No. 17-952

In the Supreme Court of the United States

WYOMING,

Petitioner,

v.

PHILLIP SAM,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Wyoming

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

STATEMENT

Miller v. *Alabama*, 567 U.S. 460 (2012), and *Montgomery* v. *Louisiana*, 136 S. Ct. 718 (2016), identify procedural and substantive protections that limit the imposition of a life-without-parole sentence to "the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible." *Montgomery*, 136 S. Ct. at 733. The petition presents the question whether a state may circumvent *Miller* and *Montgomery* by stacking multiple convictions.

Further review of that question is not warranted in this case. To begin with, this appeal is interlocutory, and it is not yet clear whether the question presented will have any practical bearing on respondent's sentence. In fact, the State has taken the view that, at resentencing, it may seek and obtain the *very same* sentence notwithstanding the lower court's decision. The Court should deny interlocutory review because the question presented may prove irrelevant to respondent's ultimate sentence.

Beyond that, further review would be premature. *Montgomery* was decided less than two years ago, and courts are still addressing several important embedded questions, including when a juvenile sentence is sufficiently lengthy to constitute, in effect, life without parole. The Court should await further percolation of these issues before again considering application of the Eighth Amendment to juvenile sentencing.

Review is also unnecessary because the decision below is plainly correct. Pursuant to *Miller*, the sentencing court held a hearing to determine whether respondent is "the rare juvenile offender whose crime

reflects irreparable corruption," such that he may be subject to a sentence of life without parole. 567 U.S. at 479-480. The sentencing court answered that question in the negative: it "made the determination that [respondent] is not one of the juvenile offenders whose crime reflects irreparable corruption." Pet. App. 59. See also *id*. at 58.

Miller and *Montgomery* thus compel the result reached below: because of the sentencing court's finding, the State is not "free to sentence a child whose crime reflects transient immaturity to life without parole." *Montgomery*, 136 S. Ct. at 735. The Wyoming Supreme Court therefore ordered the trial court to sentence respondent to a term of incarceration that allows him an *opportunity* to request parole prior to age 61. Pet. App. 59.

To be clear, the issue here is parole eligibility; respondent's lifetime sentence remains firmly in place. The holding below merely obligates the State to provide respondent the opportunity, prior to age 61, to ask officials for a discretionary grant of parole. If respondent, at that time, has "shown an inability to reform," then he "will continue to serve [his] life sentence[]." *Montgomery*, 136 S. Ct. at 736.

In the State's view, however, *Miller* ceases to apply when a juvenile is convicted of multiple crimes. That position is irreconcilable with *Graham*, *Miller*, and *Montgomery*—all of which rest on the "principle" that "'children are constitutionally different from adults for purposes of sentencing.'" *Montgomery*, 136 S. Ct. at 733 (quoting *Miller*, 567 U.S. at 471). It would also render those decisions hollow because, as the State itself recognizes (Pet. 27), a prosecutor may bring multiple charges in response to virtually any serious criminal incident where life without parole is

on the table. The State is wrong to assert that *Miller* and *Montgomery* are effectively meaningless.

That is not to say that the presence of multiple convictions is irrelevant. Rather, it is an important factor that courts must consider in conducting the *Miller* inquiry. But when, as here, a court determines that a juvenile offender is not one deserving of a life-without-parole sentence, a state may not obtain that same result by stacking multiple offenses.

For these reasons, review is unwarranted.

A. Legal background.

1. In *Graham* v. *Florida*, 560 U.S. 48 (2010), the Court held that the Eighth Amendment categorically prohibits the imposition of a life-without-parole sentence for a non-homicide offense. *Id.* at 82. It recognized that, "because juveniles have lessened culpability[,] they are less deserving of the most severe punishments." *Id.* at 68. Juveniles differ from adults in several respects: they "have a lack of maturity and an underdeveloped sense of responsibility," they "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure," and "their characters are not as well formed." *Ibid.* (quotations omitted).

Graham observed that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds." 560 U.S. at 68. The "parts of the brain involved in behavior control continue to mature through late adolescence," and actions taken as a juvenile "are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults." *Ibid.*

A life sentence, moreover, "share[s] some characteristics with death sentences that are shared by no

other sentences." *Graham*, 560 U.S. at 69. The individual is irrevocably deprived "of the most basic liberties without giving hope of restoration." *Id.* at 69-70. Such a sentence for a juvenile "means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days." *Id.* at 70 (quotation omitted). And, because of a juvenile's age, a sentence of life without parole "is an especially harsh punishment for a juvenile." *Ibid.*

2. In *Miller*, the Court held that the Eighth Amendment precludes imposing mandatory life-without-parole sentences on juveniles convicted of homicide. 567 U.S. at 465. Like *Graham*, *Miller* recognized "that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Id.* at 472.

The Court explained that each of the rationales for imposing the most severe form of punishment is mitigated by youth. Because "the heart of the retribution rationale relates to an offender's blameworthiness, the case for retribution is not as strong with a minor as with an adult." *Miller*, 567 U.S. at 472 (quotation and alterations omitted). "Nor can deterrence do the work in this context, because the same characteristics that render juveniles less culpable than adults—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment." *Ibid.* (quotation omitted). Similarly, "incapacitation" is not sufficient because "[d]eciding that a juvenile offender forever will be a danger to society would require making a judgment

that he is incorrigible—but incorrigibility is inconsistent with youth." *Id*. at 472-473 (alterations omitted). Finally, rehabilitation cannot justify a life-without-parole sentence because it "forswears altogether the rehabilitative ideal." *Id*. at 473.

This reasoning, the Court explained, "implicates any life-without-parole sentence imposed on a juvenile." *Miller*, 567 U.S. at 473. In all circumstances, "youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole." *Ibid*. *Graham* and *Miller* thus both recognize a "foundational principle"—"that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." *Id*. at 474. That is, "[m]andatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences." *Id*. at 477.

Miller concluded that the Eighth Amendment limits life-without-parole sentences to "the rare juvenile offender whose crime reflects irreparable corruption." 567 U.S. at 479-480. Because of "children's diminished culpability and heightened capacity for change," the "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Id*. at 479.

3. Subsequently, in *Montgomery* v. *Louisiana*, 136 S. Ct. 718 (2016), the Court held that *Miller* announced a new substantive rule and thus it applied retroactively. *Miller*, the Court recognized, "requires that before sentencing a juvenile to life without parole, the sentencing judge take into account 'how children are different, and how those differences counsel against irrevocably sentencing them to a life-

time in prison.'" *Montgomery*, 136 S. Ct. at 733. While some children may be sentenced to life without parole, "*Miller* made clear that 'appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.'" *Id*. at 733-734.

A "sentencer" must, therefore, "consider a juvenile's youth before imposing life without parole." *Montgomery*, 136 S. Ct. at 734. And "*Miller* prescribes" a specific "procedure" for doing so—"[a] hearing where 'youth and its attendant characteristics' are considered as sentencing factors is necessary to separate those juveniles who may be sentenced to life without parole from those who may not." *Id*. at 735. This hearing "gives effect to *Miller*'s substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity." *Ibid*.

B. Proceedings below.

1. Respondent Phillip Sam was convicted of first-degree murder and multiple counts of aggravated assault for conduct that occurred when respondent was 16 years old. Pet. App. 6-7.

A forensic psychologist who examined respondent, Dr. Wachtel, "testified that there was a 'good likelihood' that [respondent] could be rehabilitated by his 21st birthday if he receive[s] appropriate services." Pet. App. 15. At a *Miller* hearing, "the district court held that [respondent] was *not* one of the rare juveniles who 'should never have any possibility, 40, 50 years from now, of being granted parole.'" Pet. App. 57 (emphasis added). The court thus "made the determination that [respondent] is not a juvenile so irredeemable that he deserves incarceration for the rest of his life." *Id*. at 58.

The district court sentenced respondent to life in prison for the first-degree murder conviction. Pet. App. 7. Because he is a juvenile offender, Wyoming law renders him eligible for parole after he has served 25 years on that sentence. *Ibid*.

The court also sentenced respondent "to 9 to 10 years on each of the aggravated assault charges, which the district court bunched into three concurrent terms to be served consecutively." Pet. App. 7. That yielded a minimum of 27 years in prison for the assault convictions. *Id*. at 7-8.

All told, under the district court's sentence, respondent was first eligible for parole after serving 52 years of incarceration. Pet. App. 7-8. By then, he would be 70 years old. *Id*. at 8.

2. On appeal, the Wyoming Supreme Court rejected the bulk of respondent's arguments. The court determined that the district court did not abuse its discretion in denying respondent's motion to transfer his case to juvenile court. Pet. App. 8-18. The court also found that any errors in jury instructions were neither individually nor cumulatively prejudicial. *Id.* at 18-44. The court found, following petitioner's concession, that the prosecutor "engage[d] in prosecutorial misconduct" by making statements improperly designed to inflame the jury's passions and prejudices. *Id*. at 44-45. But the court found that error harmless. *Id*. at 46-48. The court also rejected respondent's argument regarding sufficiency of the evidence for the aggravated assault convictions. *Id*. at 48-53.

The court, however, held that Sam's sentence unconstitutionally excessive because it was the "functional equivalent" of sentencing a juvenile to life

without parole. Pet. App. 54-59. The court recognized that *Miller* "bar[red] life without parole * * * for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." Pet. App. 56 (quoting *Montgomery*, 136 S. Ct. at 734). Because the district court found that respondent was not among the rare category of juveniles for whom a life sentence is appropriate, *Miller* bars imposition of a life-without-parole sentence here. *Id*. at 56-58.

The court therefore proceeded to consider "whether the sentence imposed [was] a de facto life sentence that violates the strictures of *Miller*." Pet. App. 58. It noted that this Court's decisions have recognized juvenile defendants' right to "hope for some years of life outside prison walls." *Id.* at 59 (quoting *Montgomery*, 136 S. Ct. at 737).

Because a sentence of "a minimum of 52 years with possible release at age 70" was incompatible with that right, the court reversed and remanded for resentencing. Pet. App. 59. That outcome comported with the court's earlier decision in *Bear Cloud* v. *State*, 334 P.3d 132 (Wyo. 2014), which held that "[a] sentence of a minimum of 45 years," with possible release at age 61, "was the functional equivalent of life without parole." Pet App. 59. Respondent's sentence—"a minimum 52 years with possible release at age 70"—"clearly exceed[ed]" the sentence in *Bear Cloud*. *Ibid.*

Justice Kautz concurred in part and dissented in part. Pet. App. 63-67.

3. Subsequent to the filing of this petition, the state trial court stayed resentencing of respondent. At the hearing on the motion to stay, counsel for re-

spondent relayed the position that the State has taken regarding the resentencing: "the State believes that * * * [it] can get the same sentence here in this [C]ourt as long as they lay more of a factual basis, or if the Court makes more findings." See App., *infra*, 5a.

REASONS FOR DENYING THE PETITION

Review is unwarranted. This is a poor vehicle: the petition is interlocutory, the State has taken the position that the constitutional question presented may have no bearing on respondent's ultimate sentence, and further percolation of fundamental questions—including what qualifies as an effective sentence of life without parole for a juvenile—is necessary. The decision below, in any event, is plainly correct. And petitioner misstates the degree of disagreement among the lower courts.

A. This case is a poor vehicle for review.

While the question presented here does not warrant review at all, this case is a particularly poor vehicle. This is so for several reasons.

1. This case is currently interlocutory. At the conclusion of its opinion, the state supreme court remanded this matter for resentencing. Pet. App. 59. This presents at least two obstacles to review.

First, the decision below is likely not "[f]inal" for purposes of 28 U.S.C. § 1257. Petitioner does not so much as address the interlocutory nature of its petition, much less attempt to show that the decision below qualifies as "final." Since petitioner has failed to so much as articulate a theory of why interlocutory review is appropriate here, respondent has no opportunity to provide a meaningful response.

Second, it is possible that resolution of the question presented will have no practical impact on the ultimate outcome of the case. The State took the position below that, on remand, it can obtain the very same sentence as that at issue here. As defense counsel informed the trial court: "the State believes that * * * [it] can get the same sentence here in this [C]ourt as long as they lay more of a factual basis, or if the Court makes more findings." See App., *infra*, 5a.

To be sure, respondent disagrees with that characterization of the opinion below. But, given that petitioner is apparently of the view that it can obtain the *same* sentence at resentencing, it is unclear now whether the decision below will have any practical bearing.

In these circumstances, the Court should deny review until the effects of the lower court's decision are fully litigated and finally resolved. If, following remand, the federal question that petitioner asserts proves outcome-determinative of this case, petitioner can seek review at that time. Indeed, in criminal cases, the State may obtain further appellate review of a sentence "by filing a bill of exceptions in accordance with Wyo. Stat. Ann. §§ 7-12-102 and 103 or by filing a petition for writ of review pursuant to W.R.A.P. 13." *Ken* v. *State*, 267 P.3d 567, 575 (Wyo. 2011).

Until respondent is resentenced, it will remain unclear whether the question presented here makes any real, practical difference. The Court should wait for confirmation that the decision below has bearing on real-world outcomes. Until then, review is premature.

2. Additionally, as petitioner recognizes (see Pet. i, 10-11), a constituent question embedded in its petition is the point at which an aggregate minimum prison sentence, when stated in years, qualifies as an effective term of life without parole. The Court should deny review because it is unnecessary—and certainly premature—to address this issue.

The Eighth Amendment does not obligate States to "'guarantee eventual freedom;'" rather, they "must provide 'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'" *Miller*, 567 U.S. at 479 (quoting *Graham*, 560 U.S. at 75). In determining what that "meaningful opportunity" is in any given case, the Court has determined that "[i]t is for the State, in the first instance, to explore the means and mechanisms for compliance." *Graham*, 560 U.S. at 75.

States cannot circumvent *Graham*, *Miller*, and *Montgomery* by replacing the "life without parole" nomenclature with a fixed term of years that extends beyond a normal life—such as a 150-year sentence prior to parole eligibility.[1] But state courts have taken different approaches to determine when a minimum term that is stated as a matter of fixed years qualifies as an effective life-without-parole sentence. Some use actuarial data, while others are exploring categorical age rules. See Pet. 10-11.

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[1] The Court has previously rejected an attempt to distinguish a sentence expressly designated as life without parole from one that, by number of years, is functionally the same. As the Court held, there is "no basis for distinguishing, for purposes of deterrence, between an inmate serving a life sentence without possibility of parole and a person serving several sentences of a number of years, the total of which exceeds his normal life expectancy." *Sumner* v. *Shuman*, 483 U.S. 66, 83 (1987).

These differences are neither surprising nor concerning. The Court expressly anticipated that the States would have some measure of flexibility in determining what qualifies as a "meaningful opportunity" for juvenile offenders to request release from prison. *Graham*, 560 U.S. at 75. And the Court will gain valuable insight as the lower courts continue to refine their approaches to this question.

There is no basis for this Court, especially at this early juncture and so soon after its decisions in *Montgomery* and *Miller*, to wade again into this area of the law to impose a one-size-fits-all answer. As petitioner contends (Pet. 11), the lower court's direction here that respondent have an opportunity to request parole prior to age 61 appears to be an innovation in state law—one that Wyoming state courts, and other courts nationwide, will continue to examine in the years ahead. Petitioner's apparent request for this Court to resolve that issue now would deny States the latitude that *Graham* and *Miller* afford. And it would deny this Court the benefit of the lower courts fully exploring different approaches as to what qualifies as a "meaningful opportunity" for a juvenile to obtain release.

3. Moreover, it is far from clear that the lower court viewed its selection of a sentencing *remedy*—an opportunity for respondent to be paroled prior to age 61—as an issue of federal law. To be sure, the court below did identify a federal constitutional violation: that the sentencing court imposed a functional life-without-parole sentence on a juvenile, notwithstanding its finding that respondent "is *not* one of the juvenile offenders whose crime reflects irreparable corruption." Pet. App. 59 (emphasis added). But it does not follow that the particular remedy ordered by the

lower court is a decision compelled by the Eighth Amendment rather than an independent determination of state law. Certainly, nothing in the court's analysis expressly suggests a federal underpinning for its decision to require parole eligibility prior to age 61.[2]

As the Wyoming courts, and courts nationwide, explore the contours of permissible remedies in these circumstances, they will undoubtedly articulate the source of governing law. But until then, this Court's intervention in this case would be premature, given that these remedy questions remain in their infancy and would benefit from further percolation.

B. The decision below is correct.

Miller and *Montgomery* together compel the decision reached below. Those decisions inescapably direct focus to the character of the juvenile offender—and not solely the nature of his or her crimes. To be sure, when a juvenile is convicted of multiple offenses, that is *relevant* to the *Miller* analysis to determine whether he or she is "the rarest of juvenile offenders, those whose *crimes* reflect permanent incorrigibility." *Montgomery*, 136 S. Ct. at 734 (emphasis added). But when, like here, a court determines that an offender is *not* the rare juvenile for whom a life sentence is appropriate, a prosecutor may not circumvent *Miller* and *Montgomery* by stacking multiple convictions. No further review, accordingly, is warranted.

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[2] Indeed, the Wyoming Constitution provides that the "penal code shall be framed on the humane principles of reformation and prevention." Wyo. Const. art. I, § 15.

1. *Graham*, *Miller*, and *Montgomery* rest on the principle that children are "constitutionally different from adults in their level of culpability." *Montgomery*, 136 S. Ct. at 736. Children are, therefore, "less deserving of the most severe punishments." *Graham*, 560 U.S. 68. As a result, in sentencing, a court *must* "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Miller*, 567 U.S. at 480. And this "reasoning implicates *any* life-without-parole sentence for a juvenile." *Id.* at 473 (emphasis added).

The Court has explained that this analysis is not specific to the crimes for which a juvenile is charged. As the *Miller* Court put it, "none of what" the Court said earlier in *Graham* "about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific." *Miller*, 567 U.S. at 473. "Those features are evident in the same way, and to the same degree, when * * * a botched robbery turns into a killing." *Ibid.*

The net result is that imposing a sentence of life without parole is limited to "the rare juvenile offender whose crime reflects irreparable corruption." *Miller*, 567 U.S. at 479-480. See also *Montgomery*, 136 S. Ct. at 734 (limiting life without parole to "the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility").

In conducting the *Miller* inquiry, courts must consider at least three factors that make a juvenile offender distinct. First, the court must consider "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences." *Miller*, 567 U.S. at 477. Juveniles are categorically less mature and

more irresponsible relative to adults, "qualities [that] often result in impetuous and ill-considered actions and decisions." *Roper* v. *Simmons*, 543 U.S. 551, 569 (2005).

Second, the court must consider the juvenile's "family and home environment" and "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him." *Miller*, 567 U.S. at 477. That is because "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure." *Roper*, 543 U.S. at 569.

And third, youth is an era marked by transitory, developing identity, meaning that, "[f]or most teens, risky or antisocial behaviors are fleeting; they cease with maturity as individual identity becomes settled." *Roper*, 543 U.S. at 570 (quotation and alteration omitted). Courts must, therefore, consider "the possibility of rehabilitation." *Miller*, 567 U.S. at 478.

A court must consider these factors prior to sentencing *any* juvenile to life without parole. See *Miller*, 567 U.S. at 473. These factors are not, by contrast, tethered to the crime of conviction.

To be sure, in conducting the *Miller* analysis, courts will consider the nature and number of crimes committed. Sentencing courts will "take into account the differences among defendants and *crimes*." *Miller*, 567 U.S. at 480 n.8 (emphasis added). In appropriate cases, a defendant's commission of multiple crimes may have a substantial bearing on that analysis.

Indeed, the lower courts that accord with the decision below broadly recognize the relevance of the

number and nature of convictions to the *Miller* analysis. See, *e.g.*, *State* v. *Zuber*, 152 A.3d 197, 215-216 (N.J. 2017) (holding that "a small number of juveniles will receive lengthy sentences with substantial periods of parole ineligibility, particularly in cases that involve multiple offenses on different occasions or multiple victims"); *State* v. *Ramos*, 387 P.3d 650, 660 (Wash. 2017) ("[A] properly conducted *Miller* hearing does not in any way permit sentencing courts to disregard the number of victims in determining an appropriate sentence."); *State* v. *Null*, 836 N.W.2d 41, 73 (Iowa 2013) ("[T]he fact that the defendants were convicted of multiple crimes may well be relevant in the analysis of individual culpability under *Miller*.").

A juvenile's commission of multiple crimes is thus a factor in the *Miller* analysis; it does not, by contrast, take a case outside of the *Miller* framework entirely. In *Miller*, one of the juvenile offenders, Kuntrell Jackson, had been convicted of two independent crimes—capital felony murder and aggravated robbery. 567 U.S. at 466. That Jackson had committed multiple crimes did not render a life-without-parole sentence lawful; it was, at most, a factor for consideration in the proper analysis. And, following *Miller*, the Court granted, vacated, and remanded in several cases involving aggregate sentences. See *Null*, 836 N.W.2d at 73 (describing *Blackwell* v. *California*, 568 U.S. 1081 (2013), *Mauricio* v. *California*, 568 U.S. 975 (2012), *Bear Cloud* v. *Wyoming*, 568 U.S. 802 (2012), and *Whiteside* v. *Arkansas*, 567 U.S. 950 (2012)).

Similarly, the juvenile in *Graham* had committed multiple offenses. There, the juvenile pleaded guilty to armed burglary with assault or battery, a first-

degree felony carrying a maximum penalty of life imprisonment without the possibility of parole, and attempted armed robbery, a second-degree felony carrying a maximum penalty of 15 years' imprisonment. *Graham*, 560 U.S. at 53-54. *Then*, while on probation for those offenses, Graham was involved in an armed home-invasion robbery, and, separately, attempted another robbery. *Id.* at 54. The sentencing judge thus imposed an aggregate sentence—life on one charge, and 15 years on another. *Id.* at 57. As in *Miller*, the presence of multiple convictions did not alter the Court's holding with respect to the nature of juvenile offenders and the accordant protections.

Graham, *Miller*, and *Montgomery* inescapably provide procedural and substantive protections that must be satisfied before a juvenile is sentenced to life without parole. That remains true regardless whether a juvenile is subject to one—or multiple—convictions.

2. A rule to the contrary would render those protections hollow. By their nature, the substantive protections of *Graham*, *Miller*, and *Montgomery* apply only when the juvenile has engaged in exceptionally grave conduct; the States do not seek to impose life-without-parole sentences on children for non-serious offenses. In these circumstances, prosecutors can virtually always bring multiple charges. In particular, when a juvenile commits a homicide offense, that offender is invariably guilty of other crimes, such as assault or robbery. The approach that petitioner favors here would, therefore, enable prosecutors to avoid the protections of *Graham*, *Miller*, and *Montgomery* by charging multiple offenses, and then seeking to aggregate the sentences.

In fact, petitioner *agrees*. In petitioner's view, respondent's "multiple convictions are not unusual," as "[j]uvenile murderers often commit additional violent crimes." Pet. 27. Thus, as petitioner appears to see it, *Miller* ceases to apply in the *usual* case that involves a possible life-without-parole sentence for a juvenile, where a juvenile offender commits multiple offenses. It would be surprising indeed if *Miller* and *Montgomery* were limited to only those rare cases in which a state is able to charge a defendant with a crime carrying a life-without-parole penalty, but nothing else. To the contrary, "[a]fter *Miller*, it will be the rare juvenile offender who can receive" a life-without-parole sentence. *Montgomery*, 136 S. Ct. at 734.

As the Tenth Circuit explained, the States cannot "circumvent the strictures of the Constitution merely by altering the way they structure their charges or sentences." *Budder* v. *Addison*, 851 F.3d 1047, 1058 (10th Cir. 2017), *cert. denied sub nom. Byrd* v. *Budder*, 138 S. Ct. 475 (2017). In the context of a *Graham* analysis, that court held that a prosecutor "may not take a single offense and slice it into multiple sub offenses in order to avoid *Graham*'s rule that juvenile offenders who do not commit homicide may not be sentenced to life without the possibility of parole." *Ibid.* The same reasoning is true here. Indeed, the Court has "consistently eschewed" "[d]etermining constitutional claims on the basis of * * * formal distinctions, which can be manipulated largely at the will of the government." *Board of Cty. Comm'rs* v. *Umbehr*, 518 U.S. 668, 679 (1996).

3. Petitioner's invocation of *O'Neil* v. *Vermont*, 144 U.S. 323, 331 (1892), does not change this result.

The *dicta* in that decision[3] says nothing about the Court's recognition, more than a century later, that "children are constitutionally different from adults for purposes of sentencing" because of their "diminished culpability and greater prospects for reform." *Montgomery*, 136 S. Ct. at 733. Regardless whether aggregate sentences for *adults* may pass constitutional muster, the Court holds that, when offenders are sentenced for their crimes committed while they were children, the sentence must take stock of the unique attributes of youth.

A state's general authority to define criminal conduct (Pet. 17-18) does no better for petitioner. No matter how much a state may disagree with *Miller* and *Montgomery*, states cannot impose *mandatory* life-without-parole sentences on juveniles. It follows that states may not obtain that same result by instead aggregating multiple sentences.

4. Petitioner also offers a hyperbolic claim that, "[i]n Wyoming, a juvenile can now kill two people and avoid any additional punishment for the second murder." Pet. 18. Petitioner appears to mistake the nature of the *Miller* and *Montgomery* substantive protections. When a juvenile offender commits homicide, *Miller* and *Montgomery* do not categorically preclude a life-without-parole sentence. Rather, the sentencing court must take account of all factors, including those unique to youth *as well as* the nature of the offender's crimes. In circumstances where an offender commits multiple crimes—especially multi-

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[3] "The majority did not reach O'Neil's contention that this sentence was unconstitutional, for he did not include the point in his assignment of errors or in his brief." *Solem* v. *Helm*, 463 U.S. 277, 286 n.11 (1983).

ple homicides—a state will have a basis to contend that the offender is one of the "rare" children who should receive a life-without-parole sentence. Such a hearing was held here, and the sentencing court found that respondent was *not* such an irredeemable youth. Pet. App. 58. What a state may not do, however, is structure charges so as to avoid *Miller* and *Montgomery* altogether.

Petitioner fears some supposed "artificial pressure this will create to find incorrigibility." Pet. 19. But there is hardly anything artificial about this: as *Miller* and *Montgomery* hold, this is a core substantive and procedural protection imposed by the Eighth Amendment. Courts will accurately undertake this analysis, so as "to separate those juveniles who may be sentenced to life without parole from those who may not." *Montgomery*, 136 S. Ct. at 735. Prosecutors are certainly free to argue—as the prosecutor here did—that the circumstances of a juvenile offender render a life-without-parole sentence appropriate. But *Miller* and *Montgomery* do not vanish, as petitioner would have it, whenever a prosecutor seeks and obtains multiple convictions. The fundamental nature of childhood is what triggers *Miller* and *Montgomery*.

C. Petitioner overstates the disagreement among the lower courts.

1. Petitioner's characterization of the decision below as a "minority" position is incorrect; rather, the overwhelming majority of courts agree with the result reached here.

In published opinions, 15 state courts of last resort and federal circuits have held that the substantive and procedural protections in *Graham*, *Miller*,

and *Montgomery* do not evaporate when a defendant is convicted of multiple offenses.

Petitioner acknowledges that the high courts of California,[4] Connecticut,[5] Illinois,[6] New Jersey,[7] South Dakota,[8] Washington,[9] and Wyoming[10] all agree. Pet. 10-11. In fact, the agreement is broader than that: the supreme courts of Florida,[11] Nevada,[12] New Mexico,[13] and Ohio[14] have reached the same result in the context of a *Graham* claim; because the protection under *Graham* is substantially similar, those cases effectively preordain the outcome of claims in the *Miller* and *Montgomery* context. Among the federal circuits, the Seventh likewise has agreed

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[4] *People* v. *Franklin*, 370 P.3d 1053, 1059 (Cal. 2016).

[5] *Casiano* v. *Commissioner of Corr.*, 115 A.3d 1031, 1044 (Conn. 2015).

[6] *People* v. *Reyes*, 63 N.E.3d 884, 887-888 (Ill. 2016).

[7] *Zuber*, 152 A.3d at 213.

[8] *State* v. *Charles*, 892 N.W.2d 915, 921 (S.D. 2017).

[9] *Ramos*, 387 P.3d at 659.

[10] *Bear Cloud*, 334 P.3d at 144.

[11] *Henry* v. *State*, 175 So. 3d 675, 679-680 (Fla. 2015) ("Because Henry's aggregate sentence, which totals ninety years and requires him to be imprisoned until he is at least nearly ninety-five years old, does not afford him [meaningful] opportunity [to obtain release], that sentence is unconstitutional under *Graham*.").

[12] *State* v. *Boston*, 363 P.3d 453, 458 (Nev. 2015) ("[T]he decision in *Graham* applies to juvenile offenders with aggregate sentences that are the functional equivalent of life without the possibility of parole.").

[13] *Ira* v. *Janecka*, 2018 WL 1247219, at *6 (N.M. 2018).

[14] *State* v. *Moore*, 76 N.E.3d 1127, 1128-1129 (Ohio 2016).

with the lower court,[15] as have the Ninth[16] and Tenth[17] Circuits in the *Graham* context. For its part, the Iowa Supreme Court has reached the same result based on its state constitution.[18] All of these courts would have reached the same result as the one reached below.

By contrast, the majority of cases on which petitioner relies (many of which are unpublished or summary) unravel upon examination. Indeed, most pre-date *Montgomery*, which has considerable bearing on this issue.

Several of petitioner's cases do not involve a sentence that functionally denies a juvenile offender of parole. In *State* v. *Gutierrez*, 2013 WL 6230078 (N.M. 2013), for example, the defendant had neither a life-without-parole sentence nor a sentence that was functionally equivalent. It was, instead, "life *with* the possibility for parole." *Id.* at *1. Moreover, subsequent to the filing of the petition in that case, the Supreme Court of New Mexico issued a published decision "conclud[ing] that the analysis contained within *Roper* and its progeny should be applied to a

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[15] *McKinley* v. *Butler*, 809 F.3d 908, 911 (7th Cir. 2016).

[16] *Moore* v. *Biter*, 725 F.3d 1184, 1191 (9th Cir. 2013) ("Moore's sentence of 254 years is materially indistinguishable from a life sentence without parole because Moore will not be eligible for parole within his lifetime.").

[17] *Budder*, 851 F.3d at 1058 ("Just as [states] may not sentence juvenile nonhomicide offenders to 100 years instead of 'life,' they may not take a single offense and slice it into multiple sub offenses in order to avoid *Graham*'s rule that juvenile offenders who do not commit homicide may not be sentenced to life without the possibility of parole.").

[18] *Null*, 836 N.W.2d at 71.

multiple term-of-years sentence." *Ira*, 2018 WL 1247219, at *6.

Turner v. *State*, 443 S.W.3d 128 (Tex. 2014) (per curiam), is similarly inapposite because (as in *Gutierrez*) the sentence there, as reformed, was "life with the possibility of parole." *Id*. at 129. Thus, there was no parole-ineligible lifetime sentence at issue, which is the sole question here.

So too in *Johnson* v. *Commonwealth*, 793 S.E.2d 326, 331 (Va. 2016), where the juvenile offender had "the opportunity to be considered for parole." The opportunity of parole at age 60 (*ibid*.) does not conflict with the decision reached here—indeed, that is almost exactly the limitation on incarceration that the lower court would require to be imposed in this case. See Pet. App. 59.

Several other decisions cited in the petition arose in the context of plain-error or deferential habeas review and therefore did not afford an opportunity for *de novo* consideration of the question presented here. For example, not only is *United States* v. *Walton*, 537 F. App'x 430, 437 (5th Cir. 2013), unpublished, but it arose in a plain error setting, did not discuss aggregation of sentences, and involved a 40-year sentence (*ibid*.)—which is a sentence the court below would hold *is* permissible. See Pet. App. 49.

The Sixth Circuit's decision in *Starks* v. *Easterling*, 659 F. App'x 277 (6th Cir. 2016), is likewise unpublished. And, in the context of the habeas proceeding, the court did not consider the merits of any issue *de novo*; its analysis was limited to the question whether state court decisions were "contrary to" or an "unreasonable application of" "clearly es-

tablished federal law as defined by the Supreme Court." *Id.* at 280-281.

The Tenth Circuit's decision in *Davis* v. *McCollum*, 798 F.3d 1317 (10th Cir. 2015), was also decided in the context of AEDPA review—and, as we explained above, the Tenth Circuit *supports* the decision rendered below. The same is true of the Ninth Circuit's AEDPA decision in *Demirdjian* v. *Gipson*, 832 F.3d 1060, 1063-1064 (9th Cir. 2016).

Evans-García v. *United States*, 744 F.3d 235 (1st Cir. 2014), was also a habeas case; there, the bar against second or successive petitions applied, and the decision was prior to *Montgomery*. *Id.* at 241. The court moreover found any error would have been harmless because "the district court in exercising its discretion 'took full account' of [the offender's] youth." *Ibid.*

Other authority on which petitioner relies simply did not involve aggregation of sentences. For example, beyond being unpublished, *Murry* v. *Hobbs*, 2013 Ark. 64 (2013), said nothing about the question of aggregation of sentences.

The court in *Foster* v. *State*, 754 S.E.2d 33, 37 (Ga. 2014), likewise did not consider any question regarding aggregation of sentences. Beyond that, *Foster* appears to be of the view that a life-without-parole sentence *can* be imposed without the protections that *Miller* obligates; any doubt as to the applicability of *Miller* has since been erased by *Montgomery*.

Conley v. *State*, 972 N.E.2d 864, 879 (Ind. 2012), is inapposite for the same reason. It addresses, as petitioner says, the view that *Miller* "deals 'solely' with" the issue of "mandatory sentencing schemes requir-

ing life without parole for juveniles." Pet. 12 (citing *Conley*, 972 N.E.2d at 879). That holding is not the issue here, and it is also displaced by *Montgomery*. In fact, subsequent to *Conley*, the Indiana Supreme Court appears to have sided with the decision below: it holds that the proper "focus" is "on the forest—the aggregate sentence—rather than the trees—consecutive or concurrent, number of counts, or length of the sentence on any individual count." *Brown* v. *State*, 10 N.E.3d 1, 8 (Ind. 2014).

Other cases differ factually. The Eighth Circuit affirmed the sentence in *United States* v. *Jefferson*, 816 F.3d 1016, 1020 (8th Cir. 2016), because the sentencing court *had* considered the effect of youth on the sentence. See *ibid.* ("[T]he district court made an individualized sentencing decision that took full account of 'the distinctive attributes of youth.'").

While certain broad statements in *Lucero* v. *People*, 394 P.3d 1128 (Colo. 2017), *State* v. *Nathan*, 522 S.W.3d 881 (Mo. 2017), and *State* v. *Ali*, 895 N.W.2d 237 (Minn. 2017), read in isolation, might suggest a conflict with the decision below, those cases are likewise distinguishable on their facts.

In *Lucero*, the offender "will be eligible for parole when he is fifty-seven." 394 P.3d at 1133. That is within the permissible range of sentencing identified below absent a *Miller*-hearing. See Pet. App. 59. There is no conflict, accordingly, between the result reached in *Lucero* and that obtained below.

In *Nathan*, "prior to sentencing the juvenile, "the circuit court provided [the defendant] with the full benefits of *Miller*'s individualized sentencing by considering all the mitigating factors set out in *Miller* prior to sentencing him on remand." 522 S.W.3d at

891 n.16. So too in *Ali*, where, during resentencing, "the district court noted that it had considered '[a] plethora of information regarding [the offender's] youthful age, personal background, and unique circumstances.'" 895 N.W.2d at 247.

This case thus differs from *Nathan* and *Ali* factually. Here, the sentencing judge found that respondent was *not* so irredeemable so as to warrant a lifetime sentence.

The decision below—which holds that the foundational protections of *Miller* and *Montgomery* apply notwithstanding multiple convictions—accords with the overwhelming weight of authority. Given that *Montgomery* is less than two years old, and courts continue to apply it to novel circumstances, review is not warranted at this time. Rather, the Court should await further percolation in order to obtain guidance as to how other jurisdictions choose to approach these issues.

2. Against this backdrop, it is unsurprising that the Court has repeatedly declined to review this and substantially similar issues. See Pet. 25-26. On multiple occasions, the Court has denied a petition from a state. See, *e.g.*, *New Jersey* v. *Zuber*, 138 S. Ct. 152, No. 16-1496 (2017); *Byrd* v. *Budder*, 138 S. Ct. 475, No. 17-405 (2017); *Ohio* v. *Moore*, 138 S. Ct. 62, No. 16-1167 (2017); *Connecticut* v. *Riley*, 136 S. Ct. 1361, No. 14-1472 (2016); *Florida* v. *Henry*, 136 S. Ct. 1455, No. 15-871 (2016); *Semple* v. *Casiano*, 136 S. Ct. 1364, No. 15-238 (2016). The Court has likewise denied defendant-side petitions. See, *e.g.*, *Ali* v. *Minnesota*, 138 S. Ct. 640, No. 17-5578 (2018); *Willbanks* v. *Missouri Dep't of Corr.*, 138 S. Ct. 304, No. 17-165 (2017); *Bunch* v. *Bobby*, 569 U.S. 947, No. 12-558 (2013).

Given that the Court has declined repeated opportunities to address this issue and that there are myriad reasons to await further percolation among the lower courts, there is no basis for a different result now.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted.

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APRIL 2018

APPENDIX

Transcript of January 5, 2018 Hearing

THE STATE OF WYOMING,
Plaintiff,
vs.
PHILLIP SAM,
Defendant.
Docket No. 32-316

STATE OF WYOMING
COUNTY OF LARAMIE
IN THE DISTRICT COURT
FIRST JUDICIAL DISTRICT

APPEARANCES:

For the Plaintiff:
Monique Meese, Esq.
Caitlyn Harper, Esq.

For the Defendant:
Devon Peterson, Esq.
Anna Johnson, Esq.

The Defendant appeared by phone before the Court for **MOTION HEARING** proceedings in the Laramie County Courthouse, Cheyenne, Wyoming on **January 5th, 2018, with the HONORABLE THOMAS CAMPBELL,** First Judicial District Court Judge, presiding:

FRIDAY, JANUARY 5, 2018

(Whereupon the following proceedings were had.)
THE COURT: We're in recess in 33-527, and we'll begin in 32-316, please, the next matter up this afternoon. Thank you, Deputy.

SHERIFF'S DEPUTY: Sorry, Judge.

THE COURT: That's okay. We were fine.

SHERIFF'S DEPUTY: I lost track.

THE COURT: I appreciate it. We needed a break. The Court is in session in State of Wyoming v. Phillip Sam, 32-316. The Defendant is represented by Mr. Petersen and Ms. Johnson. The Defendant is -- although he's not here, I anticipate that as we get through the introductory remarks a call will come from the pen, and we'll have him join us, but just to ensure that we do this efficiently, Ms. Meese is here for the District Attorney's Office.

The first order of business would be the appearance of Ms. Harper. You filed a motion in a case in which she is not a lawyer, so can we straighten up the status?

MS. HARPER: Your Honor, my understanding was that my entry of appearance in the criminal trial below was still valid in this case. I can re-enter that if I need to.

THE COURT: That's all right. The District Attorney — she appears as a special assistant to the District Attorney?

MS. MEESE: She does, Your Honor.

THE COURT: Very well. It said Attorney General, so—

MS. HARPER: My apologies, Your Honor. I'll correct that in the future.

THE COURT: Okay. I actually guessed that was the case, but now we have a record.

First thing is this is a request for stay, and I want to proceed with Mr. Sam, but we're five minutes in, and I'm going to find out what's going on.

My first question will be to Ms. Harper. What's the period of time that you anticipate will be necessary to find out if the United States Supreme Court grants certiorari?

MS. HARPER: My understanding, Your Honor, is that we will be — our petition will be ripe to be circulated to the Supreme Court sometime this spring. They told us that is entirely dependent upon whether we get amicus, whether there is an opposition to the cert petition. So we were told sometime this spring. I also have a hard copy of the cert petition if the Court would like that.

THE COURT: That won't be — oh. Would you step out and ask her to transfer it in? Thank you. As we anticipated, the staff just said there is a call, so we'll put him on here in just a moment. Thank you.

So the State of Wyoming in this case has — well, let's wait just a moment for Mr. Sam.

(Phone ringing.)

THE COURT: This is Judge Campbell. Is this Phillip Sam?

THE DEFENDANT: Yes.

THE COURT: Thank you. Stand by, Mr. Sam. We just began in the courtroom by my introducing those present. You, now, by phone. Ms. Johnson and Mr. Petersen, counsel for the Defendant. Ms. Meese from the District Attorney's Office, and Ms. Harper, who's a Special Assistant District Attorney, also an Attorney General, as she was assigned responsibility for this motion filed, and she appears.

So all that's happened before you got on the phone was I learned that we will not know whether or not the United States Supreme Court will consider

certiorari until sometime in the spring, and it would be unrealistic to think that we would know before, you know, the end of the term. So we won't know until — very often the United States Supreme Court issues all orders on cert at the end of a term.

So if it's going to be March, April, May, even June, what's your position, Mr. Petersen, about whether sentencing should go forward?

MR. PETERSEN: Your Honor, that's also my understanding in doing a little bit of research and digging into this. I was talking to someone who was familiar with this process, and was of the opinion that it would be April at the earliest, June at the latest, so that falls in line with what the State is saying.

And, Your Honor, we do believe that a stay would be appropriate in this case; that it would be premature to proceed to resentencing at this point. There are some issues that the U.S. Supreme Court may decide or may not decide here in this case, and so we think that it would not be in Mr. Sam's best interest to go forward at this point, and not make any sense in terms of judicial economy.

THE COURT: Okay.

MR. PETERSEN: Furthermore, Your Honor, I think — I'm not sure if the Court has a copy of this, but we just recently filed a motion to continue the hearing on January 30th based on our readiness. In talking to potential experts who we've just now been able to have approval for payment, who wouldn't even be able to begin working on the case until the end of January. I think, as we've said in previous hearings in this case following the remand, that we think there is a lot left to be litigated in this case, in-

cluding which issues are even before the Court upon resentencing.

Your Honor, my understanding is that, in talking to the State, the State believes that, you know, they can get the same sentence here in this court as long as they lay more of a factual basis, or if the Court makes more findings. We certainly disagree with that. In our reading of the Wyoming Supreme Court's opinion, is that that is not an issue, and what — the only thing remaining is whether or not the sentence — or which sentence would be constitutional, and so we believe that there is a lot left to do. There is a lot of litigation that needs to be done, and certainly, would not have any objection to staying these proceedings while the case is being considered by the United States Supreme Court.

In response to something that the State said, talking about whether or not amicus briefs are filed, or whether or not there would be an opposition to the petition, Mr. Sam will certainly be opposing the petition in front of the Supreme Court. So that will — my understanding is the deadline for that is currently February 5th, but there is often a 30-day stay that's granted as a matter of course, and we'd be looking at March 5th as a deadline to even just file our response to that, so.

THE COURT: Very well.

MR. PETERSEN: Thank you, Your Honor.

THE COURT: I appreciate the history, and the defense point of view. Hopefully, everyone understands that any court, including this one, faced with the agreement of everybody, holds a hearing anyway. We have reasons for that.

The first one is that in granting the stay, I do not concede that the federal law as cited by the State applies to me. But I don't have to concede that, because under our law, and certainly under the general principles of scheduling and sentencing and equal protection, if that's — that are here in the State of Wyoming, I can grant a stay without any federal mandate to do so. And it clearly benefits the defense, and they agree. It does no harm to the — to what is likely the proper underlying sentence, at least one of them, and no challenge has been made to — at least at this point by the Department of Corrections of holding him under these circumstances. So — which I think you remember when you asked me to transport him or not transport him, I was concerned that the Department of Corrections would get their back up and say he's not ours, the entire sentence has been vacated. But until they do, so we don't have to move him to the jail. He's getting credit, and will always get any credit against any time served, and I can deal with that motion when the time comes, if it does, and that would be the only potential prejudice to him in staying it.

So I wanted a little bit of a structured stay, so what I will likely do is require the parties now to notify me immediately upon the decision to consider certiorari, because, of course, what that might mean is whole another year, and I'm not sure I wouldn't hold a hearing and have you all give me some — a bit of a record like we did here today about the positions because if they shift — and we have time. If you need to force it on the Court that they don't have any choice, you can do it at that time, Ms. Harper.

I'm just going to say in the alternative I have the authority, and will exercise it, to vacate the hearing

currently set for sentencing, and reset the matter immediately upon notice from the State's attorney concerning the U.S. Supreme Court's certiorari decision.

And I'm going to ask that you prepare the order, please, Ms. Harper, or Ms. Meese.

MS. MEESE: Will do, Your Honor.

THE COURT: Anything else today, Mr. Petersen or Ms. Johnson?

MR. PETERSEN: No, Your Honor. Thank you. THE COURT: Anything else, Ms. Harper?

MS. HARPER: Just, Your Honor, if it makes the Court feel better about whether or not there will be a motion coming from the Department of Corrections, that issue has been resolved. They called the Attorney General's Office and asked for advice on that in the back and forth, and the Department of Corrections is operating under the presumption that the murder sentence, because it was imposed according to statute, is what they can hold him on, since that's the sentence he serves first, so there will be no issue about where he belongs in the mean time.

THE COURT: I'm glad they resolved that. Like I said, I worried about that, because of the wording of the Supreme Court opinion, but it's really I'm just worried about him. If he sits around for six months or a year, or something like that, it would be awful. It's unnecessary, and it would be awful for him to be cooking in the county jail and not subject to the privileges and other things he can earn where he is.

So, with that, I'll direct you to prepare the order. Counsel may call off their witnesses, and you may even want to delay the expenditure of money, all

those things. I'm not going to put any deadlines on you with any kind of a presumptive order. I'm just going to wait to hear from you.

And with that, the Court is in recess. I'll be hanging up on you, Mr. Sam. Good day.

(Whereupon Court was in recess.)

* * * * *

REPORTER'S CERTIFICATE

I, Richard J. Matt, do hereby certify that I took the machine shorthand notes in the foregoing matter; that the same was transcribed via computer-aided transcription; that the preceding pages of typewritten matter are a true, correct and complete transcription of those proceedings ordered.

Dated at Cheyenne, Wyoming, this 3rd day of April, 2018.

/s/ Richard J. Matt
Richard J. Matt, FCRR, RPR
Official Court Reporter
Judicial District 1-A