

An Opportunity to Define *Miller*'s Mandate

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The Supreme Court recently heard oral arguments relating to the constitutionality of Lee Boyd Malvo's criminal sentence.² Malvo was seventeen years old when he participated in multiple deadly sniper attacks in the Washington D.C. area.³ In 2004, he was convicted of murder and sentenced to life without parole (LWOP).⁴ Malvo now challenges his sentence as unconstitutional, arguing that he was sentenced to LWOP without proper consideration of his age and immaturity level.⁵ Malvo argues that the Court's 2012 decision in *Miller v. Alabama*⁶ entitles him to a new sentencing hearing. There is substantial disagreement in

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² See Nina Totenberg, *D.C. Sniper Case at Supreme Court*, NPR (Oct. 17, 2019, 4:59 AM), <https://www.npr.org/2019/10/17/770848659/d-c-sniper-case-at-supreme-court> [<https://perma.cc/9GEY-J7DM>].

³ See Adam Liptak, *Supreme Court Hears Case of Lee Malvo, Sniper Who Terrorized D.C.*, N.Y. TIMES (Oct. 16, 2019), <https://www.nytimes.com/2019/10/16/us/supreme-court-dc-sniper-lee-malvo.html> [<https://perma.cc/CMB4-SET5>].

⁴ See *id.*

⁵ See *id.*

⁶ 567 U.S. 460 (2012).

courts around the country as to the types of sentences *Miller* controls, specifically whether *Miller*'s protections are triggered in cases of discretionary or de facto LWOP sentences.⁷ Further, *Miller*'s broad language about individualized hearings and factual findings has created uncertainty as to what procedural steps and substantive considerations must be taken.⁸ Malvo's challenge presents an excellent opportunity for the Supreme Court to provide clarity and guidance on *Miller*'s mandate.⁹

⁷ See generally Robert S. Chang et al., *Evading Miller*, 39 SEATTLE U. L. REV. 85 (2015) (highlighting courts' disagreement over extent of *Miller* sentencing).

⁸ See *People v. Holman*, 91 N.E.3d 849, 862-63 (Ill. 2017) (discussing alternative approaches to consideration of *Miller* factors). The Supreme Court of Illinois recognized two general approaches taken by courts attempting to comply with *Miller*. See *id.* The first approach reads *Miller* broadly as requiring that sentencing judges only consider the "generally mitigating circumstances related to a juvenile defendant's youth." See *id.* at 862. But the second approach understands *Miller* as requiring sentencing judges to make specific findings as to the factors explicitly listed in *Miller*. See *id.*

⁹ See generally Chang et al., *supra* note 7 (discussing *Miller*'s impact and interpretation in juvenile sentencing across country).

First, the Court must clarify *Miller*'s applicability.¹⁰ Some courts have held *Miller* inapplicable to sentences in which the judge had any discretion at sentencing—even discretion as narrow as a choice between life and LWOP.¹¹ The federal circuit courts have uniformly held that sentences issued in federal courts do not implicate *Miller* because the sentencing guidelines are advisory and permit sentencing judges to consider mitigating qualities of youth at sentencing.¹² The highest courts in Illinois, Iowa, and Wyoming, however, have extended *Miller* to discretionary and de

¹⁰ Compare *United States v. Jefferson*, 816 F.3d 1016, 1019 (8th Cir. 2016) (holding *Miller* inapplicable to discretionary sentence), and *Davis v. McCollum*, 798 F.3d 1317, 1321 (10th Cir. 2015) (concluding *Miller* inapplicable to discretionary LWOP), with *People v. Reyes*, 63 N.E.3d 884, 888 (Ill. 2016) (applying *Miller* to multiple mandatory “term-of-years” sentences), and *State v. Riley*, 110 A.3d 1205, 1217-18 (Conn. 2015) (applying *Miller* to discretionary sentence).

¹¹ See *Croft v. Williams*, 773 F.3d 170, 171 (7th Cir. 2014) (interpreting *Miller* inapplicable to discretionary LWOP sentence for homicidal juvenile); *Foster v. State*, 754 S.E.2d 33, 37 (Ga. 2014) (limiting *Miller*'s application to mandatory sentencing schemes only).

¹² See *Jefferson*, 816 F.3d at 1019 (pointing to advisory nature of federal sentencing guidelines); *McCollum*, 798 F.3d at 1321 (concluding discretion to issue life with parole sufficient to remove from *Miller*'s control).

facto LWOP sentences.¹³ This approach invokes a substantive interpretation of *Miller*, which requires that all juveniles facing the possibility of imprisonment for life are entitled to a consideration of their individual youthful characteristics.

The next subject of disagreement is what exactly *Miller* requires of sentencing authorities.¹⁴ The *Miller* Court invalidated sentencing schemes that precluded the sentencing authority from considering a number of factors, including a juvenile's background and upbringing, external influences he or she may have been subject to, and his or her potential for rehabilitation.¹⁵ The Ninth Circuit held sentencing schemes that *allow* a judge to consider these factors does satisfy *Miller*.¹⁶ Courts in Illinois and

¹³ See *Holman*, 91 N.E.3d at 861 (extending *Miller* to discretionary sentences and requiring consideration of *Miller* factors); *State v. Lyle*, 854 N.W.2d 378, 400-02 (Iowa 2014) (holding mitigating qualities of youth applicable to all juvenile sentencing); *Sen v. State*, 301 P.3d 106, 127 (Wyo. 2013) (indicating requirement of taking characteristics of youth into account for determination of parole eligibility).

¹⁴ See Perry L. Moriearty, *The Trilogy and Beyond*, 62 S.D. L. REV. 539, 551 (2017) (highlighting unanswered questions involving *Miller*'s procedural requirements).

¹⁵ See *Miller v. Alabama*, 567 U.S. 460, 477 (2012) (explaining flaws in mandatory sentencing schemes applied to juveniles).

¹⁶ See *Bell v. Uribe*, 748 F.3d 857, 869 (9th Cir. 2014).

Wyoming, however, have reversed sentences when the trial judge did not actually consider those factors.¹⁷

Further, the *Miller* Court announced that LWOP should be reserved for rare cases where the juvenile's crimes reflect permanent and irreversible corruption.¹⁸ In response to this language, some states require sentencing judges to make specific findings on the record as to whether the juvenile's crimes reflect youthful immaturity or irreconcilable depravity.¹⁹ For example, the Supreme Court of Missouri mandates individualized hearings and interprets *Miller* as creating a rebuttable presumption that a juvenile's crimes reflect youthful immaturity.²⁰ The Supreme Courts of Missouri and Pennsylvania have recognized this presumption and held that the state must prove beyond a

¹⁷ See *People v. Holman*, 91 N.E.3d 849, 861 (Ill. 2017) (concluding lower court must consider factors laid out in *Miller*); *Sen*, 301 P.3d at 122-24 (holding *Miller* requires individualized sentencing hearings and prescribing procedure for compliance).

¹⁸ See *Miller*, 567 U.S. at 479-80.

¹⁹ See *Sen v. State*, 301 P.3d 106, 127 (Wyo. 2013) (directing lower court to make specific findings on record regarding incorrigibility or rehabilitative potential).

²⁰ See *State v. Hart*, 404 S.W.3d 232, 241 (Mo. 2013) (reversing sentence due to lack of individualized considerations).

reasonable doubt that LWOP is appropriate and just in order to overcome it.²¹

Clearly, *Miller* has left a number of important questions unanswered. Does *Miller* apply to sentences from federal judges? Does a sentencing authority have to demonstrate consideration of the mitigating qualities of the youth? How should a sentencing authority decide if a crime committed by a seventeen-year-old is the result of youthful immaturity or indicative of permanent corruption? These issues must be addressed, and Malvo's challenge has placed them squarely before the Court.

²¹ *See id.* (placing burden on state to show LWOP appropriate beyond reasonable doubt); *see also* Commonwealth v. Batts, 163 A.3d 410, 415-16 (Pa. 2017) (recognizing requirement of overcoming presumption against LWOP and burden of proof beyond reasonable doubt).