

Trial court was not precluded from imposing a discretionary sentence of life without parole for juvenile defendant convicted of a homicide offense. [Arredondo v. State](13-3-7)

On June 26, 2013, the San Antonio Court of Appeals held that juvenile defendant's discretionary sentence of life without parole following conviction for capital murder did not violate statute prohibiting a mandatory sentence of life without parole for a juvenile offender convicted of a capital felony.

¶ 13-3-7. **Arredondo v. State**, No 04-12-00278-CR, --- S.W.3d ----, 2013 WL 3198439 (Tex.App.-San Antonio, 6/26/13).

**Facts:** The jury convicted appellant, a juvenile offender, of one count of capital murder, one count of aggravated kidnapping, and two counts of aggravated sexual assault. The trial court imposed a life sentence on each of the four counts, with the life sentences on the two counts of aggravated sexual assault to run consecutively and the remaining sentences to run concurrently. In his second issue, appellant contends the two consecutive life sentences on the counts of aggravated sexual assault amount to a de facto sentence of life without parole for non-homicide offenses and, because of his juvenile offender status, the sentence violates the prohibition against cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution as the Supreme Court has dictated in *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010). We express no opinion on whether appellant's sentence amounts to a de facto sentence of life without parole; however, for the purpose of addressing the merits of his argument, we predicate our analysis on the assumption that it does.

**Held:** Affirmed

**Opinion:** In *Graham*, the juvenile defendant pled guilty to armed burglary and attempted armed robbery, for which he was placed on deferred adjudication probation pursuant to a plea bargain. *Id.* at 2018. When he violated his probation, the trial court found him guilty of the offenses and sentenced him to life without parole FN1 for the armed burglary and fifteen years' imprisonment for the attempted armed robbery, both nonhomicide offenses. *Id.* at 2020. The Court held the Eighth Amendment forbids a State from imposing a sentence of life without parole on a juvenile offender who does not commit homicide. *Id.* at 2030. However, in clarifying its ruling, the Court noted:

Juvenile offenders who committed both homicide and nonhomicide crimes present a different situation for a sentencing judge than juvenile offenders who committed no homicide. It is difficult to say that a defendant who receives a life sentence on a nonhomicide offense but who was at the same time convicted of homicide is not in some sense being punished in part for the homicide when the judge makes the sentencing determination. The instant case concerns only those juvenile offenders sentenced to life without parole solely for a non-homicide offense. *Id.* at 2023.

The Supreme Court made clear that its holding only concerned cases where juvenile offenders are sentenced to life without parole solely for nonhomicide offenses. Here, appellant was found guilty of both homicide and nonhomicide offenses.

In the more recent opinion of *Miller v. Alabama*, — U.S. —, —, 132 S.Ct. 2455, 2464, 183 L.Ed.2d 407 (2012), the Supreme Court held mandatory sentences of life without parole for juveniles violate the Eighth Amendment. In *Miller*, two separate juvenile defendants were found guilty of murder—one of murder in the course of arson and the other of capital murder. *Id.* at 2461. Both sentencing schemes provided a mandatory sentence of either death or life without parole when convicted of either of those offenses. Because the Supreme Court had previously invalidated the death penalty for juvenile offenders, the trial court had only one possible option in sentencing upon conviction—life without parole. *Id.*; see *Roper v. Simmons*, 543 U.S. 551, 575, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (holding the death penalty cannot be imposed upon juvenile offenders). A sentence of life without parole was the required, mandatory sentence for a juvenile offender convicted under the statute and was automatically imposed upon conviction, with no exercise of discretion as to whether such a sentence was appropriate. The *Miller* Court held such a sentencing scheme providing for a required, mandatory sentence of life without parole for juvenile offenders violated the Constitution, and precluded a sentencer from taking into account an offender's age, life circumstances, and the circumstances of the homicide offense. *Miller*, 132 S.Ct. at 2464, 2467–68. However, the Court did not hold that discretionary life without parole sentences violate the Eighth Amendment. See *id.* at 2469 (“[A] sentencer needed to examine all these circumstances before concluding that life without any possibility of parole was the appropriate penalty.”). Instead, in regards to life-without-parole sentences for juvenile offenders, the *Miller* Court stated, “[a]lthough we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” *Id.*

In sum, *Graham* prevented the imposition of life without parole for juvenile offenders convicted of nonhomicide offenses. *Miller* prevented the mandatory imposition of life without parole for juvenile offenders, but specifically allowed a discretionary sentence of life without parole when the circumstances justify it. Therefore, even assuming for purposes of argument that two consecutive life sentences amount to a sentence of “life without parole,” we conclude nothing prevents such a discretionary sentence when, as here, appellant has been found guilty of both a homicide offense and nonhomicide offenses in a particularly heinous crime.

Appellant also asserts the imposition of two consecutive life sentences contravenes the intent of the Texas Legislature in amending Texas Penal Code section 12.31(a)(1) to provide for a sentence of life imprisonment for juvenile offenders, rather than life without parole.

Texas Penal Code section 12.31 provides the sentencing scheme for offenders convicted of a capital felony. See TEX. PENAL CODE ANN. § 12.31(a) (West 2011). Prior to September 1, 2009, section 12.31(a) provided for only two sentencing options when an individual was found

guilty of a capital felony—death or life without parole. Act of Sept. 1, 2005, 79th Leg., R.S., ch. 787, § 1, sec. 12.31, 2005 Tex. Gen. Laws 2705, 2705. The section was amended by the Legislature and now provides for a sentence of death, life without parole, or, when the convicted offender is a juvenile transferred to district court from juvenile court under Family Code section 54.02, life.FN2TEX. PENAL CODE § 12.31(a) (West 2011). The current statute reads as follows:

An individual adjudged guilty of a capital felony in a case in which the state does not seek the death penalty shall be punished by imprisonment in the Texas Department of Criminal Justice for: (1) life, if the individual's case was transferred to the court under Section 54.02, Family Code, or (2) life without parole. *Id.* (emphasis added).

Appellant argues that because the Legislature amended Penal Code section 12.31(a) to prohibit a sentence of life without parole for juvenile offenders convicted of capital murder, then it would follow that the Legislature also intended to prohibit a sentence of life without parole for “less serious offenses,” such as aggravated sexual assault. Again, assuming appellant's sentence amounts to life without parole, we disagree with appellant's argument.

Aggravated sexual assault is a first degree felony, and, as dictated by Penal Code section 12.32(a), carries a sentence of “life or for any term of not more than 99 years or less than 5 years.”TEX. PENAL CODE § 12.32 (first degree felony punishment); seeTEX. PENAL CODE § 22.021(e) (aggravated sexual assault is a first degree felony). The sentencer has discretion to sentence between the range provided.

The Miller holding clearly tells us that a mandatory sentence of life without parole for juveniles is unconstitutional because it is a violation of the Eighth Amendment to automatically sentence a juvenile to life without parole without first considering “how children are different” and how those differences may weigh against the imposition of such a harsh sentence. See Miller, 132 S.Ct. at 2468–69. This same principle is reflected in the Legislature's amendment of section 12.31, which, three years prior to the Miller decision, was amended to prohibit a mandatory sentence of life without parole for a juvenile offender convicted of a capital felony. However, neither the holding in Miller nor the legislative amendment to section 12.31 concerned discretionary sentences.

“[C]ourts must apply penal statutes exactly as they read.” *Coit v. State*, 808 S.W.2d 473, 475 (Tex.Crim.App.1991). We decline to extend the Legislature's amendment of section 12.31(a) so far as to imply the Legislature intended to never allow a trial court the discretion to impose a sentence of life without parole for a juvenile convicted of both homicide and non-homicide offenses. See *id.*(quoting *Ex parte Davis*, 412 S.W.2d 46, 52 (Tex.Crim.App.1967)) (“Where the statute is clear and unambiguous the Legislature must be understood to mean what it has expressed, and it is not for the courts to add or subtract from such a statute.”). Based on the foregoing, we conclude appellant's sentence does not violate his constitutional rights.

**Conclusion:** We overrule both of appellant's issues on appeal. The trial court's judgment is affirmed.