No. 20-831

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

REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 2

A. Respondents Cannot Avoid Conflict by Mischaracterizing the Petitions 2

B. The Washington Decisions Deepen the National Conflict Regarding the Scope of *Graham* and *Miller* 7

C. *Domingo-Cornelio* and *Ali* Are Not Defensible under the Eighth Amendment 12

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES

Blakely v. Washington, 542 U.S. 296 (2004) 6

Burrell v. Delaware, 207 A.3d 137 (Del. 2019).....7, 10

Graham v. Florida, 560 U.S. 48 (2010).....*passim*

Gregg v. Georgia, 428 U.S. 153 (1976) 13

Hobbs v. Turner, 431 S.W.3d 283 (Ark. 2014) 10

In re Pers. Restraint of Light-Roth, 422 P.3d 444 (Wash. 2018) 11

Lucerno v. Colorado, 394 P.3d 1128 Colo. 2017) 7

McKinley v. Butler, 809 F.3d 908 (7th Cir. 2016) 10

Miller v. Alabama, 567 U.S. 460 (2012).....*passim*

Montgomery v. Louisiana, 136 S. Ct. 718 (2016) 4

Moore v. Biter, 725 F.3d 1184 (9th Cir. 2013).....10

State v. Gregg, 474 P.3d 539 (Wash. 2020) 2, 3

State v. Houston-Sconiers, 391 P.3d 409 (Wash. 2017) 2

State v. Quevado, 947 N.W.2d 402 (S.D. 2020).....7

State v. Smith, 836 S.E.2d 348 (S.C. 2019) 7

State v. Soto-Fong, 474 P.3d 34 (Ariz. 2020) 9

State v. Taylor, 110 A.3d 338 (Conn. 2015) 8

United States v. Walton, 537 F. App'x 430 (5th Cir. 2013) 10

TABLE OF AUTHORITIES—Continued

Page

Vasquez v. Commonwealth, 781 S.E.2d 920 (Va. 2016), *cert. denied*, 137 S. Ct. 568 (2016) 8

Williams v. Kansas, 476 P.3d 808 (Kan. 2020).....8

CODES

Wash. Rev. Code § 9.94A.730(1) 4

Wash. Rev. Code § 10.95.030 4

Wash. Rev. Code § 13.04.030 4

Wash. Rev. Code § 13.40.308(2)(c) 5

Wash. Rev. Code § 46.61.5055(1)(b).....4

OTHER AUTHORITIES

Alison Lawrence, *Making Sense of Sentencing: State Systems and Policies*, National Conf. of State Legislatures (2015).....6

Boerner & Lieb, *Sentencing Reform in the Other Washington*, 28 Crime and Justice 71 (M. Tonry ed. 2001).....6

Justice Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1 (1988).....6

Richard S. Frase, *Forty Years of American Sentencing Guidelines: What Have We Learned?* 48 Crime & Justice 79 (2019) 7

S.B. 5120, 67th Leg., Reg. Sess. (Wash. 2021).....5

INTRODUCTION

In *Graham v. Florida*, 560 U.S. 48 (2010) and *Miller v. Alabama*, 567 U.S. 460 (2012), this Court held that the Eighth Amendment prohibits imposition of capital punishment on juvenile offenders and requires consideration of youth before imposing the next-harshest punishment (life without possibility of parole). Federal and state courts are struggling to determine whether the Eighth Amendment analysis applies only to juvenile life sentences without parole, or whether it extends to *de facto* life sentences. In conflict with this entire body of case law, the Washington Supreme Court has strained the Eighth Amendment to require an individual determination of proportionality before sentencing a juvenile offender for *any* length of time. The unprecedented holding deepens the national conflict and eviscerates legislative authority over criminal sentencing.

Respondents cannot side-step this clear conflict by substituting new issues and focusing on other Washington case law. They miss the critical point: The Washington Supreme Court employed the Eighth Amendment in *Domingo-Cornelio* and *Ali* to mandate consideration of youth as a mitigating factor and grant courts "absolute authority" over juvenile sentencing free of any statutory constraint. Respondents' efforts to distinguish the body of conflicting case law all fail. The cases involve determinate and indeterminate sentences, different crimes of conviction, and differing procedural postures. None of those factors were relevant to the Eighth Amendment analysis. The Washington

court's decisions directly conflict with state and federal courts nationwide by eliminating any consideration of the severity of the offense or the degree of deference afforded the sentencing court.

Respondents present no good reason why this case is not an appropriate vehicle for answering this question. Each expansion of the object of *Graham* and *Miller* correspondingly decreases legislative authority and public accountability. This Court should accept review to settle this widespread dispute.

ARGUMENT

A. Respondents Cannot Avoid Conflict by Mischaracterizing the Petitions

Domingo-Cornelio and *Ali's* holding that *every* juvenile sentence requires an individual determination of proportionality conflicts, or is in tension with, every state and federal court case that has addressed *Graham* and *Miller's* scope. Throughout their brief in opposition, Respondents try to evade that holding by focusing on *State v. Houston-Sconiers*, 391 P.3d 409 (Wash. 2017). But as the Washington Supreme Court recently confirmed, *Houston-Sconiers* only allowed sentencing courts to disregard mandatory sentencing enhancements "when supported by evidence presented at sentencing as to mitigating qualities of youth." *State v. Gregg*, 474 P.3d 539, 543 (Wash. 2020). It did not give the sentencing court absolute authority or invalidate

the procedural and evidentiary burdens imposed by Washington's structured sentencing laws. *Id.*

In *Domingo-Cornelio* and *Ali*, the Washington Supreme Court extended *Graham* and *Miller* far beyond the context of death or life without parole. It held that given *Miller's* pronouncement that "'children are different,'" the sentencing court must have "absolute discretion to impose a sentence below the adult [standard] range" for crimes committed as a juvenile. Pet. App. 1a (quoting *Miller*, 567 U.S. at 480); Pet. App. 15a; *see also* Pet. App. 64a. Respondents not only admit the unprecedented scope of the Washington decisions, but lean into it. BIO at 34. While acknowledging that this Court's decisions address only death and life without parole, they argue that the Court's Eighth Amendment analysis has been expanded by "neuroscientific research." *Id.*

The Washington Supreme Court's holding that *Domingo-Cornelio's* sentence was unconstitutional is particularly striking because the sentence was neither lengthy nor mandatory. Washington statutes provided the sentencing court with (1) discretion to set Domingo-Cornelio's punishment within a wide sentencing range, and (2) the ability to go below that range if there were "substantial and compelling reasons" for doing so. Pet. App. 105a. But without any consideration of whether the resulting sentence was cruel or unusual, the Washington court held that the sentencing procedure violated the Eighth Amendment. Untethered from the context of death or life without parole sentences, the Washington court declared that "[t]he Eighth

Amendment *requires* trial courts to exercise discretion to consider the mitigating qualities of youth at sentencing in order to protect the substantive constitutional guaranty of punishment proportionate to culpability." Pet. App. 11a (emphasis added) (citing *Montgomery v. Louisiana*, 136 S. Ct. 718, 732-33 (2016)). In short, the Washington court distorted *Miller's* holding to pronounce that the Eighth Amendment will brook *no* statutory limitation on a sentencing court's power.

Respondents assert that this places only a "small and diminishing" class of juvenile offenders at risk. BIO at 14. Not so. *Domingo-Cornelio* and *Ali* look forward: they eliminate the protections of structured sentencing for all juvenile offenders who will come before Washington's adult courts. And contrary to Respondents' claims, the Washington legislature has not negated the effect of these decisions. BIO at 14 (referring to Wash. Rev. Code § 9.94A.730(1)). Although some—but not all—juvenile offenders may petition for release after serving 20 years, there are numerous mandatory sentences that are not impacted by this legislation. For example, Washington law provides that juveniles convicted of aggravated first-degree murder must serve a mandatory minimum of 25 years. Wash. Rev. Code § 10.95.030.[1] At any rate, the Washington

[1] Mandatory sentences applicable to juvenile offenders are scattered throughout Washington's criminal code and include not only serious offenses, but also shorter mandatory sentences for crimes such as driving while intoxicated and theft of a motor vehicle. *See*, *e.g.*, Wash. Rev. Code § 46.61.5055(1)(b) (48-hour mandatory minimum sentence of confinement for drunk driving

Supreme Court's expansion of the Eighth Amendment requires resentencing hundreds of juveniles, including those who received sentences of less than 20 years. In announcing this sweeping invalidation of legislative authority, the Washington court found no need to analyze whether any of the invalidated sentencing laws imposes a cruel or unusual punishment.

Respondents' reliance on hypothetical changes in Washington law do not further their argument either. Respondents hope that the Washington legislature will enact a bill to end structured sentencing for juvenile offenders. BIO at 17 (citing S.B. 5120, 67th Leg., Reg. Sess. (Wash. 2021)). But the bill they cite is highly likely to die without passage on March 10, 2021. Respondents also suggest that one day, someone might argue that the Washington State Constitution requires an individual determination of proportionality for every juvenile sentence. BIO at 17. There is no case law supporting this idea. Tellingly, neither Domingo-Cornelio nor Ali thought the argument was worth making to the Washington Supreme Court.

Expanding *Miller's* holding to require an individual proportionality determination for every juvenile offender guts the State's ability to afford structured sentencing to juvenile offenders. Like most jurisdictions, Washington's structured sentencing system

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offense); Wash. Rev. Code § 13.04.030 (jurisdiction over juvenile licensing offenses); Wash. Rev. Code § 13.40.308(2)(c) (15-week mandatory minimum for theft of a motor vehicle for juveniles with a defined prior criminal history). The Washington court invalidated all of these statutes, regardless of whether the mandatory sentence is two days or 25 years.

ensures that similar crimes and similarly situated offenders receive comparable sentences. Alison Lawrence, *Making Sense of Sentencing: State Systems and Policies*, National Conf. of State Legislatures at 5 (2015).[2] Prior to *Domingo-Cornelio*, every Washington judge sentencing a juvenile offender in adult court was required to make transparent findings that "substantial and compelling" circumstances warranted a sentence departure, and apply the same evidentiary standard to its determination of whether to grant or deny a sentence reduction. Pet. App. 105a. The newly bestowed "absolute discretion" dispenses with this uniformity. As Respondents concede, *Domingo-Cornelio* and *Ali* do not require the court to impose a lower sentence based on youth or otherwise dictate how sentencing courts must use their discretion. BIO 24. History demonstrates that this is a recipe for racial discrimination.

Before structured sentencing reforms were adopted, unchecked judicial discretion resulted in extreme sentencing disparities and racial inequity. *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)). While structured sentencing has not eliminated racial and economic disparity, data illustrates that it has been the

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[2] Available at https://www.ncsl.org/research/civil-and-criminal-justice/making-sense-of-sentencing-state-systems-and-policies.aspx.

most effective means of reducing it. Richard S. Frase, *Forty Years of American Sentencing Guidelines: What Have We Learned?* 48 Crime & Justice 79, 80 (2019). Yet without considering whether structured sentencing—or its absence—violates the Eighth Amendment, the Washington Supreme Court has entirely foreclosed the state legislature's ability to use this critical tool.

This Court should accept review to reverse the Washington Supreme Court's declaration that the Eighth Amendment overrides the state's sovereign authority over every juvenile offender sentence.

B. The Washington Decisions Deepen the National Conflict Regarding the Scope of *Graham* and *Miller*

The Washington decisions in *Domingo-Cornelio* and *Ali* have deepened the national conflict regarding the object of *Graham* and *Miller*. Many state high courts and federal circuits have held that *Graham* and *Miller* apply only to a sentence of life without possibility of parole.[3] Others have held that the Court implied

[3] *E.g.*, *State v. Quevado*, 947 N.W.2d 402 (S.D. 2020) (holding that *Miller* does not encompass discretionary or *de facto* sentences of life without parole); *Lucerno v. Colorado*, 394 P.3d 1128 (Colo. 2017) (nonhomicide case holding *Graham* and *Miller* apply only to a single sentence of life without parole and are inapplicable to consecutive term-of-years sentences for multiple juvenile offenses); *State v. Smith*, 836 S.E.2d 348, 350 (S.C. 2019) (concluding that *Graham* and *Miller* are not applicable to a 35-year mandatory minimum sentence for a juvenile offense); *Burrell v. Delaware*, 207 A.3d 137, 142 (Del. 2019) (recognizing that mandatory life without parole comes within the scope of *Miller*

that *Graham* and *Miller* apply to lengthy or aggregate sentences that effectively act as a *de facto* life sentence, though these courts are unable to agree on what period of time is sufficient to constitute a *de facto* life sentence.[4] *Domingo-Cornelio* and *Ali* provide a bookend to the national debate, in holding that *Graham* and *Miller* require that courts make an individual determination of proportionality for *every* juvenile offender, regardless of whether the underlying offense was a purse-snatching or a murder.

Respondents attempt to minimize the conflict by contending that Washington's decisions will not impact other States. Indiana and the thirteen additional States asking this Court to accept certiorari beg to differ. In pressing the Court to settle the conflict, they expressed that if the Washington Supreme Court's reasoning were to reverberate throughout the States, it would open tens of thousands of settled juvenile sentences to collateral attack and end state sovereignty

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because it "poses too great a risk of disproportionate punishment," but holding that not all mandatory sentences fall within the scope of *Miller*); *State v. Taylor*, 110 A.3d 338, 346-37 (Conn. 2015) (nonhomicide case concluding that *Graham* and *Miller* extend only to life without parole and do not invalidate every mandatory or discretionary deprivation of a juvenile's liberty).

[4] *Compare*, *e.g.*, *Williams v. Kansas*, 476 P.3d 808 (Kan. 2020) (holding that individual determination of proportionality is required before sentencing juvenile offender to life without parole, and that the possibility of parole after 50 years is the equivalent of life) to *Vasquez v. Commonwealth*, 781 S.E.2d 920, 925-26 (Va. 2016) (holding that *Graham* is inapplicable to aggregated sentences that exceed life expectancy), *cert. denied*, 137 S. Ct. 568 (2016).

over juvenile sentencing. Br. of Amicus States at 13, 18. The States' concerns echo state court frustrations that *Graham* and *Miller* have "left the nation's courts in a wake of confusion" and resulted in "disparate resolutions" of juvenile appeals. *E.g.*, *State v. Soto-Fong*, 474 P.3d 34, 40 (Ariz. 2020).

Facing an irrefutable conflict, Respondents offer a scattershot of baseless distinctions. They contend cases can be distinguished based on the jurisdiction's primary sentencing system, the defendants' crimes of conviction, the procedural posture of the cases, or whether the sentence was mandatory or discretionary. But none of these factors is relevant to the limited question presented by the petition: Whether *Graham* and *Miller* require an individual determination of proportionality before imposing *any* sentence on a juvenile offender.

First, none of the case law discussing the scope of *Graham* and *Miller* has determined that the State's use of determinate, indeterminate, or structured sentencing drives the Eighth Amendment analysis. And it is certainly not relevant to the Washington cases, which hold that the Eighth Amendment requires an individual proportionality determination for every juvenile sentence—regardless of whether the sentence is a determinate term-of-years, indeterminate, or allows consideration of age as a mitigating factor under limited circumstances.

Respondents' attempt to distinguish cases based on whether the crime of conviction was a homicide is

also inapt. Washington overstepped *Miller* by extending the requirement of an individualized proportionality determination to every juvenile sentence—including nonhomicide cases—with sentences that fall far short of life without parole. And because the underlying crime of conviction is not determinative, the national conflict regarding *Miller* arises in the context of aggravated sentences for a variety of crimes—not just homicide.[5] The procedural posture of the conflicting case law does not offer any means of distinction either. Again, it is simply irrelevant to the Eighth Amendment issue. As the cases Respondents cite plainly demonstrate, the courts addressed the same substantive issue in all of these cases: Do *Graham* and *Miller* only address *de jure* life sentences or do they hold that the Eighth Amendment requires an individual determination of proportionality in other contexts?[6]

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[5] *E.g.*, *McKinley v. Butler*, 809 F.3d 908 (7th Cir. 2016) (homicide case concluding that the object of *Miller's* determination that children are different must encompass a *de facto* life sentence); *Moore v. Biter*, 725 F.3d 1184, 1191-92 (9th Cir. 2013) (finding aggregate sentence of 254 years for a juvenile non-homicide offender indistinguishable from a sentence of life without parole).

[6] *E.g.*, *United States v. Walton*, 537 F. App'x 430, 437 (5th Cir. 2013) (holding that *Graham* and *Miller* do not apply to a discretionary, federal sentence for a fixed term of years), *cert. denied*, 571 U.S. 1083 (2013); *Burrell v. Delaware*, 207 A.3d 137, 142 (Del. 2019) (holding that *Miller* does not require an individual proportionality determination in all juvenile sentencing); *Hobbs v. Turner*, 431 S.W.3d 283, 289-90 (Ark. 2014) (holding that in resentencing juvenile to less than a life sentence, *Graham* did not require any further consideration of youth).

Finally, there is no distinction to be made based on whether a case addressed a mandatory or discretionary sentence since Washington's companion decisions encompass both. Ali's sentence contained mandatory sentencing enhancements of six years added to a discretionary range of 20-26 years. Pet. App. 65a. But there were no mandatory aspects to Domingo-Cornelio's sentence. Pet. App. 2a, 4a. The sentencing court had discretion to consider whether a "preponderance of evidence" demonstrated "substantial and compelling reasons" for treating Domingo-Cornelio's youth as a mitigating factor. Pet. App. 105a; *In re Pers. Restraint of Light-Roth*, 422 P.3d 444, 448 (Wash. 2018). Despite the fact that the sentencing court had considerable discretion, the Washington Supreme Court held that it was insufficient. It concluded that *Graham* and *Miller* mandate that youth be considered before entry of any juvenile sentence, by a sentencing court holding "absolute," unfettered discretion. Thus, the Washington decisions directly conflict with the full spectrum of case law.

There can be no serious dispute that the state and federal courts are profoundly divided. Each incremental expansion of *Graham* and *Miller* beyond *de jure* life without parole sentences correspondingly curtails legislative authority to structure fair and consistent sentencing and places the finality of long-settled convictions in dispute. Without question, resolution of this national conflict is of national importance. Having stretched the scope of *Graham* and *Miller* to their

furthest point, the Washington decisions provide an excellent opportunity to resolve this critical dispute.

C. *Domingo-Cornelio* and *Ali* Are Not Defensible under the Eighth Amendment

It is not unconstitutionally cruel for a sentencing court to impose, after consideration of the record provided by the parties and as the juvenile offender requested, a 20-year sentence for the years-long sexual abuse of a minor. The Eighth Amendment does not require a sentencing court to *sua sponte* consider a departure from the standard range.

Under *Domingo-Cornelio* and *Ali*, the Washington Supreme Court has held that hundreds of juvenile offenders must be resentenced, regardless of the length of the sentences they were facing. This resentencing intends to facilitate the judge's exercise of "absolute" discretion to impose any sentence "less than the standard adult sentence" based on a finding of diminished culpability due to youth. Pet. App. 15a, 84a, 85a, 91a. The original sentences will be reversed regardless of whether the juvenile offenders presented evidence of diminished culpability due to youth or even requested a departure from the standard range. Pet. App. 12a, 14a.

While the Respondents urge that this is "correct" (BIO at 32), nowhere does *Miller* indicate that the Eighth Amendment is concerned with less than life sentences for juvenile offenders. Nowhere does *Miller*

strike down structured sentencing and legislative requirements for transparency in exceptional sentences.

Courts should not stray from the constitutional text and without evidence of society's standards. *Miller*, 567 U.S. at 499 (Roberts, C.J., dissenting). Courts are not representative bodies, and judges must exercise their judgment within narrow limits rather than becoming embroiled in the passions of the day and acting as legislators. *Gregg v. Georgia*, 428 U.S. 153, 175 (1976).

The decisions in the companion cases are not "required" by the Eighth Amendment as the Washington Court insists. Pet. App. 11a, 72a, 81a. Because the rule is not required, it is error.

If Eighth Amendment jurisprudence is to be extended to categorically require individualized sentencing and strict proportionality for all juvenile offenders, such a watershed change must come from the United States Supreme Court.

CONCLUSION

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

Respectfully submitted,

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