No. 17-912

In the Supreme Court of the United States

BOBBY BOSTIC,

Petitioner,

v.

BILLY DUNBAR, ACTING WARDEN,

Respondent.

On Petition for Writ of Certiorari
to the Missouri Supreme Court

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Does the Eighth Amendment prohibit a State from imposing, on a juvenile offender who committed multiple nonhomicide crimes, a set of consecutive sentences for his multiple crimes that result in parole eligibility during the offender's old age?

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JURISDICTION

This Court lacks jurisdiction over this petition. This Court lacks jurisdiction to review state decisions that rest on adequate and independent state law grounds. 28 U.S.C. § 1257. Here, the state courts did not reach a federal question but rather relied on an independent and adequate state law rule of decision—a procedural bar against certain successive habeas petitions—and therefore this Court has no jurisdiction to reach the issue. *See infra* Part III.

CONSTITUTIONAL PROVISION INVOLVED

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

INTRODUCTION

This Court should not expand its Eighth Amendment jurisprudence to create a new category of juvenile violent criminals eligible for early parole.

The Eighth Amendment prohibits a State from inflicting cruel and unusual punishments. U.S. Const. amend. viii. This Court has interpreted this Amendment to prohibit the death penalty for juvenile offenders, *Roper* v. *Simmons*, 543 U.S. 551 (2005); to prohibit a mandatory sentence of life in prison without parole for a juvenile offender convicted of a 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 nonhomicide offense, *Graham* v. *Florida*, 560 U.S. 48 (2010). But this 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. Out of respect for federalism and the textual limits of the Eighth Amendment, this Court should not do so now.

This petition concerns a juvenile offender who was sentenced to multiple, consecutive terms in prison for committing multiple crimes, and who will be eligible for parole in great old age. Bobby Bostic committed three counts of robbery, three counts of attempted robbery, two counts of assault, one count of kidnapping, eight counts of armed criminal action, and one count of possession of marijuana. App. 38a. He will be eligible for parole at age 112. App. 13a–14a.

This Court lacks jurisdiction to review the federal question presented in the petition because the judgment below rests on adequate and independent state grounds. The last reasoned decision rested on a state procedural bar: that he cannot present a new habeas petition raising the same grounds as a petition previously-denied with prejudice by a higher court.

The petition is correct that the federal and state appellate courts disagree on whether the Eighth Amendment prohibits aggregate sentences for juvenile offenders—but this Court has often and recently denied review of petitions raising this question, and nothing warrants a change of course now. Further, the Missouri Supreme Court was correct to conclude in prior cases that, under this Court's precedents, the Eighth Amendment does not prohibit such sentences, either for homicide or non-homicide offenders. This juvenile committed heinous crimes on the cusp of adulthood, but, unlike the sentences that this Court held unconstitutional in *Miller* and *Graham*, he did not receive a sentence of life in prison without the possibility of parole *for any individual crime*. Instead, he received multiple sentences, corresponding to the number and severity of his crimes, with an opportunity for parole in extreme old age.

Moreover, this petition does not present a clean or comprehensive vehicle in which to set a helpful precedent in this area. The case does not present a *Miller* homicide fact pattern, nor would it help resolve the question of at precisely what age an offender must be eligible for parole. Nor does this case present any of this Court's traditional criteria for summary reversal.

The petition should be denied.

STATEMENT

In this case, a teenager committed multiple serious crimes and was sentenced to multiple, consecutive terms in prison. This juvenile offender will first be eligible for parole at age 112, and he claims that the Eighth Amendment, as interpreted in this Court's decision in *Graham*, requires that he become eligible for parole sooner.

A. Bobby Bostic committed seventeen violent non-homicide offenses and one drug offence as a teenager.

At age 16, just before Christmas, Mr. Bostic and his accomplice Donald Hutson robbed and assaulted at gun point a group of people who were delivering toys to needy children in St. Louis. During these robberies, the duo shot one man (*after* he gave them the money they demanded), shot at another male victim (also *after* he gave them his money they demanded), and kidnapped and assaulted a lady (again, *after* she offered them all she had). App. 21a–38a.

1. Regina Lee Davis was getting toys out of her car to give to needy children for Christmas in the City of St. Louis in mid-December 1995. App. 21a. As she opened her trunk, two men walked up and put guns to her head. *Id*. They told her to drop everything back in the car and get inside again. *Id*. She dropped everything and one man took the keys out of her hand, then forced her into the back of her car. App. 21a–22a. They drove off, one man still holding a gun to her head. App. 22a.

As they drove her around the neighborhood at gunpoint, they demanded her money, interrogating her for where she may have some. App. 22a–23a. One man told her to take her earrings and coat off, and so she gave him her purse and everything she had. App. 23a. But it was not enough. As she later recounted,

> I was like 'I don't have any more money, I don't have any more money.' He was asking me for more money. So, he put his hand down in my pants to check to see if I had some money. * * * He put his hands in my pants to check and see if I had some money down in my drawers. And then he put his hand in my boots to check and see if I had any money. He touched my breasts.

App. 23a–24a. After an argument over what to do next, the men then left her in an alley and drove off. App. 24a–25a.

2. The same day, Linda Gschaar was also delivering toys to needy children with friends and coworkers. App. 26a.

Her company had adopted one of the Hundred Neediest Cases, and they had collected three carloads of gifts for the family. App. 26a. She, her boyfriend Christopher Pezzimenti, her office manager Leslie Harding, and others set to deliver these presents as a group in a caravan of three vehicles—some presents were big, like a donated couch, so they pulled up to the home in two cars and a truck. App. 26a–27a.

Just as Ms. Gschaar opened her trunk at the home to take out the couch cushions, two men came up to

her, put a gun at her head, and told her to hand over her money or he was going to shoot her. App. 27a. When she tried to get away, they chased her. App. 29a–30a.

Her boyfriend Mr. Pezzimenti, who had been on his phone, yelled at the men, and so they went after him with their guns. App. 30a. They turned the gun on him and hit him, demanding his money as they punched him. App. 29a-30a, 34a. Mr. Pezzimenti lied and denied he had any money, but one of the men hit him in the face, and said, "We're not kidding"—then he shot the ground next to Mr. Pezzimenti. App. 30a.

When Mr. Pezzimenti did nothing, one of the men then shot Mr. Pezzimenti in the side, grazing him with a bullet. App. 31a. Ms. Gschaar pleaded with Mr. Pezzimenti to give the men his money, which he did, about $500 in cash. App. 30a–31a.

The two men then came up to Kim Latice Brown Chisum, and grabbed her, taking a leather coat off of her. App. 31a–32a, 36a.

They then demanded a wallet from another man with them, Matthew Leo. App. 31a, 36a. After Mr. Leo threw his wallet down, one of the men shot at him. App. 31a–32a. The bullet missed. App. 37a.

The two men then ran away, and the group, still shaken, nevertheless unloaded their van to deliver the presents to the needy family. App. 35a.

3. Mr. Bostic later confessed to a police detective that he was one the two men who had shot at, kidnapped, and robbed these people. App. 37a. He denied

that he fired any of the shots but he admitted that he had brought and used a gun. App. 37a. He denied being the man to assault Ms. Davis in the car but he admitted that he was the driver who had kidnapped her. App. 37a–38a.

Mr. Bostic explained that he had used the money to buy marijuana. App. 37a–38a. He had tossed the guns in the river, App. 39a, and then he continued joyriding around St. Louis until the police chased him down and he was caught. App. 38a.

B. A jury of the Circuit Court of St. Louis City found Mr. Bostic guilty of three counts of robbery, three counts of attempted robbery, two counts of assault, one count of kidnapping, eight counts of armed criminal action, and one count of misdemeanor possession of marijuana. App. 38a.

The court sentenced Mr. Bostic to an aggregate sentence of 241 years in prison. Specifically, he received six individual terms in prison: Three 30-year sentences (for three counts of robbery); eight fifteen-year terms in prison (for one count of robbery, two counts of attempted robbery, one count of kidnapping, two counts of assault, and two counts of armed criminal action); six five-year terms in prison (one of each of six counts of armed criminal action); and one term of one year in prison (for his single count of misdemeanor marijuana possession). App. 41a-45a. The court imposed consecutive sentences on each of the seventeen counts but allowed for the possibility of parole on each one. App. 41a–45a. Mr. Bostic will be eligible for parole in January 2091, when he is 112 years of age. App. 13a–14a.

Central to the circuit court's sentencing decision was Mr. Bostic's total lack of remorse for his crimes, shown by his stoic emotional demeanor as well as his adamant decision to proceed to trial in the face of overwhelming evidence of guilt. At sentencing, the Court observed:

> THE COURT: Mr. Bostic, I sat through this trial, I saw your family everyday of the trial. I saw them beg with you, plead with you, try to convince you into entering a plea of guilty in a case in which the evidence was overwhelming. And you dismissed them because your friends in the workhouse knew far more than the people who love and care about you. I have received -- I saw your lawyer and people from his office trying to talk to you, and you dismissed them because you knew more than these trained legal minds because of your brilliant friends in the workhouse who wouldn't be there if they were so smart.

App. 38a–39a.

Even after the trial, Mr. Bostic did not accept any blame for his own actions—in fact, he blamed his victims as a tactic to try to avoid punishment for his crimes. As the court said,

> You don't listen to anyone. You write me these letters. It's the victim's fault. It's the police fault. It's your mother's fault. It is your fault. You put yourself in the position to be standing in front of me facing 241 years in the Department of Corrections. You did it to yourself.

> You write me these letters how brilliant you are, how intelligent you are, how you are smarter than everybody else in the world. You are the biggest fool who has ever stood in front of this Court. You have expressed no remorse. You feel sorry for Bobby. Bobby doesn't want to do this time. Bobby doesn't want to do this. Bobby's feelings are hurt. Poor little Bobby.

App. 39a. The court continued:

> I feel nothing for you. I feel the same thing for you that you apparently felt for those victims and you feel for your family. Everything is about Bobby. Bobby, Bobby, Bobby. Not once in one of these letters do you express any remorse for what you did. You're only sorry that you're gonna be locked up.

App. 40a.

To the sentencing court, this lack of remorse was all the more shocking given how narrowly Mr. Bostic's victims had escaped with their lives.

> Well, Bobby, you terrorized a group of people that night. It could have been worse, because you could be standing in front of me awaiting sentence on capital murder because if those bullets had just strayed a different way there could have been two dead people out there.
>
> But you still don't care. Everything is about Bobby.

App. 39a.

Another troubling factor was Mr. Bostic's related unconcern for the effect of his actions on his own family, especially on his mother and on his disabled brother. After many of Mr. Bostic's family members, including his mother, asked the court for clemency, the sentencing court stated:

> You have hurt your family. I have seen these people sit there and cry because you will not listen to them. You have hurt them badly. You have put so many years on your mother right now it's not even funny.
>
> You know, your mother wrote me one of the most beautiful letters I have ever received from a parent. She talked about her love for her children, her unconditional love for her children and her desire to at least have them with her so she could touch them, hold them, kiss them, feel them, tell them how she loved them.

App. 39a. The Court went on:

> You're a bright young man, but you're certainly not as bright as you think you are, because your problem is you think you're smarter than everyone else in the world. You're as smart as your friends in the workhouse. You couldn't listen to your mother, you couldn't listen to your father, you couldn't listen to your sisters and your brothers. Your brother in the wheelchair begged and pleaded with you so that you could remain a part of his

> life, and you dismissed him too. You knew the conditions under which he was shot. You knew what was going on, and still you persisted in this pattern of behavior. You made your choice, and you're gonna die with your choice because Bobby Bostic, you will die in the Department of Corrections.

App. 40a–41a.

The court also rested its decision on the fact that Mr. Bostic had not learned his lesson after previous run-ins with the law. He had been arrested on three separate occasions in the four months before he had committed these offences, including arrests for first-degree burglary, attempted robbery, resisting and interfering with arrest, two second degree assaults, possession of a controlled substance, tampering with physical evidence, possession of drug paraphernalia, twelve traffic violations, and another count of possession of a controlled substance. Sentencing Trans. at 340-41 (attached to the State's suggestions in opposition to motion to recall the mandate, No. ED 72164 (Oct. 17, 2011)). Rather than be scared straight by these arrests, he chose to rob more people and do drugs again.

The Missouri state court of appeals next affirmed his convictions and sentences on direct appeal. *Missouri* v. *Bostic*, 963 S.W.2d 720 (Mo App. E.D. 1998).

C. Mr. Bostic then began two rounds of habeas litigation, arguing in each round that under *Graham* v. *Florida*, 560 U.S. 48 (2010), he should be eligible for parole sooner in life.

1. In 2011, Bostic pursued a round of Missouri state habeas corpus litigation in the Circuit Court of Texas County, the Missouri Court of Appeals, and the Missouri Supreme Court, alleging in each court that his sentence is unconstitutional under the Eighth Amendment because he was under age eighteen at the time of his crimes. Appendix 4a–12a.

He was unsuccessful.

At the outset, the Circuit Court for Texas County dismissed his petition for a writ of habeas corpus. App. 12a. After reviewing the entire file, that court dismissed the complaint without prejudice, holding that that "Habeas Corpus is not a proper remedy." App. 12a.

Next, the Court of Appeals for the Southern District denied him a writ of habeas corpus. App. 11a. It stated, "the Court takes up for consideration petitioner's petition for writ of habeas corpus. Having seen and examined said application, and having been advised in the premises, the Court does deny the petition." App. 11a.

Then the Missouri Supreme Court denied him a writ of habeas corpus, too. App. 9a–10a. Its order stated, "on consideration of the petition for writ of habeas corpus herein to the said respondent, it is ordered by the Court here that the said petition be, and the same is hereby denied." App. 9a.

2. Mr. Bostic then started another round of litigation in the same courts and raising the same *Graham* claim. Appendix 1a–8a.

Ruling on this second habeas petition, the Circuit Court of Texas County found that Mr. Bostic's claim—that his sentence violated *Graham* v. *Florida*, 560 U.S. 48 (2010)—was essentially the same claim that the Missouri Supreme Court had rejected in 2011. App. 4a–8a. Critically, the Texas County court noted, the earlier Missouri Supreme Court decision rejecting the claim had not said that it was without prejudice. App. 5a–6a. And, under Missouri Supreme Court Rule 91.22 and many precedents interpreting that rule, a lower habeas court may not review the same issue already reviewed by a higher habeas court unless the decision of the higher court states that it is without prejudice to proceeding in a lower court. Appendix at 5a–7a (citing *Hicks* v. *Missouri*, 719 S.W.2d 86, 88–89 (Mo. App. S.D. 1986) and *Missouri* v. *Thompson*, 723 S.W.2d 76, 90 (Mo. App. S.D. 1987)).

The only difference between this petition and his prior petition, the court held, is that Mr. Bostic "merely tweaked the wording to allege that the sentencing statue as opposed to the sentence itself violates the Eighth Amendment in light of *Graham*." App. 6a. "Bostic is in reality raising the same claim that has already been rejected by the Missouri Supreme Court and attempting to convince this Court to overrule the Missouri Supreme Court's rejection of his claim. He cannot do that under Missouri Law." App. 7a.

The court thus held that "Bostic's current claim is barred by Missouri Supreme Court Rule 91.22, which bars a lower court from granting a writ of habeas corpus if a petition has been denied by a higher court."

App. 6a–7a. "Bostic should not be allowed to make unending challenges to his conviction and sentence by litigating his claims through the state and federal courts systems then tweaking his claims slightly and starting over again." App. 8a.

Mr. Bostic then raised his *Graham* claim again in habeas corpus petitions to the Missouri Court of Appeals for the Southern District, App. 3a, and the Missouri Supreme Court, App. 1a. Each court issued a summary denial of the petition. App. 1a–3a.

Mr. Bostic now asks this Court for certiorari review of the Missouri Supreme Court's summary denial of his habeas petition—even though the last reasoned decision in the case relies on a state law procedural reason for denying his *Graham* claim.

D. Even if Mr. Bostic's claims had been reached on the merits—which they were not—he still would not have prevailed in Missouri courts.

In two other cases, by a 4–3 vote, the Missouri Supreme Court has held that the Eighth Amendment does not forbid imposing on a juvenile offender who committed multiple crimes a set of consecutive sentences that result in parole eligibility during the offender's old age. *Willbanks* v. *Dep't of Corr.*, 522 S.W.3d 238 (Mo. 2017), *cert. denied sub nom. Willbanks* v. *Missouri Dep't of Corr.*, 138 S. Ct. 304 (2017) (non-homicide offenders); *State* v. *Nathan*, 522 S.W.3d 881 (Mo. 2017), *cert. denied sub nom. Willbanks* v. *Missouri Dep't of Corr.*, 138 S. Ct. 304 (2017) (homicide offenders).

In a homicide case, the court held that this Court's precedents in *Miller* and *Graham* address only sentences of life without parole given for single offenses. *Nathan*, 522 S.W.3d 886–93. *Miller* and *Graham* do not apply to multiple terms of imprisonment given to juvenile offenders who commit multiple offenses. *Id.* at 888–93. And for good reason: "multiple violent crimes deserve multiple punishments." *Id*. at 893. Indeed, if the contrary view were adopted, a juvenile could "never be sentenced to consecutive, lengthy sentences that exceed his life expectancy no matter how many violent crimes he commits." *Id.* at 895.

In a non-homicide case, the Missouri Supreme Court likewise concluded that *Graham* did not require a different sentence for nonhomicide offenders. "*Graham* did not address juvenile offenders who, like Willbanks, were sentenced to multiple fixed-term periods of imprisonment for *multiple* nonhomicide offenses. Instead, Graham concerned juvenile offenders who were sentenced to life without parole for a *single* nonhomicide offense." *Willbanks*, 522 S.W.3d at 240.

The court recognized that it would usurp the role of the legislature if it were to expand *Graham* to require earlier parole for an offender who had committed multiple violent nonhomicide offenses and received a separate, consecutive sentence for each offense. In the absence of controlling authority from this Court, the proper balance of "these penological concerns is better suited for the General Assembly" than for the courts. *Willbanks*, 522 S.W.3d at 243. Indeed, the court noted that the Missouri General Assembly had recently allowed juvenile offenders sentenced to life without parole to apply for parole after serving 25

years, and in the absence of such statutory authorization, it declined to extend this relief to offenders like Willbanks serving cumulative, consecutive sentences. *Id*. (citing Mo. Rev. Stat. § 558.047).

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

Three judges dissented. *Id*. at 247–70. For the dissenters, *Graham* authorized a new categorical approach in every case: Every juvenile offender must be eligible for parole before their average date of life expectancy, regardless of how many crimes the juvenile committed, and regardless of whether they

were homicide or nonhomicide crimes. *Id.* at 248. The dissenters argued that the State has a "virtually nonexistent" interest in deterring juveniles from committing multiple crimes, *Id.* at 268, and that juveniles have such reduced moral culpability that no significant interest is served by imposing harsh sentences on them that preclude parole eligibility earlier in their lifetimes, *Id.* at 247–70. The dissenters also dismissed any problems in identifying the necessary date of release for a juvenile, because, in their view, "difficulties in fashioning remedies have never stayed this Court's hand from doing justice." *Id.* at 269. The dissenters chastised the majority for refusing to expand *Graham* out of a fear that this Court would "get mad" and rebuke the state court for interpreting Supreme Court precedent to reach issues that the Supreme Court has not yet reached. *Id.* at 264.

The same day, the Missouri Supreme Court decided *Carr* v. *Wallace*. In *Carr*, the court held that, under *Miller*, the State may not impose a mandatory sentence of life without parole for 50 years on a juvenile homicide offender, where that sentence is most severe sentence available for the crime. *Carr* relied on this Court's statement in *Miller* that a State may not impose its "most severe penalties on juvenile offenders" in a non-discretionary manner. *Carr* v. *Wallace*, 527 S.W.3d 55, 57 (Mo. 2017) (citing *Miller*, 567 U.S. at 474). *Carr* did not present "the same stacking or functional equivalent sentences issue" presented in *Willbanks* and *Nathan*. *Id.* at 61 n.7.

REASONS FOR DENYING THE PETITION

I. This Court lacks jurisdiction over the question presented.

This Court lacks jurisdiction over this petition. When a reasoned decision is based on a state law procedural reason, this Court presumes that summary orders by higher state courts rely on the same reasoning. Here, the last reasoned state court decision in the case relies on a state law reason that is independent of the merits of the federal claim and an adequate basis for the decision. This Court thus has no jurisdiction to consider the merits of the claim in this certiorari petition.

A. This Court has no jurisdiction to review judgments that rest upon state law. Under § 1257(a), this Court may review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a). Under this statute, this Court "lacks jurisdiction to entertain a federal claim on review of a state court judgment … that is both independent of the merits of the federal claim and an adequate basis for the court's decision. *Foster* v. *Chatman*, 136 S. Ct. 1737, 1745 (2016) (internal quotation marks omitted).

To identify whether a judgment rests on state law, this Court examines the last reasoned decision in the case. And so, in the case of a summary decision by state's highest court, this Court will look through to the last reasoned decision by a lower court to determine whether the final summary decision was based on a state law ground or a federal law ground. *Ylst* v. *Nunnemaker*, 501 U.S. 797, 802–06 (1991). In *Foster*,

for instance, the Georgia Supreme Court decision was a summary denial of habeas review, and so this Court looked through to the decision of a lower court that conducted four pages of analysis of the merits of the federal constitutional claim, which showed that the Georgia Supreme Court decision was not based on a state law ground. In *Ylst*, likewise, this Court looked through unexplained habeas denials to the last reasoned state court decision and found that the decision was based on a state law procedural ground, and so the Court presumed that the summary denials were based on the same reasoning as that decision. *Id.*

B. Here, the last reasoned decision of the state court was not based on federal law but rather on state law, and therefore this Court has no jurisdiction to reach the issue presented in this petition. App. 4a–8a.

Under Missouri Supreme Court Rule 91.22 and precedents interpreting that rule, a lower habeas court may not review the same issue already reviewed by a higher habeas court unless the decision of the higher court states that it is without prejudice to proceeding in a lower court. Appendix at 5a–7a (citing *Hicks* v. *Missouri*, 719 S.W.2d 86, 88–89 (Mo. App. S.D. 1986) and *Missouri* v. *Thompson*, 723 S.W.2d 76, 90 (Mo. App. S.D. 1987)). Missouri Supreme Court precedent holds that "habeas review does not provide duplicative and unending challenges to the finality of a judgment, so it is not appropriate to review claims already raised on direct appeal or in post-conviction proceedings." *State ex rel. Strong* v. *Griffith*, 462 S.W.3d 732, 733–34 (Mo. 2015) (internal quotation marks omitted).

Here, Mr. Bostic filed a second or successive habeas petition presented to a lower court after a first petition was denied by a higher court with prejudice.

The Circuit Court of Texas County accordingly found that Mr. Bostic's claim—that his sentence violated *Graham* v. *Florida*, 560 U.S. 48 (2010)—was essentially the same claim that the Missouri Supreme Court had rejected in 2011, and was thus barred. App. 5a. The earlier Missouri Supreme Court decision rejecting the claim did not say that it was without prejudice, App. 5a–6a, and the only change between this petition and his earlier petition is that Mr. Bostic "merely tweaked the wording to allege that the sentencing statue as opposed to the sentence itself violates the Eighth Amendment in light of *Graham*." App. 6a. This was not enough to remove his petition from the scope of the rule. The court held that "Bostic should not be allowed to make unending challenges to his conviction and sentence by litigating his claims through the state and federal courts systems then tweaking his claims slightly and starting over again." App. 8a.

This case is thus like *Ylst*, as opposed to *Foster*. The Circuit Court of Texas County made a decision based on state law and it declined to reach the merits of the federal claim that Mr. Bostic now wishes this Court to review. App. 4a–8a.

Neither the petition nor any of the amicus briefs even attempt to explain why this jurisdictional rule does not bar review of the claim in this case. The closest they come to acknowledging this issue is to criticize the state court rule here for "focusing on form over substance." Br. *Amici* Former Judges, prosecutors,

and Law Enforcement Officers at 11. But this Court's jurisdictional rules are not mere matters of "form," and Missouri's procedural rules in habeas cases are justified by other powerful concerns, such as a need for order in the courts and for finality in criminal judgments.

In sum, because the last reasoned decision in the case relies purely on a state law procedural reason for denying Mr. Bostic's *Graham* claim, this Court lacks jurisdiction to review the Missouri Supreme Court's summary denial of his habeas petition.

II. The division of authority among the courts of appeals does not warrant this Court's review.

A. The petition is correct that the federal and state courts of appeals are split on the question decided below: whether the Eighth Amendment prohibits sentencing a juvenile offender to multiple consecutive terms of imprisonment for multiple crimes, where the net effect is that juvenile offender is first eligible for parole in old age.

The Missouri Supreme Court, as well as several federal and state appellate courts, holds that the Eighth Amendment does not categorically prohibit multiple consecutive sentences for multiple crimes where the juvenile offender has an opportunity for parole in old age. *Lucero* v. *People*, 394 P.3d 1128, 1132-33 (Colo. 2017) (petition for cert. not filed); *State* v. *Brown*, 118 So. 3d 332, 335, 341 (La. 2013) (petition for cert. not filed); *State* v. *Ali*, 895 N.W.2d 237, 239, 246 (Minn. 2017), *cert. denied*, 138 S. Ct. 640 (2018); *Vasquez* v. *Commonwealth*, 781 S.E.2d 920, 928 (Va.

2016), *cert. denied*, 137 S. Ct. 568 (2016). The Sixth Circuit has opined that federal law does not clearly establish that a State may not sentence a juvenile in this way. *Bunch* v. *Smith*, 685 F.3d 546, 550 (6th Cir. 2012), *cert. denied*, 133 S. Ct. 1996 (2013).

Other appellate courts, however, hold that the Eighth Amendment prohibits any consecutive sentences of this kind. *People* v. *Caballero*, 282 P.3d 291, 293, 295 (Cal. 2012), *cert denied* 135 S. Ct. 1564 (2015); *State* v. *Riley*, 110 A.3d 1205, 1206 (Conn. 2015), *cert. denied*, 136 S. Ct. 1361 (2016); *Henry* v. *State*, 175 So. 3d 675, 676, 680 (Fla. 2015), *cert. denied*, 136 S. Ct. 1455 (2016); *People* v. *Reyes*, 63 N.E.3d 884, 886, 888 (Ill. 2016) (petition for cert. not filed); *State* v. *Ragland*, 836 N.W.2d 107, 121 (Iowa 2013) (petition for cert. not filed); *Commonwealth* v. *Brown*, 1 N.E.3d 259, 261, 270 (Mass. 2013) (petition for cert. not filed); *State* v. *Boston*, 363 P.3d 453, 454, 457 (Nev. 2015) (petition for cert. not filed); *State* v. *Zuber*, 152 A.3d 197, 201–02 (N.J. 2017), *cert. denied*, 138 S. Ct. 152 (2017); *State* v. *Moore*, 76 N.E.3d 1127, 1130–49 (Ohio 2016), *cert. denied*, 138 S. Ct. 62 (2017); *State* v. *Ramos*, 387 P.3d 650, 659–61 (Wash. 2017), *cert. denied*, 138 S. Ct. 467 (2017); *Bear Cloud* v. *State*, 334 P.3d 132, 136, 141–42 (Wyo. 2014) (petition for cert. not filed). Three federal circuit courts have also held that this interpretation of the Eighth Amendment is clearly established federal law. *McKinley* v. *Butler*, 809 F.3d 908, 909, 911 (7th Cir. 2016) (petition for cert. not filed); *Moore* v. *Biter*, 725 F.3d 1184, 1186, 1192 (9th Cir. 2013) (petition for cert. not filed); *Budder* v. *Addison*, 851 F.3d 1047, 1049, 1057 (10th Cir. 2017), *cert. denied sub nom.*; *Byrd v. Budder*, 138 S. Ct. 475 (2017).

B. But, even if this Court had jurisdiction over this petition, there is no pressing need for this Court to intervene to resolve this split of authority. This Court has frequently and recently declined to review many petitions raising this issue, and nothing counsels in favor of changing course now.

This Court has repeatedly denied review of cases raising whether *Miller* and *Graham* should be expanded to apply to lengthy sentences of terms of years in prison. This Court has not intervened in any of these cases. *See, e.g., People* v. *Caballero*, 282 P.3d 291, 293 (Ca. 2012); *Connecticut* v. *Riley*, 110 A.3d 1205, 1206 (Conn. 2015); *Casiano* v. *Comm'r of Corrections*, 115 A.3d 1031, 1033–34, 1045, 1047 (Conn. 2015), *cert. denied*, 136 S. Ct. 1364 (2016); *Henry* v. *Florida*, 175 So. 3d 675, 676 (Fl. 2015); *Gridine* v. *Florida*, 175 So. 3d 672, 674 (Fl. 2015); *People* v. *Reyes*, 63 N.E.3d 884, 886 (Il. 2016).

This Court also has not reviewed cases that have properly raised the federal question of whether *Miller* and *Graham* apply only to a sentence for a single offense, or whether they also govern the imposition of multiple consecutive sentences for multiple offenses. Many courts have held that *Miller* and *Graham* do not affect aggregate sentences for multiple crimes. *Lucero*, 394 P.3d at 1130; *Brown*, 118 So. 3d at 334–35; *Ali*, 895 N.W.2d at 239; *Vasquez*, 781 S.E.2d at 925–28; *see also, e.g., State* v. *Kasic*, 265 P. 3d 410, 413, 415-16 (Ariz. App. 2011); *Bunch*, 685 F.3d at 550–51. Other courts have held that aggregate sentences for multiple crimes are covered by *Miller* and *Graham*. *See, e.g.*, *Caballero*, 282 P.3d at 293, 295; *Riley*, 110 A.3d at 1206, 1214, 1217–18; *Henry*, 175 So. 3d at 676–77,

679–80; *Reyes*, 63 N.E.3d at 886, 888; *Brown*, 1 N.E.3d at 261, 270 & n.11; *Boston*, 363 P.3d at 454, 457; *Zuber*, 152 A.3d at 201, 203–04; *Moore*, 76 N.E.3d at 1133–34, 1137–49; *Ramos*, 387 P.3d at 659–61, 668; *Bear Cloud*, 334 P.3d at 136, 141–42 (Wyo. 2014); *see also, e.g., State* v. *Ronquillo*, 361 P.3d 779, 781, 784–85 (Wash. App. 2015); *State* v. *Null*, 836 N.W.2d 41, 70-71 (Iowa 2013). This Court has not intervened in any of these cases either.

This Court also recently denied review in two cases from Missouri presenting *no* vehicle problems and that involved lengthy, comprehensive opinions from the courts below. *Willbanks v. Dep't of Corr.*, 522 S.W.3d 238 (Mo. 2017), *cert. denied sub nom. Willbanks* v. *Missouri Dep't of Corr.*, 138 S. Ct. 304 (2017) (non-homicide offenders); *State* v. *Nathan*, 522 S.W.3d 881 (Mo. 2017), *cert. denied sub nom. Willbanks* v. *Missouri Dep;t of Corr.*, 138 S. Ct. 304 (2017) (homicide offenders).

As in these past cases, if this Court were to grant review here, it would cut off future benefits that might accrue from further percolation of these aspects of these issues in the lower courts. Further percolation may be useful because *Miller* was only deemed retroactive a year-and-a-half ago, *Montgomery* v. *Louisiana*, 136 S. Ct. 718, 736 (2016), and so many States have not yet had occasion to consider whether and how *Graham* and *Miller* apply to consecutive term-of-years sentences. Likewise, it has been less than a year since this Court's decision in *Virginia* v. *LeBlanc*, 137 S. Ct. 1726, 1729 (2017), which held that *Graham* by its terms did not apply to offenders who are subject to sentences with geriatric release, and so the lower

courts would benefit from further time to reflect this decision in their reasoning.

III. The Missouri Supreme Court properly declined to expand this Court's Eighth Amendment precedent.

Even if this Court were to reach the merits of Mr. Bostic's claim, the Eighth Amendment does not prohibit his sentence here, as the Missouri Supreme Court has held in similar cases. The State may sentence a juvenile offender who committed multiple crimes to multiple consecutive terms of imprisonment, even if the net effect that the offender is eligible for parole in very old age.

The Eighth Amendment prohibits a State from inflicting "cruel and unusual punishments." U.S. Const. amend. viii. The Missouri Supreme Court has correctly held, on the facts of other cases before it, that neither *Miller* nor *Graham* affects sentences other than those of a single sentence of life without parole given for a single offense. *Willbanks* v. *Dep't of Corr.*, 522 S.W.3d 238 (Mo. 2017), *cert. denied sub nom. Willbanks* v. *Missouri Dep't of Corr.*, 138 S. Ct. 304 (2017) (non-homicide offenders); *State* v. *Nathan*, 522 S.W.3d 881 (Mo. 2017), *cert. denied sub nom. Willbanks* v. *Missouri Dep't of Corr.*, 138 S. Ct. 304 (2017) (homicide offenders).

The Missouri Supreme Court's decisions in these other cases were correct for several reasons.

First, the proliferation of appellate decisions addressing this issue in the few years since *Graham* and

Miller, discussed above, confirms that sentencing juvenile offenders to multiple consecutive sentences for multiple crimes is by no means "unusual" under the Eighth Amendment, even where it results in a lengthy period before parole eligibility. In *Graham*, this Court relied on evidence of the rarity of imposing life without parole on a juvenile offender as a punishment for a single nonhomicide crime. "[A]n examination of actual sentencing practices in jurisdictions where the sentence in question is permitted by statute discloses a consensus against its use." *Graham*, 560 U.S. at 62. By contrast, the large number of appellate decisions in the past few years shows that there is no similar "community consensus" against aggregate sentences for multiple crimes. *Id.* On the contrary, even after *Graham* and *Miller*, it remains commonplace for sentencing courts to impose such sentences.

In addition to community consensus, this Court in *Graham* also considered "whether the challenged sentencing practice serves legitimate penological goals," *id.* at 68. As the Missouri Supreme Court recognized, the "penological justifications for sentencing practice" that this Court considered in *Graham*, *id.* at 71, apply differently to juveniles who committed multiple offenses than they do to juveniles who committed a single offense. *Willbanks*, 522 S.W.3d at 243; *Nathan*, 522 S.W.3d 886–93. Simply put, "multiple violent crimes deserve multiple punishments." *Nathan*, 522 S.W.3d at 888–93. To treat a juvenile offender who commits multiple serious crimes on an equal footing with one who commits only a single crime treats the latter offender unequally, diminishes the gravity of

the offender's second and successive crimes, and undermines the State's interest in deterrence of violent crimes.

What is more, 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, like Mr. Bostic, 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).

Further, although *Graham* relied on the fact that prohibiting life without parole for a single nonhomicide offense provided a "clear line," 560 U.S. at 74, scrutinizing aggregate sentences for multiple crimes under *Graham* and *Miller* does not lend itself to adopting a "clear line." As the Missouri Supreme Court held, there is no objective means by which any court can "pick *the point* at which multiple aggregated sentences may become the functional equivalent of life without parole." *Willbanks*, 522 S.W.3d at 245. For this reason, the lower courts that have invalidated aggregate sentences under *Graham* and *Miller* have struggled and failed to identify any "clear line" for when such aggregate sentences are permissible. *See infra*, Part IV.A.2.

IV. This petition does not present a fact pattern that would allow this Court to issue a helpful precedent in this area.

This Court should not grant review of this question. But, even if this Court were inclined to review this question, this case does not present a particularly useful or frequent fact pattern that would help set a precedent in this area. A useful precedent would resolve perhaps the two greatest disputed questions in after *Graham* and *Miller*: (1) whether *Graham* and *Miller* should be made coextensive for both homicide and nonhomicide cases; and (2) the age at which parole eligibility must begin if *Miller* and *Graham* implicate lengthy term-of-years or aggregate sentences. These issues are not presented on Mr. Bostic's facts.

A. This Court could provide the greatest clarity in this area if it rules in a single case that presents both

a *Miller* homicide fact pattern and a *Graham* nonhomicide fact pattern. Since *Miller* and *Graham* were decided, lower courts have grappled with the question of whether different standards apply in the homicide and nonhomicide contexts. One issue that regularly recurs in the lower courts is whether *Miller* prohibits lengthy discretionary sentences for homicide offenders. This Court held in *Miller* that the Eighth Amendment forbids imposing a mandatory sentence of life imprisonment without parole on a juvenile who committed homicide. 567 U.S. at 479. But some courts have found a categorical prohibition on any life sentence given for homicide, even where the sentencing authority had discretion to give a lesser sentence with earlier parole eligibility. *See State* v. *Valencia*, 386 P.3d 392, 395 (Ariz. 2016), *cert. denied,* 138 S. Ct. 467 (Nov 27, 2017) (holding that *Miller* imposes substantive limits on nearly all life sentences without parole for juvenile homicide offenders even when the sentences were discretionary); *Riley*, 110 A.3d at 1206, 1214, 1217–18; *see also Brown* v. *State*, No. W2015-00887-CCA-R3-PC, 2016, 2016 WL 1562981 at * 7 (Tenn. Crim. App. April 15, 2016), *cert. denied*, 137 1331 (2017). Other courts, however, have held that *Miller* extends only to mandatory sentences of life without parole for homicide offenders, not discretionary sentences. *See Hobbs* v. *Turner*, 431 S.W.3d 283, 289 (Ark. 2014); *Brown*, 1 N.E.3d at 267; *Ali*, 895 N.W.2d at 239, 246; *Parker* v. *State*, 119 So. 3d 987, 995, 999 (Miss. 2013); *Commonwealth* v. *Batts*, 66 A.3d 286, 296 (Pa. 2013); *Jones* v. *Commonwealth*, 795 S.E.2d 705, 711–12, 721–22 (Va. 2017), *cert. denied*, 138 S. Ct. 81 (2017); *see also Ellmaker* v. *State*, 329 P.3d 1253 (Kan. Ct. App. 2014); *State* v. *Barbeau*, 883

N.W.2d 520, 531–34 (Wis. Ct. App. 2016), *cert. denied*, 137 S. Ct. 821 (2017).

This Court would not have an opportunity to resolve this question—perhaps the most important and contentious question in this area— if it granted review in this case. Instead, this Court would be likely to compound the confusion by setting off a new wave of challenges by homicide offenders, who, despite having received discretionary sentences, will claim that a decision issued in this case under *Graham* somehow changed the rule for them in *Miller*.

B. Another particularly intractable problem under *Miller* and *Graham* is the question at what point in time a juvenile must become eligible for parole to avoid a functional life sentence. Both *Miller* and *Graham* stated that an offender must have some meaningful opportunity for parole, but neither case set a specific age at which every juvenile offender must be eligible for parole. *Graham*, 560 U.S. at 82.

In the absence of specific guidance from this Court, the lower courts that have invalidated non-life sentences after *Miller* and *Graham* have come to a wide variety of conclusions. *See, e.g., Caballero*, 282 P.3d at 293 (forbidding parole eligibility that began after 110 years in prison); *Henry*, 175 So. 3d at 679-80 (holding that *Graham* forbids a juvenile offender's 90-year aggregate sentence with release at age 95 for multiple nonhomicide offences); *Gridine*, 175 So. 3d at 674–75 (holding that *Graham* prohibits a 70-year prison sentence for juvenile nonhomicide offender); *Reyes*, 63 N.E.3d at 888–89 (holding that 89 years is too long, but 32 years is not too long); *Null*, 836 N.W.2d at 45, 70–71 (holding that the possibility of

"geriatric release" at age 69 is too late); *Ragland*, 836 N.W.2d at 121–22 (holding that parole at age 78 is a de facto life sentence); *Brown* v. *State*, 10 N.E.3d 1, 8 (Ind. 2014) (relying on *Miller* and *Graham* to reduce under the state constitution an effective life sentence of 150 years for multiple homicide offenses to 80 years); *Commonwealth* v. *Okoro*, 26 N.E.3d 1092, 1098 (Mass. 2015) (upholding a sentence with the possibility of parole after 15 years); *State ex rel. Morgan* v. *State*, 217 So. 3d 266, 267–68, 271–72, 274–75 (La. 2016) (holding that a sentence without parole until the offender is age 101 is too long, and making the defendant parole-eligible after serving 30 years); *State* v. *Smith*, 892 N.W.2d 52, 64–66 (Neb. 2017), *pet. for cert. filed* No. 16-9416 (June 2, 2017) (holding that parole eligibility at age 62 did not amount to a de facto life sentence); *Boston*, 363 P.3d at 454, 457 (parole eligibility at age 116 is too long, but eligibility after 15 years is not); *Zuber*, 152 A.3d at 201, 203-04 (holding that eligibility for parole at age 72 and age 85 are de facto life sentences); *Moore*, 76 N.E.3d at 1133–34, 1137–49 (parole eligibility at age 92 is too long); *State* v. *Charles*, 892 N.W.2d 915, 919-21 (S.D. 2017) (parole eligibility at age 60 is not too long); *State* v. *Diaz*, 887 N.W.2d 751, 768 (S.D. 2016) (release at 55 years old or after 40 years is not too long); *State* v. *Springer*, 856 N.W.2d 460, 470 (S.D. 2014) (parole eligibility at age 49 is not too long); *see also, e.g., Thomas* v. *State*, 78 So.3d 644, 646 (Fla. Dist. Ct. App. 2011) (50-year sentence with release in late 60s is not too long); *Floyd* v. *State*, 87 So. 3d 45, 46 (Fla. Dist. Ct. App. 2012) (release between age 85 and age 97 is too long); *Ellmaker*, 329 P.3d 1253 (holding that "a juvenile offender who receives a hard 50 sentence actually has a chance for release from prison at the end of the term"); *Hampton*,

2016 WL 6915581, *9–10 (parole eligibility at age 45 or 55 is not too long); *Ronquillo*, 361 P.3d at 781, 784–85 (sentence of 51 years with release at age 68 is too long); *Barbeau*, 883 N.W.2d at 534 (eligibility for supervised release at age 49 is a meaningful opportunity for release); *cf. LeBlanc* v. *Mathena*, 841 F.3d 256, 260, 270 (4th Cir. 2016) (holding, under AEDPA, that release at age 60 is not a meaningful opportunity), *overruled sub nom. Virginia* v. *LeBlanc*, 137 S. Ct. 1726 (2017); *Starks* v. *Easterling*, 659 F. App'x 277, 284 (6th Cir. 2016), *cert. denied*, 137 S. Ct. 819, 196 L. Ed. 2d 605 (2017) (White, J., concurring) (recognizing, under AEDPA, that "reasonable jurists can disagree whether release after 51 to 60 years is beyond the line").

Although many courts have held that "a lengthy term of years for a juvenile offender will become a de facto life sentence at some point, there is no consensus on what that point is." *Casiano*, 115 A.3d at 1045. "Some courts conclude that only a sentence that would exceed the juvenile offender's natural life expectancy constitutes a life sentence. Others have found that a sentence is properly considered a de facto life sentence if a juvenile offender would not be eligible for release until near the expected end of his life." *Id.* Still other courts debate what factors should be included in estimating an offender's life expectancy, whether it should be the same for all people or whether it should vary based on demographic factors like race, gender, or socioeconomic class. *Id.* at 1046–47. As Judge O'Scannlain commented, many of these courts set parole eligibility based on an offender's race, gender, socioeconomic class and other as-yet unknown criteria. *Moore* v. *Biter*, 742 F.3d 917, 922 (9th Cir. 2014)

(O'Scannlain, J., joined by six other judges, dissenting from denial of rehearing en banc). But even many of the courts who have extended *Miller* and *Graham* in this way do not believe that the parole date "should turn on the niceties of epidemiology, genetic analysis, or actuarial sciences in determining precise mortality dates." *Null*, 836 N.W.2d at 71.

Because Bostic will become eligible for parole in extreme old age (age 112), this case does not present a particularly helpful vehicle to guide lower courts on this question either. Under any of these decisions, 112 years is the high end of the range.

V. This case is not a candidate for summary reversal.

Perhaps recognizing that this case does not meet this Court's criteria for certiorari, Petitioner also suggests that this case is worthy of summary reversal. Pet. 17, 23-24.

But summary reversal is not warranted here because the lower court's decision was plainly correct, *see supra*, Pt. I & III, and this case does not meet the narrow criteria for this Court to reverse a lower court without the benefit of full merits review.

This Court only takes the unusual step of summarily reversing a lower court's decision when the court below not only clearly erred, but also willfully ignored this Court's precedents. *E.g., James* v. *City of Boise, Idaho*, 136 S. Ct. 685, 686 (2016) ("In the decision below, the Idaho Supreme Court concluded that it was not bound by this Court's interpretation of § 1988 in *Hughes*."); *Caetano* v. *Massachusetts*, 136 S.

Ct. 1027, 1028 (2016) (holding that "the explanation the Massachusetts court offered for upholding the law contradicts this Court's precedent" in *Heller* under the Second Amendment, which was "clear"); *Am. Tradition P'ship, Inc.* v. *Bullock*, 567 U.S. 516 (2012) ("The question presented in this case is whether the holding of *Citizens United* applies to the Montana state law. There can be no serious doubt that it does [because] Montana's arguments in support of the judgment below either were already rejected in *Citizens United*, or fail to meaningfully distinguish that case."); *Marmet Health Care Ctr., Inc.* v. *Brown*, 565 U.S. 530, 532 (2012) ("The West Virginia court's interpretation of the FAA was both incorrect and inconsistent with clear instruction in the precedents of this Court.").

The mere "fact that a decision is indeed wrong is not an adequate reason for summary reversal without something bigger at stake." William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 NYU J.L. & Liberty 1, 25 (2015). For example, this Court recently has summarily reversed several lower-court decisions on questions of qualified immunity, intervening because the lower courts had erroneously denied qualified immunity, *Ryburn* v. *Huff*, 565 U.S. 469, 475 (2012). This Court's precedents on qualified immunity are clear, and the proper application of qualified immunity is important to society as a whole. *White* v. *Pauly*, 137 S. Ct. 548, 551 (2017). Summary reversal was helpful in those cases to correct the persistent trend among lower courts to deny qualified immunity to police officers when it should be available. *See Mullenix* v. *Luna*, 136 S. Ct. 305, 308 (2015) (per curiam).

Here, the Missouri courts did not defy this Court's precedents on the Eighth Amendment but instead applied Missouri procedural law and, if they had reached the merits, they would have applied this Court's rulings as they had in past cases. No court below applied this Court's precedents in any way that this Court has "repeatedly told courts" not to do. *Mullenix*, 136 S. Ct. at 308 (quoting *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 742 (2011)).

CONCLUSION

The petition should be denied.

Respectfully submitted,

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