IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

NORMAN BROWN, RALPH McELROY, SIDNEY ROBERTS, and THERON ROLAND, on behalf of themselves and a class of similarly situated individuals, Plaintiffs, v. ANNE L. PRECYTHE, Director of Missouri Department of Corrections, in her official capacity; KENNETH JONES, Chairman of the Missouri Board of Probation and Parole, in his official capacity; JIM WELLS, Member of the Missouri Board of Probation and Parole, in his official capacity; MARTIN RUCKER, Member of the Missouri Board of Probation and Parole, in his official capacity; ELLIS MCSWAIN, JR., Member of the Missouri Board of Probation and Parole, in his official capacity; DON RUZICKA, Member of the Missouri Board of Probation and Parole, in his official capacity; JENNIFER ZAMKUS, Member of the Missouri Board of Probation and Parole, in her official capacity; GARY DUSENBERG, Member of the Missouri Board of Probation and Parole, in his official capacity, Defendants.	)	Case No. 17-cv-4082

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

COME NOW the plaintiffs Norman Brown, Ralph McElroy, Sidney Roberts, and Theron Roland, on behalf of themselves and a class of similarly situated individuals, and for their cause against defendants Anne L. Precythe, Kenneth Jones, Jim Wells, Martin Rucker, Ellis McSwain, Don Ruzicka, Jennifer Zamkus, and Gary Dusenberg, state as follows:

INTRODUCTION

1. This challenge is brought by and on behalf of over 80 Missouri prisoners who were sentenced to die behind bars for crimes they allegedly committed as children and who, decades later, are being deprived of a meaningful opportunity for release, in contravention of their federal and state constitutional rights. Unfortunately, the Missouri Parole Board seems to believe its discretion is absolute and its actions beyond reproach. But the Board cannot violate inmates' constitutional rights. Absent intervention by this Court, the Board will continue to do so in the context of juvenile offenders whose rehabilitation and maturation is not being meaningfully considered.

2. Plaintiffs and the class they seek to represent received mandatory life without parole ("LWOP") sentences – *de facto* death sentences imposed without appropriate and constitutionally-required consideration of their youth and its attendant characteristics.

3. In 2012, the United States Supreme Court declared such sentences unconstitutional for those under 18 at the time of their crimes, noting "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Miller v. Alabama*, 132 S.Ct. 2455, 2458, 2469 (2012) (citing *Roper v. Simmons*, 543 U.S. 551, 560 (2005), and *Graham v. Florida*, 560 U.S. 48, 68-69 (2010)).

4. The Court continued that, in light of juvenile offenders' immaturity, recklessness, impetuosity, sensitivity to peer pressure, and capacity for change, LWOP should be imposed only in the rarest of cases. *Miller*, 132 S.Ct. at 2469 (quoting *Roper*, 543 U.S. at 573; *Graham*, 560 U.S. at 68); *see also Montgomery v. Louisiana*, 577 U.S. __, 136 S.Ct. 718 (2016) (holding that *Miller* applies retroactively and LWOP is only appropriate for the most incorrigible juvenile offenders).

5. The United States Supreme Court has reiterated that proposition in more recent opinions. *See Tatum v. Arizona*, 137 S.Ct. 11, 13 (Oct. 31, 2016) (noting the critical question when LWOP is on the table for juvenile offenders is "whether the petitioner was among the very 'rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.'") (Sotomayor, J., concurring) (quoting *Montgomery*, 136 S.Ct. at 734); *Adams v. Alabama*, 136 S.Ct. 1796, 1799 (May 23, 2016) (noting LWOP appropriate only for "the rare juvenile offender whose crime reflects irreparable corruption.") (Sotomayor, J., concurring) (citations omitted).

6. Simply put: children are different for sentencing purposes. As a result, Plaintiffs are entitled to a "**meaningful opportunity** to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 560 U.S. at 75 (emphasis added). Juvenile offenders sentenced to life without parole now have a constitutionally-protected liberty interest in parole proceedings permitting release based on demonstrated maturity and rehabilitation. Defendants' practices and customs governing the parole review process for Plaintiffs and the class they seek to represent deny them that right. For purposes of review, Defendants treat these "juvenile offenders" no differently than typical adult offenders.[1]

7. Instead, Plaintiffs' parole hearings are shrouded in privacy, with little-to-no ability to present mitigating evidence in their defense or see the evidence against them contained in their

[1] This is not to say adult offenders receive appropriate treatment in Missouri's parole proceedings either. Indeed, countless critiques have been lodged against the Board's arbitrary and standard-less processes. *See, e.g.*, Bogan, *Missouri Parole Board Lumbers on in Secrecy with Unfilled Seats*, ST. LOUIS POST DISPATCH, Sept. 20, 2015; David Leib, *Missouri Parole Board Among the More Secretive Agencies*, SOUTHEAST MISSOURIAN, Mar. 15, 2011; *see also* Beth Schwartzapfel, *How Parole Boards Keep Prisoners in the Dark and Behind Bars*, WASHINGTON POST, July 11, 2015 ("*Parole Boards Keep Prisoners in the Dark*"); Beth Schwartzapfel, *Life Without Parole*, THE MARSHALL PROJECT (July 10, 2015) (quoting former operations manager of Missouri's Parole Board referring to Board as "paranoid closed . . . [c]losed to the extreme.").

parole file, and with no substantive consideration of so-called *Miller* factors, including the individual's age at the time of the crime.

8. The hearings themselves last no more than 15 to 30 minutes, with the majority of the discussion focused not on the individual's rehabilitation and maturation but on the facts and circumstances of the offense, which occurred decades prior and, very much unlike the minds and behavior of juvenile offenders, are not subject to change over time.

9. Plaintiffs are not guaranteed the right to counsel at their parole hearings, and in fact are discouraged from having counsel appear as their one and only permitted delegate.

10. Of those who have had parole review hearings under RSMo. § 558.047, the vast majority have been denied parole. Upon information and belief, these denials are in whole or part based on conclusory concerns about the "circumstances of the offense." The Board has denied parole to 90% of those who are eligible under the recent change in Missouri law and requested a hearing with the Board.

11. As a result of Defendants' actions, Plaintiffs have been and continue to be denied a realistic and meaningful opportunity for release, in violation of the Eighth and Fourteenth Amendments to the United States Constitution and in violation of the Missouri Constitution, Art. I, §§ 10, 21.

12. The goal of this action is not to challenge the fact or duration of Plaintiffs' current confinement. Instead, Plaintiffs seek a declaration that the current parole process afforded individuals serving JLWOP sentences[2] is unconstitutional, and an injunction requiring Defendants to provide proceedings that afford a meaningful opportunity to obtain release based on

[2] As defined herein, "JLWOP" refers to a mandatory LWOP sentence imposed on an individual who was under 18 years of age at the time of the crime.

demonstrated maturity and rehabilitation for youthful offenders currently serving unconstitutional LWOP sentences.

JURISDICTION AND VENUE

13. Plaintiffs bring this action pursuant to 42 U.S.C. § 1983, the Eighth and Fourteenth Amendments to the United States Constitution, 42 U.S.C. § 1331 and 28 U.S.C. § 1343, and Article I, Sections 10 and 21 of the Missouri Constitution.

14. Venue is appropriate in this district pursuant to 28 U.S.C. § 1391(g) and L.R. 3.1(a)(2) because substantial events at issue in this litigation occurred in the Western District of Missouri and the County of Cole, Missouri.

PARTIES

15. Plaintiff Norman Brown is a youthful offender, now 41 years of age, incarcerated at South Central Correctional Center in Licking, Missouri, assigned MDOC No. 191425. Mr. Brown seeks declaratory and injunctive relief on behalf of himself and a class of plaintiffs sentenced to JLWOP who are currently or will in the future be subject to the unconstitutional policies and practices of the Missouri Board of Probation and Parole.

16. Plaintiff Ralph McElroy is a youthful offender, now 47 years of age, incarcerated at Eastern Reception Diagnostic and Correctional Center in Bonne Terre, Missouri, assigned MDOC No. 169637. Mr. McElroy seeks declaratory and injunctive relief on behalf of himself and a class of plaintiffs sentenced to JLWOP who are currently or will in the future be subject to the unconstitutional policies and practices of the Missouri Board of Probation and Parole.

17. Plaintiff Sidney Roberts is a youthful offender, now 45 years of age, incarcerated at Jefferson City Correctional Center in Jefferson City, Missouri, assigned MDOC No. 171590. Mr. Roberts seeks declaratory and injunctive relief on behalf of himself and a class of plaintiffs

sentenced to JLWOP who are currently or will in the future be subject to the unconstitutional policies and practices of the Missouri Board of Probation and Parole.

18. Plaintiff Theron "Pete" Roland is a youthful offender, now 46 years of age, incarcerated at Crossroads Correctional Center in Cameron, Missouri, assigned MDOC No. 165253. Mr. Roland seeks declaratory and injunctive relief on behalf of himself and a class of plaintiffs sentenced to JLWOP who are currently or will in the future be subject to the unconstitutional policies and practices of the Missouri Board of Probation and Parole.

19. Defendant Anne Precythe is the Director of the Missouri Department of Corrections ("MDOC"). She is responsible for the operations of MDOC, including adopting, approving and implementing and/or modifying the policies, practices and customs applicable to the prisons that MDOC operates throughout the State of Missouri, the Division of Probation and Parole, and the Missouri Board of Probation and Parole (the "Board" or "Parole Board"). The Parole Board is responsible for determining whether a person confined in the Department of Corrections shall be paroled or conditionally released, and for supervising all persons on probation and parole. Upon information and belief, Director Precythe is the final policymaker for MDOC, including the Board. She is sued in her official capacity.

20. Defendant Kenneth Jones is the chairman of the Parole Board. In that capacity, Chairman Jones is responsible for, among other things, the operations of the Board, including the policies, practices and customs governing the parole hearings for individuals serving JLWOP sentences. He is sued in his official capacity.

21. Defendant Jim Wells is a member of the Parole Board. In that capacity, Defendant Wells personally participates in, leads, or directs parole hearings, and contributes to or makes decisions regarding parole determinations, including for individuals serving JLWOP sentences.

Defendant Wells is responsible for *inter alia* complying with operative law and Board policies, practices and customs vis-à-vis these hearings. He is sued in his official capacity.

22. Defendant Martin Rucker is a member of the Parole Board. In that capacity, Defendant Wells personally participates in, leads, or directs parole hearings, and contributes to or makes decisions regarding parole determinations, including for individuals serving JLWOP sentences. Defendant Wells is responsible for *inter alia* complying with operative law and Board policies, practices and customs vis-à-vis these hearings. He is sued in his official capacity.

23. Defendant Ellis McSwain, Jr. is a member of the Parole Board and the former Chairman of the Board. As Chairman, McSwain was responsible for, among other things, the operations of the Board, including the policies, practices and customs governing the parole hearings for individuals serving JLWOP sentences. In his current capacity, Defendant McSwain personally participates in, leads, or directs parole hearings, and contributes to or makes decisions regarding parole determinations, including for individuals serving JLWOP sentences. Defendant McSwain is responsible for *inter alia* complying with operative law and Board policies, practices and customs vis-à-vis these hearings. He is sued in his official capacity.

24. Defendant Don Ruzicka is a member of the Parole Board. In that capacity, Defendant Ruzicka personally participates in, leads, or directs parole hearings, and contributes to or makes decisions regarding parole determinations, including for individuals serving JLWOP sentences. Defendant Ruzicka is responsible for *inter alia* complying with operative law and Board policies, practices and customs vis-à-vis these hearings. He is sued in his official capacity.

25. Defendant Jennifer Zamkus is a member of the Parole Board. In that capacity, Defendant Zamkus personally participates in, leads, or directs parole hearings, and contributes to or makes decisions regarding parole determinations, including for individuals serving JLWOP

sentences. Defendant Zamkus is responsible for *inter alia* complying with operative law and Board policies, practices and customs vis-à-vis these hearings. She is sued in her official capacity.

26. Defendant Gary Dusenberg is a member of the Parole Board. In that capacity, Defendant Dusenberg personally participates in, leads, or directs parole hearings, and contributes to or makes decisions regarding parole determinations, including for individuals serving JLWOP sentences. Defendant Dusenberg is responsible for *inter alia* complying with operative law and Board policies, practices and customs vis-à-vis these hearings. He is sued in his official capacity.

27. At all times relevant to this Complaint, Defendants Precythe, Jones, Wells, Rucker, McSwain, Ruzicka, Zamkus, and Dusenberg (collectively, "Defendants") acted under color of law.

FACTS

The United States Supreme Court's Clear Mandate that Children are Different

28. Starting in 2005, the United States Supreme Court issued a series of decisions soundly establishing the principle that children are different from adults, drawing on science and social science as well as legal precedent and common sense.

29. Because adolescent brains are not fully developed, young people do not appreciate risks, are more susceptible to peer pressure, and do not understand the consequences of their actions in the same way as adults. They also are more likely than adults to mature and change over time, or become "rehabilitated" through incarceration. For those reasons, the legal and carceral system must treat minors differently than adults.

30. In *Roper v. Simmons* – a case that originated here in Missouri – the United States Supreme Court held that the Constitution forbids the imposition of the death penalty on individuals who were under the age of 18 when their crimes were committed. 543 U.S. at 578-79. In so holding, the Supreme Court described juveniles as "categorically less culpable than the average criminal." *Id.*, at 567 (quoting *Atkins v. Virginia*, 536 U.S. 304, 316 (2002)).

31. The *Roper* opinion set forth three general differences that separate juveniles from adults: (1) lack of maturity and impetuosity; (2) susceptibility to "negative influences and outside pressures, including peer pressure"; and (3) the more transitory nature of juveniles' personality traits. 543 U.S. at 569-70.

32. Five years later, in *Graham v. Florida*, the Court held that LWOP sentences were unconstitutional for juvenile offenders who did not intentionally kill and that the state must give such individuals a meaningful opportunity to obtain release. 560 U.S. 48.

33. *Graham* drew on *Roper*, observing that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds" – differences that caution against infliction of the most severe punishments on incarcerated youth. *Id.* at 68.

34. The Court further acknowledged that LWOP is "the second most severe penalty permitted by law," and especially harsh for a juvenile defendant who would "on average serve more years and a greater percentage of his life in prison than an adult offender" serving the same sentence – "the same punishment in name only." *Graham*, 560 U.S. at 70-71 (internal citations omitted).

35. Both *Roper* and *Graham* emphasized that juveniles' lessened culpability, potential for rehabilitation, and reduced response to deterrent efforts diminish the typical penological justifications for imposing the harshest sentences. *See Graham*, 560 U.S. at 68, 71-74 (noting that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds" – for example, in "parts of the brain involved in behavior control"); *Roper*, 543 U.S. at 570 ("Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood.") (internal quotations and citations omitted).

36. Thus, as a matter of constitutional law, when juveniles are sentenced, they must be provided with some "realistic opportunity to obtain release before the end of that term." 560 U.S. at 82; *see also id.* at 75 (state must provide "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation").

37. *Graham*, *Miller* and *Montgomery* thus created a constitutionally-protected liberty interest in parole proceedings permitting early release based on demonstrated maturity and rehabilitation.

Elimination of Mandatory LWOP and the Need for Meaningful and Realistic Opportunity to Obtain Release

38. *Roper* and *Graham* converged in the Court's 2012 decision of *Miller v. Alabama*, which held that mandatory LWOP sentences for juveniles ("JLWOP" sentences) violate the Eighth Amendment. 132 S.Ct. at 2469.

39. *Miller* again reiterated that children are "less deserving of the most severe punishment." *Id.* at 2464. As the Court summarized:

> Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him.

Id. at 2468.

40. Furthermore, a mandatory punishment of LWOP for juvenile offenders "disregards the possibility of rehabilitation even when the circumstances most suggest it." *Id*.

41. In light of the unique characteristics of youth, and their "heightened capacity for change," the Court further concluded that JLWOP sentences should be "uncommon" and imposed

only on "the rare juvenile offender whose crime reflects irreparable corruption" as opposed to "unfortunate yet transient immaturity." *Id*. at 2469.

42. Furthermore, prior to the imposition of JLWOP sentences, youth are entitled to individualized hearings at which the individual's chronological age and other relevant mitigating factors relating to age must be considered. *Id*., at 2468. The sentence must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id*. at 2469.

43. Nearly four years later, the Court decided *Montgomery v. Louisiana*, clarifying that *Miller* did not merely impose a procedural requirement for individualized sentencing but "announced a substantive rule of constitutional law," which applied retroactively to cases on collateral review. 136 S.Ct. at 732, 736.

44. *Miller*'s substantive rule that LWOP "is only an appropriate punishment for the 'rare juvenile offender whose crime reflects irreparable corruption,'" *Adams*, 136 S.Ct. at 1799 (quoting *Montgomery*, 136 S.Ct. at 735), carries categorical constitutional guarantees, *Montgomery*, 136 S.Ct. at 729. Given the historical imposition of mandatory JLWOP sentences, the Court warned that "*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.

45. In these ways, *Miller* provided both substantive and procedural requirements. In addition, juveniles "must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored." *Id*. at 736-37.

Missouri's SB 590: Placing Miller *Process with the Parole Board*

46. Approximately 80 individuals incarcerated within MDOC were and remain impacted by the *Miller* decision. In its wake, the vast majority of those individuals sought state habeas corpus relief from the Missouri Supreme Court.

47. In most instances, those habeas petitions remained pending for over three years.

48. After the United States Supreme Court's opinion in *Montgomery* was announced, the Missouri Supreme Court issued a uniform order providing that *Miller*-impacted petitioners would be eligible to apply for parole after serving 25 years' imprisonment, "unless his sentence is otherwise brought into conformity with *Miller* and *Montgomery* by action of the governor or enactment of necessary legislation."[3]

49. This March 15 Order was not the end for those habeas petitions. Several months later, on July 19, the Court on its own motion vacated the March 15 Order, denied the petitions, and referred petitioners to new legislation: Senate Bill 590, 98th General Assembly ("SB 590" or "the Bill").

50. SB 590, passed by the General Assembly on May 12, 2016, sought to codify, in part, the terms of the Court's March 15 Order. The Bill was signed into law on July 13, 2016. A copy of the Bill, as signed into law, is attached hereto as **Exhibit 1**.

51. The Bill provided, in relevant part, that any person sentenced to JLWOP prior to 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 purposes of appeal, after serving twenty-five years of incarceration on the sentence of life without parole." *See* Exhibit 1; *see also* RSMo. § 558.047.1(1).

[3] This March 15, 2016 Order said nothing about other consecutive or concurrent sentences the individual petitioners might be serving.

52. SB 590 further provides that, at a "parole review hearing" under RSMo. § 558.047, the Parole Board is to consider the following factors:

> (1) Efforts made toward rehabilitation since the offense or offenses occurred, including participation in educational, vocational, or other programs during incarceration, when available;
>
> (2) The subsequent growth and increased maturity of the person since the offense or offenses occurred;
>
> (3) Evidence that the person has accepted accountability for the offense or offenses, except in cases where the person has maintained his or her innocence;
>
> (4) The person's institutional record during incarceration; and
>
> (5) Whether the person remains the same risk to society as he or she did at the time of the initial sentencing[;]

as well as:

> (1) The nature and circumstances of the offense committed by the defendant;
>
> (2) The degree of the defendant's culpability in light of his or her age and role in the offense;
>
> (3) The defendant's age, maturity, intellectual capacity, and mental and emotional health and development at the time of the offense;
>
> (4) The defendant's background, including his or her family, home, and community environment;
>
> (5) The likelihood for rehabilitation of the defendant;
>
> (6) The extent of the defendant's participation in the offense;
>
> (7) The effect of familial pressure or peer pressure on the defendant's actions;
>
> (8) The nature and extent of the defendant's prior criminal history, including whether the offense was committed by a person with a prior record of conviction for murder in the first degree, or one or more serious assaultive criminal convictions;
>
> (9) The effect of characteristics attributable to the defendant's youth on the defendant's judgment; and

> (10) A statement by the victim or the victim's family member as provided by section 557.041 until December 31, 2016, and beginning January 1, 2017, section 595.229.

RSMo. §§ 558.047.5, 565.033.1.

53. The process contemplated by SB 590 is constitutionally inadequate for a number of reasons. For example, the Bill attempts to delegate the job of the judiciary to probation and parole staff.

54. The Bill also impermissibly provides special enhancement protections for some youth but not others. For instance, going forward the prosecution must prove beyond a reasonable doubt the existence of certain aggravating factors before LWOP is a possibility. That was not required when Plaintiffs were sentenced, and the Bill imposes no such standard of proof on the Board's decision-making process.

55. The Bill also creates ambiguity with respect to individuals serving consecutive sentences and what weight the Board should give each factor listed in RSMo. §§ 558.047.5, 565.033.1. Upon information and belief, the Board is giving near-exclusive weight to the nature and circumstances of the offense relative to any other factor enumerated above.

56. It is also apparent that the Board is not giving meaningful consideration to the other factors delineated in SB 590 prior to making parole determinations for *Miller*-impacted inmates.

The Missouri Parole Board

57. Neither the Missouri Supreme Court nor SB 590 altered the sentences of Plaintiffs and the putative class they represent. Instead, SB 590 put their future in the hands of the Missouri Board of Probation and Parole: a political body long criticized for its arbitrariness, dysfunction, and lack of transparency.

58. For example, under Missouri law, all meetings of the Board are closed meetings unless posted as open, and all votes of the Board are closed. *See* RSMo.

§§ 217.670.5, 217.690; 14 CSR 80-1.010 (2). Although the hearings are recorded, the Board treats the recordings as closed records, and does not make them available to defendants. *See* RSMo. §§ 217.670.5, 217.690; 14 CSR 80-1.010 (2); *see also*, *e.g.*, Bogan, *supra* note 1; Leib, *supra* note 1; *Parole Boards Keep Prisoners in the Dark*, *supra* note 1; *Life Without Parole*, *supra* note 1 (quoting former operations manager of Missouri's Parole Board referring to Board as "paranoid closed . . . [c]losed to the extreme.").

59. The Missouri Parole Board is comprised of seven full-time members, with one designated by the Governor as Chair of the Board. Each member serves a six-year term, and not more than four members of the Board may be of the same political party. RSMo. § 217.665. The Board currently consists of the following individuals: (1) Kenneth Jones, Chairman; (2) Jim Wells, Member; (3) Martin Rucker, Member; (4) Ellis McSwain, Jr., Member; (5) Don Ruzicka, Member; (6) Jennifer Zamkus, Member; and (7) Gary Dusenberg, Member.

60. Jones is a former Moniteau County sheriff and Republican state representative. Jones' son, Caleb Jones, is Governor Eric Greitens' deputy chief of staff.

61. Wells is a former Pike County sheriff, and has served on the Board since 2009.

62. Rucker is a former Democratic state representative.

63. McSwain is a former probation and parole officer, warden at Algoa Correctional Center, and manager at other MDOC institutions. Until recently, McSwain was Chairman of the Board.

64. Ruzicka is a former Republican state representative from Mount Vernon, Missouri.

65. Zamkus is the only woman on the Board. She is a military veteran, the former human resources director for MDOC, formerly worked as a probation and parole officer and managed the Office of Civil Rights at the Missouri Department of Social Services.

66. Dusenberg is a former Republican state representative, state trooper, and Vietnam veteran from Blue Springs, Missouri.

67. None of the current members of the Board have significant background in or understanding of adolescent development or child psychology. Yet, following the passage of SB 590, the Board declined the opportunity to receive training on these issues by the Campaign for Fair Sentencing of Youth, which had specifically contacted the Board to provide technical assistance relating to the law and science applicable to such cases.

68. Along with heightened secrecy, the Board also has historically enjoyed broad discretion in its decision making. *See* RSMo. § 217.690; *see also, e.g., Blackburn v. Missouri Bd. of Prob. & Parole*, 83 S.W.3d 585, 588 (Mo. App. W.D. 2002) ("The Board is vested with wide discretion in making parole release decisions and in adopting, implementing, and following its own rules and regulations."). Where a decision is made by the full Board – even if an inmate has a hearing only before a panel – the decision is not reviewable. *See* RSMo. § 217.670.

69. Further, parole decisions are not grievable through the administrative process. *See* Missouri Department of Corrections Offender Rulebook, 68-69 (Sept. 12, 2014), available at https://doc.mo.gov/Documents/offender-rulebook-9-12-14.pdf ("You may grieve any issue except . . . matters concerning probation and parole . . . .").

70. In Missouri, the Board bears a very heavy caseload. For recent months during which data was made available, the Board was responsible for, on average, 38 parole hearings every business day. There were many occasions during the past several months where the Board conducted over 60 hearings in one day.

71. Having to review and decide this volume of cases each day all but ensures the Board does not to fully review Plaintiffs' files or evidence presented, or give adequate consideration to their chronological age and hallmark features of youth, as required by state and federal law.

Plaintiffs Denied a Meaningful and Realistic Opportunity for Release

72. Constitutionally speaking, a juvenile offender's parole review demands far more procedural protection than in typical adult parole hearings. *See Graham*, 560 U.S. at 79. That is because *Graham* and *Miller* announced both substantive and procedural requirements when assessing proportionate punishment for youth.

73. It is clear that, to date, the Board has made little-to-no distinction between parole reviews for juvenile offenders as compared with adult offenders, and has done nothing to specially protect their rights.

74. To the contrary, the JLWOP parole hearings are generally treated no differently than typical Missouri parole hearings, which themselves do not comply with due process or other constitutional norms.

75. The Board has now acknowledged a change in the law in its booklet *Procedures Governing the Granting of Paroles and Conditional Releases* (also known as the "Bluebook"), revised in January 2017[4]: "Certain offenders who were under the age of eighteen (18) at the time of the offense may petition the Board after serving twenty-five (25) years in accordance with 558.047 RSMo. Parole consideration will be determined by the Board on an individual basis." Bluebook, ¶ 20(D).

76. But there is no other mention of youthful offenders in the Bluebook. The Bluebook does not specify, for example, what factors the Board is required to consider in making a parole

[4] The Bluebook (Jan. 1, 2017) is available at http://doc.mo.gov/Documents/prob/Blue-Book.pdf.

determination for juvenile offenders serving LWOP sentences. And, upon information and belief, the Board and Institutional Parole Officers ("IPOs") are not provided with training or tools specifically tailored to considering youthful characteristics in preparing parole recommendations or reaching parole decisions for Plaintiffs and the impacted class.

77. Prior to their actual parole hearings, IPOs conduct pre-hearing interviews with inmates and, from that interview, prepare a report and recommendation for the Board. The Board does not permit inmates or their attorneys to see that report, or any other reports or recommendations from IPOs or other MDOC officials to the Board. And it is unclear what evidence-based instruments or interview techniques, if any, are used by these IPOs, who themselves lack social-scientific training.

78. Inmates are permitted to have only one person present at the hearings. This individual is referred to as the "inmate's delegate." Although an individual may choose to have their attorney present at the hearing as their sole delegate, Defendants' expectation is that the delegate will be someone who can speak to the inmate's home plan or support they would provide the inmate upon release – and no other topic.

79. Prior to hearings, attorneys also are reminded that the hearing is not a "lawyering moment." Indeed, in Norman Brown's case, the IPO admonished in advance of the hearing that the attorney-delegate would not be treated like a lawyer. *See* **Exhibit 2**.

80. Upon information and belief, a representative from MDOC's Office of Victim Services ("OVS") is also present at every hearing. The prosecuting attorney also generally attends.

81. The victims' family members face very few limitations on their participation in the hearing. They may appear in any number, are the first persons heard at the hearings, and may speak for any length of time.

82. An inmate's delegate or attorney is not permitted to share information directly with the victim's family members. In at least one instance, an attorney's attempt to share a copy of information provided to the Board with the victim's family was abruptly intercepted and halted by the representative from OVS.

83. Shortly thereafter, undersigned counsel received a letter directly from Defendant Precythe, who was not present for the proceedings. *See* **Exhibit 3**. That letter included a list of warnings and "procedures" counsel were to follow. The "procedures," which cannot be found in any law or lawfully-promulgated regulation, purport to prohibit the inmate and their delegate from, among other things, making any contact with the victims of the case, "either directly or indirectly . . . except through the Office of Victim Services." *Id*.

84. The "procedures" also reiterate that "[t]he delegate will address only issues related to transition into the community," in contravention of lawfully-promulgated Missouri regulations and *Miller* factors. *Id*.

85. In some instances where inmates or their delegate attempt to speak regarding the inmate's youth or the impact of a particular instance of childhood trauma, the Board member has cut them off and prevented them from making such further comments.

86. Attorneys are discouraged from participating in the process overall. In fact, in at least one instance an IPO told an inmate that if his attorney acted as his delegate at his parole hearing he would "pay for it." Others have similarly reported negative reactions and treatment for seeking representation at the hearing.

87. Where attorneys have appeared as delegates on behalf of their clients, they have been told on at least two occasions that they are not permitted to bring any "legal materials" – including pen and paper – into the hearing. In fact, the very first "procedure" included in Director

Precythe's April 27, 2017 letter states that "note taking during the hearing is prohibited." *See* Exhibit 3.

88. These hearings are often traumatic experiences for inmates. Yet delegates generally are not permitted to meet or speak with the inmates before or after hearings. They enter and leave the hearing room through separate doors.

89. Plaintiffs are encouraged to conduct their parole hearings via video conference, rather than in person. In some instances, inmates are encouraged to agree to a video conference without being informed of their right to have the hearing conducted in person. At other times, inmates are told they are permitted to have their hearing conducted in person rather than via video conference, but that making that election would significantly delay the hearing date.

90. Although the hearings are recorded, Plaintiffs are not permitted access to those recordings. On February 9, 2017, one of Mr. McElroy's attorneys requested the parole hearing recording on his behalf. *See* **Exhibit 4**. That request was promptly denied. *See* **Exhibit 5**.

91. The Board's decisions are often arbitrary and carelessly made. According to a report by the ACLU, "One parole board staff member in Missouri explained to a reporter that some members never read the files at all and instead based their decision on how the reviewing board member before them voted." *False Hope: How Parole Systems Fail Youth Serving Extreme Sentences*, American Civil Liberties Union (Nov. 2016) ("*False Hope*"), at 58, FN448; *see also Life Without Parole*, *supra* note 1 at 11.

92. This is especially problematic because of who attends the parole hearings. Individuals eligible for parole review do not have the pleasure of a hearing before all seven of the Board members. Instead, they are only permitted access to a "hearing panel" consisting of a single Board member and two other corrections staff members. As a result, the individual potentially

eligible for parole may never sit in the same room as the person responsible for deciding whether to grant or deny their request for parole.

93. Inmates themselves are not allowed to know or review what is in the file the Board considers at each hearing. Thus, inmates have no way of confronting evidence against them, or presenting evidence or witnesses who might provide a counter-narrative.

94. For example, at a 2013 parole hearing, a Board member told Roosevelt Price, "I think you've been involved in other murders that you haven't been caught for." Mr. Price had never been accused of another killing, and indicated he did not know where the Board member was getting that information. She simply responded, "There's things in your file I know about that I think you don't know." *Life Without Parole*, *supra* note 1 at 11.

95. At a more recent SB 590 hearing, an inmate was told by the Board member "his file" showed he had more than 100 conduct violations. That inmate was not permitted to see the Board's file. However, according to a print out the inmate received from MDOC staff, he had only 59 conduct violations – and only three in the previous six years.

96. Upon information and belief, no special accommodations are made for inmates with developmental disabilities.

97. In 2015, of the 14 individuals in Missouri serving a juvenile life sentence, only four (29%) were approved for parole.[5] The grant rate for those serving JLWOP sentences is far lower.

98. Upon information and belief, to date the Board has conducted 20 hearings under SB 590. It has granted parole in only two instances. **Thus, the Board's denial rate is 90%.**

99. The majority of *Miller*-impacted individuals who have been denied parole under this new process have received five-year setbacks – the maximum permitted under Board policies.

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[5] *False Hope*, *supra* at 46, FN340.

Others were not, in the Board's opinion, yet eligible for parole and received setbacks of many more years. Yet no explanation was provided for the lengthy delay in review or what might be needed to satisfy *Miller* factors the next time around.

100. For example, prior to Mr. Roberts' parole hearing, his IPO, Jessica Bliesath, told him that, because of the *Miller* decision, the Board could not deny parole solely based on the circumstances of the offense.[6] After receiving a denial notice, Mr. Roberts' asked IPO Bliesath why he was denied based solely on circumstances of the crime given her earlier representation. Given the barebones denial notice, even IPO Bliesath was left guessing as to the basis for the Board's decision, conjecturing that the Board's one-line explanation represented just one of the reasons the Board made their decision: "I can assure you it is not the sole reason you received a reconsideration hearing verses [sic] a release date." *See* **Exhibit 6**. But Mr. Roberts has received no notice or further explanation as to whether the Board denied parole on any other basis.

101. Further, outdates are not a guarantee of release – the Board can revoke them in their discretion. *See, e.g.*, *Life Without Parole*, *supra* note 1 at 5 (discussing the case of Keith Drone, a juvenile offender who was denied parole at five separate hearings – including once when the Board granted him parole, but then took it away).

102. If they were involved in the hearing process, the victim's family receives notification of the Board's decision before the inmate does.

103. The Board's decisions are provided to inmates on a single sheet of paper – a barebones, boilerplate form that is used to notify inmates of all manner of events related to parole considerations. Some of these forms, including those provided to Messrs. McElroy, Roland and Roberts, are attached hereto as collective **Exhibit 7**.

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[6] Undersigned counsel were provided the same information by high-level Parole Board staff.

104. There is no indication on these forms who made the decision or how the Board voted. In fact, the forms are not signed at all. *See* Exhibit 7. This stands in stark contrast with, for example, the Commonwealth of Massachusetts's policy of providing written decisions regarding parole review. *See, e.g.*, **Exhibit 8**.[7]

105. Decisions by the full Board, as opposed to a panel decision, are not subject to appeal. *See* RSMo. § 217.670. But Plaintiffs McElroy, Roberts and Roland, whose hearings were held before a panel, were still precluded from any review by the full Board. And it is unclear what, if any, information is shared from the panel to the Board.

106. In denying parole release, including in the JLWOP context, the Board most often cites to the "circumstances surrounding the offense(s)." in this way, the parole determination does not differ from the Board's standard procedures and customs. Upon information and belief, every single parole denial under SB 590, at least in part, focused on the circumstances of the present offense as a reason for denial.

107. A former operations manager of the Board admitted that denial forms would almost always say the same thing:

> Their forms would always say the same thing: "Release at this time would depreciate the seriousness of the present offense."
>
> But that was "not always the truth. Sometimes I'd make that crap up. The real reason," [Janet] Barton said, was "we don't believe in parole for people like you.

Life Without Parole, *supra* note 1 at 11.

[7] This is just one of the many ways Missouri's parole process for juvenile offenders stands in stark contrast to how such hearings are conducted elsewhere. *See, e.g., PBS Frontline: Second Chance Kids* (PBS television broadcast May 2, 2017), available at http://www.pbs.org/wgbh/frontline/film/second-chance-kids/.

108. Yet the circumstances of the offense should not foreclose a child's entitlement to release from prison. *See Adams*, 136 S.Ct. at 1800 (Sotomayor, J., concurring) ("[T]he gruesomeness of a crime is not sufficient to demonstrate that a juvenile offender is beyond redemption: 'The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.'") (quoting *Roper*, 543 U.S. at 570); *see also Montgomery*, 136 S.Ct. at 736 ("The opportunity for release [on parole] will be afforded to those who demonstrate the truth of *Miller*'s central intuition—that children who commit even heinous crimes are capable of change.").

109. The hearings themselves last, on average, no more than 15 to 30 minutes. The bulk of the short parole hearing is spent discussing the circumstances of the offense in detail, rather than the inmate's childhood, youth at the time of the offense, or demonstrated rehabilitation over years of imprisonment.

110. The Missouri Parole Board's policies, procedures, and customs deprive Plaintiffs and members of the putative class of the "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" to which they are entitled under law.

111. Thus, although SB 590 granted them the opportunity for review of their sentence before the Parole Board[8], the Board's arbitrary and standard-less practices all but guarantee that juveniles sentenced to LWOP – even those entitled to relief under SB 590 – will die in prison regardless of whether they have demonstrated rehabilitation and maturity.

[8] Plaintiffs do not concede that SB 590, even if fully complied with, remedies their unconstitutional sentences in compliance with *Miller*. But Plaintiffs continue to be subjected to SB 590 hearings.

112. At the very least, the possibility of release after 25 years, as envisioned by the Missouri Supreme Court and SB 590, is illusory.

113. Furthermore, because of the lack of transparency in parole proceedings and inability to appeal decisions, individuals are prevented from vindicating their right to a meaningful opportunity for release.

Norman Brown

114. Norman Brown has served over 25 years on his LWOP sentence – a sentence imposed on him mandatorily despite the fact that he was only 15 years old at the time of the crime, and an unarmed, unwitting accomplice to an adult co-defendant twice his age.

115. Mr. Brown is a model inmate who has completed thousands of hours of restorative justice programs, serves as a prison hospice worker, and helps run the "Puppies for Parole" dog training program.

116. Mr. Brown has a parole hearing scheduled for May 24, 2017. One of his attorneys intends to appear as his delegate. However, she has already been admonished in advance against attempting to advocate on behalf of Mr. Brown. *See* Exhibit 2.

117. Mr. Brown anticipates that he will receive the same lack of process and consideration afforded others similarly situated who have already had their parole hearings under a change in the law.

Ralph McElroy

118. Ralph McElroy has served over 30 years on his LWOP sentence.

119. Mr. McElroy has completed a GED in prison, has received numerous training certificates, and has been employed as a caretaker in the Enhanced Care Unit.

120. Mr. McElroy's parole hearing was held before a panel of the Board on December 13, 2016. His sister, Malena Riggs, attended as his only permitted delegate, as he was precluded from having both counsel and a delegate present.

121. At the hearing, as well as in the letters provided to the Board prior to the hearing, Mr. McElroy and his sister explained his extensive home plan which included a responsible fiancée, a place to live, and a potential job.

122. Upon information and belief, the hearing lasted less than half an hour. Mr. McElroy requested the transcript from his hearing, which the Board refused to provide. *See* Exhibits 4 and 5.

123. On or about, January 23, 2017, Mr. McElroy was informed that the Board denied his request for parole. The Board cited two reasons for its decision: (1) release would depreciate the seriousness of the offense based on the circumstances of the offense, and (2) a risk of later violating the law due to poor institutional adjustment. He is not scheduled for a reconsideration hearing until December 2021. This is the maximum possible setback under the Board's policies.

124. The denial notice expressly stated that the decision was not subject to appeal.

Sidney Roberts

125. Sidney Roberts has served over 28 years on his LWOP sentence.

126. During his many years in prison, Mr. Roberts completed various courses and pursued informal means of self-improvement. He maintained a steady work history, and had five different supervisors write letters of support to the Board on his behalf, commending Mr. Roberts' industriousness and good character.

127. The vast majority of Mr. Roberts' conduct violations were received when he was still in his twenties. He has had no violations in nearly eight years.

128. Like many other *Miller*-impacted youthful offenders, Mr. Roberts has attempted to request *Miller*-compliant processes at his SB 590 hearing. *See* **Exhibit 9**. His request, as with all others, has been essentially ignored by the Board.

129. Mr. Roberts' parole hearing was held before a panel of the Board on March 9, 2017. Mr. McSwain was the only Board member present at the hearing. Mr. Roberts' mother attended the hearing as his delegate because he was precluded from having both counsel and a delegate present.

130. During the hearing, Mr. McSwain grilled Mr. Roberts about the circumstances of the crime until Mr. Roberts broke down, sobbing.

131. On or about April 11, 2017, the Board denied Mr. Roberts' request for parole solely because of the circumstances of the offense. He is not scheduled for a reconsideration hearing until March 2021.

132. The denial notice expressly stated that the decision was not subject to appeal.

Theron "Pete" Roland

133. Theron "Pete" Roland has served over 29 years on his LWOP sentence. He is now 46 years old.

134. Mr. Roland also has an exceptional institutional record. At the time of his parole hearing in January 2017, Mr. Roland had not received a conduct violation in 15 years, and had been in honor dorm for approximately 14 years. In fact, over his nearly 30 years in prison, he has received no more than 14 violations.

135. Mr. Roland received a panel hearing on January 3, 2017. His sister, Kelly, attended as his only permitted delegate.

136. During Kelly's statement in support of Mr. Roland, the Board cut her off, and directed her to speak only to Mr. Roland's home plan.

137. Martin Rucker was the sole Board member at Mr. Roland's hearing. At the hearing, Mr. Rucker admitted on record that he had not reviewed Mr. Roland's file beforehand.

138. On or about January 30, 2017, the Board denied Mr. Roland's request for parole solely because of the circumstances of the offense. He is not scheduled for a reconsideration hearing until January 2022. This is the maximum possible setback under Board policies, imposed without any explanation or justification.

139. The denial notice expressly stated that the decision was not subject to appeal.

Class Action Allegations

140. Plaintiffs bring this suit as a class action on behalf of themselves and all others similarly situated, pursuant to Rules 23(a) and 23(b)(2).

141. Plaintiffs seek to represent the following class on claims for declaratory and injunctive relief: individuals in the custody of MDOC who were sentenced to LWOP under a mandatory sentencing scheme and who were under 18 years of age at the time of the offense (the "Class").

142. Information as to the precise size of the Class and the identity of those in it is exclusively controlled by Defendants. However, Plaintiffs' counsel estimate the Class includes approximately 83 individuals, including the named Plaintiffs. These individuals are geographically dispersed throughout various MDOC facilities throughout the State of Missouri. The number of persons who are members of the Class described above are so numerous that joinder of all members in one action is impracticable.

143. The named Plaintiffs will fairly and adequately represent the interests of the Class. They each possess a strong personal interest in the subject matter of the lawsuit, and will be represented by competent and skilled counsel with expertise in civil litigation and civil rights litigation. Counsel have the legal knowledge and resources to fairly and adequately represent the interests of all Class members in this action.

144. As a result of Defendants' unconstitutional policies and practices governing the JLWOP parole review process, members of the Class are or will be subjected to cruel and unusual punishment and deprived of their constitutional rights to due process. Plaintiffs seek declaratory and injunctive relief to remedy Defendants' illegal and unconstitutional policies, practices and customs.

145. Questions of law and fact that are common to the entire Class predominate. The common question at issue in this lawsuit is whether Defendants maintain a policy or custom of conducting JLWOP parole review hearings in a manner that prevents Plaintiffs from obtaining a realistic and meaningful opportunity for release based on demonstrated rehabilitation, in violation of state and federal due process requirements and prohibitions on cruel and unusual punishment.

146. Because Defendants have acted or refused to act on grounds generally applicable to the entire Class, final injunctive and declaratory relief is appropriate as to the Class as a whole. Thus, certification of the Class under Rule 23(b)(2) is proper.

CLAIMS

COUNT I
Cruel and Unusual Punishment in Violation of the Eighth Amendment to the United States Constitution – 42 U.S.C. § 1983

147. Plaintiffs incorporate all preceding paragraphs as if fully set forth herein.

148. Defendants' current policies, procedures, and customs with respect to the parole review process for Plaintiffs and the putative class fail to provide a realistic and meaningful

opportunity for release upon demonstrated rehabilitation. These policies, procedures, and customs lack legitimate penological justification, are arbitrary and capricious, and constitute cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution (as incorporated to the states by the Fourteenth Amendment).

COUNT II
Deprivation of Due Process in Violation of the Fourteenth Amendment to the United States Constitution – 42 U.S.C. § 1983

149. Plaintiffs incorporate all preceding paragraphs as if fully set forth herein.

150. Defendants' aforementioned actions, including but not limited to their ongoing failure to provide Plaintiffs and the putative class with (1) a meaningful opportunity for release upon demonstrating their growth, maturity, and rehabilitation, (2) the right to review and rebut evidence presented against them at parole hearings, and (3) sufficient notice and explanation of the basis for parole determinations constitute denial of due process of law in violation of the Fourteenth Amendment to the United States Constitution.

COUNT III
Cruel and Unusual Punishment in Violation of Article I, Section 21 of the Missouri Constitution

151. Plaintiffs incorporate all preceding paragraphs as if fully set forth herein.

152. Defendants' current policies, procedures, and customs with respect to the parole review process for Plaintiffs and the putative class fail to provide a realistic and meaningful opportunity for release upon demonstrated rehabilitation. These policies, procedures, and customs lack legitimate penological justification, are arbitrary and capricious, and constitute cruel and unusual punishment in violation of Article I, Section 21 of the Constitution of the State of Missouri.

COUNT IV
Deprivation of Due Process in Violation of Article I, Section 10 of the Missouri Constitution

153. Plaintiffs incorporate all preceding paragraphs as if fully set forth herein.

154. Defendants' aforementioned actions, including but not limited to their ongoing failure to provide Plaintiffs and the putative class with (1) a meaningful opportunity for release upon demonstrating their growth, maturity, and rehabilitation, (2) the right to review and rebut evidence presented against them at parole hearings, and (3) sufficient notice and explanation of the basis for parole determinations constitute denial of due process of law in violation of Article I, Section 10 of the Constitution of the State of Missouri.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs pray this Court:

A. For the named Plaintiffs and members of the plaintiff class, issue a declaratory judgment that Defendants' policies, procedures, and customs for JLWOP parole reviews violate the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 21 of the Missouri Constitution;

B. For the named Plaintiffs and members of the plaintiff class, grant injunctive relief ordering that Defendants formulate and implement policies, procedures, and customs for JLWOP parole reviews that ensure a realistic and meaningful opportunity for release based on demonstrated maturity, and any further appropriate injunctions to prevent the future deprivation of the rights of Plaintiffs and members of the plaintiff class, including but not limited to requiring Defendants to provide Plaintiffs with, among other things:

   i. The right to meaningful representation by counsel at parole hearings;

   ii. The right to review all information provided to the Board or panel, including but not limited to the IPO's report and recommendation, in advance of the hearing;

iii. The right to submit written material to the Board in advance of the hearing;

iv. The right to present lay and expert witness testimony at the hearing;

v. The right to cross-examine at the hearing those who have provided evidence against them and otherwise challenge evidence presented against them

vi. The right to have an independent recording made of the hearing, and to access any recording of the hearing made or maintained by the Board or panel; and

vii. The right to have a statement made, on the record and in the inmate's presence, of the decision and the specific reasons for the decision;

C. For the named Plaintiffs and members of the plaintiff class who have already had a hearing pursuant to SB 590, but have been denied parole, grant injunctive relief ordering that Defendants provide those individuals with a parole review hearing within 90 days that complies with *Graham*, *Miller*, and *Montgomery*'s constitutional mandate and ensures a realistic and meaningful opportunity for release based on demonstrated maturity;

D. Award Plaintiffs' costs, including reasonable attorneys' fees, under 29 U.S.C. § 794a and other relevant provisions of law; and

E. Allow such other and further relief to which Plaintiffs may be entitled.

Respectfully submitted,

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Dated: May 18, 2017

JS 44 (Rev 09/10)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

CIVIL COVER SHEET

This automated JS-44 conforms generally to the manual JS-44 approved by the Judicial Conference of the United States in September 1974. The data is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. The information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is authorized for use only in the Western District of Missouri.

The completed cover sheet must be saved as a pdf document and filed as an attachment to the Complaint or Notice of Removal.

Plaintiff(s):

First Listed Plaintiff:
Norman Brown ;
County of Residence: Texas County

Additional Plaintiff(s):
Ralph McElroy ;
Sidney Roberts ;
Theron Roland ;

Defendant(s):

First Listed Defendant:
Director of Missouri Department of Corrections Anne L. Precythe ;
County of Residence: Cole County

Additional Defendants(s):
Chairman of the Missouri Board of Probation and Parole Kenneth Jones ;
Member of the Missouri Board of Probation and Parole Jim Wells ;
Member of the Missouri Board of Probation and Parole Martin Rucker ;
Member of the Missouri Board of Probation and Parole Ellis McSwain ;
Member of the Missouri Board of Probation and Parole Don Ruzicka ;
Member of the Missouri Board of Probation and Parole Jennifer Zamkus ;
Member of the Missouri Board of Probation and Parole Gary Dusenberg ;

County Where Claim For Relief Arose: Cole County

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Basis of Jurisdiction: 3. Federal Question (U.S. not a party)

Citizenship of Principal Parties (Diversity Cases Only)

Plaintiff: N/A

Defendant: N/A

Origin: 1. Original Proceeding

Nature of Suit: 550 Prison Conditions

Cause of Action: 42 U.S.C. 1983

Requested in Complaint

Class Action: Class Action Under FRCP23

Monetary Demand (in Thousands):

Jury Demand: No

Related Cases: Is NOT a refiling of a previously dismissed action

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Signature: Amy E. Breihan

Date: 05/18/2017

If any of this information is incorrect, please close this window and go back to the Civil Cover Sheet Input form to make the correction and generate the updated JS44. Once corrected, print this form, sign and date it, and submit it with your new civil action.

SECOND REGULAR SESSION

[TRULY AGREED TO AND FINALLY PASSED]

HOUSE COMMITTEE SUBSTITUTE FOR

SENATE SUBSTITUTE NO. 2 FOR

SENATE COMMITTEE SUBSTITUTE FOR

SENATE BILL NO. 590

98TH GENERAL ASSEMBLY

2016

4323H.06T

AN ACT

To repeal sections 565.020, 565.030, 565.032, and 565.040, RSMo, and to enact in lieu thereof seven new sections relating to crime, with penalty provisions, an emergency clause for certain sections, and an effective date for a certain section.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section A. Sections 565.020, 565.030, 565.032, and 565.040, RSMo, are repealed and seven new sections enacted in lieu thereof, to be known as sections 558.047, 565.020, 565.030, 565.032, 565.033, 565.034, and 565.040, to read as follows:

558.047. 1. (1) Any person sentenced to a term of imprisonment for life without eligibility for parole before August 28, 2016, who was under eighteen years of age at the time of the commission of the offense or offenses, may submit to the parole board a petition for a review of his or her sentence, regardless of whether the case is final for purposes of appeal, after serving twenty-five years of incarceration on the sentence of life without parole.

(2) Any person found guilty of murder in the first degree who was sentenced on or after August 28, 2016, to a term of life imprisonment with eligibility for parole or a term of imprisonment of not less than thirty years and not to exceed forty years, who was under eighteen years of age at the time of the commission of the offense or

EXPLANATION–Matter enclosed in bold-faced brackets [thus] in this bill is not enacted and is intended to be omitted in the law.

offenses may submit to the parole board a petition for a review of his or her sentence, regardless of whether the case is final for purposes of appeal, after serving twenty-five years of incarceration, and a subsequent petition after serving thirty-five years of incarceration.

2. A copy of the petition shall be served on the office of the prosecutor in the judicial circuit of original jurisdiction. The petition shall include the person's statement that he or she was under eighteen years of age at the time of the offense, is eligible to petition under this section, and requests that his or her sentence be reviewed.

3. If any of the information required in subsection 2 of this section is missing from the petition, or if proof of service on the prosecuting or circuit attorney is not provided, the parole board shall return the petition to the person and advise him or her that the matter cannot be considered without the missing information.

4. The parole board shall hold a hearing and determine if the defendant shall be granted parole. At such a hearing, the victim or victim's family members shall retain their rights under section 595.209.

5. In a parole review hearing under this section, the board shall consider, in addition to the factors listed in section 565.033:

(1) Efforts made toward rehabilitation since the offense or offenses occurred, including participation in educational, vocational, or other programs during incarceration, when available;

(2) The subsequent growth and increased maturity of the person since the offense or offenses occurred;

(3) Evidence that the person has accepted accountability for the offense or offenses, except in cases where the person has maintained his or her innocence;

(4) The person's institutional record during incarceration; and

(5) Whether the person remains the same risk to society as he or she did at the time of the initial sentencing.

565.020. 1. A person commits the **[**crime**]** **offense** of murder in the first degree if he **or she** knowingly causes the death of another person after deliberation upon the matter.

2. **The offense of** murder in the first degree is a class A felony, and**, if a person is eighteen years of age or older at the time of the offense,** the punishment shall be either death or imprisonment for life without eligibility for probation or parole, or release except by act of the governor**[**; except that,**]**. If a

person has not reached his **[**sixteenth**] or her eighteenth** birthday at the time of the commission of the **[**crime**] offense**, the punishment shall be **[**imprisonment for life without eligibility for probation or parole, or release except by act of the governor**] as provided under section 565.033**.

565.030. 1. Where murder in the first degree is charged but not submitted or where the state waives the death penalty, the submission to the trier and all subsequent proceedings in the case shall proceed as in all other criminal cases **[**with a single stage trial in which guilt and punishment are submitted together**]**.

2. Where murder in the first degree is submitted to the trier without a waiver of the death penalty, the trial shall proceed in two stages before the same trier. At the first stage the trier shall decide only whether the defendant is guilty or not guilty of any submitted offense. The issue of punishment shall not be submitted to the trier at the first stage. If an offense is charged other than murder in the first degree in a count together with a count of murder in the first degree, the trial judge shall assess punishment on any such offense according to law, after the defendant is found guilty of such offense and after he finds the defendant to be a prior offender pursuant to chapter 558.

3. If murder in the first degree is submitted and the death penalty was not waived but the trier finds the defendant guilty of a lesser homicide, a second stage of the trial shall proceed **[**at which the only issue shall be the punishment to be assessed and declared. No further evidence shall be received. If the trier is a jury it shall be instructed on the law**] as in all other criminal cases**. The attorneys may then argue as in other criminal cases the issue of punishment, after which the trier shall assess and declare the punishment as in all other criminal cases.

4. If the trier at the first stage of a trial where the death penalty was not waived finds the defendant guilty of murder in the first degree, a second stage of the trial shall proceed at which the only issue shall be the punishment to be assessed and declared. Evidence in aggravation and mitigation of punishment, including but not limited to evidence supporting any of the aggravating or mitigating circumstances listed in subsection 2 or 3 of section 565.032, may be presented subject to the rules of evidence at criminal trials. Such evidence may include, within the discretion of the court, evidence concerning the murder victim and the impact of the **[**crime**] offense** upon the family of the victim and others. Rebuttal and surrebuttal evidence may be presented. The state shall be

the first to proceed. If the trier is a jury it shall be instructed on the law. The attorneys may then argue the issue of punishment to the jury, and the state shall have the right to open and close the argument. The trier shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor:

(1) If the trier finds by a preponderance of the evidence that the defendant is intellectually disabled; or

(2) If the trier does not find beyond a reasonable doubt at least one of the statutory aggravating circumstances set out in subsection 2 of section 565.032; or

(3) If the trier concludes that there is evidence in mitigation of punishment, including but not limited to evidence supporting the statutory mitigating circumstances listed in subsection 3 of section 565.032, which is sufficient to outweigh the evidence in aggravation of punishment found by the trier; or

(4) If the trier decides under all of the circumstances not to assess and declare the punishment at death. If the trier is a jury it shall be so instructed. If the trier assesses and declares the punishment at death it shall, in its findings or verdict, set out in writing the aggravating circumstance or circumstances listed in subsection 2 of section 565.032 which it found beyond a reasonable doubt. If the trier is a jury it shall be instructed before the case is submitted that if it is unable to decide or agree upon the punishment the court shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor or death. The court shall follow the same procedure as set out in this section whenever it is required to determine punishment for murder in the first degree.

5. Upon written agreement of the parties and with leave of the court, the issue of the defendant's intellectual disability may be taken up by the court and decided prior to trial without prejudicing the defendant's right to have the issue submitted to the trier of fact as provided in subsection 4 of this section.

6. As used in this section, the terms "intellectual disability" or "intellectually disabled" refer to a condition involving substantial limitations in general functioning characterized by significantly subaverage intellectual functioning with continual extensive related deficits and limitations in two or more adaptive behaviors such as communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics,

leisure and work, which conditions are manifested and documented before eighteen years of age.

7. The provisions of this section shall only govern offenses committed on or after August 28, 2001.

565.032. 1. In all cases of murder in the first degree for which the death penalty is authorized, the judge in a jury-waived trial shall consider, or **[**he**]** shall include in his **or her** instructions to the jury for it to consider:

(1) Whether a statutory aggravating circumstance or circumstances enumerated in subsection 2 of this section is established by the evidence beyond a reasonable doubt; and

(2) If a statutory aggravating circumstance or circumstances is proven beyond a reasonable doubt, whether the evidence as a whole justifies a sentence of death or a sentence of life imprisonment without eligibility for probation, parole, or release except by act of the governor. In determining the issues enumerated in subdivisions (1) and (2) of this subsection, the trier shall consider all evidence which it finds to be in aggravation or mitigation of punishment, including evidence received during the first stage of the trial and evidence supporting any of the statutory aggravating or mitigating circumstances set out in subsections 2 and 3 of this section. If the trier is a jury, it shall not be instructed upon any specific evidence which may be in aggravation or mitigation of punishment, but shall be instructed that each juror shall consider any evidence which he **or she** considers to be aggravating or mitigating.

2. Statutory aggravating circumstances for a murder in the first degree offense shall be limited to the following:

(1) The offense was committed by a person with a prior record of conviction for murder in the first degree, or the offense was committed by a person who has one or more serious assaultive criminal convictions;

(2) The murder in the first degree offense was committed while the offender was engaged in the commission or attempted commission of another unlawful homicide;

(3) The offender by his **or her** act of murder in the first degree knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person;

(4) The offender committed the offense of murder in the first degree for himself **or herself** or another, for the purpose of receiving money or any other thing of monetary value from the victim of the murder or another;

(5) The murder in the first degree was committed against a judicial officer, former judicial officer, prosecuting attorney or former prosecuting attorney, circuit attorney or former circuit attorney, assistant prosecuting attorney or former assistant prosecuting attorney, assistant circuit attorney or former assistant circuit attorney, peace officer or former peace officer, elected official or former elected official during or because of the exercise of his official duty;

(6) The offender caused or directed another to commit murder in the first degree or committed murder in the first degree as an agent or employee of another person;

(7) The murder in the first degree was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind;

(8) The murder in the first degree was committed against any peace officer, or fireman while engaged in the performance of his **or her** official duty;

(9) The murder in the first degree was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement;

(10) The murder in the first degree was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself **or herself** or another;

(11) The murder in the first degree was committed while the defendant was engaged in the perpetration or was aiding or encouraging another person to perpetrate or attempt to perpetrate a felony of any degree of rape, sodomy, burglary, robbery, kidnapping, or any felony offense in chapter 195 **or 579**;

(12) The murdered individual was a witness or potential witness in any past or pending investigation or past or pending prosecution, and was killed as a result of his **or her** status as a witness or potential witness;

(13) The murdered individual was an employee of an institution or facility of the department of corrections of this state or local correction agency and was killed in the course of performing his **or her** official duties, or the murdered individual was an inmate of such institution or facility;

(14) The murdered individual was killed as a result of the hijacking of an airplane, train, ship, bus or other public conveyance;

(15) The murder was committed for the purpose of concealing or attempting to conceal any felony offense defined in chapter 195 **or 579**;

(16) The murder was committed for the purpose of causing or attempting

to cause a person to refrain from initiating or aiding in the prosecution of a felony offense defined in chapter 195 **or 579**;

(17) The murder was committed during the commission of **[**a crime**]** **an offense** which is part of a pattern of criminal street gang activity as defined in section 578.421.

3. Statutory mitigating circumstances shall include the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The murder in the first degree was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The defendant was an accomplice in the murder in the first degree committed by another person and his **or her** participation was relatively minor;

(5) The defendant acted under extreme duress or under the substantial domination of another person;

(6) The capacity of the defendant to appreciate the criminality of his **or her** conduct or to conform his **or her** conduct to the requirements of law was substantially impaired;

(7) The age of the defendant at the time of the **[**crime**]** **offense**.

565.033. 1. A person found guilty of murder in the first degree who was under the age of eighteen at the time of the commission of the offense shall be sentenced to a term of life without eligibility for probation or parole as provided in section 565.034, life imprisonment with eligibility for parole, or not less than thirty years and not to exceed forty years imprisonment.

2. When assessing punishment in all first degree murder cases in which the defendant was under the age of eighteen at the time of the commission of the offense or offenses, the judge in a jury-waived trial shall consider, or the judge shall include in instructions to the jury for it to consider, the following factors:

(1) The nature and circumstances of the offense committed by the defendant;

(2) The degree of the defendant's culpability in light of his or her age and role in the offense;

(3) The defendant's age, maturity, intellectual capacity, and mental and emotional health and development at the time of the

offense;

(4) The defendant's background, including his or her family, home, and community environment;

(5) The likelihood for rehabilitation of the defendant;

(6) The extent of the defendant's participation in the offense;

(7) The effect of familial pressure or peer pressure on the defendant's actions;

(8) The nature and extent of the defendant's prior criminal history, including whether the offense was committed by a person with a prior record of conviction for murder in the first degree, or one or more serious assaultive criminal convictions;

(9) The effect of characteristics attributable to the defendant's youth on the defendant's judgment; and

(10) A statement by the victim or the victim's family member as provided by section 557.041 until December 31, 2016, and beginning January 1, 2017, section 595.229.

565.034. 1. If the state intends to seek a sentence of life without eligibility for probation or parole for a person charged with murder in the first degree who was under the age of eighteen at the time of the commission of the offense, the state must file with the court and serve upon the person a written notice of intent to seek life without eligibility for probation or parole. This notice shall be provided within one hundred twenty days of the person's arraignment upon an indictment or information charging the person with murder in the first degree. For good cause shown, the court may extend the period for service and filing of the notice. Any notice of intent to seek life without eligibility for probation or parole shall include a listing of the statutory aggravating circumstances, as provided by subsection 6 of this section, upon which the state will rely in seeking that sentence.

2. Notwithstanding any other provisions of law, where the state files a notice of intent to seek life without eligibility for probation or parole pursuant to this section, the defendant shall be entitled to an additional sixty days for the purpose of filing new motions or supplementing pending motions.

3. A notice of intent to seek life without eligibility for probation or parole pursuant to this section may be withdrawn at any time by a written notice of withdrawal filed with the court and served upon the

defendant. Once withdrawn, the notice of intent to seek life without eligibility for probation or parole shall not be refiled.

4. After the state has filed a proper notice of intent to seek life without eligibility for probation or parole pursuant to this section, the trial shall proceed in two stages before the same trier. At the first stage the trier shall decide only whether the person is guilty or not guilty of any submitted offense. The issue of punishment shall not be submitted to the trier at the first stage.

5. If the trier at the first stage of the trial finds the person guilty of murder in the first degree, a second stage of the trial shall proceed at which the only issue shall be the punishment to be assessed and declared.

6. A person found guilty of murder in the first degree who was under the age of eighteen at the time of the commission of the offense is eligible for a sentence of life without eligibility for probation or parole only if a unanimous jury, or a judge in a jury-waived sentencing, finds beyond a reasonable doubt that:

(1) The victim received physical injuries personally inflicted by the defendant and the physical injuries inflicted by the defendant caused the death of the victim; and

(2) The defendant was found guilty of first degree murder and one of the following aggravating factors was present:

(a) The defendant has a previous conviction for first degree murder, assault in the first degree, rape in the first degree, or sodomy in the first degree;

(b) The murder was committed during the perpetration of any other first degree murder, assault in the first degree, rape in the first degree, or sodomy in the first degree;

(c) The murder was committed as part of an agreement with a third party that the defendant was to receive money or any other thing of monetary value in exchange for the commission of the offense;

(d) The defendant inflicted severe pain on the victim for the pleasure of the defendant or for the purpose of inflicting torture;

(e) The defendant killed the victim after he or she was bound or otherwise rendered helpless by the defendant or another person;

(f) The defendant, while killing the victim or immediately thereafter, purposely mutilated or grossly disfigured the body of the

victim by an act or acts beyond that necessary to cause his or her death;

(g) The defendant, while killing the victim or immediately thereafter, had sexual intercourse with the victim or sexually violated him or her;

(h) The defendant killed the victim for the purposes of causing suffering to a third person; or

(i) The first degree murder was committed against a current or former: judicial officer, prosecuting attorney or assistant prosecuting attorney, law enforcement officer, firefighter, state or local corrections officer; or against a witness or potential witness to a past or pending investigation or prosecution, during or because of the exercise of their official duty or status as a witness.

565.040. 1. In the event that the death penalty provided in this chapter is held to be unconstitutional, any person convicted of murder in the first degree shall be sentenced by the court to life imprisonment without eligibility for probation, parole, or release except by act of the governor, with the exception that when a specific aggravating circumstance found in a case is held to be unconstitutional or invalid for another reason, the supreme court of Missouri is further authorized to remand the case for resentencing or retrial of the punishment pursuant to subsection 5 of section **[**565.036**]** **565.035**.

2. In the event that any death sentence imposed pursuant to this chapter is held to be unconstitutional, the trial court which previously sentenced the defendant to death shall cause the defendant to be brought before the court and shall sentence the defendant to life imprisonment without eligibility for probation, parole, or release except by act of the governor, with the exception that when a specific aggravating circumstance found in a case is held to be inapplicable, unconstitutional or invalid for another reason, the supreme court of Missouri is further authorized to remand the case for retrial of the punishment pursuant to subsection 5 of section 565.035.

Section B. The repeal and reenactment of section 565.032 of this act shall become effective on January 1, 2017.

Section C. Because of the need to adopt a punishment scheme for first degree murderers of a certain age after the United States Supreme Court declared as unconstitutional the only punishment available under Missouri law for such offenders, the repeal and reenactment of section 565.020, and the

enactment of sections 558.047, 565.033, and 565.034 of this act is deemed necessary for the immediate preservation of the public health, welfare, peace and safety, and is hereby declared to be an emergency act within the meaning of the constitution, and the repeal and reenactment of section 565.020, and the enactment of sections 558.047, 565.033, and 565.034 of this act shall be in full force and effect upon its passage and approval.

✓

EXHIBIT 2

2

Brown, Norman 191425 (6D-170)

I have your correspondence regarding the delegate appearing at your hearing. Mae Quinn has appeared previously at a hearing and it will not be an issue for her to appear at yours. However, she will not be appearing under an Attorney Visit, therefore, will not be extended any courtesies beyond the normal scope of a parole hearing delegate (i.e. No outside material other than letter(s) of support).

Aaron Jarrett
Unit Supervisor

EXHIBIT 3

Eric R. Greitens
Governor

Anne L. Precythe
Director

2729 Plaza Drive
P. O. Box 236
Jefferson City, MO 65102
Telephone: 573-751-2389
Fax: 573-526-0880

State of Missouri
DEPARTMENT OF CORRECTIONS
Ad Excelleum Conamur – "We Strive Towards Excellence"

April 27, 2017

Roderick and Solange MacArthur Justice Center
Director Mae Quinn
3115 South Grand Blvd.
Suite 300
St. Louis MO 63118

Dear Ms. Quinn:

It seems there has been some lack of understanding regarding the established protocols of parole hearing conduct. It is the desire of the Department of Corrections to balance the needs of your clients, the needs of victims and the safety and security of the institution, while maintaining the integrity of the process.

In our continuing effort to provide information and assistance to you and your clients impacted by RSMo. 558.047, for your convenience, the hearing procedures are enclosed.

It is my sincerest belief that all parties involved are seeking to restore those impacted by crime to the fullest extent possible. I am sure you agree an important part of this process is to interact in a way that conveys equity and respect. The Department of Corrections looks forward to a cooperative relationship with the MacArthur Justice Center.

If you have any questions regarding our hearing procedure protocols, please contact our Victim Advocate, Kimberly Evans at 573-526-0546. Thank you for your attention to this matter.

Sincerely,

Anne L. Precythe

Anne L. Precythe
Director

Parole Hearing Procedures

PAROLE HEARINGS

- Parole hearings are confidential proceedings and note taking during the hearing is prohibited.
- The hearing is conducted by a panel of three people; a board member, a parole analyst and a probation and parole supervisor
    - If the hearing is at the institution or what we refer to as an "in-person", the entire panel and offender are present at the hearing.
    - If the hearing is a video conference then the board member and parole analyst are at Probation and Parole Central Office. The probation and parole supervisor is at the institution with the offender.
    - In the case of a video conference, victims may choose to attend either at Probation and Parole Central Office or the institution. If the victim chooses to attend at Probation and Parole Central Office, the offender will not see the victims, but will be informed there are victims present. The victims will see the offender on the monitor.
    - The hearing panel makes a recommendation after the hearing.
    - This recommendation, a recording of the hearing, notes taken and the supporting exhibits from all parties are provided to the rest of the board to use to come to a majority decision.
    - Each board member votes either in agreement with the recommendation or may present another option.
    - The board decision will be either for release or for a future re-consideration hearing (denial of parole at this time).
    - The board can set a release date anytime in the next 5 years, or set a re-consideration hearing.
    - This final decision may take up to 12 weeks.

VICTIMS

RSMo 595.200 defines a victim: a natural person who suffers direct or threatened physical, emotional or financial harm as the result of the commission or attempted commission of a crime. The term "victim" also includes: the family members of a minor, incompetent person or a homicide victim.

- Per statute a family member is defined as a spouse, child, sibling, parent, grandparent or legal guardian of a victim.
- A victim may "delegate" a representative to speak on his behalf. This must be done in writing. This is an option if a person who is defined as a victim is unable to come to the hearing or attends the hearing but chooses to have another person speak on his behalf.

- The victim or person representing the victim who attends a hearing may be accompanied by one other person;
- The victim or person representing the victim who attends a hearing shall have the option of giving testimony in the presence of the offender or to the hearing panel without the offender being present;
- The victim or person representing the victim who attends a hearing may request partition.
- The victim or person representing the victim may call or write the parole board rather than attend the hearing;
- The victim or person representing the victim may have a personal meeting with a parole board member at Probation and Parole Central Office in Jefferson City;
- The office of victim services staff members will attend hearings for the sole purpose of support, not advocacy.

Other Opposing Parties

Parties allowed at parole hearings to present opposition as set forth in RSMo. 217.690 include: The judge, prosecuting attorney or circuit attorney and a representative of the local law enforcement agency investigating the crime shall be allowed to attend the hearing or provide information to the hearing panel in regard to the parole consideration.

Rules of Conduct Victims/Opposition:

The victim's, support people and any PA/law enforcement representatives will be addressed by the board prior to the offender being present, to set forth expectations regarding conduct during the hearing.

- Victims and PA/law enforcement representatives will speak to the panel first;
- Victims are not allowed to address the offender directly. All statements will be directed to the panel;
- Language will be professional. There should be no statements of a derogatory nature;
- There will be no outbursts during the hearing. Outbursts will result in expulsion from the hearing;
- Body language and facial expressions should remain neutral during the offender's portion of the hearing;
- The parole hearing will not be a retrial of the crime;
- There will be no rebuttal after the offender speaks;
- There is no time limit on the victim's statement;
- Victims and law enforcement have a choice to either leave after making their statements or stay for the offender portion of the hearing.

Delegates for the Offender

Parties allowed at parole hearings on behalf of offender as set forth in P6-3.3. Offenders must provide written notice within 7 days of the parole hearing as to the identity of their delegate.

- Offenders may have one delegate of their choice at the hearing within the following guidelines:
  - The warden has final authority in determining who may be allowed to enter the facility;

- Incarcerated offenders may not be a delegate at the hearing;
- Department of Corrections (DOC) employees are discouraged from being delegates unless the client is a member of their immediate family. Otherwise, staff are encouraged to provide support information in writing or by contacting the Institutional Parole Officer (IPO) prior to the hearing.
- Volunteers In Corrections may not act as a delegate for any client without prior approval from the Human Service Division director/designee.
- The offender's delegate may have a personal meeting with a parole board member at the Probation and Parole central office in Jefferson City.
- The offender's delegate may offer a statement on behalf of the offender, ask questions and provide additional information that may be requested by the hearing panel;
- The hearing panel may limit any irrelevant or repetitious statement(s);
- Delegates should be on the approved visiting list or processed as a special visit according to the Institutional Services Procedure for Offender Visitors.

Rules of Conduct Delegate

The offender and delegate will be address by the board prior to the offender's portion of the hearing.

- Offenders and delegate will not address the victims directly. All statements will be directed to the panel.
- Language will be professional. There should be no statements of a derogatory nature.
- There will be no outbursts during the hearing. Outbursts will result in expulsion from the hearing.
- The delegate will address only issues related to transition to the community, which could include offender growth, support system, home and employment.
- There is to be no contact made either directly or indirectly with the victim(s) of the case, except through the Office of Victim Services.

HUSCH BLACKWELL

Matthew D. Knepper
Attorney

190 Carondelet Plaza, Suite 600
St. Louis, MO 63105
Direct:
Fax: 314.480.1505
matt.knepper@huschblackwell.com

February 9, 2017

David Owen
Communications Director
Missouri Department of Corrections
P.O. Box 236
Jefferson City, MO 65102
doc.media@doc.mo.gov

Re: Records Request for Parole Hearing Recording for Mr. Ralph McElroy (DOC # 169637)

Dear Mr. Owen:

I am the attorney for Mr. Ralph McElroy, an inmate at Eastern Reception, Diagnostic and Correctional Center. This is a request, on Mr. McElroy's behalf, for records under the Missouri Sunshine Law, Chapter 610, Revised Statutes of Missouri. Mr. McElroy received and participated in a parole hearing as required Mo. Rev. Stat. § 558.047 on December 13, 2016. Per this Department's Procedures Governing the Granting of Paroles and Conditional Releases, Mr. McElroy's hearing was recorded.

1. Request for Parole Hearing Recording: Mr. McElroy was not allowed to use his own recording device for the hearing and therefore requests you make the recording of his December 13, 2016 parole hearing available to him. Pursuant to Mo. Rev. Stat. § 549.500, Mr. McElroy and his attorneys have a proper interest in these records and inspection should therefore be permitted.

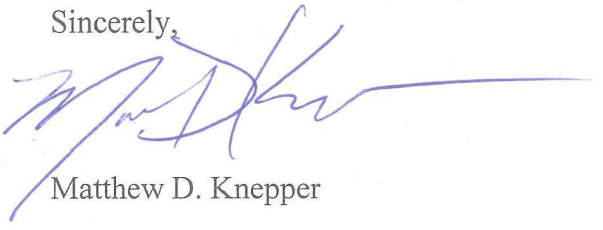
2. Request of Parole Hearing Documents: I additionally request you make available all documents prepared for and obtained due to Mr. McElroy's parole hearing pursuant to Mo. Rev. Stat. § 549.500. These documents are in the possession of the Missouri Board of Probation and Parole as a part of the Department of Corrections, a "public governmental body" as defined in Mo. Rev. Stat. § 610.010.

Our preferred form of production is digital copies (such as Word files, PDFs, or WAV) sent as email attachments. However, if records are only available in paper form, or if

transferring to a digital form would incur a cost, please let us know and we can likely make funds for copying available.

On behalf of my client, I request a response to these requests within three business days. Should you determine that any of the information requested is exempt and will not be disclosed, please provide me with a notification citing the legal authorities on which you rely.

Sincerely,



Matthew D. Knepper

SLZ

EXHIBIT 5

Eric R. Greitens
Governor

Anne L. Precythe
Director

2729 Plaza Drive
P. O. Box 236
Jefferson City, MO 65102
Telephone: 573-751-2389
Fax: 573-526-0880

State of Missouri
DEPARTMENT OF CORRECTIONS
Ad Excelleum Conamur – "We Strive Towards Excellence"

February 10, 2017

Matthew D. Knepper
190 Crondelet Plaza, Suite 600
St. Louis, MO 63105

Dear Mr. Knepper:

I am writing in response to your request for records dated February 10, 2017. Any records the Department may have that are responsive to your request are closed records pursuant to §§ 217.670.5, 549.500, and 559.125.2 RSMo. The Board of Probation and Parole declines to use any discretion it may have to disclose these records.

Sincerely,

Jay Boresi
Legal Counsel

EXHIBIT 6

Missouri Department of Corrections
Division of Probation and Parole
Jefferson City Correctional Center

To: ROBERTS, Sidney #171590

From: Jessica Bliesath, POII

Date: April 18, 2017

When it comes to the Parole Board's decision and why the decision was made, the comment on the form represents one reason why they made their decision. I can assure you it is not the sole reason you received a reconsideration hearing verses a release date. Unfortunately, the Parole Board's decision is not subject to appeal.

Something to remember, the Parole Board takes their decision making process very serious. You are serving a Life without Parole sentence. All factors are taken into consideration. Your adjustment over the years was not great, which included a new felony offense and numerous weapon violations; however, it has improved, which they acknowledged. Please understand, your rehabilitative efforts were noted and considered. Their decision, due to the fact they gave you four years verses five, in my opinion, indicates they are aware of your efforts and would like to continue seeing improved behavior and accomplishments. You will have another parole hearing in four years. Please continue to make positive progress.

Thank you!

EXHIBIT 7

DOC ID: 169637 Cycle: 19890626
DOC Name: MCELROY, RALPH

Institution/Housing Unit ERDCC/003 C 201

OFFENDER COPY

Minimum Mandatory Release Date N/A

RELATING TO RELEASE CONSIDERATION

___ 1. You have been scheduled for a parole hearing .

___ 2. At your request, your case has been closed to further parole consideration.

_X_ 3. You have been given parole consideration in a parole hearing 12/13/2016. You will be scheduled for a reconsideration hearing 12/00/2021.

___ 4. You have been scheduled for release from confinement on .

Actual release depends upon continued record of good conduct and an acceptable release plan. The release decision is:

___ Guideline ___ Below Guideline ___ Above Guideline

Special Conditions of release are:

Strategy Stipulation Date:

___ 5. Your previously set release date has been cancelled.

___ 6. Your conditional release date has been extended to .

___ 7. The Board has reviewed your appeal. It is the decision of the Board to your appeal.

___ 8. You have been scheduled for a Conditional Release Extension hearing on .

The reasons for the action taken are:

**THIS DECISION IS NOT SUBJECT TO APPEAL.

*Release at this time would depreciate the seriousness of the present offense based on:
A. Circumstances surrounding the present offense.
*There does not appear to be a reasonable probability at this time that you would live and remain at liberty without again violating the law based on:
A. Poor instituitional adjustment.

DOC ID: 171590 Cycle: 19891121
DOC Name: ROBERTS, SIDNEY JR

AD-208

Institution/Housing Unit JCCC/004

Minimum Mandatory Release Date N/A

RELATING TO RELEASE CONSIDERATION

___ 1. You have been scheduled for a parole hearing .

___ 2. At your request, your case has been closed to further parole consideration.

_X_ 3. You have been given parole consideration in a parole hearing 03/09/2017. You will be scheduled for a reconsideration hearing 03/00/2021.

___ 4. You have been scheduled for release from confinement on .

Actual release depends upon continued record of good conduct and an acceptable release plan. The release decision is:

___ Guideline ___ Below Guideline ___ Above Guideline

Special Conditions of release are:

Strategy Stipulation Date:

___ 5. Your previously set release date has been cancelled.

___ 6. Your conditional release date has been extended to .

___ 7. The Board has reviewed your appeal. It is the decision of the Board to your appeal.

___ 8. You have been scheduled for a Conditional Release Extension hearing on .

The reasons for the action taken are:

**THIS DECISION IS NOT SUBJECT TO APPEAL.

*Release at this time would depreciate the seriousness of the present offense based on:
A. Circumstances surrounding the present offense.

DOC ID: 165253 Cycle: 19880712
DOC Name: ROLAND, THERON R II

INMATE COPY

Institution/Housing Unit CRCC/003 B 234B

Minimum Mandatory Release Date N/A

RELATING TO RELEASE CONSIDERATION

___ 1. You have been scheduled for a parole hearing .

___ 2. At your request, your case has been closed to further parole consideration.

_X_ 3. You have been given parole consideration in a parole hearing 01/03/2017. You will be scheduled for a reconsideration hearing 01/00/2022.

___ 4. You have been scheduled for release from confinement on .

Actual release depends upon continued record of good conduct and an acceptable release plan. The release decision is:

___ Guideline ___ Below Guideline ___ Above Guideline

Special Conditions of release are:

Strategy Stipulation Date:

___ 5. Your previously set release date has been cancelled.

___ 6. Your conditional release date has been extended to .

___ 7. The Board has reviewed your appeal. It is the decision of the Board to your appeal.

___ 8. You have been scheduled for a Conditional Release Extension hearing on .

The reasons for the action taken are:

**THIS DECISION IS NOT SUBJECT TO APPEAL.

Release at this time would depreciate the seriousness of the present offense based upon:
A. Circumstances Surrounding the Present Offense

DOC ID: 164545 Cycle: 19880517
DOC Name: BRADSHAW, KEVIN C

Hu 6A-47
Porter-MEDICAL

Institution/Housing Unit PCC/006

Minimum Mandatory Release Date N/A

RELATING TO RELEASE CONSIDERATION

___ 1. You have been scheduled for a parole hearing .

___ 2. At your request, your case has been closed to further parole consideration.

_X_ 3. You have been given parole consideration in a parole hearing 03/01/2017. You will be scheduled for a reconsideration hearing 03/00/2021.

___ 4. You have been scheduled for release from confinement on .

Actual release depends upon continued record of good conduct and an acceptable release plan. The release decision is:

___ Guideline ___ Below Guideline ___ Above Guideline

Special Conditions of release are:

Strategy Stipulation Date:

___ 5. Your previously set release date has been cancelled.

___ 6. Your conditional release date has been extended to .

___ 7. The Board has reviewed your appeal. It is the decision of the Board to your appeal.

___ 8. You have been scheduled for a Conditional Release Extension hearing on .

The reasons for the action taken are:

**THIS DECISION IS NOT SUBJECT TO APPEAL.

Release at this time would depreciate the seriousness of the present offense based on:
A) Circumstances surrounding the present offense.

Exhibit 9

KU032A-OPN
Time - 14:01:59

Missouri Department of Corrections
BOARD OF PROBATION AND PAROLE

Page - 1
Date - 1/27/17

DOC ID: 191078 **Cycle:** 19930305
DOC Name: COLLIER, JOHNATHAN L 41 259

Institution/Housing Unit SCCC/004

Minimum Mandatory Release Date N/A

RECEIVED
JAN 30 2017
SCCC Parole Office

RELATING TO RELEASE CONSIDERATION

___ 1. You have been scheduled for a parole hearing .

___ 2. At your request, your case has been closed to further parole consideration.

_X_ 3. You have been given parole consideration in a parole hearing 12/19/2016. You will be scheduled for a reconsideration hearing 12/00/2021.

___ 4. You have been scheduled for release from confinement on .

Actual release depends upon continued record of good conduct and an acceptable release plan. The release decision is:

___ Guideline ___ Below Guideline ___ Above Guideline

Special Conditions of release are:

Strategy Stipulation Date:

___ 5. Your previously set release date has been cancelled.

___ 6. Your conditional release date has been extended to .

___ 7. The Board has reviewed your appeal. It is the decision of the Board to your appeal.

___ 8. You have been scheduled for a Conditional Release Extension hearing on .

he reasons for the action taken are:

*THIS DECISION IS NOT SUBJECT TO APPEAL.

elease at this time would depreciate the seriousness of the present offense ased on:
A) Circumstances surrounding the present offense.
B) Community opposition.

here does not appear to be a reasonable probability at this time that the ffender would live and remain at liberty without again violating the law ased on:
A) Poor institutional adjustment.

Missouri Department of Corrections
BOARD OF PROBATION AND PAROLE

INMATE COPY

DOC ID: 181041 Cycle: 19900214
DOC Name: EDEN, WALTER

Institution/Housing Unit CRCC/003 D 169B

Minimum Mandatory Release Date N/A

RELATING TO RELEASE CONSIDERATION

___ 1. You have been scheduled for a parole hearing .

___ 2. At your request, your case has been closed to further parole consideration.

_X_ 3. You have been given parole consideration in a parole hearing 01/03/2017. You will be scheduled for a reconsideration hearing 01/00/2022.

___ 4. You have been scheduled for release from confinement on .

Actual release depends upon continued record of good conduct and an acceptable release plan. The release decision is:

___ Guideline ___ Below Guideline ___ Above Guideline

Special Conditions of release are:

Strategy Stipulation Date:

___ 5. Your previously set release date has been cancelled.

___ 6. Your conditional release date has been extended to .

___ 7. The Board has reviewed your appeal. It is the decision of the Board to your appeal.

___ 8. You have been scheduled for a Conditional Release Extension hearing on .

The reasons for the action taken are:

**THIS DECISION IS NOT SUBJECT TO APPEAL.

Release at this time would depreciate the seriousness of the present offense based on:
A: Circumstances surrounding the present offense.
There does not appear to be a reasonable probability at this time that you would live and remain at liberty without again violating the law based upon:
A: Poor institutional adjustment.

Exhibit 7

AKU032A-OPN Missouri Department of Corrections Page - 1
Time - 15:47:23 BOARD OF PROBATION AND PAROLE Date - 1/27/17

DOC ID: 164676 Cycle: 19880525
DOC Name: HARDY, JAMES M 3 : 228

RECEIVED
JAN 30 2017
SCCC Parole Office

Institution/Housing Unit SCCC/003

Minimum Mandatory Release Date N/A

RELATING TO RELEASE CONSIDERATION

___ 1. You have been scheduled for a parole hearing .

___ 2. At your request, your case has been closed to further parole consideration.

_X_ 3. You have been given parole consideration in a parole hearing 12/20/2016. You will be scheduled for a reconsideration hearing 12/00/2021.

___ 4. You have been scheduled for release from confinement on .

Actual release depends upon continued record of good conduct and an acceptable release plan. The release decision is:

___ Guideline ___ Below Guideline ___ Above Guideline

Special Conditions of release are:

Strategy Stipulation Date:

___ 5. Your previously set release date has been cancelled.

___ 6. Your conditional release date has been extended to .

___ 7. The Board has reviewed your appeal. It is the decision of the Board to your appeal.

___ 8. You have been scheduled for a Conditional Release Extension hearing on .

he reasons for the action taken are:

*THIS DECISION IS NOT SUBJECT TO APPEAL.

elease at this time would depreciate the seriousness of the present offense
ased on:
A: Circumstances surrounding the present offense.
B: Use of excessive force or violence.
C: Community opposition.

Missouri Department of Corrections
BOARD OF PROBATION AND PAROLE

DOC ID: 164041 **Cycle:** 19880331
DOC Name: WILSON, LIDDELL

Institution/Housing Unit ERDCC/003 C.114

Minimum Mandatory Release Date 06/01/2018

RELATING TO RELEASE CONSIDERATION

___ 1. You have been scheduled for a parole hearing .

___ 2. At your request, your case has been closed to further parole consideration.

_X_ 3. You have been given parole consideration in a parole hearing 04/12/2017. You will be scheduled for a reconsideration hearing 04/00/2022.

___ 4. You have been scheduled for release from confinement on .

Actual release depends upon continued record of good conduct and an acceptable release plan. The release decision is:

___ Guideline ___ Below Guideline ___ Above Guideline

Special Conditions of release are:

Strategy Stipulation Date:

___ 5. Your previously set release date has been cancelled.

___ 6. Your conditional release date has been extended to .

___ 7. The Board has reviewed your appeal. It is the decision of the Board to your appeal.

___ 8. You have been scheduled for a Conditional Release Extension hearing on .

The reasons for the action taken are:

**THIS DECISION IS NOT SUBJECT TO APPEAL.

Release at this time would depreciate the seriousness of the present offense based on:
A. Circumstances surrounding the present offense.
B. Use of a weapon.
C. Community opposition.

DOC ID: 177760 **Cycle:** 19910116
DOC Name: WEDLOW, TINO R

Institution/Housing Unit CRCC/004

Minimum Mandatory Release Date N/A

RELATING TO RELEASE CONSIDERATION

___ 1. You have been scheduled for a parole hearing .

___ 2. At your request, your case has been closed to further parole consideration.

_X_ 3. You have been given parole consideration in a parole hearing 02/07/2017. You will be scheduled for a reconsideration hearing 02/00/2022.

___ 4. You have been scheduled for release from confinement on .

Actual release depends upon continued record of good conduct and an acceptable release plan. The release decision is:

___ Guideline ___ Below Guideline ___ Above Guideline

Special Conditions of release are:

Strategy Stipulation Date:

___ 5. Your previously set release date has been cancelled.

___ 6. Your conditional release date has been extended to .

___ 7. The Board has reviewed your appeal. It is the decision of the Board to your appeal.

___ 8. You have been scheduled for a Conditional Release Extension hearing on .

The reasons for the action taken are:

**THIS DECISION IS NOT SUBJECT TO APPEAL.

Release at this time would depreciate the seriousness of the present offense based on:
A. Circumstances surrounding the present offense.

There does not appear to be a reasonable probability at this time that the offender would live and remain at liberty without again violating the law based on:
A. Poor institutional adjustment.

The Commonwealth of Massachusetts
Executive Office of Public Safety
PAROLE BOARD
12 Mercer Road
Natick, Massachusetts 01760

Telephone # (508) 650-4500
Facsimile # (508) 650-4599

Deval L. Patrick
Governor

Andrea J. Cabral
Secretary

Josh Wall
Chairman

DECISION

IN THE MATTER OF

THAPPI PHOMPHAKDY

W69124

TYPE OF HEARING: **Initial Hearing**

DATE OF HEARING: **October 29, 2013**

DATE OF DECISION: **December 11, 2013**

PARTICIPATING BOARD MEMBERS: Dr. Charlene Bonner, Tonomey Coleman, Ina Howard-Hogan, Lucy Soto-Abbe, Josh Wall

DECISION OF THE BOARD: After careful consideration of all relevant facts, including the nature of the underlying offense, institutional record, the testimony of the inmate at the hearing, and the views of the public as expressed at the hearing or in written submissions to the Board, we conclude by a unanimous vote that the inmate is a suitable candidate for parole. Parole is granted to a long term residential program after one year in lower security at the Department of Correction (DOC) during which time Phomphakdy must maintain good conduct and comply with all DOC expectations for programs, activities, and employment.

I. STATEMENT OF THE CASE

On October 29, 2013, Thappi Phomphakdy appeared before the Massachusetts Parole Board for an initial parole hearing. On October 18, 1999 in Middlesex Superior Court Phomphakdy was found guilty of second degree murder and received a life sentence for the murder of Sovanna Chan, a member of a rival gang. Phomphakdy was also found guilty of possession of a firearm, and possession of a firearm with an obliterated serial number, and those charges were filed.

On December 24, 1998, at approximately 4:00 p.m., Phomphakdy, age 14, stood on the front stoop of his mother's home in Lowell and shot Sovanna Chan, age 16, in the neck, killing him. Phomphakdy belonged to the "Tiny Rascals Gang" (TRG). Chan belonged to a rival youth gang known as the "Dangerous Youth Bloods" (DLB).

Earlier that afternoon, Sovanna Chan and three of his friends, who were also members of the DLB, were hanging out at a local variety store. Three other teenagers, including Shane Downs, walked past the store. Chan and the DLB members considered Downs an enemy and followed him. The groups started arguing and swearing at each other. A member of Downs' gang responded by throwing a brick at Chan, and they fled. Chan and his gang pursued. Downs ran to Phomphakdy's house and started screaming for help. After Chan stopped in front of Phomphakdy's house to confront Downs, Downs burst through Phomphakdy's front door.

Phomphakdy, who had just finished showering, heard the shouting, removed a .22 caliber Smith & Wesson revolver from his bedroom, and ran downstairs to the front stoop. Although one of Chan's gang tried to get him to leave, Chan instead put up his hands and taunted Phomphakdy, stating "Go ahead. Buck me. Buck me." Phomphakdy responded by firing four shots in rapid succession, hitting Chan in the neck with one bullet. Phomphakdy ran back into the house, dropped the revolver, and fled through the back.

Phomphakdy stayed with a friend in Lowell for several days. On December 28, 1998, Lowell police located Phomphakdy through another TRG member. Phomphakdy was arrested and charged with murder after giving a statement in which he admitted shooting the victim.

II. CRIMINAL AND INSTITUTIONAL HISTORY

At the time of the murder, Phomphakdy was on probation for assault and battery with a dangerous weapon. That charge was continued without a finding, and the Lowell Juvenile court placed Phomphakdy under DYS supervision.

Following his murder conviction, Phomphakdy was incarcerated at Plymouth County Correctional facility until his 17th birthday. While at the Plymouth juvenile facility, Phomphakdy was placed in segregation twice for fighting other inmates. In August 2001, Phomphakdy was transferred to MCI-Concord, and then to Souza-Baranowski Correctional Center in November 2001. In June 2006, Phomphakdy was transferred to MCI-Norfolk where he was incarcerated at the time of this hearing. During the 13 years of his adult incarceration, Phomphakdy has received four disciplinary reports, the last of which occurred in February 2013 for misusing a computer located in the Metal Shop by accessing and playing downloaded video games.

Phomphakdy has been very involved in institutional programming, education and employment, including Cognitive Skills Workshop, Menswork, Alternatives to Violence, for which he became a Facilitator, four phases of Jericho Circle, and Emotional Awareness. Phomphakdy also counseled at-risk youth while at MCI-Norfolk.

Phomphakdy was in the eighth grade when committed the murder. While at Souza-Baranowski, Phomphakdy received his GED and is currently enrolled in the Boston University college program.

III. PAROLE HEARING ON OCTOBER 29, 2013

Thappi Phomphakdy, age 29, appeared for his initial parole hearing seeking parole from his life sentence for the second degree murder of Sovanna Chan. He provided the following information about his family history and life leading up to the crime. His parents emigrated from Laos to escape a violent political situation. He was born in Texas and moved with his parents to Lowell at age three. He spoke Laotian at home and English is his second language. His parents worked at the same factory, but different shifts. He did not see much of his parents because of their work schedules; if one parent was working, the other parent was home but sleeping after a shift. He had one younger brother at the time and he spent considerable time "watching over" the brother. Because he was causing some problems at home, he was sent to live with his grandparents in California at age nine or ten. He was there for only one year, during which time he "felt abandoned and built up walls" as a result. Upon returning to Lowell, he "hung with kids in the neighborhood; we were not a gang; we did regular kid things; other gangs though treated us like we were a gang; they chased us and beat us up; so we joined the Tiny Rascals gang; I was twelve."

He explained his gang activity: "we did regular gang things; fights, graffiti, shoplifting; I helped the older drug dealers; I carried a knife; I found the gun I used a couple of days before at Porky's Bridge; I fired it when I found it to see if it worked; I took it home." He explained that he was too young to be a major drug dealer. He smoked marijuana once a week. He said, "I didn't have the money to buy drugs more than weekly." Phomphakdy was not involved in the fight that immediately preceded the murder. He was at home when he heard "Shane (Downs) yelling for help so I retrieved the gun from under my mattress; I saw Shane in the house catching his breath; I saw two individuals in the yard; they said they wanted Shane; I knew they wanted Shane, not me; Mr. Chan and the other person did have weapons; there was yelling between the two groups; Mr. Chan thought it was a fake gun so he was taunting me to shoot; he said if I didn't shoot he would get me when he could; everything happened so fast; I pulled the trigger three times; the first two times I aimed a little over his head; the third shot struck him; I ran inside the house, out the back door, and then to Porky's Bridge; we had problems with DLB gang; it started before I was in the gang; the older gang members told me they were 'on-sight enemies.'"

Because he was a juvenile when convicted, Phomphakdy began his incarceration at the Plymouth juvenile facility. He said that "I still believed and was involved in the gang at Plymouth; I had a couple of fights with rival gang members at Plymouth." Upon turning 17, he was moved to MCI-Concord. He said, "Things changed when I moved up state; fellow gang members were not there and I was able to grow up without the gang members; I completed my GED and that opened up opportunities I didn't know existed; I went through the Spectrum STG (anti-gang) program in 2006 so I officially renounced in 2006; that wasn't hard because I had not been hanging out with gang members since I got to Concord in 2001."

Board Members asked Phomphakdy to discuss his rehabilitative path at the Department of Correction. He described the important steps: "I met some positive people at Concord and then at Souza; the positive people really helped me; I worked for my GED at Plymouth, Concord, and Souza; it was important for my development to obtain my GED because I had to work hard for that; knowing I could obtain the GED helped my confidence; I was active in Jericho Circle and Second Thoughts and those both helped me; Second Thoughts was an

important program for me because I learned about my issues from childhood; Jericho Circle taught me to express emotion; if I am mad or sad it helps take weight off my shoulders to speak about it." Phomphakdy said he is now a facilitator for Second Thoughts. He described several subjects that, as part of Second Thoughts, he has received additional training on, including gang avoidance, drug and alcohol use, and setting goals. As a facilitator he works weekly with young people who visit the prison. He reported that this is his fourth year with Second Thoughts. He has also completed Alternatives to Violence (multiple phases), Spectrum's Introduction to Treatment, Cognitive Skills, Violence Reduction, Emotional Awareness, Life Skills, and 12 Step. He has trained for a commercial driver's license and taken college courses. He has worked consistently at an institutional job.

Phomphakdy's brother spoke in support of parole. He said that Thappi "was always there for me when we were younger; he cooked and cleaned for me and took care of me; later he helped me make better choices when I was on the wrong path." Middlesex Assistant District Attorney Melissa Johnson spoke in opposition to parole. In closing, Thappi Phomphakdy said, "This was tough because we covered so much; I am real humble right now because we covered so many things that I had to think about."

IV. DECISION

Thappi Phomphakdy was 14 years old and a low level gang member when he committed the murder of Sovanna Chan. Phomphakdy was not involved in the gang fight that immediately preceded the murder, but armed combatants in the gang fight ended up on his front yard. As a loyal gang member, Phomphakdy grabbed a gun, ran outside, squared off with rival gang members who taunted him, and he fired the fatal shot. There is ample evidence that bricks and knives were part of the gang fight, and added to the tension in Phomphakdy's front yard. Phomphakdy has been on a remarkable rehabilitative path since he moved away from gang life in the third year of his incarceration. Once he was away from the gang, he has had very good conduct and active program participation which has specifically addressed his criminogenic needs.

The four goals of sentencing – punishment, deterrence, rehabilitation, and public protection – have been met. In considering Phomphakdy's age, the escalation of violent events that day that occurred before he became involved, and the roles played by older gang members, the Board concludes that 15 years is sufficient to achieve punishment and deterrence. Concerning rehabilitation, Phomphakdy entered prison with a limited set of issues to address. He did not have a long pattern of antisocial behavior, criminal thinking, criminal conduct, or substance abuse. Consequently, his path to reform was less complicated. Through his good conduct, active program participation, and substantive answers as this parole hearing, Phomphakdy has established that he is rehabilitated and presents no current risk for violence.

The standard we apply in assessing candidates for parole is set out in 120 C.M.R. 300.04, which provides that, "Parole Board Members shall only grant a parole permit if they are of the opinion that there is a reasonable probability that, if such offender is released, the offender will live and remain at liberty without violating the law and that release is not incompatible with the welfare of society." Applying that appropriately high standard, the Parole Board grants parole to a long-term residential program after one year in lower security. This

release plan will allow for important supports and treatment during a closely supervised transition.

SPECIAL CONDITIONS: Parole to a long-term residential program after one year in lower security; no drug use; no alcohol use; substance abuse evaluation at program with recommended treatment, if any, to be followed; one-on-one counseling for adjustment issues.

I certify that this is the decision and reasons of the Massachusetts Parole Board regarding the above referenced hearing. Pursuant to G.L. c. 127, § 130, I further certify that all voting Board Members have reviewed the applicant's entire criminal record. This signature does not indicate authorship of the decision.

Caitlin E. Casey, Chief of Staff

12/11/13
Date

SIDNEY ROBERTS' PETITION FOR PAROLE HEARING PURSUANT TO RSMO. § 558.047

COMES NOW Sidney Roberts, Jr. (#171590), by and through his undersigned counsel, and, pursuant to RSMo. § 558.047, petitions the Parole Board for a review of his sentence. Mr. Roberts further requests that the Parole Board provide him the constitutional protections and rights requested below. In support of this petition, Mr. Roberts states as follows:

1. In October 1989, Mr. Roberts was convicted of first-degree murder and armed criminal action. He was only 17 years old at the time of the offense.

2. On November 17, 1989, Mr. Roberts was given a mandatory sentence of life without parole. In addition, he was sentenced to 50 years on the armed criminal action count, to run concurrently.

3. As of the date of this petition, Mr. Roberts has been incarcerated for over 28 years. He is 45 years old, and has spent nearly two-thirds of his life behind bars.

Mr. Roberts is entitled to an individualized re-sentencing hearing.

4. Mr. Roberts does not waive any of this constitutional rights by availing himself of relief under RSMo. § 558.047. In fact, under *Miller v. Alabama*, 132 S.Ct. 2455 (2012), and *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), Mr. Roberts is entitled to an individualized sentencing procedure in which he may challenge evidence against him and present evidence of his youth, immaturity, and other mitigating factors. *Miller*, 132 S.Ct. at 2463-70; *see also Tatum v. Arizona*, 580 U.S. __, No. 15-8850, slip op. at 1 (Oct. 31, 2016). Furthermore, Mr. Roberts is entitled to a "meaningful opportunity for release based on demonstrated maturity and rehabilitation." *Graham*, 560 U.S. 48, 50 (2010); *Miller*, 132 S.Ct. at 2469.

5. In Mr. Roberts' case, the original sentencing jury did not fulfill the individualized sentencing requirement imposed by *Miller*. In fact, due to the mandatory imposition of the life

without parole sentence, Mr. Roberts could not have had an actual sentencing phase of the trial consistent with *Miller* and its progeny.

6. Thus, Mr. Roberts has never had the opportunity to present evidence related to his youth, immaturity and background as mitigating factors at a constitutionally-compliance sentencing hearing before a jury, despite the fact that the Missouri Supreme Court has recognized the importance of jury sentencing in the context of juvenile homicide cases. *State v. Hart*, 404 S.W.3d 232, 253 (Mo. 2013) (embracing a *Miller*-compliant, youth-centered, jury sentencing process for defendants who were convicted of murder as children); *see also Apprendi v. New Jersey,* 530 U.S. 466 (2000); *Blakely v. Washington*, 542 U.S. 296 (2004); *see also* Sarah French Russell, *Jury Sentencing and Juveniles: Eighth Amendment Limits and Sixth Amendment Rights*, 56 BOSTON COLLEGE L. REV. 553 (2015) (highlighting the heightened significance of sentencing proceedings in juvenile homicide matters post-*Miller*, including the now likely constitutional right to jury determination on life without parole sentences). Mr. Roberts is entitled to an individualized sentencing hearing where he can present this evidence. *Adams v. Alabama*, 136 S.Ct. 1796, 1798-1800 (2016).

7. Mr. Roberts currently has an application pending to file a federal habeas corpus petition related to this issue. Mr. Roberts expressly preserves his right to pursue an individualized sentencing hearing in compliance with *Miller* and *Montgomery* through legal proceedings. His decision to petition the Parole Board for a hearing under RSMo. § 558.047 should in no way be viewed and is not intended to act as a waiver of his right to pursue legal relief related to his unconstitutional sentence.

Mr. Roberts is entitled to a statutorily-compliant hearing before the Parole Board pursuant to RSMo. § 558.047, with additional constitutional protections.

8. Under the newly-passed RSMo. § 558.047, Mr. Roberts is entitled to a hearing before the parole board wherein the board considers, among other things: (a) Mr. Roberts' participation in education, vocational or other programs during incarceration, when available; (b) Mr. Roberts' growth and maturity since the offense; (c) Mr. Roberts' institutional record during incarceration; (d) Mr. Roberts' age, maturity, intellectual capacity, and mental and emotional health and development at the time of the offense; (e) Mr. Roberts' background, including his family, home and community environment; and (f) the effect of characteristics attributable to Mr. Roberts' youth on his judgment. *See* RSMo. §§ 558.047.4, 565.033.2.

9. In addition to the statutory requirements delineated in Sections 558.047.4 and 565.033.2, Mr. Roberts' parole hearing must satisfy other state statutory and constitutional requirements. Under the Equal Protection and Due Process clauses of the Missouri Constitution and United States Constitution[1], and both constitutions' ban on cruel, unusual and capricious sentences and rights to counsel, and a public hearing[2], Mr. Roberts is entitled to the following:

a. The right to be present in person in the room with all members of the Parole Board who will discuss and vote upon Mr. Roberts' release or continued imprisonment;

b. In the event of a decision by a panel of the Board, the right to in-person de novo review before the full Parole Board;

c. The right to meaningful representation by counsel at the hearing before the Parole Board;

d. The right to submit written materials to the Board in advance of the hearing;

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[1] *See, e.g.,* U.S. CONST. amends. V, VI, and XIV; *see also* MO. CONST. art. I §§ 2, 10, 12, 18(a).
[2] *See* U.S. CONST. amends. VI, VIII and XIV; *see also* MO. CONST. art. I, §§ 2, 10, 21.

e. The right to access Mr. Roberts' entire institutional record in advance of the hearing;

f. The right to interview Department of Corrections staff who have worked with Mr. Roberts;

g. The right to access all information provided to the Board in advance of the hearing, and all other information upon which the Board will base its decision;

h. The right to have the proceedings before the Board transcribed by a court reporter;

i. The right to present lay witness testimony in support of Mr. Roberts' release;

j. The right to present expert witness testimony in support of Mr. Roberts' release;

k. The right to challenge all information presented to the Board and to cross-examine those who have provided evidence against him; and

l. The right to a statement by the Parole Board - on the record and in Mr. Roberts' presence – of its decision and the reasons for its decision.

10. Finally, the Board should be prohibited from receiving any victim impact evidence, including but not limited to statements from victims' family members. The Eighth Amendment to the United State Constitution prohibits the admission of a victim's family members' opinions about the crime, the defendant, and the appropriate sentence. *See Bosse v. Oklahoma*, No. 15-9173, 2016 WL 5888333 (Oct. 11, 2016); *Booth v. Maryland*, 482 U.S. 496 (1987). Furthermore, under *Miller*, the Board's focus should be on Mr. Roberts' demonstrated rehabilitation and maturation since the time of the offense, not on the facts of the crime itself.

WHEREFORE, Sidney Roberts, Jr., requests that the Parole Board: (i) schedule a hearing within 90 days of this petition to review Mr. Roberts' eligibility for release; (ii) permit Mr. Roberts to appear in person, with counsel, at said hearing; (iii) provide Mr. Roberts with a copy of all

information provided to the Board at or in advance of the hearing, and all other information upon which the Board will base its decision, no later than 30 days before the scheduled hearing; (iv) provide Mr. Roberts with a copy of his entire institutional record no later than 30 days before the scheduled hearing; (v) permit Mr. Roberts to submit written material to the Board in advance of the hearing; (vi) permit Mr. Roberts the right to present lay and expert witness testimony at the hearing; (vii) permit Mr. Roberts to cross-examine at the hearing those who have provided evidence against him and otherwise challenge evidence presented against him; (viii) provide a court reporter to transcribe the hearing before the Board, or permit Mr. Roberts to provide his own reporter for that purpose; (ix) refuse to admit or review any victim impact evidence; and (x) state its decision on the record and in Mr. Roberts' presence, along with the specific reasons for its decision.

Date: December 5, 2016

By: _____
Mae C. Quinn, # 61584

Respectfully submitted,

By: _____
Amy E. Breihan, # 65499

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amy.briehan@macarthurjustice.org

Attorneys for Sidney Roberts, Jr.

CERTIFICATE OF SERVICE

I hereby attest that a copy of the foregoing petition was served upon the following this 5th day of December, 2016:

Missouri Board of Probation and Parole, Central Office
Attn: Kelly Dills, Board Operations Director
3400 Knipp Drive
Jefferson City, MO 65109

St. Louis City Circuit Attorney's Office
Carnahan Courthouse
1114 Market St.
Room 401
St. Louis, MO 63101

By: _____