SUPREME COURT OF MISSOURI
en banc

JAMES HICKLIN, A/K/A JESSICA HICKLIN,	)	*Opinion issued November 24, 2020*
Appellant,	)	
v.	)	**No. SC97692**
ERIC SCHMITT, ET AL.,	)	
Respondents.	)	

Appeal from the Circuit Court of Cole County
The Honorable Daniel R. Green, Judge

Jessica Hicklin[1] appeals the circuit court's entry of judgment against her in a declaratory judgment action against Missouri's attorney general, Eric Schmitt, and other State parties. The circuit court rejected her claim that her 1997 life-without-parole sentence for first-degree murder under section 565.020, RSMo 1994,[2] is invalid following the United States Supreme Court's decisions in *Miller v. Alabama, 567 U.S. 460 (2012)*, and *Montgomery v. Louisiana, 136 S. Ct. 718 (2016)*. *Miller* held that offenders who were juveniles at the time of their crimes are ineligible for a sentence of life without parole unless

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[1] Ms. Hicklin was convicted under the name James Hicklin but legally changed her name in 2015 to Jessica Hicklin.

[2] All statutory references are to RSMo 2016 unless otherwise noted.

they are among the small group of juveniles a fact finder determines to be eligible for a sentence of life without parole after considering the offender's age, maturity, and other factors identified by the Supreme Court. *Miller, 567 U.S. at 473-74*. *Montgomery* made that holding retroactive to persons such as Ms. Hicklin who sought collateral review of their juvenile life-without-parole sentences that had been imposed before *Miller*. *Montgomery, 136 S. Ct. at 736*.

Ms. Hicklin alleges the only sentences that could be imposed on her for first-degree murder under section 564.020, RSMo 1994, were invalidated by *Montgomery*; she further alleges Missouri's subsequent adoption of a statute addressing *Miller*-impacted individuals in Senate Bill No. 590 ("SB590"), now codified in relevant part at section 558.047, does not cure this invalidity because it neither provides her parole eligibility nor permits her to be resentenced by a judge or jury but, instead, leaves it to the parole board to determine whether she should be eligible for parole.

This Court agrees a declaratory judgment action rather than habeas corpus is the appropriate procedural vehicle for raising this constitutional claim but rejects the claim on the merits. *Miller* did require a factfinder to determine whether a juvenile was eligible for a life-without-parole sentence due to the offender's age, maturity, and other factors identified by the Supreme Court, and *Montgomery* did apply *Miller* retroactively to persons such as Ms. Hicklin. For that reason, a number of states require those juveniles already serving life-without-parole sentences to have a new sentencing hearing. But *Montgomery* also specifically provided that a state, alternatively, could provide automatic parole

eligibility and allow its parole board to consider and determine whether a particular juvenile offender should, in fact, be granted parole, so long as the parole board did so by applying the factors required by *Miller* and *Montgomery*. "The opportunity for release," the Supreme Court said, "will be afforded to those who demonstrate the truth of *Miller*'s central intuition—that children who commit even heinous crimes are capable of change." *Montgomery, 136 S. Ct. at 736*.

Missouri chose the latter alternative, and sections 558.047 and 565.033 specifically require the parole board to determine whether to grant parole to a juvenile offender after that offender has served 25 years by applying the *Miller* factors and certain other factors. After considering these factors, the parole board may decline to grant parole, but it has no authority to determine that juvenile offenders like Ms. Hicklin are ineligible for parole. This aspect of her constitutional claim, as well as her claim that the new provisions allowing parole consideration are bills of attainder, therefore, are without merit.

To the extent Ms. Hicklin also asks this Court to vacate her sentence and remand for resentencing in the event this Court were to declare her original sentence unconstitutional, such a claim must be brought in habeas corpus rather than through use of a declaratory judgment. The circuit court's judgment is affirmed.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 1995, when Ms. Hicklin was 16 years old, she shot and killed Sean Smith. She was tried as an adult, and, in February 1997, a jury found her guilty of first-degree murder under section 565.020.1, RSMo 1994, and armed criminal action under section 571.015.1,

RSMo 1994. At the time of Ms. Hicklin's sentencing in April 1997, section 565.020, RSMo 1994, provided that the punishment for first-degree murder "shall be either death or imprisonment for life without eligibility for probation or parole." *§ 565.020.2, RSMo 1994*. The circuit court sentenced Ms. Hicklin to life in prison without eligibility for probation or parole for first-degree murder and a concurrent sentence of 100 years for armed criminal action.

In 2012 in *Miller*, the Supreme Court held the "Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *567 U.S. at 479*. A sentencer, the Supreme Court said, must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id. at 480*. Though life-without-parole sentences for juvenile offenders remained constitutional in appropriate cases, the Supreme Court explained it expected such cases would be "uncommon." *Id. at 479*. Further, prior to *Miller*, in *Roper v. Simmons, 543 U.S. 551, 578 (2005)*, the Supreme Court held the death penalty may not be imposed constitutionally on any juvenile offender. A consequence of these two decisions is that, going forward, unless a juvenile offender found guilty of first-degree murder were also found to be eligible for a life-without-parole sentence, section 565.020.2, RSMo 1994, offered no valid sentence for that juvenile offender.

Unfortunately, during the four years following *Miller*, Missouri's General Assembly did not reach agreement as to how to revise section 565.020 and related statutes to provide for a constitutionally permissible sentence for the group of juvenile offenders

who were ineligible for life-without-parole sentences. Accordingly, when *State v. Hart, 404 S.W.3d 232 (Mo. banc 2013)*, presented this Court with the question of how to sentence one of these offenders, it simply remanded the juvenile offender's direct appeal of his conviction for resentencing so that a jury could determine, in accordance with *Miller*, whether a life-without-parole sentence was appropriate for the juvenile offender under all the circumstances, as it had no other sentence it could impose. *Id. at 238-39*.

Neither *Hart* nor *Miller* directly applied to persons such as Ms. Hicklin, however, as she had already been found guilty of murder, sentenced to life without parole, had her sentence affirmed on appeal, and had postconviction relief denied before *Miller* was decided. Ms. Hicklin, accordingly, filed a petition for writ of habeas corpus arguing *Miller* should be applied to her retroactively as she, too, was a juvenile when she committed her crime. While her petition was pending, the Supreme Court decided *Montgomery,* which held the prohibition against mandatory life-without-parole sentences for juvenile offenders applies retroactively to juveniles such as Ms. Hicklin and that "[a] hearing where 'youth and its attendant characteristics' are considered as sentencing factors is necessary to separate those juveniles who may be sentenced to life without parole from those who may not." *136 S. Ct. at 735*.

Of particular importance here, however, *Montgomery* also specifically stated that a retrial of "sentences, let alone convictions," was not required "in every case where a juvenile offender received mandatory life without parole." *Id. at 736*. As an alternative, the Supreme Court said, "A State may remedy a *Miller* violation by permitting juvenile

homicide offenders to be considered for parole, rather than by resentencing them." *Id.* This makes sense, for the purpose of resentencing under *Miller* was to permit the jury or judge to consider whether the juvenile was entitled to parole consideration. The need for resentencing could be bypassed, however, if a state wished to provide juveniles with eligibility for parole automatically without first requiring a resentencing hearing.

When *Montgomery* was decided, Missouri's statutes did not provide a mechanism for granting parole to those juvenile offenders serving mandatory life-without-parole sentences. This Court, therefore, resolved these juvenile offenders' still-pending petitions for habeas corpus—including Ms. Hicklin's—by issuing an order in all such cases making these juvenile offenders eligible for parole on those sentences after serving 25 years. In May 2016, while a petition for reconsideration of its ruling in Ms. Hicklin's case was still pending in this Court, Ms. Hicklin filed a declaratory judgment petition in the Cole County circuit court. She challenged the relief ordered by this Court and sought a declaration that section 565.020, RSMo 1994, was unconstitutional as applied to her.

Before Ms. Hicklin's declaratory judgment claims could be finally determined, Missouri's General Assembly passed SB590. In response to *Miller* and *Montgomery,* SB590 repealed the version of section 565.020 under which the circuit court sentenced Ms. Hicklin and enacted a new section 565.020. The new version of section 565.020, still in effect today, provides: "If a person has not reached his or her eighteenth birthday at the time of the commission of the offense [of first-degree murder], the punishment shall be as provided under section 565.033." *§ 565.020.2*. Section 565.033 then sets out an entirely

new statutory scheme for sentencing juveniles found guilty of first-degree murder. Section 565.033.2 requires the judge or jury to consider 10 discrete factors—the majority of which uniquely relate to youth and its attendant circumstances—when assessing which of three punishments to impose on a juvenile offender who has been found guilty of first-degree murder. These possible sentences are "[1] a term of life without eligibility for probation or parole as provided in section 565.034,[3] [2] life imprisonment with eligibility for parole, or [3] not less than thirty years and not to exceed forty years imprisonment." *§ 565.033.1*.

In addition to these forward-looking mandates, this new legislation also addressed retroactive application of *Miller* to juvenile offenders such as Ms. Hicklin who were already serving mandatory life-without-parole sentences before this new statutory scheme became effective in 2016. Rather than providing for resentencing of these juvenile offenders, it states, in relevant part, that they:

> 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.

§ 558.047.1(1). As part of the "parole review hearing" under section 558.047, the statute requires the board to consider the same 10 factors set forth in section 565.033.2 that the factfinder considers for new juvenile offenders. *§ 558.047.5*. It also requires the board,

[3] In addition to the 10 factors a sentencer must consider under section 565.033.2 when assessing punishment for a juvenile offender found guilty of first-degree murder, section 565.034 requires the sentencer to find the defendant personally inflicted injury upon the victim, causing death, in addition to at least one aggravating factor listed in the statute, unanimously and beyond a reasonable doubt, before imposing a life-without-parole sentence. *§ 565.034.6(1)-(2)*.

uniquely, to consider five additional independent factors. *Id.* In total, these 15 factors are: "[t]he nature and circumstances of the offense committed by the defendant"; "[t]he degree of the defendant's culpability in light of his or her age and role in the offense"; "[t]he defendant's age, maturity, intellectual capacity, and mental and emotional health and development at the time of the offense"; "[t]he defendant's background, including his or her family, home, and community environment"; "[t]he likelihood for rehabilitation of the defendant"; "[t]he extent of the defendant's participation in the offense"; "[t]he effect of familial pressure or peer pressure on the defendant's actions"; "[t]he nature and extent of the defendant's prior criminal history, including whether the offense was committed by a person with a prior record of conviction for murder in the first degree, or one or more serious assaultive criminal convictions"; "[t]he effect of characteristics attributable to the defendant's youth on the defendant's judgment"; "[a] statement by the victim or the victim's family member"; "[e]fforts made toward rehabilitation since the offense or offenses occurred, including participation in educational, vocational, or other programs during incarceration, when available"; "[t]he subsequent growth and increased maturity of the person since the offense or offenses occurred"; "[e]vidence that the person has accepted accountability for the offense or offenses, except in cases where the person has maintained his or her innocence"; "[t]he person's institutional record during incarceration"; and "[w]hether the person remains the same risk to society as he or she did at the time of the initial sentencing." *§§ 565.033.2, 558.047.5.*

Because the legislature had thereby addressed the question of how to apply *Miller* and *Montgomery* in Missouri, this Court vacated its prior order concerning the juvenile offenders then serving life-without-parole sentences. Dissatisfied, Ms. Hicklin filed an amended petition for injunctive and declaratory relief in which she asked the circuit court to: (1) issue an injunction prohibiting her continued confinement under section 565.020.2, RSMo 1994, "absent further judicial proceedings in accordance with Missouri law"; (2) issue a declaratory judgment "clearly stating what judicial process must be invoked in order to protect [her] rights, if the respondents are to be allowed to continue her restraint, or in the alternative, to order her released from their illegal custody"; and (3) declare that SB590 is constitutionally invalid (in particular, as relevant here, what is now codified as sections 558.047 and 565.020).

The State moved for judgment on the pleadings, arguing Ms. Hicklin simply was challenging her sentence, which she could not do in a declaratory judgment action. The circuit court agreed that a state habeas corpus action, rather than a declaratory judgment action, was the proper mechanism to assert what it agreed was a challenge to her sentence. It alternatively concluded that Ms. Hicklin's claims were without legal merit even were it to consider the petition as one brought in habeas corpus.

Ms. Hicklin appealed, arguing, in relevant part, that the circuit court's holding misstated the law and facts in that she had repeatedly demonstrated that her challenge is to the constitutional validity of a statute and that habeas relief was foreclosed. After a decision by the court of appeals, this Court granted transfer. *Mo. Const. art. V, § 10*.

II. STANDARD OF REVIEW

This Court reviews *de novo* a ruling on a motion for judgment on the pleadings. *Woods v. Mo. Dep't of Corr., 595 S.W.3d 504, 505 (Mo. banc 2020), citing Mo. Mun. League v. State, 489 S.W.3d 765, 767 (Mo. banc 2016)*. The "motion for judgment on the pleadings should be sustained if, from the face of the pleadings, the moving party is entitled to judgment as a matter of law." *Id., quoting Madison Block Pharmacy, Inc. v. U.S. Fid. & Guar. Co., 620 S.W.2d 343, 345 (Mo. banc 1981)*. "The well-pleaded facts of the non-moving party's pleading are treated as admitted for purposes of the motion." *Emerson Elec. Co. v. Marsh & McLennan Cos., 362 S.W.3d 7, 12 (Mo. banc 2012)*.

III. CHALLENGES TO THE CONSTITUTIONAL VALIDITY OF MISSOURI STATUTES ARE PROPERLY BROUGHT IN A DECLARATORY JUDGMENT ACTION, BUT ATTACKS ON THE VALIDITY OF A SENTENCE SHOULD BE BROUGHT IN AN ACTION FOR HABEAS CORPUS

This Court first addresses the State's assertions that Ms. Hicklin is not entitled to seek relief by way of declaratory judgment because habeas corpus provides the only proper procedural mechanism to assert her claims. The State argues that, as a practical matter, all Ms. Hicklin does is attack the validity of her sentence.

To the extent Ms. Hicklin seeks a judgment about the constitutional validity of section 565.020, RSMo 1994, the provisions of SB590, and their application to her in light of *Miller* and *Montgomery*, declaratory judgment is the proper action. Section 527.020 provides that any person whose rights are affected by a statute "may have determined any question of ... validity ... and obtain a declaration of rights ... thereunder."

As this Court noted in *McDermott v. Carnahan,* under this provision, a "declaratory judgment action to determine when [appellant] is eligible for parole under the statutes and applicable regulations is not an attack on the validity of [a] sentence or conviction. Therefore, appellant properly brought a declaratory judgment action[.]" *934 S.W.2d 285, 287 (Mo. banc 1996)*.[4]

A declaratory judgment is also appropriate when a prisoner seeks a determination as to what processes a parole hearing must have to comply with relevant Missouri statutes and *Miller* and *Montgomery*.[5] Here, however, while the parties at times reference the federal class actions alleging the Missouri parole process fails to allow consideration of the *Miller* factors in a manner consistent with due process, *see Brown v. Precythe, No. 2:17-CV-04082-NKL, 2018 WL 4956519 (W.D. Mo. Oct. 12, 2018)*; *Brown v. Precythe, No. 17-CV-4082, 2019 WL 3752973, at *7 (W.D. Mo. Aug. 8, 2019)*, Ms. Hicklin does not actually allege she is entitled to a parole hearing now or in the near future. The merits of the adequacy of Missouri's parole process in the case of juvenile offenders who have received life-without-parole sentences is therefore not ripe for review.

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[4] *See also Cooper v. Mo. Bd. of Prob. & Parole, 866 S.W.2d 135, 136-37 (Mo. banc 1993)* (involving a declaratory judgment action in which prisoners "assert[ed] that under section 549.261, RSMo 1986, they [were] currently entitled to parole").

[5] As the issue before the Court is the appropriateness of the current declaratory judgment action as opposed to a habeas action, it does not address whether, to the extent a prisoner requests that the parole board provide such a hearing in a particular case, mandamus would be an available procedural mechanism for relief. *See, e.g., State ex rel. Shields v. Purkett, 878 S.W.2d 42, 48 (Mo. banc 1994)* (issuing a writ of mandamus when a prisoner was entitled to a probation hearing in accordance with the statutes and regulations in effect at the time of his crime).

To the extent Ms. Hicklin asks this Court to vacate her sentence, however, this Court agrees with the State that habeas corpus—not a declaratory judgment—is the appropriate action. Ms. Hicklin says she cannot seek habeas relief because she is seeking resentencing, not release. But she is seeking to vacate her sentence; therefore, habeas relief would be available to her to the extent she asserts grounds that can be raised in a petition for habeas corpus. *See, e.g., State ex rel. Clemons v. Larkins, 475 S.W.3d 60, 63 (Mo. banc 2015)* (vacating a sentence in a habeas action and remanding for a new trial or resentencing); *State ex rel. Taylor v. Moore, 136 S.W.3d 799, 800 (Mo. banc 2004)* (vacating an unlawful sentence in a habeas action and remanding the prisoner to the custody of the department of corrections); *State ex rel. Taylor v. Steele, 341 S.W.3d 634, 636 (Mo. banc 2011)* (entertaining a claim but ultimately refusing to vacate a death sentence in a habeas action); *cf. McIntosh v. Haynes, 545 S.W.2d 647, 652-53 (Mo. banc 1977)* (finding a habeas action was proper when the petitioner did not seek immediate release but challenged only the conditions of confinement).

This Court, therefore, addresses in this declaratory judgment action the merits only of Ms. Hicklin's constitutional challenges to section 565.020, RSMo 1994, and SB590 as now codified in sections 565.020 and 558.047 and related statutes.

IV. THE SUPREME COURT EXPRESSLY INVITED SB590'S CORRECTION TO **MILLER** ***ERRORS***

This case involves a narrow factual situation. It turns on whether, in light of the Supreme Court's statement in *Montgomery* that *Miller* violations can be remedied by

parole eligibility, Missouri's General Assembly can accept the Supreme Court's invitation to remedy *Miller*-affected sentences by supplying parole eligibility. The answer is yes. In so holding, this Court is not deciding whether Ms. Hicklin is correct that Missouri would be better served had the General Assembly provided for resentencing, as a number of other States did.[6] The question before the Court today is whether the course the General Assembly chose was constitutional under *Montgomery*.

As previously noted, the Supreme Court in *Montgomery* specifically stated that *Miller*'s retroactive effect "*d[id] not require States to relitigate sentences*, let alone convictions, in every case where a juvenile offender received mandatory life without parole." *Montgomery, 136 S. Ct. at 736* (emphasis added). Rather, it said, a state "may remedy a *Miller* violation by permitting juvenile homicide offenders to be *considered for*

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[6] A Washington statute, for example, provides that juvenile offenders sentenced to life without parole prior to 2014 "shall be returned to the sentencing court or the sentencing court's successor for sentencing consistent with [a statute that requires consideration of the *Miller* factors]." *Wash. Rev. Code Ann. § 10.95.035(1)*; *see also State v. Delbosque, 456 P.3d 806, 819 (Wash. 2020)* ("The *Miller*-fix statute requires a full resentencing, and the sentence imposed must be subject to direct appeal."). Florida also enacted statutes providing for the resentencing of juvenile offenders. *See Miller v. State, 208 So. 3d 834, 834 (Fla. Dist. Ct. App. 2017)* ("[A]ll juveniles are entitled to judicial review and resentencing in accordance with the new statutes [sections 775.082 and 921.1402]."). Even before *Montgomery* was handed down, Michigan had enacted statutes providing for the resentencing of juvenile offenders were *Miller* to apply retroactively. *Mich. Comp. Laws Ann. § 769.25a (2014)*. *But see People v. Wiley, 919 N.W.2d 802, 820 (Mich. Ct. App. 2018)* (finding the statute violates the Ex Post Facto Clause because it removed good time credits for offenders serving life sentences). California also provides a mechanism by which juvenile offenders sentenced to life without parole can, after serving 15 years of their sentence, seek recall of that sentence and resentencing. *Cal. Penal Code § 1170(d)(2)*. *But see In re Kirchner, 393 P.3d 364, 374 (Cal. 2017)* (section 1170(d)(2) was not initially designed to remedy *Miller* errors and is not an exclusive *Miller* remedy).

parole, rather than by resentencing them." *Id.* (emphasis added). Therefore, as long as Missouri law, consistent with *Miller* and *Montgomery*, permits these *Miller*-impacted juvenile offenders to receive true parole consideration utilizing the factors set out in the relevant Missouri statutes, resentencing is not required. This Court rejects Ms. Hicklin's contrary reading of *Montgomery*.

Ms. Hicklin argues, alternatively, that section 558.047 does not actually provide juvenile offenders with parole eligibility but merely provides for an undefined opportunity for "sentence review" after serving 25 years of a murder sentence. She is mistaken.

Statutory interpretation, and the interpretation of section 558.047, is an issue of law this Court reviews *de novo*. *State v. Knox, 604 S.W.3d 316, 320 (Mo. banc 2020), citing Finnegan v. Old Republic Title Co. of St. Louis, Inc., 246 S.W.3d 928, 930 (Mo. banc 2008)*. "The primary rule of statutory interpretation is to effectuate legislative intent through reference to the plain and ordinary meaning of the statutory language." *Bateman v. Rinehart, 391 S.W.3d 441, 446 (Mo. banc 2013)*.

Ms. Hicklin correctly notes that section 558.047.1(1) provides for "a petition for a review of [a juvenile offender's] sentence." But she fails to take sufficient note of the remainder of the statute, which specifically requires the parole board to hold a hearing pursuant to that review at which it shall determine whether to grant parole based on the *Miller* and *Montgomery* factors, stating in relevant part:

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

5. In a parole review hearing under this section, the board shall consider, in addition to the factors listed in section 565.033:
    (1) Efforts made toward rehabilitation since the offense or offenses occurred, including participation in educational, vocational, or other programs during incarceration, when available;
    (2) The subsequent growth and increased maturity of the person since the offense or offenses occurred;
    (3) Evidence that the person has accepted accountability for the offense or offenses, except in cases where the person has maintained his or her innocence;
    (4) The person's institutional record during incarceration; and
    (5) Whether the person remains the same risk to society as he or she did at the time of the initial sentencing.

§ 558.047.4-.5 (emphasis added).

Contrary to Ms. Hicklin's argument, this statute expressly provides juvenile offenders such as her with *parole eligibility* on their murder sentences after 25 years.[7] In making the parole determination required under this section, the parole board considers not only the above-listed five factors in section 558.047, but also the 10 *Miller* factors in section 565.033.2.[8]

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[7] Ms. Hicklin argues the statute does not provide eligibility but rather a "one-shot" sentence review. For the reasons explained above, Ms. Hicklin is wrong to argue the statute does not provide parole eligibility. As for the frequency of parole review hearings, Ms. Hicklin cites no authority for the proposition that she is prohibited from again seeking a parole hearing in the event parole is at first denied. And section 217.690.5, RSMo Supp. 1997, provides that a prisoner denied parole is eligible for another parole review hearing not less than three years from the month of parole denial. In any case, Ms. Hicklin has not suffered a denial of parole and does not allege that the parole board has failed to reconsider her for parole.

[8] The 10 factors in section 565.033.2 are:

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

Adopting this scheme to provide *Miller*-impacted individuals with parole eligibility was the General Assembly's prerogative. *See Hart, 404 S.W.3d at 243* (discussing the legislature's authority to decide how to respond to *Miller*). In light of the Supreme Court's invitation to remedy *Miller* errors in exactly this way—"by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them"—this Court cannot say Missouri's scheme is constitutionally invalid. *Montgomery, 136 S. Ct. at 736*.[9]

> (2) The degree of the defendant's culpability in light of his or her age and role in the offense;
> (3) The defendant's age, maturity, intellectual capacity, and mental and emotional health and development at the time of the offense;
> (4) The defendant's background, including his or her family, home, and community environment;
> (5) The likelihood for rehabilitation of the defendant;
> (6) The extent of the defendant's participation in the offense;
> (7) The effect of familial pressure or peer pressure on the defendant's actions;
> (8) The nature and extent of the defendant's prior criminal history, including whether the offense was committed by a person with a prior record of conviction for murder in the first degree, or one or more serious assaultive criminal convictions;
> (9) The effect of characteristics attributable to the defendant's youth on the defendant's judgment; and
> (10) A statement by the victim or the victim's family member as provided by section 557.041 until December 31, 2016, and beginning January 1, 2017, section 595.229.

[9] Ms. Hicklin argues section 565.020 simply replaces one mandatory sentence with another mandatory sentence. But what *Miller* prohibited was treating all offenders alike without consideration of their youth and its hallmark characteristics at the time of their crimes. The new section 565.020 does not treat all offenders alike. Nor does it treat all juveniles the same. Going forward, it allows a jury or judge to choose among three possible sentences for juvenile offenders found guilty of first-degree murder. And it makes all those juveniles who were already sentenced eligible for parole but allows the difference in culpability and incorrigibility to determine whether and when they will receive parole. As explained above, *Montgomery* invited and approved this approach.

V. THE PAROLE BOARD'S AUTHORITY DOES NOT VIOLATE THE SEPARATION OF POWERS

Ms. Hicklin also argues it violates the separation of powers to allow the parole board to determine a sentence. Article II, section 1 of the Missouri Constitution provides for the separation of powers among the three branches of Missouri's government:

> The powers of government shall be divided into three distinct departments—the legislative, executive and judicial—each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted.

Further:

> The constitutional demand that the powers of the departments of government remain separate rests on history's bitter assurance that persons or groups of persons are not to be trusted with unbridled power. For this reason, the separation of the powers of government into three distinct departments is, as oft stated, "vital to our form of government."

State Auditor v. Joint Comm. on Legislative Research, 956 S.W.2d 228, 231 (Mo. banc 1997).

Ms. Hicklin argues section 558.047 violates the separation of powers by allowing the parole board, an administrative agency in the executive branch, to determine an offender's sentence, thereby usurping the role of the judiciary. But the parole board does not determine the sentence. It determines whether to grant parole. It was the Missouri General Assembly—not the parole board—that granted to Ms. Hicklin the benefit of parole eligibility. This, of course, does not offend the separation of powers because, "[i]n our tripartite form of government … sentencing power is not inherent to the judiciary, but is

dependent upon legislative authorization." *State ex rel. Hughes v. Kramer, 702 S.W.2d 517, 519 (Mo. App. 1985)*.

Ms. Hicklin argues *Mitchell v. Phillips, 596 S.W.3d 120, 123 (Mo. banc 2020)*, prohibits the retroactive application of a change in parole eligibility when, as here, the sentencing statute itself provided that the sentence would be served without parole. In such a case, this Court in *Mitchell* said, the lack of parole is part of the sentence. *Id.* But that simply meant general changes in parole eligibility did not apply to the defendant as the sentence remained the same. In other words, the legislative action at issue in *Mitchell* did not change the offender's sentence. This Court did not hold the legislature *could not* effectively change a sentence by retroactively giving the offender the benefit of parole eligibility. *Mitchell*, therefore, does not govern here, and Ms. Hicklin cites no authority to suggest it is beyond the General Assembly's authority to enact a law effectively changing her sentence to life with parole.

While she failed to raise it in a point relied on and, therefore, failed to preserve the issue properly, Ms. Hicklin also argues section 558.047 amounts to a bill of attainder because it singles out a specifically designated group and inflicts punishment on that group. Considering the point *ex gratia*, Ms. Hicklin is wrong. Section 558.047 grants parole eligibility to individuals like Ms. Hicklin. In no sense can the granting of parole eligibility be considered a "punishment." Rather, it is a benefit. *See Garozzo v. Mo. Dep't of Ins., Fin. Insts. & Prof'l Registration, Div. of Fin., 389 S.W.3d 660, 664 (Mo. banc 2013)* (discussing the three factors that determine whether a statute inflicts punishment).

Ms. Hicklin finally argues that, even if all her other arguments are rejected, because section 565.020, RSMo 1994, the statute under which she was sentenced, now offers no valid sentence for juvenile offenders, her sentence is void and, as there is no legal sentence applicable to her, this Court must direct that she receive a new sentencing hearing under the General Assembly's revised statutory scheme.

To be clear, section 565.020, RSMo 1994, remains valid as to non-juvenile offenders as well as to juvenile offenders who meet the criteria set out in *Miller* and *Montgomery*. But as *Hart* explained, absent an individualized determination that life without parole is not "just and appropriate in light of [the offender's] age, maturity and the other factors discussed in *Miller*," it is unknown whether a juvenile offender meets the criteria for a sentence of life without parole. *404 S.W.3d at 242*. Hart implied, Ms. Hicklin argues, that were such invalidity found, a serious problem would be presented unless the legislature adopted a revised statute allowing the juvenile offender to be resentenced. *See id. at 241-43*. But *Hart* did not suggest the Supreme Court or the legislature were without power to address this problem in other ways. The legislature did just that as to those already sentenced to life without parole by making all such juvenile offenders eligible for parole after 25 years pursuant to the factors already discussed. Because *Montgomery* specifically approved this approach as an alternative to resentencing, this Court rejects Ms. Hicklin's argument that resentencing was the only way to impose a valid sentence on her once

Montgomery held that *Miller* applied retroactively.[10]

VI. CONCLUSION

Through enactment of section 558.047 and the other provisions discussed, Missouri's General Assembly has provided Ms. Hicklin with the benefit of parole eligibility on her first-degree murder sentence after she serves 25 years of that sentence. The Supreme Court in *Montgomery* expressly approved this course of action when it said states were not required to resentence *Miller*-impacted juvenile offenders and, instead, invited states to correct *Miller* errors by supplying parole eligibility. This does not violate the separation of powers. As neither the sufficiency of the parole procedures used to implement *Miller* and *Montgomery* nor Ms. Hicklin's requests to vacate her sentence are properly before this Court in this declaratory judgment action, the circuit court's judgment is affirmed.

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LAURA DENVIR STITH, JUDGE

All concur.

[10] As Ms. Hicklin is not entitled to resentencing, this Court need not address her argument that, were she entitled to resentencing, it should be jury sentencing.