No. 22-7769

IN THE SUPREME COURT OF THE UNITED STATES

Tyrone D. Morant,

Petitioner,

v.

Warden Bill Stange,

Respondent.

Brief in Opposition to Petition for Writ of Certiorari
to the Supreme Court of Missouri

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Questions Presented

1. Does the Constitution require the Missouri Supreme Court to reopen an extraordinary writ case that has been final since March 15, 2016, and expand *Miller v. Alabama,* 567 U.S. 460 (2012), to require resentencing for juvenile offenders who received consecutive sentences even though *Montgomery v. Louisiana,* 577 U.S. 190 (2016), specifically held that states were not required to resentence *Miller*-affected inmates?
2. Does the Constitution require the Missouri Supreme Court to reopen an extraordinary writ case that has been final since March 15, 2016, and expand *Miller* to require earlier parole for juvenile offenders who have consecutive sentences?

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Statement of the Case

This Court's review[1] of a state conviction is informed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which limits federal review to the evidence presented in state court and presumes that the facts found by state courts are correct. 28 U.S.C. § 2254(e); *Shinn v. Ramirez,* 142 S. Ct. 1718, 1732 (2022); *Cullen v. Pinholster,* 563 U.S. 170, 180 (2011). At times, Morant's statement of the case tries to minimize his responsibility for murdering John Allen and assaulting Johnnie Bell and Angela Hickman. Morant made similar arguments to the jury who found against him, and this Court should not consider them.

When Morant sought federal habeas relief, the district court took its statement of facts from "[t]he evidence summarized by the [Missouri Court of Appeals] in the light most favorable to the verdict." *Morant v. Kemna,* 4:00-CV-01836-ERW, Doc. 11 at 2.

On the evening of September 17, 1995, Morant and Carlos Wade killed John Allen in a drive-by shooting. *Id.* Shortly before the shooting, Allen was

[1] Morant's petition repeatedly cites "Habeas Appx," which appears to reference exhibits filed with his habeas petition in March of 2013 and exhibits filed with his motion to recall the mandate in December of 2022—that he did not provide to this Court. Respondent interprets the page references in this petition asthe handwritten page numbers, "A-[page number]" at the bottom of those exhibits. Respondent has adopted Morant's citation form in referencing those exhibits and has filed them with this response to assist the Court in its review.

leaving a house in St. Louis with Angela Hickman and Johnnie Bell. *Id.* As the three walked in the street, Hickman saw Morant and Wade in a car that was a few feet away. *Id.* Someone in the car called Hickman a name, and then Morant and Wade stuck their guns out the window and shot at Bell, Allen, and Hickman. *Id.* Hickman and Bell survived, but Allen was killed. *Id.* After the shooting, Hickman left the scene with police officers. *Id.* Within an hour, Hickman identified Morant as one of the shooters. *Id.* About one month before the shooting, Morant, Wade, and another person exchanged blows with Allen and Bell. The State also presented evidence of other hostile encounters between Wade and the victims when Morant was not involved. *Id.*

A jury found Morant guilty of first-degree murder in the death of Allen, first-degree assault for shooting at Hickman, first-degree assault for shooting at Bell, and three counts of armed criminal action for using a deadly weapon to commit the crimes. Habeas Appx. at 165–70. The only possible punishment for first-degree murder was life without the possibility of parole. The jury recommended fifteen years' imprisonment for each count of first-degree assault and thirty years' imprisonment for each count of armed criminal action. Habeas Appx. at 166–170.

Wade and Morant were sentenced on January 10, 1997. Habeas Appx. at 410, 416. During Wade's sentencing, the State asked the trial court to impose the jury's recommended sentences consecutively because "we don't know what

affect any later legislative change or Board of Probation or Parole rule change may have with regard to allowing somebody to be paroled, or to be put in a less than maximum security situation." Habeas Appx. at 410. Wade's attorney asked for concurrent sentences, arguing that consecutive sentences were unnecessary because, "There's no indication that the legislation will change as to that." Habeas Appx. at 410. The trial court imposed all of Wade's sentences consecutively.

During Morant's sentencing, the trial court did not ask for a sentencing recommendation from the State. After the court overruled Morant's motion for a new trial, Morant chose not to offer any additional argument or evidence about sentencing. Habeas Appx. at 418. Morant did not argue that his sentences should be imposed concurrently. As with Wade, the trial court imposed consecutive sentences.

After *Miller* was decided, Morant filed a petition for a writ of habeas corpus in the Missouri Supreme Court alleging that his life-without-parole sentence was unconstitutional. While that petition was pending, Missouri's General Assembly enacted Missouri Statute § 558.047, which provided parole eligibility for juvenile offenders serving life-without-parole sentences for first-degree murder. Citing that statute, the Missouri Supreme Court denied Morant's petition. App. at A2.

Missouri's statute requires that, "[w]hen considering parole for an offender with consecutive sentences, the minimum term of eligibility for parole shall be calculated by adding the minimum terms of parole eligibility for each consecutive sentence." Mo. Rev. Stat. § 217.690.5. Morant's sentences for first-degree assault are classified as dangerous felonies, so, by statute, he is "required to serve a minimum prison term of eighty-five percent of the sentence imposed by the court," or forty percent once he is older than seventy years old, before he can be eligible for parole. Mo. Rev. Stat. § 558.019. Morant's sentences for armed criminal action require him to serve three years toward each sentence before he can be eligible for parole. Mo. Rev. Stat § 571.015.1 (1994). Adding together the periods of parole ineligibility for Morant's consecutive sentences, the Missouri Parole Board has determined that Morant will be eligible for parole on July 25, 2051. Habeas Appx. at 912.

In 2022, Morant filed a petition to recall the mandate in the habeas corpus case. Morant's claims in that petition were related to the periods of parole ineligibility that he must serve for his consecutive sentences. In a summary order, the Missouri Supreme Court denied the motion. App. at A1.

Reasons for Denying the Petition

I. This Court lacks jurisdiction because the Missouri Supreme Court's order below is supported by a host of adequate and independent state-law grounds.

Both of Morant's certiorari questions fail to properly invoke this Court's jurisdiction because the state-court record gives no reason to believe that the Missouri Supreme Court finally decided a federal question below. Instead, it is much more likely that the state court denied Morant's petition for one of several adequate and independent state-law reasons.

This Court should deny Morant's petition under the "well-established principle of federalism" that state-court decisions resting on state law principles are "immune from review in the federal courts." *Wainwright v. Sykes,* 433 U.S. 72, 81 (1977). This rule applies "whether the state law ground is substantive or procedural." *Coleman v. Thompson,* 501 U.S. 722, 729 (1991) (citing *Fox Film Corp. v. Muller,* 296 U.S. 207, 210 (1935)).

Morant's petition wrongly argues that the Missouri Supreme Court's summary denial must be viewed as a decision on the merits of his claims. In *Harrington v. Richter,* 562 U.S. 86 (2011), this Court said that it will presume that a summary decision is a denial on the merits only "*in the absence of any indication or state-law procedural principles to the contrary." Harrington,* 526 U.S. at 86 (emphasis added). Here, the record shows that Morant's petition was likely denied on procedural grounds. Missouri's procedural rules prohibit late-

coming post-conviction challenges that could have been raised earlier as well as "duplicative and unending challenges to the finality of a judgment[.]" *State ex rel. Strong v. Griffith,* 462 S.W.3d 732, 733–34 (Mo. 2015) (quoting *State ex rel. Woodworth v. Denney*, 396 S.W.3d 330, 337 (Mo. 2013)). The Eighth Circuit recognizes that Missouri's procedural rules often require summary denial of defaulted post-conviction claims, so a summary denial does not "fairly appear to rest primarily on federal law, or to be interwoven with federal law." *Byrd v. Delo,* 942 F.2d 1226, 1231 (8th Cir. 1991) (alteration and ellipsis omitted). And that "[a]fter *Coleman*, there is simply no reason to construe an unexplained [Missouri state habeas] denial as opening up the merits of a previously defaulted federal issue." *Byrd*, 942 F.2d at 1232.

The same is true here. Morant's petition below failed on several state substantive and procedural grounds. Because adequate and independent state-law grounds support the Missouri Supreme Court's order below, this Court has "no power to review" the order and "resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory." *Coleman,* 501 U.S. at 729.

A. State Limits on Motions to Recall Mandate

Morant asked the Missouri Supreme Court to recall its mandate in a case where the Missouri Supreme Court denied a petition for a writ of habeas

corpus that Morant filed in March of 2013. Morant's motion presents several state-law procedural issues.

1. There is no basis in Missouri law for an appellate court to recall its mandate in an original proceeding on a petition for a writ of habeas corpus.

Missouri law does not mention or even indicate that an appellate court may recall its mandate in a final original writ case. In Missouri, habeas corpus cases in appellate courts are original actions, not appeals. Prisoners seeking habeas corpus relief must first file in the circuit court[2] "for the county in which the person is held." *State ex rel. Hawley v. Midkiff,* 543 S.W.3d 604, 608 (Mo. 2018) (quoting Mo. Sup. Ct. R. 91.02(a)). When a circuit court denies a petition for a writ of habeas corpus, that order is not appealable. *Bromwell v. Nixon,* 361 S.W.3d 393, 397 (Mo. 2012) (citing *Blackmon v. Mo. Bd. of Prob. & Parole,* 97 S.W.3d 458, 458 (Mo. 2003)). Instead, Missouri's rules allow a prisoner to file a new petition for a writ of habeas corpus in a higher court. *Id.* Therefore, when Morant filed a petition for a writ of habeas corpus in the Supreme Court of Missouri, it heard that case as an original action.

There is no indication in Missouri law that an appellate court can recall its mandate in an original writ case. The Missouri Supreme Court has "never

[2] In Missouri, trial-level courts are divided into judicial circuits and are called "circuit courts." Circuit courts are supervised by the Missouri Court of Appeals, which is one court divided into geographic districts, and the Supreme Court of Missouri. Mo. Const. art. V.

fully delineated the scope of an appellate court's power to recall its mandate[,]" but, to the Warden's knowledge, there is no published case that would allow that relief in a final habeas corpus action. *See State v. Whitfield,* 107 S.W.3d 253, 264–65 (Mo. 2003). Morant cites no case that would sanction a state-law procedure for recalling the mandate in an original writ action. Instead, Morant cites *Whitfield* and *State v. Thompson,* 659 S.W.2d 766, 768 (Mo. 1983), which are both cases where the Supreme Court of Missouri recalled its mandate in appellate cases.

Missouri law indicates this distinction is not insignificant. An appellate mandate "is not a judgment or decree," it is "a notification of judgment." *State ex rel. Kansas City v. Public Service Comm'n,* 228 S.W.2d 738, 741 (Mo. 1950). The mandate is not like a judgment from a trial court, *Bd. of Regents for Southwest Missouri State University v. Harriman,* 857 S.W.2d 445, 449 (Mo. App. 1993), instead the "mandate serves the purpose of communicating the judgment to the lower court." *Id.* (citing *Kansas City,* 228 S.W.3d at 741). In original writ cases, the appellate court is not communicating its judgment to a lower court, it is simply deciding the issues presented.

That difference casts serious doubt on whether a motion to recall the mandate has any place in an original writ proceeding. In cases like *Thompson* and *Whitfield,* appellate courts recalled their mandate because the previous appellate decisions in those cases would have prevented a trial court from

taking action to grant the defendant relief. By contrast, Morant is always free to file a new petition for a writ of habeas corpus, with the caveat that a lower court cannot grant a writ of habeas corpus if a higher court has denied the writ on the same issue. Mo. Sup. Ct. R. 91.22.

To the extent that Morant's motion to recall the mandate presented claims that were previously denied by the Missouri Supreme Court, he could have sought review by filing a new habeas petition in the Missouri Supreme Court. Though duplicative habeas claims are disfavored, there is "no absolute bar" on seeking successive habeas relief. *State ex rel. Johnson v. Blair,* 628 S.W.3d 375, 381 (Mo. 2021). To the extent that Morant's petition raised new, non-duplicative claims, he must present them in a new petition filed in the circuit court for the county where he is confined. *Midkiff,* 543 S.W.3d at 608; Mo. Sup. Ct. R. 91.02(a).

This Court should not be the first court to expand the scope of motions to recall the mandate in Missouri to include original writ actions like habeas corpus cases. There is no Missouri case law or rule indicating that remedy was available to Morant, especially as other avenues of relief were available had he followed Missouri's procedural rules. As to these procedural issues, there is no indication in the record that the Missouri Supreme Court decided a federal issue required to merit this Court's review.

2. Morant's motion to recall the mandate did not present a proper basis for that relief under state law.

Even if motions to recall the mandate applied in original habeas corpus cases, Morant's motion below did not fall within the scope of relief defined for such motions. The Missouri Supreme Court has only recognized two instances where a motion to recall the mandate is appropriate, and one is no longer appropriate. *See Whitfield,* 107 S.W.3d at 264–65 (abrogated on other grounds by *State v. Wood,* 580 S.W.3d 566, 587 (Mo. 2019)). First, a motion to recall the mandate once permitted petitioners to raise claims that appellate counsel was constitutionally ineffective, but that is no longer correct. *Whitfield,* 107 S.W.3d at 265 n.10. Second, a mandate will be recalled "when the decision of a lower appellate court *directly conflicts* with a decision of the United States Supreme Court upholding the rights of the accused." *Whitfield,* 107 S.W.3d at 265 (emphasis added).

Morant did not raise a colorable claim below that the Missouri Supreme Court's prior habeas denial directly conflicted with this Court's precedent. This Court has never held that the Constitution requires resentencing for *Miller*-affected inmates who received consecutive sentences. Indeed, this Court held that the Constitution "does not require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole." *Montgomery v. Lousiana,* 577 U.S. 190, 212 (2016). Instead,

"[a] State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." *Id.*

Likewise, this Court has never held that *Miller*-affected inmates cannot be subject to consecutive periods of parole ineligibility where they have committed multiple serious crimes. Instead, this Court has observed that consecutive punishments are not material to an Eighth Amendment analysis because "it would scarcely be competent for a person to assail the constitutionality of the statute prescribing punishment for burglary, on the ground that he had committed so many burglaries that, if punishment for each were inflicted on him, he might be kept in prison for life." *O'Neil v. Vermont,* 144 U.S. 323, 331 (1892). Because the Missouri Supreme Court's 2015 decision denying Morant's petition for a writ of habeas corpus did not directly conflict with this Court's case law, there was no basis to recall the mandate under state law.

Further, no federal law requires the Missouri Supreme Court to recall its mandate in a final case under any circumstances. *See Griffin v. Illinois,* 351 U.S. 12, 18 (1956) (citing *McKane v. Durston,* 153 U.S. 684, 687–88 (1894)). States are not constitutionally required to provide appeals, and they are not constitutionally required to entertain endless requests to reopen final cases long after they are concluded. *Id.* The state-law limits on motions to recall the mandate protect "the State's significant interest in repose for concluded

litigation." *Shinn,* 142 S. Ct. at 1731. Respecting those limits and those interests, this Court should deny the petition for lack of jurisdiction.

B. State Requirements for Habeas Petitions

Although the Missouri Supreme Court could have treated Morant's motion as a petition for a writ of habeas corpus, the court was not required to do so, and Morant's motion failed to comply with state-court rules governing habeas corpus petitions. *Midkiff,* 543 S.W.3d at 608 (citing Mo. Sup. Ct. R. 91.02(a)). He failed to file in the circuit court for the county in which he was confined first, as Missouri Supreme Court Rule 91.02(a) requires.

Morant's petition also failed to conform to other state court rules for writ filings in appellate courts. Mo. Sup. Ct. R. 84.24(a). Specifically, Morant's motion did not include a writ summary, suggestions in support, or docket fee (or a motion for leave to file in forma pauperis). Mo. Sup. Ct. R. 84.24(a). As with the previous rule, the Missouri Supreme Court could have excused Morant's compliance with these rules, but it was not required to do so. Morant's failure to properly petition for a writ of habeas corpus justified its denial. *See Artuz v. Bennet,* 531 U.S. 4, 9 (2000) ("an application is 'properly filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings" including "the form of the document" and "the requisite filing fee."). Morant's violations of the Missouri Supreme Court's procedural rules provides an independent state ground to deny his petition, which deprives this

Court of jurisdiction to review the Missouri Supreme Court's order denying the alternative request for habeas relief.

C. Procedural Default

Missouri's procedural rules require litigants to raise claims "at each step of the judicial process in order to avoid default." *Arnold v. Dormire,* 675 F.3d 1082, 1087 (8th Cir. 2012) (quotations and citations omitted). Claims of constitutional error are waived if not made "at the first opportunity with citation to specific constitutional sections." *State v. Driskill,* 459 S.W.3d 412, 426 (Mo. 2015). Morant's convictions were affirmed on direct appeal to the Missouri Supreme Court, after post-conviction collateral review in the sentencing court, and on appeal from the denial of post-conviction relief. Throughout those processes, Morant did not raise a claim challenging the trial court's decision to impose consecutive sentences or a claim complaining about the consecutive periods of parole ineligibility he would be required to serve.

Although Morant may argue that he has cause for not bringing his claims during the normal course of review, there is no evidence in the record to show that the Missouri Supreme Court agreed with him. Pet. at 2–3. With some exceptions not relevant here, Missouri's doctrine of procedural default is nearly identical to its federal counterpart. *See State ex rel. Nixon v. Jaynes,* 63 S.W.3d 210, 215–16 (Mo. 2001) (adopting federal cause-and-prejudice standards); *but*

see Barton v. State, 486 S.W.3d 332, 336 (Mo. 2016) (declining to adopt an exception similar to *Martinez v. Ryan,* 566 U.S. 1 (2012)).

Though Morant may argue that he could not have discovered his claims until after *Miller* was decided, that argument fails. Any trial court or counsel error concerning whether Morant's sentences should be consecutive or concurrent was known at the time the sentences were imposed. Though Morant and his counsel may not have predicted this Court's decision in *Miller,* they knew that the consecutive or concurrent nature of Morant's sentences might matter if any of his sentences were reversed or altered by future legislation. Habeas Appx. at 410. Morant may not have cared about whether his sentences were consecutive or concurrent at the time of direct appeal and post-conviction review, he certainly had all of the facts necessary to raise his claims. As a result, Morant defaulted on these claims, and they were properly denied. *Strong,* 462 S.W.3d at 733.

For all of these independent and adequate state-law reasons, this Court lacks jurisdiction to review the Missouri Supreme Court's order denying Morant's motion to recall the mandate.

II. Even if this Court had jurisdiction, this Court should deny certiorari to respect our system of dual sovereignty.

Even presuming the Missouri Supreme Court's order below can be read to pass on a federal question, this Court should not grant certiorari review of state post-conviction claims because this Court has found federal habeas proceedings provide a more appropriate avenue to consider federal constitutional claims. *Lawrence v. Florida,* 549 U.S. 327, 335 (2007); *Kyles v. Whitley,* 498 U.S. 931, 932 (1990) (Stevens, J., concurring in the denial of certiorari).

"To respect our system of dual sovereignty," this Court and Congress have "narrowly circumscribed" federal habeas review of state convictions. *Shinn,* 142 S. Ct. at 1730 (citations omitted). The States are primarily responsible for enforcing criminal law and for "adjudicating constitutional challenges to state convictions." *Id.* at 1730–31 (quotations and citations omitted). Federal intervention intrudes on state sovereignty, imposes significant costs on state criminal justice systems, and "inflict[s] a profound injury to the powerful and legitimate interest in punishing the guilty, an interest shared by the State and the victims of crime alike." *Id.* at 1731 (quotations and citations omitted).

To avoid the harms of unnecessary federal intrusion, "Congress and federal habeas courts have set out strict rules" requiring prisoners to present

their claims in state court and requiring deference to state-court decisions on constitutional claims. *Id.* at 1731–32; 28 U.S.C. § 2254(d), (e). Each federal court has denied Morant's federal habeas petitions. *Morant v. Kemna,* 4:00-CV-01836, R. Doc. 12 (E.D.Mo. Mar. 5, 2004); R. Doc. 28 (declining to issue certificate of appealability), R. Doc. 28. There is no basis for this Court to afford Morant successive federal habeas review by granting certiorari here.

AEDPA prohibits successive review of a claim by a federal court unless the petitioner can show that the claim "relies on a new rule of constitutional law" that applies retroactively or that "the factual predicate of the claim could not have been discovered previously through the exercise of due diligence" and that the claim shows "by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found [Morant] guilty of the underlying offense." § 2244(b). Morant cannot make either showing, as recognized when thethe Eighth Circuit denied permission to file a successive habeas petition. *Morant v. Wallace,* 16-3755 (8th Cir. 2017).

Even if Morant's claims could properly be presented in a new federal habeas petition, they do not warrant relief. As discussed in point I, there are several adequate and independent state law grounds that require denial of the claims. And if, as Morant assumes, the Missouri Supreme Court denied his claims on the merits and not on procedural grounds, then federal habeas relief would be precluded under § 2254(d)(1). Both of Morant's claims require

departing from this Court's precedent. AEDPA prohibits that too. § 2254(d)(1); *White v. Woodall*, 572 U.S. 415, 426 (2014) (state courts need not extend this Court's precedent in adjudicating constitutional claims).

Morant's convictions and sentences have been exhaustively reviewed and affirmed in state and federal court. A grant of certiorari now permits an end-run around the rules that Congress and federal courts crafted to maintain our federalist system of government. To respect "Our Federalism," *Younger v. Harris,* 401 U.S. 37, 44 (1971), as well as "finality, comity, and the orderly administration of justice," *Shinn,* 142 S. Ct. at 1733 (quoting *Dretke v. Haley,* 541 U.S. 386, 388 (2004)), this Court should enforce the limits on federal review of state convictions and deny Morant's petition.

III. The Constitution does not require the Missouri Supreme Court to expand *Miller* to require resentencing *Miller*-affected offenders who received consecutive sentences.

Missouri has already remedied any constitutional error stemming from Morant's life-without-parole sentence for first-degree murder. *Montgomery,* 577 U.S. at 212; *Brown v. Precythe,* 46 F.4th 879, 886 (8th Cir. 2022) (en banc); *Hicklin v. Schmitt,* 613 S.W.3d 780, 788–89 (Mo. 2020). Because Morant received a mandatory sentence of life without parole for a murder he committed as a juvenile, his sentence violated this Court's holding that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders." *Miller*, 567 U.S. at 479.

Though *Miller* applies retroactively, it "does not require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole." *Montgomery,* 577 U.S. at 212. Instead, "[a] State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." *Id.*

Missouri followed this Court's instruction by enacting § 558.047, which allows Morant to be considered for parole after serving twenty-five years toward his sentence for first-degree murder. *Montgomery,* 577 U.S. at 212. Morant now complains about the additional periods of parole ineligibility that he must serve for his consecutive assault and armed criminal action sentences. Those sentences do not impact the Eighth Amendment analysis under *Miller*.

Since *Montgomery,* this Court has emphasized the narrow scope of *Miller's* holding. *Jones v. Mississippi,* 141 S. Ct. 1307, 1322–23 (2021); *Virginia v. Leblanc,* 137 S. Ct. 1726, 1728–29 (2017). In *Jones,* this Court said that *Miller* mandated "only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a life-without-parole sentence." *Id.* Given the procedural nature of *Miller's* holding, the *Montgomery* Court's decision to apply that holding retroactively is an outlier in this Court's jurisprudence. *Jones,* 141 S. Ct. at 1317; *see also Edwards v. Vannoy,* 141 S. Ct. 1547, 1560 (2021) (new procedural rules do not apply retroactively on collateral review). "But in making the rule retroactive,

the *Montgomery* Court unsurprisingly declined to impose new requirements not already imposed by *Miller*." *Jones,* 141 S. Ct. at 1317.

Put simply, *Miller's* retroactive impact is limited to its holding, and the Missouri Supreme Court was not required to expand that holding on state collateral review. *Id*. Likewise, *Miller's* holding did not require resentencing to provide offenders a second chance to argue about whether their sentences should be concurrent or consecutive.

When Morant was sentenced, he was free to argue that his sentences for assault and armed criminal action should be concurrent to his murder sentence. Indeed, his codefendant did." Habeas Appx. at 410 (arguing consecutive sentences serve no purpose due to life without parole sentence). The State argued that consecutive sentences best embody the punishment recommended by the jury because "we don't know what [e]ffect any later legislative change or Board of Probation or Parole rule change may have with regard to allowing somebody to be paroled, or to be put in a less than maximum security situation" *Id.*

The record shows that the parties understood the reasons consecutive sentences might be relevant if there was a future change in the law, and the sentencing judge nevertheless chose to impose consecutive sentences. Morant's current regret in failing to present additional testimony or arguments for

concurrent sentences in 1997 provides no basis to grant relief, and no structural error prevented him from doing so. It was his choice.

Similarly, Morant's claim falls outside *Miller*'s holding. This Court has said that reading additional procedural requirements into *Miller* would be "intruding more than necessary upon the States." *Id.* (citing *Jones,* 141 S. Ct. at 1321). That is even more true here. Missouri chose to accept the remedy this Court suggested in *Montgomery* rather than resentencing *Miller*-impacted offenders. Accepting Morant's argument would make *Montgomery*'s remedy a false promise and would instead require resentencing for any offender who has consecutive sentences and regrets not making additional arguments for concurrent time.[3] The Constitution does not require that, so Morant's claim fails to warrant further review from this Court.

IV. Morant's consecutive sentences do not violate the Eighth Amendment.

Morant also argues that his consecutive sentences violate the Eighth Amendment because he will not be eligible for release on all of his sentences until July 25, 2051. The Supreme Court of Missouri has found that this Court does not prohibit "multiple fixed-term periods of imprisonment for multiple

[3] Such inmates are not without any potential remedy because they may apply for a pardon or commutation to Missouri's governor. Mo. Const. art. IV, § 9; *see also Herrera v. Collins,* 506 U.S. 390, 411–416 (1993) (describing the historical role of clemency as a "fail safe" where no judicial remedies exist).

nonhomocide offenses." *Willbanks v. Dep't of Corr.,* 522 S.W.3d 238, 246 (Mo. 2017), *cert denied* 583 U.S. 873. Like Morant, the offender in *Willbanks* argued that several consecutive sentences with terms of parole ineligibility "should be considered the functional equivalent of life without parole." *Id.* at 242.

The Missouri Supreme Court found that different penological goals apply when sentencing offenders for multiple offenses instead of a single offense. *Id.* at 243. Courts have broad discretion to impose consecutive sentences when imposing punishment for multiple offenses. *Id.* It is reasonable for lawmakers and sentencing courts to believe that offenders who commit multiple offenses should be punished more harshly than offenders who commit a single offense. *Id.*; *Ali v. Roy,* 950 F.3d 572, 575 (8th Cir. 2020). This Court has observed "it would scarcely be competent for a person to assail the constitutionality of the statute prescribing punishment for burglary, on the ground that he had committed so many burglaries that, if punishment for each were inflicted on him, he might be kept in prison for life." *O'Neil v. Vermont,* 144 U.S. 323, 331 (1892). "Neither [the Supreme Court of Missouri] nor [this Court] has ruled on the constitutional impact of consecutive sentences," *Willbanks,* 522 S.W.3d at 243 (citing *United States v. Aiello,* 864 F.2d 257, 265 (2d Cir. 1988)), and this Court's observation in *O'Neil* suggests the cumulative effect of the sentences "is simply not material to proportionality under the Eighth Amendment." *Ali,* 950 F.3d at 576.

Even if there exists a combination of age and sentence length that might arguably not best serve the goals of criminal punishment, that matter "is better suited for the [Missouri's] General Assembly than this Court." *Willbanks,* 522 S.W.3d at 243. When the General Assembly enacted its legislative remedy for *Miller* violations, it "chose to limit the statute to those juveniles sentenced to life without parole" and the Supreme Court of Missouri has "decline[d] to extend the statute beyond its terms" to apply to offenders with consecutive sentences. *Id.*

That choice is well founded because 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 additional crimes.

This concern for marginal deterrence is highly relevant for offenders who commit multiple serious acts of violence in the course of 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, for example, a shooting to a carjacking, or a rape to a home invasion. In other words, "if the punishment for robbery were the same as that for murder, then robbers would have an incentive to murder any witnesses to their robberies." *United States* v. *Reibel*, 688 F.3d 868, 871 (7th Cir. 2012).

Even if Missouri's legislative scheme is to be refined in the future, that should remain the work of the state legislature and not courts. Since *Willbanks,* the General Assembly has enacted § 217.690.6, which allows the Missouri Parole Board to parole juvenile offenders with lengthy consecutive sentences. But the General Assembly specifically excluded offenders like Morant who were "found guilty of murder in the first-degree or capital murder . . . who may be found ineligible for parole or whose parole eligibility may be controlled by section 558.047." Mo. Rev. Stat. § 217.690.7 (2021). The exclusionary provisions of § 217.690.7 show the General Assembly's conscious choice to require juvenile first-degree murderers to serve the periods of parole ineligibility for any consecutive sentences. *See Jones v. Mo. Dept. of Corr.,* 588 S.W.3d 203, 208 (Mo. App. 2019) ("nothing within § 558.047 expunges sentences for other crimes committed by the juvenile, and nothing within

§ 558.047 supersedes established parole guidelines and/or authorizes the parole board to ignore these guidelines.").

The Constitution gives Missouri's legislature broad power to decide how best to punish criminals who commit multiple violent offenses and when they should be eligible for parole. *See Shinn,* 596 U.S. at 376. "The power to convict and punish criminals lies at the heart of the States' residuary and inviolable sovereignty." *Id.* (quotations and citations omitted). "Thus, "the States possess primary authority for defining and enforcing the criminal law." *Id.* (citations and quotations omitted). Nothing in the Constitution requires Missouri to supplant the General Assembly's laws with a remedy of Morant's choice, so there is no basis for further review of Morant's petition.

Conclusion

This Court should deny the petition for writ of certiorari.

Respectfully submitted,

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