

The Legacy of *Roper, Graham and Miller*

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“Children who commit
even heinous crimes are
capable of change.”

-Justice Anthony m. Kennedy, *Montgomery v. Louisiana* (2016)



Juvenile Lifers

The Sentencing Project: Lives of Juvenile Lifers:

- 79% witnessed violence in their homes
- 47% were physically abused
- Fewer than half were attending school at the time of their offense

The Supreme Court's Take on Juveniles

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

- Banned the death penalty for juveniles (under 18)

Graham v. Florida, 560 U.S. 825 (2010)

- Banned life without parole for nonhomicides for juveniles (under 18)

J.D.B. v. North Carolina, 664 U.S. ___, 131 S.Ct. 2394 (2011)

- Holding that a child's apparent age properly informs the Miranda custody analysis

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

- Banned mandatory life without parole for juveniles (under 18)

Montgomery v. Louisiana, 136 S. Ct. 718, 734 (2016)

- Holds *Miller v. Alabama* is retroactive

Distinguishing Between Adults and Juveniles

"First, children have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking." *Miller*, 132 S. Ct. at 2464 (internal citations, quotation marks, and brackets omitted); accord *Graham*, 560 U.S. at 67; *Roper*, 543 U.S. at 569.

Distinguishing Between Adults and Juveniles

Second, the Supreme Court recognized that youth are distinct from adults in constitutionally relevant ways because of their susceptibility to outside pressures (see *Miller*, *Accord Graham* and *Roper*).

Distinguishing Between Adults and Juveniles

Finally, the Supreme Court has recognized that children are different from adults because adolescence is a transitional phase. "[A] child's character is not as 'well formed' as an adult's; his traits are 'less fixed' and his actions less likely to be 'evidence of irretrievabl[e] deprav[ity]'" Miller, 132 S. Ct. at 2464 (quoting Roper, 545 U.S. at 570).

Roper v. Simmons

The susceptibility of juveniles to immature and irresponsible behavior means **"their irresponsible conduct is not as morally reprehensible as that of an adult."** Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. The reality that juveniles still struggle to define their identity means it is **less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character."**

Roper v. Simmons

From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed. Indeed, **"[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuosity and recklessness that may dominate in younger years can subside."**

Graham v. Florida
560 U.S. 825 (2010)

Standard theories of punishment do not apply when juveniles

Retribution is a legitimate reason to punish, but it cannot support the sentence at issue here. Society is entitled to impose severe sanctions on a juvenile nonhomicide offender to express its condemnation of the crime and to seek restoration of the moral imbalance caused by the offense. But "[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender."

Graham v. Florida

Deterrence does not suffice to justify the sentence either. *Roper* noted that "the same characteristics that render juveniles less culpable than adults suggest ... that juveniles will be less susceptible to deterrence." Because juveniles' "lack of maturity and underdeveloped sense of responsibility ... often result in impetuous and ill-considered actions and decisions," they are less likely to take a possible punishment into consideration when making decisions.

Graham v. Florida

Incapacitation, a third legitimate reason for imprisonment, does not justify the life without parole sentence in question here.

To justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible. The characteristics of juveniles make that judgment questionable.

Miller v. Alabama
132 S.Ct. 2455 (2012)

Mandatory LWOP precludes/prevents/ignores:

- Chronological age and its hallmark features
- Family and home environment, no matter how brutal and dysfunctional
- Circumstances of the offense, including the extent of participation, negative influence of others
- Incompetencies affecting the ability to deal with cops, prosecutors and defense attorneys

Miller v. Alabama

"We think appropriate sanctions for sentencing juveniles to this harshest of possible penalty will be **uncommon.**"

Difficulty, noted in Roper and Graham, of distinguishing between "unfortunate yet transient immaturity" and the "**rare juvenile offender whose crime reflects irreparable corruption.**"

Montgomery v. Louisiana
136 S. Ct. 718, 734 (2016)

Miller v. Alabama is retroactive, but it rendered life without parole an unconstitutional penalty for "a class of defendants because of their status" — that is, juvenile offenders whose crimes reflect the transient immaturity of youth.

Montgomery

A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them.

-The Oklahoma Court of Criminal Appeals now requires a finding of “irreparable corruption and permanent incorrigibility” beyond a reasonable doubt before life without parole can be imposed on children.

What does this mean for Texas?



Prior to *Miller*

Section 12.31 of the Penal Code

- Youth who were 16 and younger and found guilty of a capital felony received a mandatory life sentence.
- 17-year-olds, however, found guilty of a capital felony were still subjected to a mandatory life without parole sentence.

Texas Response to *Miller*: SB2

After *Miller*, the Legislature amended Texas Penal Code Section 12.31 to eliminate mandatory sentencing of life without parole for 17-year-olds.

- Instead all youth under 18 receive a mandatory life sentence if convicted of a capital felony.
- Hotly debated in the Legislature with opponents arguing that this provision would still not meet constitutional muster.
- Not made retroactive, but did apply to all nonfinal cases.



"Of the 366 Texas juveniles sentenced to life with the possibility of parole for capital murder since 1962, only 17 — less than 5 percent — have ever been released."

Megan Flynn, Sorry for Life?: Ashley Ervin Didn't Kill Anyone, But She Drove Home the Boys Who Did' Houston Press (Jan. 12, 2016)

Texas

THE AVERAGE PAROLE GRANT RATE IN TEXAS FOR THOSE CONVICTED OF CAPITAL MURDER HAS BEEN **8 PERCENT** OVER THE LAST 15 YEARS



OVERALL AVERAGE PAROLE GRANT RATE IS **36%**

American Civil Liberties Union, "False Hope: How Parole Systems Faith Youth Serving Extreme Sentences," 47 (2016)

Pending Legislation: The Second Look Bill

SB 556 (Rodriguez) and HB 1274 (Chairman Moody).
Committee Substitute will:

- ½ the parole eligibility for capital murder and first degree felonies; and
- Creates a youthful offender parole process that takes into account hallmark features of youth and recent evidence of rehabilitation

What is next?



Long Term of Years = LWOP

California, Connecticut, Florida, Iowa, Illinois, Louisiana, Nevada, Ohio, and Wyoming recognize that lengthy sentences for children are tantamount to life without parole, because youth who receive them will die in prison with no chance of review.

People v. Caballero

"Consistent with the high court's holding in *Graham*, we conclude that sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment."

Lewis v. State, 428 S.W.3d 860, 863–64 (Tex. Crim. App. 2014)

Criminal Court of Appeals held that mandatory life sentences are not unconstitutional. "*Miller* does not entitle all juvenile offenders to individualized sentencing. It requires an individualized hearing only when a juvenile can be sentenced to life without the possibility of parole."

Certification: *Kent v. United States*, 383 U.S. 541, 556 (1966).

In *Kent v. United States*, the United States Supreme Court established that the waiver of juvenile court jurisdiction represents a "critically important" action determining vitally important statutory rights of the juvenile." 383 U.S. 541, 556 (1966).

- The juvenile was therefore entitled, under the Due Process clause, to a "full investigation" during transfer proceedings, as well as the opportunity to be heard, representation by Counsel, access to social records, and a statement of reasons to accompany any transfer order.

Certification: Moon v. State,
451 S.W.3d 28
(Tex. Crim. App. 2014).

The Texas Criminal Court of Appeals recently held that *Kent* and its progeny mean that the juvenile court must “show its work’ in the transfer order.”

Certification: Kent, Moon, &
Miller

An argument can be made that the Supreme Court’s developmental jurisprudence also supports the right to an individualized determination using the *Miller* factors prior to transfer to adult court.

Under this theory, statutory schemes that permit transfer to adult court must begin the process of evaluating whether a particular youth is the “rare offender” that requires an exceptional sentence.

Law of Parties

- *Graham*: “[W]hen compared to an adult murderer, a **juvenile offender who did not kill or intend to kill** has a twice diminished moral culpability. The age of the offender and the nature of the crime each bear on the analysis.” *Graham*, 130 S.Ct. at 2027 (emphasis added).
- *Miller* majority: Court notes that one of the youth was convicted under an aiding-and-abetting theory and that this circumstance must be considered in determining culpability.

Law of Parties

Miller concurrence (Breyer, J. and Sotomayor, J.): conclude that the “twice diminished moral culpability” of a juvenile accomplice, such as Jackson, categorically precludes LWOP, “regardless of whether its application is mandatory or discretionary under state law.”

“[E]ven juveniles who meet the *Tison* standard of ‘reckless disregard’ may not be eligible for life without parole. Rather, *Graham* dictates a clear rule: The only juveniles who may constitutionally be sentenced to life without parole are those convicted of homicide offenses who ‘kill or intend to kill.’”

Law of Parties

“[R]egardless of our law with respect to adults, there is no basis for imposing a sentence of life without parole upon a juvenile who did not himself kill or intend to kill. [Accomplice liability] is premised on the idea that one engaged in a dangerous felony should understand the risk that the victim of the felony could be killed, even by a confederate. Yet the ability to consider the full consequences of a course of action and to adjust one’s conduct accordingly is precisely what we know juveniles lack capacity to do effectively.” *Miller*, 132 S.Ct. at 2476 (conc. opn. of Breyer, J.).

Complete Ban on LWOP for under 18



What to do if you have one of these cases before you?



Guidelines for Defense Counsel

Trial Defense Guidelines: Representing a Child Client Facing a Possible Life Sentence

The representation of children in adult court facing a possible life sentence is a highly specialized area of legal practice, therefore these guidelines address the unique considerations specific to the provision of a zealous trial defense.

Guidelines

- Defense Team: The defense team must include a minimum of two qualified attorneys, an investigator, a mitigation specialist, and, when appropriate, an interpreter.
 - Specialized training representing child clients and individuals charged with homicide offenses.
- Thorough investigation, including investigation of mitigating factors.
 - Refer to scope of investigation outlined in key death penalty cases: *Wiggins v. Smith* and *Rompilla v. Beard*.

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