No. _____

In The Supreme Court of the United States

THE STATE OF WASHINGTON,

Petitioner,

v.

SAID OMER ALI,

Respondent.

On Petition For Writ Of Certiorari To The Washington State Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Eighth Amendment categorically bars the death penalty for juvenile offenders, *Roper v. Simmons*, 543 U.S. 551, 571 (2005), and life without parole for juvenile nonhomicide offenders, *Graham v. Florida*, 560 U.S. 48, 74 (2010). In *Miller v. Alabama*, 567 U.S. 460, 465 (2012), the Court introduced an individual proportionality determination and held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment[.]"

The question presented is:

> Whether *Graham* and *Miller* require an individual proportionality determination before imposing *any* sentence on a juvenile offender convicted in adult court.

PARTIES TO THE PROCEEDING

The Petitioner is the State of Washington, through the King County Prosecuting Attorney's Office. The State Petitioner was the respondent below. The Respondent is Said Omer Ali, an individual incarcerated in the State of Washington. Ali was the petitioner below.

RELATED PROCEEDINGS

State v. Ali, No. 85467-0 (Washington State Supreme Court) (order denying review of lower court opinion affirming convictions and sentence, entered March 9, 2011)

State v. Ali, No. 63253-1-I (Washington State Court of Appeals, Division One) (opinion affirming convictions and sentence, entered September 20, 2010)

State v. Ali, No. 08-1-05113-1 SEA (King County Superior Court) (judgment and sentence, entered March 30, 2009)

In re Personal Restraint of Domingo-Cornelio, No. 97205-2 (Washington State Supreme Court) (opinion reversing lower court's dismissal of personal restraint petition and granting relief, entered September 17, 2020)

In re Personal Restraint of Domingo-Cornelio, No. 50818-4-II (Washington State Court of Appeals, Division Two) (order dismissing personal restraint petition, entered March 8, 2019)

State v. Cornelio, No. 93097-0 (Washington State Supreme Court) (order denying review of lower court opinion affirming convictions and sentence, entered August 31, 2016)

RELATED PROCEEDINGS—Continued

State v. Cornelio, No. 46733-0-II (Washington Court of Appeals, Division Two) (opinion affirming convictions and sentence, entered April 5, 2016)

State v. Cornelio, No. 13-1-02753-6 (Pierce County Superior Court) (judgment and sentence, entered September 24, 2014)

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INTRODUCTION

Following *Graham v. Florida*, 560 U.S. 48 (2010) and *Miller v. Alabama*, 567 U.S. 460 (2012), courts around the country struggle to answer two fundamental questions: (1) what does the Eighth Amendment require when conducting an individualized sentencing hearing under *Miller*, and (2) to what sentences do those constitutional requirements apply? The first question is presented in *Jones v. Mississippi*, No. 18-1259 (argued Nov. 3, 2020), where the Court will address the *content* of *Miller*'s constitutional requirement. This case addresses the second question—the potential sentences that are the *object* of that requirement.

In two recent companion cases, *Ali* and *Domingo-Cornelio*, the Washington Supreme Court extended the reasoning of a prior decision and concluded that the Eighth Amendment prohibits sentencing courts from imposing any legislatively enacted sentence on a juvenile offender in adult court unless it first considers the mitigating qualities of youth and concludes that the adult sentence is proportionate to the juvenile's culpability. This must be done regardless of the crime, regardless of the potential sentence, regardless of whether the juvenile negotiated a plea to lesser charges, and regardless of whether the juvenile requests such a hearing or offers mitigating evidence. Under the Washington decisions, the legislature is stripped of the power to set punishment for juvenile offenders—even those who commit heinous offenses. The Washington Supreme Court has used the Eighth Amendment to allow sentencing courts to impose no jail time at all, no matter

the severity or plentitude of a juvenile's crimes, regardless of the state legislature's sentencing requirements.

The Washington court's determination that the Eighth Amendment requires strict proportionality between crime and punishment for all juvenile offenders in adult court is unanchored to the foundations of *Graham* and *Miller*. The state high court seized on this Court's decisions setting an Eighth Amendment *ceiling* for juvenile sentences to erroneously hold that the state legislature is prohibited from setting any *floor*. It did so by singularly focusing on the lesser culpability of juvenile offenders—"children are different"—while ignoring the rationale of this Court's cases and the severity of the sentences at issue in them.

Washington's flawed interpretation of the Eighth Amendment directly conflicts with three categories of decisions across the country. First, the Washington cases conflict with decisions limiting *Miller* to *de jure* life-without-parole sentences, as those cases necessarily reject the Washington Supreme Court's reasoning. Second, the Washington cases conflict with decisions that apply *Graham* and *Miller* to *de facto* life-without-parole sentences but conclude that a particular sentence is too short to qualify. The Washington court determined that no sentence is too short to apply *Miller*. Finally, the Washington cases conflict with other state high courts that have concluded mandatory-minimum sentences less than life without parole do not implicate *Graham* or *Miller*. In contrast to the Washington cases, those courts recognize that the traditional objectives of punishment remain valid when sentencing juveniles to less than life in prison.

Untethering *Miller*'s individualized sentencing requirement from its Eighth Amendment mooring seriously distorts this Court's jurisprudence in a manner that is sure to exacerbate existing divisions among the courts as to the object of *Graham* and *Miller*. That tether was loosened in a prior Washington Supreme Court decision, *State v. Houston-Sconiers*, 391 P.3d 409 (Wash. 2017), and then severed in *Ali* and *Domingo-Cornelio*. These decisions cripple the Washington legislature's authority to substantively decide how to punish juvenile offenders in adult court. For sentences other than life without parole, the legislature should retain its prerogative to set minimum punishment for juvenile offenders. Certiorari—indeed summary reversal—is warranted.

OPINIONS BELOW

The decision of the Washington Supreme Court is reported at *In re Personal Restraint of Ali*, 474 P.3d 507 (Wash. 2020).[1] Pet. App. 1a. The decision of the Washington Supreme Court in the companion case is reported at *In re Personal Restraint of Domingo-Cornelio*, 474 P.3d 524 (Wash. 2020). Pet. App. 41a.

[1] Ali filed his successive personal restraint petition in the intermediate appellate court, which transferred it to the Washington Supreme Court for consideration. Pet. App. 6a.

JURISDICTION

The Washington Supreme Court entered judgment in each of the companion cases on September 17, 2020. This Court's jurisdiction is properly invoked pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

The relevant portions of the Washington criminal sentencing statutes are included in the Petition Appendix. Pet. App. 57a.

STATEMENT OF THE CASE

A. Ali's Crimes

Said Ali, along with others, robbed seven victims in five separate incidents over a month-long period in 2008. *State v. Ali*, 157 Wash. App. 1061, 2010 WL 3624267, at *1-2 (2010) (unpublished), *rev. denied*, 249 P.3d 1028 (2011). Three of the victims were robbed at knifepoint; one was stabbed in the stomach and suffered a liver laceration requiring surgery. *Id*. Another victim was beaten unconscious and suffered a concussion. *Id*. at *3. Ali wielded what appeared to be

a handgun in one of the robberies, holding it to the victim's head. *Id*. at *2. The stabbing victim identified Ali as the "ring leader." *Id*. at *1. Ali was sixteen years old at the time he committed the crimes.

Ali was convicted in adult court of one count of first-degree assault, five counts of first-degree robbery, and two counts of attempted first-degree robbery.[2] Ali was also convicted of three deadly weapon enhancements, correlating with the assault and two of the robberies. *Ali*, 2010 WL 3624267, at *1, 3.

B. Ali Was Sentenced to 26 Years and is Eligible for Release at Age 36

Washington's Sentencing Reform Act (SRA) was enacted in 1981 to ensure that offenders who commit similar crimes and have similar criminal histories receive similar sentences. Wash. Rev. Code § 9.94A.010. The SRA determinate sentencing scheme contains a grid of presumptive sentencing ranges based on the seriousness of the offense and the offender's criminal record. Wash. Rev. Code § 9.94A.505. A court "shall impose" a fixed sentence within the presumptive range

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[2] Ali was charged as an adult because, according to his driver's license, he was 19 years old at the time of the offenses. At trial, both he and his mother testified that he was 16 years old when the crimes occurred, and he produced a Somalian birth certificate to that effect. Regardless, because Ali was at least 16 years old and charged with a serious violent offense—first-degree assault—Washington law required that he be charged in adult court. Wash. Rev. Code § 13.04.030(1)(e)(v)(A) (2008); Wash. Rev. Code § 9.94A.030(41)(a)(v) (2008).

unless it determines "that there are substantial and compelling reasons justifying an exceptional sentence." Wash. Rev. Code § 9.94A.535 (Pet. App. 59a).

The SRA contains non-exclusive mitigating circumstances that may justify an exceptional sentence below the presumptive range, including significant impairment of an offender's "capacity to appreciate the wrongfulness of his or her conduct, or to conform his conduct to the requirements of the law." Wash. Rev. Code § 9.94A.535(1)(e) (Pet. App. 59a). "[The SRA] has *always* provided the opportunity to raise youth for the purposes of requesting an exceptional sentence downward, and mitigation based on youth is within the trial court's discretion." *In re Personal Restraint of Light-Roth*, 422 P.3d 444, 448 (Wash. 2018) (emphasis added). However, "age is not a per se mitigating factor, automatically entitling every youthful offender to an exceptional sentence," and a sentence below the presumptive range may not be imposed "absent any evidence that youth in fact diminished a defendant's culpability." *State v. O'Dell*, 358 P.3d 359, 363, 366 (Wash. 2015).

The SRA contains no affirmative requirement that a court consider a sentence below the presumptive range and places the burden on the offender to establish mitigation by a preponderance of the evidence. Wash. Rev. Code § 9.94A.535(1) (Pet. App. 59a); *State v. Ramos*, 387 P.3d 650, 664 (Wash. 2017); *State v. Gregg*, 474 P.3d 539, 542 (Wash. 2020).

Defendants convicted of certain statutory enhancements, including committing crimes with a deadly weapon, must serve an additional fixed term in addition to the base sentence within the presumptive range. Wash. Rev. Code § 9.94A.533 (Pet. App. 57a). Enhancement terms are not subject to an exceptional sentence, are mandatory, and must be served consecutively to the base sentence and to each other. Wash. Rev. Code § 9.94A.533(4)(a), (e)(ii) (Pet. App. 57a-58a).

Ali's presumptive sentencing range was 20 to 26.5 years. Pet. App. 3a. The combined three deadly weapon enhancements required the court to add six consecutive years to his base presumptive-range sentence.[3] *Id*. Ali asked the sentencing court to impose a total sentence of ten years (an exceptional mitigated sentence), arguing that the presumptive range was excessive in light of his young age and tumultuous childhood. Pet. App. 3a-4a. The sentencing court was mindful of Ali's youth, but concluded that his chronological age—*by itself*—was not a legal justification to depart from the presumptive range. Pet. App. 5a. The court imposed the low end of the range, 20 years, and added the mandatory six-year deadly-weapon-enhancement term, for a total sentence of 26 years. Pet. App. 3a, 5a. Ali's sentence was thus the lowest the court could impose

[3] The current version of the statute makes the enhancements non-mandatory as to juvenile offenders, and authorizes release after 20 years, no matter the length of the enhancement or underlying sentencing term. Wash. Rev. Code § 9.94A.533(4)(e)(ii), (15); Wash. Rev. Code § 9.94A.730 (Pet. App. 58a, 60a). Although that was not the case when Ali was sentenced, the statutory change authorizes him to seek release after 20 years.

without finding a legal mitigating factor for an exceptional sentence.

Ali's convictions were affirmed on direct appeal, and the Washington Supreme Court denied discretionary review of the intermediate appellate court's opinion. *Ali*, 2010 WL 3624267, at *1-2. Ali's convictions became final in 2011. Pet. App. 6a.

After this Court's decision in *Miller*, the Washington legislature authorized juvenile offenders convicted in adult court to apply for release after serving 20 years. Wash. Rev. Code § 9.94A.730 (Pet. App. 60a). This statute effectively removed the six-year mandatory portion of Ali's sentence, and reduced his 26-year fixed sentence to a 20- to 26-year sentence. Ali can apply for release when he is 36 years old and will be released no later than age 42.

C. After Ali Was Sentenced, the Washington Supreme Court Applied *Miller* to Lengthy Term-of-Years Sentences

In 2017, the Washington Supreme Court applied *Miller*'s individualized sentencing requirement to what it considered a *de facto* life-without-parole sentence—85 aggregate years for four counts of first-degree murder. *Ramos*, 387 P.3d at 656. The court concluded that a *Miller* hearing was required for all juvenile offenders facing "life without parole (or its functional equivalent)," even in the absence of an affirmative request. *Id*.

at 662. *Ramos* upheld the SRA's placement of the burden to prove mitigation on the juvenile offender because, "*Miller* does not authorize this court to mandate sentencing procedures that conflict with the SRA unless it is shown that [they] so undermine *Miller*'s substantive holding that they create an unacceptable risk of unconstitutional sentencing." *Id*. at 664.

Just two months after *Ramos*, the Washington high court concluded that the Eighth Amendment requires sentencing courts to consider the mitigating qualities of youth when sentencing juvenile offenders in adult court, and to have "discretion to impose any sentence below the otherwise applicable SRA range and/or sentence enhancements." *Houston-Sconiers*, 391 P.3d at 420. The court reversed the sentences in the case—31- and 26-year terms comprised entirely of mandatory firearm enhancements.[4] *Id*. at 414, 416. Citing this Court's decisions in *Roper*,[5] *Graham*, and *Miller*, the state court held that the mandatory nature of the firearm enhancements violated the Eighth Amendment for juvenile offenders, noting that the mandatory portion of the sentence could reach "lengths of 50 years or more." *Id*. at 422 (citations omitted). The court cited to cases from other states holding that *Miller* required discretion before imposing 45, 50, and 52-year sentences for juvenile offenders. *Id*. The Washington court admitted that this Court "has not applied the rule that children are different and require

[4] The sentencing court had granted both consolidated defendants an exceptionally lenient sentence of 0 months as to the presumptive SRA range. *Houston-Sconiers*, 391 P.3d at 414, 416.

[5] *Roper v. Simmons*, 534 U.S. 551 (2005).

individualized sentencing . . . in exactly this situation, i.e., with sentences of 26 and 31 years," but it nonetheless saw "no way to avoid the Eighth Amendment requirement to treat children differently, with discretion, and with consideration of mitigating factors, *in this context*." *Id*. at 419 (emphasis added).

After *Houston-Sconiers*, the Washington Supreme Court applied *Miller* to a *de facto* life sentence that was final. *State v. Scott*, 416 P.3d 1182 (Wash. 2018). The court concluded that Washington's post-*Miller* statute authorizing juvenile offenders to be released after serving 20 years sufficiently remedied an Eighth Amendment violation on collateral review. *Id*. at 1189; *see* Pet. App. 60a. Scott had been sentenced to 75 years for murder (20 years of which was mandatory) without consideration of his youth. *Id*. at 1183. The Washington court explicitly rejected Scott's argument that *Miller* and *Houston-Sconiers* required him to be resentenced. *Id*. at 1186-87.

In 2019, the Washington court reversed an aggregate 48-years-to-life sentence for a juvenile offender who had committed six crimes, including aggravated murder and first-degree murder. *State v. Gilbert*, 438 P.3d 133, 137 (Wash. 2019). The court applied its decision in *Houston-Sconiers* to conclude that the sentencing court had discretion to impose a concurrent sentence for aggravated murder, despite a statutory presumption to the contrary. *Id*. at 136.

D. The Washington Supreme Court Held that the Eighth Amendment Mandates Strict Proportionality in Punishment for All Juvenile Offenders in Adult Court

Six years after his case was final, Ali filed a personal restraint petition premised on *Houston-Sconiers*. He argued that the sentencing court violated the Eighth Amendment by not meaningfully considering his youth and by imposing a mandatory six-year deadly-weapon enhancement term.[6] As relevant here, the State maintained that *Graham* and *Miller* apply only to sentences that deprive a juvenile of a meaningful opportunity for release, and thus Ali's 26-year sentence did not implicate the Eighth Amendment. The State also cited to *Scott*, *supra*, and pointed out that as a juvenile offender, Ali can apply for release after serving 20 years of his 26-year sentence—when he is 36 years old. Ali will be no older than 42 when released.

The Washington Supreme Court ordered Ali to be resentenced, concluding that *Houston-Sconiers* was retroactive to final cases.[7] Pet. App. 23a. In so doing, the court rejected the State's argument that *Houston-Sconiers* was limited to sentences that deprive a

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[6] Ali also baldly asserted that his sentence was prohibited by the Washington State Constitution, but he did not explain why, and the Washington Supreme Court did not address that claim or decide his petition based on it.

[7] The State challenges the Washington court's conclusion that the Eighth Amendment demands strict proportionality when sentencing all juvenile offenders in adult court. It does not seek review of the state court's retroactive application of *Houston-Sconiers* under *Teague v. Lane*, 489 U.S. 288 (1989).

juvenile of a meaningful opportunity for release. Pet. App. 14a-15a. The Washington court announced that the Eighth Amendment requires "punishment proportionate to culpability" when *any* juvenile is sentenced in adult court, and prohibits *all* legislatively enacted adult sentences for "juveniles who possess such diminished culpability that [an adult sentence] would be disproportionate punishment." Pet. App. 14a, 17a, 19a-20a. The court stated that every juvenile offender in adult court is entitled to an individualized hearing "to determine whether [he or she] belongs in the class of culpability that would allow adult sentences versus the more likely outcome of a sentence that reflects the juvenile's immaturity." *Id.* at 14a, 20a.

The court also determined that the statute authorizing juvenile offenders to apply for release after 20 years was insufficient to cure the constitutional violation in Ali's case. The court reasoned that the Eighth Amendment requires an assessment of "culpability" at the time of every juvenile offender's sentencing, not a post-hoc consideration of "whether [the offender] pose[s] a continued danger after 20 years of incarceration."[8] Pet. App. 28a. The court further concluded that because the statute required Ali to serve "most" of his 26-year sentence, it did not cure the Eighth Amendment violation. *Id*.

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[8] But in *Scott*, the court had explicitly concluded that neither *Miller* nor *Houston-Sconiers*, a direct appeal case, provided a basis for resentencing on collateral review. *Scott*, 416 P.3d at 1186.

In the companion case of *In re Personal Restraint of Domingo-Cornelio*, 474 P.3d 524 (Wash. 2020), the defendant faced no mandatory sentencing provisions; he did not ask the sentencing court to impose an exceptional sentence below the presumptive sentencing range nor did he contend that there was any evidence to justify such a departure. Pet. App. 42a-44a, 54a. The sentencing court gave no indication that it was unaware of its statutory discretion to impose a sentence below the presumptive range. *Id*. Nevertheless, on collateral review, the Washington Supreme Court reversed Domingo-Cornelio's 20-year sentence for multiple counts of child rape and child molestation. The court concluded that the Eighth Amendment required the sentencing court to consider whether Domingo-Cornelio's youth justified an exceptional sentence below the presumptive range, regardless of whether it was asked to do so. *Id*. at 54a. Citing to *Ali*, the court once again stated that the Eighth Amendment requires "punishment proportionate to culpability" for *all* juvenile offenders in adult court. *Id*. at 51a.

In a joint dissent from *Domingo-Cornelio* and *Ali*, Justice Johnson and two other members of the court rejected the majority's conclusion that the Eighth Amendment requires strict proportionality between crime and punishment for all juvenile offenders. Pet. App. 38a-39a. The dissent also disagreed that Washington was retroactively required to relitigate every final juvenile sentence so that courts can consider whether the presumptive adult punishments were

permissible in light of the offenders' youth at the time of their crimes. Pet. App. 39a.

REASONS FOR GRANTING THE PETITION

This Court's Eighth Amendment cases concerning the most severe penalties for juvenile offenders have left the nation's courts conflicted over the object of *Graham* and *Miller*—to what sentences does the Eighth Amendment limit legislation for juvenile sentences. The conflict thus far has centered around those sentences at the ceiling of what this Court has declared that the Eighth Amendment allows. But the Washington companion cases remove all possibility of a legislative floor for juvenile punishment by concluding that the Eighth Amendment requires strict proportionality for all juvenile offenders in adult court. By departing from the reasoning of *Graham* and *Miller*, the Washington cases directly conflict with decisions from other state high courts and federal circuit courts. Not only do *Ali* and *Domingo-Cornelio* require the wholesale resentencing of most juvenile offenders sentenced in Washington adult courts prior to 2017, the decisions will inevitably influence other courts facing similar arguments and state lawmakers seeking to avoid constitutional infirmities in legislation.

The issue is a matter of national importance because unbridled expansion of the Eighth Amendment tramples upon sovereign authority to legislate policy regarding criminal punishment. Washington's sweeping

decisions are the extreme example of this, wholly depriving the state legislature of the authority to substantively decide how to punish juvenile offenders in adult court. Other courts have expanded *Miller* incrementally and inconsistently, applying its protections to sentences of widely divergent lengths. This conflict highlights the impracticality of judicially crafting a juvenile sentencing scheme, and results in different levels of constitutional protection based solely on geography. Review is necessary to clarify the object of the Eighth Amendment. The Amendment does not demand stripping legislatures of their authority when juvenile offenders are sentenced to something less than a life sentence.

The Court's pending decision in *Jones v. Mississippi* will not resolve the question presented here. *Jones* addresses the content of *Miller*'s constitutional rule. It does not provide a vehicle to determine the object of that rule, *i.e.*, which sentences require its application. The Court should grant certiorari to conclude that the Eighth Amendment, as construed in *Graham* and *Miller*, does not proscribe a legislative floor for punishing juvenile offenders with sentences less than life.

A. The Washington Supreme Court's Application of *Miller* to All Juvenile Offenders in Adult Court Conflicts with the Decisions of Other State High Courts and Federal Circuit Courts

Life without parole and the death penalty share some characteristics "that are shared by no other sentences" because they "alter[ ] the offender's life by a forfeiture that is irrevocable . . . without giving hope of restoration." *Graham*, 560 U.S. at 69-70. Life without parole is "especially harsh" for juvenile offenders, who will serve more years and a greater percentage of their lives in prison than adults. *Id*. at 70. Given the incongruity between a life sentence and a juvenile's diminished culpability, *Graham* banned life-without-parole sentences for juveniles who commit crimes other than murder. *Id*. at 74. Focusing on *Graham*'s recognition of the similarities between life without parole for a juvenile and a death sentence, *Miller* imported the Court's individualized sentencing cases from the death penalty context to conclude that the Eighth Amendment prohibits sentencing schemes that mandate life without parole for juveniles who commit murder. *Miller*, 567 U.S. at 489. "*Graham*, *Roper*, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing *the harshest possible penalty* for juveniles." *Id*. at 480 (emphasis added).

Central to *Graham* and *Miller* was the recognition that the four primary objectives of sentencing—retribution, deterrence, incapacitation, and rehabilitation—

are "severely diminish[ed]" when a "life-without-parole sentence" condemns a juvenile to die in prison. *Graham*, 560 U.S. at 71-72; *Miller*, 567 U.S. at 473. Those cases are thus necessarily tied to such life-without-parole sentences. While the usual penological justifications for punishment are diminished when a juvenile is sentenced to death or life imprisonment, that rationale does not apply to lesser sentences. Rehabilitation is highly relevant when an offender will be released to the community as an able-bodied adult. And other purposes, such as deterrence and retribution, are appropriate considerations for term-of-years sentences imposed on juveniles for serious crimes. These rationales, together with rehabilitation, provide a basis for a rational legislative scheme to impose lengthy confinement as appropriate punishment for serious offenses committed by juveniles.

Rather than adhere to the logic of *Graham* and *Miller*, the Washington Supreme Court has taken "children are different" as its controlling principle and abandoned any consideration of the severity of the sentence. In so doing, it has wholly eliminated the legislature's role in determining appropriate sentences for juveniles who commit the most serious crimes. The Washington cases thus directly conflict with three categories of decisions from other jurisdictions.

First, the Washington cases conflict with those state high courts and federal circuit courts that have limited *Graham* and *Miller* to *de jure* life-without-parole sentences. Those courts necessarily reject the Washington Supreme Court's extension of *Graham*

and *Miller* beyond the sentences considered. *See, e.g.*, *Bowling v. Dir., Virginia Dep't of Corr.*, 920 F.3d 192, 198-99 (4th Cir. 2019), *cert. denied sub nom.* 140 S. Ct. 2519 (2020) (*Miller* does not extend to parole-eligible offender); *Veal v. State*, 810 S.E.2d 127, 129 (Ga. 2018), *cert. denied*, 139 S. Ct. 320 (2018) (six consecutive life-with-parole sentences do not implicate *Miller*); *Wilson v. State*, ___ N.E.2d ___, 2020 WL 6737226, *7 (Ind. 2020) (term-of-years sentence does not implicate *Miller*).[9]

Second, the Washington companion cases directly contradict those courts that extend *Graham* and *Miller* to *de facto* life-without-parole sentences but conclude that some lengthy sentences do not qualify. *See, e.g.*, *State v. Shanahan*, 445 P.3d 152, 159 (Idaho 2019), *cert*.

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[9] *See also Evans-Garcia v. United States*, 744 F.3d 235, 240-41 (1st Cir. 2014) (*Miller* limited to mandatory life-without-parole sentences); *United States v. Sparks*, 941 F.3d 748, 754 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 1281 (2020) (life-with-parole and term-of-years sentences may be mandatorily imposed because *Miller* limited to actual life without parole); *Bunch v. Smith*, 685 F.3d 546, 551-52 (6th Cir. 2012) (*Graham* and *Miller* inapplicable to 89-year aggregate fixed term); *State v. Soto-Fong*, 474 P.3d 34, 36 (Ariz. 2020) (*Miller* and *Graham* not implicated by 140-year aggregate sentence); *Hobbs v. Turner*, 431 S.W.3d 283, 289 (Ark. 2014) (*Miller* limited to mandatory life without parole); *Lucero v. People*, 394 P.3d 1128, 1133 (Colo. 2017) (same); *Phon v. Commonwealth*, 545 S.W.3d 284, 298 (Ky. 2018) (same); *State v. Slocumb*, 827 S.E.2d 148, 157 (S.C. 2019) (*Miller* and *Graham* did not apply to aggregate 130-year sentence); *Lewis v. State*, 428 S.W.3d 860, 863 (Tex. Crim. App. 2014) (*Miller* inapplicable to life with possibility of parole); *Jones v. Commonwealth*, 795 S.E.2d 705, 722 (Va. 2017) (*Miller* inapplicable to sentences other than mandatory life without parole).

denied, 140 S. Ct. 545 (2019) (aggregate sentence where juvenile offender required to serve 35 years before parole eligibility not a *de facto* life sentence implicating *Miller*); *United States v. Mathurin*, 868 F.3d 921, 934-36 (11th Cir. 2017) (50-year sentence for non-homicide juvenile offender does not violate *Graham*).[10] In contrast to these courts, the Washington Supreme Court concluded that *no* sentence was too short for a juvenile to be exempt from *Miller*.

The third category of decisions with which the Washington cases conflict are those from the high courts of other states affirmatively rejecting the notion that mandatory sentences shorter than life without parole implicate *Graham* or *Miller*. The Connecticut Supreme Court refused to apply the Eighth Amendment

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[10] *See, e.g.*, *Sanders v. Eckstein*, ___ F.3d ___, 2020 WL 7018318, *5 (7th Cir. 2020) (state-court determination that aggregate 140-year term for multiple rapes where juvenile offender eligible for parole at age 50 did not violate *Graham* or require *Miller* resentencing not an unreasonable application of federal law); *Demirdjian v. Gipson*, 832 F.3d 1060, 1076 (9th Cir. 2016) (two consecutive 25-year terms with parole eligibility at age 66 did not violate Eighth Amendment); *Pedroza v. State*, 291 So. 3d 541, 544 (Fla. 2020), *cert. denied sub nom.* 19-8849, 2020 WL 5883207 (2020) (40-year sentence for murder did not implicate *Miller*); *State v. Russell*, 908 N.W.2d 669, 677 (Neb. 2018) (offender eligible for parole at 72 years provided a "meaningful and realistic opportunity to obtain release" and thus did not receive *de facto* life sentence); *State v. Diaz*, 887 N.W.2d 751, 768 (S.D. 2016) (80-year sentence with parole eligibility after 40 years, at age 55, not a *de facto* life sentence); *Wiley v. State*, 461 P.3d 413, 416 (Wyo. 2020) (parole eligibility at 58, after serving 43-year minimum term, not the functional equivalent of life in prison and did not implicate *Miller*).

to five- and ten-year mandatory-minimum sentences, explaining that the sentences in *Roper*, *Graham*, and *Miller* were "unique in [] severity." *State v. Taylor G.*, 110 A.3d 338, 346 (Conn. 2015). In *Ali*, the Washington Supreme Court summarily asserted that the difference between life without parole and lesser sentences was "one of scope, not of kind." Pet. App. 23a. But the Connecticut high court recognized that the differences between death and life without parole and other sentences is indeed qualitative:

> Death is final and irrevocable, unlike any other sentence. Life in prison without the possibility of parole is also final and irrevocable in the sense that it deprives the offender of all hope of future release and of living a normal life, even if he or she is successfully rehabilitated and capable of returning and making a positive contribution to society.

Taylor G., 110 A.3d at 346. The Connecticut court therefore concluded that the shorter sentences did "not implicate the factors deemed unacceptable in *Roper, Graham* and *Miller* when those penalties are imposed on juveniles, namely, the futility of rehabilitation and the permanent deprivation of all hope to become a productive member of society[.]" *Id*. Instead, a juvenile offender facing less than a life sentence "will be able to work toward his rehabilitation and look forward to release at a relatively young age." *Id*.

Like Connecticut, the high courts of Delaware, Massachusetts, Ohio, South Carolina, and Wisconsin have also held—contrary to the Washington

companion cases—that mandatory sentences shorter than life without parole do not implicate *Graham* or *Miller*. *See Burrell v. State*, 207 A.3d 137, 141-42 (Del. 2019) (rejecting argument that Eighth Amendment invalidates all mandatory-minimum sentencing statutes); *Commonwealth v. Lugo*, 120 N.E.3d 1212, 1219 (Mass. 2019) (mandatory life sentence with parole eligibility after 15 years for juvenile homicide offender constitutional); *State v. Anderson*, 87 N.E.3d 1203, 1212 (Ohio 2017) (mandatory three-year minimum sentence for aggravated robbery and kidnapping with firearm constitutional); *State v. Smith*, 836 S.E.2d 348, 350 (S.C. 2019) (statute setting 35-year mandatory-minimum sentence for murder constitutional); *State v. Barbeau*, 883 N.W.2d 520, 531-32 (Wis. 2016) (mandatory 20-year minimum sentence for homicide constitutional).

The Washington companion decisions illustrate the resulting logical extension when *Graham* and *Miller* are untethered from their contexts. This Court has never implied that the Eighth Amendment requires strict proportionality for juveniles sentenced to less than life. Only extreme sentences that are grossly disproportionate to the crime are forbidden. *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring in part and concurring in the judgment). By seizing onto this Court's decisions setting an Eighth Amendment ceiling for juvenile sentences, the Washington Supreme Court erroneously decided that the state legislature is prohibited from setting any floor. Its decisions were reached by singularly focusing on the culpability of juvenile offenders in general while

ignoring the severity of the sentences at issue in this Court's cases. As Chief Justice Roberts' dissent from *Miller* explained, if the controlling principle is that juveniles are different from adults, there is "no discernible end point." *Miller*, 567 U.S. at 501 (Roberts, C.J., dissenting). "[T]he only stopping point for the Court's analysis would be never permitting juvenile offenders to be tried as adults." *Id*.

The Washington court's erroneous expansion of the Eighth Amendment conflicts with decisions from other state supreme courts and federal circuit courts and has the practical effect of different federal constitutional protections for juveniles based on where they reside. Review should be granted to make it clear that sentences less than life are not the object of *Graham* and *Miller*.

B. The Question Presented is Important to Resolve Because the Washington Supreme Court's Companion Decisions Deepen the Existing Split and Improperly Invade the Legislative Function

The question presented is of great importance because the Washington court's announcement of an Eighth Amendment imperative for individualized sentencing—with unbridled authority to ignore statutory sentencing requirements—compounds the existing confusion in appellate courts and grossly intrudes on the legislative prerogative to determine the limits of punishment for juvenile offenders.

The Eighth Amendment does not mandate adherence to any one penological theory of sentencing, and the setting of prison terms involves a substantive judgement that is "properly within the province of legislatures, not courts." *Harmelin*, 501 U.S. at 998-1001 (Kennedy, J., concurring in part and concurring in the judgment). By invoking the Eighth Amendment, however, the Washington Supreme Court has reassigned the task of determining criminal punishment to the judiciary, ignoring the complex and wide-ranging considerations that inform such policy decisions. "The question of what acts are 'deserving' of what punishments is bound so tightly with questions of morality and social conditions as to make it, almost by definition, a question for legislative resolution." *Graham*, 560 U.S. at 120 (Scalia, J., dissenting).

Because of juveniles' lesser culpability and heightened capacity for change, the traditional goals of sentencing seldom justify divesting juvenile offenders of a meaningful opportunity for a future outside of prison. But there is no similarly principled basis to wholly strip the legislature of its power to define punishment for *all* juvenile offenders. The Constitution does not deprive the States of their sovereign authority to determine sentences for those juvenile offenders who do not fall within the narrow confines of *Graham* or *Miller*.

Indeed, Washington's legislature has acted swiftly to enact laws that acknowledge the differences between juvenile and adult offenders. In 2005, noting emerging brain science showing that juveniles differ from adults, the legislature excluded juvenile offenders

prosecuted in adult court from receiving the mandatory-minimum sentences applicable to certain murder, rape, and assault charges. Wash. Rev. Code § 9.94A.540 (2005). In 2014, the legislature required juveniles previously sentenced to mandatory life without parole for aggravated murder be resentenced to a range between 25 years to life after consideration of the *Miller* factors. Wash. Rev. Code § 10.95.030 (2014). The legislature declared all other juvenile offenders eligible for release after serving 20 years, notwithstanding the applicability of mandatory sentencing enhancements. Wash. Rev. Code § 9.94A.730 (2014); Wash. Rev. Code § 9.94A.533 (2015).[11] These enactments show that the legislature is able to respond appropriately to scientific advancement and shifting societal attitudes about juvenile punishment.

Moreover, by largely depriving the legislature of its authority over juvenile sentencing, the Washington Supreme Court's companion decisions consolidate all juvenile sentencing authority in the judiciary, with unfettered discretion. Yet this sets the stage for the same abuses that led Washington—like many other states and the federal government—to enact a presumptive sentencing scheme in the first place. *See Blakely v. Washington*, 542 U.S. 296, 316 (2004) (O'Connor, J., dissenting) (noting that when enacting the SRA, lawmakers' intent was "to bring much-needed uniformity,

[11] The cited provisions of Wash. Rev. Code § 10.95.030, § 9.94A.533, and § 9.94A.730, enacted in 2014 and 2015, are substantively the same in the 2020 version of the statutes, included in the Petitioner's Appendix at 57a-62a.

transparency, and accountability to an otherwise "'labyrinthine' sentencing and corrections system that 'lack[ed] any principle except unguided discretion'") (quoting another source). Severe disparities in sentences served by similarly situated offenders are too often "correlated with constitutionally suspect variables such as race." *Id*. "The lesson is powerful: racial disparity is correlated with unstructured and unreviewed discretion." *Id*. Accordingly, even as they purport to prevent injustice, the Washington Supreme Court's companion cases will simply produce more of it by giving the judiciary absolute discretion over juvenile sentencing.

This Court should accept review to make clear that for sentences less than life, the Eighth Amendment does not require the transfer of multifaceted, policy-driven sentencing decisions away from the legislature and into the hands of the judiciary.

C. This Case Presents an Excellent Vehicle to Answer the Question Presented

This case presents a key opportunity to straighten the course of Eighth Amendment jurisprudence, which has departed greatly from the concerns that informed this Court's decisions in *Roper*, *Graham*, and *Miller*. There are no procedural or jurisdictional hurdles to this Court's consideration of the question presented. The State preserved the question when it argued below that the Eighth Amendment was not implicated by sentences that do not deprive a juvenile offender of a

meaningful opportunity for release. The Washington court squarely rejected that argument. Pet. App. 14a, 32a-33a, 48a-49a. The court's decision was grounded entirely in the Eighth Amendment, with no independent state grounds considered or decided.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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