Office of Edwin Meese III

The Heritage Foundation
214 Massachusetts Avenue, N.E.
Washington, DC 20002
Phone 202/608-6180
Fax 202/547-0641

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Senator Stewart Greenleaf
Senate Judiciary Committee
19E Capitol Building
Harrisburg, Pennsylvania 17120

Dear Senator Greenleaf,

Please find enclosed a written statement by Charles Stimson and myself regarding the Commonwealth's response to the Supreme Court's recent decision on juvenile life without parole sentences in *Miller v. Alabama*. We hope that our analysis of *Miller* will prove helpful to you and your colleagues, who face the task of implementing the Court's decision within the Commonwealth, and I ask that you include it in the record for your hearing on this matter.

Sincerely,

A. M. Grossman

Andrew M. Grossman

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Statement on Life-Without-Parole Sentences for Juvenile Offenders after *Miller v. Alabama*

Testimony before
The Senate Judiciary Committee
Pennsylvania Senate

July 12, 2012

Charles D. Stimson*
Andrew M. Grossman**
The Heritage Foundation

On the next-to-last decision day of its recently concluded term, the United States Supreme Court released its decision in *Miller v. Alabama*,[1] striking down life-without-parole sentences that had been imposed on two juvenile offenders. Due, in large part, to the technical complexity of the case and the precise legal question before the Court, early reports on this decision have been misleading, with some even implying that the Court ruled to categorically bar the imposition of life-without-parole sentences for crimes committed by individuals under the age of eighteen. But the Court did no such thing. Rather, it affirmed the legality of sentencing juvenile murders to life without parole, while imposing the procedural requirement of individualized sentencing, which previously applied only in the death penalty context. After *Miller*, juvenile murderers may be sentenced to life without parole so long as the sentencer has considered the "mitigating qualities of youth."[2] *Miller* therefore requires the majority of states to amend their laws in order for life without parole to remain an available sentence for juvenile murderers where the interests of justice so requires. Because that sentence serves legitimate purposes, state legislators should act to ensure that it remains available and that sentences under state law conform to the Supreme Court's increasingly intrusive Eighth Amendment jurisprudence.

Miller 's Limited Holding

After the Supreme Court's decision in *Graham v. Florida*,[3] which barred life-without-parole sentences for juveniles convicted of non-homicide crimes based on their presumed "lessened culpability"[4] and "capacity for change,"[5] many legal observers expected that the other shoe would soon drop and that the Court would categorically prohibit life-without-parole sentences for *all* juvenile offenders. *Miller* (and its companion case, *Jackson v. Hobbs*, No. 10-9647) presented the first opportunity for such a ruling. But rather than use *Graham* as a stepping stone to the eradication of juvenile life-without-parole sentences, the Court reaffirmed the line drawn in *Graham*, suggesting that it may have some durability in the years ahead. While *Miller* refines *Graham*, it does not fundamentally alter it.

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* Mr. Stimson is Chief of Staff and Senior Legal Fellow at The Heritage Foundation. The views expressed in this testimony are his, and should not be construed as representing any official position of The Heritage Foundation.

** Mr. Grossman is a Visiting Fellow in the Center for Legal and Judicial Studies at The Heritage Foundation. The views expressed in this testimony are his, and should not be construed as representing any official position of The Heritage Foundation

[1] No. 10-9646, 567 U.S. __ (2012).

[2] *Miller*, slip op. at 13.

[3] 130 S.Ct. 2011 (2010).

[4] *Id.* at 2026.

[5] *Id.* at 2030.

The limited nature of *Miller's* central holding could not be clearer: "*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.'"[6] The *Miller* petitioner, a juvenile at the time of his offense, had been convicted in adult court of murder in the course of arson under Alabama law and was, as a result of that conviction, automatically subject to a sentence of life without parole.[7] Similarly, the *Jackson* petitioner received the same sentence, in the same fashion, following his conviction for felony murder and aggravated robbery.[8] Each challenged his sentence as disproportionate and therefore in violation of the Eight Amendment's prohibition on "cruel and unusual punishment."[9]

The majority opinion applies essentially the same analysis as in *Graham*. First, it explains that juveniles "are constitutionally different from adults for purposes of sentencing" due to their immaturity and unfixed character.[10] These characteristics, in turn, "diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes," because juveniles cannot be as culpable as adults and are capable of change.[11] As a result, held the *Graham* court, sentencing a juvenile to life without parole for a non-homicide offense is constitutionally disproportionate.[12] In *Miller*, the Court extended that principle to hold that "removing youth from the balance" by automatically imposing life without parole raises the risk that the sentence may be disproportionate and therefore unlawful.[13] Drawing from the Court's death penalty jurisprudence, to which the Court analogized life-without-parole sentences for juveniles in *Graham*, the majority held the sentencer must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison," before sentencing a juvenile murderer to life without parole.[14] Those not given this individualized consideration are subject to the *Graham* rule—that is, the state need not guarantee their eventual release but must provide "some meaningful opportunity to obtain release based on demonstrate maturity and rehabilitation."[15]

We do not, in this statement, intend to comment on the Court's reasoning—with which we disagree for reasons of both law and policy—but only to describe it so that its limited applicability may be apparent. The Court did not, of course, categorically bar life

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[6] *Miller*, slip op. at 2 (emphasis added).
[7] *Id.* at 9-10.
[8] *Id.* at 2-3.
[9] *See id.* at 3, 6.
[10] *Id.* at 8.
[11] *Miller*, slip op. at 9.
[12] *Graham*, 130 S.Ct. at 2034.
[13] *Id.* at 11.
[14] *Id.* at 17.
[15] *Graham*, 130 S.Ct. 2030.

without parole sentences for juvenile offenders. Nor did it narrow the category of offences for which the sentence may be available. Nor did it take the step, advocated by the *Jackson* petitioner, of disallowing the sentence for those convicted only of felony murder, as opposed to "murder murder."[16] Indeed, *Miller* imposes no new substantive limitations on the use of life without parole that are apparent from the text of the opinion. Rather, it simply establishes a new procedural requirement: that juvenile offenders receive the benefit of individualized consideration when faced with the possibility of life without parole. Though unjustified, and an intrusion on states' dignity and sovereign prerogatives, this is not a significant change in the law.

How States Should Respond

Whatever the merits of the Supreme Court's *Miller* decision, states that seek to maintain life-without-parole sentences as an option for juvenile murderers will have to amend their laws. Because such sentences play an important role in a narrow class of cases involving the worst of the worst juvenile offenders, they should do so.

Our monograph *Adult Time for Adult Crimes: Life Without Parole for Juvenile Killers and Violent Teens*[17] surveyed the evidence regarding life-without-parole for juvenile offenders and concluded that, when used sparingly, as it has been, life without parole is an effective and lawful sentence for the worst juvenile offenders and, on the merits, has a place in our criminal law.

The need for such sentences to be available is clear. The United States leads the Western world in juvenile crime and has done so for decades. Juveniles commit murder, rape, robbery, aggravated assault, and other serious crimes—particularly violent crimes—in numbers that dwarf those of America's international peers. In response to this flood of juvenile offenders, state legislatures have enacted common sense measures to protect their citizens and hold these dangerous criminals accountable. Indeed, states' laws reflect that there is an overwhelming national consensus that life without parole is, for certain types of juvenile offenders, an effective, appropriate, and lawful punishment.

Our survey of cases in *Adult Time for Adult Crimes* showed that states use life-without-parole sentences to narrowly target juveniles who knowingly and intentionally commit horrific crimes. We found that these sentences are both rare and common. They are rare relative to the total number of juveniles charged with violent offenses and even relative to the total number of juveniles tried in adult court. And they are common, in absolute numbers, due to the large number of offenses committed by juveniles in the United States and therefore not, in a practical or constitutional sense, "unusual." We also

[16] *Cf. Miller*, slip op. at 2-3 (Breyer, J., concurring).
[17] Charles D. Stimson and Andrew M. Grossman, *Adult Time for Adult Crimes: Life Without Parole for Juvenile Killers and Violent Teens* (The Heritage Foundation 2009).

found that many of those serving life-without-parole sentences for offenses committed while under eighteen are, in fact, the worst of the worst, convicted of crimes so severe and, in some cases, so intricately planned, that their temporal youth can be no mitigating factor.

Eric Hancock's case is typical of those juvenile offenders sentenced to life without parole. In 2007 Hancock, a Pittsburgh youth, shot and killed the cashier of a local deli that he regularly patronized. The cashier begged for his life, and Hancock shot him three times in the chest and then ransacked the store. At trial, Hancock testified that the shooting was accidental. He was convicted and sentenced to life without parole.[18]

Although *Graham* limited the availability of life-without-parole sentences,[19] we have no reason to believe that it so altered the landscape as to upend our findings or conclusions in *Adult Time for Adult Crimes*. Therefore, we continue to believe that there remains a role for life-without-parole sentences for juvenile offenders in a limited class of cases. Rather than give up, the states should adjust to comply with *Miller*. In relying on *Miller* to amend their laws to comply with the decision, states may also dissuade the Supreme Court from continuing further down the path cleared in *Graham* and *Miller* by entirely barring life-without-parole sentences for juvenile offenders.

Miller's requirements are, at once, both perfectly clear and perfectly opaque. As to sentencing, carrying out *Miller* should be straightforward. States may rely on their death penalty statutes, particularly those in effect following the Court's decisions in the 1980s and 1990s that required consideration of youth as a factor in meting out capital punishment.[20] While those cases are, strictly speaking, no longer good law after the intervening decision in *Roper v. Simmons*[21] prohibited the death penalty for juvenile offenders, the *Miller* court expressly endorses their logic and their procedural requirements.[22] Indeed, drawing on those cases, the Court lists, by negative implication, those factors that must receive due consideration:

> 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

[18] *Id.* at 20
[19] *Graham*, 130 S.Ct. at 2034.
[20] *See, e.g., Eddings v. Oklahoma*, 455 U. S. 104, 114 (1982); *Johnson v. Texas*, 509 U. S. 350, 367 (1993).
[21] 543 U.S. 551 (2005).
[22] *Miller*, slip op. at 13-14.

> 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.[23]

This type of freewheeling inquiry should be familiar to any student of the Court's capital punishment jurisprudence.[24] States that provide similar consideration to juvenile offenders facing life without parole should be on safe ground.

Lingering Questions

Unanswered by *Miller* is whether its holding applies retroactively, to sentences imposed years or even decades in the past. As a legal matter, the Court's distinction between substantive and procedural new rules has led some legal scholars to conclude that there is no case to be made for retroactive resentencing.[25] As a practical matter, the courts of appeals and the Supreme Court will be the ones to answer this question. Accordingly, the states' legislative organs should not, at this time, waive their states' right to carry out criminal sentences authorized by law at the time imposed. Rather, they should wait and see how the matter is resolved by the courts. In fact, California and other states may already be in compliance.[26]

A second uncertainty is the burden of *Miller* in cases where life without parole is available. The requirements of the penalty phase of capital-punishment cases escalate the duration, burden, and cost of trial. Cases that would be straightforward, had the only issue been the innocence of the accused, are weighted down by extensive investigation and production of mitigation evidence. Whether the same will happen in life-without-parole cases is uncertain. Caution and prudence, however, may dictate that states be especially considerate of the needs of juvenile offenders facing life without parole, lest their sentences be overturned on appeal or collateral review due to some technical deficiency.

How the Law Stands After *Miller*

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[23] *Id.* at 15 (citations omitted).
[24] *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 195 (1976).
[25] *See, e.g.*, Kent Scheidegger, *Some Further Thoughts on* Miller, Crime and Consequences (Jun. 25, 2012, 9:16 AM), http://www.crimeandconsequences.com/crimblog/2012/06/some-further-thought-on-miller.html.
[26] *Id.*

Miller is no sea change in the law—at least, not in its direct requirements. But it does point the way to future cases in which the Supreme Court could further limit the availability of life-without-parole sentences and require "individualized consideration" in more circumstances. For now, however, what it requires of states is modest, and well within their interests to carry out. They should do so.

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