No. _____

In The
Supreme Court of the United States

LEE CARROLL BROOKER,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

On Petition For Writ Of Certiorari To The Alabama Court Of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Over the last two decades, criminal punishment of people in possession of marijuana for personal use has evolved dramatically in the United States and extreme sentences have become increasingly rare. Lee Carroll Brooker was convicted of possession of less than three pounds of marijuana under Alabama Code section 13A-12-231, which makes it a Class A felony for any person to be "knowingly in actual or constructive possession of, in excess of one kilo or 2.2 pounds of any part of the plant of the genus Cannabis." He was not charged with intent to sell or distribute, and it was undisputed at trial that Mr. Brooker grew the marijuana for his personal use. Under Alabama's habitual offender statute, this conviction required that he be given a mandatory sentence of life imprisonment without parole. The trial judge bemoaned his lack of discretion and regretfully imposed that extreme sentence raising important constitutional questions:

1. Is a mandatory life imprisonment without parole sentence inherently excessive under the Eighth Amendment when the predicate for its imposition is a conviction for possession of marijuana merely for personal use?

2. Does equating possession of marijuana for personal use with the most heinous and aggravated crimes in a State's criminal code, for purposes of repeat-offender sentencing, violate the proportionality requirement of the Eighth Amendment?

QUESTIONS PRESENTED – Continued

3. Does a mandatory life imprisonment without parole sentence, imposed on an individual with prior convictions whose current offense is nothing more than the mere possession of marijuana for personal use, violate the Eighth Amendment's evolving standards of decency when such an extreme sentence for similarly situated offenders is unauthorized in almost every American jurisdiction?

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MISCELLANEOUS

PETITION FOR WRIT OF CERTIORARI

Lee Carroll Brooker respectfully petitions for a writ of certiorari to review the judgment of the Alabama Court of Criminal Appeals.

OPINIONS BELOW

The opinion of the Alabama Court of Criminal Appeals, *Brooker v. State*, No. CR-14-0126 (Ala. Crim. App. July 2, 2015), is attached at App. 1. The Alabama Court of Criminal Appeals's order denying Mr. Brooker's application for rehearing is attached at App. 18. The Alabama Supreme Court's order denying Mr. Brooker's petition for writ of certiorari, *Ex parte Brooker*, No. 1141160 (Ala. Sept. 11, 2015), is attached at App. 19.

JURISDICTION

The initial judgment of the Alabama Court of Criminal Appeals was issued on July 2, 2015. *See* App. 1. That court overruled an application for rehearing on July 24, 2015. *See* App. 18. Mr. Brooker petitioned the Alabama Supreme Court for a writ of certiorari, and that Court denied that petition on September 11, 2015, with Chief Justice Moore concurring specially to note the "excessive and unjustified" nature of the sentence in this case. *See* App. 19. This Court granted Mr. Brooker's application for extension of time to file this current petition for writ

of certiorari on December 2, 2015, extending the time to file until January 11, 2016. *Brooker v. Alabama*, No. 15A569 (2015). Jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Eighth Amendment to the United States Constitution provides:

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

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

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case presents an important question concerning the Eighth Amendment and whether the ban on cruel and unusual punishment permits a mandatory sentence of life imprisonment without parole to be predicated on a conviction for possession of marijuana for mere personal use, with no showing that the possessor intended to sell or distribute the substance to any other person. Since this Court upheld

the constitutionality of a mandatory life-without-parole sentence for drug crimes in *Harmelin v. Michigan*, 501 U.S. 957 (1991), drug policy in the United States has evolved dramatically. States and the federal government have increasingly recognized that extreme punishments for mere possession of low quantities of drugs serve no legitimate penological purpose. This is especially true for extreme, mandatory punishment of people in possession of marijuana, which has now been legalized in several jurisdictions.

Lee Brooker, a 75-year-old disabled combat veteran, was convicted in Houston County, Alabama of possessing less than three pounds of marijuana plants which he grew for personal use to aid his management of serious medical problems. Decades earlier, Mr. Brooker obtained convictions in Florida for robbery. Because Alabama alone equates low-quantity marijuana possession for personal use with the most severe and violent crimes that can be committed, the Alabama judge at Mr. Brooker's trial was required to impose a mandatory sentence of life imprisonment without parole.[1]

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[1] Ala. Code § 13A-12-231 (designating possession of more than 2.2 pounds of marijuana as a Class A felony); § 13A-6-2 (designating murder as a Class A felony); § 13A-6-61 (designating rape in the first degree as a Class A felony); § 13A-5-6 (stating that punishment for Class A felony is life imprisonment, or 10 to 99 years). The offense for which Mr. Brooker was convicted is "trafficking in cannabis." (R. 283.) However, it is not necessary that there be any showing of distribution or transport or intent to distribute or transport. Ala. Code § 13A-12-231.

(Continued on following page)

Outside Alabama, jurisdictions at every level punish marijuana possession for personal use less harshly or not at all. Many states have legalized marijuana use for medical purposes and a handful for recreational use. For an offender with prior convictions, only three other states mandate life imprisonment without parole for comparable possession of marijuana, raising important questions about whether such an extreme sentence for personal use of marijuana is "cruel and unusual" in violation of the Eighth Amendment.[2]

Lee Brooker's Background, Offense, and Sentence

Lee Brooker is a disabled combat veteran and retired carpenter. By the time of his conviction, Mr. Brooker suffered from an array of physical and mental health problems, including pressure on his cervical spinal cord and several stents placed near his heart. (C. 105-06, 170; R. 307-11, 313-15.) Mr. Brooker sought relief from pain and discomfort in the smoking

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Knowing actual or constructive possession of a quantity greater than 2.2 pounds is all that is necessary to be convicted of this offense. It was undisputed at trial that Mr. Brooker grew marijuana for personal use. (*See* R. 258.) References are to the appellate record below in this case. "C." refers to the clerk's record. "R." refers to the trial transcript.

[2] The other three outlier states are Mississippi (30 grams, which is approximately 1.1 ounces), South Dakota (2 ounces), and Louisiana (2.5 pounds). Miss. Code Ann. §§ 99-19-83, 1-3-11, 41-29-139(c)(2)(C); S.D. Codified Laws §§ 22-7-8, 22-42-6, 22-6-1(3), 24-15-4; La. Rev. Stat. Ann. §§ 15:529.1(A)(4)(b), 40:966(F)(1).

of marijuana, a practice that his primary care physician recognized as a reprieve from the symptoms of Mr. Brooker's manifold health concerns, especially his anxiety and depression. (C. 168; R. 314.)

Mr. Brooker joined the military at age 17. (C. 101; R. 299.) Mr. Brooker saw combat during two engagements, first in Lebanon, then in the Dominican Republic. In Lebanon, Mr. Brooker's unit engaged enemy forces while helping to hold the international airport in Beirut. (C. 101; R. 299.) In the Dominican Republic, Mr. Brooker saw intense combat while clearing swaths of Santo Domingo, engaging snipers while under fire and neutralizing an enemy tank unit to take a strategically important bridge. (C. 102; R. 300-05.) Mr. Brooker, a squad leader and Forward Observer, earned numerous commendations, including the Combat Infantryman Badge and Expert Infantryman Badge with added qualification bars, and attained the rank of Sergeant. (C. 102-05; R. 306.) In 1966, after taking custody of two daughters from his estranged wife while absent without leave, Mr. Brooker requested discharge due to hardship, which was granted. (R. 318-19.) He was then honorably discharged, though not before he took full responsibility for leaving his base assignment without authorization. (C. 98, 101; R. 299, 316, 318.)

Both his military service and physically demanding carpentry work took their toll on Mr. Brooker's body. As a result of firing heavy artillery throughout his military career, Mr. Brooker sustained permanent hearing damage. (C. 106; R. 309.) Mr. Brooker began

to have trouble with vertebrae putting pressure on his cervical spinal cord, a condition that was causing diminished use of his arms and legs until he had corrective spinal fusion surgery. (C. 105; R. 307-08.) For decades, Mr. Brooker has suffered severe anxiety and depression, for which he was treated by several psychiatrists in VA system hospitals and prescribed several medications. (R. 310.)

A primary method of treatment that Mr. Brooker found effective was smoking marijuana. It eased his anxiety and depression as well as provided some relief for the physical symptoms of his other maladies. (C. 168; R. 168, 310-11.) In 2011, having moved to Alabama seven years earlier, Mr. Brooker began growing his own marijuana at the home he shared with his son, Darren, to avoid having to purchase any on the street. (C. 338, 343.)

On July 20, 2011, two Dothan police officers and two Houston County Sheriff's deputies discovered marijuana plants growing approximately 100 yards from the back of the Brooker home. (R. 122.) This included a significant number that had been discarded because they were not going to have any usable yield. (C. 345.) The number of productive, live plants and discarded, unusable plants collected was disputed at trial, (*see, e.g.*, R. 170-71), but the total amount collected weighed around 2.8 pounds. (C. 232-33; R. 192.) This weight included all but the roots of both the live and discarded plants. (R. 195.) The investigating officers also found lights and potting materials inside Mr. Brooker's home. (C. 311, 340; R. 134.)

Mr. Brooker's son was also arrested and charged with marijuana possession, and he was tried first. At his son's trial, Mr. Brooker testified that he was solely responsible for growing the marijuana and explained his use for medical purposes. (C. 340-41, 345; R. 287.) This testimony was introduced at Mr. Brooker's own trial, which occurred three years after his arrest due to medical delays, (*see, e.g.*, C. 18), at the conclusion of which he was found guilty of violating section 13A-12-231. (C. 110, 235, 329; R. 161, 283.) Under this provision of Alabama's statute, possession of more than 2.2 pounds of marijuana is a Class A felony punishable with life imprisonment for a person with no prior convictions and a mandatory life imprisonment without parole sentence for someone with prior convictions. Although the trial court had put Mr. Brooker on notice that he faced life imprisonment without parole as a result of Alabama's habitual offender statute, it allowed Mr. Brooker to remain free until sentencing. (R. 286-89.)

At sentencing, the State provided certified records of several prior convictions, admitted over defense counsel's objection, and argued that Alabama's habitual offender statute applied. (R. 292.) The prior convictions included three for robbery with a firearm and one for attempted robbery that took place in Florida over 20 years earlier. The crimes all occurred during the course of four days and no one was physically injured. (C. 315-25; R. 293.) Such offenses are, under Alabama law, Class A felonies. (R. 292.) The State also provided certified records of a conviction

for violating Georgia's Controlled Substances Act in 1981. (C. 326-27; R. 319). The trial court acknowledged application of section 13A-5-9(c)(4), which mandated a life imprisonment without parole sentence for his marijuana conviction because in Alabama possession of 2.8 pounds of marijuana is a Class A felony. (R. 293.) Mr. Brooker's counsel objected to the application of the habitual offender statute and to imposition of a life-imprisonment-without-parole sentence arguing that such a sentence constituted cruel and unusual punishment. (R. 323.)

Mr. Brooker's counsel additionally objected to any sentence that did not consider Mr. Brooker's mere personal use of marijuana, history of military service, and health problems. (C. 100-08; R. 295-96.) Mr. Brooker testified at sentencing about his military service record and medical history, and at no point was any of it disputed by the State. (*See* R. 297-320.) The trial court thanked Mr. Brooker for his military service and went on to bemoan its lack of sentencing discretion, further noting that sentencing Mr. Brooker to life without parole would require significant healthcare expenditures by the state. (R. 327.) In handing down its sentence, the trial court stated, if "the Court could sentence[ ] you to a term that is less than life without parole, I would." (R. 326.)

Following the sentencing hearing, Mr. Brooker filed a Motion for New Trial, (C. 180-82), arguing, among other claims, the trial court erred in sentencing Mr. Brooker to life without parole. The motion was subsequently denied by the trial court. (C. 196.)

On appeal to the Alabama Court of Criminal Appeals, Mr. Brooker asserted that his sentence violated the Eighth Amendment's prohibition of cruel and unusual punishment and violated the Eighth Amendment's principle of proportionality.

The Court of Criminal Appeals held that because Mr. Brooker's sentence was in accord with the applicable statute, he was not entitled to relief. *Brooker v. State*, No. CR-14-0126, slip op. at 9 (Ala. Crim. App. July 2, 2015). The Court further relied upon its prior holdings, as outlined in *Wooden v. State*, 822 So. 2d 455, 458 (Ala. Crim. App. 2000), that the habitual offender statute did not violate the Eighth Amendment and that it was constitutional even though it did not permit individualized sentencing. *Brooker*, No. CR-14-0126, slip op. at 9. Mr. Brooker filed an Application for Rehearing arguing again that his sentence violated the Eighth Amendment, but this application was overruled.

Mr. Brooker filed a petition for certiorari with the Alabama Supreme Court again asserting that his sentence was cruel and unusual and disproportionate to the offense for which he was convicted. Petition for Writ of Certiorari at 10, *Ex parte Brooker*, No. 1141160 (Ala. July 3, 2015). The Alabama Supreme Court denied the petition without opinion. *Ex parte Brooker*, No. 1141160 (Ala. Sept. 11, 2015).

However, Chief Justice Roy Moore concurred specially to condemn Mr. Brooker's sentence as "excessive and unjustified." *Ex parte Brooker*, No.

1141160, slip op. at 2 (Ala. Sept. 11, 2015) (Moore, C.J., concurring specially). He wrote, "Under circumstances like those of Brooker's arrest and conviction, a trial court should have the discretion to impose a less severe sentence than life imprisonment without the possibility of parole." *Id.* After reviewing the facts as presented by the Court of Criminal Appeals, Chief Justice Moore concluded that the sentence "reveals grave flaws in our statutory sentencing scheme." *Id.* at 6.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD DECIDE IF EVOLVING STANDARDS OF DECENCY NOW PROHIBIT A MANDATORY LIFE-IMPRISONMENT-WITHOUT-PAROLE SENTENCE FOR SOMEONE CONVICTED OF MARIJUANA POSSESSION FOR PERSONAL USE.

A. Mandatory Life Imprisonment Without Parole Is an Extreme and Severe Punishment.

The Eighth Amendment question presented in this case is triggered by the extraordinarily harsh sentence that has been imposed on petitioner. With the exception of death by execution, mandatory life imprisonment without parole is the most extreme and severe punishment imposed in the United States. It is a terminal sentence which requires death in prison.

The severity of this punishment is marked both by its mandatory nature and its requirement that the person sentenced spend his life imprisoned until he is dead.

This Court has long recognized that a mandatory sentence, where there is no opportunity for a trial court to exercise its discretion, creates an increased likelihood that the sentence may be unfair, excessive, and disproportionate. *See Woodson v. North Carolina*, 428 U.S. 280, 296-97 (1976) ("The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender.") (quoting *Williams v. New York*, 337 U.S. 241, 247 (1949)); *see also Almendarez-Torrez v. United States*, 523 U.S. 224, 244-45 (1988) (noting mandatory minimum sentences are more severe than permissive maximum sentences because they eliminate judicial discretion entirely and increase likelihood of unfair imposition).

Mandatory life-without-parole sentences are also uniquely severe because they provide for no opportunity of release. This Court has acknowledged that a sentence of life without parole is different from other term-of-years punishments. Indeed, "life without parole sentences share some characteristics with death sentences that are shared by no other sentences." *Graham v. Florida*, 560 U.S. 48, 69 (2010). Unlike other sentences, life without parole is a terminal sentence that "deprives the convict of the most basic liberties without giving hope of restoration." *Id.* at 69-70.

Thus, a life-without-parole "sentence is far more severe than the life sentence [this Court] considered in *Rummel v. Estelle*," *Solem v. Helm*, 463 U.S. 277, 298 (1983), or the sentence of 25 years to life it reviewed in *Ewing v. California*, 538 U.S. 11 (2003).

Mandatory life imprisonment without parole sentences also typically require the most restrictive conditions of confinement with the most dangerous and highest risk prisoners. Prisoners condemned to life imprisonment without parole are typically barred from rehabilitative programs, services and opportunities for care and programming that are afforded other prisoners. *See Graham*, 560 U.S. at 74 ("[D]efendants serving life without parole sentences are often denied access to vocational training and other rehabilitative services that are available to other inmates.").

Consequently, imposition of a mandatory sentence of life imprisonment without parole presents heightened concerns about whether the Eighth Amendment's prohibition against cruel and unusual punishment has been violated when such a sentence is imposed without regard to evolving standards of decency.

B. Drug Policy in the United States Has Evolved Dramatically, Especially with Regard to Possession of Marijuana for Personal Use.

This Court should decide if the most extreme and severe non-capital sentence is constitutionally permissible as punishment when the predicate is the

mere possession of marijuana for personal use. Drug policy in the United States has changed significantly over the last 20 years. From 2009 to 2013, 35 states reformed their drug sentencing laws to authorize less severe and harsh punishments for drug crimes.[3] Views on marijuana, in particular, have evolved dramatically since the 1970s. Twenty-one jurisdictions have now decriminalized simple marijuana possession.[4] A total of 40 states and Washington, D.C. recognize marijuana's medical utility and have, to varying degrees, legalized marijuana for medical use. Twenty-four of these 40 jurisdictions have fully legalized marijuana for medical use and have enacted

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[3] Ram Subramanian & Rebecka Moreno, Vera Inst. of Just., *Drug War Détente? A Review of State-level Drug Law Reform, 2009-2013*, at 25 (2014).

[4] These 21 jurisdictions are: Alaska, California, Colorado, Connecticut, Delaware, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri (effective January 1, 2017), Nebraska, Nevada, New York, North Carolina, Ohio, Oregon, Rhode Island, Vermont, Washington, and Washington, D.C. Alaska Stat. Ann. § 17.38.020; Cal. Health & Safety Code § 11357; Colo. Rev. Stat. Ann. § 18-18-406.3; Conn. Gen. Stat. Ann. § 21a-279a; Del. Code Ann. tit. 16, § 4764; Me. Rev. Stat. tit. 22, § 2383; Md. Code Ann., Crim. Law § 5-601; Mass. Gen. Laws Ann. ch. 94C §§ 32L-32N; Minn. Stat. Ann. § 152.027(4); Miss. Code Ann. § 41-29-139(c)(2); Mo. Ann. Stat. § 579.015; Neb. Rev. Stat. Ann. § 28-416; Nev. Rev. Stat. Ann. § 453.336; N.Y. Penal Law §§ 221.05-.10; N.C. Gen. Stat. Ann. § 90-95(d)(4); Ohio Rev. Code Ann. § 2925.11(C)(3); Or. Rev. Stat. Ann. § 475.864; R.I. Gen. Laws Ann. § 21-28-4.01; Vt. Stat. Ann. tit. 18, §§ 4230a-4230d; Wash. Rev. Code §§ 69.50.325-.359; D.C. Code § 48-904.01.

legal protections for medical marijuana patients.[5] Additionally, since 2012, five jurisdictions have fully legalized recreational marijuana possession and usage: Alaska, Colorado, Oregon, Washington, and

[5] These 24 jurisdictions are: Alaska, Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, and Washington, D.C. Alaska Stat. Ann. §§ 17.37.010-.080; Ariz. Rev. Stat. Ann. §§ 36-2801 to -2819; Cal. Health & Safety Code §§ 11362.7-.83; Colo. Rev. Stat. Ann. § 18-18-406.3; Conn. Gen. Stat. Ann. §§ 21a-408 to -408p; Del. Code Ann. tit. 16, §§ 4902A-4928A; Haw. Rev. Stat. §§ 329-121 to -128; 410 Ill. Comp. Stat. 130/1-130/999; Me. Rev. Stat. tit. 22, §§ 2421-2430-B; Md. Code Ann., Crim. Law § 5-601; Mass. Gen. Laws Ann. ch. 94C §§ 1-17; Mich. Comp. Laws Ann. §§ 333.26421-.26430; Minn. Stat. Ann. §§ 152.21-.37; Mont. Code Ann. §§ 50-46-301 to -344; Nev. Rev. Stat. Ann. §§ 453A.010-.810; N.H. Rev. Stat. Ann. §§ 126-X:1-:10; N.J. Stat. Ann. §§ 24:6I-1 to -16; N.M. Stat. Ann. §§ 26-2B-1 to -7; N.Y. Penal Law §§ 179.00-.15; Or. Rev. Stat. Ann. §§ 475.300-.346; R.I. Gen. Laws Ann. §§ 21-28.6-4 to -13; Vt. Stat. Ann. tit. 18, §§ 4472-4473m; Wash. Rev. Code §§ 69.51A.005-.903; D.C. Code §§ 7-1671.01-.13. Another 16 jurisdictions have legalized cannabidiol (CBD), or non-psychoactive marijuana, for medical usage: Alabama, Florida, Georgia, Iowa, Kentucky, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Utah, Virginia, Wisconsin, and Wyoming. Ala. Code § 13A-12-214.2; Fla. Stat. Ann. §§ 381.986, 1004.441; Ga. Code Ann. §§ 16-12-190 to -191; Iowa Code Ann. §§ 124D.1-.8; Ky. Rev. Stat. Ann. §§ 218A.005-.080; Miss. Code Ann. § 41-29-136; Mo. Ann. Stat. § 261.265; N.C. Gen. Stat. Ann. § 90-94.1; Okla. Stat. Ann. tit. 63, §§ 2-101, -802; S.C. Code Ann. §§ 44-53-1810 to -1840; Tenn. Code Ann. § 39-17-402; Tex. Occ. Code Ann. §§ 169.001-.005; Utah Code Ann. § 58-37-4.3; Va. Code Ann. § 54.1-3408.3; Wis. Stat. Ann. § 961.34; Wyo. Stat. Ann. §§ 35-7-1801 to -1803.

Washington, D.C.[6] A clear trend has emerged that strongly supports the argument that imposition of the most extreme punishment possible for personal use of marijuana is excessive and offends objective indicia of proportionate and constitutionally permissible punishment.[7]

C. Objective Indicia Demonstrate That There Is a Consensus Against Imposing Mandatory Sentences of Life Imprisonment Without Parole for Marijuana Possession for Personal Use or Without Proof of Intent to Sell or Distribute.

Alabama is unique among states in the harshness with which it treats low quantity possession of marijuana for personal use. Alabama's classification of marijuana possession, its statutory indifference to whether possession is for personal use or for distribution, and the punishment it allows make the state an outlier. Alabama makes possession of less than three

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[6] Colorado and Washington legalized recreational marijuana use in 2012. Colo. Const. art. 18, § 16; Wash. Rev. Code §§ 69.50.325-.390. Alaska and Oregon legalized recreational marijuana use in 2014. Alaska Stat. Ann. § 17.38.020; Or. Rev. Stat. Ann. § 475.864. Washington D.C. legalized recreational marijuana use in 2015. D.C. Code § 48-904.01.

[7] Eighty-one percent of American adults now support legalizing marijuana for medical use. *Increasing Percentages of Americans Are Ready for Legal Marijuana*, The Harris Poll (May 7, 2015, 5:00 AM), http://www.theharrispoll.com/health-and-life/Americans-Ready-for-Legal-Marijuana.html.

pounds of marijuana a Class A felony, equating it in seriousness with murder, rape, terrorism and the most destructive crimes imaginable.

1. The Extreme Rarity of Jurisdictions Allowing Mandatory Life Without Parole for Possession.

The laws of 46 states, the federal government, and the District of Columbia repudiate mandatory life-without-parole sentences for possession of less than three pounds of marijuana for personal use in any circumstance, including for habitual offenders. Alabama is one of only four states with habitual offender provisions authorizing mandatory life-without-parole sentences for mere possession of less than three pounds of marijuana.[8] Only four additional states have habitual offender provisions under which possession of marijuana can result in mandatory life-without-parole sentences for any quantity. Further, within these states, the amounts of marijuana required to trigger the sentence rise quickly away

[8] The other three outlier states are Mississippi (30 grams, which is approximately 1.1 ounces), South Dakota (2 ounces), and Louisiana (2.5 pounds). Miss. Code Ann. §§ 99-19-83, 1-3-11, 41-29-139(c)(2)(C); S.D. Codified Laws §§ 22-7-8, 22-42-6, 22-6-1(3), 24-15-4; La. Rev. Stat. Ann. §§ 15:529.1(A)(4)(b), 40:966(F)(1).

from Alabama's 2.2 pounds, to 3.3 pounds, 10 pounds, 25 pounds, and 10,000 pounds, respectively.[9]

The extreme rarity of mandatory life without parole as a punishment for possession of marijuana for personal use under habitual offender provisions raises an important question about whether a national consensus now exists that such a punishment is disproportionate to the offense.

2. No Distinction Between Personal Use and Trafficking or Intent to Sell or Distribute.

The constitutional problem of a mandatory sentence of life imprisonment without parole for possession of marijuana in this case is further dramatized by Alabama's unique statutory structure which does not require any evidence of intent to sell or distribute for someone in possession of 2.8 pounds of marijuana. There was no dispute in this case that Mr. Brooker's marijuana possession was for personal use to help him manage serious medical problems. The trial court explained to the jury that "the State is not alleging that [Brooker] sold anything. They are not

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[9] Delaware (1,500 grams, which is approximately 3.3 pounds), South Carolina (10 pounds), Oklahoma (25 pounds), and North Carolina (10,000 pounds). Del. Code Ann. tit. 11, § 4214(b), tit. 16, §§ 4751C, 4755; S.C. Code Ann. §§ 17-25-45(B)-(C), 44-53-370(e); Okla. Stat. Ann. tit. 63, §§ 2-415(A)(1), (B)(1)-(2), (C)(1), (D)(3); N.C. Gen. Stat. Ann. §§ 14-7.7, 14-7.12, 90-95(h)(1)(d).

alleging that he manufactured anything or that he brought anything into the state. What they are alleging is that the defendant was in actual or constructive possession of cannabis, in excess of 1 kilo or 2.2 pounds." (R. 258.)

Unlike the law in most states, Alabama punished Mr. Brooker as a "trafficker" even though it was undisputed he used the marijuana for personal use. In the overwhelming majority of American jurisdictions, the allegation that someone is a drug trafficker has to be supported with some evidence of intent to sell or distribute for comparable quantities of marijuana.[10] In only three other states is undisputed

[10] In 32 states and the District of Columbia – Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Illinois, Indiana, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Virginia, West Virginia, Wisconsin, Wyoming, and Washington, D.C. – possession with intent to distribute is punished more harshly than mere possession and the State must demonstrate intent. Alaska Stat. Ann. §§ 11.71.040, 11.71.050, 12.55.125; Ariz. Rev. Stat. Ann. § 13-3405; Ark. Code Ann. §§ 5-64-419,-436,-215; Cal. Health & Safety Code §§ 11357, 11359; Cal. Penal Code § 1170(h); Colo. Rev. Stat. Ann. §§ 18-18-406, -1.3-401.5; Conn. Gen. Stat. Ann. §§ 21a-277(b), -279; Del. Code Ann. tit. 16, §§ 4751C(3)(c), 4754, 4756; Fla. Stat. Ann. §§ 775.072(b)(2)(d)-(e), 893.03(1)(c)(7), 893.13(1)(a)(2), 893.13(6)(a); 720 Ill. Comp. Stat. Ann. 550/4, 550/5; 730 Ill. Comp. Stat. Ann. 5/5-4.5-35, 5/5-4.5-40; Ind. Code Ann. §§ 35-48-4-10, 35-48-4-11, 35-50-2-1; Iowa Code Ann. § 124.401(1)(d), .401(5); La. Rev. Stat. Ann. § 40:966(B)(3), (F)(1); Md. Code Ann., Crim. Law §§ 5-601, 5-602, 5-607; Mass. Gen. Laws Ann. ch. 94C, §§ 34, 32C, 31;

(Continued on following page)

evidence that marijuana possession is merely for personal use, as distinct from possession with intent to sell, irrelevant for comparable quantities of marijuana.[11] The mandatory sentence imposed in this case precluded the Court from considering that Mr. Brooker's marijuana possession was for personal use to address serious medical issues.

Mich. Comp. Laws Ann. §§ 333.7401, 333.7403; Miss. Code Ann. § 41-29-139; Mo. Ann. Stat. §§ 195.202, .211; Mont. Code Ann. §§ 45-9-102 to -103, 50-32-101, -222; Neb. Rev. Stat. Ann. § 28-416; N.H. Rev. Stat. Ann. § 318-B:26; N.J. Stat. Ann. §§ 2C:35-5, 2C:35-10; N.D. Cent. Code Ann. § 19-03.1-23(1)(b), (7); Okla. Stat. Ann. tit. 63, §§ 2-401, 2-402, 2-204; 35 Pa. Cons. Stat. Ann. § 780-113(a)(16), (a)(30), (b), (f)(2); S.C. Code Ann. § 44-53-370(b)(2), (d)(2); S.D. Codified Laws §§ 22-42-6, -7; Tenn. Code Ann. §§ 39-17-417(g), -418(c)(1); Utah Code Ann. §§ 58-37-8(1)(b)(ii), 58-37-8(2)(d), 76-3-203, 76-3-204; Va. Code Ann. §§ 18.2-248.1, -250.1; W. Va. Code Ann. §§ 60A-2-204, 60A-4-401(a)(ii), (c); Wis. Stat. Ann. § 961.41(1m)(h)(3), (3g)(e), 961.14(4)(t); Wyo. Stat. Ann. §§ 35-7-1031(a)(ii), (c)(iii), 35-7-1014(d)(xiii); D.C. Code 48-904.01(a)(2)(B), (d)(1), 48-902.08(a)(6). In five states – Minnesota, New York, Ohio, Texas and Vermont – there is no offense of "possession with intent to distribute." Instead, there are only offenses of sale and possession, which are completely separate, so the issue of intent to distribute does not come up for possession. Minn. Stat. Ann. §§ 152.01-.05; N.Y. Penal Law §§ 70.00, 221.05, 221.20; Ohio Rev. Code Ann. §§ 2925.04(C)(5), .11(C)(3); Tex. Health & Safety Code Ann. §§ 481.120(b), 481.121; Vt. Stat. Ann. tit. 18, § 4230(a), (b)(3). In Oregon, there is no offense of "possession with intent to distribute" and both delivery of marijuana in any amount and possession of more than 2 pounds of marijuana are only Class A misdemeanors. Or. Rev. Stat. Ann. §§ 475.860, .864(6)-(7).

[11] These three states are Hawaii, Idaho, and Rhode Island. Haw. Rev. Stat. § 712-1249.5; Idaho Code Ann. § 37-2732B; R.I. Gen. Laws Ann. § 21-28-4.01.1.

Even as a stand-alone offense, possession of less than three pounds of marijuana for personal use is punishable by a sentence of life imprisonment in Alabama.[12] No other state authorizes such extreme punishment for such low quantities of marijuana.

The overwhelming majority of jurisdictions – 46 states and the District of Columbia – do not allow sentences of greater than 10 years imprisonment for possession of less than three pounds of marijuana for personal use as a stand-alone offense.[13] The vast majority – 36 states and the District of Columbia – allow a maximum of five years imprisonment for possession of less than three pounds of marijuana as a stand-alone offense.[14]

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[12] Ala. Code § 13A-12-231 (designating possession of more than 2.2 pounds of marijuana a Class A felony); § 13A-5-6 (stating that punishment for a Class A felony is life imprisonment, or 10 to 99 years).

[13] The three outlier states, aside from Alabama, authorizing sentences of more than 10 years imprisonment for possession of less than 3 pounds of marijuana as a stand-alone offense, are: Idaho (maximum 15 years); Mississippi (maximum 24 years); and Rhode Island (maximum 50 years). Idaho Code Ann. § 37-2732B(a)(1)(D); Miss. Code Ann. § 41-29-139(c)(2)(F); R.I. Gen. Laws Ann. § 21-28-4.01.1(a)(5), (b).

[14] Alaska (maximum 5 years), Arizona (maximum 2.5 years), California (maximum 6 months), Colorado (maximum 2 years), Connecticut (maximum 1 year), Delaware (maximum 3 years), Florida (maximum 5 years), Indiana (maximum 180 days), Iowa (maximum 6 months), Kentucky (maximum 5 years), Maine (maximum 5 years), Maryland (maximum 1 year), Massachusetts (maximum 6 months), Michigan (maximum 90 days), Minnesota (maximum 5 years), Montana (maximum 5

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years), Nebraska (maximum 2 years), Nevada (maximum 4 years), New Hampshire (maximum 1 year), New Jersey (maximum 18 months), New Mexico (maximum 1.5 years), North Carolina (maximum 8 months), Ohio (maximum 1 year), Oklahoma (maximum 1 year), Oregon (maximum 1 year), Pennsylvania (maximum 1 year), South Carolina (maximum 6 months), Tennessee (maximum 11 months and 29 days), Texas (maximum 2 years), Utah (maximum 6 months), Vermont (maximum 5 years), Virginia (maximum 30 days), Washington (maximum 5 years), West Virginia (maximum 6 months), Wisconsin (maximum 6 months), Wyoming (maximum 5 years), and the District of Colombia (maximum 180 days). Alaska Stat. Ann. §§ 11.71.040(a)(3)(F), (d), 12.55.125(e); Ariz. Rev. Stat. Ann. §§ 13-3405(B)(2), 13-702(D); Cal. Health & Safety Code § 11357(c); Colo. Rev. Stat. Ann. §§ 18-18-406(4)(a), 18-1.3-401.5(2)(a); Conn. Gen. Stat. Ann. §§ 21a-279(a)(1), 53a-36; Del. Code Ann. tit. 11, § 4205(b)(6), tit. 16, §§ 4751(c)(5), 4756; Fla. Stat. Ann. §§ 893.13(6)(a)-(b), 775.082(3)(e); Ind. Code Ann. §§ 35-48-4-11(a)(1), 35-50-3-3; Iowa Code Ann. § 124.401(1)(f)(5); Ky. Rev. Stat. Ann. §§ 218A.1421, 532.060(2)(d); Me. Rev. Stat. Ann. tit. 17-A, §§ 1107-A(1)(F)(3), 1252(2)(c); Md. Code Ann., Crim. Law § 5-601(c)(2)(i); Mass. Gen. Laws Ann. ch. 94C, § 34; Mich. Comp. Laws Ann. § 333.7403(2)(d); Minn. Stat. Ann. § 152.025(2)(a), (2)(a)(1); Mont. Code Ann. § 45-9-102(6); Neb. Rev. Stat. Ann. §§ 28-416(12), 28-105(1); Nev. Rev. Stat. Ann. §§ 453.339(1)(a), 193.130(2)(e); N.H. Rev. Stat. Ann. §§ 318-B:26, 651:2(II)(c); N.J. Stat. Ann. §§ 2C:43-6(a)(4), :35-10(a)(3); N.M. Stat. Ann. §§ 30-31-23(B)(3), 31-18-15(A)(10); N.C. Gen. Stat. Ann. §§ 90-95(d)(4), 15A-1340.17; Ohio Rev. Code Ann. § 2925.11(C)(3)(d), 2929.14(A)(3)(b); Okla. Stat. Ann. tit. 63, § 2-402(B)(2); Or. Rev. Stat. Ann. §§ 475.864, 161.615(1); 35 Pa. Cons. Stat. Ann. § 780-113(b); S.C. Code Ann. § 44-53-370(c), (d)(2); Tenn. Code Ann. § 39-17-418; Fines Imposed for Simple Possession Under the Tenn. Drug Control Act of 1989, Tenn. Att'y Gen. Op. No. 91-82 (Sept. 4, 1991); Tex. Health & Safety Code Ann. §§ 481.121, 12.35(a); Utah Code Ann. §§ 58-37-8, 76-3-204(2); Vt. Stat. Ann. tit. 18, § 4230; Va. Code Ann. § 18.2-250.1(A); Wash. Rev. Code §§ 69.50.4013, 9A.20.021(1)(c);

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II. THIS COURT SHOULD DETERMINE WHETHER EQUATING POSSESSION OF MARIJUANA FOR PERSONAL USE WITH THE MOST VIOLENT AND EXTREME CRIMES IN THE CRIMINAL CODE VIOLATES THE PROPORTIONALITY REQUIREMENT OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

The principle that a sentence may be disproportionate to an offense is well-established in this Court's jurisprudence. The Eighth Amendment, which serves as a check on the authority of state legislatures to prescribe punishments for crimes, requires that "the State's power to punish 'be exercised within the limits of civilized standards.'" *Kennedy v. Louisiana*, 554 U.S. 407, 435 (2008) (quoting *Trop v. Dulles*, 356 U.S. 86, 99 (1958) (plurality opinion)). A State's power to punish crime is therefore not "unrestrained," but rather must be "exercised under the spirit of constitutional limitations formed to establish justice." *Weems v. United States*, 217 U.S. 349, 381 (1910). This requirement is met where punishments are proportional to the severity of the crime. *Roper v. Simmons*, 543 U.S. 551, 560 (2005); *see also Solem v. Helm*, 463 U.S. 277, 290 (1983) ("[W]e hold as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant

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W. Va. Code Ann. § 60A-4-401; Wis. Stat. Ann. § 961.41; Wyo. Stat. Ann. § 35-7-1031; D.C. Code § 48-904.01(d)(1).

has been convicted. . . . [N]o penalty is *per se* constitutional.").

This Court's precedents have consistently recognized that States exceed the constitutional limitations on their power to punish crime where they impose sentences that are disproportionate to the offense. *See, e.g.*, *Solem*, 463 U.S. at 284 (writing that the Eighth Amendment's final clause "prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed"); *Roper*, 543 U.S. at 560 ("[T]he Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions."); *Robinson v. California*, 370 U.S. 660, 676 (1962) (Douglas, J., concurring) ("A punishment out of all proportion to the offense may bring it within the ban against 'cruel and unusual punishment.' ").

The question of a punishment's proportionality "cannot be considered in the abstract," but rather must be weighed against the nature of the offense. *Robinson*, 370 U.S. at 667. In *Robinson*, this Court explained that "imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual." *Id.* Yet, in the Court's view, this otherwise constitutional term of imprisonment would be unconstitutionally disproportionate where imposed for "the 'crime' of having a common cold." *Id.* ("Even one day in prison would be cruel and unusual punishment for the 'crime' of having a common cold."); *see also id.* at 676 (Douglas, J., concurring) ("[T]he principle that would deny power to exact capital punishment for a

petty crime would also deny power to punish a person by fine or imprisonment for being sick."). This Court has also recognized that the punishment of life imprisonment for an overtime parking ticket is likely unconstitutionally disproportionate. *See Rummel v. Estelle*, 445 U.S. 263, 274 n.11 (1980) (writing that while legislatures have authority to prescribe terms of imprisonment, "[t]his is not to say that a proportionality principle would not come into play" where "a legislature made overtime parking a felony punishable by life imprisonment"); *see also Hutto v. Davis*, 454 U.S. 370, 374 n.3 (1982) (same).

Numerous cases in which this Court has considered categorical challenges to the constitutionality of punishment reaffirm the Eighth Amendment's fundamental concern over disproportionality. In *Kennedy*, this Court found that "the death penalty can be disproportionate to the crime itself where the crime did not result, or was not intended to result, in death of the victim." 554 U.S. at 420, 438 (noting "fundamental, moral distinction between a 'murderer' and a 'robber' "); *see also Coker v. Georgia*, 433 U.S. 584, 598 (1977) ("We have the abiding conviction that the death penalty, which 'is unique in its severity and irrevocability,' is an excessive penalty for the rapist who, as such, does not take human life." (internal citations omitted)). In holding that the death penalty for child rape is unconstitutional under the Eighth Amendment, the *Kennedy* Court was concerned that "[t]he incongruity between the crime of child rape and the harshness of the death penalty poses the risk of

overpunishment." 554 U.S. at 441; *see also id.* at 420 ("The Court further has held that the death penalty can be disproportionate to the crime itself where the crime did not result, or was not intended to result, in death of the victim."). Furthermore, in *Graham v. Florida*, 560 U.S. 48 (2010), this Court found that life imprisonment without the possibility of parole is a disproportionate punishment for the juvenile who commits a non-homicide offense. 560 U.S. at 69 ("Although an offense like robbery or rape is 'a serious crime deserving serious punishment,' those crimes differ from homicide crimes in a moral sense." (internal citations omitted)).

Not only must punishments be proportioned to the offense, but this Court has further made clear that whether a given punishment is proportionate to a given offense can change over time. The Court has stated that it views the "concept [of proportionality] less through a historical prism than according to the 'evolving standards of decency that mark the progress of a maturing society.'" *Miller v. Alabama*, 132 S. Ct. 2455, 2463 (2012) (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)). "This is because the standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change." *Graham*, 560 U.S. at 58. The need to look to evolving standards of decency is driven by the Eighth Amendment's central concern with protecting human dignity:

> The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. . . . [T]he words of the Amendment are not precise, and . . . their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.

Trop, 356 U.S. at 100-01.

"The Eighth Amendment 'is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.'" *Hall v. Florida*, 134 S. Ct. 1986, 1992 (2014) (quoting *Weems*, 217 U.S. at 378). "Mercy toward the guilty can be a form of decency, and a maturing society may abandon harsh punishments that it comes to view as unnecessary or unjust." *Miller*, 132 S. Ct. at 2478 (Roberts, C.J., dissenting).

Evaluating evolving standards of decency has meant, in some cases, that the Court "ask[s] as part of the analysis whether 'objective indicia of society's standards, as expressed in legislative enactments and state practice,' show a 'national consensus' against a sentence for a particular class of offenders." *Id.* at 2470 (quoting *Graham*, 560 U.S. at 61). That analysis encompasses "measures of consensus other than legislation," *Kennedy*, 554 U.S. at 433, including states' "[a]ctual sentencing practices." *Graham*, 560

U.S. at 62. In other cases, the Court has described the process of looking to the punishments imposed on other individuals in the same jurisdiction and for the same offense in other jurisdictions. *Harmelin v. Michigan*, 501 U.S. 957, 1015 (1991) (Kennedy, J., concurring) (citing "this type of objective factor which forms the basis for the tripartite proportionality analysis set forth in *Solem*" as the type of objective factor the Court looks to when determining "what standards have 'evolved' "); *see also Solem*, 463 U.S. at 292 (describing that tripartite approach). In other instances, looking to evolving standards of decency has meant evaluating whether there has been "consistency in the direction of change" for or against a given punishment for a given crime. *See, e.g.*, *Hall*, 134 S. Ct. at 1997-98; *Kennedy*, 554 U.S. at 431-32; *Atkins v. Virginia*, 536 U.S. 304, 315 (2002). Finally, in evaluating evolving standards of decency, this Court has noted, " 'the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.' " *Roper*, 543 U.S. at 563 (quoting *Atkins*, 536 U.S. at 312).

With regard to imposition of the most severe non-capital punishment in the criminal code for mere possession of marijuana for personal use, it is clear that serious constitutional questions exist. Attitudes about mere possession of marijuana have evolved significantly over the last 20 years. There is a clear consensus that marijuana use is not fairly comparable to the most violent and destructive crimes. All of

the objective indicia support a claim that a mandatory sentence of life imprisonment without parole may now violate the Eighth Amendment and this Court should review this important constitutional question.

CONCLUSION

The imposition of a mandatory sentence of life imprisonment without parole for someone convicted of marijuana possession for personal use presents an important constitutional question under the Eighth Amendment. This Court should grant review and resolve the questions presented in this case.

Respectfully submitted,

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MEMORANDUM

(07/02/2015)

CR-14-0126 Houston Circuit Court CC-13-485

Lee Carroll Brooker v. State of Alabama

JOINER, Judge.

Lee Carroll Brooker was convicted of trafficking in cannabis, *see* § 13A-12-231, Ala. Code 1975, and

sentenced to life imprisonment without the possibility of parole.[1] The trial court ordered Brooker to pay a $25,000 fine, a $2,000 drug-demand-reduction assessment, a $100 forensic-sciences-trust-fund assessment, a $50 crime-victims-compensation assessment, and court costs.

The evidence at trial established that, on July 20, 2011, Brooker was in possession of at least 2.2 pounds of marijuana plants. Investigator Ronald Hall of the Dothan Police Department testified that, on July 20, 2011, he obtained written consent from Darren Brooker, Brooker's son, to search Darren's home in connection with an investigation into stolen property. Investigator Hall testified that Brooker was present when he arrived at the residence. Investigator Hall testified that he showed Brooker the consent-to-search form signed by Darren and that Brooker allowed him to enter the residence. Investigator Hall testified that he began his search in an upstairs bedroom and that he observed a "growing light and pots in the bedroom on the left that appeared to be a grow operation that was set up indoors." (R. 94.) Investigator Hall testified:

> "At that particular point, I continued to look for the property that I was there to look for. There was only one bedroom left upstairs. I went into that bedroom to look for

[1] Brooker was sentenced pursuant to the Habitual Felony Offender Act ("the HFOA"), *see* § 13A-5-9, Ala. Code 1975.

> the property. I did not find the property that I was looking for; however, in the closet of the second bedroom was old dried plants that appeared to be marijuana plants."

(R. 94-95.) Investigator Hall testified that, because the residence was located within the jurisdiction of the Houston County Sheriff's Department, he contacted Investigator Jackie Smith of that Sheriff's Department's narcotics division. On cross-examination, Investigator Hall confirmed that he did not obtain Brooker's written consent to search the residence. During Investigator Hall's testimony, the State offered, and the trial court admitted, the consent-to-search form signed by Darren Brooker and 17 photographs of the evidence discovered inside the residence. Brooker did not object to the admission of that evidence.

Investigator Smith testified that, after Investigator Hall contacted him, he responded to Darren's residence and observed what he believed to be an indoor marijuana-growing operation. Investigator Smith confirmed that, based on his observations, he decided to search for additional plants outside the house. Investigator Smith testified that Brooker confirmed to him that there were marijuana plants outside. Investigator Smith testified that "there were few plants, infant plants, real young plants, that were in pots just outside the back door that was separate from the garden where the bigger plants were." (R. 120.) Investigator Smith testified that Brooker "directed [him] down a path behind the house" where 37

larger marijuana plants were located approximately 100 yards away. (R. 120.) During Investigator Smith's testimony, the State offered, and the trial court admitted, 20 photos of the evidence discovered on Darren's property. Brooker did not object to the admission of that evidence.

Investigator Joshua Robertson of the Houston County Sheriffs Department's narcotics division testified that he accompanied Investigator Smith to Darren's residence on July 20, 2011. Investigator Robertson testified that he collected and inventoried the following items found in the house and on the surrounding property that were connected to the marijuana-growing operation: (1) 37 plants located outside the residence; (2) two plants located inside the residence; (3) rolling papers; (4) burned marijuana cigarettes; (5) loose marijuana leaves, stems, and seeds; (6) plant food; (7) fluorescent lights and bulbs; (8) two "Harvest Probe, 1000 sunlight supply power burners" (R. 151); (9) automatic timers; and (10) a large scale used for weighing marijuana. Investigator Robertson testified that those items were typically used in indoor marijuana-growing operations. During Investigator Robertson's testimony, the State offered, and the trial court admitted, the marijuana plants, lights, light bulbs, timers, scale, and sunlight supply power burners collected from Darren's property as well as the certified deed showing Darren as the owner of the property. Brooker did not object to the admission of that evidence. The State also offered the Sheriff Department's inventory list of the evidence

collected from Darren's home, and Brooker objected on the ground that it referenced Darren as a co-defendant in the case. (R. 140.) The trial court overruled Brooker's objection and admitted the inventory list.

Michael Muraski of the Alabama Department of Forensic Sciences testified that he determined that the plants collected from Darren's residence were marijuana plants weighing, at a minimum, 2.8 pounds. During Muraski's testimony, the State offered, and the trial court admitted, the certificate of analysis prepared as a result of the evidence collected from Darren's residence. Brooker did not object to the admission of that evidence.

After the State rested, the trial court held a hearing outside of the jury's presence on the motion to suppress that Brooker had filed prior to trial. Brooker testified that, on July 20, 2011, he was present at the home he shared with Darren when law enforcement knocked on the front door. Brooker testified:

> " . . . I opened the door. And there were two officers there. And they told me that they come to search the house for bicycles that was stolen. And I asked them did they have a search warrant.
>
> "And they said, no, they didn't have a search warrant. But they had a consent form signed by my son.
>
> "Q. Did they show that to you?

"A. I don't recall them showing it to me.

"Q. What did you say?

"A. But I told them, I said, 'Look, I live here, too; and I'm not consenting to a search.'

"Q. What happened next?

"A. They told me to go in the house and put the dog in the bathroom. So when I was taking the dog back to the bathroom, they came on in.

"Q. At the point when one of the officers said they need consent, they have a consent form, where were they standing?

"A. On the porch.

"Q. Was your front door opened?

"A. Yes.

". . . .

"Q. What happened when you go to take your dog – where did you put your dog?

"A. I put – I was going to put him in my bedroom, and they told me to put him in the bathroom.

"Q. Did you do that?

"A. Yes, I did.

"Q. And where were law enforcement officers standing when you came back?

"A. In the house.

". . . .

" . . . When I came back out of the bathroom, they are in the house. And there's a recliner there at the – in the living room. And they told me to sit down in that recliner.

"Q. Did you ever consent to them searching the house?

"A. No, I never consented. I never signed no consent form or nothing. They were suppose to have the consent form with them, you know.

"Q. You heard the officer that testified, I believe, Investigator Hall, that testified that, 'No, we showed him the consent form, and then Mr. Brooker consented to us searching his house'?

". . . .

"A. No. He wasn't telling the truth. You know, I had them lights in the house. I ain't going to let them in unless they got a search warrant. You know, I have been foolish. You know, I told him, I ain't signing no consent.

"I have equity in the house. And I got the check through the bank to approve it, that I give my son some money. I made the down payment on the house for him, and all that. That house is as much mine as his.

"Q. And you had been living at that house a while, right?

"A. Ten years.

> "Q. And you told them that [you] had been living at that house, right?
>
> "A. Yeah. I told them, I said, 'I [live] here, too, and I'm not signing a consent.'
>
> ". . . .
>
> "Q. Did at any point in time, did you voluntarily consent to the search of that house?
>
> "A. No. I never volunteered consent, you know."

(R. 206-09.)

Brooker's defense counsel then argued that, pursuant to *Georgia v. Randolph*, 126 S. Ct. 1515 (2006), a "physically present defendant would be a person that . . . has the right to object over, say, a roommate's consent" (R. 215); counsel argued, therefore, that because Brooker lived in Darren's house, law enforcement were required to obtain Brooker's consent to search the residence, regardless of the fact that Darren had given his consent. The State responded that, because Brooker's testimony contradicted Investigator Hall's testimony, the Court had to determine which witness was credible; if, the State argued, Investigator Hall had testified truthfully, then Brooker had given his consent and the search was not unreasonable. The trial court denied Brooker's motion to suppress.

Ultimately, the jury returned a guilty verdict against Brooker. At Brooker's sentencing hearing, the

State offered certified records from the State of Florida showing that Brooker was previously convicted for one count of attempted robbery with a firearm and three counts of robbery with a firearm. Brooker objected on the ground that the records were not "adequate proof of [his] alleged convictions." (R. 292-93.) The trial court overruled Brooker's objection and admitted the records of his convictions. The trial court determined that, under Alabama law, Brooker's robbery convictions would be treated as Class A felonies. The trial court stated:

> " . . . I want the parties to be on notice according to Section 13A-5-9, [Ala. Code 1975,] commonly referred to as Habitual Offender Act, subsection c. In all cases when it is shown that a criminal defendant has been previously convicted of any three felonies, and after such convictions has committed another felony, he or she must be punished as follows: Subparagraph four, on conviction of a Class A felony, which is this, trafficking, where the defendant has one or more prior convictions from any Class A felony, he or she must be punished by imprisonment for life without the possibility of parole."

(R. 293-94.) After the trial court stated that it had no discretion under the HFOA to enter any sentence other than life imprisonment without the possibility of parole, Brooker stated:

> " . . . [T]here has been an erosion of [the HFOA] as being mandatory in this State, Your Honor. I think that makes it clearly

> that there is opportunity for further erosion, Your Honor. And I feel like the Court has the authority to sentence him to life imprisonment. I think the Court could find in this instance, as I put in my brief, that would amount to cruel and unusual punishment. And you could use that as a constitutional grounds to sentence to life in prison. And the State could appeal that, and it could be sorted out higher up. However, I feel in this particular case, yes, you have the authority.
>
> ". . . .
>
> " . . . [W]e object under the application of the Habitual Offender Act and specifically that section of it as being cruel and unusual punishment in this case."

(R. 322-23.) The State responded that the HFOA "has been challenged constitutionally many times over the years and has always been upheld by the courts." (R. 324.) The trial court stated, "[If] the Court could sentence you to a term that is less than life without parole, I would. However, the law is very specific as to the sentence in this case. There is no discretion by the Court." (R. 326-27.)

On appeal, Brooker contends that his sentence violates the Eighth Amendment of the United States Constitution and that he was subjected to an unreasonable search in violation of the Fourth Amendment of the United States Constitution.

I.

Brooker contends that his sentence "to life imprisonment without the possibility of parole amounts to cruel and unusual punishment in violation of the [Eighth] Amendment" of the United States Constitution. (Brooker's brief, p. 14.) As best we can discern, Brooker claims that the HFOA is unconstitutional because the trial court had no authority to consider mitigating circumstances or to deviate from the HFOA when it sentenced him.

This Court has previously stated that, "when the trial court imposes a sentence within the statutory range, this court will not review that sentence. *Hoosier v. State*, 612 So. 2d 1352 (Ala. Cr. App. 1992)." *Wooden v. State*, 822 So. 2d 455, 458 (Ala. Crim. App. 2000). The HFOA provides, in relevant part:

> "(c) In all cases when it is shown that a criminal defendant has been previously convicted of any three felonies and after such convictions has committed another felony, he or she must be punished as follows:
>
> ". . . .
>
> "(4) On conviction of a Class A felony, where the defendant has one or more prior convictions for any Class A felony, he or she must be punished by imprisonment for life without the possibility of parole."

Brooker was found guilty of a Class A felony[2] after he had previously been convicted of three Class A felonies, and his sentence of life imprisonment without the possibility of parole was mandatory under § 13A-5-9(c)(4), Ala. Code 1975. Brooker's sentence was clearly within the statutory range, and the trial court did not abuse its discretion when it sentenced Brooker to life imprisonment without the possibility of parole.

> "Sentences of life imprisonment or life imprisonment without the possibility of parole imposed under the Habitual Felony Offenders Act do not violate the Eighth Amendment. *Brooks v. State*, 456 So. 2d 1142 (Ala. Cr. App. 1984). Moreover, the Habitual Felony Offenders Act is not unconstitutional on the basis that it does not provide for consideration of mitigating circumstances. *Holley v. State*, 397 SO. [sic] 2d 211 (Ala. Cr. App. [1981]), *cert. denied*, 397 So. 2d 217 (Ala. 1981)."

822 So. 2d at 458. Brooker's sentence, therefore, does not violate the Eighth Amendment and is not otherwise unconstitutional. Accordingly, he is not entitled to relief on this claim.

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[2] Trafficking in cannabis is a class A felony. *See* § 13A-12-231, Ala. Code 1975.

II.

Brooker contends that "the State violated [his] right to be free from unreasonable search and seizure in his home [because] the police conducted a search without a search warrant or proper consent to search from [him]" in violation of the Fourth Amendment of the United States Constitution. (Brooker's brief, p. 17.) Specifically, Brooker claims that the "consent form signed by Darren Brooker [did] not authorize any member of the Houston County Sheriff's Department to search his property. The consent form [was] strictly limited to 'officers of the City of Dothan, Alabama.'" (Brooker's brief, p. 20.) Brooker further claims that law-enforcement officers were required to obtain his consent in order to search the property.

Brooker's argument is not preserved for appellate review. "Review on appeal is limited to review of questions properly and timely raised at trial." *Newsome v. State*, 570 So. 2d 703, 716 (Ala. Crim. App. 1989). "Even constitutional claims may be waived on appeal if not specifically presented to the trial court." *Brown v. State*, 705 So. 2d 871, 875 (Ala. Crim. App. 1997). "In order for this court to review an alleged erroneous admission of evidence, a timely objection must be made to the introduction of the evidence, specific grounds for the objection should be stated and a ruling on the objection must be made by the trial court." *Goodson v. State*, 540 So. 2d 789, 791 (Ala. Crim. App. 1988), *abrogation on other grounds recognized by Craig v. State*, 719 So. 2d 274 (Ala. Crim. App. 1998) "When a timely objection at the time of

the admission of the evidence is not made, the issue is not preserved for this Court's review." *Ziglar v. State*, 629 So. 2d 43, 47 (Ala. Crim. App. 1993).

Brooker filed a written motion to suppress all evidence obtained as a result of the search, and the trial court set a hearing on the motion to be held at trial. The hearing was held after the State rested and, consequently, after the State had presented the entirety of the evidence that Brooker had moved to suppress in his motion. Brooker did not object to the trial court's failure to hold a suppression hearing before the State presented its evidence, and he did not object to a majority of the evidence that the State presented in its case-in-chief.[3] Brooker's claim, therefore, is not properly before this Court.

Moreover, the trial court was faced with conflicting testimony regarding Brooker's consent to search the residence. In reviewing a trial court's ruling on a motion to suppress, we apply the ore tenus standard of review to the court's findings of fact based on disputed evidence. "When evidence is presented ore

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[3] Brooker's only objection with respect to the evidence obtained as a result of the search was to the admission of the inventory list prepared by the Houston County Sheriff's Department on the ground that it listed Darren as a codefendant in the case. Brooker does not argue in his brief on appeal that the trial court erroneously overruled that objection and, therefore, we do not address that issue. *See* Rule 45B, Ala. R. App. P. ("In those criminal cases in which the death penalty has not been imposed, the Court of Criminal Appeals shall not be obligated to consider questions or issues not presented in briefs on appeal.").

tenus to the trial court, the court's findings of fact based on that evidence are presumed to be correct." *Ex parte Perkins*, 646 So. 2d 46, 47 (Ala. 1994). "'"Where evidence is presented to the trial court *ore tenus* in a nonjury[4] case, a presumption of correctness exists as to the court's conclusions on issues of fact; its determination will not be disturbed unless clearly erroneous, without supporting evidence, manifestly unjust, or against the great weight of the evidence."'" *Ex parte Jackson*, 886 So. 2d 155, 159 (Ala. 2004) (quoting *State v. Hill*, 690 So. 2d 1201, 1203 (Ala. 1996), quoting in turn, *Ex parte Agee*, 669 So. 2d 102, 104 (Ala. 1995)). *See also Shealy v. Golden*, 897 So. 2d 268, 271 (Ala. 2004) (quoting *Ex parte Carter*, 772 So. 2d 1117, 1119 (Ala. 2000) ("Under the *ore tenus* rule, the trial court's findings of fact are presumed correct and will not be disturbed on appeal unless these findings are 'plainly or palpably wrong or against the preponderance of the evidence.'")). "The ore tenus rule is grounded upon the principle that when the trial court hears oral testimony it has an opportunity to evaluate the demeanor and credibility of witnesses." *Hall v. Mazzone*, 486 So. 2d 408, 410 (Ala. 1986). When a trial court makes no specific findings of fact on the record, as in this case, "'this Court will assume that the trial judge made those findings necessary to support the judgment.'" *New*

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[4] Although Brooker's conviction was handed down by a jury, the suppression hearing took place outside the presence of the jury, and its outcome was decided by the trial court. (C. 203.)

Props., L.L.C. v. Stewart, 905 So. 2d 797, 799 (Ala. 2004) (quoting *Transamerica Commerical* [sic] *Fin. Corp. v. AmSouth Bank, N.A.*, 608 So. 2d 375, 378 (Ala. 1992)). Thus, under the ore tenus rule, "'this Court makes all the reasonable inferences and credibility choices supportive of the decision of the trial court.'" *Kennedy v. State*, 640 So. 2d 22, 26 (Ala. Crim. App. 1993) (quoting *Bradley v. State*, 494 So. 2d 750, 761 (Ala. Crim. App. 1985)). "[A]ny conflicts in the testimony or credibility of witnesses during a suppression hearing is a matter for resolution by the trial court. Absent a gross abuse of discretion, a trial court's resolution of [such] conflict[s] should not be reversed on appeal." *Sheely v. State*, 629 So. 2d 23, 29 (Ala. Crim. App. 1993) (citations omitted). "Under the *ore tenus* standard of review, we must accept as true the facts found by the trial court if there is substantial evidence to support the trial court's findings." *Beasley v. Mellon Fin. Servs. Corp.*, 569 So. 2d 389, 393 (Ala. 1990).

Investigator Hall testified that he showed Brooker the consent-to-search form signed by Darren and that Brooker consented to the search. Investigator Smith similarly testified that Brooker was cooperative when he searched the property outside the house. Brooker testified, however, that Investigator Hall never showed him the consent-to-search form and that he did not consent to the search. Although the trial court did not make specific findings of fact as to the conflicting testimony, its denial of Brooker's motion to suppress implies that it found Investigator

Hall's and Investigator Smith's testimony to be credible and that Brooker must have consented to the search. Because the trial court impliedly found that Brooker consented to the search, we cannot say that the search was unreasonable. *See Allen v. State*, 44 So. 3d 525 (Ala. Crim. App. 2009) (holding that consensual searches are exceptions to the rule that warrantless searches are per se unreasonable). There is substantial evidence in the record to support the trial court's ruling, and there is nothing in the record to indicate that the trial court abused its discretion here. Therefore, we will not reverse this case based on the trial court's resolution of the conflicting testimony. Accordingly, Brooker is not entitled to relief on this issue.

Based on the foregoing, the judgment of the trial court is affirmed.

AFFIRMED.

Windom, P.J., and Welch, Kellum, and Burke, JJ., concur.

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA

D. Scott Mitchell
Clerk
Gerri Robinson
Assistant Clerk

[SEAL]

July 24, 2015

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CR-14-0126

Lee Carroll Brooker v. State of Alabama (Appeal from Houston Circuit Court: CC13-485)

NOTICE

You are hereby notified that on July 24, 2015, the following action was taken in the above referenced cause by the Court of Criminal Appeals:

Application for Rehearing Overruled.

/s/ D. Scott Mitchell
D. Scott Mitchell, Clerk
Court of Criminal Appeals

cc: Hon. Larry K. Anderson, Circuit Judge
Hon. Carla Woodall, Circuit Clerk
J. Christopher Capps, Attorney
Laura I. Cuthbert, Asst. Attorney General

SUPREME COURT OF ALABAMA

SPECIAL TERM, 2015

1141160

Ex parte Lee Carroll Brooker

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(In re: Lee Carroll Brooker

v.

State of Alabama)

(Houston Circuit Court, CC-13-485; Court of Criminal Appeals, CR-14-0126)

(09/11/2015)

MAIN, Justice.

WRIT DENIED. NO OPINION.

Bolin, Murdock, and Bryan, JJ., concur.

Moore, C.J., concurs specially.

MOORE, Chief Justice (concurring specially).

I concur with this Court's denial of Lee Carroll Brooker's petition for a writ of certiorari. Brooker, who is 76 years old, was sentenced, as a habitual felony offender, to life imprisonment without the possibility of parole for a nonviolent, drug-related crime. The Court of Criminal Appeals affirmed his conviction and his sentence in an unpublished memorandum. *Brooker v. State* (No. CR-14-0126, July 2, 2015), ___ So. 3d ___ (Ala. Crim. App. 2015) (table). I write separately because I believe Brooker's sentence is excessive and unjustified. In imposing the sentence, the judge stated: "[I]f the Court could sentence you to a term that is less than life without parole, I would. However, the law is very specific as to the sentence in this case. There is no discretion by the Court." Under circumstances like those of Brooker's arrest and conviction, a trial court should have the discretion to impose a less severe sentence than life imprisonment without the possibility of parole.

The Court of Criminal Appeals' unpublished memorandum presents the following facts:

> "The evidence at trial established that, on July 20, 2011, Brooker was in possession of at least 2.2 pounds of marijuana plants. Investigator Ronald Hall of the Dothan Police Department testified that, on July 20, 2011, he obtained written consent from Darren Brooker, Brooker's son, to search Darren's home in connection with an investigation into stolen property. Investigator Hall

testified that Brooker was present when he arrived at the residence. Investigator Hall testified that he showed Brooker the consent-to-search form signed by Darren and that Brooker allowed him to enter the residence. Investigator Hall testified that he began his search in an upstairs bedroom and that he observed a 'growing light and pots in the bedroom on the left that appeared to be a grow operation that was set up indoors.' . . .

"'. . . .'

" . . . Investigator Hall confirmed that he did not obtain Brooker's written consent to search the residence. During Investigator Hall's testimony, the State offered, and the trial court admitted, the consent-to-search form signed by Darren Brooker and 17 photographs of the evidence discovered inside the residence. Brooker did not object to the admission of that evidence.

"Investigator [Jackie] Smith [of the Houston County Sheriff's Department] testified that, after Investigator Hall contacted him, he responded to Darren's residence and observed what he believed to be an indoor marijuana-growing operation. Investigator Smith confirmed that, based on his observations, he decided to search for additional plants outside the house. Investigator Smith testified that Brooker confirmed to him that there were marijuana plants outside. Investigator Smith testified that 'there were few plants, infant plants, real young plants, that

were in pots just outside the back door that was separate from the garden where the bigger plants were.' Investigator Smith testified that Brooker 'directed [him] down a path behind the house' where 37 larger marijuana plants were located approximately 100 yards away. During Investigator Smith's testimony, the State offered, and the trial court admitted, 20 photos of the evidence discovered on Darien's [sic] property. Brooker did not object to the admission of that evidence.

". . . .

" . . . During Investigator [Joshua] Robertson's testimony, the State offered, and the trial court admitted, the marijuana plants, lights, light bulbs, timers, scale, and sunlight supply power burners collected from Darren's property as well as the certified deed showing Darren as the owner of the property. Brooker did not object to the admission of that evidence. . . .

"Michael Muraski of the Alabama Department of Forensic Sciences testified that he determined that the plants collected from Darren's residence were marijuana plants weighing, at a minimum, 2.8 pounds. During Muraski's testimony the State offered, and the trial court admitted, the certificate of analysis prepared as a result of the evidence collected from Darren's residence. Brooker did not object to the admission of that evidence.

"After the State rested, the trial court held a hearing outside of the jury's presence on the motion to suppress that Brooker had filed prior to trial. Brooker testified that, on July 20, 2011, he was present at the home he shared with Darren when law enforcement knocked on the front door. Brooker testified:

> "' . . . I opened the door. And there were two officers there. And they told me that they come to search the house for bicycles that was stolen. And I asked them did they have a search warrant.
>
> "'And they said, no, they didn't have a search warrant. But they had a consent form signed by my son.
>
> "'Q. Did they show that to you?
>
> "'A. I don't recall them showing it to me.
>
> "'Q. What did you say?
>
> "'A. But I told them, I said, "Look, I live here, too; and I'm not consenting to a search. . . ."
>
> "'. . . .'

"Brooker's defense counsel then argued that, pursuant to *Georgia v. Randolph*, 547 U.S. 103, 126 S.Ct. 1515 (2006), a 'physically present defendant would be a person that . . . has the right to object over, say, a roommate's

> consent'; counsel argued, therefore, that because Brooker lived in Darren's house, law enforcement were required to obtain Brooker's consent to search the residence, regardless of the fact that Darren had given his consent. The State responded that, because Brooker's testimony contradicted Investigator Hall's testimony, the Court had to determine which witness was credible; if, the State argued, Investigator Hall had testified truthfully, then Brooker had given his consent and the search was not unreasonable. The trial court denied Brooker's motion to suppress.
>
> "Ultimately, the jury returned a guilty verdict against Brooker. At Brooker's sentencing hearing, the State offered certified records from the State of Florida showing that Brooker was previously convicted for one count of attempted robbery with a firearm and three counts of robbery with a firearm. . . . The trial court determined that, under Alabama law, Brooker's robbery convictions would be treated as Class A felonies. . . ."

The trial court then sentenced Brooker, under the Habitual Felony Offender Act, § 13A-5-9, Ala. Code 1975, to life imprisonment without the possibility of parole, noting that it had no discretion to sentence Brooker otherwise.

In my view, Brooker's sentence of life imprisonment without the possibility of parole for a nonviolent, drug-related crime reveals grave flaws in our

statutory sentencing scheme. I urge the legislature to revisit that statutory sentencing scheme to determine whether it serves an appropriate purpose.