

**IN THE
MISSOURI SUPREME COURT**

STATE OF MISSOURI,)	
)	Cause No. SC94745
Appellant,)	
)	
vs.)	
)	
JERRI SMILEY,)	
)	
Respondent.)	

**APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF GREENE COUNTY, MISSOURI
THIRTY FIRST JUDICIAL CIRCUIT
THE HONORABLE CALVIN R. HOLDEN, CIRCUIT JUDGE**

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

Respondent, Jerri Smiley (“Jerri”) is charged with one count of first degree assault (section 565.050)¹ and one count of armed criminal action (ACA)(section 571.015). Jerri filed two separate motions arguing that the ACA statute violated the 8th and 14th Amendments to the United States Constitution and Article I, §§10 and 21 of the Missouri Constitution. The Honorable Calvin Holden sustained Jerri’s motions as to Article I, §21 (cruel and unusual punishment) and Article I, §10 (due process) of the Missouri Constitution and severed the last sentence of § 571.015.1 RSMo., which prevents a trial court from suspending the imposition or execution of sentence upon a conviction and requires the person to spend three calendar years incarcerated in the Missouri Department of Corrections (DOC). The State appeals. This Court has original jurisdiction over challenges to the validity of a statute of Missouri. Article V, Section 3, Mo. Const.

Jerri, however, does not agree that this appeal is proper. The right to appeal is purely statutory. *State v. Burns*, 994 S.W.2d 941(Mo banc 1999). Section 547.200.1 RSMo. (2000) allows the State an interlocutory appeal in certain circumstances, none of which apply here. Section 547.200.2 and Rule 30.01 allow a party to appeal a final judgment. A judgment, however, is only considered final for purposes of appeal if it leaves no issue to be adjudicated. *State v. Burns*, 994 S.W.2d at 942.

The State argues that by severing the last sentence of section 571.015.1, the circuit court has left “no valid penalty for juvenile offenders found guilty of ACA” (App. Br. 9). The State’s reasoning is that the plain language of the ACA statute does not authorize a

¹ Statutory citations are to RSMo. 2000 unless otherwise indicated

suspended sentence and that “[T]he severance doctrine cannot create a punishment not authorized by the plain language of the statute” (App. Br. 10). The State argues that the circuit court, by severing the last sentence of § 571.015.1, “rendered the entire penalty provision unconstitutional as applied to juvenile offenders” (App. Br. 11). According to the State, since there is no longer a valid punishment, the ACA charge has essentially been dismissed and this dismissal constitutes a final order for purposes of appeal (App. Br. 11). The State relies on this Court’s reasoning in *State v. Hart*, 404 S.W.3d 232, 247 (Mo. Banc 2013), which held that severance could not be used to add a punishment not authorized by the plain language of the statute.

The State’s reliance on *Hart* is misplaced. Severing the last sentence of section 571.015.1 does not add a new punishment. It simply allows the Court to extend grace to the juvenile by suspending the punishment or, if it is executed, to allow DOC to grant the offender parole before three calendar years pass. The punishment is still a minimum of three years in prison. “The ‘sentence’ that a court imposes consists of punishment that comes within the particular statute designating the permissible penalty for the particular offense.” *Bell v. State*, 996 S.W.2d 739, 743 (Mo. App. S.D. 1999)(citing *McCauley v. State*, 486 S.W.2d 419, 423 (Mo. 1972)). The sentence is the penalty, or punishment, and the way the sentence is defined does not include probation. *Id.* (citing *McCauley v. State*, 486 S.W.2d 419, 423 (Mo. 1972)). “In effect, probation operates independently of the criminal sentence.” *Id.* (citing *Barnes v. State*, 826 S.W.2d 74, 76 (Mo. App. E.D. 1992)). Whether the circuit court sends Jerri to prison or suspends her sentence, she still

must be sentenced to a minimum term of three years in prison. *Hart* does not apply to Jerri's case.

Further, *Hart's* discussion of the severance doctrine is consistent with the circuit court's order. In *Hart*, this Court, citing to *Associated Industries of Missouri v. Director of Revenue*, 918 S.W.2d 780, 784 (Mo. banc 1996), stated that its "'first point of reference' is § 1.140. *State v. Hart*, 404 S.W.3d at 245. Section 1.140 RSMo. (2000) states:

The provisions of every statute are severable. If any provision of a statute is found by a court of competent jurisdiction to be unconstitutional, the remaining provisions of the statute are valid unless the court finds the valid provisions of the statute are so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one; or unless the court finds that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

The circuit court's order, however, only applies to juvenile offenders certified to stand trial as adults pursuant to § 211.071 RSMo. (Cum. Supp. 2013) Therefore, the severance doctrine in this case is not guided by § 1.140. *State v. Hart*, 404 S.W.3d at 245. (citing to *Associated Industries of Missouri v. Director of Revenue*, 918 S.W.2d at 784. Instead, this Court stated:

Stated another way, the statute must, in effect, be rewritten to accommodate the constitutionally imposed limitation, and this will be done as long as it is consistent with legislative intent.

Id. Additionally, this Court, in *Associated Industries of Missouri v. Director of Revenue*, 918 S.W.2d at 784, stated that even though § 1.140 was not applicable when analyzing a statute alleged to be unconstitutional as applied, the first sentence of that section showed that the legislature had a general intent that a statute “should be upheld to the fullest extent possible.” *Id.* The way this is done is to determine that the legislature still would have enacted the law in question knowing the constitutional limitation. *Id.*

Applying these principles here, Jerri respectfully submits that the circuit court’s application of the severance doctrine was appropriate. It did not add a new punishment. It does not remove any punishment. It *restricts* the application of the mandatory incarceration provision, which the circuit court found to be unconstitutional. At the same time, it upholds the statute to the fullest extent possible for juvenile offenders because the circuit court is free to impose and execute a sentence for the ACA charge. Finally, it is consistent with legislative intent. Criminal statutes are not enacted for juveniles. They are enacted for adults. The circuit court’s order has no impact on adult offenders who are found guilty of ACA. The legislature would still have passed the ACA statute even though the mandatory incarceration provision would be severed for juvenile offenders. The circuit court’s order is not tantamount to a dismissal and is not a final order for purposes of appeal. Therefore, this appeal is not proper.

The fact that this appeal is not proper, however, is not dispositive. In its discretion, this Court can treat an improper appeal as a writ of prohibition or mandamus. *In re N.D.C.*, 229 S.W.3d 602, 605 (Mo. banc 2007). See also *State v. Larson*, 79 S.W3d 891 (Mo. banc 2002). In *Larson*, this Court, citing to *Brown v. Hamid*, 856 S.W.2d 51, 53 (Mo. banc 1993), stated:

Cases should be heard on the merits if possible, construing the court rules liberally to allow an appeal to proceed. While not condoning noncompliance with the rules, a court will generally, as a matter of discretion, review on the merits where disposition is not hampered by the rule violations.

State v. Larson, 79 S.W.3d at 894. The *Larson* Court also cited to *Jones v. State*, 471 S.W.2d 166, 169 (Mo. banc 1971), where this Court treated an improper appeal as a writ of habeas corpus to avoid the delay that would come by having the process start all over and proceeding properly. *Id.* at 893, n. 8.

Jerri respectfully submits that the reasoning from these cases applies to her case. Her case is over two years old. A dismissal of this appeal will simply result in more delay as the State files for a writ of prohibition and this issue comes before this Court again. The briefs filed by the parties in this case, including the amicus brief, delineate the issues and contain the arguments upon which a decision by this Court can be handed down. Jerri asks this Court to treat the State's improper appeal as an original writ of prohibition. For the reasons discussed below, she asks that this Court deny the writ.

STATEMENT OF FACTS

Jerri is charged with one count of first degree assault and one count of ACA (L.F. 1). The following account of the facts underlying the charges is from the probable cause statement: A number of witnesses saw Jerri stab R.L. in the back (L.F. 12-14). At the time of the alleged incident, Jerri was 16 years old and 4 months pregnant (L.F. 12-14). Jerri then left the area in a car, which was later pulled over by police (L.F. 12-14). Jerri stated something along the lines of, "I'm the one who stabbed her." (L.F. 13). At that time Jerri was taken into custody (L.F. 13). Jerri told medical personnel that she had stabbed someone (L.F. 13).

Later, at the jail, Jerri's mother, Tammy Smiley, was interviewed by the police (L.F. 13). According to Ms. Smiley, Jerri tried to pull B.L. away from her (Jerri's) boyfriend, Stephen Steele (L.F. 13). Then four women started arguing with Jerri, who tried to fight the four women (L.F. 13). Tammy tried to keep Jerri away (L.F. 13). Tammy told the officer that she pushed Jerri into the car where Stephen Steele took the knife away (L.F. 13). Tammy said that Jerri admitted to the stabbing (L.F. 13). She said she told Stephen Steele to drive to the police station and told Jerri to call 911, which she did (L.F. 13).

Pursuant to § 211.071 RSMo.², a certification hearing was held before the Honorable David Jones on July 18, 2013 (L.F. 16). On July 19, 2013, Judge Jones dismissed the juvenile petition, allowing Jerri to be tried as an adult (L.F. 17).

On that same day, the Greene County Prosecutor filed a complaint against Jerri charging her with first degree assault (L.F. 1). The State was later allowed to add the ACA charge, and Jerri was bound over to circuit court on both counts (L.F. 3). A jury trial was set for March 3, 2014; it was continued a number of times and on May 2, 2014, Jerri waived her right to a jury trial and a bench trial was set for August 14, 2014 (L.F. 4-7).

On August 6, 2014, Jerri filed her first motion to declare § 571.015 unconstitutional as applied to juveniles (L.F. 8; S.L.F. 1-104).³ After hearing arguments, the Court took the matter under advisement and the bench trial was reset to November 10, 2014 (L.F. 8). On October 17, 2014, Jerri filed a supplemental motion to declare § 571.015 unconstitutional as applied to juveniles (S.L.F. 132-194). The State did not

² Section 211.071 enumerates several offenses for which a certification hearing must be held. First degree assault is one of those offenses. Section 211.071.1, RSMo. (Cum. Supp. 2013).

³ Although the motion is part of the original legal file, the exhibits filed with the motion were not included. Respondent filed a supplemental legal file with both the motion and the exhibits and will cite to the supplemental legal file when referring to these motions.

file a response to this motion and on January 6, 2015, the court sustained Jerri's motions and entered findings of fact and conclusions of law and judgment (L.F. 87-127).

In its order, the circuit court sustained Jerri's motion under the Missouri Constitution, ruling that the ACA statute violated Article I, §21, which prohibits the infliction of cruel and unusual punishment, and Missouri's constitutional protection of due process under Article I, §10 (L.F. 89) The circuit court based its decision "on an independent review of mandatory incarceration and consideration of objective indicia from within the state of Missouri." (L.F. 89).

The court first gave an overview of juvenile jurisprudence over the last twenty five years, concluding that juveniles are less culpable than adults who commit the same crimes (L.F. 90-98). The court noted that a juvenile's diminished culpability should be considered, regardless of the crime and punishment, and that juvenile jurisprudence had evolved to focus on the offender herself when determining a sentence's proportionality (L.F. 98-102). The court found that mandatory incarceration prevented a sentencer from fully considering a juvenile's youth and attendant circumstances (L.F. 102-110).⁴ The court found unpersuasive the State's argument that the ACA statute was not unconstitutional since it allowed the sentencer to "absolutely" consider a juvenile's youth and attendant circumstances, stating that the court must be allowed to suspend the sentence if it deems that appropriate (L.F. 103).

⁴ As she did with her motions in circuit court, Jerri will refer to youth and attendant circumstances as the "juvenile factors."

The court found that mandatory incarceration for juvenile offenders was unconstitutional because there would inevitably be times where a court would not find prison to be appropriate, and when that happened, none of the four recognized penological goals would be served (L.F. 110-113). The court noted that there were objective indicia in Missouri that showed that a statewide consensus had emerged against mandatory incarceration for juvenile offenders (L.F. 113-121). Specifically, the court discussed how this was shown by: (1) § 211.071 RSMo.; (2) § 211.073 RSMo.; (3) SCR29; and, (4) a decrease in the number of juveniles who were certified to stand trial as adults (L.F. 113-121). Finally, the court found that the legislature had not considered juveniles in enacting criminal statutes and that that was consistent with the analyses from *Thompson*,⁵ *Graham*, and *Miller*, and that just because the legislature wanted juveniles at times to be tried like adults did not necessarily mean that it wanted them to be sentenced like adults (L.F. 121-123). The court did not dismiss the ACA charge but instead severed the last sentence of § 571.015.1, allowing a court to suspend a juvenile's sentence if she is convicted of ACA (L.F. 126). The State then filed this appeal (L.F. 128-13).

⁵ *Thompson v. Oklahoma*, 487 U.S. 815 (1988); *Graham v. Florida*, 560 U.S. 48 (2010); *Miller v. Alabama*, 132 S.Ct. 2455 (2012).

ARGUMENT

A. Summary of Argument.

The State inaccurately frames the issue in this case as to whether the legal analysis used by the United States Supreme Court in *Miller v. Alabama*, 132 S.Ct. 2455 (2012), which prohibited a mandatory sentence of life without parole (LWOP) from being applied to juvenile offenders who commit murder, can be applied to prohibit mandatory incarceration of any length for juvenile offenders who commit any offense. The true issue is whether a statewide consensus against *mandatory* incarceration for juvenile offenders exists in Missouri which, along with an independent review of the mandatory incarceration provision of § 571.015.1 by this Court, exercising its own legal judgment, not only justifies this Court holding that Missouri's constitution prohibits *mandatory* incarceration of juvenile offenders for any offense in Missouri that currently mandates incarceration, but also justifies this Court construing Missouri's constitution to provide more protections for juvenile offenders than does the Federal constitution,

Jerri's argument begins with an independent review of the mandatory incarceration provision of the ACA statute and that review begins with an overview of how juvenile justice jurisprudence has evolved over the past twenty-five years and has established three main constitutional principles: (1) that juvenile offenders are less culpable than adults who commit the same crimes; (2) that children are constitutionally different for purposes of sentencing and criminal procedure laws must take this into account; and (3) that a juvenile's youth and attendant circumstances must be considered to ensure that her sentence is not excessive or disproportional. This independent review

will then show how the ACA statute violates all three of these principles if applied to juvenile offenders because the mandatory incarceration provision: (1) does not allow the court to consider a juvenile's diminished culpability since it requires three years in prison regardless of how much less the juvenile's culpability is; (2) it requires a juvenile to be sentenced just like an adult and therefore violates the constitutional principle that juveniles are different for purposes of sentencing; and (3) it does not allow a judge to consider a juvenile's youth and attendant circumstances since it requires a judge to send the juvenile to prison even if he does not believe, after consideration of the juvenile's youth and attendant circumstances, that prison is just or appropriate.

Jerri's argument then posits that, like the existence of a national consensus against the juvenile death penalty and LWOP for juvenile offenders for non-homicide offenses, a statewide consensus exists in Missouri against *mandatory* incarceration for juveniles. This consensus can be demonstrated with objective indicia, including: (1) section 211.071, which allows the juvenile division judge the discretion to keep a juvenile in the juvenile system, regardless of the offense, and not even subject her to the risk of incarceration; (2); section 211.073, which requires judges to consider the dual jurisdiction program as an alternative to prison, and if it is a viable option, to give specific reasons on the record if they do not utilize this option; (3) a decrease of over 25% in the number of juveniles certified to stand trial as adults since 2007; (4) the establishment of a juvenile justice task force; and, (5) the opposition to mandatory incarceration by several advocacy groups in Missouri and nationwide.

While all five indicia demonstrate a statewide consensus against mandatory incarceration, the two legislative enactments show that Missouri has endorsed, and put into practice, the three main constitutional principles of juvenile justice stated earlier. It is this consensus and the endorsement and putting into practice of these constitutional principles that justify this Court holding that Missouri's constitution provides more protections for juvenile offenders than the Federal constitution.

Finally, Jerri's argument posits that the mandatory incarceration provision of the ACA statute violates a juvenile's right to due process since it does not allow the sentencer to consider the "incompetencies of youth" that compromise a juvenile's legal representation by leading her to make choices that result in her being in a position where she must be sent to prison

B. Preservation of Error.

Jerri respectfully submits this issue has not been preserved for appeal. Her case is similar to *State v. Davis*, 348 S.W.3d 768, 770 (Mo. banc 2011), in which this Court affirmed the trial court's dismissal, holding that the State tried to make an argument to this Court that it had not made at the trial level. "An issue that was never presented to or decided by the trial court is not preserved for appellate review." *Id.* (citations omitted) The Court continued:

Because an appellate court is not a forum in which new points will be considered, but is merely a court of review to determine whether the rulings of the trial court, as there presented, were correct, a party seeking the correction of error must stand or fall on the record made in

the trial court, thus it follows that only those objections or grounds of objection which were urged in the trial court, without change and without addition, will be considered on appeal.

Id. (citation omitted) “To preserve a claim of error, counsel must object with sufficient specificity to apprise the trial court of the grounds for the objection.” *State v. Amick*, 462 S.W.3d 413, 415 (Mo. banc 2015). A review of the record clearly shows the State had ample opportunity to raise the claim below and did not do so with sufficient specificity.

At the circuit level, Jerri filed two motions with attached exhibits (S.L.F 1-194). Additionally, there was a hearing on the record (Tr. 2-45). In these motions, Jerri argued that § 571.015.1 violated the 8th and 14th Amendments to the Federal constitution and Article I, §§ 10 and 21 of the Missouri constitution (S.L.F. 2-28). Her motion addressed the Missouri Constitution, arguing that Missouri’s constitution provided more protections than did the Federal constitution (S.L.F. 12-25). Specifically, Jerri argued that enactments of the Missouri legislature, as well as a decrease in the number of juveniles certified to stand trial as adults, demonstrated a statewide consensus against mandatory incarceration (S.L.F. 12-25). Additionally, Jerri mentioned that the opposition to mandatory incarceration of juvenile offenders by various advocacy groups also helped to show a statewide consensus against mandatory incarceration (S.L.F. 24-25). Finally, Jerri pointed out how Missouri is seen as a model for juvenile justice by prominent child advocates (S.L.F. 17, n. 3).

The State, however, only superficially addressed these arguments. The State filed a response opposing Jerri’s original motion (L.F. 49-58) in which it argued that Jerri

relied almost exclusively on *Roper v. Simmons*, 543 U.S. 551 (2005), and *Miller v. Alabama*, 132 S.Ct. 2455 (2012), and that those cases only addressed the death penalty and LWOP (L.F. 51-55). Additionally, the State asserted that Jerri repeatedly argued that a court must be able to consider probation under the *Eighth Amendment* (L.F. 55)(emphasis in original). The only time the State addressed the issue under Missouri's constitution was in arguing that Jerri erroneously believed § 211.073⁶ supported her position that mandatory incarceration was cruel and unusual punishment (L.F. 56-57). Although the State argued that Jerri's claim about a statewide consensus was absurd (L.F. 58), it made no arguments to rebut Jerri's assertion that the statewide consensus supported her claim that the Missouri constitution's prohibition against cruel and unusual punishment provided more protections for juvenile offenders than did the Federal constitution.

The State did not address how the decrease in certifications demonstrated a statewide consensus against mandatory incarceration, which in turn supported Jerri's argument that Article I, §§ 10 and 21 are violated by mandatory incarceration. The State did not address how juvenile advocates praise Missouri's juvenile justice system and how

⁶ Section 211.073 RSMo. (Cum. Supp. 2013) requires a judge to consider the option of sending a juvenile offender who has not yet reached the age of 17.5 years to a Missouri Division of Youth Services Facility (DYS) for a period of time until her 21st birthday. If the juvenile successfully completes the program, the remainder of the sentence is suspended.

Jerri argued that this helped support her argument that Missouri's constitution gives juvenile offenders more protection than does the Federal constitution. In fact, the State did not mention the Missouri constitution, or any of its sections, at all. Further, at the hearing on August 12, 2014, the State never mentioned the Missouri constitution once. (Tr. 2-45) The record shows the State did not address Jerri's arguments that the ACA statute violates the Missouri constitution with sufficient specificity. The issue is not preserved.

C. Standard of Review.

The issue of whether or not a statute is constitutional is a question of law, which this Court reviews *de novo*. *State v. Young*, 362 S.W.3d 386, 390 (Mo. banc 2009). Jerri acknowledges that a statute is presumed to be constitutional and that she "bears the burden of proving the statute clearly and undoubtedly violates the constitution." *Id.* Jerri also acknowledges that "[t]his Court will 'resolve all doubt in favor of the act's validity' and may 'make every reasonable intendment to sustain the constitutionality of a statute.'" *Murrell v. State*, 215 S.W.3d 96, 102 (Mo. banc 2007)(quoting *Westin Crown Plaza Hotel v. King*, 664 S.W.2d 2, 5 (Mo. banc 1984)). "If a statutory provision can be interpreted in two ways, one constitutional and the other not constitutional, the constitutional construction shall be adopted." *Id.* (citing to *Asbury v. Lombardi*, 846 S.W.2d 196, 199 (Mo. banc 1993)).

D. The ACA Statute and the Constitutional Issues in this Case.

Section 571.015.1 states that:

any person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon is also guilty of the crime of armed criminal action and, upon conviction, shall be punished by imprisonment by the department of corrections and human resources for a term of not less than three years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of three calendar years.

The last sentence in this subsection is what is at issue in this case. Jerri claims that the mandatory incarceration provision in this sentence violates both Article I, § 21 of the Missouri constitution and Article I, § 10 of the Missouri constitution if applied to juveniles. Article I, § 21 states:

That excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Article I, § 10 states:

That no person shall be deprived of life, liberty or property without due process of law.

Jerri respectfully submits that these two provisions of Missouri's constitution should be interpreted to provide more protections than the Federal constitution. "While provisions of our state constitution may be interpreted to provide more expansive protections than comparable federal constitutional provisions, analysis of a section of the federal constitution is strongly persuasive in construing the like section of our state constitution." *State v. Johnson*, 354 S.W.3d 627, 632 (Mo. banc 2011). The equivalent of Article I, § 21 is the 8th Amendment. Thus, an analysis of 8th Amendment jurisprudence in juvenile justice matters requires a discussion on how it has evolved over the past twenty-five years. This discussion of how it has evolved is the beginning of the independent review of the ACA statute's mandatory incarceration provision as well.

E. An Independent Review of the ACA Statute.

1. The Evolution of Juvenile Justice Jurisprudence.

For more than twenty-five years, the United States Supreme Court has held that juveniles are less culpable than adults for the commission of a crime. In *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988), the Court held that executing a person who was fifteen when he committed a crime violated the 8th Amendment. The Court acknowledged that "[i]nexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult." *Id.* at 835. Further, the *Thompson* Court stated that "[t]he reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult." *Id.*

The *Thompson* Court also noted the fact that a legislature allows a juvenile to be tried as an adult *tells us nothing about the judgment these states have made regarding the appropriate punishment. Id.* at 826, n. 4. (emphasis in the original)

Seventeen years later, In *Roper v. Simmons*, 543 U.S. 551 (2005), the United States Supreme Court struck down capital punishment for all juvenile offenders. The Court stated that “the Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions.” *Id.* at 560. “The right flows from the basic ‘precept of justice that punishment for crime should be graduated and proportioned to [the] offense.’” *Id.* (quoting from *Atkins v. Virginia*, 536 U.S. 304, 311 (2002)). The Court further stated:

The prohibition against “cruel and unusual punishments,” like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To implement this framework we have established the propriety and affirmed the necessity of referring to “the evolving standards of decency that mark the progress of a maturing society” to determine which punishments are so disproportionate as to be cruel and unusual.

Roper at 560. (citation omitted) The Court based its holding on two factors. First, it determined that a national consensus had developed against the death penalty for juveniles due to “the rejection of the juvenile death penalty in the majority of States; the

infrequency of its use even where it remains on the books; *and the consistency in the trend toward abolition of the practice.*" *Id.* at 567. (emphasis added)

The Court also conducted its own independent review and held that the punishment of the death penalty was not appropriate since the culpability of juvenile offenders was less than that of an adult. *Id.* at 568-574. The Court relied on amici briefs that discussed biological differences between juveniles and adults and how the lack of brain development in a juvenile contributes to a juvenile's diminished culpability. *Id.* at 569.⁷ The Court further discussed why juveniles are not as culpable as adults: First, children have a "lack of maturity and an underdeveloped sense of responsibility." *Id.* "These qualities often result in impetuous and ill-considered actions and decisions." *Id.* (citation omitted) Second, "juveniles are more vulnerable...to negative influences and outside pressures." *Id.* They "have less control...over their own environment." *Id.* Additionally, they lack the ability to remove themselves from crime-producing environments. *Id.* Finally, "the character of a juvenile is not as well formed as that of an adult." *Id.* at 570. "The personality traits of juveniles are more transitory, less fixed." *Id.*

Finally, the Court discussed how retribution and deterrence did not justify executing juveniles. *Id.* at 571. "Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." *Id.* Deterrence did not justify the death penalty because the penological purpose of deterrence is not achieved in the

⁷ The American Medical Association brief is attached as Exhibit B, pp. A42-A57.

same way when sentences are applied to juveniles since, “the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence.” *Id.*

Five years later, juvenile justice continued to evolve in *Graham v. Florida*, 560 U.S. 48 (2010). In *Graham*, the Court struck down laws that allowed juveniles to be sentenced to life without parole for non-homicide offenses. *Id.* at 82. The Court reiterated what it stated in *Roper* about the need to look “at the evolving standards of decency that mark the progress of a maturing society.” *Id.* at 58. The *Graham* Court began its analysis by pointing out that the punishments that have been challenged in the past have not been “inherently barbaric but disproportionate to the crime,” and that “[t]he concept of proportionality is central to the 8th Amendment.” *Id.* at 59. It also reiterated what it had held in *Roper* that the “punishment for crime should be graduated and proportioned to the offense.” *Id.*

Since this was a categorical ban on a particular sentence, the Court determined whether there was a national consensus and then did an independent review. *Id.* at 61-62. The Court determined that even though many legislatures allowed juvenile offenders to be sentenced to life without parole, the actual practice was so infrequent that a national consensus had developed against it. *Id.* at 67. Additionally, the Court also cited to *Thompson* and noted that the fact that states allow juveniles to be tried in adult court does not provide an indication as to what *sentence* is appropriate for the offender. *Id.* at 66. The fact that it was *possible* for a juvenile to receive LWOP for a non-homicide offense

did not mean that the legislature intended for them to receive this punishment. *Id.* at 66-67.

The *Graham* Court then conducted its own independent review. “The judicial exercise of independent judgment requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question.” *Id.* at 67. The Court reaffirmed its holding from *Roper* about a juvenile’s diminished culpability, recognizing that “parts of the brain involved in behavior control continue to mature through late adolescence.” *Id.* at 68.⁸ The *Graham* Court also stated that “an offender’s age is relevant to the Eight Amendment, and criminal procedure laws that fail to take defendants’ youthfulness into account at all would be flawed.” *Id.* at 76.

As it did in *Roper*, the *Graham* Court discussed the penological justifications for an LWOP sentence for a juvenile offender who did not commit a homicide offense. *Id.* at 71-74. “It does not follow, however, that the purposes and effects of penal sanctions are irrelevant to the determination of Eighth Amendment restrictions.” *Id.* at 71. “A sentence

⁸ The amicus brief in *Roper* from the American Medical Association stated that this includes the frontal lobes of the brain, which are tied to “a variety of cognitive abilities including decision making, risk assessment, ability to judge future consequences, evaluating reward and punishment, behavioral inhibition, impulse control, deception, responses to positive and negative feedback and making moral judgment.” (See Exhibit B, p. A51).

lacking any penological justification is by its nature disproportionate to the offense.” *Id.*
The Court’s analysis focused on retribution, rehabilitation, incapacitation, and deterrence.
Id.

Regarding retribution, the *Graham* Court stated that retribution for a crime was legitimate but that “[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender.” *Id.* at 72 (citation omitted) Further, the Court, citing *Roper*, held that “[w]hether viewed as an attempt to express the community’s moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult.” *Id.*

As for deterrence, the *Graham* Court reaffirmed *Roper* by pointing out that the same traits that make a juvenile less culpable than an adult make him “less susceptible to deterrence.” *Id.* at 72.

In regards to incapacitation, the *Graham* Court noted while it can be necessary to protect the community from recidivism, a sentence of life without parole was not justified for a non-homicide offense. *Id.* A sentence of life without parole improperly concludes that the juvenile cannot be rehabilitated and prevents him from showing that he is capable of being rehabilitated. *Id.* at 72-73.

Finally, regarding rehabilitation, the *Graham* Court stated that rehabilitation did not justify a sentence of life without parole for a non-homicide offense because the sentence implied that rehabilitation was not possible. *Id.* at 73-75. “For juvenile offenders, who are most in need of and receptive to rehabilitation,... the absence of

rehabilitative opportunities or treatment makes the disproportionality of the sentence all the more evident.” *Id.* at 74.

The *Graham* Court also observed that the same traits that make juveniles less culpable also, “put them at a significant disadvantage in criminal proceedings.” *Id.* at 78. The Court noted that juveniles have less understanding about the criminal justice system and have difficulties trusting adults, stating:

Difficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel seen as part of the adult world a rebellious youth rejects, all can lead to poor decisions by one charged with a juvenile offense.... These factors are likely to impair the quality of a juvenile defendant's representation.

Id. at 78-79.

Two years later, in *Miller v. Alabama*, 132 S.Ct. 2455 (2012), the United States Supreme Court held that mandatory sentences of LWOP for juveniles in homicide cases violated the 8th Amendment to the United States Constitution. *Id.* at 2464. As it had in *Roper* and *Graham*, the Court again referred to “the evolving standards of decency that mark a maturing society.” The *Miller* Court, however, changed its language from *Roper* and *Graham* about the punishment needing to be graduated and proportioned to the offense and stated that the punishment “should be graduated and proportioned to *both the offender and the offense.*” *Miller v. Alabama*, 132 S.Ct. at 2463. (emphasis added)

The *Miller* Court reaffirmed the rationale of *Roper* and *Graham* “that children are constitutionally different from adults for purposes of sentencing.” *Miller v. Alabama*,

132 S.Ct. at 2464. Further, the *Miller* Court reaffirmed points made in *Roper* and *Graham* about factors that contribute to a juvenile’s diminished culpability, adding that the science supporting these holdings has only become stronger. *Id.* at 2464-2466. The *Miller* Court affirmed the opinion of Chief Justice Roberts from his concurring opinion in *Graham* that “an offender’s juvenile status can play a central role in determining a sentence’s proportionality.” *Id.* at 2466. It further held that “none of what it said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific.” *Id.* at 2465.

Regarding penological justifications, the Court in *Miller* held that the absence of a penological justification for a sentence of life without parole for a non-homicide offense diminished the justification for that sentence. *Id.* at 2465-2466. Before a sentence of life without parole could be justified for a homicide, the sentencer had to consider youth and its attendant circumstances. *Id.* The Court stated a number of factors that a sentencer needed to consider when sentencing a juvenile: age, involvement in the crime, home conditions, inability to remove himself from those conditions, immaturity, inability to foresee consequences, circumstances of the crime, and how family and peer influences contributed. *Id.* at 2467-2468. Further, the *Miller* Court, citing *Graham*, included as a factor the impact that the juvenile’s youth has on his representation and how that put her at a significant disadvantage in criminal proceedings, even commenting that the result may have been different but for these “incompetencies associated with youth.” *Id.* (citation omitted)

The *Miller* Court's analysis differed from *Roper* and *Graham* in the sense that since it was not issuing a categorical bar on a sentence, the focus on consensus was not necessary. *Miller v. Alabama*, 132 S.Ct. at 2470-2473. Further, it justified its approach by the belief, which it had mentioned in *Graham*, that just because legislatures had allowed juveniles to be tried as adults, it did not mean that the legislatures had endorsed their being *sentenced* as adults. *Id.* at 2473-2474.

A review of 8th Amendment juvenile jurisprudence shows it has evolved to establish three constitutional principles. First, juveniles are less culpable than adults who commit the same crimes. Second, juveniles are constitutionally different for purposes of sentencing and criminal procedure laws must take this difference into account. Third, youth and its attendant circumstances (juvenile factors) must be considered, regardless of the offense and potential punishment, to ensure that a sentence is not excessive or disproportionate.

2. The Constitutional Principles Established by the United States

Supreme Court's Jurisprudence are not Limited to Cases Involving the Death Penalty or LWOP.

The State has argued that the holdings of *Thompson*, *Roper*, *Graham*, and *Miller* only apply to cases that have death or LWOP as the possible punishment (App. Br. 23-27). This argument fails, however, for two reasons. First, it is true that the issue in these four cases was specifically about death or LWOP. That, however, is what the Court was limited to addressing. Anything more would have constituted an advisory opinion. *Chafin v. Chafin*, 133 S.Ct 1017, 1023 (2013). Second, the circuit court in this case

specifically stated in its order that the *rationale* of these four cases, not their specific holdings, is what supports its analysis regarding the mandatory incarceration language in the ACA statute (L.F. 88-89).

The State has also argued that the circuit court's order is an unwarranted expansion of 8th Amendment jurisprudence (Ap. Br. 27). This argument also fails. The United States Supreme Court has clearly stated that a juvenile's "distinctive (and transitory) traits and environmental vulnerabilities" is not crime-specific. *Miller v. Alabama*, 132 S.Ct. at 2465. The State has argued that the circuit court took this statement out of context and what the United States Supreme Court was really addressing was that a sentence of LWOP applied to homicide and non-homicide offenses equally (App. Br. 32-33)(quoting the Connecticut Supreme Court in *State v. Taylor*, 110 A.3d 338, 349 n. 8 (Conn. 2015)).

The State continues to cite to the *Taylor* case in its brief about the statement by the Court about the traits of youth not being crime-specific. "There is nothing in the passage suggesting that the Court was referring to less severe punishments or that trial courts should have unfettered discretion in sentencing juvenile offenders." *Id.* (App. Br. 33) What the State fails to realize is that the circuit court was not suggesting that the phrase about youth and its was *specifically* making a ruling that the statement applied to lesser punishment or that it meant that a trial court should have unfettered discretion in sentencing juveniles. What the circuit court was saying, and what Jerri is arguing here, is that that statement meant that the juvenile factors are relevant in every offense and should

be considered in every offense and should be considered regardless of the punishment.

There simply is no logical reason not to.

For example, a lack of development of frontal lobes, inability to foresee the consequences of her actions, susceptibility to peer pressure, and her inability to remove herself from a crime-producing environment play just as much of a role when a juvenile uses a knife to stab someone in the throat, stab someone in the back, or stab a person's tires. They are just as relevant when a juvenile commits a heinous act against a person or simply runs into Wal Mart and steals an Ipad. A juvenile who commits a less serious crime has less moral culpability than a juvenile who commits a very serious crime. Since the culpability is less, the potential for rehabilitation is greater.

Additionally, as the potential for rehabilitation increases, the need for incarceration decreases. This greater potential for rehabilitation makes it even more important to consider the juvenile factors before sending a juvenile to prison. The relevance this has for the ACA statute is that while the use of a weapon is serious for any offense, its use for 1st or 2nd degree assault is often morally less culpable than using it to commit a homicide. As the culpability and seriousness of the underlying felony decreases, so does the culpability of using a weapon and the *necessity* of incarceration to achieve a penological goal decreases. The Iowa Supreme Court addressed this point in *State v. Lyle*, 854 N.W.2d 358, 401 (Iowa 2014). The Court stated:

[O]ur collective sense of humanity preserved in our constitutional prohibition against cruel and unusual punishment and stirred by what we

all know about child development demands some assurance that
imprisonment is actually appropriate and necessary.

(emphasis added)

This is especially true considering the fact that for a juvenile, youth “is a time and condition of life when a person may be most susceptible to influence and to psychological damage.” *Thompson v. Oklahoma*, 487 U.S. at 834. (citing *Eddings v. California*, 455 U.S. 104, 115-116 (1982)). Thus, even a three year period of incarceration could result in a juvenile’s being negatively influenced by other inmates and experiencing events that cause psychological damage. This does not take into account the physical and sexual violence that a juvenile can face in prison. (See Am. Br. 20) The circuit court expressed the same concern at the hearing herein (Tr. 37-38).

The State also argued that the mandatory incarceration provision of the ACA statute “does not violate any principle of proportionality (App. Br. 42). In support of this argument, the State cites *Harmelin v. Michigan*, 501 U.S. 957 (1991), and its discussion of how only punishments that are grossly disproportionate to the crime violate the Eighth Amendment (App. Br. 43). The State then cites this Court’s holding in *State v. Pribble*, 285 S.W.3d 310 (Mo. banc 2009), as evidence that this Court has adopted *Harmelin’s* analysis. The State’s analysis fails for two main reasons.

First, neither *Harmelin* nor *Pribble* dealt with juvenile offenders. Indeed, the Court in *Miller* specifically stated, “*Harmelin* had nothing to do with children and did not purport to apply its holding to the sentencing of juvenile offenders. *Miller v. Alabama*, 132 S.Ct. at 2470. “We have by now held on multiple occasions that a sentencing rule

permissible for adults may not be so for children.” *Id.* Second, *Thompson, Roper, Graham, and Miller* show that for purposes of measuring proportionality in juvenile cases, the Court has gradually turned its focus away from comparing the punishment versus the offense and has directed its focus on the *offender*. “[A]n offender’s juvenile status can play a central role’ in considering a sentence’s proportionality.” *Miller v. Alabama*, 132 S.Ct. at 2466. (quoting Chief Justice Roberts’s concurring opinion in *Graham v. Florida*, 560 U.S. at 90). For juveniles, the standard for measuring proportionality is no longer a “gross disproportionality” standard where the sentence is compared to the offense and only struck down if it is grossly disproportional to the offense.

The obvious way to determine the culpability is to take into consideration the juvenile factors of each juvenile offender. These factors which will vary substantially for each juvenile. Professor Guggenheim addressed this issue:

If most juveniles who commit serious felonies have lessened culpability than most adults who commit the same crimes then it follows that juveniles who commit minor crimes (probably) also have lessened [sic] culpability than adults. As a result, the Constitution forbids ignoring these probabilities and automatically imposing a mandatory adult-like sentence on a child. This is because the statutory punishment would be based on an (sic) non-rebuttable presumption that the juvenile who committed the crime is equally morally culpable as an adult who committed the same act. This impermissibly allows the state to forgo having to prove material

facts--the propriety of punishing a juvenile based on the same combination of deterrence, incapacitation and retribution which is appropriate for an adult--by presuming them to be true. It violates the juvenile's substantive liberty interest....The substantive right in this situation is a juvenile's right not to be treated invariably as an adult for sentencing purposes, not that the sentence itself violates the child's substantive right. In order to determine what sentence is proper to impose on the juvenile, there must be a hearing on the question at which the state must bear its burden of proving that the juvenile deserves the same sentence that the legislature would impose automatically on an adult.

Martin Guggenheim, *Graham v. Florida and a Juvenile's Right to Age-Appropriate Sentencing*, 47 Harv. C.R.-C.L. Rev. 457, 491-492 (2012).

Jerri respectfully submits that the hearing that Professor Guggenheim refers to is not the certification hearing. It is true that under § 211.071.6(6) and § 211.071.6(7), the certification judge is required to consider the juvenile's age and maturity before transferring her case to adult court and subjecting her to the possibility of a sentence involving incarceration in an adult prison. It is also true that there is case law in Missouri that, at first, could be seen to support this argument. In *State v. Andrews*, 329 S.W.3d 369, 377 (Mo. banc 2010), the Court held that since § 211.071(6) and § 211.071.6(7) require a judge to consider a juvenile's youth before transfer, "Missouri's statutory scheme expressly considers the youthfulness of the child before he or she is exposed to the possibility of a mandatory life without parole sentence for first degree murder." *Id.* at

377. *Andrews*, however, was decided before *Miller*, and *Miller* specifically refutes this analysis. The *Miller* Court specifically stated:

Even when States give transfer-stage discretion to judges, it has limited utility. First, the decision maker typically will have only partial information at this early, pretrial stage about either the child or the circumstances of his offense. ..Second and still more important, the question at transfer hearings may differ dramatically from the issue at a post-trial sentencing. Because many juvenile systems require that the offender be released at a particular age or after a certain number of years, transfer decisions often present a choice between extremes: light punishment as a child or standard sentencing as an adult (here, life without parole). In many States, for example, a child convicted in juvenile court must be released from custody by the age of 21...Discretionary sentencing in adult court would provide different options: There, a judge or jury could choose, rather than a life-without-parole sentence, a lifetime prison term *with* the possibility of parole or a lengthy term of years. It is easy to imagine a judge deciding that a minor deserves a (much) harsher sentence than he would receive in juvenile court, while still not thinking life-without-parole appropriate. For that reason, the discretion available to a judge at the transfer stage cannot substitute for discretion at post-trial sentencing in adult court—and so cannot satisfy the *Eighth Amendment* (emphasis added).

Miller v. Alabama, 132 S.Ct. at 2474-2475.

Miller is clear. A juvenile court's decision to transfer a case to adult court after its consideration of the relevant factors does not negate the need of the trial court to have the flexibility to also consider the factors related to youth before imposing an appropriate sentence. This is true regardless of the crime and potential punishment. A transfer judge is not going to know more about the juvenile factors of a particular juvenile simply because the crime is less serious than murder and the potential punishment is less than LWOP. The criminal procedure laws of § 211.071(6) and § 211.071.6(7) are no longer sufficient to take a juvenile's youthfulness into account. The sentencing judge must be able to do the same.

3. The ACA Statute Does not Allow a Court to Fully Consider All of the Juvenile Factors and Will Result in a Statutorily Mandated Three Year Period of Incarceration Minimum Being Excessive for Some Juvenile Offenders.

The State does not seem to dispute that consideration of the juvenile factors is appropriate at sentencing (App. Br. 30). The State's argument is that the ACA statute is not unconstitutional because:

The court can consider these factors in determining a juvenile offender's sentence from three years to an unlimited number of years or life imprisonment. Simply because the legislature mandates a minimum sentence of three years to be served in prison does not preclude a court

from considering a juvenile's mitigating circumstances in choosing a sentence within that range.

(App. Br. 30) The State merely makes a conclusory assertion but offers no substantive argument to back up its claim. The State's logic seems to be that since the adult sentence is only three years, there is no need to take the juvenile's diminished culpability into account. This argument is without merit. The circuit court found this to be unpersuasive and this Court should too.

In Missouri, the legislature has determined that adults who use a weapon in the commission of a felony are not worthy of probation until they spend three years in prison. If a juvenile, however, is less culpable than an adult for her crimes, then it logically follows that she is less culpable than an adult for using a weapon as well. The requirement that the juvenile, like the adult who commits the same crime, must also spend three years in prison, does not allow the Court to consider that diminished culpability for the ACA charge even though the diminished culpability for many juveniles is substantial given their age, background, living circumstances, and levels of maturity – physical, emotional, social, and intellectual. Juveniles as young as 12 can be certified as adults, and certain crimes, including the one Jerri is charged with, have no minimum age. *See* § 211.071.1.

Jerri respectfully submits that with children as young as 12 (or younger), being sentenced for adult crimes, it is inevitable that the culpability for certain juveniles will be so diminished that the court will conclude that incarceration in prison is neither just nor appropriate. Given that the degree of culpability among juveniles varies substantially, it

is only logical to conclude that just as the culpability of some juveniles will warrant their receiving the maximum amount of incarceration possible, the culpability of other juveniles will warrant their receiving no incarceration. Further, the ACA's mandatory three years in prison is imposed regardless of the seriousness of the felony. Thus, the court cannot consider the seriousness of the underlying felony either. This is important because the moral culpability with the use of the weapon or dangerous instrument when it is used to commit first or second degree assault is often much less than when it is used to commit first or second degree murder.

A mandatory sentence, regardless of its length, does not allow the court to *fully* consider the fact of whether the juvenile was the primary aggressor or just a kid who tagged along because he wanted to be part of the group. It does not allow the court to fully consider whether the use of the weapon was pre-planned or used impulsively when a fight escalated into a small riot. It does not allow the court to fully consider what kind of family background the child grew up in – privileged or broken. It does not allow the court to fully consider whether the juvenile was the principal offender or an accomplice.

The Iowa Supreme Court, in *State v. Lyle*, 854 N.W.2d at 401, addressed this very issue. The Court stated:

Accordingly, the heart of the constitutional infirmity with the punishment imposed in *Miller* was its mandatory imposition, not the length of the sentence. The mandatory nature of the punishment establishes the constitutional violation. Yet, article I, § 17 requires the punishment for all crimes “be graduated and proportioned to [the]

offense.” (citation omitted) In other words, the protection of article I, § 17 applies across the board to all crimes. Thus, if mandatory sentencing for the most serious crimes that impose the most serious punishment of life in prison without parole violates article I, § 17, so would mandatory sentences for less serious crimes imposing the less serious punishment of a minimum period of time in prison without parole. All children are protected by the Iowa Constitution. The constitutional prohibition against cruel and unusual punishment does not protect all children if the constitutional infirmity identified in mandatory imprisonment for those juveniles who commit the most serious crimes is overlooked in mandatory imprisonment for those juveniles who commit less serious crimes. *Miller* is properly read to support a new sentencing framework that reconsiders mandatory sentencing for all children...*This rationale applies to all crimes, and no principled basis exists to cabin the protection only for the most serious crimes.* (emphasis added)

As with Article I, § 17 of Iowa’s constitution, Article I, § 21 of the Missouri constitution requires that the punishment be graduated to the offense and offender. The Missouri constitution protects all children. All children would not be protected by Missouri’s constitution, however, if the requirement of considering the juvenile factors for juveniles convicted of murder facing LWOP is ignored to permit mandatory imprisonment for less serious crimes. The rationale behind considering the juvenile factors for cases of murder with a potential sentence of LWOP applies to all crimes and

there is no legal or logical argument to justify applying this protection only to prohibit mandatory imprisonment of LWOP for murder.

The issue of accomplice liability warrants extra attention. In Missouri, there is no legal distinction between the principal and the accomplice. *State v. Barnum*, 14 S.W.3d 587, 591 (Mo. banc 2000). Under accomplice liability, a defendant does not need to commit every element of the crime. *Id.* Further, “mere encouragement” is enough. *Id.* Moreover, “[e]ncouragement is the equivalent of conduct that ‘by any means countenances or approves the criminal action of another.’” *Id.* (citation omitted) This encouragement can even be signs or gestures. *Id.* Additionally, “[a] defendant who embarks upon a course of criminal conduct with others is responsible for those crimes which he could reasonably anticipate would be part of that conduct.” *State v. Liles*, 237 S.W.3d 636, 640 (Mo. App. S.D. 2007). This can result in a juvenile being held accountable for a crime even though their culpability in the crime is significantly diminished.

The difficulty with this standard for juvenile is that four of the juvenile factors recognized by the United States Supreme Court are: (1) susceptibility to peer pressure; (2) an inability to extricate themselves from a crime-producing environment; (3) an inability to appreciate risks and consequences; and, (4) actual involvement in the crime. *Miller v. Alabama*, 132 S.Ct. at 2468. A juvenile might participate in a crime because of his susceptibility to peer pressure and/or an inability to extricate herself from a crime-producing environment. A juvenile also might engage in a course of criminal conduct, which starts out with minor offenses and escalates into a burglary with the use of a

switchblade. Even if she did not use the switchblade, she would be liable because under Missouri law, she would be liable for anything that she could reasonably anticipate when she began to engage in the criminal conduct. *State v. Liles*, 237 S.W.3d at 640. The difficulty with applying this standard to a juvenile is that while an adult might be able to reasonably anticipate what might happen, a juvenile would not.

The mandatory three-year incarceration period, however, will not allow the judge to consider these four juvenile factors when a juvenile is convicted of ACA through accomplice liability. The juvenile who acts as the lookout while his friends use a switchblade to break into a house is subject to the three-year period of incarceration just as is an adult who uses a switchblade⁹ to stab someone. Indeed, a juvenile who acts as the lookout while his friend breaks into a house and has a switchblade in his pocket is subject to the same mandatory three-year period of incarceration as the adult who uses the switchblade to stab someone. (*See State v. Blackwell*, 978 S.W.2d 475, 477-478 (Mo. App. E.D. 1998)). The mandatory incarceration provision of the ACA statute does not allow full consideration of these factors. It violates Article I, § 21 of the Missouri Constitution.

⁹ Section 556.061 RSMo. (Cum. Supp. 2013) includes a switchblade knife in its definition of deadly weapon.

4. The ACA Statute's Mandatory Three-Year Incarceration Has no Penological Justification.

In *Graham v. Florida*, the United States Supreme Court stated one of its duties when conducting an independent review of a sentencing practice is to consider “whether the challenged sentencing practice serves legitimate penological goals.” *Graham* at 67. (citation omitted) The Court went on to say that there are four accepted penological justifications for a sentence – retribution, deterrence, incapacitation, and rehabilitation. *Id.*

Jerri respectfully submits that with all the factors that a sentencer is required to consider, there are simply too many variables to allow mandatory incarceration of any length for juveniles. It is inevitable that with consideration of all of the factors mentioned in *Thompson, Roper, Graham, and Miller*, a court will determine that for some juveniles, prison is not just or appropriate. Upon a finding that prison is not just or appropriate, none of the recognized penological justifications applies and a sentence of *mandatory* incarceration, regardless of its length, is disproportionate.

If a court determines that prison for the juvenile is unjust and inappropriate, retribution is not a valid penological justification of a mandatory three-year period of incarceration. The Court in *Graham* stated, “[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender.” *Id.* If the judge has already determined that prison is not appropriate and just, however, the judge has decided that the wrong to the victim and society is more appropriately balanced in other ways.

If a court determines that prison for the juvenile is unjust and inappropriate, incapacitation is not a valid penological justification of a mandatory three-year period of incarceration. The judge has determined that the risk of reoffending is not great enough to require imprisonment and, in the case of the ACA statute, three years provides only a minimal period for which the community is “protected.” Spending three years in prison would result in “nothing more than the purposeless and needless imposition of pain and suffering.” (See *Coker v. Georgia*, 433 U.S. 584, 592 (1977)).

If a court determines that prison for the juvenile is unjust and inappropriate, deterrence is not a valid penological justification of a mandatory three-year period of incarceration. *Graham* was clear that juveniles rarely take a possible legal punishment into consideration when acting and the punishment at issue in that case was LWOP. *Graham v. Florida*, 560 U.S. at 72.

Finally, if a court determines that prison for the juvenile is unjust and inappropriate, rehabilitation is not a valid penological justification of a mandatory three-year period of incarceration, since the judge believes the juvenile can be rehabilitated outside of prison. People who are incarcerated have been judged by the court to need incarceration in order to be rehabilitated, incapacitated, or to provide retribution for the victim and the community.

Despite these findings, however, the ACA statute will require the court to send the juvenile to prison anyway. Jerri respectfully submits that sending her to prison if there has been a finding that no penological goal will be served by sending her to prison

constitutes cruel and unusual punishment and violates Article I, § 21 of the Missouri Constitution.

The State, in its brief, argues that when the circuit court made its ruling on the lack of a penological justification for the mandatory provision of the ACA statute, it was “pitting the judgment of the court against that of the duly elected legislature.” (App. Br. 30-31) The State, citing *State v. Pribble*, 285 S.W.3d at 314, argued that “[s]ubstantial deference is given to the legislature’s determination of proper punishment.” The State’s argument, however, fails for the simple fact that when the legislature determined the proper punishment for the ACA statute, it did so for adults, not juveniles. Two points clearly demonstrate this.

First, as discussed earlier in this brief, the crime of first degree assault has no minimum age for certification. *See* § 211.071.1. Thus, theoretically, a juvenile as young as five could be certified for first degree assault. When the felony complaint was filed she could then be charged with ACA as well and be subject to a three year period of incarceration.¹⁰ A similar concern was brought up in *Graham* when the Court discussed how a juvenile as young as 5 could be prosecuted for certain crimes and given LWOP. *Graham v. Florida*, 560 U.S. at 67. The Court indicated that while this was not realistic, it highlighted “that the statutory eligibility of a juvenile offender for life without parole

¹⁰ In *State v. Nathan*, 404 S.W.3d 253, 259-260 (Mo. banc 2013), this Court held that once a juvenile was certified to stand trial as an adults, the State could charge a juvenile with any crimes it felt were appropriate, not just the ones alleged in the juvenile petition.

does not indicate that the penalty has been endorsed through deliberate, express, and full legislative consideration.” *Id.* Jerri respectfully submits that the fact that a child as young as five could be charged with first degree assault and ACA and have a mandatory three year period in prison imposed on her highlights the same. The punishment for the ACA offense has been endorsed for adults, not juveniles. The degree of deference then is not as substantial for juvenile offenders.

Second, in its order, the circuit court pointed out that our legislature does not consider juveniles when enacting criminal statutes (L.F. 121). The only criminal statute that has any language regarding a juvenile offender is first degree murder.¹¹ That statute, however, has not been amended since 1990. *State v. Hart*, 404 S.W.3d at 245. Further, the holdings of *Roper* and *Miller* have all but completely invalidated its application to juvenile offenders. Additionally, the only other statutes with mandatory incarceration provisions that apply to juveniles are first degree rape and first degree sodomy.¹² Those statutes, however, have sections in them that, for juvenile offenders, are constitutionally questionable in light of *Miller*¹³ and patently unconstitutional in light of *Graham*.¹⁴

¹¹ Section 565.020.

¹² Section 566.030 (Cum. Supp. 2013) and section 566.060 (Cum. Supp. 2013).

¹³ Section 566.030.2(3) and section 566.060.2(3) require life imprisonment without eligibility for parole for thirty years if the victim is under twelve.

The analysis from *Graham* applies here too. Theoretically, a five year-old could rape his eight year-old sister, get certified, and receive a sentence thirty years. Theoretically, that same five year-old could rape his eight year-old sister in a vile manner and receive LWOP. All would concede the first scenario is unrealistic and that the second scenario is both unrealistic and unconstitutional, since the juvenile would be receiving a sentence of LWOP for a non-homicide offense. As with the example in *Graham* of a five year-old receiving a sentence of LWOP for a non-homicide offense, these scenarios highlight that the statutory eligibility of a juvenile offender for a life sentence with no eligibility for parole for thirty years, and the fact that the legislature has passed two criminal laws that have sections patently unconstitutional for juvenile offenders does not indicate that the penalties have been endorsed through deliberate, express, and full legislative consideration. The deference to the legislature then is not as great with juveniles as with adults.

F. Objective Indicia in Missouri Demonstrate a Statewide Consensus Against a Three-Year Mandatory Incarceration Period.

While Jerri is not challenging a specific punishment, she is challenging a sentencing practice for all crimes that currently mandate prison for juvenile offenders. Therefore, objective indicia from within the state of Missouri also need to be shown to

¹⁴ Section 566.030.2(4) and section 566.060.2(4) require a sentence of LWOP if the victim is under twelve and the offense was “outrageously or wantonly vile, horrible or inhumane, in that it involved torture or depravity of mind.”

support the argument that this Court should construe Missouri’s constitution to provide more protections for juvenile offenders than the Federal constitution, and, that Article I, § 21 prohibits mandatory incarceration for juvenile offenders. Jerri can point to five such indicia: (1) § 211.071 RSMo. (Cum. Supp. 2013); (2) § 211.073 RSMo. (Cum. Supp. 2013); (3) a decrease of over 25% in the past several years of the number of juveniles certified to stand trial as adults; (4) the establishment of the juvenile justice task force; and, (5) the opposition to mandatory incarceration of juveniles by several Missouri advocacy groups.¹⁵ In *Atkins v. Virginia*, 536 U.S. 304, 312 (2002), the United States Supreme Court stated that what is considered to be cruel and unusual punishment should be determined by current standards, which are most reliably to be determined by the statutes passed by the legislature.

1. § 211.071 RSMo.

The stark reality of juvenile justice in America is “that many States use mandatory transfer systems: A juvenile of a certain age who has committed a specified offense will

¹⁵ Although it is not included in the discussion of objective indicia, Jerri believes another relevant factor for the court to consider in deciding that Missouri’s constitution grants more protections than the Federal constitution is the fact that Missouri is seen throughout the country as having a “model” juvenile justice system. Marian Wright Edelman, President and co-founder of the Children’s Defense Fund and a renowned advocate for children, has highly praised Missouri’s juvenile system. An article written by her about Missouri juvenile system is included in the Appendix. (Exhibit N, pp. A77-A78)

be tried in adult court, regardless of any individualized circumstances.” *Miller v. Alabama*, 132 S.Ct. at 2475. “Moreover, several States at times lodge this decision exclusively in the hands of prosecutors, again with no statutory mechanism for judicial reevaluation.” *Id.* “And those ‘prosecutorial discretion laws are usually silent regarding standards, protocols, or appropriate considerations for decision making.’” *Id.* (citing Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention, P. Griffin, S. Addie, B. Adams, & K. Firestine, *Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting* 5 (2011)).

Missouri is an exception to this general rule. In Missouri, a ruling by a juvenile court judge is the *only* way a juvenile can be transferred to the adult criminal justice system. *See* § 211.071.1. Cases for juveniles always start in the juvenile division of circuit court because the Missouri legislature has recognized that there is a presumption that a juvenile’s culpability is less than that of an adult and that there is a presumption that a juvenile should have her case handled in the juvenile division, regardless of the juvenile’s age¹⁶ and regardless of the offense. Not even an allegation of first degree murder or armed criminal action automatically results in a juvenile being transferred to the adult criminal justice system. While there are certain offenses that require the court to have a certification hearing,¹⁷ no offense requires that a case be transferred to adult

¹⁶ A juvenile must be under the age of 17. *See* § 211.071.1 RSMo. (Cum. Supp. 2013)

¹⁷ These crimes are: first degree murder under § 565.020, second degree murder under § 565.021, first degree assault under § 565.050, forcible rape under § 566.030 RSMo.

criminal court. The presumption that a juvenile's case should be handled in the juvenile division of circuit court remains unless, and until, the juvenile officer (not the prosecutor) convince the juvenile court judge that the juvenile should have her case transferred to adult criminal court.

Further, § 211.071.6 requires that the juvenile court take into account a juvenile's youth and maturity before making the decision to transfer her case to adult court. Jerri respectfully submits that this demonstrates that the Missouri legislature recognizes that even when juveniles commit very serious offenses, circumstances may exist that warrant not only not sentencing a juvenile like an adult, but also not handling her case like an adult at all. Thus, a juvenile judge can consider the juvenile factors to prevent a juvenile from even being at risk to going to prison. Section 211.071 demonstrates a statewide consensus against mandatory incarceration because, unlike in many other states, the commission of a serious offense may not even result in a juvenile being at risk for going to prison. Not only are juveniles who commit serious offenses not required to go to prison, they are not required to enter the criminal justice system.

(Cum Supp. 2009) as it existed prior to August 28, 2013, rape in the first degree under § 566.030 RSMo. (Cum. Supp. 2013), forcible sodomy under § 566.060 RSMo. (Cum. Supp. 2009) as it existed prior to August 28, 2013, sodomy in the first degree under § 566.060 (Cum. Supp. 2013), first degree robbery under § 569.020, and distribution of drugs under § 195.211 RSMo. (Cum. Supp. 2003).

Section 211.071 shows that Missouri has endorsed, and put into practice, the constitutional principle that juveniles are less culpable than adults who commit the same crimes. The diminished culpability of juvenile offenders is why *all* cases start in juvenile court and why there is a presumption that a juvenile's case should be disposed in juvenile court. Section 211.071 shows that Missouri has endorsed, and put into practice, the constitutional principle that juveniles are different for purposes of sentencing because it shows there is a presumption that a juvenile should not even be sentenced like an adult at all. Finally, § 211.071 shows that Missouri has endorsed, and put into practice, the constitutional principle that the juvenile factors must be considered to ensure a sentence is not excessive or disproportional because the statute has specific provisions that must be considered before a juvenile is even at risk for receiving a sentence that is excessive or disproportional.

2. § 211.073 RSMo.

In 1995, the Missouri Legislature enacted § 211.073 RSMo. This statute set up dual jurisdiction, under which if a certified juvenile is convicted of an offense, the trial judge had the authority to send the juvenile to the Missouri Division of Youth Services (DYS) for a juvenile disposition, provided the juvenile had not reached her 17th birthday. When the juvenile completed the DYS program, successfully or unsuccessfully, the trial court had the authority to either send the juvenile to prison or suspend execution of the sentence and place the juvenile on probation.

In 2013, the Missouri legislature amended § 211.073, with two significant changes. First, it extended the time for a juvenile to be eligible for dual jurisdiction from

17 years to 17 years and six months. *See* § 211.073.1. The purpose of this extension was to prevent juveniles from being disqualified due to their cases moving slowly through the court system. (S.L.F. 83) The second major change was that unlike the original law, which stated that judges *may* consider the dual jurisdiction disposition, the law now *requires* judges to consider a dual jurisdiction disposition. *See* § 211.073.1 Further, if DYS accepts the juvenile and the judge declines to impose a dual jurisdiction sentence, the judge *must* make findings on the record as to why dual jurisdiction was not an appropriate disposition. *See* § 211.073.1(2). The language of § 211.073 contains no exceptions for any specific crime.

Jerri respectfully submits that under the rules of statutory construction and Missouri case law, the trial judge is to consider dual jurisdiction regardless of the offense. Thus, even if the presumption that a juvenile should have her case disposed in juvenile court has been overcome in an individual case, the legislature still believes there is a presumption that a juvenile should be treated differently than an adult for sentencing. That presumption is not overcome until the State convinces the circuit court not to utilize the dual jurisdiction program; and, just as the juvenile judge must give reasons for transferring a juvenile's case to adult, court, the circuit court must give reasons for not utilizing the alternative to prison

Section 211.073 demonstrates a statewide consensus against mandatory incarceration for juveniles because the requirement that the trial court consider an alternative to prison has all but eliminated mandatory incarceration. Section 211.073 also demonstrates that Missouri has endorsed, and put into practice, the constitutional

principles that juveniles are less culpable than adults who commit the same crimes and are different for purposes of sentencing because it requires that they are to be presumed different for purposes of sentencing. Further, because dual consideration is to be considered for all crimes, the presumption exists for all crimes and potential punishments, not just LWOP for murder. This presumption exists because of the endorsement of the principle that they are less culpable than adults who commit the same crimes. Finally, section 211.073 shows that Missouri has endorsed, and put into practice, the constitutional principle that the juvenile factors must be considered to ensure that a juvenile's sentence is not excessive or disproportional. By requiring the trial court to justify not invoking dual jurisdiction, the legislature has indicated its belief that a trial court must consider the juvenile factors before it imposes an adult sentence.

3. Certification Statistics

“There are other measures of consensus other than legislation.” *Graham v Florida*, 560 U.S. at 62. (citation omitted) “Actual sentencing practices are an important part of the Court's inquiry into consensus.” *Id.* (citation omitted) In her two motions in circuit court, Jerri provided the certification statistics for 2001-2013. (S.L.F. 85-92; 184-188) Those statistics show that between 2001 and 2007, the number of juveniles certified to stand trial as adults in Missouri increased, peaking in 2006 with 120 juveniles certified. These statistics also show that a disproportionate number of the juveniles who are certified are from the St. Louis area. After 2007, the number of juveniles who are certified began to 74 juveniles in 2011, 55 in 2012, 68 in 2013, and 68 in 2014 (S.L.F.

184-188).¹⁸ The statistics for 2014 show that 66 juveniles were certified in 2014. The average number of juveniles certified between 2001 and 2007 was 105. The average number between 2008 and 2014 was 78. That is over a 25% decrease in the number of juveniles being certified each year in Missouri.

While certification is not a sentencing practice, the fact remains that a juvenile who is *not* certified cannot go to prison. This drop in certifications shows that Missouri's standards of decency have evolved to a point where juveniles are only being certified as adults if it is necessary. Missouri is recognizing that juveniles, if at all possible, should have their cases disposed of in juvenile court. It also shows Missouri recognizes that children are different. And it shows that the direction and consistent direction Missouri is heading is away from mandatory incarceration because it shows Missouri is moving from sending juveniles to prison at all.

4. SCR 29

SCR 29 is not a legislative enactment but a concurrent resolution that establishes a juvenile justice task force. The task force includes six members of the legislature and twelve others whose duties are "making recommendations for juvenile justice reform on: (1) raising the age of juvenile court jurisdiction to age eighteen; (2) removing juveniles from adult jails pre-trial; and, (3) revising the age of certification to adult court." (S.L.F. 84) While minor in comparison to the legislative enactments of §§ 211.071 and 211.073, this resolution still helps to demonstrate a statewide consensus against mandatory

¹⁸ See the Missouri Juvenile and Family Division Annual Report for 2014, page 38.

incarceration because it is another example of our legislature moving in a direction away from sending juveniles to prison. SCR 29 is a small step in this direction, but it is a step nonetheless.

5. Professional and Legal Organizations

In *State ex rel. Simmons v. Roper*, 112 S.W.3d at 410-411, this Court discussed how the opposition to the death penalty for juveniles by social, religious, and professional organizations helped to demonstrate a national consensus against the death penalty for juveniles. The Court noted that the United States Supreme Court's decision in *Atkins, v. Virginia*, 536 U.S. 304 (2002), showed that the opinions of these groups "clearly demonstrated a shift back to reliance on such evidence to confirm the national consensus that evolving standards of decency proscribe imposition of the death penalty on the mentally retarded." *Id.* at 411. The Court further stated:

Similarly, here, although by no means dispositive, we find the opposition to the juvenile death penalty of the wide array of groups within the United States listed above to be consistent with the legislative and other evidence that current standards of decency do not permit the imposition of the death penalty on juveniles.

Id.

In her first motion in circuit court, Jerri discussed how national groups and one statewide group opposed mandatory incarceration (S.L.F. 24-25). There was only one Missouri group, Families and Friends Organization for Reform of Juvenile Justice (FORJMO), that opposed mandatory incarceration. On August 24, 2015, however, the

Juvenile Law Center filed an amicus brief in this case (Am. Br. 1-32). In the Appendix to the brief are the names of several groups and individuals who have signed on to the brief (Am. Br. App. 1-20). Many of these groups are Missouri based including: (1) The American Civil Liberties Union (ACLU) of Missouri; (2) The Missouri Association of Criminal Defense Lawyers (MACDL); (3) The Missouri Citizens United for the Rehabilitation of Errants (CURE); (4) The Missouri PTA; and, (5) the St. Louis University Law Clinic. (Am. Br. App. 2-11) Jerri respectfully submits that by applying the analysis used by this Court in *State ex rel. Simmons v. Roper* to her case, these six groups' opposition to mandatory incarceration helps to show a statewide consensus against mandatory incarceration for juvenile offenders.

The importance of these five indicia cannot be overemphasized. The State has argued that the principles established by *Thompson, Roper, Graham, and Miller* do not apply to the ACA statute. The independent review discussed, *supra*, refutes this assertion. Even if it doesn't, however, it doesn't matter. *Missouri* has endorsed these principles and has put them into practice. In addition to demonstrating a statewide consensus against mandatory incarceration, these indicia also show that this Court should construe the Missouri constitution to provide more protections for juvenile offenders.

The analysis of the statewide consensus parallels the analysis of a national consensus. A national consensus was shown by legislative enactments showing a movement away from the death penalty and life without parole. Jerri respectfully submits that there is a statewide consensus with legislative enactments showing a movement away from mandatory incarceration and towards flexibility with juvenile

cases. A national consensus was also shown by the infrequency of the death penalty and life without parole for non-homicide offenses. In addition, it was shown with evidence that the juvenile death penalty in the modern era was imposed largely in a few states. Jerri respectfully submits the evidence that certifications have dropped over the past years and are disproportionately in certain areas of the state also helps to show a statewide consensus against mandatory incarceration for juveniles.

G. The State Ignores The Objective Indicia That Demonstrate a Statewide Consensus Against Mandatory Incarceration.

In its brief, the State ignores entirely § 211.073 and only mentions § 211.071 to point out that a certification hearing is required for the offenses of first degree rape and first degree sodomy. The State, however, ignores that transfer is not necessary (App. Br. 33). It ignores the decrease in the numbers of juveniles being certified and ignores the establishment of the juvenile justice task force. Instead, the State simply says that the circuit court found a statewide consensus by “looking at various state statutes relating to juvenile justice matters” (App. Br. 33). The State then argues that if this “survey” shows a statewide consensus, the legislature should have also passed legislation to forbid the imposition of mandatory prison sentences.

The State’s argument fails for two reasons. First, the legislature *has passed such legislation*. By requiring the trial court to consider an alternative to prison, and requiring the trial court to justify not using this option if the alternative is viable, the legislature has virtually eliminated mandatory incarceration for juveniles already. Second, the State fails to remember that when considering whether or not a consensus against a particular

punishment has emerged, the focus is not on absolutes but on the direction, and the consistency of the direction, away from the punishment. By maintaining the practice of requiring a judge to certify a juvenile for all offenses, requiring trial judges to consider an alternative to incarceration, establishing a juvenile justice task force, decreasing the number of juveniles certified each year by over 25%, and by seeing the formation of several groups that oppose mandatory incarceration for juvenile offenders, Missouri has been heading in a consistent direction away from mandatory incarceration for juveniles. This consistent movement is what forms the consensus.

The State cited a number of cases from Pennsylvania, Illinois, Massachusetts, Minnesota, and the United States Court of Appeals, 2nd Circuit, to support its argument that the 8th Amendment is not violated by the mandatory incarceration provision of the ACA statute (App. Br. 32-33; 38-42). The fact that other jurisdictions have held that mandatory incarceration does not violate the 8th Amendment, however, has no bearing on this case. The decisions of those courts do not help this Court in determining whether a statewide consensus against mandatory incarceration exists in Missouri.

Ironically, the State argued that Jerri's reliance on *State v. Lyle* was misplaced (App. Br. 35-36). The State attempted to distinguish what the Iowa Supreme Court did in *Lyle* from what Jerri is asking this Court to do in her case. The State argued that "the Iowa Court relied on peculiar aspects of Iowa law" (App. Br. 35). The State then pointed out how the Iowa legislature gave judges discretion in sentencing matters for juvenile offenders, removing mandatory sentencing for juveniles in most cases (App. Br. 35). The

State also pointed out to how the Iowa Court relied “on a trilogy of recent juvenile cases decided by the court under the Iowa Constitution (App. Br. 36).

The State was correct in one respect. The Iowa Supreme Court *did* rely on these objective indicia from its state. It applied these objective indicia to the general principles established by *Thompson, Roper, Graham, and Miller*. This is *precisely* what Jerri is asking this Court to do in her case. Further, as Jerri argues here for Missouri, the Iowa Supreme Court stated that the state’s movement away from mandatory sentencing for juveniles for most crimes “*helps illustrate a building consensus in this state to treat juveniles differently in our courts differently than adults.*” *State v. Lyle*, 854 N.W.2d at 388. (emphasis added) The State’s assertion that Jerri’s reliance on *Lyle* is unavailing is misplaced.

H. The Mandatory Incarceration Provision in the ACA Statute Does Not Allow the Court to Consider the “Incompetencies of Youth” and Violates A Juvenile’s Right to Due Process under Article I, § 10 of the Missouri Constitution.

The analog of Article I, § 10 is the 14th Amendment. “Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness.” *California v. Trombetta*, 104 S.Ct. 2528, 2532 (1984). As discussed, *supra*, the objective indicia in Missouri that demonstrate a statewide consensus against mandatory incarceration also show that this Court should interpret the Missouri constitution to provide more protections for juvenile offenders in all respects, not just cruel and unusual punishment. Thus, the prevailing notions of

fundamental fairness for juvenile offenders are higher in Missouri than the rest of the country. Therefore, Article I, § 10 provides more protection for juvenile offenders than the 14th Amendment.

As discussed, *supra*, in *Graham v. Florida*, 560 U.S. at 78, the United States Supreme Court discussed the “special difficulties encountered by counsel in juvenile representation.” In *Miller*, the Court reaffirmed this point and added that the “incompetencies of youth,” could lead to a juvenile being charged and convicted of a greater offense and that it was necessary for the sentence to take this reality into account before imposing a just sentence. *Miller* at 2468. These difficulties are just as much of an issue for a juvenile who faces *any* amount of time in prison.

In Missouri, however, this issue is exacerbated by the fact that many juveniles are represented by public defenders. This Court has acknowledged the caseload issue with public defenders, bluntly acknowledging that “[t]he public defender's office, however, currently is facing significant case overload problems.” *State ex rel. Public Defender Commission v. Pratte*, 298 S.W.3d 870, 875 (Mo. banc 2009). An obvious difficulty with case overload problems is too little client contact. This causes trust issues between public defenders and their clients even with adults. Given the difficulties many juveniles have with trusting adults, this lack of client contact can be even more problematic.

Undoubtedly in some cases it results in the juvenile not sharing with her attorney all relevant information or not taking sound advice from her counsel. Although this causes less unfairness when the result is a juvenile spending three years in prison is less than when it results in a LWOP sentence, it still is a due process violation.

Another difficulty with high caseloads is that cases can move more slowly. This has special relevance for juvenile offenders because the alternative to prison vanishes if their cases are not disposed by the time they turn 17 years and six months old. As the circuit court noted in its order, Jerri's current public defender is her second attorney and he inherited several other cases when he took over her case (L.F. 113). This caused a delay in her case through no fault of her own (L.F. 113).

By establishing a categorical rule against mandatory incarceration for juvenile offenders, there is less of a risk that the difficulties that are associated with the incompetencies of youth will result in a juvenile making choices that put her in a position where she must be sent to prison. It also prevents a juvenile from being in a position where she has to go to prison because her case did not get disposed before she turns 17 years and six months old. Eliminating mandatory incarceration will allow the judge the flexibility of not having to send a juvenile to prison whom he thinks should not go but has no alternative. It is what is necessary to meet the prevailing notions of fundamental fairness that exist in Missouri for juvenile offenders.

CONCLUSION

The evolution of juvenile jurisprudence has established certain constitutional principles. First, juveniles are less culpable than adults who commit the same crimes. Second, juveniles are constitutionally different for purposes of sentencing and criminal procedure laws must take that into account. Finally, youth and its attendant circumstances (juvenile factors) must be considered, regardless of the offense and potential punishment in order to ensure that a juvenile's sentence is not excessive or disproportional. An independent review shows that mandatory incarceration violates these three principles. Further, there are objective indicia in Missouri that demonstrate a statewide consensus has emerged against mandatory incarceration for juvenile offenders and show how Missouri has endorsed, and put into practice, these principles. This consensus supports Jerri's argument that the Missouri constitution should be construed to provide more protections than the Federal constitution and that the prevailing notions of fundamental fairness for juvenile offenders are higher in Missouri than the country as a whole. Thus, the mandatory incarceration provision in the ACA statute violates Article I, § 21 and Article I, § 10 of the Missouri constitution. The circuit court correctly held the ACA statute to be unconstitutional for juvenile offenders. This Court should affirm its ruling.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned counsel, hereby certify that on this 8th day of September, 2015, a copy of this motion was sent through the e-filing system to Evan Buchheim, P.O. Box 899, Jefferson City, Mo. 65102.

/s/ James Egan

James Egan

CERTIFICATE OF COMPLIANCE

I, James Egan, hereby certify as follows:

The attached brief complies with the limitations contained in this Court's Rule 84.06. The brief was completed using Microsoft Word, Office 2010, in Times New Roman size 13 point font. Excluding the cover page, signature block, this certification and the certificate of service, this brief contains 14,939 words, which does not exceed the 95 % limit of 31,000 words allowed for a Respondent's brief.

/s/ James Egan

James C. Egan