No. _____

In The
Supreme Court of the United States

STATE OF WASHINGTON,

Petitioner,

v.

ENDY DOMINGO-CORNELIO,

Respondent.

On Petition For Writ Of Certiorari To The Washington Supreme Court

PETITION FOR 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 BELOW

The Petitioner is the State of Washington, through the Pierce County Prosecutor's Office. The State Petitioner was the respondent below. The Respondent is Endy Domingo-Cornelio, an individual incarcerated in the State of Washington. Domingo-Cornelio was the appellant below.

RELATED PROCEEDINGS

Pierce County Superior Court:

> *State v. Cornelio*, No. 13-1-02753-6 (Sept. 24, 2014) (judgment and sentence)

King County Superior Court:

> *State v Ali*, No. 08-1-05113-1 (March 30, 2009) (judgment and sentence)

Washington State Court of Appeals:

> *State v. Cornelio*, No. 46733-0-II (April 5, 2016) (denying direct appeal of convictions)
>
> *In re Personal Restraint of Domingo-Cornelio*, No. 50818-4-II (March 8, 2019) (denying relief on personal restraint petition)
>
> *State v. Ali*, No. 63253-1-I (September 20, 2010) (denying direct appeal of convictions)

RELATED PROCEEDINGS—Continued

Washington State Supreme Court:

State v. Domingo Cornelio, No. 93097-0 (August 31, 2016) (denying review of *State v. Cornelio*, No. 46733-0-II (August 31, 2016)) (denying review of *State v. Cornelio*, No. 46733-0-II (April 5, 2016))

In re Personal Restraint of Domingo-Cornelio, No. 97205-2 (Sept. 17, 2020) (reversing *In re Personal Restraint of Domingo-Cornelio*, No. 50818-4-II (March 8, 2019) and granting relief on personal restraint petition)

State v. Ali, No. 85467-0 (March 9, 2011) (denying review of *State v. Ali*, No. 63253-1-I (April 22, 2011))

In re Personal Restraint of Ali, No. 95578-6 (Sept. 17, 2020) (granting relief on personal restraint petition)

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INTRODUCTION

In *Graham v. Florida*, 560 U.S. 48 (2010), the Court held that the Eighth Amendment forbids a juvenile offender from being sentenced to life without parole for a nonhomicide offense. The Court reasoned that for juvenile offenders, sentences of life in prison without parole are second only to the death penalty in their severity and "share some characteristics with death sentences that are shared by no other sentences." *Id.* at 69. Two years later, *Miller v. Alabama*, 567 U.S. 460, 465 (2012) held that the Eighth Amendment requires individualized sentencing when a juvenile offender "confronts a sentence of life (and death) in prison" for a homicide conviction. *Id.* at 477. *Miller* reiterated that "this lengthiest possible incarceration 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.'" *Id.* at 475 (quoting *Graham*, 560 U.S. at 70). The Court concluded that a State cannot make such a sentence mandatory: "a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." *Id.* at 489.

In the wake of *Graham* and *Miller*, a national conflict has developed regarding two questions. The first question is what content is required in a sentencing court's decision to justify a life sentence without parole for a juvenile offender convicted of homicide. That issue will be resolved in *Jones v. Mississippi*, No. 18-1259 (argued Nov. 3, 2020).

The second question is whether the object of *Graham* and *Miller* is only life sentences without parole for juvenile offenders, or if these decisions invalidate a broader range of sentencing authority. Numerous state high courts and federal circuits have held that *Graham* and *Miller* are strictly limited to addressing *de jure* life sentences without parole. Others have held that *Graham* and *Miller* also impose constitutional limits on *de facto* life-without-parole sentences or lengthy consecutive sentences. These courts are unable to agree on what length of time is sufficiently severe to come within the rubric of *Graham* and *Miller*, but they all agree that *Graham* and *Miller* apply only to sentences of life in prison. In conflict with all of these state and federal court decisions, the Washington State Supreme Court has dispensed with any consideration of the severity of the sentence. Washington's companion decisions take this Court's recognition that "children are different" to its ultimate end point and hold that *any* sentence imposed on a juvenile offender tried in adult court requires a proportionality analysis with unfettered judicial discretion to lower the sentence to zero.

After eight years of conflicting decisions throughout the state and federal courts, it is clear that the nationwide conflict will end only when this Court provides definitive guidance regarding which sentences are the object of *Graham* and *Miller*'s holdings. The Washington Supreme Court's sweeping decisions present an ideal opportunity to address this recurring dispute. The Court should grant certiorari.

OPINIONS BELOW

The Washington Supreme Court opinion is available at *In re Personal Restraint of Domingo-Cornelio*, 474 P.3d 524 (Wash. Sept. 2020). Pet. App. 1a. The Washington Court of Appeals opinion is available at *In re Personal Restraint of Domingo-Cornelio*, 7 Wash. App. 2d 1068, 2019 WL 1093435 (2019) (unpublished). Pet. App. 17a. The companion case is available at *In re Personal Restraint of Ali*, 474 P.3d 507 (Wash. Sept. 2020). Pet. App. 63a.

JURISDICTION

The Washington Supreme Court entered judgment in each of the companion cases on September 17, 2020. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides that: "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. 103a-109a.

STATEMENT OF THE CASE

A. Washington's Sentencing Laws Treat Juvenile Offenders Differently

The Washington Legislature enacted the Sentencing Reform Act of 1981 to ensure that offenders who commit similar crimes receive roughly equivalent sentences throughout the State. Wash. Rev. Code § 9.94A.010. *See also Blakely v. Washington*, 542 U.S. 296, 315-18 (2004) (O'Connor, J., dissenting) (describing the history and purpose of the Act). The Sentencing Reform Act created 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, .510. Sentencing courts are not required to consider a departure from the presumptive range, but they may do so if the defendant establishes "by a preponderance of the evidence" that there are "substantial and compelling reasons" for doing so, including mitigation based on youth. Wash. Rev. Code § 9.94A.535 (Pet. App. 105a); *In re Pers. Restraint of Light-Roth,* 422 P.3d 444, 448 (Wash. 2018).

Adult offenders who are convicted of first-degree rape of a child face an indeterminate sentence. Wash. Rev. Code § 9.94A.507(3)(a). The court sets a minimum term within the standard sentencing range and a maximum term of life. Wash. Rev. Code § 9A.20.021(1)(a). When adult offenders are released from prison, they are subject to a lifetime of community custody under the supervision of the Department of Corrections. Wash. Rev. Code § 9.94A.507(6)(b). Revocation of community

custody can result in confinement for life. Wash. Rev. Code § 9.95.435(1).

In contrast, juvenile offenders convicted of first-degree rape of a child receive determinate sentences and a community custody term of three years. Wash. Rev. Code §§ 9.94A.505(2)(a)(i), 9.94A.507(2), 9.94A.701(1)(a). With the highest level of criminal history, the presumptive sentencing range is 20-26 years. Wash. Rev. Code § 9.94A.510.[1]

Washington's sentencing scheme also alters the punishment for juvenile offenders tried as adults on other charges. Most notably, after this Court's decision in *Miller*, the Washington Legislature enacted Wash. Rev. Code § 9.94A.730, which provides that juvenile offenders sentenced to more than 20 years of confinement may petition for early release after 20 years.

B. Domingo-Cornelio Received a Twenty-Year Sentence, at the Low End of the Presumptive Range

In 2012, eight-year-old A.C. told her mother that her cousin, Endy Domingo-Cornelio, repeatedly sexually abused her over a two-year period. *State v. Cornelio*,

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[1] While on community custody, adult offenders are also subject to more stringent sex offender registration requirements than juvenile offenders. Wash. Rev. Code § 4.24.550. An adult offender can petition for relief from the duty to register ten to fifteen years after release from prison. Wash. Rev. Code § 9A.44.142. But depending on their age at the time of the offense, a juvenile may petition for relief as soon as two to five years following their release. Wash. Rev. Code § 9A.44.143(2)(a), (3)(a).

193 Wash. App. 1014, 2016 WL 1329406, at *1 (2016) (unpublished), *rev. denied*, 380 P.3d 438 (Wash. 2016). A.C. disclosed that Domingo-Cornelio "had done really bad stuff to her" when she was four to five years old and visiting her father. *Id.* at *4. A.C. reported that during this two-year period, Domingo-Cornelio would tell her to touch his "private spot," which A.C. identified as what Domingo-Cornelio used to go to the bathroom. *Id.* He made her close her hand around his penis and rub it. *Id.* Domingo-Cornelio also licked and rubbed A.C.'s "private spot," which she identified as what she used to go to the bathroom. *Id.*

During the years of abuse, Domingo-Cornelio was between 15 and 17 years old. Pet. App. 2a. Because A.C. did not disclose the abuse for several years, Domingo-Cornelio was 21 years old when he was charged with first-degree rape of a child and three counts of first-degree child molestation.[2] *Id.* Pet. App. 2a.

Following his conviction, Domingo-Cornelio was entitled to present mitigating evidence at his sentencing hearing. The State requested a sentence of 26 years, at the high end of the presumptive statutory range. Domingo-Cornelio did not request an exceptional downward sentence and did not argue that he lacked "capacity to appreciate the wrongfulness of his

[2] Even if Domingo-Cornelio had not been an adult at the time he was charged, he would have been tried as an adult. Washington law provides that juveniles accused of first-degree rape of a child are tried in adult court if they were 16 or 17 years old when the alleged offense was committed. Wash. Rev. Code § 13.04.030(1)(e)(v)(C).

. . . conduct" (which would have justified a downward departure under Washington law). Wash. Rev. Code § 9.94A.535(1)(e). Instead, defense counsel asked for the low end of the presumptive range, a 20-year sentence. He argued that such a sentence was appropriate based in large part on Domingo-Cornelio's age:

> I don't know what benefit to either my client's psychological or psychosexual health or to society or to the victim or to the family it would do to give him more than the low end. 20 years, Your Honor. His is barely 20 himself. 20 years is a very long time in prison, and yes, the standard range goes above that quite a bit, but I would ask the Court to consider that the victim seems to be progressing through school right on time, on course. . . . I think that society, in general, does not demand acts that a teenager did, which weren't reported for four or five years, should result in more than 20 years in prison[.]

Pet. App. 3a.

Based on "all of the information before the Court," the judge imposed a fixed sentence totaling 20 years, with 36 months of community custody. This was the lowest option within the presumptive sentencing range, given Domingo-Cornelio's criminal history. Wash. Rev. Code § 9.94A.510. Pet. App. 2a, 4a. There is no indication that the court was unaware of its statutory authority to impose an exceptional sentence below the presumptive range. The convictions were affirmed on appeal. *State v. Cornelio*, No. 46733-0-II, 2016 WL

1329406 (Wash. Ct. App. 2016) (unpublished), *rev. denied*, 380 P.3d 438 (Wash. 2016).

C. After Domingo-Cornelio's Sentence Became Final, the Washington Supreme Court Decided *Houston-Sconiers*

After Domingo-Cornelio's sentence was final, the Washington Supreme Court decided a series of cases applying the holding of *Roper*, *Graham*, and *Miller* to lengthy sentences. In *State v. Ramos*, 387 P.3d 650 (Wash. 2017), the Washington court held that *Miller*'s holding applies equally to life-without-parole and *de facto* life sentences. *Ramos* recognized that "*Miller* does not authorize this court to mandate sentencing procedures" in conflict with Washington law, unless the procedures "so undermine *Miller*'s substantive holding that they create an unacceptable risk of unconstitutional sentencing." *Id.* at 664.

Less than two months later, the Washington Supreme Court decided *State v. Houston-Sconiers*, 391 P.3d 409 (Wash. 2017). Houston-Sconiers and his co-defendant were sixteen and seventeen years old when they robbed trick-or-treaters at gunpoint. *Id.* at 413. They faced a presumptive sentencing range in excess of 40 years, primarily due to multiple mandatory firearm sentencing enhancements. *Id.* at 414. The sentencing judge found that their age was a mitigating factor that justified a sentence of 0 years on the substantive criminal convictions, but imposed the mandatory sentence for the firearm enhancements. *Id.* at 416. This

sentence was required to be served as "flat time" without possibility of early release. *Id.*

The Washington Supreme Court overturned the sentences before they became final. The Washington court reasoned that this Court had recognized a difference between children and adults in "specific contexts," including "the death penalty" and "life without parole[.]" *Id.* at 418 (citing *Roper*, 543 U.S. at 574, *Graham*, 560 U.S. at 79, and *Miller*, 132 S. Ct. at 2469). The Washington Supreme Court explained that mandatory enhancements "may be as long as or even vastly exceed the portion imposed for substantive crimes, reaching lengths of 50 years or more" and concluded that their "mandatory nature" violates the Eighth Amendment. *Id.* at 422. It therefore held that in sentencing juvenile offenders, the sentencing court "must have absolute discretion" to depart not only from a presumptive sentence, but also from any mandatory sentence enhancements. *Id.* at 414.

In cases issued after *Houston-Sconiers*, the Washington Supreme Court read its decision as holding that courts have discretion to consider the mitigating qualities of youth when applying a mandatory sentencing provision that could have resulted in a *de facto* life sentence. *E.g.*, *State v. Gilbert*, 438 P.3d 133, 135-36 (Wash. 2019) (holding that sentencing courts have discretion to disregard a mandatory sentencing provision requiring consecutive sentences that would have resulted in an aggregate *de facto* life sentence). The Washington Supreme Court's decisions reflected that it did not interpret *Houston-Sconiers* to mean that judges must

always affirmatively consider a downward departure from a presumptive sentencing range in the absence of a request from the parties. In addition, the Washington court declined to apply *Houston-Sconiers* retroactively to require resentencing and consideration of youth as a mitigating factor. *See*, *e.g.*, *State v. Scott*, 416 P.3d 1182 (Wash. 2018) (upholding a statute that allowed juvenile offenders to petition for early release after serving 20 years of their sentence, without remanding for consideration of youth as a mitigating factor).

D. On Collateral Review of *Domingo-Cornelio* the Washington Supreme Court Held that an Individual Proportionality Determination Is Required in Every Juvenile Sentencing

Domingo-Cornelio filed a timely collateral attack on his sentence, contending in part that *Houston-Sconiers* entitled him to retroactive relief. Pet. App. 17a. Washington's intermediate Court of Appeals denied relief, holding that Washington has long recognized that sentencing courts have discretion to consider youthfulness as a mitigating factor if the defendant establishes by a preponderance of the evidence that it was a factor in the commission of the crime. Pet. App. 57a (citing *State v. O'Dell*, 358 P.3d 359 (Wash. 2015); *State v. Ha'mim*, 940 P.2d 633 (Wash. 1997); Wash. Rev. Code § 9.94A.535(1)(e)). The Court of Appeals concluded that *Houston-Sconiers* did not change this line of cases and therefore denied collateral relief. Pet. App. 61a.

But by a 6-3 vote, the Washington Supreme Court reversed Domingo-Cornelio's 20-year sentence. Pet. App. 1a. Indicating that its interpretation of the Eighth Amendment was compelled by the United States Supreme Court's recognition that "children are different," the Washington court extended *Houston-Sconiers*' holding beyond the "specific contexts" of capital punishment and life-without-parole sentences and announced that the Eighth Amendment requires "punishment proportionate to culpability" for all juvenile offenders sentenced in adult court. Pet. App. 10a-11a (internal citation omitted). The Washington court further held that *Houston-Sconiers* should be applied retroactively.[3] *Id.* at 11a.

In the companion case, the Washington Supreme Court overturned *Ali*'s 26-year sentence, which included six years of mandatory weapon enhancements. Pet. App. 63a. The same 6-3 majority reiterated in *Ali* that the Eighth Amendment prohibits an adult sentence unless a sentencing court first determines that it is proportionate punishment for a juvenile offender. *Id.* at 81a-82a.

In a joint dissent from *Domingo-Cornelio* and *Ali*, three judges disagreed with the majority's expansion of *Houston-Sconiers*' holding. The dissent argued that "the Eighth Amendment 'does not require strict

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[3] The State seeks review of the holding that would require individualized sentencing for juvenile offenders facing significantly less than a life sentence. It is not raising a challenge under *Teague v. Lane*, 489 U.S. 288 (1989) to the retroactive application of the Washington Supreme Court's holding.

proportionality between crime and sentence, but rather forbids only extreme sentences that are grossly disproportionate to the crime.' " Pet. App. 101a (quoting *Graham*, 560 U.S. at 60 (internal quotation marks omitted)).

REASONS FOR GRANTING THE PETITION

In a series of decisions, this Court has held that the Eighth Amendment prohibition on cruel and unusual punishments limits the imposition of the most severe punishment on juvenile offenders. Specifically, the Court has held that the Eighth Amendment prohibits the execution of persons who were under the age of 18 when they committed a capital crime. *Roper*, 543 U.S. at 568. Following *Roper*, the Court has further limited States' ability to impose sentences on juvenile offenders that can be equated to capital punishment, including life without parole for a nonhomicide offense and mandatory life without parole for a homicide conviction. *Graham*, 560 U.S. at 75; *Miller*, 567 U.S. at 489. The Court has "emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders[.]" *Miller*, 567 U.S. at 472 (citing *Graham*, 560 U.S. at 71-72).

Although the Court has never extended the holdings of *Graham* or *Miller* to sentences other than life without parole, state and federal courts are deeply divided as to the reach of those holdings. Numerous

courts have held that the object of *Graham* and *Miller* is strictly limited to sentences of life without parole. But many other state and federal courts have held that the Court's recognition of the "hallmark features" of youth implies that other lengthy or aggregate sentences are subject to *Graham* and *Miller*'s requirements. *Miller*, 567 U.S. at 477. The Washington Supreme Court's companion decisions conflict with this entire spectrum of state and federal cases by holding that *Graham* and *Miller* require a sentencing court to make an individual determination of proportionality before imposing *any* sentence on a juvenile offender, irrespective of the severity of the punishment.

This recurring issue is a matter of national importance. Unbridled expansion of the Eighth Amendment has trampled sovereign authority to set policy regarding punishment. Washington's sweeping decisions are the most extreme example of this, leaving Washington's state legislature virtually powerless to establish punishments for juvenile offenders, regardless of the severity of the offense. It is equally concerning that the Eighth Amendment is now providing vastly different levels of protection to juvenile offenders depending on the luck of their location—both within Washington State and nationally. This issue cries out for this Court's resolution.

A. State and Federal Courts Are Conflicted Regarding the Object of *Graham* and *Miller*

There is nationwide confusion over the object of the *Graham* and *Miller* holdings. One contingent of decisions holds that *Graham* and *Miller* apply strictly to life-without-parole sentences for nonhomicide offenses and mandatory life-without-parole sentences for homicide convictions. For example, the Fifth Circuit held that "*Miller* has no relevance to sentences less than [life without parole]" including sentences to a term of years or sentences of life *with* the possibility of parole. *United States v. Sparks*, 941 F.3d 748, 754 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 1281 (2020). The Fifth Circuit concluded that "[g]iven *Miller*'s endorsement of 'a lengthy term of years' as a constitutional alternative to life without parole, it would be bizarre to read *Miller* as somehow foreclosing such sentences."[4] Many state high courts also have held that *Graham* and *Miller* apply only to sentences of life without possibility of parole

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[4] *See also United States v. Jefferson*, 816 F.3d 1016, 1019 (8th Cir. 2016) (juvenile offender's mandatory sentence of 600 months did not fall within *Miller*'s categorical ban), *cert. denied*, 137 S. Ct. 2290 (2017); *Davis v. McCollum*, 798 F.3d 1317, 1321-22 (10th Cir. 2015) (upholding discretionary sentence of life without parole), *cert. denied*, 136 S. Ct. 1524 (2016); *Evans-Garcia v. United States*, 744 F.3d 235, 240-41 (1st Cir. 2014) (concluding that *Miller* did not forbid discretionary life-without-parole sentence for juvenile offender); *Bell v. Uribe*, 748 F.3d 857, 869 (9th Cir. 2013) (holding that *Miller* was not implicated by life without parole sentence, where sentencing scheme afforded judge discretion), *cert. denied*, 135 S. Ct. 1545 (2015); *United States v. Walton*, 537 Fed. App'x 430 (5th Cir. 2013) (discretionary sentence of 40 years for a nonhomicide offense is not an Eighth Amendment violation under *Miller*), *cert. denied*, 517 U.S. 1083 (2013).

or early release and do not extend to lengthy term-of-years sentences or consecutive sentences that exceed a juvenile offender's life expectancy. *See, e.g.*, *Lucero v. People*, 394 P.3d 1128, 1133 (Colo. 2017), *cert. denied*, 138 S. Ct. 641 (2018) (upholding an aggregate, 84-year term-of-years sentence).[5]

A second contingent of state and federal cases hold that the object of *Graham* and *Miller* is not limited to *de jure* life-without-parole sentences, but rather encompass any sentence that leaves a juvenile offender without a meaningful opportunity to obtain release. For example, the Maryland Supreme Court held that an aggregate sentence of 100 years, with eligibility for parole after 50 years, is a *de facto* life sentence in violation of *Graham*. *Carter v. State*, 192 A.3d 695, 725 (Md. 2018). Conversely, the Montana Supreme Court acknowledged that *Graham* and *Miller* apply to *de*

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[5] *See also State v. Soto-Fong*, 474 P.3d 34, 43 (Ariz. 2020) (holding that consecutive sentences exceeding a juvenile offender's life expectancy did not implicate the Eighth Amendment); *State v. Quevedo*, 947 N.W.2d 402 (S.D. 2020) (upholding a 90-year sentence with eligibility for parole after 45 years); *Veal v. State*, 810 S.E.2d 127, 129 (Ga. 2018) (holding that *Miller* did not require consideration of defendant's youth before imposing more than eight consecutive life-with-parole sentences); *State v. Nathan*, 522 S.W.3d 881, 891 (Mo. 2017) (concluding that *Graham* and *Miller* are inapplicable to consecutive sentences in excess of a juvenile's lifetime); *State v. Ali*, 895 N.W.2d 237, 246 (Minn. 2017) (holding that *Miller* and *Montgomery* do not apply to consecutive life sentences with possibility of release after 30 years), *cert. denied*, 138 S. Ct. 60 (2018); *Vasquez v. Commonwealth*, 781 S.E.2d 920, 925-26 (Va. 2016), *cert. denied*, 137 S. Ct. 568 (2016) (*Graham* does not apply to term-of-years sentences for nonhomicide offenses that when aggregated exceed the offender's life expectancy).

facto and discretionary life sentences, but held that a 110-year sentence, with possible early release for good behavior after 55 years, "does not trigger Eighth Amendment protections under *Montgomery*, *Miller*, and *Graham*." *Steilman v. Michael*, 407 P.3d 313, 320 (Mont. 2017).

As these cases illustrate, state and federal courts that have extended *Graham* and *Miller* beyond *de jure* life sentences have struggled to determine when a sentence constitutes a *de facto* life sentence without parole. *See, e.g., People v. Contreras*, 411 P.3d 445, 449 (Cal. 2018) (noting the "tangle of legal and empirical difficulties" in defining life expectancy); *State v. Zuber*, 152 A.3d 197, 214 (N.J. 2017) (indicating that judges "should not resort to general life-expectancy tables" in setting the length of a sentence). The Court's indication that children are unique is a key premise in *Graham* and *Miller*, but it provides no limiting principle. As a result, extension of *Graham* and *Miller* beyond life-without-parole sentences has resulted in an array of conflicting decisions, none of which have been able to articulate a controlling rule.[6]

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[6] *E.g.*, *Sanders v. Eckstein*, ___ F.3d ___, 2020 WL 7018318, *5 (7th Cir. 2020) (aggregate 140-year term, with parole eligibility at age 50, does not conflict with *Graham* or *Miller*); *Wiley v. State*, 461 P.3d 413, 416 (Wyo. 2020) (parole eligibility at age 58, after serving 43 years, is not the functional equivalent of life in prison and does not implicate *Miller*); *State v. Shanahan*, 445 P.3d 152, 159, 161 (Idaho 2019), *cert. denied*, 140 S. Ct. 545 (2019) (recognizing that "at some point on the sentencing spectrum" a lengthy sentence will come within the scope of *Miller*, but holding that an indeterminate life sentence, with the first 35 years fixed, is not

A third collection of decisions has affirmatively rejected the notion that *Graham* and *Miller* apply to mandatory sentences that do not approach life without parole. In one such opinion, the Delaware Supreme Court held that a mandatory minimum sentence of 25 years for a homicide conviction was not unconstitutional when applied to a juvenile offender. *Burrell v. Delaware*, 207 A.3d 137 (Del. 2019). The Delaware court explained that while *Miller* held that mandatory life without parole "poses too great a risk of disproportionate punishment," it "did not denounce all minimum mandatory sentencing requirements for juveniles." *Id.* at 142. The court held that unlike capital punishment and life without parole, a 25-year sentence provides the required opportunity for restitution and parole. *Id.* at 142-43. *See, e.g., State v. Smith*, 836 S.E.2d 348, 350 (S.C. 2019) (upholding a 35-year mandatory-minimum sentence for a juvenile murder conviction); *State v. Taylor G.*, 110 A.3d 338, 346 (Conn. 2015) (holding that "*Graham* and *Miller* cannot be read to mean that all mandatory deprivations of liberty are of potentially constitutional magnitude.").

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the functional equivalent of life without parole); *United States v. Mathurin*, 868 F.3d 921, 934-36 (11th Cir. 2017) (50-year sentence for nonhomicide offense does not violate *Graham*); *Casiano v. Comm'r of Corr.*, 115 A.3d 1031, 1044 (Conn. 2015) (holding that *Miller* is implicated by a 50-year prison term, without opportunity for parole); *Moore v. Biter*, 725 F.3d 1184 (9th Cir. 2013) (overturning lengthy nonhomicide sentence, based on *Graham*'s recognition that there is little difference between life without parole and extended term-of-years sentences).

Enter Washington. In conflict with every state and federal court that has examined this Eighth Amendment issue, the Washington Supreme Court held that the object of *Graham* and *Miller* is to require an individual determination of proportionality before imposition of *any* sentence on a juvenile offender. Courts across the nation have struggled to determine at what point a juvenile sentence is severe enough to come within the ambit of *Graham* and *Miller*. But none of them have taken the Washington Supreme Court's brazen approach of eliminating any consideration of the severity of the sentence or the degree of deference the statutory sentencing scheme affords the sentencing court. The Washington court stripped this Court's observation that "children are different" from its analytical context and applied it as a constitutional directive. *Miller*, 567 U.S. at 480. Pet. App. 1a, 63a. But as Chief Justice Roberts' dissent from *Miller* explained, if the controlling principle were that juveniles are different from adults, there would be "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.*

Given the conflict between Washington's decisions and state and federal courts nationwide, this Court should accept review to determine when a sentence for a juvenile offender comes within the scope of *Graham* and *Miller*.

B. The Washington Decisions Are Incorrect

The Washington Supreme Court's companion decisions in *Domingo-Cornelio* and *Ali* are egregiously wrong. The decisions purport to apply *Graham* and *Miller* while ignoring both the rationale and the actual holdings. This Court has never held that the Eighth Amendment requires that sentencing courts override the legislative function by making an individualized determination that each statutory sentencing scheme is proportionate to each juvenile offender's culpability.

1. *Graham* and *Miller* impact only the harshest sentences—not every sentence imposed on juvenile offenders

The "[t]wo strands of precedent" that form the basis of *Graham* and *Miller*'s holdings do not justify replacing legislatively determined sentencing priorities with an individual judicial determination of strict proportionality every time a juvenile offender is sentenced in adult court, no matter the sentence. *Miller*, 567 U.S. at 470. The first strand "adopted categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty." *Miller*, 567 U.S. at 470. Specifically, *Roper* and *Graham* held that the Eighth Amendment prohibits courts from sentencing juvenile offenders to death or to life without parole for a nonhomicide offense. *Id.* Similarly, the Court forbid death sentences for nonhomicide offenses and for intellectually disabled defendants. *Id.* (citing *Kennedy v. Louisiana*, 554 U.S. 407 (2008) and *Atkins v. Virginia*, 536 U.S. 304 (2002)). In

each of these cases, the Court determined whether a sentence violated the Eighth Amendment prohibition on "cruel and unusual punishment" by examining two elements: (1) the culpability of the class of offenders, and (2) the severity of the sentence.

The second strand of precedent interwoven into the *Miller* analysis are those cases holding that an individual proportionality determination is required before imposing a death sentence. *Miller*, 567 U.S. at 470 (citing *Woodson v. North Carolina*, 428 U.S. 280 (1976) and *Lockett v. Ohio*, 438 U.S. 586 (1978)). The Court explained that this line of cases "suggest[s] a distinctive set of legal rules" is applicable to the most severe penalties. *Miller*, 567 U.S. at 474-75. Because mandatory life without parole is "akin to the death penalty" for a juvenile, *Miller* "treat[ed] it similarly to that most severe punishment" and required an individualized hearing before it could be imposed. *Id.* at 475 (citing *Graham*, 560 U.S. at 60, 102). Applying these two strands, *Miller* explained that mandatory life without parole "prohibit[s] a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender." *Miller*, 567 U.S. at 474.

The Washington Supreme Court's decisions completely dispense with the analysis underlying *Graham* and *Miller*. Instead, the Washington court suggests that *Montgomery* expanded the holding of *Miller* to require sentencing courts to consider the mitigating qualities of youth before sentencing any juvenile offense. Pet. App. 11a. That is incorrect. *Montgomery*

reiterated that *Miller* "held that *mandatory* life without parole for juvenile homicide offenders violates the Eighth Amendment." *Montgomery*, 136 S. Ct. at 726. Although *Montgomery* stressed the distinctive attributes of youth, it did not remotely suggest that the Eighth Amendment compels the court's consideration of the mitigating qualities of youth in every sentencing proceeding, regardless of the severity of the statutory punishment.

2. The Washington court employed the Eighth Amendment to usurp legislative authority over punishment for juvenile offenders

In requiring that sentencing courts make an individual proportionality determination before imposing *any* sentence on a juvenile offender, the Washington decisions have also departed from this Court's recognition of "the primacy of the legislature in setting sentences, the variety of legitimate penological schemes, the state-by-state diversity protected by our federal system, and the requirement that review be guided by objective, rather than subjective factors." *Graham*, 560 U.S. at 87 (Roberts, C.J., concurring in judgment) (citing *Ewing v. California*, 538 U.S. 11, 23 (2003) and *Harmelin v. Michigan*, 501 U.S. 957, 998-1001 (1991)).

Indeed, Domingo-Cornelio's sentence provides a concrete example of the legislature's ability to objectively determine what constitutes a proportionate sentence for a juvenile offense. The Washington legislature enacted separate levels of punishment for adults and

juveniles convicted of first-degree rape of a child. Adults receive a higher indeterminate sentence, with a mandatory maximum term of life in prison. Pet. App. 105a-106a. But juvenile offenders, like Domingo-Cornelio, receive a lower, determinate sentence. Pet. App. 103a. Despite this clear demonstration of the legislative role in determining proportionate punishment, the Washington Supreme Court's companion decisions force the legislature to either cede absolute control over sentencing to the judicial branch or eliminate trial of juvenile offenders in adult court altogether.

Ironically, history demonstrates that the Washington Supreme Court's misapplication of *Miller*—and elimination of the legislative role in sentencing—invites injustice for juvenile offenders. Prior to the enactment of Washington's Sentencing Reform Act of 1981, sentencing judges and the parole board had "virtually unfettered discretion" in determining sentences, subject only to review for abuse of discretion. *Blakely*, 542 U.S. at 315 (O'Connor, J., dissenting); 1981 Wash. Laws ch. 137, p. 534. This resulted in "severe disparities" in the sentences served by similarly situated offenders. *Id.* (citing Boerner & Lieb, *Sentencing Reform in the Other Washington*, 28 Crime and Justice 71, 126-27 (M. Tonry ed. 2001)). As with the federal sentencing guidelines, "these disparities too often were correlated with constitutionally suspect variables such as race." *Id.* (citing Boerner & Lieb at 126-28 and Justice Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1,

5 (1988)). The Sentencing Reform Act was enacted to ensure that "the punishment for a criminal offense is proportionate to the seriousness of the offense . . . [and] commensurate with the punishment imposed on others committing similar offenses." Wash. Rev. Code Ann. § 9.94A.010 (2020). By returning absolute control to the judiciary, the Washington Supreme Court's companion decisions eliminate that public accountability and the resulting proportionality afforded by the Sentencing Reform Act.

C. The Consolidated Cases Are an Ideal Vehicle for Resolving this Critical Issue

The question presented is exceptionally important. Within Washington, the breathtaking expansion of *Miller* is impacting the sentencing of every juvenile offense, curtailing legislative authority to address equitable sentencing, and requiring resentencing of every offender currently serving a sentence of any length for a juvenile conviction. Nationally, state and federal courts are deeply conflicted regarding the object of *Graham* and *Miller*'s holdings. Many state and federal courts contend that only mandatory sentences of life without parole are implicated. But other state and federal courts apply *Graham* and *Miller* to lengthy term-of-years or aggregate sentences that they view as *de facto* sentences of life without parole. Having taken the concern that *Graham* and *Miller* encompass more that *de jure* life without parole sentences to its ultimate end point, Washington's companion cases afford an

excellent means of conclusively determining the scope of *Graham* and *Miller*.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

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