No. SC97692

In the Missouri Supreme Court

JESSICA HICKLIN,

Appellant,

v.

ERIC SCHMITT, et al.,

Respondents.

Appeal from the Circuit Court of Cole County, Missouri
The Honorable Daniel R. Green, Circuit Judge

RESPONDENTS' SUBSTITUTE BRIEF

ERIC S. SCHMITT
Attorney General

Andrew J. Crane
Assistant Attorney General
Missouri Bar No. 68017

P.O. Box 899
Jefferson City, Missouri 65102
Phone: (573) 751-0264
Andrew.Crane@ago.mo.gov

Attorneys for Respondents

Table of Contents

Table of Authorities 4

Introduction 8

Statement of Facts 10

Argument 13

I. The circuit court correctly held that Hicklin cannot challenge her sentence in a declaratory judgment action (responds to Hicklin's fifth point on appeal). 13

A. Hicklin cannot state a claim for a declaratory judgment because she has an alternate, adequate remedy. 13

B. Hicklin cannot show a justiciable controversy as to her sentence or her parole eligibility. 15

C. Habeas corpus relief is available and adequate to address Hicklin's claims. 18

D. This Court cannot issue habeas relief on this record. 22

II. The circuit court correctly held that Missouri Statute Section 558.047 remedied any sentencing error Hicklin suffered under *Miller* and *Montgomery* (responds to Hicklin's first, second, third, and fourth points on appeal). 25

A. The standard of review is de novo. 25

B. The General Assembly could enact Section 558.047 as a remedy for *Miller* sentencing error (responds to Hicklin's second and fourth points on appeal). 26

C. Section 558.047 remedied Hicklin's unconstitutional sentence under *Miller* and *Montgomery* (responds to Hicklin's first and third points on appeal). 37

Conclusion 50

Certificate of Service and Compliance 51

Table of Authorities

Cases

Akin v. Director of Revenue,
934 S.W.2d 295 (Mo. 1996) 25

Bowling v. Dir., VA. Dept. of Corr.,
920 F.3d 192 (4th Cir. 2019) 45

Brown v. Precythe,
No. 2:17-CV-04082-NKL, 2018 WL 4956519 (W.D. Mo. Oct. 12, 2018). 14, 43

Calder v. Bull,
3 U.S. 386 (1798) 25, 26, 31

Charron v. State,
257 S.W.3d 147 (Mo. App. W.D. 2008) 6, 13

Cooper v. State,
818 S.W.2d 653 (Mo. App. W.D. 1991) 13

Deuschle v. Jobe,
30 S.W.3d 215 (Mo. App. W.D. 2000) 23, 24

Ex parte Bethurum,
66 Mo. 545 (1877) 26, 31

Gott v. Dir. Of Revenue,
5 S.W.3d 155 (Mo. 1999) 40

Graham v. Florida,
560 U.S. 48 (2010) 34

Greenbriar Hills Country Club v. Director of Revenue,
47 S.W.3d 346 (Mo. 2001) 40

Jones v. Fife,
207 S.W.3d 614 (Mo. 2006) 28

Jones v. Missouri Department of Corrections,
588 S.W.3d 203 (Mo. App. W.D. 2019) ..... passim
Knight v. Stubblefield,
101 S.W.3d 349 (Mo. App. E.D. 2003) 20
Madison Block Pharmacy,
620 S.W.2d 343 (Mo. 1981) 21, 24
Manzara v. State,
343 S.W.3d 656 (Mo. 2011) 15
McDermott v. Carnahan,
934 S.W.2d 285 (Mo. 1996) 6, 11, 13, 19
Miller v. Alabama,
567 U.S. 460 (2012) ..... passim
Mitchell v. Phillips,
596 S.W.3d 120 (Mo. 2020) 29
Mo. Soybean Ass'n v. Mo. Clean Water Comm'n,
102 S.W.3d 10 (Mo. 2003) 12
Montgomery v. Louisiana,
136 S. Ct. 718 (2015) ..... passim
Parktown Imports, Inc. v. Audi of America, Inc.,
278 S.W. 3d 670 (Mo. 2009) 40
Schaefer v. Koster,
342 S.W.3d 299 (Mo. 2011) 7, 8, 12, 15
State v. Hicklin,
969 S.W.3d 303 (Mo. 1998) 8
State ex rel. Bunker Res. Recycling and Reclamation, Inc. v. Mehan,
782 S.W.2d 381 (Mo. 1990) 30, 31

State ex rel. Carr v. Wallace,
527 S.W.3d 55 (Mo. 2017) 7, 12, 46, 47
State ex rel. Dutton v. Sevier,
83 S.W.3d 581 (Mo. 1935) 37
State ex rel. Koster v. Oxenhandler,
491 S.W.3d 576 (Mo. App. W.D. 2016) 21
State ex rel. Nixon v. Jaynes,
73 S.W.3d 623 (Mo. 2002) 21
State ex rel. Nixon v. Pennoyer,
36 S.W.3d 767 18
State ex rel. Nixon v. Russell,
129 S.W.3d 867 (Mo. 2004) 26, 28, 29
State ex rel. Taylor v. Moore,
136 S.W.3d 799 (Mo. 2004) 12
State ex rel. Zahnd v. Van Amburg,
533 S.W.3d 227 (Mo. 2017) 7, 37
State v. Harris,
414 S.W.3d 447 (Mo. 2013) 31
State v. Hart,
404 S.W.3d 232 (Mo. 2013) .....passim
State v. Honeycutt,
421 S.W.3d 410 (Mo. 2013) 25, 26, 30, 31
State v. Mares,
335 P.3d 487 (Wyo. 2014) 46
State v. Scott,
416 P.3d 1182 (Wash. 2018) 46

State v. Smiley,
478 S.W.3d 411 (Mo. 2016) 36, 38
State v. Williams-Bey,
164 A.3d 9 (Conn. Ct. App. 2016) 46
State v. Young,
362 S.W. 3d 386 (Mo. 2012) 40, 41
Virginia v. Leblanc,
137 S. Ct. 1726 (2017) 45
Willbanks, v. Missouri Dept. of Corr.,
522 S.W.3d 238 (Mo. 2017) 15, 17, 18, 19
Woods v. Missouri Dept. of Corr.,
595 S.W.3d 504 (Mo. 2020) 24

Constitutional Provisions and Statutes

Mo. Const. Art. I, § 13 25
Mo. Const. Art. III, § 1 25
Mo. Rev. Stat. § 217.690 43
Mo. Rev. Stat. § 217.692 ..... 25, 28, 44
Mo. Rev. Stat. § 558.047 (2016) ..... passim
U.S. Const. Art. I, § 10 30

Rules

Mo. Sup. Ct. R. 84.06 49
Mo. Sup. Ct. R. 29.15 ..... 11, 12

Introduction

Jessica Hicklin is a Missouri inmate who is serving a parole-eligible life sentence for a homicide she committed as a juvenile. Hicklin was originally sentenced to life imprisonment without the possibility of parole for first-degree murder, but the General Assembly extended parole eligibility to Hicklin's sentence after the United States Supreme Court's decisions in *Miller v. Alabama* and *Montgomery v. Louisiana*. Mo. Rev. Stat. § 558.047 (2016); *Miller v. Alabama,* 567 U.S. 460 (2012); *Montgomery v. Louisiana,* 136 S. Ct. 718 (2015). Any *Miller* error in Hicklin's sentence was remedied by Section 558.047. After the General Assembly enacted Section 558.047, this Court denied Hicklin habeas relief. (L.F. at 374).

Despite the legislative remedy provided by Section 558.047, Hicklin seeks a declaration that her sentence is "unconstitutional and void" and asks to be resentenced under the "stop-gap" procedure this Court used in *State v. Hart*, 404 S.W.3d 232, 243 (Mo. 2013). Hicklin's claims fail for two reasons.

First, Hicklin cannot use declaratory judgment to challenge the validity of her sentence. Missouri's courts have long recognized that declaratory judgment will not lie to challenge the validity of an inmate's convictions or sentences. *McDermott v. Carnahan,* 934 S.W.2d 285, 287 (Mo. 1996); *Charron v. State*, 257 S.W.3d 147, 153 (Mo. App. W.D. 2008). This Court's rules require Hicklin to seek relief from her sentences in a petition for a writ of habeas

corpus because the time for filing a Rule 29.15 motion has elapsed. *State ex rel. Carr v. Wallace,* 527 S.W.3d 55, 59 (Mo. 2017). If this Court has not already denied Hicklin's claims with prejudice, then she may still raise them in habeas corpus. Hicklin cannot state a claim for declaratory judgment while habeas corpus remains an adequate, available remedy. *Schaefer v. Koster,* 342 S.W.3d 299, 300 (Mo. 2011).

Second, Hicklin's sentence is not unconstitutional, void, or even erroneous. In *Montgomery,* the Supreme Court applied *Miller* retroactively and held that "[a] State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." *Montgomery,* 136 S. Ct. at 724. *Miller* applied retroactively to Hicklin and gave rise to a claim of sentencing error, but Hicklin's sentence was "merely erroneous, not void." *State ex rel. Zahnd v. Van Amburg,* 533 S.W.3d 227, 231 (Mo. 2017). The General Assembly has broad legislative authority, including the power "decide whether and how to respond to *Miller* by authorizing additional punishments for juvenile offenders found guilty of first-degree murder." *Hart,* 404 S.W.3d at 243. The legislature's enactment of Section 558.047 did not violate any constitutional limits on its power, and remedied Hicklin's *Miller* sentencing error under *Montgomery*. Hicklin's sentence is now valid, and she has no right to resentencing.

Statement of Facts

In 1997, Appellant Jessica Hicklin was convicted of first-degree murder and armed criminal action in the death of Sean Smith. (L.F. 372). Hicklin arranged to buy $5000 dollars of crystal methamphetamine from Smith. *State v. Hicklin*, 969 S.W.3d 303, 305 (Mo. 1998). But Hicklin did not have the money to pay Smith for the drugs, so she decided to "[s]he would have to eliminate" him. *Id*. Hicklin and her friend went to meet Smith for the drug deal and each "did a line of crystal meth." *Id*. Hicklin then led Smith back to a rural house where Hicklin claimed to have hidden the money to pay for the drugs. *Id*.

After searching for the money for over an hour, Smith announced that he did not believe Hicklin had the money and was going to walk home. *Id*. Hicklin and her friend then got into Hicklin's truck, where Hicklin pulled a .38 caliber revolver from her coat pocket. *Id*. As Smith walked past the truck, Hicklin leaned over the passenger seat and shot Smith in the face. *Id*. Smith fell to the ground clutching his face and screaming. *Id*. Hicklin leaned out the passenger window and shot Smith two more times in the back. *Id*.

After murdering Smith, Hicklin went to considerable lengths to dispose of Smith's body and possessions, steal valuables from Smith's trailer, fabricate an alibi, and lie to police officers. *Id*. at 305–06. Hicklin's efforts were unsuccessful, and the jury found her guilty on all counts. *Id*. at 306 The trial court sentenced Hicklin to concurrent sentences of life imprisonment without

the possibility of probation or parole for murder and 100 years' imprisonment for armed criminal action (L.F. 372). *Id.* The pleadings reflect that Hicklin murdered Smith when she was under the age of 18 (L.F. 373).

After the United States Supreme Court decision *Miller v. Alabama*, 567 U.S. 460 (2012), Hicklin filed a state habeas corpus petition seeking relief in this Court from her mandatory life without parole sentence (L.F. 373). On March 15, 2016, this Court granted her relief, making her parole eligible on her murder sentence after serving 25 years' imprisonment, a remedy approved by the United States Supreme Court in *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016); *see also Hicklin v. Steele*, No. SC94211. Hicklin filed a motion for reconsideration (L.F. 373).

While her habeas action was still pending before this Court, Hicklin filed a declaratory judgment petition in the Cole County Circuit Court in May 2016. She challenged the relief ordered in this Court's March 15, 2016 order, and she sought a declaration that Section 565.020 was unconstitutional (L.F. 373).

In the interim, the General Assembly enacted Section 558.047 as a part of Senate Bill 590. Section 558.047.1(1) grants parole eligibility to any juvenile offender who was convicted of first-degree murder and sentenced to life without the possibility of parole before August 28, 2016, once he or she completes twenty-five years of incarceration. Mo. Rev. Stat. § 558.047 (L.F. 374). This provision was immediately applicable to Hicklin (L.F. 374).

As a result, on July 19, 2016, this Court vacated its prior order stating: "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, 98th General Assembly (L.F. 374). All other pending motions are overruled as moot." *Hicklin v. Steele*, No. SC94211 (L.F. 374). This Court then issued its mandate (L.F. 374).

As a result, the Cole County Circuit Court then directed Hicklin to file an amended petition. In the amended petition, Hicklin continued to challenge the constitutionality of Section 565.020 and added a claim against the new provisions in Section 558.047 (L.F. 374). Hicklin asked the Cole County Circuit Court to issue an injunction prohibiting her continued confinement under Section 565.020.2 "absent further judicial proceedings in accordance with Missouri law." (L.F. 374). Hicklin also asked the Cole County Circuit Court to declare "what judicial process must be invoked to protect relator's rights, if the respondents are allowed to continue her restraint, or in the alternative, to order her released from their illegal custody." (L.F. 374). Hicklin also asked the Cole County Circuit Court to declare "the SB 590 enactment unconstitutional." (L.F. 374).

Respondent moved for judgment on the pleadings arguing that Hicklin could not challenge her sentence in a declaratory judgment action, and that her many claims were meritless (L.F. 296-314).

On November 27, 2017, the Cole County Circuit Court granted Respondent's motion for judgment on the pleadings (L.F. 372-390). The circuit court found that Hicklin could not challenge her sentence in declaratory judgment and that her claims were meritless (L.F. 372-390).

Argument

I. The circuit court correctly held that Hicklin cannot challenge her sentence in a declaratory judgment action (responds to Hicklin's fifth point on appeal).

Hicklin asks this Court to declare "that her sentence is unconstitutional and void" or to issue a writ of habeas corpus. Hicklin's requested relief makes plain that she seeks again to challenge the constitutionality of her sentence, and this Court's rules and precedent make plain that her challenge cannot be brought in a declaratory judgment action. *McDermott v. Carnahan,* 934 S.W.2d 285, 287 (Mo. 1996); Mo. Sup. Ct. R. 29.15.

A. Hicklin cannot state a claim for a declaratory judgment because she has an alternate, adequate remedy.

Courts may grant a declaratory judgment if presented with:

> (1) a justiciable controversy that presents a real, substantial, presently existing controversy admitting of specific relief, as distinguished from an advisory decree upon a purely hypothetical situation; (2) a plaintiff with a legally protectable interest at stake, consisting of a pecuniary or personal interest directly at issue and subject to immediate or prospective consequential relief; (3) a controversy ripe for judicial determination; and (4) an inadequate remedy at law.

Schaefer v. Koster, 342 S.W.3d 299, 300 (Mo. 2011) (citing *Mo. Soybean Ass'n v. Mo. Clean Water Comm'n,* 102 S.W.3d 10, 25 (Mo. 2003)).

Hicklin's requested relief is not appropriate in a declaratory judgment action because this Court's rules require her to seek an alternate, *exclusive* remedy—post-conviction relief under Rule 29.15. Of course, Rule 29.15's time limits would prevent Hicklin from filing now, but this Court has held that where "an inmate fails to file a timely motion for post-conviction relief," her claim "may still merit *habeas* relief by demonstrating cause for the failure to timely raise the claim at an earlier juncture and prejudice resulting from the error that forms the basis of the claim." *State ex rel. Taylor v. Moore*, 136 S.W.3d 799, 801 (Mo. 2004) (emphasis added). Given that Hicklin's challenges to her sentence arise from the holding of *Miller v. Alabama,* a new constitutional decision made retroactive on collateral review, her claims could not have been raised during the time for petitioning under Rule 29.15. *State ex rel. Carr v. Wallace,* 527 S.W.3d 55, 59 (Mo. 2017). Hicklin's claims also challenge the sufficiency of the legislative remedy she received, as well as this Court's decision to deny her habeas petition. To the extent her claims were not already denied by this Court in 2016, Hicklin offers no reason she could not raise a new habeas petition as dozens of similarly situated prisoners have done.

Missouri's courts have long recognized that declaratory judgment will not lie to challenge the validity of an inmate's convictions or sentences.

McDermott v. Carnahan, 934 S.W.2d at 287; *Charron v. State*, 257 S.W.3d 147, 153 (Mo. App. W.D. 2008). The declaratory judgment act "'is neither a general panacea for all legal ills nor a substitute for existing remedies. It is not to be invoked where an adequate remedy already exists.'" *Charron v. State*, 257 S.W.3d at 153 (quoting *Cooper v. State*, 818 S.W.2d 653, 654 (Mo. App. W.D. 1991)). Because Hicklin has an alternate, adequate remedy in habeas corpus, she cannot state a claim for a declaratory judgment and this Court should affirm the decision of the circuit court.

B. Hicklin cannot show a justiciable controversy as to her sentence or her parole eligibility.

Hicklin seeks to circumvent clear precedent excluding her claims from declaratory judgment by characterizing them an attempt to "remove uncertainty about what her sentence is and whether it comports with *Miller*" or as seeking interpretation about her eligibility for parole. (App. Br. at 42–44). Hicklin's characterization on appeal is belied by her earlier insistence that her claim "is and always has been an attack on the constitutionality of" the first-degree murder statute she was convicted and sentenced under. (L.F. at 223).

But even if the Court accepts Hicklin's new characterization of her claims, there is no controversy between Hicklin and Respondents as to what her sentence is or whether Missouri revised statute Section 558.047 applies to

make her eligible for parole. The parties agree that Hicklin was sentenced to life without the possibility of parole in 1997. The parties also agree that, in 2016, the Missouri General Assembly enacted Section 558.047 which allows Hicklin to petition the Missouri Parole Board for parole and requires the Board to hold a hearing and determine whether to grant Hicklin parole. (L.F. at 4).

Hicklin has pleaded no facts that suggest she could not petition for parole under Section 558.047, nor that the Board has denied her parole and refused to reconsider her. In fact, in a federal class-action suit, Hicklin and her class members admitted that the Missouri Parole Board has held parole hearings for *Miller*-affected offenders under Section 558.047 and that those offenders who were denied parole have been scheduled for reconsideration no more than five years in the future. (Br. of Macarthur Justice Center at 12–13).[1] Neither Hicklin nor the Board factually dispute that she may be considered for parole, granted parole, or rescheduled for parole consideration in the future.

Because Hicklin is eligible for parole under Section 558.047, the *Miller* error affecting her sentence has been remedied and there is no controversy between the parties. Hicklin thus asks the Court to declare her *ineligible* for parole or to explain what would result if she were not eligible for parole. This

[1] *See Brown v. Precythe,* No. 2:17-CV-04082-NKL, 2018 WL 4956519 (W.D. Mo. Oct. 12, 2018) (finding from the uncontested facts that each plaintiff was denied parole release and scheduled for reconsideration no more than five years in the future).

Court cannot address either of those issues because Hicklin lacks standing to raise them.

Hicklin cannot challenge the General Assembly's decision to create a process for *Miller* offenders to receive parole consideration because she has not been injured. Hicklin cannot invoke this Court's judicial authority unless she has standing to do so. *Manzara v. State,* 343 S.W.3d 656, 658–59 (Mo. 2011). To have standing, Hicklin must show "a legally cognizable interest" and "a threatened or real injury." *Id*. Hicklin has shown no threatened or real injury that Section 558.047 has caused her. That section created a process by which she can be released from prison, where previously there was none. Hicklin cannot use this Court's judicial power to stop the Board from considering her for parole release as Section 558.047 requires.

Similarly, Hicklin cannot seek this Court's guidance about the hypothetical case in which the Board will not consider her for parole under Section 558.047. *Schaefer v. Koster,* 342 S.W.3d at 300. No facts suggest the Board will not consider Hicklin for parole under Section 558.047, and there is no reason for this Court to imagine, as Hicklin requests, what would happen in that case.

Contrary to her assertions, Hicklin's complaint is not similar to those of other offenders who seek an interpretation of statutes to determine when they will be eligible for parole *See, e.g. Willbanks, v. Missouri Dept. of Corr.,* 522

S.W.3d 238, 240 (Mo. 2017). Instead, Hicklin knows when she will be eligible for parole but seeks to be declared *ineligible* for parole, so that her sentence will be unconstitutional, so that she can be resentenced.

Hicklin's challenge to her sentence is not appropriate for declaratory judgment, and her questions about the nature of her sentence and parole eligibility do not raise a real dispute between the parties.

C. Habeas corpus relief is available and adequate to address Hicklin's claims.

Hicklin argues that habeas relief is unavailable to her, or in the alternative, that it would be inadequate even if available. She is wrong on all counts.

1. Habeas relief is available to Hicklin, even if the State could assert procedural defenses.

Hicklin argues that habeas relief is unavailable because the State may have procedural defenses to Hicklin's claims if they have been previously denied or if she failed to raise them according to the State's procedural rules. If she had filed a habeas petition, her argument goes, "the state would have argued that habeas is unavailable" because habeas relief is not "not available if an issue was not raised on direct appeal." (App. Br. at 46). In support of that argument, Hicklin cites responses filed by the Attorney General in other habeas cases, which she claims the State argued that "claims like Hicklin's" are barred.

Even if the State could assert procedural defenses in a habeas corpus proceeding, that would not make habeas relief unavailable. Whether or not Hicklin believes her claims would merit habeas relief, there is no question she could raise them there and argue that the Court should review them on the merits under exceptions to rules of procedural default.

Even the cases cited by Hicklin show that habeas is the appropriate forum to press her claims.

In response to a habeas petition filed by Michael Davis, the State argued that Davis's Eighth Amendment claims had been denied by this Court, that he could have raised them on direct appeal, and that they were meritless. *State ex rel. Davis v. Michael Bowersox,* case no. SC96014, Suggestions in Opposition to Petition for Writ of Habeas Corpus (Mo. 2017). In reply, Davis argued, under exceptions to Missouri's procedural default rules, that his claims were not barred and should be considered on the merits. *Id.,* Reply in Support of Petitioner for Writ of Habeas Corpus. This Court denied the petition.

In response to a federal habeas petition filed by Donald Steward, the State argued that Steward's claims "appear[ed] timely and [were] not procedurally barred," addressed Steward's Eighth Amendment claims on the merits, argued that his challenges to the constitutionality of Missouri statute Section 558.047 must be raised in state court before Steward could seek federal relief, and addressed his claims about Section 558.047 on the merits. *Steward*

v. Wallace, case no. 4:16-CV-00407, Doc. 21 (E.D.Mo. 2019). The federal district court found that Steward should petition for a writ of habeas corpus in state court under Rule 91 to assert his challenges to Section 558.047. *Id*. at Doc. 22.

Despite Hicklin's assertions that habeas relief is unavailable to her, the cases she cites shows that Rule 91 would present her with a forum to advance the merits of her claims and argue against any procedural defenses the State might have. Were the opposite true, an offender might bring a declaratory action at any time and gain a new merits hearing, no matter what other options were available and no matter how many previous habeas petitions the offender had unsuccessfully brought.

2. Habeas review is appropriate because Hicklin is seeking immediate release from her current confinement.

Hicklin next complains that habeas is inappropriate because she is not seeking immediate release from her confinement. Hicklin fails to explain how her request that this Court declare "that her sentence is unconstitutional and void" is not a claim seeking to overturn the sentence and judgment that confines her so that she can be resentenced. (App. Br. at 50).

Hicklin is correct that habeas relief is reserved for claims seeking immediate relief from current confinement, and not to resolve a dispute about future eligibility for release. *State ex rel. Nixon v. Pennoyer,* 36 S.W.3d 767,

770. But Hicklin is arguing that her current confinement is illegal because her sentence is unconstitutional. (App. Br. at 50).

If this Court were to grant Hicklin the relief she seeks, the Court would have to overturn the sentence and judgment that confines Hicklin and order the Johnson County Circuit Court to conduct a resentencing hearing. (App. Br. at 23, 50). But that relief is unavailable in a declaratory judgment action because this action cannot challenge the legality of Hicklin's convictions or sentences or produce relief that would overturn them. *McDermott v. Carnahan,* 934 S.W.2d at 287.

3. Habeas corpus relief is adequate to address Hicklin's claims.

Hicklin also complains that habeas relief, even if available, would be inadequate because a ruling in habeas corpus would not resolve questions about what her sentence is or when she will be eligible for parole. She also argues that habeas relief is inadequate because no appeal lies from the denial of a habeas petition. Her concerns are unfounded.

As discussed above, there is no real dispute between the parties about what sentence Hicklin is serving or when she will be considered for parole. If Hicklin claimed that Respondents had interpreted the law to deny her parole consideration, declaratory judgment would lie to determine when Hicklin

should be considered for parole. *See Willbanks, v. Missouri Dept. of Corr.,* 522 S.W.3d at 240. But Hicklin did not raise or plead any such claim.

And Hicklin's complaints about the right to appeal in writ proceedings misses the mark. While it is true that "[a]n appeal does not lie from a decision in a habeas proceeding," habeas petitioners can still have their claims reviewed by appellate courts through a successive application for a writ of habeas corpus filed in the Missouri Court of Appeals and the Missouri Supreme Court. *Knight v. Stubblefield,* 101 S.W.3d 349, 349 (Mo. App. E.D. 2003). Hicklin does not acknowledge the fact that she could seek habeas relief from the court of appeals or this court, nor does she explain why that process is inadequate. Both the court of appeals and this Court have reviewed habeas claims that were denied circuit courts and granted relief, sometimes following evidentiary hearings before a special master. Hicklin fails to show how this Court's procedures are inadequate to address her claims.

D. This Court cannot issue habeas relief on this record.

In an alternative argument, Hicklin asks the Court to issue habeas relief under Rule 91.06, but this court cannot review Hicklin's claims under Rule 91.06 because there is no evidence before this Court that Hicklin is illegally confined. Rule 91.06 provides that reviewing courts may issue habeas relief, even if a petition has not been filed, if the court has "evidence from any judicial

proceedings had before such court or judge that any person is illegally confined."

Rule 91.06 is inapplicable here because there has been no evidence introduced in judicial proceedings. In fact, because this case is an appeal from the grant of judgment on the pleadings, there is no evidence here at all. In reviewing the grant of judgment on the pleadings, this Court must assume the facts Hicklin has pleaded are true and review whether her claims fail as a matter of law. *Madison Block Pharmacy*, 620 S.W.2d 343, 345 (Mo. 1981). But to receive habeas relief, Hicklin would bear the burden to prove facts that would entitle her to relief. *State ex rel. Nixon v. Jaynes,* 73 S.W.3d 623, 624 (Mo. 2002). The allegations that Hicklin has made in her petition are not evidence that she is being illegally confined and would not justify sua sponte habeas relief under Rule 91.06.

The case Hicklin cites to support relief under Rule 91.06 does not help her. In *State ex rel. Koster v. Oxenhandler,* 491 S.W.3d 576 (Mo. App. W.D. 2016), the Missouri Court of Appeals affirmed the circuit court's grant of habeas relief on a claim that was not presented in the offender's petition. But there, the appellate court invoked Rule 91.06 to justify the circuit court's grant of habeas relief *after* the circuit court heard and considered evidence, not to justify an appellate court issuing a writ without argument or evidence. *Id.*,

To be sure, the issues presented in the current action are legal issues that involve few disputed facts. But there are several factual issues that could arise if Hicklin petitioned for a writ of habeas corpus. There could be a factual dispute about whether Hicklin was under eighteen at the time of the crime. Or, as this Court recognized in *State v. Hart*, 404 S.W.3d 232, 240–41 (2013), there could be a question of whether Hicklin has waived her right to jury sentencing if her sentence is vacated. And as Hicklin has pointed out, the State may well have procedural defenses that it has a right to investigate and assert.

Even if evidentiary issues would be unlikely to arise, this Court cannot issue a writ here, where Respondent has had no notice that factual issues would be decided and with no tested evidence before the Court. The Court should affirm the circuit court's judgment, and allow Hicklin to pursue a writ of habeas corpus according to the normal procedures.

II. The circuit court correctly held that Missouri Statute Section 558.047 remedied any sentencing error Hicklin suffered under *Miller* and *Montgomery* (responds to Hicklin's first, second, third, and fourth points on appeal).

In points I, II, III, and IV on appeal, Hicklin argues that her sentence is unconstitutional and void and that Section 558.047 did not remedy the sentence error under *Miller* and *Montgomery*. Hicklin is wrong. The General Assembly has broad constitutional authority to pass laws and, as this Court has long recognized, the legislature has the authority to pass laws to remedy unconstitutional sentences under *Miller* and *Montgomery*. In enacting Section 558.047, the legislature remedied *Miller* sentencing error through a method explicitly endorsed by the United States Supreme Court and this Court. Because Section 558.047 provides Hicklin an opportunity for continuing parole review, her sentence is not erroneous and the first-degree murder statute is not unconstitutional or void as applied to her.

A. The standard of review is de novo.

When an appellate court reviews a dismissal based on a motion for judgment on the pleadings, the court "reviews the allegations in the petition and determines if the facts pleaded are insufficient as a matter of law." *Deuschle v. Jobe*, 30 S.W.3d 215, 217 (Mo. App. W.D. 2000) "For the purposes of the motion, the party filing the motion accepts as true all facts pleaded." *Id.* "'The position of a party moving for judgment on the pleadings is similar to

that of a movant on a motion to dismiss, i.e., assuming the facts pleaded by the opposite party to be true, these facts are nevertheless insufficient as a matter of law.'" *Id.*; *Madison Block Pharmacy*, 620 S.W.2d 343, 345 (Mo. 1981). "Therefore, a trial court properly grants a motion for judgment on the pleadings when the moving party can show that on the face of the pleadings, it is entitled to a judgment as a matter of law." *Woods v. Missouri Dept. of Corr.,* 595 S.W.3d 504, 505 (Mo. 2020).

B. The General Assembly could enact Section 558.047 as a remedy for *Miller* sentencing error (responds to Hicklin's second and fourth points on appeal).

Hicklin argues that the General Assembly lacked authority to enact Section 558.047 to remedy *Miller* violations for her and other affected offenders. Hicklin is mistaken. Missouri's constitution gives the General Assembly broad authority to pass laws, including the ability to pass curative laws to remedy constitutional error. There is no constitutional provision or precedent that could prevent the General Assembly from using its authority to enact Section 558.047 as a remedy for past *Miller* sentencing error.

While the constitution forbids the General Assembly from enacting ex post facto laws or passing bills of attainder, Section 558.047 was neither of those because it does not criminalize new conduct or increase the punishment for affected offenders. Instead, it extends an opportunity for parole review to juvenile murderers serving parole-ineligible sentences.

Hicklin's argument that Section 558.047 violates the separation of powers is similarly misplaced. The statute creates a process for the Parole Board to review Hicklin's sentence, determine whether she is eligible for parole under the statute, hold a parole consideration hearing, and determine whether Hicklin should be granted parole. Those functions are well within the Parole Board's power and do not infringe on the judicial authority.

1. Missouri's Constitution gives the General Assembly broad authority to enact laws, including the power to extend parole eligibility retroactively under Section 558.047 (responds to Hicklin's second point on appeal).

Missouri's constitution invests the General Assembly with broad, plenary legislative powers, and legislative enactments carry a strong presumption of constitutionality. *Akin v. Director of Revenue,* 934 S.W.2d 295, 299 (Mo. 1996); Mo. Const. Art. III, § 1. The General Assembly's broad authority includes the ability to pass curative legislation that applies to past criminal sentences. *See State v. Honeycutt,* 421 S.W.3d 410, 419 (Mo. 2013); Mo. Rev. Stat. § 217.692.

Although Missouri's constitution prohibits ex post facto laws, laws impairing contracts, and laws retrospective in operation, those provisions only prohibit the legislature from passing laws that take away or impair vested rights under existing laws. *Id.* (citing *Calder v. Bull,* 3 U.S. 386, 390 (1798)); Mo. Const. Art. I, § 13. Both the United States Supreme Court and this Court

have long recognized that the prohibition against ex post facto laws has a narrow technical meaning that does not prohibit Congress or the General Assembly from passing legislation that would reduce the severity of criminal penalties. *Calder v. Bull,* 3 U.S. at 391; *Ex parte Bethurum,* 66 Mo. 545, 548 (1877).

As this Court noted in *Honeycutt,* Missouri's constitutional drafters specifically considered and rejected an amendment that would have "limit[ed] the legislature's authority to pass retrospective laws that would be curative or confirmatory in nature." *Honeycutt,* 421 S.W.3d at 416 (citing *Debates of the Missouri Constitutional Convention 1875,* vol. II at 398 (Isidor Loeb & Floyd C. Shoemaker, eds., State Historical Soc'y of Mo., 1938)). This Court has since held that the General Assembly has the power to enact new provisions of law that reduce criminal punishment retroactively. *State ex rel. Nixon v. Russell,* 129 S.W.3d 867, 870–71 (Mo. 2004) "As long as the new statute does not increase the length of an offender's sentence, the changes it makes are a fit subject for legislation." *Id*. at 871.

In the context of juvenile-life-without-parole sentences after *Miller*, this Court has recognized that the General Assembly bears the ultimate responsibility for correcting erroneous sentences and authorizing permissible sentences to punish future offenders prospectively. *State v. Hart*, 404 S.W.3d 232 at 246. Although *Hart* provided a procedure for resentencing offenders,

this Court recognized that its remedy was a "stop-gap measure" because "only the legislature has the authority to decide whether and how to respond to *Miller* by authorizing additional punishments for juvenile offenders found guilty of first-degree murder." *Hart,* 404 S.W.3d at 243. And when this Court originally issued habeas relief to *Miller* offenders, it recognized that its order would only be effective "unless [the] sentence is otherwise brought into conformity with *Miller* and *Montgomery* . . . by enactment of necessary legislation." (L.F. at 42).

This Court's later order dismissing Hicklin's habeas petition following the enactment of Section 558.047 respected the Court's role under the Missouri Constitution. "Fixing the punishment for crime is a legislative and not a judicial function." *State v. Hart,* 404 S.W.3d at 246. The United States Supreme Court specifically invited States to remedy *Miller* violations by "permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." *Montgomery v. Louisiana,* 136 S. Ct. 718, 737 (2016). When the General Assembly accepted that invitation and enacted Section 558.047, it exercised its "constitutional prerogative" to decide the policy question of how best to remedy *Miller* error. *State v. Hart,* 404 S.W.3d at 253 (Fischer, J., concurring). This Court should continue to respect the legislature's policy-making power.

Contrary to Hicklin's argument, the General Assembly's authority to retroactively extend parole eligibility is not new. The legislature has exercised that power on several previous occasions, and this Court has repeatedly confirmed that it can do so. In *State ex rel. Nixon v. Russell,* this Court applied a new law creating early release opportunities for non-violent offenders retroactively to offenders sentenced before it was enacted. *Id*. at 870–71. In *Jones v. Fife,* 207 S.W.3d 614, 616 (Mo. 2006), this Court found that the General Assembly could retroactively relax laws governing how prior prison commitments count in determining parole eligibility.

And just like it did in Section 558.047, the General Assembly has created new parole eligibility for first-degree murders serving parole-ineligible life sentences. Mo. Rev. Stat. § 217.692. Under Section 217.692, the General Assembly provided new parole eligibility for victims of domestic violence who were serving life without parole or life without parole for fifty years for murdering their spouse or partner. Section 217.692 provided that offenders who met the statute's conditions would be eligible for parole after serving fifteen years toward their sentence and provided procedures for the Parole Board to use in reviewing those offenders for parole. Mo. Rev. Stat. § 217.692.

Section 217.692's similarity to Section 558.047 shows the legislature's use of its power to retroactively extend parole eligibility in the interest of justice. Both Sections 217.692 and 558.047 provide new parole review to a

specific group offenders who were previously ineligible for parole and both establish specific conditions and guidelines for the parole board to use. And both sections were legislative remedies that retroactively reduced the severity of a criminal punishment.

Hicklin cites *Mitchell v. Phillips,* 596 S.W.3d 120, 124 (Mo. 2020) and argues that Section 558.047 cannot "impermissibly change Hicklin's sentence." (App. Br. at 27). Hicklin's reliance on *Mitchell* is misplaced. In that case, this Court held that the *repeal* of a penal statute does not retroactively remove a parole ineligibility restriction that was provided as part of the punishment for that offense. *Mitchell,* 596 S.W.3d at 124. And in *Mitchell,* the repeal of the criminal statutes at issue included no provision intended to retroactively reduce punishments for offenders whose sentences were finally adjudicated.

Section 558.047 did not repeal or amend a penal statute, and specifically states that it applies retroactively to offenders sentenced before August 28, 2016, "regardless of whether the case is final for purposes of appeal." Mo. Rev. Stat. § 558.047. *Mitchell* was decided based only on common-law rules about the effect of the *repeal* of criminal statutes. *Mitchell,* 596 S.W.3d at 123–24. The rule of *Mitchell* and the effect of revised statute Section 1.160 applies only to statutory repeals and amendments and does not apply to new provisions of law. *State ex rel. Nixon v. Russell,* 129 S.W.3d at 871.

This Court's precedent leaves no doubt that the General Assembly has broad control over how best to remedy *Miller* error. This Court should defer to the legislature's *Miller* remedy and reject Hicklin's attempt to circumvent it.

2. Section 558.047 is not an ex post facto law or a bill of attainder.

In a footnote, Hicklin argues that Section 558.047 cannot provide her with parole eligibility because changing her punishment to a parole-eligible life sentence would violate the federal prohibition against bills of attainder. Hicklin is wrong. Section 558.047 does not fall under the prohibition against bills of attainder or ex post facto laws.

The major limit on the General Assembly's power to pass retroactive laws is Missouri's constitutional prohibition against ex post facto laws. *State v. Honeycutt,* 421 S.W.3d at 419. Of course, the federal constitution also prohibits state legislatures from enacting bills of attainder. *State ex rel. Bunker Res. Recycling and Reclamation, Inc. v. Mehan,* 782 S.W.2d 381, 385 (Mo. 1990); U.S. Const. Art. I, § 10. The constitutional prohibitions against ex post facto laws and bills of attainder are limits on legislative power to inflict *punishment* retroactively or on specific groups of people. Section 558.047 does not inflict punishment, so it does not breach either prohibition.

Missouri's ban on ex post facto laws is coextensive with the federal Ex Post Facto Clause and prohibits laws that "provide[ ] for punishment for an act

that was not punishable when it was committed or that imposes an additional punishment to that in effect at the time the act was committed." *State v. Harris,* 414 S.W.3d 447, 449–50 (Mo. 2013). The federal Bill of Attainder Clause forbids laws that single out a person or group and punish them. *State ex rel. Bunker Res. v. Mehan,* 782 S.W.2d at 386. Under both clauses, this Court analyzes whether the effects of the law at issue fall within the historical meaning of punishment. *Id*. at 387; *State v. Honeycutt*, 421 S.W.3d at 419–20.

There can be no real argument that Section 558.047 punishes Hicklin. Section 558.047 allows Hicklin to petition the parole board to review her sentence, hold a hearing, and determine whether to grant her parole. Mo. Rev. Stat. § 558.047. Courts have long understood that the legislature's power to retroactively reduce punishment does not fall within the ex post facto prohibition. *Calder v. Bull,* 3 U.S. at 391; *Ex parte Bethurum,* 66 Mo. 545, 548 (1877). Section 558.047 does not increase Hicklin's sentence, prohibit her from participating in any lawful activity, or cause her legal or financial harm; instead the statute grants Hicklin parole eligibility that she did not previously have. Because Section 558.047 does not inflict punishment, it is not prohibited under the Ex Post Facto or Bill of Attainder Clauses and can legally apply to Hicklin.

3. Section 558.047 does not violate the separation of powers (responds to Hicklin's fourth point on appeal).

Hicklin also argues that Section 558.047 violates Missouri's constitutional separation of powers by allowing the parole board to resentence her and "make the final application of the *Miller* factors to Hicklin." (App. Br. at 38). Hicklin is wrong because her argument follows from two false premises. First, Section 558.047 does not provide for resentencing, it simply instructs the Parole Board to "hold a hearing and determine if [Hicklin] shall be granted parole," a function that is within the Parole Board's purview. Second, because the legislature has allowed Hicklin to receive parole consideration, there is no constitutional requirement that any court consider the so-called *Miller* factors and how they apply to Hicklin.

Hicklin's first mistaken assumption, that Section 558.047 provides "sentence review" like a resentencing, has no support in the statute or the scheme of laws and regulations governing Missouri's parole system. Although subsection one provides that juvenile offenders may "petition for a review of [their] sentence," the remaining subsections make clear that this sentence review is to ensure that the offender meets the statutory requirements to receive a parole hearing. Mo. Rev. Stat. § 558.047.1(1). Both subsections 2 and 3 of the statute describe pleading and notice requirements for the petition and

set out a process for the Parole Board to screen petitions to ensure eligibility under the statute. Mo. Rev. Stat. § 558.047.2–.3.

The importance of this screening process was highlighted in *Jones v. Missouri Department of Corrections,* 588 S.W.3d 203, 208 (Mo. App. W.D. 2019). There, the Missouri Court of Appeals found that Section 558.047 still requires the Parole Board to review an offender's sentence structure and determine parole eligibility under existing laws and guidelines. *Id*. The Board must use the review of the offender's sentence to ensure the offender is eligible for parole review under 558.047 and that consecutive sentences do not bar parole eligibility. *Id*.

After the Parole Board reviews an offender's petition and sentence structure, the Board "shall hold a hearing and determine if the defendant shall be granted parole." § 558.047.4. In a parole hearing under 558.047, the Board considers additional factors drafted by the legislature that concern the offender's youth at the time of the offense and subsequent maturation. As the Court of Appeals found in *Jones*, Section 558.047 does not suspend the Board's normal guidelines and rules. So the Board may—and does—follow its longstanding practice of setting offenders who are denied parole for reconsideration hearings no more than five years in the future. 14 C.S.R. 80-2(c); Br. of Macarthur Justice Center at 12–13. Reviewing sentence structures to determine parole eligibility, holding parole consideration hearings, and

rescheduling offenders for reconsideration are all functions of the Parole Board, not the courts.

Hicklin also mistakenly argues that she has a right to have a sentencing court apply the so-called *Miller* factors to her. The sentencing factors related to youthful offenders set forth in *Miller* are relevant to a sentencer's decision whether to sentence a juvenile offender to life without parole and forever remove their ability to be released into society. *Miller v. Alabama,* 567 U.SS. 460, 474–75. Factors about an offender's youth and the possibility of future rehabilitation are relevant to determine whether a sentence of life without the possibility of parole is proportional for that particular offender, because of the "irrevocable" nature of "imprisoning an offender until he dies." *Id*. The question before the Supreme Court in *Miller* and *Graham v. Florida* was whether the Eighth Amendment "prohibit[s] States from making the judgment *at the outset* that [juvenile] offenders never will be fit to renter society." *Graham v. Florida,* 560 U.S. 48, 75 (2010). Since *Montgomery* applied *Miller* retroactively, Hicklin has a right to have a court consider her youth and subsequent maturity *only if* that court forbids her from being considered for parole and irrevocably sentences her to die in prison. Under Section 558.047, Hicklin simply is not facing that threat.

The General Assembly has determined that the Parole Board, in considering Hicklin for parole, should consider factors related to Hicklin's

youth at the time of her crime and her subsequent growth in prison. Mo. Rev. Stat. § 558.047.5. But those factors are only reviewed "[i]n a parole review hearing" where the Board must determine "if [Hicklin] shall be granted parole." Mo. Rev. Stat. § 558.047.4–.5. Section 558.047 does not ask the Board to resentence Hicklin and does not allow it to make her sentence irrevocable by refusing to consider her for parole. The Board must consider Hicklin for parole, and that function does not infringe on the power of judiciary.

C. Section 558.047 remedied Hicklin's unconstitutional sentence under *Miller* and *Montgomery* (responds to Hicklin's first and third points on appeal).

Hicklin's central argument in the circuit court, and in her 2015 habeas petition before this Court, is that Missouri's first-degree murder statute is unconstitutional and void as applied to her. Hicklin's argument misreads this Court's case law. There was constitutional error in Hicklin's sentencing proceeding under *Miller*, but neither her sentence nor the statute was void.

Because of the new rule announced in *Miller v. Alabama,* Hicklin's *sentencing* under Section 565.020.2 (1994) was unconstitutional because it imposed a mandatory life-without-parole-sentence. And because *Montgomery v. Louisiana* applied the rule of *Miller* retroactively to cases on collateral review, Hicklin had a right to seek a remedy that provided her with a chance to be released. The General Assembly cured the sentencing court's error under *Miller* when it extended Hicklin an opportunity for release on parole. Because

the State has remedied any *Miller* violation through curative legislation, Hicklin has no right to further relief.

1. Hicklin's sentence is not void and does not require resentencing (responds to Hicklin's first point on appeal).

Hicklin's argues that her sentence is void and cannot be remedied by the General Assembly. Hicklin's argument is incorrect under this Court's clear precedent. *State v. Hart,* 404 S.W.3d at 239; *State v. Smiley*, 478 S.W.3d 411, 416 n.3 (Mo. 2016).

Although, Hicklin argues that "an unconstitutional law is void and is as no law," Missouri's prior first-degree murder statute was not unconstitutional or void as applied to juveniles sentenced to mandatory life-without-parole sentences. *State v. Hart,* 404 S.W.3d at 239; *State v. Smiley*, 478 S.W.3d at 416 n.3. As this Court noted in *Hart, Miller* did not "categorically bar a penalty for a class of offenders." *Hart,* 404 S.W.3d at 238 (citing *Miller,* 132 S. Ct. at 2469). Instead, it "mandate[d] that a sentencer follow a certain process . . . before imposing a particular penalty." *Id*. Even before the General Assembly enacted Section 558.047, there was no constitutional defect in the length of Hicklin's sentence or the fact that she was not eligible for parole. *Hart,* 404 S.W.3d at 238. The only defect in Hicklin's sentence was the sentencing procedure that did not comport with *Miller*. That procedural sentencing error did not void Hicklin's sentence or the statute she was sentenced under. *Id*. at 238–39.

This Court's older cases have held that a sentencing court's judgment is void when the record shows that the court lacked authority to render the judgment that it rendered. *State ex rel. Dutton v. Sevier,* 83 S.W.3d 581, 582 (Mo. 1935). But this Court has recently clarified that "if a circuit court with personal jurisdiction over the defendant and subject matter over the case enters a sentence that is contrary to law, that sentence is merely erroneous—not void." *State ex rel. Zahnd v. Van Amburg,* 533 S.W.3d 227, 231 (Mo. 2017).

There is no sound argument that the Jackson County Circuit Court lacked jurisdiction or authority to sentence Hicklin to life without the possibility of parole. Under the law at the time, life without the possibility of parole was the only punishment that Hicklin could receive and there was no constitutional provision, statute, or case that would make that sentence illegal, much less void. Under the retroactive holdings of *Miller* and *Montgomery,* the United States Supreme Court announced a new rule that gave rise to error in Hicklin's sentence. But Hicklin's sentence was "merely erroneous—not void." *State ex rel. Zahnd,* 533 S.W.3d at 231.

Nor was Missouri's first-degree murder statute—565.020.2 (1994)—void or unconstitutional as applied to Hicklin. Section 565.020.2 (1994) would only be void as applied to Hicklin if it provided no valid punishment. *Hart,* 404 S.W.

3d at 239.[2] But Section 565.020 *does* provide a valid punishment for Hicklin's first-degree murder conviction because the General Assembly has provided Hicklin with an opportunity for parole consideration after serving twenty-five years toward her sentence. Hicklin asserts that she must have resentencing under the "stop-gap" procedure that this Court created in *Hart,* but that procedure is obsolete given the General Assembly's action. *Hart,* 404 S.W.3d at 243. Even if a sentencer would determine that life imprisonment without the possibility for parole is not a permissible sentence for Hicklin, it would not matter, because the statute she was sentenced under, along with Section 558.047, now provides her with an opportunity for parole. Hicklin's first-degree murder sentence is not void, and Hicklin is not entitled to resentencing.

2. Section 558.047 provided Hicklin with an opportunity for parole review (responds to part A of Hicklin's third point on appeal).

Section 558.047 allows Hicklin to petition the Parole Board for a review of her sentence and a chance to be released on parole. Once Hicklin has served 25 years toward her sentence of imprisonment, she may petition the Parole Board. Mo. Rev. Stat. § 558.047.1(1). The Board must review Hicklin's petition to ensure that Hicklin is eligible to petition under the statute. Mo. Rev. Stat.

[2] And even if section 565.020.2 failed to provide a valid punishment for Hicklin, it would not be unconstitutional as applied to her. *Hart,* 404 S.W.3d at 246 n.11; *State v. Smiley*, 478 S.W.3d at 416 n.3.

§558.047.2–.3. The Board must also verify that Hicklin is eligible for parole under applicable statutes and guidelines. *Jones v. Missouri Department of Corr.,* 588 S.W.3d at 208. After the Board reviews Hicklin's sentence structure to verify that she is eligible for parole, the Board "shall hold a hearing to determine if [Hicklin] shall be granted parole. Mo. Rev. Stat. § 558.047.5. During that hearing, the Board will consider additional statutory factors related to Hicklin's youth at the time of her crime and subsequent growth and maturation. Mo. Rev. Stat. § 558.047.5 (1)–(5). And even if the Board does not grant Hicklin parole after her first hearing, the Board's regulations provide that "[r]econsideration hearings shall be conducted every one (1) to five (5) years at the board's discretion until a release date has been set." 14 C.S.R. 80–2(C)(2).

Hicklin argues that Section 558.047 does not grant her parole eligibility, and instead grants only a one-time sentence review. Hicklin's argument is wrong for two reasons. First, the plain language of Section 558.047 makes Hicklin eligible for parole after serving twenty-five years' imprisonment. Second, even if Section 558.047 did not require the Board to hold continuing reconsideration hearings, Hicklin has failed to plead any facts that the Board has denied her parole or that the Board has refused to reconsider her for parole at regular intervals.

In interpreting the effect of Section 558.047, this Court must give effect to legislative intent as reflected by the plain language of the statute at issue. *Parktown Imports, Inc. v. Audi of America, Inc.*, 278 S.W. 3d 670, 672 (Mo. 2009). If the meaning of a statute is not clear on its own, the Court should read the statute in harmony with the entire act and with other statutes dealing with the same or similar subject matter. *Gott v. Dir. Of Revenue,* 5 S.W.3d 155, 159–60 (Mo. 1999). This Court presumes that the General Assembly knew the existing law when it enacted a piece of legislation, and this Court also presumes that statutes enacted by the legislature are constitutional unless they clearly and undoubtedly violate the constitution. *Greenbriar Hills Country Club v. Director of Revenue,* 47 S.W.3d 346, 352 (Mo. 2001); *State v. Young,* 362 S.W. 3d 386, 390 (Mo. 2012).

Section 558.047 makes Hicklin eligible for parole if she meets the statutory conditions. The plain language of Section 558.047 provides Hicklin the ability to petition the Parole Board to review her sentence to determine whether she is eligible under the statute for a parole consideration hearing. Mo. Rev. Stat. § 558.047.1(1)–.3. If Hicklin is eligible under the statute, the Board *shall* hold a "parole review hearing" to determine whether to grant Hicklin parole. Mo. Rev. Stat. § 558.047.4–.5. Axiomatically, because the

statute allows the Parole Board to grant Hicklin parole, it makes her *eligible*[3] for parole. Hicklin's argument to the contrary ignores the plain meaning of the words in the statute.

Hicklin argument that the statute limits her to one opportunity for parole review also misreads the statute. Section 558.047 provides that offenders, like Hicklin, who were sentenced before August 28, 2016, "may submit to the parole board a petition for a review of his or her sentence, regardless of whether the case is final for the purposes of appeal, after serving twenty-five years of incarceration on the sentence of life without parole." Mo. Rev. Stat. §558.047.1(1). The statute does not say Hicklin cannot file later petitions, and does not forbid the Board for holding parole reconsideration hearings. *Id*. Although subsection (2), which applies to offenders sentenced after August 28, 2016, provides that those offenders may petition once after serving twenty five years and "a subsequent petition after serving thirty-five years," there is no such language that applies to offenders like Hicklin.

The plain language of Section 558.047 does not make clear, either way, whether Hicklin has a right to file subsequent petitions or whether the Board must hold reconsideration hearings if it denies her parole. But the law existing

[3] Webster's dictionary defines "eligible" as "qualified to participate or be chosen." *Merriam-Webster.com,* "eligible", https://www.merriam-webster.com/dictionary/eligible.

when Section 558.047 was enacted and the statutory and regulatory scheme governing parole show that Section 558.047 was intended to remedy *Miller* violations under *Montgomery v. Louisiana* and that the section does not prohibit the Board from conducting parole review under its normal regulations.

Before the General Assembly enacted Section 558.047, this Court had urged the legislature to act to remedy sentences affected by *Miller v. Alabama*. *State v. Hart,* 404 S.W.3d at 246–47; *State v. Hart,* 404 S.W.3d at 253 (Fischer, J., concurring); (L.F. at 42). In addition, the United States Supreme Court emphasized that states could remedy *Miller* error by legislatively extending parole eligibility to affected inmates after twenty five years' imprisonment. *Montgomery,* 136 S. Ct. at 736. When the legislature enacted Section 558.047, dozens of habeas petitions raising *Miller* sentencing claims were still pending in this Court. After the statute was passed, it was immediately clear to this Court that Section 558.047 was intended to remedy *Miller* error and, on that basis, this Court denied the pending habeas claims, including Hicklin's. (L.F. 374).

The remedy in Section 558.047—parole eligibility after twenty-five years' imprisonment—is nearly identical to the remedy invited in *Montgomery* and the remedy crafted in this Court's initial habeas orders. *Montgomery,* 136 S. Ct. at 736; (L.F. at 42). Given the legal context of Section 558.047, the

legislature intended to remedy *Miller* sentences by providing parole eligibility on life-without-parole sentences after twenty-five years' imprisonment.

The General Assembly's intent is even more evident in the context of other statutes and regulations governing Missouri's parole process. Missouri's regulations provide that, following a parole denial, the Board must hold reconsideration hearing at regular intervals until an inmate is scheduled for release. 14 C.S.R. 80-2(C). Hicklin does not allege that the Board will not do so in her case, nor could she. On the contrary, the Board holds regular reconsideration hearings for juvenile offenders considered under 558.047. (Br. of Macarthur Justice Center at 12–13).[4] Missouri's statutes contemplate that even the most serious offenders will be reconsidered after a parole denial. Mo. Rev. Stat. § 217.690. Under Section 217.690, any offender denied parole on a sentence of first-degree murder cannot be eligible for another parole hearing until at least three years after the parole denial. But that statute makes clear that regular parole consideration is an integral function of the parole process—even for first-degree murderers.

Section 558.047 is written to allow parole review under the Parole Board's normal guidelines. As the Missouri Court of Appeals wrote in *Jones,*

[4] *See Brown v. Precythe,* No. 2:17-CV-04082-NKL, 2018 WL 4956519 (W.D. Mo. Oct. 12, 2018) (finding from the uncontested facts that each plaintiff was denied parole release and scheduled for reconsideration no more than five years in the future).

"nothing within Section 558.047 supersedes established parole guidelines and/or authorizes the parole board to ignore these guidelines." *Jones,* 588 S.W.3d at 208. The General Assembly could have dispensed with the normal guidelines under 558.047, but chose not to. *Id*. at 208 n.5. (citing Mo. Rev. Stat. 217.692).

The language, framework, and context of Section 558.047 make clear that the General Assembly intended to remedy *Miller* violations by extending parole eligibility to life without parole sentence after twenty five years. Even if this Court finds that Section 558.047 does not require the Board to conduct regular reconsideration hearings according to its regulations, the statute does not prohibit the Board from doing so, and there is no evidence or allegation that the Board will not do so. Hicklin has failed to show that Section 558.047 does not provide her with an opportunity for parole consideration, and this Court should deny her challenge to the statute.

3. Section 558.047's grant of parole consideration is a constitutionally adequate remedy for a *Miller* sentencing error.

The General Assembly's decision to extend parole eligibility retroactively to *Miller* was a remedy explicitly endorsed by the United States Supreme Court and this Court. *Montgomery,* 136 S. Ct. at 724; (L.F. at 42). In no uncertain terms, the *Montgomery* Court emphasized that "[a] State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole,

rather than by resentencing them." *Id*. The Court also referenced a Wyoming statute, which allowed juvenile homicide offenders to seek parole after 25 years.

Since *Montgomery,* the Supreme Court has confirmed that *Miller, Montgomery,* and *Graham* did not require states to establish any specific parole process to remedy *Miller* violations. *Virginia v. Leblanc*, 137 S. Ct. 1726 (2017). In *Leblanc*, the Supreme Court found that *Graham* did not forbid Virginia's decision to make juvenile nonhomocide offenders eligible for a "geriatric release program [that] employed normal parole factors." *Id.* at 1729. The Court found that the geriatric release program allowed the Virginia Parole Board to consider the applicant's history, their conduct during incarceration, their inter-personal relationships with staff and inmates, and their changes in attitude toward self and others. *Id*. The Court held that consideration of these factors could allow a juvenile offender to obtain release based on his or her demonstrated maturity or rehabilitation. *Id*.

Leblanc makes clear that Supreme Court's Eighth Amendment cases do not mandate any time frame for parole consideration or any procedures beyond consideration of "normal parole factors." *Id*. Any rule requiring the General Assembly to do something more to remedy *Miller* violations would be a broad expansion, not supported by the text of *Miller*, *Montgomery*, and *Graham*. *Bowling v. Dir., VA. Dept. of Corr.,* 920 F.3d 192, 197 (4th Cir. 2019) (*Miller*

does not apply to "a juvenile offender who has and will continue to receive parole consideration."); *See also State v. Williams-Bey,* 164 A.3d 9, 16–18, 25–26 (Conn. Ct. App. 2016) (upholding legislative *Miller* remedy and noting a "trend" of courts finding that parole eligibility is constitutionally adequate to remedy a *Miller* violation); *see also State v. Scott,* 416 P.3d 1182, 1189 (Wash. 2018) (upholding legislative *Miller* remedy); *State v. Mares*, 335 P.3d 487, 497–98 (Wyo. 2014) (same). Under clear United States Supreme Court case law, Section 558.047 is an adequate remedy for *Miller* sentencing error.

4. Section 558.047 is not unconstitutional under this Court's decision in *State ex rel. Carr v. Wallace,* 527 S.W.3d 55 (Mo. 2017) (responds to part B of Hicklin's third point on appeal).

Hicklin argues that the General Assembly's decision to extend her parole eligibility is not enough because her sentence, life without parole for twenty five years, is now the "harshest penalty available to any juvenile offender." Hicklin argues her sentence should vacated under this Court's decision in *State ex rel. Carr v. Wallace* because *Carr* prohibits imposition of the law's harshest penalties on a juvenile offender without consideration for that offender's youth.

Hicklin's argument has a flaw. In *Carr,* this Court prohibited mandatory imposition of the law's highest penalty on a juvenile offender. *Carr,* 527 S.W.3d at 61. But Hicklin concedes that life without parole for twenty-five years is not the highest penalty under the law for her offense. In fact, all non-juvenile

offenders convicted of first-degree murder must be sentenced to death or life without the possibility of parole. And juvenile offenders sentenced prospectively may still receive life-without-parole sentences. Compared to Hicklin's sentence, there are at least two harsher punishments authorized for first-degree murder.

Hicklin ignores the fact that the General Assembly specifically intervened for offenders like her to reduce her punishment to one that the Supreme Court explicitly found to be Constitutionally permissible. *Montgomery,* 136 S. Ct. at 724. Unlike Hicklin, Carr's sentence was not affected by Section 558.047, and he remained under a sentence that this Court found to be the statutory equivalent of life-without parole. *Carr,* 527 S.W.3d at 61.

If the Court follows Hicklin's logic, no matter how much the legislature reduced her punishment, her sentence would still be erroneous until the legislature created an even higher penalty for first-degree murder, and gave her the lower one. That cannot be the law. This Court has recognized that the legislature has the authority to decide whether and how to remedy *Miller* error. *Hart,* 404 S.W.3d at 243. The legislature has chosen a constitutionally adequate remedy. *Montgomery,* 136 S. Ct. at 724. Hicklin cannot bend this Court's decision to *Carr* to justify a lower and lower penalty until she finds one that suits her.

5. Section 558.047 does not deprive Hicklin of her right to jury sentencing (responds to part C of Hicklin's third point on appeal).

Finally, Hicklin argues that Section 558.047 infringes on her right to jury sentencing under Missouri law. This argument just repeats Hicklin's claim that Section 558.047 violates the separation of powers because no jury will apply the *Miller* factors to determine Hicklin's punishment. This argument fails for the same reasons as before.

The sentencing factors related to youthful offenders set forth in *Miller* are relevant to a sentencer's decision whether to sentence a juvenile offender to life without parole and forever remove their ability to be released into society. *Miller v. Alabama,* 567 U.SS. 460, 474–75. There is no constitutional requirement that a sentencer consider factors related to an offender's youth before imposing a sentence of life *with* the possibility of parole, the sentence that Hicklin effectively serves.

Conclusion

The Cole County Circuit Court correctly found that Hicklin's claims for declaratory judgment fail as a matter of law. The circuit court's decision granting judgment on the pleadings in Respondents' favor should be affirmed.

Respectfully submitted,

ERIC S. SCHMITT
Attorney General

/s/ Andrew J. Crane

Andrew J. Crane
Assistant Attorney General
Missouri Bar #68017
PO Box 899
Jefferson City, MO 65102
(573) 751-0264
andrew.crane@ago.mo.gov

Attorneys for Respondents

Certificate of Service and Compliance

I certify that I filed this brief using the Missouri Case.Net electronic filing system on May 7, 2020. All other parties will be served electronically under Rule 103.08.

I also certify that the attached brief complies with the size, type, form, and length limitations in Missouri Supreme Court Rule 84.06 and contains 10,749 words, excluding the cover and certifications required by Rule 84.06.

/s/ Andrew J. Crane
Andrew J. Crane
Assistant Attorney General