

No. _____

In The
Supreme Court of the United States

Desmond Baker

Petitioner,

v.

State of Florida,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Do the Eighth Amendment and Fourteenth Amendment to the United States Constitution prohibit mandatory sentencing laws which require sentencing every juvenile homicide offender, who has certain nonhomicide felony convictions, to serve a de facto life sentence with no parole or sentencing review?

LIST OF PARTIES

All parties appear in the caption of the case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Desmond Baker, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida.

OPINIONS BELOW

The opinion of the District Court of Appeal of Florida, Second District, is published at *Baker v. State*, 44 Fla. L. Weekly D1795a (Fla. 2d DCA, filed July 10, 2019). A2-3

The order of August 28, 2019 of the District Court of Appeal of Florida, Second District denied Baker's Motion for Rehearing and rehearing en banc. A4

The Supreme Court of Florida denied the petition for review in an order of December 3, 2019. *Baker v. State*, SC19-1595, 2019 WL 6487394 (Fla., filed Dec. 3, 2019). A1

JURISDICTION

The Supreme Court of Florida entered its order denying discretionary review on December 3, 2019. (App. A1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment of the United States Constitution provides:

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

Section 1 of the Fourteenth Amendment of the United States Constitution provides, in pertinent part:

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

Section 775.082(1)(b)1. of the Florida Statutes states:

:

A person who actually killed, intended to kill, or attempted to kill the victim and who is convicted under s. 782.04 of a capital felony, or an offense that was reclassified as a capital felony, which was committed before the person attained 18 years of age shall be punished by a term of imprisonment for life if, after a sentencing hearing conducted by the court in accordance with s. 921.1401, the court finds that life imprisonment is an appropriate sentence. If the court finds that life imprisonment is not an appropriate sentence, such person shall be punished by a term of imprisonment of at least 40 years. A person sentenced pursuant to this subparagraph is entitled to a review of his or her sentence in accordance with s. 921.1401(2)(a).

Section 921.1402(2)(a) of the Florida Statutes states:

A juvenile offender sentenced under s. 775.082(1)(b)1, is entitled to a review of his or her sentence after 25 years. However, a juvenile offender is not entitled to review if he or she has previously been convicted of one of the following offenses, or conspiracy to commit one of the following offenses, if the offense for which the person was previously convicted was part of a separate criminal transaction or episode than that which resulted in the sentence under s. 775.082(1)(b)1.:

1. Murder;
2. Manslaughter;
3. Sexual battery;
4. Armed burglary;
5. Armed robbery;
6. Armed carjacking;
7. Home-invasion robbery;

8. Human trafficking for commercial sexual activity with a child under 18 years of age;
9. False imprisonment under s. 787.02(3)(a); or
10. Kidnapping.

STATEMENT OF THE CASE

A. Overview

Desmond Baker, born June 30, 1983, grew up in an unstable home fraught with conflict, inadequate supervision and illicit drugs. (A38). In school, Baker was placed in special classes for emotionally handicapped children. (A37). The youth Baker was an introvert with low self-esteem, poor ego strength, poor attention and poor self-control. (A37, 39). The child regularly used marijuana and occasionally added cocaine to the marijuana use. (A37).

In 1999, Desmond Baker was a homeless fifteen-year-old temporarily living with an older juvenile drug dealer, Mr. McTear. (A8). Baker got a firearm from the drug dealer home and used the gun in a botched taxi cab robbery that quickly turned into a homicide. (A8, 11). Prior to the jury trial on the felony murder charge, the state moved to exclude any evidence or argument about Baker's youth and the circumstances of his being a runaway fifteen-year-old with the limitations that accompany that age and brain functioning. The trial court excluded such evidence. (A6, 12). Baker was convicted by a jury as charged for first-degree felony murder and sentenced at sixteen years of age to the only possible sentence authorized then in Florida, life without parole. (A24) .

Immediately after the jury verdict for the felony murder charge was given, the trial court asked sixteen-year-old Baker to consider entering guilty pleas to other pending felony charges of armed robbery and armed burglary, offenses charged in a separate case. (A13-25). At that proceeding immediately following the jury verdict, Baker entered guilty pleas to those charges. (A20-23). Although those charges allow for imposition of a life sentence, the trial judge imposed lesser sentences. (A16-23). Immediately after sentencing Baker for those other felonies, the trial court adjudicated Baker guilty of the homicide offense and sentenced him to life without parole, the mandated sentence then for that crime. (A24).

After this Court's decisions in *Miller v. Alabama*, 567 U.S. 460 (2012) and *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), Baker was resentenced under Florida Statute Sections 775.082(1)(b)1. and 921.1402. *Baker v. State*, 44 Fla. L. Weekly 1795a, 2019 WL 3214083 (Fla. 2d DCA, filed July 10, 2019). Those laws, enacted in response to *Miller* and *Montgomery*, permit a juvenile first-degree felony murder offender to be sentenced to a term of years from 40 years to life in prison and mandate a review after twenty-five years or fifteen years, depending on the facts. The exception to the sentencing review requirement is set forth in Section 921.1402, which categorically bars any sentencing review if the juvenile has "prior" convictions for certain enumerated felonies, which include armed robbery and armed burglary. The state at resentencing did not seek to impose the review denial provision of 921.1402, Florida Statutes and argued in writing that Baker would be subject to a sentencing review. (A29).

The trial court, who did not preside over the original trial and sentence, resentenced Baker to a 50 year prison sentence. (A33-40). Additionally, the trial court relied on Section 921.1402 to deny Baker any sentence review, the only possible opportunity for statutory release under current Florida law, since Florida has abolished parole. (A39-40). § 921.002(1)(e), Fla. Stat. (2017); *Graham v. Florida*, 560 U.S. 48, 57 (2010). Baker moved to correct the sentencing error, arguing the imposed sentence violates the Eighth and Fourteenth Amendments. (A42-43, 50-51). Baker submitted life expectancy tables indicating he would likely die at the end of serving his sentence, meaning that the imposed fifty year term of years sentence was the same as a life without parole sentence. (A88-109). The trial court denied that portion of the motion; the fifty year sentence with no review remains. (A39-40).

Section 921.1402 precludes a juvenile from the opportunity for sentence review if the juvenile has a “prior” enumerated felony conviction. In the trial court and district court, Petitioner challenged the constitutionality of Sections 775.082(1)(b)1. and 921.1402 of the Florida Statutes, as violating the Eighth and Fourteenth Amendments. Motion to Reconsider Order on Resentencing, .(A42-43, 50-51). Initial Brief of Appellant in the District Court of Appeal, Second District (A203-204, 209-210); Baker argued he was sentenced to an unconstitutional de facto life sentence without any sentencing review or parole. (A209-210).

The District Court of Appeal, Second District, affirmed the de facto life sentence with no review or parole, relying on Section 921.1402(2)(a). (A2-3). The district court relied on a 1987 Florida death penalty case in so applying the

mandatory ban on the juvenile's sentence review. *Id.* The Second District Court of Appeal did not write to address the constitutionality of 921.1402 except to state, "We reject Baker's other arguments without discussion." (A2), When Baker moved for rehearing, the Second District Court of Appeal denied the motion. (A4). Since the district court did not write to address the constitutionality of Sections 775.082(1)(b)1. and 921.1402, Baker was foreclosed under state law from raising that issue in seeking discretionary review in the Florida Supreme Court. Article V, Section 3(b)(3), Florida Constitution; *The Florida Star v. B.J.F.*, 530 So.2d 286 (Fla. 1988)(while Florida Supreme Court has broad subject matter jurisdiction over all cases which state a point of law on which the decision rests, Article V, Section 3 circumscribes how the state supreme court is permitted to exercise that jurisdiction) Baker requested the Florida Supreme Court to exercise jurisdiction over the case, and the Florida Supreme Court declined to accept jurisdiction on December 3, 2019. (A1).

B. The 50 year Sentence Imposed is a De Facto Life Sentence

The undisputed record evidence of the U. S. Department of Health and Human Services Vital Statistics of the United States for Baker's year of birth, 1983, shows that Desmond Baker's life expectancy is not expected to extend past 65.4 years. (A88, 101).

C. Baker Will Die in Prison Without A Meaningful Opportunity For Review of His Sentence.

Desmond Baker has no avenue, other than executive clemency, to obtain release prior to the expiration of his sentence and his death in prison. Section

921.1402 bars him from any opportunity to seek release through a meaningful ability to demonstrate maturity and rehabilitation. The opportunity to seek release through a sentence review is afforded all other juvenile homicide offenders under 921.1402(a), Florida Statutes. The same statutory provision also bars a class of juvenile offenders from any sentencing review and release based solely on felony convictions and not on the facts of the homicide or on the mitigating factors of the juvenile facing sentencing.

The trial court found that when Baker committed the killing “his brain was not fully developed and his thought processes were not fully matured.” (A39). The trial court noted that psychologist Dr. McClain, stated young Baker “was more of a follower than a leader, and was also someone who suffered from low self-esteem, poor decision-making, and poor self-control.” (A39). The trial court found that young Baker “sought out the company of older males who were engaged in various forms of criminal activity and drew inspiration from them.” (A39). The state introduced no evidence regarding Baker’s ability to be rehabilitated. (A39). The resentencing judge noted that Dr. McClain had testified that Baker had “demonstrated significant maturity from 1999 to the present, making the point that the Defendant’s thinking is now more reflexive and less impulsive than it was in 1999.” (A39). The resentencing judge stated, “According to Dr. McClain, the Defendant present good prospects for rehabilitation,” but required additional counseling and was not yet rehabilitated. (A39). The resentencing court concluded, “the actual possibility of rehabilitating the Defendant remains unclear.” (A39). The resentencing judge found that Baker had support from

family members and friends and if released from prison, “he would enter a supportive environment.” (A38). As sentenced, Baker will die in prison and he will have no opportunity to prove he has been rehabilitated and to seek release.

Section 921.1402 violates the Eighth Amendment and Fourteenth Amendment by automatically ensuring a 15-year-old juvenile felony murder offender will die in prison without any opportunity to seek sentencing review or parole, regardless of the circumstances of the juvenile’s youth and his proved rehabilitation even under the harsh conditions of prison. Such a law is demonstrably cruel and unusual.

REASONS FOR GRANTING THE WRIT

I.

Do the Eighth Amendment and the Fourteenth Amendment to the United States Constitution prohibit sentencing a juvenile homicide offender to a mandatory de facto life sentence which precludes parole or review?

A. This Court should grant certiorari to resolve the confusion among the state courts concerning whether the Eighth Amendment and Fourteenth Amendment forbid sentencing a juvenile offender to a mandatory de facto life sentence which precludes any parole or review.

Here the Florida courts have upheld and implemented an unconstitutional statute that permits the state to impose a de facto life sentence without review or parole merely because other felony convictions were at some point obtained. There is a split among the federal and state courts concerning whether a term of year sentence that exceeds a juvenile’s expected life time should be equated to a life sentence for the purposes of deciding whether the term of year sentence violates the Eighth Amendment and *Miller* and *Montgomery*. *Compare Budder v. Addison*, 851 F.3d

1047 (10th Cir. 2017); *Moore v. Biter*, 725 F.3d 1184 (9th Cir. 2013); *Carter v. State*, 192 A.3d 695 (Md. 2018); *State v. Ramos*, 387 P.3d 650 (Wash. 2017); *State v. Zuber*, 152 A.3d 197 (N.J. 2017); *State v. Moore*, 76 N.E.3d 1127 (Ohio 2016); *People v. Reyes*, 63 N.E.3d 884 (Ill. 2016); *State v. Boston*, 363 P.3d 452 (Nev. 2015); *Casiano v. Comm'r of Corr.*, 115 A.3d 1031 (Conn. 2015); *Henry v. State*, 175 So.3d 675 (Fla. 2015); *Brown v. State*, 10 N.E.3d 1 (Ind. 2014); *Bear Cloud v. State*, 334 P.3d 132 (Wyo. 2014); *State v. Null*, 836 N.W.2d 107 (Iowa 2013); *People v. Caballero*, 282 P.3d 291 (Cal. 2012); *In re Robert Allen v. Norman*, 570 S.W.3d 601 (Mo. App. 2018) *with Domirdjian v. Gipson*, 832 F.3d 1060 (9th Cir. 2016); *United States v. Walton*, 537 F.App'x 430 (5th Cir. 2013); *Bunch v. Smith*, 685 F.3d 546 (6th Cir. 2012); *State v. Slocumb*, 827 S.E.2d 148 (S.C. 2019); *Lucero v. People*, 394 P.3d 1128 (Colo. 2017); *State v. Ali*, 895 N.W.2d 237 (Minn. 2017); *Vasquez v. Comm.*, 781 S.E.2d 920 (Va. 2016); *State v. Brown*, 118 S.3d 332 (La. 2013); *Adams v. State*, 707 S.E.2d 359 (Ga. 2011);

This Court should grant certiorari to resolve Florida's split from other state courts on the narrower issue concerning the constitutionality of mandatory de facto life sentences without parole or review imposed against juvenile offenders, and the Court should strike down the unconstitutional Florida statutes that permits Baker and other juveniles to be sentenced to a mandatory de facto or actual life without parole prison sentence. *See State v. Moore*, 76 N.E.3d 1127 (Ohio 2016)(77 year mandatory portion of 112 sentence for nonhomicide offenses violates Eighth Amendment); *People v. Reyes*, 63 N.E.3d 884 (Ill. 2016)(consecutive minimum

mandatory sentences totaling 97 years with parole eligibility after 89 is unconstitutional de facto life without parole sentence); *Bear Cloud v. State*, 334 P.3d 132 (Wyo. 2014)(mandatory life sentence with parole after 25 years to be served consecutive to other sentences with earliest release in 45 years when defendant is 61 years old is an unconstitutional sentence when imposed against a 15 year old offender); *People v. Caballero*, 282 P.3d 291 (Cal. 2012)(mandatory 100 year sentence with no parole violated Eighth Amendment when imposed against a 16 year old offender for three counts of attempted first-degree murder with a firearm and other nonhomicide offenses); *Allen v. Norman*, 570 S.W.3d 601 (Mo. App. 2018)(50 year mandatory sentence before consideration for parole imposed for first-degree murder against a 16 year old offender violates the Eighth Amendment).

In this case the other felony convictions of armed burglary and armed robbery were imposed at the very same proceeding in which the jury had returned a guilty verdict against sixteen-year-old Baker for the first-degree felony murder offense at bar. (A22-23). The trial court adjudicated Baker guilty and then asked the youth to consider pleading guilty to the other pending felony charges, included armed burglary and armed robbery. (A13). Here the other felonies concerned actions occurring before the homicide offense, but the convictions were imposed at the same sentencing proceeding in which the jury verdict was returned.(A22-23). Minutes after those other felony convictions were imposed, the trial court adjudicated Baker guilty of the homicide and sentenced him to life without parole. (A24-25).

In the direct appeal after resentencing, the Second District Court of Appeal

below applied section 921.1402 to contemporaneously gotten felony convictions and ruled Baker was not entitled to the sentencing review regularly afforded now to other Florida juvenile homicide offenders. (A2-3). Baker will not receive a sentencing review, while other juveniles will have their sentences reviewed, even those who have committed far more egregious and planned homicides, as well as other crimes, but who do not have the “prior” enumerated felony convictions. *See e.g., Geter v. State*, 115 So.3d 375 (Fla. 3d DCA 2013), quashed by 177 So.3d 1266 (Fla. 2015) (youth brutally raped and murdered woman with a knife in her home while her three-year-old child watched).

The unconstitutional statutory scheme defies this Court’s requirement that a child homicide offender, whose crime reflects transient immaturity, be afforded a meaningful opportunity for release unless the juvenile cannot be rehabilitated. Baker proved below that he can be rehabilitated; yet as currently sentenced, he will never have an opportunity even to seek release, which most all other juvenile homicide offenders can pursue.

B. Florida Statutes Sections 775.082(1)(b)1. and 921.1402 violate the Eighth Amendment and Fourteenth Amendment to the United States Constitution by automatically and categorically barring every child homicide offender with enumerated felony convictions from having any opportunity for release during a de facto life sentence.

The Florida courts have egregiously departed from this Court’s decisions in *Miller* and *Montgomery* by upholding a de facto life sentence with a mandated lack of any review process, ensuring Baker will die in prison. Baker, originally sentenced to a mandatory life sentence that violated the Eighth Amendment, has been

resentenced to a mandatory sentence that equals or exceeds his expected life. This sentence violates the Eighth Amendment as equally as did his original life without parole sentence. The illegal unconstitutional sentence at bar was achieved through the application of Florida Statute 921.1402, which categorically bars every juvenile offender convicted of homicide and any “prior” enumerated felony from any opportunity to prove maturation and rehabilitation, regardless of the circumstances of the offense or the offender. A sentence imposed under such a law is cruel and unusual and violates the Eighth Amendment to the United States Constitution and the Fourteenth Amendment to the United States Constitution.

1. A fifty year sentence with no parole or review equals a life sentence for a juvenile.

Since Desmond Baker’s 50 year without review sentence ends when he is at the end of his predicted 65-year life, the sentence is a de facto life sentence with a mandated lack of review. *See People v. Buffer*, 434 Ill.Dec. 692, 137 N.E.3d 763 (2019)(determining 50 year sentence imposed against juvenile homicide offender was a de facto life sentence that violated the Eighth Amendment and holding prison sentence of 40 years or less imposed on a juvenile offender provides some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation); *Carter v. State*, 461 Md. 295, 192 A.3d 695 (2018)(100 year sentence imposed against juvenile offender for nonhomicide crimes violated *Graham* where defendant is required to serve 50 years before becoming parole eligible); *State v. Moore*, 149 Ohio St. 3d 557, 583, 76 N.E.3d 1127, 1149 (2016)(112 year sentence exceeding life expectancy imposed against juvenile for non-homicide offenses

violates *Graham*); *People v. Reyes*, 63 N.E. 3d 884, 888 (Ill. 2016) (“A mandatory term-of-years sentence that cannot be served in a one lifetime has the same practical effect on a juvenile defendant’s life as would an actual mandatory sentence of life without parole – in either situation the juvenile will die in prison.”); *People v. Buffer*, 75 N.E.3d 470, 483 (Ill. App. 2017) (50 year sentence without parole for first-degree murder is a de facto life sentence. “The prospect of geriatric release, if one is to be afforded the opportunity for release at all, does not provide a ‘meaningful opportunity’ to demonstrate the ‘maturity and rehabilitation’ required by *Graham*.”) *State v. Ronquillo*, 190 Wash. App. 765, 774-775 361 P.3d 779, 784-785 (Ct. of Appeals, Div 1, 2015) (51.3 year sentence imposed against a 16-year-old offender is a de facto life sentence that violates the Eighth Amendment); *Casiano v. Commisioner*, 317 Conn 52, 115 A.3d 1031 (2015) (50 year sentence imposed against 15 year old juvenile for felony murder violates Eighth Amendment as it does not provide for parole or consideration of *Miller* factors in sentencing); *Henry v. State*, 175 So.3d 675, 680 (Fla. 2015) (90 year sentence imposed against juvenile for nonhomicide crimes invalid under the Eighth Amendment); *State v. Null*, 836 N.W.2d 41, 70 (Iowa 2013) (juvenile’s sentence of at least 52.5 years before any release for robbery and murder, reversed as violating Eighth Amendment); *Bear Cloud v. State*, 334 P.3d 132 (Wyo. 2014) (total sentences requiring serving 45 years for multiple crimes including murder equal a de facto life sentence); *People v. Caballero*, 55 Cal.4th 262, 145 Cal. Rptr.3d 286, 282 P.3d 201, 268 (2012) (sentence of

110 years for attempted murder is unconstitutional for 16 year old juvenile defendant) .

The federal prison system recognizes a life sentence as 470 months, or 39.1 years based on the average life expectancy of federal offenders. United States Sentencing Commission, “Preliminary Quarterly Data Report Through September 30, 2015”, p.8. A study of life expectancy of Michigan juveniles in prison established a juvenile’s life expectancy in prison to be only 50.6 years. LaBelle, “Michigan Life Expectancy Data for Youth Serving Natural Life Sentences,” p.2. *See United States v. Nelson*, 491 F.3d 344, 349-350 (7th Cir. 2012)(acknowledging decreased life expectancy for prisoners based on United States Sentencing Commission’s data); *United States v. Taveras*, 436 F. Supp. 2d 493, 500 (E.D.N.Y. 2006)(life expectancy in federal prison considerably shortened), *rev’d on other grounds*, *United States v. Pepin*, 514 F.3d 193 (2d Cir. 2008).

2. Sections 775.082(1)(b)1. and 921.1402 of the Florida Statutes mandate de facto life or actual life without parole or review for juveniles with enumerated felonies, regardless of the facts of the offense or the circumstances of the youth.

A juvenile punished under Section 921.1402, Florida Statutes, with an enumerated felony conviction can be sentenced only to a minimum sentence of 40 years in prison with no release and up to life in prison with no release. This sentence with no review is required no matter the circumstances of the homicide, the prior felonies or the child’s background or capacity for maturation and rehabilitation. The mandatory denial of sentencing review in Section 921.1402 gives “no significance to ‘the character and record of the individual offender or the circumstances’ of the

offense, and ‘excludes from consideration … the possibility of compassionate or mitigating factors.’” *Miller v. Alabama*, 567 U.S. 460, 475 (2012), quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)(finding mandatory death penalty sentences violate the Eighth and Fourteenth Amendments).

Felony murder in Florida requires no proof of an intent to kill. *Linehan v. State*, 442 So.2d 244, 254 (Fla. 2d DCA 1983). Baker was charged with and convicted of felony murder, a less culpable form of first-degree murder, since intent to kill was not determined by the jury. (A71-74). As currently sentenced, he will die in prison for this serious but not heinous crime for which he serves a sentence constitutionally reserved for only the rarest juveniles who cannot be rehabilitated, *Montgomery v. Louisiana*, 136 S.Ct. at 733-734; *Miller v. Alabama*, 567 U.S. at 479.

Yet such an unconstitutional sentence is mandated by Section 921.1402. Desmond Baker in adulthood has already proved he can be rehabilitated. (A39). Nevertheless, under Section 921.1402, he is barred any means of seeking a release within his expected lifetime, other than through executive clemency.

Section 921.1402 categorically requires barring a child offender from any opportunity to prove maturity and rehabilitation, in direct opposition to this Court’s holding in *Miller*. In *Miller* this Court held “the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders.” 567 U.S. at 479. Baker’s de facto life sentence imposed under Section 921.1402, mandates life in prison without the possibility of parole or review. Such a sentencing scheme directly offends the *Miller* holding and the Eighth and

Fourteenth Amendments. 567 U.S. at 479.

This Court should grant the petition and resolve the dispute among the states regarding the constitutionality of mandatory sentencing laws like section 921.1402 that require juvenile homicide offenders to serve a de facto life sentence and die in prison with no opportunity to show, as Desmond Baker has, that a youth can change and mature into a productive adult.

CONCLUSION

This Court should grant certiorari to resolve the critically important question of whether the Eighth Amendment prohibits sentencing a juvenile homicide offender to a mandatory de facto life sentence without parole or judicial review

Respectfully submitted,

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