NO. _____

23-6393

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2024

JEREMY JERMAINE BROOKS, PETITIONER

VERSUS

JAMES M. LEBLANC, SECRETARY
LOUISIANA STATE PENITENTIARY, RESPONDENT

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

PETITION FOR WRIT OF CERTIORARI

Respectfully Submitted

Jeremy Jermaine Brooks
588465 Camp C Bear-1
La. State Penitentiary
Angola, LA 70712

QUESTION PRESENTED FOR REVIEW

This case raises pressing issues of significant importance: whether Louisiana murder statutes satisfy the holdings announced in Miller/Montgomery invalidating life without parole for juvenile offenders "whose crime reflect an unfortunate yet transient immaturity" absent legislative language in the murder statutes penalty provision themselves that authorizes the trial court to impose a sentence of life with parole. The following questions are presented.

> Did the Fifth Circuit Justice err in applying the Mootness Doctrine to justify the denial of a certificate of appealability?
>
> Does the murder statutes in Louisiana, as applied to juvenile offenders, violate the Fifth and Fourteenth Amendments principle of fair notice and due process where the statutory text fail to provide prescribe penalties for juvenile offenders?
>
> Does the murder statutes in Louisiana violate the Fourteenth Amendment where they fail to designate life *with* parole language in the penalty provision?
>
> Does the murder statutes in Louisiana violate the Eighth and Fourteenth Amendments where they fail to guarantee a proportionate sentence?

PARTIES TO THE PROCEEDING

The parties to the proceeding before the United States Court of Appeals for the Fifth Circuit were petitioner, **JEREMY JERMAINE BROOKS**, and respondent, **JAMES M. LEBLANC**, Secretary Louisiana Department of Corrections. There are no parties to this action within the scope of Supreme Court rule 29.1.

INDEX OF APPENDICES

Appendix A	Ruling U.S. Fifth Circuit Court of Appeals: (issued as mandate)
Court:	United States Court of Appeal (Fifth Circuit)
Docket Number:	23-30184
Dated Decided:	September 21, 2023
U.S. Cir. Judge:	Leslie H. Southwick
Disposition:	COA Denied (merits never reviewed)

Appendix B	Judgment
Court:	U.S. Western District of Louisiana
Docket Number:	USDC No. 19-1616
Dated Decided:	March 14, 2023
Judge:	Elizabeth E. Foote
Disposition:	Denied

Appendix C	Magistrate Judge's Report and Recommendation
Court:	U.S. Western District of Louisiana
Docket Number:	USDC No. 19-1616
Dated Decided:	Feburary 1, 2023
Magistrate Judge:	Mark L. Hornsby

Appendix D

Louisiana Revised Statute 14:30
Louisiana Revised Statute 14:30.1
Louisiana Revised Statute 15:574.4
Louisiana Code Criminal Procedure, Article 878.1

TABLE OF CONTENT

TABLE OF AUTHORITIES

PAGE NUMBER

CASES

CONSTITUTIONAL PROVISIONS

STATUTES AND RULES

OTHER AUTHORITIES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The United States Court of Appeals Fifth Circuit September 21, 2023 denial of Mr. Brooks's application for Certificate of Appealability is unpublished but has been attached at Appendix "A." The judgment of the United States District Court for the Western District of Louisiana adopting the Magistrate's denial of Mr. Brooks's writ of habeas corpus on March 14, 2023 is unpublished but has been attached as Appendix "B." The United States Magistrate Judge's opinion denying Mr. Brooks's application for federal habeas corpus is unpublished and attached at Appendix "C."

JURISDICTIONAL STATEMENT

The United States Court of Appeals denied Brooks's application for Certificate of Appealability on September 21, 2023; therefore, this Court has jurisdiction under 28 U.S.C § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth, Eighth and Fourteenth Amendment to the Constitution of the United States.

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;

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."

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."

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

***

A certificate of appealability may issue .... only if the applicant has made a substantial showing of the denial of a constitutional right.

***

The case also involves the following Louisiana statutes, which are reprinted in Appendix D:

Louisiana Revised Statute 14:30
Louisiana Revised Statute 14:30.1
Louisiana Revised Statute 15:574.4
Louisiana Code Criminal Procedure, Article 878.1

STATEMENT OF THE CASE

In 2011, a petiti jury found Mr. Brooks guilty for the second degree murder of Terrell Savoie by a nonunanimous verdict of 10-2 and the court sentenced him to mandatory life sentence without parole. Mr. Brooks appealed his conviction and sentence and while the appeal was pending the United States Supreme held that "mandatory life without for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishment.'" Miller v. Alabama, 132 S.Ct. 2455 (2012). The Louisiana legislature responded to Miller in 2013 by enacting La.Code Crim. Proc. Ann. 878.1 and La. Rev. Stat. Ann 15:574.4(E). Article 878.1 required courts to conduct a hearing in any case where an offender to be sentenced to life imprisonment for first or second-degree murder where the offender was under the age of 18 at the time of the commission of the crime.

Miller and these statutes were issued while Mr. Brooks's case was pending on direct appeal resulting in the appellate court affirming Mr. Brooks's conviction but vacating and remanding his sentence. *State v. Brooks*, 47, 394 (La. App. 2 Cir. 12/12/12), 108 So.3d 161, writ denied 2013-0080 (La. 5/31/13), 118 So.3d 393. On remand, the trial court conducted a pre-sentence investigation and sentenced Mr. Brooks again to life without parole. The appellate court affirmed the new sentence. State v. Brooks, 139 So.3d 571 (La. App. 2 Cir. 2014), writ denied, 159 So.3d 459 (La. 2015).

This Court stated later in Montgomery v. Louisiana, 136 S.Ct. 718 (2016), its holding in Miller announced a substantive rule change that abrogated the state court's ruling that Miller "merely altered the permissible methods by which the State could

exercise its continuing power." Mr. Brooks then filed a Motion to Correct Illegal Sentence based Montgomery claiming: he was entitled to an individualized sentence; the trial court's sentence violated his Fifth Amendment protections of the United States Constitution to fair notice and substantive due process; the trial court imposed a sentence not legislatively prescribed in violation of substantive due process. The state court denied Mr. Brooks's motion at all levels finding Mr. Brooks's per-Miller and post-Miller (September 6, 2011 and August 15, 2013) sentencing proceedings satisfied Miller and Montgomery.

On December 18, 2019, Mr. Brooks filed a timely federal habeas corpus application under 28 U.S.C. § 2254 in the United States District Court for the Western of Shreveport Louisiana asserting four claims: insufficiency of evidence; the trial court violated his Fifth and Fourteenth Amendment protections of the United States Constitution to fair notice and substantive due process; the trial court imposed a sentence that is not legislatively prescribed in violation of the Fourteenth Amendment substantive due process protection and he was denied a proportionate sentence under the Eighth Amendment.

Mr. Brooks filed a motion to amend his petition on November 2, 2020 and the court granted the motion on November 6, 2020. On February 1, 2023, the U. S. Magistrate Judge Mark L. Hornsby issued a Report and Recommendation that the application be dismissed with prejudice. The court determined because Mr. Brooks's fair notice and substantive due process arguments had been rejected by other federal

district courts and declared moot by the United States Fifth Circuit Court of Appeals, those claims should be denied.

It also adopted the Fifth Circuit's opinion that "all that is clearly established is that a sentencing court must consider youth-related mitigating factors in those cases in which it does impose a juvenile life-without parole sentence." Jackson v. Vannoy, 981 F.3d 408, 417 (5th Cir. 2020). Mr. Brooks filed an objection to the magistrate's recommendation requesting that the district court reject said recommendation. On March 14, 2023, U.S. District Judge Elizabeth E. Foote adopted the Magistrate's Report and Recommendation in its entirety and entered a judgment denying Mr. Brooks's petition for writ of habeas corpus. The judge also denied Mr. Brooks a certificate of appealability.

The United States Fifth Circuit Court of Appeals, Judge Leslie H. Southwick, denied Mr. Brooks request for a Certificate of Appealability (COA) concluding Mr. Brooks "has not shown that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong" or that his issues deserve encouragement to proceed further."

REASONS FOR GRANTING THE PETITION

This case aligns with the Court's criteria for granting review perfectly. In Miller v. Alabama, 132 S.Ct. 2455 (2012), the Court held that the imposition of mandatory life for juvenile offenders is unconstitutional. Although the Court did not rule out mandatory life, it recognized two distinct classes of juvenile homicide offenders: the "rare" incorrigible juvenile "whose crime reflect irreparable corruption" (first degree murder) and juveniles

"whose crime reflect transient immaturity" (second degree murder) with mandatory life being prohibited for the latter class. Because parole eligibility is part of the law annexed to the crime at the time of the person's offense, ***life with parole*** language must be designated in the penalty provision of the homicide statute. Warden v. Marrero, 417 U.S. 653, 663 (1974).

Due process requires 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, 134 L.Ed.2d 809 (1996). The Supreme Court further explained that "'statutes fixing sentences' must specify the range of available sentences with 'sufficient clarity,' id., at 123, 99 S.Ct. 2198." Beckles v. United States, 137 S.Ct. 886, 892, 197 L.Ed.2d 145 (2017). The Court of Appeals, like the district court, concluded the state could circumvent Mr. Brooks's constitutional rights (i.e., Fifth Amendment right to fair notice of the penalty; Fourteenth Amendment right to punishment prescribed by the legislature and Eighth Amendment right to a proportionate penalty) to satisfy Miller by allowing the trial judge to impose life with parole, something that restricted by statute and offends the separation of powers doctrine, on every homicide juvenile offender in Louisiana.

I. Did the Fifth Circuit Justice err in applying the Mootness Doctrine to justify the denial of a certificate of appealability?

A. The Circuit Justice err in applying the Mootness Doctrine

The doctrine of mootness arises from Article III § 2, cl 1 of the Constitution, which provides federal courts with jurisdiction over a matter "only if there is a live 'case' or "controversy.'" Dierlam v. Trump, 977 F.3d 471, 476 (5th Cir. 2020) (citing

DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 126 S.Ct. 1854, 164 L.Ed.2d 589 (2006). "[A]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." Tucker, II v. Gaddis, 40 F. 4th 289 (5th Cir. 2022). This case-or-controversy requirement subsists through all stages of the federal judicial proceedings, trial and appellate. "The parties must continue to have a 'personal stake in the outcome' of the lawsuit." Lewis v. Continental Bank Corp., 494 U.S. 472, 477-478 (1990). "This means that, throughout the litigation, the plaintiff 'must have suffered, or be threatened with, an actual injury traceable to the defendant and likely be redressed by a favorable judicial decision.'" Spencer v. Kemna, 523 U.S. 1 (1998).

The District Court's conclusion that the enactment of new legislation rendered Mr. Brooks's claims moot because the legislation satisfied Miller's substantive constitutional mandate that Mr. Brooks receive parole eligibility is wrong.

Mr. Brooks argues that the new State law violates the Fifth and Fourteenth Amendment of the Constitutional because it deny juvenile offenders convicted of second degree murder the right to know the minimum and maximum penalty they could expect to receive and asked the court for leniency. The new law also deny juvenile offenders the constitutional right to receive a sentence authorized by the legislature. Montgomery v. Louisiana, 136 S.Ct., at 726 ("[a]n illegal sentence 'is primarily restricted too those instances in which the term of the prisoners sentence is not authorized by the statute or statutes which govern the penalty' for the crime of conviction") (citing State v. Mead, 2014-1051 (La. App. 4 Cir. 4/22/15), 165 So.3d 1044, 1047).

The new legislation can only be characterized as "a smoking mirror." In Louisiana, the judge is required to impose a determinate sentence in all felony cases. See La.Code Crim. Proc. Ann. 879. When this offense occurred, the punishment for committing second degree murder was mandatory life without parole. See La. Rev. Stat. Ann 14: 30.1. Prisoners otherwise eligible for parole, except those serving a life sentence, whose sentences do not carry parole restriction, became eligible for parole if they were a first time offender and served one-third of the sentence imposed by the judge. See 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).

The only way a prisoner sentenced to life without parole could be considered for parole was through commutation of his sentence (a request for mercy and a fixed term of years) which he can only initiate after serving 15 years of actual incarceration. If the Pardon Board recommends that the prisoner's sentence be fixed to a term of years, the governor's signature is then required. It is only after receiving the governor's signature the prisoner becomes eligible for parole after serving one-third of the number of years fixed by the pardon board.

Thus, according to Louisiana's sentencing scheme, if the sentencing judge wish for a defendant to receive parole eligible, he is required to impose a fixed number of years at which time the Parole Board would have scheduled a parole hearing date to reflect Mr. Brooks's possible release after completion of 1/3 of that fixed number of years. Cf. State v. Clayton, 570 So.2d 519, 528 (La. App. 5 Cir. 1990) ("[defendant] is

eligible for parole consideration after serving one-third of the sentence imposed. See La. Rev. Stat. Ann 15:574.4 A(1); State v. Smith, 570 So.2d 82, 84 (La. App. 4 Cir. 1990) ("the trial court lacked the authority to impose sentence without parole eligibility. That authority belongs to the Department of Corrections under R.S. 15:574.4, which sets forth the guidelines to be used in determining if parole is appropriate").

The district court concedes "the second degree murder statute under which [Mr. Brooks] was convicted did not itself authorize a modified sentence but concluded that the "separate, overriding and retroactive legislation now does," citing Jackson, 981 F.3d at 416. Because Mr. Brooks's "crime reflect transient immaturity" and he was sentenced to serve a punishment not authorized by statute "there is still a live controversy." In Jackson, the Court of Appeals stated that the Louisiana Legislature made other arrangements to satisfy the substantive change Miller announced. The State's replacement of an unconstitutionally disproportionate penalty with a procedural requirements (parole consideration dependent on meeting certain criteria and conditions) however does not satisfy "Miller's substantive holding that life without parole is an excessive sentence for children whose crime reflect transient immaturity." Montgomery, 577 U.S. at 2010. Such an arrangement does not eliminate the constitutional right violations Mr. Brooks still suffers.

It is undisputed Mr. Brooks has standing to challenge the denial of his Fifth and Fourteenth Amendment right to a substantive penalty authorized by the legislature and fair notice of that penalty. As a result of the State's action, Mr. Brooks has suffered an injury and will continue to suffer injury that is concrete, traceable to challenged conduct

of the State, and is likely to be redressed by a favorable judicial decision. Spokeo, Inc. v. Robins, 578 U.S. 330, (2016).

Mr. Brooks has demonstrated that reasonable jurists would find it debatable or wrong that the district court's ruling on claims presented in this federal habeas petition are not moot and deserve encouragement to proceed further.

II. Does the murder statutes in Louisiana, as applied to juvenile offenders, violate the Fifth and Fourteenth Amendments principle of fair notice and due process where the statutory text fail to provide prescribe penalties for juvenile offenders.

B. Reasonable jurists would find the district court's assessment Mr. Brooks was denied the constitutional protections to fair notice of a penalty debatable and wrong.

In Miller, the Court held that the imposition of mandatory life sentence for juvenile offenders is unconstitutional. But, the Court did not rule out mandatory life sentence for a juvenile offender convicted of capital murder. The premise of this statement is supported by the two distinct classes of juvenile homicide offenders the Court recognized: the "rare" incorrigible juvenile "whose crime reflect irreparable corruption" (first degree murder) and juveniles "whose crime reflect transient immaturity" (second degree murder) with mandatory life being prohibited for the latter class. Id., at 2469. The murder statutes in Louisiana however fail to specify which class of juvenile offender could receive mandatory life and which class cannot.

For example, first degree murder is punishable by death or life without parole upon recommendation of the jury. See La. Rev. Stat. Ann. 14:30 appendix D. The punishment of death has been declared unconstitutional for all juvenile homicide offenders; therefore, life without parole is the only penalty available upon conviction.

See Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 183 (2005) ("the Court prohibited death for defendants who committed their crimes before age 18"). To comply with the mandate in Roper, Louisiana imposes the responsive verdict of life without parole upon juvenile offenders convicted of first degree murder. Second degree murder is punishable by life without parole. See La. Rev. Stat. Ann 14:30.1 appendix D. No other penalty is available despite the Court holding that life without parole is an unconstitutionally excessive penalty for juvenile homicide offenders whose "crime... reflect[ed] transient immaturity" (the equivalent of second degree murder). Id., at 2460. The Louisiana legislature however has failed to provide juvenile offenders convicted of second murder with fair notice of the substantive penalty (parole eligibility) the judge could impose.

The Fifth Amendment protections are fundamental to our nation's concept of constitutional liberty. When this Court invalidates a criminal penalty fixed by the legislature, no court has no authority to leave in place that invalidate punishment. In BMW of N. Am., 517 U.S. at 574, the Court held ["e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of his severity of the penalty that a State may impose." See Beckles v. United States, 137 S.Ct., at 892; United States v. Batchelder, 442 U.S. 114 (1979); United States v. Evan, 333 U.S. 483 (1948).

The Court has held that parole eligibility is part of the law annexed to the crime at the time of the person's offense which means that ***life with parole*** language must be designated in the penalty provision of the homicide statute. Warden v. Marrero, 417

U.S., at 663; Beebe v. Phelps, 650 F.2d 774 (5th Cir. Unit A 1981); Sheppard v. Taylor, 556 F.2d 648, 654 (2nd Cir. 1977) ("parole eligibility is considered an integral part of any sentence"). In Jackson 981 F.3d at 415, the Fifth Circuit Court of Appeals stated "Jackson was indeed resentenced under a substantive criminal statute to a penalty not authorized by that state, at a time when no other supplemental statute authorized courts to modify the sentences of defendants in Jackson's position to bring them into compliance with Miller (that only cane later)." The Court of Appeals further admitted this claim presents "an important constitutional question that may deserve a thorough review when the appropriate time comes," and "it seems at least debatable whether a juvenile offender may constitutionally be sentenced to a punishment that, while consistent with Miller, is not authorized by the statute governing the substantive criminal offense." Id., at 415.

In United States v. Under Seal, 819 F.3d 715, 724, 725 (4th Cir. 2016), the Government filed a motion to transfer the defendant – who was a juvenile at the time of the alleged offense – pursuant to 18 U.S.C. § 5032 – for prosecution as an adult for murder in aid of racketeering in violation of 18 U.S.C. § 1959(a)(1). The crime carried a mandatory statutory penalty of either death or life imprisonment. The district court denied the Government's motion after concluding that the prosecution would be unconstitutional given the Supreme Court decisions prohibited sentencing juvenile offenders to either punishment. Under the plain language of § 1959(a)(1), the court found that Congress authorized two penalties for the crime of murder in aid of racketeering: "death or life imprisonment." The court note that a district court had "no

discretion to impose a sentence outside the statutory range established by Congress for the offense of conviction." Consequently, life imprisonment was the mandatory minimum punishment for the offense.

The court held that Miller and Roper prohibited juveniles from being sentenced to either of those congressionally authorized punishments for murder in aid of racketeering. Thus, the crux of the case before it was whether a judicial remedy exists that would nonetheless allow juveniles to be prosecuted for this offense, yet subjected to a punishment different from that enacted by Congress. In rejecting the Government's argument, the Court relied on the principle that legislatures, not courts, are charged with articulating the authorized penalties for criminal conduct.

The Court in United States v. Davis, 139 S.Ct. 2319, 2323 (2019), addressed the effects of vague laws and held: "[a] vague law is no law at all. Only the people's elected representative in [the Legislature] have the power to write new... criminal laws. And when [the Legislature] exercises that power, it has to write statutes that give ordinary people fair warning about what the law demands of them. Vague laws transgress both of those constitutional requirements. They hand off the legislature's responsibility for defining criminal behavior to unelected prosecutors and judges, and they leave people with no sure way to know what consequences will attach to their conduct. When Congress passes a vague law, the role of courts under our Constitution is not to fashion a new, clearer law to take its place, but to treat the law as a nullity and invite Congress to try again. Only when Congress has articulated the penalties authorized by law for a criminal act does the judiciary's work begin. E.g., Williams v. New York, 337 U.S. 241,

247 (1949) (noting that a sentencing judge's broad discretion to impose a sentence is limited by the "fixed statutory or constitutional limits [regarding] the type and extent of punishment after the issue of guilt has been resolved").

Mr. Brooks avers a reasonable jurist could find it debatable that the district court assessment of the constitutional claim he was denied fair notice of the penalty with a specific range for the offense he committed. That notice included parole eligibility.

III. Does the murder statutes in Louisiana violate the Fourteenth Amendment where they fail to designate life *with* parole language in the penalty provision.

C. Reasonable jurists would find the district court's assessment debatable or wrong Mr. Brooks was denied the constitutional right to a legislatively prescribed penalty

Addressing Mr. Brooks's constitutional claim that the trial judge violated his constitutional right to have a legislatively prescribed penalty imposed, the district court stated, "even though the second degree murder statute under which [Brooks] was convicted did not itself authorize a modified sentence, this separate, overriding retroactive legislation now does."

The Fifth Amendment provides in relevant part: "no person shall be deprived of life, liberty, or property, without due process of law"; the Fourteenth Amendment provides in relevant part: "nor shall any State deprive any persons of life liberty, or property, without due process of law." La. Rev. Stat. Ann 14:30.1(B) reads in relevant part "[w]hoever commits the crime of second degree murder shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence." 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 constitution. When this Court invalidated the substantive penalty attached to Mr. Brooks's offense, the only punishment legislatively authorized by Louisiana law to allow parole eligibility was the responsive penalty of manslaughter. La. Rev. Stat. Ann 14: 31 ("[w]ho commits manslaughter shall be imprisoned at hard labor for not more than forty years").

The Court has long held that "a sentence which does not comply with the letter of the criminal statute which authorized it is so erroneous that it may be set aside on appeal... or in habeas corpus proceedings." Bozza v. United States, 330 U.S. 160, 166 (1947). And, the Court noted in United States v. Evans, 333 U.S. 483 (1948), that while a statute articulates multiple crimes, the penalty provision is limited by its plain terms to certain offenses. The Court further held that ("[a] criminal statute is not operative without articulating a punishment for the proscribed conduct"). Id., at 486. A statute declaring an act unlawful but prescribing no penalty does not create a crime. Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law & 1.2.(d) (1986)("[a] crime is made up of two parts, forbidden conduct and a prescribed penalty. The former without the latter is no crime."

The general parole provisions, La. Rev. Stat. Ann 15:574.4A(1), at the time this offense was committed reveal that the trial judge, at the time of sentencing, determined when the offender would become eligible for parole and the board simply implemented that determination when an offender had served one-third of the sentence imposed. Bosworth v. Whitley, 627 So.2d at 631. La. Rev. Stat. Ann 15:574.4(B) restricts a prisoner sentenced to life from receiving parole unless the Pardon Board recommended

the sentence be fixed to a term of years and the governor's signs the recommendation. It is only after this procedure is followed prisoner becomes eligible for parole. Cf. State v. Clayton, 570 So.2d 519, 528 (La. App. 5 Cir. 1990) ("[defendant] is eligible for parole consideration after serving one-third of the sentence imposed. La. Rev. Stat. Ann 15:574.4 A(1)").

In Montgomery v. Louisiana, the Court determined Miller "announced a substantive rule of constitutional law" and "[l]ike other substantive rules. . . ' necessarily carr[ies] a significant risk that a defendant' – here, the vast majority of juvenile offenders – 'face a punishment that the law cannot impose upon him.'" Id., at 734, Despite the Court's exhortation that Miller's "substantive rule is not just erroneous but contrary to law and, as a result, void," id., the State continues to treat Miller's substantive rule change as a procedural change and sanction the retrospective application of La. C.Cr.P. art. 878.1 and R.S. 15: 574.4(E) to satisfy the mandate Miller requires. These statute are not sentencing penalties. They are merely factors the parole board must consider before releasing a juvenile on parole.

When this offense occurred, the legislature unambiguously intended for Mr. Brooks, and juveniles similarly situated, penalty to be life without parole, probation or suspension of sentence. That penalty remains in effect today without any regard to this Court declaring "a sentencing rule permissible for adults may not be so for children." Miller, 132 S.Ct., at 2470. More than 10 years have passed and the Louisiana Legislature has failed to "endorse[] through deliberate, express, and full legislative consideration" a substantive penalty for juveniles homicide offenders (second degree

murder) "whose crime reflects unfortunate yet transient immaturity." Id., at 2469.

The Court held in Warden v. Marrero "[s]ince ... an offender becomes eligible for parole after serving one-third of his sentence, parole eligibility is a function of the length of the sentence fixed by the district judge." Id., at 658. Mr. Brooks avers reasonable jurists would find the district court's assessment – "even though the second degree murder statute under which [Brooks] was convicted did not itself authorize a modified sentence, this separate, overriding retroactive legislation now does – debatable or wrong.

IV. Does the murder statutes in Louisiana violate the Eighth and Fourteenth Amendments where they fail to guarantee a proportionate sentence?

D. Reasonable jurists would find the district court's assessment of the disproportionate sentence claim debatable and wrong

The district court has misinterpreted Miller. Although the Court did not rule our life without parole sentences for offenders under 18, it ruled such sentence "violates the Eighth Amendment for a child whose crime reflects 'unfortunate yet transient immaturity.'" Id., at 734; 132 S.Ct., at 2469. And, the Court let it be known that procedural statutes like La. C.Cr.P. art 878.1 and La. Rev. Stat. Ann 15:574.4 cannot satisfy Miller's substantive rule change. Montgomery, 136 S.Ct., at 735 ("there are instances in which substantive change in law must be attended by a procedure that enables a prisoner to show that he falls within the category of the persons whom the law may no longer punish").

The Court in Weems v. United States, 217 U.S. 349, 367 (1910), held that the Eighth Amendment's prohibition of cruel and unusual punishment "guarantees

individuals the right not to be subjected to excessive sanctions." That right, the Court stated, "flows from the basic 'precept of justice that punishment for a crime should be graduated and portioned'" to both the offender and the offense. The Court's cases addressing the proportionality sentences fall within two general classifications. Graham v. Florida, 560 U.S. 48, 59 (2010). The first type is challenges to a sentence's length given all the circumstances of a case.

In Woodson v. North Carolina, 428 U.S. 280, 301 (1976), the Court stated "one of the most significant discussion in our society's treatment of capital punishment has been the rejection of the common-law practice of inexorably imposing a death sentence upon every person convicted of a specific offense." In Arave v. Creech, 507 U.S. 463, 474 (1993), the Court held "... we have explained, the aggravated circumstance must meet two requirements. First, the circumstances may not apply to every defendant convicted of murder; it must apply to a subclass of defendants convicted of murder."

The second involves categorical challenges, i.e., a particular penalty is barred in some circumstances. Graham marked the first time that the Court considered a categorical challenge to a term-of-years sentence; the Court held that a juvenile cannot be sentenced to life without parole for a nonhomicide offense. Miller soon followed. Id. at 2469 (mandatory sentence of life without parole for juvenile homicide offenders "whose crime reflect transient immaturity" is disproportionate).

The Court did allow for "a State [to] remedy a Miller violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." Montgomery, 577 U.S. at 212. Homicide in Louisiana is divided into five grades:

first degree murder; second degree murder, manslaughter, negligent homicide and vehicular homicide. See La. Rev. Stat. Ann 14:29. Of the five the legislature restricts parole as part of the substantive penalty annexed to the crime on two: first degree murder and second degree murder. The remaining three contain no restrictions. The legislature has failed to legislatively narrow the class of juvenile homicide offender eligible to receive life without parole from those who cannot. Once the Court declared Miller a substantive constitutional rule change, the legislature had a duty to "endorse through deliberate, express and full legislation consideration," id., at 132 U.S., at 2473, a penalty befitting for juvenile homicides offenders "whose crime reflect transient immaturity" (the equivalent of second degree murder) and trial courts had a judicial duty to impose it.

Mr. Brooks avers that reasonable jurists would find the district court's conclusion that every juvenile homicide offender can still face life without parole debatable or wrong.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: 12-14-23