No. _____

IN THE SUPREME COURT OF THE UNITED STATES

NORMAN BROWN,

Petitioner

v.

MICHAEL BOWERSOX, WARDEN,

SOUTH CENTRAL CORRECTIONAL CENTER,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI SUPREME COURT

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QUESTIONS PRESENTED

Norman Brown was mandatorily sentenced to life in prison without the possibility of parole, plus ninety consecutive years, for his unarmed accessorial role in a jewelry store robbery that resulted in death. He was only fifteen years old at the time of the crime, which was planned and led by a predatory adult co-defendant over twice his age. After this Court decided *Miller v. Alabama*, Norman filed a state habeas corpus petition seeking an individualized resentencing hearing in a court of law on all counts. He argued that the possibility of life without parole should be precluded at resentencing given his non-triggerman role and extremely young age at the time. Nearly four years later, and despite this Court's decision in *Montgomery v. Louisiana*, the Missouri Supreme Court denied such relief. It left all of Norman's unconstitutional sentence terms undisturbed and uncorrected. Instead it invited Norman – and the 80 or so other *Miller*-impacted youthful offenders in Missouri – to seek the equivalent of clemency from the Missouri Board of Probation and Parole under a newly passed piece of legislation, Senate Bill 590.

The questions presented are:

1. Is there a constitutional right to sentencing in a court of law, such that relinquishing absolute sentencing authority to the parole board in a *Miller-Montgomery* case violates the Fourteenth Amendment's Due Process Clause, and the Sixth Amendment's Right to Counsel, Right to Public Trial, and Right to Jury Clauses?

2. Does the continued imposition of a life without parole prison term, plus ninety consecutive years, for a fifteen-year-old child who did not personally kill, was unarmed during the store robbery, and did not engage in any act of physical violence towards the decedent, violate the Eighth and Fourteenth Amendments' prohibition against cruel and unusual punishment?

3. Does the continued imposition of a life without parole prison term, plus ninety consecutive years, upon a fifteen-year-old child who was following orders of an adult during a robbery that resulted in death, violate the Eighth and Fourteenth Amendments' prohibition against cruel and unusual punishment?

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PETITION FOR WRIT OF CERTIORARI

Norman Brown, Petitioner, respectfully requests a writ of certiorari to review the judgment and opinion of the Missouri Supreme Court.

OPINIONS BELOW

The judgment, commitment, and sentencing orders in this case are attached as Appendix A. The Missouri Supreme Court's March 15, 2016 unpublished preliminary opinion and order is attached as Appendix B. The Missouri Supreme Court's final unpublished opinion and order of July 19, 2016, denying habeas corpus relief, is attached as Appendix D.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1257(a), 2101(c), and Supreme Court Rule 13.1. The decision and judgment of the Missouri Supreme Court for which petitioner seeks review was issued on July 19, 2016. This petition is filed within 90 days of that decision and judgment.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Sixth, Eighth and Fourteenth Amendments to United States Constitution. In relevant part, the Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial, by an impartial jury . . . and to have the Assistance of Counsel for his defence."

In relevant part, the Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

And in relevant part the Fourteenth Amendment to the United States Constitution provides: "No state . . . shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This case also involves Mo. Rev. Stat. § 217.690.1, which states "When in its opinion there is a reasonable probably that an offender of a correctional center can be released without detriment to the community or to himself, the board may in its discretion release or parole such person except as otherwise provided by law. All paroles shall issue upon order of the board, duly adopted."

It also involves Missouri Senate Bill 590 (S.B. 590), which in relevant part modified Mo. Rev. Stat. §§ 558.047, 565.020, 565.033, 565.034, and is attached as Appendix C.

STATEMENT OF THE CASE

Introduction

This case presents a fundamental yet surprisingly unresolved constitutional question – that is, whether criminal defendants in the United States have a right to a sentencing proceeding in a court of law, particularly when individualized juvenile characteristics must be carefully considered at the time punishment is imposed under *Miller v. Alabama*, 132 S.Ct. 2455 (2012).

It also raises the issue of whether life without parole or its equivalent is lawful under *Miller v. Alabama* when there has been no specific determination at a sentencing hearing that an unarmed juvenile accessory actually killed or intended to kill.

It further urges review of the question of whether evolving standards of decency now preclude the youngest teens – those under 16 years of age at the time of their crimes – from eligibility for death behind bars sentences.

Procedural History

On March 19, 1993, Norman Brown was sentenced for his role in a July 1991 robbery of a jewelry store that resulted in the death of the store's owner. Norman was only 15 years old at the time of the crime. He was an unarmed companion to the adult predator, Herbert Smulls, who lured Norman to join him and actually committed the killing. Smulls was twice Norman's age and clearly used Norman as a ploy to carry out his robbery.

Despite his unarmed accessorial role, Norman received a sentence of Life Without Parole on the charge of Murder in the First degree, Life (with the possibility of parole) for an Assault charge, 30 years each for two Robbery counts, and 15 years each for two counts of Armed Criminal Action. All terms were imposed to run consecutively. *See* App. A.

On January 24, 2013, Norman Brown filed a Petition for a Writ of Habeas Corpus with the Missouri Supreme Court, arguing his sentence was invalid and unconstitutional under this Court's decision in *Miller,* 132 S.Ct. 2455, because he was mandatorily sentenced to life imprisonment without the possibility of parole – plus ninety years – for a crime that occurred when he was a child.

He further argued that life without parole as a sentence was precluded in his case as a matter of law given that he was an unarmed co-defendant in a robbery where death resulted, and thus not similarly culpable as an adult who intentionally kills. It was also legally improper given his extreme youth, since Norman was just 15 at the time.

As for remedy, Petitioner argued he was entitled to resentencing on all counts in a court of law and before a jury. This is because *Miller* further held that to comply with the Constitution, court-based sentencing hearings in juvenile homicide matters must take account of the individual characteristics of the youth, as well as ensure a meaningful opportunity for release (except in the rarest of circumstances).

He further asserted that at his resentencing, life without parole would need to be precluded as a matter of law – both given his accessorial role and his age. The

resentencing would also need revisit his *de facto* life without parole sentence that was imposed on the non-homicide counts given the likely impact of the unconstitutional mandatory life without parole provisions on his entire sentencing proceeding.

In its Suggestions in Opposition, filed on January 30, 2013, the State argued that Petitioner was not entitled to relief in part because *Miller* did not apply retroactively to cases that were on collateral review. But it did not expressly oppose resentencing on all counts.

The Missouri Supreme Court did not rule on Norman's habeas corpus request for several years as it awaited guidance from this Court on the question of retroactivity. In the interim, however, it decided the case of *State v. Hart*, 404 S.W.3d 232 (Mo. banc 2013), which provided *Miller* resentencing relief to a juvenile defendant whose matter was not yet final. In doing so, this Court found such a process generally should include a sentencing hearing in a trial court with presentation of individualized *Miller* factors to a jury for consideration. *Id.*

On January 25, 2016, this Court decided *Montgomery v. Louisiana*, 136 S.Ct. 718, holding *Miller's* ban on mandatory life without parole sentences for children must be applied retroactively in cases on state collateral review.

Thereafter, the Missouri Attorney General's Office withdrew its prior opposition to retroactive application of *Miller* in cases pending before the Missouri Supreme Court. Instead, in a handful of cases involving prisoners similarly situated to Norman, the Attorney General's Office joined the petitioners in seeking immediate remand for resentencing.

Nevertheless, rather than granting the specific relief requested by Petitioner – and the Missouri Attorney General – the Missouri Supreme Court issued an Order on March 15, 2016 that purportedly "sustained in part" the Petition for a Writ of Habeas Corpus in this matter. *See* App. B.

In doing so it indicated that Petitioner would be eligible to apply for parole from his life without parole sentence after serving 25 years "*unless* his sentence is otherwise brought into conformity with the *Miller* and *Montgomery* by action of the governor or enactment of necessary legislation." *Id.* (emphasis added).

Norman filed a timely Motion for Rehearing with the Missouri Supreme Court, challenging its denial of jury resentencing in a court of law to address the many constitutional problems inherent in his mandatory life without parole prison term, imposed consecutively with a further *de facto* life without parole prison term of 90 years.

However, apparently acting on the Missouri Supreme Court's invitation to adopt a law to impact youthful offenders serving life without parole prison terms – and to further thwart their right to a resentencing hearing in a court of law – on May 12, 2016 the Missouri General Assembly passed S.B. 590. Senate Bill 590 was signed into law by Governor Jay Nixon on July 13, 2016. *See* App. C.

Senate Bill 590, which amends various Missouri sentencing law provisions, including the First Degree Murder sentencing statute, provides in relevant part that *Miller-Montgomery*-impacted youthful offenders like Norman will not be resentenced in a court of law. Instead, after serving 25 years on their life without parole prison

term, they can apply to the Missouri Board of Probation and Parole ("Parole Board") – an arm of the Missouri Department of Corrections ("MDOC") – for the possibility of mercy and parole on the life without parole sentence.

On July 19, 2016, citing to S.B. 590, the Missouri Supreme Court issued an Order vacating its prior March 15, 2016 Order in Norman's case. It further ruled on the other pending applications in this matter, including Norman's Motion for Rehearing, declaring them moot under S.B. 590. And again citing to S.B. 590, the Missouri Supreme Court finally denied Petitioner's request for habeas corpus resentencing relief. *See* App. D.

As of today, Norman still serves an unconstitutional mandatory life without parole sentence and unconstitutional consecutive 90-year term, and has not been provided with a constitutional sentencing hearing.

REASONS FOR GRANTING THE PETITION

I. Certiorari Should Be Granted to Confirm that Sentencing Hearings in a Court of Law are a Fundamental Part of the Criminal Process in the United States Required Under the Sixth, Eighth, and Fourteenth Amendments, Particularly for Youth Facing the Possibility of Death Behind Bars

A. Fundamental Right to Sentencing in a Court of Law

Imposition of sentence in a court of law has long been a central feature of criminal prosecutions in the United States. Going back to common law England and before, the judicial branch of government has been responsible for announcing judgment and penalty. *See, e.g.,* IMMANUEL KANT, THE PHILOSOPHY OF LAW 194-198 (1887) *in* JOSHUA DRESSLER, CRIMINAL LAW 40. (5th ed. 2009) (describing the process of "juridical punishment"). The colonies and then our federal form of constitutional

government further embraced the idea that sentencing is a fundamental part of the court process relating to criminal charges. *See, e.g.,* WAYNE R. LAFAVE, MODERN CRIMINAL LAW 12-13 (4th ed. 2006) (describing American state and federal sentencing systems as historically relying on determinations of judges or juries).

Thus, perhaps different from other nations, the United States has long rejected an administrative approach to punishment that allows penalties to be left open-ended or wholly determined by government agents outside of the courtroom. *Id.*; *see also e.g., Blakely v. Washington*, 542 U.S. 296, 313 (2004) ("every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment"); *U.S. v. Merric,* 166 F.3d 406, 409 (1st Cir. 1999) (court cannot defer to probation officer decision of whether fine should be imposed); *U.S. v. Johnson,* 48 F.3d 806, 809 (4th Cir. 1995) (improper for sentencing court to abdicate restitution determination); *U.S. v. Mike*, 632 F.3d 686, 695–96 (10th Cir. 2011) (sentencing court cannot delegate issues that "implicate significant liberty interests").

Yet, quite surprisingly, this Court has never squarely addressed the issue of whether there is a constitutional right to sentencing in a court of law. And now the State of Missouri seeks to reject this time-honored touchstone of our criminal justice system by allowing the courts to delegate their sentencing role to the executive branch of government.

Specifically, the Missouri Supreme Court has denied Norman – and all other *Miller-Montgomery*-impacted inmates – the right to a lawful sentencing in a court of law in the first instance. Instead it left punishment exclusively in the hands of

executive branch appointees and employee bureaucrats at MDOC. Such a process is highly unusual, deeply troubling, and threatening to basic fairness principles inherent in criminal proceedings the United States.

Accordingly, this Court should take certiorari to make constitutionally plain what has long been assumed: defendants in the United States are entitled to sentencing in a court of law in the first instance, and placing absolute sentencing discretion within an executive branch agency is improper. Rather, such a practice – as ordered by the Missouri Supreme Court's decision denying *Miller-Montgomery* relief in this case and further contemplated by Missouri S.B. 590 – should be found unconstitutional under the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution.

The right to court-based sentencing has been declared a "critical stage" of the criminal process. *Gardner v. Florida*, 430 U.S. 349 (1977). As a result, defendants are afforded the constitutional right to counsel and meaningful representation at sentencing hearings. *Id.*; *see also Mempa v. Rhay*, 389 U.S. 128 (1967) (constitutional right of counsel at probation revocation hearing); *McConnell v. Rhay,* 393 U.S. 32, 33 (1968) (right of counsel as essential to the integrity of the sentencing process).

In requiring the right to representation at sentencing, this Court explained "it is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." *Gardner*, 430 U.S. at 358. Thus, this Court continued, "[t]he defendant has a legitimate interest in the character of the procedure

which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process." *Id.* at 358.

However, parole proceedings are different. This is especially true in jurisdictions where there is no "liberty interest" in the right to release. *Cf. Greenholtz v. Inmates of Nebraska,* 442 U.S. 1, 12 (1979). Missouri is such a state. *Cavallero v. Groose*, 908 S.W.2d 133 (Mo. banc 1995).

Parole proceedings in Missouri do not follow due process norms. Rather, the Missouri Parole Board has been permitted almost absolute discretion – and secrecy – under Missouri law, as well as its own policies and practices. *See, e.g.,* MO. REV. STAT. § 217.690; *see also* MISSOURI PROCEDURES GOVERNING THE GRANTING OF PAROLES AND CONDITIONAL RELEASES (MDOC 2009) ("BLUE BOOK"), available at: http://doc.mo.gov/Documents/prob/Blue-Book.pdf.

The Missouri Parole Board does not even afford inmates actual hearings. Instead, they are given an "interview" at which they are prevented from accessing their own prison files, precluded from cross-examining those who have provided evidence against them, calling witnesses, or even being present in the room with the Parole Board members who will decide their fate. *See* MO. REV. STAT. § 217.690.2 ("the board shall have the offender appear before a hearing panel and shall conduct a personal interview with him, unless waived by the offender"); *see also e.g.,* 14 CSR 80-1.010 (2) ("all meetings of the Board of Probation and Parole are closed meetings"); 14 CSR 80-2.010 (denying inmates the opportunity to appear before the entire Board

who will make the decision in their case, but instead providing for an interview by a panel with one Board members and two MDOC staffers).

For these reasons Missouri is nationally known and has been long criticized for its lack of process and transparency during parole proceedings. *See* Jesse Bogan, *Missouri Parole Board Lumbers on in Secrecy with Unfilled Seats*, ST. LOUIS POST DISPATCH, Sept. 20, 2015; David Leib, *Missouri Parole Board Among the More Secretive Agencies*, SOUTHEAST MISSOURIAN, Mar. 15, 2011. Thus its parole proceedings stand in stark contrast to the kinds of due-process-based, on-the-record, public hearings afforded in connection with in-court sentencings. *See*, *e.g.,* FED. R. CRIM. PRO. 32; *see also* U.S. CONST., AMEND 6 (providing for public trial and right to counsel during criminal proceedings).

S.B. 590 does indicate that when deciding whether to keep a juvenile in prison until his or her death, the Parole Board should consider five factors including "subsequent growth and increased maturity." *See* App. C. But S.B. 590 provides no guidance at all for what these terms mean, where such evidence would come from, or how much weight – if any – should be given to each factor. Rather, all of the restrictions on the secrecy of the parole process would appear to apply under S.B. 590.

And, of course, there is no right to counsel at parole proceedings – even under S.B. 590. In fact, the Missouri Parole Board in policy and in practice largely ignores attorneys who seek to represent inmates. *See, e.g.* THE BLUE BOOK (making no reference whatsoever to the right or role of counsel during parole proceedings).

Yet, Senate Bill 590 provides that prosecutors are parties to S.B. 590 proceedings and appears to allow crime victims unfettered ability to share their views and objections to release. *See* App. C; *but see Bosse v. Oklahoma,* No. 15-9173, 2016 WL 5888333 (U.S. Oct. 11, 2016) (per curiam) (reiterating the "prohibition on characterizations and opinions from a victim's family members about the crime, the defendant, and the appropriate sentence").

Thus youthful offenders like Norman, their hope and their futures, have been left at the absolute mercy of what is little more than a star chamber in Missouri. Under S.B. 590 he has been given no meaningful opportunity to access or challenge evidence, call witnesses, or have someone advocate for him as they would at an open sentencing hearing in a court of law. *See, e.g.,* MO. R. CRIM. P. 29.07; *State v. Berry,* 168 S.W.3d 527 (Mo. App. W.D. 2005) (discussing limitations on unreliable evidence at sentencing).

While this kind of parole board consideration rather than in-court sentencing would be legally infirm in a run of the mill criminal matter, it is thrice unconstitutional when it comes to youthful offenders who are facing the possibility of living out the rest of their lives behind bars. This is because such defendants also have a constitutional right to (1) a specialized, individualized sentencing hearings as described in *Miller* and *Montgomery*, and (2) a determination beyond a reasonable doubt by a jury that the crime is not a reflection transient immaturity and the defendant is irreparably corrupt. Certiorari should be granted to make clear these important constitutional rights, too.

B. Individualized Sentencing Hearing Under *Miller*

In 2005, this Court banned death sentences for any youth, regardless of the nature of the crime. *Roper v. Simmons*, 543 U.S. 551 (2005). In *Graham v. Florida,* 500 U.S. 48 (2010), the Court prohibited life without parole ("LWOP") as a sentence for youth who were not found to have intentionally killed. In *Miller*, this Court further narrowed the class of juveniles who should not be granted release from prison. 132 S.Ct. at 2469. Holding that such a determination should be extremely rare, this Court banned mandatory LWOP prison terms, even in first-degree murder cases, and further required special proceedings in such cases before such harsh terms could be imposed. *Miller* at 2459.

Specifically, this Court explained that the Eighth Amendment "mandates...that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Id.* at 2471. The Court, therefore, intended an individualized process in a court of law that would ensure the vast majority of juvenile defendants receive punishment that allows a meaningful opportunity for release – even kids who have killed.

Last year, in *Montgomery v. Louisiana*, this Court was faced with the question of whether *Miller* should apply retroactively in the states. Beyond answering that question in the affirmative, this Court made clearer yet that courts must engage in a careful constitutional narrowing to cull the rare few youth who should remain in prison until death. The Court explained, "penological justifications for life without parole collapse in light of the distinctive attributes of youth," rendering life without

parole an unconstitutionally disproportionate punishment as to "all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Id*. at 734 (internal quotations and citation omitted).

More recently, this Court issued its decision in *Adams v. Alabama,* which similarly suggested a clear right to specialized sentencing processes in a court of law. *Adams*, 136 S.Ct. 1796 (2016). *Adams* was decided along with several consolidated matters where most of the youthful offenders had initially faced the death penalty, but whose sentences were converted to LWOP after the decision in *Roper*, 543 U.S. 551. In all of the cases, certiorari was granted, the judgments vacated, and the matters remanded for "further consideration in light of *Montgomery v. Alabama*." *Adams*, 136 S.Ct. at 1796-97.

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

Justices Alito and Thomas, who dissented in *Montgomery*, joined in a separate opinion that states in no uncertain terms:

> As a result of *Montgomery* and *Miller*, states must now ensure that prisoners serving sentences of life without parole for offenses committed before the age of 18 have the benefit of an individualized sentencing procedure that considers their youth and immaturity at the time of the offense.

Id. at 1797 (J. Alito and J. Thomas concurring).

This separate concurrence does suggest that in some juvenile homicide cases where death sentences were previously set aside, LWOP sentences might be upheld without yet another resentencing hearing. *Id.* at 1797-98. But in reaching this conclusion the Justices expressly noted the significance of the prior in-court fact-finding and sentencing proceeding to support such findings – even in this subset of the most serious homicide cases. That is, where the "original sentencing jury fulfilled the individualized sentencing requirement that *Miller* subsequently imposed" – including clear consideration of youth – then, and only then, might a resentencing hearing be avoided. *Id.* at 1798.

Taken together, these cases establish that only in a "rare case" of "irreparable corruption" will a LWOP sentence be constitutionally permissible. And such a determination must be made by way of a sentencing process in a court of law that is fair, transparent, and rooted in proper consideration of Eighth Amendment jurisprudence. Missouri law, as modified by S.B. 590 in response to the *Miller* and *Montgomery* decisions, fails to provide any such process or substantive protections. Thus the Missouri Supreme Court's decision denying resentencing based upon S.B. 590 is unlawful and unconstitutional.

The bottom line is that Norman is in the same position today as he was prior to the Missouri Supreme Court taking action on July 19 – he is still serving unconstitutional sentences of mandatory LWOP for a first-degree murder and consecutive *de facto* LWOP sentences on his non-homicide counts. And even if Petitioner is somehow given access to the Missouri Parole Board under S.B. 590, its current processes and proceedings do not come anywhere close to satisfying the constitutional mandates of *Graham*, *Miller,* and *Montgomery*.

C. *Miller*-related Jury Sentencing Rights

A grant of certiorari is also essential here because, as noted above, absent a finding by the sentencer of irreparable corruption, a juvenile convicted of murder may not be exposed to a LWOP sentence. *Miller* and *Montgomery* also preclude a juvenile from receiving a LWOP sentence unless the sentencer finds that the murders were not the result of transient immaturity. Unless both of these threshold findings are made adversely to the youthful offender, the maximum possible sentence that a juvenile can receive is a parole-eligible sentence that provides him or her with a meaningful opportunity for release based on demonstrated maturity and rehabilitation.

Given the magnitude of the interests at stake, and consistent with Supreme Court Sixth Amendment case law, a jury must make any such enhancement findings in the context of a public hearing – not a prison official behind closed doors. *See, e.g.*, *Ring v. Arizona*, 536 U.S. 584 (2002); *see also Apprendi v. New Jersey,* 530 U.S. 466 (2000); *Blakely*, 542 U.S. 296.

Indeed, the Missouri Supreme Court seemed to recognize as much in its decision in *State v. Hart*, which embraced a youth-centered jury sentencing process for defendants who were convicted of murder as children and placed a high burden on the prosecution. 404 S.W.3d 253. Yet, with its July 19 Order in this case, denying habeas corpus relief and deferring the outcome of this prosecution to an administrative agency, the Missouri Supreme Court appears to have retreated from this previously adopted, constitutional course.

Thus this Court should further clarify that the considerations of irreparable corrigibility and transient immaturity required by *Montgomery* must be made by a jury, beyond a reasonable doubt, before a child can be kept in prison until his death. *See* Sarah French Russell, *Jury Sentencing and Juveniles: Eighth Amendment Limits and Sixth Amendment Rights*, 56 B.C.L. Rev. 553 (2015).

II. Certiorari Should Be Granted to Create a Categorical Ban Under the Eighth and Fourteenth Amendments on Juvenile Life Without Parole Sentences – and Their Equivalents – in Accessorial Liability Cases

There is no question that 15-year-old Norman was unarmed at the time of the crime, did not actual kill the decedent, and in fact did not physically harm him in any way. Rather, he was used as a ploy and decoy in the course of a jewelry store robbery where his co-defendant – a man more than twice his age – ultimately shot and killed the store owner.

Therefore, this case presents the court with an ideal opportunity to address whether the Eighth Amendment imposes a categorical ban on LWOP sentences for juveniles who were convicted of murder as accomplices. In *Graham v. Florida*, 560

U.S. 48, this Court held that a sentence of life without parole is unconstitutional when imposed upon juveniles convicted of non-homicide offenses. The Court's Eighth Amendment analysis in *Graham* relied on the principle that such a severe and irrevocable punishment was not constitutionally appropriate for a juvenile offender who did not "kill or intend to kill." *Id*. at 69.

In determining the constitutionality of a punishment under the Eighth Amendment, courts must look to the "evolving standards of decency that mark the progress of a maturing society," recognizing the "essential principle" that "the state must respect the human attributes of those who have committed serious crimes." *Id*. at 59. In doing so, ultimately, a reviewing court must exercise its independent judgment, considering the culpability of the offender and the severity of the punishment. *Id*. at 67.

In *Miller*, two Justices expressed the view that the Eighth Amendment, as interpreted in *Graham*, categorically forbids a sentence of life without parole for a juvenile homicide defendant who neither "killed nor intended to kill the robbery victim." *Miller*, 132 S. Ct. at 2475-2477 (Breyer, J. concurring). The majority opinion in *Miller* also contains language supporting a categorical ban on imposing LWOP for juveniles convicted as accomplices to murder. *Id*., at 2470; *see also Graham*, 132 S.Ct. at 2475 ("when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability").

Thus, while this Court has stopped short of finding a categorical Eighth Amendment bar for accessories to homicide, it has made clear that sentencing a

juvenile to life without parole should be "uncommon . . and [limited to] the rare juvenile offender whose crime reflects irreparable corruption." *Miller*, 132 S. Ct. at 2469. A juvenile "non-triggerman" would seem, therefore, to fall outside of the zone of unique child defendants for whom death behind bars might be appropriate.

This is especially true in light of Missouri's law regarding accessorial liability. Missouri's Responsibility for the Conduct of Another Doctrine, MO. REV. STAT. § 562.041, considered an outlier across the country, presents constitutional problems both as written and interpreted. *See* John Decker, *The Mental State Requirement for Accomplice Liability in American Criminal Law*, 60 S.C. L. Rev. 237 (2008) (referring to Missouri as one of only a few states with an "ambiguous, novel, [or] unique" approach to *mens rea* in accomplice liability cases based upon its inconsistent application).

Section 562.041 adopts some parts of the Model Penal Code (MPC), making an individual criminally responsible for the conduct of another when, with the purpose of promoting a crime, he aids another person in its commission or planning. *See* Model Penal Code § 2.06 (3)(a)(ii). But it leaves out an important part of the MPC, which focuses on the level of culpability required in result crimes – like homicide. In such cases the MPC recognizes that before criminal liability may be shared between a principal and an accomplice, the accomplice also needs to form and retain the statutorily defined *mens rea* relating to the result.

Section 562.041 on its face not only fails to fully track the MPC, but fails to satisfy constitutional principles that dictate that an individual must form all

requisite states of mind for a charged crime and possess them at the time of its commission for liability to attach. *See Morissette v. U.S.,* 342 U.S. 246, 274 (1952). In the case of first degree homicide that *mens rea* is twofold: undertaking action *knowing* that a death will result, after having sufficiently *deliberating* about that specific outcome. MO. REV. STAT. § 565.020. Thus purposeful promotion should not be enough without these additional specific states of mind.

Also problematic, recent Missouri cases have held that merely *encouraging* a wrongdoer, hoping that the target crime will result, can saddle an individual with the same level of culpability as the actual criminal actor or principal. *See, e.g.*, *State v. Thomas*, 387 S.W.3d 432 (Mo. App. W.D. 2013) (evidence sufficient to find defendant "was aiding or encouraging" the principals); *State v. Wilson*, 359 S.W.3d 60, 66 (Mo. App. W.D. 2011) ("There is no particular act necessary to establish accomplice liability; mere encouragement is enough"); *State v. Smith,* 229 S.W.3d 85, 93 (Mo. App. W.D. 2007) (accomplice liability satisfied with showing that defendant "'aided or encouraged' [co-defendant's] conduct constituting the offense").

This watered-down version of acting in concert liability is applied in Missouri even in the murder context. For example, in *State v. Grim*, the jury was instructed that if it found that "with the purpose of promoting or furthering the commission of [the] murder in the second degree, the defendants acted together with or aided *or encouraged* another person in committing that offense," it could convict the defendant of the same murder. *See State v. Grim,* 854 S.W.2d 403,

411 (Mo. 1993) (emphasis added). In finding the evidence sufficient in that case to uphold the conviction, the Court implicitly approved that charge.

But such a charge – criminalizing mere encouragement – could result in guilty findings for ordinary bystanders or those who rally or rouse a wrongdoer before an act. This can unfairly ratchet up culpability for persons who merely exercise poor judgment through goading, get caught up in the strong impulses of a crowd, or who are simply trying to save face or feign bravery. And, of course, all of these possibilities are especially strong when it comes to youth. Yet Section 562.041 is simply applied to juveniles – even in murder cases – as if they were miniature adults.

In fact, concepts underlying accessory liability theory – such as those relating to appropriate conduct, agreements, and risk assessment – mean different things for young people. *See id.* What might be understood as active promotion or aiding by an adult in a criminal act cannot be viewed the same for a child. Furthermore, most children do not have the same bargaining and negotiating power as adults (thus, for example, their inability to contract as a matter of law). *See* MO. REV. STAT. § 435.051 (competent to contract at age eighteen). As this Court has recognized over time, children are simply not on the same level as adults. It is impossible to see, therefore, how they can reach voluntary mutual agreement with adult criminal actors.

Given the immature mindset of teens, their inability to appreciate the consequences of their actions, and their impetuosity, they simply are not as self-

aware and self-monitoring as adults. It is inconsistent with due process norms, therefore, to treat them as equal partners as a matter of law in the context of accessorial and accomplice liability. Indeed, it seems utterly absurd that a child would be deemed *responsible for* the conduct of an adult co-defendant.

Section 562.041 renunciation provisions further demonstrate problems of applying Missouri accessorial liability law to children as adult actors – particularly in the context of robberies that result in death. This subdivision provides that an individual will not be held responsible for the criminal conduct of his cohorts if, "[b]efore the commission of the offense he abandons his purpose and gives timely warning to law enforcement or makes other proper effort to prevent the commission of the offense." Mo. Rev. Stat. § 562.041(2)(3).

Inherent in this defense are basic assumptions about autonomy, self-regulation, freedom of movement, and the like. While it might be safe to assume a grown man or woman will possess such attributes and abilities, the same cannot be said for teenagers – much less teenagers acting under orders of a predatory adult twice their age. Thus Section 562.041 unfairly denies a defense to many young people that would be available to most adults.

Perhaps recognizing these issues, although somewhat tragically, S.B. 590 prohibits the imposition of LWOP sentences for juveniles convicted as accomplices. It precludes a juvenile convicted of first degree murder ***in the future*** from receiving LWOP unless the sentencer finds beyond a reasonable doubt that the victim's physical injuries were personally inflicted by the defendant and that those injuries

cause the death of the victim. *See* App C. Thus if Norman was sentenced today in Missouri for his 1991 actions, life without parole would not be a possibility.

This newly-enacted statutory provision, therefore, reflects the inescapable fact that, as articulated in *Miller* and *Montgomery*, a juvenile convicted as an accomplice does not present one of those rare cases where LWOP would be a proportionate and constitutional punishment. And Missouri is not alone in making this change. Further reflecting the direction of change towards a categorical bar for accomplices, after *Miller* North Carolina also enacted a statute prohibiting life without parole for juveniles convicted as accomplices to a murder. N.C. Gen. Stat. § 15A-1340.19B(a)(1).

Thus, discretionary review is warranted to allow the court to address this important question that *Miller* left unanswered. Even if a categorical bar for child accomplices is not established at this time, at the very least this Court should provide guidance for the appropriate constitutional process to be used for determining whether a child accomplice is sufficiently culpable to be eligible for life without parole. *Cf. Enmund v. Florida,* 458 U.S. 782, (1982); and *Tison v. Arizona,* 481 U.S. 137 (1987).

III. Certiorari Should Be Granted to Declare that Evolving Standards of Decency Now Demand that No Person Under Sixteen Years of Age Should Be Eligible for a Life Without Parole Prison Term or its Equivalent Consistent with the Eighth and Fourteenth Amendments

In the four years since *Miller* was decided, a great deal has occurred in the United States to reshape views and values around youth, policing, and prosecution. From events in Ferguson, to the 2014 shooting death of 12-year-old Tamir Rice by police, to the aggressive law enforcement take-down of a 14-year-old bikini-clad Black

girl at a community pool in Texas, we are now different as a country. *See* Carole Cole Frowe, et al., *Jarring Image of Police Use of Force at Pool Party*, N.Y. Times, June 8, 2015; Leila Atassi, *Cleveland City Council Members Speak Out on Shooting Death of 12-Year-Old Tamir Rice*, Cleveland.com, Nov. 25, 2014.

Many who were previously numb to the ways in which kids – too frequently, kids of color – are treated harshly by the criminal justice system have now awoken. Peoples' consciousness have been raised. And even those previously seen as tough-on-crime have begun to call for more patience, mercy, and rehabilitative options for our nation's children, citing unnecessary societal costs. *See, e.g,* David Dagan, et al., *The Conservative War on Prisons,* WASHINGTON MONTHLY, Nov./Dec. 2012 (quoting conservatives like Newt Gingrich calling for downsizing prison populations, in part because of costs); *Bill Reforming Florida's Juvenile Justice System Has Some Calling for More Reform,* Right on Crime Website, Feb. 2014 (reporting James Madison Institute supports a new criminal law that "saves money and ensures positive outcomes for children"), available at: http://rightoncrime.com/2014/02/bill-reforming-floridas-juvenile-justice-system-has-some-calling-for-more-reform/.

At this point it seems fair to say most in our country believe, regardless of the crime, the youngest teens generally should be spared prosecution in adult courts – much less face the possibility of spending the rest of their lives in prison. Thus the instant case, involving Norman Brown's involvement in a crime when he was just 15 years old – presents an opportunity for this Court to reach another issue left

unaddressed in *Miller*: whether kids under 16 years of age should be categorically excluded from LWOP sentences.

The idea that youth under the age of 16 are especially vulnerable and should not be held to the same standards as adults has deep resonance in American legal history. For instance, in most states an individual must be at least 18 years old to marry without parental consent. However, 38 states allow for youth to marry once they reach the age of 16, if they have the consent of their guardians. Only three states – including Missouri – allow this exception to apply to younger teens. *See* MARRIAGE LAWS OF THE FIFTY STATES, DISTRICT OF COLUMBIA, AND PUERTO RICO, Cornell Law Information Institute, available at: https://www.law.cornell.edu/wex/table_marriage.

Similarly, most jurisdictions do not afford young teens educational decision-making power. And while many allow youth to withdraw themselves from educational services at the age of 16, none allow for 15-year-olds to do the same. *See* COMPULSORY SCHOOL AGE REQUIREMENTS, NATIONAL CENTER FOR SCHOOL LAW WEBSITE (JUNE 2010), http://www.ncsl.org/documents/educ/ECSCompulsoryAge.pdf.

Even this Court's jurisprudence has at times recognized a legal difference between 15 and 16-year-olds. *See Thompson v. Oklahoma,* 487 U.S. 815 (1988); *Stanford v. Kentucky,* 492 U.S. 361 (1989).

In past cases involving juveniles this Court has frequently looked to scientific developments to better understand emerging standards for youth in creating constitutional cut-offs. In particular it has relied heavily both brain science and behavioral psychology to different children from adults. But biological science may

provide some further insight – and distinctions – among teens that has yet to be tapped. In particular, most young teens are still developing such that they have not passed through puberty and taken on the physical attributes of an adult.

According to medical experts, most 15-year-old children still have not competed the full pubescent cycle. *See* PARENTS & TEACHERS, TEEN GROWTH AND DEVELOPMENT – YEARS 11 TO 14, PALO ALTO MEDICAL FOUNDATION WEBSITE, available at: http://www.pamf.org/parenting-teens/health/growth-development/pre-growth.html. That is because for "girls, puberty begins around ages 10 or 11 and ends around age 16." Id. "Boys enter puberty later than girls – usually around age 12 – and it lasts until around ages 16 or 17." Id.

And, as noted, standards in our modern society appear to have greatly evolved since this Court's decision in *Miller* in June 2012. *See* AKIVA LIEBERMAN, ET AL., REDUCING HARMS TO BOYS AND YOUNG MEN OF COLOR FROM CRIMINAL JUSTICE SYSTEM INVOLVEMENT at 19 (URBAN INSTITUTE, Feb. 2015). There is now a growing emphasis on "redemption" and "re-entry" for boys of color – rather than permanent incapacitation by the justice system. *Id.*

Moreover, the recent emergence of the fields of evidence-based, age-appropriate, and trauma-informed juvenile justice practices recognize that many young teens who commit serious crimes are actually victims of traumas that reflect a need for specialized treatment in light of their specific level of development, rather than punishment. *See Essential Elements of a Trauma-Informed Juvenile Justice System at 9,* THE NATIONAL CHILD TRAUMATIC STRESS NETWORK WEBSITE

("Organizations should recognize that traumatized youth may have specific needs related to their . . . developmental level and should deliver services that assist highly vulnerable sub-groups of justice-involved youth"), available at: http://www.nctsn.org/sites/default/files/assets/pdfs/jj_ee_final.pdf

For all these reasons, it would be just and appropriate for this Court to take certiorari to ban the use of life without parole sentences – and their equivalents – in the cases of kids who are under the age of 16 at the time of the offense.

CONCLUSION

For the foregoing reasons, Norman Brown requests that this Court grant the petition for certiorari.

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Respectfully submitted,

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