No. 20-5610

In the

Supreme Court of the United States

ERIC J. BROWN
Petitioner

vs.

THE STATE OF LOUISIANA
Respondent

On Petition for a Writ of Certiorari to
The Louisiana Fifth Circuit Court of Appeal

REPLY BRIEF OF PETITIONER

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Arguments in Reply

1. This Court in *Montgomery* implied that a full resentencing proceeding as remedy to a *Miller* violation does indeed disturb the finality of a state conviction.

The State of Louisiana argues that this Court's reasoning in *Montgomery* "flatly precludes the result Brown seeks,"[1] but clearly the opposite is true. In *Montgomery* this Court noted:

> Giving *Miller* retroactive effect, moreover, does not require States to relitigate sentences . . . . A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, ***rather than by resentencing them***. . . . Extending parole eligibility to juvenile offenders does not impose an onerous burden on the States, ***nor does it disturb the finality of state convictions***.[2]

The Respondent interprets the last sentence of this quotation as holding that a *Miller* resentencing does not affect finality. But taken in its proper context, the unmistakable import of this Court's statement is that *resentencing* under *Miller*, as opposed to enacting legislation automatically extending parole eligibility, does indeed disturb the finality of the conviction.

Louisiana elected not to enact such legislation, and as a consequence, Brown was indisputably *resentenced* following extensive relitigation of sentencing issues. At a pre-sentencing hearing on the contested issue regarding the appropriate remedy for the *Miller* violation in this case, the Respondent conceded that, "absolutely," the court "needs to conduct a resentencing hearing."[3] At the conclusion of that hearing, the court, noting that "each case is different," concluded that "a resentencing hearing is appropriate" in order to determine whether to impose a term of years, a

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[1] Respondent's Brief in Opposition (Opposition), at 6-7.

[2] 136 S. Ct. 718, 736 (2016) (emphasis added).

[3] State Court Record, Transcript of June 20, 2016, at 20, 39.

sentence of life with parole eligibility, or a sentence of life without parole eligibility.[4] Following several more extensive pre-sentencing hearings, in which various sentencing issues were litigated, the court did, in fact, conduct a full-blown sentencing hearing on July 2, 2018, at which seven witnesses testified and evidence was offered, a proceeding that generating a 223-page transcript.[5] Thereafter, at a hearing on October 11, 2018, the court reviewed the evidence, made findings thereon, and announced its ruling:

> The Court does hereby vacate the previous sentences handed down to Mr. Brown, and the Court, as to Count 1, the crime of second degree murder, does order that Mr. Brown serve a term of life in prison with benefit of parole. As to Count 2, the crime of armed robbery, the Court does hereby sentence Mr. Brown consistently with his previous sentence, to serve 30 years at hard labor . . . .[6]

In other words, the district court vacated Brown's original sentence and thereafter imposed a brand new sentence following a thorough adversarial evidentiary hearing, notwithstanding the Respondent's repeated reference to Brown's original sentence as having been merely *reformed* or *modified*.[7] Plainly, Brown was resentenced, as that term is contemplated by this Court in *Montgomery* as the onerous, finality-upsetting alternative to simply enacting a blanket extension of parole eligibility to all defendants sentenced in violation of *Miller*.

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[4] *Id.* at 44, 47-49.

[5] State Court Record, Transcript of July 2, 2018.

[6] State Court Record, Transcript of October 11, 2018, at 10.

[7] Opposition at 2, 11, 12.

2. Granting relief to Brown is not inconsistent with this Court's finality jurisprudence.

The Respondent contends that because other states took this Court's advice by enacting legislation that automatically grants parole eligibility to *Miller* defendants without the need for resentencing, it would be unfair, contrary to the holdings in *Griffith* & *Teague*, to consider Brown's conviction as being not final while the convictions of *Miller* defendants in Connecticut, for example, remain final.[8] But the line drawn by *Griffith* & *Teague* between those who can and cannot obtain the benefit of a new rule does not turn on notions of fairness to the defendant, whose ability to rely on a new rule turns solely on the sheer happenstance of the date that his conviction became final. Rather, the line drawn by those cases is concerned with fairness to the State, not the defendant,[9] and in this case, the State of Louisiana could have avoided upsetting the finality of the convictions of its *Miller* defendants, but it chose not to do so.

As for the Respondent's unsupported contention that a ruling in Brown's favor would "throw open the floodgates to numerous challenges by *Montgomery* claimholders [in] states across the country,"[10] it suffices to note that *Miller* is now eleven years old, yet the Respondent has not, and cannot, point to a single case, in any state or federal jurisdiction outside of Louisiana, in which a litigant has challenged the finality of this conviction based on a *Miller* resentencing. And in Louisiana, aside from the instant case, there are, so far, only two such cases, both currently pending in the Louisiana Supreme Court and both involving a *Ramos* claim.[11]

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[8] *Id.* at 8-9.

[9] *See Teague v. Lane*, 489 U.S. 288, 308-10 (1989).

[10] Opposition at 2, 10.

[11] *See State v. Sewell*, 53,571 (La. App. 2 Cir. 11/18/20), ___ So. 3d ___, 2020 WL 6750359, writ of *certiorari* filed, 20-K-1457 (La. 12/18/20); *State v. Johnson*, 19-969 (La. App. 1 Cir. 8/6/20), ___ So. 3d

3. Resolving Brown's claim would resolve conflicts among federal jurisdictions and between federal and state jurisdictions.

The Respondent contends that "none of the lower state or federal cases that Brown cites conflicts with the Louisiana Supreme Court's [sic] decision below."[12] But the Respondent makes this unsupported assertion without any mention of *Miller v. Bell* and *Jordan v. Epps*, federal district court cases that Brown discussed in depth in his Petition, where he showed how these cases directly conflict with the Louisiana appellate court's decision below, just as they conflicted with the State court decisions that gave rise to those habeas corpus decisions.[13] Brown stands on his analysis of those cases.

Brown likewise stands on his analysis identifying conflicting holdings and statements between the First Federal Circuit on the one hand, and the Ninth Circuit and the Seventh Circuit (in dicta) on the other.[14] While it is true, as the Respondent notes, that the resentencing proceedings in these cases were ordered through an extended direct appeal process rather than as relief on collateral review,[15] a ruling by this Court favorable to Brown would nonetheless answer the question in dispute in those cases, that is, whether a defendant is entitled under *Griffith* to the benefit of new rule decided after the original sentencing, if an appeal of a resentencing is still pending. Hence, consideration of that conflict is not irrelevant to whether this Court should grant *certiorari*.

___, 2020 WL 4524745,writ of *certiorari* filed, 20-1052 (La. 8/27/20).

[12] Opposition at 11.

[13] Petition for Certiorari at 5-7.

[14] *See id*. at 4-5, 8 (citing *United States v. Pizarro*, 772 F.3d 284 (1st Cir. 2014); *Ramirez-Burgos v. United States*, 313 F.3d 23 (1st Cir. 2002); *Gretzler v. Stewart*, 112 F.3d 992 (9th Cir. 1997); *United States v. Judge*, 944 F.2d 523, 526 (9th Cir. 1991); *Richardson v. Gramley*, 998 F.2d 463, 466 (7th Cir. 1993)).

[15] *See* Respondent's Brief in Opposition at 11-12.

Conclusion

Mr. Brown's case is not final. This Court should so declare.

Respectfully submitted,

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