No. 20-830

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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

INTRODUCTION

Respondents' brief in opposition to certiorari is striking for its near total failure to acknowledge or analyze the language and holdings of *Ali* and *Domingo-Cornelio*, the companion decisions below. Under those decisions, the Eighth Amendment bars the imposition of all adult sentences—discretionary or mandatory—for juvenile offenders in adult court unless the sentencing court conducts an individualized hearing and determines that the adult punishment is strictly proportionate to the individual juvenile's crime. Pet. App. 17a, 23a, 51a. Contrary to Respondents' portrayal, the companion decisions call into question *all* sentencing schemes, not simply those of states such as Washington that employ presumptive ranges to guide discretion. The holdings are relevant to every sentencing scheme in the nation and deepen the existing national conflict over the sentences to which this Court's decisions in *Graham*[1] and *Miller*[2] apply.

Lower courts and state legislatures need immediate guidance amid significant national dispute. An erroneous conclusion by the highest court of a state that the federal constitution prohibits any limitation of judicial discretion usurps the legislative function. Legislative attempts to reduce disparity through structured sentencing provisions are incompatible with the

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[1] *Graham v. Florida*, 560 U.S. 48, 74 (2010).

[2] *Miller v. Alabama*, 567 U.S. 460, 465 (2012).

companion decisions' constitutional imperative of strict proportionality and unfettered judicial discretion.

This Court should not wait to decide the crucial question of whether the Eighth Amendment removes all legislative authority to place parameters on judicial discretion for juvenile sentencing—including those juveniles who commit the most serious crimes. Respondents' citation to nationwide reform in state legislatures does not undermine the need for review; it *supports* it. State legislatures, including Washington's, are considering enacting and revising juvenile sentencing laws right now. They need to know whether they have the authority to structure sentencing practices to reduce disparity while acknowledging that juvenile offenders are not the same as adults. The companion decisions invade the separation of powers to forevermore strip such choices away. Review is vital and urgently needed.

A. Just When Clarity Is Crucial, the Erroneous Companion Decisions Confound and Deepen Existing Divisions in the Lower Courts About the Object of *Graham* and *Miller*.

Courts around the nation have inconsistently applied *Graham* and *Miller* to a wide range of sentences, leading to disparity, confusion, and doubt about legislative authority to structure fair and consistent sentences for juvenile offenders in adult court. Some courts hold that *Miller* is triggered only by *de jure* life

without parole, while others conclude that individualized sentencing extends to lengthy fixed sentences that are the functional equivalent of life. *Compare State v. Soto-Fong*, 474 P.3d 34, 40 (Ariz. 2020) *with State v. Shanahan*, 445 P.3d 152, 159 (Idaho 2019), *cert. denied*, 140 S. Ct. 545 (2019). While the Washington companion decisions are extreme in their conclusion that the Eighth Amendment requires individualized sentencing for all juveniles in adult court—no matter the offense and no matter the sentence—the broader national debate also is not limited to the harshest sentences. *See State v. Taylor G.*, 110 A.3d 338, 746 (Conn. 2015) (five- and ten-year mandatory-minimum sentences do not implicate *Graham* and *Miller*); *Burrell v. State*, 207 A.3d 137, 141-42, (Del. 2019) (rejecting argument that Eighth Amendment forbids all mandatory-minimum sentencing statutes); *Commonwealth v. Lugo*, 120 N.E.3d 1212, 1219 (Mass. 2019) (mandatory life sentence with parole eligibility after fifteen 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. Barbeau*, 883 N.W.2d 520, 531-32 (Wis. 2016) (mandatory 20-year minimum sentence for homicide constitutional). The companion decisions' erroneous expansion of the Eighth Amendment to mandate individualized sentencing for all juvenile offenders thus conflicts with cases around the nation that speak to sentences at both ends of the spectrum.

Respondents do not deny that this pervasive conflict exists. Nor do they contend that its resolution is unimportant. Instead of meaningfully responding to the merits of the petition, Respondents answer a straw man argument by repeatedly citing—incorrectly—the decision in *State v. Houston-Sconiers*.[3] Based on that faulty premise, Respondents rewrite the question presented to erroneously conclude that the companion decisions do not deepen the nationwide conflict or warrant this Court's review.

A requirement that youth be a *permissible* mitigating factor in presumptive sentencing schemes is not at issue, as Respondents' first question presented suggests. Rather, the companion decisions declare that the Eighth Amendment demands strict proportionality as to *all* juvenile offenders, regardless of the sentence length and regardless if the juvenile offers youthful mitigation or asks for a lesser sentence.[4] Pet. App. 43a,

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[3] *State v. Houston-Sconiers*, 391 P.3d 409 (Wash. 2017).

[4] *Houston-Sconiers* contained the seeds of this holding, but it involved lengthy mandatory sentences and juvenile offenders who presented evidence of youthful mitigation to support their requests for lower sentences. 391 P.3d at 414, 416. Unlike the companion decisions, *Houston-Sconiers* did not impose an affirmative obligation on sentencing courts to hold an individualized sentencing hearing in *every* case, no matter the sentence at issue and regardless of whether the court was asked to (as opposed to meaningfully considering such evidence when offered). *See id.* at 419 ("We see no way to avoid applying the Eighth Amendment "*in this context.*") (emphasis supplied). In any event, if Respondents are suggesting that failure to seek certiorari in *Houston-Sconiers* is a reason to deny certiorari in these cases, the suggestion should be rejected. There is no "one chance for certiorari" rule.

52a. And contrary to Respondents' second question presented, the decisions below use the Eighth Amendment to hand unfettered discretion to the judiciary to impose any sentence desired—not only in the face of ambiguous legislative intent, but in the face of the legislature's plain pronouncements otherwise.

The companion decisions do not simply make youth relevant, as Respondents suggest. They invoke the federal constitution to mandate unfettered judicial discretion as to all juvenile offenders in adult court. This is a significant departure from this Court's recognition that for all sentences other than death and juvenile life without parole, the Eighth Amendment guards only against sentences that are grossly disproportionate to the crime. *Graham*, 560 U.S. at 59-60 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 997, 1000-01 (1991)). Invading the States' sovereign authority to punish juvenile offenders demands more than a recognition of the lesser degree of culpability that is generally applicable to all juveniles. State legislatures are capable of informed policymaking as to juvenile sentencing. Yet the decisions below erroneously expand the Eighth Amendment to strip away all legislative authority to establish consistent sentencing rules for similarly situated offenders.

Tellingly, Respondents barely try to explain why this Court's decisions in *Miller* and *Graham* might extend to all juvenile offenders in adult court. The only justification that Respondents offer for the Washington court's novel individualized sentencing requirement for all juvenile offenders is a general recognition that

juveniles are different than adults. Br. in Opp. 34. But this Court has found those differences relevant under the Eighth Amendment only in the context of death and life without parole, where penological interests no longer justify such harsh sentences. *Roper v. Simmons*, 543 U.S. 551, 571-72 (2005); *Graham*, 560 U.S. at 71-74; *Miller*, 562 U.S. at 472.

Rehabilitation is still highly relevant to Ali, who will be released at the latest when he is 42 years old. Retribution remains an appropriate consideration for imposing a 26-year sentence for multiple, serious violent crimes, including stabbing a man and stomping another until he was unconscious. And just because juveniles might be somewhat less susceptible than adults to deterrence does not mean deterrence is wholly irrelevant in all cases. Such a view would shock most parents, who recognize that deterrence is an effective behavioral tool. To expand *Miller* to all juvenile sentences, one must ignore altogether the rationale of its holding. The axiom that "children are different" is, by itself, insufficient to justify an Eighth Amendment ban on all legislative limits of judicial discretion.

The companion decisions sow further confusion and doubt about the proper scope of the Eighth Amendment at a time when clarity is critical. Not only must sentencing courts know what the Amendment requires of them, but legislatures around the country considering statutory reform need answers as to the limits of their power. Review should be granted to answer the question presented and clarify the object of *Graham* and *Miller*.

B. The Erroneous Companion Decisions Have Far-Reaching Effect.

The Washington State Supreme Court's conclusion that the Eighth Amendment requires strict proportionality for all juveniles sentenced in adult court has far-reaching effect, the significance of which Respondents mischaracterize and underestimate. The decisions below are not dependent on any "unusual" feature of Washington sentencing law. An Eighth Amendment imperative of strict proportionality for all juvenile offenders in adult court affects *all* sentencing schemes, not only presumptive ones such as Washington's. Regardless of what any state sentencing scheme delineates—presumptive guidelines, advisory guidelines, determinate sentences, or mandatory minimums—the decisions below conclude that *all sentences* are prohibited by the federal constitution unless an individualized *Miller* hearing is held and a judge determines the sentence is strictly proportionate to the juvenile's offense. Respondents ignore the actual holdings of the decisions below and minimize the importance of the court's attempt to wrest away legislative power. This Court should not turn a blind eye to the Washington Supreme Court's departure from the Eighth Amendment's narrow proportionality principle.

Respondents' assertion that the decisions below affect only "small, and diminishing, classes of Washington defendants," Br. in Opp. 13, ignores the hundreds of previously sentenced offenders who will have to be resentenced because of the companion decisions.

Respondents' attempt to minimize this number by citing to legislation following *Miller* that authorizes release after 20 years is unavailing when the companion decisions themselves concluded that this statutory opportunity for release was immaterial to Respondents' right to be resentenced. Pet. App. 28a, 55a.

More importantly, the decisions below *prospectively* impose federal constitutional limitations on all future juvenile offenders in adult court. Apart from the necessity of retroactive resentencing required for long-final cases, the companion decisions require full individualized sentencing hearings for every juvenile offender in adult court going forward. Respondents assert that recently enacted Washington legislation making weapon enhancements discretionary for juvenile offenders would render meaningless this Court's review.[5] Br. in Opp. 18. But that argument is premised on Respondents' distorted view of what the Washington cases hold. Far from simply making deadly weapon enhancements discretionary, the companion decisions require that, going forward, every juvenile offender in adult court must receive an individualized sentencing hearing, and all sentences—with or without enhancements—are prohibited without a finding of strict proportionality.

Respondents' argument also misses the point. The decisions below hold the Eighth Amendment to be a

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[5] This statute was enacted under the belief that it was constitutionally compelled. *See Final Bill Report*, 2SSB 5488, 66th Leg., Reg. Sess. (Wash. 2020) (citing *Houston-Sconiers*).

significant impediment to current or future legislative policymaking for juveniles who commit serious crimes. The legislature's choice to enact sentencing policy is its prerogative, but the companion decisions invade the separation of powers to forevermore strip away the legislature's choices for structured juvenile sentencing standards.

Nor are the effects of the companion decisions limited to Washington, as Respondents attempt to portray. As they point out, state lawmakers around the country are grappling with the issue of juvenile sentencing in the wake of this Court's decisions in *Graham* and *Miller*. Br. in Opp. 30. But rather than undermining certiorari in this case, these legislative efforts stress the importance of it. A conclusion from a state's highest court that the Eighth Amendment grants the judiciary unfettered discretion when sentencing juveniles in adult court surely informs debates currently underway in statehouses around the nation. Indeed, the secondary source to which Respondents cite recognizes the impact of the Washington State Supreme Court's Eighth Amendment rulings on other state legislative enactments. *See* Suzanne S. La Pierre & James Dold, *The Evolution of Decency: Why Mandatory Minimum and Presumptive Sentencing Schemes Violate the Eighth Amendment for Child Offenders*, 27 Va. J. Soc. Pol'y & L. 165, 185 (2020) (citing legislative efforts to reform juvenile sentencing "in the aftermath of *Houston-Sconiers*" and other state high court decisions). Respondents may hope that misunderstanding as to the scope of the Eighth Amendment's imperatives

might be to their advantage, but it is not to the public's benefit if policy decisions are shaped by constitutional confusion.[6]

Consolidating all juvenile sentencing authority in the judiciary invites disparity. *Blakely v. Washington*, 542 U.S. 296, 315 (2004) (O'Connor, J., dissenting) (citing Boerner & Lieb, *Sentencing Reform in the Other Washington*, 28 Crime and Justice 71, 126-27 (M. Tonry ed. 2001) and Justice Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 5 (1988)). The data show that structured sentencing systems reduce inequity. Richard S. Frase, *Forty Years of American Sentencing Guidelines: What Have We Learned?* 48 Crime & Justice 79 (2019). Though likely unintended, the companion decisions' conclusion that the Eighth Amendment mandates unfettered judicial discretion as to all juvenile offenders in adult court may ultimately increase sentencing disparity. Legislatures can adapt to the data on such issues, but only if they retain the power to regulate judicial discretion. This Court should accept review to preserve the legislative prerogative to fashion sentencing schemes for juvenile offenders in adult court.

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[6] Nor is legislative change that is spurred by an illusory constitutional mandate evidence of a true evolution in attitudes. *See Miller*, 567 U.S. at 501 (Roberts, C.J., dissenting) (if *Miller* were to result in juvenile life without parole sentences becoming rare, "the Court will have bootstrapped its way to declaring that the Eighth Amendment absolutely prohibits them."). Such "logic" is circular and self-perpetuating.

C. The Question Was Presented Below.

The State's position throughout this case has been clear: The Eighth Amendment does not require individualized sentencing for all juvenile offenders in adult court. The State argued below that *Miller*'s individualized sentencing requirement was "limited to sentences that deny juveniles a meaningful opportunity for release in their lifetimes." Supp. Resp. Br., *In re Pers. Restraint of Ali*, No. 95578-6 (Aug. 27, 2019). The State explained that the "analytical justifications" for this Court's Eighth Amendment juvenile sentencing cases "simply do not apply to lesser sentences" because

> the complex penological goals of sentencing—those that the Court found lacking when juveniles are sentenced to death or to die in prison without the possibility of release—remain valid for sentences that provide juveniles a meaningful opportunity for release. *Miller* cannot be read to suggest that the Eighth Amendment prohibits *all* mandatory sentencing provisions for juveniles in adult court.

Id. at 6 (emphasis in original). To support his claim that the State "failed to raise this issue," and thus "deprived" the state court of notice of its position, Ali cites *only* to the two briefs filed by the State that addressed retroactivity and the applicability of recent state legislation. Br. in Opp. 29. Ali altogether ignores a third brief, in which the State devoted six-and-a-half pages to its attempt to convince the court that the Eighth Amendment had no applicability to Ali's sentence.

Supp. Resp. Br., *In re Pers. Restraint of Ali*, No. 95578-6 (Aug. 27, 2019).

The decision below itself confirms that the State preserved this issue because the court explicitly rejected the State's request to limit *Houston-Sconiers*' Eighth Amendment holding to life sentences. Pet. App. 14a-15a. And while Respondent Ali appears to assert that it was the State's responsibility to provide the lower court with notice that it "might want to consider" the applicability of the state constitution, he cites no authority for such a proposition. The State fully responded to Ali's Washington statutory and Eighth Amendment claims. It was not the State's responsibility to raise a state constitutional claim for him. *See* Wash. R. App. P. 16.7(a)(2) (personal restraint petition must allege grounds for unlawful restraint); Wash. R. App. P. 16.9(a) (response must answer allegations raised in petition). Ali argued below that the Eighth Amendment required him to be resentenced, but he did not present any reasoned argument based on the Washington Constitution. There are no jurisdictional or procedural barriers to this Court's review.

CONCLUSION

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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