

No. 18-98

In the Supreme Court of the United States

JERRARD T. COOK, aka JERRAD T. COOK, aka
JERRARD COOK aka JERRARD TRAMAINIE COOK,
aka J-FAT,

Petitioner,

v.

MISSISSIPPI,

Respondent.

*On Petition for Writ of Certiorari
to the Court of Appeals of Mississippi*

BRIEF IN OPPOSITION

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OPINIONS AND ORDERS BELOW

The trial court's pronouncement of the petitioner's sentence after the sentencing hearing is unpublished (Pet. App. D.). The opinion of the Court of Appeals of the State of Mississippi, affirming the petitioner's sentence is published at *Cook v. State*, 242 So.3d 865 (Miss. Ct. App. 2017), *reh'g denied*, (November 28, 2017). (Pet. App. C). The order of the Supreme Court of Mississippi denying certiorari is unpublished. (Pet. App. A).

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.* Seventeen-year-old Jerrard Cook shot and killed eighteen-year-old Marvin Durr during a robbery. Cook shot Durr in the head while Durr was seated in the driver's seat of his car. Cook shot Durr because Cook and another young man, Cearic Barnes wanted to use Durr's car to commit a robbery. However, Cook and Barnes were unable to remove Durr's body from the car, so Cook sat on top of Durr's body and drove the car to an isolated location. To destroy evidence, Barnes then set fire to the car. *Cook v. State*, 242 So 3d 865 (Miss.Ct.App.2017).

2. *Original Proceedings.* Cook was indicted for capital murder. R. 1. Cook entered a plea of guilty to capital murder and was sentenced on June 13, 2003 to the custody of the Mississippi Department of Corrections for the rest of his natural life. R. 18. Mississippi's statutory parole scheme prohibits parole eligibility for those convicted of murder, effectively making Cook's sentence life without the possibility of parole. Miss. Code Ann. § 47-7-3 (Rev.2012).

3. *Re-sentencing.* In 2012 this court held in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), that the 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, Cook was granted a new sentencing hearing. R. 223-226.

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 2486.

The Mississippi trial court considered these factors before re-sentencing Cook to life without parole. The trial court, after considering the following factors, found, "The Court does not find any significant

possibility of rehabilitation in Jerrard Cook.” Pet. App. D. R. 390-394.

a. *Chronological Age and its Hallmark Features.* In the order which the court considered the factors, the court found Cook was seventeen years and two months of age at the time of the crime.

b. *Immaturity.* The court found that it heard from several witnesses that Cook was of high character as a young man and heard no evidence that Cook was especially immature as a teenager.

c. *Impetuosity.* The court found there no evidence of impetuosity in the case. The crime was planned and its purpose was to obtain the victim’s car.

d. *Failure to Appreciate Risks and Consequences.* The court found that Cook knew that he needed to “cover his tracks” after he shot the victim.

e. *Family and Home Environment.* The court found that Cook had little contact with his father, but his mother took care of him providing to Cook decent clothing, computer games, a go-cart, and an automobile. Cook had contact with a Brookhaven police officer who counseled Cook. The officer said Cook, as a young man, was a high character child. R. 393.

f. *Circumstances of Homicide Offense.* The court found that Cook admitted that he was the “trigger man” during the homicide. The court found that there was no family pressure or direct peer pressure to commit the crime. R. 393.

g. *Possibility of Rehabilitation.* The court found that Cook had been given twenty-nine (29) rule violation reports since he was incarcerated. The court discussed the grounds for the violations. The court found that there was no significant possibility of rehabilitation.

h. *Circumstances of the Offense.* Jerrard T. Cook and Cearic Barnes intended to drive to McComb, Mississippi in order to commit armed robberies. They needed a car to travel from Brookhaven to McComb, Mississippi. Cook and Barnes stopped Barnes's cousin, whose name was Marvin Durr, and asked for a ride. Afterwards, they got out of the car, and Cook shot Durr through the window on the driver's side of the car. Durr died from the gunshot.

Cook and Barnes attempted to move Durr's body. They were unable to remove Durr's body from behind the steering wheel or from the car. Cook sat on Durr's body and drove away to a bridge. They were still unable to remove Durr's body. Cook then set the car on fire to burn and destroy the evidence.

i. *Inabilities to deal with the Legal System and Assist Counsel.* Cook was seventeen years and two months of age when the crime occurred. Cook waived his right to a jury trial, entered a plea of guilty to capital murder, and the trial court sentenced Cook to life. When the court originally sentenced Cook, Mississippi's statutory scheme mandated that Cook's life sentence would be served without parole eligibility.

REASONS FOR DENYING THE PETITION

- I. Whether the Eighth Amendment requires a sentencing authority to make a finding a juvenile “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 argues 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, Cook, did not properly present this claim to the Mississippi Court of Appeals in his Brief of the Appellant. Cook generally claimed that the trial court erred because it did not follow the instructions from *Miller* and wholly disregarded findings of the expert psychologist. The Mississippi Supreme Court denied Cook’s petition for a writ of certiorari.

Cook brought three issues before the Mississippi appellate courts in his appeal from the trial court. First, he argued that the court failed to properly analyze the juvenile homicide offender’s sentence. “. . . the trial court failed to ‘start with the Supreme Court’s pronouncement that sentencing a juvenile to life without the possibility should be a rare and uncommon’ occurrence. *State v. Seats*, 865 N.W.2d 545, 555 (Iowa 2015) citing, *Miller*, 132 S. Ct. at 2469).” Second, He argued that he was entitled to be sentenced by a jury. Third, Cook argued that the law categorically prohibits life without parole for juveniles.

In his first proposition about the analysis made by the Circuit Court, the trial court, Cook did not ask the Mississippi Court of Appeals to decide if the trial court must find that the juvenile is “permanently incorrigible.” Instead, Cook argued in his Brief of the Appellant that the court chose to wholly disregard the findings of the expert psychologist, and to do so was “. . . in direct conflict with the Court’s instructions . . .” on how to analyze juvenile homicide offenders’s sentences.

Cook cites some of the *Miller* factors and argues that there is “. . . a presumption against granting life-without parole sentences for juvenile offenders ‘that must be overcome by evidence of unusual circumstances.’”

Cook now argues that the final *Miller* factor “requires the sentencing authority to determine whether the juvenile is *irreparably corrupt*.”

In Cook’s Brief of the Appellant, Cook did not ask the appellate courts to find that the trial court was in error because the court failed to find that Cook’s crime reflected “irreparable corruption” or that Cook was “permanently incorrigible”.

Cook does state that *Montgomery* says only those juveniles whose crimes reflect “irreparable corruption” should receive life without parole. He claims that one of the *Miller* factors is the required finding that the juvenile is *irreparably corrupt*, the question is whether those statements put the issue of “permanently incorrigible” before the state courts of Mississippi.

The State of Mississippi argues that the issue was not properly raised on appeal. After the Mississippi

Court of Appeals affirmed the trial court's decision, Cook filed a motion for rehearing which asserted five errors in addition to his claims about the right to jury sentencing and the violation of federal and state constitutions.

Cook then filed a petition for certiorari asking the Mississippi Supreme Court to reverse the decision of the Mississippi Court of Appeals. Cook argued that *Montgomery v. Louisiana* explained for the first time that "Miller announced a substantive rule of constitutional law". Cook claimed that *Montgomery* required the "... court to conclude that Jerrard is the rare, *permanently* incorrigible juvenile offender." The petition also argued that the writ should have been granted because the court should hold that the practice of sentencing children to life without parole is categorically barred by the state and federal constitutions.

Cook did assert in his petition seeking certiorari that the court must determine that the juvenile was permanently incorrigible and irreparably corrupt before sentencing the juvenile to life without parole. However, the Mississippi Supreme Court then denied the petition requesting certiorari.

The Mississippi Supreme Court did not address the issue whether the sentencing authority must find that the defendant's crime reflected permanent incorrigibility or transient immaturity.

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).

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.

While the trial court did not making a finding that Cook was “permanently incorrigible” or that Cook’s crime reflected “irreparable corruption”, the court did find that it did not find any significant evidence of rehabilitation. R. 393.

C. The procedure met the requirements of *Miller* and *Montgomery*.

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 law.

D. State cases

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 re-sentencing, 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 Cook’s possibility for rehabilitation, the court found that it did not find any significant evidence of rehabilitation. R. 393.

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 it did not find any significant possibility of rehabilitation of Jerrard Cook. And, although perhaps not as explicit, the determination in Cook’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, the record and the court's written order support a finding that the sentencing court did consider Cook's youth and the attendant characteristics. Cook 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. At the age of seventeen he murdered and robbed Marvin Durr. And for the next nearly thirteen years while he was in prison, Cook continued to exhibit irredeemable behavior. Finally, at the re-sentencing hearing, the court noted that Cook behavior while incarcerated indicated a failure or unwillingness to follow directions even in a structured environment.

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 re-sentencing, 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 transient immaturity’ and those whose crimes reflect ‘irreparable corruption.’” *Id.*

Cook, however, did receive individualized sentencing. The court considered the *Miller* factors, which assisted it in determining that Cook showed no significant indication of rehabilitation.

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 re-sentencing pursuant to *Miller*, *Id.*, at 127-28. The supreme court stated that at the re-sentencing 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, Cook’s court did set forth specific findings regarding the factors of youth and its attendant characteristics. The court did not discuss “transient” immaturity, but it did make finding about Cook’s maturity. The court found no evidence supporting Cook’s rehabilitation, but it did not find that Cook’s crime reflected irreparable corruption or permanent incorrigibility.

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.

The court did not find that Cook was one of the rare and uncommon juveniles. However, the court did find that Cook showed no significant indication of rehabilitation.

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 Cook showed any significant indication of rehabilitation. Cook did not. The court did not make an express finding that Cook was irreparably corrupt and unfit to reenter society.

Wilkerson v. State, Not Yet Released for Publication, November 16, 2018,—So.3d—, 2018 WL 6010590, Criminal Court of Appeals of Alabama. The State is not mentioning this case to suggest that it is controlling precedent in the State of Alabama. The opinion is available for viewing on Westlaw at the above cite.

The Criminal Court of Appeals of Alabama held that *Miller* and *Montgomery* do not require a presumption against the imprisonment without-possibility-of-parole sentences for juveniles convicted of capital murder. The opinion held that the State does not bear the burden of proving that a juvenile defendant is “the rare irreparably depraved or corrupt offender warranting a life-without -parole sentence.”

E. The decision in the Mississippi courts was correct.

Prior to re-sentencing Cook to life without parole, the court considered Cook’s youth and its attendant characteristics. Although a formal factual finding was not required according to *Miller* and *Montgomery*, the court nevertheless found no significant showing of rehabilitation in Jerrard Cook.

II. Whether the Eighth 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 id.* 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,

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