No. 18-1267

IN THE
Supreme Court of the United States

ANGELA RENE LEEMAN, PETITIONER,

v.

STATE OF ARIZONA, RESPONDENT.

On Petition For A Writ Of Certiorari To
The Arizona Court of Appeals

REPLY BRIEF IN SUPPORT OF CERTIORARI

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INTRODUCTION

The Eighth Amendment forbids sentencing a juvenile offender to life without the possibility of parole for a non-homicide offense, and this case implicates undisputed splits of authority, including on whether a term of years sentence for juvenile non-homicide offenses that amounts to condemnation to die in prison is constitutional. The State's primary response is to avoid discussing the merits by creating confusion about the record.

The State's first and primary argument asserts a procedural bar. Opp. 12-16. However, no adequate and independent state ground bars review. The decisions below reached the merits of the Eighth Amendment questions before this Court, and the state courts did not rely on any procedural bar to deny relief of Petitioner's Eighth Amendment claims. Pet. App. 4a, 11a-16a.

The State seeks to further muddy the waters, arguing that Ms. Leeman's sentence is "partially" parole eligible and totals "*less* than the juvenile's average life expectancy." Opp. at 14 (emphasis in original). Ms. Leeman's 61-year sentence is less than normal life expectancy, but her age at her potential *release* – 78 without a successful parole application, 75 if she is successful – is indeed a punishment that condemns her to die in prison and denies her any meaningful opportunity to "rejoin society" as the constitution requires. *Graham v. Florida*, 560 U.S. 48, 79 (2010).

Finally, in a section entirely devoted to arguing the facts of Ms. Leeman's case, the State ignores the circumstances that led to the offenses in question. Ms. Leeman was taken advantage of by her adult "boyfriend," who supplied her with drugs, including

during the tragic offenses that led to her conviction. Even as it sentenced her to die in prison, the trial court found in mitigation "the [co-]defendant Hatton's influence over the significantly younger Miss Leeman," a finding that simultaneously guts the State's factual arguments and reinforces this Court's treatment of juveniles as a class as being less culpable than their adult counterparts. **6/30/94 R.T. 41.**[1]

Ms. Leeman, convicted only of nonhomicide crimes, faces death in prison. And yet she has been denied even a sentencing proceeding that would pass constitutional muster if she had been convicted of homicide. *See Miller v. Alabama*, 567 U.S. 460, 465 (2012).

ARGUMENT

I. No Adequate and Independent State Ground Bars Review.

The decisions below squarely addressed the merits of whether Ms. Leeman's 61-year sentence for a nonhomicide offense violates the Eighth Amendment, and no adequate and independent state ground bars review. *See Michigan v. Long*, 463 U.S. 1032, 1038 n.4 (1983) ("We may review a state case decided on a federal ground even if it is clear that there is an available state ground decision on which the state court could have properly relied."). The State argues that Ms. Leeman's Eighth Amendment claims are procedurally barred. Despite quoting a lengthy passage from Ms. Leeman's own briefing,

[1] "R.T." refers to the Reporter's Transcript in Arizona Court of Appeals Case No. 2 CA-CR 2017-0419. The State also cited to this transcript. Opp. 1 & n.2,

(Opp. 11), the State cannot and does not excerpt any state court's reliance on a procedural bar to deny relief. No such passage exists.

The post-conviction court denied relief on the merits, and only on the merits, of Ms. Leeman's Eighth Amendment claims:

> The plain language of the *Miller* decision requires resentencing only in cases involving juveniles who received life without parole sentences. Defendant Leeman argues that decision must apply to juveniles who receive lengthy prison terms as well. This Court disagrees.

Pet. App. 12a. That same court *did* hold that Ms. Leeman's claims of ineffective assistance of counsel were procedurally barred. Pet. App. 10a. But those claims are not before this Court. Pet. i.

The State also takes issue with raising an alternative Eighth Amendment ground for reversing the decision below: that even if neither *Miller* nor *Graham* require reversal, then *Harmelin v. Michigan*, 501 U.S. 957 (1991) does. As the State notes, the lower courts did not pass on this framing. Opp. 15, n.7. However, Ms. Leeman unquestionably raised an Eighth Amendment challenge to the proportionality of her sentence. The Eighth Amendment grounds asserted and passed on below are enough for her to win.

However, this Court may also wish to address the narrower *Harmelin* ground. Doing so would be proper: "Having raised a[n] [Eighth Amendment] claim in the state courts," Ms. Leeman can "formulate any argument [she] like[s] in support of that claim here." *Yee v. City of Excondido*, 503 U.S. 519,

535 (1992). Indeed, she can "frame the question [presented] as broadly or as narrowly as [s]he sees fit." *Id.*; *see also Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

In sum, because the state courts chose "not to rely on [any] procedural bar . . . there is no basis [for[refusing to consider the merits of the federal claim." *Harris v. Reed*, 489 U.S. 255, 265 n.12 (1989).

II. Ms. Leeman Was Sentenced to Die in Prison for Nonhomicide Offenses Committed Prior to Turning Eighteen.

The State's second argument amounts to little more than (1) its disagreement with both the premise that the Eighth Amendment accords those under eighteen special protection from the harshest penalties under law and (2) the reality that Ms. Leeman's co-defendant was also her abuser who took advantage of her age and drug addiction.

First, repeatedly noting Ms. Leeman's age, the State suggests this case is a bad vehicle because Ms. Leeman was seventeen years old at the time of the offenses. Opp. 1, 5, 17. She was indeed seventeen. That makes her a member of the class – juveniles – that the Court has identified as categorically less culpable. *See Roper v. Simmons*, 543 U.S. 551, 574 (2005). The constitutional line of eighteen years old is itself based on the very high risk of wrongly assigning blameworthiness of those less than that age. *Id.* at 573. That risk diminishes, but is present beyond age eighteen,[2] but the uncertainty that risk

[2] *See* Laurence Steinberg, *Adolescence* 51-58 (11th ed. 2017) (noting that adolescence is commonly defined as the second decade of life, ages 11-20).

creates is simply not at issue because Ms. Leeman was less than eighteen at the time of the offense and is in the protected class.

In addition to resisting the age-related line drawing the Court has undertaken, the State fails to appreciate that juveniles convicted only of nonhomicide offenses are entitled to "a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 560 U.S. at 75. The State notes that Ms. Leeman's sentence provides for "partial" parole eligibility, alleviating – in the State's view – any constitutional defect in her sentence. Opp. 14. However, at earliest, Ms. Leeman will exit prison when she is 75 years old. Opp. at 8.

It concludes such an age upon release is constitutional by relying on life expectancy tables and the figure given for Caucasian women with Ms. Leeman's birth year: 77.3 years. Such a release date does not meet *Graham*'s requirement that the opportunity of release be "upon" a showing of maturity and rehabilitation, as such a showing is likely to have occurred decades prior to Ms. Leeman's 75th year of life. Assuming she should expect to 77.3 years, two years provides minimal opportunity to develop a meaningful life outside of prison and to "rejoin society."[3] *Id.* at 79.

Moreover, reliance on actuarial tables is itself problematic. The figure relied upon is an average of all persons in the class and does not take into ac-

[3] At least two state courts of last resort have rejected the use of actuarial tables because of *Graham*'s assurance that juveniles will be given a meaningful opportunity to rejoin society. *See State v. Ragland*, 836 N.W.2d 107, 119-20, 121-22 (Iowa 2013); *People v. Contreras*, 411 P.3d 445, 448-51 (Cal. 2018).

count any factors that would have a deleterious impact on a woman's health. It is well-established that prisoners age at an accelerated rate and "[t]heir physical condition and health problems are characteristic of people ten or fifteen years older than their chronological age." Adele Cummings & Stacie Nelson Colling, *There is No Meaningful Opportunity in Meaningless Data: Why It Is Unconstitutional to Use Life Expectancy Tables in Post*-Graham *Sentences*, 18 U.C. J. Juv. Law & Pol. 267, 284 (2014). And Arizona in particular has had problems providing even basic health care to its inmates.[4] The State's claim as to Ms. Leeman's life expectancy is not based on any individualized actuarial analysis, diminishing its relevance to whether Ms. Leeman will have a meaningful opportunity to obtain release or, indeed, any opportunity at all.

Next, the state places great weight on Ms. Leeman having been convicted of multiple offenses. Opp. 16. In addition to misinterpreting the trial record, which charged each distinct injury as a separate count,[5] the State fails to appreciate the funda-

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[4] The Arizona Department of Corrections is under consent decree due to its systematic deprivation of health care to prisoners, and a federal court has held the Department in contempt, imposing fines totaling $1.5 million. *See Parsons v. Ryan*, No. CV-12-0601-PHX-DKD (D. Ariz.), Order dated June 22, 2018, available at https://www.acluaz.org/sites/default/files/field_documents/parsons_contempt_and_fine_order_june_22_2018.pdf.

[5] At one point during the trial, Ms. Leeman's counsel suggested the charges were multiplicitous and she should be tried for only one count of child abuse. Under Arizona law, multiple convictions for the same offense is a violation of the Double Jeopardy Clause. *State v. Powers*, 26 P.3d 1134 (Ariz. 2001). Unfortunately, none of Ms. Leeman's previous attorneys raised the claim. Thus, in this proceeding, the Arizona courts found the

mental difference in culpability of those who have been convicted of homicide and those who have not. *See Kennedy v. Louisiana*, 554 U.S. 407, 438 (2008); *Coker v. Georgia*, 433 U.S. 584, 598 (1977). Whatever else may be said of Ms. Leeman's crimes, they do "not compare to murder." *Coker*, 433 U.S. at 598.

Finally, the State has failed to come to grips with what even the sentencing court recognized: that Ms. Leeman's co-defendant was an abusive adult who took advantage of her youth and drug addiction. The State's portrayal of Ms. Leeman and Mr. Hatton as equals is plainly contrary to the findings of the sentencing court in 1994, in which it stated as a mitigating factor as to Ms. Leeman "the defendant Hatton's influence over the significantly younger Miss Leeman." 6/30/94 R.T. 41.

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Ms. Leeman will have no opportunity for release until at least age 75. She was a juvenile under the influence of drug addiction and an abusive, adult "boyfriend" at the time of her offenses. Her offenses were the product of the transient immaturity of youth, and she should be given an opportunity to demonstrate her fitness to rejoin society.

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claim procedurally defaulted. Ms. Leeman does not request this Court to touch the merits of the double jeopardy violation, but the trial record shows only that Ms. Leeman received a sentence of 61 years for the single act of failing to protect her child from the abuse caused by Hatton.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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