

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

DEVONERE SIMMONDS, *PETITIONER*

V.

STATE OF OHIO, *RESPONDENT*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

PETITION FOR A WRIT OF CERTIORARI

Office of the Ohio Public Defender

Charlyn Bohland #0088080
Assistant State Public Defender
Member of the Bar of this Court (#301223)

250 East Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167—Fax
Charlyn.Bohland@opd.ohio.gov

Counsel for Petitioner, Devonere Simmonds

QUESTION PRESENTED

Whether counsel's failure to investigate and present mitigating evidence of youthful characteristics on the juvenile offender's behalf constitutes deficient performance and is prejudicial when the juvenile offender is eligible for a sentence of life without the possibility of parole.

**PARTIES TO THE PROCEEDING AND
CORPORATE DISCLOSURE STATEMENT**

There are no parties to the proceeding other than those listed in the caption.

Under SUP. CT. R. 29.6, Petitioner states that no parties are corporations.

TABLE OF CONTENTS

	Page No.
Question Presented	i
Parties to the Proceedings and Corporate Disclosure Statement	ii
Table of Contents	iii
Table of Authorities	iv
Petition for a Writ of Certiorari	1
Opinions Below	1
Jurisdictional Statement	1
Constitutional Provisions	2
Statement of the Case	2
Reasons for Granting the Writ	4
A. A juvenile life-without-parole case is analogous to an adult death penalty case and the sentencing hearing is a critical stage of the proceedings	5
B. Trial counsel’s failure to investigate and present mitigating evidence at sentencing in a juvenile life-without-parole case is not a strategic decision; rather, it is denial of counsel at a critical stage of the proceedings	8
Conclusion	11
Appendix:	
APPENDIX A: <i>State v. Simmonds</i> , Supreme Court of Ohio Case No. 2017-Ohio-0853, Entry (Jan. 31, 2018)	A-1
APPENDIX B: <i>State v. Simmonds</i> , Franklin County Court of Appeals Case No. 16AP-332, Judgment Entry (May 09, 2017)	A-2

TABLE OF AUTHORITIES

Page No.

Cases:

<i>Eddings v. Oklahoma</i> , 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982)	5
<i>Graham v. Florida</i> , 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010)	5, 10
<i>Miller v. Alabama</i> , 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012)	<i>passim</i>
<i>Montgomery v. Louisiana</i> , 136 S.Ct. 718, 193 L.Ed.2d 599 (2016)	6, 10, 11
<i>Powell v. Alabama</i> , 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932)	8
<i>Roper v. Simmons</i> , 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005)	5, 10
<i>State v. Johnson</i> , 24 Ohio St.3d 87, 494 N.E.2d 1061 (1986)	4, 8
<i>State v. Long</i> , 138 Ohio St.3d 478, 2014-Ohio-849, 8 N.E.3d 890 (Ohio 2014)	6
<i>State v. Simmonds</i> , 2015 Ohio App. LEXIS 4342, 2015-Ohio-4460 (Ohio Ct. App. Oct. 27, 2015)	3
<i>State v. Simmonds</i> , 2017 Ohio App. LEXIS 1741 (Ohio Ct. App. May 9, 2017)	<i>passim</i>
<i>State v. Simmonds</i> , 151 Ohio St.3d 1505, 2018-Ohio-365, 90 N.E.3d 948 (Ohio 2018)	1
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)	8, 9, 10, 11
<i>Sumner v. Shumer</i> , 483 U.S. 66, 107 S.Ct. 2716, 97 L.Ed.2d 56, (1987)	5
<i>United States v. Cronin</i> , 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)	4, 8, 9, 11
<i>Woodson v. North Carolina</i> , 420 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976)	4, 5

TABLE OF AUTHORITIES

Page No.

Constitutional Provisions:

U.S. CONST. amend. VI	2
U.S. CONST. amend. VIII.....	2
U.S. CONST. amend. XIV	2

Statutes:

28 U.S.C. § 2101(c)	1
OHIO REV. CODE ANN. 2953.21.....	3

Other Authorities:

American Bar Association, <i>Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases</i> , Guideline 4.1 (Rev.Ed.2003).....	7
The Campaign for the Fair Sentencing of Youth, <i>Guidelines Endorsements</i>	7
The Campaign for the Fair Sentencing of Youth, <i>Trial Defense Guidelines: Representing a Child Client Facing a Possible Life Sentence</i> (2015)	7

PETITION FOR A WRIT OF CERTIORARI

Petitioner Devonere Simmonds asks this Court to issue a Writ of Certiorari to review the judgment of the Supreme Court of Ohio, entered on January 31, 2018, declining jurisdiction of his Franklin County Court of Appeals case, affirming the denial of his post-conviction petition claim of ineffective assistance of counsel.

OPINIONS BELOW

On May 9, 2017, the Franklin County, Tenth District, Court of Appeals affirmed the denial of Devonere Simmonds's post-conviction petition claim of ineffective assistance of counsel during the sentencing phase of his case in which he received a juvenile life-without-parole sentence. That opinion is available at *State v. Simmonds*, 2017 Ohio App. LEXIS 1741 (Ohio Ct. App. May 9, 2017). On January 31, 2018, the Supreme Court of Ohio declined jurisdiction of Devonere's case. That denial, which was issued without an opinion, can be found at *State v. Simmonds*, 151 Ohio St.3d 1505, 2018-Ohio-365, 90 N.E.3d 948 (Ohio 2018).

JURISDICTIONAL STATEMENT

On January 31, 2018, the Supreme Court of Ohio declined jurisdiction of Devonere Simmonds's jurisdictional appeal. Devonere now timely files this petition within 90 days of that decision. This Court's jurisdiction is invoked under 28 U.S.C. § 2101(c).

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the U.S. Constitution provides, in relevant part: “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.” U.S. CONST. amend. VI.

The Eighth Amendment to the U.S. Constitution provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII.

The Fourteenth Amendment to the U.S. Constitution provides, in relevant part: “[N]or 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.” U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

Devonere Simmonds was 17 years old in the summer of 2013, when he committed a series of offenses that resulted in the shooting deaths of two people, serious injuries to two others, and other felony charges. *See Simmonds*, 2017 Ohio App. LEXIS at *1-2. Following transfer proceedings in the Franklin County Juvenile Court, Devonere was tried in criminal court, where he was found guilty. *Id.* at *2-4.

As a result of his offenses, Devonere faced a potential sentence of life without the possibility of parole. Just two days prior to sentencing, his trial counsel learned of case law from this Court and the Supreme Court of Ohio, requiring individualized sentencing and mitigation for youth facing life-without-parole sentences. While in the

judge's chambers, Devonere's attorneys requested time to prepare for mitigation at sentencing; but, that request was denied.

At the hearing, trial counsel did not present any records or call any witnesses to testify in mitigation. Instead, counsel generally discussed adolescent development; submitted two competency evaluations that had been prepared for the juvenile court; and argued some relevant facts, including Devonere's age, immaturity, low IQ, substance abuse, and father's criminal history. *Id.* at *4-5. But, trial counsel did not investigate or include information to present mitigation on Devonere's behalf, and did not present evidence or expert testimony specifically regarding Devonere. The court sentenced Devonere to life in prison without the possibility of parole for aggravated murder and 45 additional years for the remaining offenses. *Id.* at *6-8. Devonere filed a direct appeal to the Franklin County Court of Appeals.¹

On September 2, 2015, while the direct appeal was pending, Devonere filed a post-conviction petition pursuant to OHIO REV. CODE ANN. 2953.21, asserting that his trial counsel provided ineffective assistance for failing to conduct a mitigation investigation, and present mitigation evidence and testimony at the sentencing hearing. In support of his petition, which asserted eight grounds for relief, Devonere provided affidavits, records, a sentencing-focused evaluation, attorney guidelines of representation, and other documents that were not presented at the sentencing hearing. *Simmonds*, 2017 Ohio App. LEXIS at *8-9. The trial court denied Devonere's

¹ In the direct appeal, the Franklin County Court of Appeals affirmed Devonere's convictions. *See State v. Simmonds*, 2015 Ohio App. LEXIS 4342, 2015-Ohio-4460, *17 (Ohio Ct. App. Oct. 27, 2015).

post-conviction petition claim of ineffective assistance of counsel without a hearing. *Id.* at *9. Devonere appealed the denial.

On appeal, Devonere alleged that the trial court should have used a per-se prejudice standard of review when determining counsel's effectiveness, because trial counsel failed to present mitigation at a critical stage of the proceedings, pursuant to *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) and *State v. Johnson*, 24 Ohio St.3d 87, 494 N.E.2d 1061 (1986). *Simmonds* at *12-16. Devonere further alleged that the trial court erred when it dismissed his petition without a hearing because he presented sufficient operative facts to demonstrate trial counsel's ineffectiveness. *Id.* at *16-19. The court of appeals affirmed the trial court's denial of Devonere's post-conviction petition on May 9, 2017.

On June 21, 2017, Devonere filed a timely memorandum in support of jurisdiction to the Supreme Court of Ohio, asking that court to review Devonere's ineffective assistance of counsel claim. On January 31, 2018, the Supreme Court of Ohio declined jurisdiction of Devonere's case, without an opinion. This timely Petition for a Writ of Certiorari follows.

REASONS FOR GRANTING THE WRIT

This Court has held that "[a] process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind." *Woodson v. North Carolina*, 420 U.S. 280, 304, 96

S.Ct. 2978, 49 L.Ed.2d 944 (1976). In *Woodson*, this Court held that North Carolina's mandatory death penalty statute was unconstitutional because it did not allow for mitigation and an individualized determination regarding "the appropriate punishment in a specific case." *Id.* at 305 (holding that the statute violates the Eighth and Fourteenth Amendments). Simply stated, the mitigation phase of a death penalty case is a critical stage of the proceedings. See *Sumner v. Shumer*, 483 U.S. 66, 107 S.Ct. 2716, 97 L.Ed.2d 56, (1987) ("Not only did the Eighth Amendment required that capital-sentencing schemes permit the defendant to present any relevant mitigating evidence, but '*Lockett* requires the sentencer to listen' to that evidence."), citing *Eddings v. Oklahoma*, 455 U.S. 104, 115, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

A. A juvenile life-without-parole case is analogous to an adult death penalty case and the sentencing hearing is a critical stage of the proceedings.

Some four decades later, considering the evolving standards of decency recognized in *Woodson*, this Court has ruled that for children, the Eighth Amendment prohibits the death penalty, a prison term of life without parole for non-homicide offenses, and a mandatory sentence of life without parole. *Roper v. Simmons*, 543 U.S. 551, 578, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005); *Graham v. Florida*, 560 U.S. 48, 82, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010); *Miller v. Alabama*, 567 U.S. 460, 479-480, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). And, this Court held that juvenile-life-without-parole cases are "analogous to capital punishment" cases. *Miller* at 475, quoting *Graham* at 89 (Roberts, C.J., concurring), citing *Woodson* at 304. The Supreme Court of Ohio recognized the same, reasoning that, for a child, "a sentence

of life without parole is the equivalent of a death penalty” because it “completely forecloses” the possibility that, as the child matures into adulthood, he may become amenable to rehabilitation. *State v. Long*, 138 Ohio St.3d 478, 487, 2014-Ohio-849, 8 N.E.3d 890 (Ohio 2014).

In *Miller*, this Court explained that a trial court must consider a child’s age and age-related characteristics prior to sentencing. See *Miller* at 489. This Court strongly emphasized not only a child’s age, but “the wealth of characteristics and circumstances attendant to it.” *Id.* at 476-77. “By making youth (and all that accompanies it) irrelevant to imposition of th[e] harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment.” *Id.* at 479. Therefore, age alone cannot be considered in a vacuum; rather, age provides the framework to consider circumstances and characteristics. Most recently, in *Montgomery v. Louisiana*, this Court announced that *Miller* created a substantive rule of law as follows:

Miller did bar life without parole, however, for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility. For that reason, *Miller* is no less substantive than are *Roper* and *Graham*. Before *Miller*, every juvenile convicted of a homicide offense could be sentenced to life without parole. After *Miller*, it will be the rare juvenile offender who can receive that same sentence. The only difference between *Roper* and *Graham*, on the one hand, and *Miller*, on the other hand, is that *Miller* drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption.

Montgomery v. Louisiana, 136 S.Ct. 718, 734, 193 L.Ed.2d 599 (2016).

In response to this Court’s individualized sentencing mandate, major defense organizations endorsed a change in standards of representation of children facing

lifetime prison sentences. The Campaign for the Fair Sentencing of Youth, *Guidelines Endorsements*, <http://fairsentencingofyouth.org/guidelines-endorsements/>. Now, the standards for representing children facing a sentence of life without parole mirror the defense guidelines in capital cases. See The Campaign for the Fair Sentencing of Youth, *Trial Defense Guidelines: Representing a Child Client Facing a Possible Life Sentence* (2015), 17-21, available at <https://www.fairsentencingofyouth.org/media-resources/defense-guidelines/> (accessed Apr. 25, 2018); American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, Guideline 4.1 (Rev.Ed.2003), 28-32, available at https://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_representation/2003guidelines.authcheckdam.pdf (accessed Apr. 25, 2018). These guidelines emphasize the importance of a full investigation; preparing for mitigation; and, consulting with psychologists, adolescent development experts, and lay witnesses to explain the circumstances of the child's life.

The guidelines mirror the type of "age and age-related characteristics" that this Court deemed important in *Miller*. See *Miller*, 567 U.S. at 471-72, 132 S.Ct. 2455, 183 L.Ed.2d 407. Like in the mitigation phase in a capital case, the sentencing judge must consider the child's individual and youthful characteristics before sentencing the child to life in prison without the possibility of parole. Accordingly, the sentencing hearing in a juvenile life without parole case is also a critical stage of the proceedings. See *id.*

B. Trial counsel's failure to investigate and present mitigating evidence at sentencing in a juvenile life-without-parole case is not a strategic decision; rather, it is denial of counsel at a critical stage of the proceedings.

This Court has held that counsel must be afforded at critical stages of the proceedings, like the penalty phase in a death penalty case. *See Cronin*, 466 U.S. at 654, 104 S.Ct. 2039, 80 L.Ed.2d 657. In a capital case, this Court has held that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v. Washington*, 466 U.S. 668, 690-691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Similarly, the Supreme Court of Ohio has recognized that in a capital case, "a lack of reasonable investigation and preparation for the sentencing phase of a capital trial constitutes ineffective assistance of counsel." *Johnson*, 24 Ohio St.3d at 89, 494 N.E.2d 1061.

Typically, "claims of ineffective assistance of counsel are evaluated" under the two-part test set forth in *Strickland*, which requires a demonstration of deficient performance and prejudice to the defendant. *Strickland* at 687. However, there are instances where prejudice must be presumed. *Cronin* at 659-660; *Powell v. Alabama*, 287 U.S. 45, 58-59, 53 S.Ct. 55, 77 L.Ed. 158 (1932). Counsel's failure to reasonably investigate, prepare for, and present evidence for mitigation at sentencing in a juvenile-life-without-parole case deprives the young defendant of the right to the

effective assistance of counsel at this critical stage of the proceeding. *See Cronin* at 659-660; *Strickland* at 687.

The Franklin County Court of Appeals held that Devonere's counsel's performance was not deficient or prejudicial. *See Simmonds*, 2017 Ohio App. LEXIS at *17-19. Additionally, the court of appeals refused to apply a per-se prejudice standard of review below because "no constitution, statute, rule, case, or other legal source plainly states or implies the more specific proposition posited by *Simmonds*, that it is prejudicial per se to not investigate and conduct a mitigation hearing for potential punishment of life without parole [for juvenile offenders]." *Id.* at *4-5.

But, the record below demonstrates that Devonere's trial attorneys were not prepared for the sentencing portion of the proceedings, where their young client was facing a potential life sentence without the possibility of parole. Counsel admitted that they were not aware of the case law regarding the constitutionally required individualized sentencing from both this Court and the Supreme Court of Ohio until just prior to the hearing. Counsel acknowledged that they had not fully, or even reasonably investigated the mitigation facts relevant to Devonere and that they were not prepared to proceed. Although counsel requested a continuance to more adequately prepare, that request was denied. Instead, the trial court held Devonere's sentencing hearing the day after the verdict was announced in his case and counsel did not present mitigating evidence through experts, evaluations or records conducted during a mitigation investigation. As a result, counsel presented only

cursory information at the sentencing hearing by way of argument. *See Simmonds* at *4-5.

Trial counsel's failure to investigate and present mitigating evidence to a sentencing court when a juvenile offender faces the juvenile equivalent of the death penalty cannot be considered strategic or a product of professional judgment, because choices require investigation of the law and facts, and weighing of the risks and reward. *See Strickland*, 466 U.S. at 690-691, 104 S.Ct. 2052, 80 L.Ed.2d 674. Instead, the failure to conduct a reasonable investigation, consult with mitigation experts, collect records, or review evaluations prepared for mitigation, counsel's decisions constitutes deficient performance.

As this Court noted in *Miller* and *Montgomery*, considering a child's age alone is not enough to warrant a life-without-parole sentence. *Miller*, 567 U.S. at 475-76, 132 S.Ct. 2455, 183 L.Ed.2d 407; *Montgomery*, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016), at syllabus. Instead, a sentencing court must be able to give *meaningful consideration* to "the wealth of characteristics and circumstances attendant to" a child's age. *Miller* at 476-77. Further, and as this Court recognized, "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Graham*, 560 U.S. at 68, 130 S.Ct. 2011, 176 L.Ed.2d 825, quoting *Roper*, 543 U.S. at 573, 125 S.Ct. 1183, 161 L.Ed.2d 1. Thus, it is up to counsel to provide a sentencing court with the type of evidence that would enable the

court to reach such a definite conclusion about a juvenile's capacity to be rehabilitated before imposing the harshest penalty available on a juvenile offender.

Just as in the penalty phase of an adult death penalty case, the analysis and testimony of expert witnesses is imperative to provide framework to understand how circumstances and characteristics directly impact children and their development. Not only a child's age, but "all that accompanies it" is imperative in determining the appropriate sentence. *See Miller* at 479. Accordingly, the child is prejudiced when counsel fails to reasonably investigate and present mitigating evidence in sentencing hearings where life without parole is possible, because the trial court lacks the requisite information to meaningfully consider a child's youth and attendant circumstances as required by this Court to impose that sentence.

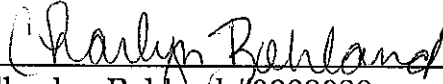
CONCLUSION

Akin to the penalty phase in a capital case, in *Miller* and *Montgomery*, this Court required an individualized determination for a child's sentence. *Miller* at 461, 489 (noting that none of what this Court has said "about children is crime-specific"); *Montgomery* at 736. Counsel's failure to investigate and present individual and age and age-related characteristics on the juvenile offender's behalf constitutes deficient performance and is prejudicial when the juvenile offender is eligible for a sentence of life without the possibility of parole. *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052, 80 L.Ed.2d 674. Counsel's inaction essentially denies the child the effective assistance of counsel at a critical stage of the proceedings. *See Cronin*, 466 U.S. at 662, 104 S.Ct.

2039, 80 L.Ed.2d 657. For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Office of the Ohio Public Defender

A handwritten signature in cursive script, reading "Charlyn Bohland", is written over a horizontal line.

Charlyn Bohland #0088080

Assistant State Public Defender

Member of the Bar of this Court (#301223)

250 East Broad Street, Suite 1400

Columbus, Ohio 43215

(614) 466-5394

(614) 752-5167—Fax

charlyn.Bohland@opd.ohio.gov

Counsel for Petitioner, Devonere Simmonds