

No. 19-_____

IN THE
Supreme Court of the United States

MICHELE BUCKNER, WARDEN,
SOUTH CENTRAL CORRECTIONAL CENTER,
Petitioner,

v.

ROBERT W. ALLEN,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI
VOLUME I

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(SEAL)

**Missouri Court of Appeals
Southern District**

Division One

In Re ROBERT W. ALLEN)
)
Petitioner,)
)
v.) No. SD35655
)
JEFF NORMAN, Warden,) **Filed: Nov. 27, 2018**
South Central Correctional)
Center,)
Respondent.)

**ORIGINAL PROCEEDINGS IN HABEAS
CORPUS**

HABEAS RELIEF GRANTED

This is an original proceeding in *habeas corpus*. Robert W. Allen (“Petitioner”) was sentenced to life without eligibility for parole for fifty years (“LWOP 50”) for a capital murder he committed in January 1984 as a sixteen-year-old. *See* sections 565.001 and 565.008.1.¹ Petitioner also received two terms of life imprisonment for first-degree murder (felony murder) and armed criminal action for other offenses he committed in the same course of events.

¹ All statutory references are to RSMo 1978.

See sections 565.003, 565.008.2, and 571.015.1. All three sentences were run consecutively.²

Petitioner seeks *habeas* relief only regarding his LWOP 50 sentence on the basis that it violates the Eighth Amendment in light of *Miller v. Alabama*, 567 U.S. 460 (2012), and *State ex rel. Carr v. Wallace*, 527 S.W.3d 55 (Mo. banc 2017).³ Petitioner maintains that his sentence for capital murder should be overturned and the case remanded for a resentencing hearing on that count pursuant to the procedure prescribed in *Carr* and *State v. Hart*, 404 S.W.3d 232 (Mo. banc 2013). The state maintains that “[i]t does not matter whether one part of the sentence would be impermissible standing alone. Instead, the aggregate sentence is analyzed under the framework in *Willibanks [v. Department of Corrections*, 522 S.W.3d 238 (Mo. banc 2017)].”

Factual Background and Procedural History

At the time of Petitioner’s offenses, capital murder was punishable only by death or a LWOP 50 sentence. See section 565.008.1. “Although the [S]tate requested the death penalty, the jury could not agree upon punishment, and the trial court did

² Petitioner’s sentence was affirmed in *State v. Allen*, 710 S.W.2d 912, 917 (Mo. App. W.D. 1986). That opinion describes “[t]he brutal facts of these murders [.]” *Id.* At 914.

³ Petitioner asserts that should he be found guilty of second-degree murder instead of capital murder following the proceedings outlined later in this opinion, his conviction for armed criminal action must also be corrected as it is predicated on the capital murder conviction. We do not decide that issue here. The record before us does not establish that capital murder was the predicate offense for the armed criminal action offense.

not impose the death penalty.” *Allen*, 710 S.W.2d at 916. The State points out that Petitioner’s additional life sentence for first degree felony murder had no mandatory minimum sentence to be served for purposes of parole eligibility, and the armed criminal action sentence had a three-year mandatory minimum before parole eligibility was established.

Petitioner is incarcerated at the South Central Correctional Center. His first attempt to obtain habeas relief on the same grounds asserted in the instant petition was denied by the circuit court. The circuit court noted that petitioner’s sentences were consecutive, thereby concluding that “the sentencer found after considering all relevant factors that the mandatory minimum for capital punishment of no parole for fifty years was not enough punishment. The sentencer thus satisfied the duty noted in [Willibanks] to ‘impose a sentence on a case-by-case basis.’ [522 S.W. 3d 243].” We disagree.

Analysis

1. *The LWOP 50 Sentence*

“A prisoner is entitled to habeas corpus relief where he proves that he is ‘restrained of his...liberty in violation of the constitution or laws of the state or federal government.’” *Carr*, 527 S.W.3d at 59 (quoting *State ex rel. Clemons v. Larkins* 475 S.W.3d 60, 76 (Mo. banc 2015)). “To withstand the Eighth Amendment’s prohibition of cruel and unusual punishment, the punishment for a crime must be proportional to both the offender and the offense.”

Id. In *Carr*, our high court reasoned that “[s]entencers should be given the opportunity to consider the mitigating qualities of a defendant’s youth.” ***Id.*** at 60. Indeed, “criminal procedure laws that fail to take defendants’ youthfulness into account at all [are] flawed.” ***Id.*** quoting ***Miller***, 567 U.S. at 473-74.

In *Carr*, the juvenile defendant was found guilty of three counts of capital murder, but he was sentenced to three concurrent sentences of LWOP 50 after the State chose not to seek the death penalty. ***Id.*** at 58. “Like ***Miller***, the mandatory statutory sentencing scheme in place at the time of Mr. Carr’s conviction denied the sentencer the opportunity to consider the attendant characteristics of Mr. Carr’s youth before imposing the severe punishment of a life sentence without the possibility of parole for 50 years.” ***Id.*** at 61. The Court found that “[b]ecause Mr. Carr’s sentence was imposed without any consideration of his youth, his sentence violates the Eighth Amendment[,]” and he “must be resentenced.” ***Id.*** at 63.

The State responds – without citation to supporting authority – that “the analysis is different [than that presented in *Carr*] when, as here, a court has chosen to impose consecutive, additional sentences for each crime. In that circumstance, no individual sentence is analyzed on its own for whether it would be impermissible.”

Based on that assertion, the State maintains that “**Willbanks** controls this case, not **Carr** or **Nathan**.⁴

The sentences at issue in **Willbanks** did not involve capital murder. *See* 522 S.W.3d at 239-40.

⁴ The last case mentioned is presumably a reference to *State v. Nathan*, 404 S.W.3d 253, 256 and 271 n.12 (Mo. banc 2013) (a sentence of life without parole for first-degree murder committed while the offender was a juvenile was reversed as violating the Eighth Amendment) (“*Nathan I*”). The State argues that *Nathan I* “has been superseded[,]” citing *State v. Nathan*, 522 S.W.3d 881, 892 (Mo. banc 2017) (“*Nathan II*”), in addition to its arguments regarding **Willbanks**. In *Nathan I*, the defendant argued “that he also should be re-sentenced on the remaining 21 non-homicide counts on which he was found guilty and sentenced below. Nathan did not appeal those convictions, however.” 404 S.W.3d at 271 n.12. The Court noted that “[t]o the extent that Nathan was attempting to assert a claim based on the combined effect of the non-homicide sentences and his sentence for the murder charge, such a claim is premature until after the re-sentencing procedure described above, and will be moot if Nathan is sentenced to life without parole.” *Id.* Such a claim was advanced in *Nathan II* and characterized as a “**Graham Claim**[.]” 522 S.W.3d at 885, after Nathan was resentenced for second-degree murder instead of first-degree murder and sentenced to life imprisonment while he was also subject to multiple other consecutive sentences. *Id.* at 884-85. Our high court found: “Unlike in **Graham**, Nathan was found guilty of second-degree murder along with multiple nonhomicide offenses. Therefore, Nathan’s claim under **Graham** is denied.” *Id.* at 888 (footnote omitted). It concluded, “[f]or this Court to hold **Graham** and **Miller** apply to consecutive sentences amounting to the functional equivalent of life in prison without the possibility of parole, it would undoubtedly need to extend both holdings to uncharted waters.” *Id.* at 893. Again, none of this alters the precedent set forth in **Carr** concerning the LWOP 50 sentence that Petitioner challenges here.

Willbanks was 17 years old when he was charged with kidnapping, first-degree assault, two counts of first-degree robbery, and three counts of armed criminal action. He was convicted and sentenced to consecutive prison terms of 15 years for the kidnapping count, life for the assault count, 20 years for each of the two robbery counts, and 100 years for each of the three armed criminal action counts.

Id. at 239. Willbanks asserted that “his sentences, in the aggregate, will result in the functional equivalent of a life without parole sentence.” *Id.* at 239. He went on to point out that “[t]he Supreme Court held [in *Graham v. Florida*, 560 U.S. 48, 82 (2010),] that the Eighth Amendment prohibits juvenile nonhomicide offenders from being sentenced to life without parole.” 522 S.W.3d at 242.

In rejecting Willbanks’s argument, our high court pointed out that he “was not sentenced to life without parole.” *Id.* “The Supreme Court has never held that consecutive lengthy sentences for multiple crimes in excess of a juvenile’s life expectancy is the functional equivalent of life without parole.” *Id.* at 246. Further, “absent guidance from the Supreme Court, [the Supreme Court of Missouri] should not arbitrarily pick *the point* at which multiple aggregated sentences may become the functional equivalent of life without parole.” *Id.* at 245.

Willbanks was then distinguished in *Carr*, our high court noting that “[a]lthough this case involves multiple offenses, Mr. Carr’s three sentences of life without the possibility of parole for 50 years were all run concurrently. This case does not present the

same stacking or functional equivalent sentences issue presented in *Willbanks*[.]” 527 S.W.3d at 61 n.7. Nonetheless, the State insists that the addition of the other sentences is what removes Petitioner’s case from analysis under *Carr*.⁵

As in *Willbanks*, 522 S.W.3d at 239, Petitioner received consecutive sentences. We believe that the critical difference, however, is that no single sentence imposed in *Willbanks* offended the Eighth Amendment. Here, Petitioner is not challenging his sentences for first degree murder and armed criminal action, nor the fact that his sentences were imposed consecutively. Instead, Petitioner contends 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.” Here, unlike *Willbanks*, no sentences need to be stacked with any others to reach a “functional” sentence of life in prison for at least fifty years before parole eligibility is reached. Petitioner has an actual LWOP 50 sentence that is separate and distinct from any of his additional sentences.

⁵ The State also argues that review of Petitioner’s sentence may advance no further than “the framework in [*Graham*]” and then must fail because Petitioner shows no national consensus against the type of sentence he received and no insufficiency in terms of the sentence’s penological goals. This argument ignores that the Supreme Court was considering a new type of categorical challenge in *Graham* as it worked through the analyses of a national consensus and penological goals. 560 U.S. at 61, 62, and 67. After doing so, it concluded that “[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide.” *Id.* at 82.

While it may well be that the trial court determined the brutal nature of Petitioner's offenses warranted consecutive sentences, the LWOP 50 sentence was mandatory after the death penalty was rejected. *See* section 565.008.1 and *Allen*, 710 S.W.2d at 914. There was no room for consideration of second-degree murder as an alternative in considering "whether [Petitioner's sentence] of life without the possibility of parole for 50 years [was] just and appropriate considering his youth, maturity, and the other **Miller** factors." *Carr*, 527 S.W.3d at 62. It was the mandatory aspect of Mr. Carr's LWOP 50 sentences that made them unconstitutional under **Miller**:

[T]he most severe mandatory penalty was imposed on Mr. Carr in direct contravention of the foundational principle "that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." *[Miller]* at 2466. Consequently, Mr. Carr's sentences violate the Eighth Amendment because they were "imposed without any opportunity for the sentencer to consider whether th[e] punishment[s were] just and appropriate in light of [Mr. Carr's] age, maturity, and other factors discussed in *Miller*." *State v. Hart*, 404 S.W.3d 232, 238 (Mo. banc 2013).

Carr, 527 S.W.3d at 61-62 (footnote omitted). Thus, **Carr** is applicable and binding on this court, and it entitles Petitioner to the *habeas* relief he seeks.

2. The Applicable Resentencing Procedure

The Court in *Carr* applied the procedures outlined in *Hart* in stating the proper resentencing procedure:

First, the sentencer must consider whether Mr. Carr's sentences of life without the possibility of parole for 50 years are just and appropriate considering his youth, maturity, and the other *Miller* factors. [*Hart*, 404 S.W.3d at 241]. If Mr. Carr elects to have a jury resentence him, the jury must be "instructed properly that it may not assess and declare" his punishment for capital murder should be life without the possibility of parole for 50 years "unless it is persuaded beyond a reasonable doubt that this sentence is just and appropriate under all the circumstances." *Id.* (internal quotation omitted). The jury must also be instructed, "before it begins its deliberations, that if it is not persuaded that life without parole [for 50 years] is a just and appropriate sentence under all the circumstances of the case, additional instructions concerning applicable punishments will be given at that time." *Id.* at 242.

If, after considering all the circumstances, the sentencer finds Mr. Carr qualifies for life without the possibility of parole for 50 years, then that is the only authorized statutory sentence. *Id.* If, however, the sentencer is not persuaded that this sentence is just and appropriate, Mr. Carr cannot receive that sentence. Instead, the trial court must declare section 565.008 void as applied to Mr. Carr on the ground that it does not provide a constitutionally valid punishment for his offense. *Id.*

If section 565.008 is void, the trial court must vacate the jury's verdict finding Mr. Carr guilty of capital murder under section 565.001 and enter a new finding that he is guilty of murder in the second degree under section 565.004. *Id.* After the sentencer enters the finding that he is guilty of murder in the second degree, the sentencer must determine his sentence based on the statutory range applicable to these offenses. *Id.* at 243. Under section 565.008.2, “[p]ersons convicted of murder in the second degree shall be punished by imprisonment by the division of corrections for a term of not less than ten years.” If Mr. Carr elects to have a jury resentence him, the jury will be provided with additional instructions regarding sentencing for murder in the second degree. *Id.* As this Court instructed in *Hart*, these additional instructions “should not be submitted to the sentencer—unless and until the sentencer has deliberated and rejected sentencing [the juvenile offender] to [life without the possibility of parole for 50 years] for [capital murder].” *Id.* Mr. Carr would then be resentenced for second degree murder within the statutorily authorized range of punishments for that offense. *Id.*

527 S.W.3d at 62 (footnote omitted).

Habeas relief is granted. Petitioner's LWOP sentence for capital murder is vacated, and the case is remanded for resentencing on that count consistent with the procedure outlined in *Carr*. See 527 S.W.3d at 62.

DON E. BURRELL, P.J. – OPINION AUTHOR

NANCY STEFFEN RAHMEYER, J. – CONCURS

GARY W. LYNCH, J. – CONCURS

IN THE CIRCUIT COURT OF TEXAS COUNTY,
MISSOURI

In Re: Robert W. Allen)
Petitioner,)
)
)
vs.) Case No.
) 17TE-CC00425
)
)
JEFF NORMAN, Warden,)
South Central Correctional)
Center,)
)
Respondent.)

ORDER DENYING WRIT OF HABEAS CORPUS

Petitioner was charged with, and convicted of, one count of capital murder, § 565.001 RSMo 1978 (victim, Rachel Hudnall), one count of murder in the first degree, § 565.050 RSMo 1978 (victim Maurice Hudnall), and one count of armed criminal action, § 571.015 RSMo 1978, in Jackson County, Missouri. The offenses occurred on January 12, 1984, when petitioner was sixteen years old (DOB: 8/7/1967).

On April 18, 1985, Petitioner was sentenced to a mandatory term of life imprisonment without probation or parole for fifty years for the capital murder charge, and sentences of life imprisonment for the other two counts with the sentences ordered to run consecutively to each other in Jackson County, Missouri. Thereafter, Petitioner filed a direct appeal, which affirmed on appeal in *State v. Allen*, 710 S.W.2d 912 (1986).

Petitioner asserts that Missouri's then effective capital murder statute made no exception for juvenile offenders, and that therefore Petitioner's mandatory sentence of life without parole for fifty years for that offense is invalid and unconstitutional in violation of the Eighth Amendment in light of *Miller v. Alabama*, 567 U.S. 460 (2012), as well as the decision by the Missouri Supreme Court in *State ex rel. Carr v. Wallace*, 527 S.W. 3d 55 (Mo. banc 2017).

The United States Supreme Court in *Miller* prohibited a sentence of life imprisonment without the possibility of parole for juvenile offenders convicted of homicide. *Miller*, 132 S.Ct. at 2464. In *Carr*, a juvenile was convicted of three counts of capital murder and was sentenced under each count to the required minimum under the effective penal statute, life imprisonment without parole for fifty years. The trial court ordered that the three sentences run concurrently. The Missouri Supreme Court held the sentences violated *Miller*, as the mandatory sentences were imposed without any opportunity for the sentencer to consider whether the punishments were just and appropriate in light of the juvenile's age, maturity and other *Miller* factors. *Carr*, 527 S.W. 3d at 61-62. However, *Carr* cautioned in footnote 7 of the opinion:

Although this case involves multiple offenses, Mr. Carr's three sentences of life without the possibility of parole for 50 years were all run concurrently. This case does not present the same stacking or functional equivalent sentences issue presented in *Willbanks v. Missouri Department of*

Corrections, 522 S.W. 3d 238, (Mo. banc July 11, 2017)...

In *Willbanks*, the defendant was convicted of and sentenced to consecutive prison terms of fifteen years for kidnapping, life for assault, twenty years for each of two robbery counts, and one hundred years for each of three armed criminal action counts. On appeal he claimed that under current Missouri parole statutes and regulations, he did does not become parole eligible approximately age eighty-five years, thus constituting the functional equivalent of life without parole in violation of *Miller*. *Willibanks*, 522 S.W. 3d at 239-241. The Missouri Supreme Court held that the consecutive sentences were permissible, stating:

Over the last decade, the Supreme Court has stated that youth affects the penological considerations for the following: capital punishment; mandatory life without parole for homicide offenders; and life without parole for nonhomicide offenders. But the Supreme Court has not held that multiple fixed-term sentences totaling beyond a juvenile offender's life expectancy are the functional equivalent of life without parole. Warning of "frequent and disruptive reassessments of [the Supreme Court's] Eighth Amendment precedents," the Supreme Court has not looked positively upon lower courts issuing various rulings without precedence from the Supreme Court. Clear, predictable, and uniform constitutional standards are especially desirable in the area of the Eighth Amendment. Extending the Supreme Court's

holdings beyond the four corners of its opinions is clearly disfavored.

The Supreme Court has never held that consecutive lengthy sentences for multiple crimes in excess of a juvenile's life expectancy is the functional equivalent of life without parole. ...Without direction from the Supreme Court to the contrary, this Court should continue to enforce its current mandatory minimum parole statutes and regulations by declining to extend Graham.

Id at 246 (internal citations and quotations marks omitted).

The Court in *Willbanks* also emphasized the nature of the consecutive sentences pronounced in that case:

The sentencer in a case (here, the trial court) has a duty to impose a sentence on a case-by-case basis. Additionally, trial courts have very broad discretion in their sentencing function, as evidenced in section 558.026.1, which provides that multiple prison terms shall run concurrently unless the court specifies that they shall run consecutively. Neither this Court nor the Supreme Court has ruled on the constitutional impact of consecutive sentences.

Id at 243 (internal citation and quotation marks omitted).

In the instant case, it appears that the caution set forth in *Willbanks* not to extend the Supreme Court's holdings beyond the four corners of its opinions dictates the denial of the writ of habeas corpus. The Missouri Supreme Court, noting that the United States Supreme Court has never ruled on the constitutionality of consecutive sentences, upheld consecutive sentences with no possibility of parole until age eighty-five years.

Though *Carr* prohibited the imposition of three sentences of life without parole of at least fifty years, the sentencer in that case had elected to run the sentences concurrent, reflecting a decision by the sentencer to reduce the sentences to the minimum allowed by law. The sentencer was unable to further reduce the sentences with regard to the mitigating factors of youth because of the mandatory minimum required by the sentencing statute. In contrast, in the instant case, 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. By necessity, then, the sentencer found after considering all relevant factors that the mandatory minimum for capital punishment of no parole for fifty years was not enough punishment. The sentencer thus satisfied the duty noted in *Willbank* to "impose a sentence on a case-by-case basis." *Id*

Petitioner's Petition for Writ of Habeas Corpus is denied.

Date: August 13, 2018 /s/ William E. Hickle,
William E. Hickle, Judge

Supreme Court of Missouri
en banc
SC97610
SD35655

January Session, 2019

In Re Robert W. Allen,
Petitioner,

vs. (TRANSFER)

Jeff Norman, Warden, South
Center Correctional Center,
Respondent,

Now at this day, on consideration of the Respondent's application to transfer the above-entitled cause from the Missouri Court of Appeals, Southern District, it is ordered that the said application be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, Betsy AuBuchon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the January Session, 2019, and on the 5th day of March, 2019, in the above entitled cause.

(SEAL) IN TESTIMONY WHEREOF, I have hereunto set my hand and the seal of said Court, at my office in the City of Jefferson, this 5th day of March, 2019.

/s/Betsy AuBuchon, Clerk
/s/Christina Susan, Deputy Clerk

**Missouri Court of Appeals
Southern District**

No. SD35655

IN RE: ROBERT W. ALLEN,)
)
Petitioner,) FILED
) DEC 14 2018
vs.) CRAIG A. STREET
) CLERK, MISSOURI
JEFF NORMAN, WARDEN,) COURT OF
SOUTH CENTRAL) APPEALS
CORRECTIONAL CENTER,) SOUTHERN
Respondent.) DISTRICT

ORDER

Now on this day, the Court overrules and denies respondent's "Motion for Rehearing and Application for Transfer."

cc: Attorneys of Record

**Missouri Court of Appeals
Southern District**

No. SD35655
(Texas County Case No. 17TE-CC00425)
(Jackson County Case No. CR-84-1010)

In re: ROBERT W. ALLEN)
)
Petitioner,) FILED
) MAR 07 2019
v.) CRAIG A. STREET
) MISSOURI COURT
JEFF NORMAN, Warden,) OF APPEALS
South Central Correctional) SOUTHERN
Center,) DISTRICT
Respondent.)

MANDATE

**ORIGINAL PROCEEDING ON PETITION FOR
WRIT OF HABEAS CORPUS**

The Court, being sufficiently advised of and concerning the premises, does consider and adjudge that Petitioner is granted habeas relief in conformity with the opinion of the Court herein delivered. The Court further order that Petitioner be remanded and delivered to the Jackson County Department of Corrections, in the state of Missouri, to be confined pending the further order and action of the Circuit Court of Jackson County in case number CR84-1010.

Opinion filed.

(SEAL) IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the Missouri Court of Appeals, Southern District, at my office in the City of Springfield on this day, March 7, 2019.

/s/CRAIG A. STREET
CRAIG A. STREET, Clerk

IN THE SUPREME COURT OF MISSOURI

ROBERT ALLEN,)
Petitioner,)
)
v.) No. SC
)
JEFFREY NORMAN,)
Respondent.)

APPLICATION FOR TRANSFER

This case raises the important question of whether the Eighth Amendment to the U.S. Constitution entitles a juvenile offender who committed three crimes—capital murder, first-degree murder, and armed criminal action—and who received three consecutive sentences—of life imprisonment, life imprisonment, and life without parole for fifty years—to early parole eligibility. The appeals court held that sentencing any juvenile offender to life without parole for fifty years is cruel and unusual punishment—no matter the total crimes committed or sentences received.

EXISTING LAW THAT REQUIRES REEXAMINATION

State ex rel. Carr v. Wallace, 527 S.W.3d 55 (Mo. 2017)

CONTRARY APPELLATE DECISIONS

Willbanks v. Missouri Department of Corrections, 522 S.W.3d 238 (Mo. 2017).

Virginia v. Leblanc, 137 S. Ct. 1726 (2017).

State v. Hart, 404 S.W.3d 232 (Mo. 2013).

Miller v. Alabama, 567 U.S. 460 (2012).

I. Statement of Facts

Robert W. Allen brutally robbed and murdered an elderly couple for petty case. *State v. Allen*, 710 S.W. 2d 912, 913 (Mo. App. W.D. 1986). When Allen was sixteen, he and an accomplice decided to rob an elderly couple because the couple's social security checks had arrived in the mail. *Id.* at 914. The pair cut the telephone wires to the victims' house, went to the door and told the female victim that their car had slid off the road. *Id.* Next they forced their way in and searched the home for things to steal. *Id.* Allen clubbed the female victim three times with a night stick and his accomplice clubbed the male victim twice in the head with a knife butt. *Id.* They then tied the victims up, laid the victims on their stomachs, and killed them by stabbing them in the back of the neck. *Id.* Allen and his accomplice then stole \$140 each. *Id.*

A jury convicted Allen of capital murder, first-degree murder, and armed criminal action. But the jury was divided on the death penalty's propriety. And so, to make the punishments fit the crimes, the trial court sentenced Allen to three consecutive terms in prison, one for each crime—two terms of life

imprisonment, and life imprisonment without the possibility of parole for fifty-years. *Id.* at 913, 916.

Decades later, Allen petitioned for habeas corpus in the Circuit Court of Texas County, Missouri from his residence at the South Central Correctional Center in Licking, Missouri. He alleged that his mandatory life without parole for fifty-years sentence violates the Eighth Amendment because he was under eighteen when he murdered his victims. Appendix at A3-A4.

The Circuit Court of Texas county denied his petition, holding that this Court's decision in *Willbanks v. Missouri Department of Corrections*, 522 S.W.3d 238 (Mo. 2017), foreclosed his claims. Appendix A3-A6. This Court had held in *Willbanks* that the Supreme Court has never expanded the Eighth Amendment this far, and it made clear that it is not cruel and unusual punishment to sentence a juvenile offender who committed multiple crimes to multiple consecutive sentences, even if the offender's aggregate sentence is the functional equivalent of life without parole. *Id.* at A5-A6. The circuit court also explained that this Court's decision in *State ex rel. Carr*, 527 S.W.3d 55 (Mo. 2017), did not concern sentences like Allen's sentences. *Carr* involved a single minimum sentence for a single crime, suggesting that an even lighter sentence might be appropriate punishment if the trial court has had discretion. But for Allen, the sentencing judge found life without the possibility of parole for fifty years too light a punishment. And so it imposed two consecutive life sentences as well. Appendix A6.

Allen then petitioned for writ of habeas corpus in the Missouri Court of Appeals Southern District. *In re Allen v. Norman*, slip op. S.D. 35655 (Mo. App. S.D. Nov. 27, 2018). That court granted him a writ of habeas corpus, holding that denying a juvenile offender parole for fifty years is unconstitutional, no matter the number of severity of crimes. *Id.* at *3-6. The court extended *Carr* to Allen's sentence because Allen like Carr received a sentence of life without the possibility of parole for fifty years, even though *Carr* did not concern consecutive sentences, and Allen received two other consecutive life sentences. *Id.*

Because it disregarded Allen's other consecutive life sentences, the appellate court ordered resentencing on only his sentence of life without parole for fifty-years. *Id.* The court thus disregarded this Court's decision in *Willbanks*, in which this Court upheld consecutive sentences for a juvenile offender even if it resulted in no parole eligibility during a normal lifetime. The appellate court found *Willbanks* distinguishable because Willbanks did not receive a single sentence of life without the possibility of parole for fifty years *within* his total aggregate sentence of 355 years. *Id.*

II. Basis for Transfer

The case raises the important question of whether a sentence of life without the possibility parole for fifty years is cruel and unusual punishment when a juvenile offender committed multiple crimes and received multiple consecutive life sentences. Going beyond this Court's decisions in *Willbanks*, *Nathan*, and *Carr*, the appellate court expanded the Eighth Amendment and the U.S. Supreme Court's

precedents to—with no basis in the Constitution—require the State to give a heinous murderer early parole eligibility.

A. The panel decision conflicts with *Willbanks*, *Nathan*, and United States Supreme Court precedent.

Under the U.S. Supreme Court’s precedents, as well as this Court’s decision in *Willbanks* and *Nathan*, this Eighth Amendment has never prohibited multiple consecutive sentences for multiple crimes. And this Court has held that it is not cruel and unusual punishment to impose multiple consecutive sentences for a juvenile offender even if the sentences last hundreds of years. *Willbanks v. Missouri Department of Corrections*, 522 S.W.3d 238 (Mo. 2017). In *Willbanks*, this Court drew a bright line: no United States Supreme Court precedent prohibits multiple consecutive sentences for multiple crimes for juvenile offenders, even if that pushes parole eligibility beyond a human life expectancy. *Id.* at 246. And, in a companion case, *Nathan*, this Court held that neither is sentencing a juvenile to consecutive, long sentences for multiple non-homicide and homicide offenses the functional equivalent of life without possibility of parole. *State v. Nathan*, 522 S.W.3d 881, 892 (Mo. banc 2017).

That said, this Court ordered resentencing in a case that did *not* involve consecutive punishments for multiple crimes. In *Carr*, a juvenile offender who committed three murders received three *concurrent* life sentences with parole ineligibility for fifty years. *State ex rel. Carr v. Wallace*, 527 S.W.3d 55 (Mo. 2017). Unlike in *Willbanks*, where the sentences

were consecutive, this Court held that this minimum sentence was unconstitutional because the sentences were concurrent and functionally amounted to a single mandatory sentence of life without parole. *Id.* at 61 n.7.

And so, setting aside for the moment whether *Carr* was rightly decided, *Carr* on its own terms does not apply here. Instead, Allen's case falls under the framework for analyzing consecutive sentences in *Willbanks* and *Nathan*. Allen's sentencing court went beyond a mandatory minimum sentence for a single crime: it found inadequate a single life sentence with parole ineligibility for fifty years when Allen committed three crimes—and so it imposed two consecutive life sentences as well. In *Carr*, the sentencing court imposed the legal mandatory-minimum sentence, unlike Allen's consecutive sentence structure.

Allen seeks a rule that no juvenile may be ineligible for parole for more than fifty years, no matter how many other crimes he committed or goes on to commit. The sole reason that the panel gave for distinguishing these precedents is that Allen received a life without parole eligibility for fifty years' sentence. But under *Miller*, *Willbanks*, and *Nathan* there is no requirement of universal parole eligibility at fifty years, as some sort of magic number, let alone this kind of entitlement when the offender committed multiple crimes.

And his life without parole for fifty-years' sentence cannot be looked at alone. Allen's sentence is not a singular term for a singular crime. His real

sentence is consecutive terms for consecutive crimes, which *Willbanks* and *Nathan* allow.

This Court's Eighth Amendment precedent requiring resentencing for long juvenile sentences goes no further than *Willbanks* and *Nathan*. A juvenile is entitled to some parole eligibility only when he is sentenced to imprisonment for life without parole for a non-homicide offense, or when he receives a single mandatory sentence of life without parole for murder. The Eighth Amendment does not give early parole eligibility to a person guilty of murder, along with multiple other offenses, who justly received multiple consecutive sentences. *Nathan*, 522 S.W.3d at 888. "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. And "the Supreme Court has not held that multiple fixed-term sentences totaling beyond a juvenile offender's life expectancy are the functional equivalent of life without parole." *Willbanks*, 522 S.W.3d at 246. The U.S. Supreme Court "did not address the constitutional validity of consecutive sentences, let alone the cumulative effect of such sentences." *Id.* at 891.

The decision below thus goes beyond *Carr* to conflict with *Willbanks*, *Nathan*, and *State v. Hart*, 404 S.W.3d 232 (Mo. 2013). But the state courts are not free to go beyond what the Supreme Court has held. Missouri's justice system "recognizes multiple violent crimes deserve multiple punishments." *Id.* at 92. This court therefore, should not allow the Court

of Appeals to expand *Carr* and overrule *Willbanks* and *Nathan* from below.

B. This Court should reexamine and overrule *State ex rel. Carr v Wallace* because it conflicts with *Willbanks, Nathan, Miller, Leblanc, and Hart*.

But even if *Carr* could be extended to Allen's sentence, which it should not be, then this Court should transfer this case to overrule *Carr*.

The United States Supreme Court in *Miller* held that a single *mandatory life without parole sentence* for an offender who committed his crime while under age eighteen violates the constitution. *Miller v. Alabama*, 567 U.S. 460 (2012). It did not hold that a term of years is the functional equivalent of a life sentence. And it did not hold that juveniles get parole eligibility even if they committed multiple crimes and received multiple consecutive sentences. This Court reads the ban in *Miller* as applying to a mandatory life without parole sentence: nothing more, nothing less. *State v. Hart*, 404 S.W.3d 232 (MO. 2013).

Later, in *Leblanc*, a habeas corpus case, the Court confirmed this plain import of *Miller*. It held that it was not contrary to nor an unreasonable application of *Miller* to hold that *Miller* allows geriatric parole eligibility rather than earlier release for a single homicide offense. *Virginia v. Leblanc*, 137 S. Ct. 1726 (2017). *Leblanc* tracks Missouri Supreme Court precedent because it confirms that U.S. Supreme Court precedent does not require more than *Miller*. *Willbanks*, 522 S.W.3d at 246.

But in *Carr*, this Court allowed an aberration to enter its jurisprudence. It expanded the holding in *Miller* from prohibiting a mandatory sentence of *life* with no parole to prohibit to prohibit a mandatory sentence of imprisonment with parole eligibility after *fifty* years. *Carr*, 527 S.W.3d at 61. The dissent in *Carr* pointed out that the majority in *Carr* extended *Miller* beyond its text, and thus the decision raised doubts about whether a juvenile offender could receive any lengthy term-of-years sentence. *Id.* 63-64 (Fisher, C.J., dissenting).

Carr was wrong when it was decided and it is wrong today. This opinion has no basis under the original public meaning of the Eighth Amendment or the U.S. Supreme Court's limited reading of the Eighth Amendment. The Eighth Amendment does not entitle juveniles to parole eligibility at fifty years in any circumstances. It should be overruled.

The decision below, though, is worse than *Carr*. Allen persuaded the appellate court to expand *Miller* even beyond *Carr*. *Carr* prohibited a (functionally-single) mandatory sentence of life in prison with parole eligibility after fifty years, considering life without parole for fifty years to be the functional equivalent of a mandatory sentence of life without parole for a single crime. Yet the panel opinion reads *Miller* to ban any sentence without parole *for fifty-years* even if the offender also received two consecutive life sentences and committed for *multiple offences*, and even if the court considered the offender's youth and held that the punishments fitted his crimes.

The panel's expansion of *Miller* thus underscores the need for a reexamination of *Carr*. State courts, especially lower state courts, should not take it on themselves to extend United States Supreme Court precedent and strike down sentences imposed under state law. *Id.* But this decision takes exactly that forbidden step.

CONCLUSION

This Court should transfer the case to the Supreme Court of Missouri.

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**IN THE MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT**

ROBERT ALLEN,)
)
Appellant,)
)
vs.) No. SD35655
)
JEFFREY NORMAN,)
)
Respondent.)

**MOTION FOR REHEARING AND
APPLICATION FOR TRANSFER**

This appeal raises the question of general interest and importance of whether the Eighth Amendment to the federal Constitution requires the State to resentence to a more lenient punishment an offender who committed capital murder, first-degree murder, and armed criminal action while under age eighteen. The court imposed consecutive sentences of life without parole for fifty years, life, and life in prison. This Court held that this sentence invalid.

EXISTING LAW THAT REQUIRES REEXAMINATION

State ex rel. Carr v. Wallace, 527 S.W.3d 55 (Mo. 2017)

CONTRARY APPELLATE DECISIONS

Willbanks v. Missouri Department of Corrections, 522 S.W.3d 238 (Mo. 2017).

Virginia v. Leblanc, 137 S. Ct. 1726 (2017)

State v. Hart, 404 S.W.3d 232 (Mo. 2013).

Miller v. Alabama, 567 U.S. 460 (2012).

I. STATEMENT OF FACTS

Robert W. Allen is guilty of brutally robbing and murdering an elderly couple for petty case. *State v. Allen*, 710 S.W. 2d 912, 913 (Mo. App. W.D. 1986). When Allen was sixteen, he and an accomplice decided to rob an elderly couple because the couple was old and their social security checks had arrived in the mail. *Id.* at 914. The pair cut the telephone wires to the victims' house, before going to the door and telling the female victim their car had slid off the road. *Id.* Allen and his accomplice next forced their way in and searched the home for things to steal. *Id.* Allen then clubbed the female victim three times with a night stick and his accomplice clubbed the male victim twice in the head with the butt of a knife. *Id.* They tied the victims up, laid the victims of their stomachs, and killed them by stabbing them in the back of the neck. *Id.* Allen and his accomplice then stole \$140 each. *Id.*

A jury found Allen guilty of capital murder, first-degree murder, and armed criminal action. And, because no lesser sentence would serve the public interests in retribution and deterrence, and because the jury was divided on the propriety of the death

penalty for Allen, the trial court sentenced him to three consecutive terms, one for each crime—of life imprisonment without probation or parole for fifty years, of life imprisonment, and of life imprisonment. *Id.* at 913, 916. He now resides at the South Central Correctional Center in Licking, Missouri under this sentence and judgment.

Decades after the jury convicted him and the trial court sentenced him, Allen petitioned for habeas corpus in the Circuit Court of Texas County, Missouri. He alleged that his mandatory life without parole for fifty-year sentence violates the Eighth Amendment because it is cruel and unusual punishment to impose this sentence on a murderer who was under eighteen years old at the time of his offenses. Appendix at A3-A4. The Circuit Court of Texas County denied his petition. Appendix A3-A6.

The Circuit of Texas County found that the decision of the Missouri Supreme Court in *Willbanks v. Missouri Department of Corrections*, 522 S.W.3d 238 (Mo. 2017) requires denying Allen a writ of habeas corpus. Appendix A4-A6. The Missouri Supreme Court in *Willbanks* had ruled that the Eighth Amendment provides no relief to an offender who committed multiple crimes and received multiple consecutive sentences, and so the court was careful not to expand United State Supreme Court precedent beyond the opinions. *Id.* at A5-A6. The circuit court also explained why *State ex rel. Carr*, 527 S.W.3d 55 (Mo. 2017), provided Allen no relief. The court in *Carr* imposed the minimum sentence, suggesting that an even lighter sentence might be appropriate punishment for the single offence that Carr committed, but here the judge found life

without the possibility of parole for fifty years to be an insufficiently severe punishment for Allen, and so it imposed two consecutive life sentences as well. Appendix A6.

Allen then filed a petition for writ of habeas corpus in the Missouri Court of Appeals Southern District. *In re Allen v. Norman*, slip op. S.D. 35655 (Mo. App. S.D. Nov. 27, 2018). A panel of this Court granted a writ of habeas corpus holding that any life sentence that contains a parole ineligibility term of fifty years is unconstitutional, no matter the number or severity of additional crimes committed. *Id.* at *3-6. The panel ordered resentencing on only that sentence, not the two consecutive life sentences. *Id.*

The panel held that, as in *Carr*, Allen received a sentence of life without the possibility of parole for fifty years, and that sentence is unconstitutional, even though *Carr* did not concern consecutive sentences. *Id.* The panel held that *Willbanks* did not apply, even though in *Willbanks* the Missouri Supreme Court held multiple consecutive sentences totaling 355 years, and parole ineligibility that extended beyond a normal human life expectancy, to be constitutional for a juvenile offender. The panel found that *Willbanks* is distinguishable, because the petitioner in *Willbanks* did not receive a sentence of life without the possibility of parole for fifty years. *Id.*

II. Basis for Transfer

The decision presents the question of general interest and importance of whether a sentence of life without the possibility parole for fifty years is

unconstitutional, even though it is followed by multiple consecutive life sentences for other offenses committed in one transaction. This question is important in itself to be resolved, but especially here, it requires further examination. The panel decision and prior state supreme court precedent conflicts with U.S. Supreme Court and other precedents. And it requires the State to give a heinous murderer early parole eligibility without any basis in the federal Constitution.

A. The panel decision conflicts with *Willbanks, Nathan, and United States Supreme Court precedent.*

The Missouri Supreme Court has held that the Eighth Amendment allows multiple *consecutive* sentences for a juvenile offender, even if the sentences last hundreds of years and create a parole ineligibility period that is longer than a normal human life expectancy, and even if the offender committed his crimes under age eighteen. *Willbanks v. Missouri Department of Corrections*, 522 S.W.3d 238 (Mo. 2017). In *Willbanks*, that court drew a bright line: no United States Supreme Court prohibits multiple sentences for multiple nonhomicide crimes. *Id.* at 246. And, in a companion case, it also held that sentencing a juvenile defendant to consecutive, lengthy sentences for multiple nonhomicide and homicide offenses was also not the functional equivalent of life without the possibility of parole. *State v. Nathan*, 522 S.W.3d 881, 892 (Mo. banc 2017).

That said, the Missouri Supreme Court ordered resentencing in a case that did not involve

consecutive punishments for multiple crimes. In *Carr*, a juvenile offender who committed three murders received three *concurrent* life sentences with parole ineligibility for fifty years. *State ex rel. Carr v. Wallace*, 527 S.W.3d 55 (Mo. 2017). Unlike in *Willbanks*, where the sentences were consecutive, the Missouri Supreme Court held that this sentence was unconstitutional because the sentences were concurrent and functionally amounted to a single mandatory sentence of life without parole. *Id.* at 61 n.7.

But, whether or not *Carr* was rightly decided, *Carr* does not apply here. Instead, Allen's case falls under the framework for analyzing consecutive sentences found in *Willbanks* and *Nathan*. Allen's sentencing court found inadequate a life sentence with parole ineligibility for fifty years, and so it imposed two consecutive life sentences as well. In *Carr*, the sentencing court imposed the legal mandatory minimum sentence. But Allen's sentence of parole eligibility after his fifty-year sentence (and after three years on his other sentences) is not the same as a life sentence for a single crime. And under *Miller*, *Willbanks*, and *Nathan* there is no requirement of parole eligibility before fifty years, let alone this kind of entitlement when the offender committed multiple crimes.

The sole reason that the panel gave for distinguishing these precedents is that Allen received a life without parole eligibility for fifty years' sentence. But the life without parole eligibility for fifty years' sentence cannot be analyzed alone. Allen's sentence is not a singular term for a singular crime. This Court thus should refuse to blind its eyes

to his true sentence of consecutive terms for consecutive crimes, and it should hold that *Willbanks* and *Nathan* analyze and permit his type of sentence.

The Supreme Court's Eighth Amendment precedent requiring resentencing for lengthy juvenile sentences goes no further than *Willbanks* and *Nathan*. It is limited to juvenile offenders sentenced to life without parole solely for a nonhomicide offense, or to a single mandatory life without parole sentence for murder, and it does not apply to a person guilty of murder along with multiple other offenses resulting in consecutive sentences. *Nathan*, 522 S.W.3d at 888. Simply put, this precedent has no application to Allen's convictions and multiple consecutive sentences, because the U.S. Supreme Court "did not address the constitutional validity of consecutive sentences, let alone the cumulative effect of such sentences." *Id.* at 891.

The state courts are not free to go beyond what the Supreme Court has held. Missouri's "justice system that recognizes multiple violent crimes deserve multiple punishments." *Id.* at 892. "Therefore, Missouri is permitted to enforce its current sentencing scheme and this Court is obligated to enforce it until the Supreme Court of the United States extends its Eighth Amendment jurisprudence to prohibit what is currently permitted." *Id.*

This Court thus lacks any authority to expand *Carr* from below to overrule *Willbanks* and *Nathan*. It should rehear or transfer the case.

B. The Missouri Supreme Court should reexamine and overrule *State ex rel. Carr v. Wallace* because it conflicts with *Willbanks, Nathan, Miller, Leblanc, and Hart*.

But even if *Carr* is extended to Allen's sentence, then this case should be transferred to the Missouri Supreme Court to reexamine and overrule *Carr*.

The United States Supreme Court in *Miller* held that a single *mandatory life without parole sentence* for an offender who committed his crime while under age eighteen violates the constitution. *Miller v. Alabama*, 567 U.S. 460 (2012). It did not hold that a term of years is the functional equivalent of a life sentence. And it did not hold that parole eligibility must exist for juveniles who commit multiple crimes and receive multiple consecutive sentences.

Then, in *Leblanc*, a later habeas corpus case, the Court confirmed the plain import of *Miller*, and held that it was not contrary to nor an unreasonable application of *Miller* to hold that *Miller* allows geriatric parole rather than earlier release. *Virginia v. Leblanc*, 137 S. Ct. 1726 (2017).

Leblanc tracks Missouri Supreme Court precedent because it confirms that United States Supreme Court precedent does not at present require more than *Miller*. *Willbanks*, 522 S.W.3d at 246. The Missouri Supreme Court historically has read the ban in *Miller* as applying to a mandatory life without parole sentence: nothing more, nothing less. *State v. Hart*, 404 S.W.3d 232 (Mo. 2013).

But in *Carr*, the Missouri Supreme Court allowed an aberration to enter its jurisprudence. It expanded the holding in *Miller* from prohibiting a mandatory sentence of *life* without parole to prohibit a mandatory sentence of life in prison with parole eligibility after *fifty* years. *Carr*, 527 S.W.3d at 61. The dissent in *Carr* pointed out that the majority extended *Miller* beyond its plain application, and thus the decision in *Carr* called into question whether any mandatory-minimum sentence could ever be imposed on a juvenile offender. *Id.* 63-64 (Fisher, C.J., dissenting).

Carr was wrong when it was decided and it is wrong today. This opinion has no basis under the original public meaning of the Eighth Amendment or the limited import of the U.S Supreme Court's precedents. It should be overruled.

But worse, as discussed above in Part I, the panel decision expands *Miller* even beyond *Carr* and thus its decision conflicts with *Miller* and *Leblanc* even more. *Carr* prohibited a (functionally-single) mandatory sentence of life in prison with parole eligibility after fifty years, deeming life without parole for fifty years to be the functional equivalent of life without parole for a single crime. Yet the panel opinion reads *Miller* to find the United States Constitution bans a sentence of life without parole *for fifty years* followed by two consecutive life sentences *for multiples offences*.

This goes beyond *Carr* and conflicts with *Willbanks, Nathan, and State v. Hart*, 404 S.W.3d 232 (Mo. 2013). "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 alone with multiple nonhomicide offenses.” *Nathan*, 522 S.W.3d at 892-93. And “the Supreme Court has not held that multiple fixed-term sentences totaling beyond a juvenile offender’s life expectancy are the functional equivalent of life without parole.” *Willbanks*, 522 S.W.3d at 246.

The panel’s further expansion of *Miller* underscores the need for a reexamination of *Carr*. State courts, especially lower state courts, should not take it on themselves to extend U.S. Supreme Court precedent. *Id.* But this decision takes exactly that forbidden step.

CONCLUSION

This Court should rehear the case, rehear the cases *en banc*, or transfer the case to the Supreme Court of Missouri.

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CERTIFICATE OF SERVICE

I hereby certify that the above was filed through Case.net on December 7, 2018, and thereby served to the parties.

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No. SD35655

**Missouri Court of Appeals
Southern District**

IN RE: ROBERT W. ALLEN

Petitioner,

v.

**JEFF NORMAN, WARDEN,
SOUTH CENTRAL CORRECTIONAL CENTER,**

Respondent.

PETITIONER'S REPLY BRIEF

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REPLY ARGUMENT

Petitioner is entitled to a writ of habeas corpus on his sentence of life without parole (LWOP) for 50 years for a capital murder offense he committed when he was 16 years old, because this sentence is unconstitutional under *State ex rel. Carr v. Wallace*, *State v. Nathan (Nathan I)*, *Miller v. Alabama*,¹ the 8th and 14th Amendments to the U.S. Constitution, and Art. I, § 21 of the Mo. Constitution, as applied to juveniles, in that Petitioner's mandatory sentence of LWOP for 50 years did not afford the sentencer an opportunity to consider Petitioner's age, maturity, limited control over his environment, the transient characteristics attendant to youth, or his capacity for rehabilitation.

The fact that there were two other sentences ordered to run consecutively to the unconstitutional capital murder sentence does not change result, because as illustrated by the

¹ *State ex rel. Carr v. Wallace*, 527 S.W.3d 55 (Mo. banc 2017); *State v. Nathan*, 404 S.W.3d 253 (Mo. banc 2013) (*Nathan I*); *Miller v. Alabama*, 567 U.S. 460 (2012).

Missouri Supreme Court’s decision in *Nathan I*, and as conceded by Respondent in another case (*Taylor v. Norman*, cited below) and by the attorney general’s office in another case (*State v. Olivas*, cited below), even if there are other sentences ordered to run consecutively to an unconstitutional sentence, the inmate is still entitled to resentencing as to the unconstitutional sentence.

Respondent concedes that “a mandatory sentence of life without parole for fifty years would violate the Eighth Amendment for a single offense for an offender under age 18 under the Missouri Supreme Court’s decision in *State ex rel. Carr v. Wallace*, 527 S.W.3d 55 (Mo. banc 2017).” (Respondent’s Brief at 8). Petitioner Allen has such an unconstitutional sentence (Exhibit 2).

But Respondent asserts, contrary to its concession in other cases cited in Petitioner’s opening brief and below, that because of the mere fact that there are other sentences ordered to run consecutively to that unconstitutional sentence, that all of Allen’s sentences, including the unconstitutional one, are thereby made constitutional (Respondent’s Brief at 8).

In making its argument, Respondent relies almost entirely on *Willbanks v. Missouri Department of Corrections*, 522 S.W.3d 238 (Mo. banc 2017), a non-homicide case that was decided on the same day as *Carr*. But, as also explained in Petitioner’s opening brief, *Willbanks* does not control because, although *Willbanks* involved consecutive sentences, *none* of the sentences in that case were

unconstitutional. The most Willbanks was required to serve on any one sentence was 25.5 years – almost half than involved for capital murder in *Carr* and Petitioner's cases.

Thus, *Willbanks* merely holds that a habeas petitioner cannot, with consecutive sentences, add the minimum parole eligibility of each sentence when making an Eighth Amendment violation claim. In other words, consecutive lengthy sentences for multiple crimes in excess of a juvenile's life expectancy do not violate the Eighth Amendment when *none* of the sentences standing alone is unconstitutional.

Contrary to Respondent's argument, the key distinction between *Carr* and *Willbanks* is *not* how the sentences were ordered to run (concurrently versus consecutively). That is a factual distinction in the case, as is the fact that *Carr* involved homicide offenses, and *Willbanks* did not. But the key distinction is that Carr was sentenced to life without parole for 50 years, which was the harshest available penalty other than death, under a mandatory sentencing scheme that afforded the sentencer no opportunity to not only consider but also to give effect to Carr's age, maturity, limited control over his environment, the transient characteristics attendant to youth, or his capacity for rehabilitation since the only available sentence for capital murder for a juvenile, other than death, was life without parole for 50 years. *Carr v. Wallace*, 527 S.W.3d at 60-62.

That it is the length and mandatory nature of the sentence, rather than the consecutive nature as argued by Respondent, that is the key distinction

between *Carr* and *Willbanks* is illustrated by what happened in *State v. Nathan*, 404 S.W.3d 253 (Mo. banc 2013) (*Nathan I*) (reversing a count of first-degree murder because the imposition of a mandatory life without parole sentence constituted cruel and unusual punishment under *Miller*).

In *Nathan I*, the trial court sentenced Nathan to life without parole for first-degree murder, and it also sentenced Nathan, among other sentences, to five life sentences (with parole) and five 15-year sentences for non-homicide crimes, all of which were to be served consecutively to each other and to the sentence for first-degree murder. *Nathan I*, 404 S.W.3d at 256-57.

Although Nathan's life without parole sentence for first-degree murder had 10 other sentences ordered to run *consecutively* to it, the Supreme Court of Missouri reversed the first-degree murder sentence and remanded the case for Nathan to be resentenced as to the first-degree murder conviction only. *Id.* at 270-71. Thus, contrary to Respondent's position in this case, 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.

In response to *Nathan I*, Respondent baldly asserts, without any authority, that *Nathan I* does not apply "because it has been superseded." (Respondent's Brief at 9). But that is not true. On the same day that *Willbanks* and *Carr* were decided, the Supreme Court also decided *State v. Nathan*, 522 S.W.3d 881 (Mo. banc 2017) (*Nathan II*). In *Nathan*

II, the Court frequently referred to its earlier opinion in *Nathan I*, and there was not even a hint that anything in its prior opinion in *Nathan I* was “superseded,” as argued by Respondent:

[In *Nathan I*] [t]his Court unanimously held the circuit court erred in dismissing the four counts for lack of jurisdiction and remanded for resentencing on those convictions as well as for resentencing on Nathan’s first-degree murder conviction because the original sentence “was imposed with no individualized consideration of the myriad of factors discussed in *Miller*.”

[Citation omitted]. A majority of this Court further held that Nathan would be entitled to reassert his right to jury-recommended sentencing on remand for the sentences he appealed. [Citation omitted].

Nathan II, 522 S.W.3d at 883-84.

The mere fact that *Nathan I* was decided before *Willbanks* does not mean that it has been “superseded,” as argued by Respondent.

Further, *Nathan II* also noted, regarding the consecutive *non-life-without-parole* sentences that Nathan received after remand from *Nathan I*, that “[n]either the dissenting opinion nor Nathan claim, nor could it be argued, that *any one of these particular sentences violates the Eighth Amendment.*” *Nathan*, 522 S.W.3d at 891, n.15 (emphasis added). Thus, the difference between *Nathan I* and *Nathan II* (as well as *Willbanks*) is not the consecutive nature of the sentences, since both *Nathan I* and

Nathan II involved such sentences; rather, the key distinction was the length (LWOP) and mandatory nature of the first-degree murder sentence in *Nathan I*, rather than the consecutive nature of the sentences.

Respondent also attempts to distinguish *State v. Olivas*, 431 S.W.3d 575 (Mo. App. W.D. 2014), where the defendant was given consecutive sentences of life without parole and life for convictions for first-degree murder and armed criminal action, respectively; yet the court of appeals, with the attorney general's office conceding error, reversed and remanded for resentencing because the life without parole sentence was unconstitutional under *Miller*.

Now, However, the attorney general's office asserts “*Olivas* is distinguishable from the current case in the (sic) defendant in *Olivas* had only one murder conviction and armed criminal action sentence linked to that murder, not two murder convictions as here.” (Respondent’s Brief at 22). But that alleged “distinction” makes no sense under Respondent’s current argument, which would make any sentence constitutional if it involves consecutive sentences, regardless of the type of offense. Respondent does not explain why a mandatory life without parole sentence for first-degree murder would be unconstitutional if an armed criminal action sentence was ordered to run consecutively to it, but it would be constitutional if a sentence for another murder offense was ordered to run consecutively to it.

Petitioner’s opening brief noted that what happened here is contrary to *Sammie D. Taylor v.*

Jeff Norman, No. 17TE-CC00476, where the habeas court granted habeas relief to Taylor in the same count, Texas County, Missouri, on the same issue, with the same Respondent (Jeff Norman). In that case, Taylor had been sentenced to a mandatory term of life without parole for 50 years for capital murder, and he was also sentenced in the same case to life sentences for three other counts (first-degree assault and two counts of first-degree robbery), with the sentence for the assault count *to run consecutively* to the capital murder count, and the sentences for the robbery counts to run concurrently to the other two counts.

Respondent Norman in *Taylor*, who is the same Respondent as in this case, filed a Response wherein it *conceded* that under *Carr*, Taylor was entitled to habeas corpus relief *as to the capital murder count*. Respondent Norman also filed a proposed Conditional Writ of Habeas Corpus, which was later signed by the habeas court, wherein Respondent agreed that, as to the capital murder count, Taylor should be ordered discharged from his life without parole for 50-year sentence for capital murder unless the sentencing court held a new sentencing proceeding that comported with the procedures outlined by the Supreme Court of Missouri in *Carr*, but Respondent's custody of Taylor as to Taylor's other non-capital murder sentences were not to be affected by that order.²

² Because Taylor's remedy only went to the capital murder sentence, and not to the other non-capital murder sentences, contrary to Respondent's argument (Respondent's Brief at 20-21), there is an incentive to avoid escalating the crime and not commit other offenses.

Respondent asserts that it and the circuit court “got it wrong” in *Taylor*, and that Taylor received “a windfall” that Petitioner Allen should not receive (Respondent’s Brief at 22). Petitioner Allen believes that Respondent got it correct in *Taylor*, and that Petitioner Allen receiving the same remedy as Taylor is not a windfall, rather it is in accord with *Carr* and *Nathan I*.³

If *Carr*, *Willbanks*, *Nathan I*, and *Nathan II* are read together, this Court should conclude that in Missouri, mandatory sentences of life without parole or life without parole for 50 years are unconstitutional for defendants who were under the age of 18 at the time of the offense, even if there are other sentences ordered to run consecutively to the unconstitutional sentence; whereas, if each individual sentence is constitutional, a defendant cannot make a successful Eighth Amendment challenge by adding the minimum parole eligibility dates of consecutive sentences.

Petitioner is entitled to habeas corpus relief, and he must be resentenced under the procedures set out in *Carr*.

CONCLUSION

³ Subsequently, at resentencing, on October 12, 2018, Taylor’s life-without-parole for 50 year sentence was not found to be just and appropriate, and as a result he received a life (with parole) sentence under former first-degree murder (equivalent to the present second-degree murder), and the other two counts were not affected. *State v. Sammie Taylor*, No. 22821-03909B.

This Court should enter an order granting habeas corpus relief to petitioner, vacate Petitioner's conviction and sentence for capital murder, and remand the case for resentencing in Jackson County, Missouri, under *Carr, supra*.

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**CERTIFICATE OF COMPLIANCE AND
SERVICE**

I certify that the attached reply brief complies with Rule 84.06(b) and contains 2,027 words as counted by Microsoft Word, excluding the cover page, the signature block, and this certificate of compliance and service, which does not exceed the 7,750 words allowed for a reply brief; and that on this 29th day of October, 2018, an electronic copy of Appellant's Reply Brief was sent through the Missouri e-Filing System to opposing counsel of record.

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No. SD35655

In the
Missouri Court of Appeals
Southern District

ROBERT ALLEN,
Petitioner,

v.

JEFF NORMAN, WARDEN, SOUTH CENTRAL
CORRECTIONAL CENTER,
Respondent.

RESPONDENT'S BRIEF

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INTRODUCTION

This Court should not expand the Supreme Court's Eighth Amendment jurisprudence to create a new category of juvenile violent criminals eligible for early parole. Allen received a constitutional set of sentences for his multiple instances of criminal activity, and so, the Court should deny the petition for writ of habeas corpus.

STATEMENT OF FACTS

Robert W. Allen is guilty of brutally robbing and murdering an elderly couple for their social security checks. He resides at the South Central Correctional Center in Licking, Missouri because of the sentence and judgment that the Circuit Court of Jackson

County imposed for his crimes. A jury found Allen guilty of capital murder, first-degree murder, and armed criminal action for which the trial court imposed consecutive sentences of life imprisonment without probation or parole for fifty years, life imprisonment, and life imprisonment. *State v. Allen*, 710 S.W.2d 912, 913 (Mo. App. W.D. 1986).

When he was 16, Allen and an accomplice decided to rob an elderly couple because the couple was old and their social security checks had arrived in the mail. *Id.* at 914. The pair cut the telephone wires to the victims' house then went to the door and told the female victim their car had slid off the road. *Id.* Allen and his accomplice forced their way into the house and searched it for things to steal. *Id.* Allen clubbed the female victim three times with a night stick and his accomplice clubbed the male victim twice in the head with the butt of a knife. *Id.* They tied the victims up, laid the victims on their stomachs, and killed them by stabbing them in the back of the neck. *Id.* Allen and his accomplice stole cash totaling \$280.00, and each took \$140.00. *Id.*

Decades after the jury convicted him and the trial court sentenced him, Allen petitioned for habeas corpus in the Circuit Court of Texas County, Missouri. He alleged that his mandatory life without parole for fifty years' sentence violates the Eighth Amendment to the United States Constitution because it is cruel and unusual punishment to impose such a sentence who was under 18 years old at the time of the offense. Appendix at A3-A4. The Circuit Court of Texas County denied the petition. Appendix A3-A6.

The Circuit of Texas County found that the decision of the Missouri Supreme Court in *Willbanks v. Missouri Department of Corrections*, 522 S.W.3d 238 (Mo. 2017) dictates denial of a writ of habeas corpus to Allen. Appendix A4-A6. The court found that the Missouri Supreme Court in *Willbanks* emphasized the consecutive nature of the sentences and was cautious not to expand relevant United States Supreme Court precedents beyond the four corners of the opinions. *Id.* At A5-A6. The court also distinguished *State ex rel. Carr*, 527 S.W.3d 55 (Mo. 2017) by noting that the judge in *Carr* imposed the minimum sentence that he had discretion to impose, but here the judge found life without the possibility of parole for 50 years to be an insufficiently severe punishment, and imposed two consecutive life sentences to run after the first life sentence. Appendix A6.

Allen now asks this Court for a writ of habeas corpus, finding that his capital murder sentence is void and ordering that he have a new sentencing proceeding. Petitioner's Brief at A18. Allen also asks that if the trial court does not again sentence him to life without parole for 50 years, that the trial court also resentence him on the armed criminal action count. *Id.*

Summary of Argument

This petition concerns a juvenile offender who received multiple, consecutive terms in prison after he committed multiple, brutal crimes. The sentencing court imposed a sentence of life without parole for fifty years, followed by two consecutive terms of life imprisonment, for a series of crimes in

which Allen and an accomplice brutally murdered an elderly couple to steal their social security benefits.

In *Willbanks v. Missouri Department of Corrections*, 522 S.W.3d 238 (Mo. 2017), and *State v. Nathan*, 522 S.W.3d 881 (Mo. 2017), the Missouri Supreme Court held that, under the Supreme Court's precedents, the Eighth Amendment does not prohibit consecutive sentences even if, under the aggregate sentence, the juvenile will not be eligible for parole in his natural life. Allen committed murder and other violent crimes as a teenager, and he was sentenced to several consecutive terms in prison. Standing alone, or imposed concurrently with other sentences, a mandatory sentence of life without parole for fifty years would violate the Eighth Amendment for a single offense for an offender under age 18 under the Missouri Supreme Court's decision in *State ex rel Carr v. Wallace*, 527 S.W.3d 55 (Mo. 2017). But the analysis is different when, as here, a court has chosen to impose consecutive, additional sentences for each crime. In that circumstance, no individual sentence is analyzed on its own for whether it would be impermissible. It does not matter whether one part of the sentence would be impermissible standing alone. Instead, the aggregate sentence is analyzed under the framework in *Willbanks*.

In *Willbanks*, the Missouri Supreme Court upheld consecutive sentences that, added together, totaled life plus 355 years, with no collective parole eligibility during a normal human life expectancy. For a punishment categorically to violate the Eighth Amendment for a class of offenders there must be a national consensus that the punishment violates the Eighth Amendment, and there must be a no

penological justification that supports the punishment, making it disproportionate to the crime.

Allen, who has the burden of persuasion, has presented no argument of a national consensus against the punishment he received, and no penological justifications for a punishment such as this, when a court has imposed consecutive sentences for multiple violent felonies, are apparent. The denial of the writ is supported by the Missouri Supreme Court decision in *Willbanks* and by the *Carr* decision, in which the Missouri Supreme distinguished *Carr* because the three life without parole for fifty-year sentences were concurrent.

Willbanks controls this case, not *Carr* or *Nathan*. *Carr* does not concern a situation in which an offender receives multiple consecutive punishments for multiple crimes. Nor does the earlier decisions in *State v. Nathan*, 404 S.W.3d 253 (Mo. 2013) apply because it has been superseded. In that case, an offender was resentenced despite consecutive sentences but the Missouri Supreme Court decided the case years before the *Willbanks* decision, and that decision now controls.

Argument

The sentencing court did not violate the Eighth Amendment by imposing consecutive sentences of life without the possibility of parole for fifty years, life imprisonment, and life imprisonment on an offender who was under age eighteen when he committed two murders and armed because the reasons justifying punishment and the analysis of those reasons

is different in a case of multiple consecutive sentences for multiple violent felonies than it is for the offenses considered by the United States Supreme Court in *Graham*, *Miller*, and *Montgomery*, in that the reasoning in *Willbanks* controls this case.

The Eighth Amendment prohibits a State from inflicting cruel and unusual punishments. U.S. Const, amend, viii. The Supreme 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 homicide offense, *Miller v. Alabama*, 567 U.S. 460 (2012); and to prohibit a sentence of life in prison without parole for a juvenile offender convicted of a non-homicide offense, *Graham v. Florida*, 560 U.S. 48 (2010).

But the U.S. Supreme Court has never interpreted the Eighth Amendment to preclude consecutive sentences for multiple crimes that result in an aggregate term of imprisonment rendering the juvenile offender eligible for parole in old age or even past a normal life expectancy. Out of respect for the textual limits of the Eighth Amendment and the instructions of past precedents, this Court should not do so now. Unlike the sentences that the Supreme Court held unconstitutional in *Miller* and *Graham*, Allen did not receive sentence of life in prison without the possibility of parole for an individual crime or a solely receive a sentence of life without parole for fifty years for an individual crime. Instead, he received several consecutive sentences,

corresponding to the number and severity of his crimes, with an opportunity for parole in old age.

I. Because this case involves a categorical ban on a punishment for class of individuals the proper analysis is guided by *Graham v. Florida*.

In *Miller v. Alabama*, 567 U.S. 460 (2012), the United States Supreme Court held that the mandatory imposition of a sentence of life without parole for murder, an offender who was under 18 at the time of the murder, violates the ban on cruel and unusual punishment in the Eighth Amendment to the United States Constitution. The United States Supreme Court in *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016) held that *Miller* was a substantive categorical ban on a type of punishment for a class of offenders and was therefore retroactive to cases on collateral review.

The Missouri cases of *State ex rel. Carr v. Wallace*, 527 S.W.3d 55 (Mo. 2017), *Willbanks v. Missouri Department of Corrections*, 522 S.W. 3d 238 (2017), and *State v. Nathan*, 522 S.W.3d 881, 885 (Mo. 2017) have direct roots in *Miller*. In *Nathan* and *Willbanks*, the Missouri Supreme Court held that the Eighth Amendment does not prohibit the State from sentencing a juvenile offender who committed multiple crimes to multiple consecutive terms of imprisonment, with the effect that the offender is eligible for parole in old age. Neither *Miller* nor *Graham* affects sentences other than those of a single sentence of life without parole given for a single offense. The Missouri cases of *Carr* and *Willbanks*, like *Miller*, therefore are controlled by the

analysis in cases such as *Graham v. Florida*, 560 U.S. 48 (2010) that set out the requirements for a punishment to be categorically banned for a class of offenders.

Simply put, the analysis turns on whether a court imposed consecutive, additional sentences for each separate offense. In that circumstance, a reviewing court does not analyze any individual sentence for its constitutionality. Instead, the aggregate sentence is analyzed under the framework in the recent opinions in *Nathan* and *Willbanks*. For that reason, even if one part of the sentence would be impermissible standing alone, under the recent opinions in *Nathan* and *Willbanks*, the sentence still is analyzed as a whole.

In response. Petitioner asserts that *Carr* controls because it is a later opinion decided the same day as *Willbanks*. Pet. Br. 15. But this assertion fails to grapple with the reasoning in either opinion, which in any event were issued simultaneously and, in the Missouri Supreme Court’s view, do not conflict. Instead, the court issued them to work in harmony and illustrate the analysis proper to different situations. Because the petitioner’s situation is of multiple consecutive sentences for multiple crimes, his situation is the same as in *Willbanks*—multiple consecutive sentences for multiple crimes—and so *Willbanks*’s analysis governs.

Falling back, the petitioner argues that *Willbanks* does not apply because “none of those sentences individually were as lengthy as the capital murder sentences in *Carr* or in Petitioner’s cases.” Pet. Br. 15. He asserts that, if any individual sentence would

be invalid standing alone, then the entire aggregate sentence, no matter how many crimes the offender committed, would be invalid. Pet. Br. 15-16.

But this assertion claims a distinction between this case and prior precedents where in reality no difference exists. The Supreme Court has never held that its Eighth Amendment precedents invalidate a long aggregate sentence imposed for multiple crimes: it has “never applied that rationale to a justice system that recognizes multiple violent crimes deserve multiple punishments.” *State v. Nathan*, 522 S.W.3d 881, 892 (Mo. 2017).

Under this bright-line limit to the U.S. Supreme Court’s precedents, as the Missouri Supreme Court explained in *Nathan* and *Willbanks*, any time consecutive sentences are imposed, the court analyzes the aggregate sentence—and it makes no difference how long or short the individual sentences making up the aggregate are. A trial court has “authority to decide a juvenile’s sentence for multiple non-homicide offenses that, according to Missouri’s sentencing statutes, may justify lengthy consecutive terms of imprisonment.” *Willbanks*, 522 S.W.3d at 243. And in homicide cases, the Supreme Court’s precedent does not extend to multiple consecutive punishments for multiple crimes. As the Missouri Supreme Court held, “the Supreme Court in *Graham* did not address whether consecutive sentences imposed on a juvenile offender who committed multiple non-homicide offenses along with a homicide offense, are unconstitutional pursuant to the Eighth Amendment” which “is legally significant distinguishing factor from *Graham* and an additional

reason why Nathan's sentences do not run afoul of *Graham*." *Nathan*, 522 S.W.3d at 887.

II. *Graham v. Florida* holds that a categorical ban on a punishment for a class of offenders requires both a national consensus and the lack of penological justification for the punishment.

In *Graham v. Florida*, 560 U.S. 48 (2010) the United States Supreme Court set out the elements that establish that a punishment categorically violates the Eighth Amendment for a class of individuals across a broad range of crimes. The Court held that the first element is the existence of a national consensus that the punishment violates evolving standards of decency. *Id.* at 62.

The Court conducted two tests for national consensus. First, the Court counted the number of legislatures that authorize the punishment, and second the Court counted the number of times the punishment was imposed, the number of states that imposed the punishment, and the punishment's distribution within the group of states that imposed it. *Id.* at 62-67.

The Court found that although 37 states, the District of Columbia, and the United States all theoretically permit life without parole sentences for non-homicide offenders under age 18, only 11 states have imposed the sentence, only 123 offenders were serving such a sentence, and 77 of those are in the single state of Florida. *Id.* at 65-67. From this evidence the Court concluded that the sentencing practice is exceedingly rare and that a national

consensus has developed against it. The Court held that because a national consensus existed against the imposition of the penalty, the Court then had the duty to analyze the culpability of the offenders because of their crimes and characteristics and the severity of the punishment to determine whether the punishment for the class of individuals violates the Eighth Amendment. *Id.* at 67.

The *Graham* Court found that because there was a national consensus against the imposition of juvenile life without parole sentences for non-homicide offenses, the Court should do its own evaluation of whether the penalty violates the Eighth Amendment. *Id.* at 67. The Court held that offenders under age 18, *who did not kill or intend to kill*, the category the court was evaluating, and which excludes Allen, have twice diminished moral culpability compared to adult murders. *Id.* at 67. And the Court found that life without parole is the most severe noncapital punishment and is particularly severe for a juvenile. *Id.* at 70-71. Bearing those findings in mind, the Court evaluated the penalty for proportionally by determining if it was justified by the penological reasons of retribution, deterrence, incapacitation, or rehabilitation, because a sentence without a legitimate penological justification is necessarily disproportionate. *Id.* at 71-74.

The Court found that the retribution of a life without parole sentence on a juvenile non-homicide offender is disproportionate because of the severity of the punishment and the lessened culpability of juveniles. *Id.* at 71-72. The Court found that deterrence did not apply because juveniles often make impetuous and ill-considered decisions and are

less likely to consider a potential punishment, particularly when it is rarely imposed. *Id.* at 72. The Court found incapacitation does not justify the punishment because some offenders' criminal actions may be explained by transient immaturity as opposed to incorrigibility. *Id.* at 72-73. Finally, the Court found that rehabilitation does not justify the sentence, as life without parole by its nature makes rehabilitation irrelevant by abandoning return to society. *Id.* at 74. The Court held that the traditional reasons for punishment do not justify the penalty and that therefore the penalty is cruel and unusual punishment. *Id.* at 74-75.

But this analysis is necessarily different for a person who has committed multiple violent felonies for which a court has determined consecutive sentences are appropriate. Under *Willbanks* and *Nathan*, the Eighth Amendment does not prohibit consecutive sentences even if, under the aggregate sentence, the juvenile will not be eligible for parole in his natural life. And here, Allen committed murder and other violent crimes as a teenager, and he was sentenced to several consecutive terms in prison. In this circumstance, no individual part of his sentence is analyzed on its own for whether it would be impermissible. Instead, the aggregate sentence is analyzed under the framework in *Graham* and *Willbanks*, and under these precedents, it remains constitutional.

III. Allen does not plead or prove either a national consensus or a lack of any penological justification for his punishment, and the penalty imposed in his case is permissible under *Graham* and its progeny.

Allen does not plead that there is a national consensus against more severe punishment for offenders like himself who have committed multiple violent felonies, in his case two brutal murders and an armed criminal action. Nor does he show that no penological purpose supports longer parole ineligibility for offenders who commit multiple violent felonies under age 18, and are therefore determined by judge to be worthy of consecutive sentences, even if one of the sentences standing alone might run afoul of *Miller*.

And he cannot plausibly do so. Retribution, deterrence, and incapacitation are all logically served by increasing parole ineligibility for each offense committed, in a way they are not in *Graham*, 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, makes sentencing arbitrary as opposed to suited to the offender.

When an offender commits two or three, or ten violent felonies, he is more culpable than an offender who commits only one. Thus, an increase in parole ineligibility makes retributive sense. A court recognizes this by imposing consecutive penalties, as opposed to the default under Missouri law of concurrent sentences.

Similarly, an offender who commits a violent felony has an incentive not to commit another, or another ten, if consecutive sentences create a potential increase in parole ineligibility. But if there is no real additional sanction, no matter how many

violent felonies an offender commits after a certain point, then there is no incentive not to commit an unlimited number of felonies. So increases in parole ineligibility when consecutive sentences are imposed rationally serve both specific deterrence and general deterrence.

One can reasonably infer that an offender who commits multiple violent felonies may need to be kept separated from society longer than an offender who committed only one. Rational incapacitation thus is served by a sentence structure like Allen's.

All these justifications distinguish this case from *Graham*. And the Eighth Amendment ban on cruel and unusual punishment flows from the idea that punishment for crimes should be graduated and proportioned. *Miller v. Alabama*, 132 S.Ct. 2455, 2463 (2012). What Allen really asks for is a one size fits all formula that would arbitrarily treat the less culpable like the more culpable. That result would go against the principles of graduated and proportioned punishment that are at the core of the Eighth Amendment.

The Circuit Court of Texas County recognized this when it found that the Missouri Supreme Court in *Willbanks* emphasized the consecutive nature of the sentences and was cautious not to expand relevant United States Supreme Court precedents beyond the four corners of the opinions. Appendix at A5-A6. The court also distinguished *State ex rel. Carr*, 527 S.W.3d 55 (Mo. 2017) from with case by noting that the court in *Carr* imposed the minimum sentence that he could impose, but here the sentence found life without the possibility of parole for 50

years was an insufficiently severe punishment, and the court imposed two consecutive life sentences to run after the first life sentence. Appendix A6. That decision fits with a reasonable reading of *Willbanks*, as opposed to a cookie cutter approach that would treat offenders with different levels of culpability as if they are the same.

IV. The Missouri precedents of *Willbanks* and *Carr* show that Allen's punishment is constitutional.

The trial court in *Willbanks* sentenced the offender, who was under age 18 at the time of his offenses, which arose from one continuous course of conduct, to seven consecutive terms of imprisonment that totaled life imprisonment plus 355 years. *Willbanks* 522 S.W.3d at 240. *Willbanks* will not become parole eligible during a normal human life expectancy. *Id.* at 241 n. 4.

The Missouri Supreme Court found the aggregate sentence and parole ineligibility period in *Willbanks* to be constitutional. *Id.* at 241-46. A key part of the Missouri Supreme Court's analysis was that consideration of legitimate goals of penal sanctions such as retribution, deterrence, and incapacitation are different where a sentencing court has affirmatively chosen to impose consecutive sentences, as opposed to allowing the default result of concurrent sentences to occur. *Id.* at 243. That is a key distinction from the offender in *Carr*, who received concurrent sentences. In *Carr*, the Missouri Supreme Court explicitly distinguished *Willbanks* by noting that *Willbanks* involved consecutive sentences but all three of Carr's life without parole for fifty-

year sentences ran concurrently. *Carr* 527 S.W.3d at 61 n. 7.

Allen and an accomplice committed a particularly brutal home invasion double murder to steal the money from social security checks of an elderly couple. *State v. Allen*, 710 S.W.2d 912, 913-14 (Mo. App. E.D. 1986). The trial court imposed three consecutive life sentences for the two murders and one armed criminal action of which the jury convicted the offender. *Id.* at 913. As in *Willbanks*, the consideration of penal sanctions here is different than in a case of a sentence for a single offense or concurrent sentences. As in *Willbanks*, here there is a legitimate penological justification for the sentence structure that is permissible under the Eighth Amendment.

A sentencing regime that effectively 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 other crimes.

This concern for marginal deterrence is highly relevant for offenders, like Allen, who commit multiple serious acts of violence during a single criminal transaction. If the punishment for that criminal transaction will be effectively the same, the offender has no incentive to avoid escalating the transaction by adding, e.g., 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).

V. Because of *Willbanks*, the cases Allen cites do not really support his position

Allen argues that his case is controlled by *State ex rel. Carr*, 527 S.W.3d 55 (Mo. 2017), which argues dictates habeas relief here. Petitioner’s Brief at 9-14. But it does not. The key distinction is that all the sentences in *Carr* ran concurrently. In *Willbanks*, and here, the sentences all run consecutively. The analysis of the reasons for punishment, retribution, specific and general deterrence, and incapacitation are different where consecutive sentences for multiple offenses are imposed. In *Carr*, the judge imposed the minimum punishment that he could legally impose. But here, the sentencing court found life without parole for 50 years was not enough punishment, and imposed two additional consecutive life sentences. *Willbanks* should be read to teach that *Miller* and *Montgomery* do not extend to such a situation.

Allen cites seven circuit court cases in which a habeas petitioner received relief as supporting a grant of relief in his case. Petitioner's Brief at 10. But he only argues that one of those cases involved consecutive sentences. *Id.* at 16. Those cases do not bind this Court. And the offender who received relief, received a windfall. The respondent and the circuit court got it wrong in that case. That mistake does not entitle Allen to a windfall. *Willbanks* controls.

Allen cites two published pre-*Willbanks* cases *State v. Nathan*, 404 S.W.3d 253 (Mo. 2013) and *State v. Olivas*, 431 S.W. 3dd 575 (Mo. App. W.D. 2014) for the proposition that consecutive sentences do not matter in this context when one of the sentences standing alone would be impermissible. Petitioner's Brief at 16-17. *Olivas* is distinguishable from the current case in the defendant in *Olivas* had only one murder conviction and an armed criminal action sentence linked to that murder, not two murder convictions as here. But the key distinction here is that both those *Nathan* and *Olivas* were decided before *Willbanks*. *Willbanks* now controls. And because of *Willbanks* this Court should deny the petition.

CONCLUSION

This Court should deny the petition for habeas corpus.

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Certificate of Service and Compliance

I hereby certify that a true and correct copy of the foregoing was electronically filed by using the Case.Net system. Counsel for petitioner will receive a copy of the foregoing document through the Case.Net system this 23th day of October, 2017.

The undersigned also certifies that the foregoing brief complies with the limitations in Rule 84.06(b) and that the brief contains 4,749 words.

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