No. 19-2910

United States Court of Appeals for the Eighth Circuit

NORMAN BROWN, et al.,

Appellees,

v.

ANNE PRECYTHE, et. al.,

Appellants

On Appeal from the United States District Court for the Western District of Missouri, Honorable Nanette K. Laughrey

BRIEF OF THE APPELLANTS

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SUMMARY OF THE CASE

After *Miller v. Alabama* and *Montgomery v. Louisiana,* Missouri extended parole eligibility to inmates serving life without parole sentences for first-degree murders they committed as juveniles. Four inmates who were denied parole brought suit seeking injunctive relief requiring Missouri officials to provide them with additional parole procedures beyond those provided to other adult inmates and beyond those provided by Missouri statute. The inmates claimed, and the district court agreed, that the Supreme Court's decisions in *Miller, Montgomery,* and *Graham v. Florida* require Missouri to enact parole procedures that provide these inmates with special opportunities and resources to present evidence favorable to their parole application and to challenge information the Board reviews during parole consideration.

This case presents an issue of first impression in federal courts of appeal: whether *Miller, Montgomery,* and *Graham* should be expanded to require States to enact specific parole procedures and what remedy such an expansion would require. The issues surrounding this novel question and the important interests at stake deserve thorough consideration. Appellants request 20 minutes for oral argument.

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JURISDICTIONAL STATEMENT

This appeal is from the final judgment of the District Court for the Western District of Missouri granting Plaintiffs' motion for summary judgment and ordering injunctive relief under 42 U.S.C. § 1983. Defendants also appeal the district court's order denying Defendants' motion to dismiss.

The district court had jurisdiction under § 1983. Plaintiffs filed a complaint alleging that the Defendants' parole consideration procedures violated Plaintiff's due process rights and subjected them to cruel and unusual punishment. (J.A. at 32–64). Plaintiffs later amended their complaint to allege that Defendants failed to comply with Missouri statutes. (J.A. at 195–235).

On October 12, 2018, the district court entered an order granting Plaintiffs summary judgment on the Constitutional claims and granting Defendants summary judgment on the state-law claims. (J.A. at 529–55). After further proceedings on what remedy to grant, the district court entered an order for injunctive relief requiring Defendants to change the policies, procedures, and customs used in considering Plaintiff's for

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parole. (J.A. at 810–32). The district court entered its unsealed injunctive relief order and final judgment on August 8, 2019. (J.A. at 29).

Defendants' filed a notice of appeal on August 20, 2019. (J.A. at 30, 834–35). Defendants' notice was timely under Fed. R. App. P. 4(a)(1)(A) because Defendants filed it within 30 days of the district court's final judgment. Therefore, this Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Whether the district court erred in granting the inmates summary judgment (and declining to grant summary judgment to Missouri officials) on the inmates' claims that Missouri's parole procedures violate their constitutional rights.

- *Virginia v. Leblanc,* 137 S.Ct. 1726 (2017).
- *Miller v. Alabama,* 567 U.S. 460 (2012).
- *Montgomery v. Louisiana,* 136 S.Ct. 718 (2016).
- *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex,* 442 U.S. 1 (1979).

This issue presents two related but distinct questions:

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1. Whether the Eighth Amendment or Due Process Clause requires states to adopt specific procedures to provide elevated parole consideration to parole-eligible juvenile murderers.
2. Whether the procedures Missouri used in extending parole eligibility to the inmates and considering them for parole provided them with a meaningful opportunity for release.

II. Whether the district court erred in prohibiting Missouri from using objective risk assessment tools in considering the inmates for parole.

- *Bounds v. Smith,* 430 U.S. 817 (1977).
- *Cepulonis v. Fair*, 732 F.2d 1, 6 (1st Cir. 1984).
- *Native American Council of Tribes v. Weber,* 750 F.3d 742 (8th Cir. 2014)
- 18 U.S.C. § 3626(a)(1).

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STATEMENT OF THE CASE

I. The parties and the complaint

The named plaintiffs/appellees in this case are four Missouri inmates who committed first-degree murder before they were eighteen years old. (J.A. at 32–33, 36–37, 271, 302).The inmates represent a class of similarly situated offenders who were all sentenced to life imprisonment without the possibility of parole under a mandatory sentencing scheme that did not allow the sentencing court to impose a lower sentence based on their youth at the time of the crime.[1] (J.A. at 33, Doc. 140).

The defendants/appellants are current and former Missouri officials including every member of the Missouri Parole Board at the time the complaint was filed and the Director of the Missouri Department of Corrections. (J.A. at 37–39).

After the United States Supreme Court's decision in *Montgomery v. Louisiana*, Missouri passed Senate Bill 590, which created § 558.047 of

[1] Some of the class members were originally sentenced to death, but after *Roper v. Simmons,* 543 U.S. 551 (2005) (holding that the Eighth Amendment forbids death sentences for juvenile offenders), those offenders were resentenced to life imprisonment without the possibility of parole.

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the Missouri Revised Statutes. (J.A. at 273–74, 303). Section § 558.047 allows inmates who were sentenced to life without parole for offenses they committed as juveniles to petition for parole after serving 25 years toward the life-without-parole sentence. (J.A. at 303). The statute also requires the Missouri Parole Board to consider many additional factors related to the inmates' youth at the time of the offense and their subsequent growth and rehabilitation. (J.A. at 273–74, 303–304). Each named plaintiff petitioned for parole under § 558.047, was considered for parole after a prehearing interview and a parole hearing, and was denied parole. (J.A. at 271, 325–33). Each named plaintiff was scheduled for reconsideration no more than five years in the future. (J.A. at 312–13, 327, 328, 329, 331).

In the district court, the inmates argued that the Supreme Court's decisions in *Miller v. Alabama, Montgomery v. Louisiana,* and *Graham v. Florida* entitled them to special parole procedures, under the Eighth Amendment and the Due Process Clause, that would allow them additional representation, resources, and opportunities to present information about their youth at the time of the crime and their subsequent efforts toward rehabilitation. (J.A. at 60–62). The inmates

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sought injunctive relief requiring Missouri officials to establish additional procedures and to give more extensive, documented consideration to the inmates' requests for parole. (J.A. at 62–63). Later, the inmates amended their complaint to include claims that Missouri officials do not comply with the requirements of § 558.047. (J.A. at 231–232).

II. The summary judgment litigation and relevant facts

Both parties moved for summary judgment on the constitutional and state-law claims. (J.A. at 262, 290). The parties largely agreed on the relevant material facts at issue. (J.A. at 547–48). The uncontroverted evidence shows that the inmates received parole consideration under the same process used for other Missouri offenders except in three notable ways: juvenile-life-without-parole ("JLWOP") inmates presented more documentary evidence than adult offenders; they received hearings that were longer than the average parole hearing; and the Board was required to consider additional statutory factors relating to the JLWOP inmates' youth, maturation, and rehabilitation. (J.A. at 274–75, 299, 311–15).

The uncontroverted evidence established the following facts about Missouri's parole process for JLWOP inmates:

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A. The Parole Board

Inmates who petition for parole review under § 558.047 are scheduled for parole consideration by the Missouri Parole Board. (J.A. at 273, 303). During the summary-judgment litigation in the district court, the Board was made up of six members, with one vacant seat. (J.A. at 308, 314). With six members, the Board requires four members to agree to finalize a majority vote of the Board. (J.A. at 313, 435)

The Board members typically had extensive experience in many areas including business, law enforcement, government, public service, and corrections. (J.A. at 315–16, 412–13, Doc. 134–4 at 7–14, Doc. 134–5 at 7–25, Doc. 134–11 at 8–12, Doc. 134–13 at 8–13, Doc. 134–14 at 6–11, Doc. 134–6 at 9–12). Board members received training on parole proceedings after they were appointed. *Id.*

None of the Board members had professional experience in adolescent development or extensive experience on youth-related legal issues. (J.A. at 304–05). The record is unclear as to whether the Board members have some training on parole issues for juvenile offenders, but it is clear that neither Board members nor parole staff had extensive or regular training on those issues. (J.A. at 304–05, 414–15).

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B. The pre-hearing process

Before a scheduled hearing, inmates were interviewed by an Institutional Parole Officer at a pre-hearing interview. (J.A. at 308). During that interview, the parole officer used a pre-hearing worksheet that includes questions about the inmates' youth at the time of the offense, the inmates' subsequent growth and maturity, and the inmates' efforts toward rehabilitation. (J.A. at 273–74, 308). From the results of the pre-hearing interview, the parole officer created a pre-hearing report, which was used by the Board in considering the inmate for parole. (J.A. at 274, 308).

The pre-hearing report included an official version of the crime, taken from court records, and also included information from Department records about the inmate's education, conduct, rehabilitative programs, and self-reported information from the inmate, such as the inmate's version of events relating to the crime, substance abuse history, childhood information, and answers to questions about their youth and subsequent growth and maturity. (J.A. at 308–11, Sealed J.A. at 19).

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C. Parole file and inmate access

Any time before or after the parole hearing, inmates, their supporters, victims, and law enforcement were allowed to submit information in writing supporting or opposing an inmate's parole. (J.A. at 445, Doc. 134–6 at 89). The Board made this information part of the inmate's parole file, which the Board members could access. *Id.*

The Board members worked to review all relevant information in an inmate's parole file before making a decision. (J.A. at 441, Doc. 134–4 at 27, 118–19, Doc. 134–5 at 40–41, 128–29, Doc. 134–13 at 43). Board members mentioned they make an additional effort to review information in the class members' cases because those case involved more extensive filings, more serious crimes, and longer institutional histories than an average parole offender. (J.A. at 441, Doc. 134–5 at 40–41, Doc. 134–13 at 43). Some Board members admitted that they are not always able to review 100 percent of the documents in the file due to time constraints. (J.A. at 441–42, Doc. 134–14 at 189).

Inmates and their representatives were not allowed to review the information in their parole file. (J.A. at 247). The Board believes

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protecting confidential information in the parole-review process is important to making fair decisions. (J.A. at 272, Doc. 134–4 at 86–90).

D. Hearing panel and length of hearing

At their parole hearings, the inmates were interviewed by a panel consisting of one Board member, one parole analyst, and one staff member from the prison where the inmate lives. (J.A. at 312). A parole hearing for an average offender lasts no more than 30 minutes, but hearings for juvenile-life-without-parole inmates last an average of about 45 minutes. (J.A. at 311).

E. Inmate delegate

The Board allowed the inmates to bring one delegate to support them at the hearing. (J.A. at 316). If the inmates chose to bring an attorney, the attorney counted as their one delegate. (J.A. at 317). If an inmate's delegate was an attorney, the attorney was still required to speak on topics relevant to parole consideration and was not typically allowed to make legal arguments to challenge the evidence presented at the inmate's trial. (J.A. at 318).

Board rules allowed a delegate to speak generally supporting the inmate's parole release, and there are no official limits on that topic. (J.A.

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at 317, 446, 448–49, Doc. 134–5 at 242, Doc. 134–12 at 67–68, Doc. 134–13 at 46, Doc. 134–14 at 119–20). But Board members often wanted to hear most about what support the delegate or others would provide to the offender to make sure they are successful on parole, and have asked delegates to tailor their comments to address that topic. (J.A. at 317, 449, Sealed J.A. at 26, Doc. 138–32 at 17, 42–45). On at least one occasion, panel members asked attorney delegates not to take notes. (J.A. at 331–332). The Board later clarified that note-taking is allowed. (J.A. at 823).

F. Parole hearing

During the parole hearing, victims and members of law enforcement with an interest in the case were allowed to speak first. (J.A. at 317). By Missouri statute, victims and law enforcement chose whether to speak with or without the inmate present. (J.A. at 317). Under Missouri law, many types of people impacted by the crime may qualify as victims (including family members of victims) and victims may bring people with them for support. (Doc. 134–5 at 100–101).

After the victims and law enforcement, the hearing panel interviewed the inmate. (Doc. 134–5 at 44–46). The panel typically addressed the inmates' version of the offense, their life and growth in

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prison, rehabilitative programs, their physical and mental health, and other topics. (J.A. at 322–25, 467–469, 470–71, 472–473, Doc. 134–5 at 44–46; *see generally* Doc. 138–32, Doc. 138–40, 138–41, 138–42, 138–48). When the panel members finished asking questions, they usually asked the inmate if there was anything else they would like to say. (Doc. 134–40 at 51, Doc. 134–41 at 47, Doc. 134–42 at 38, Doc. 134–48 at 71).

Once the inmate's interview concluded, the panel asked the delegate to speak. (J.A. at 317, Doc. 134–32 at 42, Doc. 134–40 at 48, Doc. 134–41 at 48, Doc. 134–42 at 32, Doc. 134–48 at 74). After the delegate gave his or her statement, the panel concluded the hearing and informed the inmate about what to expect from the parole process going forward, including an estimate of how long it would take the Board to reach a decision. (Doc. 134–32 at 44–46, Doc. 134–41 at 49–50, Doc. 134–42 at 43, Doc. 134–48 at 86)

G. Panel vote and recommendation, and Board action sheet

After the hearing, the panel members would deliberate and vote on whether and when to schedule the inmate for parole. (J.A. at 315). The panel's decision was then referred for a majority vote of the Board. (J.A. at 271–72). When a parole decision was made by a majority of the Board,

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the votes of the non-board panel members did not count, though voting Board members could see how the panel members voted. (J.A. at 271–72, Doc. 134–3 at 185–88).

The panel's decision was recorded on a Board Action Sheet, which contained spaces to record the votes of the panel and the Board members, a space for comments, and a form used to select the reasons for the Board's decision. (J.A. at 303). The only two reasons for denial that the Board could select were "release at this time would depreciate the seriousness of the offense or that there is not a reasonable probability that if the offender were released at this time he would live and remain at liberty without again violating the law." (J.A. at 276, Doc. 134–4 at 117–118).

In hearings for the class members the Board used an extra page that contains factors relating to the inmates' youth, subsequent growth, and maturity, as well as spaces for the panel members to write information relating to those factors that was discussed during the hearing. (J.A. at 274, Doc. 134–2). Board members considered all the information presented to them, including the factors Missouri law required them to consider. (J.A. at 275, Doc. 134–3 at 125–28, 161, 172–

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74, 177, 182–85, Doc. 134–4 at 175, Doc. 134–5 at 60–73, Doc. 134–14 at 65–80, 116–17, 145–79).

H. Board voting process

During the voting process, the Board members reviewed the parole file in turn. (J.A. at 216, Doc. 134–3 at 168). Each member to review the file recorded their vote until a majority of the Board members agreed on whether to schedule the inmate for parole and what, if any, scheduled release date the inmate should receive. (Doc. 134–3 at 184). The Board members could discuss parole cases with each other, but typically did not meet as a whole to discuss cases. (Doc. 134–6 at 48–49, 97–98). If necessary, Board members could schedule cases to be discussed by the full Board at a Board meeting. *Id*.

I. Hearing audio recordings

Audio from the parole hearing was recorded. Inmates were not allowed to review the recording, but Board members could access it. (Doc. 134–6 at 58, Doc. 134–14 at 48). Board members who were not present at the hearing were not required to listen to the recording before voting on whether to parole an inmate. *Id.* The Board did not systematically review

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parole hearing audio files, but did use them to review inmate complaints. (Doc. 134–5 at 206–207).

J. Notice of Board's decision

When the Board reached a decision, they notified the inmate of their decision using a boilerplate form. (J.A. at 335). Board members admitted the form did not explain all of the reasons for their decision, nor did it explain the evidence considered in making the decision. (J.A. at 335). The notice form did not contain suggestions for how the inmates could improve their chances of parole at the next hearing. (J.A. at 335).

Inmates were able to ask their institutional parole officer for help improving their chances for parole. (J.A. at 335). Although the institutional parole officer would not normally be present for the parole hearing, the institutional parole officer does have the ability to review inmates' parole files to assist them. (J.A. at 335, Doc. 134–8 at 64).

K. Inmates' granted parole or scheduled for reconsideration

At the time of the summary-judgment briefing, the Board had held 28 hearings for JLWOP inmates under § 558.047 of the Missouri Revised Statutes. (J.A. at 319, Doc. 139–43). Of those 28, four were scheduled for release after their first parole hearing. *Id.* Inmates who were not granted

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parole after their first hearing were scheduled for reconsideration no more than five years in the future. (J.A. at 319). Missouri inmates as a whole enjoy a high chance of early release. (J.A. at 272). In 2016, 95 percent of Missouri prison releases were releases on parole or other early release. (J.A. at 272, Doc. 134–22 at 67, Table 7.1). Only 5 percent of inmates were released due to their sentence expiring. *Id.* Of offenders who committed violent Class A or Class B felonies, 93.6 percent were given early release, and only 7.4 percent were released due to their sentence expiring. (Doc. 134–22 at 67, Table 7.2). On average, the violent Class A and Class B felony offenders served about 10 years' imprisonment before their first release. *Id.*

III. The summary judgment decision

Both parties filed competing motions for summary judgment as to the state-law and constitutional claims. (J.A. at 262, 290). The district court granted the inmates summary judgment on the constitutional claims and granted the state officials summary judgment on the state-law claims. (J.A. at 529–555). In the summary judgment order, the district court found that *Miller* and *Montgomery* required Missouri to adopt parole procedures necessary to give the inmates a "meaningful

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opportunity for release based on demonstrated rehabilitation." (J.A. at 547–52). As to the state-law claims, the district court found that the inmates failed to make a prima facie showing that the Missouri Parole Board does not consider the evidence it is required to consider during parole hearings for *Miller* inmates. (J.A. at 553).

IV. The remedy litigation

After granting the inmates summary judgment on the constitutional claims, the district court held further proceedings to determine what remedy to grant. (J.A. at 27–30, 555). Missouri officials submitted a proposed plan for compliance, and the inmates submitted objections and a competing plan. (J.A. at 28, 556, 572). After a court-ordered settlement conference, Missouri submitted an amended plan, followed by the inmates' amended response. (J.A. at 28, 607, 636). The district court held a hearing "regarding the proposed plan of compliance," and the parties submitted a final round of briefing following the hearing. (J.A. at 28–29, 653, 777, 779). On August 8, 2019, the district court entered an order and judgment granting declaratory and injunctive relief. (J.A. at 29, 810).

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While the district court largely accepted Missouri officials' plan for compliance, the district court did not accept Missouri's plan to use the Ohio Risk Assessment System, an objective risk and needs assessment, in evaluating the inmates for parole. (J.A. at 829–830). Instead, the district court prohibited Missouri from using the Ohio Risk Assessment System or "any risk assessment tool" that was not "developed to address inmates affected by *Montgomery* or *Miller*." (J.A. at 829–830).

SUMMARY OF THE ARGUMENT

In a drastic expansion of Supreme Court case law, the district court expanded cases about criminal sentencing (*Miller v. Alabama, Montgomery v. Louisiana,* and *Graham v. Florida*) to require Missouri to transform parole consideration into an adversarial proceeding—allowing inmates to call expert and lay witnesses, present legal argument through counsel, compel production of state records, scrutinize victim statements, and challenge the reasons behind parole denials.

The district court erred in granting summary judgment on the inmates' constitutional claims because *Miller, Montgomery,* and *Graham* do not say anything about state parole procedures, and do not require states to change the way they consider inmates for parole. The Supreme

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Court and federal appellate courts have long held that neither the Eighth Amendment nor the Due Process Clause allow federal courts to review the procedures states use to consider inmates for discretionary parole. *Baumann v. Ariz. Dept. of Corr.,* 754 F.2d 841, 846 (9th Cir. 1985); *Greenholtz v. Inmates of Nebraska Penal and Corr. Complex,* 442 U.S. 1, 7–8 (1979).

Miller, Montgomery, and *Graham* do not overturn these well-settled limits on federal oversight of state parole procedures. Those cases have nothing to do with the parole process and only discuss the rights that juvenile offenders must be afforded during criminal sentencing proceedings. In fact, *Montgomery* holds that parole eligibility itself can remedy an unconstitutional life sentence that violates *Miller*. *Montgomery,* 136 S.Ct. at 724.

After the Supreme Court's decisions in *Miller v. Alabama* and *Montgomery v. Louisiana,* Missouri's General Assembly adopted the remedy explicitly endorsed by the Supreme Court and provided for juvenile murderers to be considered for parole after serving 25 years' imprisonment toward their murder sentences. Missouri's decision to extend parole eligibility to its *Miller* inmates remedied any constitutional

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infirmity in their sentences. *Id.* And even if there were an issue with Missouri's decision to enact the Supreme Court's remedy, that would not allow the inmates to challenge Missouri's parole procedures; instead, they should seek individual collateral relief to remedy any remaining sentencing defects.

Similarly, the district court had no authority to review Missouri's parole process under the requirements of the Due Process Clause. While states may not deprive inmates of their liberty or property without due process of law, due process protections can only apply during parole review if the inmates demonstrate that the Constitution or state law mandates their release under certain circumstances. *Kentucky Dept. of Corr. v. Thompson,* 490 U.S. 454, 462 (1989). But inmates are not entitled to be released from prison before the end of a valid sentence, and nothing in *Miller, Montgomery, or Graham* changes that. *Greenholtz v. Nebraska Inmates,* 442 U.S. 1 at 7–8.

Quite the contrary, *Graham* confirms that "[a] State is not required to guarantee eventual freedom to a juvenile offender," nor are states required to "release that offender during his natural life." *Graham,* 560 U.S. at 75. Because the inmates have no protected liberty interest in

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conditional release on parole from prison, they have no constitutional right to any particular procedures during parole release consideration. *Greenholtz v. Nebraska Inmates,* 442 U.S. at 7–8.

Even if *Miller* and *Montgomery* applied to parole proceedings, Missouri's parole review process provided the inmates with a meaningful and realistic opportunity for release. Missouri went beyond the Supreme Court's remedy in *Montgomery* and required that the Parole Board consider additional factors related to the inmates' youth at the time of the crime, including subsequent maturation and efforts toward rehabilitation. Missouri's parole process allowed inmates advance notice to prepare for hearings, pre-hearing interviews with staff members, in-person hearings with Board members and analysts, the chance to submit information for the Board's consideration, and many other rights. Missouri offenders enjoy a high chance of early release on parole, and around 14 percent of *Miller* inmates were scheduled for release after their first parole hearing.

Other district courts have found potential fault with state parole systems that are based solely on file review or that parole an strikingly low number of inmates. *See Greiman v. Hodges,* 79 F.Supp.3d 933, 936,

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942 (S.D. Iowa Jan. 15, 2015); *Maryland Restorative Justice Initiative v. Hogan,* 2017 WL 467731, (D. Md. Feb. 3, 2017). These systems differ significantly from Missouri's system because they do not allow *Miller* and *Graham* inmates to participate meaningfully in the parole process, and give them only a fleeting hope of parole consideration.

Missouri's parole process is very different from these examples: it provides guaranteed in-person participation and allows the Board to consider a wide range of information about every inmate, including factors related to their youth at the time of the offense and subsequent growth. Missouri inmates also have a high chance of eventual release on parole. There is no legal basis for the district court's decision to strike down Missouri's parole system, and this Court should reverse.

The district court also erred in one critical element of its remedy. Although many aspects of the district court's order properly respected Missouri's policy-making authority, the Court prohibited Missouri from using the Ohio Risk Assessment System or other risk assessment tools unless Missouri can find a tool that was developed to address *Miller* and *Montgomery* inmates. The district court's decision extended to matters not before the Court, was based solely on one hearsay affidavit, and did

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not give Missouri an opportunity to explore other ways to implement an objective risk assessment system. The district court's decision disregards federal law and precedent requiring federal courts to defer to State policy-makers in crafting injunctive remedies, and the Court should reverse. *Native American Council of Tribes v. Weber,* 750 F.3d 742, 753 (8th Cir. 2014); 18 U.S.C. § 3626(a)(1).

ARGUMENT

I. The district court should have granted the Missouri Officials' motion for summary judgment and denied the inmates' constitutional claims because the uncontroverted record shows that the Missouri Officials have not subjected the inmates to cruel and unusual punishment or denied them due process.

During the summary-judgment litigation, the inmates established that Missouri's parole process establishes some limits on their ability to present information and witnesses in person and on their ability to review the Board's documents and the reasons for the Board's decision. But the inmates failed to allege or show that they were being denied the parole *consideration* that *Miller and Montgomery* require and that Missouri law provides.

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All of the inmates' claims rested on their assumption "a juvenile offender's parole review demands far more *procedural* protection than in typical adult hearings." (Doc. 22 at ¶ 75). But that argument is not supported by the Constitution or United States Supreme Court precedent. The district court erred in expanding *Miller v. Alabama,* 567 U.S. 460 (2012), *Montgomery v. Louisiana,* 136 S.Ct. 718 (2016), and *Graham v. Florida*, 560 U.S. 48 (2010), to apply to the inmates' parole proceedings, and if the Court corrects that error, the inmates' claims must fail as a matter of law.

But even if *Miller, Montgomery,* and *Graham* do impose constitutional requirements on state parole systems, the facts establish that Missouri's parole system passes constitutional muster. Missouri allows inmates to have regular, holistic review proceedings that have led to multiple class members being scheduled for release after their first parole hearing. And over the years, the same parole process has granted early release to nearly 95 percent of Missouri inmates. The class members' opportunities for early release are not meaningless or unrealistic by any reading of the facts and Supreme Court precedent, so their claims must fail.

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A. Standard of review

This Court reviews orders granting summary judgment de novo. *Farver v. McCarthy*, 931 F.3d 808, 811 (8th Cir. 2019). So this Court applies "the same standard as the district court, view[ing] the evidence in the light most favorable to the nonmoving party, and giv[ing] the nonmoving party the benefit of all reasonable inferences to be drawn from the evidence." *Adkison v. G.D. Searle & Co.*, 971 F.2d 132, 134 (8th Cir. 1992). Summary judgment is only proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. Proc. 56(a). A court looks to the entire record, including "depositions, documents, [and] affidavits or declarations." Fed. R. Civ. Proc. 56(c).

B. The inmates' claims fail as a matter of law because the Supreme Court's decisions in *Miller*, *Montgomery*, and *Graham* do not require States to change their parole process.

There is simply no authority for the district court's conclusion that Missouri officials are required to give juvenile murderers special treatment, beyond that given to other adult offenders, when considering them for parole. Neither the Eighth Amendment nor the Due Process

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Clause gives federal courts the authority to dictate state parole procedures to benefit parole-eligible juvenile murderers.

Miller and *Montgomery* make clear that Missouri remedied any Eighth Amendment problems with the class members' sentences by giving them statutory parole consideration.

1. Missouri's decision to make the inmates eligible for parole remedied the constitutional defect in the inmates' sentences.

In *Miller v. Alabama*, the Supreme Court addressed whether the Eighth Amendment's Cruel and Unusual Punishment Clause prohibited criminal courts from sentencing juvenile murderers to life imprisonment without the possibility of parole. The Court found that states may sentence juvenile murderers to life without parole, but that the permanent nature of the punishment required courts to hear and consider evidence about the how the offender's youth affected their crime.

By its own terms, *Miller* "does not categorically bar a penalty for a class of offenders or type of crime—as, for example, [the Court] did in *Roper* or *Graham*. Instead, it mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Miller,* 567 U.S.

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at 483. *Miller* only concerned the procedures a judge or jury must follow before removing the opportunity for a youthful murderer to *ever* be considered for release from prison. *Miller* said nothing about what procedures can be used to consider offenders for parole release at any one of the many hearings they may receive. And *Miller* did not hold that parole-eligible juvenile murderers were entitled to adversarial procedures to tilt parole consideration in their favor.

Similarly, the Supreme Court's decision in *Montgomery v. Louisiana* plainly states that parole eligibility completely remedies a violation of *Miller's* Eighth Amendment requirements. *Montgomery,* 136 S.Ct. at 724. The Court's finding that "[a] State may remedy a *Miller* violation by extending parole eligibility to juvenile offenders" is unqualified, and does not contemplate the need for any further remedy. *Id.* The Court's solution shows that parole eligibility, in itself, is a remedy for a *Miller* violation.

Indeed, Justice Scalia's dissent in *Montgomery* makes clear that the Court viewed parole eligibility as a complete remedy for *Miller* offenders. *Montgomery,* 136 S.Ct. 718, 744 (Scalia, J., dissenting). Justice Scalia noted that the Court's suggestion—legislative extension of parole

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eligibility—removed the possibility that juvenile murderers would be resentenced to life without parole, and effectively secured them the best case scenario by making life without parole sentences a "practical impossibility." *Id.* Missouri's juvenile murderers have benefited as Justice Scalia predicted, and they have received greater relief than required by *Montgomery*.

Under Missouri law, the inmates are guaranteed parole consideration, at regular intervals, that considers a wide range of factors related to their life in prison, their growth, and their maturity. And they did not have to risk their parole ineligible sentences being confirmed by a second sentencing court. Even though Missouri's *Miller* offenders have received more than the best possible remedy contemplated by the majority and dissent in *Miller* and *Montgomery,* they seek an unprecedented expansion requiring Missouri officials to give them *even more* extensive and favorable parole consideration than that given to other inmates who committed less serious offenses.

The district court's decision to force Missouri to alter its parole process is far outside the bounds of *Miller* and *Montgomery*. Those cases were decided under the Cruel and Unusual Punishment Clause, but the

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decision to grant or deny an inmate parole is not part of punishment at all. *Warden v. Marrero,* 417 U.S. 653, 658 (1974); *Greenholtz v. Inmates of Nebraska Penal and Corr. Complex,* 442 U.S. 1, 7–8 (1979); *Stewart v. U.S.,* 325 F.2d 745, 746 (8th Cir. 1964). Courts have long held that a prisoner's disappointment in being denied parole release does not equate with cruel and unusual punishment. *Baumann v. Ariz. Dept. of Corr.,* 754 F.2d 841, 846 (9th Cir. 1985); *Lustgarden v. Gunter,* 966 F.2d 552, 555 (10th Cir. 1992); *Damiano v. Fla. Parole & Prob. Comm'n,* 785 F.2d 929, 933 (11th Cir. 1986); *Craft v. Tex. Bd. of Pardons & Paroles*, 550 F.2d 1054, 1055 (5th Cir. 1977); *Stewart v. U.S.,* 325 F.2d 745, 746 (8th Cir. 1964). Even the consequences of allegedly "arbitrary and capricious" parole denials do not implicate the Eighth Amendment. *Craft v. Tex Bd. of Pardons & Paroles,* 550 F.2d at 1055 (citing *Cook v. Whiteside,* 505 F.2d 32, 34 (5th Cir. 1974)).

Miller and *Graham* dealt with the narrow area of the law where parole intersects with punishment: when a sentencing court seeks to deny parole eligibility at the outset, as part of the sentence. Those cases examined whether the Eighth Amendment "prohibit[s] States from making the judgment at the outset that [juvenile] offenders never will be

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fit to renter society." *Graham,* 560 U.S. at 75. The reason for *Montgomery's* retroactive application of *Miller* was the "significant risk" that many juvenile offenders would "face a punishment that the law cannot impose upon them"—life without the possibility of parole. *Montgomery,* 136 S.Ct. at 734. When a court imposes a life-without-parole sentence, the bar on parole eligibility is part of the punishment for that crime because it is "implicit in the terms of the sentence" *Warden v. Marrero,* 417 U.S. at 658. Outside initial prohibitions on parole eligibility, the Eighth Amendment has no applicability to parole. *Id*; *Baumann v. Ariz. Dept. of Corr.,* 754 F.2d at 846; *Lustgarden v. Gunter,* 966 F.2d at 555.

The district court held that *Miller, Montgomery,* and *Graham* impose a substantive requirement that states give juvenile offenders a "meaningful and realistic opportunity for release based on demonstrated maturity and efforts toward rehabilitation" beyond normal parole consideration, but that holding is unsupported by the opinions themselves.

On the contrary, normal parole eligibility *is* the meaningful opportunity for release that *Miller, Montgomery,* and *Graham* discussed.

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Parole hearings, by their nature, give inmates the opportunity to demonstrate that they have matured or that they have made efforts toward rehabilitation. There is no reasonable argument that *Miller, Montgomery,* and *Graham* concerned cases of juvenile offenders serving parole-eligible sentences or applied to parole-eligible offenders at all.

The district court also placed much stock in the Supreme Court's discussion of "developments in psychology and brain science" that "continue to show fundamental differences between juvenile and adult minds." (Doc. 158 at 14) (citing *Miller,* 567 U.S. at 481); *see also Graham,* 560 U.S. at 68. But the social-science evidence discussed by the Court cannot create constitutional requirements beyond the Court's limited holdings related to sentencing. In fact, the Supreme Court has warned courts not to expand its juvenile-offender Eighth Amendment precedent based on social-science reasoning. *Roper v. Simmons,* 543 U.S. 551, 574 (2005); *Miller,* 567 U.S. at 540–541; *Graham,* 560 U.S. at 78.

In *Roper*, the Supreme Court noted that social sciences suggest that "the qualities that distinguish juveniles from adults do not disappear when an individual turns 18," but found that kind of evidence did not justify special treatment of young offenders beyond the bright-line

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holding that juvenile offenders cannot be sentenced to death. *Roper,* 543 U.S. at 574. In *Miller* and *Graham*, the Supreme Court issued similar bright-line holdings invalidating certain criminal sentences for offenders who were under 18. Federal courts have overwhelmingly declined to extend *Roper, Miller* and *Graham* to older offenders despite social-science evidence. *United States v. Dock,* 541 F.App'x. 242, 245 (4th Cir. 2013); *Doyle v. Stephens,* 535 Fed. App'x 391, 395 (5th Cir. 2013); *United States v. Marshall,* 736 F.3d 492, 500 (6th Cir. 2013); *Melton v. Fla. Dep't. of Corr.*, 778 F.3d 1234, 1235, 1237 (11th Cir. 2015).

For the same reasons, this Court should not extend *Miller* and *Graham* to mandate what procedures states can use in parole hearings for the middle-aged adults that make up the plaintiff class. *Miller* and *Graham* establish a bright-line rule for use in *sentencing* juvenile offenders, but they do not create a legal rule that requires states to give adult inmates who committed crimes at a young age special treatment and consideration at every step of the legal and correctional process. Nor could they. As the Court noted in *Roper,* the law must draw a line between constitutional and unconstitutional punishments. Nothing in

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the Constitution requires states to adopt policies that reflect plaintiff's view of current social-science research.

Miller and *Graham* make clear that "youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole." *Miller,* 567 U.S at 474. The Eighth Amendment prohibits states from making "an irrevocable judgment about an offender's value and place in society" without proper consideration during a sentencing proceeding. *Graham,* 560 U.S. at 74. Each class member faced that situation at their own sentencing, but because of the remedy crafted by Missouri's legislature, no class member will face permanent removal from society again. Instead, they will always have another opportunity to tell their story, answer questions about their life in prison, and show the parole board that they have matured since the time of their offenses.

The uncontroverted facts show that Missouri has followed the Supreme Court's instruction in *Montgomery* and remedied the class members' unconstitutional sentences. The Court should reverse the district court's grant of summary judgment and find that the inmates' Eighth Amendment claims fail as a matter of law.

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2. The inmates have no liberty interest in parole release

In order to invoke the procedural protection of the Due Process Clause, the class members must show that Missouri officials are depriving them of their liberty without giving them due process of law. But, because the inmates' have been lawfully sentenced to life imprisonment, they have no protectable right to be released from prison. *Greenholtz v. Nebraska Inmates,* 442 U.S. at 7. And because the inmates are not entitled to be released, they have no right to procedures to protect that non-existent entitlement. *Id.*

Miller and *Graham* do not overturn the Supreme Court's clear holding that "there is no constitutional or inherent right of a convicted person to be released before the expiration of a valid sentence." *Greenholtz v. Nebraska Inmates,* 442 U.S. at 7. In order to receive additional procedural protections during parole consideration, the inmates must show that Constitutional provisions or state law *mandate* their release if substantive predicates are met. *Bd. of Regents of State Colleges v. Roth,* 408 U.S. 564, 577 (1972); *Kentucky Dept. of Corr. V. Thompson,* 490 U.S. 454, 462 (1989); *Elliot v. Martinez,* 675 F.3d 1241,

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1244 (10th Cir. 2012). Put another way, the inmates cannot prevail unless, there is some set of facts that, if shown during parole consideration, *require* that the inmate be scheduled for release. *Id.*

To determine whether due process requirements apply at all, this Court "must look not the weight, but the nature of the right at stake." *Greenholtz,* 442 U.S. at 7 (citing *Roth,* 408 U.S. at 570–571). To invoke due process concerns, the inmates must show "more than an abstract need or desire" and "more than a unilateral expectation." *Id.* They must show, "a legitimate claim of entitlement" to release on parole, arising from the Constitution or Missouri law. *Id.*; *Thompson,* 490 U.S. at 460.

The inmates have no liberty interest that invokes the Due Process Clause. *Miller, Montgomery,* and *Graham* do not provide juvenile offenders with a right to be released. On the contrary, *Graham* emphasized that "[a] State is not required to guarantee eventual freedom to a juvenile offender" and clarified that the Eighth Amendment only works to "prohibit States from making the judgment at the outset that those offenders never will be fit to renter society." *Graham,* 560 U.S. at 75. *Graham* leaves States to decide "the means and mechanisms for compliance" and does not require States to release parole-eligible juvenile

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offenders "during their natural lives," especially if those offenders commit "truly horrifying crimes" or turn out to be "irredeemable." *Id.*

Since *Graham* the Supreme Court has made clear that the "opportunity for release" that case mentioned referred to eligibility for parole consideration given in the State's normal practice, and does not require any special procedures. *Virginia v. Leblanc,* 137 S.Ct. 1726, 1728–29 (2017).

In *Leblanc*, the Supreme Court found that *Graham* did not forbid Virginia's decision to make juvenile nonhomocide offenders eligible for a "geriatric release program [that] employed normal parole factors." *Id.* at 1729. The Court found that the geriatric release program allowed the Virginia Parole Board to consider the applicant's history, their conduct during incarceration, their inter-personal relationships with staff and inmates, and their changes in attitude toward self and others. *Id.* The Court held that consideration of these factors could allow a juvenile offender to obtain release based on his or her demonstrated maturity or rehabilitation. *Id.*

Leblanc makes clear that the language in *Graham* did not mandate any time frame for parole consideration or any procedures beyond

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consideration of "normal parole factors." *Id.* The Court noted that the "next logical step" from *Graham* might be to hold that a geriatric release program does not satisfy the Eighth Amendment, "but perhaps not." *Id.* Either way, *Leblanc* makes clear that neither the holding nor dicta of *Graham* gives rise to a clear entitlement that could support the inmates' due process claims.

Similarly, Missouri law does not entitle the inmates to release after parole hearings. Instead, Missouri's statutes place that decision at the Parole Board's discretion. Mo. Rev. Stat. § 217.690.2 (2018). Based on the Board's parole review, it "may" order parole, and nothing in Missouri's parole statute "shall be construed to require the release of an offender on parole nor reduce the sentence of an offender. . ." Mo. Rev. Stat. § 217.690.12 (2018).[2] Both state and federal courts have long recognized that Missouri law provides no entitlement to release on parole. *Cavallaro v. Groose*, 908 S.W.2d 133, 134–36 (Mo. 1995); *Gettings v. Mo. Dep't of*

[2] Missouri's parole statute was amended during the course of the litigation, but the prior statute did not establish a liberty interest either. Mo. Rev. Stat. § 217.690.1 (2005). That version provided that "the board may in its discretion release or parole such person as otherwise prohibited by law." *Id.*

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Corrections, 950 S.W2d 7, 10 (Mo. App. 1997); *Gale v. Moore,* 763 F.2d 341, 343 (8th Cir. 1985).

Despite the lack of a constitutional or statutory entitlement to release on parole, the district court still found that due process protects the inmates' right "to a meaningful and realistic opportunity to secure release upon demonstrated maturity and rehabilitation." (Doc. at 16). The district court's holding fails to specify the nature of the inmates' supposed liberty interest, and appears to find that the inmates have an entitlement to *procedures themselves*, but not an entitlement to release. That holding does not support relief under the Due Process Clause.

The district court failed to find or describe a constitutionally adequate liberty interest. The inmates cannot be entitled to special procedures during parole consideration unless those procedures are necessary to protect an *entitlement to release. Bd. of Regents of State Colleges v. Roth,* 408 U.S. 564, 577 (1972); *Kentucky Dept. of Corr. V. Thompson,* 490 U.S. 454, 462 (1989). The district court did not find that the inmates have an interest in being released; instead the district court finds that the inmates have a protected interest in being considered for

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release with the benefit of certain procedures that make that consideration subjectively "meaningful" and "realistic."

But that holding cannot stand because it does not actually describe any liberty that the inmates are entitled to besides procedures themselves. And upon further examination, no matter how the purported liberty interest is described, it either does not exist under constitutional or state law or clearly has not been infringed.

The inmates may argue that the liberty interest could be described as entitlement to parole consideration. Certainly § 558.047 of the Missouri Revised Statutes provides the inmates the right to petition for parole, but they have not alleged that Missouri has failed to allow petitions and hearings. On the other hand, the Constitution does not entitle the inmates to parole consideration *at all*. *Greenholtz,* 442 U.S. 1, 7 (1979). If the inmates could prove that Missouri has removed their ability to be considered for parole, they may be able to show that their sentences are unconstitutional under *Miller* and the Eighth Amendment, but that would, at best, entitle them to individual collateral relief. It would not give the district court authority to order Missouri to adopt specific procedures. After all, *Montgomery* makes clear that states *may*

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offer parole eligibility to remedy *Miller* violations, but are not required to choose that remedy. *Montgomery,* 136 S.Ct. at 736.

The inmates may argue they are entitled to parole consideration with specific types of procedures that guarantee their ability to call witnesses, present evidence, and seek review of the ultimate decision. But the inmates cannot have a due process interest in process itself. *Olim v. Wakienekona,* 461 U.S. 238, 250 n. 12 (1983). "[A]n expectation of receiving process is not, without more, a liberty interest protected by the Due Process Clause." *Id.* "Process is not an end in itself," so "an entitlement to nothing but a procedure cannot be the basis for a liberty or property interest." *Id.*; *Elliot v. Martinez,* 675 F.3d 1241, 1245 (10th Cir. 2012) (citations omitted).

The inmates may argue that their liberty interest is an entitlement to parole release, but that claim is foreclosed by United States Supreme Court case law, including *Miller* and *Graham*. The Supreme Court's well-settled case law teaches that a valid conviction removes any entitlement to liberty before the sentence expires. *Greenholtz,* 442 U.S. at 7. And *Graham* confirms that case law by explicitly explaining that juvenile

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offenders are not entitled to any guarantee that they will be released. *Graham,* 560 U.S. at 75.

Finally, the inmates may argue that they have an entitlement to release if they can show that they are not "incorrigible" or irreparably corrupt. *Miller,* 567 U.S. at 479–80. But that question is simply irrelevant during regular parole consideration because, as the class members' consideration in this case demonstrates, inmates will always have another opportunity for release.

In *Roper, Miller,* and *Graham,* the Supreme Court found that permanent punishments that remove any chance of release should rarely be imposed on juveniles at the time of sentencing because, except in rare cases, the a young person's ability to grow and change is incompatible with such permanent punishments. *Id*. But the holdings of those cases make clear that parole eligibility is the *solution* to this problem, not another area where it applies. *Montgomery,* 136 S.Ct. at 724. If class members demonstrate that they are not incorrigible or irreparably corrupt, that only means that the Board should continue to hear from them to see if their eventual growth and change warrants, in the Board's discretion, release on parole.

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The difficulty the district court faced in describing the inmates' specific liberty interest in this case is not surprising, because no such liberty interest exists. *Miller, Montgomery,* and *Graham* did not announce any entitlement that would empower federal courts to revise Missouri's parole process. Instead, the command of those cases ended the moment Missouri remedied the class members' unconstitutional sentence by extending them parole eligibility. *Montgomery,* 136 S.Ct. at 724.

C. Even if the inmates could state an Eighth Amendment or due process claim, the record shows that Missouri officials provided the inmates with a meaningful and realistic opportunity for release.

As discussed above, there is no set of facts under which the class members could show that they are entitled to the relief they sought—the ability to force Missouri to change its parole procedures to be more favorable to them. *Miller* and *Montgomery* dealt only with whether juvenile offenders' sentences were constitutional and what remedy applied. Missouri has remedied any *Miller* violation, and so those cases no longer apply to the class members as they receive regular parole consideration.

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That said, the language of *Miller* might be read to imply that the inmates could be entitled to relief from their sentences if they could demonstrate that Missouri's parole consideration is completely meaningless or unrealistic. *Miller v. Alabama,* 567 U.S. at 479.

There may be some procedures that so restrict inmates' ability to correspond with the decision maker that they have no ability to demonstrate their maturity or efforts toward reform. There could also be a system where parole is so unlikely that it is pointless to proceed, giving the inmates no real hope of release. A sham parole system that provides only an illusory chance of release might not satisfy the Eighth Amendment. But here, the uncontroverted evidence shows that Missouri provides the offenders with regular, real opportunities to be released on parole.

Missouri provided offenders with advance notice of their parole review, an opportunity to be heard, and an opportunity to submit documents. Before any hearing, inmates were interviewed by parole staff, who prepared a report that summarized a variety of information relevant to their readiness for parole. Missouri allowed its inmates to interact directly with a Parole Board member and answer questions and

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concerns that the hearing panel had. Inmates were allowed to bring a person for support, and to provide information that could help convince the Board they were ready for parole. The inmates' supporters could also submit letters in support which were reviewed by the Board. Board members worked to review the relevant documents and consider all of the information they were presented with when making their decision.

In sum, the Board allowed inmates to actively participate in the hearing process and had discretion to grant them release when it believed they were ready. The district court relied on other district court cases that allowed challenges to state parole systems to proceed past the motion-to-dismiss stage, but Missouri's parole process always ensured far more meaningful review than the systems examined in those cases.

For example, in *Greiman v. Hodges,* an Iowa inmate alleged that the Iowa Board of Parole "summarily" denied him parole following a "case file review" that did not allow for the inmate to participate in person. 79 F.Supp.3d 933, 936, 942 (S.D. Iowa 2015). The inmate alleged the parole board had denied him parole based only on the seriousness of the offense as evidenced by his criminal records and prison file. *Id*. At 936. The Board did not allow him to present them with any information regarding

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his maturation or rehabilitation. *Id.* Even more, the inmate alleged the Board considered him ineligible for parole until he completed a sex offender treatment program, but would not allow him to enroll in the program. *Id.*

Similarly, in *Hayden v. Keller,* a district court reviewed North Carolina's parole system that only permitted "file review" and provided "no opportunity for a juvenile offender to be heard during the course of his/her parole review." 134 F. Supp. 3d 1000, 1002–03 (E.D.N.C. Sep. 25, 2015). North Carolina's parole commissioners "are not aware, and do not consider, whether a particular offender was a juvenile at the time of his/her offense." *Id.*

And in *Maryland Restorative Justice Initiative v. Hogan,* 2017 WL 467731 (D. Md. Feb. 3, 2017), the district court allowed inmates' claims to proceed against the Maryland parole system. There, the inmates alleged that "of more than 200 parole-eligible juvenile lifers in Maryland," "*no one* has been paroled in the last 20 years." *Id.* at *1.

The district courts in these cases likely concluded that the inmates had no more than an illusory chance at parole, and no opportunity to demonstrate that they had matured and worked to improve themselves.

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Such illusory parole consideration may not remedy a *Miller* violation, but no reasonable argument can be made that Missouri's parole system has the same barriers to release. Instead of file review, Missouri always allows live interviews, both with a parole staff member and the hearing panel. Where the *Maryland* inmates alleged that parole release was impossible, the evidence here shows that Missouri inmates get early release at a high rate, including a significant number of the class members who were scheduled for release after their first hearing.

The district court took issue with several of the Board's policies and practices. For example, the Board limited the information that inmates could review, including recommendations of parole staff and Board member votes. The inmates could bring only one delegate, and even if that delegate was an attorney, none of the Board members were lawyers and the Board did not allow legal argument. Missouri's Constitution and statutes also provide broad rights for victims to speak in or out of the offender's presence, and inmates were not permitted to review private victim statements, including those from law enforcement officers. The Board's notices were barebones, and the Board offered only boilerplate explanations for parole denials, basing many of them on the

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circumstances surrounding the offense. And at the time of the summary judgment litigation, the Board did not use comprehensive objective tools to assess the inmates' needs or risk of reoffending.

But none of these limitations renders the inmates' opportunity for parole meaningless or unrealistic. Parole consideration hearings need not be adversarial proceedings where the inmates review evidence, present witnesses, and cross-examine victims. *Greenholtz,* 442 U.S. at 5. On the contrary, the Supreme Court has found that policies that invite or encourage "a continuing state of adversary relations between society and the inmate" actively harms Missouri's goals of rehabilitating inmates to be law-abiding members of society. *Id.* at 14. Parole release does not require either side to prove its case. At bottom, a release decision "depends on an amalgam of elements, some of which are factual but many of which are purely subjective appraisals by the Board members based upon their experience with the difficult and sensitive task evaluating the advisability of parole release." *Id.* at 10.

The district court found that Board's policies limited class members from presenting evidence and legal argument about the *Miller* factors and did not sufficiently focus the Board's consideration on the questions

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presented in *Miller*. (Doc. 21–23). But this analysis misses the point. The Board does not, and cannot, answer the same question posed to a *Miller* sentencing court. The class members do not need legal analysis or scientific experts to demonstrate "what any parent knows"—that children are more likely to make impulsive mistakes. *Miller,* 567 U.S. at 471. And they are not entitled to present lawyers or doctors to show Board members that they have matured and grown since they committed murder as a youth. The inmates must have the opportunity to show the Board that they have changed and to be considered for release. They evidence shows they have that opportunity. To the extent the inmates can state a claim for relief, on these facts, their claims fail as a matter of law.

II. The district court erred in prohibiting Missouri officials from using the Ohio Risk Assessment System or other objective measures in considering the inmates for parole.

If this Court finds that the district court should have granted Missouri officials summary judgment on the inmates' constitutional claims, it need to consider whether the district court's remedy was proper. But even if the summary judgment order below is left in place,

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the district court's decision to prohibit Missouri from using objective risk assessment tools in considering the inmates for parole cannot stand.

Even though the district court recognized the importance of "objective tools, matrices, or criteria" in evaluating the inmates, the district court rejected Missouri's decision to evaluate the inmates using Ohio Risk Assessment System, a validated tool that has been integrated into Missouri's corrections system, and "similar risk assessment tools." (J.A. at 551, 829–830). The district court ordered this relief based on statements in an affidavit that Missouri's suggestion did not comply with the "industry best practice according to the National Institution of Corrections" and that it would be "relatively easy" for the Missouri Department of Corrections to design an entirely new system that is specifically tailored to the roughly 100 class members. (J.A. at 829–830).

The district court's order prohibiting the use of the Ohio Risk Assessment System impermissibly substitutes the district court's policy judgment for that of Missouri's legislature and corrections officials. Even worse, the district court based its decision solely on contested hearsay statements and failed to consider the impacts of its sweeping ban on objective risk and needs assessment tools.

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A. Under precedent, Missouri was entitled to make policy decisions about how to achieve constitutional compliance.

Consistent with federalism principles, where district court grants the state agency an opportunity to provide a remedial plan, the court should assess the validity of the particular plan adopted, rather than weighing whether the executive could have picked a better plan.

This procedure reflects that, in many cases, the remedies necessary require policy choices, and so, under our system of government, the "ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 58 (1973).

The Supreme Court showed in *Bounds v. Smith* that courts are to respect the right of state officials to select and design a remedy to correct constitutional violations. 430 U.S. 817, 818-19 (1977). In *Bounds*, a remedy was necessary to bring state prisons into compliance with the right of prisoners to access the courts, but "[r]ather than attempting 'to dictate precisely what course the State should follow,' the trial court "charge(d) the Department of Correction with the task of devising a constitutionally sound program" to assure

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inmates access to the courts. *Id.* at 818-19. This procedure "left to the State the choice of what alternative would 'most easily and economically' fulfill" its legal obligations. *Id.* On review, the Supreme Court approved this procedure, holding that the trial court had "scrupulously respected the limits on" the court's role versus state administrators, *id.* at 832-33, and wisely ensured that it did not "thrust itself into state institutional administration," *id.* 819-20. "Rather, it ordered petitioners themselves to devise a remedy for the violation," and it approved this remedy after considering objections from the inmates about whether it would cure the violation. *Id.*

As the Supreme Court later stated, *Bounds* "was an *exemplar* of what should be done." *Lewis v. Casey*, 518 U.S. 343, 363 (1996) (emphasis added).

But if *Bounds* gives the exemplar of what a court should do to arrive at a remedy for constitutional violations, *Lewis v. Casey* presented the model of what courts should *not* do.

In *Lewis*, a district court seized upon its power to implement a remedy for the denial of access to the courts to impose system-wide changes on state prisons—with no deference to the State's interests

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in the proper management of its criminal justice system. 518 U.S. 343, 359-61 (1996). The district court had conferred upon its special master, a law professor—rather than upon state officials—the responsibility for devising a remedial plan, and the court severely limited the remedies that the master could choose. *Id*. at 363. The resulting injunction required the prison to provide prisoners with legal assistance from lawyers, paralegals, and legal assistants; it ordered the creation of a law training program for bilingual prisoners; and it ordered regular library access even for lockdown prisoners. *Id*. at 347–48. The order even detailed the operations of prison libraries, including "the times that libraries were to be kept open, the number of hours of library use to which each inmate was entitled (10 per week), the minimal educational requirements for prison librarians (a library science degree, law degree, or paralegal degree), the content of a videotaped legal-research course for inmates (to be prepared by persons appointed by the Special Master but funded by ADOC), and similar matters." *Id*.

The Supreme Court reversed, holding that a court must develop the remedial plan by a process that considers the views of state

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authorities, and a court may select its own remedy only if the state officials in that case are uncooperative and recalcitrant and so fail to suggest a remedy. *Id*. at 362, n.8. Calling the district court's remedy "inordinately—indeed, wildly—intrusive," the Supreme Court explained that it amounted to "the ne plus ultra of what our opinions have lamented as a court's 'in the name of the Constitution, becom[ing] ... enmeshed in the minutiae of prison operations.'" *Id*. at 362. As the Supreme Court explained, it "is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm." *Id*. at 349. It "is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution." *Id*. Just as in the habeas context, "[t]he strong considerations of comity that require giving a state court system that has convicted a defendant the first opportunity to correct its own errors ... also require giving the States the first opportunity to correct the errors made in the internal administration of their prisons.'" *Id*. at 362 (1996) (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 492 (1973)).

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As the First Circuit held, this Supreme Court precedent means that when a state official offers a remedy to cure a constitutional shortcoming, "ordinarily their plan should be accepted unless it fails constitutional muster." *Cepulonis v. Fair*, 732 F.2d 1, 6 (1st Cir. 1984). "If constitutionally defective, the court should explain why," but the court should not seize upon any defects to impose its own unilateral remedy without consultation with state officials. *Cepulonis v. Fair*, 732 F.2d at 6. The devising of a remedy "is best left, in the first instance at least, to the officials charged with running the institution on a day-to-day basis, absent a finding of bad faith or undue delay." *Id.* at 7.

The Supreme Court has applied the federalism and separation of powers principles of *Bounds* and *Lewis* to many other remedial cases.

For instance, in *Brown v. Plata*, which concerned prison overcrowding, the Supreme Court held that the trial court must "accord the State considerable latitude to find mechanisms and make plans to correct the violations" out of proper respect for the State and for its governmental processes. 563 U.S. 493, 543 (2011). The

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Supreme Court also instructed lower courts that "scope of the remedy must be proportional to the scope of the violation, and the order must extend no further than necessary to remedy the violation." *Id*. at 531.

Likewise, in *Horne v. Flores,* when Arizona failed to provide adequate English-language instruction in schools, the Supreme Court approved the trial court's repeated opportunities for the State to provide legislative funding and decide how to restructure schools. 557 U.S. 433, 444 (2009). Still, the Supreme Court reversed the court's entry of a broad injunction, which rested on a disputed interpretation of state law, and which obscured accountability between the federal and state governments for the "drastic remedy" ultimately imposed. *Id*. at 471.

Nor should courts rush to require remedies on a hasty basis without giving state officials reasonable time to research, propose, and implement their own solutions. As one state supreme court has explained, courts usually give "the legislature a reasonable period to correct the deficiency to accommodate a legislative solution." *State ex rel. Longanacre v. Crabtree*, 177 W. Va. 132, 137, 350 S.E.2d 760, 765 (1986).

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In the management of state prisons, Congress has made the limitations on a district court's injunctive power explicit. The Prisoner Litigation Reform Act provides that any relief ordered by the district court must be "narrowly drawn," must extend "no further than necessary to correct the violation," and must constitute "the least intrusive means necessary to correct th[at] violation." 18 U.S.C. § 3626(a)(1). The trial court must "give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief." *Id*. This Court has held that the PLRA "limits remedies to those necessary to remedy the proven violation of federal rights." *Native American Council of Tribes v. Weber,* 750 F.3d 742, 753 (8th Cir. 2014); *Tyler v. Murphy,* 135 F.3d 594, 596 (8th Cir. 1998).

B. The district court's order prohibiting the use of the Ohio Risk Assessment system contradicts this precedent.

Although the district court recognized that "[i]t is for the State, in the first instance, to explore the means and mechanisms for compliance," the district court failed to give adequate deference to Missouri's decision to use the Ohio Risk Assessment System or adequate consideration to the impacts of a broad prohibition against objective tools. The scope,

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reasoning, and evidentiary basis of the district court's decision all demonstrate its failure to comply with applicable precedent.

The only question before the district court was whether Missouri's plan remedied the constitutional violations that the district court found in Missouri's parole process. *Cepulonis v. Fair*, 732 F.2d at 6. Even if the district court found that Missouri's plan to use the Ohio Risk Assessment System did not pass constitutional muster, it was only allowed to say why, not order additional, unilateral relief without consulting Missouri officials. *Id*. Instead of simply rejecting Missouri's suggestion that the risk assessment system would aid in reforming its parole process, the district court ordered that Missouri "shall not use any risk assessment tool unless it has been developed to address inmates affected by *Miller* and *Montgomery*. (J.A. at 829–830). Not only did the district court reject Missouri's proposed plan, it prohibited Missouri from using other systems that were not proposed to the court and about which the court heard no evidence.

The scope of the district court's order defies Supreme Court precedent and the clear prescription of the Prisoner Litigation Reform Act. The district court was required to narrowly tailor its remedies to

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"those necessary to remedy the proven violation of federal rights." *Native American Council of Tribes v. Weber,* 750 F.3d at 753. None of the claims before the Court on summary judgment dealt with Missouri's use of the Ohio Risk Assessment System. Quite the contrary, the inmates alleged, and the district court found, that Missouri *should* use objective measures in evaluating the inmates for parole. (J.A. at 551). Under federal law, the district court was not permitted to order a broad proscription of Missouri's future plan to use the Ohio Risk Assessment System. The Court could have made findings as to whether the risk assessment plan would remedy any proven constitutional violations, but it had no authority to prohibit Missouri from using the Ohio system or any other risk assessment tool.

In prohibiting Missouri's use of risk assessment tools, the district court did not even try to offer a constitutionally permissible reason. Instead, the court found that the Constitution requires Missouri to adopt the "[i]ndustry best practice according to the National Institution of Corrections," which in one affiant's opinion, would be "relatively easy." (J.A. at 829–830). This reasoning is in sharp contrast to binding Supreme Court precedent that required the district court to defer to Missouri's

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officials on what practices are best and what will be easy or effective to implement. *Bounds v. Smith,* 430 U.S. at 818-19; *Brown v. Plata,* 563 U.S. at 543.

The district court found its order was necessary because the Ohio Risk Assessment System calculates that inmates who have less connection to the community through marriage or employment generally have a higher risk of recidivism. (J.A. at 829–830). Because *Miller* inmates have been imprisoned since they were young, they are less likely to be able to demonstrate regular employment or family connections, and more likely to have high risk in that area of the assessment. (J.A. at 829–830). Whether or not that is true, the district court cannot order Missouri to refrain from using validated tools to determine inmates' risk and needs simply because those tools might find that the inmates do have risks and needs. Nothing in *Miller, Montgomery, or Graham* requires Missouri to only consider information that is favorable to the inmates in considering them for parole. Missouri officials must decide how to consider available information during the parole consideration process, but it cannot be unconstitutional for Missouri to have objective information to consider simply because it might be unfavorable to the inmates.

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It is important to note that there was no evidence that the Ohio Risk Assessment system would not accurately apply to the inmates. At best, the contested evidence showed that the Ohio Risk Assessment system *may* produce unreliable results in some areas. The district court relied on an affidavit from Todd R. Clear in which Dr. Clear stated that based on "unclear" information "the use of the ORAS tool for the class members *may* produce unreliable results." (Doc. 166-4 at 3–5). Even if Dr. Clear's concerns were well-founded, that would not mean that objective assessments generated by the Ohio system were not useful to Missouri officials—much less unconstitutional. The Board's plan for compliance allowed the inmates or their counsel to argue during parole consideration about the quality of information in the Board's files. (J.A. at 823). Any concerns raised in Dr. Clear's affidavit could easily have been raised during parole consideration, allowing Missouri officials to decide what weight to give each assessment.

The district court's reasoning for prohibiting the use of risk assessment tools makes clear that the court was substituting its policy judgment for that of Missouri's legislature, Department of Corrections, and Parole Board. Supreme Court precedent prohibits such unwarranted

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federal intrusion. *Bounds v. Smith,* 430 U.S. at 818-19; *Brown v. Plata,* 563 U.S. at 543.

It is difficult to imagine a case where it might be necessary for a district court to order the extensive, policy focused relief ordered here. But even if there were such a case, the district court could not broadly prohibit a state's proposed remedy without thoroughly considering state officials' input on the implementation and impact of such a plan. The district court did not do that here.

After Missouri initially proposed to use the Ohio Risk Assessment system in evaluating the inmates for parole, the inmates objected, citing Dr. Clear's concerns from his affidavit. (J.A. at 591–92). Despite mediation and settlement conferences, the parties could not agree on whether the Board should use the Ohio Risk Assessment system. The Court held an evidentiary hearing to consider the remaining contested issues. At that hearing, the inmates did not present testimony from Dr. Clear or introduce evidence that could substantiate the affidavit. (J.A. at 653–776).

Despite the lack of further evidence on the issue, the district court relied solely on Dr. Clear's hearsay statements in ordering Missouri

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officials not to use the Ohio Risk Assessment System. Even worse, the district court did so without consulting Missouri officials to determine whether they could implement the Ohio Risk Assessment System in a way that would satisfy the court's concerns. And the court failed to give Missouri an opportunity to implement that system (or another risk assessment system) in a constitutional manner. Instead, based solely on one untested affidavit, the district court found that the use of any risk assessment system is unconstitutional unless specifically tailored to the class members.

The district court's failure to consider additional evidence before making a sweeping policy pronouncement demonstrates the wisdom of Supreme Court precedent that forbids that relief. During the remedy litigation, Missouri began implementing the use of the Ohio Risk Assessment system in all facets of its corrections system.[3] Missouri law now requires the Board to "conduct a validated risk and needs

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[3] *See* Missouri Dept. of Corr., "Ohio Risk Assessment System (ORAS)", doc.mo.gov/justice-reinvestment-initiative/oras.

Because Missouri's integration of the Ohio Risk Assessment System was only beginning during the time of the remedy litigation, information about it is not well-developed in the record.

assessment" for use in consideration "before ordering the parole of any offender." Mo. Rev. Stat. § 217.690 (2018).

Even if Missouri could create a new risk assessment tool specifically for its small class of juvenile offenders sentenced to life without parole, validating that tool would require releasing some of those offenders to observe the accuracy of the tool's predictions about their risk to reoffend. But Missouri law would not allow the Board to parole the offenders without using a validated tool. Because the district court failed to seek out additional information from Missouri's corrections officials, its order has created a Catch-22 that may prohibit Missouri from paroling any of the class members.

The district court's order prohibiting Missouri from using a risk assessment tool in assessing the inmates exceeded its authority. Under well-settled Supreme Court precedent, this Court should reverse the judgment below.

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CONCLUSION

For these reasons, the Court should reverse the district court's order and judgment granting summary judgment and injunctive relief.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the type-volume limits of Fed. R. App. P. 32(a)(7)(B)(i) in that it contains 12,415 words excluding the parts exempted by Fed. R. App. P. 32(f). I further certify that this document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) in that this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 (size 14 Century Schoolbook font). The brief and addendum have been scanned for viruses and are virus free.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was electronically filed by using the CM/ECF system. Counsel for Appellees will receive a copy of the foregoing document through the CM/ECF system this 12th day of December, 2019.

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