

No. 18-5239

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

DESHAWN TERRELL,

Petitioner,

v.

THE STATE OF OHIO

Respondent.

**On Petition for Writ of Certiorari to the
Eighth District Court of Appeals, Ohio**

REPLY BRIEF FOR PETITIONER

ERIKA CUNLIFFE*
JEFFREY M. GAMSO
310 Lakeside Avenue, Suite 200
Cleveland, Ohio 44113
216-443-7583
jeff.gamso@gmail.com
Counsel for Petitioner, Anthony Sowell
**Counsel of Record*

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
Introduction	1
I. This was a case of felony murder	2
II. The federal and state authority split on the meaning of this Court's juvenile sentencing jurisprudence is clear.....	3
III. Deshawn Terrell has not challenged the life with the possibility of parole sentence he received, he challenges the fact that the court had no choice but to impose it.	4
IV. Mandatory sentences for juveniles following convictions under theories of accomplice liability and felony murder are unconstitutional.....	6
CONCLUSION.....	8

TABLE OF AUTHORITIES

CASES

<i>Graham v. Florida</i> , 560 U.S. 48, 75 (2010)	4
<i>Lucero v. People</i> , 394 P.3d 1128, 1130 (Colo. 2017)	4
<i>McKinley v. Butler</i> , 809 F.3d 908 (7th Cir. 2016)	3
<i>Miller v. Alabama</i> , 567 U.S. 460 (2012)	4
<i>Miller. Demirdjian v. Gipson</i> , 832 F.3d 1060 (9th Cir. 2016)	3
<i>Montgomery v. Louisiana</i> , 136 S. Ct. 718, 736. (2016)	5
<i>Montgomery v. Louisiana</i> , 136 S. Ct. 718, 736. (2016)	5
<i>Roper v. Simmons</i> , 543 U.S. 551 (2005)	4
<i>Starks v. Easterling</i> , 659 Fed. Appx. 277 (6th Cir. 2016)	3
<i>State v. Houston-Sconiers</i> , 188 Wash. 2d 1, 20, 391 P.3d 409, 419 (2017)	4
<i>State v. Long</i> , 2014-Ohio-849, 138 Ohio St. 3d 478.....	4
<i>State v. Lyle</i> , 854 N.W.2d 378, 398 (Iowa 2014).....	4
<i>State v. Mahdi Hassan Ali</i> , 895 N.W.2d 237, 246 (Minn. 2017).....	3
<i>United States v. Walton</i> , 537 Fed. Appx. 430 (5th Cir. 2013)	3

STATUTES

O.R.C. 2903.02	2, 7
----------------------	------

CONSTITUTIONAL PROVISIONS

Eighth Amendment, United States Constitution	6
--	---

REPLY BRIEF OF PETITIONER

Introduction

The State of Ohio opposes certiorari, contending that because Ohio's murder statute leaves in place the possibility of parole at some point in Deshawn Terrell's lifetime, there is nothing for this Court to consider. But that argument misses the point. Ohio's murder statute is unconstitutional because it requires the trial court to treat juvenile offenders just as it treats adults. In so doing, Ohio violates the underlying premise of this Court's jurisprudence – that juvenile offenders are generally less culpable than adults; that children are fundamentally different.

State and federal courts are split on the question of whether this Court's juvenile sentencing jurisprudence implicates all mandatory juvenile sentences. Resolving that question is at the heart of this petition, a question Respondent overlooks by failing to address why this split should not be addressed and rectified by this Court.

Instead, Respondent argues that because Deshawn Terrell did not receive a death sentence or one of life without parole, *Roper*, *Graham*, and *Miller* have no bearing on his case. Those cases, however, build on a deeper foundation. *Roper*, *Graham*, and *Miller* are not merely directed at the sentencing process. Rather, they announce that juveniles are different from adults, they expand upon why, and, to some extent, they explain how juveniles in the sentencing context should be treated differently from adults. The State of Ohio's insistence to the contrary notwithstanding, the reasoning that underpins these cases naturally calls into

question the validity of Ohio's murder statute, which forbids the consideration of an offender's juvenile status in imposing a sentence.

I. This was a case of felony murder.

When Deshawn Terrell agreed to help Shantez Giles rob a gas station and convenience store on Cleveland's eastside, he did not intend to kill anyone. And, as a factual matter he did not do so. It was Giles who shot and killed Mohammed Ismail, but Terrell was still charged with aggravated felony murder, felony murder, and purposeful murder. Ultimately, on the advice of counsel, Terrell resolved the charges by way of a no contest plea to a purposeful murder count under O.R.C. 2903.02(A) and the remaining counts were dismissed. The State of Ohio's claim that the no contest plea equates to Terrell's admission that he purposefully killed anyone ignores the facts.

In pressing its claim that Deshawn Terrell was equally culpable for the murder, the State of Ohio stresses that he was almost 18 years old. But the fact remains that under both the law and science Terrell is less culpable for what he did than an adult. The State also takes liberties with the case's facts, suggesting that Terrell may also have been a shooter. That is false. The limited testimony developed in the case reflects that no firearm attributed to Mr. Terrell was fired during the incident.

In the end, like so many others, this is a case about a robbery gone horribly wrong. But it is also a case about an adolescent's typical inability to contemplate the consequences of his actions and distance himself from unstable peers or situations.

Above all, this case addresses a sentencing scheme that requires the trial court to treat children as if they were adults.

It is entitled to this Court's attention.

II. The federal and state authority split on the meaning of this Court's juvenile sentencing jurisprudence is clear.

The division of authority among state courts and the federal circuits is not only deeply entrenched, but some courts have explicitly indicated that they are waiting for this Court to clarify the juvenile sentencing issue, rather than address the issue.

Both the Fifth and the 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) (“It is not our role to predict future outcomes.”). In contrast both the Ninth and Seventh Circuits have ruled on whether *Miller* can be extended and have reached opposite conclusions. see *Demirdjian v. Gipson*, 832 F.3d 1060 (9th Cir. 2016)(finding that eligibility for parole does not implicate *Graham* or *Miller*); see also *McKinley v. Butler*, 809 F.3d 908 (7th Cir. 2016)(finding that the ‘children are different’ passage from *Miller* cannot be logically limited to only sentences without the possibility of parole). This split is only more pronounced in state courts.

Minnesota refused to expand *Miller* absent explicit guidance. 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.”). Both Ohio and Colorado have acted on their own volition to limit *Miller* and *Graham* to their explicit holding. See *State v. Long*, 2014-Ohio-849, 138 Ohio St. 3d 478, 8 N.E.3d 890; see also *Lucero v. People*, 394 P.3d 1128, 1130 (Colo. 2017).

In contrast, Iowa and Washington have definitively held that all mandatory juvenile sentences are unconstitutional. See *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.”); see also *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.”). This petition raises questions that courts have answered in contradictory ways, or declined to answer while waiting on further guidance from this Court. That guidance should be provided here.

III. Deshawn Terrell has not challenged the life with the possibility of parole sentence he received, he challenges the fact that the court had no choice but to impose it.

Respondent has correctly summarized this Court’s juvenile jurisprudence. See *Roper v. Simmons*, 543 U.S. 551 (2005); *Miller v. Alabama*, 567 U.S. 460 (2012); *Graham v. Florida*, 560 U.S. 48, 75 (2010). Where Respondent falls short is where it reaches the conclusion that, because those three cases concern sentences not

specifically at issue here, their respective holdings have no effect on Deshawn Terrell.

It is true that this Court held in *Graham* that states are required to give juveniles convicted of non-homicide offense “some meaningful opportunity to obtain release based on demonstrated maturity or rehabilitation.” 560 U.S. at 75. It is also true that in *Montgomery v. Louisiana*, this Court expressly held that a state “may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them.” 136 S. Ct. 718, 736. (2016). And Terrell *may someday*¹ have an opportunity for parole, which may (or may not) provide him a “meaningful opportunity to obtain release” based on demonstrated rehabilitation as required by *Graham*. 560 U.S. at 75. But what Respondent also misses is that this Court’s jurisprudence in those cases unequivocally implicates the imposition of mandatory sentences on juveniles as if they were adults.

Juveniles are constitutionally different than adults, and the Eighth Amendment protections afforded to them are more extensive as a result. *Miller*, 567 U.S. at 471 (“*Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing.”). Children grow, develop, and change, which the opportunity for parole can allow. But, more importantly, juveniles are also different from adults because their brains are not fully developed at the time of the misconduct, and they cannot appreciate consequences. *Id.* at 471.

¹ In Ohio, the parole board generally does not grant release to anyone serving a life sentence for murder on the first eligibility date and often delays the next hearing by 10 additional years. See, e.g., <https://www.aclu.org/report/report-false-hope-how-parole-systems-fail-youth-serving-extreme-sentences>

The mere opportunity for parole dozens of years later fails to account for those essential differences.

This Court has repeatedly invoked adolescents' categorical differences in ruling that penological justifications for juvenile sentences are not always sufficient. *Id* at 461. And this Court's logic has not been exclusively limited 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 with the possibility of life.

Respondent argues that the logic of this petition requires this Court to invalidate every mandatory sentence for juvenile offenders across the United States. But, as Respondent correctly points out, a sentence does not violate the Eighth Amendment simply because it is mandatory. *Harmelin v. Michigan*, 501 U.S. at 995. Petitioner agrees.

At issue in this petition is not whether Deshawn Terrell's sentence is unconstitutional because it is mandatory. Rather the logic of this petition flows from this Court's reasoning, namely the idea that "a sentencing rule permissible for adults may not be so for children." *Miller*, 567 U.S. at 481. A mandatory sentence may be constitutional for a juvenile; this Petition asks whether a statute that allows the imposition of a mandatory sentence without any regard to a juvenile's status is constitutional. This Court's jurisprudence suggests the answer to that question is no.

IV. Mandatory sentences for juveniles following convictions under theories of accomplice liability and felony murder are unconstitutional.

Respondent argues that even though Deshawn Terrell did not kill or intend to kill, his role in the robbery that led to Mohammed Ismail's death was so significant as to make him equally culpable to the shooter. This argument ignores Terrell's juvenile status, ignores the impact his juvenile status had on his decision to participate in the crime, and ignores the unconstitutional failure to take his status into account at the sentencing stage.

It is true that Terrell pleaded no contest to murder, but the facts of this case clearly demonstrate that he did not "purposely cause the death of another." O.R.C. 2903.02(A). Terrell, like many other juveniles, failed to appreciate, not only the consequences of his actions on the night of the robbery, but also the consequences of his plea. But whether he was convicted on a theory of felony murder or transferred intent, neither theory takes into account a defendant's juvenile status or that he did not actually kill or intend to kill.

Liability for the murder in this case was premised on a theory of "transferred intent", the idea that one engaged in a dangerous felony should understand the risk that a victim of the felony could be killed. *Miller*, 567 U.S. at 492. Juveniles cannot appreciate that risk; "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 492 (Breyer, J., concurring). Neither theory

adequately applies to juveniles because juveniles cannot be deterred if they cannot appreciate risk.

Respondent argues as if theories of transferred intent and felony murder not only should apply equally to both children to adults, but that to argue otherwise ignores the facts in this case. But the facts of this case, facts that make this an ideal vehicle for certiorari, show exactly why transferred intent and felony murder are unconstitutional as applied to juveniles.

Terrell's codefendant, who was also a juvenile, was unable to appreciate the consequences of his actions, but he fired the fatal shot anyway. This Court has recognized that juveniles may have diminished culpability; for a statute to allow that diminished culpability to be transferred to another juvenile without any consideration of the facts of the case is to ensure an absurd result.

Terrell could not have understood the risk he was taking when he agreed to rob a store with his friends, that one of his friends might kill someone, and that Terrell himself would be punished for the killing. Mandatory juvenile sentences are unconstitutional no matter the type of sentence if, in imposing that sentence, the court is barred from taking that juvenile status into account. That is a position that calls out for this Court's clarification and support.

CONCLUSION

For the reasons above as well as those set forth in Deshawn Terrell's Petition for Writ of Certiorari, this Court should grant the writ.

Respectfully submitted,

/s/Erika B. Cunliffe

COUNSEL FOR PETITIONER
ERIKA B. CUNLIFFE*
JEFFREY M. GAMSO
310 Lakeside Avenue, Suite 200
Cleveland, Ohio 44113
(216) 443-7583
jeff.gamso@gmail.com
Counsel for Petitioner
Anthony Sowell

**Counsel of Record*