No.

**IN THE**

# Supreme Court of the United States

JERRARD T. COOK,

*Petitioner,*

v.

STATE OF MISSISSIPPI,

*Respondent.*

On Petition for a Writ of Certiorari to the Supreme Court of Mississippi

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

The Court stated in *Montgomery v. Louisiana* that the Eighth Amendment prohibits life without parole sentences "for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." 136 S. Ct. 718, 734 (2016). Nonetheless, federal appellate courts and state courts of last resort are divided on whether the Eighth Amendment authorizes a juvenile to be sentenced to life without parole absent a finding of permanent incorrigibility.

The first question presented is:

1. Whether the Eighth Amendment requires the sentencing authority to make a finding that a juvenile is permanently incorrigible in order to impose a sentence of life in prison without the possibility of parole.

The second question presented is:

2. Whether the Eighth Amendment prohibits a life without parole sentence for a crime committed by a juvenile.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Constitutional Provisions**



**Statutes**



**Other Authorities**

## PETITION FOR A WRIT OF CERTIORARI

Petitioner Jerrard Cook respectfully petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of Mississippi in this case.

## OPINIONS AND ORDERS BELOW

The circuit court's order sentencing petitioner to life without the possibility of parole (Pet. App. 27a) is unpublished. The opinion of the Court of Appeals of Mississippi affirming the circuit court (Pet. App. 4a) is reported at 242 So.3d 865. The order of the Supreme Court of Mississippi denying certiorari (Pet. App. 1a) is unpublished but is referenced in the Southern Reporter at 237 So.3d 1269.

## JURISDICTION

The Supreme Court of Mississippi's denial of certiorari was entered on March 22, 2018. Justice Alito extended the time to file this petition to July 20, 2018. 17A1336. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

## CONSTITUTIONAL PROVISION INVOLVED

The Eighth Amendment to the United States Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

## INTRODUCTION

Jerrard Cook has been condemned to life in prison without the possibility of parole for a murder he committed when he was just seventeen years old. The court that sentenced Cook made no finding that his crime reflected permanent incorrigibility. Nor could it have reasonably done so: the psychologist appointed by the court to examine Cook stated that Cook was *not* one of those rare juvenile offenders who is incapable of rehabilitation.

That the sentencing authority made no finding of permanent incorrigibility would have been grounds for reversal under the Eighth Amendment in the Fourth Circuit and the highest courts of seven states. But not in Mississippi, where no finding of permanent incorrigibility is required before sentencing a teenaged offender to die in prison.

Mississippi's approach, which it shares with four other states, warrants the Court's review. The Court has already made clear that the Eighth Amendment prohibits the extreme punishment of life imprisonment without the possibility of parole for "all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016), *as revised* (Jan. 27, 2016). This case perfectly illustrates the danger that state sentencing authorities, if not required to make a finding of permanent incorrigibility, will deviate from the substance of the Court's Eighth Amendment rule and impose sentences of life without parole even on juveniles who are not irreparably corrupt.

The Court should grant certiorari.

## STATEMENT OF THE CASE

1. *Petitioner*. For the first twelve years of his life, Jerrard Cook, a boy of "average to low-average intelligence," was raised by his grandmother. Tr. 176.[1] He had no relationship with his father, who went to prison for drug-related offenses around the time Cook was born. Tr. 154–55. His mother, herself a longtime drug user, was rarely around; she would have given Cook up for adoption if her own mother had not talked her out of it. Tr. 154–57.

Cook and his grandmother were close. Tr. 159. The relationship shaped Cook's behavior. Tr. 159. At his grandmother's insistence, Cook attended church "[e]very day the doors opened." Tr. 157. While his grandmother was raising him, Cook "was a good child in school"; he was involved in student activities, and he would bring home his artwork and sports trophies. Tr. 158.

When Cook was about twelve years old, his grandmother passed away. Tr. 158–59. The loss was devastating. Tr. 158–59. A forensic psychologist appointed by the court to evaluate Cook testified that he "spiraled out downwards" and "was largely unsupervised" after her death. Tr. 177.

Without much supervision as a teenager, Cook began skipping school, using illegal drugs, and hanging around with a bad crowd—including Cearic Barnes, Tr. 121, who would eventually become his co-defendant, Pet. App. 28a. Cook, like many adolescents, was

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[1] Herein, all references to "R." and "Tr." are to the record clerk's papers and record transcript on file with the Mississippi Court of Appeals, No. 2016-CT-00687-COA.

influenced by peer pressure, and without his grandmother's guidance, he "gravitated more toward the street," where "his behavior . . . was largely motivated by wanting to appear cool, appear tough." Tr. 178. Cook seemed to respond well to periods of structure and discipline, such as when he was sent to training school or mentored by a local authority figure. Tr. 159–61. But when those temporary solutions ended, he was set adrift, and his behavior backslid. Tr. 159–61.

Cook's mother has admitted that, despite her son's rebellious behavior, she did not punish him. Tr. 160. Moreover, although she believed he was using drugs as a teenager, she made no meaningful attempt to stop him. Tr. 160. Cook never received any therapy or counseling. Tr. 183.

2. *Crime and original sentence.* When Cook was seventeen years old, he shot and killed an eighteen-year-old acquaintance named Marvin Durr. Pet. App. 5a.

On the day in question, Cook and his friend Cearic Barnes had been walking through town with another teenager; as a group, they had talked about robbing local convenience stores, but had not followed through on any of their plans. Pet. App. 28a; *see also id.* at 6a. Cook had a gun with him that he had taken from his uncle's house. *Id.* at 6a. When the third friend left, Barnes and Cook decided they would flag down a car from the side of the road, steal it, and drive to a nearby town to rob a store. *Id.* at 6a–7a. The first car they flagged down was a police cruiser, and it drove on after a brief stop. *Id.* at 7a. The second car they flagged down was driven by Marvin Durr, Barnes's cousin. *Id.* Durr agreed to give them a ride to Cook's

aunt's house. *Id.* Barnes and Cook gave Durr wrong directions, and after he missed a turn, they told him to let them out by the side of the road. *Id.* Durr did so, but as he was driving away, Cook flagged him down again and shot him in the head, killing him. *Id.*

Barnes and Cook tried to remove Durr's body from the car, but they could not, so Cook sat on Durr's body and drove the car to a nearby bridge, where he knew there were alligators in the water. *Id.* There, Barnes and Cook were still unable to remove Durr's body, so Barnes set fire to the car to destroy evidence. *Id.* Cook discarded the gun and burned the clothes. *Id.* at 8a.

In 2003, Cook pleaded guilty to capital murder. *Id.* at 29a. He was sentenced to life in prison without the possibility of parole. *Id.*

3. *Resentencing hearing*. Following this Court's decision in *Miller v. Alabama*, 567 U.S. 460 (2012), which held that mandatory life-without-parole sentences imposed on juveniles violate the Eighth Amendment, Cook filed a motion requesting that the state circuit court vacate his original sentence and resentence him to life with the possibility of parole. R. 62.

The circuit court granted the motion in part, vacating Cook's sentence and ordering a resentencing hearing. R. 28–29. For purposes of that hearing, the court ordered Cook to undergo a "mental competency examination that includes, among other things, the specific sentencing considerations enunciated in *Miller v. Alabama*." R. 30. The court appointed forensic psychologist W. Criss Lott, Ph.D., to conduct the evaluation and, if necessary, testify at the resentencing hearing. R. 30.

At Cook's resentencing hearing, the State called three witnesses, none of whom had had any significant interactions with Cook since at least as far back as his trial and original sentencing, fourteen years earlier. Danny Smith had prosecuted Cook fourteen years ago as a district attorney. Tr. 79–80. Mr. Smith admitted that he had had no contact with Cook since Cook's sentencing and that his opinion of Cook was based entirely on what he could remember about the prosecution. Tr. 99. Bobby Bell, Sr., a local police chief, had served as a "mentor" to Cook back when Mr. Bell had worked as a truant officer and substitute teacher. Tr. 102. Mr. Bell acknowledged that he had not "seen or talked to" Cook since Cook was twelve or thirteen years old. Tr. 103, 106. Jerry S. Durr, the victim's father, also testified. Tr. 108. Mr. Durr acknowledged that he had had no direct personal interactions with Cook since the time of his sentencing, with the exception of a letter from Cook in which Cook apologized for the murder of Marvin Durr. Tr. 113.

Cook called several witnesses who knew him as a child and had continued to interact with him after his conviction: his mother, Sharon Cook, Tr. 153–64; his cousin, Angela Daniels, Tr. 117–29; his fiancé, Vera Quarles, Tr. 165–71; and his pastor, Reverend Bruce Smith, Tr. 129–40. In addition to discussing Cook's difficult childhood, *see* Tr. 154–58, and immaturity at the time of the crime, *see* Tr. 134, 160, 167–68, these witnesses explained that Cook had "matured a lot" while in prison, Tr. 123, had "taken responsibility" for his crime, Tr. 164, and had consistently expressed remorse, Tr. 164, 170. Furthermore, Reverend Smith testified to his belief that Cook had undergone a sincere religious "change" while incarcerated. Tr. 135.

Cook also called Dr. Lott, the forensic psychologist appointed by the court. Tr. 172. Dr. Lott was the only expert to testify at the hearing.

Among other things, Dr. Lott testified that Cook "did not appear to be one of those . . . rare offenders who couldn't be rehabilitated." Tr. at 192. Dr. Lott stated that in "90 plus percent of the cases," juveniles who have committed offenses, including violent offenses, become less likely to offend after age seventeen. Tr. 187, 188. "[I]t's my opinion," Dr. Lott testified, "that [Cook] does not represent one of those rare offenders who could not be rehabilitated." Tr. 203.

4. *Reinstatement of sentence.* Following the hearing, the circuit court issued an order reinstating Cook's original sentence of life imprisonment without the possibility of parole. Pet. App. 27a. The court opined that neither Cook's young age at the time of the murder, Cook's upbringing, nor the circumstances of the crime "weigh[ed] against a sentence of life without parole." Pet. App. 29a–31a. Based on Cook's prison disciplinary record, the court stated its belief that he lacked "any significant possibility of rehabilitation." Pet. App. 31a. The court made no reference whatsoever to Dr. Lott's testimony that Cook "does not represent one of those rare offenders who could not be rehabilitated." Tr. 203; Pet. App. 27a–32a.

Cook moved to set aside the court's order reimposing a sentence of life in prison without the possibility of parole. R. 49. He made two arguments that remain relevant at this stage. First, the circuit court "failed to make a specific finding, supported by credible evidence, that [Cook] is rare, uncommon, and irreparably corrupt." R. 52. Second, the sentence of "life with-

out the possibility of parole is excessive, unreasonable, cruel and unusual when applied to juveniles in general, as a class, and specifically as to [Cook]," and therefore, it "violates . . . the Fifth, Eighth, and Fourteenth Amendments to the Constitution." R. 56. The circuit court denied the motion. R. 59.

5. *Court of Appeals of Mississippi*. Cook appealed his sentence to the Court of Appeals of Mississippi. *See* Pet. App. 21a. Again, he made two arguments that remain relevant at this stage. First, he argued that the circuit court erred in imposing a life without parole sentence because the court made no finding that Cook was irreparably corrupt. Brief of the Appellant at 17.[2] Second, and alternatively, Cook argued that sentencing juveniles to life without parole is categorically unconstitutional because it violates the Eighth and Fourteenth Amendments. *Id.* at 22.

The court of appeals rejected Cook's arguments and affirmed the circuit court. Pet. App. 25a. First, the court held that sentencing authorities are not required to make a finding of permanent incorrigibility before imposing a life without parole sentence on a juvenile offender. The court reasoned that, "in *Montgomery*, the [Supreme] Court specifically stated that '*Miller* did not require trial courts to make a finding of fact regarding a child's incorrigibility' and that '*Miller* did not impose a formal factfinding requirement.'" *Id.* at 22a (quoting *Montgomery*, 136 S. Ct. at 735). Instead, the court found that *Miller* simply "identif[ied] some factors that the judge is supposed to consider in reaching a sentencing decision." Pet.

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[2] Brief of the Appellant, *Cook v. State*, 242 So.3d 865 (Miss. Ct. App. Aug. 8, 2017), 2016 WL 10732890.

App. 16a. Thus, the court concluded that a judge may impose a sentence of life without parole as long as she has "discussed and applied" the so-called *Miller* factors and her conclusion is not "arbitrary or capricious." *Id.* at 21a.

In addition to rejecting a fact-finding requirement, the court dismissed *Montgomery*'s "permanent incorrigibility" and "irreparable corruption" standard, *see Montgomery*, 136 S. Ct. at 734, as a "theological concept." Pet. App. 16a.[3] The court stated: "We … note that the United States Supreme Court has never defined 'irreparable corruption,' a term that sounds more like a theological concept than a rule of law to be applied by an earthly judge." *Id.* at 16a.

Second, the court held that the Constitution does not categorically bar sentencing juveniles to life without parole. *Id.* at 25a.

The court of appeals denied rehearing, with one judge voting to grant it. Pet. App. 2a.

6. *Supreme Court of Mississippi.* Cook petitioned the Supreme Court of Mississippi for a writ of certiorari. *See id.* at 1a. In relevant part, Cook argued that the reinstatement of his sentence violated the Eighth Amendment because: (1) the sentencing authority did not find and could not have found that Cook was the rare, permanently incorrigible juvenile offender for whom a life-without-parole sentence is permissible; and (2) the Constitution categorically bars sentencing

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[3] In *Montgomery*, the Court uses the terms "permanent incorrigibility" and "irreparable corruption" interchangeably. *See, e.g.*, *Montgomery*, 136 S. Ct. at 734.

juvenile offenders to life imprisonment without possibility of parole. Miss. S. Ct. Pet. at 6, 8.[4] The Supreme Court of Mississippi denied Cook's petition, with two justices voting to grant it. Pet. App. 1a.

7. This petition followed.

## REASONS FOR GRANTING THE PETITION

There is a deep split of authority on whether the Eighth Amendment permits a juvenile to be sentenced to life without parole in the absence of a finding that the juvenile is permanently incorrigible. The Ninth Circuit is split with the Fourth Circuit on this question, and among state courts of last resort, the issue has resulted in at least twelve majority opinions, split 7–5, and four dissents. The split is deep and acknowledged. Because the division of authority results from differing interpretations of this Court's decision in *Montgomery v. Louisiana,* 136 S. Ct. 718 (2016), only this Court can resolve the disagreement.

The issue is important because without an incorrigibility finding, there is no way to know if a sentencing authority determined, as this Court's jurisprudence demands, that a particular juvenile defendant is in fact among the "rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Id*. at 734. In practical terms, if a finding of permanent incorrigibility is not required, state sentencing authorities will remain "free to sentence a child whose crime reflects transient immaturity to life without parole." *Id*. at 735.

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[4] Petition for Certiorari, *Cook v. State*, 237 So. 3d 1269 (Table) (Miss. 2018), *available at* http://bit.ly/Miss_CertPet.

This case presents the question cleanly and illustrates the danger of dispensing with the incorrigibility finding. This Court has consistently recognized that "[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." *Roper v. Simmons*, 543 U.S. 551, 573 (2005). *See also Graham v. Florida*, 560 U.S. 48, 68 (2010). And in this case, a court-appointed psychologist examined Cook and testified to his "opinion that [Cook] does *not* represent one of those rare offenders who could not be rehabilitated." Tr. 203 (emphasis added). Yet the trial court—free from any obligation to make a finding that Cook is permanently incorrigible—imposed a life without parole sentence without so much as mentioning the expert witness's opinion.

This case also presents the question of whether the Eighth Amendment categorically forbids a life without parole sentence for a juvenile—a punishment that American society has come to reject. In the six years since *Miller*, States have moved decisively to prohibit life without parole sentences for juveniles. All told, the sentence is extinct, or nearly so, in 34 jurisdictions.[5]

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[5] The same two questions are presented in a petition pending before the Court in *Davis v. Mississippi*, No. 17-1343.

## I. This Court Should Decide Whether Sentencing An Offender To Life Without Parole For A Crime Committed As A Juvenile Requires A Finding Of Permanent Incorrigibility.

### A. The Question Divides Both The Federal Circuits And State Supreme Courts.

Federal circuits and state supreme courts are intractably divided on whether the Eighth Amendment requires a sentencing authority to make a finding that a juvenile is permanently incorrigible before imposing a sentence of life without parole. The Fourth Circuit holds that a finding of permanent incorrigibility is required, *see Malvo v. Mathena*, 893 F.3d 265, 267 (4th Cir. 2018), while the Ninth Circuit holds just the opposite, *see United States v. Briones*, 890 F.3d 811, 819 (9th Cir. 2018).

At least seven state courts of last resort hold that a finding is required, while five state courts of last resort hold just the opposite. *See infra* at 16–22. The issue has also prompted at least four dissents by federal court of appeals judges and justices who sit on state courts of last resort. *See infra* at 15–17, 21. And the split is acknowledged. *See People v. Skinner*, No. 152448, 2018 WL 3059768, at *25 (Mich. June 20, 2018) (Markman, C.J., dissenting) (noting "the split of authority in state courts post-*Miller* on whether a court must make a specific 'finding' of irreparable corruption").[6]

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[6] *See also* Alice Reichman Hoesterey, *Confusion in Montgomery's Wake*, Appendix B: Irreparable Corruption Determination, 45 FORDHAM URB. L.J. 149, 190–93 (2017).

1. The disagreement among courts flows directly from an ambiguity in this Court's decision in *Montgomery*. *Montgomery*'s logic strongly implies that a juvenile may not be sentenced to life without parole without a finding of permanent incorrigibility. *Montgomery* holds that the Eighth Amendment bars life without parole sentences "for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." 136 S. Ct. at 733–34. *Montgomery* also charges sentencing authorities with the duty of "separat[ing] those juveniles who may be sentenced to life without parole from those who may not." *Id*. at 735. It would seem, then, that a sentencing authority must reach a conclusion that a juvenile is permanently incorrigible, and therefore one of "those juveniles who may be sentenced to life without parole," *id.*, before imposing such a sentence. It also would seem that such a conclusion could take no form other than a finding, whether oral or written.

However, the following statement in *Montgomery* complicates the issue:

> Louisiana suggests that *Miller* cannot have made a constitutional distinction between children whose crimes reflect transient immaturity and those whose crimes reflect irreparable corruption because *Miller* did not require trial courts to make a finding of fact regarding a child's incorrigibility. That this finding is not required, however, speaks only to the degree of procedure *Miller* mandated in order to implement its substantive guarantee. When a new substantive rule of constitutional law is established, this Court is careful to limit

> the scope of any attendant procedural requirement to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems. *See Ford v. Wainwright*, 477 U.S. 399, 416–417 (1986) ("[W]e leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences").

*Id.* at 735.

As we show below, most courts consider any ambiguity introduced by this dictum (the "*Montgomery* fact-finding dictum") to be secondary to *Montgomery*'s central logic. These courts require a finding of permanent incorrigibility. Other courts, however, rely on the dictum to conclude that sentencing authorities may impose life without parole sentences on juveniles without finding permanent incorrigibility.

2. The Fourth and Ninth Circuits are split on whether a finding of permanent incorrigibility is required. The Fourth Circuit recently held that "a sentencing judge … violates *Miller*'s rule any time it imposes a discretionary life-without-parole sentence on a juvenile homicide offender without first concluding that the offender's 'crimes reflect permanent incorrigibility,' as distinct from 'the transient immaturity of youth.'" *Malvo*, 893 F.3d at 274. "[I]rreparable corruption or permanent incorrigibility," the court stated, is "a determination that is now a prerequisite to imposing a life-without parole sentence on a juvenile homicide offender." *Id.* at 275. As a result, the court affirmed the district court's ruling granting a writ of habeas corpus, vacating a juvenile life sentence without

the possibility of parole, and ordering the state trial court to hold a resentencing "to determine … whether [the defendant] qualifies as one of the rare juvenile offenders who may, consistent with the Eighth Amendment, be sentenced to life without the possibility of parole because his 'crimes reflect permanent incorrigibility.'" *Id.* at 267 (quoting *Montgomery*, 136 S. Ct. at 734).

The Ninth Circuit, however, rejected a finding requirement in *United States v. Briones*, where "[t]he gist of [the defendant's] appeal" included the argument that "the district court failed to make an explicit finding that Briones was 'incorrigible.'" 890 F.3d at 818. Relying on *Montgomery*'s factfinding dictum, the Ninth Circuit stated that "[n]othing in the *Miller* case suggests that the sentencing judge use any particular verbiage or recite any magic phrase." *Id.* at 819 (citing *Montgomery*, 136 S. Ct. at 735).

Judge O'Scannlain concurred in part and dissented in part, faulting the district court for imposing a life sentence "[w]ithout any evident ruling on th[e] question" of permanent incorrigibility. *Id.* at 822–23 (O'Scannlain, J., concurring in part and dissenting in part). Judge O'Scannlain opined that "[p]erhaps … the district court could have determined that … Briones is permanently incorrigible … [,] [b]ut the transcript does not indicate that the district court made such determination." *Id.* at 824. Thus, Judge O' Scannlain would have "remand[ed] for the limited purpose of permitting the district court properly to perform the analysis required by *Miller* and *Montgomery*." *Id.* at 822.

3. Seven state courts of last resort hold that the Eighth Amendment requires a finding of permanent

incorrigibility before a juvenile may be sentenced to life without parole.

a. *Supreme Court of Georgia*: In *Veal v. State*, the trial court sentenced a defendant to life without parole during the interval between *Miller* and *Montgomery*. 784 S.E.2d 403, 410 (Ga. 2016). The Supreme Court of Georgia stated that it might have affirmed the trial court under *Miller*, "[b]ut then came *Montgomery*." *Id.* at 410. The court explained that under *Montgomery's* "explication of *Miller*," the sentencer must "determine whether a particular defendant falls into th[e] almost-all juvenile murderer category for which [life without parole] sentences are banned." *Id.* at 411(emphasis omitted) (citing *Montgomery*, 136 S. Ct. at 736). That is, the sentencer must make a "specific determination that [the defendant] is *irreparably corrupt*." *Id.* The supreme court remanded the case for a new sentencing because:

> [t]he trial court did not . . . make any sort of distinct determination on the record that Appellant is irreparably corrupt or permanently incorrigible, as necessary to put him in the narrow class of juvenile murderers for whom [a life without parole] sentence is proportional under the Eighth Amendment as interpreted in *Miller* as refined by *Montgomery*.

*Id.* at 412.

b. *Court of Criminal Appeals of Oklahoma*: Oklahoma's court of last resort for criminal cases requires a finding of permanent incorrigibility. *Luna v. State*, 387 P.3d 956 (Okla. Crim. App. 2016). In *Luna*, the court vacated a juvenile life without parole sentence and remanded the case "for resentencing to determine

whether the crime reflects Luna's transient immaturity, or an irreparable corruption and permanent incorrigibility warranting the extreme sanction of life imprisonment without parole." *Id.* at 963. Indeed, the court held that the fact-finder at sentencing (which in Oklahoma is a jury) may not impose a life without parole sentence on a juvenile "unless [it] find[s] beyond a reasonable doubt that the defendant is irreparably corrupt and permanently incorrigible." *Id.* at 963 n.11. *See also Stevens v. State*, No. PC-2017-219, 2018 WL 2171002, at *7 (Okla. Crim. App. May 10, 2018) (citing *Luna*, 387 P.3d at 963 n.11) ("It is the State's burden to prove, beyond a reasonable doubt, that [a juvenile homicide offender] is irreparably corrupt and permanently incorrigible.").

Two judges filed partial concurrences and dissents in *Luna*, disagreeing with the majority's holding that *Montgomery* requires a finding of permanent incorrigibility. Judge Lumpkin cited *Montgomery*'s fact-finding dictum and opined that the Court of Criminal Appeals "wrongly expands upon the requirements of [*Montgomery*]." *Luna*, 387 P.3d at 963 (Lumpkin, J., concurring in part and dissenting in part). Judge Hudson also concluded that *Montgomery* does not require a finding that a defendant "is irreparably corrupt and permanently incorrigible." *Luna*, 387 P.3d at 965 (Hudson, J., concurring in part and dissenting in part).

c. *Supreme Court of Illinois*: The Supreme Court of Illinois holds that "[u]nder *Miller* and *Montgomery*, a juvenile defendant may be sentenced to life imprisonment without parole, but only if the trial court determines that the defendant's conduct showed irretrievable depravity, permanent incorrigibility, or irrepara-

ble corruption beyond the possibility of rehabilitation." *People v. Holman*, 91 N.E. 3d 849, 863 (Ill. 2017).

d. *Supreme Court of Wyoming*: The Supreme Court of Wyoming holds that before a life without parole sentence may be imposed, "*Miller* and *Montgomery* require a sentencing court to make a finding that . . . the juvenile offender's crime reflects irreparable corruption resulting in permanent incorrigibility, rather than transient immaturity." *Davis v. State*, 415 P.3d 666, 695 (Wyo. 2018). The sentencing court must make the finding "explicitly"—it is not enough to say, as did the sentencing court in *Davis*, that "[the offender] is 'one of those rare cases where the sentence previously imposed was appropriate.'" *Id.* [7]

e. *Supreme Court of Iowa*: In its pre-*Montgomery* decision in *State v. Seats*, the Supreme Court of Iowa vacated a life without parole sentence. 865 N.W.2d 545, 555–56 (Iowa 2015). The supreme court stated that the trial court could impose life without parole again on remand only if it finds "the juvenile is irreparably corrupt, beyond rehabilitation, and thus unfit ever to reenter society." *Id.* at 558. The court later re-

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[7] Even before *Montgomery*, the Supreme Court of Wyoming had held that the Eighth Amendment requires a finding of permanent incorrigibility. In *Sen v. State*, 301 P.3d 106, 127 (Wyo. 2013), the court held that to sentence a juvenile to life without parole, "the district court must set forth specific findings supporting a distinction between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'"

iterated the need for such a finding in a post-*Montgomery* decision. *State v. Sweet*, 879 N.W.2d 811, 833 (Iowa 2016).[8]

f. *Supreme Court of Florida*: In *Landrum v. State*, the Supreme Court of Florida ordered a new sentencing where the trial court's statement of reasons for a life without parole sentence indicated that it "did not consider whether the crime itself reflected 'transient immaturity' rather than 'irreparable corruption.'" 192 So. 3d 459, 468 (Fla. 2016). The supreme court held that "the Eighth Amendment requires that sentencing of juvenile offenders be individualized in order to separate the 'rare' juvenile offender whose crime reflects 'irreparable corruption,' from the juvenile offender whose crime reflects 'transient immaturity.'" *Id.* at 466 (citing *Montgomery*, 136 S. Ct. at 734).

g. *Supreme Court of Pennsylvania*: The Supreme Court of Pennsylvania requires a finding of permanent incorrigibility, although it is unclear whether the court derives the requirement from state procedural law or federal constitutional law. *See Commonwealth v. Batts*, 163 A.3d 410, 433, 435 (Pa. 2017). At one point, *Batts* states that *Montgomery* does not impose a formal fact-finding requirement:

> Although the *Montgomery* Court acknowledged that *Miller* contains no "formal fact-finding requirement" prior to a sentencing court imposing a sentence of life without the possibility of parole on a juvenile, the

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[8] In *Sweet*, the Supreme Court of Iowa also held that the Iowa Constitution categorically prohibits juvenile life without parole. 879 N.W.2d at 839.

> Court stated that this omission was purposeful so as to permit the States to sovereignly administer their criminal justice systems and establish a procedure for the proper implementation of *Miller*'s holding.

*Id.* at 433 (quoting *Montgomery*, 136 S. Ct. at 735).

On the other hand, a later portion of the decision states just the opposite—that this Court's jurisprudence requires a finding of permanent incorrigibility: "Under *Miller* and *Montgomery*, a sentencing court has no discretion to sentence a juvenile offender to life without parole unless it *finds* that the defendant is one of the 'rare' and 'uncommon' children possessing the above-stated characteristics, permitting its imposition." *Id.* at 435 (emphasis added) (citing *Montgomery*, 136 S. Ct. at 726, 734; *Miller*, 567 U.S. at 479; *Graham*, 560 U.S. at 73; *Roper*, 543 U.S. at 572–73).

4. Five state supreme courts hold that the Eighth Amendment does *not* require a trial court to make a finding of permanent incorrigibility to sentence a juvenile to life without parole.

a. *Supreme Court of Arizona*: In *State v. Valencia*, two juveniles had been sentenced to life in prison without the possibility of parole for homicides committed in the 1990s. 386 P.3d 392, 393 (Ariz. 2016). The intermediate appellate court vacated the sentences because the trial judge did not make a finding of permanent incorrigibility. *Id.* The Supreme Court of Arizona reversed and reinstated the sentences, concluding that *Miller* and *Montgomery* do not require a finding of permanent incorrigibility. *Id.* at 396. The supreme court derived that conclusion from *Montgomery*'s fact-finding dictum. *Id.* at 395–96 (quoting *Montgomery*, 136 S. Ct. at 736).

b. *Supreme Court of Mississippi*: The Supreme Court of Mississippi held in *Chandler v. State*, 242 So.3d 65, 69 (Miss. 2018), that *Miller* and *Montgomery* do not require a finding of permanent incorrigibility. Relying solely on the *Montgomery* fact-finding dictum, the court stated, "*Miller* does not require trial courts to make a finding of fact regarding a child's incorrigibility." *Id.* (citing *Montgomery*, 136 S. Ct. at 735).

Chief Justice Waller dissented, joined by three other justices. *Id.* at 71 (Waller, C.J., dissenting). They concluded that "the trial court's resentencing of Chandler was insufficient as a matter of law" because the trial court "did not articulate that Chandler is among 'the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.'" *Id.* (quoting *Montgomery*, 136 S. Ct. at 734).

c. *Supreme Court of Washington*: The Supreme Court of Washington rejects the view that "the sentencing court must make an explicit finding that the juvenile's homicide offenses reflect irreparable corruption before imposing life without parole." *State v. Ramos*, 387 P.3d 650, 663 (Wash. 2017). The court grounded this conclusion on *Montgomery*'s fact-finding dictum: "[T]he Supreme Court has expressly acknowledged that '*Miller* did not require trial courts to make a finding of fact regarding a child's incorrigibility.'" *Id.* at 665 (emphasis omitted) (quoting *Montgomer*y, 136 S. Ct. at 735).

d. *Supreme Court of Idaho*: The Supreme Court of Idaho also holds that a finding of permanent incorrigibility is not required. *Johnson v. State*, 395 P.3d 1246, 1258 (Idaho 2017). Relying on the *Montgomery*

fact-finding dictum, the supreme court found the argument that such a finding is required to be "without merit." *Id.*

e. *Supreme Court of Michigan*. The Supreme Court of Michigan rejects a fact-finding requirement based on the *Montgomery* fact-finding dictum. *See Skinner,* 2018 WL 3059768, at *15. However, the court also characterized this Court's decisions on juvenile life without parole sentences as "not models of clarity" and acknowledged that "there is language in both *Miller* and *Montgomery* that at least arguably would suggest that a finding of irreparable corruption is required before a life-without-parole sentence can be imposed." *Id.* at *10, 14.

**B. The Question Is Important.**

1. The issue this case raises is important because *Montgomery*'s command cannot be meaningfully enforced except through a required finding. *Montgomery* instructs sentencing authorities to limit life without parole to "the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." 136 S. Ct. at 734. That function necessarily requires a finding of permanent incorrigibility. Indeed, even the dissent in *Montgomery* stated that the decision requires sentencing authorities to "resolve" the question of incorrigibility. *Id.* at 744 (Scalia, J., dissenting). Trial courts resolve questions by making findings.

2. Findings are crucial to juvenile life without parole sentences just as they are crucial to death sentences. In the same way that an aggravator must be found to sentence a defendant to death, permanent incorrigibility must be found to sentence a juvenile to life without parole. These are the only punishments that the Eighth Amendment limits to "a subclass of

defendants convicted of murder." *See Tuilaepa v. California*, 512 U.S. 967, 972 (1994). Like capital punishment, juvenile life without parole calls for "a distinctive set of legal rules" because this Court "view[s] this ultimate penalty for juveniles as akin to the death penalty." *Miller*, 567 U.S. at 475; *see also id.* at 481 ("[I]f . . . 'death is different,' children are different too.").

A required finding in the juvenile life without parole context would limit the extraordinary punishment of life without parole to the eligible group of offenders. In capital punishment cases, the Court has stated "that the trier of fact must convict the defendant of murder and *find* one 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase." *Tuilaepa*, 512 U.S. at 971–72 (1994) (emphasis added).[9] The same logic applies to juvenile life without parole sentences and requires a finding to ensure that the punishment is restricted to the eligible group. Without a finding that a given juvenile is irreparably corrupt, there remains "a grave risk" that corrigible juveniles will be sentenced to life without parole and thereby "held in violation of the Constitution." *Montgomery*, 132 S. Ct. at 736.

3. The finding is necessary for appellate review, as well. As Justice Sotomayor recently wrote, life without parole sentences—perhaps even for adults—may

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[9] *See also Lowenfield v. Phelps*, 484 U.S. 231, 246 (1988) (holding that a death sentence satisfied the Eighth Amendment because the jury at the guilt phase "found" an aggravating factor); *Jurek v. Texas*, 428 U.S. 262, 273 (1976) (plurality opinion) (upholding Texas capital murder law that "essentially requires that one of five aggravating circumstances be found before a defendant can be found guilty of capital murder . . .").

require an appellate court to determine whether a trial court's sentence "properly took account of [the defendant's] circumstances, was imposed as a result of bias, or was otherwise imposed in a 'freakish manner.'" *Campbell v. Ohio*, 138 S. Ct. 1059, 1061 (2018) (statement of Sotomayor, J., respecting the denial of certiorari) (footnote omitted). Whether an offender is permanently incorrigible is *the* central question in juvenile life without parole cases, and the sentencing authority should be required to answer it so as to ensure the opportunity for adequate review on appeal. In other words, the appellate court should not be left to guess the sentencing authority's thoughts on the decisive issue.

### C. This Case Is An Excellent Vehicle To Decide The Question.

1. This case provides a strong vehicle to decide whether the Eighth Amendment forbids juvenile life without parole sentences unaccompanied by a finding of permanent incorrigibility. The court of appeals clearly rejected the contention that a permanent incorrigibility finding is required. Pet. App. 22a. The court noted that Cook "reasons that he is entitled to parole eligibility unless the sentencer finds that his offense reflects 'irreparable corruption.'" Pet. App. 21a (quoting *Montgomery*, 136 S. Ct. at 734). The court stated that "[t]he *Miller* and *Montgomery* opinions refute Cook's argument." *Id.* at 22a. The court continued: "Moreover, in *Montgomery*, the [Supreme] Court specifically stated that '*Miller* did not require trial courts to make a finding of fact regarding a child's incorrigibility' and that '*Miller* did not impose a formal factfinding requirement.'" Pet. App. at 22a (quoting *Montgomery*, 136 S. Ct. at 735). The court

also disparaged the permanent incorrigibility standard as "more like a theological concept than a rule of law." Pet. App. 16a.

2. The trial court clearly failed to make a finding of permanent incorrigibility. To be sure, the trial court stated its belief that Cook lacked "any significant possibility of rehabilitation." Pet. App. 31a. But that statement falls far short of a finding that Cook is forever *incapable* of rehabilitation. *Montgomery*, 136 S. Ct. at 733. The trial court also failed to acknowledge the permanent incorrigibility standard, failed to recognize that only the "rarest" juvenile homicide offenders will be permanently incorrigible, and failed even to mention the court-appointed psychologist's expert opinion that Cook "does not represent one of those rare offenders who could not be rehabilitated." Pet. App. 31a; Tr. 203.

3. While the Court generally may prefer to grant review in cases that include a written opinion by a state court of last resort, the Supreme Court of Mississippi considered and rejected the argument that *Montgomery* requires an incorrigibility finding in *Chandler*. *See Chandler*, 242 So.3d at 69. The supreme court filed a reasoned opinion on the issue, and four justices joined a reasoned dissent. *See supra* at 21. This Court therefore has the benefit of the considered views of the Supreme Court of Mississippi on the first question presented, notwithstanding that court's decision not to hear this case. Moreover, the decision not to hear this case lets stand the appellate court's open rebellion against the permanent incorrigibility standard, which it derided as a "theological concept." Pet. App. 16a.

## II. In The Alternative, The Court Should Grant Review To Decide Whether The Eighth Amendment Prohibits Sentencing Juveniles To Life Without Parole.

*Miller* reserved the question whether "the Eighth Amendment requires a categorical bar on life without parole for juveniles." 567 U.S. at 479. That question is ripe for consideration today. In the six years since *Miller*, State legislatures have moved decisively to prohibit the sentence. In other jurisdictions, it hangs on as matter of law but is dead as a matter of fact. All told, thirty-four jurisdictions have eliminated juvenile life without parole entirely or limited the sentence to five or fewer incarcerated offenders. Meanwhile, cases like this one—where the sentencing judge discounted Cook's age and failed to mention the court-appointed psychologist's testimony that Cook was not incapable of rehabilitation—illustrate the arbitrary manner in which the sentence is imposed. Pet. App. 29a. To send a juvenile to prison with no hope of getting out alive violates the Cruel and Unusual Punishments Clause of the Eighth Amendment.

1. Thirty-four jurisdictions in the United States have eliminated, or nearly eliminated, juvenile life without parole. This clear trend toward abolition demonstrates that our society has come to reject this extreme punishment. *See Graham*, 560 U.S. at 62 (stating that legislative enactments and "[a]ctual sentencing practices" provide objective indicia of societal consensus); *see also Miller*, 567 U.S. at 482.

Spurred by *Miller*, legislatures have unambiguously addressed juvenile life without parole sentences—and rejected their imposition. Prior to *Miller*,

only four states prohibited the practice.[10] Six years later, the landscape has changed. Seventeen more jurisdictions now bar the practice by statute or court ruling, for a total of twenty-one.[11] Another six states

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[10] See Alaska Stat. § 12.55.125; Colo. Rev. Stat. §§ 17-22.5-104(IV), 18-1.3-401(4)(b)(1); Kan. Stat. Ann. § 21-6618; Ky. Rev. Stat. Ann. § 640.040(1).

[11] See Juvenile Sentencing Project, Juvenile Life Without Parole Sentences in the United States, November 2017 Snapshot (Nov. 20, 2017), https://www.juvenilelwop.org/wp-content/uploads/November%202017%20Snapshot%20of%20JLWOP%20Sentences%2011.20.17.pdf. *See also* S.B. 294, 91st Gen. Assemb., Reg. Sess. (Ark. 2017) (amending Ark. Code §§ 5-4-104(b), 5-4-108, 5-4-602(3), 5-10-101(c), 5-10-102(c), 16-80-104, 16-93-612(e), 16-93-613, 16-93-614, 16-93-618, and enacting new sections), http://www.arkleg.state.ar.us/assembly/2017/2017R/Bills/SB294.pdf; S.B. 394, Reg. Sess. (Cal. 2017) (amending Cal. Penal Code §§ 3051, 4801), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB394; S.B. 796, Jan. Sess. (Conn. 2015) (amending Conn. Gen. Stat. §§ 54-125a, 46b-127, 46b-133c, 46b-133d, 53a-46a, 53a-54b, 53a-54d, 53a-54a), https://www.cga.ct.gov/2015/ACT/pa/pdf/2015PA-00084-R00SB-00796-PA.pdf; S.B. 9, 147th Gen. Assemb., Reg. Sess. (Del. 2013) (amending Del. Code Ann. tit. 11, §§ 636(b), 4209(a), 4209A, 4204A), http://delcode.delaware.gov/sessionlaws/ga147/chp037.pdf; B21-0683, D.C. Act 21-568 (D.C. 2016) (amending, in relevant part, D.C. Code §§ 24-403 *et seq*.); H.B. 2116, 27th Leg. Sess. (Haw. 2014) (amending Haw. Rev. Stat. §§ 706-656(1), 706-657 (2014)); A. 373, 217th Leg. (N.J. 2017) (amending N.J. Stat. 2C:11-3), http://www.njleg.state.nj.us/2016/Bills/AL17/150_.PDF; A.B. 267, 78th Reg. Sess. (Nev. 2015) (enacting Nev. Rev. Stat. §§ 176, 176.025, 213, 213.107), https://www.leg.state.nv.us/Session/78th2015/Bills/AB/AB267_EN.pdf; H.B. 1195, 65th Leg. Assemb. (N.D. 2017) (amending N.D. Cent. Code § 12.1-20-03 and enacting § 12.1-32), http://www.legis.nd.gov/assembly/65-2017/documents/17-0583-04000.pdf; S.B. 140, 2016 S.D. Sess. Laws ch. 121 (S.D. 2016) (amending S.D. Codified Laws § 22-6-1

appear to have zero juvenile offenders serving life without parole sentences.[12] In seven other states, five or fewer individuals remain incarcerated pursuant to such sentences.[13] In total, thirty-four jurisdictions have abandoned juvenile life without parole sentences or curtailed them to the point of near elimination.

2. Only a categorical bar to juvenile life without parole sentences can prevent the intolerable risk that corrigible juveniles will be sentenced to life without parole. If, as the court of appeals would have it, permanent incorrigibility is "a theological concept," not

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and enacting a new section), http://sdlegislature.gov/docs/legsession/2016/Bills/SB140ENR.pdf; S.B. 2, 83rd Leg., Special Sess. (Tex. 2013) (amending Tex. Penal Code Ann. § 12.31, Tex. Code Crim. Proc. Ann. art. 37.071); H.B. 405, 61st Leg., Gen. Sess. (Utah 2016) (amending Utah Code Ann. §§ 76-3-203.6, 76-3-206, 73-6-207, 73-6-207.5, 73-6-207.7 and enacting § 76-3-209); H. 62, 73rd Sess. (Vt. 2015) (enacting Vt. Stat. Ann. tit. 13, § 7045); 5 H.B. 4210, 81st Leg., 2d Sess. (W.Va. 2014) (amending and enacting W. Va. Code §§ 61-2-2, 61-2-14a, 62-3-15, 62-3-22, 62-3-23, 62-12-13b), http://www.wvlegislature.gov/Bill_Status/bills_text.cfm?billdoc=HB4210%20SUB%20ENR.htm&yr=2014&sesstype=RS&billtype=B&houseorig=H&i=4210; H.B. 23, 62nd Leg., Gen. Sess. (Wyo. 2013) (amending Wyo. Stat. Ann. §§ 6-2-101, 6-2-306, 6-10-201, 6-10-301, 7-13-402); *See also Diatchenko v. Dist. Att'y for Suffolk Dist.*, 1 N.E.3d 270 (Mass. 2013) (juvenile life without parole sentences violate the Massachusetts Constitution); *State v. Sweet*, 879 N.W.2d 811 (Iowa 2016) (juvenile life without parole sentences violate the Iowa Constitution).

[12] These are: Maine, Minnesota, Missouri, New Mexico, New York, and Rhode Island. November 2017 Snapshot, *supra,* at 8, 9, 10, 11, 14.

[13] These are: Idaho (4), Indiana (5), Montana (1), Nebraska (4), New Hampshire (5), Ohio (no more than 3), and Oregon (5). *Id.* at 6, 10, 11, 12, 13.

"a rule of law to be applied by an earthly judge," Pet. App. 16a, arbitrary application is unavoidable—it is certain that some life without parole sentences will be "imposed capriciously or in a freakish manner." *Campbell*, 138 S. Ct. at 1060 (statement of Sotomayor, J., respecting the denial of certiorari) (quoting *Gregg v. Georgia*, 428 U.S. 153, 195 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.)).

A categorical bar is also necessary to prevent the "'unacceptable likelihood . . . that the brutality or cold-blooded nature of any particular crime [will] overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a [lesser] sentence[.]" *Graham*, 560 U.S. at 77–78 (quoting *Roper*, 543 U.S. at 573).

3. This case provides an excellent vehicle to address whether the Eighth Amendment categorically bars life without parole for juveniles. The posture of the case—direct appeal rather than collateral review—simplifies the issue. The case presents the question cleanly, on a complete record, with the issue fully preserved in the lower courts.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX

**APPENDIX A**

Serial: 217821

**IN THE SUPREME COURT OF MISSISSIPPI**

No. 2016-CT-00687-SCT

[Filed Mar. 22, 2018]

***JERRARD T. COOK A/K/A JERRAD T. COOK A/K/A JERRARD COOK A/K/A JERRARD TRAMAINE COOK A/K/A J-FAT*** ***Appellant/Petitioner***

***v.***

***STATE OF MISSISSIPPI*** ***Appellee/Respondent***

**ORDER**

This matter is before the Court on the Petition for Certiorari filed by counsel for Jerrard T. Cook and the response in opposition filed by counsel for the State of Mississippi. Having duly considered this matter, the Court finds the petition should be denied.

IT IS THEREFORE ORDERED the Petition for Certiorari is hereby denied.

SO ORDERED, this 12th day of March, 2018.

/s James D. Maxwell II
JAMES D. MAXWELL II, JUSTICE
FOR THE COURT

TO DENY: WALLER, C.J., RANDOLPH, P.J., COLEMAN, MAXWELL, BEAM AND CHAMBERLIN, JJ.

TO GRANT: KITCHENS, P.J., AND KING., J.

NOT PARTICIPATING: ISHEE, J.

## APPENDIX B

**Supreme Court of Mississippi**
**Court of Appeals of the State of Mississippi**
*Office of the Clerk*

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November 28, 2017

This is to advise you that the Mississippi Court of Appeals rendered the following decision on the 28th day of November, 2017.

Court of Appeals Case # 2016-CA-00687-COA
Trial Court Case # 02-250-MS-KS

Jerrard T. Cook a/k/a Jerrad T. Cook a/k/a Jerrard Cook a/k/a Jerrard Tramaine Cook a/k/a J-Fat v. State of Mississippi

The motion for rehearing is denied. Westbrooks, J., would grant. Tindell, J., not participating.

* NOTICE TO CHANCERY/CIRCUIT/COUNTY COURT CLERKS *

If an original of any exhibit other than photos was sent to the Supreme Court Clerk and should now be returned to you, please advise this office in writing immediately.

**Please note: Pursuant to MRAP 45(c), amended effective July, 1, 2010, copies of opinions will not be mailed. Any opinion rendered may be found at www.courts.ms.gov under the Quick**

**Links/Supreme Court/Decision for the date of the decision or the Quick Links/Court of Appeals/Decision for the date of the decision.**

## APPENDIX C

## IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
## NO. 2016-CA-00687-COA

**JERRARD T. COOK A/K/A JERRAD T. COOK A/K/A JERRARD COOK A/K/A JERRARD TRAMAINE COOK A/K/A J-FAT** — **APPELLANT**

**v.**

**STATE OF MISSISSIPPI** — **APPELLEE**

| | |
|---|---|
| DATE OF JUDGMENT: | 04/01/2016 |
| TRIAL JUDGE: | HON. DAVID H. STRONG JR. |
| COURT FROM WHICH APPEALED: | LINCOLN COUNTY CIRCUIT COURT |
| ATTORNEY FOR APPELLANT: | OFFICE OF STATE PUBLIC DEFENDER BY: ERIN ELIZABETH BRIGGS |
| ATTORNEY FOR APPELLEE: | OFFICE OF THE ATTORNEY GENERAL BY: SCOTT STUART |
| NATURE OF THE CASE: | CIVIL - POST-CONVICTION RELIEF |
| DISPOSITION: | AFFIRMED – 08/08/2017 |
| MOTION FOR REHEARING FILED: | |
| MANDATE ISSUED: | |

**BEFORE GRIFFIS, P.J., WILSON AND WESTBROOKS, JJ.**

**WILSON, J., FOR THE COURT:**

¶1. Jerrard Cook shot and killed Marvin Durr during a robbery. Durr was eighteen years old at the time of his death. Cook was seventeen years old at the time of the offense. Cook's accomplice, Cearic Barnes, was eighteen years old. Cook shot Durr in the head while Durr was seated in the driver's seat of his car. He shot Durr because he and Barnes wanted to use Durr's car to commit a robbery. However, Cook and Barnes were unable to remove Durr's body from the car, so Cook sat on top of Durr's body and drove the car to an isolated location. To destroy evidence, Barnes then set fire to the car.

¶2. Cook was arrested, confessed, and pled guilty to capital murder, and the circuit court imposed a mandatory sentence of life imprisonment. Cook's conviction for capital murder rendered him ineligible for parole. Miss. Code Ann. § 47-7-3(1)(f) (Rev. 2015).[1] Several years later, in *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012), the United States Supreme Court held "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." The Court held that the sentencer must have the "discretion" to "consider mitigating circumstances" before a sentence of life without the possibility of parole (LWOP) may be imposed in cases in which the

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[1] Barnes later pled guilty to murder and is also serving a life sentence. *See Barnes v. State*, 51 So. 3d 986, 988 (¶2) (Miss. Ct. App. 2010), *cert. denied*, 50 So. 3d 1003 (Miss. 2011). He is also ineligible for parole.

defendant was under the age of eighteen at the time of the offense. *Id.* at 2475.

¶3. The circuit court appointed counsel to represent Cook and held a new sentencing hearing to consider the factors discussed in *Miller*. After considering the testimony and other evidence presented, the judge found that Cook was not entitled to parole eligibility under *Miller*. On appeal, Cook argues (1) that the circuit court erred by not granting him parole eligibility, (2) that he should have been resentenced by a jury rather than a judge, and (3) that a sentence of LWOP is unconstitutional in all cases in which the offender is under the age of eighteen at the time of the offense. We find no error and affirm.

**FACTS AND PROCEEDINGS BELOW**

¶4. On the evening of June 18, 2002, Cook, Barnes, and Eric Williams were walking together in Brookhaven. Cook had a gun, which he had obtained when he broke into his uncle's house a few days earlier. Cook and Barnes wanted some money. Cook later said he needed money to get his car fixed and could not find a job. So the three young men decided to rob a convenience store. Cook and Barnes planned to go into the store and commit the robbery, while Williams would remain outside as the lookout. Cook and Barnes had masks to wear during the robbery. However, the first store they planned to rob was closed. They planned to rob a second store, but Cook decided there were too many customers present. Eventually, Williams went home, leaving Cook and Barnes.

¶5. Cook and Barnes then decided that they would flag down a car and ask for a ride, carjack the car,

and drive to McComb to rob a store. Cook and Barnes wanted to rob a store in McComb because they thought that they were less likely to be recognized there. The first car that Cook flagged down turned out to be a police car. Cook and Barnes spoke briefly to the police officer, and the officer drove on without incident.

¶6. Durr, who was Barnes's cousin, was driving the next car that Cook flagged down. Cook and Barnes asked Durr to give them a ride to Cook's aunt's house, and Durr agreed. Cook and Barnes gave Durr incorrect directions and caused him to miss the turn to Cook's aunt's house. They then told Durr that he could let them out along South Washington Street in Brookhaven. Cook and Barnes exited the car, and as Durr turned around on South Washington Street, Cook flagged him down again and walked up to the driver's side window to speak. Cook then shot Durr in the left temple from a distance of an inch or two. Cook later told law enforcement that Durr "was just at the wrong place at the wrong time." Cook also said that Durr "was like the weak type," and he could have taken the car from Durr "without using a gun." Nonetheless, Cook shot Durr in the head.

¶7. Cook and Barnes then attempted to pull Durr's body from the car, but they were unable to do so. So Cook sat on top of Durr's body and drove the car to a bridge. It was Cook's idea to "[d]ump [Durr's] body under the bridge" because he knew there were "alligators" under the bridge. However, again, Cook and Barnes were unable to remove Durr's body from the car. Cook then went through Durr's pockets but did not find much money. Using a lighter, Barnes then set fire to the car to destroy evidence. Cook

later told investigators that he thought that Durr was still alive when they set the car on fire. Cook stated that as he was sitting on top of Durr, he felt Durr "move" and just "had a feeling he wasn't dead." Nonetheless, Barnes set the car on fire, and then he and Cook fled into the woods. Cook discarded his gun in the woods, and Barnes later burned their clothes in order to destroy evidence.

¶8. Cook and Barnes were indicted for capital murder. Cook pled guilty to capital murder and was sentenced to life imprisonment. His conviction makes him ineligible for parole. *See* Miss. Code Ann. § 47-7-3(1)(f). Barnes later pled guilty to murder, was sentenced to life imprisonment, and is also ineligible for parole. *See Barnes v. State*, 51 So. 3d 986, 988 (¶2) (Miss. Ct. App. 2010).

¶9. In 2012, the United States Supreme Court held "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Miller*, 132 S. Ct. at 2469. The Court held that the sentencer must have the "discretion" to "consider mitigating circumstances" before a sentence of LWOP may be imposed. *Id.* at 2475. In *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), the Court clarified or expanded *Miller*'s holding. There, the Court stated that a sentence of LWOP is valid only for "those rare children whose crimes reflect irreparable corruption." *Id.* at 734. According to the Court, the Eighth Amendment mandates parole eligibility for juvenile murderers "whose crimes reflected only transient immaturity." *Id.* at 736. Also, in *Parker v. State*, 119 So. 3d 987, 995-99 (¶¶18-28) (Miss. 2013), our Supreme Court summarized the factors to be considered and procedure to be followed

in cases in which *Miller* requires a new sentencing hearing.

¶10. Post-*Miller*, Cook filed a motion to be resentenced and granted parole eligibility pursuant to *Miller*. The circuit court appointed counsel to represent Cook and appointed Dr. Criss Lott, Ph.D., to conduct a mental evaluation of Cook. The court denied Cook's motion to have a jury determine whether he should be parole eligible.

¶11. On March 30, 2016, the circuit court held a hearing to determine whether Cook should be declared parole eligible pursuant to *Miller*. The State called the former district attorney, Brookhaven Chief of Police Bobby Bell, and Durr's father, Reverend Jerry Durr. The former district attorney testified about the murder and its investigation. Chief Bell testified that he mentored Cook when Cook was about thirteen years old; however, he lost touch with Cook thereafter. Reverend Durr testified that Cook attended youth events at his church until he was about twelve years old and that Cook generally was a respectful child; however, like Chief Bell, Reverend Durr had not been around Cook for several years prior to the murder.

¶12. The parties also stipulated to the admission of a number of exhibits, including transcripts of recorded statements that Cook, Barnes, and Williams gave to law enforcement; Cook's school records and prison records; and Dr. Lott's report. Cook's prison records show that he has been the subject of twenty-nine rule violation reports (RVRs) during his incarceration, including for assaulting a corrections officer, threatening a corrections officer, possessing a shank, using and possessing marijuana,

and possessing a cell phone. Cook's school records show that he attended Oakley Training School (now known as Oakley Youth Development Center) from October 2001 to March 2002. Cook told Dr. Lott that the youth court sent him to Oakley because two friends asked him to drive them to a store, the friends robbed the store, and he was arrested for conspiracy to commit armed robbery.

¶13. Cook's cousin Angela Daniels testified on his behalf. She testified that Cook had no relationship with his father and was raised by his mother and grandmother. Daniels described Cook as a "typical child," "always . . . smiling." She testified that Cook started to get into trouble as a teenager, and she became concerned that he was smoking marijuana and skipping school. Daniels believed that Cook had "matured a lot" since 2002.

¶14. Reverend Bruce Smith testified that Cook attended his church as a child. Reverend Smith remembered Cook as "always joking and jovial." Reverend Smith also testified that Cook seemed immature for his age at seventeen. Reverend Smith believed that Cook had matured since the murder; however, he had only visited Cook twice in prison.

¶15. Cook's mother, Sharon, testified that Cook did not have a relationship with his father, who went to prison soon after Cook was born. Sharon testified that when Cook was younger, she used drugs and went out to clubs and frequently worked two jobs. As a result, Cook's grandmother played a significant role in raising him, and they were very close. Cook was devastated when his grandmother passed away when he was twelve years old. Although Sharon was gone a lot, she testified that she always provided for

Cook. Cook always had clothes and food, and she "[b]ought him anything he wanted," including a car. There was no evidence or suggestion that Cook was abused or neglected as a child.

¶16. Sharon testified that Cook's crime was "out of his character." She thought that he "didn't understand the consequences" of his actions. To illustrate, Sharon testified that Cook was doing pushups when she visited him in jail after the murder. Sharon thought this showed that Cook believed that he would be getting out of jail soon. Sharon testified that Cook had changed and was more mature than he was in 2002. She also thought that he was remorseful.

¶17. Cook's fiancee, Vera Quarles, testified that she knew Cook for several years prior to the murder and was "shocked" or "surprised" when she heard about it. She did not believe that Cook understood the consequences of his actions because she went to visit him in jail before he pled guilty, and he asked her on a date, as if he thought he would be released soon. Quarles and Cook did not date prior to the murder, but they reconnected in 2014 and later became engaged. Quarles thought that Cook was more mature than he was in 2002.

¶18. Dr. Lott testified as an expert witness in clinical and forensic psychology. Dr. Lott performed a mental evaluation of Cook, with particular attention to the factors discussed in *Miller*. Dr. Lott testified that Cook was cooperative during their interview. He described Cook as having average to low-average intelligence. He noted that Cook had been an average student and probably could have done better in school. Dr. Lott testified that he "didn't see

anything with [Cook's] case that . . . indicated that he was well outside the adolescent norm." Dr. Lott also testified that "the first years of [Cook's] life appear to [have been] fairly normal" despite his father's absence and his mother's drug use. With respect to issues of maturity, Dr. Lott testified that it appeared that Cook was a "normal, typical" seventeen year old at the time of the offense.

¶19. Dr. Lott opined that the murder appeared to have been committed in a way that "was almost haphazard." Dr. Lott testified that studies have shown that ninety to ninety-five percent of violent juvenile offenders "do not reoffend" as adults. Dr. Lott had not seen "any data . . . to suggest" that Cook was the sort of "rare" offender who warranted a sentence of LWOP under *Miller*. However, Dr. Lott said that was just "[his] impression" and that he could not "state it with certainty." Dr. Lott testified that psychologists "can't distinguish between those [offenders] who commit an offense at sixteen, seventeen, and what they're going to be like at [twenty-seven] or [thirty-seven]." He acknowledged that "[n]o one can do that with any degree of certainty"—no "mental health professional has a crystal ball and can determine what somebody will be like in [twenty] years."[2]

¶20. On April 1, 2016, the circuit court entered an order denying Cook's request for parole eligibility. The court addressed the factors discussed in *Miller* and *Parker* and found that there were no mitigating circumstances that mandated parole eligibility. Cook

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[2] Cook also subpoenaed Steven Pickett, the chairman of the State Parole Board, to testify at the hearing. However, Pickett had no personal knowledge of Cook's case.

filed a timely motion for reconsideration, which was denied, and a timely notice of appeal.

**DISCUSSION**

¶21. On appeal, Cook, through appointed counsel from the Indigent Appeals Division of the Office of State Public Defender, argues (1) that he should be declared eligible for parole under *Miller* and *Parker*, (2) that he was entitled to a jury determination of his sentence, and (3) that the Eighth Amendment to the United States Constitution and Article 3, Section 28 of the Mississippi Constitution categorically prohibit a sentence of LWOP when the offender was under the age of eighteen at the time of the offense. We address these issues in turn.

*I. The circuit judge did not abuse his discretion by declining to declare Cook parole eligible.*

¶22. In *Miller*, the United States Supreme Court stated, "[W]e think appropriate occasions for sentencing juveniles to [LWOP] will be uncommon." *Miller*, 132 S. Ct. at 2469. The Court said that this sentence would only be appropriate for "the rare juvenile offender whose crime reflects irreparable corruption." *Id.* (quoting *Roper v. Simmons*, 543 U.S. 551, 573 (2005)). Cook argues that the circuit judge erred by declining to grant him parole eligibility because he is not such an "uncommon" or "rare" offender.

¶23. As this Court has held on two prior occasions, we review a circuit judge's sentencing decision under *Miller* only for an abuse of discretion. *Hudspeth v. State*, 179 So. 3d 1226, 1228 (¶12) (Miss. Ct. App. 2015); *Davis v. State*, 2016-CA-00638-COA, 2017 WL

2782015, at*2 (¶8) (Miss. Ct. App. June 27, 2017). Cook argues that we should apply "heightened scrutiny," as in a death penalty case. *See, e.g.*, *Byrom v. State*, 863 So. 2d 836, 846 (¶9) (Miss. 2003). Neither this Court nor the Mississippi Supreme Court has ever held that appeals from *Miller* hearings are subject to "heightened scrutiny," and we decline to do so now. Moreover, even in a capital case, it does not appear that any sort of "heightened scrutiny" or de novo review is applied to the circuit judge's or jury's ultimate finding that the death penalty is the appropriate sentence.[3]

¶24. This Court is in no position to conduct a de novo, appellate resentencing of the offender. Nor would it be appropriate for us to substitute our own collective view of an appropriate sentence for the considered judgment of the circuit judge, who listened to and observed the demeanor of the witnesses at sentencing and the offender himself, looked the offender in the eye, and imposed what he adjudged to be a just sentence. Rather, our standard of review is abuse of discretion, as it is in other appeals in which a sentence is alleged to be

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[3] *See Byrom,* 863 So. 2d at 881-83 (¶¶164-71) (affirming sentence of death because "sufficient evidence existed to support the finding" of an aggravating factor, "the trial judge clearly *considered* all the mitigating circumstances," and the sentence was not "imposed under the influence of passion, prejudice or any other arbitrary factor" and was "not disproportionate"); *Bishop v. State*, 812 So. 2d 934, 948 (¶45) (Miss. 2002) ("When the sufficiency of the evidence [of facts necessary to support the death penalty] is challenged, we must view the evidence and all reasonable inferences which may be drawn therefrom in the light most consistent with the verdict. We have no authority to disturb the verdict short of a conclusion that no rational trier of fact could have found the fact at issue beyond a reasonable doubt.").

excessive. *See, e.g.*, *Reynolds v. State*, 585 So. 2d 753, 756 (Miss. 1991); *Carter v. State*, 450 So. 2d 67, 69 (Miss. 1984); *May v. State*, 435 So. 2d 1181, 1184 (Miss. 1983).

¶25. Cook next argues that the circuit judge failed to "acknowledge" that *Miller* and *Montgomery* have established a "presumption against" a sentence of LWOP in all cases in which the offender was under the age of eighteen at the time of the offense. In support of this argument, Cook relies on the Connecticut Supreme Court's opinion in *State v. Riley*, 110 A.3d 1205, 1214 (Conn. 2015). *But see id.* at 1222 (Espinosa, J., dissenting) (rejecting the suggestion that *Miller* established such a "presumption"). However, our own Supreme Court has indicated that no such presumption exists. In *Jones v. State*, 122 So. 3d 698, 702 (¶14) (Miss. 2013), our Supreme Court stated that a sentence of LWOP remains appropriate for "juveniles who *fail to convince the sentencing authority* that *Miller* considerations are sufficient to prohibit its [imposition]." (Emphasis added). Thus, *Jones* places the burden on the offender to persuade the judge that he is entitled to relief under *Miller*. We are bound to follow the decision of the Mississippi Supreme Court in *Jones*.

¶26. We now consider whether the circuit judge abused his discretion by finding that Cook was not eligible for parole under *Miller*. We begin by acknowledging that the United States Supreme Court has given the sentencing judge in a *Miller* case a difficult, if not impossible, task. According to the Supreme Court, the judge is supposed to determine whether the offender's "crimes reflected *only* transient immaturity" or instead "reflect irreparable

corruption." *Montgomery*, 136 S. Ct. at 736 (emphasis added). Apparently, there are only two possibilities: either the murder reflects only youthful immaturity, or else the offender is irreparably corrupt. We note that there probably are few murders that "reflect[] *only* transient immaturity" and nothing else, a description that seems to effectively absolve the offender of culpability. We also note that the United States Supreme Court has never defined "irreparable corruption," a term that sounds more like a theological concept than a rule of law to be applied by an earthly judge.

¶27. With these observations, *Miller* and our Supreme Court's decision in *Parker* do identify some factors that the judge is supposed to consider in reaching a sentencing decision. Thus, the judge in a *Miller* case is bound to consider and apply these factors in a nonarbitrary fashion. If the offender persuades the judge that the *Miller* factors preponderate in favor of parole eligibility, then the judge must declare the offender parole eligible. *Parker*, 119 So. 3d at 999 (¶28).[4] If, however, the judge determines that *Miller* does not mandate parole eligibility, then the judge *must* deny relief because the Legislature has provided by law that persons convicted of murder are not eligible for parole. *See* Miss. Code Ann. § 47-7-3(1)(f); *Stromas v. State*, 618 So. 2d 116, 123 (Miss. 1993) ("It is the [L]egislature's prerogative, and not this Court's, to set the length of sentences.").

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[4] As we recently stated, *Miller* "obviously 'is binding on the tribunals and citizens of the respective states in comparable cases.'" *Mason v. State*, 2015-CP-00523-COA, 2017 WL 2335516, at *3 n.2 (Miss. Ct. App. May 30, 2017) (quoting *Bolton v. City of Greenville*, 178 So. 2d 667, 672 (Miss. 1965)).

¶28. In *Parker*, our Supreme Court made clear that "*Miller* does not prohibit sentences of life without parole for juvenile offenders. Rather, it 'requires the sentencing authority to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.'" *Parker*, 119 So. 3d at 995 (¶19) (quoting *Miller*, 132 S. Ct. at 2469). As the *Parker* Court explained, *Miller* "identified several factors" that the "sentencing authority" must consider before sentencing a juvenile offender to LWOP:

> Mandatory life without parole for a juvenile 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. . . . And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.

*Id.* at 995-96 (¶19) (quoting *Miller*, 132 S. Ct. at 2468).

¶29. The circuit judge addressed these factors in his order denying relief. As to chronological age, the judge noted that Cook was seventeen years and two months old when he murdered Durr. The judge reasoned that Cook "was sufficiently close to his eighteenth birthday that this factor should not weigh against the imposition of a sentence of [LWOP]." In addition, we note that Barnes was only one year older than Cook, and although he did not pull the trigger, he also received an effective sentence of LWOP.

¶30. As to maturity or immaturity, the judge noted that the evidence did not show that Cook "was especially immature for his age." Dr. Lott testified that Cook was of average intelligence and well within the normal range of maturity for a seventeen year old.

¶31. As to impetuosity, the judge found that there was "no evidence of impetuosity in this case." Rather, "the plan to take the victim's vehicle was just that, a plan." The judge also found that "[t]he crime was premeditated" and that Cook stole the gun from his uncle "for the purpose which he accomplished." The judge's findings are supported by substantial evidence. We also note that Cook and Barnes were presented with repeated opportunities to abandon their plans: The first store they planned to rob was closed, and there were too many customers at the second store. Cook then flagged down a car to rob, but it turned out to be a police car. That was no deterrent. Cook simply flagged down the next driver, which turned out to be Barnes's cousin. Even after Durr gave them a ride and Cook and Barnes exited the car without incident, Cook decided to shoot Durr in the head and take his car. After the crime was

committed, Cook and Barnes went to great lengths to try to cover their tracks and destroy evidence. The circuit judge did not abuse his discretion by finding that this factor did not weigh in favor of parole eligibility under *Miller*.

¶32. The court next found "that there ha[d] been little, if any, proof of [Cook's] failure to appreciate risks and/or consequences of his actions." The court did not find it significant that Cook was doing pushups in his jail cell when his mother came to visit him. The court also noted that Cook's and Barnes's efforts to cover their tracks suggested an awareness of the consequences. There is substantial evidence to support the circuit judge's finding that this factor did not weigh in favor of parole eligibility under *Miller*.

¶33. With respect to Cook's "family and home environment," the judge acknowledged that Cook grew up in a broken, single-parent home because of his father's imprisonment and that Cook's mother struggled with drugs. However, the judge also noted that Cook's "mother took care of him in spite of her battles with drug addiction." The judge found that Cook "always had decent clothing as well as computer games, a go cart and later an automobile." There was no suggestion or evidence that Cook was ever abused or neglected. Also, Chief Bell was willing to serve as a mentor to Cook. The court found that although Cook "did not enjoy an ideal childhood," this factor did not indicate that he should be granted parole eligibility. This was not an abuse of discretion. Cook's family and home environment was not a mitigating factor comparable to the backgrounds of the fourteen-year-old offenders discussed in *Miller*, 132 S. Ct. at 2468-69.

¶34. The circuit judge next found that the "circumstances of the homicide offense," including the extent of Cook's participation and any familial or peer pressures, did not weigh in favor of parole eligibility. As the judge noted, there is no question that Cook pulled the trigger, and there was no pressure from his family to commit a crime. While Dr. Lott suggested that there might have been peer pressure, there was no evidence that Barnes or anyone else pressured Cook into murdering Durr. The judge reasoned that, if anything, Cook, Barnes, and Williams all encouraged one another in their violent, criminal plans. We find no abuse of discretion in this aspect of the circuit judge's decision. As discussed above, Cook admitted that he shot Durr in the head because he wanted to use Durr's car to commit an armed robbery, and Cook then went to great lengths to destroy the evidence.

¶35. Finally, the judge considered the "possibility of rehabilitation." The judge discussed Cook's numerous RVRs while incarcerated and did "not find any significant possibility of rehabilitation." There was no abuse of discretion in this finding. As discussed above, Dr. Lott testified only that it was his "impression" that he had not seen "any data . . . to suggest" that Cook was the type of allegedly "rare" juvenile offender who will commit additional violent crimes as an adult. However, Dr. Lott conceded that he could not make that prediction "with any degree of certainty." He also acknowledged that psychologists really "can't distinguish between" offenders who will reoffend and those who will not. At the end of the hearing in the circuit court, Cook spoke very briefly "in allocution." Although he "ask[ed] for forgiveness from the Durr family," he did

not provide any additional testimony or evidence to demonstrate that rehabilitation was likely.

¶36. In addition to the circuit judge's findings, we note that there is no evidence to suggest that the crime should have been charged as a lesser offense. Cook was clearly guilty of the capital offense to which he pled. *See Miller*, 132 S. Ct. at 2468 (suggesting consideration of whether the offender "might have been charged and convicted of a lesser offense"). Also, from the standpoint that proportionality in sentencing is desirable, we again note that Barnes was only one year older than Cook, and although he did not pull the trigger, he also received an effective sentence of LWOP.

¶37. Our standard of review is abuse of discretion. The circuit judge in this case discussed and applied the correct legal standard, i.e., the relevant factors outlined in *Miller* and *Parker*. In addition, the judge's findings and reasoning are supported by substantial evidence and are not arbitrary or capricious. Even in sentencing a juvenile offender, a judge should consider that retribution and deterrence are proper purposes of sentencing. *See Taggart v. State*, 957 So. 2d 981, 994 (¶31) (Miss. 2007). On the facts of this case, we cannot say that the judge abused his discretion by declining to declare Cook eligible for parole.

*II. Cook was not entitled to be resentenced by a jury.*

¶38. Cook next argues that he has a "constitutional right to have his sentence determined by a jury." He reasons that he is entitled to parole eligibility unless the sentencer finds that his offense reflects "irreparable corruption." *Montgomery*, 136 S. Ct. at

734. And he relies on the principle that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). Cook argues that, when read in conjunction with the *Apprendi* line of cases, *Miller* and *Montgomery* establish a constitutional right to jury resentencing. We disagree.

¶39. The *Miller* and *Montgomery* opinions refute Cook's argument. *Miller* held that "a *judge* or jury must have the opportunity to consider mitigating circumstances before imposing" the sentence of LWOP in the case of a juvenile offender. *Miller*, 132 S. Ct. at 2475 (emphasis added). And in *Montgomery*, the Court stated, "*Miller* requires that before sentencing a juvenile to [LWOP], the sentencing *judge* [must] take into account" certain potentially mitigating factors. *Montgomery*, 136 S. Ct. at 733 (emphasis added). Moreover, in *Montgomery*, the Court specifically stated that "*Miller* did not require trial courts to make a finding of fact regarding a child's incorrigibility" and that "*Miller* did not impose a formal factfinding requirement." *Id.* at 735.

¶40. It may be that "irreparable corruption" is not considered an objective, provable "fact" for purposes of *Apprendi*. Or it may be that *Apprendi* does not apply because "irreparable corruption" is something that a defendant must disprove in order to mitigate his punishment, rather than something the State must prove in order to increase the penalty. Whatever the reason, unless the United States Supreme Court's opinions in *Miller* and *Montgomery* do not mean what they specifically say—that a judge

may sentence the offender to LWOP—Cook does not have a constitutional right to be resentenced by a jury.

¶41. In support of his argument, Cook also cites an unpublished order entered by a panel of the Mississippi Supreme Court. *Dycus v. State*, 2012-M-02041 (Sept. 17, 2014). Dycus was convicted and sentenced to death following a jury trial. He was later resentenced to LWOP after the United States Supreme Court prohibited the imposition of the death penalty on offenders who were under the age of eighteen when their crimes were committed. *See Roper*, 543 U.S. at 578. Post-*Miller*, Dycus filed a motion in the Mississippi Supreme Court again requesting resentencing. In a two-page order, a three-justice panel ordered a "new sentencing hearing before a jury under [Mississippi Code Annotated] section 99-19-101," the general statute governing sentencing and the imposition of the death penalty in capital cases. The *Dycus* order provides no further explanation as to why the hearing was to be "before a jury" rather than a judge alone.

¶42. We do not believe that the unpublished order in *Dycus* is controlling or applicable to this case. To begin with, the unpublished panel order has no precedential value. *Westbrook v. City of Jackson*, 665 So. 2d 833, 837 n.2 (Miss. 1995); *see also Miss. Transp. Comm'n ex rel. Moore v. Allday*, 726 So. 2d 563, 566-67 (¶13) (Miss. 1998) (McRae, J., dissenting) ("[O]ur unpublished orders and opinions are of no precedential value[.]").

¶43. In addition, *Dycus* is distinguishable in that Dycus originally was convicted and sentenced by a jury, which was perhaps a reason that he should be

resentenced by a jury. In contrast, Cook pled guilty. When he pled guilty, Cook waived his right to a jury trial and confirmed that he understood that he would be sentenced by the judge. He did so in writing and under oath. Section 99-19-101(1) (Rev. 2015) provides that a sentencing proceeding in a capital case "may be conducted before the trial judge sitting without a jury if both the State . . . and the defendant agree thereto in writing."

¶44. Finally, section 99-19-101 does not grant Cook a right to a jury in a "*Miller* hearing." A *Miller* hearing is a specialized proceeding that is required solely because the United States Supreme Court's decision in *Miller* decreed it. It is a judicial invention. In such a proceeding, the sentencer is supposed to consider the offender's age, characteristics sometimes associated with youth, the offender's family and home environment, the possibility of rehabilitation, and the facts and circumstances of the crime. *See generally Parker*, 119 So. 3d at 995-96 (¶19) (quoting *Miller*, 132 S. Ct. at 2468). The hearing required by section 99-19-101, in contrast, is a statutory procedure established by the Legislature in the exercise of its authority to set sentences for criminal offenses. *See Stromas*, 618 So. 2d at 123. The statute identifies certain aggravating circumstances and mitigating circumstances for the jury to consider. The statutory factors overlap with the *Miller* factors, but they are not the same. On its face, section 99-19-101 does not apply to *Miller* hearings. Absent some further direction from the Legislature, we see no reason to interpret section 99-19-101 to require juries in *Miller* hearings.

*III. Cook's sentence is not unconstitutional.*

¶45. Finally, Cook urges this Court to hold that the United States Constitution and the Mississippi Constitution "categorically prohibit imposing [LWOP] sentences on juveniles." However, the United States Supreme Court has declined to announce such a categorical rule. *Miller*, 132 S. Ct. at 2463. The Mississippi Supreme Court has also recognized that "*Miller* does not prohibit sentences of [LWOP] for juvenile offenders." *Parker*, 119 So. 3d at 995 (¶19). Rather, a defendant sentenced to life imprisonment is ineligible for parole unless he "convince[s] the sentencing authority that *Miller* considerations" require parole eligibility. *Jones*, 122 So. 3d at 702 (¶14). Moreover, the Legislature has effectively mandated a minimum sentence of LWOP for the offense of capital murder. "It is the [L]egislature's prerogative, and not this Court's, to set the length of sentences." *Stromas*, 618 So. 2d at 123. "Declaring a sentence violative of the Eighth Amendment to the U.S. Constitution carries a heavy burden and only in rare cases should this Court make such a finding." *Id.* We decline to hold that a defendant convicted of capital murder has an absolute constitutional right to be considered for parole.

**CONCLUSION**

¶46. The circuit judge did not abuse his discretion or otherwise err in declining to declare Cook parole eligible. Cook's sentence does not violate the United States Constitution or the Mississippi Constitution. Therefore, we affirm.

¶47. **AFFIRMED.**

**LEE, C.J., GRIFFIS, P.J., ISHEE, CARLTON, FAIR AND GREENLEE, JJ., CONCUR. IRVING, P.J., AND BARNES, J., CONCUR IN PART AND IN THE RESULT WITHOUT SEPARATE WRITTEN OPINION. WESTBROOKS, J., CONCURS IN RESULT ONLY WITHOUT SEPARATE WRITTEN OPINION.**

## APPENDIX D

## IN THE CIRCUIT COURT OF LINCOLN COUNTY, MISSISSIPPI

[FILED Apr. 1, 2016]

JERRARD T. COOK

VS. CAUSE NUMBER CI2013-0219-LS

STATE OF MISSISSIPPI

## ORDER DENYING RE-SENTENCING PURSUANT TO *MILLER V. ALABAMA* AND *PARKER V. STATE*

THIS CAUSE cam on hearing on the motion for post conviction relief for resentencing pursuant to *Miller v. Alabama* and *Parker v. State*, and the Court having conducted a hearing on the merits, finds that the motion is not well taken and is hereby denied.

On June 25, 2012, the United States Supreme Court issued the opinion in *Miller v. Alabama*.[1] Miller held that juveniles could not be sentenced to life without the possibility of parole except in certain cases. In 2013, the Mississippi Supreme Court, following the *Miller* decision ruled in *Parker v. State*.[2] In *Parker*, the Court stated, "*Miller* does not prohibit sentences of life without parole for juvenile offenders. Rather, it "require[s] [the sentencing authority] to take into account how children are different, and how

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[1] *Miller v. Alabama*, 132 S. Ct. 2455, 183 L.Ed.2d 407, 80 U.S.W.W. 4580

[2] *Parker v. State*, 119 So. 3d 987 (Miss.2013).

those differences counsel against irrevocably sentencing them to a lifetime in prison."[3]

The factors to be considered before a life sentence may be passed are:

1. Chronological age
2. Immaturity
3. Impetuosity
4. Failure to appreciate risks and consequences
5. Family and home environment
6. Circumstances of the homicide offense
    A. Extent of participation in the crime
    B. Familial and/or peer pressure
7. Possibility of Rehabilitation

One June 18, 2002, Jerrard Cook and his co-defendant, Cearic Barnes, flagged down a vehicle driven by the victim, Marvin Terrel Durr. Cook and Barnes had discussed committing a number of crimes but to that point had not followed through on any of their plans. Apparently, several days earlier, Cook had broken into his uncle's home and stolen a firearm. Barnes and Cook asked Durr to give them a ride to an auntie's home. At some point during the ride, Cook took out his weapon and shot the victim, then and there killing him. The defendants tried to remove the victim's body from the vehicle and when they were not able to do so, Cook sat on top of the victim's dead body and drove the vehicle. Barnes then set the vehicle on fire presumably in order to destroy evidence.

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[3] *Id* at 995.

On June 13, 2003, Cook pled guilty to the offense of capital murder and ten days later was sentenced by Circuit Court Judge Keith Starrett to life without the possibility of parole, which at that time was the only sentence possible other than the death penalty.

Pursuant to the *Parker* opinion, the Court now considers the factors as they apply to the instant case.

1. Chronological age: At the time of the crime, the defendant was seventeen (17) years and two (2) months of age. The Court finds that the defendant was sufficiently close to his eighteenth (18th) birthday such that this factor should not weigh against the imposition of a sentence of life without parole.

2. Immaturity: The Court heard from a number of witnesses that the defendant was a high character individual as a young man. The Court did not hear any evidence that during his teenage years the defendant was especially immature. The Court finds the defendant's maturity level at the time of the offense does not weigh against the imposition of a sentence of life without parole.

3. Impetuosity: The Court heard no evidence of impetuosity in this case. By all accounts, the plan to take the victim's vehicle was just that, a plan. The crime was premeditated and Jerrard Cook had stolen the gun for the purpose which he accomplished.

4. Failure to appreciate risks and consequences: Some evidence was presented by Cook's witnesses which purported to indicate a failure to appreciate risks and consequences. His mother testified that he was doing push ups in the Lincoln County Jail

following his arrest. The Court fails to understands how that proves a lack of appreciation for risks and consequences. The defendant knew after he shot the victim that he should take actions to cover his tracks. When he and Barnes were unable to move the victim out of his driver's seat, he sat on to of the dead victim and drove his car. The Court finds that there has been little, if any, proof of the defendant's failure to appreciate risks and/or consequences of his actions. The Court finds that this factor does not weigh against a sentence of life without parole.

5. Family and home environment: The defendant grew up in a broken single parent home. His father was institutionalized for most of his life and he had little, if any, contact with him. However, his mother took care of him in spite of her battles with drug addiction. He always had decent clothing as well as computer games, a go cart and later an automobile. Brookhaven Police Chief Bobby Bell testified that he counseled the defendant during his early years and he was a normal, well behaved child. In fact, the defendant was one of only two children that Chief Bell ever allowed to come and visit in his home with members of his family. He testified that Jerrard Cook, as a young man, was a high character child. While the defendant did not enjoy an ideal childhood, the court does not find his family and home environment was so lacking that he should not be sentenced to life without the possibility of parole.

6. Circumstances of homicide offense: The defendant admits being the trigger man during the homicide in question. There was no pressure from his

family to commit this crime. There was testimony from Dr. Criss Lott that while peer pressure may have existed, it was not direct peer pressure on the defendant to commit the crime, but rather three (3) young men who seemed to encourage each other to commit an offense. The Court finds that the circumstances of the homicide, including extent of participation and familiar and/or peer pressure do not weight against a sentence of life without parole.

7. Possibility of Rehabilitation: While incarcerated, the defendant has been the subject of twenty-nine (29) rule violation reports. The RVRs have been issued for the following reasons: refusal to be searched, sleeping in the wrong bunk, threatening a corrections officer, refusing a living area inspection, refusing to follow orders, masturbating, refusing to report to work with no valid medical reason, possession of a sharpened object, use of marijuana, possession of marijuana, possession of a cell phone in a correctional facility, assaulting a corrections officer, and masturbating in the direction of a corrections officer.

The Court finds that Cook's behavior while incarcerated indicates a failure and/or unwillingness to follow directions even in a structured environment. The Court does not find any significant possibility of rehabilitation in Jerrard Cook.

IT IS THEREFORE ORDERED AND ADJUGED that the defendant, Jerrard Cook, is hereby sentenced to life without the possibility of parole, restitution in the amount of the funeral costs, court costs, and a fine of $10,000. It is this Court's intent that the original

sentence of June 13, 2003 be hereby reinstated in all respects.

This Order shall be placed in the court file of the above styled cause and a stamped "filed" copy of this Order shall be forwarded to all parties and attorneys of record by the Clerk of this Court.

SO ORDERED AND ADJUDGED on this the 1st day of April 2016.

[Signature]
CIRCUIT COURT JUDGE

DAVID H. STRONG, JR.
Circuit Court Judge
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