

No.

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IN THE

**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 2018

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**DESHAWN TERRELL,**

*Petitioner,*

v.

**THE STATE OF OHIO**

*Respondent.*

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**PETITION FOR WRIT OF CERTIORARI**

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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.

**COUNSEL FOR RESPONDENT**

MICHAEL C. O’MALLEY  
Cuyahoga County Prosecutor  
The Justice Center – 9<sup>th</sup> Floor  
1200 Ontario Street  
Cleveland, Ohio 44113  
(216) 443-7800  
*Counsel for Respondent State of Ohio*

**COUNSEL FOR PETITIONER**

MARK A. STANTON,  
Cuyahoga County Public Defender  
ERIKA B. CUNLIFFE,\*  
JEFFREY M. GAMSO,  
Assistant Public Defenders  
310 Lakeside Avenue, Suite 200  
Cleveland, OH 44113  
(216) 443-7583

*Counsel for Petitioner Deshawn Terrell*  
*\*Counsel of Record*

### **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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## **OPINIONS BELOW**

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*, 8<sup>th</sup> 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*, 8<sup>th</sup> 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.<sup>1</sup> 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*,

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<sup>1</sup> 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,

/s/ Erika B. Cunliffe

ERIKA CUNLIFFE  
JEFFREY M. GAMSO  
Courthouse Square, Suite 200  
310 Lakeside Avenue  
Cleveland, Ohio 44113  
216-443-7583

*Counsel for Petitioner*



No.

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IN THE

**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 2018

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**DESHAWN TERRELL,**

*Petitioner,*

v.

**THE STATE OF OHIO**

*Respondent.*

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PETITION FOR WRIT OF CERTIORARI TO  
THE EIGHTH DISTRICT COURT OF APPEALS

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**PROOF OF SERVICE**

---

I hereby certify that three copies of the enclosed Petition for Leave to Proceed in Forma Pauperis and Petition for Writ of Certiorari were served via the United State's Postal Service, on this 29th day of June, 2018 upon:

Michael C. O'Malley  
Cuyahoga County Prosecutor  
The Justice Center – 9<sup>th</sup> Floor  
1200 Ontario Street  
Cleveland, OH 44113

/s/ Erika B. Cunliffe

ERIKA B. CUNLIFFE  
Courthouse Square, Suite 200  
310 Lakeside Avenue  
Cleveland, Ohio 44113

One of the attorneys for  
Petitioner Deshawn Terrell

## **APPENDIX**

[Cite as *State v. Terrell*, 2016-Ohio-4563.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 103428

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**DESHAWN T. TERRELL**

DEFENDANT-APPELLANT

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**JUDGMENT:**  
AFFIRMED

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-13-581323-A

**BEFORE:** E.T. Gallagher, J., E.A. Gallagher, P.J., and S. Gallagher, J.

**RELEASED AND JOURNALIZED:** June 23, 2016

## **ATTORNEYS FOR APPELLANT**

Robert L. Tobik  
Cuyahoga County Public Defender

BY: Erika B. Cunliffe  
Assistant Public Defender  
Courthouse Square, Suite 200  
310 Lakeside Avenue  
Cleveland, Ohio 44113

## **ATTORNEYS FOR APPELLEE**

Timothy J. McGinty  
Cuyahoga County Prosecutor

BY: Christopher D. Schroeder  
Assistant Prosecuting Attorney  
The Justice Center  
1200 Ontario Street  
Cleveland, Ohio 44113

EILEEN T. GALLAGHER, J.:

{¶1} Defendant-appellant, Deshawn Terrell (“Terrell”), appeals his sentence and raises one assignment of error for review:

The mandatory sentencing provision under R.C. 2929.02(B)(1) is unconstitutional as applied in the instant matter where it requires the trial court to impose a sentence of 15 years to life imprisonment notwithstanding the defendant’s juvenile status at the time of the offense and the fact that he did not actually commit the murder.

{¶2} We find no merit to the appeal and affirm the trial court’s judgment.

### **I. Facts and Procedural History**

{¶3} The state filed four complaints in the juvenile division of the Cuyahoga County Common Pleas Court, charging Terrell with four armed robberies and related offenses. The complaint in Cuyahoga J.C. No. DL-13-111146 alleged that Terrell and two codefendants robbed a gas station named Biggie’s Food Mart, located on East 55th Street in Cleveland in July 2013. One of Terrell’s codefendants shot and killed a store clerk during the heist. Consequently, Terrell was charged with aggravated murder, aggravated robbery, and felonious assault, all with one- and three-year firearm specifications.

{¶4} In Cuyahoga J.C. No. JL-13-114543, Terrell was charged with three counts of aggravated robbery, two counts of kidnapping, grand theft, and carrying a concealed weapon. The armed robbery, kidnapping, and grand theft counts included one- and three-year firearm specifications. These counts arose from an armed robbery that occurred at Danzey’s Discount Store, located at 7809 Woodland Avenue in Cleveland in July 2013.

{¶5} Two other complaints charged Terrell with five counts of aggravated robbery, two counts of kidnapping, two counts of carrying a concealed weapon, and petty theft. The

aggravated robbery and kidnapping counts included one- and three-year firearm specifications. These charges arose from two separate armed robberies that occurred at a Family Dollar store located on Superior Avenue in Cleveland, and a restaurant known as Jack Spratt's Pizza, located at 4323 Payne Avenue in Cleveland. The robberies occurred in September and October 2013.

{¶6} The juvenile court held a probable cause hearing on all the charges. After hearing the evidence, the court found insufficient probable cause to charge Terrell with the offenses that were committed at Jack Spratt's Pizza and the Family Dollar store. Accordingly, the court dismissed those complaints without prejudice. However, the juvenile court concluded there was probable cause that Terrell was complicit in the murder of the store clerk at Biggie's Food Mart and ordered the case transferred to the general division pursuant to R.C. 2151.12(A)(1).<sup>1</sup>

{¶7} The Cuyahoga County Grand Jury subsequently returned an 18-count indictment, charging Terrell with two counts of aggravated murder, three counts of murder, five counts of aggravated robbery, three counts of kidnapping, four counts of felonious assault, and one count of tampering with evidence in Cuyahoga C.P. No. CR-13-581323-A. All the charges, except for tampering with evidence, included one- and three-year firearm specifications.

{¶8} The juvenile court held an amenability hearing in J.C. No. DL-13-114611, which involved the robbery of Danzey's Discount store. The court determined Terrell was not amenable to care or rehabilitation within the juvenile system and ordered the case transferred to the general division of the common pleas court. The Cuyahoga County Grand Jury subsequently indicted Terrell in Cuyahoga C.P. No. CR-14-583092-A on two counts of

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<sup>1</sup> R.C. 2151.12(A)(1) mandates the transfer of certain cases from the juvenile division to the general division of the common pleas court where the juvenile is accused of murder.

aggravated robbery, two counts of kidnapping, and two counts of theft, all with one- and three-year firearm specifications.

{¶9} Prior to trial in C.P. No. CR-13-581323-A, Terrell filed a motion to dismiss the charges, or in the alternative, to transfer the case back to the juvenile court. Terrell asserted the mandatory minimum prison term of 15 years to life for murder set forth in R.C. 2929.02(B)(1) was unconstitutional as applied to him because it precluded the court from considering mitigating factors inherent in his status as a juvenile. He argued the mandatory indefinite sentence violated his Eighth Amendment right to be free of cruel and unusual punishment.

{¶10} Following a hearing, the trial court denied Terrell's motion to dismiss or to transfer jurisdiction to the juvenile court. Terrell filed an interlocutory appeal of the trial court's judgment, which was dismissed for lack of a final, appealable order. On remand, Terrell pleaded no contest in C.P. Case No. CR-13-581323-A to one count of murder, in violation of R.C. 2903.02(A), with a three-year firearm specification, and one count of aggravated robbery. He pleaded no contest to one count of aggravated robbery alleged in C.P. No. CR-14-583092.

{¶11} In Cuyahoga C.P. No. CR-13-581323-A, the court found Terrell guilty of the charges and sentenced him to a mandatory 15 years to life imprisonment on the murder conviction, to be served consecutive to the three years on the gun specification, and consecutive to three years on the aggravated robbery conviction, for an aggregate 21-year prison term. The court sentenced Terrell to three-years imprisonment on his aggravated robbery conviction in C.P. No. CR-14-583092, to be served concurrently with the three-year sentence on the aggravated robbery in C.P. No. CR-13-581323. Terrell now appeals his mandatory 21 year to life prison sentence.

## **II. Law and Analysis**

{¶12} In his sole assignment of error, Terrell argues the trial court erred in failing to dismiss the charges against him, or in the alternative, to transfer his cases to the juvenile court. He contends the mandatory 15 years to life sentence set forth in R.C. 2929.02(B)(1) cannot be lawfully applied to juvenile offenders.

{¶13} R.C. 2929.02(B)(1) states, in pertinent part, that “whoever is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code shall be imprisoned for an indefinite term of fifteen years to life.” Terrell argues R.C. 2929.02(B)(1) violates the Eighth Amendment protection against cruel and unusual punishment because it precludes the court from considering mitigating factors such as his age, immaturity, neglectful childhood, and trauma he experienced as an adolescent. He relies on *Miller v. Alabama*, 567 U.S. \_\_\_, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), *Montgomery v. Louisiana*, 577 U.S. \_\_\_, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016), and *State v. Long*, 138 Ohio St.3d 478, 2014-Ohio-849, 8 N.E.3d 890, to support his argument.

{¶14} In *Miller*, two 14-year-old offenders were convicted of murder and were sentenced to life imprisonment without the possibility of parole. The life sentences were statutorily mandated in both cases. In determining the constitutionality of the defendants’ mandatory life sentences, the *Miller* court discussed a line of precedent in which the court had recognized that “children are constitutionally different from adults for purposes of sentencing.” *Id.* at 2464, citing *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), and *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010).

{¶15} The *Miller* court observed that “[b]ecause juveniles have diminished culpability and greater prospects for reform, \* \* \* ‘they are less deserving of the most severe punishments.’”



*Miller* at 2464, quoting *Graham* at 68. The court explained that children are different from adults offenders in three primary ways:

First, children have a “lack of maturity and an underdeveloped sense of responsibility,” leading to recklessness, impulsivity, and heedless risk-taking. Second, children “are more vulnerable \* \* \* to negative influences and outside pressures,” including from their family and peers; they have limited “contro[l] over their own environment” and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child’s character is not as “well formed” as an adult’s; his traits are “less fixed” and his actions less likely to be “evidence of irretrievabl[e] deprav[ity].”

*Miller*, 567 U.S. \_\_\_, 132 S.Ct. at 2462, 183 L.Ed.2d 407, quoting *Roper* at 570. Thus, the court continued, mandatory life sentences without the possibility of parole for juveniles

precludes consideration of his chronological age and its hallmark features — among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him — and from which he cannot usually extricate himself — no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth — for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. See, e.g., *Graham*, 560 U.S. [48], 130 S.Ct. 2011, 176 L.Ed.2d 825 (“[T]he features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings”); *J. D. B. v. North Carolina*, 564 U.S. [261], 131 S. Ct. 2394, 180 L.Ed.2d 310 (2011) (discussing children’s responses to interrogation). And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.

*Id.* at 2468. Based on this reasoning, the *Miller* court concluded that “the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders.” *Id.* at 2469.

{¶16} In *Long*, 138 Ohio St.3d 478, 2014-Ohio-849, 8 N.E.3d 890, the Ohio Supreme Court followed *Miller* and held that “a court, in exercising its discretion under R.C. 2929.03(A),

must separately consider the youth of a juvenile offender as a mitigating factor before imposing a sentence of life without parole.” *Id.* at paragraph one of the syllabus.

{¶17} Terrell argues the mandatory 15 years to life sentence he received is unlawful based on this precedent. However, Terrell’s sentence is different from the sentences at issue in *Miller*, *Graham*, and *Long* because he was not sentenced to life without the possibility of parole. Terrell is entitled to parole hearings after 21 years to determine if he has been rehabilitated to such an extent that he may re-enter society. Indeed, rehabilitation is a legitimate goal of penal sanctions. *Graham*, 560 U.S. at 71, 130 S.Ct. 2011, 176 L.Ed.2d 825.

{¶18} Furthermore, this court has refused to extend the rationale in *Miller*, 567 U.S. \_\_\_, 132 S.Ct. 2455, 183 L.Ed.2d 407, *Graham*, *Roper*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1, and *Long* to sentences where parole is afforded. *See e.g., State v. Hammond*, 8th Dist. Cuyahoga No. 100656, 2014-Ohio-4673; *see also State v. Zimmerman*, 2d Dist. Clark No. 2015-CA-62 and 2015-CA-63, 2016-Ohio-1475.

{¶19} Terrell nevertheless argues the United States Supreme Court’s recent decision in *Montgomery*, 577 U.S. \_\_\_, 136 S.Ct. 718, 193 L.Ed.2d 599, expanded the court’s holding in *Miller* to include discretionary sentences. He claims the *Montgomery* court held that even discretionary sentences for juveniles convicted of murder are unconstitutional “unless the sentencing court explicitly concludes that the juvenile is ‘irreparably corrupt’ or ‘permanently incorrigible.’” (Appellant’s Brief p. 4, quoting *Montgomery* at 735.)

{¶20} However, like *Miller*, the *Montgomery* court was discussing the imposition of *mandatory life sentences without parole*. The decision had nothing to do with mandatory indefinite life sentences, such as the one at issue here. *Montgomery* clarified the court’s holding in *Miller* by explaining that life imprisonment without parole may be justified in rare cases if the

court finds the juvenile offender exhibits such depravity that rehabilitation is impossible. *Id.* at 733. Indeed, *Miller* held that before a sentencing court can impose a life sentence without parole, the juvenile defendant “must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored.” *Id.* at 736-737.

{¶21} Despite Terrell’s argument to the contrary, *Montgomery* did not expand the court’s holding in *Miller*. Nor did *Miller* categorically ban life sentences without the possibility of parole for juvenile offenders. Rather the court in *Miller* concluded that based on the unique circumstances of juveniles, the Eighth Amendment requires juvenile offenders be given a “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” *Miller*, 567 U.S. \_\_\_, 132 S.Ct. at 2469, 183 L.Ed.2d 407, quoting *Graham*, 560 U.S. at 75, 130 S.Ct. 2011, 176 L.Ed.2d 825.

{¶22} Terrell’s 21 years to life prison sentence affords him the opportunity to regain his freedom once he has matured and demonstrated rehabilitation. Moreover, as previously explained, we refused to extend the rationale in *Miller* to juvenile cases where the offender is afforded the possibility of parole as in *Hammond*, 8th Dist. Cuyahoga No. 100656, 2014-Ohio-4673, and we decline to do so now.

{¶23} The sole assignment of error is overruled.

{¶24} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant’s conviction having been affirmed,

any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

EILEEN T. GALLAGHER, JUDGE

EILEEN A. GALLAGHER, P.J., and  
SEAN C. GALLAGHER, J., CONCUR

# The Supreme Court of Ohio

FILED

DEC 29 2016

CLERK OF COURT  
SUPREME COURT OF OHIO

State of Ohio

Case No. 2016-1100

v.

RECONSIDERATION ENTRY

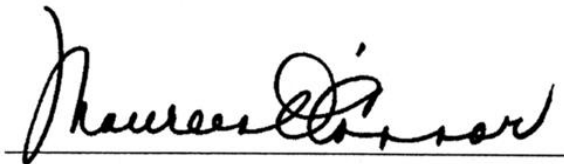
Deshawn T. Terrell

Cuyahoga County

It is ordered by the court that the motion for reconsideration in this case is granted and the jurisdictional is accepted.

It is ordered by the court, sua sponte, that this cause is held for the decision in Supreme Court Case No. 2016-0317, *State of Ohio v. Rickym Anderson*, and the briefing schedule is stayed.

(Cuyahoga County Court of Appeals; No. 103428)



Maureen O'Connor  
Chief Justice

**THE STATE OF OHIO, APPELLEE, v. TERRELL, APPELLANT.**

**[Cite as *State v. Terrell*, 152 Ohio St.3d 160, 2018-Ohio-258.]**

*Appeal dismissed as having been improvidently accepted.*

(No. 2016-1100—Submitted November 21, 2017—Decided January 16, 2018.\*)

APPEAL from the Court of Appeals for Cuyahoga County,

No. 103428, 2016-Ohio-4563.

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{¶ 1} This cause is dismissed as having been improvidently accepted.

O'DONNELL, KENNEDY, FISCHER, and DEWINE, JJ., concur.

O'CONNOR, C.J., and FRENCH and O'NEILL, JJ., dissent.

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Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and  
Christopher D. Schroeder, Assistant Prosecuting Attorney, for appellee.

Robert L. Tobik, Cuyahoga County Public Defender, and Erika B. Cunliffe,  
Assistant Public Defender, for appellant.

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\*Reporter's Note: This cause was decided on January 16, 2018, but was released to the public on January 30, 2018, subsequent to the resignation of Justice William M. O'Neill, who participated in the decision.

# The Supreme Court of Ohio

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## CASE ANNOUNCEMENTS

January 30, 2018

[Cite as *01/30/2018 Case Announcements*, 2018-Ohio-359.]

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## MERIT DECISIONS WITH OPINIONS\*

**2016-0789. State v. Zimmerman, Slip Opinion No. 2018-Ohio-249.**

Clark App. Nos. 2015-CA-62 and 2015-CA-63, 2016-Ohio-1475. Cause dismissed as improvidently accepted.

O'Donnell, Kennedy, Fischer, and DeWine, JJ., concur.

O'Connor, C.J., and French and O'Neill, JJ., dissent.

**2016-1011. State ex rel. Kerns v. Simmers, Slip Opinion No. 2018-Ohio-256.**

In Mandamus. Writ denied.

O'Connor, C.J., and O'Donnell, French, O'Neill, Fischer, and DeWine, JJ., concur.

Kennedy, J., concurs in judgment only.

**2016-1100. State v. Terrell, Slip Opinion No. 2018-Ohio-258.**

Cuyahoga App. No. 103428, 2016-Ohio-4563. Cause dismissed as improvidently accepted.

O'Donnell, Kennedy, Fischer, and DeWine, JJ., concur.

O'Connor, C.J., and French and O'Neill, JJ., dissent.

**2016-1462. State v. Gordon, Slip Opinion No. 2018-Ohio-259.**

Cuyahoga App. No. 103494, 2016-Ohio-5407. Judgment reversed and cause remanded.

O'Connor, C.J., and O'Donnell, Kennedy, French, Fischer, and DeWine, JJ., concur.

O'Neill, J., dissents.

\* Reporter's Note: These cases were decided on January 16, 2018, but are being released to the public on January 30, 2018, subsequent to the resignation of Justice William M. O'Neill, who participated in the decisions.