

the CAMPAIGN *for the* FAIR
SENTENCING *of* YOUTH 

July 27, 2015

Chief Judge Patti B. Saris
Chair, United States Sentencing Commission
Office of Public Affairs
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC, 20002-8002

CC: Judge Charles R. Breyer, Ms. Dabney Friedrich, Ms. Rachel Barkow, Judge William H. Pryor, Jr., Mr. Jonathan J. Wroblewski

RE: Amending the U.S. Sentencing Guidelines to Reflect Recent Supreme Court Case Law and Adolescent Brain and Behavioral Science

Dear Chair Saris and Commissioners,

Thank you very much for the opportunity to provide public comment on possible priority issues for the United States Sentencing Commission to consider in its next amendment cycle. The Campaign for the Fair Sentencing of Youth would like to request that the U.S. Sentencing Commission prioritize updating the Sentencing Guidelines as they pertain to youth during this amendment cycle. This update is directly related to the Commission's stated priority 2, specifically the sub-priority to study approaches "to account for the defendant's role, culpability, and relevant conduct."¹ The current U.S. Sentencing Guidelines have not yet been revised to account for recent advancements in our understanding of adolescent brain and behavioral development, as well as recently-decided cases before the U.S. Supreme Court. In some cases, where youth face life sentences in the federal system, application of the U.S. Sentencing Guidelines is now unconstitutional.

Children under eighteen can be transferred for criminal prosecution in the federal system for a range of crimes, including drug offenses, firearms possession, and violent crimes.² Between 1999 and 2008, 1,335 youth were committed as adults to the Federal

¹ United States Sentencing Commission, Proposed Priorities for Amendment Cycle, BAC 2210-40.

² 18 U.S.C. § 5032.

Bureau of Prisons for crimes they committed while under age 18.³ As of this writing, 27 inmates in the federal system are *currently* under age eighteen.⁴ A significant number of children are adjudicated as adults in the federal system and are sentenced under provisions that are devoid of reference to critical youth-related mitigating factors.

The U.S. Supreme Court has repeatedly concluded children are constitutionally different than adults in criminal sentencing

Throughout the last decade, the United States Supreme Court has repeatedly concluded that children are constitutionally different than adults for the purpose of criminal sentencing. In *Roper v. Simmons* (2005), the Court struck down the death penalty for children, finding that it violated the 8th Amendment's prohibition against cruel and unusual punishment.⁵ The Court emphasized empirical research demonstrating that children are developmentally different than adults and have a unique capacity to grow and change as they mature.⁶ In *Graham v. Florida* (2010), the Court struck down life-without-parole sentences for non-homicide offenses, holding that states must give children a "realistic opportunity to obtain release."⁷

Most recently, in *Miller v. Alabama* (2012), the Court struck down mandatory life without parole sentences for youth convicted of homicide offenses and ruled that sentencing courts must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison" any time a child faces a potential life-without-parole sentence.⁸ *Miller* also requires that if a child is facing a sentence of life in prison, sentencing judges must consider certain factors related to the child's age and his or her prospects for reform. Some of these factors include, but are not limited to, age at the time of the offense, impetuosity, family and community environment, ability to appreciate the risks and consequences of their conduct, intellectual capacity, peer or familial pressure, involvement in the child welfare system, traumatic history, level of participation in the offense, capacity for rehabilitation, and any other mitigating factor or circumstance.⁹ The Court said that once these factors are considered, the use of life sentences upon children should be "uncommon."¹⁰ In the upcoming term, in *Montgomery v. Louisiana*, the Court will address the retroactive application of *Miller* to individuals currently serving life-without-parole sentences.¹¹

³ Juvenile Offenders and Victims: 2014 National Report, National Center for Juvenile Justice and Office of Juvenile Justice and Delinquency Prevention, at 110. Available at <http://www.ojjdp.gov/ojstatbb/nr2014/downloads/NR2014.pdf>.

⁴ Federal Bureau of Prison Statistics, Age, available at http://www.bop.gov/about/statistics/statistics_inmate_age.jsp. Last viewed 22 July 2015.

⁵ *Roper v. Simmons*, 543 U.S. 551 (2005).

⁶ *Id.*

⁷ *Graham v. Florida*, 130 S. Ct. 2011 (2010).

⁸ *Miller v. Alabama*, 132 S.Ct. 2455 (2012).

⁹ *Id.* at 2468.

¹⁰ *Id.* at 2469.

¹¹ Grant of Certiorari, *Montgomery v. Louisiana*, (2015) (No. 14-280).

Advances in adolescent developmental research demonstrate an empirical basis for treating youth differently than adults

The current Guidelines have not yet been revised to account for consistent scientific advancements in adolescent brain and behavioral development. As many parents and educators could verify from personal experience, the adolescent brain is not fully mature even at age 18.¹² Empirical studies have repeatedly shown that youth's brains are not fully developed, making it difficult for them to consider the long-term impact of their actions, control their emotions and impulses, and evaluate risks and reward in the same way as adults.¹³ Additionally, youth as a whole are more vulnerable, more susceptible to peer pressure, and more heavily influenced by their surrounding environments, which they rarely can control.¹⁴ Due to the plasticity of their developing brains, however, children also possess a unique capacity for change and rehabilitation.¹⁵

The Sentencing Guidelines are unconstitutional under Graham and Miller and ignore scientific understanding about adolescent development

The U.S. Sentencing Guidelines should be updated to comply with *Graham*, *Miller*, and modern scientific understanding of adolescent development. For individuals convicted of first degree murder, the only recommended sentence in the Guidelines is life, which in the federal system means life without any opportunity of release.¹⁶ Additionally, through stacking of charges, it is possible for a youth to receive a *de facto* life sentence for a non-homicide offense. Although not binding, the Guidelines fail to comply with *Miller* and *Graham* because they mandate life sentences for youth in the absence of judicial discretion and fail to provide a meaningful opportunity for release. The use of the U.S. Sentencing Guidelines in any resentencing or prospective sentencing of any individual who faces a life or *de facto* life sentence for a crime they committed as a child would be unconstitutional as a result of *Graham* and *Miller*. Under the federal sentencing laws, there is no provision for parole; thus any sentence for a homicide offense(s) that imposes life or its equivalent on a youth is suspect under *Miller*. Any sentence that imposes life or its equivalent on a youth for non-homicide offense(s) is unconstitutional under *Graham*.

Additionally, the Guidelines consider youth to be an optional consideration only in unique circumstances, stating “[a]ge (including youth) may be relevant in determining whether a departure is warranted, if considerations based on age, individually or in

¹² Laurence Steinberg, Adolescent Development and Juvenile Justice, 5 ANN. REV. CLINICAL PSYCHOL. 459 (2009).

¹³ *Id.*; Laurence Steinberg, A Social Neuroscience Perspective on Adolescent Risk-Taking, 28 DEVELOPMENTAL REV. 78 (2008).

¹⁴ Laurence Steinberg, Adolescent Development and Juvenile Justice, 5 ANN. REV. CLINICAL PSYCHOL. 459 (2009); Dustin Albert & Laurence Steinberg, Peer Influences on Adolescent Risk Behavior, in INHIBITORY CONTROL AND DRUG ABUSE PREVENTION: FROM RESEARCH TO TRANSLATION (Michael Bardo et al. eds., 2011).

¹⁵ Jay N. Giedd, The Teen Brain: Insights from Neuroimaging, 42 J. OF ADOLESCENT HEALTH 335 (2008); Mark Lipsey et al., Effective Intervention for Serious Juvenile Offenders, JUV. JUST. BULL. 4-6 (2000).

¹⁶ U.S. Sentencing Commission Guidelines Manual §2A1.1, Commentary, Application Notes 2(A).

combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines.”¹⁷ By making considerations of youth an exception rather than the rule, the Guidelines ignore the key premise of *Miller*, which requires consideration of age. Rather than evaluating youth-related features as mitigating factors, the Guidelines explicitly state “Lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing are not relevant grounds in determining whether a departure is warranted,”¹⁸ a statement that is antithetical to the core holding of *Miller*. The Commission should update the Guidelines to ensure that federal judges who sentence youth explicitly consider youth-related mitigating factors in full compliance with recent U.S. Supreme Court jurisprudence and current adolescent brain development.

The U.S. Sentencing Commission should make youth sentencing a priority

Although the Sentencing Guidelines are not mandatory for federal judges, they are persuasive instruction to judges responsible for sentencing in the federal criminal justice system and also influence the decisions of prosecutors. The Sentencing Guidelines were created for use with adults and their application to children under eighteen fails to recognize the evolving science and law finding that children are developmentally and constitutionally different from adults.

The Campaign for the Fair Sentencing of Youth believes it is critical for the U.S. Sentencing Commission to address the role of the Sentencing Guidelines in circumstances where youth are convicted of crimes as adults. Both judges and prosecutors utilize the Sentencing Guidelines in making decisions that have long-term implications for both defendants and the community. Judges, prosecutors, and youthful defendants would all benefit from guidance as to how judges should properly consider age-related mitigating factors at the time of sentencing. Therefore, the Campaign for the Fair Sentencing of Youth respectfully request that the Commission revise the Sentencing Guidelines to account for the ways in which youth differ from adults and the means by which judges should consider these differences at sentencing. Alternatively, the Commission should explicitly preclude application of the Sentencing Guidelines to individuals who committed offenses while under age eighteen.

Sincerely,

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Director and National Coordinator

¹⁷ U.S. Sentencing Commission Guidelines Manual §5H1.1.

¹⁸ U.S. Sentencing Commission Guidelines Manual §5H1.12.