

SENATE FISCAL AGENCY
 MEMORANDUM

DATE: August 16, 2012
TO: Members of the Michigan State Senate
FROM: Dan O'Connor, Fiscal Analyst
RE: Juvenile Lifers: *Miller v. Alabama* and Michigan

On June 25, 2012, the United States Supreme Court issued a ruling in the case of *Miller v. Alabama*, a decision that may have important implications for criminal justice policy in the State of Michigan. Justice Elena Kagan, writing the opinion for the majority, stated, "Mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments'." Michigan is among the 28 states plus the Federal government that have mandatory life without parole for at least some juveniles. In light of this ruling, the following provides an overview of the case findings, as well as summarizes responses from key stakeholders in Michigan, including the Michigan Department of Corrections, the State Appellate Defender Office, and the Office of the Attorney General.

Miller v. Alabama: No Mandatory Life without Parole for Juvenile Offenders

The decision in *Miller v. Alabama* was based upon two cases that the Supreme Court consolidated for the purpose of considering the issue of juvenile life without parole. In the first case, *Jackson v. Hobbs*, the petitioner was Kuntrell Jackson, who was involved in a robbery in Arkansas that resulted in murder when he was 14 years old. In the namesake case, *Miller v. Alabama*, the petitioner Evan Miller beat a man and then burned down his trailer home while he was still inside, resulting in the man's death. Like Jackson, Miller was 14 years old at the time of his crime and had at least one co-conspirator. Other circumstances potentially relevant for consideration in the cases include that it was Jackson's co-conspirator, not Jackson himself, who shot and killed the store clerk, and that Miller's arson-murder came at the conclusion of a night of drinking and drug use partially facilitated by the man he killed.

The primary conclusion of the U.S. Supreme Court is that a mandatory sentence of life without parole for those under 18 years of age at the time of their crime is a violation of the Eighth Amendment and is therefore unconstitutional. One important distinction to recognize is that the ruling is not an outright prohibition on the sentence of life without parole for juvenile offenders; rather, it declares that *mandatory* life without parole for juvenile offenders is unconstitutional. Therefore, life without the possibility of parole can still be among the sentencing *options*, but Justice Kagan wrote that she expected it to be "uncommon" and that "individualized consideration" is required before a sentencing court reaches the conclusion that life without the possibility of parole is truly the appropriate penalty. In the absence of "individualized consideration", the sentence of life without the possibility of parole would be unconstitutional.

Miller v. Alabama also provides some specifics on what it means by "individualized consideration" of juvenile offenders. This consideration must "take into account how children are different", in particular regarding how juveniles have "diminished culpability and greater

prospects for reform". Characteristics of juveniles that differentiate them from adult offenders (for whom mandatory life without parole sentences are still allowed) include their general lack of maturity, vulnerability to outside pressures (peer pressure), and that their traits are much less fixed, meaning that their actions may not be evidence of unchangeable vile.

Finally, the ruling makes clear that simply because judges or prosecutors (prosecutors, in Michigan) may have had the initial choice of whether to try an offender as an adult, that does not negate the mandatory nature of the sentence required once a juvenile is convicted of murder as an adult. Justice Kagan stated that the decision to try the offender as an adult is often a false choice because charging someone in the juvenile system may mean he or she can be released on his or her 21st birthday, which may be viewed as too lenient given the magnitude of the crime of murder. With the juvenile system seeming too lenient in most cases, the judges or prosecutors are then forced to seek adult charges that carry the mandatory sentence of life without parole, even though they may believe that an intermediate sentence, such as a long term of years or life *with* the possibility of parole, is more appropriate.

What this Means for Michigan

All stakeholders agree that Michigan needs a statutory change to bring the law into compliance with the ruling. Currently, MCL 769.1(1) states, "The court shall sentence a juvenile convicted of any of the following crimes as an adult..." and then goes on to list a variety of violent and/or serious offenses including first-degree murder", which is punishable by mandatory imprisonment for life without eligibility for parole. This section may be among many considered for amendment. Exactly how the law will change, however, will be a significant policy decision. At a minimum, the law must be changed to include one option other than life without the possibility of parole; one consideration for the second option may be life *with* the possibility of parole.

However, some advocates may argue that making that minimum level of change would not adequately bring Michigan statute into compliance with *Miller*. There are two lines of argument that are relevant to this debate. First, some might contend that life *with* the possibility of parole is not differentiable from life without the possibility of parole because so few parolable lifers are ultimately granted parole (and many who are paroled are medically fragile). They may cite *Graham v. Florida* (as Justice Kagan did in *Miller*) which states, "A State is not required to guarantee eventual freedom", but must provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation". What constitutes a "meaningful opportunity" for release would be an issue to be decided in court. Supporters of this argument would like to see a long term of years provided as a third sentencing option available in some instances, in addition to life with and without parole.

The second argument would be that the *Miller* ruling calls for more than just sentencing options: it also calls for "individualized consideration" and that "a sentence follow a certain process – considering an offender's youth and attendant characteristics – before imposing a particular penalty". Proponents of this argument would like the revised statute also to provide details about the process by which individual consideration should be completed in each case. The *Miller* ruling is clear that in order for life without parole to be imposed, individual consideration must be given, but what is not clear is whether the mandate for individual consideration still applies when lesser sentences are imposed.

In addition to how the statute should be altered to ensure that future juvenile murder cases are tried in a manner consistent with *Miller*, a second issue is what impact the ruling may have on current inmates serving life-without-parole sentences for crimes committed as juveniles. This issue has been one of confusion and controversy, and is likely to remain so in the near future. The range of arguments is large. Some claim that the *Miller* decision means all of the current juvenile lifers are entitled to a resentencing hearing, while others believe that the decision does not apply to the past cases or that having resentencing hearings would violate crime victims' rights. As with the statutory change, there remains a significant source of ambiguity whether charges less than life without the possibility of parole still will require "individual consideration". For example, if a court considers a juvenile who has petitioned for resentencing and the court decides to reduce the sentence to life with the possibility of parole, must that court still follow a process of individual consideration that takes into account the potentially mitigating characteristics of youth?

Stakeholder Responses

On July 17, 2012, the House Appropriations Subcommittee on Corrections held a hearing to explore the implications of *Miller v. Alabama*. Three stakeholder groups provided testimony: the Michigan Department of Corrections (MDOC), the State Appellate Defender Office (SADO), and the Michigan Department of Attorney General (AG).

Speaking on behalf of the MDOC, Executive Bureau Administrator Russell Marlan and Legislative Liaison Jessica Peterson stated that the Department had looked through its population and determined that there are 370 individuals for whom the decision may be applicable. Of these, 202 were 17 years old at the time of their crime, which means that they were automatically tried in adult court under Michigan law; the remaining 168 were 16 or younger and were waived to adult court. Members of the subcommittee requested additional information from the MDOC, such as a chart showing the breakdown of the amount of time served for these 370 individuals and a map showing the areas where jurisdictions will be affected by possible resentencing; these materials are forthcoming. The MDOC representatives declined to weigh in on how the fates of the 370 inmates may play out in the courts; they emphasized that the MDOC's role is to carry out sentences, not determine them.

Also at the hearing, SADO Director Dawn Van Hoek and Deputy Director Jonathan Sacks testified on behalf of their office. They stated that of the 370 juvenile lifers, SADO had previously represented 125. The board that oversees SADO has already approved SADO's taking on the responsibility of representing its former clients through any resentencing or mitigating circumstances hearings. According to SADO, this will create a low-cost situation for taxpayers as SADO attorneys are already familiar with these cases, so they can represent these clients effectively without starting to learn about the case from scratch. Also, SADO has been involved with a process to recruit private sector attorneys who will be willing to take on (pro bono) the cases of the remaining 245 juvenile lifer clients not previously represented by SADO; this may save counties the cost of appointing counsel. The Director and Deputy Director clarified for the subcommittee that they believe *Miller v. Alabama* is fully retroactive and that this means resentencing hearings will be necessary (but that resentencing *not* a retrial).

The SADO representatives also provided some information about SADO's 125 clients and stated why they believe at least one third of them will have a very good chance of receiving a

reduction in their sentence. At least 30 of the 125 were not the actual killers in multiple co-defendant cases; instead, they may have been a getaway driver or another type of accomplice. Several former clients also turned down plea bargain offers for parolable sentences, and some of these clients have already served more than 20 years.

The final testimony was provided by representatives of the Department of Attorney General, Director of Crime Victim Advocacy John Lazet and Deputy Attorney General Margaret Nelson. They raised several questions, such as whether the decision is actually retroactive, and whether past legislative changes to remove judicial discretion will have an impact on eligibility (in other words, if someone was sentenced before judicial discretion was limited, he or she arguably was not sentenced under a mandatory scheme). The AG's representatives also stated the Department's strong desire for crime victims' rights to be respected throughout the process.

In a press release dated July 31, 2012, the Department of Attorney General issued an additional response to the *Miller v. Alabama* decision. According to the press release, Attorney General Schuette, along with Wayne County Prosecutor Kym Worthy (whose county was the site of many of the potentially affected cases), are calling on the Michigan Supreme Court to consider the question of retroactivity in a prompt manner; they believe that one possible avenue for Michigan Supreme Court intervention would be for the court to agree to hear the case of *People v. Davis*, in which a man is appealing a sentence of life without parole for crimes he committed at the age of 16. Attorney General Schuette stated that resentencing hearings would allow for "re-victimization" of the families and loved ones of the homicide victims, which could be avoided "by following established court precedent that says U.S. Supreme Court rulings addressing criminal justice processes are not retroactive". According to the press release, the precedent Attorney General Schuette was referring to is known as "the Teague Rule", which comes from the 1989 ruling in *Teague v. Lane*.

Conclusion

In the coming months and years, the courts will likely decide what will happen to the 370 current juvenile lifers. There is unanimous agreement, however, that statutory change is necessary to determine how future cases are handled. Senators can likely expect to see bills on these topics beginning the committee process this autumn.

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