

**COMMISSION ON JUVENILE SENTENCING
FOR HEINOUS CRIMES**

FINAL REPORT AND RECOMMENDATIONS

October 26, 2017

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I. EXECUTIVE SUMMARY

The Commission on Juvenile Sentencing for Heinous Crimes, chaired by the Honorable Kathleen Gearin and John Kingrey, is an independent citizens group composed of individuals from diverse backgrounds in law, politics, public safety, and academics. The Commission was established in December 2016 by Robin Wolpert, President of the Minnesota State Bar Association, in response to a 2012 U.S. Supreme Court decision, *Miller v. Alabama*, which invalidated mandatory sentences of life without the possibility of release for juvenile homicide offenders. Based on this decision, and the 2016 decision *Montgomery v. Louisiana*, key portions of Minnesota's Heinous Crimes Act (Minn. Stat. § 609.106) are unconstitutional as applied to juveniles.

In order to bring the Heinous Crimes Act into conformity with the United States Constitution, the Legislature has two options. The Legislature could (1) amend the Heinous Crimes Act to specify the factors that should be used to sentence juveniles who are convicted of crimes under the Heinous Crimes Act or (2) eliminate the sentence of life without the possibility of release for juvenile who are convicted of crimes under the Heinous Crimes Act and establish a sentence of life in prison with the eligibility for parole after a specific term of years. The Commission was charged with making recommendations to the Legislature regarding the factors that should be used to sentence juveniles who

are convicted of crimes under the Heinous Crimes Act, should the Legislature choose to retain the option of sentencing a juvenile to a life without the possibility of release. Because the Commission's mandate was limited to identifying the sentencing factors should the Legislature retain the sentence of life without the possibility of release, the Commission makes no recommendation on which option the Legislature should adopt. Accordingly, this Report should not be interpreted as endorsing either option.

The Commission considered and evaluated the Heinous Crimes Act based on the requirements of *Miller* and *Montgomery*. In *Miller*, the Supreme Court held that the 8th Amendment's prohibition of cruel and unusual punishment forbids a sentencing scheme that mandates life in prison without the possibility of release for juvenile homicide offenders. In *Montgomery*, the Supreme Court held that *Miller's* prohibition of mandatory life without parole sentences for juvenile offenders is retroactive in cases on state collateral (post-conviction) review. Under both *Miller* and *Montgomery*, sentencing a juvenile to life without parole is excessive under the 8th Amendment for all but the rare juvenile offender whose crime reflects "irreparable corruption." Nevertheless, the Court did not ban life sentences without the possibility of release. Instead, the Court required that a sentence follow a certain process and consider an offender's youth and attendant characteristics and circumstances before imposing a particular penalty.

The Minnesota Heinous Crimes Act, Minn. Stat. § 609.106, provides that those who commit certain crimes, including first-degree premeditated murder, *shall* be sentenced to life without the possibility of release. On its face, the statute is unconstitutional as applied to juveniles. Since 2012, efforts to revise this statute and bring it into conformity with *Miller* have been unsuccessful. Minnesota is one of nine states that have not acted in the wake of *Miller* to bring its sentencing statute into compliance with U.S. Supreme Court requirements.

A core function of the Legislature is to fix the punishments for criminal acts. As a policy-making institution, the Legislature has the power to fashion state-wide sentencing policy and leverage the knowledge and expertise of key stakeholders in the criminal justice system. In the absence of legislative action, the courts have been working to fashion sentencing procedures that comply with *Miller* on a case-by-case basis.

The Commission recommends that Legislature bring the Heinous Crimes Act into compliance with U.S. Supreme Court requirements by (1) amending the Heinous Crimes Act to specify the factors that should be used to sentence juveniles who are convicted of crimes under the Heinous Crimes Act or (2) eliminating the sentence of life without the possibility of release for juveniles who are convicted of crimes under the Heinous Crimes Act and establishing a sentence of life in prison with the eligibility for parole after a specific term of

years. If the Legislature chooses to maintain the sentence of life without the possibility of release for juveniles, the Commission recommends that the Heinous Crimes Act be amended to provide for consideration of the factors identified by the U.S. Supreme Court in *Miller* and *Montgomery*. More specifically, the Commission recommends that the Act be amended to provide that in determining whether a defendant should receive the sentence of life without the possibility of release, a court shall consider (1) the nature and circumstances of the offense, including any mitigating and/or aggravating facts; (2) the defendant's age and intellectual capacity at the time of the offense; (3) the extent of the defendant's participation in the offense; (4) the effect, if any, of familial pressure or peer pressure on the defendant's actions at the time of the offense; (5) the defendant's immaturity, impetuosity, or failure to appreciate risks and consequences at the time of the offense; (6) the defendant's mental, emotional, and psychological health; (7) the defendant's background, including his or her family, home, and community environment; (8) the nature and extent of the defendant's prior delinquent and/or criminal history, and the defendant's prior history of delinquency programming and treatment; and (9) any other circumstances relevant to the determination of irreparable corruption or transient immaturity. To assist in this determination, the Commission recommends that prior to sentencing, a court must order a psychological evaluation or a

psychiatric evaluation. The evaluation should be conducted by a licensed professional with expertise in forensic evaluations of juveniles.

If the Legislature chooses to eliminate life without the possibility of release for juveniles convicted of crimes under the Heinous Crimes Act, and establish a sentence of life in prison with the eligibility for parole after a specific term of years, the sentencing factors identified above are also relevant for the release decision after the defendant has served the minimum term of imprisonment.

The Commission's recommendations are fully detailed in Section V of this Report.

II. The Commission

The members of the Commission include judges, members of the Legislature, prosecutors, criminal defense attorneys, and experts in community corrections, neuroscience, child psychology, and the rehabilitation and reintegration of juvenile offenders into society. The biographies of the Commission's members can be found in Appendix A of this Report.

III. Meetings of the Commission

The Commission held six meetings between January and June, 2017. The duration of each meeting was approximately 2 ½ hours. At each meeting, experts and key criminal justice system stakeholders made presentations to the Commission. The information provided by these experts informed the

Commission's deliberations, and established the foundation for the recommendations in this report. A brief summary of the presentations is set forth below. Additional information is attached in the appendices.

On January 9, 2017, **Leslie J. Rosenberg** of the Office of the Appellate Public Defender presented **The US Supreme Court's Juvenile Justice Jurisprudence**. Her presentation offered a timeline of key developments in the field of juvenile justice and an in-depth discussion of *Roper v. Simmons*, *Graham v. Florida*, *J.D.B. v. North Carolina*, *Miller v. Alabama*, and *Montgomery v. Louisiana*. This talk explained that the U.S. Supreme Court views juvenile defendants as distinct from adults and that children should be held accountable in age appropriate ways. The materials provided to the Commission by Ms. Rosenberg are contained in Appendix B.

Also at the January 9, 2017 meeting, **Professor Perry Moriearty** from the University of Minnesota Law School and **Jean Burdorf** of the Hennepin County Attorney's Office presented **Post-Conviction Updates and Minnesota Case Law**. They detailed the status of the eight Minnesota offenders who were sentenced to life without parole as juveniles and who must now be resentenced in accordance with *Miller*. Both presenters discussed the specific facts of each case and how variations in the circumstances resulted in different resentencing outcomes. These presentations highlighted the particularly challenging issue of sentencing

in cases involving multiple victims. The materials provided to the Commission by Professor Moriearty and Ms. Burdorf are contained in Appendix C.

On February 6, 2017, **Tom Arneson** of the Hennepin County Attorney's Office presented on the **Current Process to Try Juveniles as Adults in Minnesota**. His presentation detailed the means by which some juvenile offenders ages 14 and older may be certified and tried as adults in Minnesota courts or designated as extended jurisdiction juveniles (EJJ), resulting in a juvenile sentence with a stayed adult sentence that can be invoked if necessary. Mr. Arneson reviewed the differences between extended juvenile jurisdiction and adult certification and explained the public safety factors that are relevant to the court's decision, such as the seriousness of the offense, prior delinquency record and programming history, and the adequacy of punishment or programming in juvenile court. The materials provided to the Commission by Mr. Arneson are provided in Appendix D.

Also at the February 6, 2017, meeting, **Shelley McBride** presented on **Juvenile Community Corrections**. Her presentation focused on the juvenile supervision system and the role of juvenile probation officers in Minnesota. She explained that, unlike the adult system, the juvenile justice system is required to focus on rehabilitation. Thus, the goals of a juvenile probation officer are to promote public safety, teach the juvenile new skills to repair harm caused by the

juvenile's upbringing or trauma, and repair harm to the victim. When the process is commenced to certify a juvenile to adult court, the juvenile probation officers conduct an in-depth and comprehensive adult certification study. Ms. McBride detailed the certification study process and the elements that go into a completed study. The level of detail and length of the study is designed to acquaint the court with each individual defendant and provide the court with the necessary information to weigh and evaluate the public safety factors required to be considered by the court. Commission members observed that the information that must be gathered for the certification study in some ways parallels the type of information that would need to be gathered to assess the factors the U.S. Supreme Court requires to be considered under *Miller* when the court is deciding whether to impose a sentence of life without release upon an offender who was a juvenile at the time of the offense. The materials provided to the Commission by Ms. McBride are contained in Appendix E.

On February 27, 2017, **Professor Francis Shen** presented on **Neuroscience and Juvenile Sentencing**. He discussed the intricacies and difficulties of using neuroscience to reach legal conclusions about juvenile offenders. There is a general scientific consensus that juvenile brains are different than adult brains; different brain circuits develop at different times, with some continuing to develop into a juvenile's early 20s, and these differences affect impulse control

and executive function. There is less consensus in the field about whether and how this scientific knowledge regarding adolescent brain development can or should be used in the legal system. Although neuroscience has made advancements in understanding the differences between juveniles and adult brains on an aggregate level, this generalized information cannot be used to provide meaningful information about particular *individuals*. For example, even if scientific knowledge indicates that juveniles as a group are more likely to exhibit poor impulse control, we cannot also conclude that a particular juvenile offender who committed a particular crime did so because the neural pathways that regulate impulse control were not yet fully developed. Thus, some insights from neuroscience may be useful in making generalized legal arguments, but courts that consider neuroscientific evidence should do so with appropriate caution. The materials provided to the Commission by Professor Shen are contained in Appendix F.

Also at the February 27, 2017, meeting, **Kelly Mitchell**, Executive Director of the Robina Institute of Criminal Law and Criminal Justice presented her **National Survey of Juvenile LWOP Statutes**. This survey examined what other states with similar sentencing issues are doing to comply with *Miller* and other recent court decisions. The map provided at Appendix G details the responses of the 50 states to *Miller*; the map does not incorporate additional changes that have

occurred since February 2017. Some states have created statutes that duplicate the factors used in *Miller* (see factors listed in section V below); others have added more factors. *See also* Appendix G, Incorporation of *Miller* Factors Into Statutes. Case law is beginning to emerge in some states about what these factors mean in practice. Some states, rather than attempting to determine the rehabilitative potential of juveniles at the time of sentencing, have instead taken the approach of creating opportunities for meaningful consideration of parole release after juveniles have served a set minimum term of incarceration. Other states have responded to *Miller* by eliminating the possibility of life without the possibility of release for juveniles altogether and implementing a lengthy term of years sentence, with the opportunity for parole after serving a set minimum term. Among the states that had mandatory life without parole provisions that would have applied to juveniles prior to the U.S. Supreme Court rulings, very few have not acted to remedy their statutory law. At the time this presentation was made to the Commission, only eleven states had not acted to remedy their unconstitutional laws; today, Minnesota is just one of nine states that have not yet acted. The materials provided to the Commission by Executive Director Mitchell are contained in Appendix G.

Finally, at the April 3, 2017, meeting, **Dr. Dawn Peuschold** presented on **Current Neuropsychological Criteria for Juvenile Homicide Offenders in**

Minnesota. Dr. Peuschold discussed the role that psychologists play in the certification study. There are six factors that implicate public safety and determine the fate of adult certification. Mental health professionals play a role in evaluating some of these factors, particularly the defendant's culpability, programmatic history and ability to benefit from further interventions, and level of risk for re-offense. Risk of re-offense may include an evaluation of early episodes of violence and of the offender's trauma or abuse history. Psychologists must also gain insight into the familial and social context, and into individual personality issues or cognitive deficits. In reviewing the information that informs the public safety factors for the certification decision, psychologists attempt to identify those factors that treatment can impact or change versus those factors that are innate to the juvenile. Dr. Peuschold explained that there is a great deal of overlap between the public safety factors considered for certification purpose and the factors identified by the Supreme Court in *Miller*. The materials provided to the Commission by Dr. Peuschold are contained in Appendix H.

IV. Juvenile Justice Case Law Developments at the U.S. Supreme Court

The United States Supreme Court, drawing on brain and behavioral development research, has ruled three times within the last decade that children are constitutionally different from adults and, in certain cases, should not be

subject to the same punishments as adults. For additional details regarding this case law, please see the materials in Appendix B.

In *Roper v. Simmons* (2005) the Court struck down the death penalty for children, finding it to be a violation of the Eighth Amendment's prohibition on cruel and unusual punishment. In that opinion, the Court emphasized brain and behavioral development science showing that children are fundamentally different than adults in their development and that they have a unique capacity to grow and change as they mature. This case is contained in Appendix I.

In *Graham v. Florida*, the Supreme Court determined that life sentences without the possibility of release are unconstitutional as applied to juveniles convicted of non-homicide offenses. The Court held that these juveniles must be given a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." This case is contained in Appendix J.

In *Miller v. Alabama* (2012), the Court determined that mandatory sentences of life without release were also unconstitutional as applied to juvenile homicide offenders. The Court did not foreclose the possibility that life without parole might be appropriate in some instances, instead holding that a judge or jury must have the opportunity to consider mitigating circumstances" before imposing such a sentence. The Court identified ten factors relevant to the decision to sentence a juvenile to life without parole: age, immaturity or

impetuosity, failure to appreciate risks and consequences, family and home environment, circumstances of the offense, extent of participation in the offense, familial or peer pressures, inability to deal with police officers or prosecutors, incapacity to assist in the defense, and possibility of rehabilitation. This case is contained in Appendix K.

In 2016, the Supreme Court determined in *Montgomery v. Louisiana* that the holding in *Miller* is retroactive in cases on state collateral (post-conviction) review. This case is contained in Appendix L.

V. Commission Proposal

The Commission recommends that Legislature bring the Heinous Crimes Act into compliance with U.S. Supreme Court requirements by (1) amending the Heinous Crimes Act to specify the factors that should be used to sentence juveniles who are convicted of crimes under the Heinous Crimes Act or (2) eliminating the sentence of life without the possibility of release for juveniles who are convicted of crimes under the Heinous Crimes Act and establishing a sentence of life in prison with the eligibility for parole after a specific term of years. The Commission takes no position on whether the Legislature should retain the option of life without the possibility of release. If the Legislature chooses to retain the sentence of life without the possibility of release for juveniles convicted under the Heinous Crimes Act, it must be determined

whether the juvenile is one of the rare offenders whose crime reflects irreparable corruption or permanent incorrigibility, or whether the juvenile is one whose crime reflects transient immaturity. In making this determination, the following factors must be considered:

- (a) The nature and circumstances of the offense committed by the defendant, including any mitigating and/or aggravating facts.
- (b) The defendant's age and intellectual capacity at the time of the offense.
- (c) The extent of the defendant's participation in the offense.
- (d) The effect, if any, of familial pressure or peer pressure on the defendant's actions at the time of the offense.
- (e) The defendant's immaturity, impetuosity, or failure to appreciate risks and consequences at the time of the offense.
- (f) The defendant's mental, emotional, and psychological health.
- (g) The defendant's background, including his or her family, home, and community environment.
- (h) The nature and extent of the defendant's prior delinquent and/or criminal history, and the defendant's prior history of delinquency programming and treatment.
- (i) Any other circumstances relevant to the determination of irreparable corruption or transient immaturity.

The Legislature should also require the sentencing judge to order a psychological evaluation or a psychiatric evaluation by a licensed professional with expertise in forensic evaluations of juveniles.¹

¹ It should be noted that the possible implications of adding these factors under *Blakely v. Washington*, 542 U.S. 296 (2004), was not discussed by the Commission so any legislation may need to be drafted to accommodate *Blakely* issues.

VI. Additional Recommendations

If the Legislature chooses to eliminate life without the possibility of release for juveniles convicted of crimes under the Heinous Crimes Act, and establish a sentence of a life in prison with the eligibility for parole after a specific term of years, the sentencing factors identified above are also relevant for the parole decision after the defendant has served the minimum term of imprisonment.

In the course of its work, the Commission identified a second Minnesota statute, Minn. Stat. § 609.3455, subd. 2, which is unconstitutional as applied to juveniles. In *Graham v. Florida*, 130 S. Ct. 2011 (2010), the Supreme Court determined that life sentences without the possibility of release are unconstitutional as applied to juveniles convicted of *non-homicide offenses*. Minn. Stat. § 609.3455, subd. 2 provides that those conviction of certain egregious first-time and repeat sex offenses *shall* be sentenced to life without release under certain circumstances. Because this statute governs sentencing for non-homicide offenses, a sentence of life without release is unconstitutional under *Graham*. To bring this statute into conformity, the statute must be amended to provide for a sentence other than life without release for offenders who were juveniles at the time of the offense. The Commission did not develop a specific recommendation as to what an appropriate sentence might be because the statute falls outside of the Commission's mandate and because the decision as to sentence length is

within the purview of the Legislature. Moreover, few juveniles would ever be subject to sentencing under this statute. Nevertheless, the Commission believes that it is necessary to amend Minn. Stat. § 609.3455, subd. 2, to bring it into conformity with constitutional requirements because the statute could be applied to an offender who was a juvenile at the time of the offense.