies. He has also served as the director of various criminal defense clinics at UMKC since 1983, including the Public Defender Appeals Clinic, the Public Defender Trial Clinic, the Death Penalty Representation Clinic, and the Wrongful Convictions Clinic. For the past several years he has actively advanced the rights of youthful offenders in Missouri serving life without parole prison sentences, remains counsel of record of several such youth, and previously represented petitioner Jessica Hicklin in unrelated litigation.

Mae C. Quinn, currently a Visiting Professor of Law at the University of Florida Levin College of Law, previously served as the Director of the Juvenile Rights and Re-Entry Project as a Professor of Law at Washington University School of Law in St. Louis, and as the Inaugural Director of the MacArthur Justice Center in St. Louis. In these prior roles Professor Quinn helped to provide representation to several individual youthful offenders serving life without parole prison sentences in Missouri and lead federal challenges

[1] Unless otherwise indicated, academic or institutional affiliation is provided for identification purposes only and amici join this brief in their individual capacities.

to existing Missouri Parole Board practices, including its handling of juvenile life without parole review matters under SB590. Professor Quinn no longer serves as counsel of record in any Missouri juvenile life without parole-related matters.

University of Florida Levin College of Law students Ebony Love and David Walsh assisted Professor Quinn in editing this brief. This brief also benefited from editorial support from University of Florida undergraduate students Brendon Keeler, Callie Sellers, Zachary Brookmyer, Samantha Srebnick, Samuel Brodigan, Aastha Sinha, Tina Bhatt, Yesha Shah, Alexa Riley, William Grossman, Marlee Anctil, Nina Hodges, Natasha Rivera, and Hannah Collins.

Valena Beety currently teaches Criminal Law, Criminal Procedure, and Post-Conviction Remedies at Arizona State University Sandra Day O'Connor College of Law. She also serves as the Deputy Director for the school's Academy for Justice. Previously, she founded and directed the West Virginia Innocence Project, and represented juveniles sentenced to life without parole in West Virginia at their first parole hearings post *Miller v. Alabama*. She is an expert in the fields of criminal law, procedure, prison and parole law.

Jenny Carroll is the Wiggins, Child, Quinn & Pantazis Professor of Law at the University of Alabama, School of Law. Currently the Chair of the American Association of Law School's Section on Criminal Justice, Professor Carroll is an expert in the areas of criminal law and procedure and juvenile justice. Her influential scholarship in these field has been cited extensively. In addition, she has been appointed Chair of the Alabama State Advisory Committee to the U.S. Commission on Civil Rights. Before becoming a tenured

faculty member at the University of Alabama, Professor Carroll represented accused youth and adults as a public defender in Washington state and an E. Barrett Prettyman Fellow at Georgetown Law Center's Criminal Justice Clinic.

Douglas Colbert is a Professor of Law at the University of Maryland Carey School of Law. He is an expert in criminal justice matters and has published many law review articles relied upon by advocates and academics alike. Professor Colbert has taught a range of courses including Criminal Law, Criminal Procedure, and Race, Law, and Criminal Justice. He has also led access to justice initiatives for incarcerated persons in Maryland and beyond, including through successful bail reform litigation efforts and law student representation trips to New Orleans post-Katrina.

Nora V. Demleitner is the Roy L. Steinheimer Jr. Professor of Law at Washington and Lee University in Virginia. Her academic research focuses on criminal justice, sentencing, and post-sentence collateral consequences. She has authored over sixty law review articles, is the lead author of *Sentencing Law and Policy* (Wolters Kluwer), the leading casebook in the field, and serves an editor of the *Federal Sentencing Reporter*. She is an elected member of the American Law Institute, the European Law Institute, and the International Academy of Comparative Law. She is a member of the board of the Prison Policy Initiative and the Collateral Consequences Resource Center.

Tigran Eldred is a Professor of Law at New England Law | Boston. He writes about criminal law and procedure, legal ethics, and access to justice issues, including the right to effective assistance of counsel. He has served as counsel of record on behalf of countless

imprisoned indigent defendants in the state and federal criminal justice system at trial, sentencing, and on appeal, in addition to consulting with law enforcement and other justice system stakeholders domestically and abroad.

Barbara Fedders is an Assistant Professor of Law and Director of the Youth Justice Clinic. A well-respected scholar, she is an expert in criminal law and procedure, juvenile justice, and courtroom practice, whose work has been published in the nation's leading law reviews. Professor Fedders has received honors and awards relating to her teaching and training of juvenile defense attorneys, including being recognized by the National Juvenile Defender Center as an expert on best practices in the field.

Martin Guggenheim is the Fiorello LaGuardia Professor of Clinical Law at NYU School of Law and one of the nation's foremost experts on children's rights and family law. He has taught at NYU Law, where he now co-directs the Family Defense Clinic, since 1973. From 1998 to 2002 he was director of Clinical and Advocacy Programs at NYU and the Executive Director of Washington Square Legal Services, Inc. from 1987 to 2000. For 15 years, he taught the Juvenile Rights Clinic in which students represented accused juvenile delinquents in New York's Family Court. Professor Guggenheim has been an active litigator in the area of children and the law and argued leading cases on juvenile delinquency and family rights in the United States Supreme Court. He is also a well-known scholar, having published more than 50 articles and book chapters, plus six books.

Randy Hertz is the Vice Dean of N.Y.U. School of Law and the director of the law school's clinical program. He has been at the law school since 1985, and teaches the Juvenile Defender Clinic, first-year Criminal Law, and a simulation course titled "Criminal Litigation." Before joining the N.Y.U. faculty, he worked at the Public Defender Service for the District of Columbia, in the juvenile, criminal, appellate and special litigation divisions. He writes in the areas of criminal and juvenile justice and is the co-author, with Professor James Liebman of Columbia Law School, of a two-volume treatise titled "Federal Habeas Corpus Law and Practice"; the co-author, with Professor Anthony G. Amsterdam of N.Y.U. Law School, of "Trial Manual for the Defense of Criminal Cases"; and the co-author, with Professor Amsterdam and N.Y.U. Law Professor Martin Guggenheim, of "Trial Manual for Defense Attorneys in Juvenile Delinquency Cases." He is an editor-in-chief of the *Clinical Law Review* and has received awards for his law and advocacy leadership, including the American Bar Association's Livingston Hall award for advocacy in the juvenile justice field in 2000.

Paul Holland is an Associate Professor at Seattle University School of Law, where he teaches the Youth Advocacy Clinic, representing clients charged as offenders in juvenile court. He has taught in clinical programs representing adolescent clients since 1993, serving on the faculties at Georgetown University Law Center, Loyola University (Chicago) School of Law, and the University of Michigan Law School. He is the author of *Schooling Miranda: Policing Interrogation in the Twenty–First Century Schoolhouse*, 52 Loy.L.Rev. 39, 1 (2006), one of the earliest works to examine the legal and policy implications of

modern schoolhouse policing practices. He has made numerous presentations at conferences and trainings on the emerging legal and scientific understanding of adolescent development.

Emily Hughes is Associate Dean and Professor and Bouma Fellow in Law at the University of Iowa College of Law, where she focuses on criminal law and procedure, the death penalty, and professional responsibility. Before joining the University of Iowa, Professor Hughes taught criminal law and criminal procedure at Washington University School of Law in Missouri from 2006-2011. At Washington University, she also helped to supervise Washington University's Criminal Justice Clinic, which operates in collaboration with the Saint Louis County office of the Missouri State Public Defender System. She retains an active interest in the development of Missouri law and its impact upon juveniles and criminal defendants.

Michelle Jacobs is a Professor of Law and Assistant Director of the Criminal Justice Center at the University of Florida Levin College of Law. Professor Jacobs teaches Criminal Law, Criminal Procedure, International Criminal Law, Critical Race Theory and a seminar, Criminal Law in the Virtual Context, which examines the ways technological development creates interesting intersections between traditional civil law and criminal law. Her scholarship and public media presentations have contributed to important conversations about criminal justice reform in the United States.

Lea Johnston, University Term Professor of Law at the University of Florida Levin College of Law, is a leading expert on mental health and criminal law and procedure. Her work has appeared in the Washington University Law Review, the Notre Dame

Law Review, the UC Davis Law Review, the Fordham Law Review, the Georgia Law Review, and the Florida Law Review, among others. In 2012, the California Supreme Court quoted Johnston's proposed standard for representational competence and endorsed its use by courts and experts. Her work has been widely cited by legal scholars and appears in leading treatises in criminal law and criminal procedure.

Corinna Lain is the S.D. Roberts and Sandra Moore Professor of Law at the University of Richmond School of Law. An expert in criminal justice and procedure, sentencing and capital punishment, and constitutional law, Professor Lain's scholarship, which often uses the lens of legal history, has appeared in the *Stanford Law Review, University of Pennsylvania Law Review*, *Duke Law Journal*, *UCLA Law Review*, and *Georgetown Law Journal*, among other venues. Professor Lain is a member of the American Law Institute, and received the University of Richmond's Distinguished Educator Award in 2006.

Shobha L. Mahadev is a Clinical Associate Professor of Law at the Children and Family Justice Center (CFJC) at Northwestern Pritzker School of Law. Professor Mahadev represents children in juvenile court, as well as adults convicted for offenses that occurred in their youth. She also serves as the project director for the Illinois Coalition for the Fair Sentencing of Children, which is housed in the CFJC, and oversees policy and litigation strategy with respect to advocating for fair laws for children and youth sentenced to life-without-parole and other lengthy sentences. Professor Mahadev has represented individuals in post-conviction, appellate, and resentencing proceedings held pursuant to the U.S. Supreme Court's decisions in *Miller v. Alabama* and *Montgomery v. Louisiana*.

Deborah Jones Merritt is the John Deaver Drinko-Baker & Hostetler Chair in Law at The Ohio State University Moritz College of Law, with additional appointments on the faculties of sociology, public policy, and women's, gender, and sexuality studies. Before joining the academy, Professor Merritt clerked for Judge (now Justice) Ruth Bader Ginsburg on the Court of Appeals for the District of Columbia Circuit and for Justice Sandra Day O'Connor on the Supreme Court of the United States. Professor Merritt has also been called upon to serve as counsel of record before the United States Supreme Court. A prolific scholar and award-winning professor, she teaches and writes in the areas of civil rights and civil liberties, criminal law and justice, courtroom practice and evidence.

Pamela Metzger is Director of the Deason Criminal Justice Reform Center and a Professor of Law at the SMU Dedman School of Law. A nationally recognized Sixth Amendment and ethics scholar, Professor Metzger's scholarship has appeared in publications such as the *Yale Law Journal*, *Vanderbilt Law Review*, *Southern California Law Review* and *Northwestern University Law Review*, and has been widely cited by leading authorities and by the U.S. Supreme Court. She is well-known for working round-the-clock work to help 8,000 indigent defendants left incarcerated without legal representation after Hurricane Katrina devastated New Orleans in 2005.

Eric J. Miller is a Professor of Law and Leo J. O'Brien Fellow at Loyola Law School – Los Angeles, where he focuses on criminal law, criminal procedure, and race. Before joining Loyola Law, Professor Miller taught criminal law and criminal procedure at Saint Louis University School of Law in Missouri from 2005-2013 and has in the past submitted

testimony to the Missouri Senate regarding their policies on criminal justice. He retains an active interest in the development of Missouri law and its impact upon juveniles.

Perry Moriearty is an Associate Professor of Law at the University of Minnesota Law School, where she teaches criminal law, juvenile justice and co-directs the Child Advocacy & Juvenile Justice Clinic. Professor Moriearty is a national expert on juvenile sentencing and policy, with a focus on juvenile life without parole based on her research and practice. Her scholarship has been cited in numerous publications and legal decisions. She is also a co-author with Professor Barry Feld of a leading juvenile justice casebook.

Jane Murphy is the Laurence M. Katz Professor of Law at the University of Baltimore School of Law where she also serves as Director of Juvenile Justice Project and Co-Director of the Mediation Clinic for Families. A well-known scholar-practitioner in the area of youth justice, in 2018 her advocacy work for juvenile lifers in the state of Maryland was recognized by the Alan J. Davis award and the Herbert S. Garten Special Project Award. Professor Murphy joins this brief on behalf of interests of clients represented by the University of Baltimore School of Law's Juvenile Justice Project.

Kenneth Nunn is the Associate Director of the Center on Children and Families at UF Law and the Assistant Director of the Criminal Justice Center. His teaching and scholarship expertise lies in the fields of Criminal Law, Criminal Procedure, Race Relations and the Law, Police Brutality, Race and the Criminal Process, Cultural Studies, and African and African-centered thought. Nunn has published a variety of written works, includ-

ing several book chapters and various articles on topics such as race, diversity, critical theories and human injustice. He was a member of the Florida Innocence Commission that was established to suggest changes in Florida law to avoid wrongful convictions

Michael Pinard is the Francis & Harriet Iglehart Professor of Law and Co-Director of the Clinical Law Program at the University of Maryland Francis King Carey School of Law. He teaches the Youth, Education, and Justice Clinic, which works with schoolchildren who have been excluded from school through expulsion, suspension and other means. The clinic also works with individuals who are serving life sentences in Maryland for crimes committed as children and who continue to seek release from incarceration.

Katheryn Russell-Brown is the Levin, Mabie & Levin Professor and Director of the Center for the Study of Race and Race Relations at the University of Florida, Levin College of Law. Professor Russell-Brown teaches, researches, and writes on issues of race and crime and the sociology of law. In addition to holding a law degree from the University of California, Hastings, Professor Russell-Brown earned a Ph.D. in criminology from the University of Maryland. Her article, "The Constitutionality of Jury Override in Alabama Death Penalty Cases," was cited in the U.S. Supreme Court decision, *Harris v. Alabama* (1995), and she has written several important texts on criminal law.

Jane M. Spinak is the Edward Ross Aranow Clinical Professor of Law at Columbia Law School. She co-founded the school's Child Advocacy and Family Advocacy Clinics, and currently directs the Adolescent Representation Clinic, which represents adolescents and young adults aging out of foster care, including 18-21 year olds under the jurisdiction

of the Family Court. During the mid-1990s, Spinak served as Attorney-in-Charge of the Juvenile Rights Division of the Legal Aid Society of New York City. In 2002, she became the founding Chair of the Board of the Center for Family Representation. Spinak is a member of the New York State Permanent Judicial Commission on Justice for Children and co-chaired a recent Task Force on the Future of the Family Court.

Kele Stewart is the Associate Dean for Experiential Learning, Professor of Law, and Co-Director, Children & Youth Law Clinic at the University of Miami School of Law. In the clinic, Associate Dean Stewart supervises students who handle cases involving abused, abandoned and neglected children. She also teaches courses on family and juvenile law and legal practice, and writes extensively in the areas of child welfare, children's rights and clinical education. Known as a national and international expert on the rights of youth, in 2011-2012, she received a Fulbright Scholar award to study the child protection system in her native country Trinidad & Tobago.

Madalyn K. Wasilczuk directs the Juvenile Defense Clinic at Louisiana State University Paul M. Hebert Law Center. In the clinic, Professor Wasilczuk and her students represent young people in East Baton Rouge Juvenile Court. Prior to joining the LSU faculty, she was a clinical teaching fellow at Cornell Law School, litigating and teaching as part of the Center on the Death Penalty Worldwide. Before she began teaching, Professor Wasilczuk practiced at the Defender Association of Philadelphia. As an International Legal Foundation fellow, Professor Wasilczuk has also trained juvenile public defenders and

other legal system stakeholders in Myanmar and Tunisia on adolescent development and best practices in juvenile defense.

Erika Wilson is the Director of Clinical Programs in addition to serving as an Associate Professor of Law and the Thomas Willis Lambeth Distinguished Chair in Public Policy at the University of North Carolina School of Law. Professor Wilson is a well-known scholar who teaches and writes in the areas of civil rights, social justice, and critical race theory. Previously an attorney with the Lawyers Committee for Civil Rights, as well as Arnold and Porter, she currently focuses on the educational and other rights of youth in her scholarship and clinical work.

CONSENT OF THE PARTIES

Counsel for Appellant Jessica Hicklin and Respondent State of Missouri have consented to the filing of this brief.

SUMMARY OF THE ARGUMENT

In the United States, convicted criminal defendants are expected to be sentenced in a court of law.[2] This is more than some theoretical principle. It is a truism embedded in the conscience and culture of our country. Yet with Section 558.047 of the Missouri Revised Statutes, part of the alleged "*Miller* fix" created by way of Missouri Senate Bill 590 (SB 590) in 2016, the Missouri legislature has attempted to do away with courtroom sentencing for an entire class of criminal defendants – those entitled to sentence relief under *Miller v. Alabama*, 567 U.S. 460 (2012).

Instead, it has asked the Missouri Parole Board to step in to decide criminal penalties for youthful offenders, like Jessica Hicklin, without first affording them lawful judicial branch sentencing proceedings and sentences. But in *Miller*, the United States Supreme Court outlawed automatic juvenile life-without-parole sentences, requiring immaturity and youthful characteristics to be considered in a meaningful proceeding before such penalties could be imposed. *Id.* at 470. Moreover, it made clear that a life-without-parole sentence—the worst that may be imposed upon any child—was to be incredibly rare in this country and allowed only when a young person was shown to be "irreparabl[y] corrupt[]." *Id.* at 479–80.

---

[2] The arguments in this brief are largely drawn from a recent law review article written by one of the amicus curiae. *See* Mae C. Quinn, *Constitutionally Incapable: Parole Boards as Sentencing Courts*, 72 SMU LAW REVIEW 565 (2019).

The "parole board punishment" process created by SB 590 presents a shocking departure. But allowing a Missouri executive branch body to serve unilaterally as sole decider of penalty terms—up to and including life without parole—is more than highly unusual. It is problematic as a matter of law, policy, and precedent. Failing to take action to preclude such practices could result in serious consequences for Missouri, not just in *Miller*-matters, but beyond.

Historically, parole officials in Missouri and elsewhere have played a limited mercy-granting role focused narrowly on the issue of inmate rehabilitation. That, however, was on the back end of the punishment process after the sentence was formally imposed by way of final court judgment. As executive branch actors, they have not been called upon to entirely displace the judicial branch to serve both as front-end penalty adjudicators responsible for proportionality, narrowing, and mitigation assessments, as well as early-release gatekeepers evaluating reform and risk.

In fact, parole-grant determinations are seen as highly informal proceedings, made behind closed doors, without court-level due process protections or even involvement of defense counsel. And the interests, roles, and experiences of parole agency officials are far different from the legally-trained judiciary that oversees court-based penalty processes. Permitting parole board displacement of sentencing courts in Missouri *Miller*-matters, over the objection of individual impacted youthful offenders, is not just inadvisable but unconstitutional. It is also poor public policy that could have long-term, wide-reaching negative implications for Missouri's criminal justice system.

For all these reasons, amici urge this Court to afford Missouri's *Miller*-impacted inmates the right to sentencing hearings in courts of law, if they so desire. Not only does this respect the constitutional rights of these youthful offenders, but also will protect against the Missouri Parole Board from automatically being used as a kind of "second best" sentencing court in other criminal cases in the future. *Cf.* William Ortman, *Second-Best Criminal Justice*, 96 WASH. U. L. REV. 1061 (2019).[3]

ARGUMENT

I. *MILLER* AND *MONTGOMERY* DO NOT ESTABLISH THAT THE MISSOURI PAROLE BOARD CAN UNILATERALLY DISPLACE THE STATE'S JUDICIAL BRANCH AS SENTENCING AUTHORITY.

Missouri SB 590 improperly vested the Missouri Parole Board with judicial authority that it does not possess. Neither the federal nor state Constitution, nor Supreme Court jurisprudence relating to youthful offender sentencing, provide for executive branch parole

[3] Of course, another alternative would be for state stakeholders to finally come together and agree to release all *Miller*-impacted inmates—once they have served somewhere between fifteen to twenty-five years of incarceration. Such a term reflects the emerging consensus of what constitutes an appropriately lengthy sanction for youthful transgressions, even in the case of causing death. This would avoid wasting further time, energy, and words – along with productive years in the lives of reformed Missouri youthful offenders.

boards to entirely displace the judicial branch as constitutional sentencing body. And nothing in *Miller v. Alabama* or *Montgomery v. Louisiana* permits states to unilaterally deny youthful offenders lawful sentencing proceedings in a court of law when such process is requested.

A. *MILLER V. ALABAMA*

Beginning in 2005, the Supreme Court handed down a series of decisions establishing that youth are different from adults for purposes of sentencing. *Miller*, 567 U.S. at 471 (noting that children are categorically different from adults for purpose of sentencing); *see also Graham v. Florida*, 560 U.S. 48, 68 (2010); *Roper v. Simmons*, 543 U.S. 551, 569 (2005); Mae C. Quinn, *Introduction: Evolving Standards in Juvenile Justice from* Gault *to* Graham *and Beyond*, 38 WASH. U. J.L. & POL'Y 1, 12–13 (2012).

Drawing on biological and social science developments—as well as past precedent and the common-sense experiences of parents—the Court explained that adolescent brains are different from those of fully-grown defendants. *See generally* Kristin Henning, *Juvenile Justice After* Graham v. Florida*: Keeping Due Process, Autonomy, and Paternalism in Balance*, 38 WASH. U. J.L. & POL'Y 17, 23–25 (2012); Perry L. Moriearty, *The Trilogy and Beyond*, 62 S.D. L. REV. 539, 545–46 (2017).

As a result, youth are now considered categorically less culpable than adults in criminal matters. *See* Mae C. Quinn, *In Loco Juvenile Justice: Minors in Munis, Cash from Kids, and Adolescent Pro Se Advocacy—Ferguson and Beyond*, 2015 B.Y.U. L. REV. 1247, 1299–1302 (2015). Youth do not fully appreciate risks, are more susceptible to negative influences and pressures, and do not understand the consequences of their actions

in the same way as adults. *See Miller*, 567 U.S. at 490 (Breyer, J., concurring); *Graham*, 560 U.S. at 68; *Roper*, 543 U.S. at 569–70. They are also more amenable to rehabilitation since they change over time and grow out of their immaturity and risk-seeking conduct. *See Miller*, 567 U.S. at 472, 477; *Graham*, 560 U.S. at 72–74; *Roper*, 543 U.S. at 571. Relying on these findings, the Court substantively restricted juvenile sentences in a range of ways.

As this Court knows, in 2005, in *Roper v. Simmons*, the Court struck down capital punishment for children. *Roper*, 543 U.S at 568; *see* Quinn, *Evolving Standards*, at 12. The Court held that their still evolving moral compasses and transitory traits made youth "categorically less culpable" than adults, requiring states to exempt them from the country's most serious criminal sanction available for adults: the death penalty. *Roper*, 543 U.S. at 567–70 (quoting *Atkins v. Virginia*, 536 U.S. 304, 316 (2002)); *see* Quinn, *Evolving Standards*, at 12.

In 2010, in *Graham v. Florida*, the Court created another sentencing ban for youth, holding that children who do not intentionally kill cannot be sentenced to a prison term of life without parole. *Graham*, 560 U.S. at 82; *see also* Henning, at 17. The Court noted that a life-without-parole sentence, "the second most severe penalty permitted by law," was the most serious punishment a child could face. *Graham*, 560 U.S. at 69 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring)). Thus, "likening life-without-parole sentences imposed on juveniles to the death penalty itself," the Court in *Graham* applied heightened proportionality analysis to categorically narrow the universe

of youth who could potentially receive death-behind-bars sentences. *See Miller*, 567 U.S. at 474–75 (describing the holding in *Graham*); *see also Graham*, 560 U.S. at 48, 75, 82.

In 2012, the Court decided *Miller v. Alabama*, which struck down mandatory life-without-parole prison terms for young people—even those who intentionally kill. *See Miller*, 567 U.S. at 489. It reiterated that only "the rare juvenile offender whose crime reflects irreparable corruption," rather than "transient immaturity," should be eligible for life without parole. *Id.* at 479–80. It explained that it "viewed this ultimate penalty for juveniles as akin to the death penalty," as for them it was the "most severe punishment" available under law. *Id.* at 475. A careful narrowing and proportionality process would be needed, as in death penalty cases, to demonstrate the harshest available sentence could be imposed. *Id.* at 476.

Miller also made clear that a child's circumstances, including mitigating factors relating to youth, had to be considered and evaluated in an individualized sentencing process. This would need to occur before a child defendant could be deemed beyond reach such that "irrevocably sentencing them to a lifetime in prison" was appropriate. *Id.* at 480. Accordingly, it reversed the state court judgment that upheld Miller's sentence. *See id.* at 489. It did the same for Kuntrell Jackson, the defendant in the companion case to *Miller*. *Id.* Both defendants were remanded for new sentencing hearings in their respective state trial courts. *See* Matt Smith, *Evan Miller Offers Apology as Resentencing Hearing Wraps*, JUV. JUST. INFO. EXCHANGE (Mar. 15, 2017), http://jjie.org/2017/03/15/brain-science-prison-staff-warden-take-stand-in-evan-miller-resentencing-trial; *see also* Associated Press, *Arkansas Court to Hear Case on Past Juvenile Life Sentences*, KUAR ONLINE (Apr. 14, 2015),

https://www.ualrpublicradio.org/post/arkansas-court-hear-case-past-juvenile-life-sentences.

B. *MONTGOMERY V. LOUISIANA*

States that had automatic juvenile-life-without-parole sentences on their books responded to *Miller* in a range of ways. *See generally* Beth Caldwell, *Creating Meaningful Opportunities for Release:* Graham*,* Miller *and California's Youth Offender Parole Hearings*, 40 N.Y.U. REV. L. & SOC. CHANGE 245 (2016); Joshua Rovner, *Slow to Act: State Responses to 2012 Supreme Court Mandate on Life Without Parole*, SENT'G PROJECT (June 25, 2014), https://www.sentencingproject.org/wp-content/uploads/2015/11/Slow-to-Act-State-Responses-to-Miller.pdf.

As for past cases where automatic death-behind-bars prison terms were already imposed, responses also varied. Sarah French Russell & Tracy L. Denholtz, *Procedures for Proportionate Sentences: The Next Wave of Eighth Amendment Noncapital Litigation,* 48 CONN. L. REV. 1121, 1137–39 (2016). Some jurisdictions quickly held that *Miller*-impacted inmates needed to be remanded to trial courts for constitutional resentencing, as it occurred in the cases of Miller and Jackson. *See, e.g.*, Robert S. Chang et al., *Evading* Miller, 39 SEATTLE U. L. REV. 85, 92-93 (2015); *see also People v. Davis*, 6 N.E.3d 709, 723 (Ill. 2014) ("We remand for a new sentencing hearing, where the trial court may consider all permissible sentences."). Others held that *Miller* should not be applied retroactively to past cases because *Miller* was a procedural decision under *Teague v. Lane* and did not announce a new substantive criminal law rule. *See generally Teague v. Lane*, 489 U.S. 288 (1989); Rovner*, Slow to Act*.

Missouri, however, was among a third group of states that declined to act until the Supreme Court took action to address the question of *Miller*'s retrospective application. *See Missouri's Failure to Act on Juvenile Life Terms Could Have Expensive Consequences*, ST. LOUIS POST-DISPATCH (Oct. 25, 2015).[4]

In 2016, in *Montgomery v. Louisiana*, the Court finally held that *Miller* applied retroactively to the over 2,000 youth incarcerated under mandatory life-without-parole judgments and orders. *See Montgomery v. Louisiana*, 136 S. Ct. 718, 732–36 (2016). Writing for the majority, Justice Kennedy addressed the main substantive issue before the Court:

> The Court now holds that *Miller* announced a substantive rule of constitutional law. The conclusion that *Miller* states a substantive rule comports with the principles that informed *Teague*. . . . *Miller*'s conclusion that the sentence of life without parole is disproportionate for the vast majority of juvenile offenders raises a grave risk that many are being held in violation of the Constitution.

Id. at 736.

The Court posited that, "[a]fter *Miller*, it will be the rare juvenile offender who can receive that same sentence." *Id.* at 734. Justice Kennedy further clarified that *Miller* also

[4] For the sake of length, parallel web citations generally have not been used in this brief.

impacted sentencing procedures. Specifically, it demanded a specialized approach to individualization to protect against disproportionality in the cases of juvenile offenders:

> To be sure, *Miller*'s holding has a procedural component. *Miller* requires a sentencer to consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence. . . . The procedure *Miller* prescribes is . . . . [a] hearing where "youth and its attendant characteristics" are considered as sentencing factors [and] is necessary to separate those juveniles who may be sentenced to life without parole from those who may not. The hearing does not replace but rather gives effect to *Miller*'s substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity.

Montgomery, 136 S. Ct. at 734–35 (internal citations omitted).

Youth previously given mandatory life-without-parole sentences were, thus, entitled to relief. *See id*. at 736–37. Defendant Montgomery, like Miller and Jackson, had his case remanded and was provided with a resentencing hearing in state court. *See id.*

Notably, the question of remedial process for the other *Miller*-impacted inmates across the country was not before the Court. Yet Justice Kennedy offered a highly unusual suggestion for them, opining that not all would need to return to trial courts for resentencing:

> Giving *Miller* retroactive effect . . . does not require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received

> mandatory life without parole. 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) (juvenile homicide offenders eligible for parole after 25 years)).

Relying on the Wyoming post-*Miller* youthful-offender-parole statute as the Court's only authority, Justice Kennedy continued: "Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment." *Id.*

But such dicta reached beyond the retroactivity issue presented to the Court. It reflects a highly unusual turn in law and has been read to propose a deeply problematic practice: permitting a state executive branch agency to decide in the first instance the appropriate prison sentence in an individual case. Moreover, as further discussed below, such a course of action fails to ensure Justice Kennedy's earlier command—a meaningful process to guarantee youth are very rarely incarcerated for their lifetime.

In fact, most states with *Miller*-impacted inmates in need of relief – including Wyoming – did not embrace this approach. *See, e.g.*, *Harris v. State*, 547 S.W.3d 64, 70–71 (Ark. 2018) (acknowledging *Montgomery*'s dicta, declining to directly send *Miller*-impacted youthful offender to parole board for review, and instead ordering court resentencing); *see also Stevens v. State*, 422 P.3d 741, 750 (Okla. Crim. App. 2018) (where state

seeks to expose juvenile murderer to life without parole, it must prove beyond a reasonable doubt at a jury sentencing that the defendant is "irreparably corrupt"); Kimberly Thomas, *Random If not "Rare"? The Eighth Amendment Weaknesses of Post*-Miller *Legislation*, 68 S.C. L. REV. 393, 403 (2017) ("Of the states that have passed legislation that still permits life without parole, by far the most common approach has been to change the sentencing hearing itself, instead of, for example, the parole board process.").

Moreover, the 2013 Wyoming provision cited by Justice Kennedy was not expressly retroactive. Joshua Wolfson, *Juvenile Killer Law Won't Change 8 Sentences*, CASPER STAR TRIB., Feb. 25, 2013, at A1, A10. Rather, in 2018, Wyoming's high court sent a *Miller*-related case to the trial court for resentencing and declined to apply its parole statutes retrospectively or to follow the path proposed by Justice Kennedy. *See Davis v. State*, 415 P.3d 666, 677 (Wyo. 2018) (at request of both prosecution and defense, expressly declining to accept Justice Kennedy's proposed "solution" of sending juvenile life without parole matter to the parole board for review before allowing for resentencing hearing in court).

Yet, Missouri became one of only a handful of states that adopted this unorthodox practice, sending *Miller*-impacted defendants directly to executive branch agencies to seek sentencing relief. *See* ASS'N OF PAROLING AUTHS. INT'L & NAT'L INST. OF CORR., A HANDBOOK FOR NEW PAROLE BOARD MEMBERS 25 (Peggy Burke ed., 2003) (noting that "[t]he paroling authority is an executive branch agency"); Associated Press, *A State-by-State Look at Juvenile Life Without Parole*, SEATTLE TIMES (July 30, 2017) (describing related practices in states like Missouri, Connecticut, Massachusetts, and Nevada). And as will be further described, even among these states Missouri is an outlier in terms of the

Parole Board's lack of professional training, any statutory framework guiding their "sentencing" work in *Miller* matters, or court-like features.

C. IMPROPERLY PUNTING TO THE PAROLE BOARD IN MISSOURI

After *Miller* was decided, a collective of Missouri attorneys and law students litigated throughout the courts of this state on behalf of all 100 *Miller*-impacted inmates. [5] They also appeared several times before the legislature to try to bring the state's criminal code into constitutional compliance. This went on for years without success. *Montgomery*.

[5] This collective included more than 100 attorneys; law students; mitigation support experts, law school faculty members such as Sean O'Brien, Mae C. Quinn and Kathryn Pierce; public defenders organized under the leadership of Melinda Pendergraph; private attorneys such as Elizabeth Carlyle and Kent Gipson; Amy Breihan and Jim Wyrsch as pro bono counsel at Bryan Cave; and Matt Knepper, Denyse Jones, and Sarah Zimmerman and other pro bono counsel at Husch Blackwell. This group also engaged during this time with Bryan Stevenson's Equal Justice Initiative, Marcia Levick's Juvenile Law Center, and other national youth-justice organizations, on behalf of Missouri's *Miller*-impacted youthful offenders.

Post-*Montgomery*, amicus curiae Mae Quinn left academia for two years to launch the MacArthur Justice Center at St. Louis (MJC) as its Inaugural Director. MJC further litigated on behalf of Missouri's *Miller*-impacted youthful offenders and continues to do so under the leadership of Amy Breihan.

See, e.g., Jennifer S. Mann, *Juvenile Life Terms Still Up in the Air after Court Case*, ST. LOUIS POST-DISPATCH (Oct. 18, 2015).

Once *Montgomery* was handed down, *Miller*-impacted inmates in Missouri—including Jessica Hicklin, Norman Brown, and others—filed further emergency applications with this Court, urging immediate remand for trial court resentencing. *See generally* Brief of Petitioner Jessica Hicklin, Statement of Facts; *see also* Petitioner's Motion for Summary Judgment & Issuance of Writ of Habeas Corpus at 1, *Brown v. Bowersox*, No. SC 93094 (Mo. Feb. 4, 2016).

In the case of Norman Brown, during the 1990's he had been lured by an older father figure, nearly twice his age, to accompany him during a jewelry store theft in the St. Louis area. Second Amended Complaint for Declaratory & Injunctive Relief at ¶ 128, *Brown v. Precythe*, No. 2:17-cv-04082-NKL (W.D. Mo. Nov. 1, 2017). Tragically, the theft resulted in the shooting death of the store's owner at the hands of the armed adult codefendant. *Id.* at ¶ 129. Yet Brown, an unarmed, non-trigger man—only fifteen years old at the time of the crime—received a mandatory life-without-parole prison term based upon an accessorial liability theory for murder in the first degree, a Class A felony. *Id.* at ¶ 128; *see also* Katie Rose Quandt, *The False Hope of Parole*, OUTLINE (Mar. 8, 2018).

Hicklin, Brown, and the other Missouri *Miller*-impacted inmates argued that, as a result of *Montgomery*, Missouri's mandatory life-without-parole language needed to be struck from the criminal code when applied to their cases. *See, e.g.*, Norman Brown's Second Amended Complaint for Declaratory & Injunctive Relief at ¶ 128. Further, they sought trial court resentencing under Missouri's remaining lawful sentencing provisions for Class

A felonies, which provided for determinate terms of between ten to thirty years' incarceration or, if appropriate given the facts and circumstances, a life sentence with parole eligibility. *See, e.g.*, Norman Brown's Motion for Summary Judgment & Issuance of Writ of Habeas Corpus, at 2; Petition for Writ of Habeas Corpus at 7–9, *Lotts v. Wallace*, No. SC 92831 (Mo. Sept. 7, 2012); *see also* MO. REV. STAT. § 565.020(2) (1993); MO. REV. STAT. § 558.011(1)(1) (1993).

Contrary to the position it is taking currently in the Hicklin matter, after *Montgomery* was decided, the Missouri Attorney General's Office did not oppose petitioners' applications for immediate resentencing. *See, e.g.*, Petition for Writ of Habeas Corpus at 6, *Lotts v. Steele*, No. SC 97025 (Mo. Mar. 13, 2018) (describing how "[t]he State did not file any opposition" to the motions for Summary Judgment filed by Missouri's *Miller*-impacted youthful offenders following the decision in *Montgomery*). Yet, this Court denied their requests.

Instead, it held that all *Miller*-impacted youthful offenders could apply to the Missouri Department of Probation and Parole to seek review of their existing mandatory life-without-parole sentences after serving twenty-five years. *See, e.g.*, Order at 2, *Brown v. Bowersox*, No. SC 93094 (Mo. Mar. 15, 2016). In doing so, no existing judgment or sentence orders were struck. In addition, this Court issued individual orders in each *Miller*-impacted matter extending a somewhat unusual invitation to the Missouri Governor or Legislature to weigh in on the situation. *Id.* ("[P]etitioner shall be eligible to apply for parole after serving 25 years' imprisonment on his sentence of life without parole unless

his sentence is otherwise brought into conformity with *Miller* and *Montgomery* by action of the governor or enactment of necessary legislation.").

Ultimately, the Missouri Legislature accepted this Court's suggestion and hastily passed Senate Bill 590, which was signed into law by Governor Jay Nixon. *See* Kurt Erickson, *Future Unclear for Juvenile Murder Sentencing Changes*, ST. LOUIS POST-DISPATCH (Apr. 27, 2016) (reporting on hurried efforts to enact Missouri Senate Bill 590).

Senate Bill 590 endorsed the framework of having an administrative body—the Missouri Department of Probation and Parole (also known as the Missouri Parole Board)—review the existing mandatory life-without-parole sentences of *Miller*-impacted youthful offenders after they served twenty-five years. *See* S.B. 590, 98th Gen. Assemb., 2d Reg. Sess. (Mo. 2016) (codified at MO. REV. STAT. §§ 558.047, 565.033). On its own motion, this Court then withdrew its prior orders in all individual *Miller* matters, declaring the habeas requests now moot. *See e.g.*, Order, *Brown v. Precythe*, at 3 ("On the Court's own motion, the Court's March 15, 2016, order is vacated. The motion for rehearing is overruled as moot. The petition is denied. See Senate Bill No. 590 . . . .").

Missouri's *Miller*-impacted inmates therefore have been left serving unconstitutional mandatory life-without-parole prison terms—unless and until the state's parole board, as sole adjudicator, somehow decides otherwise.

Since SB590 became law, Missouri's *Miller*-impacted inmates have been challenging its provisions in state and federal proceedings in a range of ways, seeking meaningful relief under *Montgomery*. In addition to asserting ex post facto claims given the new bill's attempt to override existing sentencing laws, *see generally* Paul D. Reingold & Kimberly

Thomas, *Wrong Turn on the Ex Post Facto Clause*, 106 CALIF. L. REV. 593 (2018), they pointed out that the bill improperly delegated legislative power to parole officials who were left without any real term-of-year guidelines or legal standards for sentencing review. Petitioner's Supplement to Motion for Rehearing at 2, *Brown v. Bowersox*, No. SC 93094 (Mo. May 20, 2016) (urging Missouri Supreme Court to remedy the further "confusion and unconstitutionality" created by the passage of Senate Bill 590).

Beyond all of this, Missouri's *Miller*-impacted inmates have repeatedly argued that executive branch Parole Board decision-making cannot entirely displace constitutionally rooted judicial branch sentencing processes—in other words, absent express waiver of such a fundamental right, that they are constitutionally entitled to be sentenced in a court of law. *See, e.g., Brown v. Bowersox*, No. SC 93094 (Mo. 2016), *cert. denied*, 137 S. Ct. 637 (2017); *Polk v. Lewis*, No. SC 96917, 2018 Mo. LEXIS 268 (Mo. July 3, 2018), *cert. denied*, 139 S. Ct. 466 (2018) (advancing similar arguments relating to the right to sentencing before a court); Order, *Lotts v. Steele*, No. SC 97025 (Mo. July 3, 2018) (denying petition for habeas corpus of Equal Justice Initiative, arguing Senate Bill 590, as implemented, denied petitioner his constitutional right to an adversarial sentencing process within a court of law). Yet the Parole Board remains vested with the power to unilaterally displace sentencing courts in post-*Miller* remedy matters in Missouri.

II. COURT-BASED SENTENCING RIGHTS AS FUNDAMENTAL CONSTITUTIONAL GUARANTEE.

Admittedly, neither the Constitution's express language nor the case law interpreting it reference a right to be sentenced in a court of law. Even the Eighth Amendment to the United States Constitution, entitled "Further Guarantees in Criminal Cases" is silent on the issue. Yet for generations, Supreme Court decisions have been written as if this is the case.

This has been so in federal and state matters dating back to the 1800s, and the practice continued throughout the twentieth century as the Court developed its doctrines relating to constitutional sentencing rights and into the present day. *See, e.g., Ex Parte Watkins*, 28 U.S. (1 Pet.) 193, 195–96 (1830); *Dimmick v. Tompkins*, 194 U.S. 540, 549 (1904); *Graham v. West Virginia,* 224 U.S. 616, 627 (1912); *see also Ex Parte United States,* 242 U.S. 27, 41–42 (1916)(noting "Indisputably under our constitutional system the right to try offenses against the criminal laws, and, upon conviction, to impose the punishment provided by law, is judicial, and it is equally to be conceded that, in exerting the powers vested in them on such subject, courts inherently possess ample right to exercise reasonable, that is, judicial, discretion to enable them to wisely exert their authority.")

This narrative of the judicial branch as locus for sentencing was strengthened as the Court announced specific procedural and substantive constitutional rights for state court sentencings under the Incorporation Doctrine. Still, the Court has never formally declared a fundamental constitutional right to sentencing by a court of law.

B. DEVELOPMENT OF CONSTITUTIONAL PROCEDURAL SENTENCING PROTECTIONS

Rather, procedural sentencing rights have emerged over time in the United States by way of individual Supreme Court cases. Taken as a whole, these cases blanket the penalty phase to instantiate court as a constitutional setting. Thus, even if the Court has not explicitly held these rights and protections must be delivered by a court of law—rather than some other government venue—it is clearly assumed. But Missouri *Miller*-impacted inmates are not receiving a lawful court-based sentencing process, or the individual procedural protections outlined below.

1. Due Process and Individualization

Well before the Supreme Court began incorporating specific Bill of Rights' protections into state criminal proceedings, it acknowledged that the Fourteenth Amendment's Due Process Clause created a floor below which local governments could not fall. *Powell v. Texas*, 392 U.S. 514, 536–37 (1968) (describing the benefit of "fruitful experimentation" across states in the field of criminal justice). For instance, in *Williams v. New York*, the "leading ruling on the content of due process as it applies to procedures in traditional discretionary sentencing," the Court acknowledged the need for certain protections during sentencing proceedings. WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 1253 (5th ed. 2009); *Williams v. New York*, 337 U.S. 241, 251 (1949).

In *Williams*, the trial court discounted the jury's life sentence recommendation and instead ordered execution based, at least in part, upon hearsay evidence in a presentence report. *Id.* at 244. The Court, noting the defendant never sought to contest the claims nor

argued they were factually incorrect, found there was no due process violation. *Id.* at 252. However, even as it did so, the Court reiterated its expectation that state punishment proceedings would be handled by the judicial branch, describing the "grave responsibility of fixing sentence[s]" as one belonging to the courts. *Id.* at 251.

Nearly thirty years later in *Gardner v. Florida*, another case raising concerns about a pre-sentence report, the Court vacated a death sentence imposed in violation of due process. 430 U.S. 349, 404–05 (1977) (remanded by a plurality for "further proceedings at the trial court not inconsistent with this opinion"). Unlike *Williams*, the defendant in *Gardner* did not have access to all of the information considered at sentencing. *Id.* at 351. Instead, the judge reviewed information in a pre-sentence report marked "confidential" and kept it from the defendant and his attorney. *Id.* at 353. In reaching its decision, not only did the plurality distinguish *Gardner* from *Williams* on its facts, but it ultimately embraced the "death is different" framework for Eighth Amendment cases that, as discussed, has since been expanded to juvenile sentencing matters. *Id.* at 357-358. It therefore held some level of heightened due process protection was necessary to avoid arbitrary outcomes in cases involving the most serious sentence available. *Gardner*, 430 U.S. at 358. Again, judicial branch sentencing was implied as the norm in this decision for both death and non-death matters.

The Court has also expressly required basic due process protections in non-capital sentencing proceedings. In 1948, in *Townsend v. Burke*, the Court held the state court sentencing process lacked fundamental fairness. 334 U.S. 736, 737–740 (1948). Townsend

was subjected to a hurried guilty plea without access to counsel and then was quickly sentenced. *Id.* at 737–39. During the in-court sentencing colloquy, the trial judge relied on the defendant's alleged past conviction record—ignoring the fact that some information presented was simply incorrect and related to another defendant. *Id.* at 737, 739–40 (addressing the imposition of "two indeterminate sentences, not exceeding 10 to 20 years").

Townsend based his subsequent Supreme Court challenge on the right to counsel. *Id.* at 738–41. However, the Court did not go so far as to find that the Sixth Amendment applied to state criminal sentencing proceedings—something that happened decades later. Instead it found that

> while disadvantaged by lack of counsel, this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result, whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction cannot stand.

Id. at 740–41. This serves as one of the Court's first articulations of the constitutional right to an individualized sentencing determination based upon specific characteristics of the defendant and facts of his case. Due process individualization has been considered in many cases since. *Oyler v. Boles*, 368 U.S. 448, 452 (1962); *Keenan v. Burke*, 342 U.S. 881, 881 (1951) (per curiam); *see also Johnson v. United States*, 135 S. Ct. 2551, 2560 (2015) ("Invoking so shapeless a provision to condemn someone to prison for 15 years to life does not comport with the Constitution's guarantee of due process.").

In all these cases—both capital and non-capital—by repeatedly referencing the role played by trial courts in deciding appropriate punishments, the Supreme Court also advanced the expectation that sentences would be imposed by the judicial branch of government. Over time, the Court has expanded the list of rights afforded at sentencing by way of the incorporation doctrine. Here too, the Court's language and discussions assume sentencing in a courtroom.

2. Critical Stage and Right to Counsel

Starting with *Mempa v. Rhay* in 1967, the Supreme Court held defendants have the right to counsel in state prosecutions at both trial and sentencing. 389 U.S. 128, 137 (1967). Using the Fourteenth Amendment as a bridge to the Sixth Amendment, the Court declared that the post-trial punishment phase is a "critical stage" of the criminal process where an accused facing incarceration must be afforded the "effective assistance of counsel" if requested. *Gideon v. Wainwright*, 372 U.S. 335, 342–44 (1963); *see also* Mae C. Quinn, *Giving Kids Their Due: Theorizing a Modern Fourteenth Framework for Juvenile Defense Representation*, 99 IOWA L. REV. 2185, 2199 (2014). The Court went on:

> [T]he necessity for the aid of counsel in marshaling the facts, introducing evidence of mitigating circumstances and in general aiding and assisting the defendant to present his case as to sentence is apparent.

Mempa, 389 U.S. at 135. In this way, criminal defendants in state-level sentencing cases are now entitled to the same right of court-appointed counsel as those involved in Article III federal court punishment proceedings. *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972);

see also Iowa v. Tovar, 541 U.S. 77, 80–81 (2004); *Scott v. Illinois*, 440 U.S. 367, 373–74 (1979).

Mempa involved two Washington state probation revocation matters. *Mempa*, 389 U.S. at 136–37. Petitioners pleaded guilty and were placed on probation with imprisonment deferred. Id. However, because of alleged violations, they were brought before the court without counsel and had their deferred term-of-years sentences summarily imposed. *Id.* The probation revocation and sentencing occurred in a court of law and was not administratively determined or imposed by Washington's executive branch probation agency. *Id.* Moreover, when the Court later held that *Mempa* established a retroactive rule, it remanded similar matters so that the defendants in those cases could avail themselves of resentencing proceedings in a court with the assistance of counsel. *McConnell v. Rhay*, 393 U.S. 2, 3–4 (1968).

In the *Gardner* death penalty case described above, which the Court took up a decade after *Mempa*, it not only demanded due process fairness but also reaffirmed its commitment to representation rights during sentencing. *Gardner v. Florida*, 430 U.S. 349, 357–58 (1977). Since portions of the presentence report had been withheld from defense counsel, the Court remanded the matter with specific instructions to hold a resentencing hearing where counsel would be allowed to more meaningfully advocate for his client. *Id.* at 362. The Court specifically rejected the possibility of allowing Gardner's original death judgment to stand and have the state appellate court merely review the sentence. *Id.*

During the 1980s, the Court was asked in *Strickland v. Washington* to evaluate representational effectiveness under the Sixth Amendment in the context of a capital murder

matter. 466 U.S. 668, 671 (1984). The Court reinstated a death sentence at the request of the state, finding the record failed to demonstrate deficient attorney performance impacting the outcome of the proceedings. *Id.* at 700–01. Although the accused did not prevail, the Court noted the constitutional significance of the sentencing process, particularly where a defendant faced the most serious penalty allowed by law. *Id.* at 685–87. Specifically, the capital sentencing process was

> like a trial in its adversarial format and . . . that counsel's role in the proceeding is comparable to counsel's role at trial—to ensure that the adversarial testing process works to produce a just result . . . .

Id. *see also* John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 COLUM. L. REV. 1967, 1987 (2005) (noting the Court "took pains to link the world of capital sentencing to the world of trial"); Emily Hughes, *Mitigating Death*, 18 CORNELL J.L. & PUB. POL'Y 337, 352–57 (2009) (describing features of effective assistance of counsel for death-eligible cases). Thus it drew a clear picture of capital sentencing occurring only under the auspices of the judicial branch.

In the non-capital context, the threshold for ineffective representation for sentencing is not as clear. Yet, no Sixth Amendment sentencing decision has ever suggested that incarceration might be imposed outside of the judicial setting. Rather, just as in-court "debate between adversaries is often essential to the truth-seeking function of trials," in all cases meaningful representation should include "giving counsel an opportunity to comment on

facts which may influence the sentencing decision." *Gardner v. Florida*, 430 U.S. 349, 360 (1977).

3. Jury Determinations

The Supreme Court has not imposed an absolute right to jury findings beyond a reasonable doubt at all state sentence proceedings, even where there is a right to jury trial. *Jones v. United States*, 526 U.S. 227, 251–52 (1999); *see also United States v. Booker*, 543 U.S. 220, 226 (2005). However, in both state and federal matters, capital and non-capital, the Court has guaranteed a right to jury determination for facts or aggravating circumstances that enhance a jail or prison sentence beyond that ordinarily contemplated by controlling law. For instance, in *Apprendi v. New Jersey*, the Court granted relief after a sentencing judge—and not a jury—made findings of fact that exposed the defendant to a sentence higher than the statutory maximum. 530 U.S. 466, 490 (2000); *see also Jones*, 526 U.S. at 251–52. In addition, the Court held that such sentence enhancement findings—as with any element of a crime—must be proven by the prosecution beyond a reasonable doubt. *Apprendi*, 530 U.S. at 483–84. This differentiates enhancement cases from run-of-the-mill criminal matters where a preponderance standard for contested facts is sufficient. Id. *See generally United States v. Fatico*, 441 F. Supp. 1285 (E.D.N.Y. 1977), *rev'd*, 579 F.2d 707 (2d Cir. 1978).

In *Ring v. Arizona*, the Court further explained that under the Sixth Amendment, a jury—and not a judge—must decide beyond a reasonable doubt whether aggravating factors exist that make a murder case eligible for a death sentence. 536 U.S. 584, 609 (2002). In doing so, the Court invalidated death penalty statutes and sentencing practices in several

states. LINDA E. CARTER & ELLEN KREITZBERG, UNDERSTANDING CAPITAL PUNISHMENT LAW 350–51 (2004).

Here, again, beyond establishing specific procedural requirements, these decisions imply a belief in sentencing as a judicial-branch function—whether it is one to be exercised by judge or jury given the specifics of a given case—and a process that involves a hearing in a court of law. Neither are being provided in *Miller*-remedy cases sent directly to parole boards for penalty review.

B. ESTABLISHMENT OF SUBSTANTIVE CONSTITUTIONAL SENTENCING REQUIREMENTS

The Court has also established a range of substantive rights that apply to state criminal punishments, in addition to procedural protections. Even if these cases do not expressly announce such a requirement, they also rest on a penalty phase process under judicial watch—not executive authority. They also provide further understanding of constitutional protections being denied in *Miller*-sentence review matters that were sent directly to parole boards without in-court resentencing.

1. Cruel, Arbitrary, or Discriminatory

In *Wilkerson v. Utah*, decided in 1878, the Court permitted death by firing squad as ordered by the trial judge because it was consistent with the options provided by statute. *Wilkerson v. Utah*, 99 U.S. 130, 132–33 (1878). But it indicated that acts of "unnecessary cruelty"—such as being "embowelled alive" or "quartered"—would be inconsistent with community norms in the United States at the time. *Id.* at 135–36. In *Furman v. Georgia*, the Court's per curium opinion struck not just one death sentence as unconstitutional but

death sanctions for a group of defendants whose cases were appealed from both Georgia and Texas. 408 U.S. 238, 239–40 (1972) (per curiam). In individual concurring decisions, Justices explained the death sentence schemes in these jurisdictions generated highly arbitrary results. For instance, Justice Douglas noted that their modes of execution might not be "inhuman and barbarous," as described in *Wilkerson*. *Id.* at 241 (Douglas, J., concurring). But, the method for deciding who would be executed lacked the rationality needed to survive a constitutional challenge. *Id.* at 253; *see also* Olivia B. Waxman, *The Story of the Last U.S. Execution Before a Nationwide Moratorium Took Effect 50 Years Ago*, TIME (June 2, 2017).

Outside of the death penalty context, the Court has seldom applied the Eighth Amendment analyses used in *Wilkerson* or *Furman*. However, in *Robinson v. California*, the Court did grant relief for a defendant sentenced to ninety days under a California statute based upon his status as a drug addict. 370 U.S. 660, 667–68 (1962). In his concurring opinion, Justice Douglas explained that imprisonment due to being diseased is the kind of "barbarous action" the Court warned about in past decisions. *Id.* at 675–78 (Douglas, J., concurring) (comparing Robinson's sentence to the "rack and thumbscrew" condemned in earlier Eighth Amendment cases). On the other hand, Justice Harlan's concurrence expressed concern about "arbitrar[iness]" inherent in jailing a drug-addicted person for the passive act of merely being present in a state. *Id.* at 678–79 (Harlan, J., concurring).

These death and non-death cases relating to cruel or arbitrary punishments also demonstrate an embrace of judicial branch criminal penalty determinations. For instance, the *Wilkerson* Court spent a great deal of time describing the actual sentencing hearing held

before "the presiding justice in open court," as wholly consistent with the Constitution. *Wilkerson*, 99 U.S. at 130–31. It further noted "the duty" of describing the mode of punishment "is devolved upon the court authorized to pass the sentence." *Id.* at 137. Similarly, in both *Furman* and *Robinson*, when finding the sentences constitutionally problematic, the Court clearly proceeded on the assumption that any subsequent lawful sentencing processes would need to occur in a court. *Furman v. Georgia*, 408 U.S. 238, 253 (1972) (Douglas, J., concurring) (per curiam) (describing sentencing in the judicial branch); *Robinson*, 370 U.S. at 664 (describing the role of the court in interpreting and applying criminal sentencing laws).

The Court also has held "invidious discrimination" at sentencing violates constitutional equal protection principles. *Williams v. Illinois*, 399 U.S. 235, 242–44 (1970). In 1970, it set aside the incarcerative sentence in *Williams*, where the defendant failed to pay his fine due to indigence. *Id.* at 241. The Court warned that the poor could not be sentenced to longer terms for failure to satisfy their fines. *Id.* at 241–42. To do so would be to create improper classification based upon wealth or lack thereof. *Id.* at 240–41.

To date, the Court has not invalidated a sentence or sentencing scheme based upon racial discrimination. It side-stepped such a finding in *McCleskey v. Kemp*, noting the defendant needed evidence of purposeful discrimination in his case to support an equal protection claim. 481 U.S. 279, 292–93 (1987). Instead, he offered generalized data about the system as a whole. *Id.* at 293. Notably, in both *Williams* and *McCleskey,* the Court assumed that sentencing proceedings would be part of a trial court record and, thus, would be available to review. *Id.* at 255–56.

2. Proportionality and Special Individualization

Finally, under the Eighth Amendment's Cruel and Unusual Punishments Clause, the Court has developed a separate body of law that focuses on the issue of excessiveness of a sanction: proportionality jurisprudence. As previously noted, for years the Court applied two different tests for such matters—one for death penalty cases where the court considered evolving standards of decency, which included bringing its own independent judgment to bear. It used another for non-death cases, where the Court reviewed matters for gross disproportionality with great deference to state sentencing determinations. *Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991); *Solem v. Helm*, 463 U.S. 277, 290 (1983). In both sets of cases, however, it was clear from the context and Court's analyses that the judicial branch was the intended site of sentencing. *Harmelin*, 501 U.S. at 993; *Solem*, 463 U.S. at 283–84.

In extending its evolving standards of decency test outside of the execution arena to cases of youthful offenders, the Court reiterated common understandings of the role of the judiciary at sentencing. In *Miller*, writing for a five-member majority which included Justice Kennedy, Justice Kagan noted:

> *Graham*, *Roper,* and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.

Miller v. Alabama, 567 U.S. 460, 489 (2012). Thus, the Court suggested a specialized individualized narrowing and proportionality approach in juvenile sentencing cases, akin to those applied in death penalty matters. *Id.*

This language in *Miller*, of course, offers a very different vision of penalty assessments than Justice Kennedy's passing parole board proposal in *Montgomery*. Cases decided after *Montgomery* also align with the view that juvenile matters need to be carefully evaluated at the time of sentencing within the judicial branch. *Adams v. Alabama*, for instance, describes specialized sentencing processes in a court of law. 136 S. Ct. 1796 (2016). *Adams* was decided along with several consolidated matters where most of the youthful offenders had initially faced the death penalty, but whose sentences were converted to life without parole after the decision in *Roper*. In all of the cases, certiorari was granted, the judgments were vacated, and the matters were remanded for "further consideration in light of *Montgomery v. Louisiana*." *Id.* at 1796–97.

Justices Sotomayor and Ginsburg, who were part of the majority in *Montgomery*, clarified that even these cases needed to be reviewed anew in courts of law. *Id.* at 1799 (Sotomayor, J., concurring). That is, an "exacting" fact-finding would need to take place in court before any such defendant could be seen as among the rare few for whom future release could be denied. *Id.* There is "no shortcut," Justice Sotomayor wrote, for lower courts weighing "the difficult but essential question whether petitioners are among the very 'rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.'" *Id.* at 1801 (citing *Montgomery*, 136 S. Ct. at 734). Justices Alito and Thomas, who dissented in *Montgomery*, agreed:

> As a result of *Montgomery* and *Miller*, States must now ensure that prisoners serving sentences of life without parole for offenses committed before the

> age of 18 have the benefit of an individualized sentencing procedure that considers their youth and immaturity at the time of the offense.

Id. at 1797 (Alito, J., concurring). This separate concurrence does suggest some juvenile life without parole sentences might be upheld without another resentencing hearing, but that would only occur where the "original sentencing jury fulfilled the individualized sentencing requirement that *Miller* subsequently imposed." *Id.* at 1798.

Such recent recommitment to courtroom penalty phase proceedings renders Justice Kennedy's suggestion—that parole proceedings might replace court sentencing in at least some *Miller*-remedy cases—even more puzzling. When further contextualized within the historically limited role and ongoing problematic activities of parole boards, it becomes even more apparent they are patently incapable of displacing sentencing courts in *Miller* cases or any other criminal imprisonment matters.

C. MISSOURI REQUIREMENTS OF COURT-BASED SENTENCING

Historically Missouri has not only embraced all of the federal constitutional sentencing requirements reflected in aforementioned Supreme Court decisions but, arguably, has been even clearer in its commitment to court-based sentencing as a fundamental right in criminal cases. *See, e.g.,* MO. CONST., Art. V, Section 14 (granting circuit courts original jurisdiction in all criminal matters); *see also State v. Lindsey*, 996 S.W.2d 577, 579 (Mo. App. W.D. 1999)(describing the fundamental duty of sentencing courts in Missouri to make a "case by case, defendant by defendant" assessment for each individual facing punishment); MO. R. CRIM. PRO. 29.03; 29.07.

Indeed, the Missouri Supreme Court has held "it is error for the trial court to inform the jury that the sentence imposed by its verdict may be diminished by parole or some similar procedure not administered by the judicial branch of government." *State v. Cornett*, 381 S.W. 2d 878, 881 (Mo. 1964). This further implies sentencing in Missouri is exclusively a judicial branch function rather than the executive branch, which oversees parole.

III. MISSOURI PAROLE BOARD AS LIMITED AND LARGELY EXTRA-LEGAL EXECUTIVE BRANCH AGENCY.

A. ESTABLISHMENT OF THE EXECUTIVE BRANCH MERCY FUNCTION

Our federal tripartite system of government dates back to the colonial era. *The Federalist Papers* provide that the federal legislature, judiciary, and elected executive should each have separate designated tasks. THE FEDERALIST NO. 47, at 245 (James Madison) (Ian Shapiro ed., 2009). This was meant to protect against many of the abuses that occurred in common law England, which included overreach by the crown. *Id.* at 247. The monarchy at times exerted absolutist control over the British court system, leading at times to an imposition of overly harsh and horrific punishments for those who dared to dissent. *Harmelin v. Michigan*, 501 U.S. 957, 967–68 (1991).

The Federalist Papers thus articulated an extremely restricted role for the federal executive branch when it came to criminal sanctions—intervening after a penalty was imposed only to grant reprieves or pardons as a form of benevolence and mercy. THE FEDERALIST NO. 74 (Alexander Hamilton); *see also* Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 TEX. L. REV. 569, 589–95 (1991). These ideas were largely formalized in Article II, Section 2 of the Constitution,

which provides the president with power to grant reprieves or pardons in federal criminal cases. But this provision makes clear that executive intervention is solely for the purpose of softening or reducing a given sentence, not to impose a penalty or expand it.

As further discussed below, individual states have not been required to comply with Article I, II, and III separation-of-powers principles. *See* Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1188 (1999) ("Despite the Federalist views of separation of powers, the U.S. Constitution fails to dictate a specific form of separation of powers for state governments."). Yet, most jurisdictions have adopted the same tripartite system, with state judicial branches serving as sentencing entities and governors as executive actors having power to grant clemency from harsh determinate sanctions. *See, e.g.* John Devlin, *Toward a State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions*, 66 TEMP. L. REV. 1205, 1219–21 (1993). This includes Missouri. *See generally* MO. CONST.

B. LIMITED POWER ALLOCATED TO PAROLE BOARDS GENERALLY

At the start of the twentieth century, indeterminate sentencing was introduced as a new method of sanction to allow for greater focus on defendant rehabilitation. *See* Katherine Puzauskas & Kevin Morrow, *No Indeterminate Sentencing Without Parole*, 44 OHIO N.U. L. REV. 263, 266 (2018). Under this new model, rather than select a set term of imprisonment—such as three years—courts were called upon to impose an appropriate sentencing range—such as three to twenty years' incarceration. Richard A. Bierschbach, *Proportionality and Parole*, 160 U. PA. L. REV. 1745, 1750–51 (2018) (describing shift from

retributive system to one that allowed for more utilitarian concerns, like rehabilitation, by way of indeterminate sentences). This resulted in the birth of parole and parole boards as executive branch agencies becoming involved on the back end of punishment process. Matthew Drecun, Note, *Cruel and Unusual Parole*, 95 TEX. L. REV. 707, 709 (2017) (indicating that by 1930, nearly all states and the federal government maintained their own parole systems).

Parole agencies and parole boards were tasked with determining, within the period already imposed by the court, when an inmate should be released from prison. *See e.g.,* Bierschbach, *Proportionality and Parole*, 160 U. PA. L. REV. 1745 at n. 153; Rachel E. Barkow & Kathleen M. O'Neill, *Delegating Punitive Power: The Political Economy of Sentencing Commission and Guidelines Formation*, 84 TEX. L. REV. 1973, 1991 (2006) ("Parole officials also exercised authority over sentencing in these indeterminate regimes, though their authority was derivative of judicial authority. Specifically, while parole officials determined an offender's ultimate release date, the judicial sentence set the parameters within which parole officials operated.").

Such thinking was also applied in life-sentence matters. At least in theory, these decisions were based upon personal progress and defendant rehabilitation, as well as current safety risk. *See* Kimberly Thomas & Paul Reingold, *From Grace to Grids: Rethinking Due Process Protection for Parole*, 170 J. CRIM. L. & CRIMINOLOGY 213, 216–17 (2017) (during "most of the eighteenth and nineteenth centuries, parole as we know it today did not exist"); *see also* Michael Willrich, *The Two Percent Solution: Eugenic Jurisprudence and the Socialization of American Law, 1900-1930*, 16 L. & HIST. REV. 63, 77 (1998).

Despite these supposed benevolent concerns, parole systems drew criticism from the beginning. Puzauskas & Morrow, 44 OHIO N.U. L. REV. 263, at 270–71.

Some state-level parole board models were successfully challenged as legislative encroachments upon the limited right of reprieve granted to governors. *People v. Cummings*, 50 N.W. 310, 311–12 (Mich. 1891); *State ex rel. Bishop v. State Bd. of Corrs*., 52 P. 1090, 1090 (Utah 1898); *In re Conditional Discharge of Convicts*, 51 A. 10, 13 (Vt. 1901). For instance, in 1901, Vermont's governor sought an advisory opinion from the state's high court regarding the legality of the Board of Prison Commissioners, which was established under a new state legislative enactment. *Conditional Discharge of Convicts*, 51 A. at 12. In response, the Vermont Supreme Court found the act unconstitutional under the state separation of powers doctrine. *Id.* at 15. Specifically, it held: "The effect of this act would be to transfer the power of conditional pardon from the governor to the Board of Prison Commissioners, which, as before seen, cannot be done by legislative action . . . ." *Id.* at 12. Similar successful challenges were advanced in Utah and Michigan. *Cummings*, 50 N.W. 310; *Bishop*, 52 P. 1090.

But as such matters percolated up to the Supreme Court, it found they did not implicate the federal Constitution. Puzauskas & Morrow, 44 OHIO N.U. L. REV. 263, at 270–71. Specifically, in 1902, Illinois' system was challenged in *Dryer v. Illinois* for conferring "judicial powers upon a collection of persons who do not belong to the judicial department, and, in effect, invest[ing] them with the pardoning power committed by the constitution to the Governor of the State." 187 U.S. 71, 83–84 (1902). But the Court made clear that states

were free to structure their state governments as they wished. Accordingly, federal separation of powers principles were not deployed to address the issue. *Id.* Parole boards and sentencing courts were left to coexist in the states.

Over the next few decades, both the federal government and individual states tweaked their parole systems in response to legal concerns. Puzauskas & Morrow, 44 OHIO N.U. L. REV. 263, at 271–72. And parole boards became a regular part of the correctional landscape. As a result, many studies and scholars referred to them as working in tandem with courts and playing a significant role in indeterminate sentencing. Jon O. Newman, *Parole Release Decisionmaking and the Sentencing Process*, 84 YALE L.J. 810, 814 (1975) ("Although parole release decisions have been regarded as virtually autonomous from sentencing per se, parole is an integral part of the sentencing and correctional process."). But they remained limited in power—allowed only to discharge defendants from incarceration, not pronounce penalties in the first instance.

Over time the parole system drew further criticism. Edward E. Rhine et al., *The Future of Parole Release*, 46 CRIME & JUST. 279, 279 (2016) ("Starting in the 1970s and continuing through the 1990s, parole boards witnessed a precipitous loss of legitimacy."). For instance, in 1967, the President's Crime Commission documented wide-spread problems of recidivism despite the use of indeterminate sentencing and parole supervision. Puzauskas & Morrow, 44 OHIO N.U. L. REV. 263, at 271. And during the 1970s, "[b]ecause few parole boards had explicit criteria or policies for their release decisions, those decisions were criticized as arbitrary and capricious." A HANDBOOK FOR NEW PAROLE BOARD MEMBERS, at 5 ("It was asserted that these decisions were driven more by the individual

prejudices and idiosyncrasies of board members than by research-based predictions of parole success."). Data demonstrated the agencies were producing vast differences among similar cases, including racial disparities in release outcomes. Dhammika Dharmapala et al., *Legislatures, Judges, and Parole Boards: The Allocation of Discretion Under Determinate Sentencing*, 62 FLA. L. REV. 1037, 1042–43 (2010); *see also* Puzauskas & Morrow, 44 OHIO N.U. L. REV. 263, at 271.

It seemed everyone from attorneys to academics to religious organizations believed that, overall, the parole model undermined fairness in the punishment process. Anne M. Heinz et al., *Sentencing by Parole Board: An Evaluation*, 67 J. CRIM. L. & CRIMINOLOGY 1 (1976) (cataloging complaints about parole boards from various groups). This led to further litigation relating to parole boards.

C. DE-COURTIFICATION OF STATE PAROLE BOARDS

In contrast to earlier litigation that challenged the existence of parole boards, by the 1970s cases attacked their increasingly lax processes. But rather than correct what was seen as growing irrationality in the parole grant system, the Supreme Court somewhat inscrutably gave state parole agencies greater license to engage in ad hoc activities.

Most notably, in *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, the Court acknowledged the largely discretionary nature of the parole grant process that had emerged across the states. *Greenholtz v. Inmates of Nebraska*, 442 U.S. 1, 7–9 (1979). Rather than rein in such activities, the Court held, "There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." *Id.* at 7. Instead, unless the state created a promise of release by way of

statute, an inmate possessed no recognized constitutional "liberty interest" in early discharge. *Id.* at 12.

Significantly, the Court contrasted the informal administrative parole release process with adversarial proceedings where a court decides whether to "convict or confine" a defendant. Accordingly, it noted state parole boards were free to establish whatever system they believed appropriate for their limited roles—including relying exclusively on information in their own files and withholding such "evidence" from inmates under review. *Id.* at 7–12. Nor did states have to provide appointed counsel for such hearings. *Id.* In this way, parole grant "hearings" demanded far fewer formalities and protections than what the Court described just a few years earlier in *Morrissey v. Brewer*, 408 U.S. 471 (1972) and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). Those cases addressed parole board revocation of conditional parole and ending liberty where a rational process was required and the right to counsel presumed. *Greenholtz*, 442 U.S. at 9 ("The fallacy in respondents' position is that parole *release* and parole *revocation* are quite different. There is a crucial distinction between being deprived of a liberty one has, as in parole, and being denied a conditional liberty that one desires.").

D. RECOMMITMENT TO COURTS

As a result of *Greenholtz*, parole board work was essentially split into two very different domains with revocation proceedings requiring heightened protections for defendants while parole grant processes became essentially extra-legal. *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 366–67 (1998) (reiterating informal nature of parole grant

proceedings); Thomas & Reingold, 170 J. CRIM. L. & CRIMINOLOGY 213 at 225–27 (describing recent cases post-*Greenholtz* that arguably increase parole board autonomy); *see also* Victoria Palacios, *Go and Sin No More: Rationality and Release Decisions by Parole Boards*, 45 S.C. L. REV. 567, 578–79 (1994). In fact, some states—like Missouri—revisited their parole laws to remove language and ensure inmates could not argue they had a "liberty interest" in early release. *See Bd. of Pardons v. Allen,* 482 U.S. 369, 378 n.10 (1987) (finding Montana to be an outlying state that retained a parole grant liberty interest while many more states did not); *see also, e.g.*, *Ingrassia v. Purkett*, 985 F.2d 987, 988 (8th Cir. 1993) (noting that Missouri law now provides "almost unlimited discretion" to the parole board, without any "liberty interest" in release for inmates).

Yet other states decided to simply abolish their parole systems, as did the federal government. Rhine et al., 46 CRIME & JUST. at 279. Thus, by the 1980s, determinate sentencing largely came back into vogue. *Id.*; *see also*, Beth Schwartzapfel, *Parole Boards: Problems and Promise*, 28 FED. SENT. R. 79, 80 (2015) (reporting that "truth in sentencing" became a mantra for many during this period). And in many places, sentencing became informed by guidelines that attempted to promote fairness and avoid the unpredictability of the parole process. SENTENCING REFORM IN OVERCROWDED TIMES (Michael Tonry & Kathleen Hatlestad eds., 1997) (collecting essays on emergence of sentencing guidelines schemes across the country and reemergence of determinate sentencing).

For instance, in 1984, the Sentencing Reform Act created the Federal Sentencing Commission (the Commission), which promulgated guidelines to promote proportionality and sentence uniformity. Sentencing Reform Act of 1984, 18 U.S.C. § 3551; 28 U.S.C. §§

991–998. But while the Commission had a great deal of power, the trial court remained the locus of sentencing. *See e.g.*, *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1342 (2016) (describing United States Sentencing Commission); 18 U.S.C. § 3553 (section titled, "Imposition of a sentence"). The Act retained a fundamental commitment to judicial branch criminal punishment proceedings. *Id. see also* Jack B. Weinstein, *A Trial Judge's First Impressions of the Federal Sentencing Guidelines*, 52 ALB. L. REV. 1, 1 (1997) (describing adoption of the Sentencing Commission's Federal Sentencing Guidelines as an effort to create greater "consistency, uniformity and fairness" in federal sentencing).

The Commission was also challenged for violating separation of powers principles by abdicating congressional power to agency-like actors housed in the judicial branch. *Mistretta v. United States*, 488 U.S. 361, 371 (1989). The Supreme Court rejected the claim, explaining that the Commission fell within a "twilight" area of systemic innovation and judicial rule-making. *Id.* at 386. It did not encroach upon the judicial branch's core function as primary arbiter of individual cases and controversies. *Id.* at 389–90.

Recent Supreme Court cases have also reiterated the primacy of the judicial branch when it comes to setting individual sentences. For instance, in 2005, the Court declared once and for all, in *United States v. Booker*, that the federal Sentencing Guidelines were merely advisory. 543 U.S. 220, 245 (2005). In doing so, it reminded criminal justice stakeholders that the Commission "makes political and substantive decisions" about recommended sentencing ranges, "rather than performing adjudicatory functions," which firmly remain with the judicial branch. *Id.* at 242.

Booker further clarified when a jury would need to hear sentencing facts and render a judgment beyond a reasonable doubt. *Id.* at 244. Read together with the other jury sentencing cases decided during this period—such as *Apprendi* and *Ring* described above—the Court's assumption that federal and state imprisonment terms would always be imposed in a courtroom is plain. On the state level, a similar shift away from agency influence on criminal penalties and parole board impact on sentences took place during this time. A HANDBOOK FOR NEW PAROLE BOARD MEMBERS, at 1 ("[O]ver 55 percent of all releases from state prisons were as a result of a discretionary decision by a paroling authority" in 1980 while "only about 25 percent of such releases were made by paroling authorities" in 1999).

IV. CONSTITUTIONAL INCAPACITY OF MISSOURI'S PAROLE BOARD.

A. MISSOURI PAROLE BOARD AS ARBITRARY AND UNRELIABLE BODY

Given this history, corrections leadership in this country has been forced to admit that today, "parole occupies a somewhat ambiguous place" and tenuous role in the criminal justice system. *See e.g.* A HANDBOOK FOR NEW PAROLE BOARD MEMBERS 1 (Peggy Burke ed., 2003). For instance, critiques of parole practices, which in places like Missouri have become more like an "assembly line" than a legal proceeding, have increased. *Id*. As the Robina Institute on Criminal Justice at the University of Minnesota has documented:

> The right to be heard during the parole consideration process . . . is minimal. A personal interview with a prisoner will suffice; in addition, parole hearings do not need to be public and the inmate does not have a universal right to be

present. The hearing itself may be conducted by a board representative, rather than a member of the board.

Alexis Watts, *Parole Release Reconsideration in States with Discretionary Release*, ROBINA INST. (Apr. 7, 2017).

Moreover, reports of ad hoc, unprofessional, and unreliable parole board decision-making permeate the news and contemporary criminal justice landscape. *See, e.g.*, Dirk VAN ZYL SMIT & CATHERINE APPLETON at 251 ("[P]arole mechanisms in the United States have striking shortcomings at all levels"). *See generally* SENT'G PROJECT, DELAYING A SECOND CHANCE: THE DECLINING PROSPECTS FOR PAROLE ON LIFE SENTENCES (2017) (documenting a variety of problems affecting parole board decision-making, including informal prosecutorial and political influence that may dictate outcomes). Sadly, Missouri is a national leader when it comes to parole system scandals regarding lack of oversight or reliability.

For instance, the MacArthur Justice Center in St. Louis filed freedom of information requests to investigate practices of Missouri's Parole Board in 2017, based upon rumors among inmates and others. Those requests surfaced documents confirming what had been reported—that countless Missouri release hearings had turned into literal games for the enjoyment of one of the parole board members, Don Ruzicka. Jesse Bogan, *Missouri Parole Board Played Word Games During Hearings with Inmates*, ST. LOUIS POST DISPATCH (June 9, 2017)(reporting on the MacArthur Justice Center's parole investigation and subsequent press conference calling for Ruzicka's removal).

Ruzicka had coaxed colleagues to inject nonsensical words into the proceedings—such as "platypus" or "armadillo"—or song lyrics—such as "Folsom Prison Blues" or "Soul Man." Each staff member who got an inmate to repeat the word or lyric would earn a point. *Id*. The goal was to earn the most points by the end of day's parole hearing docket. *Id*. Ruzicka and other hearing officers could be heard laughing on tapes of the proceedings, joking during testimony, and saying things like, "I just got four points." Although the state had conducted its own internal investigation substantiating these actions, no serious disciplinary action was taken. *Id*.

It was not until a press conference was called to shed light on these activities months after the fact, resulting in national attention, that the offending board member was pressured to resign. *See, e.g.*, Dakin Andone, *Missouri Parole Board Member Resigns for Playing Word Games During Hearings*, CNN (June 12, 2017); Associated Press, *Missouri Officials Toyed with Inmates During Parole Hearings, Report Says*, ABC ACTION NEWS (June 9, 2017). And that was only after that official oversaw at least some of Missouri's *Miller*-related sentence review hearings—including the case of Norman Brown referenced above. *See* Jesse Bogan, *Missouri Parole Board Played Word Games During Hearings with Inmates*, ST. LOUIS POST DISPATCH (June 9, 2017).

Brown was denied access to his parole file before his *Miller* parole board sentence review hearing, precluded from meaningfully challenging erroneous or unreliable information that might be in the file, and allowed to bring only one person with him into the hearing room—either an attorney or a supporter. Second Amended Complaint for Declaratory & Injunctive Relief at ¶¶ 128–146, *Brown v. Precythe*, No. 2:17-cv-04082-NKL

(W.D. Mo. Nov. 1, 2017). His attorney was met at the door of the hearing area and directed to leave pen and paper outside as she would not be permitted to take notes during the hearing. *See Brown v. Precythe*, No. 2:17-cv-04082-NKL, 2017 WL 4980872, at *1 (W.D. Mo. Oct. 31, 2017) (class action filed by a group of attorneys in 2017, including amicus curiae Mae Quinn challenging unfairness of Missouri parole board sentence review practices on behalf of all of Missouri's *Miller*-impacted inmates).

Traditional attorney advocacy on Brown's behalf was not permitted—other than to explain in just a few minutes any re-entry support plans that might be in place. *Id.* at *5. The parole panel heard extensive comments from the wife of the decedent, also a victim of the crime, along with the original prosecutor who tried the case. *Id*. The prosecutor did not serve as an attorney. Instead, he could testify as a witness, offer his views on why Brown should not be released, and even introduce diagrams of the crime scene he drew himself but that had never been introduced at trial. *Id*. Just a few days later, Brown learned that the parole board accepted the prosecutor's recommendations and, based solely on the seriousness of his offense, would remain imprisoned. *Id*.

A class action was filed on behalf of Brown and the other youthful offenders directed to the Missouri parole board under Senate Bill 590. *Id*. at *1. Without conceding that parole review could displace courtroom sentencing, the lawsuit argued the hearings denied youthful offenders sufficient process and protection. *Id*. at *6. Missouri's *Miller*-impacted youthful offenders prevailed on summary judgment in 2018. Order at *10, *Brown*

v. Precythe, 2018 WL 4956519 (W.D. Mo. Oct. 12, 2018) (No. 2:17-cv-04082-NKL) (ordering state to submit plan to provide *Miller*-impacted inmates with meaningful and constitutionally compliant sentence review process).

Yet the Missouri Parole Board still fails to provide the same procedures and protections during *Miller* sentence review hearings as provided in a court of law at sentencing. *See generally, e.g.*, Plan for Compliance with Applicable Requirements, *Brown v. Precythe*, No. 2:17-cv-04082-NKL (W.D. Mo. Mar. 4, 2019) (proposing that *Miller*-impacted inmates could now have up to four individuals attend their life without parole review hearing—including counsel and an expert—but that the state would not provide funds for representation or experts for the sentence review process). Thus, the Missouri Parole Board remains a highly problematic agency and entity that resists legal standards and norms.

In fact, in one of her last acts as Director of the MacArthur Justice Center, amicus curiae Mae Quinn filed another class action lawsuit against the Missouri Parole Board on behalf of thousands of Missouri parolees who had been denied the right to counsel and hearings in connection with alleged parole violations. *See* Matthew Clarke, *MacArthur Justice Center Files Lawsuit Over Missouri Parole Revocations*, PRISON LEGAL NEWS (June 5, 2018), https://www.prisonlegalnews.org/news/2018/jun/5/macauthur-justice-center-files-lawsuit-over-missouri-parole-revocations/; Dan Margolies, *Thousands of Missouri Inmates Whose Paroles Were Revoked May Be Entitled To Relief, Judge Rules*, KCUR (Feb. 28, 2019). The class of parolees prevailed on summary judgment. *See* Order Granting Summary Judgment for Plaintiff Class, *Gasca v. Precythe*, U.S. Dist. Ct., W.D. Mo., Feb. 27,

2019, https://www.macarthurjustice.org/wp-content/uploads/2017/10/146_Order20Granting20Ps2720MSJ_2019.02.27.pdf.

B. PENUMBRAL RIGHT TO JUDICIAL BRANCH PENALTY PHASE

It is impossible to imagine federal courts having their sentencing authority entirely stripped and redelegated to an executive body. *See* Michael S. Greco, President's Message, *Lawyers Have a Lot to Teach*, 91 ABA J. 6, 6 (2005) (noting separation of powers and independent judiciary are part of the "fabric of our republic"). If this issue arose on the federal level, it seems likely that the Supreme Court would declare, once and for all, that sentencing is a judicial branch function under Article III of the Constitution—even during this era of increased federal agency autonomy. *See generally* Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. 227 (2016) (providing an account of administrative agencies as an extra-constitutional component of government that may be part of the "new separation of powers" landscape). But because the federal government no longer actively maintains a parole system, this will not occur. Jonathan Turley, *Madisonian Tectonics: How Form Follows Function in Constitutional and Architectural Interpretation*, 83 GEO. WASH. L. REV. 305, 313 (2015) (the term "separation of powers . . . is not mentioned in the text but permeates the constitutional structure as an architectural theme"). But federal

separation-of-powers norms should be instructive when considering the constitutionality of this practice on the state level—despite older state parole cases like *Dryer*.[6]

As noted, every state including Missouri now maintains a tripartite government in the image of the federal system. There are subtle differences in branch powers at the state level as compared to the federal system. However, common sense suggests that some actions by individual states would so offend our respect for separation of powers they should be prohibited under the U.S. Constitution. *See* Robert A. Shapiro, *Contingency and Universalism in State Separation of Powers Discourse*, 4 ROGER WILLIAMS U. L. REV. 79, 80 (1998) (acknowledging "federal precedent sets the terms for much state separation of powers debate, and federal principles provide a presumptive standard for state constitutional decisions"). For instance, if states did away with their judicial government branches entirely, the Supreme Court would stop such actions if asked to do so. If this did not occur based upon a strict separation-of-powers claim, more generalized due process arguments would likely be brought to bear to ensure state judiciaries were not dismantled.

Even if constitutional separation-of-powers doctrine or some close approximation does not require the state judicial branch to impose criminal penalties, this does not end the discussion. The concept of court-centered sentencing is more than mere backdrop in

---

[6] Indeed, the issue in *Dreyer v. Illinois*, 187 U.S. 71 (1902), was not whether a parole board could serve as a sentencing body to the exclusion of courts. The case challenged the creation of the parole system—which involved court-based sentencing in the first instance, followed by possible discretionary release akin to clemency. *Id.* at 78–85.

the Court's criminal punishment cases described above. Application of the Court's past penumbral reasoning provides further grounds for deeming the judicial branch the only constitutionally appropriate entity for sentencing. Brannon P. Denning & Glenn Harlan Reynolds, *Comfortably Penumbral*, 77 B.U. L. REV. 1089, 1096 (1997) (noting Justices on both the Right and the Left have turned to "penumbral reasoning" to advance constitutional rights).

No different from individual liberties jurisprudence in other areas, the overlap and reverberations of recognized rights cause the further free-standing constitutional right of punishment imposition in a court of law. *See* David Crump, *How Do the Courts Really Discover Unenumerated Fundamental Rights? Cataloguing the Methods of Judicial Alchemy*, 19 HARV. J.L. & PUB. POL'Y 795, 854–55 (1996) (explaining that *Roe v. Wade*, like "[m]ost of the Court's privacy decisions," involved "a leap away from logic founded on strict constitutional premises").

Both the right to counsel at sentencing and due process fairness have been mandated by the Supreme Court in federal and state criminal cases. These mandates imply oversight by the court system to ensure delivery of these protections around criminal punishment. The Court has recognized many other rights and requirements not contained in the Constitution's text—from privacy, to specially worded warnings, to specific timeframes. *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965); *Miranda v. Arizona*, 384 U.S. 436, 467–69 (1996); *Maryland v. Shatzer*, 559 U.S. 98, 116–17 (2010). It has done so by either situating them within existing provisions where they seem most at home—

like Miranda rights living mostly within the Fifth Amendment—or establishing their existence at the intersection of recognized rights under the Constitution. *Miranda*, 384 U.S. at 457, 494, 499; *see Griswold*, 381 U.S. at 484 (finding "zones of privacy," protecting the right to contraception, inherent in the First, Third, Fourth, Fifth, and Ninth Amendments to the Constitution); *see also* David Luban, *The Warren Court and the Concept of a Right*, 34 HARV. C.R.-C.L. L. REV. 7, 27–28 (1999).

With sentencing recognized as a critical stage of the criminal process where counsel and due process protections must be afforded, the Court has provided more than adequate support for a related fundamental right to sentencing in a court of law to emanate therefrom. Glenn H. Reynolds, *Penumbral Reasoning on the Right*, 140 U. PA. L. REV. 1333, 1344 (1992) ("[P]enumbral reasoning is almost certainly more appropriate in the context of individual rights than anywhere else.").

Thus, separate from the individual procedural or substantive rights guaranteed during sentencing, reading the Sixth and Fourteenth Amendments together should provide for a right to a court-centered penalty phase in all criminal cases involving incarceration—*Miller*-fix or otherwise. This is so even when the right to jury determination at sentencing is not implicated.

But as further explained below, *Miller* very much implicates the right to jury determination during the penalty phase. Even if existing constitutional sentencing rights are not read together to create an instantiated and free-standing right to a penalty phase in a court of law, each of the individual rights standing alone should preclude states from merely redirecting *Miller* resentencing decisions to existing parole boards.

C. PAROLE BOARDS AND PROCEDURAL INABILITY TO PUNISH

Regardless of any new free-standing claim to a constitutional right to be sentenced in a court of law, parole boards fall far short in *Miller* sentence review matters—or any other—to serve as sole sentencers. Some jurisdictions are providing more process than others to try to come close to looking like judicial branch resentencing hearings. Yet, state parole boards cannot wholly satisfy all the specific procedural rights and substantive protections summarized in Part C due to their structures and current practices.

1. Jury Determinations

When sentence enhancements are implicated or fact-finding beyond the trial jury's elements determination is needed, defendants have a constitutional right to sentencing by jury with the beyond a reasonable doubt burden placed squarely on the prosecution. *See* W. David Ball, *Heinous, Atrocious, and Cruel: Apprendi, Indeterminate Sentencing, and the Meaning of Punishment*, 109 COLUM. L. REV. 893, 921 (2009) (analyzing parole board "second-guessing" facts as Sixth Amendment jury right issue).

Several states post-*Miller* have already provided for jury determination on whether lifetime incarceration without release is warranted. *See Moore v. Mississippi*, No. 2017-KA-00379-SCT, 2019 WL 4316161, at *8–9 (Miss. May 30, 2019); *see also Johnson v. Elliott*, No. PR 2018-1203, 2019 WL 2251707, at *7 (Okla. Crim. App. May 24, 2019) ("The Sixth Amendment demands that the trial necessary to impose life without parole on a juvenile homicide offender must be a trial by jury, unless a jury is affirmatively waived.").

Life without parole is the most serious sentence that may be imposed on a child. Consistent with *Roper*, *Graham*, and *Miller*, where life without parole is a possibility for a juvenile, sentencing must be handled with the same heightened concerns as with the death penalty for an adult. Appropriate narrowing must take place, and "irreparable corruption" should be treated like an enhancement above any other term of incarceration as in *Apprendi* and *Ring*.

A jury must find beyond a reasonable doubt that a child is beyond rehabilitation to permit lifetime incarceration. Missouri utilizes such an approach for new juvenile first degree murder matters. MO. ANN. STAT. § 565.033 (West 2016) (providing for jury sentencing in juvenile first-degree murder cases); *see also State v. Hart*, 404 S.W.3d 232, 239 (Mo. 2013) (remanding for resentencing of youth who received mandatory life without parole, with right to jury finding beyond a reasonable doubt to uphold life without parole sentence).

But petit juries are not generally involved in the work of executive agencies. *Cf. Cox v. United States*, 332 U.S. 442, 453 (1947) (holding that federal juries are without power to pass judgment on actions of federal agencies). Contemporary parole boards cannot lawfully summon and convene jury venires. *See, e.g.*, ADMIN. OFFICE OF THE U.S. COURTS, HANDBOOK FOR TRIAL JURORS SERVING IN THE UNITED STATES DISTRICT COURTS 1, https://www.flmd.uscourts.gov/sites/flmd/files/documents/handbook-for-trial-jurors.pdf. Nor does it appear that any kind of special process for jury determinations at parole board hearings, post-*Miller*, is occurring. *See, e.g.*, MO. ANN. STAT. § 558.047 (West 2016) (codification of Senate Bill 590, which allows for jury determinations in new

juvenile first degree murder cases but not those matters redirected to the parole board for sentencing review); *Diatchenko v. Dist. Attorney for Suffolk,* 1 N.E.3d 270, 276, 280 (Mass. 2013).

Missouri youthful offenders are not even permitted to have a hearing before the entire parole board. *See* BD. OF PROB. & PAROLE, MO. DEP'T OF CORRECTIONS, PROCEDURES GOVERNING THE GRANTING OF PAROLES AND CONDITIONAL RELEASES 6 (2017). Instead, the hearings are held before a small parole board panel. *Id*. (describing use of small panel hearings followed by full board votes). Yet, the entire board is given the opportunity to decide on the defendant's release or continued incarceration—potentially for the rest of their life. *Id.*; *see generally* Declaratory & Injunctive Relief Order, *Brown v. Precythe*, No. 2:17-cv-04082-NKL (W.D. Mo. Aug. 8, 2019).

2. Critical Stage and Right to Counsel

Even if not all *Miller*-impacted inmates are entitled to jury determinations beyond a reasonable doubt at resentencing, Missouri's Parole Boards is still ill-suited to deliver on the other individual procedures insured during a courtroom-based penalty phase. *See* Sarah French Russell, *Jury Sentencing and Juveniles: Eighth Amendment Limits and Sixth Amendment Rights*, 56 B.C. L. Rev. 553, 586 (2015); *see also* Laura Cohen, *Freedom's Road: Youth, Parole, and the Promise of Miller v. Alabama and Graham v. Florida*, 35 CARDOZO L. REV. 1031, 1064 (2014). For instance, as sentencing is now seen as a critical phase of the criminal process, free appointed counsel is available to indigent defendants facing incarceration during court sentencing. Historically, inmates are not entitled to free counsel at parole grant hearings—or even meaningful representation by retained counsel.

Instead, as a matter of parole policies and customs, attorneys are frequently expected to step away from their traditional role when they accompany clients before the parole board. *See, e.g.*, Emily Corwin, "*You're Full of #$*@!" At N.H. Parole Board, Tough Talk Can Veer to the Profane*, N.H. PUB. RADIO (June 27, 2017) (recounting experience of defense attorney who saw parole hearings as a kind of "wild west" where board members controlled the process). The standing practice in Missouri has been to relegate counsel to the role of friend or supporter able to shed light on community reentry plans. They generally are not permitted to cross-examine witnesses, challenge evidence, or make objections. *See, e.g.*, MISSOURI PROCEDURES GOVERNING THE GRANTING OF PAROLES at 6 (describing the limited role of the inmate delegate, who may be a friend, family member, or attorney).

Even after Missouri's *Miller*-impacted plaintiffs prevailed on their class action, attorneys for the parole board filed papers with the district court seeking to impose limits on the process. The board only agreed to allow up to four individuals to attend the review hearings for *Miller*-impacted inmates, including counsel and an expert–a position adopted by the district court. *See generally* Declaratory and Injunctive Relief Order, *Brown v. Precythe*, 2019 WL 3752973 (W.D. Mo. Aug. 8, 2019) (No. 2:17-cv-04082-NKL). In addition, Missouri continues to refuse to provide attorneys, for funding for counsel, for *Miller*-impacted inmates being sent to the Parole Board for sentencing review hearings. *See id*.

3. Due Process and Individualization

Lack of defense counsel or limitations on representation, along with the unusual role of prosecutor as witness, also affects the meaningfulness and adequacy of the process provided. It is not just inflammatory opinions of the prosecutor that result in unreliable evidence or unfairness in the proceedings. Many inmates have been precluded from seeing the contents of their correctional files or other materials the parole board may consider. *See e.g.*, Rebecca Rivas, *MacArthur Justice Center Files Lawsuit Against Missouri Dept. of Corrections, Argues Parole Proceedings for Juvenile Offenders Are Unconstitutional*, ST. LOUIS AMERICAN (Dec. 30, 2016) (reporting on lawsuit in non-*Miller* youthful offender case which challenged Missouri parole board practice of refusing to allow inmates to review information submitted by victims, notes of prison staff, or any other information in file other than disciplinary record).

Parole boards historically have claimed to have special understanding of rehabilitation and risk assessments of inmate reoffending. However, such assertions are dubious given the quality of the risk assessment instruments administered and used in some states—and the absolute lack of formal assessments in others. *Cf.* Alice Reichman Hoesterey, *Confusion in Montgomery's Wake: State Responses, the Mandates of* Montgomery, *and Why a Complete Categorical Ban on Life Without Parole for Juveniles is the Only Constitutional Option*, 45 FORDHAM URB. L.J. 149, 188 (2017) (opining that "[a] future parole board, with the added knowledge that only comes with time, will be in a better position to determine whether or not a juvenile can be rehabilitated").

In fact, at the outset Missouri was not using formal risk assessment instruments with *Miller* sentence review hearings. Instead, an inmate interview is completed by a parole board staffer who may or may not have a college degree—let alone specialized psychological or risk assessment training. Second Amended Complaint for Declaratory & Injunctive Relief at ¶ 80, *Brown v. Precythe*, No. 2:17-cv-04082-NKL (W.D. Mo. Nov. 1, 2017). That staff member then offers a written report and opinion to the board based upon that short interview, which is then relied upon during the sentence review process by board members rendering a decision. *Id*.

After Missouri's *Miller*-impacted youthful offenders prevailed on their class action lawsuit against the parole board, the board offered to start using formal risk assessment instruments. But it is not at all clear whether such risk instruments are valid generally, who will administer them, or how. Plan for Compliance with Applicable Requirements at 10, *Brown v. Precythe*, No. 2:17-cv-04082-NKL (W.D. Mo. Mar. 4, 2019).

In addition, Missouri's Parole Board promised to have its staff engage in more youth-focused inquiries before opining before the Board in the day's ahead. These inquiries included questions like these: "What is the mitigating effect of any details of their background? How did it impact their developmental status at the time of crime? How did it impact their culpability? How did it impact their capacity for rehabilitation?" *Id*. Presenting such questions to a single parole staffer—who does not know the defendant, the law, or have any training or guidance relevant to assessing such weighty proportionality issues—allows that person to serve as a sort of rogue, single juror operating on instincts rather than jury instructions.

Courtroom sentencing hearings do not afford defendants all the same rights as at trial. But they receive far more process than what is provided by the Missouri Parole Board generally—or in *Miller*-impacted matters specifically. Supreme Court decisions from as early as the middle of the last century, including *Townsend v. Burke*, and more recently *Gardner v. Florida*, set aside sentences based upon lack of due process when questionable information was presented or defense counsel was not provided an opportunity to review and challenge evidence.

It could be argued non-death penalty sentencing matters generally require less process than in capital cases. But the sentencing process provided in typical felony matters is greater than what is provided in parole board hearings in *Miller* cases or otherwise. As *Graham* and *Miller* teach, any youthful offender cases where lifetime incarceration may be possible is akin to a death case. Therefore, proper narrowing and proportionality analysis is needed to determine the rare youth who is irredeemable. Clearly, this is not occurring in Missouri Parole Board proceedings.

Missouri Parole Board sentencing review processes also fail to allow for direct appeal or meaningful post-hearing review. *See* SENTENCING REFORM IN OVERCROWDED TIMES at 11 (Michael Tonry & Kathleen Hatlestad eds., 1997) ("[S]entencing guidelines, backed up by appellate sentence review, can reduce racial, gender, and other unwanted disparities."). Rather, as in other states, inmates are either told to seek further administrative relief through the agency or that they have no right to challenge outcomes at all. *See generally Types of Hearings*, LA. DEP'T PUB. SAFETY & CORR. ("[T]his process does not

establish a formal appeal process as parole is an administrative discretionary decision that is not subject to appeal.").

Even after supposed specialized rules were put in place for *Miller*-fix parole board hearings, this has been the case in Missouri. *See* Rachel Lippmann, *Parole Anything but Certain for Juvenile Lifers a Year After Missouri Changed Law*, ST. LOUIS PUB. RADIO (Aug. 3, 2017) (article including a copy of Missouri Parole Board decision paperwork from *Miller* sentencing review matter, noting "THIS DECISION IS NOT SUBJECT TO APPEAL"); *see also* Petition for Declaratory Judgment, *Eric Gray v. Missouri Department of Corrections*, 16AC-CC00565 (Mo. Cir. Ct., Cole Co. 2016) (describing notices provided to youthful offender Eric Gray, informing him there was not right to review or appeal the Parole Board's determination).

While the constitutional right to counsel during direct appeal in criminal cases applies, there is no similar right to counsel to challenge *Miller*-impacted parole board outcomes. *See* Mae C. Quinn, *Reconceptualizing Competence: An Appeal*, 66 WASH. & LEE L. REV. 259, 289–90 (2009) (discussing constitutional right to appointed counsel in criminal appeal matters despite lack of constitutional right to criminal appeal in the first instance). Instead, affirmative litigation seeking extraordinary relief is required. *See e.g.*, Rebecca Rivas, *MacArthur Justice Center Files Lawsuit Against Missouri Dept. of Corrections, Argues Parole Proceedings for Juvenile Offenders Are Unconstitutional*, ST. LOUIS AMERICAN (Dec. 30, 2016); Alexis Watts & Edward E. Rine, *Parole Board Held in Contempt After Failing to Follow State's Parole Release Laws*, ROBINA INST. (June 6, 2016).

In summary, Missouri Parole Board punishment proceedings fall far short of delivering the constitutional procedural protections promised in a court of law. Whether or not jury determinations would be required during an in-court hearing, the processes provided in Missouri's parole proceedings generally, and *Miller*-fix matters specifically, cannot satisfy constitutional procedural protections for sentencing.

D. SUBSTANTIVE SHORTCOMING OF PAROLE BOARD PENALTIES

Given the above descriptions, Missouri's *Miller* sentence review processes also raise serious questions about satisfying substantive constitutional requirements with juvenile life-without-parole review matters. Current structures, staffing, and culture make the Missouri Parole Board ill-equipped to offer individualized proportionality analyses to make sure youth will rarely be incarcerated until the end of their lives. And examining the substantive constitutional question of proportionality in parole review hearings highlights further incoherency inherent in the existing arrangement.

1. Arbitrary, Discriminatory, or Cruel

Given the impact of *Greenholtz*, granting parole boards near carte blanche to create release hearing mechanisms most entirely eschew formal legal standards. As will be further discussed below, it is the rare parole board member who has any legal training—let alone a law degree that would assure competence in legal analysis. This is obviously the case as it pertains to the doctrines directly applicable to criminal sentencing processes. Constitutional doctrines ancillary to criminal processes, such as equal protection, are likely even more foreign and far afield from boards. *See* Beth Schwartzapfel, *Nine Things You Probably Didn't Know About Parole*, MARSHALL PROJECT (July 10, 2015)("If you

are a farmer, auto salesman, DuPont executive or personal fitness trainer, you too can be on a parole board.").

Lack of training, belief that their actions are beyond challenge, and other shortcomings provide a high risk that parole board members will ask about, or take account of, facts that would be substantively prohibited at a criminal sentencing. For instance, inmates may also face discrimination before the Missouri Parole Board based upon their poverty. In considering on inmate reentry plans in connection with requests for release, the Missouri Parole Board may focus on proposed community living situations. CAMPAIGN FOR THE FAIR SENTENCING OF YOUTH, PAROLE PREPARATION TOOLKIT 13 (2018) (providing advice for youthful offenders who may appear unrepresented before parole boards after *Graham* and *Miller*, including how to develop re-entry housing plans). But most youthful offenders will not have money for transitional housing. *See generally* Ashley Nellis, SENT'G PROJECT, THE LIVES OF JUVENILE LIFERS: FINDINGS FROM A NATIONAL SURVEY 36 (2012) (noting that most youth with life sentences come from poor families who may not be able to financially support them upon their release as adults). Thus, Missouri Board Members may consider inmate poverty in a manner that would violate *Williams v. Illinois* in a courthouse sentencing.

Given the lack of counsel provided in such hearings, mentally impaired inmates also may be facing direct or indirect forms of discrimination. Many of the youth previously sentenced to life without parole were especially vulnerable to peer pressures because of brain damage, low IQ scores, or other deficits considered disabilities. Ashley Nellis, SENT'G PROJECT, THE LIVES OF JUVENILE LIFERS: FINDINGS FROM A NATIONAL

SURVEY 8–13 (2012) (describing history of trauma, lack of education, and mental health challenges of many youth serving life sentences). And these conditions may prevent such inmates from fully understanding standard protocols or social cues; or make them seem defiant, aloof, or even come across as disrespectful. Beth Schwartzapfel, *The Secret Hints for Winning Parole*, MARSHALL PROJECT (Jan. 26, 2016) (noting how mentally ill, illiterate, and otherwise vulnerable inmates may do most poorly during parole interviews, regardless of their level of rehabilitation or readiness for release). Absent meaningful advocacy to ensure such issues around competence are not used against clients, mentally disabled youthful offenders may have their deficits used against them—essentially as aggravating factors warranting denial of a sentence reduction.

Indeed, amicus curiae Mae Quinn provided pro bono representation to one *Miller*-impacted youthful offender who had an IQ score reflecting intellectual disabilities. Absent attorney investigation and participation, this fact and the inmate's associated lack of comprehension would have not been known by the Missouri Parole Board, which does not conduct psychological evaluations.

Further, unlike some states that have opted for parole board sentence review hearings for *Miller*-impacted inmates, Missouri conducts parole hearings inside of prisons. Thus, they are private affairs held outside of public view. Indeed, prisoners and their lawyers historically have been blocked from accessing parole hearing transcripts as a matter of course. *See* Katie Rose Quandt, *The False Hope of Parole*, OUTLINE (Mar. 8, 2018)

(reporting on the closed nature of Missouri parole hearings, even in *Miller* sentence review matters). Thus, attempting to bring to light prohibited sentencing bias or discrimination, as contemplated by *Williams* and *McCleskey*, is near impossible.

The limited number of parole hearing transcripts that have been obtained in Missouri – by way of litigation and legal actions – are of generally poor quality and fail to ensure all statements made are memorialized. For instance, records relating to the "word game" hearings conducted by board member Ruzicka were filled with notations that part of the proceedings were simply inaudible. *See* Jesse Bogan, *Missouri Parole Board Played Word Games During Hearings with Inmates*, ST. LOUIS POST DISPATCH (June 9, 2017).

Arbitrariness can further creep into parole board assessments in *Miller*-fix cases through the layered and bureaucratic processes employed by the Missouri Parole Board. Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 IND. L.J. 373, 376–77 (2014) (describing ad hoc practices of parole boards, including application of unwritten rules and agency norms at hearings). From inflammatory claims of victims and prosecutors, to incorrect information in parole files, to unsubstantiated "expert" opinions about risk or maturation made by untrained staff, parole board decisions may rest upon information that would be deemed wholly irrelevant or unduly prejudicial during court proceedings. *See id*.

Similarly, such proof would not satisfy the preponderance standard applied at most individual sentencing hearings, much less the beyond a reasonable doubt bar that likely

applies to *Miller* sentence matters where lifetime incarceration is possible. The widespread nature of such practices renders the parole system rife with the randomness and caprice that resulted in the Supreme Court's ruling in *Furman* and the death penalty moratorium that followed. *Cf.* Janet C. Hoeffel, *The Jurisprudence of Death and Youth: Now the Twain Should Meet*, 46 TEX. TECH L. REV. 29, 66–68 (2013) (urging application of *Furman*'s anti-arbitrariness principles to juvenile transfer hearings).

2. Proportionality and Heightened Individualization

Some states have created specialized parole hearing units with specially-trained hearing officers. That is not the case for Missouri's *Miller* sentence review matters. *See, e.g.*, Katherine Barrett & Richard Greene, *To Work on Parole Boards, No Experience Necessary*, GOVERNING (Sept. 2016) (lamenting that many parole boards are untrained in law and ill-equipped to make the kinds of decisions they are presented). Indeed, Missouri's Parole Board went so far as to decline the opportunity to become educated through free trainings on the adolescent development process, which were offered by the Campaign for Fair Sentencing on Youth—the nation's leading organization dedicated to juvenile life without parole.[7]

To date, nothing suggests that Missouri's Parole Board, handling *Miller*-fix matters in lieu of sentencing courts, is equipped to accurately evaluate "the difficult but essential question whether [those who appear before them] are among the very 'rarest of juvenile

[7] Apparently an offer extended by the Campaign for Fair Sentencing of Youth, to train Missouri Parole Board members and staff, was rejected.

offenders, those whose crimes reflect permanent incorrigibility.'" *See Adams v. Alabama*, 136 S. Ct. 1796, 1801 (2016) (Sotomayor, J., concurring) (quoting *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016)).

The decision to send juvenile life without parole remedy cases directly to the parole board as an approximation of *Miller*'s proportionality promise – in Missouri as in a few other states – was motivated largely by efficiency and ease. This can be seen in the explanation of the Connecticut court when, post-*Montgomery*, it changed course and denied the request in *Williams-Bey* for trial court resentencing in a *Miller*-impacted matter. *State v. Williams-Bey*, 114 A.3d 467, 489–90 (Conn. App. Ct. 2016).

The court complained about exposing the victims to "emotional burdens" or requiring trial courts to hold complex or "cumbersome" resentencing hearings. *Id.* at 488–89. Further, it claimed it would be "exceedingly difficult" for the trial judge to make the findings needed by *Miller*—because the resentencing "would in reality be more akin to a parole hearing." *Id.* at 488. The difficulties—or unconstitutionality—of a parole board being transformed into an impromptu substitute judicial branch were not discussed. The same holds true in Missouri which seems to want to settle for "close enough" to constitutional.

V. FURTHER NEGATIVE SYSTEMIC IMPLICATIONS OF THE MISSOURI PAROLE BOARD SERVING AS SENTENCING BODY OVER YOUTHFUL OFFENDER OBJECTIONS.

Missouri's "close enough" or "second best" criminal punishment practices have ramifications beyond the cases of individual *Miller*-impacted youthful offenders. There will be lasting effects for years to come given the departure of these cases from criminal justice norms. They also raise serious questions about the durability of our criminal justice system and whether the right to sentencing in a court of law might give way in other matters for the sake of convenience – or worse. Accordingly, this section urges recommitment to trial court sentencing when requested. This is not only to respect the constitutional rights of *Miller*-impacted inmates who were unlawfully condemned to die behind bars as children but to protect against further unfairness and erosion of time-honored justice system principles.

A. CRIMINAL PRACTICE NORMS AND PROCEDURAL JUSTICE

Constitutionality aside, sending cases to parole boards for sentencing – over the objection of criminal defendants – flies in the face of a wide range of norms built into state criminal justice systems over many decades. Such protocols shed professional conduct requirements and ethical frameworks imposed on lawyers and judges working within sentencing courts. They also conflict with existing Missouri criminal code provisions, rules of procedure, and other expectations held by a range of criminal justice system stakeholders. *See* MO. R. CRIM. PRO. 29.03 (describing how "the court shall assess and declare the punishment" in Missouri criminal matters); MO. R. CRIM. PRO. 29.07 (describing process for

defendant allocution and sentence before the court; *see also* NORA V. DEMLEITNER ET AL., SENTENCING LAW AND POLICY: CASES, STATUTES, AND GUIDELINES 405 (2004) ("While in some situations, constitutional rights (including any developing rights under *Apprendi*) may be an essential part of sentencing process, in most cases the principle procedures will be nonconstitutional, guided by statute and, to an even greater extent, by rules of procedure, prosecutorial policies, and local judicial culture."). In these ways Missouri's Parole board penalty phase proceedings further undermine the fairness that should be afforded to *Miller*-impacted inmates—in addition to doing damage to the integrity of the state's already challenged criminal justice system.

It is no secret that Missouri's court systems need improvement. Racial bias, indiscriminate use of cash bail, and the imposition of fines and fees on the indigent are all matters on everyone's radar and are being attacked by way of policy changes and civil rights prosecutions. *See, e.g.*, Mae C. Quinn & Eirik Cheverud, *Civil Arrest? (Another) St. Louis Case Study in Unconstitutionality*, 52 WASH. U. J.L. & POL'Y 95, 95–96 (2016) (describing efforts of activist attorneys to stand with protesters and others in the face of overzealous policing and prosecution in the St. Louis region). Many of these efforts have been undertaken by zealous attorneys, working in collaboration with impacted communities. *Id.*

In addition, even where individual Missouri courts are flawed in their operations, individual attorneys maintain a duty to advance the causes of their clients at sentencing. *See generally* MODEL RULES OF PROF'L CONDUCT r. 1.3 (AM. BAR ASS'N 1983) ("A lawyer shall act with reasonable diligence and promptness in representing a client."); *see also* DAVID J. KEEFE, SEN'G PROJECT, SENTENCING ADVOCACY AND THE RIGHT TO EFFECTIVE

ASSISTANCE OF COUNSEL 12–14 (2003) (focusing on features of effective non-capital sentence advocacy in state courts).

Prosecutors are also prohibited from simply trying to win in court without being mindful of their duty to seek justice. *See* MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt. 1 ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice . . . ."). And judges, who accountable to the public, can be sanctioned unethical behavior and misdeeds on and off the sentencing bench. *See* CYNTHIA GRAY, ST. JUST. INST., A STUDY OF STATE JUDICIAL DISCIPLINE SANCTIONS 1 (2002); *see also* Stephen Deere, *Ferguson Judge Criticized as Revenue Generator Who Helped Bring in Millions*, ST. LOUIS POST DISPATCH, March 9, 2015.

Unfortunately, the same checks do not exist for Missouri's broken parole system. Relatively speaking, particularly since *Greenholtz*, few attorneys file lawsuits to try to improve Missouri parole practices. Investigations and press conferences like the one involving Ruzicka are the exception. And challenges are largely brought by *pro se* inmates whose cases are quickly dismissed on technical issues. *See* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1588–89 (2003).

This lack of transparency and accountability exists, in part, because of the lack of appointed counsel. Thus, Missouri parole release hearings remain far below the law and lawyering radar. MISSOURI PROCEDURES GOVERNING THE GRANTING OF PAROLES, at 6 (describing the limited role of the inmate delegate, who may be a friend, family member, or attorney). *See generally* Plan for Compliance with Applicable Requirements, *Brown v.*

Precythe. Most inmates lack resources to hire attorneys to assist them; public defender services generally are not afforded for these hearings; and just a few entities across the country—such as law school clinics and non-profits like ACLU and the MacArthur Justice Center—will consider taking such cases without a fee. *See, e.g.*, *Representation at Hearings*, PRISONER LEGAL SERVS. MASS., http://www.plsma.org/parole/representation-at-parole-hearings/ **(**informing inmates that they generally do not have a right to counsel at a parole grant hearing, but that some law school clinics might provide free representation).

Beyond this, as noted, most parole board members and staffers are lay persons who are not just non-judges, but who lack any meaningful legal training. Gavin Rozzi, *Lesniak Calls State Parole Board "Dumping Ground" for Patronage*, OCEAN CTY. POLITICS (June 22, 2016). Missouri is no exception. *See* Alisha Shurr, *Parson Appoints Munzlinger to Probation and Parole Board, Fills Education Board*, The Missouri Times, Mar. 12, 2019 (describing Munzlinger as a former soybean farmer who previously led the Missouri Senate's agriculture committee); *see also* Kurt Erickson, *Missouri's Governor Populates His Administration with Former Colleagues,* St. Louis Post Dispatch, Mar. 27, 2019 (describing the history of Missouri's Parole Board, and appointments based upon loyalty and prior political position). Thus, lawyer and judicial ethics norms fail to serve as a floor to maintain professionalism and legal standards in the parole hearing room or agency's offices—as would be the case in courtroom sentence proceedings.

Similarly, although they may not yet rise to the level of constitutional guarantees, criminal defendants across the country are provided with public sentencing hearings and the right to robust allocution. *See, e.g.*, Kimberly A. Thomas, *Beyond Mitigation: Towards*

a Theory of Allocution, 75 FORDHAM L. REV. 2641, 2678–79 (2007) (noting sentencing hearings are open to the public to allow transparency and public engagement); *see also* David A. Hoffman, *The Federal Sentencing Guidelines and Confrontation Rights*, 42 DUKE L.J. 382 (1992). Yet the Missouri Parole Board does not respect these time-honored expectations. For instance, as already noted, it conducts parole hearings in private, denying defendants the experience of sentence proceedings that are mostly open to public view and scrutiny. In these ways, such proceedings are shrouded in secrecy and prevent the community from seeing, hearing, or understanding the process.

In addition, in Missouri inmates may be made to appear before the Parole Boards via video camera or provided with little time to make their case. It also expects inmates to answer questions posed, rather than provide a presentation akin to allocution. But court sentencing hearings have historically respected a defendant's right to in-person and individualized allocution on all issues that may relate to punishment. *See* Mark W. Bennett & Ira P. Robbins, *Last Words: A Survey and Analysis of Federal Judges' Views on Allocution in Sentencing*, 65 ALA. L. REV. 735, 741 (2014) (dating back to 1600s England, allocution was embraced in the United States in 1940s). Such information might include clarification about the facts of the crime, evidence in mitigation, or powerful statements of remorse or regret. But this practice, too, has been hampered by Missouri's "assembly line" parole process. Indeed, during Norman Brown's *Miller*-relief sentence review hearing, Brown and counsel for amici were instructed not to direct statements or apologies to the victim but to look straight ahead and address the parole board only.

In these ways and others, Missouri parole review hearings fail to allow for individualized holistic reckoning on the part of the youthful offenders in *Miller* cases or deny the victim the opportunity to receive an authentic apology. See Jean HAMPTON, A NEW THEORY OF RETRIBUTION, IN LIABILITY AND RESPONSIBILITY: ESSAYS IN LAW AND MORALS 377, 404, 412 (R.G. Frey & Christopher W. Morris eds., 1991).

B. MISSOURI MILLER MATTERS AS SECOND-BEST SENTENCING SENTINELS

Missouri's Parole Board sentence review hearings in *Miller* relief matters present another set of significant concerns for the justice system. As noted, the Parole Board can take no action to address underlying orders or commitment mandates that set forth unconstitutional mandatory terms of life without parole. Its members have no power to modify or issue a proper criminal sentencing "judgment" in the manner described by the Supreme Court as early as 1830 in *Ex Parte Watkins*. And yet, somehow these administrative agencies are supposed to review and then amend the mandatory death-behind-bars sentences of youthful offenders if they determine that such sentences are inappropriate. This presents an irreconcilable catch-22.

This dilemma was astutely presented in a recent public letter to the press by Cedrik Clerk, one of Missouri's *Miller*-impacted inmates who still awaits relief. He wrote: "How can we possibly make parole on a life without parole sentence?" *See* Cedric Clerk, *Missouri Ignores US Supreme Court Ruling Requiring Resentencing of Prisoners Given Life Without Parole as Juveniles*, S.F. BAY VIEW (July 20, 2017). It might be argued that these cases are really no different from ordinary life sentence matters. Except, of course, inmates like Clerk have not appeared in court for a sentence modification that imposes a

single life sentence. Moreover, this claim only brings into sharper focus an underlying conundrum created by juvenile life sentence matters after *Graham*, *Miller*, and *Montgomery*.

If the response to Clerk's question is that the status of these cases is ambiguous or in flux, this just highlights one of the original arguments advanced in Missouri to challenge Senate Bill 590—that the Parole Board appears to be operating not just as a court but as a quasi-legislature. It is selecting terms to be served in individual cases while also creating unwritten sentencing schemes from whole cloth. And *Miller*-impacted youthful offenders are, therefore, living in legal limbo behind bars with no lawful sentence order or term in place at all. Such a grave state of affairs presents a further affront to our justice system as a whole—in addition to violating the rights of *Miller*-impacted inmates who remain unlawfully imprisoned without a clear sentence or remedy.

A final response to the arguments presented by Clerk might be that *Miller*-impacted youthful offenders are a unique group of defendants whose situation is sui generis. Given that they are an exception, then we should not be concerned; the problems presented by their cases will not be seen again in Missouri's justice system. It is true that parole board punishments are currently occurring in only a narrow band of cases that have unique features. But absent embrace of the constitutional analyses advanced by this article regarding a fundamental right to sentencing in a court of law, there appears to be no impediment to the legislature seeking to use parole board punishment proceedings in other kinds of cases.

That is, if parole board punishments are permitted here—in some of the most sensitive, specialized, and conceptually complex matters in the justice system—the Missouri

state legislature surely would not be constitutionally prohibited from delegating ultimate sentencing power to parole boards in other less serious criminal cases. This could allow wide-spread departure from long-standing practices of public hearing, defendant allocution, judicial oversight of the penalty phase, and the other time-honored expectations addressed above. This broader criminal justice system implication alone suggests current practices in Missouri *Miller*-impacted matters must be reconsidered, and defendants must be permitted to be sentenced in a courthouse proceeding, if they desire.

CONCLUSION

In the wake of *Miller v. Alabama*, Missouri has unfortunately side-stepped the long-understood venue of sentencing—trial courts—to place punishment decision-making into the hands of parole agency bureaucrats. To be sure, parole boards have become a relatively regular part of the correctional landscape in this country, sharing some part in release decisions in some jurisdictions for already sentenced inmates. But they have never previously been empowered to serve as criminal sanctioners in the first instance in Missouri – or anywhere else.

Although this is currently occurring in only a narrow band of cases—those involving youthful offenders entitled to sentencing relief under *Miller v. Alabama*—the implications are significant and potentially far-reaching. It is, therefore, important to ensure that this practice is not allowed to take further hold to displace sentencing courts in the Show Me state.

Such recommitment would not be at all remarkable. Court-based sentencing has been the norm in this country for nearly two centuries. Holding that Missouri courts should serve as the venues of first resort for imposing criminal penalties naturally flows from several already existing strands of constitutional jurisprudence. First, it grows from our nation's commitment to the practice, which derives from the penumbral features of the Sixth and Fourteenth Amendments. Second, federal separation of powers helps formalize implied understandings that state judicial branches hold the power to pronounce sentences in the first instance. Third, such recommitment is wholly consistent with each of the individual constitutional protections the Court has extended to state court sentencing proceedings by way of the incorporation doctrine. Finally, it is consistent with Missouri law and state constitutional norms.

Indeed, given the *ad hoc* and problematic nature of many of the Missouri Parole Board practices—many making front page news over the last decade all across the country—it is clear Missouri's courts of law should be favored as sentencing venues of first resort, even as a matter of pure public policy. To be sure, our Missouri courts are in no way perfect arbiters of justice. But they are the far superior choice, compared to the Parole Board, when it comes to the important task of imposition of criminal punishment in Missouri.

It may be that some *Miller*-impacted inmates are granted release when they appear before parole boards for purposes of sentence review. For these defendants, the fact that they have not been formally resentenced may not present an immediate concern. Provided with their liberty, they may be willing to waive their right to further formal court process.

But *Miller*-impacted youthful offenders who want to be formally resentenced before appearing before a parole board, or who have been denied release following Missouri Parole Board sentence review – which is the majority of *Miller*-impacted inmates so far – should be permitted the opportunity to have their cases remanded for purposes of a lawful hearing in a court of law. *See* Sarah Lustbader & Vaidya Gullapalli, *Missouri's Parole Board Can No Longer Ignore the Rehabilitation of People Sentenced to Life Without Parole*, APPEAL (Oct. 16, 2018), https://theappeal.org/missouris-parole-board-can-no-longer-ignore-the-rehabilitation-of-people-sentenced-to-juvenile-life-without-parole/ (reporting that 85% of *Miller*-impacted inmates who appeared before the board for sentence review were denied release).

Such resentencing hearings should include jury fact-finding, appointed counsel, robust due process protections—as well as application of the special narrowing and juvenile proportionality considerations provided by *Miller*. Thereafter, depending upon the sentence imposed by the judicial branch, they should be afforded continuing Missouri Parole Board assessments for possible early release that continues to account for the defendant's youthful characteristics.

Sentencing as a critical stage of the criminal process should occur in a public courtroom overseen by professional jurists trained in the law and include due process protections and the right to counsel. Absent an affirmative waiver of sentencing rights by *Miller* inmates, Missouri agency actors should not be allowed to unilaterally impose criminal sanctions in processes that lack fundamental fairness, legal ethics mandates, or protections against arbitrariness in *Miller*-impacted matters or any other.

Respectfully submitted,

/s/Sean D. O'Brien
SEAN D. O'BRIEN
UMKC School of Law*
500 East 52nd Street
Kansas City, MO 64110
(816) 235-6152
(816) 235-5276 (fax)
obriensd@umkc.edu

CERTIFICATION PURSUANT TO RULE 84.06

The undersigned certifies that the foregoing brief was created using 13-point Times New Roman font, saved in Adobe Acrobat ".pdf" format for purposes of electronic filing, and complies with the limitations on length contained in Mo. Civ. Rule 84.06(b), in that it contains approximately 24,636 words, including the Cover, Table of Contents, Table of Authorities, Statement of Interest for Amici, and end of document Certifications.

/s/ *Sean D. O'Brien*

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Brief for Amici Curiae was submitted through the Court's electronic filing and service program on February 10, 2020 for purposes of provisional filing with the Missouri Supreme Court, as well as service upon counsel of record for Petitioner and Respondent (both of whom consent to such filing)

/s/ *Sean D. O'Brien*