

***de facto* JUVENILE LIFE WITHOUT PAROLE (JLWOP) – HOW JUDGES IGNORE THE LAW**

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Abstract

In 2012, the U.S. Supreme Court in *Miller v. Alabama* held that mandatory life without parole sentences for juvenile offenders are unconstitutional. Several years later, the Court in *Montgomery v. Louisiana* determined *Miller* must be applied retroactively. However, *Montgomery* did more than decide the of retroactivity – it expanded *Miller*'s holding. The Court ruled that those sentenced as teenagers to mandatory life imprisonment without parole must have a chance to argue that they be released from prison. Following the decision in *Montgomery*, state courts have split over whether the decision requires additional protections for juveniles facing life without parole. States' statutory schemes and appellate court decisions have allowed for the use of *de facto* life sentences for juveniles convicted of homicide as well as nonhomicide offenses. This session will posit that *Montgomery* does in fact mandate additional procedures beyond what many states have implemented. We propose that the time is ripe for courts to determine whether these 'virtual life' terms adhere to the Court's Eighth Amendment prohibition against cruel and unusual punishment.

Keywords: *Juvenile life without parole, JLWOP, juvenile capital murders, de facto life sentences, unconstitutional juvenile life sentences without parole.*

1. Summary

While one in seven individuals in confinement today are serving life sentences, a proportion of the incarcerated population includes individuals sentenced to "nonlife terms" that are long enough to resemble a life term. Consider a 17-year-old in Arkansas was sentenced to 240 years in prison for multiple counts of robbery and aggravated robbery; confirmed on appeal by the Supreme Court of Arkansas (*Proctor v. Kelley*). Fundamentally, a *de facto* or 'virtual' life sentence is a lengthy sentence that technically is not a life sentence but is the fundamental equivalent of one. The Sentencing Project considers a virtual life sentence to be 50 years or more. (Laugalis et.al., 2023). *Montgomery*'s holding that life without parole is only justified for the irreparably corrupt offender is complicated by one significant factor: it is impossible to tell with any certainty which juveniles fall into this category. The Court in *Graham* acknowledged this fact, stating that, "juvenile offenders cannot with reliability be classified among the worst offenders"¹ (*Graham v. Florida*). This is because the science of adolescent brain development, on which the Court based its conclusion that 'children are different', plainly states that making an accurate determination about a juvenile's permanent character is impossible. The Court in *Graham* considered taking a case-by-case approach by creating a rule that would require courts to take a juvenile offender's age into consideration at sentencing, much like what the *Miller* Court did². However, the Court found such an approach insufficient to provide adequate constitutional protections³. The Court proceeded to cite five reasons why a categorical ban on juvenile life without parole for nonhomicide offenders was necessary: (1) cannot identify the incorrigible offender; (2) high risk of erroneous sentencing; (3) differences between juvenile and adult offenders too large to allow for such a risk; (4) juveniles have impaired criminal representation; and (5) juveniles should have a chance to demonstrate maturity and reform⁴. Neither of these last two factors are crime specific. Undoubtedly, every factor that led the Court to deem a categorical ban necessary in nonhomicide cases equally applies to the sentencing of juvenile

¹ *Graham v. Florida*

² *Id.* at 76

³ *Id.* at 78

⁴ *Id.* at 77-79

homicide offenders to life without parole. Based on these factors, the *Graham* Court ultimately concluded that laws “allowing the imposition of these sentences based only on a *discretionary, subjective judgment* by a judge or jury that the offender is *irredeemably depraved*, are *insufficient* to prevent the possibility that the offender will receive a life without parole sentence for which he or she lacks the moral culpability”⁵ (emphasis added). The majority of U.S. Circuit Courts of Appeals have equated *de facto* life with LWOP.

However, the most recent Supreme Court ruling in *Jones v. Mississippi* (2021) may be moving away from how youth should be sentenced, i.e., that decision has renewed interest in the constitutionality of lengthy sentences for juveniles. Here the Supreme Court ruled 6-3 that states *can* sentence juvenile offenders to life in prison without parole without making a separate assessment of their incorrigibility. The Court’s ruling held that the Eighth Amendment does not require a finding that a juvenile is permanently incorrigible before imposing a sentence of life without parole, i.e., states have discretionary ability to hold juvenile offenders to life sentences without parole without having to make a separate assessment of their incorrigibility (Laugalis et al, 2023). Enabling *de facto* life sentences, either through the sentencing court’s discretion or a minimum term of 40 years, directly contradicts the Court’s *Graham* and *Miller* decisions. Adolescent characteristics that may influence criminal behavior include impulsivity, immaturity, lower cognitive functioning, and being more prone to peer pressure. Understanding these differences and applying them to sentencing laws and policies has been inconsistent. For juveniles with long sentences an option is a parole hearing providing them the opportunity for redemption; a parole hearing after significant time to transform and rehabilitate means imposing sentences that are ‘developmentally appropriate.’ Failing to provide juveniles with a meaningful opportunity for release under the Court precedents of *Graham*, *Miller*, and *Montgomery* condemns juveniles to *de facto* life sentences. Determining the constitutionality of *de facto* life sentences might be the next frontier for legal jurisprudence at the state or federal level. More states may need to take steps to clarify the definition of *de facto* life based on adolescent culpability and the rehabilitative potential of youth.

2. Conclusion

This session will explore these and related issues.

References

- Graham v. Florida*, 560 U.S. 48, 68 (2010).
Jones v. Mississippi, 141 S. Ct. 1307 (2021).
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Proctor v. Kelley, 562S.W.3d 837 (Ark. Sup. Ct. 2018), *cert. denied*, 140 S. Ct. 481 (2019).

⁵*Id* at 77