

No.

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**In the Supreme Court of the United States**

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BRANDON KELLY,  
SUPERINTENDENT, OREGON STATE PENITENTIARY,

*Petitioner,*

v.

LYDELL MARCUS WHITE,

*Respondent.*

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On Petition for a Writ of Certiorari to the Supreme  
Court of the State of Oregon

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**PETITION FOR WRIT OF CERTIORARI**

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### QUESTION PRESENTED

Respondent received a 67-year non-mandatory sentence 25 years ago, when he was 15 years old, for the murder of an elderly couple.

Does the Eighth Amendment, under *Miller v. Alabama*, 567 U.S. 460 (2012), which applies to mandatory sentences, require invalidation of respondent's sentence?

Petitioner seeks review because this question is also presented in a pending case before this Court—*Mathena v. Malvo*, 139 S. Ct. 1317 (2019) (No. 18-217).

## **PARTIES TO THE PROCEEDING**

The petitioner is the Superintendent of the Oregon State Penitentiary Brandon Kelly. The prior Superintendent of the Oregon State Penitentiary, Jeff Premo, was the defendant and respondent in the courts below. The respondent is Lydell Marcus White, the petitioner in the courts below.

## TABLE OF CONTENTS

	Page(s)
QUESTION PRESENTED .....	i
PARTIES TO THE PROCEEDING .....	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES .....	iv
TABLE OF AUTHORITIES .....	v
PETITION FOR A WRIT OF CERTIORARI.....	1
OPINIONS BELOW .....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	2
STATEMENT OF THE CASE.....	3
A. Criminal Proceedings .....	3
B. Direct appeal and prior post-conviction challenges .....	6
C. Successive post-conviction proceedings underlying this petition.....	7
REASONS FOR GRANTING THE PETITION.....	9
CONCLUSION.....	10
APPENDIX	
APPENDIX A. <i>White v. Premo</i> , 443 P.3d 597 (Or. 2019) (No. S065188).....	1a
APPENDIX B. <i>White v. Premo</i> , 397 P.3d 504 (Or. App. 2017) (No. A154435).....	27a
APPENDIX C. <i>White v. Premo</i> , General Judgment, Marion County Circuit Court Case No. 11C-24315 (2013).....	44a

## TABLE OF AUTHORITIES

## Page(s)

**Cases Cited**

<i>Mathena v. Malvo</i> , 139 S. Ct. 1317 (2019) .....	i, 1, 9, 10
<i>Miller v. Alabama</i> , 567 U.S. 460 (2012) .....	i, 7, 8, 9
<i>Montgomery v. Louisiana</i> , 136 S. Ct. 718 (2016) .....	8, 9
<i>State v. White (Lydell)</i> , 911 P.2d 1287 (Or. App.), rev. den., 920 P.2d 550 (Or. 1996) .....	6
<i>White (Laycelle) v. Premo</i> , No. S065233 (Or. S. Ct. May 31, 2019) .....	1
<i>White (Lydell) v. Hill</i> , (A130478) (Or. App. 2007) .....	7
<i>White (Lydell) v. Premo</i> , 397 P.3d 504 (Or. App. 2017) .....	7
<i>White (Lydell) v. Premo</i> , No. S065188 (Or. S. Ct. May 31, 2019) .....	1
<i>White (Lydell) v. Thompson</i> , 991 P.2d 63 (Or. App. 1999), rev. den., 994 P.2d 132 (Or. 2000) .....	6

**Constitutional and Statutory Provisions**

28 U.S.C. § 1257(a) .....	2
Or. Rev. Stat. § 138.510(3)(b) .....	7
Or. Rev. Stat. § 138.550(3) .....	7
Or. Rev. Stat. § 163.095 (1993) .....	4
Or. Rev. Stat. § 163.105(1)(c) (1993) .....	5
Or. Rev. Stat. § 163.115 (1993) .....	4, 5
Or. Rev. Stat. § 164.395 (1993) .....	5
Or. Rev. Stat. § 419C.349 (1993) .....	4

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page(s)</b>
U.S. Const., Amend. VIII.....	i, 2, 7, 8, 9, 10
U.S. Const., Amend. XIV .....	2, 7
<b>Administrative Rules</b>	
Or. Admin. R. 291-097-0215.....	5
<b>Other Authorities</b>	
Or. R. App. P. 5.15(2).....	3

**PETITION FOR A WRIT OF CERTIORARI**

Petitioner Brandon Kelly, Superintendent of the Oregon State Penitentiary, respectfully petitions for a writ of certiorari to the Oregon Supreme Court in *White (Lydell) v. Premo*, No. S065188 (Or. S. Ct. May 31, 2019) and respectfully requests that this Court hold this case pending resolution of *Mathena v. Malvo*, 139 S. Ct. 1317 (2019) (No. 18-217), which presents the same legal issue.<sup>1</sup>

**OPINIONS BELOW**

The judgment of the Oregon Supreme Court is a published opinion reversing the decisions of the Oregon Court of Appeals and the Oregon Circuit Court, which had denied respondent's petition for post-conviction relief. The Oregon Supreme Court's opinion is attached as Appendix "A." (Pet. App. 1a). The Oregon Court of Appeals opinion is attached as Appendix "B." (Pet. App. 27a). The judgment of the Oregon Circuit Court denying the petition for post-conviction relief is attached as Appendix "C." (Pet. App. 44a). On June 21, 2019, the Oregon Supreme Court issued an order granting petitioner's motion to stay issuance of the appellate judgment pending the

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<sup>1</sup> The Legal Issues and Factual Background in this petition are substantially similar to those in the concurrently filed petition for a writ of certiorari in *White (Laycelle) v. Premo*, No. S065233 (Or. S. Ct. May 31, 2019), involving respondent's twin brother and accomplice in the underlying crimes. The Oregon Supreme Court decided the brothers' cases in separate opinions issued on the same day, with most of the detailed factual background and legal analysis contained in the opinion underlying this petition.

filing of a petition for a writ of certiorari with this Court.

### **JURISDICTION**

The Oregon Supreme Court's opinion was entered on May 31, 2019. This Court's jurisdiction is pursuant to 28 U.S.C. § 1257(a).

### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. Amend. VIII.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV.



## STATEMENT OF THE CASE

### A. Criminal Proceedings

In 1993—when they were 15 years old—respondent and his twin brother, Laycelle, decided to steal a car. (Pet. App. 2a, 24a). They planned the crime for several days, looking to steal the car from someone who could not easily fight back. (Pet. App. 24a). The victims were a married couple living in Salem, Oregon—R.R. and G.R.<sup>2</sup> R.R. was 82 years old and his wife, G.R., was 80 years old. (Pet. App. 24a; Supt. Or. S. Ct. Br. 9).<sup>3</sup>

In planning the theft, respondent and his brother acquired a small baseball bat and put on surgical gloves. (Pet. App. 24a; Supt. Or. S. Ct. Br. 8-9). They entered the victims' house through an open back window, and they found the victims in their bed where they appeared to be asleep. (Pet. App. 24a; Supt. Or. S. Ct. Br. App. 9).

Respondent “jumped on top of [R.R.] and attempted to strangle him.” (Supt. Or. S. Ct. Br. 9). Laycelle “threw” G.R. to the ground and “attempted to choke her.” (*Id.*). When Laycelle’s “arms got tired, he used his forearm to attempt to strangle her.” (*Id.*). Laycelle stabbed G.R. in the throat with a knife, hit her repeatedly with his fists, and hit her head repeatedly with the bat. (*Id.*). Respondent hit R.R.

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<sup>2</sup> Full names of crime victims generally are not used in briefs or opinions in the Oregon appellate courts. Or. R. App. Pr. 5.15(2).

<sup>3</sup> Supt. Or. S. Ct. Br. refers to the Superintendent’s Brief on the Merits filed in the Oregon Supreme Court.

“in the head repeatedly with the bat.” (*Id.*). He hit R.R. “so hard that blood flew onto the ceiling and the walls of the bedroom.” (*Id.*).

When the victims were no longer moving, respondent and Laycelle searched the house for car keys. (*Id.*). Respondent took a wedding ring off of G.R.’s hand and took a knife from the nightstand drawer. (*Id.*). Respondent and his brother found a key they thought might be to the victims’ car. (*Id.* at 10). They went out to the garage to attempt to start the car with that key. (*Id.*). When it did not work, they returned to the victims’ bedroom. (*Id.*). The brothers found G.R. attempting to crawl on the floor by her bed and Laycelle “started wrestling with her again hitting her repeatedly with his fists, stopping only after she stopped moving.” (*Id.*). Respondent personally caused R.R.’s death. (*Id.*). Respondent “intentionally encouraged, promoted, and assisted Laycelle \* \* \* in the planning and commission of the crimes that resulted in the death of [G.R.]” (*Id.*). Respondent and Laycelle returned to the garage and successfully stole the victims’ vehicle. (*Id.*).

Respondent and his brother were initially charged in juvenile court but, based on the seriousness of the crimes, the state moved to remand the cases to adult court. (*Id.* at 11). After a lengthy hearing, the juvenile court remanded both respondent and Laycelle to adult court. (*Id.* at 12); Or. Rev. Stat. § 419C.349 (1993). In early 1995, following a stipulated-facts trial, respondent was convicted of aggravated murder (Or. Rev. Stat. § 163.095 (1993)) and murder (Or. Rev. Stat. § 163.115 (1993)). (Pet. App. 2a).

For the aggravated murder conviction, the trial court imposed a sentence of life in prison, with the possibility of parole after 30 years. (Pet. App. 14a); Or. Rev. Stat. § 163.105(1)(c) (1993). For the murder conviction, the trial court imposed a discretionary upward-departure sentence of 800 months (almost 67 years) in prison, to be served concurrently to the aggravated murder sentence.<sup>4</sup> (Pet. App. 14a); Or. Rev. Stat. § 163.115 (1993). The murder sentence was imposed pursuant to state sentencing guidelines and upward-departure factors found by the sentencing court. (Supt. Or. S. Ct. Br. 14). Although respondent is eligible for good-time credit that could reduce his sentence by up to 13 years, *see* Or. Admin. R. 291-097-0215 (setting out rules for credits that reduce time of incarceration), he is *not* eligible for parole for his murder sentence. (Pet. App. 15a). Among the departure factors found and relied on by the sentencing court were “the brutality of the crime,” (Supt. Or. S. Ct. Br. 14-15); respondent’s premeditation in committing the crime, (*Id.* at 15); and the “particular vulnerability of the victims,” including the fact that respondent “sought out victims who were old, frail and defenseless,” (*Id.*). The sentencing court also observed that respondent had been given “many chances” “over a long period of time” before choosing to commit “a crime as brutal and as ugly as this crime.” (*Id.* at 14). The court explained that respondent and his brother “beat these

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<sup>4</sup> Respondent was also given a 36-month sentence for a related robbery conviction. Or. Rev. Stat. § 164.395 (1993). That sentence was consecutive to the other two sentences. (Pet. App. 14a).

people for a long, long time until they were dead.” (Pet. App. 25a). It emphasized that most people “cannot even imagine [a] scene as messy and as gruesome” as the crime scene here. (Pet. App. 25a).

Ultimately, the sentencing court concluded that respondent was responsible for his conduct, and that the only way to protect society was to imprison respondent for a long time:

*I don't think you have the internal control to control your behavior... [U]ltimately the responsibility for our conduct, [for] each of us, is ourselves. No matter the past, no matter the reasons, no matter the failures of the system to intervene earlier, to give more treatment at an earlier stage, no matter about anything else, you did what you did. And the simpl[e] matter is we can't afford to take a chance on you ever again.*

(Pet. App. 25a-26a (emphasis added)).

### **B. Direct appeal and prior post-conviction challenges**

Respondent's convictions and sentences were affirmed without a written opinion on direct appeal. *State v. White (Lydell)*, 911 P.2d 1287 (Or. App.), *rev. den.*, 920 P.2d 550 (Or. 1996). Respondent then filed two petitions for state post-conviction relief, raising constitutional challenges to his sentences. *White (Lydell) v. Thompson*, 991 P.2d 63 (Or. App. 1999), *rev. den.*, 994 P.2d 132 (Or. 2000); *White (Lydell) v.*

*Hill* (A130478) (Or. App. 2007). The Oregon courts denied relief in both petitions.

**C. Successive post-conviction proceedings underlying this petition**

In 2011—16 years after respondent’s conviction—respondent filed a third petition for state post-conviction relief. (Pet. App. 2a-3a). Respondent alleged that his 67-year sentence for murder was illegal under the Eighth and Fourteenth Amendments, as interpreted by this Court in *Miller*, where this Court held that the Eighth Amendment barred a mandatory life sentence, without the possibility of parole, for most juvenile offenders. (Pet. App. 2a). According to respondent, his 67-year sentence for murder violated *Miller*, despite the fact that it was not a mandatory sentence. (Pet. App. 2a).

The superintendent moved for summary judgment, arguing that the petition was procedurally barred under Or. Rev. Stat. § 138.510(3)(b) (statute of limitations) and Or. Rev. Stat. § 138.550(3) (prohibition on successive post-conviction relief petitions). The post-conviction court agreed with the superintendent, granted his motion for summary judgment, and dismissed the petition for post-conviction relief. The Oregon Court of Appeals affirmed. (Pet. App. 3a, 27a-43a). *White (Lydell) v. Premo*, 397 P.3d 504 (Or. App. 2017).

The Oregon Supreme Court reversed. First, the court held—as a matter of state law—that respondent’s procedural default should be excused because the constitutional challenge to his sentence could not reasonably have been raised before this

Court decided the line of cases culminating in *Miller* and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). (Pet. App. 14a). The Oregon Supreme Court then addressed the merits of respondent's Eighth Amendment challenge, and it held that respondent's sentence violated the Eighth Amendment. In so concluding, the Oregon Supreme Court reached three discrete holdings: (1) *Miller* and *Montgomery* apply to lengthy term-of-years sentences that are the "functional equivalent" of true-life sentences; (2) *Miller* and *Montgomery* prohibit non-mandatory true-life sentences for juvenile offenders without a determination by the sentencing court indicating that the crimes reflect "irreparable corruption"; and (3) the sentencing court in this case failed to appropriately consider whether respondent "is one of the rare juvenile offenders whose crimes demonstrate irreparable corruption" making him eligible for a true-life sentence. (Pet. App. 14a-26a).

With regard to the second holding—the only one at issue in this petition—the Oregon Supreme Court rejected the state's argument that so long as the sentencing court had the discretion to impose a lesser sentence, the court was not required to make any particular finding to justify a true-life sentence. The holding was as follows:

The superintendent is factually correct in his observation that the 800-month sentence that the sentencing court imposed was not a mandatory sentence and that the court took [respondent's] individual characteristics into consideration in imposing it. But,

as noted, *Miller* did more than require that a trial court engage in individualized sentencing; it prohibited a trial court from irrevocably sentencing a juvenile to life in prison without determining that the juvenile is one of the ‘rare’ offenders ‘whose crimes reflect irreparable corruption.’

(Pet. App. 20a-21a (quoting *Montgomery*, 136 S. Ct. at 734)). Whether the Oregon Supreme Court correctly decided this question will be answered by this Court in *Malvo*. (Pet. App. 21a n.10.)

### REASONS FOR GRANTING THE PETITION

On March 18, 2019, this Court granted a petition for a writ of certiorari in *Mathena v. Malvo*, 139 S. Ct. 1317 (2019) (No. 18-217). The issue presented in *Malvo* is the same one presented in this case. The specific question presented in *Malvo* is whether *Montgomery*—which applied, by its terms, only to “mandatory” sentences—substantively expanded the rule from *Miller* to apply also to non-mandatory sentences. Although the petitioner in *Malvo* worded the question presented differently from the one presented in this petition, the substance of the issue is the same: Does the Eighth Amendment’s restriction on true-life sentences for juveniles convicted of murder apply only to *mandatory* true-life sentences, or does it also apply to true-life sentences imposed under a statutory scheme that granted the trial court discretion to impose a lesser sentence? Therefore, a decision in *Malvo* will affect this case and all other pending challenges to non-mandatory juvenile true-life sentences.

If, in *Malvo*, this Court holds that the Eighth Amendment prohibits only mandatory true-life sentences for juveniles, then sentencing schemes, as here, that permit consideration of an offender's individual circumstances and characteristics—including youth—do not violate the Constitution. Because respondent did not receive a mandatory true-life sentence, such a ruling in *Malvo* would support reversal in this case. Granting the petition for a writ of certiorari in this case will ensure that this Court's decision in *Malvo* will be applied not only to this case, but also to pending and future Oregon cases that involve a similar issue.

### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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