7-17-2012

Children Aren't Adults, Even When They Kill

Reichi Lee
Golden Gate University School of Law, relee@ggu.edu

THE RECORDER
ESSENTIAL CALIFORNIA LEGAL CONTENT

ALM Properties, Inc.
Page printed from: *The Recorder*

Back to Article

Children Aren't Adults, Even When They Kill

New Senate Bill seeks to promote discretion in juvenile sentencing, explains Reichi Lee of Golden Gate University School of Law.

Reichi Lee

2012-07-17 03:41:16 PM

In June, the U.S. Supreme Court in Miller v. Alabama issued its third opinion about youth offenders in the past decade that reflects a significant shift in law and public policy surrounding the treatment of juveniles in the criminal justice system. California law does not violate *Miller* on its face, but by operation its results reflect the very practice that the court found unconstitutional. Senate Bill 9, consistent with the values expressed in *Miller*, seeks to change that.

The court's decisions are grounded upon a single, fundamental premise: Children are different from adults. Building upon *Roper v. Simmons* (2005), which eliminated the juvenile death penalty, and *Graham v. Florida* (2010) which prohibited a sentence of life without the possibility of parole for nonhomicide crimes committed by juveniles, *Miller* held that the Eighth Amendment's prohibition of cruel and unusual punishment forbids a sentencing scheme that mandates life without parole for juveniles convicted of murder. It did not ban life without parole for juvenile offenders; only that such a sentence cannot be mandatory.

The distinction between children and adults is far from surprising, given the legal disqualifications placed on children as a class, such as limitations on their ability to enter into a binding contract, marry without parental consent, and validly consent to police questioning. But the court's recognition that children are different from adults relevant to their criminal behavior, even when they kill, will undoubtedly change the way states resolve complex issues of culpability and proportionate punishment for juvenile offenders. If passed, SB 9, authored by state Senator Leland Yee, D-San Francisco/San Mateo, will change the way California law punishes minors. The bill has failed on repeated occasions, but is again before the Assembly on the heels of *Miller*. Timing is everything and the change for California may come sooner than later.

The two cases at issue in *Miller* involved two minors, now in their mid- to late 20s. One of them, Kuntrell Jackson, then age 14, tried to rob a video store with two other boys. Although Jackson did not fire the gun that killed the store clerk, nor did prosecutors argue that he intended her death, under Arkansas law, a defendant convicted of capital murder (Jackson was charged with and convicted of capital felony murder and aggravated robbery) faces death or life without parole. Jackson was ineligible for the death penalty under *Thompson v. Oklahoma* (1988), which held that capital punishment for youth under 16 years of age violates the Eighth Amendment. He was sentenced to life without parole.

In the second case, Evan Miller was also 14 years old when he committed his crimes. He and a friend were at his home when a neighbor came to make a drug deal with Miller's mother. After a night of drinking and using drugs with the neighbor, the boys attacked the man with a baseball bat. Miller delivered the blows that killed the neighbor and the two boys set his trailer on fire to cover up the evidence. Miller was convicted of murder in the course of arson, which, under Alabama law, carries a mandatory minimum sentence of life without parole.

Justice Elena Kagan, writing for the 5-4 majority, argued that when a sentencing scheme is mandatory, it "removed youth from the balance" — ignoring the very concept of proportionality that is central to the Eighth Amendment. While *Graham* specifically distinguished nonhomicide crimes from murder, Kagan emphasized that the same rationale for the court's prior decisions —

children have diminished culpability based on their "transient rashness, proclivity for risk, and inability to assess consequences" yet possessing a "greater capacity for change" — also applies if the child's crime is murder.

In both cases, the boys came from violent and abusive homes. Jackson's mother and his grandmother had previously shot other individuals. Miller had been in and out of foster care due to his stepfather's physical abuse and his mother's substance abuse. Miller himself regularly used drugs and alcohol. By the age of six, he had attempted suicide four times. While the court acknowledged that they undoubtedly deserved severe punishment, it found that sentencing schemes, like those in Arkansas and Alabama, that do not provide a judge or jury the opportunity to consider "youth and all that accompanies it" before imposing the harshest prison sentence, is unconstitutional. The significance of the court's decision is not that every child has the capacity for change; rather, distinguishing at an early age between children who will change or will not, is risky and uncertain at best.

What this means is that 28 states and the federal government, which currently make life without parole the mandatory (or mandatory minimum) punishment for some form of murder by juvenile offenders, can no longer do so without considering the individual characteristics and circumstances of the youth. California is not among those states since life without parole sentences for juveniles are permissive. How someone under 18 would come to face a life without parole sentence in California depends on a number of key factors, namely, what led them to end up in adult criminal court and the factors and biases that play into judicial discretion (or, critics say, the lack of discretion) at sentencing.

In juvenile court, the goal is rehabilitation. In contrast, a conviction in adult criminal court serves to punish the offender. Punitive laws in recent years, including those in response to the rise in teen crime, opened the door for minors to be tried in adult court for a variety of crimes, making them eligible for harsher penalties. For example, in California, anyone 14 years or older who is alleged to have committed a murder under one of the 22 enumerated special circumstances (such as the killing of a police officer, a killing committed during the commission of a felony, or a killing related to gang activity) will automatically be prosecuted in adult court. For a teen 16 years or older but under 18 at the time of the crime, a conviction of a special circumstance murder means life without parole, or a term of 25 years to life, at the discretion of the court. However, the California court of appeal has made clear that judicial discretion to impose the lesser of the two sentences operates as an exception, not the rule. Once found guilty, the default sentence in these cases is life without parole unless the judge finds "good reason" to impose 25 years to life. The reality, critics say, is that judges rarely exercise their discretion to impose the lesser sentence.

Although *Miller* does not directly impact California's sentencing scheme, proponents of SB 9 hope that the same values expressed in *Miller* will pave the way for the bill's passage. With some exceptions, the bill, which would have retroactive application, provides that a person who was under 18 at the time of committing a crime for which he was sentenced to life without parole, after serving 15 years in prison, may petition the court for resentencing. The petition must include a statement from the defendant that includes his or her remorse and work towards rehabilitation. If a resentencing hearing is granted, the court would have the discretion, after considering criteria such as factors that influenced the defendant's involvement in the crime and the defendant's rehabilitation potential, to grant a lower sentence or let the original sentence stand. If the sentence is not recalled, the defendant may submit another petition after serving 20 years in prison; and thereafter, after serving 24 years. A final petition may be submitted during the 25th year of the defendant's sentence. "This is not a get-out-of-jail card," Yee has said, but "an opportunity to plead your case."

Approximately 309 juveniles are currently serving life-without-parole sentences in California. A majority of them were convicted of first-degree murder with special circumstances. According to a study conducted by the Human Rights Watch, many of them did not physically commit the murder (e.g., they were convicted of felony murder or under an aiding and abetting theory); many were under the influence of an adult co-defendant. Even more troubling, the study found that in California, for every 21.14 African-American youths arrested for murder, one is serving a life without parole sentence; whereas for every 123.31 white youths arrested for murder, one is serving the same sentence. This suggests that something after their arrests, perhaps unequal treatment in the courts or before sentencing judges, is causing the disparities in sentencing.

Opponents of SB 9, including police groups, prosecutors and victim's rights advocates, argue that discretion is already built into existing law and SB 9 adds yet another level of scrutiny that victims' families have to endure. Proponents argue that the reality of most of these cases defies an assumption that life without parole is a sentence always reserved for "the worst of the worst." The bill, having passed in the Senate, has until the end of August to pass in the Assembly.

Reichi Lee is an adjunct professor and assistant director of the Academic Development Program at Golden Gate University School of Law in San Francisco. Prior to GGU, she was a staff attorney at East Bay Children's Law Offices where she represented youth in child abuse and neglect proceedings in Alameda County Juvenile Dependency Court. She can be reached at relee@ggu.edu.

In Practice articles inform readers on developments in substantive law, practice issues or law firm management. Contact Vitaly Gashpar with submissions or questions at vgashpar@alm.com.