

The Status of Juvenile Life Without Parole Sentences following *Montgomery v Louisiana*

S A D O Michigan

State Appellate Defender Office and Criminal Defense Resource Center

<http://sado.org/Articles/Article/410>

On January 25, 2016, the United States Supreme Court in *Montgomery v Louisiana*, ___ US ___; (Docket No. 14-280, issued 1/25/16), ruled the decision in *Miller v Alabama*, 567 US ___; 132 S Ct 2455 (2012) fully retroactive¹ to all juvenile mandatory life without parole homicide sentences. In *Miller*, the Court held the imposition of a mandatory life without parole sentence for a juvenile under the age of 18 on the date of the offense violates the Eighth Amendment prohibition on "cruel and unusual punishment." While the Michigan Supreme Court previously ruled the *Miller* opinion was not retroactive to Michigan cases which were no longer pending on direct appeal [*People v Carp*, 298 Mich 472 (2012)], that decision has now been overruled by the *Montgomery* opinion.

The *Montgomery* decision has a significant impact on the numerous Michigan prisoners who are currently serving first-degree murder, life without parole sentences for homicides which occurred when the prisoner was under the age of 18. The purpose of this article is to briefly discuss the current situation, as it impacts both direct appeal and non-direct appeal proceedings, in light of *Montgomery*.

MCL 769.25a – Michigan’s Juvenile Life Without Parole Sentencing Statute

Following *Miller*, the Michigan Legislature enacted MCL 769.25a, which set forth statutory and procedural requirements if *Miller* were found to be retroactive. The statute currently states that if the United States Supreme Court (USSC) ever ruled *Miller* to be retroactive, which it did in *Montgomery*, then all persons serving life sentences for an offense that occurred before the individual was 18 years of age are eligible for resentencing under the *Miller* factors. The statute states the prosecution in each county has 30 days from the date the decision is final² to notify their Circuit Court of all defendants sentenced in that county who are now entitled to resentencing. The prosecution has 180 days from the date the decision is final to file in any case where it is seeking life without parole, a motion seeking imposition of that sentence. **If the prosecutor does not file for life without parole within that time, the defendant must be resentenced to a term of years.** The minimum term must be between 25 years and 40 years and the maximum term is set at 60 years. MCL 769.25(9). The statute states that a hearing on the prosecution’s motion must be held as provided in MCL 769.25(6). The statute also gives priority in scheduling resentencings to prisoners who have already served over 20 years. MCL 769.25a(5)(a).

Despite the clear statutory language outlining the procedure to be applied now that the *Montgomery* decision has been issued, several complicating factors are still at work. First, the USSC in *Montgomery* wrote that states may remedy the cruel and unusual violation of juvenile mandatory non-parolable life sentences by providing only for parole eligibility to all persons serving such sentences. However, as indicated above, the Michigan Legislature has already decided that the appropriate remedy following a decision like *Montgomery* should be resentencing. Yet, there is little preventing the Legislature from further

amending MCL 769.25a to provide for only parole eligibility rather than resentencing. As of the date of this article, the Legislature has not moved to amend MCL 769.25a in any fashion, but the possibility cannot be ignored.

Pending State Litigation: People v Skinner – Right to a Jury at Sentencing

Second, the Michigan Court of Appeals ruled, in *People v Skinner*, __ Mich App __ (Docket No. 317892, issued 8/20/15), that *Miller* defendants have a Sixth Amendment right to have a jury make findings under the proof beyond a reasonable doubt standard in determining whether a life without parole sentence will be imposed. A leave application was filed by the prosecution and the *Skinner* application is currently pending in the Michigan Supreme Court.

Subsequent to the *Skinner* decision, the Michigan Court of Appeals released a second published opinion stating that while it was obligated to follow *Skinner*, the panel disagreed with the majority opinion, and called for a conflicts panel to be convened under MCR 7.215(J)(3). *People v Hyatt*, __ Mich App __ (Docket No. 325741, issued 1/19/16).³

On February 12, 2016, the full Court of Appeals issued an order vacating the portion of the *Hyatt* opinion that discussed the sentencing claim, and ordered a conflicts panel be convened and granted the parties leave to submit supplemental pleadings.

Given this situation, it appears highly likely, particularly if the conflicts panel disagrees with the *Skinner* majority decision, that the Michigan Supreme Court will grant leave in either or both cases to resolve any conflict. This issue concerns the Sixth Amendment right to a jury trial, so the potential exists for this issue to be ultimately resolved in the Federal courts, either through habeas corpus proceedings out of Michigan or any other state with similar statutory post-*Miller* amendments, or through a direct grant of certiorari in the United States Supreme Court.

Now that *Montgomery* has been released, leading to the probable scenario of resentencings in the numerous juvenile life without parole cases that were previously barred under *Carp*, the impact of the *Skinner* rule is substantial. The complex nature of *Miller* hearings will require a much more time consuming, complicated, and expensive proceeding than the average appellate resentencing. Not only might it be exceedingly difficult to locate and produce records (medical, educational, prior misconducts, etc), relevant to the *Miller* factors concerning the individual prisoner as of the date of the offense, it may also be difficult to locate witnesses, evidence, or exhibits regarding the facts of the underlying offense, which is a factor courts are permitted to consider at resentencing. MCL 769.25(7). Further, it is likely in many of the older cases that the trial judge is no longer on the bench, so a successor judge will be in a similar situation to a new jury – unaware of the trial evidence absent a full-blown hearing that may entail, where necessary, essentially a retrial where the issue is the appropriate sentence, not guilt.

For now, given that no one knows whether *Skinner* will be reversed, many if not most resentencings under *Miller* in direct appeal cases are on hold. If negotiations do not result in a sentence agreement in a particular case, it is likely that most parties and/or courts will elect not to proceed until such time as the many questions arising from *Skinner* are resolved.

Pending Federal Litigation: A Meaningful Opportunity for Parole

A related federal case, *Hill v Snyder*, Nos. 13-2661 and 13-2705) is currently pending in the United States Court of Appeals for the Sixth Circuit. The plaintiffs, a group of Michigan prisoners who were sentenced to life in prison without the possibility of parole for crimes committed when they were juveniles, challenged Michigan's juvenile life without parole sentencing scheme by filing suit in 2010. After lengthy litigation, the lawsuit is currently pending in the Sixth Circuit. Lead attorney in that case is Deborah LaBelle.

There is also pending litigation in the Federal District Court for the Western District of Michigan on whether a parole board hearing provides a meaningful chance of release under the dictates and considerations outlined in *Miller*. The plaintiff filed a §1983 action asserting that the Michigan Parole Board's refusal to provide meaningful review of his eligibility for parole violates his Eighth Amendment rights, as he is serving a sentence of life with the possibility of parole for a drug offense committed while a juvenile.

Next Steps for Attorneys

For attorneys representing clients who are either currently entitled to a resentencing under *Miller* and MCL 769.25a in direct appeal cases, or who are now eligible for resentencing under *Montgomery*, information on how to proceed involves consideration of several factors. First, defense attorneys must wait for the 30 day and 180 day time limits for action by the county prosecutors to elapse. Until that time, the defense will not know in which cases the prosecution will move for re-imposition of a life without parole sentence. Until those decisions are communicated to the defense, attorneys should assume that they will have to conduct full *Miller* hearings, before either a judge or jury, and begin preparation of assembling evidence, documents, psychological evaluations, prison records, and all other relevant material showing the client's conduct and progress since first incarcerated. Since resurrecting a possibly decades old case will be as onerous a chore for prosecutors as it will be for defense counsel, the older the case the greater the potential for negotiation to a term of years sentence. Since cases in which the client has already served 20 years are given priority for scheduling under the statute, those cases should be given the most immediate attention.

For attorneys currently representing juveniles facing first-degree murder charges or convictions at the trial level, the situation is similarly uncertain. Attorneys should raise the *Skinner* decision as the currently controlling Michigan precedent, and object if the trial judge denies a motion for a jury finding on the sentence. In any case, a full *Miller* hearing, dealing with all the relevant *Miller* factors, is mandated by statute. The mandate of such an extensive proceeding can be used in plea negotiations prior to trial where reduction of the charge is possible.

Important Information for Prisoners

All prisoners who are currently serving a life without parole sentence for a homicide offense that occurred while 17 years old or younger, and who have not already had a *Miller* resentencing hearing, are affected by the *Montgomery* retroactivity decision. Michigan has approximately 364 individuals fitting that criteria. The State Appellate Defender Office (SADO) intends to represent all of its former clients following *Montgomery*. If you were represented by SADO on appeal, you should have already heard from SADO about next steps.

If you are not currently represented by counsel, or have not heard anything about representation, please contact the Michigan Appellate Assigned Counsel System⁴ (MAACS) instead of taking any unilateral action. MAACS, along with the Youth Access Mitigation Committee,⁵ are working together to ensure that all prisoners affected by *Montgomery* have adequate and effective counsel to represent them at any future proceedings.

It is important that all prisoners work through counsel, as the matters at issue are extremely complicated and beyond the resources of any incarcerated prisoner to successfully litigate. As indicated above, the situation is fluid, and likely not to be settled soon. Prisoners should not seek to file pro per pleadings, or communicate directly with the county prosecutors, as such actions could risk forfeiture of important rights. Understandably, any prisoner who has been incarcerated for years wants immediate action, but that may only be achieved through careful and detailed negotiation, if at all. All prisoners should make efforts to assist counsel in discovery and production of MDOC records, and in particular documentation of positive achievements during the term of incarceration.

Resources for Juvenile Lifers

Updates on the *Montgomery* decision and the procedures going forward in Michigan will be posted on SADO's website at www.sado.org. SADO will also soon be hosting an "Informational Session for Families and Friends of Incarcerated Juvenile Lifers." Families should check SADO's website for those details, or contact Marilena David-Martin directly by email at mdavid@sado.org.

***by: Peter Van Hoek, Assistant Defender
State Appellate Defender Office
pvanhoek@sado.org***

Endnotes

1. "Retroactive" means that the decision applies to all cases, regardless of the date or the age of the case.
2. A decision of the United States Supreme Court is final when the Court issues its mandate in the case, not the date the opinion is released.
3. While Mr. Hyatt's direct appeal was consolidated with that of his two co-defendants' trial, the sentencing issue in the case applies only to him, as he was the only juvenile defendant.
4. MAACS can be reached at: 200 N. Washington Sq., Suite 250, Lansing, MI 48933. Telephone: (517) 334-1200.
5. The Youth Access Mitigation Committee includes the American Civil Liberties Union, the University of Michigan Law School Juvenile Justice Clinic, the Dykema Gossett law firm, and representatives from the Criminal Defense Attorneys of Michigan.