2010

Defending Juveniles Facing Life Without Parole in Michigan

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Criminal Defense Newsletter

September, 2010
Volume 33, Number 12

Features

Departments

Appellate Courts

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I. Introduction

In *Graham v. Florida*, the United States Supreme Court held that life without parole could not be imposed on a juvenile offender for a non-homicide crime.[1] This article discusses the challenges, under the Eighth Amendment and the Michigan Constitution, to the sentence of life without parole imposed on someone 17 years old or less.

II. The Graham opinion and analysis

Graham was 16 years old when he and three other youths attempted to rob a restaurant and one of Graham's accomplices hit the manager in the head with a metal bar.[2] Graham was charged as an adult with armed burglary with assault or battery, a first-degree felony with a maximum penalty of life without parole. He pleaded guilty.[3] At his sentencing, Graham stated that it was his "first and last time getting in trouble," and that he "made a promise to God and myself that if I get a second chance, I'm going to do whatever it takes to get to the [National Football League]."[4] Graham was sentenced to 3 years of probation, with the first 12 months served in jail.

While on probation, Graham was arrested again after a high speed chase with police, this time for a home invasion robbery. At his probation violation hearing, Graham denied the robbery, but admitted violating probation by fleeing police.[5] The state also presented evidence about the robbery, including victim testimony. Although the presentence investigation report recommended a 4-year sentence, the judge gave him life without parole.

The *Graham* Court distilled two strands of Eighth Amendment cases addressing the proportionality of sentences; cases challenging "the length of term-of-years sentences given all the circumstances in a particular case" and cases "in which the Court implements the proportionality standard by certain categorical restrictions on the death penalty."[6] In the first line of cases,[7] the Court considers the circumstances of the cases to, first, compare the gravity of the offense and the severity of the penalty. " '[I]n the rare case in which [this] threshold comparison . . . leads to an inference of gross disproportionality' the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions."[8] In the second class of cases, which until Graham had involved only death penalty cases, the Court had used categorical rules to evaluate the nature of the offense[9] and characteristics of the offender.[10] In these cases, the Court "first considers 'objective indicia of society's standards, as expressed in legislative enactments and state practice' to determine whether there is national consensus against the sentencing practice at issue . . . [then], guided by 'the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose,' the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution."[11]

The Court determined that Graham's case, despite not being a death penalty case, fit in the second class of cases because it involved a challenge to a "sentencing practice" as applied to a "class of offenders who have committed a range of crimes." In applying this law, the Court found that although 37 states permit life without parole for non-homicide juvenile offenders in some circumstances, actual sentencing practice showed a consensus against the imposition of life without parole in these cases.[12] The Court also exercised its "independent judgment" to consider the "culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment," including an inquiry into whether the sentence serves legitimate penological goals. As for the offenders, the Court stated that *Roper* "established that because juveniles have lessened culpability they are less deserving of the most severe punishments."[13] The Court approvingly cited the modern brain science, discussed in *Roper*, which shows "fundamental differences between juvenile and adult minds" including the fact that "parts of the brain involved in behavior control continue to mature through late adolescence."[14]

III. Michigan's children sentenced to life without parole

In Michigan, children can be tried and given a life without parole sentence through cases that are directly filed by the prosecution in adult circuit court, MCL 712A.2, cases in which the juvenile is tried as an adult in family court, MCL 712A.2d(1), MCL 712A.18(m) (can sentence as adults), and cases that are waived by a judge into adult court, MCL 712A.4(1); MCL 712A.4(4). Persons who were 17-years-old when the crime occurred are treated as adults in Michigan.

In Michigan, prior to *Graham*, it was hypothetically possible for a 17-year-old to be sentenced to life without parole for an offense that did not involve a death, under a criminal sexual conduct repeat offender statute. MCL 750.520b(2)(c.). No juveniles are serving sentences under this provision, however.[15]

Approximately 350 individuals are serving life without parole in Michigan for homicide crimes committed when they were a juvenile.[16]

The *Graham* court, however, left some potential ambiguity when it described the scope of its ruling. In various places in the opinion, the Court says that the ruling applies to "non-homicide" offenses, but also describes the "twice diminished" culpability of a juvenile "who did not kill or intend to kill" and, at the end of the opinion, summarizes that it "holds that for a juvenile offender who did not commit homicide" the punishment is banned. This raises the possibility that the ruling also affect offenders who did not actually commit a killing, or "intend to kill."[17]

IV. Is it constitutional to sentence juveniles to life without parole for homicides?

Even for homicide offenses, *Graham* changes the legal landscape for juveniles facing life without parole. The Court reaffirmed that "[t]he concept of proportionality is central to the Eighth Amendment."[18] The Court for the first time in a non-death penalty case applied a categorical ban on a sentencing practice for a class of offenders, instead of allowing courts to examine sentences on a case-by-case basis.[19]

Litigation following *Graham* will more clearly determine the meaning of the Court's language, but, for

now, both approaches are viable. Under *Graham*, a defendant who makes a broad challenge to the unconstitutionality of a sentence for a particular offense (such as felony murder) or class of offenders (such as 14-year olds) should take the same approach as the *Graham* majority. Nothing in the Court's opinion eliminated an Eighth Amendment challenge to life without parole for a particular juvenile charged or convicted of homicide. The Court's analysis, however, suggests that such a challenge should be brought under the "gross proportionality" test, as in *Solem v. Helm*, 463 U.S. 277 (1983) and *Harmelin v. Michigan*, 501 U.S. 957 (1991), previously applied to term-of-years challenges. Therefore, at this point, attorneys raising Eighth Amendment challenges for their juvenile clients should raise both categorical challenges to the sentence of life without parole under the *Graham* analysis, and should raise individual challenges to the proportionality of the sentence for their particular client, likely under the more traditional "gross proportionality" standard, but informed by the culpability analysis in *Graham*.

"Direct file" cases

A subset of cases that may be particularly vulnerable to challenge is the sentence of life without parole for juveniles who were directly filed into adult court or who were 17-years-old and automatically considered an adult. In these cases, no judge ever considered the maturity, potential for rehabilitation, or culpability of the child. For juveniles, the cases are filed at the prosecutor's discretion MCL 712A.2; MCL 600.606 and, upon conviction of first-degree murder, life without parole is mandatory. MCL 769.1(1)(g); MCL 750.316. For 17-year-olds, the same outcome occurs.

The lack of discretion available in juvenile sentencing also renders the sentences imposed in Michigan truly unusual. In a vast majority of states, courts have discretion in either the decision to transfer children in the mid-teens to adult court or in sentencing for first-degree murder offenses. *See, e.g., People v. Miller*, Amicus Br. 2001 WL 34387680 (Ill. 2001). Only a handful of states have no discretion at all in transfer or sentencing. Colorado, which previously allowed little discretion, recently banned juvenile LWOP sentences altogether. Colo. Rev. Stat. 17-22.5-104(IV) (2007). California, one of the other states with limited discretion like Michigan, has found the sentence unconstitutional in a specific case. *Nuñez*, 173 Cal. App. 4th 709 (2009). Because of this unusual scheme, Michigan sentences a disproportionate number of juvenile offenders to life without parole, including many who would likely receive lesser sentences in almost every other state.

V. The Michigan constitution offers broader protection against unconstitutional punish-ments

In light of *Graham*, the sentence of life without parole on any juvenile should also be challenged under the broader protections of the Michigan constitution. Mich. Const. Art. I § 16. This broader protection is due, in part, to the difference in the texts. *People v. Bullock*, 440 Mich. 15, 30-31 (1992). The state provision bans "cruel *or* unusual punishment" rather than the "cruel *and* unusual punishments" of the Eighth Amendment, with the former phrasing "necessarily encompass[ing] a broader sweep" of disallowed punishments. *Id.* at 31. In addition, the history of Michigan's constitution and the weight of case law in the state support finding broader protections in the state provision. *Id.* at 32-41.

As a result, Michigan has developed its own four-part test to determine if a sentence is "cruel or unusual," which "requires consideration of the gravity of the offense, the harshness of the penalty, a comparison of the penalty to penalties for other crimes in this state, a comparison of the penalty to penalties imposed for the same offense in other states, and the goal of rehabilitation." *People v. Dipiazza*, 286 Mich. App. 137, 153-54, (2009) (finding sex offender registry unconstitutional as applied to individual in that case).

First, as emphasized by the *Graham* Court, juveniles have diminished culpability compared to adult offenders, which must be taken into account when examining the gravity of the offense. *See also Lorentzen*, 387 Mich. 167, 176 (1972).

Second, a comparison of LWOP sentences imposed on other offenders within Michigan shows that juveniles who receive the sentence are being treated disproportionately. *Bullock*, 440 Mich. 15, 33-34, *People v. Lorentzen*, 387 Mich. at 176-81. LWOP is the most serious sentence that a Michigan offender can receive. Mich. Const. Art. IV § 46 (banning the death penalty). Less culpable youth are, therefore, being sentenced on par with adult criminals who committed equal, and sometimes more severe, offenses or who were a principal in the crime. *See, e.g., Second Chances* at 5, 7, 13, 17 (describing Michigan cases in which

children received LWOP for crimes in which they had far less serious involvement than other, often older, individuals and often received harsher punishment).

An unusually high number of juveniles are given life without parole sentences in Michigan, and the penalty is imposed in cases where it would be unlikely for another state to impose the penalty. *See, e.g.*, Frontline, *When Kids Get Life*, available at: http://www.pbs.org/wgbh/pages/frontline/whenkidsgetlife/etc/map.html (last updated May 21, 2009) (showing that Michigan has the second-highest number of persons serving LWOP for crimes committed as juveniles).

Finally, life without the possibility of parole for a juvenile eliminates any goal of rehabilitation. *Bullock*, 440 Mich. at 34; *Dipiazza*, 286 Mich. App. at 154. This prong – rehabilitation – is crucially important when examining an extreme sentence given to a child. "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." *Roper*, 543 U.S. at 570. Further, most children "age out" of criminal behavior.[20] Even if non-habilitation goals are considered, little to no additional purpose of punishment is gained. *People v. Fernandez*, 427 Mich. 321, 339 (1986) (looking to other purposes served when considering an adult sentence); *see also Graham*, 130 S.Ct. at 2028-30 (analyzing failure to meet goals of retribution, deterrence and incapacitation).

The Michigan Supreme Court has never ruled on the constitutionality of life without parole for juveniles. The one published Michigan Court of Appeals opinion on a juvenile LWOP sentence ruled on the previous juvenile transfer system, in which a judge made a determination whether or not the child should be sentenced as an adult. *People v. Launsburry*, 217 Mich. App. 358 (1996). In fact, this determination was integral to the Court's analysis. *See id.* at 364.[21]

What you can do for your juvenile client facing life without parole in light of Graham?

→ Litigate and preserve the constitutionality, under both the federal and Michigan constitution, of the sentence of life without parole imposed for an offense committed when someone was under 18 years old.

→ Submit expert affidavits, records, scientific information or articles, or other documents to support your motion.

→ If possible, obtain an evidentiary hearing where you can present evidence that challenges the sentence of life without parole for adolescents generally and that shows why the sentence would be, for this specific client, cruel and/or unusual.

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End Notes

1. *Graham v. Florida*, 130 S.Ct. 2011 (2010). Both Graham and Roper draw a bright line by defining juveniles as those under 18 years old. In Michigan, 17 year olds are considered adults and are not charged in the family court. See MCL 712A.2.
2. *Graham*, 130 S.Ct. at 2018.
3. *Id.*
4. *Id.*
5. *Id.* at 2018-19.
6. *Id.* at 2021.
7. This line of cases includes *Rummel v. Estelle*, 445 U.S. 263 (1980); *Solem v. Helm*, 463 U.S. 277 (1983); *Harmelin v. Michigan*, 501 U.S. 957 (1991); and *Ewing v. California*, 538 U.S. 11 (2003).
8. 130 S.Ct. at 2022.
9. These cases included *Kennedy v. Louisiana*, 128 S.Ct. 2641 (2008), *modified by* 129 S.Ct. 1 (2008); *Enmund v. Florida*, 458 U.S. 782 (1982); and *Coker v. Georgia*, 433 U.S. 584 (1977).
10. These cases included *Roper v. Simmons*, 543 U.S. 551 (2005), *Atkins v. Virginia*, 536 U.S. 304 (2002); *Thompson v. Oklahoma*, 487 U.S. 815 (1988).
11. *Graham*, 130 S.Ct. at 2022.
12. In practice, just over 100 juvenile offenders are serving the sentence for non-homicide crimes and 12 jurisdictions, in fact, impose the sentence on these offenders. *Id.* at 2023.
13. *Id.* at 2026, quoting *Roper*, 543 U.S. at 569.
14. *Id.*
15. FRONTLINE, When Kids Get Life (May 21, 2009), http://www.pbs.org/wgbh/pages/frontline/whenkidsget life/etc/map.html (showing 346 persons as of 2009).
16. *Annino et al., Juvenile Life without Parole for Non-Homicide Offenses: Florida Compared to Nation, Table A* (Sept. 14, 2009)
17. Not all persons convicted of homicide killed or intended to kill. For example, someone convicted under an aiding and abetting theory can be held responsible for "those crimes that are the natural and probable consequences of the offense he intends to aid

or abet." *People v. Robinson*, 475 Mich. 1, 15 (2006).

18. *Graham*, 130 S.Ct. at 2021.

19. *See id.* at 2022. In a concurring opinion in *Graham*, Chief Justice Roberts advanced a case-by-case approach. *Graham*, 130 S.Ct. at 2041-42.

20. Terrie E. Moffitt, Adolescence-Limited and Life-Course Persistent Antisocial Behavior: A Developmental Taxonomy, 100 Psychology Review 674, 675 (1993).

21. A few unpublished Court of Appeals opinions have rejected a per se challenge to life without parole for juveniles. *See People v. Jarrett*, Docket No. 173921 (Aug. 9, 1996); *People v. Espie*, Docket No. 222303, (Jan. 22, 2002).