No. 19-_____

In the Supreme Court of the United States

MICHELE BUCKNER, WARDEN,
SOUTH CENTRAL CORRECTIONAL CENTER,
Petitioner,
v.
ROBERT W. ALLEN
Respondent.

On Petition for Writ of Certiorari
to the Missouri Court of Appeals

Petition for Writ of Certiorari

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QUESTION PRESENTED

The Eighth Amendment to the federal Constitution prohibits a State from inflicting cruel and unusual punishment. U.S. Const. amend. viii. This Court has interpreted the Eighth Amendment to prohibit a mandatory sentence of life in prison without parole for a juvenile offender convicted of a single homicide offense, *Miller v. Alabama*, 567 U.S. 460 (2012), and to prohibit any sentence of life in prison without parole for a juvenile offender convicted of a single nonhomicide offense, *Graham v. Florida*, 560 U.S. 48 (2010).

The juvenile offender in this case committed three offences at age 16—capital murder, first-degree murder, and armed criminal action. He received three consecutive sentences for his three crimes—a mandatory sentence of life in prison without parole for 50 years, a mandatory life sentence, and a discretionary life sentence, one of which renders him ineligible for parole for another three years.

A Missouri state appellate court granted him habeas relief.

The question presented is

Under the Eighth Amendment, may a State sentence a juvenile offender convicted of multiple crimes to multiple consecutive terms of years in prison under which the offender has aggregate parole eligibility after serving 53 years, including a mandatory term of imprisonment without parole for 50 years?

PARTIES TO THE PROCEEDING

Petitioner Michele Buckner is the warden of the South Central Correctional Center. The prior warden, Jeffrey Norman, was the respondent below.

Respondent Robert W. Allen is an offender incarcerated at the South Central Correctional Center. He was the petitioner below.

RELATED CASES

This petition for a writ of certiorari arises out of a petition for a writ of habeas corpus filed in the Missouri Court of Appeals for the Southern District by an incarcerated offender, Robert W. Allen. After receiving habeas relief, Mr. Allen now awaits resentencing in the Circuit Court of Jackson County, Missouri at Independence, No. 16CR84001010-01.

The following is a list of all challenges in state and federal trial and appellate courts to his criminal conviction or sentence.

- **Criminal Trial, Sentencing, and Resentencing.** Jackson County Circuit Court, Missouri, Nos. 16CR84001010 and 16CR84001010-01, *State v. Allen* (sentenced April 18, 1985).

- **Criminal Appeal.** Missouri Court of Appeals for the Western District, No. WD 37013, *State v. Allen*, 710 S.W.2d 912 (Mo. App. W.D. 1986) (decided May 27, 1986).

- **Petition for a Writ of Habeas Corpus in State Trial Court.** Texas County Circuit Court, Missouri, No. 17TE-CC-00425, *Allen v. Norman* (petition denied August 13, 2018).

- **Petition for a Writ of Habeas Corpus in State Appellate Court.** Missouri Court of Appeals for the Southern District, No. SD35655, *In re Robert Allen v. Jeff Norman*, 570 S.W.3d 601 (Mo. App. S.D. 2018) (granting writ of habeas corpus Nov. 27,

2018; denying rehearing or transfer December 14, 2018).

- **Denial of Transfer on Petition for a Writ of Habeas Corpus in State Appellate Court.** Supreme Court of Missouri, No. SC97610, *In re Robert Allen v. Jeff Norman* (transfer denied March 5, 2019).

Missouri is unaware of a state post-conviction review proceeding or a federal petition for a writ of habeas corpus.

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The earlier trial-court opinion of the Circuit Court of Texas County, Missouri denying habeas relief on August 13, 2018 is unreported and is reprinted in the appendix at 12a.

The order of the Supreme Court of Missouri denying transfer is unreported and is reprinted in the appendix at17a.

The order of the Missouri Court of Appeals denying rehearing and transfer is unreported and is reprinted in the appendix at 19a.

The opinion of the Missouri Court of Appeals for the Western District affirming the offender's conviction and his original sentence is reported at *State v. Allen*, 710 S.W.2d 912 (Mo. App. W.D. 1986).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). The Missouri Court of Appeals granted a writ of habeas corpus on November 27, 2018, and denied rehearing and transfer on December 14, 2018. App. 1a, 19a. The Supreme Court of Missouri denied transfer on March 5, 2019. App. 17a. The Missouri Court of Appeals issued its mandate on March 7, 2019. App. 20a–21a. On May 28, 2019, this Court granted an application to extend the time to file the petition until July 3, 2019. No. 18A1227.

This dispute is a live case or controversy under Article III. Mr. Allen has not yet been resentenced—but even if he were, resentencing would not moot this case. *Mancusi v. Stubbs*, 408 U.S. 204, 206 (1972). That is because the State and Mr. Allen continue to disagree about the proper length of Mr. Allen's sentence, which he is serving. And reversal would undo what the habeas corpus court did by permitting the state courts to reimpose the longer sentence that Mr. Allen has not yet served. *Kernan v. Cuero*, 138 S. Ct. 4, 7 (2017).

CONSTITUTIONAL PROVISION INVOLVED

The Eighth Amendment to the U.S. Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

INTRODUCTION

This Court should clarify that the Eighth Amendment makes no category of juvenile offenders eligible for early parole beyond the limits imposed by the Court's past decisions in *Graham* and *Miller*.

The Eighth Amendment prohibits a State from inflicting cruel and unusual punishments. U.S. Const. amend. viii. This Court has interpreted this Amendment to prohibit the death penalty for juvenile offenders, *Roper* v. *Simmons*, 543 U.S. 551 (2005); to prohibit a mandatory sentence of life in prison without parole for a juvenile offender convicted of a single homicide offense, *Miller* v. *Alabama*, 567 U.S. 460 (2012); and to prohibit any sentence of life in prison without parole for a juvenile offender convicted of a single nonhomicide offense, *Graham* v. *Florida*, 560 U.S. 48 (2010).

This Court has never interpreted the Eighth Amendment to preclude consecutive sentences for a juvenile offender who commits multiple crimes, even if the aggregate sentence for all the crimes requires the offender to serve a series of terms of years in prison without parole eligibility until old age, if at all. Nor would this type of serial punishment raise the same constitutional concerns as a single term of life in prison for a juvenile who committed a single offence: multiple crimes merit multiple punishments, and the possibility of additional punishment deters additional crime.

But in the seven years since this Court last provided substantive guidance in this area, federal and state appellate courts across the country have gone far

beyond this Court's precedents. Purporting to apply the Eighth Amendment, they have set aside an untold number of prison sentences for juvenile offenders guilty of multiple crimes. And they have ordered States across the nation to give these offenders early parole eligibility and have applied their decisions retroactively, no matter how many crimes or how long ago the crimes were committed, because this Court held that *Graham* and *Miller* are retroactive. *Montgomery* v. *Louisiana*, 136 S. Ct. 718, 736 (2016). Out of respect for federalism and the textual limits of the Eighth Amendment, this Court should make clear that the Eighth Amendment does not require these results.

This petition concerns a juvenile offender who was sentenced to multiple, consecutive sentences for committing multiple crimes at age 16, and who will be eligible for parole after serving 53 years in prison. As a teenager in the mid-1980s, Robert W. Allen committed two homicide crimes and one nonhomicide weapons crime. A Missouri jury found Mr. Allen guilty of capital murder, first-degree murder, and armed criminal action. After the jury deadlocked on imposing the death penalty, a state trial court sentenced him to three consecutive prison sentences. He received a statutorily-mandatory sentence of life in prison without parole for 50 years for the capital murder conviction. He received a mandatory life sentence for the first-degree murder conviction (that did not add to his parole ineligibility). And he received a life sentence for the armed criminal action conviction, imposed in the trial court's discretion, which added an another three years in prison to Mr. Allen's parole

eligibility. Under these aggregate sentences, he is eligible for parole at age 69.

More than three decades later, citing this Court's Eighth Amendment precedent, a Missouri appellate court granted him a writ of habeas corpus under the theory that his statutorily mandated sentence of life in prison without parole for 50 years amounts to life in prison without parole. The appeals court then ordered that if a jury could not decide that requiring him to be in prison for 50 years was appropriate considering the factors this Court described in *Miller*, the trial court must declare the statute under which he was convicted void as applied to him, vacate his capital murder conviction, and enter a new conviction of second-degree murder. Then the court must have a jury sentence him to a prison term of at least ten years, with no statutory requirement of time to serve before he is eligible for parole.

This Court should grant review and uphold Mr. Allen's original punishment. Aside from cases that fall within the strict limits of *Graham* and *Miller*, the Eighth Amendment makes no category of juvenile offenders eligible for early parole.

This case presents an appropriate and timely vehicle to consider these questions. Without this Court's review, the inconsistent patchwork of results that has emerged in state and federal courts across the country risks becoming entrenched. Granting review here will provide an opportunity to restore uniformity to the area of sentencing of juvenile offenders convicted of very serious crimes.

STATEMENT

A teenager committed multiple serious crimes and was sentenced to multiple, consecutive terms in prison under which he will be eligible for parole at age 69. But he obtained habeas relief under the theory that because he committed his crimes at age sixteen, the Eighth Amendment after *Miller* and *Graham* requires a more lenient sentencing. App. 1a.

A. Robert W. Allen committed three "brutal" violent offenses as a teenager: capital murder, first-degree murder, and armed criminal action. *State v. Allen*, 710 S.W.2d 912, 913–14 (Mo. Ct. App. 1986).

Maurice and Rachel Hudnall were an elderly couple who "had been husband and wife for 67 or 68 years, residing in Independence, Missouri." *Id.* at 913.

In the January winter of 1984, Mr. Allen and an acquaintance decided to rob the Hudnalls "because they were old and it was right after social security checks had arrived in the mail." *Id.* at 914. The two talked over plans for the robbery and then "walked to the Hudnalls' home with wire snips which were used to cut the telephone wires." *Id.* They then knocked on the front door and, when Mrs. Hudnall answered, they told her that "their car had slid off the road." *Id.* She responded that her elderly husband could not help them. *Id.* But they pushed their way in. *Id.* And, with a nightstick in hand, Mr. Allen pushed Mrs. Hudnall into a chair while his accomplice ransacked the bedrooms for money and drugs. *Id.*

Mr. Allen then "hit Mrs. Hudnall in the head three times with the nightstick." *Id*. And he told the accomplice "to knock out the old man with the nightstick," but the accomplice instead hit Mr. Hudnall twice on the head with a knife butt, making the old man fall from a chair near the kitchen. *Id*. The accomplice then found a billfold in the living room and took money from it, telling Mr. Allen, "Let's go, we got the money." *Id*.

But Mr. Allen thought the Hudnalls would identify them, and so he refused. *Id*.

Instead, he insisted that he had to kill the old people "the way Muslims kill people—by tying 'their ankles to their feet' while they were lying on their stomach and then stabbing them in the back of the neck." *Id*. Mr. Allen then stabbed Mrs. Hudnall in the back of the neck, killing her. The two murderers left the house by the back door for a safe house, "where they divided the money, $140.00 each." *Id*.

Two days later, a neighbor grew concerned at the newspapers collecting on the Hudnalls' doorstep and called Mr. Hudnall's daughter-in-law, "who entered the home through the unlocked door and there saw Mrs. Hudnall lying on the floor." *Id*. "The telephone being dead, she asked a neighbor to call an ambulance, then returned to the Hudnall home." *Id*.

She then saw her father-in-law: he was not dead but still "lying next to his wife, appearing to be rather rigid and was shaking." *Id*. Mr. Hudnall said that they "had jerked him out of the chair and hit him over the head." *Id*.

About eight hours later, Mr. Hudnall died at a hospital from a heart attack. *Id*. The expert medical opinion was that "the trauma of the blows to his head, lying cold and immobile on the floor for two days, and the loss of his wife, brought on the heart attack that caused his death." *Id*.

B. A jury of the Circuit Court of Jackson County found Mr. Allen guilty of capital murder, first-degree murder, and armed criminal action for murdering the elderly Hudnalls for the money from their Social Security checks. App. 1a.

After a Missouri jury deadlocked on imposing the death penalty, the court sentenced Mr. Allen to an aggregate sentence of 53 years in prison before he was eligible for parole. Jackson County Circuit Court, Nos. 16CR84001010, *State v. Allen* (sentenced April 18, 1985); App. 1a–3a. He received a mandatory sentence of life in prison without parole for 50 years for capital murder. He also received a mandatory life sentence for first-degree murder that did not result in additional parole ineligibility and a life sentence on the armed criminal action count imposed in the trial court's discretion that makes him ineligible for parole for another three years. The Missouri Board of Probation and Parole calculates that under this sentence structure Mr. Allen will be eligible for parole in 2037, when he is 69.

The Missouri state court of appeals affirmed his convictions on direct appeal. *State v. Allen*, 710 S.W.2d 912 (Mo. App. W.D. 1986).

C. In mid-2017, more than three decades after his conviction was affirmed, Mr. Allen sought habeas corpus relief, arguing that he should be eligible for parole much sooner in life than age 69. App. 154a. Mr. Allen sought a writ of habeas in the Circuit Court of Texas County, alleging that his sentence is unconstitutional under *Miller v. Alabama*, 567 U.S. 460 (2012), and *Graham* v. *Florida*, 560 U.S. 48 (2010), because he was under age eighteen at the time of his crimes. App. 154a.

He did not succeed. App. 12a. After briefing on the Eighth Amendment reprinted here at App. 131a, 135a, 137a, 144a, 150a, 154a, the circuit court held that the Eighth Amendment did not prohibit his aggregate sentence. App. 12a–16a. The court noted that "the United States Supreme Court has never ruled on the constitutionality of consecutive sentences," and here "the sentencer pronounced that the three sentences of life without parole for fifty years, life with no mandatory minimum, and life with a three year mandatory minimum, shall run consecutive with one another." App. 16a. "By necessity, then, the sentencer found after considering all relevant factors that the mandatory minimum for capital [murder] of no parole for fifty years was not enough punishment" and had imposed this sentence "on a case-by-case basis." *Id*.

Mr. Allen then petitioned the Missouri Court of Appeals for the Southern District for a writ of habeas corpus, raising the same *Graham* and *Miller* claims. App. 116a. The parties then re-briefed the same Eighth Amendment issues, reprinted here at 44a, 56a, 78a, 102a, 116a.

D. Mr. Allen's case was not the first time the Missouri courts wrestled with the framework to apply after this Court's decisions in *Graham* and *Miller*. Instead, his case was one of the last, and it came under a three-case framework that the Supreme Court of Missouri had set forth a few years earlier.

In the first of the earlier Missouri cases, *Carr* v. *Wallace*, the Missouri Supreme Court held that, under *Miller*, the State may not impose three concurrent mandatory sentences of life without parole for 50 years on a juvenile homicide offender. The Court in *Carr* extended this Court's precedents from sentences of life in prison without parole to long terms of years in prison with parole in old age by citing a passing remark in *Miller* that a State may not impose its "most severe penalties on juvenile offenders" in a non-discretionary manner. *Carr* v. *Wallace*, 527 S.W.3d 55, 57 (Mo. 2017) (citing *Miller*, 567 U.S. at 474). Because neither the death penalty nor mandatory life in prison were available in Missouri for minors after *Roper* and *Miller*, the remaining sentence on the statute books in effect at the time of Mr. Allen's offence that imposed the most severe punishment was a mandatory term of life in prison without parole for 50 years. *Id.* And, because this sentence was now the most severe, the Supreme Court of Missouri held that it could not be mandatory either. *Id.*

A main difference between *Carr* and other cases involving long sentences for juvenile offenders was that *Carr* (as in *Graham* and *Miller*) concerned an offender convicted of three murders who received concurrent sentences for the murders. *Carr* did not pre-

sent a "stacking or functional equivalent sentences issue" arising from multiple consecutive sentences imposed for multiple crimes. *Id.* at 61 n.7.

In the second and third of the three Missouri cases after *Graham* and *Miller*, the Missouri Supreme Court held that this Court's framework has no application to an offender who received multiple consecutive sentences for multiple crimes. In *State* v. *Nathan* and *Willbanks* v. *Department of Corrections*, the Missouri Supreme Court held that the Eighth Amendment does not forbid imposing on a juvenile offender who committed multiple crimes a set of consecutive sentences that result in parole eligibility during the offender's old age. *State* v. *Nathan*, 522 S.W.3d 881 (Mo. 2017); *Willbanks* v. *Dep't of Corr.*, 522 S.W.3d 238 (Mo. 2017), *cert. denied*, 138 S. Ct. 304 (2019). "*Graham* did not address juvenile offenders who, like Willbanks, were sentenced to multiple fixed-term periods of imprisonment for *multiple* nonhomicide offenses." *Willbanks*, 522 S.W.3d at 242. "Instead, *Graham* concerned juvenile offenders who were sentenced to life without parole for a *single* nonhomicide offense." *Id.* at 240. Nor did *Miller* apply to multiple terms of imprisonment given to juvenile offenders who commit multiple offenses. *Nathan*, 522 S.W.3d at 888–93. And for good reason: "multiple violent crimes deserve multiple punishments." *Id.* at 892. Indeed, if the contrary view were adopted, a juvenile could "never be sentenced to consecutive, lengthy sentences that exceed his life expectancy no matter how many violent crimes he commits." *Id.* at 882.

The court recognized that it would usurp the legislature's role if it were to expand this Court's decisions to require earlier parole for an offender who had committed multiple violent offenses and received a separate, consecutive sentence for each offense. The balance of "these penological concerns is better suited for the General Assembly" than for the courts. *Willbanks*, 522 S.W.3d at 243. And the court noted that the Missouri General Assembly had reacted to this Court's decisions by allowing juvenile offenders sentenced to a mandatory term of life without parole to apply for parole after serving 25 years. *Id.* (citing Mo. Rev. Stat. § 558.047).

The Missouri Supreme Court also pointed out a practical problem with extending *Miller* or *Graham* to offenders sentenced to multiple consecutive sentences: a court has no objective way to "arbitrarily pick *the point* at which multiple aggregated sentences may become the functional equivalent of life without parole." *Id.* at 245. Quoting the Sixth Circuit's decision in *Bunch* v. *Smith*, 685 F.3d 546, 552 (6th Cir. 2012), the court noted many intractable questions that it would have to confront if it sought to decide what counted as a de facto life sentence: "At what number of years would the Eighth Amendment become implicated in the sentencing of a juvenile: twenty, thirty, forty, fifty, some lesser or greater number? Would gain time be taken into account? Could the number vary from offender to offender based on race, gender, socioeconomic class or other criteria? Does the number of crimes matter?" *Willbanks*, 522 S.W.3d at 246. Indeed, the court observed, those courts that have opined in this area have not come to any "uniform agreement as to when, aggregate sentences and parole

ineligibility for juvenile offenders constitutes cruel and unusual punishment." *Id*. at 245.

Three judges dissented. *Id*. at 247–70. For the dissenters, *Graham* authorized a new categorical approach in every case: Every juvenile offender must be eligible for parole before their average date of life expectancy, no matter how many crimes the juvenile committed, and no matter if they were homicide or nonhomicide crimes. *Id*. at 248. The dissenters asserted that the State has a "virtually nonexistent" interest in deterring juveniles from committing multiple crimes, i*d*. at 268, and that juveniles have such reduced moral culpability that no significant interest is served by imposing harsh sentences on them that preclude parole eligibility earlier in their lifetimes. *Id*. at 247–70. The dissenters also dismissed any problems in identifying the necessary date of release for a juvenile, because, in their view, "difficulties in fashioning remedies have never stayed this Court's hand from doing justice." *Id*. at 268. These dissenters chastised the majority for refusing to expand *Graham* out of a fear that this Court would "get mad" and rebuke the state court for interpreting Supreme Court precedent to reach issues that the Supreme Court has not yet reached. *Id*. at 264.

E. On top of this double layer of precedent, the Missouri Court of Appeals for the Southern District engrafted its own approach when it issued Mr. Allen a writ of habeas corpus on his sentence.

The appeals court refused to consider that Mr. Allen received three consecutive sentences for three crimes to get his total parole ineligibility of 53 years. App. 4a–5a, 7a. Instead, although the court agreed

that Mr. Allen "received consecutive sentences," it accepted Mr. Allen's request to treat his sentence as only a single sentence of life without parole for 50 years. App. 2a, 7a.

Then it held that the Eighth Amendment forbids a mandatory sentence of life without parole for 50 years if imposed in isolation for a single homicide offence. App. 7a. It agreed with Mr. Allen that "if one part of a sentence is impermissible, the defendant is entitled to be resentenced as to the unconstitutional part of the sentence even if there are other sentences running consecutively to it." *Id*. And so the court considered Mr. Allen's sentence to be just a single mandatory sentence of life in prison without parole for 50 years, which "violates the Eighth Amendment in light of *Miller v. Alabama*, 567 U.S. 460 (2012)" and *Carr*. App. 2a.

The court then ordered a jury to resentence Mr. Allen under a unique procedure: either a jury must decide that parole eligibility after 50 years was appropriate, or, if it was not, then the trial court must vacate the jury's verdict for capital murder, find Mr. Allen guilty of second-degree murder, and impose punishment for second-degree murder. A second-degree murder conviction only carries a minimum term of at least ten years and it has no statutory parole ineligibility. App. 9a–10a.

If resentenced for second-degree murder, Mr. Allen would most likely be eligible for parole immediately. App. 9a–10a. His aggregate sentence could fall from serving 53 years in prison before parole eligibility to serving just 3.

The Missouri Court of Appeals and the Supreme Court of Missouri then denied rehearing or transfer. App. 17a, 19a, 22a, 33a.

REASONS TO GRANT THE PETITION

This petition implicates a deep and widespread division of authority among the federal and state appellate courts on an important question of constitutional criminal law.

Since this Court decided *Graham* and *Miller*, many federal and state appellate courts have seized on this Court's opinions to go well beyond what this Court held. They have declared virtually every juvenile offender eligible for court-determined early parole eligibility. These courts have not weighed the serious nature of the crimes, or whether the crimes were homicide or nonhomicide offences. They have not regarded the fact that no individual sentence was for life in prison without parole. They have failed to evaluate a sentence differently when it imposes multiple terms of imprisonment to punish multiple crimes. And they have refused to let the States decide parole eligibility through a democratic process, instead picking their own parole eligibility dates.

To be sure, not every court has gone so far, which is why, with no limiting guidance from this Court for many years, an inconsistent patchwork of judge-made parole-eligibility doctrine has sprung up across the country. In half the country, violent offenders have rights that offenders in the other half lack, and justice is denied for victims in half the country that victims in the other half receive.

It is time for this Court to clarify that the Eighth Amendment does not go beyond *Graham* and *Miller*: It does not prohibit sentencing juvenile offenders to multiple terms, corresponding to the number and

severity of the offender's crimes, even if some sentences are mandatory and even if parole eligibility falls in old age, if at all.

I. The division of authority among the courts of appeals after *Graham* and *Miller* warrants this Court's review.

The courts of appeals have divided on four key issues after *Graham* and *Miller*, all of which this case implicates:

(1) whether *Graham* and *Miller* should be made coextensive for homicide and nonhomicide cases;

(2) whether, for either homicide or nonhomicide juvenile offenders, the rules announced in *Graham* and *Miller* apply not only to sentences of life without parole but to sentences where an offender has parole eligibility after serving a term of years in prison;

(3) whether the Eighth Amendment imposes any parole-eligibility requirements when a juvenile offender commits multiple crimes and receives multiple sentences with consecutive terms of years of parole ineligibility; and

(4) at what age parole eligibility must begin if *Graham* and *Miller* implicate sentences of life with parole or other long term-of-years sentences.

Deciding this case would set a particularly useful precedent because it would resolve these disputed questions. The uncertainty from the division on these questions creates significant disagreement in the sentencing process. *Virginia v. LeBlanc*, 137 S. Ct. 1726, 1729 (2017); *Mathena v. Malvo*, No. 18-217, *cert.*

granted, 139 S. Ct. 1317 (2019). Some or all of these questions are usually present in each juvenile case, and courts have divided on them in seemingly endless permutations. The court below reached each of these questions when it held that, under the Eighth Amendment, a State may not sentence a juvenile offender convicted of multiple crimes to multiple consecutive sentences under which the offender has aggregate parole eligibility after serving 53 years in prison, including a mandatory term of life imprisonment without parole for 50 years for a homicide offence.

A. Mandatory versus discretionary homicide sentences. Since this Court decided *Graham* and *Miller*, lower courts have grappled with a threshold question that should be simple: whether different standards apply if the juvenile killed someone. This Court held in *Miller* that the Eighth Amendment forbids imposing a mandatory sentence of life imprisonment without parole on a juvenile who committed homicide. 567 U.S. at 479. Nothing in *Miller* adopted the prohibition announced two years earlier in *Graham* on any sentence of life in prison without parole for a juvenile convicted of a single nonhomicide offense. *Graham v. Florida*, 560 U.S. 48 (2010).

But some courts have purported to find in *Miller* a categorical prohibition on any life sentence for homicide, even where the sentencing authority may impose a sentence with parole eligibility. These courts claim that, despite having received discretionary sentences, *Graham* gives homicide offenders more relief than *Miller* provides, or they hold that *Miller* imposes

substantive limits on imposing discretionary life sentences without parole for juvenile homicide offenders. *E.g., Carter v. State*, 192 A.3d 695, 701 (Md. 2018); *Steilman v. Michael*, 407 P.3d 313, 315 (Mont. 2017), *cert. denied*, 138 S. Ct. 1999 (2018); *People v. Holman*, 2017 IL 120655, ¶ 40, 91 N.E.3d 849, 861, *cert. denied sub nom. Holman v. Illinois*, 138 S. Ct. 937 (2018); *Luna v. State*, 387 P.3d 956, 961 (Okla. Crim. App. 2016); *State* v. *Valencia*, 386 P.3d 392, 395 (Ariz. 2016); *State* v. *Riley*, 110 A.3d 1205, 1206, 1214, 1217–18 (Conn. 2015); *Casiano v. Commissioner of Corr.*, 115 A.3d 1031, 1043 (Conn. 2015); *State v. Houston*, 353 P.3d 55, 75 (Utah 2015); *State v. Long*, 8 N.E.3d 890, 899 (Ohio 2014); *Bear Cloud v. State*, 334 P.3d 132, 141–43 (Wyo. 2014).

But other state high courts have hewed more closely to this Court's opinions. They hold that *Miller* imposes parole eligibility requirements only on mandatory sentences of life without parole for homicide offenders, not to homicide sentences imposed in a court's discretion, and they do not curtail the court's discretion. *E.g., Chandler v. State*, 242 So. 3d 65, 70 (Miss. 2018), *cert. denied*, 139 S. Ct. 790 (2019); *State* v. *Nathan*, 522 S.W.3d 881 (Mo. 2017); *State v. Castaneda*, 889 N.W.2d 87, 97 (Neb. 2017); *Lucero v. People*, 394 P.3d 1128, 1133 (Colo. 2017), *cert. denied*, 138 S. Ct. 641 (2018); *State v. Charles*, 892 N.W.2d 915, 919 (S.D. 2017); *Conley v. State*, 972 N.E.2d 864, 876 (Ind. 2012); *Hobbs* v. *Turner*, 431 S.W.3d 283, 289 (Ark. 2014); *Commonwealth* v. *Brown*, 1 N.E.3d 259, 267 (Mass. 2013); *State* v. *Ali*, 895 N.W.2d 237, 239, 246 (Minn. 2017), *cert. denied*, 138 S. Ct. 640 (2018); *Parker* v. *State*, 119 So. 3d 987, 995, 999 (Miss. 2013); *Commonwealth* v. *Batts*, 66 A.3d 286, 296 (Pa. 2013);

Jones v. *Commonwealth*, 795 S.E.2d 705, 711–12, 721–22 (Va. 2017); *Murry v. Hobbs*, 2013 WL 593365, at *4 (Ark. Feb. 14, 2013); *State v. Gutierrez*, No. 33,354, 2013 WL 6230078, at *2 (N.M., Dec. 2, 2013); *Turner v. State*, 443 S.W.3d 128, 129 (Tex. Crim. App. 2014).

Several federal circuit courts agree. *E.g., Evans–Garcia v. United States*, 744 F.3d 235, 240–41 (1st Cir. 2014); *Contreras v. Davis*, 716 F. App'x 160, 163 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 2012 (2018); *United States v. Walton*, 537 F. App'x 430, 437 (5th Cir. 2013); *Croft v. Williams*, 773 F.3d 170, 171 (7th Cir. 2014); *United States v. Jefferson*, 816 F.3d 1016, 1019 (8th Cir. 2016); *Davis v. McCollum*, 798 F.3d 1317, 1321–22 (10th Cir. 2015); *Bell v. Uribe*, 748 F.3d 857, 869 (9th Cir. 2013).

This Court could provide the greatest clarity in this area if it rules on a *Miller* homicide fact pattern that *Graham* does not apply beyond a nonhomicide fact pattern and that *Graham* does not require parole eligibility for every homicide offender. Applying this holding to Mr. Allen would resolve this split and it would enable States to understand with certainty the framework for imposing the most serious punishments on the most serious crimes.

B. Life sentences versus term-of-years sentences. A second issue dividing the lower courts and decided below is whether—for homicide or nonhomicide sentences—the parole eligibility framework in *Graham* and *Miller* applies not only to life sentences but to life sentences with parole eligibility or lengthy term-of-years sentences.

Both *Graham* and *Miller* concerned juvenile offenders sentenced to life in prison without parole. But many courts, like the Missouri Supreme Court and the court below, have held that certain long sentences are the functional equivalents of a life sentence, and the offender must have earlier parole eligibility than state law provides. *E.g., Carter*, 461 192 A.3d at 725–34; *Sam v. State*, 401 P.3d 834, 859 (Wyo. 2017), *cert. denied*, 138 S. Ct. 1988 (2018); *Carr* v. *Wallace*, 527 S.W.3d 55, 57 (Mo. 2017); *People v. Franklin*, 370 P.3d 1053, 1059 (Cal. 2016); *People* v. *Caballero*, 282 P.3d 291, 293, 295 (Cal. 2012); *Riley*, 110 A.3d at 1206; *Casiano* v. *Comm'r of Corr.*, 115 A.3d 1031, 1033–34, 1045, 1047 (Conn. 2015); *Henry* v. *State*, 175 So. 3d 675, 676 (Fla. 2015); *Gridine v. State*, 175 So. 3d 672, 674 (Fla. 2015); *People* v. *Reyes*, 63 N.E.3d 884, 886 (Ill. 2016).

Other courts disagree, holding that *Graham* and *Miller* do not apply to a long term of years. *E.g.*, *United States v. Walton*, 537 F. App'x 430, 437 (5th Cir. 2013); *United States v. Jefferson*, 816 F.3d 1016, 1019 (8th Cir. 2016); *Proctor v. Kelley*, 562 S.W.3d 837, 842 (Ark. 2018), *pet for cert. filed*, No. 18-8951; *Charles*, 892 N.W.2d at 919–20; *Vasquez v. Com.*, 781 S.E.2d 920 (Va. 2016).

This Court could use this case to resolve whether *Graham* and *Miller* apply to life sentences with parole eligibility or long term-of-years sentences, such as Mr. Allen's aggregate life sentences, which require him to serve a term of 53 years in prison before he is eligible for parole.

C. Single-offense versus aggregate sentences. The lower courts are sharply divided on

whether the Eighth Amendment treats multiple consecutive sentences for multiple offenses the same as a single sentence for a single offense.

Some courts hold that multiple crimes deserve multiple punishments. Several state high courts hold that the Eighth Amendment does not categorically prohibit multiple consecutive sentences of terms of years for multiple crimes where the juvenile offender has an opportunity for parole in old age. *E.g., State v. Slocumb*, 827 S.E.2d 148, 155 (S.C. 2019); *Flowers v. State*, 907 N.W.2d 901, 906 (Minn. 2018), *cert. denied*, 139 S. Ct. 194 (2018); *Veal v. State*, 810 S.E.2d 127, 129 (Ga. 2018), *cert. denied*, 139 S. Ct. 320 (2018); *Willbanks* v. *Dep't of Corr.*, 522 S.W.3d 238 (Mo. 2017); *Nathan*, 522 S.W.3d 881 (Mo. 2017); *Lucero* v. *People*, 394 P.3d 1128, 1132–33 (Colo. 2017); *State* v. *Brown*, 118 So. 3d 332, 335, 341, 334–35 (La. 2013); *Ali*, 895 N.W.2d at 239, 246; *Vasquez* v. *Commonwealth*, 781 S.E.2d 920, 928 (Va. 2016). These courts hold that *Graham* and *Miller* do not affect aggregate sentences for multiple crimes.

Federal courts have also opined under AEDPA that federal law does not clearly establish that a State may not sentence a juvenile in this way. *E.g., Demirdjian v. Gipson*, 832 F.3d 1060, 1076 (9th Cir. 2016); *Bunch* v. *Smith*, 685 F.3d 546, 550 (6th Cir. 2012).

But other appellate courts hold that the Eighth Amendment considers consecutive sentences as one aggregate sentence, and so an offender has a guaranteed right to parole eligibility at a certain age, no matter how many crimes the offender committed as a juvenile. *E.g., Carter*, 461 192 A.3d at 725–34; *Steilman*,

407 P.3d at 319; C*aballero*, 282 P.3d at 293, 295; *State* v. *Riley*, 110 A.3d 1205, 1206, 1214, 1217–18 (Conn. 2015); *Henry*, 175 So. 3d at 676–77, 679–80; *Reyes*, 63 N.E.3d at 886, 888; *State* v. *Ragland*, 836 N.W.2d 107, 121 (Iowa 2013); *Brown*, 1 N.E.3d at 261, 270 & n.11; *State* v. *Boston*, 363 P.3d 453, 454, 457 (Nev. 2015); *State* v. *Zuber*, 152 A.3d 197, 201–04 (N.J. 2017); *State* v. *Moore*, 76 N.E.3d 1127, 1130–49 (Ohio 2016); *State* v. *Ramos*, 387 P.3d 650, 659–61, 668 (Wash. 2017); *Bear Cloud* v. *State*, 334 P.3d 132, 136, 141–42 (Wyo. 2014); *see also, e.g., State* v. *Null*, 836 N.W.2d 41, 70–71 (Iowa 2013). These courts hold that *Graham* and *Miller* apply to aggregate multiple sentences for multiple crimes.

Federal circuit courts have also held that this interpretation of the Eighth Amendment is clearly established federal law under AEDPA. *McKinley* v. *Butler*, 809 F.3d 908, 909, 911 (7th Cir. 2016); *Moore* v. *Biter*, 725 F.3d 1184, 1186, 1192 (9th Cir. 2013); *Budder* v. *Addison*, 851 F.3d 1047, 1049, 1057 (10th Cir. 2017).

Because Mr. Allen received a lengthy aggregate parole ineligibility term stemming from three aggregate sentences—one for each of his three offences—this petition presents a chance to resolve this question.

D. The age at which parole eligibility must begin if *Graham* and *Miller* implicate lengthy term-of-years or aggregate sentences. Finally, one intractable problem under *Graham* and *Miller* is at what time a juvenile must become eligible for parole to avoid a functional life sentence. Both *Graham* and *Miller* stated that certain offenders must have

some meaningful opportunity for parole, either through a sentencing court or a parole board, but neither case set a specific age at which offenders must be eligible for parole. *Graham*, 560 U.S. at 82.

With no specific guidance from this Court, the lower courts have come to many conclusions about the age at which offenders have a right to a parole hearing. *E.g., Carr*, 527 S.W.3d at 57 (forbidding life in prison without parole for 50 years); *Caballero*, 282 P.3d at 293 (forbidding parole eligibility that began after 110 years); *Henry*, 175 So. 3d at 679–80 (holding that *Graham* forbids a juvenile offender's 90-year aggregate sentence with release at age 95); *Gridine*, 175 So. 3d at 674–75 (holding that *Graham* prohibits a 70-year prison sentence); *Reyes*, 63 N.E.3d at 888–89 (holding that 89 years is too long, but 32 years is not too long); *Null*, 836 N.W.2d at 45, 70–71 (holding that the possibility of "geriatric release" at age 69 is too late); *Ragland*, 836 N.W.2d at 121–22 (holding that parole eligibility at age 78 is a de facto life sentence); *Brown* v. *State*, 10 N.E.3d 1, 8 (Ind. 2014) (relying on *Graham* and *Miller* to reduce under the state constitution an effective life sentence of 150 years to 80 years); *Commonwealth* v. *Okoro*, 26 N.E.3d 1092, 1098 (Mass. 2015) (upholding a sentence with parole eligibility after 15 years); *State ex rel. Morgan* v. *State*, 217 So. 3d 266, 267–68, 271–72, 274–75 (La. 2016) (holding that a sentence without parole until the offender is age 101 is too long, and making the defendant parole-eligible after serving 30 years); *State* v. *Smith*, 892 N.W.2d 52, 64–66 (Neb. 2017) (holding that parole eligibility at age 62 did not amount to a de facto life sentence); *Boston*, 363 P.3d at 454, 457 (parole eligibility at age 116 is too long, but eligibility after 15

years is not); *Zuber*, 152 A.3d at 201, 203–04 (holding that parole eligibility at age 72 and age 85 is a de facto life sentence); *Moore*, 76 N.E.3d at 1133–34, 1137–49 (parole eligibility at age 92 is too long); *State* v. *Charles*, 892 N.W.2d 915, 919–21 (S.D. 2017) (parole eligibility at age 60 is not too long); *State* v. *Diaz*, 887 N.W.2d 751, 768 (S.D. 2016) (release at 55 years old or after 40 years is not too long); *State* v. *Springer*, 856 N.W.2d 460, 470 (S.D. 2014) (parole eligibility at age 49 is not too long).

Federal courts have also come to various conclusions on this point. *LeBlanc* v. *Mathena*, 841 F.3d 256, 260, 270 (4th Cir. 2016) (holding, under AEDPA, that release at age 60 is not a meaningful opportunity), *overruled sub nom. Virginia* v. *LeBlanc*, 137 S. Ct. 1726 (2017); *Starks* v. *Easterling*, 659 F. App'x 277, 284 (6th Cir. 2016) (White, J., concurring) (recognizing, under AEDPA, that "reasonable jurists can disagree whether release after 51 to 60 years is beyond the line"); *Demirdjian v. Gipson*, 832 F.3d 1060, 1077 (9th Cir. 2016) (upholding release at 66 under AEDPA); *United States v. Mathurin*, 868 F.3d 921, 935 (11th Cir. 2017), *cert. denied*, 139 S. Ct. 55 (2018) (holding that imprisonment with the possibility of release at age 69 is not a de facto life sentence); *cf. United States v. Grant*, 887 F.3d 131, 150 (3d Cir. 2018), *reh'g en banc granted, opinion vacated*, 905 F.3d 285 (3d Cir. 2018) (holding that a nonhomicide offender must have parole eligibility "before the age of retirement").

This confusion shows that, although many courts have held that "a lengthy term of years for a juvenile offender will become a de facto life sentence at some point, there is no consensus on what that point is."

Casiano, 115 A.3d at 1045. "Some courts conclude that only a sentence that would exceed the juvenile offender's natural life expectancy constitutes a life sentence. Others have found that a sentence is properly considered a de facto life sentence if a juvenile offender would not be eligible for release until near the expected end of his life." *Id.* Still other courts debate what factors should be included in estimating an offender's life expectancy, whether it should be the same for all people or whether it should vary based on demographic factors like race, gender, or socioeconomic class. *Id.* at 1046–47. As Judge O'Scannlain commented, many of these courts set parole eligibility based on an offender's race, gender, socioeconomic class and other as-yet unknown criteria. *Moore* v. *Biter*, 742 F.3d 917, 922 (9th Cir. 2014) (O'Scannlain, J., joined by six other judges, dissenting from denial of rehearing en banc). But even many courts that have extended *Graham* and *Miller* in this way do not believe that the parole date "should turn on the niceties of epidemiology, genetic analysis, or actuarial sciences in determining precise mortality dates." *Null*, 836 N.W.2d at 71. In short, "there appears to be no consensus as to what constitutes a meaningful opportunity for release." *Smith*, 892 N.W.2d at 66.

Because Mr. Allen would become eligible for parole at age 69 after serving a minimum term of 53 years in prison before he receives parole eligibility, this case presents an appropriate vehicle to address this question as well.

II. The splits of authority here are well-developed.

No further percolation is needed here. Many state and federal courts have addressed these issues, sometimes repeatedly, yielding a wide variety of often-inconsistent results.

And no benefits of percolation remain from the few cases left in the pipeline. This split is real and entrenched. Victims and offenders in different states are treated differently. And, with this abundance of precedent, this Court has ample input from many courts that have weighed in.

This split implicates very important issues. The division of authority affects every new trial and sentencing of every juvenile exposed to lengthy criminal sentences in every state. Before Mr. Allen's case arose, the Missouri Supreme Court had incorrectly held that *Miller* prohibited a single sentence of life without parole for 50 years, *Carr* v. *Wallace*, 527 S.W.3d 55, 57 (Mo. 2017), but it had also correctly held, on the facts of other cases before it, that neither *Miller* nor *Graham* affects consecutive sentences resulting in stacked terms of parole ineligibility, *Willbanks* v. *Dep't of Corr.*, 522 S.W.3d 238 (Mo. 2017); *State* v. *Nathan*, 522 S.W.3d 881 (Mo. 2017). That Mr. Allen still obtained habeas relief itself shows the ongoing instability and inconsistency in the law here.

Moreover, there may be fewer opportunities to restore clarity in the future. *Miller* was made retroactive more than three years ago in *Montgomery* v. *Louisiana*, 136 S. Ct. 718, 736 (2016), and so nearly every State has now already determined whether and how

Graham and *Miller* apply to consecutive parole-eligible life sentences or lengthy term-of-years sentences. Some States have resentenced nearly all their offenders. And other States have resentenced only those offenders under the strict limits of *Graham* and *Miller*. In some States, like Missouri, the state legislature has provided for earlier release dates for many offenders sentenced to life terms. Mo. Rev. Stat. § 558.047; *see, e.g.*, *State v. Scott*, 416 P.3d 1182, 1189 (Wash. 2018); *State v. Williams-Bey*, 164 A.3d 9, 25–29 (Conn. Ct. App. 2016); *State v. Mares*, 335 P.3d 487, 497–98 (Wyo. 2014). This Court has denied previous petitions raising these issues. And so now, to the State's knowledge, Mr. Allen is the last of ten inmates convicted of capital murder in Missouri who were under age eighteen at the time of their crimes and were sentenced to life without parole for fifty years and were then ordered resentenced.

If this Court does not consider the question presented now, it is unlikely to have many opportunities to do so again. Unlike in civil cases, where fact patterns can arise many years down the road, in criminal cases, future prosecutors are unlikely to seek sentences made unlawful by precedent.

If anything, the cases still likely to reach this Court will arise under the deferential standards of collateral review, such as *Virginia v. LeBlanc*, 137 S. Ct. 1726, 1727 (2017), and *Mathena v. Malvo*, No. 18-217, *cert. granted,* 139 S. Ct. 1317 (2019), and thus are unlikely to provide this Court a chance to clarify the Eighth Amendment's underlying reach. On collateral federal habeas review, these merits arguments cannot be resolved. *LeBlanc*, 137 S. Ct. at 1729. This case

thus presents an ideal vehicle to clarify the limits of *Graham* and *Miller*.

III. This Court should make clear that the Eighth Amendment does not require any parole eligibility for juvenile offenders beyond the holdings of *Graham* and *Miller*.

The Eighth Amendment does not prohibit sentencing Mr. Allen to serve at least 50 years in prison before he is eligible for parole. The State may sentence a juvenile offender who committed multiple crimes to multiple consecutive terms of years of imprisonment, even if the effect is that the offender is eligible for parole in old age, if at all. "Nothing in *Miller* or *Graham* takes away a sentencer's (the circuit court in this case) authority to run sentences consecutively for a homicide offense along with multiple non-homicide offenses." *Nathan*, 522 S.W.3d at 892–93.

Mr. Allen's sentence of life without parole for 50 years cannot be looked at alone. His sentence is not a singular term for a singular crime. Robert W. Allen is guilty of brutally robbing and murdering an elderly couple, Maurice and Rachel Hudnall, for the money from their social security checks. For his violent crimes, he must serve 53 years in prison before he is eligible for parole, because he was convicted of three consecutive life sentences—and the Eighth Amendment allows this punishment.

The proliferation of appellate decisions addressing this issue since *Graham* and *Miller* confirms that sentencing juvenile offenders to multiple consecutive sentences for multiple crimes is by no means "unu-

sual" under the Eighth Amendment, even where it results in a long period before parole eligibility. On the contrary, this sentencing practice is common, and there is thus no basis to conclude that it violates any societal standard of decency. This is especially true because, in nearly all cases, the individual sentencer has discretion whether to impose sentences concurrently or consecutively. Large numbers of individual sentencers across the United States, each apprised of the specific facts of each case, have continued to impose such consecutive sentences for multiple crimes on juvenile offenders in the wake of *Graham* and *Miller*. There is thus no emerging societal consensus against this practice.

In *Graham*, this Court relied on evidence of the rarity of imposing life without parole on a juvenile offender as a punishment for a single nonhomicide crime. "[A]n examination of actual sentencing practices in jurisdictions where the sentence in question is permitted by statute discloses a consensus against its use." *Graham*, 560 U.S. at 62. The "[c]ommunity consensus" against life without parole for a single nonhomicide crime was "entitled to great weight" in the Court's calculus. *Id.* at 67 (quoting *Kennedy* v. *Louisiana*, 554 U.S. 407, 434 (2008)). By contrast, the large number of appellate decisions in the past few years shows that there is no similar "community consensus" against aggregate sentences for multiple crimes. *Id.* On the contrary, even after *Graham* and *Miller*, it remains commonplace for sentencing courts to impose such sentences.

Nor is there greater certainty in the legislative branches. Some state legislatures set parole eligibility

at ages ranging from 15 years to 40 years by statute for juvenile offenders. *See, e.g.*, Ariz. Rev. Stat. Ann. § 13-716 (2014) (parole eligibility "on completion of service of the minimum sentence"); Cal. Pen. Code § 3051 (2016) (parole eligibility at 25 years); Colo. Rev. Stat. Ann. § 17-22.5-104(2)(d)(IV) (2006) (parole eligibility at 40 years); Conn. Gen. Stat. Ann. § 54-125a(f) (2015) (parole eligibility at 30 years); Del. Code Ann. tit. 11, §§ 4209A (2013) (limiting sentences for a juvenile homicide offender to 25 years to life); Fla. Stat. § 921.1402(2) (2014) (parole eligibility at 25 years); La. Rev. Stat. Ann. § 15:574.4(E) (2014) (parole eligibility at 35 years); W. Va. Code § 61-11-23(a)(2)(b) (2014) (parole eligibility at 15 years); Wyo. Stat. Ann. § 6-10-301(c) (2016) (parole eligibility at 25 years). The Missouri state legislature made juvenile offenders sentenced to a mandatory sentence of life without parole eligible to apply for parole after serving 25 years of that sentence. Mo. Rev. Stat. § 558.047.

Here, there is no community consensus in favor of leniency, but even if there were, it should not be dispositive. "[W]here the punishment is in itself permissible, '[t]he Eighth Amendment is not a ratchet, whereby a temporary consensus on leniency for a particular crime fixes a permanent constitutional maximum, disabling the States from giving effect to altered beliefs and responding to changed social conditions.'" *Atkins v. Virginia*, 536 U.S. 304, 349 (2002) (Scalia, J., dissenting) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 990 (1991)).

Together with community consensus, this Court in *Graham* also considered "whether the challenged sentencing practice serves legitimate penological

goals." *Id.* at 67. As the Missouri Supreme Court recognized, the "penological justifications for sentencing practice" that this Court considered in *Graham*, *id.* at 71, apply differently to juveniles who committed multiple offenses than they do to juveniles who committed a single offense. *Willbanks*, 522 S.W.3d at 243; *Nathan*, 522 S.W.3d 886–93. Simply put, "multiple violent crimes deserve multiple punishments." *Nathan*, 522 S.W.3d at 888–93. To treat a juvenile offender who commits multiple serious crimes on an equal footing with one who commits only a single crime treats the latter offender unequally, diminishes the gravity of the offender's second and successive crimes, and undermines the State's interest in deterrence of violent crimes. Retribution, deterrence, and incapacitation are all served by increasing parole ineligibility for each offense committed, in a way they are not in G*raham*, which banned a life without parole sentence for a single offense. And limiting parole ineligibility to a set period, no matter how many violent felonies an offender commits, risks public safety—and it makes sentencing arbitrary as opposed to suited to the offender.

What is more, a sentencing regime that prohibits aggregate sentences for juvenile offenders past a fixed point of parole eligibility would undermine the State's critical interest in marginal deterrence against the commission of multiple crimes by a single offender. "Nothing in the Constitution forbids marginal deterrence for extra crimes; if the sentence for [one crime] were concurrent with the sentence for [another crime], then there would be neither deterrence nor punishment for the extra danger created." *United States* v. *Buffman*, 464 F. App'x 548, 549 (7th Cir. 2012). If a

juvenile knows that, once guilty of a single serious offense, he is guaranteed to be eligible for release on the same date, no matter what further crimes he commits, he has no incentive to curtail his behavior and abstain from more crimes.

This concern for marginal deterrence matters for offenders, like Mr. Allen, who commit multiple serious acts of violence during a single home invasion. If the punishment for that criminal transaction will be effectively the same, the offender has no incentive to avoid escalating the transaction by adding, for example, a shooting to a carjacking, or a rape to a home invasion. In other words, "if the punishment for robbery were the same as that for murder, then robbers would have an incentive to murder any witnesses to their robberies." *United States* v. *Reibel*, 688 F.3d 868, 871 (7th Cir. 2012). And then, later in custody, the offender would have no incentive not to commit new crimes against police officers, court personnel, prison guards, and fellow inmates.

Graham also relied on the fact that prohibiting life without parole for a single nonhomicide offense provided a "clear line." 560 U.S. at 74. But scrutinizing aggregate consecutive sentences for multiple crimes under *Graham* and *Miller* does not lend itself to adopting a "clear line." As the Missouri Supreme Court held, there is no objective way any court can "pick *the point* at which multiple aggregated sentences may become the functional equivalent of life without parole." *Willbanks*, 522 S.W.3d at 245. For this reason, the lower courts that have invalidated aggregate sentences under *Graham* and *Miller* have struggled and

identified no "clear line" for when such aggregate sentences are permissible. *See supra* Pt. II.

But even if *Graham* and *Miller* were extended to multiple consecutive sentences and so these sentences added together were the functional equivalent of life without parole, *Miller* does not prohibit the imposition of a sentence of life with parole after a certain time on a juvenile homicide offender like Mr. Allen. Rather, *Miller* requires only that such a sentence of life without parole cannot be *mandatory*, based solely on the offense—*i.e.*, that the sentencer must have discretion to consider the defendant's age, maturity, and other circumstances *or* the offender must have a chance for release on parole. *Miller*, 567 U.S. at 480, 483. Mr. Allen meets both factors. He received an individualized, discretionary form of sentencing in view of his aggregate sentence. App. 16a. And he received a more lenient sentence than life without parole, which *Miller* declined to forbid for homicide offenders, because he is likely to be eligible for parole in his lifetime. *See Miller*, 567 U.S. at 480 (holding that "we do not foreclose a sentencer's ability to make th[e] judgment in homicide cases," after individualized consideration, that life without parole is an appropriate sentence).

The sentences here do not concern a sentence of life in prison without parole and thus are not contrary to this Court's decisions in *Graham* or *Miller*. Nor should *Graham* and *Miller* be extended to require early parole eligibility for any new classes of juvenile offenders.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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