

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 II

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No. SD35655

**MISSOURI COURT OF APPEALS
Southern District**

IN RE: ROBERT W. ALLEN,

Petitioner,

vs.

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

Respondent.

PETITIONER'S BRIEF

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JURISDICTIONAL STATEMENT

Petitioner was convicted of one count of capital murder, § 565.001, one count of murder in the first degree, § 565.003, and one count of armed criminal action, § 571.015, in Jackson County, Missouri (Exhibits 1-2).¹ These offenses occurred on January 12, 1984, when Petitioner was 16 years old (Exhibits 1-5).

After a jury trial was held, Petitioner was sentenced to a mandatory term of life without parole (LWOP) for 50 years for the capital murder charge, and sentences of life imprisonment for the other two counts with the sentences ordered to run

¹ Statutory references are to RSMo 1978 unless otherwise indicated. Petitioner requests that this Court take judicial notice of its file and all its pleadings in this case. References to "Exhibits" are to the Exhibits attached to Petitioner's Petition for Writ of Habeas Corpus filed in this Court.

consecutively to each other (Exhibits 2-3). Thereafter, Petitioner filed a direct appeal, which was affirmed on appeal in *State v. Allen*, 710 S.W.2d 912 (Mo. App. W.D. 1986) (Exhibit 3).

Petitioner is currently serving his sentence in the custody of Jeff Norman, Warden, South Central Correctional Center, Texas County, Missouri. Jurisdiction and venue of this petition lies with this Court. Section 477.060. Previously, Petition filed a writ of habeas corpus in the Texas County Circuit Court, No. 17TE-CC00425, as required by Rule 91.02(a); that petition was denied. On August 20, 2018, Petitioner filed a Petition for Writ of Habeas Corpus with this Court. On August 29, 2018, this Court determined that a writ of habeas corpus should be issued, ordered Respondent to file an answer by September 10, 2018, and ordered briefs to be filed in accordance with Supreme Court rule 84.24(h).

This Court has jurisdiction to “issue and determine original remedial writs,” including writs of habeas corpus under Art. V. § 4, subsection 1, of the Missouri Constitution. This appeal involves no issues reserved to the exclusive appellate jurisdiction of the Missouri Supreme Court; thus, jurisdiction properly lies in this Court. Art. V, § 3 Mo. Const., (amended, 1982); § 477.060, RSMo 2000.

STATEMENT OF FACTS

Petitioner was convicted of one count of capital murder, § 565.001, one count of murder in the first degree, § 565.003 (felony murder), and one count of armed criminal action, § 571.015, in Jackson County,

Missouri (Exhibits 1-2). These offenses occurred on January 12, 1984, when Petitioner was sixteen years old (DOB: 8/7/1967) (Exhibits 1-5).

After a jury trial was held, Petitioner was sentenced to a mandatory term of life without parole (LWOP) for 50 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 (Exhibits 2-3). Thereafter, Petitioner filed a direct appeal, which was affirmed on appeal in *State v. Allen*, 710 S.W.2d 912 (Mo. App. W.D. 1986) (Exhibit 3).

In 2017, the Supreme Court of Missouri granted habeas corpus relief in *State ex rel. Carry v. Wallace*, 527 S.W.3d 55 (Mo. banc 2017), holding that the Eighth Amendment prohibits a juvenile defendant to be sentenced to LWOP for 50 years under a mandatory sentencing scheme that does not afford the sentencer an opportunity to consider the juvenile's age, maturity, limited control over his environment, the transient characteristics attendant to youth, or his capacity for rehabilitation. *Carr*, 527 S.W.3d at 57.

Subsequently, Petitioner, who was serving his sentence of LWOP for 50 years for capital murder in the custody of Jeff Norman, Warden, South Central Correctional Center, Texas County, Missouri, filed a petition for writ of habeas corpus in the Texas County Circuit Court, No. 17TE-CC00425; that petition was denied by that court (Exhibit No. 6).

On August 20, 2018, Petitioner filed a Petition for Writ of Habeas Corpus with this Court. On August

29, 2018, this Court determined that a writ of habeas corpus be issued, and ordered Respondent Jeff Norman to file an answer with this Court on or before September 10, 2018, which Respondent did, and this Court ordered briefs to be filed in accordance with Supreme Court Rule 84.24(h).

Any further facts necessary for the disposition of this case will be set out in the argument portion of this brief.

POINT RELIED ON

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*,² the 8th and 14th Amendment 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

² *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).

unconstitutional capital murder sentence does not change result, because as illustrated by the 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 often sentences ordered to run consecutively to an unconstitutional sentence, the inmate is still entitled to resentencing as to the unconstitutional sentence.

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);

Miller v. Alabama, 567 U.S._, S.Ct. 2455 (2012);

Edwards v. Steele, 533 S.W.3d 238 (Mo. App. E.D. 2017):

U.S. Const. Amend VIII an XIV;

Article I, § 21, Mo. Const.;

Article V, § 4, Mo. Const.;

§§ 565.001, 565.003, 565.004, 565.008, and 571.015, RSMo (1978).

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*,³ 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 sentences does not change result, because as illustrated by the 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.

◆
Introduction:

In *State ex rel. Carr v. Wallace*, 527 S.W.3d 55, 57 (Mo. banc 2017), the Supreme Court of Missouri held that the Eighth Amendment prohibits a juvenile

³ *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).

defendant to be sentenced to life without the possibility of parole (LWOP) for 50 years under mandatory capital murder sentencing scheme that did not afford the sentencer an opportunity to consider his age, maturity, limited control over his environment, the transient characteristics attendance to youth, or his capacity for rehabilitation. As a result, Carr was granted habeas corpus relief.

Petitioner's case is controlled by *Carr*. Both Carr and Petitioner were charged under the former capital murder statute, section 565.001. Both Carr and Petitioner received sentences of LWOP for 50 years. Both Carr and Petitioner were less than 18 years old at the time the capital murders were committed.⁴

This Court is constitutionally bound to follow the last controlling decision of the Supreme Court of Missouri. *State v. Spencer*, 307 S.W.3d 203, 205 (Mo. App. S.D. 2010). Thus, Petitioner, like Carr, is entitled to habeas corpus relief, and he must be resentenced by a jury, unless he waives it, under the procedure set out in *Carr*.

Not only is Petitioner similarly situated to the habeas petitioner in *Carr*, other than Petitioner, every other juvenile who received a sentence of LWOP for 50 years has received habeas corpus relief. See, *Hardy Bivens v. Jay Cassady*, No. 16AC-CC00181-01, *William J. Gephart v. Jay Cassady*, No. 17AC-CC00572, *Donnell White v. Ronda Pash*, No.

⁴ For Eighth Amendment purposes, 18 years of age is the significant age. See, *Edwards v. Steele*, 533 S.W.3d 238 (Mo. App. E.D. 2017); *Roper v. Simmons*, 543 U.S. 551, 574 (2005).

17DK-CC00176, *Robin Greathouse v. Jason Lewis*, No. 17MI-CV00672, *Sammie D. Taylor v. Jeff Norman*, No. 17TE-CC00476, *Jeffery Scott v. State of Missouri et al.*, No. 16AC-CC00312, and *Edwards v. Steele*, 533 S.W.3d 238 (Mo. App. E.D. 2017). Petitioner should receive the same relief as these other petitioners.

Standard for Obtaining Habeas Relief:

Article V, § 4 of the Missouri Constitution vests this Court with the authority “to issue and determine original remedial writs.” Including writs of habeas corpus. *State ex rel. Zinna v. Steele*, 301 S.W.3d 510, 513 (Mo. banc 2010). Habeas corpus relief is the final judicial inquiry into the validity of a criminal conviction and functions to relieve prisoners whose convictions violate fundamental fairness. *Carr*, 527 S.W.3d at 59. A prisoner is entitled to a writ of habeas corpus when the prisoner is restrained of his or her liberty in violation of the constitution or laws of the state or federal government. *Id.* Questions of law, including constitutional challenges, are reviewed *de novo*. *Earth Island Inst. v. Union Elec. Co.*, 456 S.W.3d 27, 32 (Mo. banc 2015).

Relevant facts:

Petitioner was convicted of one count of capital murder, § 565.001, one count of murder in the first degree, § 565.003 (felony murder), and one count of

armed criminal action, § 571.015, in Jackson County, Missouri (Exhibits 1-2). These offenses occurred on January 12, 1984, when Petitioner was sixteen years old (DOB: 8/7/1967) (Exhibits 1-5).

After a jury trial was held, Petitioner was sentenced to a mandatory term of LWOP for 50 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 (Exhibits 2-3). Thereafter, Petitioner filed a direct appeal, which was affirmed on appeal in *State v. Allen*, 710 S.W.2d 912 (Mo. App. W.D. 1986) (Exhibit 3).

In 2017, the Supreme Court of Missouri granted habeas corpus relief in *Carr, supra*, holding that the Eighth Amendment prohibits a juvenile defendant from being sentenced to LWOP for 50 years under a mandatory sentencing scheme that does not afford the sentencer an opportunity to consider his age, maturity, limited control over his environment, the transient characteristics attendant to youth, or his capacity for rehabilitation, *Carr*, 527 S.W.3d at 57.

Subsequently, Petitioner, who was serving his sentence of LWOP for 50 years for capital murder in the custody of Jeff Norman, Warden, South Central Correctional Center, Texas County, Missouri, filed a petition for writ of habeas corpus in the Texas County Circuit Court, No. 17TE-CC00425; that petition was denied by that court (Exhibit No. 6).

On August 20, 2018, Petitioner for a Petition for Writ of Habeas Corpus with this Court. On August 29, 2018, this Court determined that a writ of habeas

corpus be issued, and order Respondent Jeff Norman to file an answer with this Court on or before September 10, 2018, which Respondent did, and this Court ordered briefs to be filed in accordance with Supreme Court Rule 84.24(h).

Constitutional Provisions Involved:

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

Similarly, Article I, § 21 of the Missouri Constitution provides that cruel and unusual punishment shall not be inflicted.

The Fourteenth Amendment to the U.S. constitution provides, “...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.”⁵

Petitioner’s sentence of life without parole for 50 years is unconstitutional under State ex rel. Carr v. Wallace, 527 S.W.3d 55 (Mo. banc 2017):

⁵ The Eighth Amendment’s guarantee against cruel and unusual punishments is made applicable against the States through the Fourteenth Amendment. *Graham v. Florida*, 560 U.S. 48, 53 (2010).

Jason Carr was charged with three counts of capital murder under § 565.001. *Carr*, 527 S.W.3d at 56. At the time of the offenses, Carr was 16 years old. *Id.* Also at that time, capital murder could only be punished by death or LWOP for 50 years. § 565.008.1 *Id.* at 56-57, 60.⁶

A jury convicted Carr of the three counts of capital murder. *Id.* at 58. Following the jury's verdict, the trial court sentenced him to three concurrent sentences of LWOP for 50 years. *Id.* The court of appeals affirmed his convictions on direct appeal, and his claim of ineffective assistance of counsel was also denied. *Id.*

Carr filed a petition for a writ of habeas corpus in the Supreme Court of Missouri after *Miller v. Alabama*, 567 U.S. 460 (2012). *Carr*, 527 S.W.3d at 58. Carr contended that his sentences violated the Eighth Amendment because, following the decision in *Miller*, juvenile offenders cannot be sentenced to LWOP under mandatory sentencing schemes that preclude consideration of the offender's youth and attendant circumstances. *Id.* at 58-59.

While Carr's habeas petition was pending, the Supreme Court of the United States held that *Miller's* substantive rule must be applied retroactively on collateral review of a juvenile offender's mandatory sentence of LWOP. *Montgomery v. Louisiana*, –U.S.–, 136 S.Ct. 718, 736 (2016).

⁶ Later, the Supreme Court of the United States invalidated the death penalty for juveniles in *Roper v. Simmons*, 543 U.S. 551, 578-79 (2005).

Carr had not raised his Eighth Amendment claim on direct review or in a post-conviction proceeding. *Carr* 527 S.W.3d at 59. Nevertheless, the Supreme Court of Missouri in *Carr* held that because Carr was seeking retroactive application of *Miller*'s substantive rule of constitutional law to the facts and circumstances of his case, Carr had cause for failing to previously raise his constitutional claims, and he could seek habeas corpus relief on his claims that his sentences were imposed in violation of the Eighth Amendment pursuant to *Miller*, *Id.*

Ultimately, the *Carr* Court held that *Miller* controlled because Carr was sentenced to the harshest penalty other than death available 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 was LWOP for 50 years. *Id.* at 60-62. As a result, Carr's sentences were imposed 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. *Id.*

The Court granted habeas relief because Carr's sentences of LWOP for 50 years violated the Eighth Amendment, and he was entitled to be resentenced so his youth and other attendant circumstances surrounding his offense could be taken into consideration to ensure he would not be forced to

serve a disproportionate sentence in violation of the Eighth Amendment. *Id.* In doing so, the Court ordered that Carr must be resentenced under the procedures set out in *State v. Hart*, 404 S.W.3d 232 (Mo. banc 2013). *Carr*, 527 S.W.3d at 62-63.⁷

Petitioner's case is controlled by *Carr*. Petitioner, like Carr, was less than 18 years old at the time the capital murder was committed, and he received the same sentence for capital murder that Carr received for his capital offenses – LWOP for 50 years. Thus, Petitioner, like Carr is entitled to habeas corpus relief, and he must be resentenced under the procedures set out in *Carr* and *Hart*. *Carr*, 527 S.W.3d at 62-63.

Willbanks v. MDOC is not controlling

Respondent's Answer (Answer) pleads that “[t]his Court should not expand the Supreme Court's Eighth Amendment jurisprudence to create a new category of juvenile violent criminals eligible for early parole.” (Answer, pg. 1). Petitioner is not asking this Court to expand anything; Petitioner is requesting that this Court follow the Supreme Court's opinion in *Carr*, *supra*. This Court is constitutionally bound to follow the last controlling decision of the Supreme Court of Missouri. *State v. Spencer*, 307 S.W.3d 203, 205 (Mo. App. S.D. 2010).

In support of Respondent's argument, Respondent, following the lead of the Texas County

⁷ After remand, Carr was sentenced to three concurrent 50-year prison sentences for the lesser included offense of second-degree murder, which was permissible under the procedure in *Hart*, *supra*. *State v. Carr*, No. 44R068300181.

Circuit Court in this case, erroneously relies upon *Willbanks v. Missouri Department of Corrections*, 522 S.W.3d 238 (Mo. banc 2017) in arguing that Petitioner should be denied relief. *Willbanks* is not controlling. Instead, *Carr*, which was decided on the same day as *Willbanks*, is controlling.

Willbanks does not control because, although it involved consecutive sentences, none of those sentences individually were as lengthy as the capital murder sentence in *Carr* or in Petitioner's case; in other words, none of the sentences involved 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. The same sentence that *Carr* received on his three capital murder sentences (LWOP for 50 years on each sentence) is the same sentence that Petitioner received on his capital murder sentence and thus *that* sentence is unconstitutional under *Carr*. *Carr* held that Miller controlled that case because *Carr* was sentenced to the harshest penalty for capital murder other than death available under a mandatory sentencing scheme. *Carr*, 527 S.W.3d at 60. Petitioner received the same mandatory sentence for his capital murder charge; thus, *Carr*, not *Willbanks*, controls.

Willbanks, in contrast to *Carr*, 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 does not violate the Eighth Amendment when *none* of the sentences standing alone is unconstitutional. *Willbanks* did *not* hold, as

contended by Respondent, that an unconstitutional sentence, such as LWOP for 50 years, can be converted into a constitutional one as long as another sentence is ordered to run consecutively to the unconstitutional sentence.

Further, what the circuit court ruled, and Respondent's position in this case argues, 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).

Taylor had been sentenced to a mandatory term of LWOP 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 sentences 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's 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 LWOP for 50-year sentence for capital murder within 180 days of that order unless the sentencing court held a new sentence 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. Petitioner should have gotten the same relief that Taylor received.

Respondent argues, contrary to its position in *Taylor*, that the "analysis is different when, as here, a court has chosen to impose consecutive, additional sentences," and that "[i]t does not matter whether one part of the sentence would be impermissible standing alone." (Answer. pg. 3).

Respondent's argument is not only contrary to its position in *Taylor*, but it is also contrary to 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 mandatory LWOP sentence constituted cruel and unusual punishment under *Miller*).

In *Nathan I*, the trial court sentenced Nathan to LWOP for first-degree murder, and it also sentenced Nathan 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; it also sentenced Nathan to eleven life sentences (with parole) for armed criminal action, with these sentences to be served concurrently with the other sentences and to each other. *Nathan I*, 404 S.W.3d at 256-57.

Although Nathan's LWOP sentence 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 re-sentenced 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 standing alone, the defendant is entitled to be resentenced as to the unconstitutional sentence even if there are other sentences running consecutively to it. *In accord, State v. Olivas*, 431 S.W.3d 575 (Mo. App. W.D. 2014), where the defendant had been given consecutive sentences of LWOP 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 LWOP sentence was unconstitutional under *Miller* and *Hart*.

Conclusion

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*, and *Hart, supra*. Also see, *Edwards, supra* (habeas relief granted, and Petitioner is entitled to be resentenced in accordance with the procedure outline in *Carr* and *Hart*).

Petitioner, like Carr, is entitled to habeas corpus relief, and he must be resentenced under the procedures set out in *Carr* and *Hart*. *Carr*, 527 S.W.3d at 62-63. If, after considering all the circumstances, the sentencer is not persuaded that a sentence of LWOP for 50 years is just appropriate, Petitioner cannot receive that sentence. *Id.* Instead,

the trial court must declare § 565.008 void as applied to Petitioner on the ground that it does not provide a constitutionally valid punishment for his offense. *Id.* If § 565.008 is void, the trial court must vacate the jury's verdict finding Petitioner guilty of capital murder and enter a new finding that he is guilty of murder in the second degree under § 565.004. *Id.* After the court enters the finding that Petitioner is guilty of murder in the second degree, the sentencer must determine his sentence based on the statutory range applicable to this offense, which under § 565.008.2, RSMo 1978, is "imprisonment by the division of corrections for a term of not less than ten years." *Id.*

Additionally, if, on remand, the trial court is required to vacate the sentencer's verdict that Petitioner is guilty of capital murder on the ground that § 565.008 is void, the trial court also must vacate the jury's finding that Petitioner was guilty of the armed criminal action charge predicated on his being found guilty of capital murder. *Nathan I*, 404 S.W.3d at 271, n. 11. The trial court then must enter a new finding that Petitioner is guilty of armed criminal action in connection with his guilt on the second-degree murder charge. *Id.* Petitioner then will be sentenced for the new armed criminal action charge at the same time and in the same manner as he is sentenced for the new second-degree murder charge. *Id.*

CONCLUSION

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*, and *Hart, supra*. Also see, *Edwards, supra* (habeas relief granted, and Petitioner is entitled to be resentenced in accordance with the procedure outline in *Carr* and *Hart*).

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE
AND SERVICE**

I, Craig A. Johnston, hereby certify: The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word 2010, in Times New Roman size 13 point font, and includes the information required by Rule 55.03. According to the word-count function of Microsoft Word, excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 4,550 words, which does not exceed the 31,000 words allowed for an appellant's brief. And, on this 5th day of October,

2018, electronic copies of Petitioner's Brief, and Petitioner's Brief Appendix, were sent through the Missouri e-Filing System to opposing counsel of record.

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

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

**ANSWER TO PETITION FOR HABEAS
CORPUS AND RETURN TO PRELIMINARY
WRIT**

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. Here, Allen received a constitutional set of sentences for his criminal activity, and so, the Court should deny the petition for writ of habeas corpus.

Statement of Custody and Parties

Robert W. Allen resides at the South Central Correctional Center in Licking, Missouri, because of the sentence and judgment of the Circuit Court of Jackson County. A jury found Allen guilty of capital murder, first-degree murder, and armed criminal action for which the 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). Warden Jeff Norman is the respondent.

Statement of Exhibits

Respondent's Exhibit 1 is an offender search result showing Allen's place of confinement.

Respondent's Exhibit 2 is a Department of Corrections record showing Allen's sentence structure.

Respondent's Exhibit 3 is Allen's judgment of conviction and sentence.

Summary of Argument

This petition concerns a juvenile offender who was sentenced to multiple, consecutive terms in prison for committing multiple 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* and *Nathan*, 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. Here, 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 *Carr* decision. But the analysis is different when, as here, a court has chosen to impose consecutive, additional sentences. 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. In order 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 penological justifications for a punishment such as this, when a court has imposed consecutive sentences for multiple violent felonies, is 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 Court distinguished *Carr* because

the three life without parole for fifty year sentences were concurrent.

Analysis

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, on 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.

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 in light of their crimes and characteristics and the severity of the punishment to determine if 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 must 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 murderers. *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 proportionality 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 was not applicable 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 be contrary to the idea of graduated and proportioned punishment that is at the core of the Eighth Amendment.

IV. The Missouri precedents of *Willbanks* and *Carr* support the conclusion 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.

Here, Allen and an accomplice committed a particularly brutal home invasion double murder in an attempt 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).

Conclusion

This Court should deny the petition for habeas corpus with prejudice without further judicial proceedings.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was electronically filed by using the Case.Net system this 10th day of September 2018. Counsel for Allen should be served electronically with a copy.

/s/ Michael J. Spillane

MICHAEL J. SPILLANE
Assistant Attorney General

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

In Re ROBERT ALLEN,)
)
Petitioner,)
) Case No. _____
vs.) Texas Co. No
) 17TE-CC00425
JEFF NORMAN, Warden)
South Central)
Correctional Center)
Respondent.

**PETITION FOR A WRIT OF HABEAS CORPUS
AND SUGGESTIONS IN SUPPORT OF THE
PETITION**

COMES NOW, petitioner, Robert W. Allen, a Missouri prisoner in respondent's custody, and petitions this Court, pursuant to Rule 91, for a Writ of Habeas Corpus vacating his conviction for the offense of capital murder and his sentence of life without the possibility of parole LWOP for 50 years. Petitioner is similarly situated to the habeas petitioner in *State ex rel. Carr v. Wallace*, 527 S.W.3d 55 (Mo. banc 2017), and he is entitled to the same relief as Mr. Carr – a remand for resentencing that comports with the procedures outline by the Missouri Supreme Court in *Carr* and *State v. Hart*, 404 S.W.3d 232 (Mo. banc 2013).

Other than Mr. Allen, every other juvenile who received a sentence of LWOP for 50 years has

received habeas corpus relief. See, *Hardy Bivens v. Jay Cassady*, No. 16AC-CC00181-01, *William J. Gephardt v. Jay Cassady*, No. 17AC-CC00572, *Donnell White v. Ronda Pash*, No. 17DK-CC00176, *Robin Greathouse v. Jason Lewis*, No. 17MI-CV00672, *Sammie D. Taylor v. Jeff Norman*, No. 17TE-CC00476, *Jeffery Scott v. State of Missouri et. al.*, No. 16AC-CC00312, and *Edwards v. Steele*, 533 S.W.3d 238 (Mo. App. E.D. 2017). In support of this petition, Petitioner states as follows:

I. Jurisdictional Statement

Petitioner is currently serving his sentence of LWOP for 50 years for capital murder in the custody of Jeff Norman, Warden, South Central Correctional Center in Licking, Texas County, Missouri. Jurisdiction and venue of this petition lies with this court. Section 477.060. Previously, Petition filed a writ of habeas corpus in the Texas County Circuit Court No. 17TE-CC00425 as required by Rule 91.02(a); that petition was denied by that court. Pursuant to Rule 91.04(a)(4), petitioner also states that no petition for relief raising the issues brought herein has been sought in any higher court.

II. Procedural background

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 (Exhibits 1–2). These shooting offenses occurred on

January 12, 1984, when Petitioner was sixteen years old (DOB: 8/7/1967) (Exhibits 1–5).

After a jury trial was held, Petitioner was sentenced to a mandatory term of LWOP for 50 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 (Exhibits 2–3). Thereafter, Petitioner filed a direct appeal, which was affirmed on appeal in *State v. Allen*, 710 S.W.2d 912 (Mo. App. W.D. 1986) (Exhibit 3).

Because Missouri's former capital murder statute made no exception for juvenile offenders, Petitioner's mandatory sentence of LWOP for 50 years for that offense, without consideration of Petitioner's youth and attendant circumstances, is invalid and unconstitutional in violation of the Eighth Amendment in light of the recent decisions by the Supreme Court of the United States in *Miller v. Alabama*, 567 U.S. 460 (2012) and *Montgomery v. Louisiana*, — U.S. —, 136 S.Ct. 718, 736 (2016), as well as the decision by the Supreme Court of Missouri in *Carr*. Also see, *Edwards v. Steele*, *supra*. (habeas relief granted; Petitioner's sentence violated the Eighth Amendment in accordance with *Carr* and *Miller*; and Petitioner was entitled to be resentenced). Thus, Petitioner's conviction and sentence for capital murder should be overturned and Petitioner should receive a resentencing hearing in Jackson County, Missouri pursuant to *Carr*, *supra*, and *Hart*, *supra*.

III. This case is controlled by State ex rel. Carr v. Wallace.

Jason Carr was convicted of three counts of capital murder under § 565.001, RSMo 1978. *Carr*, 527 S.W.3d at 56. At the time of the offenses, Mr. Carr was 16 years old. *Id.* Also at the time, capital murder could only be punished by death or a LWOP for 50 years. § 565.008.1, RSMo 1978. *Id.* at 56–57, 60. The state did not seek the death penalty. *Id.* at 58. Therefore, if convicted, the only eligible sentence Mr. Carr could receive LWOP for 50 years.¹ *Id.*

A jury convicted Mr. Carr of three counts of capital murder. *Id.* Following the jury's verdict, the trial court sentenced him to three concurrent sentences of LWOP for 50 years. *Id.* The court of appeals affirmed his convictions on direct appeal, and his claim of ineffective assistance of counsel was also denied. *Id.*

Mr. Carr filed a petition for a writ of habeas corpus in the Supreme Court of Missouri after the Supreme Court of the United States' decision in *Miller*. *Id.* Mr. Carr contended that his sentences violated the Eighth Amendment because, following the decision in *Miller*, juvenile offenders cannot be sentenced to life without parole pursuant to mandatory sentencing schemes that preclude consideration of the offender's youth and attendant's circumstances. *Id.* at 58–59.

¹ The alternative punishment available under the capital murder statute was LWOP for 50 years, thereby making it the second harshest penalty that could be imposed on a homicide offender. § 565.008. Had the death penalty been sought and imposed, this penalty would have been invalidated following *Roper v. Simmons*, 543 U.S. 551, 578–79 (2005) (Eighth Amendment prohibits the imposition of the death penalty on defendants who commit murder at age 17 or younger).

While Mr. Carr's habeas petition was pending, the Supreme Court of the United States held that *Miller*'s substantive rule must be applied retroactively on collateral review of a juvenile offender's mandatory sentence of life without parole. *Montgomery*, — U.S. —, 136 S.Ct. at 736. Although prisoners are generally required to raise constitutional claims on direct appeal or in a post-conviction proceeding, a defendant has cause for failing to raise such claims where a new constitutional rule may be applied retroactively on collateral review. *State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 401 (Mo. banc 2003).

Mr. Carr did not raise his Eighth Amendment claims on direct review or in a post-conviction proceeding. *Carr*, 527 S.W.3d at 59. Nevertheless, the Supreme Court of Missouri in *Carr*, following *Montgomery*, held that because Mr. Carr was seeking retroactive application of *Miller*'s substantive rule of constitutional law to the facts and circumstances of his case, Mr. Carr had cause for failing to previously raise his constitutional claims, and he could seek habeas corpus relief on his claims that his sentences were imposed in violation of the Eighth Amendment pursuant to *Miller*. *Id.* at 59.

Ultimately, the Supreme Court of Missouri held that *Miller* controlled because Mr. Carr was sentenced to the harshest penalty other than death available under a mandatory sentencing scheme that afforded the sentence no opportunity to consider his age, maturity, limited control over his environment, the transient characteristics attendant to youth, or his capacity for

rehabilitation. *Id.* at 60–62. As a result, Mr. Carr’s sentences were imposed in direct contravention of the foundation principle that imposition of a state’s most severe penalties on juvenile offenders cannot proceed as though they were not children. *Id.*

Consequently, the Court held that Mr. Carr’s sentences of LWOP for 50 years violated the Eighth Amendment, and that he must be resentenced so his youth and other attendant circumstances surrounding his offense can be taken into consideration to ensure he will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment. *Id.* The Court granted habeas relief. *Id.*

In doing so, the Court ordered that Mr. Carr must be resentenced under the procedures set out in *Hart*. *Id.* at 62–63. First, the sentencer must consider whether Mr. Carr’s sentences of LWOP for 50 years are just and appropriate considering his youth, maturity, and other *Miller* factors. *Id.* 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 LWOP for 50 years unless it is persuaded beyond a reasonable doubt that this sentence is just and appropriate under all circumstances. *Id.* The jury must also be instructed, before it begins its deliberations, that if it is not persuaded that LWOP for 50 years is a just and appropriate sentence under all circumstances of the case, additional instructions concerning applicable punishments will be given at that time. *Id.*

If, after considering all the circumstances, the sentence finds Mr. Carr qualifies for LWOP 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 § 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 § 565.008 is void, the trial court must vacate the jury's verdict finding Mr. Carr guilty of capital murder and enter a new finding that he is guilty of murder in the second degree under § 565.004. *Id.* After the trial court enters the finding that Mr. Carr is guilty of murder in the second degree, the sentencer must determine his sentence based on the statutory range applicable to these offenses. *Id.* Under § 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 on 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.* These additional instructions should not be submitted to the sentencer—unless and until the sentencer has deliberated and rejected sentencing the juvenile offender to LWOP 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.*

Petitioner's case is controlled by *Carr*. Petitioner, like Mr. Carr, was less than eighteen years old at the time the capital murder was committed.² Thus, Petitioner, like Mr. Carr, is entitled to habeas corpus relief, and he must be resentenced so his youth and other attendant circumstances surrounding his offense can be taken into consideration to ensure he will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment.

If, after considering all the circumstances, the sentencer is not persuaded that a sentence of LWOP for 50 years is just and appropriate, Petitioner cannot receive that sentence. Instead, the trial court must declare § 565.008 void as applied to Petitioner on the ground that it does not provide a constitutionally valid punishment for his offense. If § 565.008 is void, the trial court must vacate the jury's verdict finding Petitioner guilty of capital murder and enter a new finding that he is guilty of murder in the second degree under § 565.004. After the court enters the finding that Petitioner is guilty of murder in the second degree, the sentencer must determine his sentence based on the statutory range applicable to this offense, which under § 565.008.2, RSMo 1978, is "imprisonment by the division of corrections for a term of not less than ten years."

Additionally, if, on remand, the trial court is required to vacate the sentencer's verdict that Petitioner is guilty of first-degree murder on the ground that § 565.020 is void, the trial court also

² For Eighth Amendment purposes, eighteen years of age is the significant age. See, *Edwards, supra*; *Roper*, 543 U.S. at 574.

must vacate the jury's finding that Petitioner was guilty of the armed criminal action charge predicated on his being found guilty of first-degree murder. *State v. Nathan*, 404 S.W.3d 253, 271, n. 11 (Mo. banc 2013). The trial court then must enter a new finding that Petitioner is guilty of armed criminal action in connection with his guilt on the second-degree murder charge. *Id.* Petitioner then will be sentenced for the new armed criminal action charge at the same time and in the same manner as he is sentenced for the new second-degree murder charge. *Id.*

IV. Willbanks v. MDOC is not controlling

The Texas County Circuit Court in this case erroneously relied upon *Willbanks v. Missouri Department of Corrections*, 522 S.W.3d 238 (Mo. banc 2017) in denying relief (Exhibit 6). *Willbanks* is not controlling. Instead, *Carr*, which was decided on the same day as *Willbanks*, is controlling.

The Texas County Circuit Court ruled that:

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 cases, 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 without one another. By necessity, then, the sentencer found after considering all relevant facts that the mandatory minimum for capital punishment of no parole for 50 years was not enough punishment.

This ruling is legally, and factually, incorrect because the initial sentence in both *Carr* and Mr. Allen's cases were juries, and those sentencers were unable to recommend lower sentences than LWOP for 50 years for the capital murder counts based on the mitigating factors of youth because of the mandatory minimum required by the capital murder statute. See *Carr*, 527 S.W.3d at 61 (“*Yet the jury was afforded no opportunity to consider* his age, maturity, limited control over his environment, the transient characteristics attendant to youth, or his capacity for rehabilitation when assessing whether the punishment of life without the possibility of parole for 50 years proportionately punished him as a juvenile offender,” emphasis added). That the trial courts in both *Carr* and Mr. Allen's cases, after jury verdicts, later had options to order other sentences concurrent or consecutive to an unconstitutional sentence cannot convert an unconstitutional sentence to a constitutional one based on the fact that the judge wants the defendant to serve other sentences consecutively.³

³ Additionally, as in *Carr*, there was no evidence that judge likewise considered the mitigating factors of youth, the

Willbanks does not control because it involved non-homicide offenses, and thus was governed by *Graham v. Florida*, 560 U.S. 48 (2010). It also involved seven consecutive sentences, none of which individually were as lengthy as the capital murder sentence in *Carr* or in Petitioner's case. 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 case.

In contrast, *Carr*, is a homicide case, and was thus governed by *Miller v. Alabama*, 567 U.S. (2012) rather than *Graham*.⁴ Similarly, Petitioner Allen's case also is a homicide case and is thus governed by *Carr* not *Willbanks*. Further, the same sentence that Mr. Carr received on his three capital murder sentences (LWOP for 50 years on each sentence) is the same sentence that Petitioner received on his capital murder sentence and thus *that* sentence is unconstitutional under *Carr*.⁵ *Carr* held that *Miller* controlled that case because Mr. Carr was sentenced to the harshest penalty for capital murder other than death available under a mandatory sentencing scheme. *Carr v.*, 527 S.W.3d at 60. Mr. Allen received the same

attendant characteristics of youth, the circumstances of the offense or the potential for rehabilitation when finally pronouncing sentence. *Carr*, 527 S.W.3d at 62–63.

⁴ *Graham* was not even cited in the *Carr* opinion.

⁵ Mr. Carr's three concurrent sentences for capital murder had a lower mandatory minimum sentence (parole ineligibility for 50 years until Mr. Carr was 66 years old) than Petitioner, who was the same age as Mr. Carr when Mr. Carr committed his capital offenses.

mandatory sentence for his capital murder charge; thus, *Carr* controls.

Willbanks, in contrast, merely held that a habeas petitioner could not, with consecutive sentences, add the minimum parole eligibility when making an Eighth Amendment violation claim. In other words, consecutive lengthy sentences for multiple crimes in excess of a juvenile's life expectancy does not violate the Eighth Amendment when none of the sentences standing alone was unconstitutional. *Willbanks* did *not* hold that an unconstitutional sentence, such as LWOP for 50 years, could be converted into a constitutional one if another sentence were ordered to run consecutively to the unconstitutional sentence, requiring the defendant to serve even more time in prison.

Further, what the circuit court ruled, and Respondent's position in this case is contrary to *Sammie D. Taylor v. Jeff Norman*, No. 17TE-CC00476, where the habeas court, the Hon. John D. Beger, granted habeas relief to Taylor in Texas County, Missouri, on the same issue, with the same Respondent (Jeff Norman), who was represented by the same attorney.

Taylor had been sentenced to a mandatory term of LWOP for fifty 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 v. Norman*, which 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 Judge Beger, wherein Respondent agreed that as to the capital murder count that Taylor should be ordered discharged from his LWOP for 50-years sentence for capital murder within 180 days of that order unless the sentencing court held a new sentencing proceeding that comported with the procedures outlined by the Missouri Supreme Court in *Carr v. Wallace*, but Respondent's custody of Taylor as to Taylor's other non-capital murder sentences were not to be affected by that order. Mr. Allen should have gotten the same relief that Mr. Taylor received.

V. Conclusion

WHEREFORE, for all the foregoing reasons, Petitioner respectfully requests that this Court require Respondent to show cause as to why habeas relief should not be granted and thereafter, after a thorough review of the facts and law, enter an order granting a writ of habeas corpus vacating Petitioner's conviction and sentence for capital murder and remand the case for resentencing in Jackson County, Missouri, under *Carr, supra*, and *Hart, supra*. See, *Edwards v. Steele, supra* (habeas relief granted,

and Petitioner is entitled to be resentenced in accordance with the procedure outline in *Carr* and *Hart*).

Respectfully submitted,

/s/ Craig A. Johnston
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Assistant State Public Defender

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of August, 2018, this Petition for a Writ of Habeas Corpus and Suggestions in Support of the Petition was electronically filed via case.net through the Missouri e-Filing system and a true and correct copy was mailed to Stephen D. Hawke, the Office of the Attorney General, 207 W. High Street, P.O. Box 899, Jefferson City, Missouri 65102, stephen.hawke@ago.mo.gov, representing Respondent, and to Respondent Jeff Norman, Warden, South Central Correctional Center, 255 West Highway 32, Licking, MO 65542.

/s/ Craig A. Johnston
Craig A. Johnston, MOBar #32191

IN THE CIRCUIT COURT OF TEXAS COUNTY,
MISSOURI

In Re ROBERT ALLEN,)
)
Petitioner,)
) Case No.
vs.) 17TE-CC00425
)
JEFF NORMAN, Warden)
South Central)
Correctional Center)
 Respondent.

**PETITIONER'S NOTICE OF SUPPLEMENTAL
AUTHORITY IN SUPPORT OF MOTION FOR
JUDGMENT ON THE PLEADINGS**

COMES NOW, Petitioner, Robert Allen, and moves this Court to issue a writ of habeas corpus Rule 91, based upon the pleadings in this case in light of the Supreme court of Missouri's decision in *State ex rel. Carr v. Wallace*, 527 S.W.3d 55 (Mo. banc 2017), for the reasons previously set forth, and in light of the following supplemental authority that was filed after the prior filings in this case.

On April 6, 2018, in *Sammie D. Taylor v. Jeff Norman*, No. 17TE-CC00476, the habeas court, the Hon. John D. Beger, granted habeas relief to Taylor in Texas County, Missouri, on the same issue, with the same Respondent (Jeff Norman), who was represented by the same attorney.

Taylor had been sentenced to a mandatory term of life imprisonment without probation or parole for fifty 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 v. Norman*, which is the same Respondent as in this case, filed a Response wherein it conceded that under *Carr v. Wallace*, 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 Judge Beger, wherein Respondent agreed that as to the capital murder count that Taylor should be ordered discharged from his life without parole for fifty-years sentence for capital murder within 180 days of that order unless the sentencing court held a new sentencing proceeding that comported with the procedures outlined by the Missouri Supreme Court in *Carr v. Wallace*, but Respondent's custody of Taylor as to Taylor's other non-capital murder sentences were not affected by that order.¹

Respondent's concession of habeas relief in *Taylor v. Norman* was correct; it is also inconsistent with Respondent's prior position in this case. This Court should follow *Taylor v. Norman* and sustain the petition for a writ of habeas corpus, and order the

¹ Both the Response and the Conditional Writ of Habeas Corpus that were filed in *Taylor v. Norman* are being filed with this motion.

Respondent to discharge Petitioner Robert Allen within 180 days of its order unless the sentencing court holds a new sentencing proceeding that comports with the procedures outlined by our Missouri Supreme Court in *Carr v. Wallace*.

Respectfully submitted,

/s/ Craig A. Johnston
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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of May, 2018, this Petitioner's Notice of Supplemental Authority in Support of Motion for Judgment on the Pleadings was electronically filed via Case.net through the Missouri e-Filing System and thereby served to counsel for Respondent.

Respectfully submitted,

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IN THE CIRCUIT COURT OF TEXAS COUNTY
STATE OF MISSOURI

ROBERT ALLEN,)
)
Petitioner,)
)Case No.
vs.) 17TE-CC00425
)
JEFF NORMAN,)
)
Respondent.)

**SUGGESTIONS IN OPPOSITION TO MOTION
FOR JUDGMENT ON THE PLEADINGS**

In his Motion for Judgment on the Pleadings, Allen repeats the same arguments made in the original petition and the Reply. Similarly, respondent will repeat the argument made in the Response, albeit in an abbreviated fashion.

Conglomerate sentences with lengthy mandatory minimum sentences are lawful under the Missouri Supreme Court's decision in *Willbanks v. Missouri Department of Corrections*, 522 S.W.3d 238 (Mo. banc 2017). In *Willbanks* the court upheld conglomerate felony sentences for a juvenile offender with parole ineligibility until the offender is approximately eighty five years old. *Id.* at 240–1. Allen's conglomerate felony sentences for the multiple felonies render him ineligible for parole until he is approximately seventy years old. Because Allen's sentence has a mandatory minimum that is

substantially less than one upheld in *Willbanks*, the Court should deny Allen relief.

Respectfully submitted

JOSHUA D. HAWLEY
Attorney General

\s\ Stephen D. Hawke
STEPHEN D. HAWKE
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Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the forgoing was electronically filed by using the Case.Net system and thereby served to counsel for Petitioner, this 20 day of March, 2018, to:

\s\ Stephen D. Hawke
Stephen D. Hawke
Assistant Attorney General

**IN THE CIRCUIT COURT OF TEXAS COUNTY,
MISSOURI**

In Re ROBERT W. ALLEN)

Petitioner,)
v.) Case No.
) 17TE-CC00425
)
JEFF NORMAN, Warden)
South Central)
Correctional Center)
Respondent.)

**PETITIONER'S MOTION FOR JUDGMENT ON
THE PLEADINGS**

COMES NOW, Petitioner, Robert Allen, and moves this Court, under Rules 55.27(b) and 91.17, to issue a writ of habeas corpus, Rule 91, based upon the pleadings in this case in light on the Supreme Court of Missouri's decision in *State ex. rel v. Wallace*, 527 S.W.3d 55 (Mo. banc 2017).¹

Petitioner was charged with, and convicted of, one count of capital murder, § 565.001 RSMo 1978, one count of murder in the first degree, § 565.050 RSMo 1978, and one count of armed criminal action, § 571.0.15 RSMo 1978, in Jackson County, Missouri. These shooting offenses occurred on January 12, 1984, when Petitioner was 16 years old (DOB: 8/7/1967). Petitioner was sentenced to a mandatory

¹ On January 29, 2018, Petitioner previously filed a proposed order granting a conditional writ of habeas corpus.

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. Petitioner is currently serving these sentences in the custody of Jeff Norman, Warden, South Central Correctional Center in Licking, Missouri.

Petitioner's case is controlled by *Carr*. Mr. Carr was convicted of three counts of capital murder. *Carr*, 527 S.W.3d at 56. At the time of the offenses, Mr. Carr was 16 years old. *Id.* Also at the time, capital murder could only be punished by death or a life sentence without the possibility of parole for 50 years. *Id.* at 56–58. Following a jury trial, the court sentenced him to three concurrent sentences of life imprisonment without the eligibility for parole for 50 years. *Id.*

Subsequently, after the Supreme court of the United States decision in *Miller v. Alabama*, 567 U.S. 460 (2012), Mr. Carr filed a petition for a writ of habeas corpus in the Supreme Court of Missouri. *Id.* Mr. Carr contended that, under *Miller*, his sentences violated the Eighth Amendment.

The Supreme Court of Missouri granted habeas relief and held that *Miller* controlled because Mr. Carr was sentenced to the harshest penalty other than death available under a mandatory sentencing scheme that afforded the sentencer no opportunity to consider his age, maturity, limited control over his environment, the transient characteristics attendant to youth, or his capacity for rehabilitation. *Id.* at 60–62. The Court held that Mr. Carr's sentences of life

without the possibility of parole for 50 years violated the Eighth Amendment, and that he must be resentenced so his youth and other attendant circumstances surrounding his offense could be taken into consideration to ensure he would not be forced to serve a disproportionate sentence in violation of the Eighth Amendment. *Id.*

Petitioner's case is comparable to *Carr*. Petitioner, like Mr. Carr, was 16 years old at the time the capital murder was committed. For the capital murder offense, Petitioner, like Mr. Carr, was sentenced to the harshest penalty other than death available under a mandatory sentencing scheme that afforded the sentencer no opportunity to consider his age, maturity, limited control over his environment, the transient characteristics attendant to youth, or his capacity for rehabilitation. Petitioner's mandatory sentence of life without parole for fifty years for that offense, without consideration of Petitioner's youth and attendant circumstances, is invalid and unconstitutional in violation of the Eighth Amendment in light of the decisions in *Carr* and *Miller*.

Habeas courts in Missouri have granted corpus petitions on the *Carr* issue in *Hardy Bivens v. Jay Cassidy*, No. 16AC-CC00181-01, *William J. Gephart v. Jay Cassady*, No. 17AC-CC00572, *Donnell White v. Ronda Pash*, No. 17DK-CC00176, *Robin Greathouse v. Jason Lewis*, No. 17MI-CV00672, and *Jeffery Scott v. State of Missouri et. al.*, No. 16AC-CC00312. Also, the Eastern District Court of Appeals granted habeas corpus relief on the *Carr* issue in *Edwards v. Steele*, 533 S.W.3d 238 (Mo. App. E.D. 2017).

Respondent asserted in its response that the petition for writ of habeas corpus is meritless because “the case is controlled by the Missouri Supreme Court decision in *Willbanks v. Missouri Department of Corrections*, 522 S.W.3d 238 (Mo. banc 2017).” (Response, pg. 2). As noted in Petitioner’s Reply, Respondent is wrong. *Willbanks* is not controlling. Instead, *Carr*, which was decided on the same day as *Willbanks*, is controlling.

Willbanks involved non-homicide offenses, and thus was governed by *Graham v. Florida*, 560 U.S. 48 (2010). It also involved seven consecutive sentences, none of which individually were as lengthy as the capital murder sentence in *Carr* or in Petitioner’s case.

In contrast, *Carr* and Petitioner’s cases are homicide cases, and are thus governed by *Miller* rather than *Graham* or *Willbanks*. Further, the same sentence that Mr. Carr received on his three capital murder sentences (life without parole for 50 years on each sentence) is the same sentence that Petitioner received on his capital murder sentence and thus *that* sentence is unconstitutional under *Carr*.

Respondent’s argument placed almost sole weight on the fact that Mr. Allen’s sentence in this case “has a mandatory minimum that appears substantially less than *Willbanks*.” (Response, pg. 3). But that clearly is not controlling because *Carr* and *Willbanks* were decided on the same day, and Mr. Carr’s three concurrent sentences for capital murder had a lower mandatory minimum sentence (parole ineligibility for 50 years until Mr. Carr was 66 years old) than

either Mr. Willbanks (parole ineligibility until age 85) or Petitioner, who was the same age Mr. Carr when Mr. Carr committed his capital offenses. Mr. Allen's parole eligibility *on the capital murder charge* is the same as Mr. Carr's.

Although Mr. Carr was eligible for parole at an earlier age than Mr. Willbanks (66 versus 85), a fact that had to be clear to the Supreme Court since it decided both cases on the same day, that fact was not controlling and Mr. Carr's sentences were held to be unconstitutional. This is because Mr. Willbanks's total parole eligibility date was the result of adding the minimum parole eligibility for seven consecutive sentences. In *Willbanks*, the most Willbanks was required to serve on any one sentence was 25.5 years. Willbanks merely held that a habeas petitioner could not, with consecutive sentences, add the minimum parole eligibility dates when making an Eighth Amendment violation claim. In other words, consecutive lengthy sentences for multiple crimes in excess of a juvenile's life expectancy does not violate the Eighth Amendment when none of the sentences standing alone was unconstitutional.

Carr held that *Miller* controlled that case because Mr. Carr was sentenced to the harshest penalty for capital murder other than death available under mandatory sentencing scheme. *Carr v.* 527 S.W.3d at 60. Mr. Allen received the same mandatory sentence for his capital murder charge; thus *Carr* controls. The fact that Mr. Allen has other sentences running consecutively to his unconstitutional sentence for capital murder does not make change the fact that his sentence of life without parole for 50 years is unconstitutional under *Carr*. Cf. *State v.*

Olivas, 431 S.W.3d 575 (Mo. banc 2014) (sentence of life imprisonment without possibility of probation or parole for first-degree murder, imposed without individualized consideration, violated the Eighth Amendment even though there was a consecutive sentence of life imprisonment without the possibility of parole for armed criminal action; defendant to be re-sentenced on both offenses).

This court should sustain the petition for a writ of habeas corpus, and order Respondent to discharge Petitioner Robert Allen within 180 days of its order unless the sentencing court holds a new sentencing proceeding that comports with the procedures by our Missouri Supreme Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify on this 13th day of March, 2018, this Petitioner's Motion for Judgment on the Pleadings was electronically filed via Case.net through the Missouri e-Filing System and thereby served to counsel for Respondent.

/s/ Craig A. Johnston
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IN THE CIRCUIT COURT OF TEXAS COUNTY,
MISSOURI

In Re ROBERT ALLEN,)
)
Petitioner,)
) Case No.
v.) 17TE-CC00425
)
JEFF NORMAN, Warden)
South Central)
Correctional Center)
Respondent.

**PETITIONER'S REPLY TO RESPONSE TO
ORDER TO SHOW CAUSE**

COMES NOW, Petitioner, Robert Allen, and in reply to Respondent's Response to Order to Show Cause, states as follows:

Respondent asserts that the petition for writ of habeas corpus is meritless because “the case is controlled by the Missouri Supreme Court decision in *Willbanks v. Missouri Department of Corrections*, 522 S.W.3d 238 (Mo. banc 2017).” (Response, pg. 2).

Respondent is wrong. *Willbanks* is not controlling. Instead, *State ex. rel Carr v. Wallace*, 527 S.W. 3d 55 (Mo. banc 2017), which was decided on the same day as *Willbanks* is controlling.

Willbanks involved non-homicide offenses, and thus was governed by *Graham v. Florida*, 560 U.S.

48 (2010). It also involved seven consecutive sentences, none of which individually were as lengthy as the capital murder sentence in *Carr* or in Petitioner's case.

In contrast, *Carr*, is a homicide case, and was thus governed by *Miller v. Alabama*, 567 U.S. (2012) rather than *Graham*.¹ Similarly, Petitioner Allen's case also is a homicide case and is thus governed by *Carr* not *Willbanks*. Further, the same sentence that Mr. Carr received on his three capital murder sentences (life without parole for 50 years on each sentence) is the same sentence that Petitioner received on his capital murder sentence and thus *that* sentence is unconstitutional under *Carr* ².

Respondent's argument places almost sole weight on the fact that the Mr. Allen's sentence in this case "has a mandatory minimum that appears substantially less than *Willbanks*. (Response, pg. 3). But that clearly is not controlling because *Carr* and *Willbanks* were decided on the same day, and Mr. Carr's three concurrent sentences for capital murder had a lower mandatory minimum sentence (parole

¹ *Graham* was not even cited in the *Carr* opinion

² Additionally, if, on remand, as a result of *Carr*, the trial court is required to vacate the sentencer's verdict that Mr. Allen is guilty of first-degree murder on the ground that section 565.020 is void, and resentence him as to second-degree murder, the trial court also must vacate the jury's finding that Mr. Allen was guilty of the armed criminal action charge predicated on his being found guilty of first-degree murder. *State v. Nathan*, 404 S.W.3d 253, 271, n.11 (Mo. banc 2013). The trial court then must enter a new finding that Mr. Allen is guilty of armed criminal action in connection with his guilt on the second-degree murder charge. *Id.* Mr. Allen then will be sentenced for the new armed criminal action charge at the same time as he is sentenced for the new second-degree murder charge. *Id.*

ineligibility for 50 years until Mr. Carr was 66 years old) than either Mr. Willbanks (parole ineligibility until age 85) or Petitioner, who was the same age as Mr. Carr when Mr. Carr committed his capital offenses. Respondent has not explained why Mr. Carr was entitled to relief and Mr. Allen is not, even though *Mr. Allen's parole eligibility on the capital murder charge is the same as Mr. Carr's.*

Although Mr. Carr was eligible for parole at an earlier age than Mr. Willbanks (66 versus 85), a fact that had to be clear to the Supreme Court since it decided both cases on the same day, that fact was not controlling and Mr. Carr's sentences were held to be unconstitutional. This is because Mr. Willbanks's total parole eligibility date was the result of adding the minimum parole eligibility for seven consecutive sentences.

Respondent points out that *Willbanks* involved sentences of 15 years, life imprisonment, 20 years, 20 years, and three terms of 100 years (Response, pg. 2). The first four of these sentences were dangerous felonies, § 556.061(8), and because an offender is required to serve a minimum prison term of 85% of any sentence for a dangerous felony, see § 558.019.3, 85% of those sentences are: 12.75 years, 25.5 years, 17 years, and 17 years. Mr. Willbanks's three consecutive 100-year prison sentences for armed criminal action are not dangerous offenses, and sentences for non-dangerous felonies that aggregate over 75 years are calculated at 75 years. § 558.019.4(2), and offenders serving sentences for non-dangerous felonies totaling 45 years or more are

eligible for parole after 15 years. 14 CSR 80-2.010(1)(E).³

Thus, in *Willbanks*, the most Willbanks was required to serve on any one sentence was 25.5 years.⁴ *Willbanks* merely held that a habeas petitioner could not, with consecutive sentences, add the minimum parole eligibility when making an Eighth Amendment violation claim. In other words, consecutive lengthy sentences for multiple crimes in excess of a juvenile's life expectancy does not violate the Eighth Amendment when none of the sentences standing alone was unconstitutional.

Mr. Carr, in contrast, was not parole eligible for 50 years as to each capital offense sentence, which ran concurrent with each other for a total of 50 years parole ineligibility. *Carr* held that *Miller* controlled that case because Mr. Carr was sentenced to the harshest penalty for capital murder other than death available under a mandatory sentencing scheme. *Carr v.*, 527 S.W.3d at 60. Mr. Allen received the same mandatory sentence for his capital murder charge; thus, *Carr* controls.

Habeas courts in Missouri have granted habeas corpus petitions and entered judgments on the *Carr* issue in *Hardy Bivens v. Jay Cassady*, No. 16AC-CC00181-01, *William J. Gephart v. Jay Cassady*, No.

³ DOC determined that Mr. Willbanks was eligible for parole *on the dangerous felonies* when he is 70 years old, under the geriatric provision of § 558.019.2(3), and then he had to serve 15 more years for the armed criminal action charges.

⁴ It is 25.5 years because 85% of life *with parole* for parole purposes is treated as 30 years, § 558.019.4(1), and 85% of 30 is 25.5

17AC-CC00572, and *Donnell White v. Ronda Pash*, No. 17DK-CC00176. Also, the Eastern District Court of Appeals has granted habeas corpus relief on the *Carr* issue in *Edwards v. Steele*, 533 S.W.3d 238 (Mo. App. E.D. 2017).

Thus, Petitioner's Petition for a Writ of Habeas Corpus is controlled by the Supreme Court's decision in *Carr*, and Mr. Allen is entitled to habeas relief. This Court should sustain the petition for a writ of habeas corpus, and order Respondent to discharge Petitioner Robert Allen within 180 days of its order unless the sentencing court holds a new sentencing proceeding that comports with the procedures outlined by our Missouri Supreme Court.⁵

Respectfully submitted,

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⁵ Petitioner has filed a proposed order granting relief.

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of January, 2018, this Petitioner's Response and Request for Expedited Review was electronically filed via Case.net through the Missouri e-Filing System and thereby served to counsel for Respondent.

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**IN THE CIRCUIT COURT OF TEXAS COUNTY
STATE OF MISSOURI**

ROBERT ALLEN,)
)
 Petitioner,)
) Case No.
 v.) 17TE-CC00425
)
 JEFF NORMAN,)
)
 Respondent.)

**RESPONSE TO ORDER TO SHOW CAUSE WHY
A WRIT OF HABEAS CORPUS SHOULD NOT
BE GRANTED**

Because Allen has received a constitutional group of sentences for his criminal activity, the Court should deny the petition for writ of habeas corpus.

Statement of Custody and Parties

Robert W. Allen resides at the South Central Correctional Center in Licking, Missouri, due to the sentence and judgment of the Jackson County Circuit Court. A jury found Allen guilty of capital murder, first-degree murder and armed criminal action for which he received consecutive sentences of life imprisonment without probation or parole for fifty years, life imprisonment, and life imprisonment. Allen serves these sentences. Warden Jeff Norman is the respondent. Missouri Supreme Court Rules 91.01, .04, .07.

Statement of Merits

Allen contends that his sentence violates the Eighth Amendment because he was less than eighteen when he murdered (Petition, p.2, *citing Miller v. Alabama*, 132 S. Ct. 2455 (2012)). Allen contends that he is entitled to relief under *Carr v. Wallace*, 527 S.W.3d 55 (Mo. banc 2017). Due to Allen's consecutive sentences, the case is controlled by the Missouri Supreme Court decision in *Willbanks v. Missouri Department of Corrections*, 522 S.W.3d 238 (Mo. banc 2017). The petition is meritless.

In *Willbanks*, a seventeen-year-old offender received consecutive sentences for kidnapping, first-degree assault, two counts of first-degree robbery and three counts of armed criminal action. After conviction, the trial court sentenced him fifteen years, life imprisonment, twenty years, twenty years, and three terms of one hundred years' imprisonment. Due to the mandatory minimums for these sentences, the offender would not become parole eligible until he is approximately eighty five years old. *Id.* at 240-1. Because of the consecutive sentences for the multiple crimes, the offender's Eighth Amendment rights were not violated. "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.

In the present case, Allen's sentences also have mandatory minimums. The sentence for capital murder is life without parole for fifty years. Phrased another way, there is a mandatory minimum of fifty years for this sentence. The life sentence for first-degree murder does not have a mandatory minimum. The life sentence for armed criminal action has a three year mandatory minimum. Section 571.015.1, RSMo. Because the trial court ordered the sentences to run consecutively, the mandatory minimums also run consecutively. *Edger v. Missouri Board of Probation and Parole*, 307 S.W.3d 718 (Mo. App. W.D. 2010). As a result of his crimes, Allen has sentences with mandatory minimums that total over fifty-three years. This conglomerate sentence is proper under *Willbanks*. Indeed, the sentence in this case has a mandatory minimum that appears substantially less than *Willbanks*.

Because Allen's sentences are proper under *Willbanks*, the Court should deny the petition.

Respectfully submitted

JOSHUA D. HAWLEY
Attorney General

\s\ Stephen D. Hawke
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Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was electronically filed using the Missouri E-Filing system and thereby served to counsel for Petitioner, this 26th day of January, 2018.

\s\ Stephen D. Hawke
Stephen D. Hawke
Assistant Attorney General

IN THE CIRCUIT COURT OF TEXAS COUNTY,
MISSOURI

In Re ROBERT W. ALLEN,)
Petitioner,)
v.) Case No._
JEFF NORMAN, Warden.)
South Central Correctional Center,)

PETITION FOR A WRIT OF HABEAS CORPUS

COMES NOW petitioner, Robert W. Allen, a Missouri prisoner in respondent's custody, and petitions this Court, pursuant to Rule 91, for a Writ of Habeas Corpus vacating his conviction for the offense of capital murder and his sentence of life without the possibility of parole for fifty years. Petitioner is similarly situated to the habeas petitioner in *State ex rel. Carr v. Wallace*, No. SC 93487, 2017 WL 2952314 (Mo. July 11, 2017), *reh'g* denied (Oct. 5, 2017), and he's entitled to the same relief as Mr. Carr – a remand for resentencing. In support of this petition, Petitioner states as follows:

I. Jurisdictional Statement

Petitioner is currently serving his sentence of life without parole for fifty years for capital murder in the custody of Jeff Norman, Warden, South Central Correctional Center in Licking, Missouri. Jurisdiction and venue of this petition lies with this Court pursuant to Rule 91.02(a). Pursuant to Rule 91.04(a)(4), petitioner also states that no petition for

relief raising the issues brought herein has been sought in any higher court.

II. Procedural background

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 (Exhibits 1-2). These shootings offenses occurred on January 12, 1984, when Petitioner was sixteen years old (DOB: 8/7/1967) (Exhibits 1-4).

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 (Exhibits 2-3). Thereafter, Petitioner filed a direct appeal, which was affirmed on appeal in *State v. Allen*, 710 S.W.2d 912 (1986) (Exhibit 3).

Because Missouri's former capital murder statute made no exception for juvenile offenders, Petitioner's mandatory sentence of life without parole for fifty years for that offense, without consideration of Petitioner's youth and attendant circumstances, is invalid and unconstitutional in violation of the Eighth Amendment in light of the recent decisions by the Supreme Court of the *United States in Miller v. Alabama*, 567 U.S. 460 (2012) and *Montgomery v. Louisiana*, – U.S. –, 136 S.Ct. 718, 736 (2016), as well as the decision by the Supreme Court of

Missouri in *Carr*. Also see, *Edwards v. Steele*, No. ED105946 (Mo. App. E.D. November 7, 2017) (habeas relief granted; Petitioner's sentence violates the Eighth Amendment pursuant to *Carr* and *Miller*, and Petitioner is entitled to be resentenced in accordance with the procedure outline in *Carr* and *State v. Hart*, 404 S.W.3d 232 (Mo. banc 2013)). Thus, Petitioner's conviction and sentence for capital murder should be overturned and Petitioner should receive a resentencing hearing in Jackson County, Missouri pursuant to *Carr, supra*, and *Hart, supra*.

III. This case is controlled by State ex rel. Carr v. Wallace, No. SC93487

Jason Carr was convicted of three counts of capital murder under section 565.001, RSMo 1978.¹ Carr, No. SC 93487, 2017 WL 2952314, at *1-2. At the time of the offenses, Mr. Carr was 16 years old. *Id.* Also at that time, capital murder could only be punished by death or a life sentence without the possibility of parole for 50 years. Section 565.008.1, RSMo 1978. *Id.* The state did not seek the death penalty. *Id.* Therefore, if convicted, the only eligible sentence Mr. Carr could receive was life without the possibility of parole for 50 years.² *Id.*

¹ Under section 565.001, “[a]ny person who unlawfully, willfully, knowingly, deliberately, and with premeditation kills or causes the killing of another human being is guilty of the offense of capital murder.”

² At the time of Mr. Carr's conviction, the alternative punishment available under the capital murder status was life without the possibility of parole for 50 years, thereby making it the second harshest penalty that could be imposed on a homicide offender. Section 565.008. Had the death penalty been sought and imposed, this penalty would have been invalidated following *Rover v. Simmons*, 543 U.S. 551, 578-79 (2005), which

In 1983, a jury convicted Mr. Carr of three counts of capital murder. *Id.* Following the jury's verdict, the trial court sentenced him to three concurrent sentences of life imprisonment without the eligibility for parole for 50 years. *Id.* The court of appeals affirmed his convictions on direct appeal, and Mr. Carr's claim of ineffective assistance of counsel was also denied. *Id.*

Mr. Carr filed a petition for a writ of habeas corpus in the Supreme Court of Missouri after the Supreme Court of the United States' decision in *Miller*. Mr. Carr contended that his sentences violated the Eighth Amendment because, following the decision in *Miller*, Juvenile offenders cannot be sentenced to life without parole pursuant to mandatory sentencing schemes that preclude consideration of the offender's youth and attendant circumstances. *Carr*, 2017 WL 2952314, at *1-2.

While Mr. Carr's habeas petition was pending, the Supreme Court of the United States held that *Miller*'s substantive rule must be applied retroactively on collateral review of a juvenile offender's mandatory sentence of life without parole. *Montgomery*, – U.S. –, 136 S.Ct. at 736. Although prisoners are generally required to raise constitutional claims on direct appeal or in post-conviction proceeding, a defendant has cause for failing to raise such claims where a new constitutional rule may be applied retroactively on collateral review. *State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 401 (Mo. banc 2003).

held that the Eighth Amendment prohibits the imposition of the death penalty on defendants who commit first degree murder at age 17 or younger.

Mr. Carr did not raise his Eighth Amendment claims on direct review or in a post-conviction proceeding. Nevertheless, the Supreme Court of Missouri in *Carr*, following *Montgomery*, held that because Mr. Carr was seeking retroactive application of *Miller*'s substantive rule of constitutional law to the facts and circumstances of his case, Mr. Carr had cause for failing to previously raise his constitutional claims, and he could seek habeas corpus relief on his claims that his sentences were imposed in violation of the Eighth Amendment pursuant to *Miller*. *Carr*, 2017 WL 2952314, at *3.

Ultimately, the Supreme Court of Missouri held that *Miller* controlled because Mr. Carr was sentenced to the harshest penalty other than death available under mandatory sentencing scheme that afforded the sentencer no opportunity to consider his age, maturity, limited control over his environment, the transient characteristics attendant to youth, or his capacity for rehabilitation. *Id.* at *1-2, 4. As a result, Mr. Carr's sentences were imposed in direct contravention of the foundation principal that imposition of a state's most severe penalties on juvenile offenders cannot proceed as though they were not children. *Id.*

Consequently, the Court held that Mr. Carr's sentences of life without the possibility for 50 years violated the Eighth Amendment, and that he must be resentenced so his youth and other attendant circumstances surrounding his offense can be taken into consideration to ensure he will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment. *Id.* The Court granted habeas relief. *Id.*

In doing so, the Court ordered that Mr. Carr must be resentenced under the procedures set out in *Hart*. *Id.* at *5. 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 other *Miller* factors. *Carr*, 2017 WL 2952314, at *5. 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.* 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.*

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.* at *6. 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 and enter a new finding that he is guilty of murder in the second degree under section

565.004. *Id.* After the trial court enters the finding that Mr. Carr is guilty of murder in the second degree, the sentencer must determine his sentence based on the statutory range applicable to these offenses. *Id.* 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.* 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.*

Petitioner’s case is controlled by *Carr*. Petitioner, like Mr. Carr, was sixteen years old at the time the capital murder was committed.

For the capital murder offense, Petitioner, like Mr. Carr, was sentenced to the harshest penalty other than death available under a mandatory sentencing scheme that afforded the sentencer no opportunity to consider his age, maturity, limited control over his environment, the transient characteristics attended to youth, or his capacity for rehabilitation.

Petitioner, like Mr. Carr, is entitled to habeas corpus relief, and he must be resentenced so his youth and other attendant circumstances

surrounding his offense can be taken into consideration to ensure he will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment.

If, after considering all the circumstances, the sentencer is not persuaded that a sentence of life without the possibility of parole for 50 years is just and appropriate, Petitioner cannot receive that sentence. Instead, the trial court must declare section 565.008 void as applied to Petitioner's on the ground that it does not provide a constitutionally valid punishment for his offense. If section 565.008 is void, the trial court must vacate the jury's verdict finding Petitioner guilty of capital murder and enter a new finding that his is guilty of murder in the second degree under section 565.004. After the court enters the finding that Petitioner is guilty of murder in the second degree, the sentencer must determine his sentence based on the statutory range applicable to this offense, which under section 565.008.2 RSMo 1978, is "imprisonment by the division of corrections for a term of not less than ten years."

Additionally, if, on remand, the trial court is required to vacate the sentencer's verdict that Petitioner is guilty of first-degree murder on the ground that section 565.020 is void, the trial court also must vacate the jury's finding that Petitioner was guilty of the armed criminal action charge predicated on his being found guilty of first-degree murder. *State v. Nathan*, 404 S.W.3d 253, 271, n. 11 (Mo. banc 2013). The trial court then must enter a new finding that Petitioner is guilty of armed criminal action in connection with his guilt on the second-degree murder charge. *Id.* Petitioner then

will be sentenced for the new armed criminal action charge at the same time and in the same manner as he is sentenced for the new second-degree murder charge. *Id.*

IV. Conclusion

WHEREFORE, for all the foregoing reasons, Petitioner respectfully request that this Court require Respondent to show cause as to why habeas relief should not be granted and thereafter, after a through review of the facts and law, enter an order granting a writ of habeas corpus vacating Petitioner's conviction and sentence for capital murder and remand the case for resentencing in Jackson County, Missouri, under *Carr, supra*, and *Hart supra*, and grant such other and further relief that the Court deems fair and just under the circumstances. See, *Edwards v. Steele, supra* (habeas relief granted, and Petitioner is entitled to be resentenced in accordance with the procedure outline in *Carr* and *Hart*.)

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of November, 2017, this petition was electronically filed via case.net through the Missouri e-Filing System and a true and correct copy was mailed to the Office of the Attorney General, 207 W. High Street, P.O. Box 899, Jefferson City, Missouri 65012.

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