No. _____

In the
Supreme Court of the United States

STATE OF TENNESSEE,

Petitioner,

v.

TYSHON BOOKER,

Respondent.

On Cross-Petition for a Writ of Certiorari to the Tennessee Supreme Court

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court's Eighth Amendment jurisprudence prohibits life-without-parole sentences for juvenile offenders in two circumstances: (1) when the juvenile has not committed a homicide, *Graham v. Florida*, 560 U.S. 48 (2010), and (2) even when the juvenile has committed a homicide, when life without parole is the mandatory sentence, *Miller v. Alabama*, 567 U.S. 460 (2012). Tyshon Booker committed a murder and a robbery when he was 16 years old. He was not sentenced to life without parole, but the trial court imposed a mandatory life sentence, which requires service of 51 years' imprisonment before Booker can be released. A divided Tennessee Supreme Court held that this sentence also violates the Eighth Amendment, App. 65a–76a (plurality opinion), although a strong dissent described the ruling as "a policy decision . . . that impermissibly move[d] the [c]ourt into an area reserved to the legislative branch," App. 92a (Bivins, J., dissenting).

In a pending petition for a writ of certiorari (Case No. 22-7180), Booker urges the Court to consider whether the initial juvenile-transfer decision must be made by a jury, not a judge. The State of Tennessee, as Cross-Petitioner, presents the following additional question for review:

Whether this Court should extend *Graham* and *Miller* to term-of-years prison sentences that permit a juvenile offender's release after a lengthy period of incarceration.

PARTIES TO THE PROCEEDINGS BELOW

The State of Tennessee, Cross-Petitioner here, was the appellee in the Tennessee Supreme Court. Tyshon Booker, Cross-Respondent here, was the appellant in the Tennessee Supreme Court and the defendant in the trial court. As this conditional cross-petition is not being filed by or on behalf of a nongovernmental corporation, no corporate disclosure statement is included.

RELATED PROCEEDINGS

Tyshon Booker v. State, No. E2017-00714-CCA-R10-CD (Tenn. Crim. App. May 26, 2017) (denying application for extraordinary appeal).

Tyshon Booker v. State, No. E2017-00714-SC-R10-CD (Tenn. July 6, 2017) (denying application for extraordinary appeal).

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INTRODUCTION

In a series of Eighth Amendment cases, this Court has limited the power of the States to impose life-without-parole sentences on juvenile offenders. *Graham*, 560 U.S. at 79 (categorically barring life without parole for juvenile nonhomicide offenders); *Miller*, 567 U.S. at 479–480 (prohibiting mandatory life without parole for juvenile homicide offenders). But the Court has never decided whether these rules extend to sentences that permit release only after a lengthy period of imprisonment. In fact, it left that not "insubstantial" question open in *Virginia v. LeBlanc*, 582 U.S. 91, 95 (2017).

In the absence of this Court's guidance, the lower courts—both state and federal—are hopelessly divided. Some courts have held that *Graham* and *Miller* are limited to the life-without-parole sentences they confronted. Others have extended the rules from those cases to lengthy term-of-years sentences. And even within that contingent, there is division over where to draw the constitutional line—40 years, 50 years, or something else.

The Tennessee Supreme Court held that Tyshon Booker's mandatory life sentence, which permits release after 51 years' imprisonment, is unconstitutional. The plurality and concurrence reasoned that the procedural requirements of *Miller* apply to Tennessee's life sentence largely because it is the longest mandatory sentence for juvenile homicide offenders in the country. Despite a thoughtful dissent urging restraint, the court invalidated sentences in more than two decades of murder cases involving over

100 juvenile murderers and their victims (not to mention future juvenile murderers).

The court's analysis was wrong, but it was not surprising given this Court's longstanding silence on this question and the resulting divide among the lower courts. The court even acknowledged the lack of guidance from this Court but felt compelled to expand the scope of the Eighth Amendment anyway. After all, the plurality noted, this Court may not have "the chance to rule on this precise issue soon, if ever." App. 78a.

But this case provides such a chance. Should the Court grant Booker's pending petition, it should also decide this issue.

OPINIONS BELOW

See Petition at 1–2, No. 22-7180 (U.S.). As the relevant opinions and orders are set forth in the Petition Appendix in Case Number 22-7180, no additional appendix is being filed with this conditional cross-petition. *See* Sup. Ct. R. 12.5.

JURISDICTIONAL STATEMENT

The judgment of the Tennessee Supreme Court was entered on November 18, 2022. App. 111a. Tyshon Booker timely obtained a 45-day extension to file a petition for writ of certiorari. *Tyshon Booker v. Tennessee*, No. 22A719 (U.S. Feb. 7, 2023). Invoking this Court's jurisdiction under 28 U.S.C. § 1257(a), Booker timely filed a petition for a writ of certiorari in this Court, which was docketed by the Clerk on April 3, 2023. *Tyshon Booker v. Tennessee*, No. 22-7180

(U.S. Apr. 3, 2023). The State of Tennessee, respondent to that petition, also invoking this Court's § 1257(a) jurisdiction, timely files this conditional cross-petition for a writ of certiorari under Sup. Ct. R. 12.5 and 13.4.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Eighth Amendment to the United States Constitution provides as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Section 40-35-501(h) of the Tennessee Code Annotated provides as follows:

> (h)(1) Release eligibility for a defendant committing the offense of first degree murder on or after November 1, 1989, but prior to July 1, 1995, who receives a sentence of imprisonment for life occurs after service of sixty percent (60%) of sixty (60) years less sentence credits earned and retained by the defendant, but in no event shall a defendant sentenced to imprisonment for life be eligible for parole until the defendant has served a minimum of twenty-five (25) full calendar years of the sentence, notwithstanding the governor's power to reduce prison overcrowding pursuant to title 41, chapter 1, part 5, any sentence reduction credits

> authorized by § 41-21-236, or any other provision of law relating to sentence credits.
>
> (2) There shall be no release eligibility for a person committing first degree murder, on or after July 1, 1995, and receiving a sentence of imprisonment for life. The person shall serve one hundred percent (100%) of sixty (60) years less sentence credits earned and retained. However, no sentence reduction credits authorized by § 41-21-236 or any other law, shall operate to reduce the sentence imposed by the court by more than fifteen percent (15%).
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> (3) There shall be no release eligibility for a defendant receiving a sentence of imprisonment for life without possibility of parole for first degree murder, attempted first degree murder, or aggravated rape of a child.

STATEMENT OF THE CASE

A. Legal Background

This Court has addressed life-without-parole sentences for juvenile offenders in a string of cases over the past 13 years. Each of these cases dealt with a sentence that barred the juvenile offender from ever being released from custody, absent executive clemency.

This Court first addressed this issue in *Graham v. Florida*, where it considered life-without-parole sentences for nonhomicide juvenile offenders. The Court considered the issue under the evolving-

standards-of-decency framework, 560 U.S. at 58, and began by seeking out "objective indicia" of a national consensus, *id.* at 62. Although a clear majority of States permitted life-without-parole sentences for juvenile offenders, these sentences were relatively rare for nonhomicide juvenile offenders. *Id.* at 62–66. That was enough, according to the Court in *Graham*, to establish that a national consensus had developed against imposing such a sentence on a juvenile offender who had not committed a homicide. *Id.* at 67.

Next exercising its "independent judgment" about the constitutionality of the sentence, the Court observed that "juvenile offenders cannot with reliability be classified among the worst offenders," *id.* at 68 (quotation marks omitted), and since the juveniles in *Graham* had not committed a homicide, they had a "twice diminished moral culpability," *id.* at 69. The Court then weighed the juveniles' diminished culpability against the severity of life without parole, which is the "second most severe penalty permitted by law," behind only the death penalty. *Id.* And, the Court noted, life without parole and capital punishment "share some characteristics . . . that are shared by no other sentences." *Id.* The Court also doubted that penological justifications supported the sentence when applied to nonhomicide juvenile offenders. *Id.* at 71–74. In light of these conclusions, this Court took the unprecedent step of categorically barring a prison sentence, prohibiting States from sentencing nonhomicide juvenile offenders to life without parole. *Id.* at 75–79.

Two years later, the Court revisited this issue in *Miller v. Alabama*, which addressed life without parole for juvenile *homicide* offenders. The Court again stressed that life without parole is like a death sentence because it ensures that the juvenile offender will die in prison. *See* 567 U.S. at 470, 474-475. But *Miller* did not outlaw life without parole for juvenile homicide offenders. Instead, the Court focused on *mandatory* life-without-parole sentences, *id.* at 465, 474, invoking a line of precedent that requires "individualized sentencing when imposing the death penalty," *id.* at 475 (citing *Woodson v. North Carolina*, 428 U.S. 280 (1976)). Because a mandatory death sentence is unconstitutional, "a similar rule should apply when a juvenile confronts a sentence of life (and death) in prison." *Id.* at 477 (emphasis added). A sentencer therefore must consider "how children are different" before "irrevocably sentencing them to a lifetime in prison." *Id.* at 480.

The Court later held that *Miller* announced a substantive rule of constitutional law—and therefore one that is retroactive—because it precludes life without parole "for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Montgomery v. Louisiana*, 577 U.S. 190, 209 (2016). But this Court has effectively cabined *Montgomery* to its holding and clarified that the rule announced in *Miller* has a "procedural function." *Jones v. Mississippi*, 141 S. Ct. 1307, 1317 & n.4 (2021) (suggesting *Montgomery*'s retroactivity analysis was "in tension" with the Court's precedent but not disturbing *Montgomery*'s holding); *see also id.* at 1327 (Thomas, J., concurring) (describing the majority

opinion as "[o]verrul[ing] *Montgomery* in substance but not in name").

Most recently, this Court considered the Eighth Amendment implications of a *discretionary* life-without-parole sentence. In *Jones v. Mississippi*, the defendant argued that the sentencing judge had to find him to be permanently incorrigible before sentencing him to life without parole. *Id.* at 1313. This Court disagreed, observing that in *Miller* and *Montgomery* it had "unequivocally stated that a separate factual finding of permanent incorrigibility is not required before a sentencer imposes a life-without-parole sentence on a murderer under 18." *Id.* at 1318–19. Instead, under the Eighth Amendment, a State may sentence a juvenile homicide offender to life without parole so long as "the sentence is not mandatory and the sentencer therefore has discretion to impose a lesser punishment."[1] *Id.* at 1311, 1322.

Amid these decisions, the lower courts have taken varied and inconsistent positions on whether these principles apply to lengthy term-of-years sentences. *See supra* at 14–25. But this Court has not decided that question; in fact, it has left that question open.

In *Virginia v. LeBlanc*—a federal habeas corpus case—this Court summarily reversed the Fourth

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[1] The Court suggested that Tennessee's sentencing scheme complies with this mandate. *Jones*, 141 S. Ct. at 1318 n.5 & 1320 (citing Tenn. Code Ann. §§ 39-13-202, -204, -207 (2018)); *see also Miller*, 567 U.S. at 483 n.10 (identifying 15 States with compliant systems, including 12 identified by Alabama in its brief, which included Tennessee).

Circuit's holding that Virginia's geriatric release program (permitting release at 60 or 65 years old) did not provide juvenile inmates a meaningful opportunity for release under *Graham*. 582 U.S. at 93–94 (discussing *LeBlanc v. Mathena*, 841 F.3d 256, 259–260 (4th Cir. 2016)). This Court concluded that "it was not objectively unreasonable for the state court to conclude that, because the geriatric release program employed normal parole factors, it satisfied *Graham*'s requirement that juveniles convicted of a nonhomicide crime have a meaningful opportunity to receive parole." *Id.* at 94–95.

Because the case arose in the federal habeas corpus context, the Court could not decide the underlying constitutional question in *LeBlanc*. *Id.* at 95. But the Court acknowledged that the issue was a debatable one, noting that there "are reasonable arguments on both sides," including that "juveniles cannot seek geriatric release until they have spent at least four decades in prison." *Id.* (internal quotation marks omitted). The Court has not, since then, revisited the issue, but this cross-petition offers a perfect vehicle for doing so.

B. Factual and Procedural Background

When he was 16 years old, Booker shot and killed G'Metrick Caldwell before making off with Caldwell's cell phone. Booker was arrested three days later. The Knox County Juvenile Court ultimately transferred Booker to criminal court for prosecution, where he was indicted on two counts of felony murder and two counts of especially aggravated robbery. App. 63a. At trial, the State established that Booker confessed to a

neighbor that he had killed Caldwell, and that this confession was corroborated by significant forensic and circumstantial proof. App. 12a–23a. Booker himself ultimately admitted, during his trial, to shooting and killing Caldwell, though he claimed to have acted in self-defense. App. 21a–23a, 63a–64a. The jury convicted Booker as charged on all counts.

After the jury returned its verdict, the trial court immediately imposed the mandatory sentences of life imprisonment for the felony-murder convictions, which the court merged.[2] In Tennessee, a life sentence is a term of 60 years' imprisonment. Tenn. Code Ann. §§ 39-13-208(c); 40-35-501(h)(2). Although there is no parole eligibility for a life sentence, an inmate can reduce the 60-year term by up to 15 percent through sentencing credits earned while in custody. Tenn. Code Ann. § 40-35-501(h)(2); *see also Brown v. Jordan*, 563 S.W.3d 196, 202 (Tenn. 2018) (analyzing Tenn. Code Ann. §§ 40-35-501(i)(1), (i)(2)(a) (2018)).[3] This means that an inmate, including a juvenile offender,

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[2] Only two other sentences are available for first-degree murder: life without parole and death. Booker was not eligible for the death penalty because he was a juvenile at the time of the offense, Tenn. Code Ann. § 37-1-134(a)(1)(B), and the State never filed a notice that it was seeking life without parole, *see* Tenn. Code Ann. § 39-13-208(a)–(c). As a result, Booker's life sentence was mandatory. App. 64a n.6. The trial court also sentenced Booker to 20 years' imprisonment for especially aggravated robbery to be served concurrently with his life sentence. App. 64a.

[3] At the time Booker committed his offense, the release-eligibility provisions in § 40-35-501(h)(2) were codified in "substantively identical" provisions at §§ 40-35-501(i)(1), (i)(2)(a) (2018). App. 64a n.6.

must serve at least 51 years' but no more than 60 years' imprisonment before he will be released. App. 64a.

On appeal, Booker challenged his sentence under *Miller*. The Court of Criminal Appeals denied relief, noting that it had repeatedly rejected the claim that a juvenile's mandatory life sentence in Tennessee violates *Miller*. App. 53a–54a. The Tennessee Supreme Court granted review of this issue. A deeply divided court held that Booker's sentence violates the Eighth Amendment. App. 59a-110a.

The plurality decision emphasized—twice—that it was called to decide the question in the absence of guidance from this Court. *Id.* at 62a–63a, 77a–78a (noting that this Court had not ruled on this issue but refusing to "shirk" the court's duty to decide "what the law is"). But because this Court "may not have the chance to rule on this precise issue soon, if ever," and "[m]any other state supreme courts ha[d] resolved this issue without delay," the plurality pressed forward over the dissent's strong and well-reasoned objection. *Id.* at 77a–78a.

To determine whether the Eighth Amendment bars Booker's sentence, the plurality looked to "objective indicia" of contemporary values by surveying the sentences applicable to juvenile homicide offenders in other States. It saw "Tennessee [a]s a clear outlier in its sentencing of juvenile homicide offenders" because it imposes "the harshest of any sentence in the country" and "a juvenile offender serving a life sentence in Tennessee is

incarcerated longer than juvenile offenders serving life sentences in other states." *Id.* at 71a.

But the plurality was not willing to say that Tennessee's life sentence is *always* disproportionate to the crime. It took issue instead with the mandatory nature of the sentence, concluding that Tennessee's statutory framework "lacks the necessary procedural protection to guard against disproportionate sentencing" required by this Court's juvenile sentencing decisions. *See id.* at 74a. And the plurality concluded—after largely repeating this Court's analysis in *Miller*—that the mandatory sentence was "not supported by sufficient penological objectives," at least when imposed on a juvenile. *Id.* at 75a–76a.

Based on these conclusions, the plurality held that Booker's sentence violates the Eighth Amendment, and it pretermitted Booker's state constitutional argument as well as his argument that his sentence was the equivalent of life without parole. *Id.* at 76a.

And the plurality made the breadth of its decision clear, noting that it resolved an "injustice" for Booker "and the over 100 other juvenile homicide offenders who are or will be incarcerated in Tennessee prisons under an unconstitutional sentencing scheme." *Id.* at 77a. As a remedy, the plurality held that an older sentencing scheme, which is still codified at Tenn. Code Ann. § 40-35-501(h)(1), would apply to Booker instead. *Id.* at 76a–78a. This maintains Booker's life sentence but grants him, "in line with *Montgomery*," parole eligibility after he serves between 25 and 36 years in prison. *Id.* at 79a.

Justice Holly Kirby concurred in the plurality's decision. Like the plurality, she highlighted that this Court has never addressed this issue. *Id.* at 89a (Kirby, J., concurring). In the absence of guidance from this Court, Justice Kirby looked to the "objective indicia of national consensus" against the punishment, which makes Tennessee "an island in the nation." *Id.* at 90a. And by "objective indicia of national consensus" Justice Kirby meant the legislative enactments of the other States, which all had more lenient sentencing policies for juvenile offenders, as well as some state court decisions declaring other state statutes unconstitutional. *Id.* at 86a–87a. The concurrence acknowledged that many of these state statutes were enacted in response to *Miller*'s prohibition on mandatory life-without-parole sentences for juvenile homicide offenders. *Id.* at 86a. Nevertheless, the "direction" of these enactments over a 10-year period since *Miller* convinced Justice Kirby that the national consensus had simply shifted underneath the feet of the citizens of Tennessee.

Justice Jeffrey Bivins, along with the Chief Justice, dissented. Like both the plurality and the concurrence, the dissent noted repeatedly the absence of guidance from this Court on this question. *See id.* at 102a, 105a–107a (Bivins, J., dissenting). After extensively cataloging the deep and well-established split of authority on this issue among the other lower courts, the dissent concluded that it is not "wise or appropriate to extend *Miller*, or other existing Eighth Amendment precedent, by predicting whether the United States Supreme Court would extend its

jurisprudence and hold unconstitutional a lengthy term-of-years sentence in this context." *Id.* at 106a.

The dissent further observed that the difficult moral and social policy questions presented by juvenile sentences like this one are to be answered by the legislature, not the judiciary. *Id.* at 108a–109a (quoting *Jones*, 141 S. Ct. at 1322). The dissent pointed out that, by expanding this Court's precedent, the plurality and concurrence made "a policy decision" that "pushed aside appropriate confines of judicial restraint and applied an evolving standards of decency/independent judgment analysis that impermissibly moves the Court into an area reserved to the legislative branch." *Id.* at 92a.

REASONS FOR GRANTING THE PETITION

If this Court grants Booker's petition for a writ of certiorari, it should also grant review to resolve the question presented here, which has roiled the lower courts for over a decade: do *Graham* and *Miller* apply to a prison sentence that permits a juvenile offender's release, but only after a lengthy period of incarceration? This is a critical question that has led to a well-established split among the lower courts, and this case would be an ideal vehicle for deciding it.

I. The Lower Courts Are Divided on the Question Presented.

This Court's "Eighth Amendment jurisprudence concerning parole-ineligible life sentences for juveniles has left the nation's courts in a wake of confusion." *State v. Soto-Fong*, 474 P.3d 34, 40 (Ariz.

2020). The lower courts "are split approximately evenly on whether *Graham* and *Miller* should be extended to at least some" non-life-without-parole sentences. *Wilson v. State*, 157 N.E.3d 1163, 1174 (Ind. 2020). In fact, Booker acknowledged the split of authority below, and each opinion of the Tennessee Supreme Court stressed—and lamented—that this issue has been extensively litigated throughout the country without guidance from this Court. App. 77a-78a (plurality opinion), 86a, 90a n.11 (Kirby, J., concurring), 102a–105a (Bivins, J., dissenting).

A. State courts of last resort are deeply divided.

The state high courts have splintered on the threshold question of whether *Graham* and *Miller* apply at all to non-life-without-parole sentences. And even those courts that have extended *Graham* and *Miller* to non-life-without-parole sentences have split further on the questions of how long is too long and why.

1. Several state courts of last resort have refused to extend *Graham* and *Miller* to non-life-without-parole sentences.

Ten state high courts have refused to extend *Graham* or *Miller* beyond life-without-parole sentences, even if the sentence requires many decades of service before release eligibility. *See Soto-Fung*, 474 P.3d at 41–42; *Hobbs v. Turner*, 431 S.W.3d 283, 289 (Ark. 2014); *Lucero v. People*, 394 P.3d 1128, 1132–1134 (Colo. 2017); *Veal v. State*, 810 S.E.2d 127, 128–129 (Ga. 2018); *Wilson*, 157 N.E.3d at 1174–1176;

State v. Gulley, 505 P.3d 354, 365–366 (Kan.), *cert. denied*, 143 S. Ct. 361 (2022); *State v. Ali*, 895 N.W.2d 237, 246 (Minn. 2017); *State v. Slocumb*, 827 S.E.2d 148, 152–156 (S.C. 2019); *Vasquez v. Commonwealth*, 781 S.E.2d 920, 928 (Va. 2016); *Lewis v. State*, 428 S.W.3d 860, 863–864 (Tex. Crim. App. 2014). In fact, several of the courts have affirmed sentences that are more than double the length of Booker's sentence. *E.g.*, *Soto-Fung*, 474 P.3d at 37 (140 years and 109 years); *Wilson*, 157 N.E.3d at 1176, 1184 (upholding 181-year sentence under *Miller*, but reducing on state law grounds to 100 years, which permits release in the defendant's mid-to-late 60s).

These courts frequently focus on the limited nature of this Court's reasoning in *Graham* and *Miller*—that the Court looked only at the particular sentence before it.[4] *E.g.*, *Wilson*, 157 N.E.3d at 1176 (the defendant's sentence does not "violate the Eighth Amendment because *Miller*, *Graham*, and *Montgomery* expressly indicate their holdings apply only to life-without-parole sentences"); *Lucero*, 394 P.3d at 1133; *Veal*, 810 S.E.2d at 128–129. And many stress not only the

[4] Many of these courts considered this issue in the context of "aggregate" sentences (sentences for multiple offenses run consecutively). But some did not. *See Gulley*, 505 P.3d at 366 (upholding a single sentence precluding release until the inmate is 66 as well as a short consecutive term); *Lewis*, 428 S.W.3d at 863–864 (declining to apply *Miller* to mandatory life with parole, which precludes release for 40 years, Tex. Gov't Code Ann. § 508.145(b)). And other courts also address the constitutionality of lengthy term-of-years sentences, like life with parole. *E.g.*, *Wilson*, 157 N.E.3d at 1174–1175; *Slocumb*, 827 S.E.2d at 152–154.

narrow language used in these opinions but also the explicit limitations noted by the dissenting opinions in *Graham* without challenge from the majority. *E.g.*, *Wilson*, 157 N.E.3d at 1174 ("Dissenting in *Graham*, Justice Alito noted that '[n]othing in the Court's opinion affects the imposition of a sentence to a term of years without the possibility of parole.'" (quoting *Graham*, 560 U.S. at 124, (Alito, J., dissenting)); *Slocumb*, 827 S.E.2d at 152 ("The majority in no way acknowledged or responded to either Justice Alito's or Justice Thomas's statements that the majority holding did not apply to juvenile offenders serving lengthy term-of-years sentences."); *Vasquez*, 781 S.E.2d at 925 (noting the same).

These courts also caution that extending *Graham* and *Miller* to non-life-without-parole sentences would cause nearly insurmountable line-drawing problems. *E.g.*, *Wilson*, 157 N.E.3d at 1175–1176 (observing that "well-meaning attempts at fully defining *de facto* life sentences" is "largely guess work" and "can end up creating requirements that would vastly alter sentencing procedures for a large swath of juveniles"); *Slocumb*, 827 S.E.2d at 156 (recognizing de facto life sentences "would lead to a number of unanswered questions"). And of course, they note the distinctly legislative nature of establishing the appropriate length of a criminal sentence for an entire class of offenders. *Soto-Fong*, 474 P.3d at 42 (recognizing de facto life sentences would "invariably require us to assume the legislative prerogative to establish criminal sentences"); *see also Vasquez*, 781 S.E.2d at 928 (exercising judicial restraint and suggesting that the legislature explore the issue).

2. Several States have extended *Graham* and *Miller*, but they diverge on how long is too long.

On the other hand, many state supreme courts have extended *Graham* and *Miller* to lengthy term-of-years sentences. These courts often highlight portions of the analysis in *Graham* and *Miller*, particularly its focus on the diminished culpability of juveniles. *E.g.*, *State v. Kelliher*, 873 S.E.2d 366, 381 (N.C. 2022). And they reason that many of the conclusions this Court drew about life without parole are also true for lengthy term-of-years sentences. *E.g.*, *People v. Buffer*, 137 N.E.3d 763, 771–772 (Ill. 2019).

But these courts are deeply divided on how long is too long (and why). There are two broad camps in this contingent, with some state high courts invalidating sentences that bar release until late in a juvenile offender's life (e.g., in an offender's 60s) while others hold that late-in-life release is constitutionally adequate.

First, 13 state supreme courts, including the Tennessee Supreme Court below, have invalidated sentences precluding release until later in an offenders' life under *Graham* or *Miller*.[5] *See* App. 76a; *People v. Contreras*, 411 P.3d 445, 446, 454 (Cal. 2018)

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[5] Two others have extended *Graham* and *Miller* to sentences requiring service of more than 90 years. *See State ex rel. Morgan v. State*, 217 So.3d 266, 271–275 (La. 2016) (99 years without parole); *State v. Boston*, 363 P.3d 453, 454, 456–458 (Nev. 2015) (92 years before parole eligible).

(invalidating 50- and 58-year sentences with release eligibility at 66 and 74 years old); *Casiano v. Comm'r of Correction*, 115 A.3d 1031, 1044–1048 (Conn. 2015) (50-year sentence with release at 66 years old); *Buffer*, 137 N.E.3d at 774 (50-year sentence with eligibility for release at 66 years old); *State v. Ragland*, 836 N.W.2d 107, 121–122 (Iowa 2013) (60-year commuted sentence with parole eligibility at 78 years old); *Carter v. State*, 192 A.3d 695, 725–734 (Md. 2018) (parole eligibility after 50 years at 67 years old); *State ex rel. Carr v. Wallace*, 527 S.W.3d 55, 60–62 (Mo. 2017) (same); *Kelliher*, 873 S.E.2d at 370, 381 (50-year sentence with parole eligibility at 67 years old); *State v. Zuber*, 152 A.3d 197, 201, 211–214 (N.J. 2017) (55 years or 68 years and 3 months with parole eligibility at 72 and 85 years old); *State v. Patrick*, 172 N.E.3d 952, 958–961 (Ohio 2020) (parole eligibility after 33 years with release in the offender's 50s); *White v. Premo*, 443 P.3d 597, 603–608 (Or. 2019) (800-month sentence with release eligibility after 54 years at 68 years old); *State v. Haag*, 495 P.3d 241, 250–252 (Wash. 2021) (46-year sentence with release eligibility at 63 years old); *Bear Cloud v. State*, 334 P.3d 132, 136, 141–144 (Wyo. 2014) (just over 45 years with release eligibility at 61 years old).[6]

The reasoning of these courts is anything but uniform. Many courts consider whether a lengthy

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[6] The Wyoming Supreme Court later made clear that this 45-year/61-years-old line set the constitutional bar. *Davis v. State*, 472 P.3d 1030, 1033–1035 (Wyo. 2020) (upholding sentence requiring over 42 years imprisonment with parole eligibility at 60 years old).

term-of-years sentence is so long that it is the "functional equivalent" of, or "de facto," life without parole. But the courts often disagree on what this concept captures: They have said that it includes sentences that exceed a juvenile offender's life expectancy, *Casiano*, 115 A.3d at 1045–1047, or that deny a juvenile inmate "the right to reenter the community" in a "meaningful way," *Kelliher*, 873 S.E.2d at 381 (quotation marks omitted), or that provide only "geriatric release," *Bear Cloud*, 334 P.3d at 142. Other courts rely on different reasoning, for example, whether a sentence happens to be the harshest sentence on the State's books, *Wallace*, 527 S.W.3d at 61,[7] or, in the court below, whether the offender would have received a shorter sentence in other States, App. 71a–73a (plurality opinion), 86a–87a (Kirby, J., concurring).

These courts have also been unable to agree on where (or how) to draw a constitutional line. *See Carter*, 192 A.3d at 727–730 (collecting cases). Some courts have suggested the line should be drawn at least at 50 years, since, they say, no "state high court . . . has found incarceration of a juvenile for 50 years or more before parole eligibility to fall outside the strictures of *Graham* and *Miller*."[8] *Contreras*, 411

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[7] Despite the holding in *Wallace*, the Missouri Supreme Court has declined to extend *Graham* and *Miller* to aggregate sentences. *Willbanks v. Dep't of Corr.*, 522 S.W.3d 238, 241–246 (Mo. 2017).

[8] As it happens, this statement would no longer be true within a matter of weeks after the decision *Contreras* and over one year before the decision in *White*. *See State v. Russell*, 908 N.W.2d

P.3d at 455–456; *see also White*, 443 P.3d at 605 (noting as much but declining to draw the line). But some courts have drawn the line even lower: at 45 years' imprisonment and 61 years old at the time of release, *Davis*, 472 P.3d at 1033–1034, or at 40 years' imprisonment, *Buffer*, 137 N.E.3d at 774.

Other courts have been reluctant to draw a constitutional line at all and instead "thrust the legislative pen in the trial court's hand" by remanding for the court to consider a set of vague principles, *Soto-Fung*, 474 P.3d at 43 (analyzing *Bear Cloud*, 334 P.3d at 142–43), or they urge the legislature to step in and relieve the court of this difficult task, *see Casiano*, 115 A.3d at 1047–1048; *Zuber*, 152 A.3d at 215. But even these hesitant courts offer little guidance on where the legislature would be authorized to set an appropriate sentence. App. 78a–79a (encouraging the legislature to weigh in without drawing any clear constitutional lines); *see also Zuber*, 152 A.3d at 215 (noting "serious constitutional issues" with "substantial periods of parole ineligibility" for juveniles and encouraging the legislature to "examine the issue").

Second, and by contrast, several state high courts have found that, although *Graham* and *Miller* may extend to non-life-without-parole sentences, they do not bar sentences that permit release in a juvenile offender's later years. Five States have held that release in an offender's 60s (or even later) is adequate. *Russell*, 908 N.W.2d at 677 (55-year sentence with

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669, 677 (Neb. 2018); *see also State v. Steele*, 915 N.W.2d 560, 567 (Neb. 2018).

parole eligibility at 72 years old); *State v. Lopez*, 261 A.3d 314, 320 (N.H. 2021) (45 years to life and parole eligible at 62 years old); *Ira v. Janecka*, 419 P.3d 161, 169–171 (N.M. 2018) (46 years before parole eligible at 62 years old); *State v. Charles*, 892 N.W.2d 915, 920–921 (S.D. 2017) (release eligibility at 60 years old); *Angel v. Commonwealth*, 704 S.E.2d 386, 401–402 (Va. 2011) (geriatric release statute with release at 60 years old); *see also Gulley*, 505 P.3d at 366 (noting, after refusing to extend *Graham* and *Miller* to non-life-without-parole sentences, that release eligibility at 66 or 71 years old does not "ensure[] that Gulley will . . . live his entire life in prison"); *State v. Quevedo*, 947 N.W.2d 402, 410 (S.D. 2020) (concluding, in the context of a state statute, that release eligibility at 62 years old was not a de facto life sentence). And five state high courts, as well as the D.C. Court of Appeals, have affirmed sentences barring release until the offender's 50s or 40s. *Pedroza v. State*, 291 So.3d 541, 544–45 (Fla. 2020) (40-year sentence with release eligibility at 55 years old); *Burrell v. State*, 207 A.3d 137, 144–145 (Del. 2019) (37-year sentence with opportunity for modification after 30 years); *State v. Shanahan*, 445 P.3d 152, 160–161 (Idaho 2019) (parole eligibility after 35 years at 50 years old); *Steilman v. Michael*, 407 P.3d 313, 320 (Mont. 2017) (sentence permitting release after "as little as 31.33 years"); *James v. United States*, 59 A.3d 1233, 1236–1237 (D.C. 2013) (30-year sentence); *State v. Vang*, 847 N.W.2d 248, 262–263 (Minn. 2014) (same).

Generally, these courts conclude that this timeframe provides a meaningful opportunity for release. *E.g.*, *State v. Smith*, 892 N.W.2d 52, 66 (Neb.

2017) (concluding that "there appears to be no consensus as to what constitutes a meaningful opportunity for release" but holding that the juvenile's sentence, which provided release eligibility at 62 years old, satisfied that standard); *Angel*, 704 S.E.2d at 402. But even among this contingent there is further division, with some courts observing that release in a defendant's 70s might be sufficient and others suggesting it would not be. *Compare Smith*, 892 N.W.2d at 66 (observing that "in today's society, it is not unusual for people to work well into their seventies and have a meaningful life well beyond age 62 or even at age 77"), *with Janecka*, 419 P.3d at 171 (holding that the "opportunity to obtain release when [the inmate] is 62 years old constitutionally meaningful, albeit the outer limit").

The split of authority in the States is well-developed, and the state courts are hopelessly inconsistent on multiple fronts. And as demonstrated by the lower court's ruling in this case, there is no end in sight to this divide.

B. The circuit courts are also divided on the question presented.

The state courts are not the only ones struggling with this issue. The circuit courts—both in the federal habeas context and outside it—are also divided on this issue.

Two circuits have refused to extend *Graham* and *Miller* to sentences other than life without parole. The Fifth Circuit has held 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." *United States v. Sparks*, 941 F.3d 748, 754 (5th Cir. 2019) (upholding 35-year sentence and disagreeing with decision that created a "rebuttable presumption" that a juvenile should have the opportunity for release before retirement age). And the Sixth Circuit, when reviewing a habeas petition from a state prisoner, rejected a challenge to the very sentence at issue in this case, noting that "*Miller*'s holding simply does not cover a lengthy term of imprisonment that falls short of life without parole." *Atkins v. Crowell*, 945 F.3d 476, 478 (6th Cir. 2019), *cert. denied*, 140 S. Ct. 2786 (2020); *see also Bunch v. Smith*, 685 F.3d 546, 551 (6th Cir. 2012) ("[S]ince no federal court has ever extended *Graham*'s holding beyond its plain language to a juvenile offender who received consecutive, fixed-term sentences, we cannot say that Bunch's sentence was contrary to clearly established federal law.").

On the other hand, four circuits have extended *Graham* and *Miller* to lengthy sentences. *United States v. Friend*, 2 F.4th 369, 378 (4th Cir.), *cert. denied*, 142 S. Ct. 724 (2021); *Budder v. Addison*, 851 F.3d 1047, 1056–1060 (10th Cir. 2017); *McKinley v. Butler*, 809 F.3d 908, 911–914 (7th Cir. 2016); *Moore v. Biter*, 725 F.3d 1184, 1191–1194 (9th Cir. 2013); *see also United States v. Mathurin*, 868 F.3d 921, 932–936 (11th Cir. 2017) (assuming without deciding that *Graham* and *Miller* extend to these sentences). And although some of these cases arise in the habeas context, there is a split even among the courts that have addressed the issue without applying any sort of

deference to a state court decision. *Compare Sparks*, 941 F.3d at 754, *with Friend*, 2 F.4th at 378.

Further, those circuit courts extending *Graham* and *Miller* conflict with a large contingent of state supreme courts on where to draw the "murky line of how long is too long." *See Friend*, 2 F.4th at 378. Several have affirmed sentences that permit release in an offender's 60s. *Id.* (concluding release in an offender's 60s allows "a limited period of freedom"); *Mathurin*, 868 F.3d at 934–935 (affirming roughly 50-year sentence (after credit) that permits release at 67 years old); *Demirdjian v. Gipson*, 832 F.3d 1060, 1077 (9th Cir. 2016) (affirming a sentence, in the federal habeas context, that permitted release at 66 years old); *see also United States v. Portillo*, 981 F.3d 181, 184 & 187 n.21 (2d Cir. 2020) (55-year sentence for a 15-year-old offender, which could result in his release at 63 years old, was "not a life sentence"). Contrast that with a number of enterprising state supreme courts, including the court below, that have invalidated similar sentences under *Graham* or *Miller*.[9] *E.g.*, App. 76a (60 year sentence with release possible after 51 years at 67 years old); *Contreras*, 411 P.3d at 446, 454 (50-year sentence with release eligibility at 66); *Casiano*, 115 A.3d at 1044–1048 (same); *Buffer*, 137 N.E.3d at 774 (same); *Carter*, 192

[9] A panel of the Third Circuit did extend these cases to a sentence barring release until the defendant reached 72 years old. *United States v. Grant*, 887 F.3d 131, 151–153 (3d Cir. 2018). But the full court granted en banc review and rejected the constitutional challenge on the basis that the sentencer had discretion to impose a lesser sentence. *United States v. Grant*, 9 F.4th 186, 197–198 (3d Cir. 2021).

A.3d at 725–734 (parole eligibility after 50 years at 67 years old); *Wallace*, 527 S.W.3d at 60–62 (same); *Kelliher*, 873 S.E.2d at 370, 381 (same); *Premo*, 443 P.3d at 603–608 (release eligibility after 54 years at 68 years old).

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The lower courts are in desperate need of guidance from this Court on the reach of its Eighth Amendment precedent. If the Court grants Booker's petition, it should also grant this petition and provide that guidance.

II. The Question Presented Is Important.

This Court resolves important federal questions that have been decided by state courts of last resort. Sup. Ct. R. 10(b), (c). The question presented here is important.

First, *Graham* and *Miller* should not be lightly extended. This Court has traditionally deferred to state legislative judgment in criminal sentencing policy, even if the results are harsh. *See Ewing v. California*, 538 U.S. 11, 29–30 (2003) (plurality opinion) (concluding that California's three strikes law, though resulting in a long sentence, reflected a "rational legislative judgment, entitled to deference"). Because of that, "[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare." *Rummel v. Estelle*, 445 U.S. 263, 272 (1980); *see also Solem v. Helm*, 463 U.S. 277, 289 (1983) (agreeing with this principle though noting that

the proportionality principle still applies in noncapital cases). In fact, before *Graham*, the Court had *never* categorically barred any non-capital sentence. *Graham*, 560 U.S. at 61. But in an "unprecedented" step, *Miller*, 567 U.S. at 475, this Court in *Graham* imposed a categorical ban on a particular prison term, eschewing a case-by-case approach for addressing the proportionality of juvenile prison sentences, 560 U.S. at 75–79.

The Court should not, without weighing in itself, permit these cases to be extended further. After all, the Court's longstanding deference to state legislative judgment on criminal sentencing endures after *Graham* and *Miller*. *See Jones*, 141 S. Ct. at 1323 (noting recent reforms adopted by the States but holding that "the U.S. Constitution, as this Court's precedents have interpreted it, does not demand those particular policy approaches"). And *non*-categorical solutions are still a viable means of addressing close questions of proportionality, even in juvenile sentencing. *See id.* at 1322 ("[T]his case does not properly present—and thus we do not consider—any as-applied Eighth Amendment claim of disproportionality regarding Jones's sentence."); *Graham*, 560 U.S. at 90 (Roberts, C.J., concurring in the judgment) ("[O]ur existing precedent already provides a sufficient framework for assessing the concerns outlined by the majority."). That is particularly significant here because employing a case-by-case approach to lengthy sentences, rather than imposing a categorical prohibition, avoids interceding on legislative prerogatives and engaging

in arbitrary line-drawing. *Cf. Wilson*, 157 N.E.3d at 1175–1176; *Soto-Fong*, 474 P.3d at 42–43.

Second, the uncertainty created by this Court's juvenile-sentencing precedent has made a hard job harder. As this Court recently recognized, the "profound questions of morality and social policy" raised by cases like this one are answered by the States when they enact their sentencing laws. *Jones*, 141 S. Ct. at 1322; *see Ewing*, 538 U.S. at 24–25 (discussing the Court's longstanding tradition of deferring to state legislative judgment "in making and implementing such important policy decisions"). These "profound" questions "provoke[] intemperate emotions, deeply conflicting interest, and intractable disagreements." *Harmelin v. Michigan*, 501 U.S. 957, 998 (1991) (Kennedy, J., concurring in part and concurring in the judgment) (internal quotation marks omitted). And that makes these questions especially difficult to answer. *Id.* ("Determinations about the nature and purposes of punishment for criminal acts implicate difficult and enduring questions respecting the sanctity of the individual, the nature of law, and the relation between law and the social order.").

But only when legislators know what they *may* do can they debate what they *should* do. Thus, without clarity, these "profound," "enduring," and "important" questions about social policy are largely tabled in favor of trying to guess where this Court (or a state court trying to apply this Court's precedent) will go next. That frustrates the democratic process in an area where public buy-in is particularly important.

Tennessee provides a good example of this problem. The length of Tennessee's life sentence for juvenile offenders was a point of significant public interest in the years leading up to the decision below.[10] And the legislature had taken notice. Bills addressing the issue had been introduced in recent years, *e.g.*, H.B. 876, 111th General Assembly (2020), including one that passed the state senate in 2021, which would have provided earlier release eligibility for *all* offenders serving life sentences, S.B. 0561, 112th General Assembly (2021). *See also* App. 108a (Bivins, J., dissenting).

But since the Tennessee Supreme Court decided this case, the legislature has not made progress on any bills to "fix" this sentence, despite the plurality's open invitation to do so. App. 78a–79a. This is not surprising: how long of a sentence, exactly, is the legislature permitted to require for a juvenile offender? The Tennessee Supreme Court did not make it clear, except to imply that the sentence should be in line with sentences adopted by other States. App. 73a (plurality opinion), 90a (Kirby, J., concurring). The legislature then is not really positioned to make any sort of "profound" judgments in enacting a new sentencing scheme; its job has largely been farmed out to other States, many of whom were simply reacting to *Miller* when adopting their current sentencing

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[10] *E.g.*, Anita Wadhwani, *Cyntoia Brown: National legal groups join appeal to free woman sentenced to life at 16*, THE TENNESSEAN, Jan. 17, 2018, https://www.tennessean.com/story/news/2018/01/17/cyntoia-brown-national-legal-groups-join-appeal-free-woman-sentenced-life-16/1040772001/.

policies. It is no surprise then that the legislature has not rushed to take on the task.

Third, the Court's silence has caused a feedback loop between state legislatures and state courts. Many state legislatures, in the aftermath of *Miller*'s prohibition on mandatory life-without-parole sentences, enacted laws providing some opportunity for release for juvenile homicide offenders. And no wonder: this was explicitly encouraged by the Court in *Montgomery*. 577 U.S. at 212 ("A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." (citing Wyo. Stat. Ann. § 6-10-301(c) (2013)); *see id.* at 227 (Scalia, J., dissenting) ("[I]n Godfather fashion, the majority makes state legislatures an offer they can't refuse: Avoid all the utterly impossible nonsense we have prescribed by simply permitting juvenile homicide offenders to be considered for parole." (quotation marks omitted)).

Some lower courts have pounced on these *Miller* fixes as dubious proof that the contemporary standards of decency have shifted. *E.g.*, *Contreras*, 411 P.3d at 455–456; *Carter*, 192 A.3d at 729–730. Consistent with this thinking, the Tennessee Supreme Court plurality below relied heavily (if not almost entirely) on the fact that Tennessee's life sentence was the harshest mandatory sentence in the country for a juvenile offender. App. 71a–73a (plurality opinion), 86a–87a, 90a (Kirby, J., concurring).

This analysis is deeply flawed. The mere fact that Tennessee's juvenile life sentence is longer than any

other State's (at least as a mandatory minimum) is simply not enough to violate the Eighth Amendment. *Rummel*, 445 U.S. at 281–282 ("Even were we to assume that the statute employed against Rummel was the most stringent found in the 50 States, that severity hardly would render Rummel's punishment 'grossly disproportionate' to his offenses or to the punishment he would have received in the other States."). That is because, "[a]bsent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State." *Id.* at 282. Instead, there must be a "nationwide trend" in the state legislatures that demonstrates the standards of decency have changed. *See id.* at 283–284.

Like other state courts, the court below claimed to have found such a trend among, at least in part, the *Miller* fixes adopted around the country. App. 71a–73a (plurality opinion), 86a–87a, 90a (Kirby, J., concurring). But these state statutes do not demonstrate that "time works changes," *Weems v. United States*, 217 U.S. 349, 373 (1910), such that the nation's citizens have decided against lengthy periods of confinement for juvenile offenders. They simply show that the States strive to comply with this Court's rulings (or their own high courts' rulings). *See* App. 107a n.14 (Bivins, J., dissenting) ("[T]he purported national consensus applied in this case in no way developed in an organic manner . . . . Many of the legislative and judicial decisions relied upon by the concurrence arose simply as responses to *Miller*."). The court below—as have others—nevertheless relied

on these legislative changes to expand the reach of the Eighth Amendment, invalidating over 100 sentences in the process. The Court should stop this race to the bottom.

III. This Case Is a Good Vehicle for Resolving the Question Presented.

If the Court grants review of Booker's petition, this case would be an ideal vehicle for resolving this split of authority.

First, this case would present no obstacles to deciding the question presented. The Tennessee Supreme Court decided the issue solely on Eighth Amendment grounds, explicitly pretermitting Booker's state constitutional claim. App. 76a. That distinguishes this case from other state supreme court decisions that have rested on *both* state and federal constitutional grounds, *e.g.*, *Zuber*, 152 A.3d at 213–214, or *only* state constitutional grounds, *see State v. Null*, 836 N.W.2d 41, 70 (Iowa 2013).[11] As to the cases arising in circuit courts, many arise in the federal habeas context, *e.g.*, *Budder*, 851 F.3d at 1059–1060, which precludes this Court from addressing the underlying constitutional question, *see LeBlanc*, 137 S. Ct. at 1729. This case presents an opportunity for

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[11] *See New Jersey v. Zuber*, 16-1496, 138 S. Ct. 152 (2017) (denying the State's petition in a case where the state supreme court also ruled on state constitutional grounds); *Semple v. Casiano*, 15-238, 136 S. Ct. 1364 (2016) (denying State's petition in a case where questions of state law, including state plea procedures, were tied-up in the merits).

the Court to address this issue without these complications.

Second, the length of Booker's sentence implicates an important dividing line among many of the state courts. Although the courts expanding *Graham* and *Miller* have often been reluctant to make the constitutional line clear, many of them have concluded that a sentence exceeding 50 years before release eligibility crosses it. *See infra* at 19–20. The minimum service required for Booker's sentence—51 years—is just over that line without being so far over that it does not clearly implicate the split. *Cf. Byrd v. Budder*, 17-405, 138 S. Ct. 475 (2017) (denying certiorari in a case with a 131.75-year sentence); *Ohio v. Moore*, 16-1167, 138 S. Ct. 62 (2017) (denying certiorari in a case involving a 112-year sentence where the defendant would not be eligible for release until he was 92 years old). And it allows the Court to consider these issues in the context of a sentence that is indistinguishable from sentences other courts have already treated inconsistently. *Compare Mathurin*, 868 F.3d at 934–935 (affirming sentence that required service of just over 50 years—685 months less seven years for good time credit—with release at 67 years old), *with Kelliher*, 873 S.E.2d at 370 (invalidating sentence requiring service of 50 years with release at 67 years old).

Third, this case does not present any need to reconsider the rulings in *Graham*, *Miller*, or *Montgomery*. Instead, this case presents a question this Court has simply not yet addressed: the extent to which *Graham* and *Miller* extend to non-life-without-

parole prison sentences. And Booker's sentence is on direct review, so this case does not require retroactive application of any rule. *Cf. Jones*, 141 S. Ct. at 1317 n.4 (suggesting that "*Montgomery*'s application of the *Teague* standard [may be] in tension with the Court's retroactivity precedents").

CONCLUSION

If the Court grants the petition for a writ of certiorari in Case No. 22-7180, the conditional cross-petition for a writ of certiorari should also be granted.

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