IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT

LANCE LEE BERRY	)	
	)	
Petitioner,	)	
v.	)	
	)	Case No. _____
	)	
JEFF NORMAN,	)	
Superintendant, South Central	)	
Correctional Center	)	
	)	
Respondent.	)	

PETITION FOR WRIT OF HABEAS CORPUS

TABLE OF CONTENTS

STATEMENT OF ISSUES

1. Whether Missouri statute § 558.047 violates the Equal Protection Clause of the United States Constitution because it grants a parole hearing to juveniles sentenced to life without parole after they have served 25 years in prison, but it fails to give that same benefit to similarly situated juveniles who are sentenced to the functional equivalent of life without parole via an extremely long sentence?

2. Whether Lance Berry's 30-year sentence for Second Degree Murder (imposed when he was a juvenile) is disproportionate under the Eighth Amendment given that it is a harsher sentence than currently exists for juveniles convicted of the more serious crime of First Degree Murder?

3. Whether Lance Berry's four consecutive life sentences (imposed when he was a juvenile) violate the Eighth Amendment because they aggregate to a de facto life without parole sentence that offends the dictates of *Graham v. Florida* and *Miller v. Alabama*?

INTRODUCTION

This case is about equal protection. Appellant Lance Berry was convicted as a juvenile of Felony Murder in the Second Degree, Robbery, and two counts of Armed Criminal Action, all stemming from the same criminal episode. He received four life sentences to run consecutively, which, under Missouri law, means that he will almost certainly die in prison before he is parole eligible. Thus, Lance Berry's sentence is the functional equivalent of "life without parole" or "LWOP." Subsequently, Missouri passed § 558.047, which mandates that juvenile offenders specifically sentenced to "life without parole" shall receive a parole hearing after 25 years. But § 558.047 says nothing about all the juveniles, like Lance Berry, who were not specifically sentenced to LWOP, but who might as well have been because their sentences are so long that they will die in prison before they are parole eligible. Thus, § 558.047 elevates form over substance. It protects children fated to spend the rest of their lives in prison if their sentence specifically reads, "life without parole." But it fails to protect all other similarly situated children who are also fated to spend the rest of their lives in prison, yet by virtue of an extremely long sentence instead of a "life without parole" sentence. This is irrational. It is unfair. It is the antithesis of the equal protection guarantee mandated by our constitution.

This case is also about the Eighth Amendment – the cruel and unusual punishments clause as well as the proportionality principle embodied within it. Regarding proportionality, § 558.047 (because it reduced the penalty for First Degree Murder) creates the ironic result that juveniles convicted of Second Degree Murder can actually receive a harsher sentence than for First Degree Murder. This is what happened to Lance Berry, and it flies in the face of basic proportionality logic, which dictates that more serious crimes should be punished more severely than less serious crimes and vice versa. Regarding the cruel and unusual punishments clause, Lance Berry's four life sentences, in aggregate, violate the clause because they are the functional equivalent of life without parole, a sentence constitutionally forbidden for juveniles by the United States Supreme Court in *Graham v. Florida*, 560 U.S. 48 (2010) and *Miller v. Alabama*, 567 U.S. 460 (2012).

Lance Berry hereby seeks the following three forms of relief. First, he seeks to have § 558.047 deemed unconstitutional on its face because it violates the Fourteenth Amendment's equal protection guarantee. Second, he seeks to have his four life sentences vacated and reconsidered in light of *Graham v. Florida* and *Miller v. Alabama*. Third, if his four life sentences are not vacated, he seeks in the

alternative to be re-sentenced on his Felony Murder conviction because his sentence for this offense is harsher than the sentence for First Degree Murder, and, as such, it is disproportionate under the Eighth Amendment.

To be clear, this case is not merely about constitutional principles. It is also, at its core, about basic fairness. Is it fair for a law to grant a second chance at life to some juvenile offenders fated to die in prison but not others based merely on the semantics of their sentence and not the substance of their character? Is it fair to punish a juvenile more harshly for a less serious offense and less harshly for a more serious offense? Is it fair to circumvent the dictate that juveniles offenders shall not be sentenced to mandatory life without parole by granting them a parole hearing, but so far past their life expectancy that they will have to be resurrected from the grave in order to argue for their eventual release?

The answer to these questions is obviously no, which dictates that the relief sought here must be granted.

STATEMENT OF THE CASE

A. Factual Summary

This is a murder case. It is sad and difficult. It involves two boys and an innocent victim, all three of whose lives were ruined in the moment that a trigger was thoughtlessly pulled.

The two boys are now men. They are black. They have been in prison at this point for fourteen years and will likely die there. They are Lance Berry, the Appellant, and his childhood friend, Quinton Canton.

The victim was a white man. His name was Gus Karellas, and he owned a restaurant named the G&D Steakhouse in Mexico, Missouri. (Transcript "Tr." 346-347).

On the night in question, Lance Berry and Quinton Canton, though just boys, pretended to be men. They were poor boys from a poor black community, and to them, a small-time robbery carried with it the prospect of serious currency. (Tr. 572). It also carried with it the exciting possibility of danger, of being outlaws, of being wanted men. This of course is to say nothing of the guns that would be needed. Soldiers had guns, so boys with guns were soldiers. (Tr. 569).

The plan was to steal a night's earnings from the G&D Steakhouse. Quinton Canton was a former employee at the restaurant, so he knew Mr. Karellas's closing routine – knew that Mr. Karellas always put the night's earnings in a pair of money bags after closing, knew that every night he carried the money out to his car at 9 p.m. for deposit at the bank the next day. He would be an easy target. (Tr. 349-351, 361, 374, 387). No violence would be necessary. Just the threat of it would suffice.

So the boys each got a gun. (Tr. 559). When Lance got his, it was like magic. He pretended to point and fire it like they do in the movies. (Tr. 549-550, 626).

Soon, however, it was time for the real deal, time to man up, or to at least pretend. Both boys went to the G&D Steakhouse. (Tr. 547, 628). Then, wearing masks, they hid behind a dumpster in the restaurant's back alley and waited for Mr. Karellas to exit as he always did. (Tr. 558-563, 631-632).

Exactly what happened next – the how and why – is unclear. We know that Gus Karellas died that night from a gunshot wound to his neck. (Tr. 507). Before dying, we know that Mr. Karellas ran back into his restaurant and yelled at his employees to chase the guys who shot him. (Tr. 364-368, 380). Then he collapsed. (*Id.*) We also know that immediately after the robbery, Lance Berry and Quinton Canton ran back to their getaway car where two teenaged girls – friends of theirs – were waiting. According to the girls' testimony, Quinton Canton yelled at Lance Berry, "Why'd you shoot that man? That ain't what we planned to do!" Lance Berry then, despite his feminine face, spoke in the manliest voice he could. "Shut the f--- up," he said. "We're supposed to be boys. We're soldiers." (Tr. 568, 593, 639-640). Then he said that Mr. Karellas had tried to run. (Tr. 593).

The boys stole an estimated $1,500 that night. (Tr. 352, 376, 577). At trial, the state alleged that Lance Berry intended to kill Mr. Karellas as an act of premeditation. (Tr. 139). But they failed. Thus, Lance was acquitted of First Degree Murder. He was instead convicted of Felony Murder in the Second Degree, Robbery in the First Degree and two counts of Armed Criminal Action. (Tr. 933-934). On the date of offense, he was just 17 years old.[1]

[1] The date of offense is November 16, 2004. Lance was born on September 17, 1987.

B. Sentencing

Missouri has a Sentencing Advisory Commission that has created statewide guidelines for sentences based on the nature of the offense and the history of the offender. §558.019.6. The guidelines are just that – guidelines. They are recommendations for trial court judges, but they are not obligatory to follow. §558.019.7.

The guidelines are based on statewide research of typical sentences handed down for all violations of the penal code, from misdemeanors to murder. §558.019.6. Their purpose is to promote fairness via uniformity of sentencing across the state. *Id.*

Here, the guidelines provided that the presumptive sentence for Murder in the Second Degree committed by a 17-year-old with no prior related offenses was 10 years. The mitigated sentence called for community-based sentencing, and the aggravated sentence called for 15 years. [Need citations for this data as its not provided in Lance's appellate brief].

Despite the guidelines' recommended maximum of 15 years, the trial judge here gave Lance Berry four life sentences, one for each of his four convictions. Then the judge ordered each life sentence to run consecutive to the others. (Tr. 949-950).

The judge relied on four factors when imposing this sentence. The first was the devastating effect of the crime on the Karellas family. (Tr. 947-949). The second was the shock to the community of the crime. (Tr. 947-949). The third was Lance's purported lack of remorse, based on the judge's perception of Lance during the trial – this, despite the fact that Lance did not testify, and despite the fact that Lance said in the PSI he was sorry, an apology the judge rejected as "lame."[2] (Tr. 947-949). Finally, the judge relied on Quinton Canton's 115-year sentence (which had been recommended by the jury in his case) as a reference point to determine that Lance, as the shooter, should be punished more harshly than his co-defendant. (Tr. 947-949). This last factor was not a permissible consideration by law. *State v. Shafer,* 969 S.W.2d 719, 742 (Mo. Banc 1998). But that did not stop the judge here.

[2] It should also be noted that when Lance was arrested and booked, he said to the booking officer, "Just shoot me," a comment that can reasonably be interpreted as an expression of remorse. (Tr. 690).

Thus, in sentencing Lance Berry, the judge relied heavily on what he considered aggravating factors. Importantly, however, he either failed to consider or refused to consider any factors in mitigation. Regarding the latter, he said he didn't care about Lance's "minor" criminal history. (Tr. 940). Regarding the former, he never considered the circumstances of Lance's family and home environment – that his father was a severely mentally ill alcoholic and crack addict who abandoned him at the age of seven, that his mother was an alcoholic who was only able to raise him in abject poverty, that his primary role model was his brother – eleven years older than himself – who was a crack dealer and a Blood. He never considered that when Lance's brother went to prison when Lance was twelve, Lance was from then on raised by Crips who adopted him into their gang, got him regularly using marijuana and ecstasy, and got him dealing crack – again, all by the age of twelve. The judge also never considered the impact that peer pressure had on the crimes committed here – that Lance's closest role models, men ten years older than himself, told him that he needed to commit this crime in order to earn respect, in order to continue to be a part of their gang. The effect of this peer pressure cannot be overstated. To a boy like Lance Berry, whose only real and reliable family were his fellow Crips, the threat of banishment if he didn't commit this crime was the equivalent of total isolation from his only community, total lack of respect from everyone who mattered, a figurative death to be sure. It was as if he, a child, had a gun put to his head to commit this crime. The judge also never considered important circumstances related to the crime – that Lance Berry and Quinton Canton were not in their right minds when they committed the crime. They were instead high on marijuana and ecstasy. In fact, that they had not slept for days due to being high on these drugs – drugs they had received from their role models, their family, their fellow gang members.

In sum, the judge ignored what every parent knows about teenaged children – that they are immature, irresponsible, reckless, impulsive, unusually susceptible to peer pressure, and usually incapable of extricating themselves from crime-producing environments if that is the world into which they are born. Moreover, the judge ignored that all these shortcomings, inherent is most children, are not permanent character flaws. They are instead transient personality traits which teenagers usually outgrow. Thus, the judge ignored that teenagers have a greater claim to forgiveness – because youth is not their fault – and that they have better prospects for reform than do adults because they are still maturing out of the above listed shortcomings. *E.g. Miller v. Alabama*, 567 U.S. at 460. Put simply, the judge ignored what the United States Supreme Court now requires to be considered

– i.e. the mitigating qualities of youth – when it is possible that a juvenile offender could be sentenced to prison for the rest of his life. *Id.*

C. Parole eligibility

Because of statutory and regulatory mandatory minimum sentencing requirements preceding parole eligibility, Lance Berry is not eligible for parole until May 24, 2058 when he will be 71 years old.[3] By then, he will have served 54 years in prison.

Parole eligibility is calculated by adding the sum of the minimum terms of each consecutive sentence. *Edger v. Mo. Bd. of Prob. & Parole,* 307 S.W.3d 718, 721 (Mo. App. 2010). Lance's parole eligibility calculation is as follows:

The first sentence he must serve is for Murder in the Second Degree. The life sentence on this conviction for purposes of parole eligibility is treated like a 30-year sentence. § 558.019.4 (1).[4] Then, since the crime is a "serious felony," Lance must serve 85% of the 30 years (i.e. 25.5 years) before he is parole eligible on this sentence. *See* §556.061(8) (dangerous felony); *see* 558.019.3 (85% rule). According to the Department of Corrections, Lance's parole eligibility on this sentence will occur on May 24, 2031 when he is 44 years old.

The next sentence Lance must then serve (after the 25.5 years on the murder) is for the Armed Criminal Action ("ACA") conviction associated with the murder. This conviction is not treated as a "dangerous felony," and offenders serving sentences for non-dangerous felonies totaling 45 years or more are eligible for parole after 15 years. 14 CSR 80-2.010(1)(E). The life sentence here is treated as greater than 45 years; thus, according to the Department of Corrections, Lance's parole eligibility on this sentence will occur on May 24, 2046 when he is 59 years old (i.e. 15 years after his parole eligibility date on the murder sentence).

The next sentence Lance must serve (after the 25.5 years on the murder and the 15 years the ACA) is for the robbery conviction. Normally, the life sentence on this conviction would be treated just like the life sentence on the murder conviction, i.e. as a "dangerous felony" requiring 85% of the 30 years to be served before parole eligibility. *See* §556.061(8) (dangerous felony); *see* 558.019.3 (85% rule). But here, because Lance will reach the age of 70 while serving this sentence,

[3] Lance's date of birth is September 17, 1987.

[4] All statutory citations are to RSMo 2000 (need to amend this to 2004).

the 70-year rule applies. The 70-year rule provides that if an offender has reached the age of 70, and if he has served 40% of the sentence presently being considered, then he is parole eligible on his entire sentence once both these conditions are met. § 559.019.3. Here, the life sentence on the robbery is treated like a 30-year sentence for purposes of parole eligibility. § 558.019.4 (1). Forty per cent of 30 years is 12 twelve years. Since Lance will begin serving this sentence for Robbery at the age of 59, he will be finished with 40% of the sentence (i.e. 12 years) at the age of 71. At that point, both conditions of the 70-year rule will be met, i.e. Lance will have turned 70, and 40% of his 30-year sentence – i.e. 12 years – will have been served. Thus, according to the Department of Corrections, Lance will be parole eligible on his entire sentence at the age of 71 on May 24, 2058.[5]

D. Life Expectancy

The problem with Lance Berry being parole eligible for the first time at age 71 is that, according to actuarial statistics from the Center for Disease Control ("CDC"), he is only expected to live to age 72. *See* Exhibit B, Table 105, *Life Expectancy by Sex, Age, and Race: 2007* (Given that Lance is now 31, he is expected to live 41.8 more years, which means he is expected to live to age 72.8). Importantly, these CDC life expectancy statistics are for people who are not in prison. Thus, they overstate Lance's actual life expectancy because living in prison shortens peoples' lives, frequently by a large number of years. *See e.g.* John J. Gibbons & Nicholas de B. Katzenbach, *Confronting Confinement* 11 (June 2006) (concluding that life expectancy in prison is considerably shortened by stress, violence, and disease). In fact, one recent study conducted in New York found that each year lived in prison takes two years off the inmate's life expectancy.[6] Another study out of Michigan found that juveniles in that state sentenced to LWOP live to an average age of just 50.[7] Put simply, it is not reasonable to expect that Lance Berry will be alive to attend his first parole

[5] *See* Exhibit A (email from DOC time computation confirming that the above calculation is correct).

[6] https://www.prisonpolicy.org/blog/2017/06/26/life_expectancy/

[7] Campaign for the Fair Sentencing of Youth, "Michigan Life Expectancy Data for Youth Serving Natural Life Sentences," (2012–2015) p. 2, available at http://fairsentencingofyouth. org/wp-content/uploads/2010/02/Michigan-Life-Expectancy-Data-Youth-Serving-Life.pdf.

hearing. The length of his sentence effectively mandates that he die in prison. Thus, his sentence is the functional equivalent of life without parole.[8]

ARGUMENT

I. Missouri Statute § 558.047 violates the Equal Protection Clause of the United States Constitution because it grants a parole hearing to juveniles sentenced to LWOP after they have served 25 years in prison, but it fails to give that same benefit to similarly situated juveniles who are sentenced to the functional equivalent of LWOP via an extremely long sentence.[9]

A. Section 558.047 is a sentencing statute that treats functionally identical sentences differently, thereby harming the entire class of juvenile de facto LWOP offenders.

In 2012, the United States Supreme Court ruled in *Miller v. Alabama,* 567 U.S. at 460, that it violates the Eighth Amendment's cruel and unusual punishments clause to sentence a juvenile to LWOP for homicide. Specifically, the court held that a juvenile convicted of homicide must be given a "meaningful opportunity to obtain release based on maturity and rehabilitation," unless, at a sentencing hearing that accounts for the circumstances of youth, he is found to be the exceedingly rare type of juvenile who is irredeemable. *Id.* at 480. Four years later the court then held in *Montgomery v. Louisiana,* 136 S.Ct. 718 (2016), that *Miller* applies retroactively.

Because of *Miller* and *Montgomery,* there were many juvenile offenders around the country who were then serving LWOP sentences that were illegal and which, therefore, needed to be amended. Missouri responded to this problem by passing § 558.047, which requires that juvenile offenders who are serving a sentence of LWOP must be granted a meaningful opportunity to obtain release via a parole hearing after they have served 25 years of their sentence. In relevant part, § 558.047 reads as follows:

---

[8] QUESTION to counsel : Should we put in a procedural history paragraph somewhere in this Statement of the Case, which states that Lance filed a pro se habeas petition in the trial court in 2014 and was denied relief? Or, will this be summarized earlier in a Statement of Jurisdiction paragraph explaining why the current filing in the court of appeals is appropriate?

[9] Note to counsel: Let's discuss whether to add in a Missouri state EPC claim.

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

Thus, § 558.047 essentially rescues an entire class of juvenile offenders who, by virtue of their sentence to LWOP, are deprived of any meaningful opportunity to obtain release before their death. (This class of offenders will hereinafter be referred to as "de jure LWOP offenders."). But § 558.047 ignores another entire class of juvenile offenders (hereinafter referred to as "de facto LWOP offenders"), who, also by virtue of their sentence, are deprived of any meaningful opportunity to obtain release before their death. This unprotected class of de facto LWOP offenders are those juveniles who have received such an extremely long sentence that their parole eligibility date falls either outside of, or barely inside of, their own life expectancy. This class of juveniles have not received a sentence of LWOP, at least nominally. But their sentence is so long that it is the functional equivalent of LWOP since they are essentially fated to spend the rest of their life in prison.

For the foregoing reasons, § 558.047 is a sentencing statute that treats virtually identical sentences differently. In other words, the statute grants de jure LWOP offenders a parole hearing after 25 years, but it grants no such benefit to the class of similarly situated de facto LWOP offenders.

B. The three tiers of scrutiny for an equal protection claim.

All laws classify. Which is nothing remarkable. Laws routinely define the group or groups to which they apply, and in doing so, they usually treat different groups differently. This is normal. It is useful. It is in fact necessary to an ordered society of laws.

But the Equal Protection Clause of the United States Constitution – which requires that the law treats similarly situated people alike – imposes limits on how laws make classifications. In general, the clause requires that government classifications be justified, not arbitrary. *See Clements v. Fashing,* 457 U.S. 957, 967 (1982) ("Classification is the essence of all legislation, and only those classifications which are invidious, arbitrary, or irrational offend the Equal Protection Clause of the Constitution."); *see also Reed v. Reed,* 404 U.S. 71, 77 (1971) ("A classification 'must be reasonable, not arbitrary, and must rest upon

some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'") (citing *Royster Guano Co. v. Virginia,* 253 U.S. 412, 415 (1920)).

Courts rely on a set of tests collectively labelled "means-ends scrutiny" to determine if a law's justification for treating people differently is sufficient.

There are three different "means-ends scrutiny" tests.

The first is called "strict scrutiny." It applies in two contexts – i.e. when a legislative classification infringes upon a fundamental constitutional right, or when it applies to a "suspect class" based on, for example, race, ethnicity or alienage. *See Plyler v. Doe,* 457 U.S. 202, 215 (1982) ("Thus, we have treated as presumptively invidious those classifications that disadvantage a 'suspect class' or that impinge upon the exercise of a 'fundamental right.'"). Under strict scrutiny, a challenged classification must be (a) justified by a compelling government interest, (b) narrowly tailored to achieve the compelling interest, and (c) be the least restrictive means necessary to achieve the interest at stake. *E.g. Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 227 (1995). This exacting standard is difficult to meet. It has been said to be "strict in theory, but fatal in fact" because few laws can satisfy its heavy burden of proof. *See* Gerald Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 Harv. L. Rev. 1, 8 (1972).

The second type of means-ends scrutiny is called "intermediate scrutiny." It applies in two scenarios. First, to quasi-suspect classes. *See e.g. United States v. Virginia,* 518 U.S. 515 (1996) (gender); *Clark v. Jeter,* 486 U.S. 456 (1988) (non-marital children). Second, to quasi-fundamental rights. *See e.g. City of Cleburne v. Cleburne Living Center,* 473 U.S. 432 (1985) (J. Marshall, Brennan, and Blackum concurring and stating that while the majority opinion nominally uses rational basis review, it in fact employs heightened scrutiny because of the quasi-suspect class (developmentally disabled persons) and the quasi-fundamental right (housing) that were at stake in the case); *Plyler v. Doe,* 457 U.S. 202 (1982) (J. Marshall, Blackmum, and Powell concurring and stating that while the majority opinion nominally uses rational basis review, it in fact employs heightened scrutiny because of the quasi-fundamental nature of the right (education) at issue in the case); *see also e.g. Lowrie v. Goldenhersh,* 716 F.2d 401, 411 (7th Cir. 1983) (stating that intermediate scrutiny is "limited to cases involving quasi-fundamental rights and quasi-suspect classes.") (citing John E. Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee – Prohibited, Neutral,*

and Permissive Classifications, 62 Geo. L. J. 1071, 1082 (1974); *Alma Soc'y Inc. v. Mellon*, 601 F.2d 1225, 1234 n. 18 (2nd Cir. 1979) (noting that quasi-fundamental rights are subject to intermediate scrutiny) *cert. denied*, 444 U.S. 995 (1979). Under intermediate scrutiny, the challenged classification must further an important government interest by means that are substantially related to that interest. This standard of review, though demanding, is less exacting than strict scrutiny.

The third type of means-ends scrutiny is called "rational basis review." It applies to any law challenged on equal protection grounds that does not infringe upon fundamental or quasi-fundamental rights or disfavor a suspect or quasi-suspect class. *Cleburne*, 473 U.S. at 432. It is the most deferential of the three means-ends tests and requires only that the challenged classification be rationally related to a legitimate government interest. *Id.*

C. Strict scrutiny should apply to § 558.047 (1) because it harms a suspect class, and (2) because it infringes upon the fundamental right, guaranteed by the Eighth Amendment, to be free of cruel and unusual punishments.

1. Juvenile de facto LWOP offenders should be treated as a suspect class.

Historically, the Supreme Court has relied on four different factors to justify treating a group that is disfavored by a statute as a suspect class. The first is whether the group exhibits obvious, immutable or distinguishing characteristics that create a clearly discernible class. *E.g. Lyng v. Castillo*, 477 U.S. 635 (1986). The second is whether there exists a real and meaningful distinction between the favored and disfavored groups that justifies treating the disfavored group differently, *e.g. City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), or if instead the differential treatment is based on stereotypes about the disfavored group. *E.g. Frontiero v. Richardson*, 411 U.S. 677 (1973). The third is whether there is reason to suspect that the political process has failed to protect the disfavored group. *E.g. Cleburne*, 473 U.S. at 445. The fourth is whether there exists a history of discrimination against the disfavored group. *Id.*

Other than relying on these factors to deem a group a suspect class, the Supreme Court has provided no explicit guidance on how to weight the factors. We at least know that all four factors are not necessary to create a suspect class. *See San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (using the disjunctive instead of the conjunctive when observing that a suspect

class is one "saddled with such disabilities, *or* subjected to such a history of purposeful unequal treatment, *or* relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.") (emphasis added); *see also Cleburne,* 473 U.S. at 472, n.24 (Marshall, J., concurring in part and dissenting in part) ("The 'political powerlessness' of a group may be relevant, but that factor is neither necessary, as the gender cases demonstrate, nor sufficient, as the example of minors illustrates."). In lieu of creating clear doctrinal rules, the court has instead conducted somewhat ad hoc analyses that rely on the four factors to differing degrees, depending on the facts of each case. Richard E. Levy, *Political Process and Individual Fairness Rationales in the U.S. Supreme Court's Suspect Classification Jurisprudence*, 50 WASHBURN L.J. 33, 42-47 (2010). Despite the court's lack of clear guidance, however, the court's more recent disparate impact and affirmative action cases suggest that the second factor (i.e. whether there exists a real and meaningful distinction between the favored and disfavored groups) is the most important factor, while the political process and history of discrimination rationales (i.e. factors three and four) have faded in importance. *Id.*

Nevertheless, here, all four factors support the conclusion that the class of de facto juvenile LWOP offenders disfavored by § 558.047 should be treated as a suspect class.

First, the disfavored juveniles share distinguishing characteristics that make them a clearly discernible and discrete class. By contrast to, for example, the parents, children and siblings in *Lyng,* 477 U.S. at 645, who, as a group, were too broadly cast to form a clearly discernible and discrete class, the juveniles here are a discrete and easily discernible group. Within the population of juvenile offenders, the suspect class is defined at one margin as those offenders not explicitly sentenced to LWOP but at the other margin as those sentenced to such extremely long terms they are deprived of any meaningful opportunity at release. This is a class that is easy to identify and not very large.[10]

Second, there is no real or meaningful distinction between the favored and disfavored groups of juveniles that justifies treating the two groups differently. Juveniles who receive a de jure sentence of LWOP are denied all hope. *Graham,*

[10] Note to counsel: I have contacted, but not heard back from, the Missouri Dept. of Corrections' research and planning division to try to get more specific data on how many juveniles are serving de facto LWOP sentences in Missouri (e.g. a sentence, for example, where the 70-year rule applies).

560 U.S. at 68. They are denied any chance to show rehabilitation because they are required to spend the rest of their life in prison no matter what. *Id.* To a juvenile, this is the virtual equivalent of a death sentence, as the Supreme Court has aptly noted. *Id.* at 64. Juveniles who receive a de facto sentence of LWOP suffer the exact same fate. They too are denied all hope. They too are denied any chance to show rehabilitation because they too are effectively required to spend the rest of their life in prison no matter what. A de facto sentence of LWOP is every bit as much a death sentence to a juvenile as is a de jure sentence of LWOP. Put simply, the same result ensues from either sentence – a juvenile is locked up, and the key is thrown away. *See Summer v. Shuman,* 483 U.S. 66, 83 (1987) (". . . there is no basis for distinguishing, for purposes of deterrence, between an inmate serving a life sentence without possibility of parole and a person serving several sentences of a number of years, the total of which exceeds his normal life expectancy."). Thus, the classification drawn by § 558.047 treating differently these two groups of offenders with these two types of sentences should be deemed suspect because the sentences are different in form only, but not in substance.

There being no real or meaningful distinction between the two offender groups here, it is reasonable to conclude that the classification drawn by § 558.047 reflects highly stigmatizing stereotypes about juvenile offenders rather than real differences among them. Professor Barry Feld recently characterized these stereotypes as follows:

> Violence and homicide in the late 1980s and early 1990s enabled conservative politicians to promote a stereotype of dangerous superpredators – cold-eyed young killers suffering from moral poverty – rather than traditional images of disadvantaged youths who needed help. Based on erroneous demographic projections, they predicted a bloodbath of youth crime, even as juvenile violence declined precipitously. Relying on those flawed predictions, legislators preemptively enacted laws that emphasized suppression of crime – punishment, deterrence, and incapacitation – rather than efforts to rehabilitate children. Juvenile justice shifted from a welfare to a penal orientation and assumed responsibility to manage and control delinquents rather than to treat them. Beginning in the 1970s, just deserts and retribution displaced rehabilitation as rationales for adult and juvenile sentencing policy. Judges focused primarily on offenders' present offense and criminal history. . . The fallacious predictions during the Get Tough Era of an impending bloodbath by superpredators propelled punitive policies. States lowered the age for [juvenile] transfer [to adult court], increased the number of excluded offenses, and shifted discretion from judges to prosecutors . .. Barry C. Feld, *Competence and Culpability:*

Delinquents in Juvenile Courts, Youths in Criminal Courts, 102 Minn. L. Rev. 473, 477-478 (2017).

Stereotypes about juvenile offenders being morally bankrupt superpredators fueled the growing prevalence of extreme sentences for juveniles like the one Lance Berry is now serving. Andrea T. Martinez, *Superpredators: The Demonization of our Children by the Law* (Review of book by the same title), 3 J.L. & FAM. STUD. 251 (2001). Since there is no real or meaningful distinction supporting the classification drawn by § 558.047, it appears that the classification reflects these stereotypes, not reality. In other words, § 558.047 was not voluntarily passed by the Missouri Legislature. It was in effect a required response to the Supreme Court's ruling in *Miller*, and it appears that de facto LWOP offenders were excluded from the ambit of the statute in order the minimize the statute's effect on extremely long juvenile sentences. This exclusion appears to have been motivated by incorrect and invidious stereotypes about juvenile offenders as incorrigible superpredators. This is forbidden by the Supreme Court's equal protection jurisprudence, so the classification should be treated as suspect.

Third, there is good reason to suspect that the political process has failed to protect the disfavored group of juveniles here. Of course, it is important to note that the suspect class here is not all juveniles. Age, after all, is not a suspect classification. *E.g. Gregory v. Ashcroft*, 501 U.S. 452 (1991). But it is equally important to note that juveniles are denied the right to vote, so they are underrepresented in the political process. Their interests are only protected by adult proxy, which at times falls short, as evidenced, for example, by the widespread decrease over the last decade in K-12 education funding in many states around the county, a circumstance that experts have deemed catastrophic for children, and which has recently led to massive protests and teacher walkouts in many states around the country.[11] Thus, the suspect class here, being denied the right to vote, is unable to protect itself via the legislative process. Age not being a suspect classification, this factor alone might be insufficient to warrant strict scrutiny. But in combination with the above factors, it supports the conclusion that the disfavored group of juveniles here is not in a position to adequately protect itself from the discriminatory wishes of the majoritarian public which categorically

[11] https://www.cbpp.org/research/state-budget-and-tax/a-punishing-decade-for-school-funding; https://www.cbpp.org/research/state-budget-and-tax/most-states-have-cut-school-funding-and-some-continue-cutting; https://www.reuters.com/article/us-usa-election-education/after-walkouts-us-teachers-eye-elections-for-school-funding-gains-idUSKBN1HL10G.

labels the group as full of irredeemable superpredators. As such, this group of juvenile offenders should be treated as a suspect class. *See Cleburne*, 473 U.S. at 472, n.24 (Marshall, J., concurring in part and dissenting in part) ("The 'political powerlessness' of a group may be relevant, but that factor is neither necessary, as the gender cases demonstrate, nor sufficient, as the example of minors illustrates.").

Finally, there does indeed exist a history of discrimination against the disfavored group given that they are predominantly African American, as is Lance Berry.[12] Of course, it goes without saying that African Americans have faced a long and sordid history of invidious racial discrimination in this country. This history of discrimination persists in the criminal justice system, as detailed recently by the ACLU in a written report on racial disparities in sentencing that was submitted to the Inter-American Commission on Human Rights. *See https://www.aclu.org/sites/default/files/assets/141027_iachr_racial_disparities_aclu_submission_0.pdf*. The report concludes that "there are stark racial disparities in the imposition of life without parole sentences for juvenile offenders in the United States." *Id.* Specifically, the report found that, "nationally, about 77 percent of juvenile offenders serving LWOP are black and Latino, while Black youth are serving these sentences at a rate 10 times higher than white youth." *Id.* These statistics, while alarming, are even more alarming in certain states. In California, for example, "Black youth are serving the sentence [of LWOP] at a rate that is 18 times higher than the rate for white youth." *Id.* That race is the cause for these statistics is perhaps nowhere more apparent than when looking at the race of the victims of violent crime. The ACLU report found that black juvenile offenders convicted of killing a white person – as here – are almost twice as likely to receive an LWOP sentence as a white juvenile offender convicted of killing a black person. *Id.* Yet another factor that skews stiff sentences disproportionately towards blacks is prosecutorial decision making. One study cited by the ACLU found "that Black defendants face significantly more severe charges than whites, even after controlling for characteristics of the offense, criminal history, defense counsel type, age and education of the offender, crime rates, and economic characteristics of the jurisdiction." *Id.* Finally, it is of no moment that the classification drawn here by § 558.047 is, on its face, race neutral. The ACLU report makes an obvious point – "that racial disparities in sentencing can result from theoretically 'race neutral' sentencing policies that have significant disparate racial effects,

[12] Note to counsel: I have contacted, but have not heard back from, the Missouri Department of Corrections' planning and research office to try to get data on the racial make-up of the juvenile de facto LWOP population in Missouri.

particularly in the cases of habitual offender laws and many drug policies, including mandatory minimums, school zone drug enhancements, and federal policies adopted by Congress in 1986 and 1996 that at the time established a 100-to-one sentencing disparity between crack and powder cocaine offenses." *Id.*

While the classification here is race neutral on its face, it adversely affects black juvenile offenders in a disproportionate manner.[13] This fact alone might not be enough to trigger strict scrutiny. But as with the voting issue above, when it is considered along with the other factors here, it strongly supports treating the adversely affected group of juveniles here as a suspect class. Put simply, most of the juveniles that comprise the suggested class are black, and blacks have historically been discriminated against in this country.[14]

For the foregoing reason, all relevant factors in determining a suspect class support the conclusion that the adversely affected group of juveniles here should be deemed a suspect class.

2. Section 558.047 infringes upon the fundamental right, guaranteed by the Eighth Amendment, to be free of cruel and unusual punishments.

A right is deemed "fundamental" if it is explicitly enumerated in the Constitution. *San Antonio Indep. Sch. Dist.v. Rodriguez,* 411 U.S. 1, 33 (1973). Obviously, thus, the Eighth Amendment right to be free of cruel and unusual punishment, and the proportionality principle that it embodies, is a fundamental right. *See Griswold v. Connecticut,* 381 U.S. 479 (1965) (noting that the Supreme Court has on numerous occasions held that the first eight amendments to the Constitution "express personal fundamental rights.") (citations omitted).

The question then becomes whether the classification drawn by § 558.047 infringes upon the right.

---

[13] Note to counsel: we need to confirm this is true in Missouri.

[14] Admittedly, the statistics cited in this paragraph apply to de jure LWOP sentences, not de facto LWOP sentences. But there is every reason to believe that blacks are disproportionately sentenced to de facto LWOP just as they are to de jure LWOP given that stark racial disparities abide "at every stage of the criminal justice system, including stops and searches, arrests, prosecutions, plea negotiations, trials and sentencings." *Id.*

Importantly, the Supreme Court has repeatedly held that a fundamental right can be infringed, thus triggering strict scrutiny, absent an outright denial of the right. First Amendment decisions have repeatedly held that strict scrutiny applies not only to outright denials but also to restraints that make exercise of fundamental rights more difficult. *See e.g. Sherbert v. Verner,* 374 U.S. 398 (1963) (free exercise of religion); *NAACP v. Button,* 371 U.S. 415 (1963) (freedom of expression and association); *Linmark Associates v. Township of Willingboro,* 431 U.S. 85 (1977) (freedom of expression). Strict scrutiny has applied in voting rights cases too, even when relatively minor infringements, such as dilution of voting strength caused by malapportionment, have been involved. *Reynolds v. Sims*, 377 U.S. 53 (1964); *Chapman v. Meier,* 420 U.S. 1 (1975); *Connor v. Finch,* 431 U.S. 407 (1977). Similarly, cases involving the fundamental right to travel hold that statutes that impair free exercise of the right to travel are subject to strict scrutiny regardless of whether the statutes actually deter or prevent travel. *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974); *Dunn v. Blumstein,* 405 U.S. 330 (1972); *Shapiro v. Thompson*, 394 U.S. 618 (1969). Finally, poor people asserting a fundamental right of access to the courts have had court costs excused without first being required to show that their indigency was an absolute bar to access. *Griffin v. Illinois*, 351 U.S. 12 (1956); *Douglas v. California*, 372 U.S. 353 (1963); *Boddie v. Connecticut*, 401 U.S. 371 (1971).

That infringement can occur without an outright denial of the right is important to note because it means that the Missouri Supreme Court cases *Willbanks v. Dep't of Corr.,* 522 S.W.3d 238 (Mo. 2017), and *State v. Nathan,* 522 S.W.3d 881 (Mo. 2017), holding that de facto LWOP sentences for juveniles do not violate the Eighth Amendment under *Miller* and *Graham* do not preclude a finding of infringement here. In other words, Lance Berry's Eighth Amendment right can be infringed without the right being entirely abrogated.

Indeed, given that Lance's sentence for Second Degree Murder and related offenses is more severe than it would have been had he been convicted of the more serious offense of First Degree Murder, it is apparent that his Eighth Amendment right has been infringed.

The very premise of the Eighth Amendment protection against cruel and unusual punishments is that punishments should be graduated and proportioned such that less serious crimes result in less serious punishments, and conversely, more serious crimes result in more serious punishments. *See Graham v. Florida,* 560 U.S. 48, 67 (2010) (citing *Weems v. United States,* 217 U.S. 349 (1910). Thus, when we see the opposite in practice, this is good evidence that the Eight

Amendment has been infringed. *See Solem v. Helm*, 103 S. Ct. 3001 (1983) ("if more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive."). In fact, state and federal courts around the country have held that the Eighth Amendment is infringed when an offender's sentence for a less serious crime is greater than it would have been had he been convicted of a more serious crime. *See e.g. State ex. rel. Morgan v. State*, 217 So.3d 266 (La. 2016) (holding that juvenile offender's 99 year sentence for armed robbery violated the Eighth Amendment because other offenders convicted of more serious crimes received more lenient sentences under recently passed legislation); *Peters v. State*, 128 So.3d 832, 851 (Fla. 4th DCA 2013) (juvenile's sentence to 99 years for armed robbery violated the Eighth Amendment because the sentence was greater than what was statutorily allowed for more serious crimes); *State v. Dayutis*, 498 A.2d 325, 328 (1985) (Second Degree Murder statute found disproportionate under the Eighth Amendment because the maximum penalty exceeded that for First Degree Murder); *Roberts v. Collins*, 544 F.2d 168, 170 (4th Cir. 1976) (". . . the constitution does not sanction the imposition of a greater punishment for a lesser included offense than lawfully may be imposed for the greater offense."); *Thomas v. State*, 348 N.E.2d 4,7 (1976) ("The Eighth Amendment to the United States Constitution and Art. 1, s. 16 of the Indiana Constitution have been interpreted by this court as prohibiting the Legislature from providing punishments for lesser included offenses which are greater than those provided for the greater offenses."); *Application of Cannon*, 281 P.2d 233, 235 (1955) (invalidating, on proportionality grounds, statute requiring life imprisonment for an assault with intent to rape where the greater crime of rape authorized a sentence of not more than 20 years).

Here, § 558.047 infringes upon Lance Berry's Eighth Amendment right in two important ways:

First, Lance's sentence for Second Degree Murder, by itself, is harsher than the sentence he would now be serving if he had been convicted of the more serious crime of First Degree Murder. This is because § 558.047 effectively reduced the penalty for First Degree Murder from life without parole to life with parole, with parole eligibility occurring after 25 years. To understand how this sentence is more lenient than Lance's sentence for Second Degree Murder, it's necessary to understand how Lance's sentence for Second Degree Murder operates. Under Missouri law, Lance's life sentence for Second Degree Murder is treated as a 30-year sentence. § 558.019.4 (1). Then, since Second Degree Murder is a "serious felony," Lance must serve 85% of the 30 years (i.e. 25.5 years) before he is parole eligible. *See* §556.061(8) (dangerous felony); *see* 558.019.3 (85% rule). Thus,

Lance is parole eligible on his life sentence for Second Degree Murder after 25.5 years. However, if Lance had been convicted of First Degree Murder, he would have been sentenced to LWOP back in 2006. Yet now, under § 558.047, any juvenile sentenced to LWOP gets a parole hearing after 25 years. This yields an irrational result. If Lance had been convicted of First Degree Murder, he'd be parole eligible now after 25 years. But since he was instead convicted of Second Degree Murder, he is first parole eligible after 25.5 years. In other words, Lance's parole eligibility for Second Degree Murder occurs six months after what his parole eligibility would have been had he been convicted of First Degree Murder. Effectively, his sentence for Second Degree Murder is harsher than the sentence he would have received had he been convicted of First Degree Murder. This makes no sense, and it is clearly disproportionate under the above cited case law. As such, § 558.047 infringes upon Lance's Eighth Amendment right, which necessitates strict scrutiny of § 558.047.

The second reason that Lance's sentence is disproportionate is because § 558.047 (by reducing the penalty for First Degree Murder) makes the sentence for First Degree Murder more lenient than Lance's sentence for Second Degree Murder and related offenses by 31 years. As noted previously, Lance's four consecutive life sentences make him parole eligible at 71, after he has served 54 years in prison. But if Lance had been convicted of First Degree Murder, and had he thus been sentenced to LWOP, he would be eligible for parole after 25 years under § 558.047. In this instance, thus, § 558.047 makes the sentence for First Degree Murder more lenient than the sentence for Second Degree Murder and related offenses by 31 years. This is determined as follows: 54 years to parole eligibility on the sentence for Second Degree Murder and related offenses minus 25 years to parole eligibility on a First Degree Murder sentence equals a difference of 31 years (54 - 25 = 31). This makes little sense. It too is disproportionate under the above cited case law. As such, § 558.047 infringes upon Lance Berry's Eighth Amendment right, which necessitates strict scrutiny of § 558.047.

For the foregoing reasons, § 558.047 should be subject to strict scrutiny (1) because it adversely affects a suspect class, and (2) because it infringes upon Lance's fundamental rights under the Eighth Amendment. *See generally* Ian P. Farrell, *Strict Scrutiny Under the Eighth Amendment,* 40 FLA. ST. U. L. REV. 853 (2013) (arguing that extreme sentences for juveniles, such as LWOP, should be treated as inherently suspect, and thus subject to strict scrutiny, given that juveniles are, by definition, the least culpable offenders because of their youth).

D. If this court deems that strict scrutiny is inappropriate, then intermediate scrutiny should apply because § 558.047 affects a quasi-suspect class and infringes upon a quasi-fundamental right.

At a minimum, we are here dealing with a quasi-suspect class and a quasi-fundamental right, each, in and of itself, justifying intermediate scrutiny. The fact that we have both together amplifies the case for intermediate scrutiny. *See* Julie A. Nice, *The Emerging Third Strand in Equal Protection Jurisprudence: Recognizing the Co-Constitutive Nature of Rights and Classes*, 99 U. Ill. L. Rev. 1209 (1999) (describing that the Supreme Court has on several occasions used heightened scrutiny to invalidate a statute that implicates both a quasi-suspect class and a quasi-fundamental right).

First, if this court deems that the suggested class here is not enough like race, nationality or alienage to justify strict scrutiny, the suggested class nevertheless resembles these suspect classes closely enough that it should be deemed quasi-suspect. "Quasi" means to "have some resemblance, usually by possession of certain attributes." *https://www.merriam-webster.com/dictionary/quasi?src=search-dict-hed*. If this court determines, for example, that the class's political powerlessness or that the history of discrimination against the class is not as pervasive or invidious as it is for, say, racial minorities, then the solution is not to simply default to rational basis review. This court should instead weigh the four factors identified above and evaluate how the class stacks up against the other well-accepted suspect classes. *See e.g. Windsor v. U.S.*, 699 F.3d 169, 189 (2nd Cir. 2012) (weighing the above four factors and holding that homosexuals are a quasi-suspect class). Conducting this analysis yields the conclusion that the suggested class here bears enough of the hallmarks of the traditionally suspect classes to be treated as a quasi-suspect class.

Second, while it strains the imagination that the Eighth Amendment right to be free of cruel and unusual punishment might be deemed something less than a fully enumerated fundamental constitutional right (thus demanding strict scrutiny), the ideological force of the right at least qualifies it as quasi-fundamental. If, for example, the right were not enumerated in the Constitution, its history and pedigree would still earn it the label of an unenumerated fundamental right, and, at the very least, a quasi-fundamental right.

An unenumerated right is deemed "fundamental" if it is "within the contemplation of the 'liberty or property' language of the Fourteenth Amendment." *Morrisey v. Brewer*, 408 U.S. 471, 494 (1972). Unenumerated fundamental rights

are those that are "implicit to the concept of ordered liberty," *Palko v. Connecticut,* 302 U.S. 319, 325 (1937), and which are "deeply rooted in the nations history and traditions." *Moore v. City of E. Cleveland,* 431 U.S. 494, 503 (1977). Unenumerated fundamental rights include, but are not limited to, "the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of [one's] own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923).

Here, the very ideals of the right to be free of cruel and unusual punishments trace back to 1215 in the Magna Carta, a document greatly esteemed in British and American legal communities and once described as "the greatest constitutional document of all time – the foundation of the freedom of the individual against the arbitrary authority of the despot." Danziger, Danny; Gillingham, John (2004). *1215: The Year of the Magna Carta*. Hodder Paperbacks. ISBN 978-0340824757. The precise language of the right, while younger, is no less pedigreed. It comes from Article 10 of the English Bill of Rights of 1689. *See Trop v. Dulles*, 356 U.S. 86, 100 (1958) ("The phrase in our Constitution was taken directly from the English Declaration of Rights of 1688 [sic], and the principle it represents can be traced back to the Magna Carta."). The right is also deeply rooted in our own nation's history and traditions. Language similar to the cruel and unusual punishments clause was first introduced into the laws of Massachusetts in 1641. *Tortured History: Finding Our Way Back to the Lost Origins of the Eighth Amendment,* 31 PEPP. L. REV. 661, 664 (2004). Language virtually identical to the clause made its way into the Virginia Declaration of Rights in 1776. *Id.* at 668. Eight other states subsequently adopted the clause into their own bills of rights before the clause was eventually embraced in 1791 as the Eighth Amendment. *Id.* at 669, n. 99. Before that, however, the Congress of the Confederation of the United States incorporated the clause into the Northwest Ordinance in 1787, which is the constitutional document that incorporated Ohio, Indiana, Illinois, Michigan and Wisconsin into the Union. *Id.*

Put simply, there can be no doubt that the right to be free of cruel and unusual punishments is a fundamental right. As such, it is at the very least a quasi-fundamental right.

Given that we are here dealing with at least a quasi-suspect class and a quasi-fundamental right, intermediate scrutiny is the appropriate form of means-ends scrutiny to apply in the event this court chooses not to apply strict scrutiny.

E. Even if strict scrutiny and intermediate scrutiny do not apply, § 558.047 should be subject to what scholars call "rational-basis-with-bite."

As has been repeatedly and widely recognized, there are, in application, at least two variations of the rational basis test that the United States Supreme Court has used. *See e.g.* Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through Romer v. Evans*, 32 Ind. L. Rev. 357 (1999) (noting that there are "two sets of rationality cases, one deferential and one heightened); Robert C. Farrell, *Equal Protection Rational Basis Case in the Supreme Court Since Romer v. Evans*, 14 Geo. J. L. & Pub. Pol'y 441 (2016) (analyzing the different techniques of heightened versus deferential rational basis review as well as when the Supreme Court applies each of the two versions); Jennifer L. Greenblatt, *Putting the Government to the (Heightened, Intermediate, or Strict) Scrutiny Test: Disparate Application Shows Not All Rights and Powers Are Created Equal*, 10 Fla. Coastal L.Rev. 421, 477 (2009) (United States Supreme Court has plainly strayed from three-tiered approach); Gunther, 86 Harv. L.Rev. at 17–24 (noting dissatisfaction with tiers and tendency to intervene without strict scrutiny); R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice,* 4 U. Pa. J. Const. L. 225, 230–33 (2002) (identifying three different types of rational basis review in United States Supreme Court cases); Raffi S. Baroutjian, Note, *The Advent of the Multifactor, Sliding-Scale Standard of Equal Protection Review: Out with the Traditional Three-Tier Method of Analysis, in with Romer v. Evans,* 30 Loy. L.A. L.Rev. 1277, 1301–05 (1997) (citing *Romer v. Evans*, 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996), as example of stricter rational basis review under Federal Equal Protection Clause); Peter S. Smith, Note, *The Demise of Three-Tier Review: Has the United States Supreme Court Adopted A "Sliding Scale" Approach Toward Equal Protection Jurisprudence?*, 23 J. Contemp. L. 475, 480–88 (1997) (citing Justice Marshall dissents advocating sliding scale approach); Neelum J. Wadhwani, Note, *Rational Reviews, Irrational Results,* 84 Tex. L.Rev. 801, 803 (2006) (noting waffling between rational basis test—where any conceivable government interests is sufficient—and more stringent test, which includes inquiry regarding whether the actual government action taken is justifiable).

There is, on the one hand, a deferential version of the rational basis test in which the court examines a challenged classification for "any conceivable" rational purpose to support it, regardless of whether there exists any evidence for the

conceived purpose and regardless of whether there is any correlation between the conceived purpose and the challenged classification. *E.g.* Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through Romer v. Evans*, 32 Ind. L. Rev. 357, 359-360 (1999). This version of rational basis review is so deferential that it has widely been criticized as toothless. *Id.* Any conceivable purpose for a statutory distinction can be imagined if the purpose need not be based upon reality. *Id.* Thus, deferential rational basis review essentially renders all challenged statutes impervious to any equal protection challenge. *Id.*

But on the other hand, there is a more demanding version of rational basis test in which the court requires the state to produce actual evidence of a legitimate government purpose to support the challenged classification, and also requires that there be an actual (not a hypothetical) correlation between the stated purpose of the classification and the classification itself. *Id.* This heightened form of rational basis review is often called "rational-basis-with-bite," and it is the form of review the Supreme Court has always used when invalidating a statute based on rational basis review. *Id.*

This of course begs the question which form of rational basis review should apply here if strict and intermediate scrutiny are inapplicable.

Fortunately, the cases in which the Supreme Court has used rational-basis-with-bite reveal two important themes that are also present here, thus indicating that this higher form of scrutiny should apply here as well.

First, the court has used rational-basis-with-bite to invalidate a challenged classification when the classification implicated basic rights that, while not "fundamental" or "quasi-fundamental" in the constitutional sense, were nevertheless important enough that they closely approximated fundamental rights. *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUIONAL LAW 1611 (2d ed. 1988) (noting that with respect to heightened rational basis review, "the court has not always referred to the importance of the interest at stake when heightening its level of scrutiny, but it is hard to believe that importance was not at least a factor in the closer look taken by the Court."); *see also e.g. Quinn v. Millsap*, 491 U.S. 95 (1989) (implicating a basic right of access to the political process, analogous to the right to vote, by invalidating a law that required ownership of property in order to serve on a county board); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (implicating a basic right to housing/shelter when invalidating the denial of a building permit for a group home

for the developmentally disabled); *Plyler v. Doe,* 457 U.S. 202 (1982) (invalidating law that denied free public school education to undocumented school aged children and stating that while education is not a fundamental right, "neither is it some governmental benefit indistinguishable from other forms of social welfare legislation" given its importance in "maintaining our basic institutions."); *Zobel v. Williams*, 457 U.S. 55 (1982) (implicating a basic right to reside in the state of one's choosing, analogous to the fundamental right to travel, when invalidating a preference system in Alaska that gave greater oil dividends to residents who had lived in the state longer than those who had moved to the state recently); *United States Department of Agriculture v. Moreno,* 413 U.S. 528 (1973) (implicating a basic right to sustenance when invalidating a law that denied food stamps to households that contained one or more unrelated individuals); *Griffin v. Illinois*, 351 U.S. 12 (1956) (implicating a basic right to appeal, analogous to the fundamental right to counsel, when invalidating a law that barred indigent appellants from filing an appeal if they could not afford the cost of transcripts).

Second, the court has also used rational-basis-with-bite to invalidate a challenged classification when the classification created a disfavored class that, while not traditionally a suspect or quasi-suspect class, nevertheless bore characteristics that closely approximated a suspect class. *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUIONAL LAW 1445 (2d ed. 1988) (noting that the Supreme Court has used a heightened rational basis test in cases that involved "statutes creating classes based on factors the Court evidently regards as in some sense 'suspect' but appears unwilling to label as such."); *see also e.g. United States v. Windsor,* 133 S. Ct. 2675 (2013) (protecting gay men and women by holding that it violates equal protection and due process for federal law to exclude from the definition of "marriage" same-sex couples); *Romer v. Evans,* 517 U.S. 620 (1996) (protecting gay men and women by invalidating a state constitutional amendment that barred any law that prohibited discrimination based upon homosexuality); *Cleburne,* 473 U.S. at 432 (protecting the developmentally disabled when invalidating the denial of a building permit for a group home for such individuals); *Plyler,* 457 U.S. at 202 (protecting undocumented immigrant children from being denied a free public school education); *Moreno,* 413 U.S. at 528 (protecting "hippies" who were targeted by legislation that denied food stamps to households that contained one or more unrelated individuals).

Here, both above referenced themes are present. First, the classification here implicates important basic rights. While the classification may not completely abrogate Lance Berry's Eighth Amendment right under *State v*, *Nathan*, 522 S.W.3d 881 (Mo. 2017), it nevertheless significantly implicates the proportionality

principles embodied in the Eighth Amendment. Therefore, the issue here is as important as the issue of access to the appellate process in *Griffin,* the right of access to the political process in *Quinn,* the right to reside in the state of one's choosing in *Zobel,* the right to basic sustenance in *Moreno,* the right to housing in *Cleburne,* or the right to education in *Plyler.* Second, the classification here creates a disfavored class that, if not a traditionally suspect or quasi-suspect, nevertheless has many of the same characteristics of a suspect class, as discussed previously.

Thus, given the important similarities between this case and those in which the Supreme Court has used rational-basis-with-bite to find an equal protection violation, this court should use rational-basis-with-bite if it chooses not to apply strict or intermediate scrutiny.

F. Section 558.047 fails under all levels of means-ends scrutiny.

Even if this court uses deferential rational basis review, the classification here still violates equal protection. The distinction that § 558.047 draws between de jure LWOP offenders and de facto LWOP offenders is neither rational nor related to a legitimate government interest. On its face, the distinction is irrational. It grants more leniency to the more culpable offender and punishes more severely the less culpable offender. *See* § I(C)(2) of this brief. This flies in the face of basic penal code logic which dictates that more culpable offenders should be punished more severely, not less severely, and vice versa. Under § 558.047, the only juvenile offenders who fall within the ambit of the statute are those who were specifically sentenced to LWOP. By definition, this means they committed First Degree Murder, the most serious crime possible. But all other juvenile offenders who have a de facto LWOP sentence have not committed First Degree Murder. Instead they have committed lesser offenses. But because their sentence is de facto LWOP instead of de jure LWOP, they receive no protection from § 558.047. In other words, under § 558.047, first degree murders sentenced to LWOP are entitled to a parole hearing after 25 years, but a juvenile convicted of a Second Degree Murder (and related offenses) and who is sentenced to de facto LWOP will likely never even receive a parole hearing (and certainly not within 25 years). This makes no sense. Under § 558.047, first degree murderers receive more leniency than second degree murderers. Conversely, second degree murderers are punished more severely than first degree murderers. Under the logic of the statute, Lance Berry would have been better off had had he been convicted of First Degree Murder instead of Second Degree Murder. It is a struggle to imagine what legitimate government interest could be furthered by such an irrational result.

Thus, even under deferential rational basis review, the classification drawn by § 558.047 violates the Equal Protection Clause. Since the classification fails rational basis review, it necessarily fails intermediate and strict scrutiny.

II. Lance Berry's four consecutive life sentences violate the Eighth Amendment (a) because they are disproportionate, and (b) because they aggregate to a de facto LWOP sentence that offends the dictates of *Graham v. Florida* and *Miller v. Alabama.*

A. Lance Berry's sentence is disproportionate.

The very premise of the Eighth Amendment protection against cruel and unusual punishments is that punishments should be graduated and proportioned such that less serious crimes result in less serious punishments, and conversely, more serious crimes result in more serious punishments. *See Graham v. Florida*, 560 U.S. 48, 67 (2010) (citing *Weems v. United States*, 217 U.S. 349 (1910). Thus, when we see the opposite in practice, this is good evidence that the Eight Amendment has been infringed. *See Solem v. Helm*, 103 S. Ct. 3001 (1983) ("if more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive."). In fact, state and federal courts around the country have held that the Eighth Amendment is infringed when an offender's sentence for a less serious crime is greater than it would have been had he been convicted of a more serious crime. *See* § I(C)(2) of this brief (collecting cases).

Here, Lance's sentence is disproportionate in two ways:

First, his sentence for Second Degree Murder, by itself, is harsher than the sentence he would now be serving if he had been convicted of the more serious crime of First Degree Murder. This is because his parole eligibility for Second Degree Murder occurs six months after what his parole eligibility would have been had he been convicted of First Degree Murder. *See* § I(C)(2) of this brief for details on why this is the case. Effectively, thus, Lance's sentence for Second Degree Murder is harsher than the sentence he would have received had he been convicted of First Degree Murder. This makes no sense, and it is clearly disproportionate under the above cited case law.

The second reason why Lance's sentence is disproportionate is because § 558.047 (by reducing the penalty for First Degree Murder) makes the sentence for

First Degree Murder more lenient than Lance's sentence for Second Degree Murder and related offenses by 31 years. *See* § I(C)(2) of this brief for details on why this is the case. It simply makes no sense that Lance is punished so much more harshly for Second Degree Murder (and offenses necessarily related to the commission of this crime) than he would have been had he been convicted First Degree Murder, which is the most serious crime possible. As such, Lance's entire sentence is disproportionate under the above cited case law.

For purposes of brevity, counsel has not repeated the entirety of the arguments made in § I(C)(2) of this brief dealing with Eighth Amendment infringment. Nevertheless, counsel now incorporates here all the arguments made in § I(C)(2). For the foregoing reasons, Lance's sentence is disproportionate and, thus, violates the Eighth Amendment.

B. Lance Berry's four consecutive life sentences aggregate to a de facto LWOP sentence that offends the dictates of *Graham v. Florida* and *Miller v. Alabama*.

1. The Missouri Supreme Court has previously rejected this argument in two different cases, but those opinions were wrongly decided for the reasons stated in the dissents.

As a threshold matter, it is important to note that in *Willbanks v. Dep't of Corr.*, 522 S.W.3d 238 (Mo. 2017), and *State v. Nathan,* 522 S.W. 3d 881 (Mo. 2017), the Missouri Supreme Court considered and rejected the same argument that Lance Berry now makes here. Understanding that this court is bound by these cases, Lance Berry nevertheless presents his argument below for purposes of issue preservation so that this claim may eventually be presented to the United States Supreme Court, if necessary. Lance Berry argues that *Willbanks* and *Nathan* are out of step with the great weight of authority from courts all around the country who have decided this issue and that they were wrongly decided for the reasons stated in the dissents to those opinions.

2. The Eighth Amendment and the U.S. Supreme Court's use of the categorical approach to juvenile sentencing.

The Eighth Amendment prohibition against excessive punishment "flows from the basic precept of justice that punishment for crime should be graduated and proportioned to both the offender and the offense." *Miller v. Alabama,* 567 U.S. at 464. While courts interpret the Eight Amendment by reference to history,

tradition, and precedent, the concept of proportionality embodied in the Eighth Amendment is "viewed less through a historical prism than according to the evolving standards of decency that mark the progress of a maturing society." *Id.* (citations omitted).

With respect to the latter, evolving standards of decency have recently forced courts around the county to reevaluate juvenile sentencing. Whereas before, juveniles – especially in serious cases – were treated as adults, courts now account for social science evidence that shows how juveniles are different.

Thus, on four occasions in the past twelve years, the United States Supreme Court has considered how the Eighth Amendment applies to sentences imposed on juveniles. In each case, the court set fundamental limits on those sentences. First, in *Roper v. Simmons,* 543 U.S. 551 (2005), the court held that it is unconstitutional to sentence a juvenile to death. Second, in *Graham v. Florida,* 560 U.S. 48 (2010), the court held that it is unconstitutional to sentence a juvenile to life without parole for a nonhomicide offense. Third, in *Miller v. Alabama,* 567 U.S. 460 (2012), the court held that it is also unconstitutional to sentence a juvenile to a mandatory sentence of life without parole for a homicide related offense. Finally, in *Montgomery v. Louisiana,* 136 S.Ct. 718 (2016), the court held that *Miller, supra,* announced a new substantive constitutional rule, thus dictating it must operate not just prospectively, but retroactively as well.

In arriving at the above holdings, the Supreme Court relied on three basic rationales as to how juveniles are different from adults. First, juveniles are more immature and impetuous, and because of their youth, they fail to adequately appreciate risks and consequences. *E.g. Miller,* 567 U.S. at 471. Second, juveniles are more vulnerable to the negative influences of their environment, which may be affected by poverty, crime, dysfunctional family, and peer pressure. *Id.* Third, the character of a juvenile is not as well formed as that of an adult; the personality traits are more transitory, less fixed. *Id.*

Taken together, these differences meant two important things to the Supreme Court. First, they meant that the grossly irresponsible conduct of a juvenile is not as morally reprehensible as that of an adult's. *Id.* at 472. Juveniles, in other words, have a greater claim to forgiveness. *Id.* Second, the above differences meant to the court that a juvenile's failings offer a greater possibility of being reformed. *Id.*

All of which leads to an important point about the logic underpinning the Supreme Court's recent jurisprudence on juvenile sentencing. When assessing an

Eight Amendment challenge to an appellant's sentence, the Supreme Court uses one of two approaches – either the case-by-case approach or the categorical approach. Under the case-by-case approach, the court weighs the gravity of the crimes committed against the severity of the sentence given the particular facts of the case at hand. *E.g. Solem*, 463 U.S. at 277. This approach applies, for example, to an *adult* offender who claims that his lengthy term-of-years sentence is excessive. *Id.* Under the categorical approach, however, the court assesses whether to categorically ban a type of sentencing practice (such as the death penalty or a sentence to life without parole) based on a mismatch between the culpability of the class of offenders subjected to the penalty and the severity of the penalty itself. This approach has applied, for example, to a defendant who established that it is always unconstitutional to impose the death penalty for the crime of rape. *Coker v. Georgia*, 433 U.S. 584 (1977).

Importantly, in the four above referenced juvenile sentencing cases, the Supreme Court used the categorical approach, holding that, for the reasons addressed above, children, as a class, "are constitutionally different from adults for sentencing purposes." *Miller*, 567 U.S. at 465. Thus, categorically, juveniles cannot be sentenced to death. *Roper*, 543 U.S. 551. Categorically, they cannot be sentenced to life without parole for a non-homicide offense. *Graham*, 560 U.S. at 48. And, categorically, they cannot be sentenced to life without parole for a homicide unless they are first found to be irreparably corrupt. *Miller*, 567 U.S. at 465.

3. The categorical approach should apply here because nothing that Roper, Graham, and Miller said about how and why juveniles are different from adults depends on whether the juvenile committed one crime or multiple crimes.

In *Nathan*, 522 S.W. 3d at 881, the Missouri Supreme Court held that *Miller* and *Graham* do not bar consecutive sentences that aggregate to a de facto LWOP sentence given that *Miller* and *Graham* barred LWOP for a single crime, whereas a consecutive sentence, by definition, means that the offender committed multiple crimes. The argument assumes that the multi-crime offender (even if no homicide is committed) is more culpable than the single-crime offender (even if the single crime is First Degree Murder). Thus, *Nathan's* approach to a juvenile's Eighth Amendment challenge to a consecutive sentence that aggregates to de facto LWOP is to consider each sentence individually based on the nature of the crime and the severity of the sentence. This is the case-by-case approach. *Nathan* rejects the

categorical approach of *Roper, Graham,* and *Miller* when considering a de facto LWOP sentence for a juvenile offender.

However, a review of *Graham* and *Miller,* as well as *Roper,* upon which *Graham* and *Miller* relied, shows that the holding in *Nathan* is fundamentally flawed.

Graham and *Miller* concluded that juveniles, by virtue of youth, are categorically different than adults for sentencing purposes because juveniles are immature, impetuous, short-sighted, and impressionable – especially with respect to negative surroundings. *Miller*, 567 U.S. at 471. But what redeems juveniles is that these traits, also by virtue of youth, are transitory, not fixed. *Id.* They are, put simply, usually outgrown. Thus, juveniles have a greater claim to forgiveness, and they present a greater possibility of being reformed. *Id.*

What is important to note here is that these traits – immaturity, impetuosity, short-sightedness, and impressionability – are precisely what make juveniles juveniles. They are what define juveniles as a class. Moreover, these traits are still transitory, not fixed, whether a juvenile has committed just one crime, or multiple crimes, or no crime at all. Thus, none of the conclusions about juveniles in *Roper, Miller,* and *Graham* depend on them having committed just one crime or multiple crimes or no crimes at all. Because juveniles are immature, impetuous, short-sighted, and impressionable, they are still categorically less culpable than adults, whether they commit one crime or multiple crimes. They still categorically have a greater claim to forgiveness, whether they commit just one crime or multiple crimes. They still categorically have a better chance to reform, whether they commit one crime or multiple crimes. Thus, the categorical approach to juvenile sentencing espoused in *Roper, Graham,* and *Miller* should apply with equal force whether a juvenile has committed just one crime or multiple crimes. Which is why the *Miller* court, relying on the same categorical approach used in *Roper* and *Graham,* said the following: "*Roper* and *Graham* emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, *even when they commit terrible* ***crimes****." Miller,* 132 S.Ct. at 2465 (emphasis added) (note use of the plural form of the word crime, suggesting that the categorical approach should be used even if the juvenile is convicted of multiple crimes).

The shear force of the above logic is undeniable.

It is in fact the same logic the Supreme Court used in *Graham* to extrapolate from *Roper* that if the death penalty is categorically unconstitutional for juvenile offenders, then LWOP – which is nearly akin to the death penalty – must also be categorically unconstitutional for juvenile offenders who do not kill anyone. *Graham*, 560 U.S. at 65. The *Graham* court's focus was not on the gravity of the offense as compared to the severity of the sentence (i.e. the case-by-case approach). Its focus was instead on the fact that, as *Roper* previously determined, juveniles are constitutionally (and categorically) different than adults because they are immature, impetuous, short-sighted, and impressionable; thus they are more deserving of forgiveness, and more likely to be reformed. *Id.* In other words, it was not the crime or its severity that mattered in *Graham*; it was the offender's status as a juvenile that mattered. *Id.* (holding that the categorical approach of *Roper* was appropriate and stating, "No recent data provide reason to reconsider the Court's observations in *Roper* about the nature of juveniles . . . It remains true that from a moral standpoint, it would be misguided to equate the failing of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.") (internal quotations omitted).

This same logic was similarly on display in *Miller* when the Supreme Court extrapolated from *Graham's* reasoning that if LWOP is categorically unconstitutional for juvenile offenders who don't kill someone, then mandatory LWOP must also be categorically unconstitutional for those that do. As in *Graham*, the *Miller* court's focus was not on the gravity of the offense as compared to the severity of the sentence (i.e. the case-by-case approach). Its focus was instead on the fact that, as *Roper* and *Graham* previously determined, juveniles are constitutionally (and categorically) different than adults because they are immature, impetuous, short-sighted, and impressionable; thus they are more deserving of forgiveness, and more likely to be reformed. Again, as in *Graham*, it was not the crime or its severity that mattered in *Miller*; it was the offender's status as a juvenile that mattered. To make this point, *Miller* said the following: "While *Graham's* flat ban on life without parole was for nonhomicide crimes, nothing that *Graham* said about children is crime specific. Thus, its reasoning implicates any life-without-parole sentence for a juvenile, even as its categorical bar relates only to nonhomicide offenses." *Miller*, 567 U.S. at 471.

The exact same thing can be said here. While *Miller's* flat ban addressed only a single sentence of LWOP for a single homicide related offense, nothing that *Miller* said about children is crime specific. Thus, *Miller's* reasoning implicates any juvenile sentence, whether for a single crime of multiple crimes, that denies

the juvenile a meaningful opportunity at release, even as its categorical bar technically relates only to a single sentence to life without parole.

For the foregoing reasons, *Nathan's* rejection of the categorical approach to a juvenile's Eight Amendment challenge to a de facto LWOP sentence was incorrect. As such, it should not operate as a bar to the relief sought here.

4. The weight of authority from courts around the country dictates that the categorical approach of Graham and Miller should apply here.

As noted previously, Lance Berry received four consecutive life sentences stemming from a single criminal transaction – one for Felony Murder in the Second Degree, one for Robbery in the First Degree, and two counts of Armed Criminal Action. These sentences aggregate to a de facto sentence of LWOP. Thus, given that *Graham* applies to nonhomicide offenses and *Miller* applies to homicide offenses, the question is whether *Graham* and *Miller* together apply to an aggregate de facto LWOP sentence for homicide and nonhomicide offenses.

Although the United States Supreme Court has not yet answered this question, the overwhelming weight of authority from courts around the country dictates that the categorical approach of *Graham* and *Miller* should apply here to ban Lance Berry's aggregate de facto LWOP sentence. *See Nathan,* 522 S.W.3d at 881 (dissent, collecting cases); *see also Willbanks*, 522 S.W.3d at 238 (dissent, collecting cases).

5. The four penological goals of sentencing are not served by juvenile de facto LWOP sentences, just as the Supreme Court held they are not served by juvenile de jure LWOP sentences.

In *Graham* and *Miller*, the Supreme Court ruled that, because of the defining character traits of juveniles discussed above, none of the four penological goals of criminal sentencing are served by requiring children to die in prison. First, because of their reduced moral culpability, the court held that retribution is not served by imposition of the harshest sentences: "Because the heart of the retribution rationale relates to an offender's blameworthiness, the case for retribution is not as strong with a minor as with an adult." *Graham*, 560 U.S. at 70-71. Second, the court determined that the characteristics of juveniles also make them less susceptible to deterrence: "Owing to their lack of maturity and underdeveloped sense of responsibility," juveniles are "less likely to take a possible punishment into consideration when making decisions." *Graham*, 560 U.S. at 72. In fact, the

Supreme Court has previously stated that the likelihood juveniles weigh the consequences of their acts to be "virtually nonexistent." *Roper*, 543 U.S. at 572. Third, the court found that a juvenile's capacity for change also means that the incapacitation rationale does not justify a sentence of LWOP. This is because, in order to sentence a juvenile to LWOP, the court must find at the outset that the child is irredeemable, that he is forever lost and can never change. Yet the Supreme Court noted that making this determination about a child at such a young age is exceedingly difficult. *See Miller*, 132 S.Ct. at 2469 ("That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."). Finally, the court determined that a juvenile's capacity for change is also why a sentence of LWOP undermines the goal of rehabilitation. "Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope. Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation. A young person who knows that he or she has no chance to leave prison before life's end has little incentive to become a responsible individual." *Graham*, 560 U.S. at 79.

De jure LWOP sentences and de facto LWOP sentences are different in name only. In substances, they are the same. They both deprive a juvenile of any meaningful opportunity at release. Therefore, just as the penological goals of sentencing are not served by a de jure sentence of LWOP, they are similarly not served by a de facto sentence to LWOP.

6. Lance Berry is serving an unconstitutional de facto LWOP sentence because his parole eligibility date is beyond his natural life expectancy.

As noted above, the reasoning in *Graham* and *Miller* dictates that all juvenile offenders shall be granted "a meaningful chance to obtain release," whether they have committed one crime or multiple crimes, unless the juvenile is found to be irreparably corrupt. Here, Lance Berry's sentence denies him any "meaningful chance to obtain release" because he will likely be dead when he first becomes eligible for parole. Lance is first eligible for parole at age 71. But, according to actuarial statistics from the CDC, he is only expected to live to age 72. *See* Exhibit B, Table 105, *Life Expectancy by Sex, Age, and Race: 2007*. Importantly, these CDC life expectancy statistics are for people who are not in prison. Thus, they overstate Lance's actual life expectancy because living in

prison shortens peoples' lives, frequently by a large number of years. *See e.g.* John J. Gibbons & Nicholas de B. Katzenbach, *Confronting Confinement* 11 (June 2006) (concluding that life expectancy in prison is considerably shortened by stress, violence, and disease). In fact, one recent study conducted in New York found that each year lived in prison takes two years off the inmate's life expectancy.[15] Another study out of Michigan found that juveniles in that state sentenced to LWOP live to an average age of just 50.[16] Put simply, it is not reasonable to expect that Lance Berry will be alive to attend his first parole hearing. The length of his sentence effectively mandates that he die in prison. Thus, his sentence gives him no "meaningful chance to obtain release," and as such, it violates the dictates of *Graham* and *Miller*.

7. Lance Berry should be entitled to the benefits of § 558.047, granting him a parole hearing after 25 years.

For the foregoing reasons, Lance Berry's sentence violates the Eighth Amendment's prohibition against cruel and unusual punishments. Given that the Missouri Legislature has already determined that granting a parole hearing after 25 years in prison is the appropriate remedy in the context of de jure LWOP sentences, it is appropriate to apply that same remedy to the de fact LWOP sentence here. *See Nathan*, 522 S.W.3d at 881 (dissent's discussion of remedy); *see also Willbanks*, 522 S.W.3d at 238 (same).

CONCLUSION

Man is ruined. Man is redeemed. This is not only the theme of the Bible, it is the story of Lance Berry's life. The only difference is that Lance Berry's fall occurred not when he was a man, but a boy.

As shocking as were the night's events of November 16, 2004, they were every bit as predictable. Lance Berry was practically fated to fall. Every influence in his life – every environmental factor, every role model, every life story he ever witnessed – slowly drew him like gravity to the G&D Steakhouse that night. And lest this sound like an excuse to some – a tired trope about society failing yet

[15] https://www.prisonpolicy.org/blog/2017/06/26/life_expectancy/

[16] Campaign for the Fair Sentencing of Youth, "Michigan Life Expectancy Data for Youth Serving Natural Life Sentences," (2012–2015) p. 2, available at http://fairsentencingofyouth. org/wp-content/uploads/2010/02/Michigan-Life-Expectancy-Data-Youth-Serving-Life.pdf.

another poor minority – it is important to note the following. Unrealistic notions of free will cannot be fairly used to permanently condemn Lance Berry for the terrible thing he did. Lance Berry did not choose to be born into abject poverty. He did not choose an alcoholic mother or a drug addicted father. He did not choose for his primary role model a drug dealing older brother. Nor did he choose from the age of 12 on to be raised by gang bangers who got him doing and dealing drugs before he had even completed his 7th grade year in school. The point is this. As the United States Supreme Court said in *Miller v. Alabama*, "Children are more vulnerable to negative influences and outside pressures, including from their family and peers; they have limited control over their own environment and lack the ability to extricate themselves from horrific crime-producing settings." 567 U.S. at 470 (internal quotations omitted). Thus, Lance Berry's culpability for the things he did is largely diminished by the environment in which he was raised. This is not a tired trope. It is a truism.

Which brings us to another truth, also stated by the justices of our Supreme Court, and it is that: ". . . developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds – for example, in parts of the brain involved in behavioral control . . . [this] transient rashness, proclivity for risk, and inability to assess consequences [reduce] a child's moral culpability and enhance the prospect that, as the years go by and neurological development occurs, his deficiencies will be reformed." *Id.* (internal quotations omitted). Lance Berry is the living exemplum of this truth. His deficiencies have indeed been reformed. Despite the fact that in prison, Lance Berry lives in a far more hostile and dangerous world than if he lived free in society, he has chosen a peaceful and contemplative life. He is now a Buddhist, aided in large part by being an autodidact of the first order. He has completed countless correspondence classes through the Ratna Peace Initiative, a nonprofit for teaching Buddhism to inmates. He has read a veritable library of books on mindfulness and meditation. He continues to read voraciously, deepening his mind, expanding his limits. He meditates at least one hour per day. He teaches other inmates about Buddhism and mindfulness and even leads them in group mediations. He regularly donates what money he can – money he has earned in prison – to Buddhist nonprofits around the world. Put simply, Lance Berry has defied remarkable odds against him, odds that would seem to have fated him to a life of iniquity and violence. He lives in a world – prison – that is full of depravity and danger, constantly surrounded by predators, constantly surrounded by drugs smuggled in from the outside, constantly surrounded by the threat of violence. Given how he was raised, one would expect Lance Berry to give into this world, to become a part of it. Instead, however, he has risen above it. Instead, he has transcended gang rivalries, race rivalries, and

everyday power struggles between all kinds of desperate men to become a beacon of peace in a prison world that is constantly at war with itself.

Lance Berry, the boy, was ruined. But Lance Berry, the man, has found a redemption, at least as much as one can from inside the cloistered walls of a prison cell. This redemption, however, is in many ways inchoate. It cannot be completed until he achieves a full reconciliation with society, a showing that he can live a peaceful, productive, and law-abiding life outside the confines of the South Central Correctional Center in Licking, Missouri.

Whether or not Lance Berry will ever reconcile with society will of course be up to him. But first, it is up to the law whether he will even get the chance to try.

Fortunately, the law here is willing for the following three reasons. First, the Equal Protection Clause dictates that it is unconstitutional for § 558.047 to grant a second chance at life to some juvenile offenders fated to die in prison but not others based merely on the semantics of their sentence and not the substance of their character. Thus, to be constitutional, § 558.047 must grant a parole hearing after 25 years to de facto LWOP offenders just as it does to de jure LWOP offenders. Second, the Eighth Amendment dictates the all juveniles offenders, regardless of whether they have committed one crime or multiple crimes shall be granted a "meaningful" chance to obtain release, unless they are deemed irreparably corrupt. Lance Berry was never deemed irreparably corrupt, so he must be granted a "meaningful" chance to obtain release. Third, stare decisis – the bedrock principle of our common law – dictates that no lower court shall circumvent the United States Supreme Court's dictate that juvenile's convicted of killing someone shall not be sentenced to mandatory life without parole by granting such juveniles a parole hearing, but so far past their life expectancy that they will have to be resurrected from the grave in order to argue for their eventual release. As such, the Missouri Supreme Court case of *State v. Nathan* was wrongly decided. Thus, it does not properly bar the relief sought here via the Eighth Amendment.

Lance Berry was a juvenile when he committed the crimes at issue in this case. As is well established by the Supreme Court, juveniles are the least culpable criminal offenders because of their underdeveloped brains, and they are the most likely to be reformed for the same reason, namely, their underdeveloped brains, which will eventually develop completely. Thus, if rehabilitation – purportedly one of the primary goals of a criminal sentence – is to be more than a hollow

promise (indeed, more than an outright lie), then we as a society must be willing to give juveniles who commit terrible crimes a chance at rehabilitation. Lance Berry's sentence gives him no such chance. It determined at the outset that he was not man, but monster, and that he must, therefore, be caged for the rest of his life. This was neither reasonable, nor fair. Time has proven that. It was also unconstitutional.

Thus, for the reasons stated in this brief, this court should hold that Lance Berry's sentence is unconstitutional and that § 558.047 violates equal protection.