No. 19-7794

IN THE

Supreme Court of the United States

JEREMY SHANE FOGLEMAN,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

On Petition for a Writ of Certiorari to the Mississippi Supreme Court

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

This case presents an important question left unresolved after *Alleyne v. United States*, 570 U.S. 99 (2013): whether the Sixth Amendment requires a jury to make any factual finding that increases a criminal defendant's mandatory minimum sentence by automatically restricting his eligibility for parole. The State concedes that this question has divided state courts of last resort. BIO 23. It also concedes the question's nationwide importance, recognizing the "far-reaching consequences" of a decision in petitioner's favor. *Id.* 25; *see also* Amici Br. 12 (issue "has sweeping consequences for criminal defendants across the nation").

The State instead opposes certiorari based on two alleged vehicle concerns. Neither has merit. First, this case is not moot because petitioner continues to suffer collateral consequences from the trial court's having designated his conviction a crime of violence under Mississippi law. They include, among others, permanent ineligibility for expungement and inmate rehabilitation programs. A favorable decision by this Court would redress those collateral consequences, just as the Mississippi Court of Appeals' unanimous decision did before it was reversed. Second, petitioner's subsequent convictions in a separate case are irrelevant to the question presented here and this Court's consideration of it. Not only are those convictions not part of the record in this case, but none was designated a crime of violence. The only conviction giving rise to the collateral consequences that a favorable decision by this Court would redress is the one at issue here.

In fact, this case is an excellent vehicle. The constitutional question is cleanly presented and pre-

served for this Court's review—it is, as the State acknowledges, the "sole claim" at issue. BIO 6. That claim, moreover, is not subject to a charge of harmless error, which is why the State raises none. And it arrives to this Court on direct review from a sharply divided Mississippi Supreme Court.

Whether *Alleyne* invalidates state laws requiring sentencing courts to impose increased periods of parole ineligibility based upon judge-found facts has generated widespread confusion. Only this Court can resolve that confusion, and it should take the opportunity to do so now.

I. The State Concedes That Lower Courts Are Intractably Divided on an Issue of Nationwide Importance.

The existence of an entrenched split among state courts of last resort is beyond dispute. BIO 23. A divided court below exacerbated that split when it "disagree[d] with the analysis" of two other state supreme courts that had reached the opposite conclusion. Pet.App.E.8.

Unable to deny the conflict, the State attempts to downplay it. First, the State claims that the conflict is "thin" because the division is "three to three"—with Mississippi joining "at least" Illinois and Kentucky on one side against Kansas, Michigan, and New Jersey on the other. BIO 23 & n.17. In fact, the split runs deeper. *See* 6 Wayne R. LaFave et al., *Criminal Procedure* § 26.4(i), at n.227 (4th ed. 2019) (including Ohio and Pennsylvania). But even if the State's conservative estimate were accurate, it more than suffices for this Court to intervene. *See, e.g.*, *Currier v. Virginia*, 138 S. Ct. 355 (2017) (granting review despite respondent's claim that the split was three to three).

Second, the State asserts that the conflict is "artificial in many respects," citing only the Michigan Supreme Court's decision in *People v. Lockridge*, 870 N.W.2d 502 (Mich. 2015). BIO 23-24. The State focuses on *Lockridge* because that case, unlike others the State cites, did not involve the constitutionality of a particular statute. But *Lockridge*'s reasoning, which the State omits, proves that distinction illusory. *Lockridge* held Michigan's sentencing guidelines unconstitutional under *Alleyne* insofar as they required a judge to increase a defendant's minimum sentence based on judicial factfinding. 870 N.W.2d at 513-14. In Michigan, critically, a minimum sentence "determines when that defendant is eligible for parole consideration." *Id.* at 516. Rejecting the argument that *Alleyne* does not apply because "there is no constitutional entitlement to parole,"[1] *Lockridge* concluded that judge-found facts automatically postponing a defendant's eligibility for parole violate the Sixth Amendment. *Id.* at 516-17. That conclusion is in direct conflict with the decision below, which is why the majority had to expressly "disagree" with it. Pet.App.E.8.

Only this Court can resolve that conflict, and it should do so now because the lower courts are in disarray. Take this case as an example. Nine judges of the Mississippi Court of Appeals, sitting en banc, found that the trial court's crime-of-violence designation at sentencing violated the Sixth Amendment under *Alleyne*. Pet.App.B.[2] But a bare majority of the Mississippi Supreme Court disagreed, holding five to

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[1] The majority below embraced the same argument, Pet.App.E.8, and the State advances it here, BIO 17 & n.11.

[2] The tenth concurred in the judgment. Pet.App.B.9.

three that there was no violation. In this case alone, then, the split among appellate jurists is twelve to five in petitioner's favor.

Mississippi is not alone in its confusion. The Michigan Supreme Court divided five to two in *Lockridge*. And courts in Illinois and Kentucky, though encamped on their side of the divide, have expressed uncertainty about their holdings. *See Biederman v. Commonwealth*, 434 S.W.3d 40, 46 (Ky. 2014); *People v. Gray*, No. 1-14-3474, 2017 WL 2800019, at *11 (Ill. App. Ct. June 26, 2017) (unpublished).

The Court should resolve this "important federal question" on which state courts of last resort are in "conflict[]." Sup. Ct. R. 10(b). Although the State tries to dissuade the Court from considering the question presented because of its "far-reaching consequences," BIO 25, that is a reason to grant certiorari, not deny it, *see* Amici Br. 6-12 (citing "[a]t least fifteen states" with constitutionally suspect statutes). So is the entrenched nature of the split. Mississippi, for instance, has already doubled down on its position. *See Bowman v. State*, 283 So. 3d 154, 168 (Miss. 2019) (rejecting *Alleyne* challenge to Section 97-3-2 in light of the decision below). Further percolation in the lower courts will only prolong the uncertainty about the meaning of the Sixth Amendment's jury trial right.

II. The State's Alleged Vehicle Concerns Lack Merit.

There is no dispute that the Sixth Amendment question is cleanly presented and perfectly preserved here. Nor is there any question of harmless error. The State instead asserts two related vehicle concerns, neither of which has merit.

1. The case is not moot. Petitioner can easily show "some ongoing 'collateral consequenc[e]' that is 'traceable' to the challenged portion of the sentence and 'likely to be redressed by a favorable judicial decision.'" *United States v. Juvenile Male*, 564 U.S. 932, 936 (2011) (per curiam) (quoting *Spencer v. Kemna*, 523 U.S. 1, 7 (1998)). One concrete, collateral consequence is petitioner's permanent ineligibility for expungement: "a person is not eligible to expunge a felony classified as . . . [a] crime of violence as provided in Section 97-3-2." Miss. Code Ann. § 99-19-71(2)(a)(i). That consequence is directly traceable to the challenged portion of petitioner's sentence—*i.e.*, the crime-of-violence designation under Section 97-3-2. Resp.App.13a-14a. And it would be redressed by a favorable decision from this Court, just as it was when the Mississippi Court of Appeals found in petitioner's favor and eliminated the designation. *See* Pet.App.B.8 (reversing and rendering "the provisions of Fogleman's sentence stating that it shall be served as a sentence for a 'crime of violence' pursuant to section 97-3-2(2)").

There is nothing "speculative" about petitioner's ineligibility for expungement. BIO 12. He is not eligible. That is true today, with certainty, because of the trial court's crime-of-violence designation. So this case is unlike *Spencer*, where the asserted collateral consequences depended on the existence of a "future parole proceeding," a "future sentencing proceeding," or a "future criminal or civil proceeding." 523 U.S. at 14-15. And it is unlike the "possible, indirect benefit in a future lawsuit" asserted in *Juvenile Male*. 564 U.S. at 937.

In a footnote, the State implies that petitioner might still be eligible to have his crime of violence expunged. BIO 13 n.8. But to reach that result, a court would

have to conclude that petitioner's crime of violence under subsection (2) of Section 97-3-2 is somehow not a "crime of violence as provided in Section 97-3-2." No Mississippi court has ventured such an antitextual reading of the statute, which is why no citation graces the State's footnote. That a court might someday do so is speculative, to say the least.

Ineligibility for expungement, moreover, is a sufficiently serious collateral consequence. Expungement is a meaningful remedy: "The effect of the expunction order shall be to restore the person, in the contemplation of the law, to the status he occupied before any arrest or indictment for which convicted." Miss. Code Ann. § 99-19-71(3). Access to that remedy is fundamental for someone like petitioner.

The Sixth Circuit's recent decision in *Sullivan v. Benningfield*, 920 F.3d 401 (6th Cir. 2019), is instructive. There, the defendants argued that the plaintiffs' release from jail mooted their claims seeking a thirty-day sentencing credit. *Id.* at 412. The plaintiffs responded that awarding them the credit retroactively "would allow them to pursue expungement 30 days sooner" under Tennessee law. *Id.* at 413. The court agreed with the plaintiffs, finding their allegation "that the 30-day sentencing credit would accelerate their access to expungement" a sufficiently "concrete" collateral consequence. *Id.* The court so held even though the ultimate decision on expungement is discretionary in Tennessee, as it is in Mississippi. *See* Tenn. Code Ann. § 40-32-101(g)(5). Merely delaying plaintiffs' "*access* to expungement" by thirty days was enough. *Sullivan*, 920 F.3d at 413 (emphasis added). It follows that permanently denying petitioner access to expungement is a sufficient collateral consequence to overcome the State's suggestion of mootness. *See*

also State v. Golston, 643 N.E.2d 109, 112 (Ohio 1994) (finding defendant's loss of "statutory right to seek expungement" a sufficient collateral consequence).

So too is petitioner's permanent ineligibility for participation in Mississippi's state-county work program. Pet. 14-15. The State attempts to lump this rehabilitation program in with other "alternative sentencing opportunities" that it claims petitioner "cannot benefit from" anymore. BIO 11-12. But this program is available to inmates like petitioner so long as they are eligible. *See* Miss. Code Ann. § 47-5-471. Petitioner is not, however, because he was "convicted of . . . a crime of violence as defined by Section 97-3-2." *Id.*

Furthermore, petitioner's challenge is not just that he received a harsher sentence, but that he was effectively convicted of a more serious crime, all based on judicial factfinding. His case is moot, then, "only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction." *Sibron v. New York*, 392 U.S. 40, 57 (1968) (cited at BIO 10). The State cannot make that showing because petitioner's crime-of-violence conviction continues to expose him to a host of additional consequences. For example, petitioner may now be sentenced to life imprisonment under Mississippi's more severe habitual offender law because he was "convicted" of a "crime of violence, as defined by Section 97-3-2." Miss. Code Ann. § 99-19-83. That possibility has not been foreclosed,[3] and it is enough to establish a live controversy. *See, e.g.*, *Evitts*

[3] Petitioner still faces exposure under Section 99-19-83. That remains true even though he was recently sentenced under a different habitual offender statute. Resp.App.19a-21a (citing Miss. Code Ann. § 99-19-81).

v. Lucey, 469 U.S. 387, 391 n.4 (1985) (case "not moot" because of "the possibility" respondent's conviction "would be used to subject him to persistent felony offender prosecution"); *Sibron*, 392 U.S. at 55-56 (possibility that conviction could be used at "sentencing should Sibron again be convicted of a crime" was sufficient).

Any of the foregoing consequences defeats the State's mootness argument, which, the State admits, it did not raise below. BIO 7 n.6. While the State's failure to raise mootness before either of the Mississippi appellate courts does not preclude this Court from evaluating the existence of a case or controversy, the State's belated claim reflects how weak the argument is. The State now contends that petitioner's case has been moot since 2016. *Id.* at 2. Yet the State did not raise the issue below in any of the three briefs it filed thereafter.[4] To the contrary, the State highlighted several collateral consequences of a "crime-of-violence determination" in its principal brief, including "eligibility for parole" and "eligibility for habitual offender enhancements." 2017 WL 6760483, at 7. The State never hinted that the case might be moot, and it recently argued that a similar case was not moot because of ongoing collateral consequences. *See State v. Runnels*, 281 So. 3d 148, 151 n.5 (Miss. Ct. App. 2019) ("[T]he State argues that where a party can show 'collateral consequences' flowing from the action, the case would not be made moot upon the inmate's

[4] *See* Appellee Br., *Fogleman v. State*, 2017 WL 6760483 (Miss. Ct. App. Mar. 8, 2017); Mot. for Reh'g, *Fogleman v. State* (Miss. Ct. App. Oct. 15, 2018); Pet. for Certiorari, *Fogleman v. State* (Miss. Jan. 24, 2019).

release."). The State's repeated failure to assert mootness below undercuts its attempt to do so here.

2. The State's other vehicle argument is related to its first and therefore fails for similar reasons. Repackaging its mootness argument, the State claims that answering the question presented in this case "makes no difference" to petitioner. BIO 3, 22. But a favorable decision would make a difference: it would eliminate the only crime-of-violence designation from petitioner's record and all the collateral consequences associated with it. None of petitioner's 2020 convictions was designated a crime of violence. *See* Resp.App.19a-21a. Only his 2016 conviction was. *Id.* 13a-14a. So the 2020 convictions, in addition to being irrelevant to the question presented and not part of the record here, have no impact on the collateral consequences that petitioner continues to suffer because of the 2016 crime-of-violence designation. The 2020 convictions are a red herring.

III. The State's Merits Arguments Are No Reason to Deny Review.

The State spends the most time arguing the merits. BIO 13-22. These arguments, of course, are no reason to deny certiorari. Rather, they underscore the ongoing debate around the question presented and the pressing need for this Court to answer it.

The State's merits arguments, in any event, are unconvincing. "When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury." *Alleyne*, 570 U.S. at 114-15. "And that is exactly what occurred here," the dissent below correctly found. Pet.App.E.20. After a jury convicted petitioner of failure to stop a motor

vehicle, the sentencing judge made a factual finding that petitioner had "used physical force against another person." Resp.App.14a. That finding transformed petitioner's offense into a "crime of violence" under Mississippi law. Miss. Code Ann. § 97-3-2(2). The crime-of-violence designation, in turn, *required* the judge to sentence petitioner to a longer term of parole ineligibility (50 percent) than he would have received based on the jury's verdict alone (25 percent). *Id.* "Section 97-3-2(2)," explained the dissent below, "does not permit the trial court to exercise discretion" once it has made the factual finding. Pet.App.E.20. In other words, the judge-found fact "alter[ed] the legally prescribed punishment so as to aggravate it." *Alleyne*, 570 U.S. at 114. And it did so by automatically increasing the minimum amount of time petitioner must serve in prison, which "heightens the loss of liberty associated with the crime." *Id.* at 113; *see also Hester v. United States*, 139 S. Ct. 509 (2019) (Gorsuch, J., dissenting from denial of certiorari) (jury must find all facts necessary to support "term of incarceration").

Petitioner's case illustrates why the Sixth Amendment forbids this sort of judicial factfinding. Prosecutors indicted him for (and the jury found him guilty of) failure to stop a motor vehicle under Section 97-9-72(2). Resp.App.15a. Then, at sentencing, the judge found by a preponderance of the evidence that petitioner had committed the offense using "physical force against another person"—a fact giving rise to an aggravated punishment that petitioner could not "predict" simply "from the face of the indictment." *Alleyne*, 570 U.S. at 113-14. Petitioner was never charged with using physical force against another, so he had no reason to "prepare his defence" against it. *Id.* at 111 (quotation marks omitted). Yet he was

sentenced for the new, more serious crime of failure to stop a motor vehicle while using physical force against another. That is what violates the Sixth Amendment. *See id.* at 115.

The State claims repeatedly that there can be no Sixth Amendment violation because the sentence petitioner received—five years—was within the range authorized by the jury's verdict. BIO 5-6, 15 & n.9. But "this fact is beside the point." *Alleyne*, 570 U.S. at 114. "It is no answer," this Court emphasized, "to say that the defendant could have received the same sentence with or without" the fact that should have been submitted to a jury. *Id.* at 115.

As Justice Gorsuch explained recently, "Both the 'floor' and 'ceiling' of a sentencing range 'define the legally prescribed penalty.'" *United States v. Haymond*, 139 S. Ct. 2369, 2378 (2019) (plurality opinion). Because the trial court's factual finding increased the statutorily prescribed floor, it is irrelevant that petitioner's sentence—like Alleyne's and Haymond's—"fell within the statutory sentencing range authorized by the jury's findings." *Id.* What matters under the Sixth Amendment is that judge-found facts "increased 'the legally prescribed range of allowable sentences.'" *Id.*

Here, the trial court's factual finding increased petitioner's legally prescribed minimum sentence from 25 percent to 50 percent of his five-year term, exposing him "to a greater punishment than that authorized by the jury's guilty verdict." *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000). The dissent below is correct that such an "elevation in punishment, dependent upon a judicial fact finding, violates the *Apprendi* rule." Pet.App.E.20-21. This Court should grant review and reach the same conclusion.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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