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USA: 'We learn, sometimes, from our mistakes'

Supreme Court outlaws life imprisonment without possibility of release for children who commit non-homicide crimes

18 May 2010

AI Index: AMR 51/042/2010

Society changes. Knowledge accumulates. We learn, sometimes, from our mistakes. Punishments that did not seem cruel and unusual at one time may, in the light of reason and experience, be found cruel and unusual at a later time

US Supreme Court Justice John Paul Stevens, concurring in *Graham v. Florida*, 17 May 2010

Applying its "evolving standards of decency" analysis, which five years earlier had led it to abolish the use of the death penalty against children, the US Supreme Court has taken another step towards bringing the USA into line with international human rights law on the treatment of young offenders. On 17 May 2010, a majority of the Court held that the imposition of life imprisonment without the possibility of parole for a non-homicide offence committed by an under-18-year-old is "cruel and unusual" punishment in violation of the Eighth Amendment to the US Constitution. In such cases, the individual must be given "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation".

While the majority opinion in *Graham v. Florida* was grounded in an analysis of domestic law and practice, it noted that the international landscape supported its conclusion. The USA, it found, "adheres to a sentencing practice rejected the world over", and in fact, "the United States is the only Nation that imposes life without parole sentences on juvenile non-homicide offenders". As the majority noted, the UN Convention on the Rights of the Child, which prohibits life imprisonment without the possibility of release against anyone who was under 18 years old at the time of the crime, *whatever the nature of the crime*, has been ratified by every country except Somalia and the USA. The majority opinion, authored by Justice Anthony Kennedy, continued:

"The Court has treated the laws and practices of other nations and international agreements as relevant to the Eighth Amendment not because those norms are binding or controlling but because the judgment of the world's nations that a particular sentencing practice is inconsistent with basic principles of decency demonstrate that the Court's rationale has respected reasoning behind it".

Four Justices joined Justice Kennedy in finding a categorical rule against the imposition of life imprisonment without the possibility of parole (LWOP) for non-homicide crimes involving children.¹ A sixth, Chief Justice John Roberts, concurred in the judgment, but only in as far as it applied to the case in front of the Court rather than as a categorical rule. The case was that of Terrance Jamar Graham, who was sentenced to LWOP in Florida for the attempted robbery of a restaurant in Jacksonville committed in 2003 when he was 16 years old.² Although initially sentenced to terms of probation under a plea agreement, he was subsequently sentenced to LWOP when, at 17, he violated the terms of the probation.

According to the Supreme Court, Terrance Graham is one of 129 prisoners in the USA serving LWOP sentences for non-homicide crimes committed before they turned 18 years old, a small percentage of the total number of individuals serving LWOP for crimes committed as children.³ Seventy-seven of these 129 prisoners (60 per cent) are in Florida, while the other 52 are in just 10 other states and in the federal system.⁴ The fact that only 12 jurisdictions have prisoners serving LWOP sentences for juvenile non-homicide crimes, out of the 39 which permit this sentence in such cases⁵, coupled with the fact that the

majority of these 12 jurisdictions do so quite rarely, led the Supreme Court majority to conclude that a "national consensus" had developed against this practice.⁶

The ruling noted that such a consensus was "not itself determinative as to whether a punishment is cruel and unusual". The Court, it said, must bring its own independent judgment to bear. Here the majority drew on the Court's 2005 ruling prohibiting the death penalty against under-18-year-old offenders. In that ruling, *Roper v. Simmons*, the Court had recognized that compared to adults, children have a lack of maturity, an underdeveloped sense of responsibility, and a vulnerability to negative influences, and that as a result of such characteristics "juvenile offenders cannot with reliability be classified among the worst of offenders". No recent data, the Court continued, gave cause for it to reconsider that conclusion. Indeed, "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds".

Life without parole, the majority said, "is the second most severe penalty permitted by law", and indeed shares some characteristics with the most severe, the death penalty. Life without parole, it continued, "alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency – the remote possibility of which does not mitigate the harshness of the sentence". Life without parole, it continued, is "an especially harsh punishment for a juvenile", as the young offender will serve, on average, more years and a greater percentage of his or her life in prison than an older offender: "A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only".

Justice Kennedy's opinion then examined the various goals of punishment and found none of them – retribution, deterrence, incapacitation, and rehabilitation – justified the use of LWOP against children for non-homicide offences. In the case of rehabilitation, for example, the ruling noted that

"the penalty forswears altogether the rehabilitative ideal. By denying the defendant the right to re-enter the community, the State makes an irrevocable judgment about that person's value and place in society. This judgment is not appropriate in light of a juvenile non-homicide offender's capacity for change and limited moral culpability".

A categorical rule against such use of LWOP gives all such offenders "a chance to demonstrate maturity and reform", Justice Kennedy wrote. He continued:

"Life in prison without the possibility of parole gives no chance for fulfilment outside prison walls, no chance for reconciliation with society, no hope. Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation. A young person who knows that he or she has no chance to leave prison before life's end has little incentive to become a responsible individual".

The ruling does not require states to "guarantee eventual freedom to a juvenile offender convicted of a non-homicide crime". "What the State must do", the majority ordered, "is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. It is for the State, in the first instance, to explore the means and mechanisms for compliance".

The widespread recognition around the world of the attributes of youth, and how this should shape the state's response to children who come into conflict with the criminal law, informs the international prohibition of life without the possibility of release for any crime committed by an under-18-year-old. Amnesty International, whose 2005 report on this issue⁷ and the brief before the US Supreme Court that it joined in this case⁸ were cited in Justice Kennedy's opinion, welcomes the *Graham* ruling. The organization will continue to campaign for the USA to end *in all cases* the use of life imprisonment without parole against children, and for the USA to ratify the UN Convention on the Rights of the Child.

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¹ Justices Stevens, Ginsburg, Breyer and Sotomayor.

² In a second case before the Court on the same issue, of Florida inmate Joe Sullivan serving LWOP for a crime committed when he was 13 years old, the Supreme Court dismissed the case as "improvidently granted", without further comment. Justice Kennedy did draw attention to Joe Sullivan's case in the majority opinion in *Graham v. Florida*, stating that the facts of the case "demonstrate the flaw's of Florida's system". It is not clear whether the fact that the Florida courts had declined, for procedural reasons, to rule on the Eighth Amendment claim in the Sullivan case was what led the Supreme Court to dismiss it without ruling.

³ At least 2,500 people in the USA are serving life imprisonment without the possibility of parole for crimes committed when they were younger than 18 years old. For a current case of a 12-year-old facing LWOP for a crime involving a homicide, see Amnesty International Urgent Action. 28 April 2010, <http://www.amnesty.org/en/library/info/AMR51/032/2010/en>

⁴ The 10 states are California, Delaware, Iowa, Louisiana, Mississippi, Nebraska, Nevada, Oklahoma, South Carolina and Virginia.

⁵ The other 27 jurisdictions which permit LWOP for juvenile non-homicide offences, but according to the US Supreme Court currently have no such prisoners, are: Alabama, Arizona, Arkansas, District of Columbia, Georgia, Idaho, Illinois, Indiana, Maryland, Michigan, Minnesota, Missouri, New Hampshire, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, Washington, West Virginia, Wisconsin, Wyoming.

⁶ The dissent authored by Justice Thomas, and joined by Justices Scalia and Alito (in part), took issue with this finding. The "news" that "the standards of American society have evolved such that the Constitution now requires [this] prohibition" will "come as a surprise to the American people", given that 39 jurisdictions allow it. "I am unwilling", Justice Thomas wrote, "to assume that we, as members of this Court, are any more capable of making such moral judgments than our fellow citizens".

⁷ USA: The rest of their lives: Life without Parole for Child Offenders in the United States: a joint Human Rights Watch/Amnesty International Report, October 2005, <http://www.amnesty.org/en/library/info/AMR51/162/2005/en>

⁸ Brief at http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-7412_PetitionerAmCuAmnestyIntl.pdf