No. 18-

IN THE
Supreme Court of the United States

ANGELA RENE LEEMAN, PETITIONER,

v.

STATE OF ARIZONA, RESPONDENT.

On Petition For A Writ Of Certiorari To
The Arizona Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether *Graham v. Florida*, 560 U.S. 48 (2010), applies with the equal force to consecutive sentences for non-homicide offenses that work in the aggregate to foreclose the possibility of parole during a juvenile's lifetime as it does to "life without parole" sentences.

2. Even if *Graham* does not apply, whether *Miller v. Alabama*, 567 U.S. 460 (2012), provides any protection to juveniles facing such sentences for non-homicide offenses.

3. In the alternative, whether, in assessing gross disproportionality, a court should review the cumulative effect of the sentences imposed rather than each sentence in isolation. *Harmelin v. Michigan*, 501 U.S. 957 (1991).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Angela Rene Leeman respectfully petitions for a writ of certiorari to review the judgment of the Arizona Court of Appeals.

OPINIONS BELOW

The March 9, 2018, decision of the Arizona Court of Appeals is unreported and reproduced as Petitioner's Appendix A. Pet. App. 1a–4a. The unpublished November 27, 2017, ruling of the Arizona Superior Court, Pima County, is reproduced here as Petitioner's Appendix B. *Id.* at 5a–17a. The October 30, 2018, order of the Supreme Court of Arizona denying review is unreported but is reproduced as Petitioner's Appendix C. Pet. App. 18a.

JURISDICTION

The Supreme Court of Arizona denied review of Ms. Leeman's petition on October 30, 2018. On January 17, 2019, Justice Kagan granted an extension of time to file this Petition to and including March 29, 2019. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION 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."

INTRODUCTION

Angela Leeman was arrested after bringing her sick child to the emergency room, where physicians discovered considerable evidence of abuse. A seventeen-year-old runaway from an abusive home life of her own, Ms. Leeman had been living for many

months under the influence drugs and the control of her much older and abusive adult "boyfriend," Gregory Hatton. She was convicted of multiple counts of child abuse for failing to protect her son from her abuser. Despite being prosecuted as the principal actor in all of the offense against Ms. Leeman's son, and in spite of the fact that his "relationship" with Angela was itself a violation of Arizona child sexual abuse statutes, Hatton inexplicably is serving a lighter sentence and will be eligible for parole in 2038. Without this Court's intervention, Ms. Leeman will die in prison without ever receiving the same opportunity.

This case again presents the Court with a juvenile who has been sentenced to die in prison and been unable to obtain reprieve because, instead of formally being a life without the possibility of parole sentence, the functional equivalent has been imposed as the product of aggregate sentences.

This case, however, is unique in that in addition to implicating questions about the reach of *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, 567 U.S. 460 (2012), it also concerns a long-standing split of authority on the application of the prohibition on grossly disproportionate sentences provided in *Harmelin v. Michigan*, 501 U.S. 957 (1991). If *Graham* does not provide Ms. Leeman with reprieve, then surely *Miller*'s limitation on life without the possibility of parole for all but the irreparably corrupt juvenile murders would. And if neither *Graham* nor *Miller* does, then her sentence should be considered grossly disproportionate under *Harmelin*. The Arizona state courts are in conflict with, among others, the Ninth Circuit on these

questions, and this Court should grant review and reverse.

STATEMENT OF THE CASE

Angela Leeman was convicted in 1994 of thirteen counts of child abuse and two drug charges for conduct that occurred while she was a juvenile. Although the basis for her convictions was failure to protect her child from the abusive acts of a significantly older, abusive adult boyfriend, the sentencing court imposed not only mandatory consecutive sentences as to two counts but also partially aggravated the terms, reaching a cumulative 61 years imprisonment. She is ineligible for release until 2054, when she will be 78 years old.

There was overwhelming evidence of the mitigating aspects of Ms. Leeman's youth before the trial and post-conviction court. Ms. Leeman was born in St. Petersburg, Florida, in 1975, to a sixteen-year-old mother who abandoned her shortly after her birth. She lived with her paternal grandparents but did not meet her biological father until he was released from prison when she was eight. Her alcoholic and abusive grandparents forbade her from having any relationships with peers outside of school hours and prevented her from participating in any out-of-school activities. As a child, Ms. Leeman suffered from a speech delay, but her grandparents refused to meet with the school regarding her developmental delays.

It was only when she was eight, and her father came home from prison to pick her up, that she realized her grandparents were not her birth mother and father. During the two years that Ms. Leeman was in the custody of her abusive, alcoholic father, he beat her repeatedly and violently; once he broke

her nose and kept her out of school in order to conceal the signs of the abuse. Thereafter, she bounced around a series of family members' homes that provided consistency only insofar as she suffered abuse and trauma at every doorstep. She was beaten with a boat paddle. An aunt made her sleep in the laundry room. Ms. Leeman fled to her father's, and he added sexual assault to his physical abuse. The police were called about one particularly violent incident.

Ms. Leeman hitchhiked her way across the country, getting as far away as possible from the serial abuse of her family members. Desperate to escape, she traded sex for rides from truckers. Ms. Leeman eventually arrived in Tucson, where she was temporarily given a home by one of the truckers she had met along the way, but he kicked her out after she revealed her pregnancy to him.

And so it was that Angela Leeman, still a child herself, found herself living as the mother of an infant son in Tucson in 1992. She got a job bagging groceries and had a series of unstable housing situations before getting an apartment of her own. After she lost her job, she was evicted for failing to pay rent and became homeless. Ms. Leeman worried about being discovered as a runaway and being returned to Florida and her abusive family. Had it not been for Gregory Hatton, a 29-year-old gas station clerk who offered her a place to stay, she would have been out of options.

Hatton had a history of preying on adolescent girls and selling drugs and alcohol to children. Hatton introduced Ms. Leeman to highly addictive drugs, on which she quickly became dependent, and he expected sex from her in exchange for drugs and

a place to stay.[1] It was not long before Hatton had Ms. Leeman in a near constant drug-induced fog, feeding her a continuous diet of methamphetamine, cocaine, LSD, marijuana, and a variety of other substances. Ms. Leeman was in precisely this state when Hatton had the opportunity to physically and sexually assault her son without her knowledge.

Even in her stupor, Ms. Leeman eventually recognized that something was wrong with her son and took him to the hospital. However, because she failed to protect her son and seek medical attention sooner despite evidence of his injuries, Ms. Leeman was convicted following a jury trial of thirteen counts of child abuse and child neglect, in addition to possession of methamphetamine and of paraphernalia.

At a joint sentencing hearing with Ms. Leeman's own abuser, despite Ms. Leeman's age, her lack of a juvenile record, and evidence of a "poor home environment and a lack of family stability," the prosecutors asked the court to ensure that Ms. Leeman would die in prison. The prosecutors pointed out that Arizona case law required her to prove that any proffered mitigation had a causal nexus with the crime.[2] The trial court granted the prosecution's re-

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[1] Hatton's awareness of her age made him guilty of statutory rape and contributory delinquency under Arizona state law. Ariz. Rev. Stat. §§ 13-1405(A) & 13-3613. He also took nude pictures of Ms. Leeman, making him guilty of sexual exploitation of a minor. Ariz. Rev. Stat. § 13-3553(A)(1)-(2).

[2] Between 1989 and 2004, the Arizona Supreme Court consistently held that mitigating evidence was irrelevant unless it had a clear causal nexus to the offense. *See State v. Wallace*, 773 P.2d 983, 986 (Ariz. 1989), *cert. denied*, 494 U.S. 1047 (1990); *see also McKinney v. Ryan*, 813 F.3d 798, 801 (9th Cir. 2015) (noting history of causal nexus requirement for rele-

quest and gave Ms. Leeman an aggravated cumulative sentence of 61 years in the Arizona Department of Corrections.

In prison, despite lacking any meaningful possibility of release within her lifetime, Ms. Leeman has used the regret and remorse that she feels for what happened to her son as motivation for learning and positive change. She received counseling that helped her deal with her own lifetime of abuse, and she dedicated herself to a 20-year path of successful performance in programming, education, and job training. She obtained a job doing telephone sales—the only inmate serving a sentence of life imprisonment permitted to do the job, because it is for a company engaged in reentry services that continues the inmates' employment after their release from prison. She has not had an infraction of any sort in the past seven years, only two minor violations in the last fourteen years, and her relatively sparse record of disciplinary issues before that mainly consists of minor violations. After successfully petitioning and lobbying on her own behalf, Ms. Leeman was granted special permission to participate in a six-month reentry program within the prison, and a sober living house has already guaranteed her a bed in the event she is ever released.

In September 2017, Ms. Leeman filed a petition for post-conviction review in state court, asserting, among other claims, that she was entitled to resentencing because her sentences amounted to func-

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vance of mitigating evidence); *Spreitz v. Ryan*, 916 F.3d 1262, 1276 (9th Cir. 2019) (same). "Trial judges are presumed to know the law and to apply it in making their decisions." *Walton v. Arizona*, 497 U.S. 639, 653 (1989).

tional life without parole within the meaning of *Graham v. Florida*, 560 U.S. 48 (2010), *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016). Brief for Petitioner, *State v. Leeman*, No. CR42678.

Despite the facts of her case and overwhelming evidence of her rehabilitation (none of which was challenged by the State or questioned by the court), the trial court in post-conviction held that the Arizona Court of Appeals' decision in *State v. Kasic*, 265 P.3d 410 (Ariz. Ct. App. 2011), foreclosed any possibility of relief because Ms. Leeman's consecutive sentences only exceeded human life expectancy if considered in the aggregate. As it was only the cumulative effect of the sentences that foreclosed a possibility of release, the court analyzed each individual sentence for gross disproportionality and denied relief.

The Arizona Court of Appeals granted review but denied relief in an unpublished memorandum decision which concluded that the superior court had "clearly identified the claims Leeman had raised and resolved them correctly in a thorough, well-reasoned minute entry," which it adopted in its entirety. App. 4a. The Court of Appeals failed to address Petitioner's request to overrule *Kasic*. *Id.* The Arizona Supreme Court denied discretionary review by summary order on October 30, 2018. App. 18a.

REASONS FOR GRANTING THE PETITION

Ms. Leeman is serving a term-of-years sentence for a juvenile non-homicide conviction that, if left standing, will mean she dies in prison having never had an opportunity to seek release in light of her demonstrated rehabilitation. In addition to implicating two well defined splits of authorities nationally,

this case implicates conflicts between the Arizona state courts and the Ninth Circuit.

The courts below upheld the constitutionality of Ms. Leeman's sentences because they amounted to a sentence to die in prison only if considered cumulatively. The Arizona courts have long distinguished the protections in both *Graham* and *Harmelin* on this basis. In each instance, Arizona courts only determine whether a single sentence is cruel and unusual, declining to consider its effect in the context of the total term imposed. *State v. Berger*, 134 P.3d 378, 384 (Ariz. 2006) ("if the sentence for a particular offense is not disproportionately long, it does not become so merely because the consecutive sentences are lengthy in the aggregate."); *Kasic*, 265 P.3d at 415.

It is the substance, not the form, of juvenile sentences to die in prison that renders them unjustifiable for purposes of the Eighth Amendment. "[I]n passing upon constitutional questions the court has regard to substance and not to mere matters of form." *Near v. State of Minnesota ex rel. Olson*, 283 U.S. 697, 708 (1931). In substance, Ms. Leeman's sentences for her juvenile conviction for non-homicide offenses mean that she will die in prison.

But even if *Graham* provides no reprieve for her, then she should at least be entitled to the protections of *Miller*. This Court has held repeatedly that those who "do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers." *Graham*, 560 U.S. at 69. Thus, Ms. Leeman should, at a minimum, be afforded the protections accorded juveniles who murder.

Finally, even if this Court declines to ensure that she receives the categorical protections it has accorded other juveniles facing death in prison, it should hold that the cumulative effect of her sentence is grossly disproportionate. These issues implicate well-defined conflicts of authority and warrant this Court's review.

I. There Is A Split Of Authority On Whether Sentencing A Juvenile Convicted Only Of Non-homicide Offenses To Die In Prison Is Unconstitutional.

Juveniles convicted of non-homicide offenses must be provided a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 74–75. Nonetheless, the state and federal courts are deeply split on whether this limitation extends to any sentence other than a sentence formally denominated life without the possibility of parole imposed for a single offense.

This split arises against the backdrop of the Court's recent Eighth Amendment jurisprudence categorically excluded most or all juveniles from the harshest penalties under law, the death penalty and life without the possibility of parole. *See Miller*, 567 U.S. 460; *Graham*, 560 U.S. 48; *Roper v. Simmons*, 543 U.S. 551 (2005). Each of the exclusions is premised on the notion that the traditional justifications for punishment—retribution, deterrence, incapacitation, and rehabilitation—are insufficient to support the most severe punishments on most, if not all, juveniles.

Roper excluded all juveniles from capital punishment. *Graham* excluded all juveniles convicted of non-homicide offenses from life without the possibil-

ity of parole. And *Miller*, while declining to address whether a juvenile could ever constitutionally be sentenced to life without the possibility of parole, limited that sentence only to the rare juvenile homicide offender who is irreparably corrupt. 567 U.S. at 479. That is, "*Miller* drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption." *Montgomery*, 136 S. Ct. at 734.[3]

The split of authority at issue here arises in the context of both *Graham* and *Miller* cases. That is, courts are split over whether a term of years sentence that guarantees a death in prison is the equivalent of life without the possibility of parole for purposes of applying the protections announced in those cases.

Some jurisdictions, including the Ninth Circuit, have concluded that they are equivalent sentences. These jurisdictions take a practical approach to implementing the central holding of *Graham* and *Miller*: a term of years sentence that provides "no hope of reentering society . . . is irreconcilable with *Graham*'s mandate that a juvenile nonhomicide offender

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[3] The scope of *Miller*'s retroactivity is now pending before the Court. *See Mathena v. Malvo*, No. 18-217 (U.S. Mar. 18, 2019). However, the issues presented in this case are substantive and do not turn on the question presented in that case. Should the Court conclude otherwise, Petitioner respectfully requests that the Court hold this Petition pending *Malvo*'s resolution. *See* Stephen M. Shapiro, et al., Supreme Court Practice 6.XIV.31.(e) 485–86 (10th ed. 2013) (describing process of holding petitions that present questions that may be affected by a forthcoming merits case ruling).

must be provided 'some meaningful opportunity' to reenter society." *Moore v. Biter*, 725 F.3d 1184, 1194 (9th Cir. 2013) (quoting *Graham*, 560 U.S. at 75); *see also* Oliver W. Holmes, *Law in Science and Science in Law*, 12 Harv. L. Rev. 443, 460 (1899) ("we must think things not words."). They recognize that "states may not circumvent the strictures of the Constitution merely by altering the way they structure their charges or sentences." *Budder v. Addison,* 851 F.3d 1047, 1058–59 (10th Cir. 2017).

The Seventh, Ninth, and Tenth Circuit Courts of Appeals, along with California, Illinois, Iowa, Louisiana, Maryland, Montana, New Jersey, New Mexico, Ohio, Oregon, Washington, and Wyoming constitute the majority position. They apply the protections of *Graham* and *Miller* as long as the juvenile offender receives a sentence to die in prison. *See McKinley v. Butler,* 809 F.3d 908, 914 (7th Cir. 2016); *Moore*, 725 F.3d at 1194; *Budder,* 851 F.3d at 1058–59; *People v. Caballero*, 282 P.3d 291 (Cal. 2012); *People v. Reyes*, 63 N.E.3d 884, 888 (Ill. 2016); *State v. Null,* 836 N.W. 2d 41, 72 (Iowa 2013); *State ex rel. Morgan v. State,* 217 So.3d 266, 276–77 (La. 2016);[4] *Carter v. State*, 192 A.3d 695, 735 (Md. 2018); *Steilman v. Michael*, 407 P.3d 313, 319 (Mont. 2017); *State v. Zuber,* 152 A.3d 197, 211–12 (N.J. 2017), *cert. denied,* 138 S. Ct. 152 (2017); *Ira v. Janecka*, 419 P.3d 161, 163 (N.M. 2018); *State v. Moore,* 76 N.E.3d 557 (Ohio 2016), *cert. denied,* 138 S. Ct. 62 (2017); *Kinkel v. Persson*, 417 P.3d 401,

[4] Louisiana does not extend *Graham* protections to consecutive sentences that exceed life expectancy. *State v. Brown*, 118 So. 3d 332, 342 (La. 2013). That state does, however, recognize that such a sentence is the functional equivalent of life without the possibility of parole.

412 (Or. 2018), *cert. denied sub. nom.*, *Kinkle v. Laney*, 139 S. Ct. 789 (2019); *State v. Ramos*, 387 P.3d 650, 660 (Wash. 2017), *cert. denied*, 138 S. Ct. 467 (2017); *Bear Cloud v. State,* 334 P.3d 132, 141–42 (Wyo. 2014).

At least two jurisdictions have held that even where the evidence did not clearly establish that petitioner's prison term was beyond his life expectancy, relief was nonetheless required where the defendant would not be parole eligible until he was elderly. *See Null,* 836 N.W. at 71 ("The prospect of a geriatric release, if one is to be afforded the opportunity for release at all, does not provide a 'meaningful opportunity' to demonstrate the 'maturity and rehabilitation' required to obtain release and reenter society as required by *Graham*."); *People v. Contreras*, 411 P.3d 445, 451 (Cal. 2018) ("Of course, there can be no guarantee that every juvenile offender who suffers a lengthy sentence will live until his or her parole eligibility date. But we do not believe the outer boundary of a lawful sentence can be fixed by a concept that *by definition* would not afford a realistic opportunity for release to a substantial fraction of juvenile offenders.").

A minority of jurisdictions, including Arizona, takes a formalistic approach: the protections of *Graham* and *Miller* only apply if the sentence is denominated "life without the possibility of parole." Some of these jurisdictions do not extend these protections if there are aggregate sentences, instead of a single sentence, that exceeds life expectancy. *See, e.g.*, *Lucero v. People,* 394 P.3d 1128, 1132 (Colo. 2017), *cert. denied,* 138 S. Ct. 641 (2018); *Vasquez v. Com.,* 781 S.E.2d 920, 925 (Va. 2016), *cert. denied*, 137 S. Ct. 568 (2016). Others explicitly decline to extend

Eighth Amendment protection to sentences other than those imposing literal "life without the possibility of parole" unless and until this Court requires as much, refusing to independently interpret the Constitution. *See, e.g., Starks v. Easterling*, 659 Fed. Appx. 277, 280 (6th Cir. 2016) (declining to apply *Miller* to term-of-years-sentences until this Court does so because "it is not our role to predict future outcomes."), *cert. denied*, 137 S. Ct. 819 (2017); *Veal v. State*, 810 S.E.2d 127, 129 (Ga. 2018) (declining to apply *Miller* to term-of-years sentences "[b]ecause the Supreme Court has not . . . ."), *cert. denied*, 139 U.S. 320 (2018); *State v. Ali,* 895 N.W.2d 237, 239 (Minn. 2017) (declining to "extend the *Miller*/*Montgomery* rule" because the "Court has not squarely addressed the issue"), *cert. denied*, 138 S. Ct. 640 (2018).

The Sixth Circuit, along with Arizona, Arkansas, Indiana, Colorado, Georgia, Minnesota, Missouri, Nebraska, and Virginia all decline to extend *Graham* and *Miller* protections to at least some term-of-year sentences that exceed life expectancy. *Bunch v. Smith*, 685 F.3d 546, 550 (6th Cir. 2012)[5]; *Kasic*, 265 P.3d at 411; *Proctor v. Kelley*, 562 S.W.3d 837, 842 (Ark. 2018); *State v. Taylor*, 86 N.E.3d 157, 167 (Ind. 2017), *cert. denied*, 139 S. Ct. 591 (2018); *Armstrong v. People*, 395 P.3d 748, 749 (Colo. 2017),

[5] In *Bunch*, AEDPA's limits on federal review were central to its ultimate conclusion that Mr. Bunch was not entitled to relief. That court held that *Graham* "did not clearly establish that consecutive, fixed-term sentences for juveniles who commit multiple nonhomicide offenses are unconstitutional when they amount to the practical equivalent of life without parole." *Id.* The Ninth Circuit has held the opposite: that *Graham* does clearly establish as much. *Moore*, 725 F.3d at 1194.

cert. denied, 138 S. Ct. 641 (2018); *Veal*, 810 S.E.2d at 129; *Ali,* 895 N.W.2d at 239; *Willbanks v. Dep't of Corr.*, 522 S.W.3d 238, 239 (Mo. 2017), *cert. denied*, 138 S. Ct. 304 (2017); *State v. Trotter,* 908 N.W.2d 656, 661 (Neb. 2018); *Vasquez*, 781 S.E.2d at 925.

This substantial split of authority is indicative of the importance of the issue. Moreover, the stakes at issue – death in prison – warrant merits review. In light of the substantial split and large number of jurisdictions that have weighed in on the matter, waiting for further development is unnecessary and this Court should grant review.

II. Despite Not Being Irreparably Corrupt, Ms. Leeman Was Sentenced To Die In Prison.

There is no good reason *Graham* would not provide reprieve from Ms. Leeman's sentences. But it would be bizarre to hold that the constitutional protections of neither *Graham* nor *Miller* and *Montgomery* apply here. After all, *Miller*'s rule was tailored to homicide offenses, offenses categorically the worst of the worst. *See Kennedy v. Louisiana*, 554 U.S. 407, 438 (2008) (noting inherent difference "between homicide and other serious violent offenses against the individual" and the greater gravity of the former).

The protections in *Graham* and *Miller* "rest[ ] on not only common sense—what 'any parent knows'—but on science and social science as well": relative to adults, juveniles possess a "lack of maturity," are "more vulnerable . . . to negative influences and outside pressures, including from their family and peers," and are more capable of change. *Miller*, 567 U.S. at 471–72. These characteristics and related

behaviors do not change depending on the label attached to a criminal sanction. *Id.* at 471 ("[C]hildren are constitutionally different from adults for purposes of sentencing.").

Thus, "*Miller* requires that before sentencing a juvenile to life without parole, the sentencing judge" must make an assessment of whether she is "the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified." *Montgomery*, 136 S. Ct. at 733. Moreover, as the Arizona Supreme Court has recognized, "even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects unfortunate yet transient immaturity." *State v. Valencia*, 386 P.3d 392, 395 (Ariz. 2016) (internal quotation marks omitted).

Specifically, before sentencing a juvenile to die in prison, "*Miller* requires a sentencer to consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence." *Montgomery*, 136 S. Ct. 718, 734 (citing *Miller*, 132 S. Ct. at 2471). This finding is required because a life sentence "is an 'especially harsh punishment for a juvenile,' because he will almost inevitably serve 'more years and a greater percentage of his life in prison than an adult offender.'" *Miller*, 567 U.S. at 475 (quoting *Graham*, 506 U.S. at 70).

The requisite review under *Miller* did not take place at Ms. Leeman's sentencing, nor has any such review happened since. Although the sentencing court made reference to the chronological fact of Ms. Leeman's age, it did not follow the process, mandat-

ed by *Miller*, of giving proper weight to her youth and all of its attendant characteristics and circumstances. For instance, there is certainly no evidence to suggest that the sentencing court gave any weight to the fact that Ms. Leeman's adolescent brain had an underdeveloped prefrontal cortex which inhibited her ability to control behavior, plan ahead, and avoid risks as established in "the ever-growing body of research in developmental psychology and neuroscience" emphasized in *Miller*. 567 U.S. at 472 n.5. Nor was there meaningful consideration given to her capacity for change once she was extricated from the toxic environment in which she found herself because of her youth.

Whatever one may think of Ms. Leeman's conduct, it does not rise to the level of homicide in culpability, victim impact, or any other relevant sense. *See Graham*, 560 U.S. at 69 ("There is a line between homicide and other serious violent offenses." (internal quotation marks omitted)). Thus, at a minimum, Ms. Leeman should receive the same relief to which murderers are now entitled under *Miller*.

The sentencing court did not properly consider the *Miller* factors and no court to date has made an affirmative finding that she is among those rare juvenile offenders who may be sentenced to die in prison for homicide, much less non-homicide offenses.

III. Ms. Leeman's Sentence Also Violates the Eighth Amendment Under *Harmelin v. Michigan*.

Whether or not a sentence violates the Constitution as a categorical matter, Eighth Amendment review for disproportionality, properly construed,

should provide relief for Ms. Leeman, whose punishment is grossly disproportionate to her culpability and to punishments that others have received under analogous circumstances. *See Graham*, 560 U.S. at 86–96 (Roberts, C.J., concurring). That is, even if the Arizona courts were correct to exclude Ms. Leeman from the categorical protections set forth in *Graham* and *Miller*, this Court should grant review to resolve an additional split of authority: whether in assessing gross disproportionality courts consider the aggregate sentences imposed or instead limit their review to individual sentences, regardless of their aggregate effect.

Outside the context of categorical protections from punishment accorded to juveniles, the intellectually disabled, and those who do not intend to kill, a "narrow proportionality principle" prohibits sentences that are "grossly disproportionate to the crime." *Harmelin*, 501 U.S. at 997–98 (Kennedy, J., concurring). To assess proportionality, courts must compare "the gravity of the offense" to the "harshness of the penalty." *Ewing v. California*, 538 U.S. 11, 22 (2003) (plurality opinion). Where this inquiry provides an "inference" of gross disproportionality, the court must then compare the punishment to punishments imposed for similar offenses both within and outside of the jurisdiction. *Solem v. Helm*, 463 U.S. 277, 291–92 (1983).

Arizona courts refuse at the outset to consider the aggregate sentence in assessing whether or not a challenged punishment squares with the requirements of the Eighth Amendment, implicating a split of authority. That is, Arizona is among those reviewing only individual sentences in isolation from their aggregate effect. Along with the Second, Third,

Fourth, Sixth, Seventh, and Tenth Circuits and the states of Colorado, Iowa, Ohio, and South Dakota, Arizona has been clear that "if the sentence for a particular offense is not disproportionately long, it does not become so merely because it is consecutive to another sentence . . . even if a defendant faces a total sentence exceeding normal life expectancy as a result . . . ." *Berger*, 134 P.3d at 384; *see also United States v. Aiello*, 864 F.2d 257, 265 (2d Cir. 1988) ("Eighth Amendment analysis focuses on the sentence imposed for each specific crime, not on the cumulative sentence"); *Murray v. Warden Lewisburg USP*, 634 F. App'x 381, 383 (3d Cir. 2016) (an Eighth Amendment analysis "focuses on the sentence imposed for each specific crime, not on the cumulative sentence for multiple crimes") (citation omitted); *United States v. Ming Hong*, 242 F.3d 528, 532 (4th Cir. 2001) (reviewing a defendant's consecutive one-year sentences individually rather than collectively for the purposes of a gross disproportionality analysis); *United States v. Beverly*, 369 F.3d 516, 537 (6th Cir. 2004) (concluding there was no Eighth Amendment violation where a defendant received consecutive sentences for separate robberies because none of the individual sentences were grossly disproportionate to the crime of robbery); *Pearson v. Ramos*, 237 F.3d 881, 886 (7th Cir. 2001) ("[I]t is wrong to treat stacked sanctions as a single sanction."); *Hawkins v. Hargett*, 200 F.3d 1279, 1285 n.5 (10th Cir. 1999) ("The Eighth Amendment analysis focuses on the sentence imposed for each specific crime, not on the cumulative effect for multiple crimes."); *Close v. People*, 48 P.3d 528, 541–42 (Colo. 2002) (considering each sentence separately for the purposes of an Eighth Amendment proportionality analysis); *State v. August*, 589 N.W.2d 740,

744 (Iowa 1999) ("There is nothing cruel and unusual about punishing a person committing *two* crimes more severely than a person committing only one crime, which is the effect of consecutive sentencing."); *State v. Hairston*, 888 N.E.2d 1073, 1078 (Ohio 2008) ("proportionality review should focus on individual sentences rather than on the cumulative impact of multiple sentences imposed consecutively"); *State v. Buchold*, 727 N.W.2d 816 (S.D. 2007) (consecutive sentencing scheme not subject to Eighth Amendment scrutiny).

Other courts, including the First and Ninth Circuits and at least one state court of last resort, have taken the opposite approach, considering the cumulative effect of the sentences imposed. In reviewing (and ultimately affirming) consecutive sentences, the Ninth Circuit has twice reviewed the cumulative effect of the sentences, rather than each individually, for compliance with the Eighth Amendment.[6] *See United States v. Hungerford*, 465 F.3d 1113, 1118 (9th Cir. 2006); *United States v. Parker*, 241 F.3d 1114, 1117–18 (9th Cir. 2001); *see also United States v. Rivera-Ruperto*, 884 F.3d 25, 26, n.4 (1st Cir. 2018) (reviewing a defendant's consecutive sentences cumulatively for the purposes of an Eighth Amendment challenge); *Carter v. State*, 461 Md. 295, 361, 192 A.3d 695, 734 (2018), *reconsideration denied* (Oct. 4, 2018) (concluding that courts must consider the "total sentencing package" when doing an Eighth Amendment analysis).

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[6] In an unpublished decision, the Ninth Circuit has noted that there is no clearly established federal law on whether a court should consider sentences individually or in the aggregate for purposes of assessing gross disproportionality. *See Berger v. Horne*, 525 Fed. App'x 543, 545 (9th Cir. 2013).

The trial court in Ms. Leeman's case imposed sentences of 20 and 30 years for two of the child abuse counts; under Arizona law, those charges were designated "dangerous crimes against children" and were required to be run consecutively to each other and to all other counts. Pet. App. 6a, 8a-9a; *see also* Ariz. Rev. Stat. § 13-604.01 (Rev. 1993). As to the remaining eleven abuse counts and two drug counts, the court imposed sentences ranging from 3.75 to 11 years, to run concurrently with each other as permitted by law, for a cumulative sentence of 61 years. Pet. App. 6a, 8a-9a.

In their cursory review of Ms. Leeman's sentences, the courts below have simply affirmed the flawed logic of *Kasic*, affirming the legitimacy of her aggregated sentence because "the individual term of years for each count, while lengthy, did not amount to a life without parole sentence." Pet. App. 18a. The courts below failed to recognize that *Kasic* relied on *Harmelin*, *see Kasic*, 265 P.3d at 415, 416, and to acknowledge that the use of *Harmelin* to justify sentences for juveniles has since been resoundingly rejected. *See Miller*, 567 U.S. at 481 (characterizing reliance on *Harmelin* "myopic" because "a sentencing rule permissible for adults may not be so for children").

Ms. Leeman's co-defendant, the adult who committed the despicable acts injuring her child and who was convicted, as the principal, with an otherwise nearly identical set of crimes, will be eligible for release in 2038.[7] As presented below, in Arizona

[7] The Arizona Department of Corrections publishes release dates on its website, including those of Angela Leeman and Gregory Hatton. Arizona Department of Corrections, Inmate Data Search *available at* http://tinyurl.com/AZDOCData.

where a defendant's child ultimately dies from the abuse – a homicide – that defendant regularly receives a much more lenient sentence than Ms. Leeman did. Pet. for Postconviction Relief at 39, *State v. Leeman*, No. CR-42678 (Pima Cnty. Superior Court, filed Sept. 8, 2017) (collecting seven cases involving child abuse resulting in death in which the defendant received a sentence ranging from as little as probation to a maximum of 22 years). Those sentences are much more closely in line with punishments authorized by most state legislatures: indeed, only seven other states have failure-to-protect or similar statutes that would authorize life imprisonment as a punishment for adults whose criminal responsibility approximates Ms. Leeman's. Tim Talley, *Group Takes Aim at Oklahoma's Failure-to-Protect Law*, Associated Press (Sept. 29, 2018), *available at* https://tinyurl.com/yxp6fabe.

Ms. Leeman's sentence is not only disproportionate to the punishments imposed on her more culpable codefendant and on other equally-culpable criminal defendants in and outside of Arizona, it is significantly more harsh than the sentences that many juvenile *murderers* in Arizona are now serving. A recently-adopted statute, passed in the wake of *Miller*, entitles juveniles convicted of homicide crimes to seek parole after serving twenty-five years if they were originally sentenced to life with a possibility of release after twenty-five years, a sentence, that when imposed, did not actually entitle them to parole. *See* Ariz. Rev. Stat. § 13-716; *see also* Michael Kiefer and Jackee Coe, *Arizona Inmates Sentenced to Life with Chance of Parole – After Parole Was Abolished*, The Arizona Republic (Mar. 19, 2017).

However, that statute provides no such relief for non-homicide offenders such as Ms. Leeman.

Endorsing the rank formalism that lies at the heart of the Arizona courts' approach to Eighth Amendment analysis is "an enterprise that [the courts] have consistently eschewed." *Bd. of City. Comm'rs v. Umbehr*, 518 U.S. 668, 679 (1996). In the context of assessing the impact of lengthy sentences in particular, the Court has consistently emphasized function, not form. In *Sumner v. Shuman*, 483 U.S. 66 (1987), for example, the Court equated a sentence of life without the possibility of parole with a sentence or several "sentences of a number of years, the total of which exceeds his normal life expectancy." *Id.* at 83. The Court concluded that the presence of a mandatory death sentence for a murder committed while serving a formal life without the possibility of parole sentence, but not for a murder committed while serving its functional equivalent, undermined the state's claimed need for a mandatory death sentence. *Id.*

In *Solem v. Helm*, the Court recognized that recidivists can be punished more harshly and thus endorsed the principle that, for purposes of the Eighth Amendment the sentence imposed must be considered in the context of all the crimes that the defendant has committed. 463 U.S. at 296. It should make no difference whether the sentence is imposed for crime committed over a period of time, as with recidivist sentencing, or, as here, as part of a single episode. Properly construed, proportionality analysis would account for the effect of the sentence being imposed, including the aggregate effect.

The law should undertake a more realistic assessment of Ms. Leeman's sentence than the courts

have to date. Her sentence is equivalent in all but name to a sentence of life without the possibility of parole.

IV. This Case Presents An Optimal Opportunity To Address The Merits Of The Question Presented.

Ms. Leeman's case is an excellent vehicle for addressing the questions presented and is favorably distinguished from the cases in which the Court is considering or has declined to review related questions.

Unlike most juvenile offenders serving life in prison, Ms. Leeman committed no homicide crime. In fact, she was convicted for doing nothing, since her convictions were based on a failure to protect her son from her co-defendant. *See* Ariz. Rev. Stat. § 13-3623(A) (person who has care or custody of a child commits child abuse by permitting another to injure the child or permitting the child's health to be endangered). Thus, the Court may find that she is categorically ineligible for a life without parole sentence (and any of its functional equivalents), regardless of the *Miller* factors and without making any further determinations about her individual culpability or irreparable corruption.

The Arizona courts have premised their denial of relief entirely on the fact that the individual sentences she received "while lengthy, did not amount to a life without parole sentence." Pet. App. 18a. By simply finding that her sentence violates *Graham*, the Court can resolve the split of authority between jurisdictions that have found an equivalency between lengthy terms of years and the sentences at issue in *Graham*, *Miller*, and *Montgomery*, and

those, like Arizona, that insist on a distinction by clarifying that such formalisms have no place when determining the constitutional protections accorded juveniles at sentencing.

Ms. Leeman's case presents a compelling opportunity to address whether any sentence which by its nature ensures that a defendant will die in prison amounts to life without the possibility of parole.

Granting review and ruling for Ms. Leeman will provide her with an opportunity to demonstrate that she has been rehabilitated. Her sentence will no longer mean "a denial of hope" and that "whatever the future might hold in store for [her] mind and spirit . . . [s]he [may not] remain in prison for the rest of [her] days." *Graham*, 560 U.S. at 69-70 (internal quotation marks and bracket omitted). At the same time, this Court can put an end to the position of the minority of jurisdictions, that sentencing courts can circumvent the protections of *Miller* and *Graham* simply by restructuring a life-without-parole sentence to a term of years that will equally condemn the juvenile to death in prison. This is precisely how the Arizona courts have guaranteed that Ms. Leeman – who was not only an overwhelmingly redeemable teenager in 1994, but is a redeemed woman in 2019 – will nonetheless never realize the promise of *Miller*: a meaningful opportunity for redemption and release.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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