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Juveniles

Miller Bars Even Nonmandatory LWOP If Judge Didn't Consider Offender's Youth

The Eighth Amendment as interpreted in *Miller v. Alabama*, 2012 BL 157303, 91 CrL 413 (U.S. 2012), prohibits even a discretionary sentence of life imprisonment without parole for a murder committed by a juvenile unless the sentencing judge actually considered the offender's youth, the South Carolina Supreme Court held Nov. 12. (*Aiken v. Byars*, 2014 BL 318154, S.C., No. 27465, 11/12/14)

The large number of jurisdictions that had mandatory LWOP schemes was partially the result of the Supreme Court's ruling in *Roper v. Simmons,* 543 U.S. 551, 76 CrL 407 (2005), which banned the death penalty for any crime committed before the offender's 18th birthday. Many jurisdictions had polar schemes that required sentencers to choose between two options: death or LWOP. When *Simmons* eliminated the first choice, LWOP was left as the only available punishment, making it mandatory.

In reaction to *Miller*, some state courts and legislatures changed their schemes to make LWOP discretionary for juvenile offenders.

"*Miller* does more than ban mandatory life sentencing schemes for juveniles; it establishes an affirmative requirement that courts fully explore the impact of the defendant's juvenility on the sentence rendered."

JUSTICE KAYE G. HEARN

The South Carolina court's ruling means that prosecutors who thought their state's discretionary LWOP sentences were safe from *Miller* challenges should prepare for arguments urging broader applications of that decision.

''In our view, whether their sentence is mandatory or permissible, any juvenile offender who receives a sentence of life without the possibility of parole is entitled to the same constitutional protections afforded by the Eighth Amendment's guarantee against cruel and unusual punishment,'' the court said in an opinion by Justice Kaye G. Hearn.

''We must give effect to the proportionality rationale integral to *Miller*'s holding—youth has constitutional significance,'' the court said. ''As such, it must be afforded adequate weight in sentencing.''

Breaking New Ground. Marsha L. Levick of the Juvenile Law Center, Philadelphia, told Bloomberg BNA the ruling appears to represent the first time a state court has held that *Miller* is violated when a sentencing judge exercises discretion to impose LWOP but fails to ''consider the hallmark features of youth.''

''In other words,'' Levick said, ''while mandatory sentencing schemes unambiguously preclude consideration of the mitigating factors of youth, even discretionary schemes that fail to allow the presentation of evidence addressing the five areas of youth characteristics that Justice Kagan identified in *Miller* also run afoul of the Eighth Amendment.''

''This is actually quite groundbreaking, as it potentially extends the reach of *Miller* to more than just the 29 jurisdictions across the country that mandatorily impose life without parole in homicide cases,'' she said.

***Miller* Is Retroactive.** The court also held that *Miller* is retroactive to cases on collateral review. Both questions have divided the courts that have answered them. The rulings against the state mean that a party and amici curiae with abundant resources have a reason to take the issues to the U.S. Supreme Court.

The disagreements surrounding these issues were reflected in divisions in the South Carolina court. Three of the five justices agreed with the idea that *Miller* doesn't apply to offenders who received discretionary LWOP; however, one of the three issued an opinion concurring in the court's decision on the ground that he would reach the same conclusion as a matter of state constitutional law.

***Miller* Banned Mandatory LWOP.** In *Graham v. Florida*, 560 U.S. 48, 87 CrL 195 (2010), the U.S. Supreme Court made LWOP categorically off-limits for all juveniles convicted of nonhomicide offenses committed before the offenders' 18th birthday.

Miller stopped short of a similar categorical rule for homicide offenses committed by juveniles and, instead, extended the ban to homicides where LWOP was the only sentence available.

Both decisions were based on the idea that offenders under the age of 18 are constitutionally distinct from adult offenders because juveniles are generally less culpable on account of their lack of maturity, underdevel-

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oped sense of responsibility, impetuousness and greater vulnerability to negative influences and pressures.

However, *Miller* was a 5-4 decision, and the majority declined to take a position on the question of the circumstances in which LWOP would be constitutional for a juvenile homicide offense except to say it should be ''uncommon.''

Moreover, two of the justices in the majority argued that the ban should apply only when a juvenile offender is convicted on the basis of a felony-murder theory or some other homicide offense in which the juvenile had no intent to kill.

***Miller* Rationale Applies to Discretionary LWOP.** The South Carolina court acknowledged that the narrow majority decision in *Miller* didn't extend to discretionary LWOP.

However, ''*Miller* is clear that it is the failure of a sentencing court to consider the hallmark features of youth prior to sentencing that offends the Constitution,'' the court said. ''Contrary to the dissent's interpretation, *Miller* does more than ban mandatory life sentencing schemes for juveniles; it establishes an affirmative requirement that courts fully explore the impact of the defendant's juvenility on the sentence rendered.''

The court's decision came in a class action filed by 15 prisoners serving LWOP on adult convictions for murders committed before they were 18.

Although some of the prisoners' sentencing hearings ''touch[ed] on the issues of youth, none of them approach the sort of hearing envisioned by *Miller* where the factors of youth are carefully and thoughtfully considered,'' the court said.

The *Miller* majority explicitly stated that it was not foreclosing a sentencer from reaching the ''rare'' judgment that a crime committed by a juvenile offender ''reflects irreparable corruption.'' But in the same sentence, the majority also stated that a sentence is ''required'' to ''take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.''

This statement in *Miller* ''deserves universal application,'' the South Carolina court said.

''The absence of this level of inquiry into the characteristics of youth produced a facially unconstitutional sentence for these petitioners,'' the court said. Accordingly, it held that the prisoners in this case and ''those similarly situated'' are ''entitled to resentencing to allow the inmates to present evidence specific to their attributes of youth and allow the judge to consider such evidence in the light of its constitutional weight.''

***Miller* Applies to All Convictions.** Before considering whether *Miller* applies to a nonmandatory scheme, the court first had to resolve whether that decision applies retroactively on collateral review.

Under *Teague v. Lane*, 489 U.S. 288 (1989), the Constitution doesn't require ''new'' rules of constitutional criminal procedure that are announced by the court to be applied in cases in which the convictions had already been upheld on direct appeal when the new rule was announced. A ''new rule'' for *Teague* purposes is one that was ''not dictated by precedent existing at the time the defendant's conviction became final.''

Courts that have held that *Miller* isn't retroactive have held that the new rule is procedural in nature and isn't fundamental enough to be considered a ''watershed'' rule of procedure for purposes of the *Teague* analysis.

The South Carolina court, however, agreed with those other courts that have decided that the *Miller* rule is substantive in nature and that the *Miller* court signaled that its holding is retroactive by applying it to one of the petitioners in that case.

Justice Costa M. Pleicones was the concurring justice who preferred to rely on the state constitution.

Chief Justice Jean Hoefer Toal's dissenting opinion was joined by Justice John W. Kittredge. ''In my opinion, it is a leap of faith for the majority to extend *Miller*'s holding—expressly applicable only to mandatory sentencing schemes—to a discretionary sentencing scheme, and to require strict compliance with a rule that the Supreme Court has not yet set forth,'' Toal said.

The prisoners were represented by a group of attorneys that included John H. Blume III, director of Cornell University Law School's Juvenile Justice Clinic, Ithaca, N.Y. The state was represented by Donald J. Zelenka and J. Benjamin Aplin, of the South Carolina Attorney General's Office, Columbia, S.C.

BY HUGH B. KAPLAN

*Full text at http://www.bloomberglaw.com/public/document/TYRONE_AIKEN_MATTHEW_CLARK_ERIC_GRAHAM_BRADFORD_M_HAIGLER_ANGELO_*

Decisions From Other States

Miller Is Retroactive:

State v. Mares, 96 CrL 140 (Wyo. 2014)

In re State, 2014 BL 240248, 95 CrL 671 (N.H. 2014)

Ex Parte Maxwell, 424 S.W.3d 66, 94 CrL 745 (Tex. Crim. App. 2014)

People v. Davis, 6 N.E.3d 709, 94 CrL 769 (Ill. 2014)

State v. Mantich, 842 N.W.2d 716, 94 CrL 549 (Neb. 2014)

Diatchenko v. District Attorney, 1 N.E.3d 270, 94 CrL 418 (Mass. 2013)

Miller Isn't Retroactive:

Commonwealth v. Cunningham, 81 A.3d 1, 94 CrL 200 (Pa. 2013)

Chambers v. State, 831 N.W.2d 311, 93 CrL 316 (Minn. 2013)

People v. Carp, 828 N.W.2d 685, 95 CrL 529 (Mich. 2014)

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