No. 18-7923

ORIGINAL

October Term 2018

IN THE

SUPREME COURT OF THE UNITED STATES

DERRICK JONES — PETITIONER
(Your Name)

vs.

JAMES M. LEBLANC, Secretary, Louisiana Department of Corrections — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States District Court for the Eastern of Louisiana
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Derrick Jones
(Your Name)

La. State Penitentiary, 17544 Tunica Trace
(Address)

Angola, Louisiana
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION PRESENTED FOR REVIEW

(1) Could jurists of reason debate whether Louisiana may, consistent with the Due Process Clause's fair notice requirement, judicially invent a new procedure to remedy the substantive rule change this Court announced and applied that procedure retrospectively?

(2) Could jurists of reason debate whether Louisiana may, consistent with Due Process, indefinitely detain juvenile non-homicide offenders without a legislatively prescribed sentence provision?

(3) Could jurists of reason debate whether Louisiana may, consistent with the *Ex Post Facto* Clause and *Graham v. Florida*, judicially impose a new, non-retroactive remedy to juveniles sentenced to life without parole for non-homicide offenses?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 2018

DERRICK JONES
Petitioner

versus

JAMES M. LEBANC, Secretary
Louisiana Department of Public Safety and Correction
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Derrick Jones respectfully prays that a writ of certiorari issue to review the judgment of the United States Fifth Circuit Court of Appeals entered in this proceeding on October 15, 2018. This petition presents important issues regarding juvenile non-homicide juvenile offenders receiving "fair notice" of the substantive sentencing provision legislatively prescribed, the Eighth Amendment's "disproportionately" principle and an ex post facto violation in regard to that have been decided by the United States District Court for the Eastern District of Louisiana in conflict with the decisions of this Court. Sup.Ct.R. 10(c). These issues have not been, but must be, decided by this Court.

OPINION BELOW

The October 15, 2018 opinion of Court of Appeals denying panel rehearing is unpublished but has been attached at "Appendix A." The September 4, 2018 Circuit Court Judge opinion denying Mr. Jones a COA is unpublished but has been attached at "Appendix B." The March 17, 2017 Report and Recommendation of the United States Magistrate for the Eastern District of Louisiana is unpublished but has been attached as "Appendix C." The November 2, 2017 judgment of the United States District Court For the Eastern District of Louisiana judgment denying Mr. Jones COA is unpublished and attached as "Appendix D."

JURISDICTION

The United States court of appeals denied petitioner's application for Certificate of Appealability on September 4, 2018. A Motion for Panel Reconsideration was timely filed but denied on October 15, 2018. Therefore, this court has jurisdiction under 28 U.S.C § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the Constitution provides in pertinent part:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law;. . ."

2. The Eighth Amendment to the Constitution provides in pertinent part:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

3. The Fourteenth Amendment to the Constitution provides in pertinent part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

4. **Article I § 9, Clause 3 of the Constitution provides:**

"No. . . ex post facto law shall be passed."

5. **Article I § 10, Clause 1 of the Constitution provides:**

"No State shall. . . pass any. . .ex post facto Law"

6. **28 U.S.C. § 2253 provides in pertinent part:**

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

* * *

A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

* * *

The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

8. **LSA-R.S. 15:574.4** states in pertinent parts:

A (1) A person, otherwise eligible for parole, convicted of a first felony offense and committed to the Department of Public Safety and Corrections shall be eligible for parole consideration upon serving one-third of the sentence imposed; upon conviction of a second felony offense, such person shall be eligible for parole consideration upon serving one-half of the sentence imposed. A person convicted of a third or subsequent felony and committed to the Department of Public Safety and Corrections shall not be eligible for parole.

* * *

(3) Notwithstanding the provisions of Paragraph (A)(1) or any other law to the contrary, unless eligible for parole at an earlier date, a person committed to the Department of Corrections for a term or terms of imprisonment with or without benefit of parole for thirty years or more shall be eligible for parole consideration upon serving at least twenty years of the terms or terms of imprisonment in actual custody and upon reaching the age of forty-five. *This provision shall not apply to a person serving a life sentence unless the sentence has been commuted to a fixed term of years.*

(B) No person shall be eligible for parole consideration who has been convicted of armed robbery and denied parole eligibility under the provisions of R.S. 14:64, or who has been conviction of violation of the

Narcotic Drug Law and denied parole eligibility under the provisions of R.S. 40:981. *No prisoner serving a life sentence shall be eligible for parole consideration until his life sentence has been commuted to a fixed term of years.* No Prisoner may be paroled while there is pending against him any indictment or information for any crime suspected of having been committed by him while a prisoner.

LSA-R.S. 15:574.4(D) stated in pertinent parts:

D. (1) Notwithstanding any provisions of law to the contrary, any person a sentence of life imprisonment who was under the age of eighteen years at the time of the commission of the offense, except for a person serving a life sentence for a conviction of first degree murder (R.S. 14:30) or second degree murder (R.S. 14:30.1), shall be eligible for parole consideration pursuant to the provisions of this Subsection if all of the following conditions have been met:

(a) The offender has served thirty years of the sentence imposed.

(b) The offender has not committed any disciplinary offenses in the twelve consecutive months prior to the parole eligibility date.

(c)The offender has completed the mandatory minimum of one hundred hours of prerelease programming in accordance with R.S. 15:827.1

(d) The offender has completed substance abuse treatment as applicable

(e) The offender has obtained a GED certificate, unless the offender has previously obtained a high school diploma rot is deemed by a certified educator as being incapable of obtaining a GED certification due to a learning disability. If the offender is deemed incapable of obtaining a GED certification, the offender shall complete at least one of the following:

(i) A literacy program

(ii) An adult basic education program

(iii) A job skills training program.

(f) The offender has obtained a low-risk level designation determined by a validated risk assessment instrument approved by the secretary of the Department of Public Safety and Corrections.

(g) The offender has completed a reentry program to be determined by the Department of Public Safety and Corrections.

(h) If the offender was convicted of aggravated rape, he shall be designated a sex offender and upon release shall comply with all sex offender registration and notification provisions as required by law.

(2) For each offender eligible for parole consideration pursuant to the provisions of this Subsection, the committee shall meet in a three-member panel and each member of the panel shall be provided with and shall consider a written evaluation of the offender by a person who has expertise in adolescent brain development and behavior and any other relevant evidence pertaining to the offender.

(3) The panel shall render specific findings of fact in support of its decision.

STATEMENT OF THE CASE

I. INTRODUCTION

This case aligns perfectly with the Court's criteria for granting review. The first question presented - whether the Fifth Amendment requires that a non-homicide juvenile offender receive fair notice of the substantive penalty he will received if convicted - is one of first impression among federal circuits and state courts of last resort. Mr. Jones filed his federal habeas petition raising, inter alia, a fifth amendment due process claim that he was denied his liberty without first given fair notice of the substantive penalty provision prescribed by the legislature.

Intervening precedent from this Court establishes that Graham's announcement of a substantive rule change abrogates the district court erroneous ruling Mr. Jones did not have a reasonable expectation that Graham violations - substantive rule changes - require penalties legislatively prescribed. However, the court denied Mr. Jones relief and concluded he was did not satisfy the threshold showing necessary for a Certificate of Appealability ("COA") As a result, a sentence the constitution prohibits the state from imposing on Mr. Jones - life without parole, probation or suspension of sentence - has been allowed to remain intact without any regard for the fundamental principles of "fair notice" and "proportionate sentencing" our criminal justice system rest upon.

II. State Court Collateral Proceeding

A. Mr. Jones' Motion to Correct

In 2016, this Court made the announcement that Graham and Miller announced substantive constitutional rule changes that prohibited state official from sentencing juvenile non-homicide offenders to life without parole abrogating Louisiana's holding that

Grahman represented a procedural rule change.[1] Derrick Jones submitted a Motion to Correct Illegal Sentence and Memorandum in Support in the Criminal District Court asking that the court's illegal sentencing procedure of deleting parole consideration from the substantive penalty provision of aggravated rape and direct the Department of Correction to amend their record to allow parole consideration for Mr. Jones and juvenile offenders similarly situated.

The court denied Mr. Jones relief on May 26, 2016 and he sought review in the Fourth Circuit Court of Appeal and denied relief on August July 28, 2016.[2] The Louisiana Supreme Court denied certiorari January 9, 2018.[3]

B. Federal Habeas Proceedings

On January 27, 2016, Mr. Jones filed his petition for Writ of Habeas Corpus Relief in the United States District Court, Eastern District of Louisiana claiming that the state court violated his fifth amendment due process right to "fair notice" of his sentence, the trial court imposed a sentence not prescribed by statute at the time the offense was committed and violation of his right against ex post facto laws.

United States Magistrate Michael B. North recommended that Mr. Jones' petition be dismissed with prejudice concluding the state court's denial of relief on the claims Jones "was not contrary to, or an unreasonable application or, clearly established federal law, as determined by the Supreme Court of the United States." United States District Judge Jane Triche-Milazzo adopted the Magistrate's Report and Recommendation on November 2, 2017. She also denied Mr. Jones a certificate of

1 Montgomery v. Louisiana, 136 S.Ct. 718 (2016).
2 State ex rel Derrick Jones v. State of Louisiana, 2016-K-0700 (La. App. 4 Cir. 2016)
3 State ex rel Derrick Jones v. State of Louisiana, 231 So. 652 (La. 2018)

appealability to challenge the magistrate's ruling. However, the court did grant Mr. Jones permission to proceed in forma pauperis on December 4, 2017. Consequently, Jones requests that this Court issue a COA.

REASONS FOR GRANTING THE PETITION

The Court of Appeal, like the district court, relied on the magistrate's report and recommendation which rest on two factual incorrect statements of law concerning historical developments in the areas of disproportionate sentencing. The magistrate seems to think this Honorable Court has never required state courts to resentence non-juvenile homicide offender to a legislatively prescribed penalty but only required state courts to substitute the constitutional right with a reformatory procedure. While adult offenders enjoy sentencing guideline protection, diminution of sentence, excessive sentence and the sentencing discretion of the "sentencer," non-homicide offenders in Louisiana are denied such rights.

Mr. Jones, like other juveniles in Louisiana who were sentenced to life without parole after having been convicted of non-homicide offenses, has never been afforded a constitutionally required individualized penalty dictated by the trilogy of juvenile cases - Graham, Miller and Montgomery. Instead, Louisiana insists on passing off the judicial responsibility of imposing a substantive penalty to the Parole Board in every case ignoring this Court's substantive constitutional rule charge.

Several federal court have interpreted Graham to mandate that non-homicide juvenile offenders (and homicide juvenile offenders "whose crime reflect transient immaturity") receive an individualize sentence and not just have the parole board decide their fate. Louisiana lower courts ignored Mr. Jones claims that it is unconstitutional to

deny non-homicide juvenile offenders their liberty without a legislatively prescribed sentence provision.

Because the division of authority results from different interpretations of this Court's decisions in Graham, Montgomery, Rogers v. Tennessee, 532 U.S. 451, 457 (2001) and Bouie v. City of Columbia, 378 U.S. 347 (1964), only this Court can resolve the disagreement.

ARGUMENT

1. The Court of Appeals for the Fifth Circuit Has Decided A Federal Question In A Way Which Conflicts with Relevant Decisions of This Honorable Court

This Honorable Court announced a substantive constitutional rule change making life without parole for juveniles convicted of non-homicide offenses disproportionately unconstitutional. This activated petitioner's due process right to "fair warning" of the substantive penalty the state's legislature intended for him to serve upon conviction of the crime charged. It is clearly established by this Honorable Court that "[a]. . . sentence imposed in violation of a substantive rule is not just erroneous but contrary to law and, as a result, void. . . [i]t follows, as a general principle, that a court has no authority to leave in place a . . . sentence that violates a substantive rule. . . regardless of whether the . . . sentence became final before the rule was announced."[4]

It is "clearly established" by this Honorable Court that the principle of "fair warning" has long been part of our system of justice, *United States v. Bass,* 404 U.S. 336, 348, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971), and is recognized as "fundamental to our concept of constitutional liberty," *Marks v. United States,* 430 U.S. 188, 97 S.Ct.

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4 *Montgomery v. Louisiana,* 136 S.Ct. 718, 731 (2016) (citing *Ex parte Siebold,* 100 U.S. 371, 376, 25 L.Ed. 717 (1880) ("an unconstitutional law is void, and is as no law.").

990, 51 L.Ed.2d 260 (1977). Due Process also guarantees that "a person receive fair notice not only of the conduct that will subject him to punishment, but also the severity of the penalty that a State may impose." *BMW of N. Am. v. Gore*, 517 U.S. 559, 574, 116 S.Ct. 1589, 1598 (1996). "The determination of whether a criminal statute provides fair warning of its prohibitions must be made on basis of the statute itself and other pertinent law, rather than on the basis of ad hoc appraisal of subjective expectations or particular defendants." *Bouie v. City of Columbia*, 378 U.S. 347, 356, 84 S.Ct. 1697 (1964). In *Magwood v. Patterson,* this Honorable Court held that a "fair warning claim could be raised in the habeas corpus petition challenging his [a]. . . sentence that was imposed following a new sentencing hearing."[5]

As early as 1931, Justice Holmes wrote "although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *McBoyle v. United States,* 283 U.S. 25, 27, 51 S.Ct. 340, 75 L.Ed. 816 (1931). Mr. Jones begs the question has he received "fair notice" of what the law intends to do him if found guilty for committing a non-homicide offense.[6] The answer unequivocally is no.

A. Unexpected and Indefensible Judicial Interpretation of Criminal Sentencing Provision

In the 60s and 70s, this Honorable Court decided a pair of cases that invalidate mandatory death penalties for first degree murder (R.S. 14:30), aggravated rape (R.S. 14:42) and aggravated kidnapping (R.S. 14:44). See *Witherspoon v. Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968); *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct.

5 Id. 561 U.S. 320, 130 S.Ct. 2788, 2803, 177 L.Ed.2d 592 (2010)
6 Graham v. Flordia, 560 U.S. 48, 68 (2010).

2726, 33 L.Ed.2d 346 (1972). To comply with this Court's rulings, the Louisiana Supreme Court ordered trial courts to resentence defendants convicted of aggravated rape to life imprisonment without parole. E.g., *State v. Shaffer*, 260 La. 605, 257 So.2d 121 (1971); *State v. Franklin*, 268 So.2d 249, 263 La. 344 (La. 1972). The Supreme Court concluded that the responsive verdict of guilty without capital punishment was the next authorized verdict for the crime and remanded for resentencing as if that verdict had been returned.

In 1973, the legislature amended La.C.Cr.P. Article 814 to provide that the only responsive verdicts to aggravated rape are guilty, guilty of attempted aggravated rape, guilty of simple rape and not guilty. La. Act No, 126 (1973). Similarly, La.C.Cr.P. 817 was amended to delete the provision authorizing the qualifying verdict "guilty without capital punishment." La. Act No. 125 § 1 (1973). Several years later the United States Supreme Court again decided a pair of cases that invalidated mandatory death penalties for first degree murder (R.S. 14:30), aggravated rape (R.S. 14:42) and aggravated kidnapping (R.S. 14:44) in *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct., 3001, 49 L.Ed.2d 974 (1976) and *Selman v. Louisiana*, 428 U.S. 906, 96 S.Ct. 3214, 49 L.Ed.2d 1212 (1976).

Because La.C.Cr.P. 817 had been deleted at the time those crime occurred, the Louisiana Supreme Court, in order to fix the appropriate sentence, considered what other responsive verdicts the jury might have returned at the time the crime was committed and settled on attempted aggravate rape. The Court rejected the State's recommendation that the defendant be given a sentence of life imprisonment because (1) no lesser included offense of the crime of aggravated rape carried such a penalty at

the time of the commission of this crime, (2) to do so would constitute judicial legislation of an ex post facto law and (3) the legislature obviously intended to impose the most serious penalty available under the law because it deleted Article 817 qualifying verdict. See., e.g., *State v. Burge,* 362 So.2d 1371 (La. 1978); *State v. Lee,* 340 So.2d 180 (La. 1976) *State v. Craig,* 340 So.2d 191 (La. 1976). It then instructed trial courts to resentence defendants whose penalties had been excised by Roberts and Selman to the most serious penalty for the next lesser included offense.

Due process is violated when new judicial interpretations of criminal statutes that are "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue" is applied retroactively. *Rogers v. Tennessee,* 532 U.S. 451, 461, 121 S.Ct. 1693, 1700, 149 L.Ed.2d 697 (2001) (quoting Bouie v. City of Columbia, 378 U.S. 347, 354, 84 S.Ct. 1697, 1703, 12 L.Ed.2d 894 (1964)).

Louisiana's aggravated rape penalty provision in 1989 prohibited parole to any person convicted for the offense. The penological statute governing parole also prohibited parole to offenders sentenced to life. As far back as 1976, the Louisiana Supreme Court held that once Louisiana's aggravated rape penalty is invalidated due process protection requires that the prisoner receive the next serious penalty considered by the jury. Cf. *State v. Kennedy,* 994 So.2d 1287 (La. 2008) (even in cases involving the rape of a child, death penalty should be expanded to instances where the victim's life was not taken". . . we are constrained to . . resentence [defendant] to life imprisonment at hard labor without benefit of parole, probation or suspension of sentence), on remand from this Honorable Court, *Kennedy v. Louisiana,* 128 S.Ct. 2641, 171 L.Ed.2d 525 (2008); *State v. Selman,* 340 So.2d 260 (La. 1976) (we have

concluded that the appropriate sentence to be imposed upon a valid conviction for aggravated rape is the most severe constitutional penalty established by the legislature for a lesser included offense at the time the crime was committed. See La.C.Cr.P.art 814, as amended by Act 1973, No. 126. § 1.), on remand from *Selman v. Louisiana*, 428 U.S. 906, 96 S.Ct. 3214, 49 L.Ed.2d 1212 (1976); *State v. Craig*, 340 So.2d at 194 (since mandatory death penalty has been held unconstitutional and since legislature abrogated responsive verdict of 'guilty without capital punishment' for aggravated rape, defendant was to be resentenced to most serious for the next lesser included offense); *State v. Burge*, 362 So.2d at 1375 (we have consistently held that although the death penalty may be unconstitutional, the prosecution for the offense is nonetheless valid. Where necessary, an improper death sentence is vacated, and the case is remanded for resentencing to the most serious penalty for the next lesser included offense). These cases evince that the Shaffer decision was "unforeseeable."

B. Retroactive Judicial Expansion of Precise Statutory Sentencing Provision

When this offense occurred, LSA-15:574.4 governed parole eligibility (which is determined by the sentence) and eligibility for parole consideration (which is dependent on meeting certain criteria and conditions specified by statute). Subsection A(1) of the scheme provided prisoners parole consideration under the following circumstances: "when a first time offender has served one-third of the sentence imposed or when a second offender has served one-half of the sentence imposed." Id. This provision explicitly excluded prisoner serving life from receiving parole eligibility until the sentence had been commuted to a fixed term of years. Subsection (3) provided that prisoners sentenced to terms of thirty years or longer and who had reached the age of forty-five

were eligible for parole consideration after serving at least twenty years in actual custody. This subsection too explicitly excluded prisoners serving life until his/her sentence was commuted to a fixed term of years. Subsection B excluded prisoners serving life sentences for parole consideration. See LSA-R.S. 15:574.4(B) (West 1989).

When this Honorable Court announced the substantive constitutional rule change in Graham that children under 18-years old who committed nonhomicide offenses could not receive life without parole, Shaffer (who was 16 when his offense (aggravated rape) occurred) filed a motion to correct illegal sentence in the trial court asking that he receive the next most severe penalty in effect when his offense was committed. The trial court denied petitioner's request and he appealed to the Louisiana Supreme Court. That Court denied relief holding: "[w]e agree with relator[] that Louisiana must comply with the Graham decision but reject [his] proposed solution." Shaffer, 77 So.2d 939 (2011). The Court proceeded to severe LSA-R.S. 15:574.4(A)(3) and LSA-R.S. 15:574.4(B).

> "We therefore hold, as me must under Graham, that the Eighth Amendment precludes the state from interposing the Governor's ad hoc exercise of executive clemency as a gateway to accessing procedures the state has established for ameliorating long terms of imprisonment as part of the rehabilitative process to which inmates serving life terms for nonhomicide crimes committed when they were under the age of 18 years would otherwise have access, once they reach the age of 45 years and have served 20 years of their sentences in actual custody. The state thus many not enforce the commutation provisos in La.R.S. 15:574.4(A)(2) and 15:574.4(B) against relators and all other similarly situated persons, and the former provisions offer objective criteria set by the legislature that may bring Louisiana into compliance with the Graham decision."

Id., 942-943.

In Louisiana when a portion of a law is invalidated, the entire law may remain enforceable if the remaining portion of the law is severable. *State v. Dilosa,* 848 So.2d 546, (2003). In determining whether severability is appropriate in a given case, this Honorable Court clearly established: "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." Cf., *Alaska Airlines, Inc. v. Brock,* 480 U.S. 678, 684, 107 S.Ct. 1476, 94 L.Ed.2d 661 (1987) (cautioning that courts cannot rewrite statutes in the name of severance in order "to conform them to constitutional requirement").

Legislatures, not courts, are charged with articulating the authorized penalties for criminal conduct. *Harris v. United States,* 536 U.S. 545, 557, 122 S.Ct. 2406 (2002) (explaining that defining criminal conduct, including its appropriate punishment, is "a task generally left to the legislative branch"). As this standard reflects, severance only works "if the balance of the legislation [can] function[] independently." Id.

> "The test for severability is whether the unconstitutional portion of the law [is] so interrelated and connected with the constitutional parts that they cannot be separated without destroying the intention manifested by the enacting body. If the remaining portion is separate from the offending portion, this Court may strike only the offending portion and leave the remainder intact."

Here, the Court's substantive constitutional rule change made the sentencing provision of R.S. 14:42 unenforceable as pertains to juveniles because what remained of the statute is "incapable of functioning independently." *United States v. Evans,* 333 U.S. 483, 485, 68 S.Ct. 634, 92 L.Ed. 823 (1948). Graham's prohibited the state from

imposing a life sentence without parole on Mr. Jones and as such the state cannot substituted substantive sentencing provision with reformatory sentencing procedure, i.e., LSA-R.S. 15:574.4(A)(2); LSA-R.S. 15:574.4(B) and LSA-R.S. 15:574.4(D), under the guise of severability. Cf., *U.S. v. Under Seal,* 819 F.3d 715, 727 (4th Cir. 2016) ("if the '[d]eprivation of the right to fair warning . . .can result . . .from an unforeseeable and retroactive judicial expansion of statutory language that appears narrow and precise on its face,' Rogers, 532 U.S. at 457, 121 S.Ct. 1693, then surely it can also come from an unforeseeable and retroactive judicial severability analysis that would result in excising an offense's penalty provision so that the penalty for another offense would now apply").

2. Juvenile Non-Homicide Offenders Detained Without A Legislatively Prescribed Sentencing Provision Violate Due Process

The maxim *nullum ponem sine lege* - no punishment without law - is a creature not just of the common law and international law, but the fundamental fairness required by due process under the Louisiana and Federal Constitutions. When this Court invalidated the statutory basis for Jones' punishment in Graham, the only punishment authorized by statute was that of attempted aggravated rape - the next-most-severe sentence considered by the jury.

It is clearly established that the due process clause is violated if an individual is subjected by a court to sanction not provided for or contemplated by legislative authority. E.g., *Bozza v. United States,* 330 U.S. 160, 166, 67 S.Ct. 645 (1947). When this offense was committed, the penalty provision for aggravated rape read: "whoever commits the crime of aggravated rape shall be punished by life imprisonment at hard labor without benefit of parole, probation or suspension of sentence." LSA-R.S. 14:42.

This sentence, as applied to juveniles "whose crime reflects 'unfortunate yet transient immaturity'", was declared unconstitutional in Graham, 560 U.S., at 68, 130 S.Ct., at 2026 (quoting Roper v. Simmons, 125 S.Ct. 1183), thereby leaving Mr. Jones without a valid sentence.[7]

It is the legislature's prerogative to determine the length of a sentence imposed for the crimes classified as felonies, and the courts are charged with applying those punishments unless they are found unconstitutional. *Harmelin v. Michigan*, 501 U.S. 957, 998, 111 S.Ct. 2680 (1991) (". . . the fixing of prison terms for specific crimes involves a substantial penological judgment that, as a general matter, is 'properly within the province of legislatures, not courts"); United States v. Evans, 333 U.S. , at 486, 68 S.Ct. 634. Here, substituting a substantive penalty prescribed by the legislature with a penological device deprives petitioner of liberty without due process. *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980).

3. Retroactive Judicial Expansion Of Precise Sentencing Provision Violate *Ex Post Facto* Clause

After this Honorable Court announcement that Louisiana could not enforce its mandatory life without parole penalty on children convicted for non-homicide crimes because it violated the Eighth Amendment's prohibition on disproportionality, the trial court vacated Jones' life without parole sentence and resentenced him to 50-years in accordance with LSA-R.S. 14:42(27).

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7 "Parole is a correctional or penological device authorizing the service of a sentence outside of prison. . . . Parole is possible only after criminal prosecution and imposition of a sentence. The purpose of parole is reformatory rather than punitive." 67A C.J.S. Parole § 42 (2000). See also *Bosworth v. Whitley*, 627 So.2d 629, 631 (La. 1993) (parole eligibility is determined by the sentence and eligibility for parole consideration is dependent on meeting certain criteria and conditions specified by statute).

When this offense occurred, LSA-15:574.4A(1), the statutory scheme that governed parole eligibility, provided: "when a first time offender had served one-third of the sentence imposed or when a second offender has served one-half of the sentence imposed." Under this statute, the court's fifty year sentence made Mr. Jones parole eligible after serving 1/3 of his sentence. Based on this Court's mandate the sentencing court imposed a constitutional sentence of fifty years "in the first instance," Graham, 130 S.Ct., at 2030, because the legislature failed to enact a "penalty for children," id., at 2026, undeserving of life imprisonment. The court also considered Mr. Jones' evidence supporting his "demonstrated maturity and rehabilitation," id., 2030, while incarcerated which included petitioner earning his G.E.D.; vocational technical diplomas welding and cement and concrete finishing; Class B trustee status; completion of numerous rehabilitation programs designed to help him develop into a productive adult.

"A law violates the Ex Post facto Clause if it is 'retrospective,' that is, it 'appl[ies] to events occurring before its enactment,' that is, it 'appl[ies] to events occurring before its enactment,' and it 'disadvantage[s] the offender affected by it." *Weaver v. Graham*, 450 U.S. 24, 29, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981). In *Peugh v. United States* 133 S.Ct. 2072 (2013), the United States Supreme Court held that it has "never accepted the proposition that a law must increase the maximum sentence for which a defendant is eligible in order to violate the Ex Post Facto Clause."

> "The touchstone of this court's inquiry is whether a given change in law presents a 'sufficient risk of increasing the measure of punishment attached to the covered crimes' Garner, 529 U.S., at 250, 120 S.Ct. 1362 (quoting Morales, 514 U.S., at 509, 115 S.Ct. 1597). The question when a change in law creates such a risk is 'a matter of degree'; the test cannot be reduced to a 'single formula.'"
>
> * * *

> Our holding today is consistent with basic principles of fairness that animate the Ex Post Facto Clause. The Framers considered ex post facto laws to be 'contrary to the first principles of the social compact and to every principles of sound legislation' The Federalist No. 44, p. 282 (C. Rossiter ed. 1961) (J. Madison). The Clause ensures that individuals have fair warning of applicable laws and guards against vindictive legislative action. See Weaver v. Graham, 450 U.S. 24, 28-29, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981). Even where these concerns are not directly implicated, however, the Clause also safeguards 'a fundamental fairness interest. . .in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life.' Carmell, 529 U.S., at 533, 120 S.Ct. 1620."

Id., 2081-82.

The Magistrate conceded LSA-15:574.4(D) was enacted in 2012, twenty three (23) years after Jones' offense and applied retroactively, but he disagreed that the trial court's retrospective application amounted to a disadvantage. Again, complying with Graham, the trial court imposed a constitutional individualized sentence of fifty (50) years pursuant to LSA-R.S. 14:42(27). Under this penalty provision, Mr. Jones was parole *eligible* after he served one-third of that sentence, which was 16.5 years.

Under LSA-15:574.4(D), retrospectively applied twenty three (23) years later Mr. Jones' confinement, he comes eligible for parole *consideration* after he has served 30 years. He must also satisfy a list of requirements before being considered for parole which did not exist when the offense occurred. Clearly, retroactive application of the change in [15:574.4(D)] created a sufficient risk of increasing the measure of punishment attached to [Mr. Jones']. . .crimes" by eliminating the legislature's "deliberate, express[ed], and full legislative consideration" found in LSA-R.S. 14:42(27). Peugh v. United States, 569 U.S., at 539; Garner v. Jones, 529 U.S. 244, 250, 120 S.Ct. 1362 (2000)

CONCLUSION

For all the reasons detailed above, Mr. Jones has demonstrated his entitlement to relief under 28 U.S.C. § 2254 The lower courts' decisions to the contrary are in error or, at minimum, debatable amongst jurists of reason and Mr. Jones is entitled to a COA.

Respectfully submitted,

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