No. _____

In The
Supreme Court of the United States

STATE OF WYOMING,

Petitioner,

v.

PHILLIP SAM,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Wyoming

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When a juvenile is sentenced for murder and other violent crimes, does the Eighth Amendment limit a judge to an aggregate term of years that allows a meaningful opportunity for release even though none of the separate sentences are cruel and unusual?

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The opinion of the Wyoming Supreme Court is reported at *State v. Sam*, 401 P.3d 834 (Wyo. 2017) and is attached to this petition as an appendix.

JURISDICTION

The judgment of the Wyoming Supreme Court was entered on August 24, 2017. Sam subsequently petitioned for re-hearing and the court denied the petition on September 26, 2017. This Court has jurisdiction to review this case under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Eighth Amendment to the United States Constitution provides, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

INTRODUCTION

Sixteen-year-old Phillip Sam stole a gun and ambushed a group of twelve teenagers. After spraying bullets from a distance, he approached one young man, who lay wounded in the middle of the street pleading for his life, and Sam executed him. A Wyoming jury convicted Sam of first-degree murder and twelve counts of aggravated assault.

In Wyoming, first-degree murder by a juvenile is punished by life in prison, but the Wyoming Legislature has provided that the juvenile homicide offender is eligible for parole after serving twenty-five years. Wyo. Stat. Ann. § 6-10-301(c). This change was made in response to this Court's decision in *Miller v. Alabama*, 567 U.S. 460 (2012). In Wyoming, causing or attempting to cause bodily injury with a deadly weapon has no minimum sentence and is punishable by up to ten years in prison. Wyo. Stat. Ann. § 6-2-502(b). While Sam could have served 120 consecutive years for his twelve aggravated assaults, the judge grouped these charges and sentenced Sam to three consecutive terms of nine to ten years in prison to be served after parole from the murder conviction. Sam is guaranteed an opportunity for release from prison after serving fifty-two years. Wyo. Stat. Ann. § 7-13-402(a).

This Court specifically noted that the Wyoming Legislature has remedied any potential *Miller* violations for Wyoming juvenile defendants. *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718, 736 (2016) (citing Wyo. Stat. Ann. § 6-10-301(c)). The Wyoming Supreme Court, however, disagrees and has interpreted *Miller* to forbid what it describes as de facto life sentences. The Wyoming Supreme Court interprets *Miller* to prohibit a judge from sentencing a juvenile who is not "incorrigible" to an aggregate sentence of more than forty-five years before parole eligibility or to a sentence under which there is no possibility of parole until after age sixty-one, regardless of how many

violent crimes the juvenile may have committed. (App. 58-59). This mechanistic "45/61 rule" aggregates consecutive sentences into a single term of years beyond which a court – even one that appropriately weighs youth and reasonably applies state sentencing law – cannot go. (*Id.* at 59).

Of the sixteen state supreme courts to consider the constitutionality of functional or de facto life sentences, seven have extended *Miller* to prohibit a sentence for a juvenile that those courts deem tantamount to life without parole. Nine have not. The federal courts of appeals are also divided. The Seventh Circuit has extended *Miller*, while the First, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits have not. This despite the fact that juvenile murderers are rarely prosecuted in the federal courts, limiting federal review to post-conviction proceedings. 28 U.S.C. § 2254(d)(1).

At its heart, this court split reflects the tension between *Miller*'s holding and this Court's summary of *Miller* in *Montgomery v. Louisiana*. *Miller* holds that a state legislature cannot require that all juveniles who commit intentional murder be sentenced to life in prison without the potential for redemption or release: "a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." *Miller*, 567 U.S. at 489. When the *Montgomery* Court described *Miller*, however, some of its language shifted focus away from the **processes** state legislatures had to enshrine so juvenile murderers would not be automatically sentenced to life without parole to instead focus on

sentencing **outcomes** for juvenile murderers: "*Miller* determined that sentencing a child to life without parole is excessive for all but the rare juvenile offender whose crime reflects irreparable corruption." *Montgomery*, 136 S. Ct. at 734. This shift in language underlies lower courts' disagreement about whether *Miller* requires that sentences for murder be aggregated with sentences for other violent crimes, which has the effect of greatly restricting the discretion of the judges and juries that *Miller* sought to preserve.

The State of Wyoming petitions this Court for certiorari to resolve the confusion in the lower courts and establish that the Eighth Amendment does not prohibit a judge from imposing an appropriate sentence for each violent crime committed by a young murderer even if, in the aggregate, the juvenile will serve a lengthy term of years in prison that the juvenile is not certain to outlive.

STATEMENT OF THE CASE

Late on Saturday afternoon, October 4, 2014, sixteen-year-old Phillip Sam stole a .40 caliber pistol and a loaded magazine from his mother's boyfriend. (App. 5). He went to a local movie theater to provoke a fight with a group of teenagers. (*Id.*). The group was already inside, so Sam slashed the tires and broke a mirror on a car belonging to one of his targets. (*Id.*). Sam then returned to a friend's house, brandished the

stolen gun, and declared to all present that he was going to kill someone that night. (*Id.*).

When the teenagers discovered the damage to the car, Sam arranged a fight at a local park. (*Id.* at 5-6). Knowing that none of his targets had a gun, Sam went to the park with five friends. (*Id.*). Sam and one friend waited in a park pavilion for the victims to arrive. (*Id.*). While waiting, Sam's friend asked him whether he really needed to kill or injure anyone that night. (*Id.* at 6). Sam said yes. (*Id.*).

When the other group of teenagers arrived, Sam pulled a bandana over his face and hid behind some trees until they got closer. (*Id.*). Sam then stepped out and fired repeatedly at the twelve teenagers, striking two. (*Id.*). He shot Damian Brennand in the arm and nineteen-year-old Tyler Burns in the chest. (*Id.*). The group scattered to flee the gunfire, and Sam walked up to Burns, who lay injured on the ground. (*Id.*). As Burns pleaded for his life, Sam shot Burns in the head, killing him. (*Id.*).

Sam was tried for thirteen violent crimes: one count of first-degree murder and twelve counts of aggravated assault for shooting at the twelve teenagers. (*Id.* at 6-7). A jury found Sam guilty of all crimes, making him eligible to receive a sentence of life in prison for the murder (as modified by the Wyoming Legislature for juveniles) plus up to ten years for each count of aggravated assault. (*Id.* at 7). At sentencing, the trial court held that Sam was not one of the rare juveniles who "should never have any possibility, 40, 50 years

from now, of being granted parole." (*Id.* at 57). In addition to the sentence for murder, the judge sentenced Sam to nine to ten years in prison for each conviction of aggravated assault. (*Id.* at 7). In Wyoming, however, the judge alone decides whether a sentence is to be served concurrently or consecutively. *Baker v. State*, 260 P.3d 268, 272 (Wyo. 2011). Exercising this authority, the trial judge consolidated these convictions into three groups. (App. 7-8). Each conviction within a group would be served concurrently while each group of convictions would be served consecutive to one another and consecutive to Sam's parole from his murder conviction. (*Id.*). The result was a sentence of twenty-seven to thirty years for the twelve aggravated assaults instead of the potential 120 years allowed under law.[1]

On appeal to the Wyoming Supreme Court, Sam argued that because he could not be paroled from all of his sentences until he had served at least fifty-two years, he had received a de facto sentence of life without the possibility of parole. These sentences in the aggregate, therefore, were unconstitutional under the Eighth Amendment, this Court's opinion in *Miller v. Alabama*, and the Wyoming Supreme Court's precedent interpreting those authorities. *See Bear Cloud v.*

[1] As will be discussed in greater detail below, Sam can further reduce his sentence through good behavior while incarcerated. *See* Wyo. Stat. Ann. § 7-13-420 (requiring a system of good time and special good time allowances). Were Sam to behave as a model prisoner while incarcerated, he would be eligible for parole after serving forty years.

State, 334 P.3d 132 (Wyo. 2014) (hereinafter "*Bear Cloud III*").

The Wyoming Supreme Court agreed, holding that *Miller* requires a sentencing court to affirmatively conclude a juvenile is incorrigible before imposing sentences for multiple violent crimes if, in the aggregate, the sentences result in a lengthy term of years before parole eligibility. (App. 57-59); *Bear Cloud III*, 334 P.3d at 141-42. The Wyoming Supreme Court stated it would not "abandon the ceiling set by *Miller*." (App. 57, n.8). It adopted a bright line rule: "[a]n aggregated minimum sentence exceeding the 45/61 standard [45 years of parole ineligibility or older than 61 at release] is the functional equivalent of life without parole and violates . . . *Miller* and its progeny." (*Id.* at 59). The court also refused to consider Sam's ability to shorten his sentence through good behavior in prison. (*Id.* at 7-8, 66-67).

From the *Miller* Court's holding that "a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles," the Wyoming Supreme Court imposed a mathematical limit to sentences other than mandatory life in prison without parole for juveniles. *Compare Miller*, 567 U.S. at 489, *with* (App. 58-59).

REASONS FOR GRANTING THE PETITION

A. The lower courts have splintered on whether the Eighth Amendment, as interpreted by *Miller v. Alabama*, requires aggregation of a juvenile's sentence for homicide with his sentences for additional violent crimes or whether the Eighth Amendment only requires that the length of each sentence be reviewed separately.

Miller v. Alabama held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" *Miller*, 567 U.S. at 465. The statutes before the Court in *Miller* mandated that all juvenile murderers convicted as adults serve life in prison without the possibility of parole, which removed all discretion from the sentencing court and denied recognition that "children are constitutionally different from adults for purposes of sentencing." *Id.* at 466, 469, 471.

Because juveniles are different, mandatory sentences of life without the possibility of parole are offensive "by their nature" as they ignore the juvenile murderer's "age and the wealth of characteristics and circumstances attendant to it." *Id.* at 476. A judge or jury must have the ability to consider the defendant's age, immaturity, impetuosity, and failure to appreciate risks and the consequences that flow from them, in addition to the defendant's home environment and the circumstances of the offense. *Id.* at 479. When a state legislature mandates one-size-fits-all punishment for

murderers, those factors cannot be considered and that sentence violates the Eighth Amendment when imposed on a juvenile.

Sixteen state supreme courts and seven federal courts of appeals have considered whether *Miller* extends beyond the mandatory imposition of life without the possibility of parole.[2] Of the sixteen state supreme courts to consider whether *Miller* reaches "functional" or de facto life sentences, nine have read *Miller* to prohibit only a mandatory sentence of life without parole for murder committed by a juvenile; sentences for the juvenile's other violent crimes are analyzed separately. The other seven states, including Wyoming, have extended *Miller* to review all of the sentences imposed on the juvenile in the aggregate, deeming a lengthy term of years to be tantamount to life without parole, although these seven states disagree as to how to draw the line. Wyoming provides a mathematical cap; some use actuarial tables; and some impose the restriction but refuse to draw a line.

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[2] More courts have considered whether *Graham v. Florida*, 560 U.S. 48 (2010), prohibiting life without parole for non-homicide crimes, requires aggregation in that distinct context: preventing a sentencing court from imposing a lengthy term of years that, as a practical matter, will result in the juvenile non-homicide offender's death long before parole eligibility for his crimes. *See, e.g.*, *State v. Moore*, 76 N.E.3d 1127 (Ohio 2016), *cert. denied*, 583 U.S. ___ (Oct. 2, 2017).

This petition presents an issue only under *Miller*, not *Graham*. Sam murdered another young man, making *Graham*'s categorical ban against life without parole inapplicable. (App. 55). "Sam may not slice his aggregate sentence into multiple sub offenses in order to apply a more lenient sentencing rule." (*Id.* at 56).

The deep splintering of the states evinces significant confusion over *Miller*. The Wyoming Supreme Court and six other state courts have applied *Miller* to aggregate sentencing packages that they then review as a single sentence of de facto life without parole. *Compare Miller*, 567 U.S. at 465, *with People v. Franklin*, 370 P.3d 1053, 1059 (Cal. 2016) (applying *Miller* to lengthy sentences that amount to the "functional equivalent of life without parole"); *Casiano v. Comm'r of Corr.*, 115 A.3d 1031, 1044 (Conn. 2015) (agreeing with those courts that have extended *Miller* to sentences where a juvenile may actually be imprisoned for the rest of his life as a result of a lengthy sentence); *People v. Reyes*, 63 N.E.3d 884, 887-88 (Ill. 2016) (holding that *Miller* applies to a mandatory term-of-years sentence that functionally amounts to life in prison without the possibility of parole); *State v. Zuber*, 152 A.3d 197, 213 (N.J. 2017) (finding that aggregate sentences trigger the protections of *Miller*); *State v. Charles*, 892 N.W.2d 915, 921 (S.D. 2017) (upholding a ninety-two year sentence with parole eligibility at age sixty, but declaring that a sentence to a term of years for a juvenile homicide offender will not always pass constitutional muster); *and State v. Ramos*, 387 P.3d 650, 659 (Wash. 2017) (stating affirmatively that *Miller* "applies equally" to literal and de facto life without parole sentences).

None of these courts agree, however, on when the young murderer's sentence becomes de facto life without parole. Washington judicially converts a discrete term of years into a sentence of life without parole

when the aggregate sentence length exceeds the "average human life span." *See, e.g.*, *Ramos*, 387 P.3d at 658 (addressing "standard range consecutive sentencing" that resulted in an eighty-five year sentence). California uses actuarial data to define when a term of years becomes the equivalent of life without parole. *See, e.g.*, *People v. Caballero*, 282 P.3d 291, 294 n.3 (Cal. 2012) (reasoning that a term of years that exceeds a particular defendant's "life expectancy" as defined by "the normal life expectancy of a healthy person of defendant's age and gender living in the United States" is the equivalent of a sentence of life without parole triggering the categorical prohibition of *Miller*). Wyoming has declared a uniform cap. *Compare* (App. 59) *and Bear Cloud III*, 334 P.3d at 142, *with State v. Null*, 836 N.W.2d 41, 71-72 (Iowa 2013) (concluding, based on the Iowa Constitution, that *Miller*'s principles apply to lengthy term-of-years sentences and refusing to consider "the niceties of epidemiology, genetic analysis, or actuarial sciences in determining precise mortality dates"). While Wyoming's approach avoids the startling implications of sentencing based on generalities about life expectancy, that court has provided no basis for the line it drew. *Compare* (App. at 59) (pointing to *Bear Cloud III*, 334 P.3d at 136, 142, as the origin of this rule), *with Bear Cloud III*, 334 P.3d at 136, 141-42 (providing no discussion of the 45/61 rule); *see also Boneshirt v. United States*, No. CIV 13-3008-RAL, 2014 U.S. Dist. LEXIS 161922, at **28-30 (D.S.D. Nov. 19, 2014) (rejecting petitioner's argument that his race, gender, and locality should dictate the length of his sentence).

The nine majority states have refused to apply *Miller* to anything other than mandatory life without parole. For example, the Minnesota Supreme Court held that *Miller* was silent on "whether the *Miller*/*Montgomery* rule should be extended to cases in which a juvenile homicide offender receives consecutive sentences of life imprisonment with the possibility of release that the juvenile contends are, in the aggregate, the 'functional equivalent,'" of life without the possibility of parole and therefore declined to extend *Miller* without further guidance. *State v. Ali*, 895 N.W.2d 237, 244 & 246 (Minn. 2017). Eight other state courts of last resort have also declined expansion. *See Murry v. Hobbs*, No. 12-880, 2013 Ark. LEXIS 71, at *3 (Ark. Feb. 14, 2013) (per curiam) (holding *Miller* is only applicable when a mandatory life without parole sentence is imposed); *Lucero v. People*, 394 P.3d 1128, 1130 (Colo. 2017) (holding that neither *Graham* nor *Miller* applies to an aggregate term-of-years sentence); *Foster v. State*, 754 S.E.2d 33, 37 (Ga. 2014) (concluding that *Miller* does not apply when the sentencing court has discretion over the sentence imposed); *Conley v. State*, 972 N.E.2d 864, 879 (Ind. 2012) (noting *Miller* deals "solely" with mandatory sentencing schemes requiring life without parole for juveniles, so Indiana's discretionary life without parole sentence for juveniles was not affected); *State v. Nathan*, 522 S.W.3d 881, 892 (Mo. 2017) (noting that because this Court has never held that a juvenile defendant cannot receive multiple sentences for multiple crimes, *Miller* does not extend beyond mandatory life without parole sentences); *State v. Gutierrez*, No. 33,354, 2013 N.M.

Unpub. LEXIS 20, at *4 (N.M. Dec. 2, 2013) (holding *Miller* does not apply to a sentence that includes the possibility of parole); *Turner v. State*, 443 S.W.3d 128, 129 (Tex. Crim. App. 2014) (holding *Miller* prohibits mandatory life without parole for juvenile offenders and does not apply to juvenile offenders sentenced to life *with* the possibility of parole); *Johnson v. Commonwealth*, 793 S.E.2d 326, 331 (Va. 2016) (holding because the remedy for a *Miller* violation is to permit a juvenile homicide offender to be considered for parole, *Miller* clearly does not apply to a sentence where a juvenile offender has the opportunity to be considered for parole).

In the federal courts of appeals, the First, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits have adopted the majority view, while the Seventh Circuit sides with the minority. This conflict has not arisen with full force within the federal courts of appeals, and it will not. Juveniles are seldom prosecuted as adults in the federal court system. For *Miller* to apply, the juvenile must commit at least one murder, and the states have the principal responsibility to deter this crime. The federal split is therefore filtered through the federal courts' consideration of whether the state courts have acted in a manner that is contrary to or an unreasonable application of clearly established Federal law. 28 U.S.C. § 2254(d)(1).

The Seventh Circuit extended *Miller* to require the state court judge to consider the aggregate effect of multiple sentences. *McKinley v. Butler*, 809 F.3d 908 (7th Cir. 2016). At the outset of its analysis, the

Seventh Circuit noted that McKinley's sentences for first-degree murder and the firearm enhancement to that conviction were discretionary term-of-years sentences. *Id.* at 911. The court, however, found that *Miller*'s holding "cannot logically be limited to *de jure* life sentences," and must also extend to the aggregate of multiple sentences likely to result in the juvenile offender spending life in prison because "children are different." *Id.*

The other federal courts of appeals have limited *Miller* to the mandatory imposition of a sentence of life without parole for a juvenile homicide offender. For example, the Ninth Circuit rejected a challenge to a sentence where the individual received two consecutive terms of twenty-five years to life for two counts of murder with the intent to inflict torture. *Demirdjian v. Gipson*, 832 F.3d 1060, 1063, 1076-77 (9th Cir. 2016). In rejecting the argument that these sentences created a de facto life sentence, the Ninth Circuit cited this Court's opinion in *Lockyer v. Andrade* in which an adult defendant was sentenced to serve two consecutive sentences of twenty-five years to life in prison for two counts of felony petty theft with a prior conviction under California's "three strikes" law. *Lockyer v. Andrade*, 538 U.S. 63, 66-68 (2003). Lockyer argued that his two sentences were the functional equivalent of life without parole, but this Court found them distinguishable because Lockyer could be paroled if he lived to be eighty-four years old. *Id.* at 73-74. Because Demirdjian would be eligible for parole when he was sixty-six years old, the Ninth Circuit held that his

sentence did not offend *Miller*. *Demirdjian*, 832 F.3d at 1077.

Joining the Ninth Circuit are the First, Fifth, Sixth, Eighth, and Tenth Circuits. *Evans-García v. United States*, 744 F.3d 235, 240 (1st Cir. 2014) (holding *Miller* did not apply because petitioner was not mandated to serve life in prison without parole); *United States v. Walton*, 537 F. App'x 430, 437 (5th Cir. 2013) (unpublished) (holding that applying *Miller* to Walton's discretionary federal sentence for a term of years would be an "extension of precedent" and failure to do so was not plain error); *Starks v. Easterling*, 659 F. App'x 277, 280-81 (6th Cir. 2016) (unpublished) (denying post-conviction relief because this Court has not yet explicitly held that the Eighth Amendment and *Miller* extend to juvenile sentences that are the functional equivalent of life without parole); *United States v. Jefferson*, 816 F.3d 1016, 1019 (8th Cir. 2016) (holding Jefferson's 600 month sentence did not fall within *Miller*'s categorical ban on mandatory life without parole sentences for juveniles and declining to extend *Miller*); *Davis v. McCollum*, 798 F.3d 1317, 1321-22 (10th Cir. 2015) (noting that *Miller* said nothing about non-mandatory life without parole sentencing).

B. The aggregation of sentences has profound consequences for the administration of justice in the states, like Wyoming, that have adopted the minority view of *Miller* and require aggregation.

When adopting the minority view, the lower courts have rejected this Court's consistent direction since 1892. The Eighth Amendment is concerned with the length of a sentence for a specific crime, not the length of time a criminal will serve for all of the crimes he chose to commit. *O'Neil v. Vermont*, 144 U.S. 323 (1892). In *O'Neil*, this Court reviewed the petitioner's conviction for 307 crimes of "selling intoxicating liquors" without authority. *Id.* at 327. O'Neil was fined a total of $6,638.72 that, if not paid before a certain date, would require that he spend more than fifty years in prison. *Id.* at 330. Although not raised by O'Neil, the Court discussed the Eighth Amendment's application. *Id.* at 331. Even if O'Neil had argued that the aggregate fifty years of incarceration was a too "severe penalty" for his behavior, the Eighth Amendment would provide no relief because an individual cannot seek protection from a lengthy term of years in prison "simply because he has committed a great many such offenses." *Id.* "[I]t would scarcely be competent" for an individual to object to his punishment on the basis that he had committed so many crimes that he would spend the rest of his life in prison if punished for all of them. *Id.* (discussing the opinion of the Vermont Supreme Court). The Eighth Amendment requires intervention only when the penalty is "unreasonably severe" for a

single offense; the unreasonableness for O'Neil was "only in the number of offenses" he had committed. *Id.*

O'Neil's logic is consistent with this Court's Eighth Amendment proportionality analysis. "[S]ubstantial deference" is afforded to the "broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals." *Solem v. Helm*, 463 U.S. 277, 290 (1983). Deference is required because "the fixing of prison terms for specific crimes involves a substantive penological judgment that, as a general matter, is 'properly within the province of the legislatures, not courts.'" *Harmelin v. Michigan*, 501 U.S. 957, 998 (1991) (quoting *Rummel v. Estelle*, 445 U.S. 263, 275-76 (1980)). To judicially aggregate a defendant's separate crimes into one sentence for Eighth Amendment analysis subverts a legislature's authority to tailor individual punishments to individual crimes. *McCleskey v. Zant*, 499 U.S. 467, 491 (1991) (noting "our federal system recognizes the independent power of a State to articulate societal norms through criminal law"), *superseded by statute on other grounds*, 28 U.S.C. § 2244(b)(2). Although legislatures cannot imagine the endless combinations of crimes a defendant may commit, the Eighth Amendment neither requires nor anticipates that courts make such decisions in the first instance.

The aggregation adopted by the Wyoming Supreme Court and the minority courts rejects the federalism of *O'Neil*, *Harmelin*, and *Solem*. *Cf. Rummel*, 445

U.S. at 282 (reiterating that: "Our Constitution 'is made for people of fundamentally differing views.' . . . Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State.") (quoting *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting)). The authority to proscribe separate sentences for separate crimes is irrelevant when the aggregate length of a sentence is crushed downward by a categorical cap.

Should this Court determine that the Eighth Amendment requires that all of a young murderer's criminal sanctions be aggregated, it would override the many state statutes that permit consecutive sentences as well as those that provide sentencing ranges, leading to penalties artificially below that expected for violent crime sprees. In Wyoming, a juvenile can now kill two people and avoid any additional punishment for the second murder. The Wyoming Supreme Court's analysis aggregates the two homicide sentences, and unless they are to be served concurrently, the sentences would require the juvenile to serve fifty years in prison before earning the opportunity for parole – a number that violates Wyoming's 45/61 rule. Practically, then, young murderers can commit additional murders without consequence. Moreover, any other violent crimes carry the potential for only twenty years of additional punishment.

If society may impose severe sanctions on a juvenile non-homicide offender "to express its condemnation

of the crime and to seek restoration of the moral imbalance caused by the offense," *Graham*, 560 U.S. at 71, even more should a society be able to impose severe sanctions on the juvenile **homicide** offender who commits a string of additional violent offenses. Such severe sanctions are warranted; the resulting moral imbalance is even more pronounced when the crimes involve extreme violence, careful premeditation, and a dozen victims. *See Kennedy v. Louisiana*, 554 U.S. 407, 438 (2008) (observing that non-homicide crimes cannot be compared to murder in either "'terms of moral depravity and of the injury to the person and to the public'" or in their "'severity and irrevocability'") (quoting *Coker v. Georgia*, 433 U.S. 584, 598 (1977) (plurality opinion)).

If *Miller* means what the Wyoming Supreme Court and others have said, then consecutive sentences for multiple violent crimes are only permissible when the sentencing court finds offenders to be of the "rare" class who deserve to die in prison. Notwithstanding the artificial pressure this will create to find incorrigibility – either conflating it with the commission of multiple crimes or simply becoming more likely to conclude a young murderer is incorrigible – the minority approach ignores the fact that courts are not actually mandating that a juvenile die in prison. To avoid that result, the Eighth Amendment must only require that the sentence for each crime be proportionate to the harm caused with due consideration of the offender's individual culpability and circumstances. To hold otherwise removes discretion from sentencing courts and

state legislatures to determine the appropriate punishment for various crimes. States are "entitled to make [their] own judgment as to where such lines lie, subject only to those strictures of the Eighth Amendment that can be informed by objective factors." *Rummel*, 445 U.S. at 284. Comparing the excessiveness of the sentence for one crime against another is a task for legislatures, not courts, because it is "invariably a subjective determination, there being no clear way to make 'any constitutional distinction between one term of years and a shorter or longer term of years.'" *Hutto v. Davis*, 454 U.S. 370, 373 (1982) (per curiam) (quoting *Rummel*, 445 U.S. at 275-76).

The minority courts are already facing problems that will metastasize nationwide if elevated to Eighth Amendment orthodoxy: "[w]hat if the aggregate sentences are from different cases? From different circuits? From different jurisdictions? If from different jurisdictions, which jurisdiction must modify its sentence or sentences to avoid constitutional infirmity?" *Moore v. Biter*, 742 F.3d 917, 922 (9th Cir. 2014) (quoting *Walle v. State*, 99 So. 3d 967, 972 (Fla. Dist. Ct. App. 2012)).

Without this Court's guidance, the states will struggle to determine the time beyond which aggregated sentences transform into a single de facto sentence of life without parole. Accuracy would seem to require that sentencing courts predict an offender's life expectancy, leading to unanswerable and likely improper questions. To what extent should a court consider the differences in life expectancy among those of

different genders and races? Should a juvenile's family medical history be considered, having a judge or jury determine whether the defendant is susceptible to high blood pressure, diabetes, ovarian or prostate cancer, or another risk factor that may cut life short? Should courts anticipate medical advances and treatment options for a defendant and whether the defendant would be more or less likely to receive such treatment through a Department of Corrections medical system – all to predict whether the proposed sentence will allow some years of life outside prison walls?

Moreover, a strict aggregate sentencing ceiling under *Miller* prevents states from using other information to determine whether a juvenile has "demonstrated maturity and rehabilitation" sufficient to earn release. *Graham*, 560 U.S. at 75. While a mandatory parole hearing is one method to evaluate a defendant's redemption, it is not the only one, and this Court expects the states "in the first instance, to explore the means and mechanisms for compliance." *Id*. But under the Wyoming Supreme Court's interpretation, the Eighth Amendment bars consideration of any potential sentence reduction based on the prisoner's good behavior. (App. 8, 66-67); *Bear Cloud III*, 334 P.3d at 136 n.3 (citing *Pepper v. United States*, 562 U.S. 476, 501 n.14 (2011)).

Wyoming permits an inmate to reduce the time he will actually serve through his behavior in prison. *See* Wyo. Stat. Ann. § 7-13-201. The Wyoming Legislature requires "a system of good time and special good time allowances for inmates" that "may provide either for

good time to be deducted from the maximum sentence or for good time to be deducted from the minimum sentence imposed by the sentencing court, or both[.]" Wyo. Stat. Ann. § 7-13-420(a). Consistent with that command, the "Inmate Good Time" policy allows inmates to earn up to fifteen days "per month for each month served on a sentence, reducing the minimum and maximum sentence to be served" if the inmate demonstrates "a proper and helpful attitude, conduct and behavior in the facility and/or has adhered to the rules of the facility[.]" Wyoming Department of Corrections, Inmate Good Time, Policy & Procedure #1.500, § II(D) at *2 (Nov. 29, 2017), http://corrections.wyo.gov/home/policies. In addition, an inmate can earn up to one year of "special" good time for "an especially proper and helpful attitude, exemplary conduct and behavior in the facility and . . . exemplary adherence to the rules of the facility" or "by substantial compliance with his/her individualized case plan[.]" *Id*. § IV(F)(1) at *14. Although good time credit does not reduce life sentences, it is generally awarded as a matter of course for terms of years. *Id*. § III(D) at *4.

In this case, Wyoming's good time policy means that Sam could be eligible for release from prison after forty years. Sam is eligible for parole from his murder sentence after twenty-five years. Wyo. Stat. Ann. § 6-10-301(c). If, while serving his subsequent sentences for aggravated assault, he demonstrates behavior that entitles him to regular and special good time, then his three consecutive nine to ten year sentences could be reduced to five to six years each. Consequently, Sam

could earn release after only forty years (twenty-five years (murder) + five years (for five counts of aggravated assault) + five years (for five additional counts of aggravated assault) + five years (for the aggravated assault counts involving the two victims Sam shot)). He could, therefore, be released from prison at age fifty-six.

The Wyoming Supreme Court, however, interprets *Miller*'s command to require a sentence that allows parole if the juvenile redeems himself but implicitly assumes the juvenile will not demonstrate this same redemption while in prison. *Bear Cloud III*, 334 P.3d at 136 n.3. Put another way, a juvenile's ability to shorten his sentence through good behavior while in prison is irrelevant. *Id.*; (App. 66-67 (Kautz, J., dissenting)). When the Wyoming Supreme Court refused to consider the possibility of Sam's parole after forty years, it interpreted the requirement for a meaningful opportunity of release to be more than "release based on demonstrated maturity and rehabilitation." *Compare* (App. 8, 66-67), *with Graham*, 560 U.S. at 51. This despite *Graham*'s recognition that a state "is not required to guarantee eventual freedom to a juvenile offender." *Graham*, 560 U.S. at 75.

One need not reject the principle that children are constitutionally different to conclude that *Miller* only prohibits state legislatures from removing a sentencing court's ability to consider the "offender's age and the wealth of characteristics and circumstances attendant to it." *Id.* at 471, 476. The *Miller* Court implicitly confirmed this limit on its holding, noting that the

Court had been tasked only with "consider[ing] the constitutionality of mandatory sentencing schemes – **which by definition remove a judge's or jury's discretion** – so no comparable gap between legislation and practice can exist." *Id*. at 483 n.10 (emphasis added). When a court retains the discretion to impose a lengthy sentence and to determine the point at which parole should be possible, the law does not mandate that a young murderer die in prison, and, therefore, does not fall within the reach of *Miller*.

Nor does *Montgomery v. Louisiana* require a different conclusion. In holding that *Miller* announced a substantive rule of law and was therefore retroactive, this Court explicitly noted that a state "may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them," citing Wyoming's law. *Montgomery*, 136 S. Ct. at 736 (2016) (citing Wyo. Stat. Ann. § 6-10-301(c)). After *Miller*, the Wyoming Legislature granted parole eligibility to every juvenile sentenced to life in prison upon service of twenty-five years of incarceration. *Id.* If a "*Miller* violation" may be cured with parole eligibility, then *Miller* necessarily reaches only those situations when a juvenile is not, and never will be, parole eligible.

C. This case presents a clean vehicle to consider this disagreement over the meaning of *Miller*.

Sam's case presents a clean opportunity for this Court to address whether *Miller* forbids lengthy non-life sentences for juvenile murderers created by aggregating the discretionary, consecutive terms of years imposed for additional violent crimes with the murder sentence. Recently, this Court has denied several petitions for certiorari seeking review of aggregate juvenile sentences, but none of these cases presented a clean *Miller* question. *See, e.g.*, Petition for a Writ of Certiorari at i., *Ohio v. Moore*, No. 16-1167, *cert. denied*, 583 U.S. ___ (Oct. 2, 2017); Petition for a Writ of Certiorari at i., *New Jersey v. Zuber*, No. 16-1496, *cert. denied*, 583 U.S. ___ (Oct. 2, 2017); Petition for a Writ of Certiorari at i., *Byrd v. Budder*, No. 17-405, *cert. denied*, 583 U.S. ___ (Nov. 27, 2017).

Because Sam murdered Tyler Burns, the Wyoming Supreme Court relied solely on the Eighth Amendment as interpreted by *Miller* to invalidate his aggregate sentence. (App. 55-59). "Juvenile offenders who committed both homicide and nonhomicide crimes present a different situation for a sentencing judge than juvenile offenders who committed no homicide." *Graham*, 560 U.S. at 63. Just as this class of juvenile offender presents a different situation for sentencing judges, so too does this class present a different situation for this Court, which has consistently drawn this distinction as it has shaped its juvenile sentencing jurisprudence. "[D]efendants who do not kill, intend to kill, or foresee that life will be taken are categorically

less deserving of the most serious forms of punishment than are murderers." *Graham*, 560 U.S. at 69 (citations omitted). In *Miller* this Court continued to "[take] care to distinguish [non-homicide] offenses from murder, based on both moral culpability and consequential harm." *Miller*, 576 U.S. at 473.

While both *Ohio v. Moore* and *Byrd v. Budder* presented questions of aggregate sentencing, both were based on *Graham* and this Court's treatment of non-homicide offenders. That is not the case with Sam. *State v. Zuber* combined two cases, one involving the aggregate sentence of a homicide offender and another involving the aggregate sentence of a non-homicide offender. *Zuber*, 152 A.3d at 201. The New Jersey Supreme Court's resulting opinion inextricably intertwined both *Miller* and *Graham*, complicating review by this Court. *Id.* at 213. Those complexities are not present here.

Moreover, Sam's case is unencumbered by any questions of state law. The Wyoming Supreme Court has not invoked the Wyoming Constitution. (App. 55-59); *see also Bear Cloud III*, 334 P.3d at 137 & n.4 (declining to address the question of aggregate sentencing under the Wyoming Constitution); *contra Zuber*, 152 A.3d at 206.

In addition, unlike the sentencing guidelines in *Pepper* or the mandatory statutes in *Miller*, Wyoming sentencing decisions are in the hands of a judge. *Pepper*, 562 U.S. at 489-90 (discussing the relationship between the federal sentencing guidelines and the

"traditional discretion of sentencing courts to" consider many factors); *Miller*, 567 U.S. at 466, 469 (discussing statutes under which life in prison without the possibility of parole was the only possible sentence). Indeed, Wyoming sentencing law preserves judicial flexibility throughout. A judge can impose probation in lieu of incarceration for any crime not punishable by death or life imprisonment. Wyo. Stat. Ann. § 7-13-302. Therefore, a juvenile, like any other defendant, can receive probation for any crime other than first or second degree murder or kidnapping even when the criminal statute states a mandatory minimum sentence. *Id.*; *see also* Wyo. Stat. Ann. § 6-2-101(c) (providing murder in the first degree is punishable either by death or life imprisonment); Wyo. Stat. Ann. § 6-2-104 (providing second-degree murder is punishable with up to life imprisonment); Wyo. Stat. Ann. § 6-2-201 (providing kidnapping is punishable by up to life in prison).

Finally, the Wyoming Supreme Court's 45/61 bright line rule is the lowest in the country and review would allow this Court to consider how much flexibility states retain to develop "appropriate ways to enforce the constitutional restriction [imposed by *Miller*] upon their execution of sentences." *Montgomery*, 136 S. Ct. at 735 (quoting *Ford v. Wainwright*, 477 U.S. 399, 416-17 (1986)).

Phillip Sam's multiple convictions are not unusual. Juvenile murderers often commit additional violent crimes, but as the dissenting justice on the Wyoming Supreme Court articulated, "[n]o Supreme Court case addresses aggregate sentences for murder plus other

violent crimes." (App. 64) (Kautz, J., dissenting). In the absence of guidance from this Court, the lower courts will continue to struggle with the implementation of *Miller*'s protections to situations beyond those addressed in that opinion.

CONCLUSION

Based upon the foregoing, the State of Wyoming requests that this Court grant a writ of certiorari to review the decision of the Wyoming Supreme Court.

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