No. 17-952

In The

Supreme Court of the United States

STATE OF WYOMING,

Petitioner,

v.

PHILLIP SAM,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Wyoming

REPLY BRIEF FOR THE PETITIONER

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ARGUMENT

The State of Wyoming and the Respondent agree that when a juvenile is sentenced for murder after trial as an adult, murder is seldom the only criminal act. (Opp. at 17) ("[W]hen a juvenile commits a homicide offense, that offender is invariably guilty of other crimes, such as assault or robbery."). Indeed, for *Miller* to apply at all, the juvenile has already engaged in "exceptionally grave conduct" – first-degree murder – beyond what most other persons of any age would contemplate. (*Id.*).

With this reality, the States have struggled to apply *Miller*'s statement that the "appropriate occasions [under the Eighth Amendment] for sentencing juveniles to this harshest possible penalty will be uncommon." *Miller v. Alabama*, 567 U.S. 460, 479 (2012). The Respondent interprets this statement to prohibit aggregate sentences beyond a certain length for all but the rare juvenile offender, noting that one of the petitioners in *Miller* and the petitioner in *Graham* were convicted of multiple crimes. (Opp. at 13). Because both *Miller* and *Graham* involved sentences of life without parole for a single crime, however, the petitioners' sentences for other offenses were immaterial to this Court's holdings. *See Jackson v. State*, 194 S.W.3d 757, 759 (Ark. 2004); *Graham v. Florida*, 560 U.S. 48, 57 (2010). The majority courts have therefore dismissed Respondent's argument as an unwarranted expansion of the Eighth Amendment.

With the decision of Pennsylvania's Superior Court of Appeals in February, yet another court has rejected the Wyoming Supreme Court's reasoning and concluded that the Eighth Amendment, as interpreted by *Miller*, does not grant "volume discounts" to juvenile offenders who commit both homicide and other crimes. *Commonwealth v. Foust*, No. 1118 WDA 2016, 2018 Pa. Super. LEXIS 150, *37 (Pa. Super. Ct. Feb. 21, 2018). *Foust* has the potential for further review, but the case further highlights the deep split about whether *Miller* altered the criminal justice system in the manner the Wyoming Supreme Court demands: sentences for juvenile murderers are subject to an aggregate limit unless the defendant is proven beyond a reasonable doubt to be irredeemably corrupt. *State v. Davis*, S-16-0291, 2018 Wyo. LEXIS 43, at *34-35 & *37-38 (Wyo. Apr. 13, 2018). This Court's guidance is needed, and this case presents that opportunity for review.

1. This case is final. "In a criminal prosecution, finality generally is defined by a judgment of conviction and the imposition of a sentence." *Florida v. Thomas*, 532 U.S. 774, 777 (2001); *see also Price v. State*, 716 P.2d 324, 327 (Wyo. 1986) (holding that a judgment and sentence is a final order when issued). Respondent has been convicted and sentenced. In an attempt to create uncertainty, Respondent quotes his own defense counsel as evidence that the State of Wyoming believes this is an interlocutory appeal. (Opp. at 10). Nothing could be further from the truth. Sam must be re-sentenced if this Court declines review, but "the federal issue, finally decided by the highest court

in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Thomas*, 532 U.S. at 778 (quoting *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 480 (1975)).

The trial court concluded that Respondent's crimes and background do not demonstrate he is incorrigible, so the Wyoming Supreme Court ordered that the Eighth Amendment limits any sentence for his additional crimes to no longer than twenty years before a parole hearing. (Pet. App. at 57, 59). For Respondent to receive a sentence identical to his earlier one, "a faithful application of *Miller* and *Montgomery* [*v. Alabama*, 136 S. Ct. 718 (2016)]" in Wyoming requires that the State prove "beyond a reasonable doubt that the juvenile offender is irreparably corrupt." *Davis*, 2018 Wyo. LEXIS 43, at *34-35 & *37-38. As to the mitigating factors of youth and the Respondent's criminal acts in 2014 – when he sprayed gunfire at a group of teenagers and then executed Tyler Burns – the trial court has made its decision. Of course, Respondent's behavior while incarcerated could be relevant as to whether his crimes reflect transient immaturity or irreparable corruption. Whether and to what extent the trial judge can consider Respondent's behavior in prison at resentencing is a legal question that has never been presented in this case. Speculation by Respondent's trial counsel that Respondent might act, as an adult prisoner, in a manner that demonstrates irreparable corruption does not make the decision of the Wyoming Supreme Court any less final.

2. Respondent identifies consensus in the lower courts where there is none. The "flat ban" on sentencing juveniles to life without parole for nonhomicide crimes is irrelevant to this petition. *Miller*, 567 U.S. at 473 (characterizing *Graham*). The Wyoming Supreme Court rejected Respondent's attempt to blend cases involving juvenile murderers with cases that do not, so this Court's review does not require interpretation of *Graham*. (Pet. App. at 55) ("Unfortunately, Mr. Sam did commit homicide, and *Graham*'s categorical ban does not apply to him."). The distinction between *Graham* and *Miller* is clearest in the Tenth Circuit, which has concluded that juvenile murderers may not evade punishment for other crimes by citing *Miller*, while also concluding that *Graham* prohibits lengthy aggregate sentences that foreclose release for nonhomicide offenders. *Compare Davis v. McCollum*, 798 F.3d 1317, 1321 (10th Cir. 2015) (*Miller* is "narrowly drawn: it protects juveniles who commit crimes from the mandatory imposition of life without possibility of parole."), *with Budder v. Addison*, 851 F.3d 1047, 1058 (10th Cir. 2017) (Just as *Graham* prohibits States from sentencing "juvenile non-homicide 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.").

These Tenth Circuit cases do not present an unresolved intra-circuit split; their logic is consistent. One follows the directives of *Graham* and the other, *Miller*. Respondent confuses this in his discussion of the

caselaw. (*See* Opp. at 21-26). The State's Petition addressed many of the cases cited by Respondent; in all but two of the cases cited for the first time in the Respondent's brief, the juvenile did not commit murder: *Henry v. State*, 175 So. 3d 675, 676 (Fla. 2015) (sexual battery, robbery, kidnapping, carjacking, burglary, possession of marijuana); *State v. Boston*, 363 P.3d 453, 454 (Nev. 2015) (kidnapping, sexual assault, robbery, dissuading a witness from reporting, burglary, lewdness with a minor, assault and battery); *Ira v. Janecka*, No. S-1-SC-35657, 2018 N.M. LEXIS 24, at *2 (N.M. Mar. 9, 2018) (sexual penetration, intimidation of a witness); *Willbanks v. Missouri Dep't of Corr.*, 522 S.W.3d 238, 239 (Mo. 2017) (kidnapping, assault, robbery, armed criminal action); *Bunch v. Smith*, 685 F.3d 546, 547 (6th Cir. 2013) (robbery, kidnapping, rape). In the two that involved a murder, neither concluded that *Miller* applies to aggregate sentences. *Brown v. State*, 10 N.E.3d 1, 8 (Ind. 2014) (invoking state constitutional authority to revise sentence based on the appellate court's "collective sense of what is appropriate"); *State v. Riley*, 110 A.3d 1205, 1218-19 (Conn. 2015) (remanding for individualized sentencing hearing).

3. The Court should resolve this conflict now. Respondent suggests delay will allow the States to determine what qualifies as a meaningful opportunity for release from prison. (Opp. at 12). The lower court disagreements, however, are not about how to implement *Miller* but whether *Miller* applies to aggregate sentences at all. (*See*, *e.g.*, Pet. App. at 55-59). *Miller* was "careful to limit the scope of any attendant procedural

requirements to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems," but the principles of federalism do not allow disagreement about "the substantive character of the federal right at issue." *Montgomery*, 136 S. Ct. at 735.

This petition asks whether the substantive right identified in *Miller* reaches to multiple criminal acts. Respondent several times suggests that if *Miller* does not apply to the aggregate sentences of juvenile murderers, prosecutors could create a mandatory life sentence simply by bringing multiple charges. (Opp. at 2-3, 17). Such evasion is not possible in Wyoming, or in many other states, where judges have the sole authority to decide whether sentences will be served consecutively or concurrently. A prosecutor cannot create a de facto life without parole sentence through charging decisions. This petition, therefore, does not raise a question about Wyoming's **implementation** of *Miller* but only a question about the scope of the underlying Eighth Amendment right.

This case presents no state constitutional question. The Wyoming Supreme Court has consistently held that it interprets the United States Constitution with its 45/61 *Miller* rule. (*Compare* Opp. at 12-13, *with* Pet. App. at 57-58); *see also*, *e.g.*, *Davis*, 2018 Wyo. LEXIS 43, at *18 ("In *Bear Cloud III*, [the Wyoming Supreme Court] considered the question of whether Mr. Bear Cloud's aggregate sentence violated the Eighth Amendment."). By interposing the Wyoming Constitution into his brief, Respondent is trying to evade review

by presenting a question not considered by the Wyoming Supreme Court.

The Wyoming Supreme Court does not interpret the Wyoming Constitution without a distinct invocation of its protection, even when the Wyoming Constitution contains a right similar to that guaranteed under the United States Constitution. "A litigant must provide a precise, analytically sound approach when advancing an argument to independently interpret the state constitution." *Bear Cloud v. State*, 334 P.3d 132, 137 (Wyo. 2014). When the litigant "does not provide the independent state constitutional analysis required for [the court] to consider whether the state constitution provides greater protection than the United States Constitution," the Wyoming Supreme Court "will limit [its] discussion to United States Constitution jurisprudence." *Hathaway v. State*, 399 P.3d 625, 630 n.1 (Wyo. 2017). No claim under the Wyoming Constitution was raised by Respondent. (*See*, *e.g.*, Pet. App. at 55-59).

Finally, review should happen now as the States re-examine, pursuant to *Montgomery*, the sentences of all individuals imprisoned for lengthy terms for crimes committed as juveniles. Today, an individual incarcerated for multiple crimes in a majority state is unaffected by *Miller*, while in Wyoming that same individual must have the opportunity for release from all incarceration within 45 years no matter how many crimes were committed. Because every juvenile murderer's sentence is under review, an opinion in this case could be incorporated into ongoing proceedings.

Further delay of this Court's review will only increase the burden on the States as they "marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards." *Teague v. Lane*, 489 U.S. 288, 310 (1989).

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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