No. 17-1343

In the Supreme Court of the United States

SHAWN LABARRON DAVIS,
Petitioner,

v.

MISSISSIPPI,
Respondent.

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

BRIEF IN OPPOSITION

JIM HOOD
Attorney General
State of Mississippi

KATY TAYLOR GERBER
Special Assistant Attorney General
Counsel of Record
Office of the Attorney General
Post Office Box 220
Jackson, Mississippi 39205
Telephone: (601) 359-3680
kgerb@ago.state.ms.us

Attorneys for Respondent

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

I. Whether the Eight Amendment requires a sentencing authority to make a finding that a juvenile is "permanently incorrigible" before imposing a sentence of life without the possibility of parole.

II. Whether the Eight Amendment categorically prohibits sentencing juveniles to life without the possibility of parole.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION

STATUTES

RULES

OPINIONS AND ORDERS BELOW

The trial court's pronouncement of the petitioner's sentence is unpublished. (Pet. App. 10a-16a). The opinion of the Court of Appeals of the State of Mississippi, affirming the petitioner's sentence is published at *Davis v. State*, 234 So. 3d 440 (Miss. Ct. App. 2017), *reh'g denied* (October 10, 2017). (Pet. App. 4a-9a, 2a-3a). The order of the Supreme Court of Mississippi denying certiorari is unpublished. (Pet. App. 1a).

JURISDICTION

The petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257. He fails to do so.

CONSTITUTIONAL PROVISION INVOLVED

The Eighth Amendment to the U.S. Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

STATEMENT OF THE CASE

1. *The crime*. In 2002, sixteen-year-old Shawn Davis,[1] Anthony Booker, and seventeen-year-old Mary Scarborough devised a plan to rob fifty-something-year-old Dorian Johnson, Scarborough's former boyfriend. *Scarborough v. State*, 956 So. 2d 382, 383 (Miss. Ct. App. 2007). Johnson had been allegedly stalking Scarborough. *Id*. While planning the robbery, Davis had the idea to kill Johnson as well. *Id*.

---

[1] Davis was born in 1986. Tr. 5.

A few weeks later, Davis told Johnson that Scarborough had some marijuana for them to smoke at the park. *Id*. at 383-84; Ex. 3 at 261.[2] When Johnson and Davis arrived at the park, Scarborough got in Johnson's vehicle. *Id*. at 384. At some point, Scarborough signaled for Booker to come over. *Id*. Then Booker and Davis dragged Johnson, who was partially paralyzed, out of his car at knifepoint, and brutally beat and kicked him. *Id*. at 383-84.

When Johnson fell unconscious, they put him in the back of the vehicle and started driving toward an alligator pit. *Id*. at 384. On the way, Davis continued to hit Johnson. *Id*. When they discovered that the alligator pit was closed, they drove to another location where they pulled Johnson out of the vehicle and resumed savagely beating and kicking him. *Id*. Then Davis took a knife and repeatedly slashed at Johnson's face, neck, and head. *Id*. Once Johnson stopped moving, they searched and robbed his body. *Id*.[3]

After leaving Johnson to die, the group attempted to destroy any evidence of the crime and abandoned Johnson's vehicle in a parking lot. *Id*. Then they went to the beach and smoked cigars. Ex. 3 at 267. According to the medical examiner, it likely took Johnson several hours to die due to a combination of

---

[2] All references to "R.," "Tr.," and "Ex." Are to the record, record transcript, and record exhibits on file with the Mississippi Court of Appeals, Docket No. 2016-CT-00638.

[3] At Scarborough's trial, Davis testified, rather candidly, that it was his idea to kill (in addition to rob) Johnson and that he did most of the beating and kicking and all of the stabbing. Ex. 3 at 262, 264.

blood loss, brain swelling, and internal damage to vital organs. Ex. 4 at 229, 231. He had over thirty cut and stab wounds. Ex. 4 at 228.

2. *Original proceedings*. Davis was indicted for capital murder. R. 10. But in 2004, he pleaded guilty to murder under Mississippi Code Annotated section 97-3-19(1)(a) and was sentenced to life in prison. R. 11-15, 17. Mississippi's statutory parole scheme prohibits parole eligibility for those convicted of murder, effectively making Davis's sentence life without the possibility of parole. Miss. Code Ann. § 47-7-3 (Rev. 2012).

3. *Resentencing*. In 2012, this Court held in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), that *mandatory* life without parole sentences for juveniles violate the Eighth Amendment to the United States Constitution. *Miller*, 132 S. Ct. at 2460. As a result, in 2014, Davis was granted a new sentencing hearing. R. 73-74.

While *Miller* did not categorically prohibit the imposition of life without the possibility of parole, it did hold that, prior to sentencing a juvenile to life without parole, the sentencing authority must consider the offender's youth and its attendant characteristics. *Miller*, 132 S. Ct. at 2471. *Miller* suggested that sentencing authorities consider certain factors, including but not limited to: the defendant's chronological age and its hallmark features, his family and home environment, the circumstances of the homicide offense (including the extent of the defendant's participation), his inabilities to deal with the legal system and assist counsel, and the possibility of rehabilitation. *Id*. at 2468. Contrary to the petitioner's assertion, the court considered each of

these factors before resentencing him to life without parole. Pet. App. 10a-16a.

a. *Chronological Age and its Hallmark Features*. At the resentencing hearing, the court noted that Davis was sixteen years old when he committed the crime. Tr. 122. The court also noted that Davis dropped out of school after the tenth grade, but was of average intelligence. Pet. App. 12a.

b. *Family and Home Environment*. The court acknowledged that Davis had a "difficult and dysfunctional" family life. Pet. App. 11a. He was raised by a single mother who was an alcoholic and drug user and who often neglected him. Pet. App. 11a. But the court noted that Davis had the benefit of other authority figures in his life. Pet. App. 11a, T. 83.

c. *Circumstances of the Offense*. The court then discussed the "cold-bloodedness" of the crime. T. 21. The court recalled that Davis devised a scheme, weeks in advance, to rob and murder Johnson. Pet. App. 13a-14a. Subsequently, Davis beat and stabbed Johnson who was partially paralyzed. Pet. App. 13a, 15a. And while Johnson slowly bled to death, Davis and his friends went to the beach. Pet. App. 15a. The court specifically noted that the killing was Davis's idea. Pet. App. 15a.

d. *Inabilities to Deal with the Legal System and Assist Counsel*. The court recalled that Davis was indicted for capital murder but pleaded guilty to the reduced charge of murder. Pet. App. 11a, 13a.[4]

---

[4] *Roper v. Simmons*, 543 U.S. 551 (2005), which eliminated the death penalty for juveniles, had not been decided at the time.

e. *Possibility of Rehabilitation*. Finally, the court discussed Davis's possibility of rehabilitation. The court considered Davis's history of expulsions and suspensions from school. Pet. App. 12a. He was once expelled for bringing a knife to school. Pet. App. 12a. And he was suspended several times, once for threatening a teacher. Pet. App. 12a. The court considered Davis's prior criminal record, which indicated that he had been previously charged with stealing an adult movie and burglary of an automobile. Pet. App. 11a, Ex. 10 at 2. And the court considered Davis's prior psychological evaluation, which revealed that "[he] ha[d] a very definite potential for further delinquency." Pet. App. 11a-12a; Ex. 10 at 6.

The court also considered Davis's records of incarceration, which included incident reports for: vulgar language, failure to obey directives (e.g., interfering with headcounts, loitering in unauthorized areas, and escaping from his cell), possession of contraband (e.g., tobacco, alcohol, a cell phone, a seven-inch knife, and a nine-inch knife), assault of other inmates, assault of an officer, and sexual acts towards officers. Pet. App. 12a-13a; Ex. 9. And the court noted that Davis's records were devoid of any indication that he had availed himself of the numerous programs available to him as an inmate (e.g., GED and drug and alcohol programs). Pet. App. 13a.

Then the court stated: "I have not seen or observed one shred of remorse on your part for the part you played in this crime. . . . I see no remorse here because I don't believe you have any." Pet. App. 15a. The court found that Davis's "release into society through parole would constitute a danger to the public in general and

especially to vulnerable citizens in particular." Pet. App. 15a-16a. Ultimately, the court resentenced Davis to life without parole. Pet. App. 16a.

4. *Court of Appeals of the State of Mississippi*. Davis appealed his sentence to the Court of Appeals of the State of Mississippi. Pet. App. 5a. Davis argued that the court below "applied the wrong legal standard and failed to consider some of the *Miller* factors, while giving inappropriate weight to . . . other factors," and he asserted that he was not one of the "rare juveniles" who deserved a sentence of life without parole. Pet. Miss. Ct. App. Br. 10. Davis also argued that the Eighth Amendment categorically prohibits sentencing juveniles who commit murder to life without parole. Pet. Miss. Ct. App. Br. 21, 23.

The Court of Appeals rejected Davis's arguments and affirmed his sentence. Pet. App. 4a-9a.

5. *Supreme Court of Mississippi*. After the Court of Appeals denied Davis's motion for rehearing, he obtained new counsel and petitioned for certiorari in the Supreme Court of Mississippi. Pet. App. 1a-3a. The supreme court denied Davis's petition. Pet. App. 1a. And his petition for certiorari in this Court followed.

REASONS FOR DENYING THE PETITION

"Review on a writ of certiorari is . . . a matter . . . of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons." U.S. Sup. Ct. R. 10. The present petition contains two questions. The first question was not properly presented in the state court. And because it was not addressed by the Mississippi Court of Appeals or the Mississippi Supreme Court, this case is a poor vehicle for resolving any conflict. In addition, the petitioner's claim fails to raise a federal question. And there is not a genuine split of authority. As to the second question presented, the decision of the Mississippi Court of Appeals is consistent with the precedent of this Court. And the petitioner's claim lacks merit. For these reasons, the State of Mississippi respectfully requests that this Court deny certiorari.

I. Whether the Eight Amendment requires a sentencing authority to make a finding that a juvenile is "permanently incorrigible" before imposing a sentence of life without the possibility of parole.

A. The petitioner's claim was not properly presented in the state court.

The petitioner claims that the Eighth Amendment requires a sentencing authority to make a finding that a juvenile is "permanently incorrigible" before imposing a sentence of life without the possibility of parole. However, the petitioner did not properly present this claim to the Mississippi Court of Appeals in his Appellant's Brief.

In dismissing a petition for writ of certiorari, this Court has stated that it "has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim 'was either addressed by or properly presented to the state court that rendered the decision [it has] been asked to review." *Howell v. Mississippi*, 543 U.S. 440, 443 (2005). Where the state court decision is silent on the question presented by a petition for certiorari, this Court will assume that the issue was not properly presented. *Adams v. Robertson*, 520 U.S. 83, 86 (1997).

In his initial appeal, the thrust of the Appellant's argument was that the sentencer abused its discretion in applying the *Miller* factors. And with respect to the rehabilitation factor, the question was whether the trial court made a finding of permanent incorrigibility before sentencing Davis to life without parole, not whether the trial court was required to do so under the Eighth Amendment. For this reason, neither the State (in its Appellee's Brief) nor the Court of Appeals addressed the claim. Because the petitioner's claim was not properly presented to the Court of Appeals, this court is without jurisdiction to consider it. See *Cardinale v. Louisiana*, 394 U.S. 437 (1969).

B. In the alternative, this case is a poor vehicle for resolving any conflict.

Even if the petitioner properly presented his claim, the fact that the Mississippi Court of Appeals did not address it, and the fact that the Mississippi Supreme Court denied certiorari without a written opinion makes this case a poor vehicle for resolving any conflict.

C. The petitioner's claim does not present a federal question.

This Court is also without jurisdiction to consider the petitioner's claim because it fails to present a federal question.

In *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), this Court explained that *Miller* announced a substantive rule. *Montgomery*, 136 S. Ct. at 734. "*Miller* determined that sentencing [juveniles] to life without parole is excessive for all but 'the rare juvenile offender whose crime reflects irreparable corruption.'" *Id*. Therefore, "it rendered life without parole an unconstitutional penalty for 'a class of defendants because of their status' – that is, juvenile offenders whose crimes reflect the transient immaturity of youth." *Id*. But *Miller* has a procedural component as well. *Id*. That is, before determining that life without parole is an appropriate sentence, a sentencer must conduct a hearing where the juvenile's youth and its attendant characteristics are considered. *Id*. at 734-35. Beyond requiring a hearing, however, this Court declined to set forth a specific procedure for lower courts to follow. Instead, this Court carefully limited the scope of its opinion "to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems." *Id*. at 735. And when faced with the question of whether *Miller* imposed a "formal fact-finding requirement," this court explicitly stated that it did not. See *id*.

By conducting a *Miller* hearing where a juvenile's youth and its attendant characteristics are considered, the Eighth Amendment is satisfied. The petitioner is attempting to add an additional procedural

requirement; however, such a requirement is not supported by the law.

D. There is not a genuine split of authority.

The petitioner cites to decisions from several of the states' highest courts in support of this claim that the states are deeply divided as to whether the Eighth Amendment requires an incorrigibility finding. But as will be shown below, those courts would not have reached a different result on the facts of this case.

1. *Veal v. State*, 784 S.E.2d 403 (Ga. 2016): Veal was convicted of numerous crimes, including murder, which he committed when he was 17 ½ years old. *Veal*, 784 S.E.2d at 405. In sentencing Veal, the court stated: "[B]ased on the evidence . . . it's the intent of the court that the defendant be sentenced to [life without parole]." *Id*. at 409. Veal appealed his sentence, and the Georgia Supreme Court remanded for resentencing, noting that the court did not make any sort of distinct determination on the record that Veal was irreparably corrupt or permanently incorrigible. *Id*. at 412.

The instant case is distinguishable. When considering Davis's possibility for rehabilitation, the court found that his "release into society through parole would constitute a danger to the public[.]" This Court has stated, "[d]eciding that a 'juvenile offender forever will be a danger to society' would require 'making a judgment that he is incorrigible[.]'" *Miller*, 132 S. Ct. at 2465. Unlike *Veal*, there was a distinct determination on the record that Davis was permanently incorrigible.

2. *People v. Holman*, 91 N.E.3d 849 (Ill. 2017): In sentencing Holman to life without parole, the court

stated: "[T]his [d]efendant cannot be rehabilitated, and . . . it is important that society be protected from [him]." *Holman*, 91 N.E.3d at 855. Holman appealed his sentence, and the Illinois Supreme Court held that a juvenile may be sentenced to life without parole "but only if the [sentencer] determines that the defendant's conduct showed irretrievable depravity, permanent incorrigibility, or irreparable corruption beyond the possibility of rehabilitation." *Id*. at 863. Because the court made such a determination, the supreme court affirmed. *Id*. at 865.

As discussed, the court determined that Davis was permanently incorrigible. And, although perhaps not as explicit, the determination in Davis's case was similar to the determination in Holman's case.

3. *Luna v. State*, 387 P.3d 956 (Okla. Crim. App. 2016): Luna appealed his life without parole sentence, and the Oklahoma Court of Criminal Appeals noted that the record simply did not support a finding that the sentencing jury considered Luna's youth with its attendant characteristics and his chances for rehabilitation. *Luna*, 387 P.3d at 962. The court of criminal appeals further noted that there was no evidence before the jury as to whether Luna's crime reflected only transient immaturity or whether his crime reflected irreparable corruption. *Id*. Ultimately, the court held that Luna was entitled to a meaningful procedure through which he could attempt to show that he was not deserving of a sentence of life without parole. *Id*.

In contrast, Davis was given a meaningful procedure through which he attempted to show that he was not deserving of life without parole. However, the

court found that he was deserving of such a sentence. As a child, Davis had a history of suspensions and expulsions from school. He had also been charged with at least two crimes. Then at the age of sixteen, he murdered and robbed Johnson. And for the next ten years while he was in prison, he continued to exhibit irredeemable behavior.[5] Finally, at the resentencing hearing, the court noted that Davis (who was then twenty-eight years old) appeared to still lack any shred of remorse for murdering Johnson. Unlike *Luna*, the record provides ample support that Davis was permanently incorrigible.

4. *Landrum v. State*, 192 So. 3d 459 (Fla. 2016): Following Landrum's conviction for murder, the court simply stated: "[I]t's the judgment, order and sentence of the [c]ourt that you be adjudicated guilty of the offense of murder in the second degree and confined in state prison for the remainder of your natural life therefore." *Landrum*, 192 So. 3d at 462. In remanding for resentencing, the Florida Supreme Court noted that Landrum did not receive individualized sentencing as required by *Miller*. *Id*. at 467. And the supreme court stated, "Without this individualized sentencing consideration, a sentencer is unable to distinguish between juvenile offenders whose crimes 'reflect

---

[5] If there is any question about the relevancy of Davis's behavior after he was sentenced to life without parole, one need look no further than this Court's decision in *Montgomery*. The *Montgomery* Court noted: "[The p]etitioner has discussed in his submissions to this Court his evolution from a troubled, misguided youth to a model member of the prison community." *Montgomery*, 136 S. Ct. at 736. And the Court stated, "The petitioner's submissions are relevant . . . as an example of one kind of evidence that prisoners might use to demonstrate rehabilitation." *Id*.

transient immaturity' and those whose crimes reflect 'irreparable corruption.'" *Id*.

But Davis received individualized sentencing. The court thoroughly considered each of the *Miller* factors, which assisted it in determining that Davis was irreparably corrupt.

5. *Sen v. State*, 301 P.3d 106 (Wyo. 2013): Sen was sentenced to life without parole under a mandatory sentencing scheme. *Sen*, 301 P.3d at 127. Accordingly, the Supreme Court of Wyoming remanded for resentencing pursuant to *Miller*. *Id*. at 127-28. The supreme court stated that at the resentencing hearing, the sentencer "must set forth specific findings *supporting* a distinction between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity and the rare juvenile offender whose crime reflects irreparable corruption [or permanent incorrigibility].'" *Id*. at 127. (Emphasis added).

As discussed, the court did set forth specific findings supporting a distinction between the juvenile offender whose crime reflects unfortunate yet transient immaturity and the rare juvenile offender whose crime reflects permanent incorrigibility. Davis is the latter.

6. *Commonwealth v. Batts*, 163 A.3d 410 (Pa. 2017): In vacating Batts's sentence and remanding for resentencing, the Pennsylvania Supreme Court stated: "[A] sentencing court has no discretion to sentence a juvenile offender to life without parole unless it finds that the defendant is one of the "rare" and "uncommon" [juveniles] possessing the above-stated characteristics, permitting its imposition." *Batts*, 163 A.3d at 435.

But again, the instant case is distinguishable. The court did find that Davis was one of the rare juveniles entitled to life without the possibility of parole.

7. *State v. Seats*, 865 N.W.2d 545 (Iowa 2015): In vacating Seats's sentence and remanding for resentencing, the Supreme Court of Iowa stated that "[t]he question the [sentencer] must answer at the time of [re]sentencing is whether the juvenile is irreparably corrupt, beyond rehabilitation, and thus unfit ever to reenter society[.]" *Seats*, 865 N.W.2d at 558.

The instant case is distinguishable. The court answered the question as to whether Davis was irreparably corrupt, beyond rehabilitation, and thus unfit to ever reenter society through parole. And it answered the question in the affirmative.

Because it cannot be said that the above courts would have reached a different result on the facts of this case, there is not a genuine split of authority.

E. The decision below was correct.

Prior to resentencing Davis to life without parole, the court considered Davis's youth and its attendant characteristics. Although a formal-factual finding was not required, the court nevertheless found that Davis was not entitled to the possibility of parole because he would be a danger to society. And there is ample support in the record that Davis was permanently incorrigible, beyond rehabilitation, and thus unfit to ever reenter into society. The Mississippi Court of Appeals was hardly left to guess what the court was thinking, and it properly affirmed Davis's sentence.

II. Whether the Eight Amendment categorically prohibits sentencing juveniles to life without the possibility of parole.

A. This Court's prior decisions are controlling.

The petitioner claims that the Eighth Amendment categorically prohibits sentencing juveniles to life without parole. However, this Court's prior decisions indicate otherwise.

In *Roper*, "one of the justifications [this] Court gave for decreeing an end to the death penalty for murders . . . committed by . . . juvenile[s] was that life without parole was a severe enough punishment." *Montgomery*, 136 S. Ct. at 744 (Scalia, J., dissenting) (citing *Roper*, 543 U.S. at 572). And again, in *Graham*, this Court left in place this punishment for juvenile homicide offenders. See i*d*. at 742. (citing *Graham v. Florida*, 560 U.S. 48, 69 (2010)).

In *Miller*, this Court noted that "the concept of proportionality is central to the Eighth Amendment." *Miller*, 132 S. Ct. at 2463. This Court then held that sentencing a juvenile to life without parole may be constitutional provided he receives individualized sentencing. In effect, this Court recognized that (although rare or uncommon) there will be cases where life without parole is a proportionate sentence for a juvenile who has committed murder. This is one of them.

B. The petitioner's argument is without merit.

Finally, the petitioner's claim, that sentencing juveniles to life without parole violates the Eighth Amendment, is without merit.

"When determining whether a punishment is cruel and unusual, this Court typically begins with 'objective indicia of society's standards, as expressed in legislative enactments and state practice' . . . to determine whether there is a consensus against [such a] sentencing practice." *Miller*, 132 S. Ct. at 2477-78 (Roberts, C.J., dissenting). The petitioner asserts that twenty-one states have completely eliminated life without parole sentences for juveniles who commit murder, and thirteen states have five or fewer juveniles currently serving life without parole sentences. Thus, the petitioner contends that there is a "national consensus" against sentencing juveniles to life without parole. However, Justice Thomas's dissent in *Miller* stated, in relevant part:

> Today, the Court makes clear that, even though its decision leaves intact the discretionary imposition of life-without-parole sentences for juvenile homicide offenders, it 'thinks appropriate occasions for sentencing juveniles to life without parole will be uncommon.' That statement may well cause trial judges to shy away from imposing life without parole sentences and embolden appellate judges to set them aside when they are imposed. And, when a future petitioner seeks a categorical ban on sentences of life without parole for juvenile homicide offenders this Court will most

> assuredly look to the 'actual sentencing practices' triggered by these cases.

Id. at 2486 (Thomas, J., dissenting) (internal citations omitted). Any trend away from the imposition of life without parole sentences for juveniles who commit murder is likely a Court-imposed trend, and it is unlikely objective indicia of society's standards.

This Court also looks to "evolving standards of decency that mark the progress of a maturing society." *Id*. at 2478 (Roberts, C.J., dissenting). "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." *Id*. But, as Chief Justice Roberts has pointed out, "decency is not the same as leniency." *Id*. "A decent society protects the innocent from violence." *Id*. Juveniles who commit murder are "overwhelmingly . . . young men who are fast approaching the legal age of adulthood." *Id*. at 2489 (Alito, J., dissenting). In fact, "[s]eventeen-year-olds commit a significant number of murders every year, and some of these crimes are incredibly brutal." *Id*. A decent society is one that would remove those guilty of the most heinous murders from its midst.

CONCLUSION

For the each of the above and foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

JIM HOOD
Attorney General
State of Mississippi

KATY TAYLOR GERBER
Special Assistant Attorney General
Counsel of Record
Office of the Attorney General
Post Office Box 220
Jackson, Mississippi 39205
Telephone: (601) 359-3680
kgerb@ago.state.ms.us

Attorneys for Respondent

June 13, 2018