No. 17-165

In the Supreme Court of the United States

TIMOTHY S. WILLBANKS, Petitioner,

v.

MISSOURI DEPARTMENT OF CORRECTIONS, Respondent.

LEDALE NATHAN, Petitioner,

v.

STATE OF MISSOURI, 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 both homicide and nonhomicide crimes, a set of consecutive sentences for his multiple crimes that result in parole eligibility in old age, even where the sentencer's decision to impose such consecutive sentences was discretionary, not mandatory?

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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2. *Missouri* v. *Nathan*. The Missouri Supreme Court's recent opinion in *State* v. *Nathan*, App. 66a, a second direct criminal appeal, has not yet been published in the S.W.3d, but is available at 2017 WL 2952773. The Missouri Court of Appeals's order in this appeal, App. 171a, is not published in the S.W.3d, but is available at 2015 WL 7253338. The Missouri Court of Appeals' memorandum opinion, App. 173a, is not published in the S.W.3d and is unavailable on Westlaw. The Missouri Supreme Court's opinion in Mr. Nathan's first direct appeal is reported at 404 S.W.3d 253 (Mo. 2013). The Missouri Court of Appeals' opinion in the appeal is not reported in the S.W.3d, but is available at 2012 WL 5860933.

JURISDICTION

The judgments of the Missouri Supreme Court were entered on July 11, 2017. No party sought rehearing. This Court has jurisdiction under 28 U.S.C. § 1257(a).

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."

GLOSSARY

App.	Petitioner's Appendix
L.F.	State Legal File (analogous to a federal court appendix)
Pet.	Petition

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 two juvenile offenders who were sentenced to multiple, consecutive terms in prison for committing multiple crimes, and who will both be eligible for parole in old age. Ledale Nathan committed murder and other violent crimes as a teenager, was sentenced to several consecutive terms in prison, and will be eligible for parole at age 85. Timothy Willbanks committed assault with intent to kill or seriously injure, robbery, and kidnapping, has been sentenced to several consecutive terms in prison, and will also be eligible for parole at age 85.

The petition is correct that the federal and state appellate courts disagree on whether the Eighth Amendment prohibits aggregate sentences of this kind—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 that, under this Court's precedents, the Eighth Amendment does not prohibit such sentences. Both juveniles committed heinous crimes on the cusp of adulthood, but, unlike the sentences that this Court held unconstitutional in *Miller* and *Graham*, neither juvenile received a sentence of life in prison without the possibility of parole for any individual crime. Instead, each offender received multiple sentences, corresponding to the number and severity of his crimes, with an opportunity for parole in old age.

For these reasons, this Court should adhere to its recent practice and decline to consider these Eighth Amendment questions. But if this Court decides to address the question, this petition presents a clean and comprehensive vehicle in which to do so. Because the Missouri Supreme Court affirmed the sentences without remand, the decisions below are final judgments under 28 U.S.C. § 1257(a). The case provides a *Miller* homicide fact pattern and a *Graham* nonhomicide fact pattern, and it presents five interpretive issues that have divided the lower courts in the aftermath of *Miller* and *Graham*.

STATEMENT

This petition concerns two criminal cases in which teenagers committed multiple serious crimes and were sentenced to multiple, consecutive terms in

prison. Each juvenile offender will first be eligible for parole at age 85, and each offender claims that the Eighth Amendment, as interpreted in this Court's decisions in *Miller* and *Graham*, requires that he become eligible for parole sooner.

A. Ledale Nathan committed 26 homicide and nonhomicide offenses as a teenager. After serving the mandatory portions of his consecutive sentences, he will be eligible for parole at age 85. He argues that the Eighth Amendment, as interpreted by this Court in *Miller*, prohibits what he considers to be a *de facto* life sentence.

1. At age 16, Nathan murdered Gina Stallis and shot several others during a midnight robbery and home invasion. App. 68a; *see State* v. *Nathan*, 404 S.W.3d 253, 257–58 (Mo. 2013); *State* v. *Nathan*, 2012 WL 3422420, at *1319 (Mo. App. E.D. 2012).

After speeding up with squealing wheels to Ida Rask's house, Nathan and an accomplice held up Ms. Rask's grandson, Nicholas Koenig, and an off-duty St. Louis police officer, Isabella Lovadina, at pistol point. 404 S.W.3d at 257; 2012 WL 3422420, at *13. The young men ordered the pair to turn over whatever they had before forcing them into the house. 404 S.W.3d at 257.

While his accomplice held the victims at gunpoint, Nathan rounded up the family sleeping in the house. He marched from their beds to the ground floor the family matriarch, Ms. Rask; her two daughters, Rosemary Whitrock and Susan Koenig; her granddaughter Gina Stallis; and her great-grandsons, the children of Ms. Stallis. *Ibid.* Nathan and his accomplice then

seized the women's jewelry off their bodies and from their dressers and jewelry boxes, and they took the money in the women's purses and a large television set from the second floor, all the time thrusting guns in the women's faces and threatening to kill them. *Ibid.*

Nathan then ordered Ms. Stallis to go alone with him in the basement in the dark. *Ibid.*

Rather than let Nathan herd the victims one-by-one into the basement—for rape, execution, or another grim fate—Officer Lovadina stepped in. *Ibid.* She came up to the basement hallway and offered to go to the basement herself.

To stop her, Nathan's accomplice moved toward her, pushing against a tight group of Nathan, Mr. Koenig, and Ms. Stallis. 404 S.W.3d at 257–58. Unwilling to go down without a fight, Officer Lovadina charged the accomplice to disarm him. *Ibid.* Nathan then moved in, silver pistol in hand. *Id.* at 258.

Seven bullets ricocheted through the jostling group, going straight through one person and into another. *Ibid.* Mr. Koenig was hit in three places. *Ibid.* Nathan himself was shot in the hand. *Ibid.* Officer Lovadina was hit five times—with the final shots fired right into her as she lay on the floor. *Ibid.* And Ms. Stallis lay dead from a single gunshot wound to her chest. *Ibid.*

Nathan was quickly taken to the hospital by his accomplice, where Nathan told the X-ray technician to get rid of the red hoodie that he had been wearing. *Ibid.* Nathan then lied to the police about how he had

been shot, while his accomplice tried to throw away his own black pistol and the jewelry they had stolen. *Ibid.*

But the police found their car, and in the car was an empty seven-shot clip and Nathan's silver pistol, with Nathan's DNA on the grip of the pistol, and Officer Lovadina's blood spattered on the outside and inside of the barrel. *Ibid.* All of the bullets removed from Officer Lovadina and Ms. Stallis, as well as all of the seven shell casings removed from the hallway of their home, matched Nathan's silver pistol. *Ibid.*; App. 178a.

2. Nathan was convicted by a jury of 26 offenses in the St. Louis City Circuit Court: one count of first-degree murder, two counts of first-degree assault, four counts of first-degree robbery, one count of first-degree burglary, five counts of kidnapping, and thirteen counts of armed criminal action. App. 68a.

Initially, Nathan was given a mandatory sentence of life without parole for the murder, plus five additional consecutive life sentences, many concurrent life sentences, and several consecutive 15-year sentences. App. 68a.

During his direct appeal, this Court held in *Miller* v. *Alabama* that the Eighth Amendment forbids a mandatory sentence of life in prison without parole for juvenile homicide offender. As a result, the Missouri Supreme Court remanded his case to the trial court for resentencing on the murder count. *State* v. *Nathan*, 404 S.W.3d 253, 269–71 (Mo. 2013), App. 69a.

On remand, the jury did not reach a unanimous verdict on whether Mr. Nathan should receive a sentence of life in prison without parole, and so the trial court vacated his first-degree murder conviction and entered a new conviction of second-degree murder. App. 69a–70a. The jury then recommended a sentence of life in prison with parole on this count, and the court set it to run consecutively to Mr. Nathan's other life and fixed-year sentences. App. 70a–71a.

All in all, Mr. Nathan received an aggregate sentence of 13 terms of life in prison with the possibility of parole. App. 70a. He received 26 individual terms in prison, one for each offense: 19 life sentences (for one count of second-degree murder, two counts of first-degree assault, three counts of first-degree robbery, and 13 counts of armed criminal action); one 30-year term in prison (for one count of first-degree robbery); and six terms of 15 years in prison (for one count of first-degree burglary and five counts of kidnapping). App. 174a. The court ordered him to serve every sentence for each predicate offense consecutively and to serve the sentence for each count of armed criminal action concurrently with each predicate offense.

After taking into account Missouri's statutory and regulatory mandatory minimum requirements, Nathan will be eligible for parole at age 85. This date is approximately 68 years after he entered the custody of the Missouri Department of Corrections.

3. On direct appeal from his new sentence, Nathan alleged that his new sentence still does not satisfy this Court's decision in *Miller* because the Eighth Amendment not only prohibits giving him a *mandatory* sentence of life without parole, but also prohibits giving

him *any* term of imprisonment—including one the sentencer had discretion to impose—under which he is first eligible for parole at age 85.

The Missouri Court of Appeals affirmed Mr. Nathan's new sentence without dissent. App. 171a–179a. The court agreed that, under *Miller*, a court must consider a juvenile's youth and circumstances before imposing a life-without-parole sentence for a homicide offense, but, here, despite the "truly horrifying" nature of his crimes, Mr. Nathan was not sentenced to life without parole. App. 176a–77a.

B. Timothy Willbanks committed seven violent nonhomicide offenses as a teenager. After serving the mandatory portions of the life and fixed-year terms of imprisonment imposed for his offenses, he will be eligible for parole at age 85. He argues that the Eighth Amendment, as interpreted by this Court in *Graham*, requires that he be eligible for parole sooner.

1. At age 17, at the conclusion of a violent carjacking and kidnapping, Willbanks shot 24-year-old Christina Morales four times and left her to die by a river. App.3a. She survived only because she crawled—maimed, bleeding, and in agony—for 40 minutes through mud and muck to safety. App. 131a; L.F. 31.

As part of a youth filled with drugs and car thefts, Willbanks hatched and led a plan with two of his friends to steal a car. App. 2a, 130a; L.F. 8. On a winter's day in 1999, he ambushed Ms. Morales with a sawed-off shotgun in her apartment complex's parking lot after she returned home from work. App. 2a, 130a; L.F. 8. Terrified, she begged him to take her car,

her purse, and her money and go, but Willbanks instead ordered her to drive him to an ATM, where he removed all of the money from her bank account. App. 2a, 130a. She kept pleading with him, but each time she begged him not to harm her, he threatened to do just that unless she shut up. App. 130a.

Willbanks then made her drive toward the river, but when she turned the wrong way, Willbanks was enraged and forced her into the trunk of her car. App. 3a, 130a. When his wild driving then tossed her about the trunk, he yelled at her to stop moving around so much. App. 130a. As he drove, he munched on the fast food that she had left in the car, complaining that, "bitch, there's nothing on this cheeseburger." App. 130a. In the trunk, Ms. Morales tried to hide her jewelry, but as soon as they stopped, Willbanks made her climb back into the trunk and fetch it for him, along with her coat, purse, wallet, phone, credit cards, driver's license, and social security card. App. 131a.

Willbanks's friends had followed him from the apartment parking lot in a separate car and, at this point, they told him to leave her alone—but he told them he wanted to shoot her. App. 2a, 131a. Willbanks forced Ms. Morales to turn around and walk toward a tree, and he shot her as she walked away—in his own words, "as many times and as fast as he could." App. 131a. Bullets pierced her four times: in the right arm, the shoulder, the lower back, and, finally, in the head. App. 3a, 131a. She fell into the sludge on the river bank, and Willbanks left her for dead. App. 2a, 131a. He later told a friend that he liked the way she had screamed when he shot her. App. 131a.

Miraculously, Ms. Morales, crippled and bleeding from four gunshot wounds, managed to crawl for 40 minutes through the mud to get help at a nearby house. App. 131a; L.F. 9. Permanently maimed and disfigured, she identified Willbanks in a photograph lineup. App. 3a, 131a. Once arrested, both Willbanks and his accomplices confessed to the whole thing. App. 3a.

2. Willbanks was convicted by a jury in the Jackson County Circuit Court of seven offenses: first-degree assault, kidnapping, two counts of first-degree robbery, and three counts of armed criminal action. App. 3a; L.F. 9–10. In Missouri, first-degree assault is akin to attempted murder: an "attempt[] to kill or knowingly cause[] or attempt[] to cause serious physical injury to another person." Mo. Rev. Stat. § 565.050; App. 152a.

The trial court sentenced Mr. Willbanks to an aggregate sentence of life in prison plus 355 years, all to be served consecutively and with the possibility of parole. App. 131a–132a. He received six individual terms in prison: One life sentence (for first-degree assault); one fifteen-year term in prison (for kidnapping); two 20-year terms in prison (one for each robbery count); and three terms of 100 years in prison (for each count of armed criminal action). App. 131a–132a.

After taking into account Missouri's statutory and regulatory mandatory minimum requirements for all of his different sentences, Mr. Willbanks will be eligible for parole at age 85. App. 6a n.4. This date is approximately 67 years, 8 months after his delivery to the Missouri Department of Corrections.

The Missouri state courts affirmed his convictions and sentences on direct appeal, *State* v. *Willbanks*, 75 S.W.3d 333 (Mo. App. W.D. 2002), and they denied his motion for post-conviction relief, *Willbanks* v. *State*, 167 S.W.3d 789 (Mo. App. W.D. 2005).

Willbanks then filed a state declaratory judgment action alleging that, under this Court's decision in *Graham,* he should be eligible for parole sooner, because he was allegedly subject to a *de facto* life sentence with his parole eligibility set for age 85. App. 3a–4a, 129a, 135a.

The Cole County Circuit Court entered judgment for the State, App. 4a, and the Missouri Court of Appeals affirmed without dissent, treating his appeal as an original petition for a writ of habeas corpus, App. 129a–170a. Both courts explained that, by its plain terms, *Graham* applies to sentences of life without parole, not to multiple, consecutive, parole-eligible sentences. App. 135a, 142a–143a. And here, none of Willbanks's sentences "were life imprisonment without parole, and none of them—standing in isolation—come[s] even close to imprisoning Willbanks for his natural lifetime without the possibility of parole." App. 155a. Mr. Willbanks's "longest sentence was, in fact, life *with* the possibility of parole." *Ibid.*

The Missouri Court of Appeals also refused to expand *Graham* to require a set time of mandatory parole eligibility for each juvenile. The Court relied on the difficulty in defining a *de facto* sentence of life without parole, and it also reasoned that a universal, set date of parole eligibility for all offenders would displace Missouri's method of discretionary sentencing,

in which courts take into account "the relative culpability of the offender, such as the number of crimes at issue, whether the series of crimes occurred in a single event or over a period of time, the number of victims involved, and the offender's role in the crimes." App. 165a.

C. By a 4–3 vote, the Missouri Supreme Court affirmed the decisions in *Nathan* and *Willbanks*.

In Nathan's case, the court held that *Miller* and *Graham* address only sentences of life without parole given for single offenses. *Miller* and *Graham* do not apply to multiple terms of imprisonment given to juvenile offenders who commit multiple offenses. App. 66a–128a. And for good reason: "multiple violent crimes deserve multiple punishments." App. 88a.

Accordingly, the Missouri Supreme Court held that *Miller* does not require a different sentence for Nathan. Nathan received an individualized, discretionary form of sentencing for his homicide and nonhomicide offenses, so his sentence plainly does not run afoul of *Miller*'s holding against *mandatory* life without parole for juvenile homicide offenders. App. 83a–85a. As the court held, " '*Miller* does not categorically bar sentencing a juvenile offender who commits first-degree murder to life without parole.' " App. 79a (quoting *State* v. *Hart*, 404 S.W.3d 237–38 (Mo. 2013)). Instead, *Miller* requires that a sentence of life without parole can be imposed only if the sentencer has discretion to consider the appropriateness of the sentence in light of the defendant's age, maturity, and other circumstances. App. 80a (citing *Miller*, 567 U.S. at 480, 483). 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." App. 67a.

Moreover, by its own terms, *Graham* affords no relief to a homicide offender like Nathan, because *Graham* expressly limited its holding to "'juvenile offenders sentenced to life without parole solely for a nonhomicide offense.'" App. 73a (quoting *Graham*, 560 U.S. at 63).

In Willbanks' case, the Missouri Supreme Court likewise concluded that *Graham* did not require a different sentence for Willbanks' nonhomicide offenses. "*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." App. 2a, 8a.

The court held that it would usurp the role of the legislature if it were to expand *Graham* to require earlier parole for an offender like Willbanks 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 Missouri Supreme Court held, the proper balance of "these penological concerns is better suited for the General Assembly" than for the courts. App. 9a. 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. Mo. Rev. Stat. § 558.047; App. 9a–10a.

The Missouri Supreme Court also held that 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." App. 13a. 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?" App. 14a. 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." App. 12a.

Three judges dissented. App. 16a–65a. 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. App. 48a. The dissenters argued that the State has a "virtually nonexistent" interest in deterring juveniles from commit-

ting multiple crimes, App. 60a, 123a, 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, App. 60a, 122a. 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." App. 62a, 124a. The dissenters saw no reason not to expand *Graham*, simply because 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. App. 53a–54a.

D. 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*, —— S.W.3d ——, 2017 WL 2952314 (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*. 2017 WL 2952314, at *5, n.7.

The State has filed a motion for rehearing in *Carr* on a limited question of remedy under Missouri state law. The case remains pending in the Missouri Supreme Court.

E. Nathan and Willbanks now petition for this Court's review.

REASONS FOR DENYING THE PETITION

I. 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 consective 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 below, as well as several federal and state appellate courts, hold 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), *pet. for cert. pending*, No. 17-5578 (filed Aug. 8, 2017); *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), *pet. for cert. pending*, No. 16-1496 (filed June 12, 2017); *State* v. *Moore*, 76 N.E.3d 1127, 1130–49 (Ohio 2016), *pet. for cert. pending*, No. 16-1167 (filed Mar. 22, 2017); *State* v. *Ramos*, 387 P.3d 650, 659–61 (Wash. 2017), *pet. for cert. pending*, No. 16-9363 (filed May 23, 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) (petition for cert. not filed).

B. For two reasons, there is no pressing need for this Court to intervene to resolve this split of authority.

First, this Court has often and recently declined to review petitions raising this issue, and nothing counsels in favor of changing course now. Indeed, if this Court were to grant review now, it would cut off future benefits that might accrue from further percolation of this issue in the lower courts. Further percolation may be useful because *Miller* was only deemed retroactive last year, *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.

Second, the Missouri Supreme Court correctly interpreted and applied this Court's precedents. As the court below recognized, the sentences at issue in this case do not concern a sentence of life in prison without parole and thus are not contrary to this Court's decisions in *Graham* or *Miller*. *See infra* Pt. II; S. Ct. R. 10.

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

The Missouri Supreme Court correctly held that the Eighth Amendment does not prohibit the State from sentencing a juvenile offender who committed multiple crimes to multiple consecutive terms of imprisonment, with the net effect that the offender is eligible for parole in old age.

The Eighth Amendment prohibits a State from inflicting "cruel and unusual punishments." U.S. Const. amend. viii. The Missouri Supreme Court correctly held, on the facts 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. App. 1a–65a, 66a–128a. Here, by contrast, each offender committed multiple crimes and received multiple sentences, and each offender has an opportunity for parole in old age.

The Missouri Supreme Court's decision was 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. On the contrary, this sentencing practice is evidently quite common, and thus there is no basis to conclude that it violates any societal standard of decency. This is especially true because, in the vast majority of cases, the individual sentencer has discretion to decide whether to impose sentences concurrently or consecutively. Large numbers of individual sentencers across the United States, each apprised of the specific facts of each case, have continued to impose such consecutive sentences for multiple crimes on juvenile offenders in the wake of *Graham* and *Miller*. Thus, there is no emerging societal consensus against this practice.

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. The "[c]ommunity consensus" against life without parole for a single nonhomicide crime was "entitled to great weight" in the Court's calculus. *Id.* at 67 (quoting *Kennedy* v. *Louisiana*, 128 S. Ct. 2641, 2658 (2008)). By contrast, the large number of appellate decisions in the past few years that grapple with the question whether aggregate sentences for multiple crimes run afoul of *Graham* and *Miller* attests that there is no "community consensus" against such aggregate sentences for multiple crimes. *Id.* On the contrary, even after *Graham* and *Miller*, it remains commonplace for sentencers 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. "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. App. 9a, 13a, 15a–16a. As the Missouri Supreme Court held, "multiple violent crimes deserve multiple punishments." App. 88a. 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. Under the Eighth Amendment, "because each sentence is a separate punishment for a separate offense, the proper question on review is whether a sentence is constitutionally disproportionate to the offense for which it was imposed." *Lucero*, 394 P.3d at 1133.

Further, 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 deterrrence 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 both Nathan and Willbanks, 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, *e.g.*, a shooting to a carjacking, or a rape to a home invasion. In other words, "if the punishment for robbery were the same as that for murder, then robbers would have an incentive to murder any witnesses to their robberies." *United States* v. *Reibel*, 688 F.3d 868, 871 (7th Cir. 2012).

Further, *Graham* relied on the fact that prohibiting life without parole for a single nonhomicide offense provided a "clear line." 560 U.S. at 74; *see also Bunch*, 685 F.3d at 551 (noting that *Graham*

"stressed" the necessity of a "clear line"). By contrast, 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." App. 13a.

For this reason, the lower courts that have invalidated aggregate sentences under *Graham* and *Miller* have struggled and failed to identify a "clear line" for when such aggregate sentences are permissible. *See infra*, Part III.B.5.

Moreover, in Nathan's case, the Missouri Supreme Court's decision was plainly correct for an additional reason. Nathan received his sentence upon individualized consideration of his case, both by the sentencing jury and the sentencing judge. *Miller* does not prohibit the imposition of a sentence of life without parole on a juvenile homicide offender like Nathan. Rather, *Miller* requires only that such a sentence cannot be *mandatory*, based solely on the offense—*i.e.*, that the sentencer must have discretion to consider the defendant's age, maturity, and other circumstances. *Miller*, 567 U.S. at 480, 483. Here, Nathan received an individualized, discretionary form of sentencing. App. 83a–85a. In fact, Nathan received a more lenient sentence than life without parole, which *Miller* declined to forbid for homicide offenders. *See Miller*, 567 U.S. at 480 (holding that "we do not foreclose a sentencer's ability to make th[e] judgment in homicide cases," after individualized consideration, that life without parole is an appropriate sentence).

Nathan's sentence was also plainly permissible under *Graham*. As the Missouri Supreme Court reasoned, *Graham* expressly disclaimed any application to "juvenile offenders who, like Willbanks, were sentenced to multiple fixed-term periods of imprisonment for *multiple* nonhomicide offenses." App. 8a. Accordingly, the Missouri Supreme Court's decisions and its application of *Graham* and *Miller* were well-reasoned and correct.

III. This petition is a clean and comprehensive vehicle to examine the question presented.

This Court should not grant review of this question. But if this Court decides to review the issue, this case provides a clean and comprehensive vehicle to do so. The Missouri Supreme Court's decisions are "final" judgments under 28 U.S.C. § 1257(a) because the Court did not remand the cases for further proceedings. This petition presents fact patterns under both *Miller* and *Graham*, and it also raises five interpretive issues that have divided the lower courts in the wake of *Graham* and *Miller*.

A. The Missouri Supreme Court's decisions constitute "final judgments" under 28 U.S.C. § 1257(a).

First, the decisions under review constitute "[f]inal judgments" under 28 U.S.C. § 1257(a) because the Missouri Supreme Court simply affirmed the sentences without remanding for future proceedings. Under § 1257(a), this Court may review only "[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 final-judgment rule, if "anything further remains to be determined" by the state courts,

this Court can grant review only in very rare circumstances. *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 124 (1945). Section 1257(a) normally will "preclude review 'where anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State.'" *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 477 (1975) (quoting *Radio Station WOW, Inc.*, 326 U.S. at 124). There are "very few" departures from this rule, which apply only in extremely narrow circumstances that carry "serious public consequences." *Id.*; *Radio Station WOW, Inc.*, 326 U.S. at 124.

Thus, a state-court appellate decision in which the offender prevailed and the state court remanded for resentencing may not constitute a "final judgment" under 28 U.S.C. § 1257(a). But in these cases, the Missouri Supreme Court affirmed the sentences without remand. Accordingly, the petition presents a vehicle without jurisdictional problems under § 1257(a).

B. The petition presents parallel *Miller* and *Graham* fact patterns, and it presents five interpretive issues that have divided the lower courts.

Since *Miller* and *Graham* were decided, lower courts have grappled with the question of whether different standards apply in the homicide and nonhomicide contexts. This Court thus 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. This petition presents such vehicle.

In addition, this petition is also a suitable vehicle to reach five interpretive questions that have divided the lower courts under both *Miller* and *Graham*.

1. Mandatory versus discretionary homicide sentences. 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), *pet. for cert. pending*, No. 16-9424 (filed May 31, 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. Ct. Crim. App. April 15, 2016), *cert. denied*, 137 S.Ct. 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), *pet for cert. pending*,

No. 16-1337 (filed May 3, 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).

Through Nathan's case, this petition presents a vehicle to resolve this question.

2. Whether attempted murder is deemed a homicide or nonhomicide offense. Willbanks's case also raises the recurring question of whether attempted murder is a homicide offence subject to *Miller*, or a nonhomicide offence subject to *Graham*. Some courts have held attempted murder is a homicide offense. *Twyman* v. *State*, 2011 WL 3078822, *1 (Del. July 25, 2011) (attempted murder is a homicide offense); *Cervantes* v. *Biter*, 2014 WL 2586884, *4–5 (C.D. Cal. February 7, 2014) (attempted murder is a homicide offense); *People* v. *Gipson*, 34 N.E.3d 560, 576 (Ill. App. Ct. 2015), *reh'g denied* (June 22, 2015) ("[W]e seriously question whether attempted murder constitutes a nonhomicide offense."). Others have held or assumed it is a nonhomicide offense. App. 153a–155a (assuming that attempted murder is a nonhomicide offense); *Bramlett* v. *Hobbs*, 463 S.W.3d 283, 288 (Ark. 2015) (attempted capital murder is not a homicide offense); *Gridine* v. *State*, 175 So. 3d 672, 674–75 (Fla. 2015), *cert. denied*, 136 S. Ct. 1387 (2016) (attemped murder is not a homicide offense); *State* v. *Hampton*, No. W2015-00469-CCA-R3-CD, 2016 WL 6915581, at *7 (Tenn. Crim. App. Nov. 23, 2016), appeal denied (Apr. 12, 2017) (attempted murder is a nonhomicide offense). Because Willbanks was convicted of an offense equivalent to attempted murder, his case presents this issue as well.

3. Life versus term-of-years sentences. Another issue dividing the lower courts is whether, in the context of both homicide and nonhomicide juvenile offenders, the rules announced in *Miller* and *Graham* apply not only to life sentences but to sentences of terms of years. Both *Miller* and *Graham* concerned juvenile offenders sentenced to life in prison. But other offenders, sentenced to lengthy terms of years in prison, have argued that their sentences are the functional equivalent of a life sentence, and thus should be subject to the same requirements as *Miller* and *Graham*. *See, e.g., Caballero*, 282 P.3d at 293; *Riley*, 110 A.3d at 1206; *Casiano* v. *Comm'r of Corrections*, 115 A.3d 1031, 1033–34, 1045, 1047 (Conn. 2015), *cert. denied*, 136 S. Ct. 1364 (2016); *Henry*, 175 So. 3d at 676; *Gridine*, 175 So. 3d at 674; *Reyes*, 63 N.E.3d at 886. This petition raises the question whether *Miller* and *Graham* should be expanded to apply to lengthy sentences of terms of years in prison.

4. Single-offense versus aggregate sentences. As discussed above, a further issue that recurs under *Miller* and *Graham* is whether they 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).

Because both Nathan and Willbanks received lengthy aggregate sentences, this petition presents an opportunity to address this question.

5. The age at which parole eligibility must begin if *Miller* and *Graham* implicate lengthy term-of-years or aggregate sentences. Finally, a 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 on precisely when a juvenile offender must become eligible for parole. *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 juve-

nile 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 at121–22 (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 offences 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").

Some state legislatures set parole eligibility at ages ranging from 15 years to 40 years by statute for juvenile offenders. *See, e.g.*, Ariz. Rev. Stat. Ann. § 13-716 (2014) (parole eligibility "on completion of service of the minimum sentence"); Cal. Pen. Code § 3051 (2016) (parole eligibility at 25 years); Colo. Rev. Stat. Ann. § 17-22.5-104(2)(d)(IV) (2006) (parole eligibility at 40 years); Conn. Gen. Stat. Ann. § 54-125a(f) (2015) (parole eligibility at 30 years); Del. Code Ann. tit. 11, §§ 4209A (2013) (limiting sentences for a juvenile homicide offender to 25 years to life); Fla. Stat. § 921.1402(2) (2014) (parole eligibility at 25 years);

La. Rev. Stat. Ann. § 15:574.4(E) (2014) (parole eligibility at 35 years); W. Va. Code § 61-11-23(a)(2)(b) (2014) (parole eligibility at 15 years); Wyo. Stat. Ann. § 6-10-301(c) (2016) (parole eligibility at 25 years).

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. In short, "there appears to be no consensus as to what constitutes a meaningful opportunity for release." *Smith*, 892 N.W.2d at 66.

Because Nathan and Willbanks will become eligible for parole in their old age, this case presents an appropriate vehicle to address this question as well.

CONCLUSION

The petition should be denied. But if this Court decides to examine this question, it should grant or hold this petition. Respectfully submitted,

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