NO. 97205-2

SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT OF

ENDY DOMINGO-CORNELIO,

Petitioner.

From the Superior Court of Pierce County
The Honorable Vicki L. Hogan

No. 13-1-02753-6

RESPONDENT'S ANSWER TO AMICI IN SUPPORT OF PETITIONER

MARY E. ROBNETT
Prosecuting Attorney

Teresa Chen
Deputy Prosecuting Attorney
WSB # 31762
930 Tacoma Ave., Rm 946
Tacoma, WA 98402
(253) 798-7400

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I. INTRODUCTION

The Court must refuse to consider claims which Cornelio has not himself made. Amici argue that the SRA must be dismantled as regards to juvenile offenders. The issue has been briefed and will be decided in *State v. Gregg*, No. 97517-5, but not in Cornelio's case. Amici also offer unvetted studies without consideration for the facts or issues of this case.

II. STATEMENT OF THE CASE

The Defendant Cornelio has been convicted by a jury of first degree child rape and three counts of first degree child molestation, offenses committed when he was 15-17 years old.[1] Unpublished Opinion at 8. Because Cornelio directed his 4-5 year old victim not to tell anyone about the abuse, the allegation did not come out right away. Unpub. Op. at 7. Regardless, based on his age at the time of the offense and the seriousness of the crime, adult jurisdiction would have been automatic. RCW 13.04.030(e)(v)(C) (for 17-year-old charged with first degree child rape).

Cornelio was 19 years old when charges were filed on July 9, 2013, and he was 22 when he was sentenced on September 24, 2014. Cornelio

[1] The court of appeals miscalculated Cornelio's offense age as 14-16. Unpub. Op. at 2. Cornelio was born on July 15, 1992. The jury convicted him of offenses alleged to have taken place between November 9, 2007 and November 8, 2009.

challenged this sentence for the first time by way of personal restraint petition, claiming that the sentence he requested and received in 2014 was illegal under the later-decided *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017). The court of appeals rejected this claim, holding that *Houston-Sconiers* did not overturn a prior appellate decision "that was determinative of a material issue" in Cornelio's case. Unpub. Op. at 34.

III. ARGUMENT

A. This Court must clarify that its ruling in *Houston-Sconiers* is limited to mandatory sentencing provisions which may result in de facto life sentences.

The State has interpreted *Houston-Sconiers* to hold that sentencing courts have the discretion to depart from otherwise mandatory provisions when sentencing juvenile offenders who are faced with a de facto life sentence. Supplemental Brief of Respondent at 5. Such a rule is justifiable under the United States Supreme Court's Eighth Amendment precedent.

Amici have interpreted the case quite differently. They argue that *Houston-Sconiers* requires a *Miller*[2] hearing for <u>any</u> sentence imposed on a

[2] *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012).

juvenile offender. Brief of Amici (Korematsu) at 10; Brief of Amici (Columbia) at 2. No other state has found the Eighth Amendment justifies such a rule.[3]

If Amici are correct, such a rule would require *Miller* hearings and resentencings in all juvenile offender non-traffic cases (felony and

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[3] *See e.g. Burrell v. State*, 207 A.3d 137 (Del. 2019) (25-year mandatory minimum sentence for juvenile offender did not run afoul of *Miller*); *State v. Michel*, 257 So.3d 3 (Fla 2018) (finding *Miller* and *Graham* not implicated in life sentence with possibility of parole after 25 years); *State v. Rivera*, 172 A.3d 260, 267 (Conn. App. 2017) ("[U]nder *Miller*, a sentencing court's obligation to consider youth related mitigating factors is limited to cases in which the court imposes a sentence of life, or its equivalent, *without* parole."); *State v. Barbeau*, 883 N.W.2d 520 (Wis. 2016) (rejecting claims, based on *Miller* and *Lyle*, that statutory scheme with a range of penalties for intentional homicide from a minimum mandatory sentence of 20 years to life imprisonment violated United States and Wisconsin Constitutions' prohibitions against cruel and unusual punishment); *People v. Banks*, 36 N.E.3d 432 (Ill. App. 2015) (upholding defendant's minimum mandatory sentence of 45 years for first-degree murder with a mandatory firearm enhancement against cruel-and-unusual punishment claim under *Roper, Graham,* and *Miller)*; *State v. Springer*, 856 N.W.2d 460, 467-68 (S.D. 2014) (*Miller* does not apply to a 261-year sentence with parole eligibility in 33 years); *State v. Lyle*, 854 NW.2d 378 (Iowa 2014) (a prohibition of statutorily required mandatory minima on juvenile offenders was only authorized under the state constitution, not the federal constitution); *Com. v. Lawrence*, 99 A.3d 116 (Pa. Super. 2014) (holding that a statute imposing a minimum mandatory sentence of 35 years on a juvenile defendant convicted of murder did not violate Eighth Amendment as interpreted in *Miller*); *State v. Vang*, 847 N.W.2d 248, 262-63 (Minn. 2014) (holding *Miller* inapplicable to a life sentence with the possibility of parole in 30 years); *Ellmaker v. State,* 329 P.3d 1253 (Kan.Ct.App. 2014) (holding that *Miller* does not apply to a mandatory 50–year sentence because it is not the functional equivalent of life without parole); *James v. United States*, 59 A.3d 1233, 1238 (D.C. 2013) (holding *Miller* not implicated by mandatory minimum term of 30 years); *State v. Williams,* 842 N.W.2d 536 (Wis. Ct. App. 2013) (holding *Graham* inapplicable to homicide cases and *Miller* only applicable to sentences of mandatory life without parole); *Bunch v. Smith,* 685 F.3d 546, 551–53 (6th Cir. 2012) (holding *Graham* inapplicable to term-of-years sentences and declaring that if the United States Supreme Court wishes to expand its holding, it must do so explicitly); *Adams v. State,* 707 S.E.2d 359, 365 (Ga. 2011) (holding *Graham* inapplicable to term-of-years sentences); *State v. Brown,* 118 So.3d 332 (La. 2013) (declining to extend *Miller* to lengthy term-of-years sentences); *State v. Kasic,* 265 P.3d 410, 414–15 (Ariz. App. 2011) (holding *Graham* inapplicable to term-of-years sentences).

misdemeanor) as well as district court cases where jurisdiction was determined under RCW 13.04.030(1)(e)(iii)-(iv).

If the State is correct, then the court of appeals properly held that *Houston-Sconiers* is not material to Cornelio's sentence. Cornelio was not facing a de facto life sentence with mandatory provisions.[4] Even a significant change in law that applies retroactively is no basis for review where it is not material to the defendant's particular case. *In re Yung-Cheng Tsai*, 183 Wn.2d 91, 351 P.3d 138 (2015); RAP 16.4(c).

B. The *Houston-Sconiers* rule is a procedural rule which implements *Miller's* substantive rule that a juvenile's meaningful opportunity for release not be placed at risk without the court's exercise of discretion.

Two categories of rules apply retroactively: substantive rules and watershed rules of criminal procedure. *Teague v. Lane*, 489 U.S. 288, 307, 312-13, 109 S.Ct 1060, 103 L.Ed.2d 334 (1989). Neither Cornelio nor Amici assert that *Houston-Sconiers* announced a watershed procedural rule. Rather, they argue that *Houston-Sconiers* announced a new, substantive rule. Columbia at 14; Korematsu at 10; Supplemental Brief of Petitioner at 7-10. This is not tenable.

Rules which alter the range of punishable conduct or the punishable class of persons are substantive. *Schriro v. Summerlin*, 542 U.S. 348, 353,

[4] N.B. Washington law prohibits the imposition of mandatory minimum terms on cases which have been transferred from juvenile court. RCW 9.94A.540(3)(a).

124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004). *Houston-Sconiers* did not alter the conduct or class of persons which the law may punish, but only increased the court's oversight in determining that punishment.

The courts have frequently found, on the other hand, that rules which regulate sentencing procedures in order to enforce the substantive guarantees of the Eighth Amendment are procedural. *See e.g. United States v. Cruz*, 423 F.3d 1119, 1120 (9th Cir. 2005) (rule allocating authority to juries to decide sentencing facts was procedural); *Beard v. Banks*, 542 U.S. 406, 408, 416-17, 420, 124 S. Ct. 2504, 159 L. Ed. 2d 494 (2004) (rule requiring juries to consider all mitigating factors was procedural); *Summerlin*, 542 U.S. at 354 (rule requiring juries to find aggravating factors was procedural); *O'Dell v. Netherland*, 521 U.S. 151, 167, 117 S. Ct. 1969, 138 L. Ed. 2d 351 (1997) (rule permitting juries to know that defendant will be ineligible for parole was procedural); *Sawyer v. Smith*, 497 U.S. 227, 242, 110 S. Ct. 2822, 111 L. Ed. 2d 193 (1990) (rule requiring that the sentencers understand their responsibility was procedural).

The United States Supreme Court warned against "conflat[ing] a procedural requirement necessary to implement a substantive guarantee" with the substantive rule. *Montgomery v. Louisiana*, --U.S. --, 136 S. Ct. 718, 734-35, 193 L. Ed. 2d 599 (2016). The *Miller* hearing with its exercise of court discretion is the attendant "procedure that enables a prisoner to

show that he falls within the category of persons whom the law may no longer punish." *Id.* at 735. But *Miller* "did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that *the penological justifications for life without parole collapse in light of 'the distinctive attributes of youth.'*" *Id.* at 734 (emphasis added).

> Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects " 'unfortunate yet transient immaturity.'" Because *Miller* determined that sentencing a child to life without parole is excessive for all but " 'the rare juvenile offender whose crime reflects irreparable corruption,' " it rendered life without parole an unconstitutional penalty for "a class of defendants because of their status"—that is, juvenile offenders whose crimes reflect the transient immaturity of youth. As a result, *Miller* announced a substantive rule of constitutional law.

Id. Houston-Sconiers did not alter the substantive rule in *Miller*.

Weeks before *Houston-Sconiers* issued, this Court held that *Miller* applies equally to literal and de facto life-without-parole sentences. *State v. Ramos*, 187 Wn.2d 420, 387 P.3d 650 (2017). The literal sentence can only be found in aggravated murder and three strikes cases. The de facto sentence can occur in all manner of ways, including from mandatory provisions like the firearm enhancement. Recognizing this, *Houston-Sconiers* provided the procedure (departure from mandatory provisions)

which continues to advance *Miller*'s same substantive goal (discretion to provide juvenile offenders meaningful opportunity for release in one's lifetime).

Amici must grossly misinterpret the holding of *Houston-Sconiers* in order to claim it is substantive. They are forced to argue that *Houston-Sconiers* established that the penological justifications for sentencing a juvenile offender to *anything other than a juvenile disposition* collapse in light of the distinctive attributes of youth. But *Houston-Sconiers* did not and could not have arrived at this holding. There can be no question that the Eighth Amendment is not offended by a juvenile offender receiving, for example, a sentence within the standard range for crimes of possessing cocaine, failing to register as a sex offender, or attempting to elude a pursuing police vehicle. A standard range sentence in such a case begins at zero days. RCW 9.94A.510; RCW 9.94A.515; RCW 9.94A.517.

Houston-Sconiers is not a substantive rule, and therefore, it does not apply retroactively.

C. It is improper for Amici to raise claims independent of the parties and which the Court intends to resolve in a separate case, *State v. Gregg*, No. 97517-5.

One month before oral argument, Amici Korematsu raises two novel arguments, which Cornelio has not himself raised or briefed. First, in this Eighth Amendment matter, Korematsu asks this Court to reconsider *Ramos*

and find standard ranges[5] as applied to juvenile offenders violate the Washington constitution. Korematsu at 15 (citing *Ramos*, 187 Wn.2d at 445). Second, Korematsu asks this Court to hold that the lack of a *Miller* hearing in any juvenile offender sentencing is per se prejudicial. *But see* Supplemental Brief of Petitioner at 7-10 (Cornelio has accepted that he must demonstrate actual and substantial prejudice).

Courts should not consider arguments which have only been raised by amici. *State v. Gonzalez*, 110 Wn.2d 738, 752 n.2, 757 P.2d 925 (1988).

This Court will be addressing Korematsu's first question squarely in *State v. Gregg*, 194 Wn.2d 1002, 451 P.3d 341 (2019). Defendant Gregg argued that "the Eighth Amendment to the United States Constitution and article I, section 14 of the Washington Constitution require a presumption that a juvenile's youth is a mitigating factor and that the State assume the burden to prove otherwise beyond a reasonable doubt." *State v. Gregg*, 9 Wn. App. 2d 569, 574, 444 P.3d 1219 (2019). The court of appeals rejected this specific claim, Gregg requested review. *Gregg*, 9 Wn. App. 2d at 576-

[5] Assuming arguendo that standard ranges are unconstitutional, Amici would give the sentencing courts discretion to sentence both far above as well as below them, because only RCW 9A.20.021 would remain. *State v. Pillatos*, 159 Wn.2d 459, 150 P.3d 1130 (2007) (A superior court may not deviate from legislatively prescribed sentencing procedures during the interim between the supreme court's rejection of the law and the effective date of any subsequent amendment). This would return us to a time before the SRA when judges had virtually unfettered discretion which inevitably resulted in severe racial disparities. *Blakely v. Washington*, 542 U.S. 296, 315, 124 S.Ct. 2531, 2544, 159 L.Ed.2d 403 (2004) (O'Connor, J., dissenting).

79, Petition for Discretionary Review, *State v. Gregg*, No. 97517-5 (Wash. Aug. 6, 2019); Petitioner's Supplemental Brief, *State v. Gregg*, No. 97517-5 (Wash. Dec. 20, 2019). And the King County Prosecutor's Office has briefed the issue for the Court. Supplemental Brief of Respondent, *State v. Gregg*, No. 97517-5 (Wash. Dec. 20, 2019).

Gregg is scheduled for oral argument February 25, a couple weeks after Cornelio's case. This Court must decline to preview an issue here where the claim has not been raised or briefed by the parties.

Likewise, the Court must decline to reconsider the long-established, oft-repeated standards for personal restraint petitions. In *Matter of Meippen*, 193 Wn.2d 310, 440 P.3d 978 (2019), neither majority nor dissent quibbled over this standard. The courts' review of personal restraint petitions is constrained, and relief gained through collateral relief is extraordinary. *In re Fero*, 190 Wn. 2d 1, 14, 409 P.3d 214, 222 (2018). In a personal restraint petition, the burden of proof shifts to the petitioner. *In re Cook*, 114 Wn.2d 802, 814, 792 P.2d 506 (1990); *Hews v. Evans*, 99 Wn.2d 80, 88, 660 P.2d 263 (1983). And there must be a heightened showing of prejudice. *Fero*, 190 Wn.2d at 15.

If the challenge is in the context of constitutional error, petitioners have a threshold burden of demonstrating actual and substantial prejudice or the petition will be dismissed. *Cook*, 114 Wn.2d at 810. For non-

constitutional claims, the preliminary showing is higher: the claimed error must constitute a fundamental defect which inherently results in a complete miscarriage of justice. *Cook*, 114 Wn.2d at 811.

These standards respect the finality principle and the primacy given to a direct appeal. They are only relaxed where error affects the framework within which the trial proceeds. *See e.g State v. Wise,* 176 Wn.2d 1, 13-14, 288 P.3d 1113 (2012). A party's failure to request the court exercise discretion is not structural error.

D. A spurious statistic is not a basis for reversal.

Korematsu argues that Cornelio's and Ali's sentences should be reversed in order to send a message to post-*Houston-Sconiers* sentencing courts to depart downward more often. Korematsu at 12-15. The argument relies on a false premise.

This Court observed that "most juvenile homicide offenders *facing the possibility of life without parole* will be able to meet their burden of proving an exceptional sentence below the standard range is justified." *Ramos*, 187 Wn.2d at 443 (emphasis added). Amici inform that there were 109 declinations and 22 mitigated sentences for age in 2018-19. In an apples-to-oranges comparison, Korematsu wrongly concludes that *Ramos'* expectation has not been met. The truth is we cannot tell from this data how

many of the 109 cases were homicides, much less homicides with the potential of life without parole. It is entirely possible that none were.

Amici make many other interpretive errors. They fail to observe that not all cases charged in 2018-19 will be resolved in that same time. They assume that declinations remain static from year to year. And they ignore that mitigated resolutions based on offender characteristics like transient immaturity are generally reflected in plea negotiations, which is how most cases resolve, not in exceptional sentences. Parties like to resolve cases with some certainty about the outcome. Prosecutors can provide controlled, mitigated resolutions by amending and dismissing charges.

E. The Court should decline to consider facts/studies which are raised for the first time in an amicus brief.

For the first time, in a brief filed only a month before oral argument, Columbia asks this Court to consider recidivism articles, including an unpublished dissertation. Columbia at 16-17. Columbia also intends to present oral argument through Marsha Levick who is likely to assert conclusions based on information that was not presented to the sentencing court. Supplemental Brief of Petitioner at 17. The Court should decline to consider facts off the record, especially research that has not been vetted through cross-examination. Tessa L. Dysart, Frenemies of the Court –

Weaponized Amicus Briefs, Appellate Advocacy Blog (Sept. 10, 2019).[6] "Amicus briefs that rely on social research data ... are particularly susceptible to being weaponized when they distort that data." *Id.* (citing Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. Rev. 91(1993)). These studies are "funneled through the screen of advocacy." Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 Va. L. Rev. at 1757, 1784 (2014).[7]

Courts may only take judicial notice of facts "not subject to reasonable dispute" and either "generally know within the trial court's territorial jurisdiction" or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." ER 201(b); 5 Wash. Prac., Evidence Law and Practice § 201.1 (6th ed.). Courts may be tempted to ignore this rule when the information is offered through amicus briefing, perhaps under the mistaken belief that an amicus curiae is a disinterested party. But amici are not disinterested parties. Helen Anderson, Frenemies of the Court: The Many Faces of Amicus Curiae, 49 U. Rich. L. Rev. 361, 362 n.4, n.7 (2015) (the label "amicus curiae" encourages "delusive innocuousness" where biased interveners have the

[6] https://lawprofessors.typepad.com/appellate_advocacy/2019/09/frenemies-of-the-court-weaponized-amicus-briefs.html
[7] http://ssrn.com/abstract=2409071

potential to exert significant and not harmless influence on a decision).[8] Reliance on the perceived neutrality of an amicus can produce disastrous results.

In *Nken v. Holder*, 556 U.S. 418, 129 S. Ct. 1749, 173 L. Ed. 2d 550 (2009), Chief Justice Roberts relied upon the Solicitor General's amicus brief which argued that deportation does not cause irreparable harm, because DHS had a policy of repatriating victorious litigants. Nancy Morawetz, Convenient Facts: *Nken v. Holder*, the Solicitor General, and the Presentation of Internal Government Facts,[9] 88-5 N.Y.U.L. Rev. 1600 (2013). This turned out to be false. Following FOIA litigation, it was discovered there was no such policy or practice. The Office of the Solicitor General was forced to apologize. But the opinion was written, and the damage was done.

Fred Korematsu was himself a victim of this practice. Following the admission of error in *Nken*, the U.S. Solicitor General further acknowledged doctoring a War Department report "to provide a bogus military justification" in its defense of internment cases involving Fred Korematsu, among others. Morawetz, 88-5 N.Y.U.L. Rev. at 1603. This is

[8] https://bit.ly/2uOhx7i
[9] https://bit.ly/2uPvOki

why we do not take reports or studies at face value but scrutinize them through established legal procedures at the trial level.

It is not enough to say that the party has an opportunity to rebut the late-presented "fact" in briefing. In one professor's review of what check the adversary system provided on amicus-provided facts, only 35 out of 124 factual claims were even addressed. Larsen, 100 Va. L. Rev. at 1800-02 ("the amicus machine is too big, and the field of possible authorities is too vast for the parties to be able to keep up"). The proper way to vet these claims is at the trial court with a witness list, curricula vitae of experts, and cross-examination under the *Frye* standard, inquiring into the research methods, sample size, protocols, etc.. Procedural due process requires the restrictive rule. *State v. K.N.*, 124 Wn. App. 875, 883, 103 P.3d 844 (2004). A party has a right to a meaningful opportunity to be heard (to depose, cross-examine) regarding any fact that is adjudicative and determinative of the outcome.

Columbia argues that juveniles are unlikely to recidivate. This is not exactly what their cited sources say.

One source summarizes[10] its findings in this way:

> Results of this study found that adolescent sex offenders were significantly more likely to sexually reoffend in the 8-year period after their release from a juvenile correctional facility than were a

[10] https://journals.sagepub.com/doi/pdf/10.1177/0306624X01453004

> control group of other non–sex offending adolescent delinquents from the same institution. Juvenile non-sex offenders, child sexual offenders, and adolescent rapists were all found to be significantly more likely to be involved in sexual assaults than was the general male population in the United States.

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).

Another found that "the best predictor during a juvenile career for adult sex offending was the frequency of offending" in any context. 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).[11] *See also* 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* at 3 (2012) (majority of sex offenders have no prior sex offenses but two-thirds had prior criminal involvement).[12] From this result, it appears Cornelio's four non-sex convictions as a teenager and substance abuse may be relevant factors.

A third found that older sex offenders, like violent offenders, were less likely to reoffend or at least get caught. Zgoba at 1, 4, 29. But

[11] https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1745-9133.2007.00451.x
[12] https://www.ncjrs.gov/pdffiles1/nij/grants/240099.pdf

recidivism doubled between 5 and 10 years, suggesting suppression while under formal supervision. *Zgoba* at 27.

Sexual recidivism is variously defined, making it difficult to compare studies, particularly those that rely on self-report of misconduct. Michael F. Caldwell et al., *Study Characteristics & Recidivism Base Rates in Juvenile Sex Offender Recidivism*, 54 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 197, 199 (2010). In the studies Caldwell reviews, recidivism is defined as arrest or conviction. *Id.* at 203. However, it is common knowledge that the majority of sexual violence goes undetected. *Id.* at 199. Even when it is disclosed to law enforcement, for various reasons that have nothing to do with actual innocence, an offense may not result in arrest or prosecution. *See e.g.* Letourneau et al., *The Influence of Sex Offender Registration on Juvenile Sexual Recidivism*, 20 CRIM. JUSTICE POL'Y R. 136 (2009) (finding prosecutors are less likely to prosecute juvenile sex offenders); David Finkelhor et al., *Juveniles Who Commit Sex Offenses Against Minors,* Juvenile Justice Bulletin (Dec. 2009) at 6 (finding police are considerably less likely to arrest younger offenders).[13] Caldwell readily admits up front that studies of sexual recidivism underestimate the actual rate of sexual violence. *Id. Accord Zgoba* at 10, 28.

[13] https://www.ncjrs.gov/pdffiles1/ojjdp/227763.pdf

Because sexual violence is largely unreported, these studies describe very little.

Moreover, there is a diversity among juvenile sex offenders which Amici's studies do not address. *Finkelhor* at 3. "This diversity indicates the need to avoid stereotypes about juvenile sex offenders." *Id.* at 8. Studies which collapse all juvenile offenders into a monolithic block will be hard to interpret. Juvenile offenses against minors appear to plateau and drop after age 14. *Id.* at 4-5. Cornelio is an outlier in this data set. His known offenses began after 14 and continued at least to the age of 17, indicating they were not driven by sexual curiosity or impulse. His continued abuse of the same victim demonstrated a longstanding pattern of violation.

Columbia argues that Cornelio has not reoffended. Columbia at 18. As far as the victim is concerned, he has. Even though Cornelio had limited access to her, the abuse happened over a period of two years resulting in four convictions. This was not a single offense.

Columbia misinforms that Cornelio "faced charges as an adult solely because of a delayed prosecution; ten years have elapsed since his offense." Columbia at 16. In fact, if Cornelio had been charged immediately, adult jurisdiction would have been automatic under RCW 13.04.030(e)(v)(C). This also falsely suggests that ten years passed between the offense and prosecution. The Defendant was 15-17 years old

when he committed his offenses and 19 when he was charged. That is a passage of only two years. And finally, this conflates preaccusatorial delay (which did not occur) with delayed disclosure (a common phenomenon for sexual assault victims of every age, and particularly so when the offender silences the victim as happened here).

It is not possible to conclude from the sundry articles, as Columbia advises, that Cornelio is at low risk of reoffense.

Certainly, the sentencing judge could have departed downward sua sponte, having presided over the trial. She chose not to. She knew that Cornelio was 17 at the time of his last offense. She would also have been aware that interventions for the 22-year-old Cornelio would not be available through JRA, and therefore would be limited. While persons who participate in treatment while they are juveniles may have good outcomes, Cornelio was no longer a juvenile and had not requested treatment as an adult or even accepted responsibility. Four of the five claims raised in the personal restraint petition (filed three years after his sentence) challenge his conviction. Cornelio has not accepted responsibility.

IV. CONCLUSION

This Court should hold that *Houston-Sconiers* is a procedural rule giving sentencing courts discretion to depart from otherwise mandatory provisions when sentencing juvenile offenders who are faced with a de facto life sentence and affirm Cornelio's sentence.

RESPECTFULLY SUBMITTED this 3rd day of February, 2020.

MARY E. ROBNETT
Pierce County Prosecuting Attorney

Teresa Chen WSB# 31762
Deputy Prosecuting Attorney

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The undersigned certifies that on this day she delivered by E-file or U.S. mail to the attorney of record for the appellant / petitioner and appellant / petitioner c/o his/her attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on the date below.

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