

FILED
SUPREME COURT
STATE OF WASHINGTON
1/13/2020 4:50 PM
BY SUSAN L. CARLSON
CLERK

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 97205-2

IN RE THE PERSONAL RESTRAINT OF
ENDY DOMINGO-CORNELIO,
PETITIONER

**BRIEF OF *AMICI CURIAE* JUVENILE LAW CENTER, HUMAN
RIGHTS FOR KIDS, AND COLUMBIA LEGAL SERVICES IN
SUPPORT OF PETITIONER**

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I. IDENTITY AND INTEREST OF *AMICUS CURIAE*

The identity and interest of *amici curiae* are set forth in the previously granted Motion for Leave to File an *Amicus Curiae* Brief.¹

II. STATEMENT OF THE CASE

Amici Curiae adopt the Statement of the Case as set forth in the Supplemental Brief of Petitioner Domingo-Cornelio.

III. ISSUE TO BE ADDRESSED BY *AMICI*

Amici will address the retroactivity of *State v. Houston-Sconiers* as applied to presumptive and mandatory minimum sentences such as that imposed on Domingo-Cornelio. *Amici* will also address the social science research which disproves the theory that individuals who commit sexual offenses as youth, like Domingo-Cornelio, are likely to reoffend sexually.

IV. ARGUMENT

A. *HOUSTON-SCONIERS* ESTABLISHED A SUBSTANTIVE RULE OF LAW THAT APPLIES RETROACTIVELY

In *State v. Houston-Sconiers*, this Court held, for youth convicted and facing punishment in the adult criminal justice system, that “the sentencing judge’s hands are not tied.

¹ *Amici Curiae* filed Motions for Leave To File *Amici Curiae* Brief And Extension Of Time To File Brief in the instant case as well as in *State v. Ali*, No. 95578-6, which were granted by this court on December 31, 2019. *Amici* understand that although the legal questions at issue in both cases are similar, the cases have not been consolidated. As such, *Amici* are submitting an amicus brief only in the instant case.

Because ‘children are different’ under the Eighth Amendment and hence ‘criminal procedure laws’ must take the defendants’ youthfulness into account, sentencing courts must have absolute discretion to depart as far as they want below otherwise applicable SRA ranges and/or sentencing enhancements when sentencing juveniles in adult court, regardless of how the juvenile got there.

State v. Houston-Sconiers, 188 Wn.2d 1, 9, 391 P.3d 409 (2017). In accordance with the United States Supreme Court’s decision in *Miller v. Alabama*, *Houston-Sconiers* rejected presumptive or mandatory sentencing schemes because they do not allow for the consideration of the mitigating characteristics of youth in every case.

While the sentencing scheme here — and this Court’s rule regarding the SRA announced in *Houston-Sconiers* — does not forbid the imposition of a particular sentence, it does forbid the imposition of any SRA sentence on a youth absent a hearing where the youth’s individual traits and other mitigating attributes are taken into account. This Court held, “[t]rial courts must consider mitigating qualities of youth at sentencing and must have discretion to impose any sentence below the otherwise applicable SRA range and/or sentence enhancements,” *id.* at 21, echoing the United States Supreme Court’s mandate that “youth matters.” *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718, 733 (2016); *Miller v. Alabama*, 567 U.S. 460, 477, 132 S. Ct. 2455 (2012); *Graham v. Florida*, 560 U.S. 48, 71, 130 S.

Ct. 2011 (2010); *Roper v. Simmons*, 543 U.S. 551, 569-70, 125 S. Ct. 1183 (2005); *Thompson v. Oklahoma*, 487 U.S. 815, 834, 108 S. Ct. 2687 (1988). Sentencing schemes that require presumptive minimums or specific enhancements stand in direct contradiction to the constitutional requirement of proportional sentencing for youth under the Eighth Amendment. *Miller*, 567 U.S. at 483.

And while the Supreme Court recognized decades ago that youth deserve less punishment for even the most severe crimes because of their reduced impulse control and immature thinking, *Thompson*, 487 U.S. at 834, the *Miller* Court more than expanded this principle, adopting a scientific basis for upending juvenile sentencing and prohibiting mandatory penalties that

preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it. Under these schemes, every juvenile will receive the same sentence as every other. And still worse, each juvenile will receive the same sentence as the vast majority of adults committing similar . . . offenses.

Miller, 567 U.S. at 476-77. While *Miller* dealt specifically with the mandatory imposition of life without parole, *Miller* also caps a series of Supreme Court sentencing cases rejecting the application of adult sentencing rules to juveniles once convicted in adult court because of the inherently disproportionate nature of these adult sentences. As this Court

wrote in *Houston-Sconiers* with reference to lengthy and in-part mandatory term of years sentences, “[w]e see no way to avoid the Eighth Amendment requirement to treat children differently, with discretion and with consideration of mitigating factors, in this context.” 188 Wn.2d at 20.

1. The *Montgomery* Court’s Retroactivity Analysis Requires That *Houston-Sconiers* Be Applied Retroactively

Four years after renouncing mandatory life without parole sentences for juveniles, the Supreme Court ruled in *Montgomery v. Louisiana* that *Miller* was a substantive rule because the punishment “pos[ed] too great a risk of disproportionate punishment,” *Montgomery*, 136 S. Ct. at 733 (alteration in original) (quoting *Miller*, 567 U.S. at 479), and was therefore retroactive. The “substantive categorical guarantees” prohibit a punishment “regardless of the procedures followed” as “the Constitution itself deprives the State of the power to impose a certain penalty.” *Penry v. Lynaugh*, 492 U.S. 302, 329-30, 109 S. Ct. 3934 (1989), overturned in part by *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242 (2002); *see also Montgomery*, 136 S. Ct. at 729.

Montgomery applied *Miller* retroactively because it “placed certain criminal laws and punishments altogether beyond the State’s power to impose.” *Montgomery*, 136 S. Ct. at 729. Even the “use of flawless sentencing procedures” cannot “legitimate a punishment where the

Constitution immunizes the defendant from the sentence imposed.” *Id.* at 730. When a new substantive rule “carr[ies] a significant risk that a defendant . . . faces a punishment that the law cannot impose upon him,” the rule may be retroactively applied. *Schriro v. Summerlin*, 542 U.S. 348, 352, 124 S. Ct. 2519 (quoting *Bousley v. United States*, 523 U.S. 614, 620, 118 S. Ct. 1604 (1998)). If a sentence is prohibited by a new substantive rule, it “is not just erroneous but contrary to law and, as a result, void.” *Montgomery*, 136 S. Ct. at 731. The fact that the sentence became final prior to the new rule is irrelevant as “[t]here is no grandfather clause that permits States to enforce punishments the Constitution forbids.” *Id.*

To hold a governmental Act to be unconstitutional is not to announce that we forbid it, but that the Constitution forbids it. . . the question is not whether some decision of ours ‘applies’ in the way that a law applies; the question is whether the Constitution, as interpreted in that decision, invalidates the statute. Since the Constitution does not change from year to year; since it does not conform to our decisions, but our decisions are supposed to conform to it; the notion that our interpretation of the Constitution in a particular decision could take prospective form does not make sense.

Danforth v. Minnesota, 552 U.S. 264, 286, 128 S. Ct. 1029 (2008) (quoting *American Trucking Associations, Inc. v. Smith*, 496 U.S. 167, 201, 110 S. Ct. 2323 (Scalia, J., concurring) (1990)).

Similarly, *Houston-Sconiers* forbids the State from imposing presumptive minimum or mandatory adult penalties on a child—a life

sentence, a lengthy sentence that is the functional equivalent of a life sentence (*de facto* life sentence), or any mandatory term of years sentence—absent an individualized consideration of their youth and its mitigating characteristics. Despite the State’s assertion that *Houston-Sconiers* is limited to *de facto* life without parole sentences, this Court declared unambiguously, in overturning a term of years sentence, that the Eighth Amendment requires discretion and consideration of mitigating factors in any adult sentencing case. *Houston-Sconiers*, 188 Wn.2d at 21.

As in *Miller*, this Court in *Houston-Sconiers* placed the mechanistic application of adult sentencing schemes beyond the state’s power to impose on juveniles and mandated discretion, requiring individualized considerations of youth and rejecting the notion that such a sentence was presumptively appropriate. *Houston-Sconiers*, 188 Wn.2d at 37 (“...in sentencing juveniles in the adult criminal justice system, a trial court must be vested with full discretion to depart from... sentencing guidelines and any otherwise mandatory sentence...and to take the particular circumstances surrounding a defendant’s youth into account”). “[A] sentencer misses too much if he treats every child as an adult.” *Miller*, 567 U.S. at 477. Thus, as the Supreme Court of Iowa first held in *State v. Lyle*, “sentencing juveniles according to statutorily required mandatory minimums does not adequately serve legitimate penological objectives.”

State v. Lyle, 854 N.W.2d 378, 398 (Iowa 2014). This is no less true when adult sentencing schemes are deemed presumptively applicable with respect to either minimum sentencing guidelines or certain mandatory sentencing enhancements. Retribution in light of a juvenile’s diminished culpability is an “irrational exercise.” *Lyle*, 854 N.W.2d at 399; *Thompson*, 487 U.S. at 836-37. The deterrence rationale is “even less applicable when the crime (and concordantly the punishment) is lesser.” *Id.* Similarly, “the rehabilitative objective can be inhibited by mandatory minimum sentences” and delaying the release of a juvenile once he or she matures and reforms is “nothing more than the purposeless and needless imposition of pain and suffering.” *Lyle*, 854 N.W.2d at 399; *Thompson*, 487 U.S. at 838. This disconnect between presumptive or mandatory minimum sentences and penological objectives renders these sentences unconstitutional under the Eighth Amendment. *Lyle*, 854 N.W.2d at 398.

i. The Iowa Supreme Court’s Reasoning In Retroactively Banning Juvenile Mandatory Sentences Is Applicable to this Court’s Ban on the Imposition of the SRA on Youth Absent the Sentencing Court’s Appropriate Exercise of Discretion

Following *Miller*, the Iowa Supreme Court was the first court in the nation to consider the propriety of mandatory minimum sentences for youth irrespective of their offense. *Lyle*, 854 N.W.2d at 378. At issue in *Lyle* was

the imposition of a mandatory seven-year prison sentence on a youth convicted of second-degree robbery for taking a small amount of marijuana from a fellow student. *Id.* at 381. In holding the mandatory sentence unconstitutional, the *Lyle* Court reasoned that youths’ diminished culpability established in juvenile death penalty and life without parole cases “also applies, perhaps more so, in the context of lesser penalties as well.” *Id.* at 398, quoting *State v. Pearson*, 836 N.W.2d 88, 98 (Iowa 2013). Noting that the *Miller* analysis was not “crime-specific,” the *Lyle* Court concluded “the natural concomitant that what ...[the court] said is not punishment-specific either.” *Id.* at 399. *See also Commonwealth v. Perez*, 80 N.E.3d 967, 975 (Mass. 2017) (a mandatory minimum sentence longer than 15 years for non-homicide crimes violated the principal of proportionality and was thus unconstitutional. “[T]he judge expressly declined to consider the juvenile defendant’s age as a mitigating factor, which, as we have said, is required in the circumstances of this case.”).

The *Lyle* Court emphasized that its decision was “not about excusing juvenile behavior, but imposing punishment in a way that is consistent with our understanding of humanity today.” *Id.* at 398. The *Lyle* Court concluded:

The constitutional prohibition against cruel and unusual punishment does not protect all children if the constitutional infirmity identified in mandatory imprisonment for those

juveniles who commit the most serious crimes is overlooked in mandatory imprisonment for those juveniles who commit less serious crimes . . . *Mandatory minimum sentencing results in cruel and unusual punishment due to the differences between children and adults.* This rationale applies to all crimes, and no principled basis exists to cabin the protection only for the most serious crimes.

Id. at 401-02. With respect to retroactive application of its ruling, the court further reasoned that the remedy in holding these mandatory sentences unconstitutional was to resentence all individuals serving mandatory sentences of imprisonment. *Id.* at 403. The court indicated that such a process would “impose administrative and other burdens,” but that “individual rights” were in need of protection and therefore the burden was one the “legal system is required to assume.” *Id.*

Even if the resentencing does not alter the sentence for most juveniles, or any juvenile, the action taken by our district judges in each case will honor the decency and humanity embedded within . . . the Iowa Constitution . . . The youth of this state will be better served when judges have been permitted to carefully consider all of the circumstances of each case to craft an appropriate sentence and give each juvenile the individual sentencing attention they deserve and our constitution demands. The State will be better served as well.

Id. *Lyle*’s logic applies here as well. This Court’s decision in *Houston-Sconiers* requires retroactive application to “honor the decency and humanity” embedded in our constitutional protections and ensure the

“individual rights” of youth serving standard range adult sentences or mandatory sentencing enhancements are protected.

ii. A National Consensus Against Mandatory Sentencing Schemes Has Emerged

The Lyle court held that its ruling was retroactive because, like *Miller*, imposing a mandatory punishment on children was cruel and unusual punishment and thus created a new substantive rule. *Lyle*, 854 N.W.2d at 403. The *Lyle* Court relied on a traditional Eighth Amendment analysis to find the mandatory sentencing scheme unconstitutional: The “punishment for crime should be graduated and proportioned to both the offender and the offense,” *Atkins*, 536 U.S. at 311, considering, in part, “the evolving standards of decency that mark the progress of a maturing society.” *Miller*, 567 U.S. at 469-70. This latter analysis includes consideration of the “objective indicia of society’s standards, as expressed in legislative enactments and state practice” to determine whether a national consensus against a sentencing practice exists. *Roper*, 543 U.S. at 564. “It is not so much the number of States [enacting reform] that is significant, but the consistency of the direction of change.” *Atkins*, 536 U.S. at 315.

The court also “must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution.” *Roper*, 543 U.S. at 572. This judgement considers the

culpability of the individual in light of the offense and whether “the challenged sentencing practice serves legitimate penological goals.” *Graham*, 560 U.S. at 67, 71.

The *Lyle* court concluded that mandatory sentences can never be proportional punishment for youth in light of their diminished culpability and noted in particular recent legislative efforts to expand judicial discretion in juvenile sentencing, finding that they “illustrate a building consensus in this state to treat juveniles in our courts differently than adults.” *Id.* at 388.

The Court continued:

Society is now beginning to recognize a growing understanding that mandatory sentences of imprisonment for crimes committed by children are undesirable in society. If there is not yet a consensus against mandatory minimum sentencing for juveniles, a consensus is certainly building... in the direction of eliminating mandatory minimum sentencing.

Id. at 389.

State legislatures, relying on *Miller*’s ruling, have followed the decisions in *Lyle*, *Perez*, and *Houston-Sconiers* by requiring the consideration of the *Miller* factors at sentencing for all children in adult court and authorizing judges to depart from the standard sentencing range for adults. *See, e.g.*, H.B. 4210, 81st Leg., Reg. Sess. (W. Va. 2014) (requiring an individualized *Miller* sentencing hearing for every child sentenced as an adult); AB 218, 79th Leg., Gen. Sess. (Nv. 2017) (requiring

courts to consider the “diminished culpability of juveniles as compared to that of adults and the typical characteristics of youth” and authorizing judges to “reduce any mandatory minimum period of incarceration . . .”); District of Columbia Comprehensive Youth Justice Amendment Act, D.C. Law 21-238 (2016) (eliminating all mandatory minimum sentences for youth prosecuted in the adult criminal system).

Furthermore, in 2019 alone, bills were introduced in two states, and in Congress, requiring the *Miller* factors to be considered at sentencing and authorizing judges to depart from mandatory minimums. *See* H.R. 1949, 116th Congress (2019) (requiring consideration of youth and giving judges greater discretion when sentencing children in the federal system); S.B. 607, 92nd Gen. Ass., Reg. Sess. (Ar. 2019) (“The General Assembly finds that there is a recent *trend in the United States of giving greater discretion to judges when sentencing children, including departing from mandatory minimums in appropriate cases . . .*”); H.B. 218, 32nd Leg., Reg. Sess. (Hi. 2019) (requiring consideration of the *Miller* factors at sentencing and allowing judges to depart from mandatory minimum sentences). Additionally, legislatures in South Carolina, Hawaii, Vermont, and Rhode Island have all adopted resolutions expressing support for the U.N. Convention on the Rights of the Child (CRC), which states, in relevant part: “every child having infringed the penal law shall have the right to be treated

in a manner which *takes into account the child's age* and the desirability of *promoting the child's reintegration.*" H.C.R. No. 69, 20th Leg., Reg. Sess. (Hi. 2007); *See also*, S.R. 3013, Gen. Ass., Reg. Sess. (Ri. 2002); *See also*, J.R.S. 33, 82nd Leg., Gen. Sess. (Vt. 1998); *See also*, S.C.R. 790, 109th Leg., Reg. Sess. (Sc. 1992). This human rights protection has been interpreted as requiring that no child shall be "sentenced by the same guidelines that would apply to adults, regardless of the offense committed." *The Situation of Children in the Adult Criminal Justice System in the United States*, Inter-American Commission on Human Rights, pg. 142 (March 1, 2019).

Since *Lyle*, the "direction and consistency of change" in state courts and legislatures across the country evinces that a national consensus against sentencing children using adult sentencing guidelines, without first considering the *Miller* factors, has emerged. As such, any sentence imposed on children without due consideration of the mitigating features of youth cannot stand.²

² In *Connecticut v. Santiago*, 122 A.3d 1 (Conn. 2015), the Connecticut Supreme Court ruled that Mr. Santiago was entitled to the benefit of new state legislation banning the death penalty prospectively only; Mr. Santiago had been sentenced to death prior to the effective date of the new legislation. 122 A.3d at 11-12. In an inverse but analogous scenario to the legal landscape here, the court found that the new legislation meant that Connecticut now viewed the death penalty as contrary to the evolving standards of decency and thus violative of the state ban on cruel and unusual punishment. *Id.* at 55. As such, once banned as cruel and unusual punishment, the death penalty could no longer be imposed on some individuals but not others. *Id.* at 85. Here, it is this Court which has ruled the mechanistic application of adult sentences to children to be violative of the Eighth Amendment's ban on cruel and unusual punishment — a ruling which comports with the growing trend to bar such application across the country as set forth herein — which means that the evolving

2. The Continued Imposition Of Mandatory Adult Sentences On Youth Relies On An Unconstitutional Non-Rebuttable Presumption That A Youth Is As Morally Culpable As An Adult

In violation of the substantive rule announced in *Houston-Sconiers*, Domingo-Cornelio faced an adult mandatory minimum sentencing scheme that created the non-rebuttable presumption that a youth sentenced prior to this Court’s decision in *Houston-Sconiers* was as morally culpable as an adult who committed the same act. This statutory scheme contravenes due process principles by creating an unconstitutional irrebuttable presumption regarding youth’s blameworthiness, contrary to precedent establishing that juveniles possess distinctive characteristics and attributes that laws of criminal procedure must take into account.

Irrebuttable presumptions are only constitutional if there is a rational connection between the fact proved and the fact presumed. *Tot v. United States*, 319 U.S. 463, 467, 63 S. Ct. 1241 (1943) (“Under our decisions a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed”); *Manley v. Georgia*, 279 U.S. 1, 6, 49 S. Ct. 215 (1929) (holding statutes creating arbitrary presumptions or which “deny a fair opportunity to repel it violate the due process clause”); *See also State v. Dobbins*, 67 Wn.App.

standards of decency do not permit the continuing disparate treatment of otherwise identically situated youth.

15, 21, 834 P.2d 646 (1992) (holding presumption of sentencing enhancement for drug trafficking near schools rational as it detrimentally affects school children).

The irrebuttable presumption that a youth is as morally culpable as an adult contravenes the Supreme Court’s core holding that as a matter of law children are different from adults. *Miller*, 567 U.S. at 476-77 (“...criminal procedure laws that fail to take defendants’ youthfulness into account at all would be flawed”); *Roper*, 543 U.S. at 564 (holding penological goals of rehabilitation and incapacitation incompatible with juveniles because of their inherent “capacity for change”); *Thompson*, 487 U.S. at 834 (“Crimes committed by youths... *deserve less punishment* because adolescents may have less capacity to control their conduct and to think in long-range terms than adults”); *Houston-Sconiers*, 188 Wn.2d at 17-18 (stating Supreme Court cases make two substantive rules of law clear: first, “that a sentencing rule permissible for adults may not be so for children,” and second, that the Eighth Amendment requires another protection, besides numerical proportionality, in juvenile sentencings—the exercise of discretion”). Such a scheme does not satisfy the concerns underlying the Court’s requirements of due process.

Despite the Supreme Court’s jurisprudence that youth must face different criminal procedures than adults, and this Court’s requirement that

sentencing courts have full discretion to consider youth, Domingo-Cornelio never received his constitutional right to an individualized sentencing hearing. The trial court also did not exercise the right to use discretion to depart from the adult sentencing scheme as the case predates *Houston-Sconiers*. Domingo-Cornelio “faces a punishment that the law cannot impose upon him” *Montgomery*, 136 S. Ct. at 734 (alteration in original) (citations omitted), absent the sentencing court’s exercise of discretion.

Prior to *Houston-Sconiers*, Washington’s sentencing guidelines and mandatory enhancements reflected the irrebuttable presumption that a youth is as morally culpable as an adult. However, *Houston-Sconiers* makes clear that this irrebuttable presumption is erroneous for all juvenile defendants. *Houston-Sconiers*, 188 Wn.2d at 20. *See, e.g., In re J.B.*, 107 A.3d 1 (2014) (Pennsylvania Supreme Court found juvenile sex offender registration created an irrebuttable presumption of dangerousness that was not universally true as to all juvenile defendants and retroactively struck registration for all individuals to which it applied.).

B. INDIVIDUALS WHO COMMIT SEXUAL OFFENSES AS CHILDREN ARE UNLIKELY TO RECIDIVATE

In addition to the illegality of Domingo-Cornelio’s mandatory sentence under prevailing case law, the nature and circumstances of his offense underscore the inevitable error in applying presumptive or

mandatory sentencing schemes to children. Domingo-Cornelio is no different from other individuals who have sexually offended in childhood: he does not pose a heightened risk to the community of re-offending sexually. He faced charges as an adult solely because of a delayed prosecution; ten years have elapsed since his offense. His childhood conduct is not presumptively a mark of irretrievable depravity, but of immaturity, impulsivity, and sexual curiosity.

The recidivism rates of youth who sexually offend—which are remarkably consistent across studies, across time, and across populations—are exceptionally low. Michael F. Caldwell et al., *Study Characteristics & Recidivism Base Rates in Juvenile Sex Offender Recidivism*, 54 INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 197, 198 (2010), *available at* <http://commissiononsexoffenderrecidivism.com/wp-content/uploads/2014/09/Caldwell-Michael-2010-Study-Characteristics-and-recidivism-base-rates-in-juvenile-sex-offender-recidivism.pdf> (citing to recidivism studies dating back to 1994); *see also* E.M. Driessen, *Characteristics of Youth Referred for Sexual Offenses*, unpublished doctoral dissertation, University of Wisconsin-Milwaukee (2002); Michael P. Hagan et al., *Eight-Year Comparative Analysis of Adolescent Rapists, Adolescent Child Molesters, Other Adolescent Delinquents, and the General Population*, 45 INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 314 (2001); Franklin

E. Zimring et al., *Investigating the Continuity of Sex Offending: Evidence from the Second Philadelphia Birth Cohort*, 26 JUSTICE Q. 58 (2009), available at <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1590&context=facpubs>; Franklin E. Zimring et al., *Sexual Delinquency in Racine: Does Early Sex Offending Predict Later Sex Offending in Youth and Young Adulthood?*, 6 CRIMINOLOGY & PUB. POL'Y 507 (2007). Likelihood of re-offending sexually further declines as youth age into young adulthood. Kristen M. Zgoba et al., *A Multi-State Recidivism Study Using Static-99R and Static-2002 Risk Scores and Tier Guidelines from the Adam Walsh Act* 24, 29 (2012), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/240099.pdf>; Letourneau et al., *The Influence of Sex Offender Registration on Juvenile Sexual Recidivism*, 20 CRIM. JUSTICE POL'Y R. 136, 142 (2009). Researchers attribute this decline not to the effects of reporting or treatment, but to the passage of time. Letourneau, *Influence of Registration* at 147. When individuals have remained in their community for a period of time after their offense, their likelihood of recidivism further declines. R. Karl Hanson, et al., *High Risk Sex Offenders May Not be High Risk Forever*, 29 J. OF INTERPERSONAL VIOLENCE 2792, 2805 (2014) (individuals who remain offense-free in the community cut their recidivism rates in half every five years).

A meta-study of over 63 studies and over 11,200 children found an average sexual recidivism rate of 7.09 percent over an average 5-year follow-up. Caldwell, *Recidivism Study 2010* at 202. When rare sexual recidivism does occur among young offenders, it is nearly always within the first few years following the original offense. *Id.* at 205. Even youth initially evaluated as “high risk” are unlikely to reoffend if they remain offense-free within a relatively brief period following the initial adjudication. Donna Vandiver, *A Prospective Analysis of Juvenile Male Sex Offenders: Characteristics and Recidivism Rates as Adults*, 21 J. INTERPERSONAL VIOLENCE 673 (2006). Domingo-Cornelio’s actual history indicates his low risk of re-offense. He remained free of sexual misconduct prior to his delayed prosecution.

V. CONCLUSION

The imposition of an adult presumptive minimum sentence or mandatory enhancements is not a proportional punishment for a child if the judge has not properly exercised discretion to fully consider the mitigating characteristics of youth. *Miller*, 567 U.S. at 460. *See also Tatum v. Arizona*, 580 U.S. ___, 137 S. Ct. 11, 12 (2016) (Sotomayor, J., concurring) (citing *Montgomery*, 136 S. Ct. at 734) (holding that minimizing the *Miller* factors and “merely not[ing] age as a mitigating circumstance without further discussion” is insufficient); *Adams v. Alabama*, 578 U.S.

___, 136 S. Ct. 1796, 1800 (2016) (Sotomayor, J., concurring); *See also State v. Ramos*, 187 Wn.2d 420, 443, 387 P.3d 650 (2017) (“a *Miller* hearing must do far more than simply recite the differences between juveniles and adults and make conclusory statements that the offender has not shown an exceptional downward sentence is justified”). “An unconstitutional sentence remains unconstitutional even if the district court held a hearing before imposing it.” *State v. Roby*, 897 N.W.2d 127 (Iowa 2017). While resentencing may impose a burden on the lower courts, as it did in Iowa when more than 100 child offenders were re-sentenced, the youth of Washington, and the state itself, “will be better served when judges . . . give each juvenile the individual sentencing attention they deserve and our constitution demands.” *Lyle*, at 403.

WHEREFORE, for the foregoing reasons, this Court should remand Domingo-Cornelio for resentencing to ensure his sentence complies with the substantive constitutional protections announced in *Houston-Sconiers*.

DATED this 13th day of January, 2020.

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Appellate Court Case Title: Personal Restraint Petition of Endy Domingo-Cornelio
Superior Court Case Number: 13-1-02753-6

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