

3. Whitlock, who was in her twenties, became pregnant with Eric's child while Eric was still a child himself.

4. While intimately involved with Eric, Ms. Whitlock was also involved with other males, including reported Crip gang members from her neighborhood. This upset Eric. But more importantly, it also put him in grave danger. *See Exhibit A at 2-3.*

5. In fact, on March 20, 2009, Whitlock took Eric to her grandmother's home in St. Louis City. Thereafter, Whitlock walked Eric down a nearby street where he was confronted by men Whitlock knew from her neighborhood, including Crip gang member Alvin Williams. Words were exchanged, gunfire rang out, and ultimately Alvin Williams was shot. Eric and Whitlock ran from the scene together; Williams died that day. *See Exhibit A at 3-5.*

6. Eric was, thereafter, arrested and charged with causing Williams' death. Despite his youth, vulnerability, and status as child rape victim, the St. Louis City Juvenile Court relinquished jurisdiction over Eric, leaving him to stand trial as an adult. *See Exhibit A at 5-6.*

7. But at trial, after hearing about the above circumstances from Whitlock, the jury acquitted Eric of first-degree-murder. He was convicted of the lesser charge of manslaughter, for recklessly causing Williams' death and one count of Armed Criminal Action.

8. Eric received a sentence of 7 years for manslaughter and 25 years for Armed Criminal Action. *Id.* at 6.

9. On July 13, 2016, Eric was supposed to be considered for release by a panel of the Missouri Board of Probation and Parole. *See Exhibit B.* But after being interviewed by the panel for a short period of time, Eric received a single page decision from the full Board stating he was denied parole. The unsigned decision, dated August 4, 2016, went on to state Eric will not be considered for parole release again for another five years. *See Exhibit G.*

10. Eric now asks this Honorable Court to declare unlawful and improper, both the arbitrary procedures provided by the Missouri Board of Probation and Parole, and its decision denying his release.

PARTIES, JURISDICTION, AND VENUE

11. Petitioner, Eric Gray, is currently confined at Crossroads Correctional Center located in Cameron, Missouri. This facility is maintained by Respondent, Missouri Department of Corrections (MDOC).

12. The Missouri Board of Probation and Parole (Parole Board) is a subdivision of MDOC pursuant to Missouri Revised Statutes Section 217.015. The Chairman of the Parole Board appoints parole officers and institutional parole officers “to carry out the purposes of the board.” Mo. Rev. Stat. 217.705.1.

13. MDOC is a Missouri executive branch agency that maintains its headquarters in Jefferson City, Cole County, Missouri. The Parole Board’s offices are also located in Jefferson City, Cole County, Missouri. Thus, Cole County Circuit Court is a proper venue for this action.

14. As described further below, this Court has jurisdiction to review the arbitrary and deficient processes afforded to Eric by the Parole Board, as well as its single-page parole denial, by way of declaratory judgment action pursuant to Section 527.010, et seq., of the Missouri Revised Statutes, and Rule 87.01 et seq., of the Missouri Supreme Court Rules.

FURTHER PROCEDURAL HISTORY

A. Pre-Hearing Process

15. As noted above, Eric was notified that he was “scheduled for a parole hearing [on] 07/13/2016” by way of an MDOC “Relating to Release Consideration” Form. *See* Exhibit B. The written notice provided no information about the content of the information that would be relied

upon by the Board in considering his possible release, his ability to access such materials, or any kind of special process that would be applied to his case. *Id.*

16. Upon information and belief, Eric was required to submit to an extensive pre-hearing interview by an Institutional Parole Officer (“IPO”) for purposes of creating a report for the use and consideration of the Parole Board. That Report, upon information and belief, provided both an opinion on the part of the IPO regarding Eric’s alleged level of “risk” for reoffending and recommendation on the question of whether parole should be granted or denied.

17. Eric was also provided with a parole hearing “Delegate Form,” which allowed him to name only one person as his representative at his scheduled parole hearing. There was no ability to name both an attorney and a witness.

18. In advance of the parole hearing, undersigned counsel provided personal notice to MDOC’s legal counsel and staff at Crossroads Correctional Center that she would be serving as Eric’s attorney for purposes of the parole hearing and submitted a packet of mitigation materials. *See Exhibits C, D, and E.*

19. Undersigned counsel also requested access to Eric’s entire institutional record in order to prepare for the hearing, including any “disciplinary documents, letters from the victim’s family, and risk assessment instruments” that would also be made available to the Parole Board. *See Exhibits D and E.* Counsel indicated she was open to receiving the materials by email, facsimile, or upon traveling to the facility to review the file in person. *Id.*

20. On the morning of July 12, 2016, IPO Kelley Burke, appointed to her position pursuant to Mo. Rev. Stat. 217.705.1, responded to undersigned counsel on behalf of MDOC. *See Exhibit E.*

21. IPO Burke noted the Board was “not allowed to provide . . . the documentation that is provided to the Parole Board for consideration [because] [t]he material is the property of the state of Missouri.” *See* Exhibit E. Ms. Burke further indicated that “in order to obtain any documentation, [counsel] would need to file a motion in court and submit a subpoena for the material.” *Id.*

22. Ms. Burke also provided notice that counsel was being admitted as the single “delegate” Eric was allowed to have present at the hearing. Thus, counsel’s presence was merely seen as a “special visit,” and her identity was not viewed any differently than a family member or lay witness. *Id.*

23. Thereafter, at 6:42pm on July 12, 2016, the Crossroads Correctional Center Records Supervisor, Anita Booth, contacted undersigned counsel by email and provided a copy of Eric’s disciplinary record at MDOC. However, none of the other requested materials were provided to counsel or Eric in advance of the hearing or since. *See* Exhibit F.¹

B. Parole Panel Hearing but Decision by the Full Board

24. On the morning of July 13, 2016, Eric appeared with undersigned counsel before a Hearing Panel of the Parole Board. Consistent with its usual practice, the Hearing Panel consisted of one duly appointed and sworn Parole Board member, Martin Rucker, and two MDOC staff members.

25. The Hearing Panel members made clear at the outset that counsel could not speak unless and until spoken to by members of the Panel.

¹ As noted throughout, true and correct copies of all documents referenced above as relating to the Pre-Hearing Process have been attached as exhibits to this submission.

26. The panel members then interviewed Eric for a short period of time. During the interview Panel members referred to paperwork in their files that neither undersigned counsel nor Eric were provided or allowed to check for accuracy.

27. The Panel did not specifically rely on information in the mitigation packet provided by undersigned counsel or inquire in detail about Eric's status as a child at the time of the crime.

28. At the end of the interview undersigned was only permitted to say a few further words on behalf of Eric.

29. Several weeks later Eric received another one-page "Relating to Release Consideration" form, nearly identical to the document scheduling his parole hearing. However, the latter document, dated August 8, 2016, states: "You have been given parole consideration in a parole hearing [on] 07/13/2016. You will be rescheduled for a reconsideration hearing [on] 07/00/2021." *See Exhibit G.*

30. The form went on to state "[t]he reasons for the action taken":

There does not appear to be a reasonable probability at this time that you would live and remain at liberty without again violating the law based upon: A: Poor institutional adjustment.

Release at this time would depreciate the seriousness of the present offense based on: A: Circumstances surrounding the present offense.

See Exhibit G.

31. The form was not signed, did not specifically indicate who took "the action," or when. But it did state that "[t]his decision is not subject to appeal." *See Exhibit G.*²

² As noted throughout, true and correct copies of all documents referenced above as relating to the Parole Panel Hearing but Decision by the Full Board have been attached as exhibits to this submission.

C. Post-Hearing Proceedings

32. Nevertheless, upon receiving the denial, Eric requested a parole denial Appeal Form from an IPO as directed by Section 16 of the MDOC PROCEDURES GOVERNING THE GRANTING OF PAROLES AND CONDITIONAL RELEASES at 9 (April 2009) (“MDOC Procedures”).

33. When Eric’s request was denied, undersigned sought to intervene to obtain an appeal form for him. However, both Crossroads Correctional Center staff and legal counsel for MDOC confirmed that the required form was not provided because no review of the denial would be permitted. This is because Eric’s parole determination, without any prior notice, had been entirely removed from the purview of the Hearing Panel. *See* Exhibit H.

34. Rather, according to MDOC legal counsel:

Due to the seriousness of Mr. Gray’s offense, the parole board removed his case from the jurisdiction of a hearing panel and considered his case. By majority vote, the board declined to set a presumptive parole release date and instead decided to reconsider Mr. Gray for release at a future date. As this decision came from the board and not a hearing panel, Mr. Gray is not eligible for any appeal.

See id.

35. In an abundance of caution, both Eric and the undersigned submitted a written request to the Board, seeking to challenge both the process provided and outcome of Eric’s parole consideration proceedings.

36. These submissions set forth various constitutional, statutory, and regulation-based objections on Eric’s behalf. In particular, he challenged the following:

- (a) Lack of access to his entire institutional file and all materials available to the Parole Board so as to be able to meaningfully respond to questions by the Hearing Panel, present meaningful arguments, and correct any inaccuracies in the record;

- (b) Lack of access to risk assessment instruments, score sheets, or other evaluative tools and standards available to the Board and/or considered during its deliberations;
- (c) Inability to have more than one person present in the hearing and treatment of counsel as Eric's single permitted "delegate";
- (d) Failure to consider in any meaningful way the special issues presented by Eric's youth at the time of the offense and youthful characteristics while incarcerated;
- (e) Improper weight given to Eric's institutional record given his incarceration during his teen years and transition from childhood into adulthood;
- (f) Improper consideration given to the seriousness of the offense, particularly given Eric's youth at the time of the alleged crime;
- (g) Unilateral removal of Eric's case from the Hearing Panel to the full board for consideration, without any prior notice or cause, rendering the hearing absolutely meaningless;
- (h) Board's decision to impose the maximum five (5) year "set back" after Eric's conditional release date, without any specific reason justifying such duration or its denial of a presumptive release date.

See Exhibit I.

37. Although the Board did not specifically rule on Petitioner's appeal and legal challenges, IPO Kelley Burke responded to Eric's appeal submissions. She dismissed all of his concerns stating he had not been denied due process because, essentially, the Parole Board had absolute discretion. *See Exhibit J.*

38. The IPO also provided rationales for the Board's actions that, among other things, were factually incorrect, inconsistent with her prior claims, and in conflict with state law and constitutional requirements.

39. With regard to Eric's challenge to his inability to call witnesses other than counsel, Ms. Burke claimed he had no right to call witnesses to testify. Rather the "delegate is to

be present in order to advise the Board of the support that they will provide the offender upon release. This is the only reason the delegate is allowed.” The IPO went on to state that since “a parole hearing is not a court proceeding . . . there is no need to have an attorney present. However, it is the offender’s choice as to who they choose to have at the hearing to advise the parole board of the support they will be offered.” *See Exhibit J.*

40. Claiming that Eric’s “case has never been one that could be determined by the parole hearing panel,” Ms. Burke discounted Eric’s objection to unilateral removal of his matter to the full Board without prior notice or ability to engage the Board. Rather, she asserted, “[a]ny offense in which there is a death, must be sent back for a majority board decision.” *See Exhibit J.*

41. Responding to Eric’s complaint about lack of access to the materials available to the Parole Board, such as documents in his institutional record, risk assessment instruments, score sheets or other evaluative tools or standards, Ms. Burke noted Eric was not allowed access to such materials as they are “not open to the public.” Thus, his concerns about inaccuracy or arbitrariness of materials considered by the Board were discounted. *See Exhibit J.*

42. In dismissing Eric’s concerns about his special status as a juvenile at the time of the alleged reckless homicide and attendant Armed Criminal Action conviction, Mr. Burke stated:

With regard to your statement regarding the Supreme Court ruling regarding juveniles, as the ruling states: offenders who committed crimes as juveniles and are serving sentences of Life With Out Parole [sic], shall now be eligible to petition the parole board for a parole hearing. The Missouri Parole Board has abided by the Supreme Court ruling.

See Exhibit J.

43. IPO Burke was apparently equally unimpressed with Eric’s related challenges to the proffered bases for his parole denial, which were similarly rooted in his special status as a youth under the age of eighteen (18) at the time of his crime and incarceration. First, she claimed

“[t]he board will not release you into the community if you won’t follow the rules/regulations within the prison” without offering any meaningful explanation of why his overall institutional adjustment was seen as poor or unacceptable for a youthful offender. *See* Exhibit J.

44. Second, again without any analysis relating to his juvenile offender status, IPO Burke claimed “it is absurd to think that the seriousness of the offense would not matter in the decision of whether to release or not to release.” *See* Exhibit J.

45. Finally, Eric’s challenge to the imposition of the maximum five (5) year “set back” without explanation or consideration of his youth was similarly dismissed out of hand. Mr. Burke simply responded, “[a]gain, it is within the parole board’s rights to determine whether an offender will be released or scheduled for a Reconsideration Hearing.” *See* Exhibit J.³

DECLARATORY JUDGMENT STANDARD

46. Missouri law provides that circuit courts “shall have the power to declare rights, status, and other legal relations” “within their respective jurisdictions” by way of declaratory judgment action. *See* MO. REV. STAT. 527.010; *see also* MO. S. CT. R. 87.02. This includes the ability to construe statutes to resolve ongoing disputes and render judgments “respecting the validity of agency rules.” MO. S. CT. R. 87.02 (a) and (c).

47. The declaratory judgment power is especially broad, allowing judicial intervention “in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove uncertainty.” MO. REV. STAT. 527.050.

48. Petitioner Eric Gray has a real, ripe, and presently existing controversy involving the Missouri Department of Corrections. *See Charron v. State*, 257 S.W.3d 147, 151-52 (Mo.

³ As noted throughout, true and correct copies of all documents referenced above as relating to the Post-Hearing Proceedings have been attached as exhibits to this submission.

App. W.D. 2008). He has been grievously impacted by its Parole Board's rules, policies and practices, which have misinterpreted and misapplied Missouri state laws and regulations, violated his constitutional rights, and resulted in his continuing incarceration. *See* MO. REV. STAT. 217.690 (“[t]he board shall adopt rules not inconsistent with the law, in accordance with section 217.040, with respect to the eligibility of offenders for parole, the conduct of parole hearings or conditions to be imposed on paroled offenders”).

49. Thus declaratory judgment, long used to correct unlawful practices or erroneous determinations by the Parole Board, is especially appropriate here. *See, e.g., Masters v. George Lombardi, Department of Corrections*, 472 S.W.3d 214 (Mo. App. W.D. 2015); *Edger v. Missouri Board of Probation and Parole*, 307 S.W.3d 718 (Mo. App. W.D. 2010); *see also Wayne v. Missouri Board of Probation and Parole*, 83 F.3d 994 (8th Cir. 1996) (describing state declaratory judgment actions as one of three permissible vehicles for challenging practices and determinations of the Missouri Parole Board).

COUNT ONE:
DECLARATORY JUDGMENT – CONSTITUTIONAL VIOLATION

Juvenile Offenders Deprived a Protected Liberty Interest in Parole Proceedings

50. Petitioner hereby incorporates by reference paragraphs 1 through 49 of this Petition as though fully set forth herein.

51. The State of Missouri has long argued adult inmates have no constitutionally-protected liberty interest in parole proceedings since they can be entirely denied the right to release on parole. However, even if true, this is not the case for juvenile offenders who under United States Supreme Court precedent have an absolute constitutional right to a “*meaningful* opportunity for release.” *Graham v. Florida*, 560 U.S. 48, 75 (2010) (emphasis added); *see also Miller v. Alabama*, 132 S. Ct. 2455 (2012); *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

52. The Court has warned: “[a]n offender’s age’ ... ‘is relevant to the Eighth Amendment,’ and so ‘criminal procedure laws that fail to take defendants’ youthfulness into account at all would be flawed.” *Miller*, at 2466 (quoting *Graham*, 560 U.S. at 76).

53. Missouri parole laws and procedures applied to Eric’s case – involving a reckless homicide committed by a 16-year-old – wholly failed to specifically take account of Eric’s age to ensure meaningful consideration. They thus violate the Eighth Amendment to the United States Constitution and Article I, Section 21, of the Missouri Constitution.

WHEREFORE, Petitioner Eric Gray prays for a declaratory judgment stating that youthful offenders who are under the age of eighteen (18) at the time of their offenses have a protected liberty interest in parole release different from adult offenders; ordering MDOC to apply this standard to parole proceedings for such offenders; remanding this matter to the Parole Board for a new hearing where such a standard should be applied; and ordering the Respondent to pay costs and expenses in relation to this action, and for such other and further relief as the Court deems just and appropriate.

COUNT TWO:
DECLARATORY JUDGMENT – CONSTITUTIONAL VIOLATION

MDOC’s Arbitrary Processes Preclude Meaningful Opportunity for Parole

54. Petitioner hereby incorporates by reference paragraphs 1 through 53 of this Petition as though fully set forth herein.

55. According to MDOC, Eric’s “parole hearing [was] not a court proceeding” at all. *See Exhibit J*. But even if Missouri parole hearings are not hearings held in a court of law, they must comport with the law – including basic constitutional protections and principles.⁴

⁴ MDOC’s claims about the extra-legal nature of parole proceedings are especially curious in light of the IPO’s instruction to counsel that she must file a motion in court and obtain a

56. Regardless of whether Missouri provides a mandatory right to parole release generally, the state is not allowed to run an entirely arbitrary parole system.

57. That is, just because an inmate does not have a substantive due process right to a particular release date, that does not mean a state can administer its system in a capricious manner. Basic procedural due process still applies.

58. What is more, youthful offenders have a heightened legal right to release that adult offenders do not enjoy. Therefore, they are entitled to even more protections and meaningful processes during the parole review process than adults enjoy under the Due Process Clauses of both the United States Constitution and Missouri Constitution.

59. Here the entire process was steeped in caprice. From Eric's inability to review and challenge the factual information before the Hearing Panel, to a prohibition on fact witnesses if counsel was present, to his case's removal from the Panel to the Board without prior notice, to the imposition of the maximum set-back without explanation, the whim of MDOC controlled.

60. Even the prohibition on an appeal and responses by MDOC officials to Eric's legal challenges reflect a system that believes it is essentially beyond review or reproach.

61. But unreliable processes and base-less decision-making is contrary to the kind of due process that should be provided in ordinary parole proceedings.

62. Worse, it stands in stark contrast to the kind of special and meaningful parole process that is constitutionally required for juvenile offenders. *See, e.g., Graham*, 560 U.S. 48; *Miller v. Alabama*, 132 U.S. 2455.

subpoena before any of Eric's institutional records would be provided for review in advance of the parole hearing. *See* Exhibit E.

63. For all these reasons, MDOC Parole Board policies and procedures applied in Eric's case denied him due process of law. *See* U.S. CONST., AMENDS. XIV; MO. CONST., ART. 1, SECTION 21.

WHEREFORE, Petitioner Eric Gray prays for a declaratory judgment stating that MDOC must afford a meaningful opportunity for release for all youthful offenders under the age of eighteen (18) at the time of their alleged crime, and that such meaningful opportunity at a minimum includes due process protections including the right to review and contest all information presented to the Parole Board, to present fact witnesses to testify on his behalf, to have a hearing before the Hearing Panel unless provided with prior notice and the opportunity to challenge removal from the Panel, and to at least a rational basis and stated reasons for any particular set-back; ordering MDOC to apply this standard to parole proceedings for such offenders, remanding this matter to the Parole Board for a new hearing where such standards should be applied; and ordering the Respondent to pay costs and expenses in relation to this action, and for such other and further relief as the Court deems just and appropriate.

COUNT THREE:
DECLARATORY JUDGMENT – CONSTITUTIONAL VIOLATION

Unlawful Denial of Right to Counsel During Youthful Offender Parole Proceedings

64. Petitioner hereby incorporates by reference paragraphs 1 through 63 of this Petition as though fully set forth herein.

65. As noted, Eric was informed by MDOC that he had “no need to have an attorney present [at the parole hearing].” Moreover, he was admonished “it is the offender’s choice as to who they choose to have at the hearing to advise the parole board of the support they will be offered.” *See* Exhibit J.

66. Thus Eric, like all other Missouri inmates, was given the option of having his attorney present to assist him during his parole proceedings or to have a fact witness give testimony on his behalf.

67. While no inmate should ever be placed in such an impossible position, given Eric's youthful offender status this Hobbesian choice was clearly unconstitutional as it undermined his right to basic due process, to counsel, and the meaningfulness of the process guaranteed to youthful offenders.

68. The kind of fundamentally unfair dilemma presented by selecting either the option of legal representation or fact evidence is surely inconsistent with minimal conceptions of fairness and rationality inherent in due process.

69. Second, as noted, the rock-and-hard place presented by current Missouri parole practices results in involuntary waivers of either the right to counsel or to present supportive testimony. Given that Eric was provided with no real choice at all, the forced election also runs afoul of long-respected due process principles.

70. Beyond the basic due process problems presented by the false option outlined above, Missouri parole hearings should be seen as the kind of proceedings at which a constitutional right to counsel should attach.

71. This is especially true given their extremely complicated standards that frequently escape common sense interpretation and the extent to which the discretion to provide freedom has been placed in the hands of the Parole Board in Missouri.

72. And finally, as noted, juvenile offenders must be given special protections and considerations during the criminal process. For parole proceedings that means a meaningful

opportunity for review and release. That should at least include the right to fact witnesses AND counsel. *See* U.S.CONST., AMENDS. VI and XIV; Mo. CONST., ART. 1, SECTIONS 10 and 18A.

WHEREFORE, Petitioner Eric Gray prays for a declaratory judgment stating that youthful offenders who are under the age of eighteen (18) at the time of their offenses have a right to meaningful assistance of counsel in parole release proceedings different from adult offenders; ordering MDOC to apply this standard to parole proceedings for such offenders; remanding this matter to the Parole Board for a new hearing where such a standard should be applied; and ordering the Respondent to pay costs and expenses in relation to this action, and for such other and further relief as the Court deems just and appropriate.

COUNT FOUR:
DECLARATORY JUDGMENT – CONSTITUTIONAL VIOLATION

Failure to Consider Youthful Offenders Categorically Less Culpable as a Matter of Law

73. Petitioner hereby incorporates by reference paragraphs 1 through 72 of this Petition as though fully set forth herein.

74. Not only did MDOC fail to sufficiently account for Eric’s youthful offender status in terms of applicable procedures, but it wholly overlooked the special factors and legal standards developed by the United States Supreme Court when it comes to considering culpability and rehabilitation of youth. *See, e.g., Graham*, 560 U.S. 48; *Miller v. Alabama*, 132 U.S. 2455.

75. Indeed, it appears MDOC possesses a deeply flawed and limited understanding of the United States Supreme Court’s recent jurisprudence relating to youthful offender sentencing. *See, e.g.,* Exhibit J. While the Court addressed life without parole prison terms, it has also provided a great deal of additional guidance to states who sentence children as adults.

76. As noted, it has made clear that all children serving adult prison sentences need to be provided with a meaningful opportunity for release. But more than this, it has set forth various criteria that are relevant to determining whether a juvenile offender should be released on parole.

77. The process and decision-maker must take account of the youthful offender's "lack of maturity" at the time of the crime, "susceptib[ility] to negative influences and outside pressures, including peer pressure" during youth, and less well-formed moral character. *Graham*, 560 U.S., at 68. This is true regardless of the nature or gravity of the crime, which should not be the focus of the determination. *See id.*

78. Thus, denying parole to a youthful offender based upon the seriousness of the offense is wholly inconsistent with the Supreme Court's jurisprudence that holds youth must be seen as categorically less culpable. Equally problematic is undue emphasis on institutional adjustment reflecting traits of youth.

79. Yet, that is exactly what occurred here, in contravention of the teaching of *Graham*, *Miller*, and *Montgomery*. *See also* U.S. CONST., AMENDS. VIII and XIV; Mo. CONST., ART. 1, SECTIONS 10 and 21.

WHEREFORE, Petitioner Eric Gray prays for a declaratory judgment stating that youthful offenders who are under the age of eighteen (18) at the time of their offenses must be viewed as categorically less culpable than adults and be considered under special parole laws, regulations, and procedures that take account of such differences; ordering MDOC to apply these standards to parole proceedings for such offenders; remanding this matter to the Parole Board for a new hearing where such standards should be applied; and ordering the Respondent to pay costs and expenses in relation to this action, and for such other and further relief as the Court deems just and appropriate.

COUNT FIVE:
DECLARATORY JUDGMENT – STATE STATUTORY AND REGULATORY VIOLATION

Improper Removal from Hearing Panel Jurisdiction Without Good Cause or Prior Notice

80. Petitioner hereby incorporates by reference paragraphs 1 through 79 of this Petition as though fully set forth herein.

81. Missouri Revised Statute 217.670.2 provides: “Decisions of the board regarding granting of paroles . . . shall be by a majority vote of the hearing panel members.” In addition, the panel “shall consist of one member of the board and two hearing officers appointed by the board.”

Id.

82. Nowhere in Missouri’s parole laws does it state that any time a death has resulted a parole case *must* be removed from the Hearing Panel and decided instead by the full board in a different kind of process. Thus, MDOC’s policies and practices applying such a rule are inconsistent with statutory law.

83. Missouri’s Code of State Regulations provides further information about the parole review process. For instance, it sets forth explicit expectations for defendants, including that they will be able to personally present their case to the hearing panel considering their case. 14 CSR 80-2.010 (3) (A).

84. It also lays out the role that will be played by the Hearing Panel, which includes consideration of the evidence in the defendant’s institutional record and file, “evaluat[ing] the offender in regard to suitability for parole release,” and determining parole conditions. 14 CSR 80-2.010 (3) (B).

85. Although 217.670.2 suggests that in certain circumstances a particular case might be removed from the Parole Panel system by a particularized application by one of the Board

members, the law does not contemplate treating all cases involving death – regardless of the cause or state of mind involved – differently than other cases.

86. What is more, Missouri parole law surely does not support a claim that such exclusion could occur without prior notice. Indeed, 217.670 makes it quite clear that changes in process – such as presentation to the panel by way of video conference rather than in person – require not just notice but consent on the part of the defendant. *See* Mo. Rev. Stat. 217.670.6.

87. Given the secret standards applied, in Eric’s case the entire hearing was rendered illusory and meaningless. He was led to believe he was appearing before the individuals who would be deciding his case, that they were the individuals who needed to be convinced he was ready to be released, and that if they disagreed he would be able to take an appeal to the full Parole Board, as contemplated by statute. *See* Mo. Rev. Stat. 217.670.2.

88. However, after he received his decision denying parole release, he was not only denied an appeal, but was told he could not even have the proper form to request an appeal given that the full Board had already decided his case in a process previously unbeknownst to him. *See* Exhibits H.

WHEREFORE, Petitioner Eric Gray prays for a declaratory judgment stating that pursuant to Missouri regulations and laws, absent prior notice and demonstration of special circumstances shown in an individual case, a parole release hearing must be held in the first instance before an MDOC Hearing Panel and shall provide for the right to appeal to the full board upon a decision denying parole; ordering MDOC to apply this standard to Eric’s parole proceedings; remanding this matter to the Parole Board for a new hearing where this standard should be applied; and ordering the Respondent to pay costs and expenses in relation to this action, and for such other and further relief as the Court deems just and appropriate.

COUNT SIX:
DECLARATORY JUDGMENT – STATE STATUTORY AND REGULATORY VIOLATION

Inability to Access Parole Record and Challenge False Information

89. Petitioner hereby incorporates by reference paragraphs 1 through 88 of this Petition as though fully set forth herein.

90. Consistent with Missouri law, Eric should have been allowed (a) to review information being relied upon by the Board, in part to be able to correct any inaccuracies and (b) to present at least one witness on his behalf even if his attorney was present. *See, e.g.*, 14 CSR 80-2.010 (3)(A) & (5).

91. The Respondent discounted Eric’s expressed concerns about inaccuracy or falsehoods in the materials considered by the Board. Instead, responding to Eric’s complaint about lack of access to the materials available to the Parole Board, Ms. Burke claimed Eric was not allowed to review such materials as they are “not open to the public.” *See* Exhibit J.

92. But this response makes no sense. Whether or not such information is available to the general public is wholly irrelevant to whether Eric – the very person to whom the records are about – should have access to them as a matter of course.

93. What is more, Missouri law and Parole Board regulations make clear that Eric must be provided access to the materials contained in the Parole Board’s file. If not, his right to “challeng[e] allegations of fact” before the Board that are “believed to be false” would be meaningless. *See* 14 CSR 80-2.010 (3)(A)(6).

94. In fact, this requirement has been expressly incorporated into MDOC Procedures. *See* MDOC PROCEDURES at 4 (at parole hearing offender should be given the opportunity to “[p]resent and discuss matters that are appropriate for consideration, including challenging information that they perceive to be false”).

95. It would be impossible to address errors in the record considered by the Parole Panel without being able to review the Parole Board's file in advance.

WHEREFORE, Petitioner Eric Gray prays for a declaratory judgment stating that pursuant to Missouri regulations and laws, an inmate must be given reasonable opportunity to review and contest any and all materials available to the Parole Board for its consideration at the time of his parole release proceeding; ordering MDOC to apply this standard to parole proceedings; remanding this matter to the Parole Board for a new hearing where this standard should be applied; and ordering the Respondent to pay costs and expenses in relation to this action, and for such other and further relief as the Court deems just and appropriate.

COUNT SEVEN:
DECLARATORY JUDGMENT – STATE STATUTORY AND REGULATORY VIOLATION

Improper Restrictions on the Role of the Inmate's Delegate

96. Petitioner hereby incorporates by reference paragraphs 1 through 95 of this Petition as though fully set forth herein.

97. With regard to Eric's challenge to his inability to call witnesses other than counsel, again, MDOC claimed Eric was only allowed to have one delegate. And that person's role was limited to being "present in order to advise the Board of the support that they will provide the offender upon release." *See* Exhibit J. In fact, IPO reiterated "[t]his is the only reason the delegate is allowed." *Id.* But, of course, that is not at all what Missouri law and regulations say about lay witnesses who may appear with prisoners before the parole panel.

98. Petitioner and undersigned counsel were forced to rely on this representation and misinterpretation of law, thereby precluding Petitioner from having a fact-witness or delegate other than counsel present during the hearing.

99. Missouri parole regulations make clear that inmates may bring witnesses to share information about what support they will give upon the defendant’s release. Indeed, they have the right to engage the Hearing Panel in at least three ways: (i) to “offer a statement on behalf of the offender”; (ii) to ask questions of the parole panel; and (iii) to provide any information that might assist the panel. Relegating delegates to the singular role outlined by the IPO in Eric’s case is inappropriate and contrary to Missouri law. *See* 14 C.S.R. 80-2.010 (5) (A) (1).

WHEREFORE, Petitioner Eric Gray prays for a declaratory judgment stating that pursuant to Missouri regulations and laws, an inmate must be permitted to present one or more fact witnesses at a parole release hearing to give testimony or offer statements on an offender’s behalf, make inquiries of the Parole Panel, and provide any other information that might assist the panel such as documentary evidence, photographs, or videos; ordering MDOC to apply this standard to parole proceedings; remanding this matter to the Parole Board for a new hearing where this standard should be applied; and ordering the Respondent to pay costs and expenses in relation to this action, and for such other and further relief as the Court deems just and appropriate.

COUNT EIGHT:
DECLARATORY JUDGMENT – STATE STATUTORY AND REGULATORY VIOLATION

Illegal Option of Legal Counsel or a Fact Witness

100. Petitioner hereby incorporates by reference paragraphs 1 through 99 of this Petition as though fully set forth herein.

101. As attorneys are allowed to be present during parole hearings – indeed MDOC has conceded as much – they must be permitted to satisfy their professional roles as advocates and counselors during such proceedings for the inmates who they represent. *See, e.g.,* MO. SUP. CT. R. 4 PREAMBLE (attorneys have duty to serve as advisors, advocates, and negotiators for their clients).

102. The right to counsel is especially important in the case of youthful offender parole hearings. *See, e.g.*, MO. REV. STAT. § 211.211 (describing continuing role of juvenile defense counsel as applying to “all stages of the proceedings”); *see also* U.S.CONST., AMENDS. VI and XIV; MO. CONST., ART. 1, SECTIONS 10 and 18A.

WHEREFORE, Petitioner Eric Gray prays for a declaratory judgment stating that pursuant to Missouri regulations and laws, an inmate may not be required to make an election as between meaningful legal representation or fact witness testimony at a parole hearing, and that counsel must not be relegated to the role of fact witness but instead must be permitted to satisfy her professional duties; ordering MDOC to apply these standards to parole proceedings; remanding this matter to the Parole Board for a new hearing where this standard should be applied; ordering the Respondent to pay costs and expenses in relation to this action, and for such other; and further relief as the Court deems just and appropriate.

COUNT NINE:

DECLARATORY JUDGMENT – STATE STATUTORY AND REGULATORY VIOLATION

Improper Maximum 5-Year Set-Back for Juvenile Offender Without Cause or Explanation

103. Petitioner hereby incorporates by reference paragraphs 1 through 102 of this Petition as though fully set forth herein.

104. Following any parole release hearing the Parole Board must provide written notice of its decision to an inmate, including why a parole decision is in the best interest of society. *See* MO. REV. STAT. § 217.690; *see also* 14 C.S.R. 80-2.010 (6) (B).

105. Here the Board offered no explanation whatsoever for choosing to impose the maximum reconsideration set-back term under the law – five (5) years – and for rejecting any lesser possibility which could have been as little as one (1) year. *See* 14 C.S.R. 80-2.010 (6) (C) (2). Failure to provide any reason for the maximum set-back is inconsistent with state law.

106. In addition, any such a decision was an abuse of discretion as it is unsupported by the weight of the evidence, particularly given Eric's youthful offender status and need for special treatment and consideration under state law.

WHEREFORE, Petitioner Eric Gray prays for a declaratory judgment stating that pursuant to Missouri regulations and laws, MDOC's Parole Board must not impose any set back greater than what is necessary under the circumstances and must state reasons not only for denying parole but for the length of the set-back; ordering MDOC to apply this standard to parole proceedings; remanding this matter to the Parole Board for a new hearing where this standard should be applied; and ordering the Respondent to pay costs and expenses in relation to this action, and for such other and further relief as the Court deems just and appropriate.

CONCLUSION

WHEREFORE, Petitioner Eric Gray urges this Honorable Court to enter a Judgment and Order declaring that:

- (1) As a matter of constitutional law, youthful offenders who are under the age of eighteen (18) at the time of their offenses have a protected liberty interest in parole release different from adult offenders;
- (2) As a matter of constitutional law, MDOC must afford a meaningful opportunity for release for all youthful offenders under the age of eighteen (18) at the time of their offense, and that such meaningful opportunity at a minimum includes due process protections including the right to review and contest all information presented to the Parole Board, to present fact witnesses to testify on his behalf, to have a hearing before the Hearing Panel unless provided with prior notice and the opportunity to

challenge removal from the Panel, and to at least a rational basis and supported reasons for any particular set-back:

- (3) As a matter of constitutional law, youthful offenders who are under the age of eighteen (18) at the time of their offenses have a right to meaningful assistance of counsel in parole release different from adult offenders;
- (4) As a matter of constitutional law, youthful offenders who are under the age of eighteen (18) at the time of their offenses must be viewed as categorically less culpable than adults and be considered under special parole laws, regulations, and procedures that take account of such differences;
- (5) Pursuant to Missouri regulations and laws, absent prior notice and demonstration of special circumstances shown in an individual case, a parole release hearing must be held in the first instance before an MDOC Hearing Panel and shall provide for the right to appeal to the full board upon a decision denying parole;
- (6) Pursuant to Missouri regulations and laws, an inmate must be given reasonable opportunity to review and contest any and all materials available to the Parole Board for its consideration at the time of his parole release proceeding;
- (7) Pursuant to Missouri regulations and laws, an inmate must be permitted to present one or more fact witnesses at a parole release hearing to give testimony or offer statements on an offender's behalf, make inquiries of the Parole Panel, and provide any other information that might assist the panel such as documentary evidence, photographs, or videos;
- (8) Pursuant to Missouri regulations and laws, an inmate may not be required to make an election as between meaningful legal representation or fact witness testimony at

a parole hearing, and that counsel must not be relegated to the role of fact witness but instead must be permitted to satisfy her professional duties; and

- (9) Pursuant to Missouri regulations and laws, MDOC's Parole Board must not impose any set back greater than what is necessary under the circumstances and must state reasons not only for denying parole but for the length of the set-back.

Petitioner Eric Gray further prays that this Honorable Court order MDOC to apply these standards to parole proceedings; remand this matter to the Parole Board for a new hearing where these standards should be applied; and order the Respondent to pay litigation costs, expenses, and attorneys fees in relation to this action, and for such other and further relief as the Court deems just and appropriate.

Respectfully submitted,

/s/ Mae C. Quinn

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/s/ Amy E. Breihan

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