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Missouri's Path Towards "A Meaningful Opportunity for Release." Should Remedying Unconstitutional Sentences Permit Judicial Review of Parole Board Decisions?

Kristen S. Spina

MISSOURI'S PATH TOWARDS "A MEANINGFUL OPPORTUNITY FOR RELEASE." SHOULD REMEDYING UNCONSTITUTIONAL SENTENCES PERMIT JUDICIAL REVIEW OF PAROLE BOARD DECISIONS?

INTRODUCTION

Access to the courts to challenge agency action is a "vital component of the administrative system" both federally and within the states.[1] Moreover, judicial review protects against "arbitrary power" and "improper or illegal administrative action."[2] Missouri's legislature has statutorily limited judicial review of parole board decisions denying release to eligible prisoners.[3] The state judiciary has acquiesced to this jurisdictional limitation in a few cases.[4] The Department of Corrections ("DOC") fits organizationally within the Executive branch in Missouri as an administrative agency.[5] The Division of Probation and Parole is a subset of the Missouri DOC.[6] Aside from explicit statutory provisions addressing judicial review, the Missouri Administrative Procedure Act ("MAPA") also provides a path to judicial review of administrative decisions.[7] However, Missouri courts have held that parole denials fall outside the agency decisions included within the general MAPA judicial review provisions.[8] In the most recent of these cases, *Ladd v. Board of Probation and Parole*, the court of appeals reasoned that because the statutes regulating the parole board are not

1. William McGrath et al., *Project: State Judicial Review of Administrative Action*, 43 ADMIN. L. REV. 571, 577 (1991).

2. *Id.* at 577, 589.

3. MO. REV. STAT. § 217.670(3) (2018) ("The orders of the board shall not be reviewable except as to compliance with the terms of sections 217.650 to 217.810 or any rules promulgated pursuant to such section.").

4. Smith v. Bd. of Prob. & Parole, 743 S.W.2d 123, 124 (Mo. Ct. App. 1988); State *ex rel.* Michell v. Dalton, 831 S.W.2d 942, 946 (Mo. Ct. App. 1992); Cooper v. Bd. of Prob. & Parole, 866 S.W.2d 135, 137 (Mo. 1993); Ladd v. Bd. of Prob. & Parole, 299 S.W.3d 33, 42 (Mo. Ct. App. 2009).

5. *Guide to Missouri's Government*, MO.GOV, https://www.mo.gov/government/guide-to-missouris-government/ [https://perma.cc/7RPE-383S].

6. *Probation and Parole*, MO. DEP'T OF CORR., https://doc.mo.gov/divisions/probation-parole [https://perma.cc/8ETB-H5WJ].

7. MO. REV. STAT. § 536.100 (2018); Alfred S. Neely IV, *Administrative Practice and Procedure*, *in* 20 MO. PRAC. SERIES § 3:2 (4th ed., 2006) (The Missouri Practice Series refers to the Missouri Administrative Procedure Act as "the MAPA," and this Note will use the same nomenclature.).

8. *Ladd*, 299 S.W.3d at 37; MO. REV. STAT. § 536.100.

silent with regards to judicial review, and in fact specifically address and proscribe review with few exceptions, the MAPA judicial review provisions do not apply.[9] Additionally, in Missouri, there is traditionally no recognized liberty interest in parole.[10] Parole is considered simply a grace of the legislature. Without any liberty interest, parole determinations are free to operate outside the due process of law otherwise guaranteed under the Fourteenth Amendment of the United States Constitution and article I, section 10 of the Missouri Constitution.[11]

The law may seem settled regarding judicial review of parole determinations and liberty interests in parole, but what if a sentence is unconstitutional? What if the United States Supreme Court has declared that a particular sentence violates the Eighth Amendment, and prisoners under that sentence are entitled to a meaningful opportunity for release? These are the questions that undoubtedly affect the ninety-four prisoners in Missouri convicted of homicide offenses prior to the age of eighteen, now serving life in prison without the possibility of parole.[12] In *Miller v. Alabama* and its retroactive application in *Montgomery v. Louisiana*, the Supreme Court held that mandatory sentences of life without the possibility of parole ("LWOP") imposed on juvenile offenders are unconstitutional.[13] Do these prisoners, currently serving illegal sentences, have a liberty interest in release or parole? And if so, should they be entitled to due process including judicial review of parole denial?

This Note analyzes these questions with regard to the specific class of *Miller*-impacted prisoners. In order to orient this analysis, Part I will review the Supreme Court's Eighth Amendment jurisprudence, most specifically *Roper*, *Graham*, *Miller*, and *Montgomery* and evaluate the origin of a liberty interest held by this class. Next, Part II will discuss the permissible state remedies under *Miller*, the Missouri legislature's response, and current litigation regarding the validity of that response. Then, Part III will provide an overview of the paths to judicial review of executive agency decisions in Missouri and argue that these *Miller*-impacted youthful offenders are entitled to judicial review of parole board denials under Missouri's statutory scheme, as well as the Missouri and

9. *Ladd*, 299 S.W.3d at 37.

10. *Id*. at 39; Delay v. Bd. of Prob. & Parole, 174 S.W.3d 662, 665 (Mo. Ct. App. 2005).

11. U.S. CONST. amend. XIV, § 1; MO. CONST. art. I, §§ 10, 21.

12. *50-State Examination*, THE ASSOC. PRESS (Jul. 31, 2017), ap.org/explore/locked-up-for-life/50-states [https://perma.cc/68SW-N5HX]. The MacArthur Justice Center approximates eighty incarcerated individuals are impacted by the *Miller* decision. Second Amended Complaint for Declaratory & Injunctive Relief at 13, Brown v. Precythe, No. 17-cv-4082, 2017 WL 4980872 (W.D. Mo. Oct. 31, 2017), ECF No. 65, https://www.macarthurjustice.org/wp-content/uploads/2018/06/65_Second-AMENDED-COMPLAINT.pdf [https://perma.cc/G6WA-UNR5] [hereinafter "Brown Complaint"].

13. Miller v. Alabama, 567 U.S. 460, 465 (2012); Montgomery v. Louisiana, 136 S. Ct. 718, 736 (2016).

federal constitutions. Finally, Part IV will address possible concerns with this approach to judicial review of parole determinations for *Miller*-impacted offenders.

I. THE SUPREME COURT'S EIGHTH AMENDMENT JURISPRUDENCE AND CATEGORICAL RULES

A series of Supreme Court decisions in the early to mid-2000s involve Eighth Amendment analysis focused on juvenile offenders in the criminal justice system.[14] These cases illuminated the various problems with imposing society's severest sentences on juvenile offenders. The Court elected to apply the Eighth Amendment through categorical rules, as opposed to case-by-case evaluation, for youthful offenders.[15] The cases substantially build on one another, extending Eighth Amendment categorial rules in capital sentencing to different kinds of sentences imposed on juveniles from the death penalty to LWOP for nonhomicide offenses and eventually to LWOP for homicide offenses.

In *Roper v. Simmons*, originating in Missouri and ultimately decided in 2005, the Court held that the Eighth and Fourteenth Amendments prohibited the death penalty as a form of punishment for juvenile offenders, those who committed a crime prior to reaching age eighteen.[16] In doing so, the Court furthered its Eighth Amendment jurisprudence.[17] In its analysis in *Roper*, and a remaining theme in subsequent Eighth Amendment cases, the Court referred to "the evolving standards of decency that mark the progress of a maturing society" to carve out categorical ineligibility for harsh punishments following a two-prong approach: (1) the objective indicia of consensus among the many States, and (2) the Court's own subjective analysis (i.e. examining the nature of the offense, the offender's characteristics, and any legitimate penological goals).[18] In expounding this principle, the Court asserted that children are constitutionally different and relied on neuroscientific data and commonly known features of youth to emphasize three general differences between juveniles under eighteen and adults: (1) lack of maturity creating an inability to evaluate consequences; (2) vulnerability to negative influence and outside pressure; and (3) transitory

14. Roper v. Simmons, 543 U.S. 551, 555 (2005); Graham v. Florida, 560 U.S. 48, 52–53 (2010); *Miller,* 567 U.S. at 469; *Montgomery,* 136 S. Ct. at 736.

15. *Roper*, 543 U.S. at 572; *Graham*, 560 U.S. at 61–62; *Montgomery*, 136 S. Ct. at 734 (explaining that because *Miller* determined juvenile LWOP excessive for all but the rare juvenile offender who demonstrates irreparable corruption, *Miller* rendered LWOP unconstitutional for "a class of defendants," juvenile offenders whose crimes reflect transient immaturity of youth "because of their status").

16. *Roper*, 543 U.S. at 578.

17. *Id.* at 560; U.S. CONST. amend. VIII.

18. *Roper*, 543 U.S. at 561, 564 (quotation omitted); *accord* Perry L. Moriearty, *The Trilogy and Beyond*, 62 S.D. L. REV. 539, 541 (2017).

personality traits that are less solidified than that of adults.[19] The Court further explained that laws in every state prohibiting minors from certain activities like voting or serving on juries recognize the irresponsibility and immaturity of juveniles.[20] The Court also explicated that the susceptibility of juveniles to outside pressure results from their lack of autonomy and control over their immediate environment within their families, schools, or set of resources.[21] Moreover, the disparity in juvenile and adult cognitive ability is long recognized and grounded in modern neuroscientific evidence of the incomplete development of the prefrontal cortex in adolescents.[22] The ability to make rational decisions, exhibit self-control, solve problems, plan, and regulate aggression are tied to the functioning of the prefrontal cortex.[23] The Court recognized this difference in brain development between juveniles and adults resulting in a finding of diminished culpability on behalf of juveniles and justifying a distinction between juvenile offenders from adults especially for the purposes of punishment.[24] Notably, the Court explained, "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."[25] Clearly, the Court takes seriously the notion that juvenile offenders are uniquely situated to mature and rehabilitate from the transient traits of youth.[26] This disposition impacted the Court's subsequent decisions in *Graham, Miller*, and *Montgomery*.

In 2010, the Court decided *Graham v. Florida*, another Eighth Amendment case evaluated on the basis of "evolving standards of decency" and continual recognition of the characteristics that differentiate adolescent from adult offenders.[27] In *Graham*, the Court announced a new categorical rule outside the death penalty context, under the Eighth Amendment, banning LWOP as a

19. Roper v. Simmons, 543 U.S. 551, 569 (2005); Kristen Bell, *A Stone of Hope: Legal and Empirical Analysis of California Juvenile Lifer Parole Decisions,* 54 HARV. C.R.-C.L. L. REV. 455, 461 (2019); Moriearty, *supra* note 18, at 545; Tiffani Darden, *Constitutionally Different: A Child's Right to Substantive Due Process*, 50 LOY. U. CHI. L.J. 211, 220 (2018).

20. *Roper*, 543 U.S. at 569; Bell, *supra* note 19, at 461–62.

21. *Roper*, 543 U.S. at 569; Bell, *supra* note 19, at 461–62.

22. Elizabeth Kingston, *Validating* Montgomery*'s Recharacterization of* Miller*: An End to LWOP for Juveniles*, 38 U. LA VERNE L. REV. 23, 26–27 (2016); Mary Marshall, Note, Miller v. Alabama *and the Problem of Prediction*, 119 COLUM. L. REV. 1633, 1661 (2019).

23. Kingston, *supra* note 22, at 28.

24. Roper v. Simmons, 543 U.S. 551, 570 (2005); Shawna Quast, Note, *Reasonable Minds May Differ: The Application of* Miller *and* Graham *to Consecutive Sentences for Juvenile Offenders in Missouri,* 83 MO. L. REV. 835, 844 (2018).

25. *Roper*, 543 U.S. at 573.

26. *Id.*; Lila Meadow, *Realizing "Meaningful" in Maryland: A Call for Reforming Maryland's Parole System in Light of* Graham, Miller, *&* Montgomery*,* 48 U. BALT. L. F. 59, 59–60 (2018).

27. Graham v. Florida, 560 U.S. 48, 48, 82 (2010).

possible sentence for non-homicide juvenile offenders.[28] The Court had not yet extended Eighth Amendment proportionality principles beyond capital cases.[29] The analysis set forth in *Roper* was heavily relied upon by the Court in this decision. The Court reiterated the underdeveloped sense of responsibility, vulnerabilities, and unformed character inherent to youthful offenders.[30] Additionally, the Court noted that developments in psychology and brain science continue to expose these fundamental differences between juveniles and adults.[31] Another area emphasized by the Court was the severity of the LWOP sentence applied to juveniles, likening it to the death penalty, ultimately resulting in a "death-behind-bars" sentence.[32] While the LWOP sentence does not execute the prisoner, it "deprives the convict of the most basic liberties without giving hope of restoration."[33]

Further, the Court evaluated each possible penological justification for the imposition of LWOP sentences in this context and found that this most severe juvenile sentence served no valid penological goal (retribution, deterrence, incapacitation, or rehabilitation).[34] The Court recognized retribution as a legitimate reason to punish, but explained that the core of the retribution rationale is to directly relate a criminal sentence to an offender's personal culpability.[35] Referring back to the second difference between juveniles and adults announced in *Roper*, juveniles lack control over their environment and have less opportunity to remove negative influences in their lives which reduces their overall culpability.[36] Relying on the logic that transient factors of youth render juvenile offenders less culpable than their adult counterparts, the Court

28. *Id.*; Alice Reichman Hoesterey, *Confusion in* Montgomery*'s Wake: State Responses, the Mandates of* Montgomery*, and Why a Complete Categorical Ban on Life Without Parole for Juveniles is the Only Constitutional Option*, 45 FORDHAM URB. L.J. 149, 155 (2017).

29. Hoesterey, *supra* note 28, at 155.

30. *Graham*, 560 U.S. at 68; Hoesterey, *supra* note 28, at 155.

31. *Graham*, 560 U.S. at 68; Hoesterey, *supra* note 28, at 155; Darden, *supra* note 19, at 220.

32. Graham v. Florida, 560 U.S. 48, 70 (2010); Mae C. Quinn, *Constitutionally Incapable: Parole Boards as Sentencing Courts*, 72 SMU L. REV. 565, 571–72 (2019); CAROL S. STEIKER & JORDAN M. STEIKER, COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT 313 (2016) (recognizing the terms "living death" or "death in prison" to describe LWOP sentences); s*ee also* MARC MAUER & ASHLEY NELLIS, THE MEANING OF LIFE 131 (2018) (using the term "death in prison").

33. *Graham*, 560 U.S. at 69–70.

34. *Id.* at 71–75; Marshall, *supra* note 22, at 1639; Megan Annitto, Graham*'s Gatekeeper and Beyond: Juvenile Sentencing and Release Reform in the Wake of* Graham *and* Miller*,* 80 BROOK. L. REV. 119, 124 (2014); Brooke Wheelwright, Note, *Instilling Hope: Suggested Legislative Reform for Missouri Regarding Juvenile Sentencing Pursuant to Supreme Court Decisions in* Miller *and* Montgomery, 82 MO. L. REV. 267, 280 (2017); Eileen Hirsch & Martha Askins, *Juvenile Lifers: Reforming Extreme Sentences*, WIS. LAW., Jan. 2019, at 15 (2019).

35. *Graham*, 560 U.S. at 71.

36. Roper v. Simmons, 543 U.S. 551, 569 (2005); Bell, *supra* note 19, at 461.

found the case for retribution to be undermined and relatively weak.[37] Rejecting deterrence as a legitimate penological justification for juvenile LWOP, the Court reiterated the first key difference between juvenile and adult offenders: that juveniles are less likely to consider possible consequences and punishment when making decisions (especially when the punishment is rarely effected).[38] Incapacitation, another recognized rationale for imprisonment, was also rejected by the Court as a justification for juvenile LWOP sentences for non-homicide offenders.[39] The Court reasoned that lifetime incapacitation incorrectly assumes that the juvenile offender will remain a danger to society for their entire future.[40] This flawed assumption is inconsistent with the modern understanding of the characteristics of youth emphasized in both *Roper* and *Graham*.[41] Lastly, the Court disposed of rehabilitation as a justification for juvenile LWOP, tying back to the third primary difference explained in *Roper*.[42] Considering their unformed character, heightened capacity for change, and lessened moral culpability, denying a juvenile the right to reenter the community is not appropriate, and instead discourages them from reforming in prison.[43]

Finding no proper penological justification for these LWOP sentences, the Court mandated a remedy for non-homicide juvenile offenders and ordered that a State must provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[44] While *Graham* did not require a State to guarantee the offender's eventual release, reserving the remote possibility that a person who committed horrifying crimes could be irredeemable, *Graham* did guarantee that each of these offenders receive a realistic chance to demonstrate maturity and reform.[45]

In 2012, the Court reviewed *Miller v. Alabama*, which consolidated two cases involving fourteen-year-old defendants sentenced to LWOP for homicide offenses.[46] The Court held that imposing a mandatory LWOP sentence for homicide offenses committed while under the age of eighteen also violated the Eighth Amendment's prohibition on cruel and unusual punishment.[47] In coming to this conclusion, the Court inevitably relied on its precedent in *Roper* and

37. Bell, *supra* note 19, at 462 (citing *Roper*, 543 U.S. at 571); Wheelwright, *supra* note 34, at 281.

38. Graham v. Florida, 560 U.S. 48, 72 (2010).

39. *Id*.

40. *Id.*; Hirsch & Askins, *supra* note 34, at 15.

41. *Graham*, 560 U.S. at 72–73; Megan McCabe Jarrett, *Stifling the Shot at a Second Chance: Florida's Response to* Graham *and* Miller *and the Missed Opportunity for Change in Juvenile Sentencing*, 45 STETSON L. REV. 499, 525 (2016).

42. Roper v. Simmons, 543 U.S. 551, 570 (2005); Bell, *supra* note 19, at 461–62.

43. Graham v. Florida, 560 U.S. 48, 74 (2010); Wheelwright, *supra* note 34, at 282.

44. *Graham*, 560 U.S. at 75.

45. *Id.* at 79.

46. 567 U.S. 460, 460 (2012); Marshall, *supra* note 22, at 1641.

47. *Miller*, 567 U.S. at 489; Hoesterey, *supra* note 28, at 156; Quast, *supra* note 24, at 843.

Graham establishing that children are constitutionally different from adults in criminal sentencing.[48] The characteristics of youth—immaturity, irresponsibility, recklessness, and impetuosity—also resurfaced in the Court's evaluation of the constitutionality of LWOP sentences for juvenile homicide offenders in *Miller*.[49] Familiarly, the Court relied on neuroscientific evidence, refutation of any valid penological justification, and the unique similarities of LWOP to the death penalty as society's harshest available punishments.[50] While *Graham* dealt with less severe crimes, the Court in *Miller* recognized that *Graham's* axioms regarding juveniles (their transient characteristics of youth, vulnerabilities, and ability to mature and rehabilitate) were not crime-specific.[51]

The Court ultimately held that imposing mandatory LWOP sentences on juvenile offenders convicted of homicide, without consideration of age and characteristics of youth, violated the Eighth Amendment.[52] Thus, the Court mandated an individualized sentencing process, where mitigating factors of youth must be considered before imposing LWOP on juvenile homicide offenders.[53] Additionally, the Court emphasized that with this individualized sentencing approach the mitigating youthful qualities considered should "counsel against" imposition of LWOP for juveniles, and LWOP should be "uncommon."[54] Without directly announcing a categorical rule in *Miller*, the Court reiterated its principle in *Graham*: that a State must provide some meaningful opportunity to obtain release grounded in maturity and rehabilitation, now on behalf of a juvenile homicide offender.[55]

In 2016, *Montgomery v. Louisiana* clarified the retroactive applicability of *Miller*.[56] In *Montgomery*, the Court announced that substantive rules set forth in precedent regarding categorical constitutional guarantees eliminate the State's power to impose certain criminal laws or punishments.[57] Further, *Montgomery* made clear that if a State tries to enforce a penalty deemed unconstitutional, the

48. *Miller*, 567 U.S. at 471; Hoesterey, *supra* note 28, at 156; Quast, *supra* note 24, at 843; Jarrett, *supra* note 41, at 508.

49. *Miller*, 567 U.S. at 472; Kingston, *supra* note 22, at 52.

50. *Miller*, 567 U.S. at 471–77 (finding no stark difference from the penological discussion set forth in *Graham* even though that analysis initially applied to non-homicide offenses); Hirsch & Askins, *supra* note 34, at 15; Kingston, *supra* note 22, at 52–53; Quinn, *supra* 32, at 571–72.

51. Miller v. Alabama, 567 U.S. 460, 473 (2012); Kingston, *supra* note 22, at 53.

52. *Miller*, 567 U.S. at 489; Sarah French Russell & Tracy L. Denholtz, *Procedures for Proportionate Sentences: The Next Wave of Eighth Amendment Noncapital Litigation,* 48 CONN. L. REV. 1121, 1127–28 (2016).

53. Quinn, *supra* note 32, at 572; John R. Mills et al., *Juvenile Life Without Parole in Law and Practice: Chronicling the Rapid Change Underway*, 65 AM. U. L. REV. 535, 544 (2016).

54. *Miller*, 567 U.S. at 479–80; Sarah French Russell, *Jury Sentencing and Juveniles*: *Eighth Amendment Limits and Sixth Amendment Rights*, 56 B.C. L. REV. 553, 554 (2015).

55. *Miller*, 567 U.S. at 479.

56. 136 S. Ct. 718, 734 (2016).

57. *Id.* at 729.

resulting sentence is unlawful.[58] The Court used these principles to explain the substantive rule announced in *Miller* and its necessary retroactive application.[59]

Additionally, *Montgomery* reiterated some of the most important takeaways from *Miller*. The Court in *Montgomery* explained that LWOP sentences are disproportionate for all but the rarest of children "whose crimes reflect 'irreparable corruption'" or "permanent incorrigibility,"[60] and all other juvenile offenders subject to this illegal sentence should receive "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[61] The Court held that imposition of LWOP sentences on juvenile offenders whose crimes reflect transient immaturity (as compared to those rare children deemed irreparably corrupt) does, indeed, deprive this "class" of a substantive right.[62] While the Court seemed to expressly denounce a categorical bar to LWOP sentences for juvenile homicide offenders in *Miller*, the Court in *Montgomery* claimed that *Miller* did create a categorical ban on LWOP for all juveniles except the rare, permanently incorrigible youth.[63] *Montgomery* also upheld *Miller's* procedural requirement that a sentencer must "consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence."[64]

Importantly, the opinion in *Montgomery* contains dicta that provides *Miller* violations may be remedied by allowing juvenile homicide offenders to be considered for parole rather than solely relitigating sentences.[65] In the Court's view, this remedy could ensure that juveniles whose crimes reflect transient immaturity, and who have since matured, will not be forced to serve disproportionate and unconstitutional sentences.[66] Immediately after suggesting parole eligibility as a conceivable remedy for *Miller*-impacted prisoners, the Court reiterated the idea at the core of *Miller* that "the opportunity for release *will* be afforded" to those juvenile offenders, who even having committed heinous crimes, demonstrate their capacity for change.[67] The Court concluded

58. *Id.* at 729–30.

59. *Id.* at 734, 736.

60. *Id.* at 726, 734.

61. Miller v. Alabama, 567 U.S. 460, 479 (2012); Montgomery v. Louisiana, 136 S. Ct. 718, 735 (2016).

62. *Montgomery*, 136 S. Ct. at 734.

63. *Id.* (requiring that permanent incorrigibility be determined under the individualized sentencing procedural requirement announced in *Miller*); Hoesterey, *supra* note 28, at 160.

64. *Montgomery*, 136 S. Ct. at 734.

65. *Id.* at 736; Quinn, *supra* note 32, at 574 (noting this "highly unusual turn in law" poses a deeply problematic practice wherein a state executive branch agency has the power to decide the appropriate prison sentence in an individual case as a remedy to a constitutional violation); Bell, *supra* note 19, at 463 (emphasizing that this dicta "is in deep tension with the Court's decades-old jurisprudence on parole.").

66. Montgomery v. Louisiana, 136 S. Ct. 718, 736 (2016).

67. *Id.* (emphasis added).

that prisoners like Montgomery must be afforded the opportunity to demonstrate their crimes did not signal irreparable corruption, and, more significantly, if the juvenile offender does not demonstrate such corruption, their hope for life outside of prison "*must* be restored."[68]

II. STATE REMEDIES UNDER *MILLER/MONTGOMERY*

Miller and *Montgomery* do little to announce strict requirements or guidance for states to retroactively remedy these unconstitutional LWOP sentences. In *Montgomery*, the Court asserts that *Miller* does not require a State to relitigate sentences or convictions in every juvenile LWOP case.[69] In dicta, the Court imagines that parole eligibility may be a potential option to remedy the illegal juvenile LWOP sentences.[70] The Court did make clear that within the scope of any compliant resentencing proceeding, the factors of youth and attendant circumstances of the crime must be considered to deliver a meaningful opportunity for release.[71] Resolving the issue of how to effectively remedy these illegal sentences has been left to the discretion of each state.

A. Missouri Legislature's Response

Based on the Supreme Court's ruling in *Miller*, and its retroactive application in *Montgomery*, the Missouri legislature created a new list of ten sentencing factors for judges to consider in a jury-waived sentencing hearing or for jury instructions.[72] The language in *Miller* and *Montgomery* directly influenced the sentencing factors enumerated by the Missouri legislature. The factors urge the consideration of the defendant's culpability in light of his or her age or role in the offense, the defendant's age, maturity, intelligence, mental development, and characteristics of youth at the time of the offense, the

68. *Id.* at 736–37 (emphasis added).

69. *Id.* at 736.

70. *Id.*; Quinn, *supra* note 32, at 574.

71. Montgomery v. Louisiana, 136 S. Ct. 718, 736 (2016); Hoesterey, *supra* note 28, at 161; Darden, *supra* note 19, at 222–23.

72. MO. REV. STAT. § 565.033.2(1)–(10) (2016) (factors include: (1) The nature and circumstances of the offense committed by the defendant; (2) The degree of the defendant's culpability in light of his or her age and role in the offense; (3) The defendant's age, maturity, intellectual capacity, and mental and emotional health and development at the time of the offense; (4) The defendant's background, including his or her family, home, and community environment; (5) The likelihood for rehabilitation of the defendant; (6) The extent of the defendant's participation in the offense; (7) The effect of familial pressure or peer pressure on the defendant's actions; (8) The nature and extent of the defendant's prior criminal history, including whether the offense was committed by a person with a prior record of conviction for murder in the first degree, or one or more serious assaultive criminal convictions; (9) The effect of characteristics attributable to the defendant's youth on the defendant's judgment; and (10) A statement by the victim or the victim's family member as provided by Missouri's victim's rights statutes).

defendant's likelihood of rehabilitation, and the effect of external familial or peer pressures on the defendant's actions.[73]

For a retroactive remedy in response to *Montgomery*, the Missouri legislature also enacted Senate Bill 590 to grant parole eligibility for prisoners currently serving LWOP sentences for crimes committed while under the age of eighteen.[74] These juvenile offenders, formerly sentenced to LWOP, are parole-eligible after twenty-five years under Missouri's scheme.[75] Through this course of action, Missouri delegates responsibility of creating a meaningful opportunity for release for *Miller/Montgomery*-impacted prisoners to the parole board within the Missouri DOC, an executive administrative agency.[76] Missouri's juvenile LWOP prisoners continue to serve unconstitutional sentences leaving their fate in the hands of the state's parole board to decide otherwise.[77] Missouri's statute explicitly requires that the parole board "hold a hearing and determine if the defendant shall be granted parole."[78] During the parole "hearing," the statute provides that all the factors enumerated in the juvenile sentencing statute along with the additional five factors specifically listed in the parole proceeding statute must be considered to determine if parole will be granted.[79]

These factors may seem robust and in compliance with the constitutional remedy imagined in *Miller* and *Montgomery*, but these parole determinations fall short of the procedural mandate in *Miller* for individualized sentencing proceedings. The theory that parole eligibility creates a meaningful opportunity for release in cases of juvenile offenders serving unconstitutional sentences has met the harsh reality of the operation of Missouri's parole board. In Missouri, as of mid-2017, the parole board had denied parole to twenty of twenty-three juvenile lifers who had already petitioned for parole.[80] This reality seems distant

73. *Id.*; *see also* MO. REV. STAT. § 558.047.5(1)–(5) (2016) (additional factors to be specifically considered by the parole board include: (1) Efforts made toward rehabilitation since the offense or offenses occurred, including participation in educational, vocational, or other programs during incarceration, when available; (2) The subsequent growth and increased maturity of the person since the offense or offenses occurred; (3) Evidence that the person has accepted accountability for the offense or offenses, except in cases where the person has maintained his or her innocence; (4) The person's institutional record during incarceration; and (5) Whether the person remains the same risk to society as he or she did at the time of the initial sentencing).

74. *See* S.B. 590, 98th Gen. Assemb., 2d Reg. Sess. (Mo. 2016) (relevant portion codified at MO. REV. STAT. § 558.047.1)

75. *Id.*

76. MO. REV. STAT. § 558.047.4.

77. Quinn, *supra* note 32, at 577.

78. MO. REV. STAT. § 558.047.4.

79. MO. REV. STAT. § 558.047.5; MO. REV. STAT. § 565.033.2(1)–(10) (2016). *See supra* notes 72-73 and accompanying text.

80. Sharon Cohen & Adam Geller, *AP Exclusive: Parole for Young Lifers Inconsistent Across US*, ASSOC. PRESS (July 13, 2017), https://apnews.com/article/a592b421f7604e2b88a170b5b438235f.

from the Court's holdings in *Miller* and *Montgomery* that all but the rare offender who exhibits "irreparable corruption" must have their hope for life outside of prison restored.[81] This less-than-hopeful outcome of Missouri's response to *Miller* led to class action litigation on behalf of the juvenile lifers who were denied parole.

B. Class Action Calling for Changes in Missouri's Parole Proceedings: Brown v. Precythe

In 2017, the MacArthur Justice Center filed a class action suit in federal court against the Missouri DOC on behalf of several juvenile offender plaintiffs sentenced to LWOP who received their statutorily permitted parole hearing but were subsequently denied parole.[82] The complaint in this action alleged that the practices of the Missouri parole board did nothing to differentiate the parole hearings of juvenile offenders from those of adult offenders, a core requirement of the constitutional protections of *Miller*.[83] Additionally, the complaint detailed the gross misconduct and abuse of power demonstrated by the parole board as the board participated in games during parole hearings, routinely rushed through hearings, and delivered arbitrary and conclusory decisions, often with boilerplate language, providing no explanation for the denial of release.[84] To say the practices of the Missouri parole board ran awry of their function and purpose is an understatement. The board members attempted to inject uncommon, amusing words, such as "platypus," and sometimes song lyrics into the proceedings to earn the board members "points" to win internal competitions.[85] Along with the flagrant unprofessionalism displayed by the board, the parole eligible prisoners, like named Plaintiff Norman Brown, could not access their parole files before the proceedings to correct any erroneous information relied upon in the determination.[86] Moreover, during the parole proceedings only one person was permitted to accompany the prisoner, and if this person was an attorney, the board prohibited any type of advocacy or even notetaking.[87] Conversely, the board members heard extensive statements from the victim's family, along with the original prosecutor in the case—who was uniquely allowed to testify as a witness, offer opinions about the crime and prisoner, and produce "evidence" not introduced at trial.[88] The *Brown* complaint argued, among other things, that these juvenile lifers could not possibly be afforded due

81. Montgomery v. Louisiana, 136 S. Ct. 718, 736 (2016).

82. Brown v. Precythe, No. 17-cv-04082, 2017 WL 4980872, at *1 (W.D. Mo. Oct. 31, 2017).

83. Brown Complaint, *supra* note 12, at 3–4.

84. *Id.* at 1–2.

85. *Id.* at 2, 27; Quinn, *supra* note 32, at 596.

86. Brown v. Precythe, No. 17-cv-04082, 2017 WL 4980872, at *4 (W.D. Mo. Oct. 31, 2017); Quinn, *supra* note 32, at 596.

87. *Brown*, 2017 WL 4980872, at *4; Quinn, *supra* note 32, at 596–97.

88. *Brown*, 2017 WL 4980872, at *4; Quinn, *supra* note 32, at 597.

process of their constitutionally protected liberty interest in a parole system that does not comply with statutory requirements or Supreme Court mandates to afford a "meaningful opportunity for release" based on the factors associated with youth and the demonstration of maturity and rehabilitation.[89]

The United States District Court for the Western District of Missouri issued an order for declaratory and injunctive relief on August 8, 2019, outlining over twenty necessary reforms to Missouri's parole process for these *Miller*-impacted prisoners serving unconstitutional sentences.[90] According to the district court, the current parole process is constitutionally inadequate as successfully argued by the plaintiffs in *Brown.*[91] Many of the current practices fail to evaluate the primary factors presented in *Miller,* and Missouri's parole process, specifically for juveniles unconstitutionally sentenced to LWOP, needs to be updated to capture these *Miller* factors and allow meaningful opportunity for release.[92]

The district court also held that the parole board's "policies, procedures, and customs" for the parole review of juvenile lifers outright "violate the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 21, of the Missouri Constitution."[93] The changes to parole board procedure ordered by the court include: allowing note taking during hearings, providing notice of the hearing, creating an opportunity to bring delegates and legal counsel to the hearing, deemphasizing the "seriousness of the offense," deemphasizing participation in programming unavailable to lifers, providing training, granting access to recordings and parole files, initiating the hearing process, providing required forms, updating the risk assessment methodology, collecting a record, and providing an opportunity to bring expert witnesses.[94] These changes highlight the court's view that this parole procedure, for juvenile lifers exercising their constitutional rights under *Miller*, is perhaps adversarial in nature, a proposition discussed in further detail below in Part III.

The order in *Brown* is certainly a step in the right direction to allow juvenile offenders a meaningful opportunity for release,[95] but this case presents another

89. Brown Complaint, *supra* note 12, at 36.

90. Brown v. Precythe, No. 17-cv-4082, 2019 WL 3752973, at *7–11 (W.D. Mo. Aug. 8, 2019) (appeal filed to the Eighth Circuit).

91. *Id.* at *7.

92. *Id.*

93. *Id.*

94. *Id.* at *7–11.

95. In November 2020, St. Louis Public Radio reported that since the class-action lawsuit against the Missouri parole board, six men sentenced to JLWOP had been released and another thirteen had been granted release dates. Sarah Fenske, *Sentenced to Life as Juveniles, St. Louis Men See Freedom After Decades in Prison*, ST. LOUIS PUBLIC RADIO (Nov. 13, 2020, 3:19 PM), https://news.stlpublicradio.org/show/st-louis-on-the-air/2020-11-13/sentenced-to-life-as-juveniles-st-louis-men-see-freedom-after-decades-in-prison [https://perma.cc/KW3S-9F53]. Although, the parole board has agreed to implement these reforms, their position remains that they are not constitutionally required to do so and have since filed an appeal to the Eighth Circuit. *See generally*

unique question of whether individual denials of parole should be judicially reviewable especially when the power and discretion to remedy a constitutional claim rests solely in the hands of the parole board. Without conceding that judicial review of parole board decisions could displace the need for courtroom sentencing, the case for judicial review is discussed in more detail below.

III. THE CASE FOR JUDICIAL REVIEW OF PAROLE BOARD DENIALS SPECIFICALLY FOR *MILLER*-IMPACTED PRISONERS

Famously stemming from the Supreme Court decision in *Marbury v. Madison*,[96] judicial review protects fundamental individual rights from government infringement by permitting access to the courts, even in the administrative context, when someone is aggrieved by an administrative agency decision.[97]

Judicial review is prevalent in Missouri's administrative scheme. Missouri's administrative agencies engage in rulemaking, adjudication, licensing, ratemaking, and a host of other activities.[98] All executive agencies are regulated under the MAPA[99] which provides a specific process for judicial review of agency decisions.[100]

In Missouri, there are two potential paths for this class of prisoners to receive judicial review of parole board denials. First, because the DOC is regulated under the MAPA, parole denials to this class can be judicially reviewed if these parole determinations qualify as "contested" cases. While traditional parole determinations have been considered "uncontested" per the Missouri judiciary,[101] *Miller*-impacted juvenile lifers must be considered differently. A second path to judicial review arises under the Due Process Clause of the Fourteenth Amendment, as it applies to states, along with parallel provisions under the Missouri Constitution.[102]

Brief of the Appellants, Brown v. Precythe, 2019 WL 3752973 (W.D. Mo. Aug. 8, 2019) (No. 19-2910); *see also* Brown v. Precythe, No. 17-cv-04082, 2017 WL 4980872, at *6 (W.D. Mo. Oct. 31, 2017).

96. *See* 5 U.S. 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.").

97. GEORGE J. GORDON & MICHAEL E. MILAKOVICH, PUBLIC ADMINISTRATION IN AMERICA 71 (6th ed. 1998).

98. Neely, *supra* note 7, at § 1:4.

99. *Id.* § 4:1 (The Missouri Practice Series refers to the Missouri Administrative Procedure Act as "the MAPA," and this Note will use the same nomenclature).

100. *Id.* § 12:1.

101. Ladd v. Mo. Bd. of Prob. & Parole, 299 S.W.3d 33, 37 (Mo. Ct. App. W.D. 2009).

102. U.S. CONST. amend. XIV, § 1; MO. CONST. art. I, §§ 10 and 21.

A. Liberty Interests in Parole

In reviewing both of these paths to judicial review, understanding the presence of a vested liberty interest is helpful. Just as the plaintiffs in *Brown* asserted in their complaint, the Supreme Court's Eighth Amendment jurisprudence ultimately leading to *Miller* and *Montgomery* has created a liberty interest in release for juvenile offenders sentenced to LWOP who can demonstrate maturity and rehabilitation.[103] The Court in *Montgomery* clarified the categorical nature of the rule for the class of those juvenile lifers who can demonstrate maturity versus the exception for the rare, minority class of individuals who show "permanent incorrigibility."[104]

1. The Federal Constitution Does Not Generally Create a Vested Liberty Interest in Parole

To evaluate this liberty interest, it is worth taking a step back to acknowledge the Supreme Court's disposition that, generally, prisoners do not have a vested liberty interest in parole, and parole boards can typically operate without constitutional constraints in release decisions.[105] Also of note, there is no requirement for states to offer parole at all for standard adult offenders.[106] When a state does offer parole to adult offenders, there is no requirement that prisoners be provided with a realistic or meaningful opportunity for release.[107] In *Greenholtz v. Inmates of the Nebraska Penal and Corrections Complex*, prisoners in Nebraska brought a class action for violation of their due process rights under the Civil Rights Act,[108] claiming they had been unconstitutionally denied parole by the Nebraska Board of Parole.[109] In considering whether a Due Process Clause violation resulted, the Court evaluated the parole board's discretionary denials against the prisoners' claims to a liberty interest.[110] The prisoners argued they had reasonable entitlement to release under the possibility of parole and an expectation of parole created by the state's statute.[111] The Court ultimately held that eligibility, or possibility, for release on parole does not ensure that release.[112] The Court announced, "There is no constitutional or inherent right of a convicted person to be conditionally released before the

103. Montgomery v. Louisiana, 136 S. Ct. 718, 726, 734 (2016).

104. *Id*. at 734.

105. Greenholtz v. Inmates of the Neb. Penal and Corr. Complex, 442 U.S. 1, 7 (1979); Russell & Denholtz, *supra* note 52, at 1131; W. David Ball, *Heinous, Atrocious, and Cruel:* Apprendi, *Indeterminate Sentencing, and the Meaning of Punishment*, 109 COLUM. L. REV. 893, 944 (2009).

106. Russell & Denholtz, *supra* note 52, at 1131.

107. *Id.*

108. 42 U.S.C. § 1983.

109. *Greenholtz*, 442 U.S. at 3–4.

110. *Id.* at 4, 8.

111. *Id.* at 8–9.

112. *Id.* at 11; Bell, *supra* note 19, at 463–64.

expiration of a valid sentence."[113] The Court found the "natural desire of an individual to be released" and the "initial resistance to being confined" indistinguishable from one another.[114] The Court reiterated that a valid conviction, with all of the associated procedural safeguards, does deprive a prisoner of his liberty, but in a constitutional manner.[115] Refusing to recognize a liberty interest in the possibility of parole, the Court in *Greenholtz* also provided for the option that state statutes can create a vested liberty interest in parole if they so choose, although Nebraska's statute in *Greenholtz* presented "unique structure and language" that only entitled "some" constitutional protection.[116]

Therefore, absent a statutory basis for a liberty interest, normal parole seekers have no liberty interest and therefore no due process rights in parole proceedings. However, *Greenholtz* examined discretionary parole decisions for the general population of parole eligible prisoners seeking conditional release before the expiration of a valid sentence—a class of prisoners distinguishable from the juvenile lifers impacted by the holdings in *Miller/Montgomery*.[117]

2. Evolution of a Liberty Interest in Parole in Missouri

Prisoner's liberty interests in parole in Missouri have undergone an evolution at the hands of the state legislature and subsequently the judiciary. Missouri's old parole statute, Mo. Rev. Stat. 549.261 (repealed), provided:

> When in its opinion there is reasonable probability that the prisoner can be released without detriment to the community or to himself, the board *shall* release on parole any person confined in any correctional institution administered by state authorities.[118]

In *Williams v. Missouri Board of Probation and Parole*, the Eighth Circuit held that prisoners in Missouri penal institutions had a vested, protected liberty interest in parole release rooted in this state law.[119] In *Williams*, the court relied heavily on comparison with the statute in *Greenholtz*, focusing on Missouri's operative language that "the board shall release on parole" any prisoner who met the statutory and regulatory guidelines for release.[120] In response to this finding, the Missouri legislature revised their parole law removing the "shall" language

113. *Greenholtz*, 442 U.S. at 7.

114. *Id.*

115. *Id.*

116. *Id.* at 12–13; Quinn, *supra* note 32, at 592; Ball, *supra* note 105, at 945–46.

117. Greenholtz v. Inmates of the Neb. Penal and Corr. Complex, 442 U.S. 1, 7 (1979).

118. MO. REV. STAT. § 549.261 (repealed 1982) (emphasis added); *accord* Williams v. Mo. Bd. of Prob. & Parole, 661 F.2d 697, 698 (8th Cir. 1981) (superseded by statute).

119. *Williams*, 661 F.2d at 698–99 (superseded by statute).

120. *Id.* at 699 (superseded by statute).

that created the liberty interest in early release and implicated due process.[121] Missouri's replacement parole statute provided:

> When in its opinion there is reasonable probability 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 prohibited by law.[122]

After this substantial change to Missouri's parole statute, courts have held that parole eligible prisoners have no liberty interest in parole or entitlement to early release.[123] In *Ladd*, the Missouri Court of Appeals held there is no recognized liberty interest in the possibility of parole for ordinary prisoners.[124] Additionally, in *Ladd*, the court held that the lack of liberty interest in parole possibility does not trigger the mandate under due process for a high level of procedural formality, like judicial review.[125] The court held that Missouri's statute granting power to the parole board creates no justifiable expectation of release, giving the board near absolute discretion in granting or denying parole.[126] Further, the court found that ordinary adult offender prisoners do not have a substantive due process right to be released from their sentence early.[127]

3. Liberty Interest in Parole Specifically for Juvenile Offenders Sentenced to LWOP

Despite the lack of a vested liberty interest in Missouri's current parole statute, in *Miller* and its progeny, the Supreme Court made clear that the class of juvenile offenders mandatorily sentenced to LWOP are certainly different from standard adult offenders for the purpose of sentencing and parole.[128] It seems clear, at least under Missouri's current statutory framework and relevant case law, that adult offenders serving constitutionally valid sentences of life with parole have no constitutionally protected liberty interest in early release or parole.[129] However, *Miller*-impacted juvenile offenders are currently serving

121. State *ex rel.* Cavallaro v. Groose, 908 S.W.2d 133, 135 (Mo. 1995); Quinn, *supra* note 32, at 593.

122. MO. REV. STAT. § 217.690 (2005) (emphasis added). As of August 2018, Missouri updated this language in the statute, however, the discretionary nature of parole remains emphasized within the statute's title, which conveys that the "Board *may* order release or parole." MO. REV. STAT. § 217.690 (2018) (emphasis added).

123. Ingrassia v. Purkett, 985 F.2d 987, 988 (8th Cir. 1993) (noting the parole board has nearly unlimited discretion); *Cavallaro*, 908 S.W.2d at 135; Delay v. Bd. of Prob. & Parole, 174 S.W.3d 662, 665 (Mo Ct. App. W.D. 2005); Quinn, *supra* note 32, at 593.

124. Ladd v. Bd. of Prob. & Parole, 299 S.W.3d 33, 39 (Mo. Ct. App. 2009).

125. *Id.*

126. *Id.* at 39–41.

127. *Id.* at 39.

128. Miller v. Alabama, 567 U.S. 460, 471 (2012).

129. *See supra* notes 118–23 and accompanying text.

unlawful sentences, and if parole is the chosen remedy for this constitutional violation, then there is a constitutionally protected liberty interest in the "meaningful opportunity of release" through parole.[130] According to *Miller* and *Montgomery*, these juvenile offenders do not have a mere hope or expectation of early release, but they have substantive and procedural constitutionally protected rights to a meaningful opportunity to release contingent only upon their ability to demonstrate maturity and rehabilitation.[131] Interestingly, the operational language in *Miller* and *Montgomery* function more like the "shall" language of the prior Missouri statute. The Court is explicit in its language in *Montgomery*, "The opportunity for release *will be afforded* to those who demonstrate the truth of *Miller*'s central intuition—that children who commit even heinous crimes are capable of change."[132] Under *Miller* and *Montgomery*, juvenile offenders sentenced to LWOP are not simply seeking the mercy of early release, but they are awaiting fulfillment of the Eighth Amendment's promise that they will be released upon demonstrated rehabilitation.[133] The nature of the vested liberty interest for this class of *Miller*-impacted juvenile offenders who demonstrate maturity and rehabilitation is obviously different from a general interest in the possibility of early release.

B. The Paths to Judicial Review in Missouri under the MAPA

As mentioned above, the Missouri DOC, and its Division of Probation and Parole, fit organizationally within the executive branch as an administrative agency.[134] The MAPA governs Missouri administrative agencies including the procedures for judicial review of agency decisions.[135] The MAPA describes two types of cases and their respective reviewability: "contested"[136] and "non-contested"[137] cases. Under the MAPA, "[a]ny person who has exhausted all administrative remedies provided by law and who is aggrieved by a final decision in a contested case, whether such decision is affirmative or negative in form, shall be entitled to judicial review thereof."[138] Further, the MAPA defines contested cases as, "proceeding[s] before an agency in which legal rights, duties

130. *Miller*, 567 U.S. at 479, 489; Montgomery v. Louisiana, 136 S. Ct. 718, 736–37 (2016).

131. *Montgomery*, 136 S. Ct. at 732–34; Russell & Denholtz, *supra* note 52, at 1129–30.

132. *Montgomery*, 136 S. Ct. at 736 (emphasis added).

133. Bell, *supra* note 19, at 526 (arguing the liberty interest possessed by juvenile lifers "entails not only liberty from prison, but their very first and only opportunity to live as an adult in society—including the opportunity to vote, to own property, to work for a living wage, to live with a partner, and to have children").

134. *Executive Departments*, GUIDE TO MISSOURI'S GOVERNMENT, https://www.mo.gov/government/guide-to-missouris-government/ [https://perma.cc/YFM2-4AAR].

135. MO. REV. STAT. § 536 (2019).

136. *Id.* §§ 536.100–536.140.

137. *Id.* § 536.150.

138. *Id.* § 536.100.

or privileges of specific parties are required by law to be determined after hearing."[139] While the MAPA does not explicitly define non-contested cases, Missouri courts use the term often.[140] The MAPA does provide that:

> [w]hen any administrative officer or body . . . shall have rendered a decision which is not subject to administrative review, determining the legal rights, duties or privileges of any person . . . and there is no other provision for judicial inquiry into or review . . . such decision may be reviewed by suit for injunction, certiorari, mandamus, prohibition or other appropriate action.[141]

1. No Path for Review of Parole Board Decisions as Non-contested Cases

Within the MAPA's framework, non-contested cases are judicially reviewable when "there is no other provision for judicial inquiry . . . or review."[142] Generally, the MAPA provides for judicial review of administrative decisions unless there is an exception. The parole statute has carved out such an exception by specifically addressing and proscribing review of board decisions stating, "[t]he orders of the board shall not be reviewable."[143] Missouri courts have held that parole denials fall outside the type of agency decisions included within the general MAPA judicial review provisions and are specifically subject to the parole provision limiting availability of judicial review.[144] In the most recent of these cases, *Ladd*, the court reasoned that because the statutes regulating the parole board are not silent with regard to judicial review, and in fact specifically address the issue, the other MAPA judicial review provisions which generally allow judicial review, do not apply.[145] Moreover, the court in

139. *Id.* § 536.010.4; Neely, *supra* note 7, at § 8:5. The definition of "contested case" under the MAPA is explained as follows:

> For purposes of analysis, it is helpful to divide the definition into its four basic components. Thus, a contested case is: (1) 'a proceeding before an agency'; (2) 'in which legal rights, duties or privileges of specific parties'; (3) 'are required by law'; (4) 'to be determined after a hearing.' In determining whether an administrative proceeding is a contested case, the object for inquiry should be the agency's action when measured against these elements. These four basic components are what must be satisfied. What is not dispositive is what the agency thinks on the issue. That an agency says the proceeding is, or is not, a contested case may reflect as much wishful thinking of the agency, or post-hoc rationalization of its counsel, as legal resolution of the issue. Similarly, the procedures the agency actually employed should not be dispositive.

Id.

140. Neely, *supra* note 7, at § 12:2.

141. MO. REV. STAT. § 536.150 (2019).

142. *Id.*

143. MO. REV. STAT. § 217.670.3.

144. Ladd v. Mo. Bd. of Prob. & Parole, 299 S.W.3d 33, 37 (Mo. Ct. App. W.D. 2009); MO. REV. STAT. § 536.100 (2019).

145. *Ladd*, 299 S.W.3d at 37; *see also* Hundley v. Wenzel, 59 S.W.3d 1, 4–5 (Mo. Ct. App. W.D. 2001) (holding that "when a statute exists concerning judicial review of administrative

Ladd asserted that "a parole hearing, as contemplated by the statutes and regulations governing the Board, does not meet the minimum indicia of a contested case."[146] Another case, *Smith v. Board of Probation and Parole*, characterizes parole hearings as mere interviews, and categorizes the relationship between the parole board and prisoner as supervisory, as opposed to adversarial.[147] Somewhat helpfully, the court in *Ladd* does provide additional context into the distinction between contested and non-contested cases holding "a contested case implies an adversarial relationship."[148] In *State ex rel. Mitchell v. Dalton*, the court explains some procedural indicia of the adversarial nature of a contested case are a hearing, required notice to necessary parties, use of sworn testimony, the right to call, examine and cross-examine witnesses, and the application of evidentiary rules.[149]

While these cases seem to foreclose the possibility that parole board decisions are reviewable under the MAPA, the context is entirely different as applied to juvenile offenders sentenced to LWOP. Without conceding that the judiciary's conclusion is correct regarding standard parole eligible prisoners, it is certainly incorrect pertaining to juvenile lifers post-*Miller*/*Montgomery*. Regarding this class of juvenile lifers, parole eligibility is supposed to function as a constitutional remedy to an Eighth Amendment violation. As previously established, this class of prisoners has a liberty interest in parole.[150] With a constitutional remedy and liberty interest at stake, parole proceedings for this class of *Miller*-impacted prisoners is necessarily adversarial and should fall into the definition of a "contested" case under the MAPA.

2. The Path for Review of Juvenile Lifer Parole Board Decisions as Contested Cases

The first component of a contested case is that it be "a proceeding before an agency."[151] "Proceeding" is not defined in the MAPA, however as discussed above, Missouri courts have understood this to mean an adversarial hearing.[152] Generally, Missouri courts have regarded the parole determination as a

procedures, it is to be followed exclusive of the general provisions for judicial review of administrative decisions").

146. *Ladd*, 299 S.W.3d at 38.

147. *Id.*; Smith v. Bd. of Prob. & Parole, 743 S.W.2d 123, 124–25 (Mo. Ct. App. W.D. 1988).

148. *Ladd*, 299 S.W.3d at 38.

149. State *ex rel.* Mitchell v. Dalton, 831 S.W.2d 942, 944 (Mo. Ct. App. E.D. 1992).

150. *See generally supra* Part III.A.3.

151. MO. REV. STAT. § 536.010.4 (2019); Neely, *supra* note 7 (defining "contested case" under the MAPA.)

152. Benton-Hecht Moving & Storage v. Call, 82 S.W.2d 668, 671 (Mo. Ct. App. W.D. 1989) (elaborating that the hearing must be adversarial shown by a contest of opponents favoring divergent results in the agency decision); Ladd v. Mo. Bd. of Prob. & Parole, 299 S.W.3d 33, 38 (Mo. Ct. App. W.D. 2009) ("Among other attributes, a contested case implies an adversarial relationship"); Neely, *supra* note 7, at § 8.5.

supervisory, non-adversarial hearing.[153] However, this conclusion, especially considering the juvenile lifer class, is confounding.

At parole determinations, prosecutors, who are served with the initial petition for parole, are allowed to speak for any length of time, or present arguments based on unproven theories about the prisoner's crime.[154] Likewise, victim representatives are the first members permitted to speak in front of the parole board, and may speak for any length of time.[155] These victim representatives often speak outside of the prisoner's presence and are permitted to argue law before the board.[156] The parole hearings involve presentations to the board that are necessarily adverse to the prisoner's interest in release. Additionally, the mandated changes to the parole board process enumerated in *Brown v. Precythe*, illuminate the adversarial nature of these parole proceedings. Missouri juvenile lifer parole seekers now must be permitted to bring a lawyer who is welcome to challenge evidence, especially evidence based on false statements that could influence the board's decision, present evidence, make arguments, and produce expert witnesses.[157]

Other states have taken similar actions to add procedural protections for this class of *Miller*-impacted juvenile offenders during parole hearings which further evidences the adversarial nature of these proceedings. Recognizing the importance of the constitutional pronouncements in *Graham* and *Miller*, state legislatures and courts have provided for robust procedural protections for juveniles facing the harshest punishments during parole or resentencing proceedings. California provides counsel in parole hearings for juvenile offenders serving life sentences.[158] Similarly, Connecticut entitles juveniles facing lengthy sentences to counsel in parole hearings, and appoints counsel twelve months before the hearing to prepare.[159] In Florida, parole eligible juvenile offenders are also entitled to counsel, and public defenders are appointed for indigent offenders.[160] Nebraska requires review of a "comprehensive mental health evaluation" for LWOP eligible juveniles and annual review of release after initial parole denial.[161] Louisiana requires the

153. *Ladd*, 299 S.W.3d at 38; Smith v. Bd. of Prob. & Parole, 743 S.W.2d 123, 125 (Mo. Ct. App. 1988).

154. MO. REV. STAT. § 558.047.2 (2019); Brown v. Precythe, No. 17-cv-4082, 2019 WL 3752973, at *6 (W.D. Mo. Aug. 8, 2019) (appeal filed to the Eighth Circuit).

155. *Brown*, 2019 WL 3752973, at *5.

156. *Id.*

157. *Id.* at 7–11.

158. CAL. PENAL CODE § 3041.7 (2016).

159. CONN. GEN. STAT. § 54-125a(f)(3) (2019).

160. FLA. STAT. ANN. § 921.1402(5) (2020). Note that Florida has a judicial resentencing scheme which is different than the parole scheme adopted by Missouri, however the procedural protections provided are still informative.

161. NEB. REV. STAT. § 28-105.02(2) (2020); NEB. REV. STAT. § 83-1,110.04 (2020). Other states also require regular review, like Delaware, which provides for judicial review and potential

parole board to consider a written evaluation by a person with expertise in adolescent brain development and behavior.[162] A Massachusetts court held that a "meaningful opportunity for parole release" includes provision of counsel and expert services to indigent juvenile offenders.[163] Many states recognize that the unique status of juvenile offenders, identified in *Graham* and *Miller*, requires deviation from the typical parole process for that of standard adult offenders, and the parole hearings for this class of prisoners are more confrontational and adversarial because constitutionally protected liberty interests are at stake.[164] These procedural safeguards demonstrate the adversarial nature of these proceedings to this class of juvenile lifers, especially regarding their entitlement to a "meaningful opportunity" for release.

Moreover, the fact that there is a burden within the parole hearings on juvenile lifers demonstrates their adversarial nature. Although it is unclear whether the state possesses the burden and must demonstrate "irreparable corruption" or the juvenile lifer possesses the burden of showing maturity and rehabilitation, there is a burden to prove one or the other.[165] The burden unique to this constitutional remedy for juvenile lifers also weighs in favor of considering these proceedings adversarial.

The other necessary components to qualify under "contested" cases within the MAPA are easily shown by juvenile lifers. The proceeding "in which legal rights, duties or privileges of specific parties" are affected must be "required by law to be determined after a hearing."[166] In this context, the term "law" encompasses constitutional provisions, state statutes, or local ordinances."[167] The legal rights of juvenile lifers are clearly at stake within these parole hearings. The Supreme Court requires, under *Miller/Montgomery*, a constitutional remedy

sentence modification every five years for all juvenile sentences greater than thirty years in length. DEL. CODE ANN. tit. 11, § 4204A(d) (2020).

162. LA. STAT. ANN. § 574.4(g)(2) (2019).

163. Diatchenko v. Dist. Att'y for the Suffolk Dist., 27 N.E.3d 349, 367 (Mass. 2015).

164. *See, e.g.*, Hayden v. Keller, 134 F. Supp. 3d 1000, 1009 (E.D.N.C 2015) (holding that the North Carolina parole system is unconstitutional for failing to distinguish parole reviews of juvenile offenders from adult offenders); W. VA. CODE § 62-12-13B(b) (2020) (listing several special parole considerations unique to juvenile offenders); FLA. STAT. ANN. § 921.1402(6) (2020) (requiring courts reviewing juvenile LWOP sentences to consider distinct youth-related factors). Moreover, state legislatures have repeatedly required parole boards for juvenile offenders to thoroughly explain and provide reasoning for each parole decision. *See, e.g.*, CONN. GEN. STAT. §54-125(f)(5) (2019) (requiring the board to articulate "its decision and the reasons for its decision"); LA. STAT. ANN. § 574.4(g)(3) (2019) (providing that a parole panel "render specific findings of fact in support of its decision"); FLA. STAT. § 921.1402 (2020) (mandating that resentencing courts issue a written order stating the reasons against sentence modification).

165. Montgomery v. Louisiana, 136 S. Ct. 718, 736 (2016).

166. MO. REV. STAT. § 536.010(4) (2016); Neely, *supra* note 7, at § 8.5 (providing the definition of "contested case" under the MAPA).

167. Neely, *supra* note 7.

to restore the legal rights of juveniles sentenced to LWOP to serve a lawful sentence.[168] Within its discretion under the Supreme Court's decision in *Montgomery*, the Missouri legislature chose to provide a statutory remedy by requiring a hearing in front of the parole board.[169]

Because the requirements for a "contested" case under the MAPA are met, this class of juvenile lifers should be granted access to judicial review of parole denials.

C. Vested Liberty Interest Requires Due Process Including Judicial Review

Missouri's old statute, ensuring parole release with "shall" language, afforded parole seekers due process and judicial review of parole board denials because of the liberty interest granted by the legislature.[170] Because Missouri historically offered judicial review of parole board decisions under the old statute, juvenile offenders unconstitutionally sentenced to LWOP must also be afforded due process and judicial review.[171] Juveniles serving unlawful LWOP sentences also have a liberty interest, not provided via statute, but rather under the Eighth Amendment.[172] With regard to juveniles automatically sentenced to LWOP, both *Miller* and *Montgomery* mandate a "meaningful opportunity to obtain release" as a remedy to the Eighth Amendment violation and entitles this class of prisoners to due process.[173]

Where a constitutional right is infringed, an inherent right of due process exists, including appeal from executive agency decisions.[174] Due process is a flexible concept that requires different degrees of protection for different types of interests.[175] The Due Process Clauses of the Fifth and Fourteenth Amendments of the United States Constitution, along with parallel clauses in Missouri's state constitution, prohibit the federal and state government from depriving individuals of "life, liberty, or property, without due process of

168. Miller v. Alabama, 567 U.S. 460, 489 (2012); *Montgomery*, 136 S. Ct. at 726, 734.

169. MO. REV. STAT. § 558.047.1 (2016).

170. MO. REV. STAT. § 549.261 (repealed 1982); see *supra* Part III.A.2.

171. MO. REV. STAT. § 549.261 (repealed 1982); *accord* Williams v. Mo. Bd. of Prob. & Parole, 661 F.2d 697, 698 (8th Cir. 1981) (superseded by statute).

172. *See generally supra* Part III.A.3. *See also* Brown v. Precythe, No. 17-cv-04082, 2017 WL 4980872, at *12 (W.D. Mo. Oct. 31, 2017) (announcing "under *Graham, Miller*, and *Montgomery*, the juvenile offender has a liberty interest in a meaningful parole review.").

173. Miller v. Alabama, 567 U.S. 460, 479 (2012); Montgomery v. Louisiana, 136 S. Ct. 718, 734 (2016). The Court in *Miller* and *Montgomery* does imagine there is a class of juvenile offenders that may qualify as irreparably corrupt, in which case, so long as they are provided *Miller*-compliant resentencing as a remedy, they may receive a sentence that forever denies the possibility of release.

174. 2 AM. JUR. 2D *Administrative Law* § 423 (2003); Jennifer Lumley-Hluska, Note, *The Contest over "Contested Cases": A Study on How the Connecticut Legislature's reading of Two Words May be Depriving You of Your Right to Judicial Review and Due Process of the Law*, 23 QLR 1239, 1246 (2005).

175. Lumley-Hluska, *supra* note 174, at 1250–51.

law."[176] The doctrine of due process ensures individuals the opportunity to be heard and provides access to judicial review, which are necessary functions of our legal system.[177]

Furthermore, the courts in Missouri have broad jurisdiction and have subject matter jurisdiction "over *all* cases and matters, civil and criminal."[178] Within this remedial authority, the Missouri Supreme Court has held that procedural rules and limitations on the court's ability to grant relief are not absolute; they are "subject to the right recognized by article I, section 14 [of Missouri's Constitution] to have a remedy for a legal wrong."[179] The Missouri courts are competent to review the parole denials of *Miller*-impacted juvenile offenders under the due process required in association with the liberty interest held by this class.

IV. POTENTIAL OBJECTIONS TO THE ARGUMENT FOR JUDICIAL REVIEW

A. Opening the Floodgates to the Judiciary

Some may argue that allowing judicial review of parole board denials will open the floodgates to the judiciary. Refusal of judicial review of parole board denials, specifically for *Miller*-impacted prisoners, due to this fear is irresponsible. In a famous dissent, Justice Brennan admonishes the view that opening the judiciary's door to widespread challenges is simply a "fear of too much justice."[180] From an efficiency and cost savings perspective, this argument is also weak. Mass incarceration cost taxpayers, state governments, and federal governments almost two hundred billion dollars every year, without much enhancement to public safety.[181] Affording appropriate due process through judicial review for *Miller*-impacted prisoners could actually save resources and money by alleviating mass incarceration and providing a meaningful opportunity of release to the prisoners who show rehabilitation.

176. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1; MO. CONST. art. I, §§ 10 and 21.

177. Lumley-Hluska, *supra* note 174, at 1240.

178. MO. CONST. art. V, § 14; J.C.W. *ex rel.* Webb v. Wyciskalla*,* 275 S.W.3d 249, 253 (Mo. 2009) (emphasis in original); Brief of Legal Post-Conviction Scholars Amici Curiae in Support of the Circuit Attorney's Motion for New Trial at 12, State v. Johnson, 2021 WL 822826 (Mo. 2021) (No. SC98303), 2020 WL 7646760.

179. *Webb*, 275 S.W.3d at 255; Brief of Legal Post-Conviction Scholars Amici Curiae in Support of the Circuit Attorney's Motion for New Trial at 12–13, State v. Johnson, 2021 WL 822826 (Mo. 2021) (No. SC98303), 2020 WL 7646760.

180. McCleskey v. Kemp, 481 U.S. 279, 339 (1987) (Brennan, J. dissenting).

181. *Mass Incarceration Costs $182 Billion Every Year, Without Adding Much to Public Safety*, EQUAL JUSTICE INITIATIVE (Feb. 6, 2017), https://eji.org/news/mass-incarceration-costs-182-billion-annually/ [https://perma.cc/NNZ7-NLWP]; Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, PRISON POLICY INITIATIVE (Jan. 25, 2017), https://www.prisonpolicy.org/reports/money.html [https://perma.cc/TAN7-TUDH].

B. Implications for Victims' Rights

While victims' rights are a serious concern within the criminal justice system, these rights can clash with the constitutional rights of prisoners. These two interests must be balanced, and "[p]rison walls do not form a barrier separating [prisoners] from the protections of the Constitution."[182] In *Brown v. Precythe*, in promulgating changes to the Missouri parole process, the court recognized that victims and their representatives are entitled to special protections in parole hearings.[183] However, the court explicitly stated that "[a]t the same time, a meaningful opportunity for *Miller*-affected [prisoners] to demonstrate maturity and rehabilitation requires notice of all adverse information presented to the parole board."[184] The court understood the need to balance victims' rights and prisoner rights, noting that the rights afforded to victims cannot infringe or outweigh the constitutional rights guaranteed to juveniles sentenced to LWOP.[185]

C. Department of Corrections' Obligation to Public Safety

The Missouri DOC has an obligation to foster public safety.[186] Without adequate due process in parole proceedings, parole determinations are arbitrary. With arbitrary determinations, there is an unacceptable risk not only that juvenile offenders deserving release are serving unconstitutionally excessive sentences, but also that offenders who present a danger to public safety could be released. It is in the DOC's and the public's best interest to allow for judicial review of parole denials for *Miller*-impacted prisoners, to ensure that only those who have demonstrated "maturity and rehabilitation" are released.[187]

V. CONCLUSION

Judicial review, as a part of due process of law, protects individuals when government actions infringe their constitutional rights, including the actions of administrative agencies. As a part of its Eighth Amendment jurisprudence, under *Miller* and *Montgomery*, the Supreme Court has recognized a liberty interest for

182. Steve Disharoon, Comment, *California's Broken Parole System: Flawed Standards and Insufficient Oversight Threaten the Rights of Prisoners*, 44 U.S.F. L. REV. 177, 190–91 (2009); Turner v. Safley, 482 U.S. 78, 84 (1987).

183. Brown v. Precythe, No. 17-cv-4082, 2019 WL 3752973, at *10 (W.D. Mo. Aug. 8, 2019) (appeal filed to the 8th Circuit).

184. *Id.*

185. *Id.*

186. *Probation and Parole*, MISSOURI DEP'T OF CORR., https://doc.mo.gov/divisions/probation-parole [https://perma.cc/S3M8-LRNE].

187. *Brown*, 2019 WL 3752973, at *11 (quoting *Montgomery*). In addition to this perspective, Marc Mauer and Ashely Nellis argue that through the lens of traditional sentencing goals, excessive punishment, like life without parole, is limited and actually has diminishing returns regarding public safety. MARC MAUER & ASHLEY NELLIS, THE MEANING OF LIFE 131 (2018).

juveniles sentenced to LWOP who demonstrate maturity and rehabilitation. These juveniles are currently serving unlawful, unconstitutional sentences that Missouri has decided to remedy through parole board hearings. Arbitrary and capricious decisions by the parole board violate the constitutional rights of *Miller*-impacted juveniles. Where parole is denied, in the name of due process, judicial review should provide redress. Judicial review should be allowed under the MAPA through the "contested case" pathway or under general due process of law through the Federal and Missouri Constitutions. By providing judicial review, the courts can ensure that constitutional rights are protected and prisoners who demonstrate rehabilitation are afforded a meaningful opportunity to reenter society.

KRISTEN S. SPINA*

* Juris Doctor, Saint Louis University School of Law (May 2021); Bachelor of Science in Business Management, Purdue University (2015). This Note is published with tremendous gratitude to my faculty advisor and mentor, Joseph C. Welling (associate attorney at The Phillips Black Project and adjunct instructor at Saint Louis University School of Law), for his guidance during the development and writing processes. I also thank my family and friends for their continual love and support. Finally, I extend my thanks to the Staff and Editorial Board of Volume 65. Their diligence, dedication, humor, and brilliance have made our publication possible.