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IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI  
STATE OF MISSOURI

STATE OF MISSOURI, )  
Plaintiff )  
v. )  
ALYSSA D BUSTAMANTE, )  
Defendant )

Cause No. 09AC-CR03516-01F

Div. No. **FILED**

FEB 17 2011

BRENDA A. UMSTATTD  
CLERK CIRCUIT COURT  
COLE COUNTY, MISSOURI

**Motion to Declare §565.020.2 RSMo Unconstitutional as it Applies to Juveniles in General and to Alyssa in Particular and to Preclude the Imposition of a Life Without Probation or Parole Sentence**

COMES NOW Alyssa D. Bustamante, the Accused, by and through undersigned counsel, Donald Catlett and Charles Moreland, and respectfully requests that this Court order that the State desist from prosecuting Alyssa on a charge of first degree murder since the only possible penalty under §565.020, life with no opportunity for probation or parole, would constitute cruel and unusual punishment if imposed on a juvenile offender or that this Court declare §565.020.2 RSMo unconstitutional as it applies to juveniles in general and to Alyssa in particular. Alyssa further moves that this Court refuse to sentence Alyssa to life with no opportunity for probation or parole, even if she is convicted of first degree murder.

Should this Court deny Alyssa's requests, she will be denied equal protection, due process, and reliable jury sentencing, as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article I, §§2, 10, 18(a) and 21 of the

Missouri Constitution, and Articles 10 and 11 of the Universal Declaration of Human Rights and Articles 9 and 14, §§1 of the International Covenant on Civil and Political Rights. She also will be subjected to cruel and unusual punishment, in violation of the Eighth Amendment to the United States Constitution, Article I, §21 of the Missouri Constitution, and Article 6, §1 of the International Covenant on Civil and Political Rights, Article 5 of the Universal Declaration of Human Rights and Article 37(a) of the International Convention on the Rights of the Child.

In support of this motion, Alyssa states as follows:

1. On November 18, 2009, the State charged Alyssa with one count of first degree murder, §565.020 RSMo, and one count of armed criminal action. §571.015 RSMo.

2. As of November 18, 2009, Alyssa was 15 years old, having turned 15 on January 18, 2009.

3. Section 565.020.1 provides that “A person commits the crime of murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter.” Section 565.020.2 further provides that

Murder in the first degree is a class A felony, and the punishment shall be either death or imprisonment for life without eligibility for probation or parole, or release except by act of the governor; except that, if a person has not reached his sixteenth birthday at the time of the commission of the crime, the punishment shall be imprisonment for life without eligibility for probation or parole, or release except by act of the governor.

4. Since Alyssa was less than 18 years old when the offenses with which she is charged were committed, if she is convicted of first degree murder in this prosecution, the only punishment for which she is eligible under §565.020.2 is life imprisonment with no opportunity for probation or parole. *Roper v. Simmons*, 543 U.S. 551, 568 (2005); *State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 413 (Mo.banc 2003) (imposing a death sentence on one under age 18 violates the Eighth and Fourteenth Amendments).

5. A sentence of life imprisonment with no opportunity for probation or parole is, like a sentence of death, unique in its severity. *Graham v. Florida*, \_\_U.S.\_\_, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010). And, when applied to a juvenile offender, it, like a sentence of death, violates the state and federal constitutional provisions guaranteeing freedom from cruel and unusual punishment. Moreover, it violates international law, which protects juvenile offenders against cruel and unusual punishment. *International Covenant for Civil and Political Rights, Article 7; International Convention on the Rights of the Child, Article 37(a)*.

6. In *Simmons*, Justice Kennedy, writing for the Court, noted three general differences between juvenile offenders and adults that rendered their classification, alongside adult offenders, as “among the worst offenders” unreliable. First, juvenile offenders more often demonstrate a “lack of maturity and an under-developed sense of responsibility,” which often lead to “impetuous and ill-considered actions and decisions.” *Simmons*, 543 U.S. at 569, citing *Johnson v. Texas*, 509 U.S. 350, 367 (1993); *Eddings v. Oklahoma*, 455 U.S. 104, 115-16 (1982). Justice Kennedy referenced the wealth of

scientific and sociological data that confirms that “adolescents are overrepresented statistically in virtually every category of reckless behavior.” *Simmons*, 543 U.S. at 569, citing Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 *Developmental Rev.* 339 (1992). Second, Justice Kennedy noted that juveniles “are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure.” *Simmons*, 543 U.S. at 569. This, the Court stated, in part was due to juveniles having “less control, or less experience with control, over their own environment.” *Id.*; citing Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 *A. Psychologist* 1109, 1014 (2003). Third, Justice Kennedy acknowledged that “the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.” *Simmons*, 543 U.S. at 570; citing, E. Erikson, *Identity: Youth and Crisis* (1968).

7. These differences, Justice Kennedy stated, “render suspect any conclusion that a juvenile falls among the worst offenders.” *Simmons*, 543 U.S. at 570. These differences render their “irresponsible conduct” less “morally reprehensible as that of an adult.” *Id.*; *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988). Because juveniles are still struggling to define their identity, “it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.”

*Simmons*, 543 U.S. at 570.

8. Thereafter, in *Graham v. Florida*, \_\_\_U.S. \_\_\_, 130 S.Ct. 2011, 176 L.Ed. 2d 825 (2010), with Justice Kennedy again writing for the Court, the question of what constitutes cruel and unusual punishment for juvenile offenders was again at issue. Justice Kennedy noted that this Eighth Amendment question is often resolved through a study of the proportionate nature of sentencing. Proportionality is determined, he stated, through reference to two subsets—one considering the nature of the offense and the other considering the characteristics of the offender. *Id.*, 130 S.Ct. at 2021-22. In *Graham*, the Court faced the question of whether a life without parole sentence for a juvenile non-homicide offender constituted cruel and unusual punishment. Largely because of the Court’s finding that both the nature of the crime and the age of the offender were relevant considerations, both creating a “diminished moral culpability,” *Id.* at 2027, the Court concluded that a life without parole sentence was unconstitutional.

9. In *State v. Andrews*, \_\_\_S.W.3d \_\_\_, 2010 WL 5209310 (Mo.banc December 21, 2010), the Missouri Supreme Court addressed the constitutionality of a sentence of life with no opportunity for parole for a juvenile convicted of first degree murder. While the principal opinion noted no constitutional impediment to that sentence, Justices Wolff, Stith and Teitelman argued, in dissent, that such a sentence violates the Eighth Amendment’s prohibition against cruel and unusual punishment. That analysis should control here.

10. Echoing Justice Kennedy's writings in *Roper* and *Graham*, Justice Wolff noted that the Eighth Amendment's prohibition against cruel and unusual punishment incorporates the "precept of justice that punishment for crime should be graduated and proportioned to [the] offense." *Andrews*, slip op. at 9 (Wolff, J., dissenting), citing *Weems v. United States*, 217 U.S. 349, 367 (1910). That which is permissible under the Eighth Amendment varies, depending upon the characteristics of the individual defendant, including his age and mental capacity. *Andrews*, slip op. at 9; *Simmons*, 543 U.S. at 553-54; *Atkins v. Virginia*, 536 U.S. 304 (2002). Furthermore, our conception of that which is "cruel and unusual" evolves, demonstrating the "progress of a maturing society." *Andrews*, at 9, citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958)(plurality opinion). While the standard remains constant, its applicability "must reflect the changes in moral understanding of society." *Andrews*, at 9; *Graham*, 130 S.Ct. at 2011.

11. Justice Wolff noted that, in *Graham*, the Court considered "'objective indicia of society's standards, as expressed in legislative enactments and state practice' to determine whether there is a national consensus against a particular type of sentencing." *Andrews*, at 10, citing *Graham*, 130 S.Ct. at 2022. The *Graham* Court found that, because life without parole sentences are imposed so rarely on juvenile offenders in non-homicide cases, a national consensus exists, demonstrating that standards of decency have evolved to prohibit imposing a life without parole sentence on a juvenile in a non-homicide case. *Id.* at 2023-26.

12. Justice Wolff undertook a similar analysis in *Andrews*. He noted that about 2,600 offenders are currently serving life without parole sentences for homicides committed while they were juveniles. *Andrews*, at 11. Seven states and the District of Columbia prohibit life without parole sentences for juveniles, four states allow that sentence but do not impose it, and 40 states and the federal system both allow and actually sentence juvenile offenders to life without parole sentences. *Id.* Justice Wolff stated that, while these numbers do not demonstrate a consensus against life without parole sentences for juvenile offenders, actual sentencing practices demonstrate an evolving standard. *Id.*

13. In the majority of states in which a life without parole sentence is permitted for juveniles, courts are mandated to impose that sentence. *Id.* Thus, as Justice Wolff stated, "it is impossible to determine whether sentencing practices show that standards have evolved because, in practice, many courts have no discretion in this area of sentencing." *Id.* In those jurisdictions that mandate life without parole sentences, the average number of juveniles so sentenced is significantly higher—82.36—than in jurisdictions in which courts have sentencing discretion—13.19. *Id.* Justice Wolff suggested that "These statistics, which are raw numbers and not percentages of those sentenced, illustrate that an evolving standard may be occurring but that mandatory sentencing schemes prevent effective analysis." *Id.*

14. National practice and trends are relevant in determining whether a particular practice constitutes cruel and unusual punishment. International practice also may

support the independent conclusions of this nation's courts that a particular punishment is cruel and unusual. *Graham*, 130 S.Ct. at 2033; *Simmons*, 543 U.S. at 575-58; *Atkins*, 536 U.S. at 317-18, n.21; *Trop*, 356 U.S. at 102-03. As the *Graham* Court noted, "only 11 nations authorize life without parole for juvenile offenders under any circumstances; and only 2 of them, the United States and Israel, ever impose the punishment in practice." *Graham*, 130 S.Ct. at 2033; M. Leighton & C. de la Vega, *Sentencing Our Children to Die in Prison: Global Law and Practice* 4 (2007). Moreover, Article 37(a) of the International Convention on the Rights of the Child, to which the United States is a signatory state but which only the United States and Somalia have not ratified, specifically prohibits imposing a life without parole sentence for any offense committed by a person under 18 years of age. *Graham*, 130 S.Ct. at 2034; Marian Magnuson, *Taking Lives: How the United States Has Violated the International Covenant of Civil and Political Rights By Sentencing Juveniles to Life Without Parole*, 14 U.S. Davis J. Juv. L. & Policy 163, 170 (2010). While, as the State's *amici* in *Graham* stressed that the United States is not bound by any international legal agreement that prohibits imposing a life without parole sentence on a juvenile offender, as Justice Kennedy noted, that argument "miss[es] the mark." *Graham*, 130 S.Ct. at 2034. The question is not whether international law prohibits imposing this sentence. Instead, the question is whether that punishment is cruel and unusual. And, the "overwhelming weight of international opinion" against imposing such a sentence provides significant confirmation to the conclusion that a life without parole sentence in these circumstances is cruel and unusual.

*Id.*

15. Both the *Graham* Court and Justice Wolff also looked to the significant body of scientific evidence demonstrating that, “due to juveniles’ innate biological differences, they must not be held to the same punitive standard as adults.” *Andrews*, at 12. Justice Kennedy noted objective scientific data that demonstrates the ongoing process of maturation that a juvenile’s brain undergoes through late adolescence. *Graham*, 130 S.Ct. at 2026.

16. Justice Wolff further noted “Brain imaging studies have shown that the frontal lobes of the brain, which are not developed until late adolescence, have an impact on response inhibition, regulation of emotion, planning and organization.” *Andrews*, at 12. A recent study documents four significant changes in the brain during adolescence. First, during adolescence, the gray matter in the pre-frontal regions of the brain decreases, improving both information processing and logical reasoning. *Id.*; citing Lawrence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?* 64 *Am. Psychologist*, November 2009, at 742. Second, also during adolescence, the activity of dopamine, a neurotransmitter, shifts both in how many receptors there are and where they are located. This in turn affects how an adolescent weighs the costs and rewards of engaging in certain behaviors. *Id.* at 743. Third, during that same time period, the brain’s white matter in the pre-frontal regions increases, affecting the adolescent’s response inhibition, long-term planning, weighing of benefits and risks, and the ability to simultaneously consider multiple sources of information. *Id.* Fourth, with

age, the connections between the cortical and subcortical regions of the brain increase. These connections help to regulate emotions. *Id.* As Justice Wolff noted, studies show that “impulse control, anticipation of future consequences, strategic planning and resistance to peer influence all increase linearly from preadolescence through late adolescence.” *Andrews*, at 13. All of this research, Justice Wolff stated, leads to the inexorable conclusion that juveniles are different. *Id.*

17. Because “juveniles are different,” in that they lack maturity; have an underdeveloped sense of responsibility; are more vulnerable or susceptible to negative influences and outside pressures, and their characters are not as well formed as those of adults, *Id.*, the punishment to which they are subject “should reflect the ambiguity regarding motivation and culpability in the commission of a crime.” *Id.* Even when a juvenile commits a homicide, the juvenile’s culpability “for the same crime is innately less than an adult’s because ‘from a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a great possibility exists that a minor’s character deficiencies will be reformed.’” *Id.*, citing *Simmons*, 543 U.S. at 570.

18. Justice Wolff also noted in *Andrews* that a life without parole sentence for a juvenile offender, even a juvenile who is alleged to have committed a homicide, lacks any legitimate penological justification. *Andrews*, at 14. A sentence that lacks any such justification *a fortiori* is disproportionate, and its infliction cruel and unusual. *Id.*; *Graham*, 130 S.Ct. at 2028.

19. Retribution is a legitimate sentencing goal if it is “directly related to the personal culpability of the criminal offender.” *Andrews*, at 14; citing *Tison v. Arizona*, 481 U.S. 137, 149 (1987). Since “a juvenile’s culpability, even for homicide, is substantially less than an adult’s,” retribution is not a legitimate sentencing goal in a case such as this. *Andrews*, at 14; *Simmons*, 543 U.S. at 570; *Graham*, 130 S.Ct. at 2011.

20. Deterrence is also a legitimate penological goal. However, since “juveniles have diminished capacity to evaluate the long-term consequences of their behavior as well as an increased tendency to engage in risk-taking behavior,” *Andrews*, at 14; *Graham*, 130 S.Ct. at 2028-29; Steinberg, 64 *Am. Psychologist* at 246-51, a life without parole sentence has a “limited [deterrent] impact.” *Andrews*, at 14. The limited impact is insufficient to justify such a sentence as a deterrent. *Id.*

21. Incapacitation is also a legitimate penological goal. It does not justify a life without parole sentence for juvenile offenders, however, because, for that sentence to be legitimate, “the juvenile offender must be incorrigible and, therefore, present a permanent danger to society.” *Id.*; *Graham*, 130 S.Ct. at 2029. Juveniles are, by their nature, subject to and *able to* change—that is “an essential characteristic of juveniles.” *Id.*; *Andrews*, at 14.

22. While rehabilitation is also a legitimate penological goal, a life without parole sentence for a juvenile constitutes an explicit rejection of that theory. *Id.* Life without parole is, in practicality, a death sentence. *Id.* And, because offenders serving life without parole sentences “usually are denied access to vocational training and other

rehabilitative services,” they are “denied the chance to become rehabilitated and rejoin society.” *Id.*; *Graham*, 130 S.Ct. at 2030. Because a juvenile offender is denied any opportunity for redemption, rehabilitation is not even on the table as a sentencing goal.

23. Although not directly at issue in *Graham*, before both the *Andrews* Court and this Court now, is whether the mandatory nature of a life without parole sentence for a juvenile offender violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §18(a) of the Missouri Constitution. Justices Wolff, Stith and Teitelman found that such a sentence violates those constitutional principles. Indeed, Justice Kennedy noted in *Graham* that “An offender’s age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants’ youthfulness into account at all would be flawed.” *Graham*, 130 S.Ct. at 2031.

24. In every criminal jury trial in Missouri, except for cases involving juvenile offenders convicted of first degree murder committed while under 18, defendants are entitled to adduce evidence in mitigation of punishment. §557.036.2 RSMo; *Andrews*, at 15. Section 565.020 precludes consideration of the offender’s age in imposing sentence. Justices Wolff, Stith and Teitelman found that this preclusion violates the Eighth Amendment since it “fails to ensure that [a] sentence is proportional to [the] crime.” *Andrews*, at 15.

25. As Justice Wolff noted in his dissent, the principal opinion in *Andrews* rejected this analysis, believing that, since a defendant’s youth is considered as part of the certification process, that is sufficient. *Id.* at 16. The principal opinion espouses the belief

that the certification process is not part of the criminal trial. Therefore, it stated, the Sixth Amendment, as explicated in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), does not require that the jury make the factual findings the statute requires, including the question of the defendant's age, in determining whether the defendant is to be certified. *Andrews*, at 16.

26. Justice Wolff pointed out that, if the certification process is the mechanism by which a defendant's youth is to be considered, as *Graham* requires, it must be considered by the jury. *Andrews*, at 16. Moreover, the certification process is designed to determine whether a juvenile can be tried as an adult. *Id.* It is **not** intended to be utilized to determine whether the juvenile "is sufficiently culpable and his or her cognitive processes are developed sufficiently that the child can be sentenced to life without parole. The latter is a separate question that may have a different answer, as *Roper* recognized in stating that a child may be certified to stand trial as an adult yet not be eligible for the death penalty because of his or her youth." *Andrews*, at 16, citing *Simmons*, 543 U.S. at 578-79.

27. Justice Stith, who concurred fully in Justice Wolff's dissent, wrote separately in *Andrews* to address two remaining, and intertwined, issues. First, she emphasized that, by precluding the jury from considering mitigating factors, like the defendant's age, the defendant is denied the kind of individualized assessment of culpability that the *Graham* Court stated is essential to the constitutionality of sentencing a juvenile to life imprisonment. *Andrews*, at 17; citing *Graham*. This kind of denial violates the Eighth

Amendment. *Graham*, 130 S.Ct. at 2031; *Andrews*, at 17. It is also inconsistent with §565.032 RSMo, which reflects the command of Missouri's Legislature that juries be instructed to consider a defendant's age in determining the appropriate punishment since age "may affect the defendant's culpability and mitigate the punishment for his or her crime...." *Andrews*, at 17.

28. Justice Stith also noted that the principal opinion's holding that a judge's decision to certify a juvenile to stand trial as an adult is "merely a decision as to which court has jurisdiction over the defendant dramatically oversimplifies what is occurring." *Id.* at 20. Since the principal opinion also argues, slip op. at 14-15, that, if a defendant's culpability must be considered, the judge also satisfies that requirement in the certification process, as Justice Stith noted, "the principal opinion, therefore, seeks to have it both ways." *Id.* at 20. Further, as Justice Stith pointed out, if the certification takes the place of a jury's consideration of culpability, it violates the Sixth Amendment and *Apprendi*. *Id.* If it does not consider culpability, the juvenile offender is denied any consideration of these factors in the determination of guilt and punishment. This in turn violates *Graham*. *Andrews*, at 20.

29. Finally, implicit in the dissenting opinions filed by both Justices Wolff and Stith is the recognition that, although juvenile offenders certified to stand trial as adults on a charge of first degree murder are categorically denied consideration of their youth and other mitigating factors when either a judge or jury determines their punishment, similarly situated older offenders are entitled to consideration of those factors. *Andrews*,

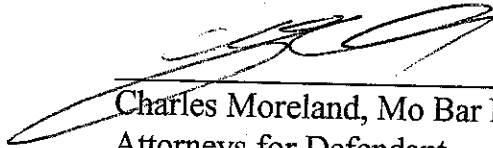
at 16. This disparate treatment also violates the right of the juvenile offender, like Alyssa, to equal protection under the laws, as guaranteed by the 14<sup>th</sup> Amendment to the United States Constitution and Article 1, §2 of the Missouri Constitution.

30. As the Court recognized first in *Simmons* and then in *Graham*, imposing on any offender a sentence of life with no opportunity for probation or parole is one of the harshest punishments available. “The State does not execute the offender sentenced to life without parole, but the sentence alters the offender’s life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence.” *Graham*, 130 S.Ct. at 2027. Especially when it applies to juvenile offenders, such sentences are unmitigated in their harshness. “Life without parole is an especially harsh punishment for a juvenile. Under this sentence a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender. A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only.” *Id.* at 2028.

WHEREFORE, Alyssa respectfully requests that this Court grant the relief requested in this motion and all other such relief as is just and equitable to protect her state and federal constitutional rights and her rights under international law.

Respectfully submitted,

  
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**Certificate of Service**

I certify that a true copy of the above and foregoing was personally served on all parties this 9th day of February, 2011.

  
Donald Catlett