

No. 18-5239

In the Supreme Court of the United States

DESHAWN TERRELL,

Petitioner,

v.

STATE OF OHIO,

Respondent.

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

BRIEF IN OPPOSITION

MICHAEL C. O'MALLEY

Cuyahoga County Prosecutor

CHRISTOPHER D. SCHROEDER

Assistant Prosecuting Attorney

Counsel of Record

The Justice Center, 8th Floor

1200 Ontario Street

Cleveland, Ohio 44113

cschroeder@prosecutor.cuyahogacounty.us

(216) 443-7733

Counsel for Respondent State of Ohio

QUESTIONS PRESENTED

Does the Eighth Amendment prohibit a state from imposing a mandatory sentence of 15 years to life in prison on a 17 year old juvenile defendant convicted of murder?

TABLE OF CONTENTS

QUESTIONS PRESENTED.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE.....	1
SUMMARY OF THE ARGUMENT	3
REASONS FOR DENYING THE WRIT	5
1. This Court’s decisions in Roper, Graham, and Miller establish that a life sentence that provides an offender a meaningful opportunity for release is constitutional under the Eighth Amendment.	5
2. Terrell’s sentence of life with parole eligibility after 21 years does not implicate the concerns of Graham and Miller.	6
3. This Court expressly approved of life sentences with parole eligibility for juveniles in Montgomery v. Louisiana.....	10
4. Terrell, as an accomplice who admitted to purposely causing the death of the victim, is equally liable for the victim’s death.....	11
CONCLUSION.....	12

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Atkins v. Virginia</i> , 536 U.S. 304 (2002)	5
<i>Bostic v. Dunbar</i> , 138 S. Ct. 1593 (2018)	4
<i>Graham v. Florida</i> , 560 U.S. 48 (2010)	4-8, 11-12
<i>Harmelin v. Michigan</i> , 501 U.S. 957 (1991)	6, 9
<i>Helm v. Solem</i> , 684 F.2d 582 (8th Cir.1982)	7
<i>Miller v. Alabama</i> , 567 U.S. 460 (2012)	passim
<i>Montgomery v. Louisiana</i> , 136 S. Ct. 718 (2016)	10-11
<i>Roper v. Simmons</i> , 543 U.S. 551 (2005)	5, 8, 10, 12
<i>State v. Anderson</i> , 151 Ohio St.3d 212 (2017)	2-3
<i>State v. Terrell</i> , 147 Ohio St.3d 1445 (2016)	2
<i>Virginia v. LeBlanc</i> , 137 S. Ct. 1726 (2017)	4
<i>Willbanks v. Missouri Dep't of Corr.</i> , 138 S. Ct. 304 (2017)	4

<u>Statutes</u>	<u>Page(s)</u>
Ohio Revised Code 2903.02(A).....	2, 11
Ohio Revised Code 2911.11(A)(1)	2
Ohio Revised Code 2929.02	9
Ohio Revised Code 2929.02(B)(1)	1, 2, 9

STATEMENT OF THE CASE

At approximately 3:50 a.m. on July 30, 2013, Deshawn Terrell, 17, Shawntez Giles, 16, and Victor Flournoy, 19, attempted to rob a gas station named Biggie's Food Mart in Cleveland, Ohio. *See* Pet. App. 3a. All three were wearing blue surgical gloves and carrying their own handguns. Terrell began the robbery by pointing his gun at the head of the store clerk, Mohammed Ismail, outside the store. Terrell and Ismail began to struggle over the gun. Ismail broke free of Terrell and ran inside the store, trying to get to safety behind the counter. One witness stated that she heard a gunshot outside the store from the area where Terrell was standing as Ismail fled. Shawntez Giles, on his way out of the store after shooting and wounding store owner Esmeil Ayad, also shot Ismail in the abdomen, killing him. Terrell, Giles, and Flournoy then fled the store together.

The murder of Mohammed Ismail was the last of a spree of four separate armed robberies that Terrell committed on the east side of Cleveland in July of 2013. *See* Pet. App. 3-4a. Terrell was 17 years old at the time of the robberies, less than four months from his 18th birthday.

Terrell was bound over from juvenile court to the general division of the Ohio court of common pleas to be tried as an adult for Ismail's murder, as well as for a second armed robbery. *See* Pet. App. 4a. Once in common pleas court, Terrell filed a motion to dismiss the charges, or in the alternative, to transfer his case back to juvenile court. *See* Pet. App. 5a. Terrell argued that Ohio Revised Code 2929.02(B)(1), which required the imposition of a mandatory sentence of 15 years to

life imprisonment for murder, was unconstitutional as applied to a juvenile offender.

Id. The trial court denied Terrell's motion. *Id.*

Terrell then pleaded no-contest to murder in violation of Ohio Revised Code 2903.02(A), with a three-year firearm specification, and aggravated robbery in violation of Ohio Revised Code 2911.11(A)(1). *Id.* The trial court accepted Terrell's pleas of no contest and allowed the State to present all of the facts described above to establish a violation of each statute. The trial court found Terrell guilty on both counts and sentenced him to 15 years to life imprisonment on the murder, prior and consecutive to three years imprisonment on the firearm specification, and consecutive to three years imprisonment in a second case related to the aggravated robbery of Danzey's Discount Drug Store. *Id.* This resulted in an overall prison term of 21 years to life imprisonment. *Id.* Terrell will be eligible for parole in 2034, at age 38.

Terrell appealed the trial court's denial of his motion to dismiss, raising his constitutional challenge to the mandatory 15-to-life sentence contained in Ohio Revised Code 2929.02(B)(1). Terrell did not challenge either his three-year sentence for the firearm specification or the discretionary three year sentence for the second case of aggravated robbery. The state appellate court unanimously rejected Terrell's Eighth Amendment claim and affirmed. *See* Pet. App. 1-10a.

The Ohio Supreme Court initially declined discretionary jurisdiction over Terrell's discretionary appeal of that decision. *State v. Terrell*, 147 Ohio St.3d 1445 (2016). Terrell then filed a motion for reconsideration, pointing out that the state supreme court recently accepted jurisdiction over another case, *State v. Rickym*

Anderson, regarding the constitutionality of mandatory sentencing statutes as applied to juveniles. The state supreme court granted Terrell's motion for reconsideration, accepted jurisdiction over his appeal, and held Terrell's case for its decision in *Anderson*. See Pet. App. 11a.

On July 5, 2017, the Ohio Supreme Court decided *Anderson*, holding that the imposition of a mandatory minimum sentence of three years on a juvenile offender for aggravated robbery and kidnapping did not violate the Eighth Amendment's prohibition against cruel and unusual punishment. See *State v. Anderson*, 151 Ohio St.3d 212 (2017). The state supreme court thereafter dismissed Terrell's appeal as having been improvidently accepted. See Pet. App. 12a. Terrell now asks this Court to grant certiorari.

SUMMARY OF THE ARGUMENT

In juvenile sentencing cases, this Court has established a bright-line distinction between life without parole (now the juvenile equivalent of the death penalty) and all other possible sentences. Life without parole for juveniles is unique under the law because it forecloses any possibility of release in the future. Whenever a trial court imposes a sentence of life without parole on a juvenile offender, it must have discretion to consider the offender's youth before doing so.

Petitioner Deshawn Terrell is now asking this Court to hold that a mandatory sentence of 15 years to life imprisonment is unconstitutionally cruel and unusual punishment. But that sentence does not implicate the same issues as a sentence of life without parole. Even in the case of a juvenile convicted of a non-homicide offense,

the Eighth Amendment only requires “some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” *Graham v. Florida*, 560 U.S. 48, 75 (2010). Terrell was convicted of a homicide offense, and nevertheless, will have that opportunity, as he will be eligible for parole at the age of just 38.

The facts of this case thus fall far short of the “geriatric release” at issue in *Virginia v. LeBlanc*, 137 S. Ct. 1726, 1727 (2017) (per curiam) (Virginia Supreme Court’s determination that *Graham* did not prohibit Virginia’s “geriatric release” program, under which inmates could apply for parole at the age of 60 after serving at least 10 years in prison or age 65 after serving at least 5 years in prison, was not an unreasonable application of *Graham* under AEDPA). Over the past few years, this Court has repeatedly denied certiorari over petitions arguing that this Court should extend *Graham* and *Miller v. Alabama*, 567 U.S. 460 (2012), to de facto life without parole sentences. *See Bostic v. Dunbar*, cert. denied, 138 S. Ct. 1593 (2018) (juvenile non-homicide offender sentenced to a term-of-years that would guarantee the offender would die in prison because he would not be eligible for parole until the age of 112); *Willbanks v. Missouri Dep’t of Corr.*, cert. denied, 138 S. Ct. 304 (2017) (juvenile homicide offender eligible for parole at age 85). This case does not present even those fact patterns. Deshawn Terrell will be eligible for parole decades before his sentence could ever be considered de facto life without parole.

Moreover, Terrell was convicted of a homicide offense – the killing of an innocent store clerk during a robbery to which Terrell brought a gun, wore blue plastic gloves to conceal his fingerprints and DNA, pointed a gun at the victim’s head,

fought with the victim, and according to one witness, fired a shot at the victim that missed as the victim tried to flee. This placed Terrell within the class of offenders deserving of the most serious form of punishment. Under the Eighth Amendment, the state could have imposed a sentence of life without parole under these facts. The actual sentence imposed in this case – 15 years to life imprisonment – does not implicate the procedural safeguards this Court has enforced in cases involving juveniles sentenced to life without parole. This Court should adhere to the well-established reasoning of *Graham* and *Miller* and decline certiorari over this case.

REASONS FOR DENYING THE WRIT

- 1. *Roper*, *Graham* and *Miller* all establish that a life sentence that provides a juvenile offender a meaningful opportunity for release is constitutional under the Eighth Amendment.**

In *Roper v. Simmons*, 543 U.S. 551 (2005), this Court held that the Eighth and Fourteenth Amendments forbid the imposition of the death penalty on juvenile offenders. This Court held that “[c]apital punishment must be limited to those offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution.’” *Id.* at 568, quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002). “[J]uvenile offenders cannot with reliability be classified among the worst offenders.” *Id.* at 569.

In *Graham v. Florida*, 560 U.S. 48 (2010), this Court held that the Eighth Amendment’s Cruel and Unusual Punishments Clause prohibited sentencing a juvenile offender to life in prison without the possibility of parole for a non-homicide crime. This Court described life without parole as “the second most severe penalty

permitted by law.” *Id.* at 69, quoting *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991). “[L]ife without parole sentences share some characteristics with death sentences that are shared by no other sentences.” *Id.*

“The State does not execute the offender sentenced to life without parole, but the sentence alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency--the remote possibility of which does not mitigate the harshness of the sentence. *Solem*, 463 U.S., at 300-301, 103 S. Ct. 3001, 77 L. Ed. 2d 637. As one court observed in overturning a life without parole sentence for a juvenile defendant, this sentence ‘means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days.’ *Naovarath v. State*, 105 Nev. 525, 526, 779 P.2d 944 (1989).”

Id. at 69-70. This Court thus required states to give juveniles convicted of non-homicide offenses “some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” *Id.* at 75.

In *Miller v. Alabama*, 567 U.S. 460 (2012), this Court held that the Eighth Amendment prohibited any sentencing scheme that mandated life in prison without the possibility of parole for juvenile offenders. This Court noted that *Graham* “likened life without parole for juveniles to the death penalty itself[.]” *Id.* at 470. Because life without parole was now the juvenile equivalent of the death penalty, “a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.” *Id.* at 489.

2. Terrell’s sentence of life with parole eligibility after 15 years does not implicate the concerns of *Graham* and *Miller*.

None of these cases are applicable to Terrell, either in their express holdings or in their implicit reasoning. Terrell was not sentenced to death or life without the

possibility of parole. He was sentenced to life with the possibility of parole after 15 years, consecutive to a pair of three-year sentences he does not challenge. Terrell will thus be only 38 years old when he becomes eligible for parole. This is not a “denial of hope[;]” it does not mean “that good behavior and character improvement are immaterial[;]” and it does not mean that Terrell “will remain in prison for the rest of his days” regardless of “whatever the future might hold in store” for him. *Graham* at 69-70. Terrell will have a “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” *Graham* at 75. Whether Terrell is ever released from prison will depend on the particularized facts of Terrell’s case, his behavior in prison, and his progress at rehabilitation. This is exactly what this Court required in *Graham*.

This distinguishes Terrell’s case from the life without parole sentences at issue in *Graham* and *Miller*. “A life sentence without parole differs qualitatively from a sentence for a term of years or a life sentence with the prospect of parole. As with the death penalty, the State totally rejects rehabilitation as a basic goal of our criminal justice system by imposing a life sentence without parole.” *Helm v. Solem*, 684 F.2d 582, 585 (8th Cir.1982). Terrell has not suffered that irreversible loss of freedom. Because a sentence of life without parole precludes any “meaningful opportunity to obtain release[;]” this Court has recognized that “life without parole sentences share some characteristics with death sentences that are shared **by no other sentences.**” *Graham* at 69 (emphasis added).

The possibility that Terrell might never be released from prison is also permissible under *Graham*:

“It bears emphasis, however, that while the Eighth Amendment prohibits a State from imposing a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life. Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does prohibit States from making the judgment at the outset that those offenders never will be fit to reenter society.”

Graham at 75. The length of Terrell’s incarceration will depend on his rehabilitation from this point forward. And Terrell’s age at the time of the offense is a factor that the Ohio Parole Authority may consider in determining when he should be released.

Miller is a case about process; it does not ban life without parole sentences for juveniles, but rather, prescribes how states must impose those sentences under the Eighth Amendment. “Our decision does not categorically bar a penalty for a class of offenders or type of crime – as, for example, we did in *Roper* or *Graham*. Instead, it mandates only that a sentencer follow a certain process – considering an offender’s youth and attendant characteristics – before imposing a particular penalty.” *Miller* at 483. But the process this Court articulated in *Miller* applies only to a specific class of individuals – juveniles sentenced to life imprisonment without the possibility of parole. Terrell is not a member of that class. He is therefore not entitled to the benefit of procedural protections that exists specifically to protect juveniles against sentences of life without parole.

Ohio Revised Code 2929.02 does not mandate a sentence of life without parole. It refers to “an indefinite term of fifteen years to life[,]” thus creating an extremely broad range of potential sentences in Terrell’s case. See Ohio Revised Code 2929.02(B)(1). Terrell may be released at age 38, age 83, or he may die in prison. The only “mandatory” part of that sentence is that Terrell must serve at least 15 years, consecutive to two other three-year sentences that Terrell is not challenging. That sentence is not disproportionate to the severity of Terrell’s offenses. And a potential life sentence for murder does not become disproportionate just because the first 15 years of that sentence are mandatory. “There can be no serious contention, then, that a sentence which is not otherwise cruel and unusual becomes so simply because it is ‘mandatory.’” *Harmelin v. Michigan*, 501 U.S. at 995.

Under the logic of Terrell’s argument, every sentencing statute that results in mandatory imprisonment of any length would be unconstitutional if applied to juvenile offenders. Every non-probationable offense carries with it a sentencing range. The minimum sentence in that range is always, by definition, a mandatory sentence to the extent that a trial court cannot sentence the offender to a term of years below that minimum. The trial court never has discretion to go below the minimum sentence. Terrell’s argument, if accepted, would result in the wholesale invalidation of every mandatory minimum sentence for juvenile offenders across the United States. This Court has never suggested that the Eighth Amendment requires such an outcome, prohibiting any or all mandatory sentences on juveniles tried in adult court.

3. This Court expressly approved of life sentences with parole eligibility for juveniles in *Montgomery v. Louisiana*.

Terrell also relies upon this Court's decision in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), but *Montgomery* does nothing to help Terrell. In *Montgomery*, this Court held that *Miller* was retroactive to juveniles sentenced before this Court decided *Miller* in 2012. This Court in *Montgomery* simply reaffirmed what it had already stated in *Miller*: "Although *Miller* did not foreclose a sentencer's ability to impose life without parole on a juvenile, this Court explained that a lifetime in prison is a disproportionate sentence for all but the rarest of children, those whose crimes reflect 'irreparable corruption.'" *Montgomery* at 726, quoting *Roper v. Simmons*, 543 U.S. at 573 ("It 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").

Montgomery did not require a sentencing court to consider a juvenile offender's youth before imposing a sentence of life with parole eligibility. "*Miller* did not impose a formal factfinding requirement[.]" *Id.* at 735. It is only a sentence of life without parole that must be reserved for juveniles "whose crimes reflect 'irreparable corruption.'" *Montgomery* at 726, quoting *Roper* at 573. Only those juveniles are permanently denied any chance at rehabilitation.

In fact, this Court expressly held in *Montgomery* that a state "may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." *Id.* at 736. Terrell already has such a sentence. "Those prisoners who have shown an inability to reform will continue to serve life

sentences. The opportunity for release will be afforded to those who demonstrate the truth of *Miller*'s central intuition—that children who commit even heinous crimes are capable of change.” *Id.* This Court’s explicit sanction of a sentence of life with parole eligibility for juveniles in *Montgomery* forecloses Terrell’s claim.

4. Terrell, as an accomplice who admitted to purposely causing the death of the victim, is equally liable for the victim’s death.

Finally, the portion of Terrell’s petition that discusses the felony murder rule is irrelevant to this Court’s consideration because Terrell was convicted of purposeful murder, not felony murder. In pleading no contest to murder, Terrell admitted that he “purposely cause[d] the death of another[.]” Ohio Revised Code 2903.02(A). This placed Terrell within the category of defendants who “kill, intend to kill, or foresee that life will be taken” who are “deserving of the most serious forms of punishment[.]” *Graham* at 69.

Although it was Terrell’s accomplice, Shawntez Giles, who fired the fatal shot, Terrell’s culpability in the murder was significant. Terrell acted together with Giles and Victor Flournoy to plan and attempt the robbery. He brought a gun to the store and wore blue surgical gloves to avoid leaving fingerprints or DNA. It was Terrell who first pointed the gun at the victim’s head and struggled with him over the gun. One of the witnesses testified that she heard a gunshot outside the store where Terrell was fighting with the victim. And Terrell then fled the scene with Giles and Flournoy after the shooting. Terrell’s no contest plea to purposeful murder, rather than felony murder, reflected Terrell’s complicity in the deliberate killing. Giles, the shooter, pleaded guilty to aggravated murder and received a longer sentence of 33

years to life. Terrell, by contrast, received a lesser sentence of 21 years to life because he was not the principal offender. The length of those sentences thus reflected the state courts' consideration of the individual culpability of each defendant.

In *Roper*, *Graham* and *Miller*, this Court established that two sentences – death and life without parole – were distinct from all other available punishments. Those two sentences are not at issue in this case. Life without parole is, by definition, mutually exclusive with any possibility of eventual release. By contrast, Terrell's sentence will render him eligible for parole at just 38 years old. Terrell may very well be released while he is still young enough to have a long and meaningful life outside of prison. Far from being a denial of all hope, Terrell's sentence places his future release in his own hands and gives him an incentive to work towards rehabilitation despite his terrible offense. This is all that the Eighth Amendment requires.

CONCLUSION

For all of the foregoing reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,



MICHAEL C. O'MALLEY

Cuyahoga County Prosecutor

CHRISTOPHER D. SCHROEDER

Assistant Prosecuting Attorney

Counsel of Record

The Justice Center, 8th Floor

1200 Ontario Street

Cleveland, Ohio 44113

cschroeder@prosecutor.cuyahogacounty.us

(216) 443-7733

No. 18-5239
In the Supreme Court of the United States

DESHAWN TERRELL, *Petitioner*,

v.

STATE OF OHIO, *Respondent*.

PROOF OF SERVICE

Pursuant to Rules 29.3 and 29.5(b) of the Rules of the Supreme Court of the United States, Christopher D. Schroeder, counsel of record for Respondent and a member of the Bar of this Court, hereby certifies that on July 24, 2018, he served Erika Cunliffe, counsel of record for Petitioner DeShawn Terrell, and co-counsel Jeffrey M. Gamso, by placing in the United States Mail, postage pre-paid, properly addressed to Attorneys Cunliffe and Gamso at the Cuyahoga County Public Defender's Office, 310 Lakeside Avenue, Suite 200, Cleveland, Ohio 44113, a copy of the Brief in Opposition to Petition for Writ of Certiorari.

Counsel of record for Responded further certifies that on July 24, 2018, he served Marsha L. Levick, counsel of record for *Amici Curiae* The Juvenile Law Center, The Center on Wrongful Convictions of Youth, and The Center for Law, Brain and Behavior, and co-counsel for *Amici* Rita Saha Shah and Danielle Whiteman, by placing in the United States Mail, postage pre-paid, properly addressed to Attorneys Levick, Shah, and Whiteman, at the Juvenile Law Center, 1315 Walnut Street, 4th Floor, Philadelphia, PA 19107, a copy of the Brief in Opposition to Petition for Writ of Certiorari.

All parties required to be served in this case have been served.

Respectfully submitted,



CHRISTOPHER D. SCHROEDER

Counsel of Record

CUYAHOGA COUNTY PROSECUTOR'S OFFICE

The Justice Center, 8th Floor

1200 Ontario Street

Cleveland, Ohio 44113

cschroeder@prosecutor.cuyahogacounty.us

(216) 443-7733

Counsel for Respondent State of Ohio