

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

DESHAWN TERRELL,

Petitioner,

v.

THE STATE OF OHIO

Respondent.

PETITION FOR WRIT OF CERTIORARI

Deshawn Terrell respectfully petitions this Court for a writ of certiorari to review the judgment of the Eighth District Court of Appeals in which it rejected Terrell’s claim that as applied to juveniles, Ohio’s felony murder statute violated the Constitution’s Eighth Amendment’s prohibition against cruel and unusual punishment because it precluded the sentencing court from considering the juvenile’s minority status or his mitigating role in the offense.

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QUESTION PRESENTED

Does the mandatory sentencing provision for the offense of felony murder under Ohio Revised Code § 2929.02(B)(1) violate the Eighth and Fourteenth Amendments of the Constitution as applied to juveniles because it requires the trial court to impose a sentence of 15 years to life imprisonment notwithstanding the defendant's juvenile status or the fact that he did not actually commit the underlying murder?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW
AND RULE 29.6 STATEMENT

All parties appear in the caption of the case on the cover page. None of the parties thereon have a corporate interest in the outcome of this case.

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The decision of the Eighth District Court of Appeals affirming petitioner's conviction and sentence was decided on June 23, 2016 and published as *State v. Terrell*, 8th Dist. No. 103428, 2016-Ohio-4563 (Pet. App. 1-10). The Ohio Supreme Court's order accepting jurisdiction and holding case for decision in Case No. 2016-0317 was issued on December 29, 2016. (Pet. App. 11) The Ohio Supreme Court's order dismissing Mr. Terrell's appeal as improvidently accepted was issued on January 16, 2018 and is published under *State v. Terrell*, 152 Ohio St.3d 160, 2018 Ohio 258. (Pet. App. 12)

JURISDICTION

Petitioner seeks review from the June 23, 2016 decision of the Eighth District Court of Appeals affirming his conviction and sentence. *State v. Terrell*, 8th Dist. No. 103428, 2016-Ohio-4563. The Ohio Supreme Court's order accepting jurisdiction and holding case for decision in Case No. 2016-0317 was issued on December 29, 2016. That Court's subsequent order dismissing Mr. Terrell's appeal as improvidently accepted was issued on January 16, 2018 and is published under *State v. Terrell*, 152 Ohio St.3d 160, 2018 Ohio 258. On May 1, 2018, Justice Kagan extended the time within which to file a petition for writ of certiorari to and including June 29, 2018. Jurisdiction is conferred on this Court pursuant to 28 U.S.C. §§ 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the 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 relevant part that:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state 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.

INTRODUCTION

Children are different – from each other and from adults – and, as a result, we treat them differently. They may not enter into contracts; they may not vote; they may not enlist in the armed services; they may not drink alcohol. Why do we impose these restrictions? Because, as a class, minors are less responsible.

It follows, as this Court has repeatedly recognized, that children are less culpable. *See Roper v. Simmons*, 543 U.S. 569 (2005); *Graham v. Florida*, 560 U.S. 68 (2010); *Miller v. Alabama*, 567 U.S. 460, 471 (2012); *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718 (2016). A sentencing scheme that forbids a trial court from taking into account the essential differences between adult and child offenders rejects that understanding. Rather, it creates a non-rebuttable mandatory presumption that child and adult are equally culpable. Such a scheme ignores universal acknowledgement of the fact that children are, and should be, constitutionally speaking, in a class by themselves.

As this Court has come to recognize what we all knew about the tendency of youths to act out is physiological in origin – the adolescent brain is not fully developed. Specifically, the frontal lobe, where risk-taking and moral decision-making take place, does not mature until one is almost twenty-five years old.

Deshawn Terrell's prosecution and sentencing as an adult raise constitutional concerns that this Court left unresolved in *Miller* and *Graham*. Deshawn was 17 years old when he participated in a robbery where an accomplice killed one of the victims. He was charged as an adult, pleaded no contest to aggravated robbery and murder, and the trial court sentenced him to 21 years to life in prison. Given that sentence, Deshawn will have spent the prime years of his life in prison, and be well into middle age before he even sees the parole board.

The judges before whom Deshawn appeared may have wanted to treat him like a child. But the juvenile court judge never had a chance because Deshawn was subject to a mandatory bindover. The adult trial court's hands were similarly tied, because Ohio's felony murder statute requires the trial court to impose a life sentence once it found Deshawn guilty of murder. ORC § 2929.02(B)(1)

This Court has accepted appeals involving juvenile justice and concluded that treating kids like adults is not only unwise, it is unconstitutional. Accordingly, Petitioner is asking this Court to grant certiorari over this case and hold that the mandatory sentencing provision for Ohio's felony murder statute set forth under O.R.C. § 2929.02(B)(1) is unconstitutional as applied to juveniles because it requires the trial court to impose a sentence of 15 years to life imprisonment

notwithstanding the offender's juvenile status at the time of the offense or the fact that he did not actually commit or intend to commit the underlying murder.

Legal Context

For sentencing purposes, this court has determined juvenile offenders rest on a different constitutional footing than adults. *See Simmons, Graham, Miller, Montgomery*. Specifically, under the Eighth Amendment, this Court has found constitutional limitations on a state's ability to impose certain criminal sentences on juvenile offenders.

In *Simmons*, this Court concluded that the Eighth Amendment categorically bars courts from imposing the death penalty on juvenile offenders. 543 U.S. at 570. Because juveniles' characters are not as well formed as adults', their diminished culpability undermines the penological justifications of the death penalty, making it a disproportionate punishment that violates the Eighth Amendment. *Id.* at 570-71.

In *Graham*, this Court established another Eighth Amendment bar on juvenile punishments, prohibiting life without parole sentences for non-homicide offenses. 560 U.S. at 68. Relying on the principles established in *Simmons*, the Court noted that because life without parole sentences share characteristics with the death penalty, and are especially harsh for juveniles, these sentences also lack sufficient penological justification and disproportionately punish juveniles. *Id.* at 69, 71.

Two years after *Graham*, this Court addressed life without parole sentences for homicide offenses and concluded that the Eighth Amendment forbids

“mandatory life without parole [sentences] for those under the age of 18 at the time of their crimes.” *Miller*, 576 U.S. at 465. In *Montgomery*, the Court clarified that *Miller* had announced a substantive rule of constitutional law rendering life without parole sentences unconstitutional for any child but those that demonstrate “irreparable corruption”. 136 S. Ct. at 733-734. To implement *Miller*’s substantive rule, sentencing courts must examine a juvenile offender’s attendant circumstances to ensure the defendant is irreparably corrupt before imposing a life without parole sentence. *Id.* at 735-736.

These limitations on juvenile sentencing exposure, which also call for individualized sentencing consideration, rest on the fundamental differences between juveniles and adults. These differences are apparent, both from a common-sense appreciation of children’s lack of maturity—“any parent knows”—and from developments in psychology and brain science. *Miller*, 567 U.S. at 471 (quoting *Simmons* and *Graham*). Research has consistently shown that children have an inability to assess consequences, that they lack maturity and a sense of responsibility and, as a result, engage in risky behavior without an appreciation of the actual risks. *Id.* at 472; *see also Thompson v. Oklahoma*, 487 U.S. 815, 837 (1988) (“The likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent.”).

Children are also far more vulnerable to negative influences and pressures, both from their families and their peers. *Miller*, 567 U.S. at 471. As a result they

have a near inability to control their environment and remove themselves from difficult, often dangerous, settings. *Id.* Beyond that, a juvenile's character is not as well-formed as an adult's and their traits less static, meaning that a sentencing rule designed to punish adults may not be appropriate for children. *Id.* at 481. ("A sentencing rule permissible for adults may not be so for children."). Unable to escape crime-producing environments, and with a more malleable character, children are inherently less culpable than adults. *Graham* at 68. This lesser culpability suggests that individualized sentencing of juveniles is always required, especially in circumstances where a harsh, mandatory sentence is otherwise the result.

STATEMENT OF THE CASE

This case illustrates the conflict over whether this Court's well-established Eighth Amendment principles concerning juveniles extends to mandatory sentences of juveniles with lesser culpability. The rules formulated in *Graham* and *Miller* barred specific juvenile sentencing practices, but also left critical juvenile sentencing questions unanswered. This Court has repeatedly recognized that juveniles are different from adult offenders, and that these differences afford them stronger constitutional protections than adults during sentencing. *See Miller*, 567 U.S. at 470; *accord Graham*, 560 U.S. at 68; *Simmons*. At its core, the question this case presents is directly responsive to that principle: Does the Eighth Amendment require trial courts to consider a juvenile's youth and attendant mitigating

circumstances before imposing a sentence of life with parole for a felony murder conviction?

Deshawn Terrell was a 17-year-old adolescent when he participated in a robbery attempt that led to the shooting and tragic death of Mohammed Ismail. Under Ohio law, Deshawn had to be treated as an adult. Deshawn did not kill or intend to kill Mr. Ismail. Nevertheless, because a robbery accomplice did so, Deshawn was charged with felony murder pursuant to O.R.C. 2929.02(B)(1). Under that provision, the court that sentenced Deshawn could not consider his juvenile status, his familial history, peer pressure, the fact that the actual shooter had a history of violent misconduct, and that Deshawn neither intended to kill, nor killed Mr. Ismail. Under Ohio's felony murder statute, none of these factors mattered. In fact, notwithstanding the logic of *Miller* and *Graham*, the trial court was not permitted to consider any mitigation. Instead the court sentenced Deshawn as it would any adult, to a mandatory life sentence with the possibility of parole after 21 years.

Individualized sentencing consideration for juveniles is essential, because they are vulnerable to pressure from peers and possess a limited ability to remove themselves from "horrific, crime producing settings." *Miller*, 567 U.S. at 470. And, as this Court explained in *Miller*, nothing that *Graham* says about juveniles, specifically regarding their "distinctive (and transitory) mental traits and environmental vulnerabilities," is crime specific. *Id.* at 473. *Miller's* holding requires trial courts recognize and consider a juvenile's circumstances before sentencing a

child to life without parole, even for homicides. *Id.* But this case perfectly illustrates why a juvenile regime that lacks individual sentencing for *all* juvenile sentences is also inconsistent with *Miller*. The Court should grant this petition for certiorari in order to clarify this Court’s juvenile sentencing jurisprudence.

REASONS FOR GRANTING THE PETITION

I) State courts and federal circuits are divided on the applicability of *Miller* and *Graham*.

A) State Court Split

In *Miller*, this Court established a standard to guide sentencing courts, specifically addressing juvenile LWOP for homicide offenses. Under the rationale that juveniles are constitutionally different than adults, the Court declared that the “imposition of the State’s most severe penalties on juvenile offenders cannot proceed as though they were not children.” *Id.* at 474. Given that principle, the Court indicated that “a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.” *Id.* at 489. Otherwise the inability or a decision to not consider the mitigating factors associated with adolescence risks a violation of the Eighth Amendment. *Id.* at 489. But lower courts are conflicted on how far *Miller* extends and whether other sentences or sentencing practices for juveniles violate the Eighth Amendment.

State supreme courts have responded to *Miller*’s dictates either by offering broad protections to juveniles or by narrowly following this Court’s explicit command regarding juvenile life without parole sentences. Washington and Iowa

have responded to *Miller* by taking the decision to its logical endpoint by eliminating mandatory juvenile sentences.

In Iowa, the high court has relied on *Miller*'s Eighth Amendment construction to limit juvenile sentences in two ways. First, that court has applied *Miller* to eliminate *de jure* life sentences. See, *State v. Ramos*, 187 Wn.2d 420, 437 (Wash. 2017); and *State v. Null*, 836 N.W.2d 41, 71 (Iowa 2013). In addition, the Iowa Supreme Court has held that, in light of juveniles' categorically demonstrated lessened culpability, trial courts were barred from imposing mandatory adult minimum sentences on juveniles. *State v. Lyle*, 854 N.W.2d 378, 398 (Iowa 2014) ("...the time when a seventeen-year-old could seriously be considered to have adult-like culpability has passed.").

The Washington Supreme Court has likewise held that trial courts must consider the mitigating qualities of youth at sentencing, even in adult court, thereby eliminating mandatory sentencing for juveniles. *State v. Houston-Sconiers*, 188 Wash. 2d 1, 20, 391 P.3d 409, 419 (2017) ("Critically, the Eighth Amendment requires trial courts to exercise this discretion at the time of sentencing itself, regardless of what opportunities for discretionary release may occur down the line.").

Other states have also extended *Miller* and *Graham*, although more incrementally, particularly in finding that *Miller* must apply to *de facto* life without parole sentences. For example, Wyoming declared that *de facto* life without parole sentences fall within *Miller*'s purview. See *Cloud v. State*, 334 P.3d 132, 142 (Wyo.

2014) (“To do otherwise would be to ignore the reality that lengthy aggregate sentences have the effect of mandating that a juvenile die in prison”) (internal quotations omitted).

But other states have responded to this Court differently, often because they feel this Court has not given them sufficient direction. Minnesota refused to expand the protections *Miller* afforded to juvenile offenders absent further guidance from this Court. *See State v. Mahdi Hassan Ali*, 895 N.W.2d 237, 246 (Minn. 2017) (“[H]ere, we simply hold that absent further guidance from the [Supreme Court of the United States], we will not extend the *Miller/Montgomery* rule.”).

In Ohio, the state Supreme Court has declined to go beyond a narrow understanding of *Miller*. *See State v. Long*, 2014-Ohio-849, 138 Ohio St. 3d 478, 8 N.E.3d 890. Colorado has likewise held that life without parole sentences and lengthy term-of-years sentences were separate things. *Lucero v. People*, 394 P.3d 1128, 1130 (Colo. 2017). But even that decision was not written without some reservations. *Id.* at 1135 (“[T]he majority has misperceived and unduly limited the reach of *Graham* and *Miller*.”) (Gabriel, J., concurring).

The differences in states’ responses, with some explicitly waiting for clarification from this Court, illustrates the need for additional guidance on what *Miller* and *Graham* mean for all juvenile sentencing. Of course, some states have found that this Court has given sufficient guidance; perhaps that would be enough to avoid granting this petition if there was not also a split among the federal circuits.

B) Federal Split

Several federal courts have addressed the application of *Miller* beyond a narrow holding concerning life without parole sentences. The resulting split demonstrates that this is not merely a state court issue.

In the federal sphere, the Seventh Circuit declared that *Miller* applies to de facto life without parole sentences. *See, e.g., McKinley v. Butler*, 809 F.3d 908 (7th Cir. 2016); *see also Croft v. Williams*, 773 F.3d 170 (7th Cir. 2014). The court held that the ‘children are different’ passage from *Miller v. Alabama* cannot logically be limited to just de jure life sentences. *Id.* at 911. It has to mean something more. Accordingly, trial courts must consider a juvenile’s age and attendant circumstances before imposing a de facto life without parole sentence. *Id.* at 914.

The Ninth Circuit also entertained the idea of applying *Miller* to *de facto* life without parole sentences, but unlike the Seventh Circuit, it did not make a definitive ruling regarding the obligations of trial courts under *Miller*. *Demirdjian v. Gipson*, 832 F.3d 1060 (9th Cir. 2016).

The Court was unable to determine how a long a sentence must be before it equates to life without parole, or becomes a de jure life sentence. *Id.* at 1076. The Ninth Circuit instead held that because the defendant would be eligible for parole when he was 66 years old, his sentence did not share sufficient characteristics with a death penalty such that the logic of *Graham* and *Miller* would apply. *Id.* at 1076.

Both the Fifth and Sixth Circuits have declined to go beyond *Miller* absent explicit clarification from this Court. *See United States v. Walton*, 537 Fed. Appx.

430 (5th Cir. 2013) (“Walton attempts to raise novel constitutional arguments that would require the extension of precedent.”); *see also Starks v. Easterling*, 659 Fed. Appx. 277 (6th Cir. 2016). In *Starks*, the Sixth Circuit noted this Court’s “growing unease with draconian sentences imposed upon juveniles.” 659 Fed. Appx. at 277. But because lower courts are split on the scope of *Miller*, absent any definitive ruling from this Court, the Sixth Circuit declined to find more robust sentencing protections for juveniles. *Id.* at 280. (“It is not our role to predict future outcomes.”).

This Court should accept this matter, address the divisions between the lower courts, and clarify the Eighth Amendment’s protections for juveniles at sentencing.

II. Implicit in *Miller* is the proposition that mandatory sentences for juveniles are unconstitutional, not just that certain sentencing practices are unconstitutional.

Underlying the Eighth Amendment limits imposed on juvenile sentencing practices is the understanding that juveniles are constitutionally different than adults. *Miller*, 567 U.S. at 471 (“*Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing.”). Children are constitutionally different for a number of reasons but essentially they differ because of the expectation that they will grow and change. *Id.* at 461. Their traits are “less fixed”; therefore their actions are less likely to be evidence of “irretrievabl[e] deprav[ity].” *Id.* at 461 quoting *Roper* at 570.

This Court has repeatedly invoked this principle to decide that penological justifications for juvenile sentences are not always sufficient. *Id.* at 461. But this

Court's logic is not limited solely to the sentencing scenarios contemplated in *Simmons, Graham, and Miller. Id.* at 461. ("nothing that *Graham* said about children is crime-specific."). The logic of these cases, that children's differences make them constitutionally different from adults, implicates mandatory juvenile sentences, no matter their length.

This Court has "held on multiple occasions that a sentencing rule permissible for adults may not be so for children." *Id.* at 481. That means that a juvenile must be sentenced according to their culpability if their constitutional differences are to be adequately recognized.

It is true that many juveniles have their juvenile status considered when decisions are made on whether to transfer them to adult court. But that consideration could not have occurred in this case because the bindover to adult court was mandated by law. In light of *Miller*, the Constitution requires at least some consideration before the court treats a juvenile exactly like an adult. One would think that even more true in the felony murder context.

III. The felony murder rule as applied to juveniles creates a disproportionate result that contravenes this Court's jurisprudence. O.R.C. § 2929.02(B)(1), which codifies this rule, should be struck down as unconstitutional.

The penological justifications for many sentences fall apart when used in a juvenile context; the logic behind felony murder is no different. Felony murder has at its core, a goal of deterring criminals from behaving in a manner where death

could result from their crimes.¹ But, as Justice Breyer recognized in his concurring opinion in *Miller*, juveniles are incapable of making that kind of assessment. 570 at 490. In fact, “the ability to consider the full consequences of a course of action and to adjust one’s conduct accordingly is precisely what we know juveniles lack capacity to do effectively.” *Id.* at 490. (Breyer, J., concurring). Felony murder statutes punish juveniles for consequences they cannot help but fail to understand.

This Court’s felony murder jurisprudence already recognizes the diminished culpability of non-principals and precludes the application of mandatory sentencing schemes to individuals who may have participated, but did not commit a murder. *See Enmund v. Florida*, 458 U.S. 782, 798, 801 (1982) (limiting culpability for the felony crime because homicide crimes are morally different); *see also Tison v. Arizona*, 481 U.S. 137, 151 (1987) (upholding defendants’ death sentences when they acted with “reckless indifference” and their participation in the crime was “major”). When sentencing a child, this reasoning applies with greater force. *Miller*, 570 U.S. at 481 (“[A] sentencing rule permissible for adults may not be so for children.”).

Because children require more protections, in *Graham* this Court expanded its felony murder jurisprudence further, recognizing that a juvenile offender who “did not kill or intend to kill has a twice diminished moral culpability.” *Graham*,

¹ See, Francis, Traci Rose, “*Availability of The Felony-Murder Rule Today: Equitable And Just Or Unfair And Excessive?*” (2005). Electronic Theses and Dissertations. 444. <http://stars.library.ucf.edu/etd/444>. Surveying the use of the rule in jurisdictions nationwide.

560 U.S., at 69. Despite that, Ohio's felony murder statute simply ignores juveniles' status.

This creates especially disproportionate results given everything we know about juveniles and everything this Court has heretofore acknowledged in this regard. Incidents where felony murder results often involve the crime producing settings and environmental hazards that juveniles have a difficult time negotiating. Here Deshawn Terrell was dealing with pressure from another juvenile and an adult co-defendant. Because of consequences he was intellectually and emotionally unable to predict, a robbery resulted in a shooting, for which he has been deemed responsible under Ohio law. Yet, like so many other juveniles, he could not have made the decisions necessary to remove himself from a situation where such a consequence was possible.

Terrell is being punished for the consequences of another's actions; he is also being punished for his categorical inability to consider the consequences of his own behavior as it related to the actions of another. Felony murder statutes doubly punish juveniles and lead to unconstitutional disproportionate results.

Terrell's accomplice was also a juvenile, equally lacking an appreciation of his conduct's gravity, which further undercuts Terrell's culpability

Ohio's felony murder statute and the mandatory sentence it requires prevents courts not only from considering co-conspirators age and attendant circumstances, but the actual killer's status as well. Terrell is being disproportionately punished by Ohio's felony murder statute because he is being

held responsible for his scientifically recognized inability to assess risks. He is being further punished because he is also being held responsible for the actions of another juvenile. Without any discretion to consider a juveniles' particular case, felony murder statutes create absurd results.

Deshawn Terrell should have his juvenile status and the constitutional protections that come with it recognized at sentencing. That is especially critical in felony murder cases where another person, who also happened to be a juvenile, acted to create fatal consequences. Deshawn Terrell could not have fully understood his conduct's potential consequences. And if Terrell was not able to appreciate the consequences of his own actions, he was never going to anticipate the actions of another juvenile – his juvenile codefendant who was the shooter. The Eighth District Court of Appeals invoked *Miller* to affirm Deshawn's 21 years to life sentence in the face of his Eighth Amendment challenge. That decision strains the logic that underlies this Court's decisions, particularly in *Graham* and *Miller*, well past reason.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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