

# FAIR PUNISHMENT PROJECT



## JUVENILE LIFE WITHOUT PAROLE:

### GRAHAM, MILLER, AND JUVENILES WHO COMMIT MULTIPLE OFFENSES

#### PROJECT OVERVIEW

The Fair Punishment Project is a joint initiative of Harvard Law School’s Charles Hamilton Houston Institute for Race & Justice and its Criminal Justice Institute. To promote a proportionate, fair and accountable justice system, the Fair Punishment Project provides concise issue briefs on important doctrinal questions that are developing in state and federal courts.

#### IN BRIEF

##### Question:

Do the protections of *Graham v. Florida* and *Miller v. Alabama* extend to term-of-years sentences imposed consecutively for multiple offenses, which combine to deprive a juvenile offender of a meaningful opportunity for future release?

##### Answer:

Yes. In *Graham* and *Miller*, the U.S. Supreme Court severely limited the imposition of life-without-parole sentences on juveniles. No matter the severity of the crime (or crimes) a juvenile has committed, he cannot be denied any possibility of future release unless he is the rare juvenile homicide offender “who exhibits such irretrievable depravity that rehabilitation is impossible.” The animating principle behind these decisions is that, relative to adults, juveniles

possess a “lack of maturity and an underdeveloped sense of responsibility,” tend to be “more vulnerable or susceptible to negative influences and outside pressures, including peer pressure,” and are “more capable of change.” Social science proves, and the Court recognized, that for almost all children, what presents as incorrigibility is actually a transitory state. Once the juvenile’s brain fully develops, he or she is likely to emerge as a less impulsive, more responsible, more stable person.

There is no coherent limiting principle that would cabin the scope of these holdings to encompass only life-without-parole sentences, imposed for a single offense. Rather, *Graham* and *Miller* must apply equally to any term-of-years sentence that denies a juvenile offender the “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” While a juvenile’s commission of multiple offenses, contemporaneously or apart, may inform *Miller*’s “irretrievably depraved” inquiry, it is far from dispositive. The commission of multiple offenses in no way forecloses the possibility that the juvenile will develop into a responsible and law-abiding citizen over time. Therefore, he may not be exempted from *Graham* and *Miller*’s protections.

## ANALYSIS

### I. Background and Legal Principles

Both *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, 132 S. Ct. 2455 (2012), address the permissibility of life-without-parole sentences for juveniles. In *Graham*, the Court categorically prohibited the imposition of a life without parole sentence on a juvenile convicted of a nonhomicide offense. 560 U.S. at 74. The Court underscored that such a sentence is excessive because it denies the juvenile “any chance to later demonstrate that he is fit to rejoin society.” *Id.* at 79 (“As one court observed in overturning a life without parole sentence for a

juvenile defendant, this sentence ‘means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days’”(quoting *Naovarath v. State*, 105 Nev. 525, 526 (1989)) .

Two years later, *Miller* held unconstitutional the imposition of a mandatory life-without-parole sentence upon a juvenile convicted of homicide. Again, the Court emphasized the harshness of “[i]mprisoning a[] [juvenile] offender until he dies,” 132 S.Ct. at 2466, and explained that the risk of disproportionality stems from both “children's diminished culpability and heightened capacity for change” and “the great difficulty [of] distinguishing at this early age between ‘the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.’” *Id.* (citing *Roper*, 543 U.S., at 573). *Miller* not only prohibited mandatory life-without-parole sentences for juveniles; it held that a lifetime of incarceration is only permissible for “the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible.” *Montgomery v. Louisiana*, 136 S. Ct. 718, 733 (2016).

The fundamental lesson of *Graham* and *Miller* is plain: juveniles who can be rehabilitated must be given that opportunity.

## **II. Most Courts Agree that *Graham* and *Miller* Afford Protection to Juveniles Who Commit Multiple Offenses.**

In the years since the *Graham* and *Miller* decisions, many state courts have held that lengthy term-of-years sentences, imposed consecutively for multiple offenses, are constitutionally equivalent to juvenile “life-without-parole” sentences. Each of these cases recognized that it is the effect of the sentence imposed upon a juvenile offender, rather than its precise form, that determines its constitutionality. Because a lengthy aggregate sentence can also

guarantee that a child will die in prison, without any meaningful opportunity for release, it is constitutionality indistinguishable from the “life without parole” sentences addressed by *Graham* and *Miller*.

In *Henry v. State*, 175 So.3d 675 (Fla. 2015), which involved a 90-year aggregate sentence resulting from consecutive sentences imposed on eight separate felony offenses, the Florida Supreme Court held that *Graham* applies with equal force to aggregate sentences that do “not afford any ‘meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.’” *Id.* at 676, 679 (quoting *Graham*, 560 U.S. at 75). That court concluded that *Graham*, which was predicated on the unique characteristics and reduced culpability of children, required that all juvenile nonhomicide offenders have such an opportunity. *Id.* at 679.

Most other courts addressing the scope of *Graham* have employed a similar analysis. *See State v. Boston*, 363 P.3d 453, 458 (Nev. 2015) (juvenile’s 14 life sentences with the possibility of parole, plus a consecutive 92 years in prison, which required him to serve 100 years in prison before he was eligible for release, was unconstitutional under *Graham*); *People v. Caballero*, 282 P.3d 291, 295 (Cal. 2012) (110–years–to–life sentence imposed for three counts of attempted murder was the functional equivalent of a sentence of life without the possibility of parole under *Graham*); *People v. Rainer*, 2013 COA 51, 2013 WL 1490107 (Colo. Ct. App. April 13, 2013), certiorari granted, *People v. Rainer*, No. 13SC408, 2014 WL 7330977 (Colo. Dec. 22, 2014) (aggregate 112-year sentence imposed for four nonhomicide offenses violated *Graham*); *State v. Null*, 836 N.W.2d 41, 73 (Iowa 2013) (“While we think the fact that the defendants were convicted of multiple crimes may well be relevant in the analysis of individual culpability under *Miller*, we agree ... the imposition of an aggregate sentence does not remove the case from the ambit of *Miller's* principles.”).

Similarly, courts have also ruled that *de facto* life sentences were unconstitutional even when one of the juvenile's many offenses was a homicide. In *Bear Cloud v. State*, 334 P.3d 132, 135 (Wy. 2014), the Wyoming Supreme Court addressed the applicability of *Miller* to Bear Cloud's lengthy consecutive sentences for first-degree murder, conspiracy to commit aggravated burglary, and aggravated burglary. After reviewing the Court's reasoning in *Roper*, *Graham*, and *Miller*, the Wyoming court concluded that *Miller*'s protections must apply to aggregate sentences that result in a lifetime of imprisonment. "[T]he teachings of the *Roper/Graham/Miller* trilogy require sentencing courts to provide an individualized sentencing hearing to weigh the factors for determining a juvenile's 'diminished culpability and greater prospects for reform' when, as here, the aggregate sentences result in the functional equivalent of life without parole." *Id.* at 141-42; *see also State v. Riley*, 110 A.3d 1205, 1213-14 (Conn. 2015) (aggregate 100-year sentence imposed for murder and three other offenses was an effective life sentence implicating *Miller*); *Null*, 836 N.W.2d at 73 (aggregate sentence imposed for murder and robbery offenses which required defendant to serve 52.5 years before eligible for release violated *Miller*); *People v. Nieto*, 52 N.E.3d 442, 455 (Ill. App. Ct. 2016) (four sentences, imposed consecutively for multiple homicide and nonhomicide crimes, which when aggregated equaled 78 years, violated *Miller*).

### **III. A Minority of Courts Have Found That *Graham* and *Miller* Do Not Afford Protection to Juveniles Who Commit Multiple Offenses.**

The courts that have concluded that *Graham* and *Miller* are inapplicable to juveniles who commit multiple offenses have largely employed two different rationales. The first is that *Graham* and *Miller* only apply to their facts: life-without-parole sentences imposed for a single offense. *See, e.g., State v. Brown*, 118 So. 3d 332, 341 (La. 2013) ("[W]e see nothing in *Graham* that even applies to sentences for multiple convictions, as *Graham* conducted no analysis of

sentences for multiple convictions and provides no guidance on how to handle such sentences.”); *Lowe-Kelley v. State*, No. M2015–00138–CCA–R3–PC (Tenn. Ct. Crim. App. Feb. 24, 2016) at \*8 (aggregate 120-year sentence did not violate *Miller*, which “is silent about its applicability to consecutive sentences imposed for multiple convictions”); *State v. Watkins*, 2013-Ohio-5544, ¶¶ 18-19, 2013 WL 6708397 (Ohio Ct. App. Dec. 17, 2013), appeal allowed *State v. Watkins*, 10 N.E.3d 737 (Ohio 2014) at \*5 (*Graham*’s categorical prohibition “did not include non-lifetime but otherwise lengthy sentences and indeed, it would be hard to arrive at a categorical prohibition against such a wide range of possible sentences that could, arguably, constitute a functional equivalent of a life sentence”). Second, some courts have held that, as long as the sentence imposed for each individual offense is constitutionally permissible, *Graham* and *Miller* are not violated when those sentences are aggregated or run consecutive. *See, e.g., State v. Doody*, No. 1 CA-CR 14-0218, 2015 WL 6876776 at \*6 (Ariz. Ct. App. Nov. 10, 2015)(quoting *State v. Berger*, 212 Ariz. 473, 479, ¶ 28, 134 P.3d 378, 384 (2006)) (“A sentence that does not violate the prohibitions against cruel and unusual punishment does not become unconstitutional ‘merely because it is consecutive to another sentence for a separate offense or because the consecutive sentences are lengthy in aggregate.’”); *Willbanks v. Missouri Dep’t of Corr.*, No. WD 77913, 2015 WL 6468489 at \*6 (Mo. Ct. App. Oct. 27, 2015), cause ordered transferred to Missouri Supreme Court (April 5, 2016) (same); *Watkins*, 2013 WL 6708397 at \*6 (quoting *State v. Hairston*, 888 N.E.2d 103, 1078 (Ohio 2008)) (“the Supreme Court of Ohio analyzes cruel and unusual disproportionality claims arising from lengthy aggregate terms of consecutive sentences based on the individual sentences imposed on each count and not the ‘cumulative impact of multiple sentences imposed consecutively.’”). Neither rationale withstands scrutiny.

First, exempting long terms of years from the reach of *Graham* and *Miller* reduces their protections to form over substance, a practice that United States Supreme Court precedent has soundly disapproved in a number of contexts. *See, e.g., Bd. of Cty. Comm'rs v. Umbehr*, 518 U.S. 668, 679 (1996) (“Determining constitutional claims on the basis of [] formal distinctions, which can be manipulated largely at the will of the government . . . , is an enterprise that we have consistently eschewed.”). Affording constitutional protection to a juvenile sentenced to life-without-parole, but not one sentenced to 150 years without parole, is a perfect example of the kind of arbitrary line-drawing the Supreme Court routinely scorns.

It is also incorrect that *Graham* and *Miller* are not applicable to children who commit multiple offenses. *Graham* and *Miller*, which turn on the reduced culpability of juveniles and their greater capacity for change, must apply to all juveniles whose sentences foreclose a meaningful opportunity for release. The same impulsivity and underdeveloped judgment that lead a juvenile to commit one offense can lead the same child to commit multiple offenses. All children, regardless of the number of offenses they commit, possess a “lack of maturity and an underdeveloped sense of responsibility,” and tend to be “more vulnerable or susceptible to negative influences and outside pressures, including peer pressure.” *Graham*, 560 U.S. at 68 (quoting *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005)). In fact, these unique characteristics of juveniles make it substantially more likely that they may commit several crimes before they are mature enough to respond to the incentives and rehabilitative opportunities offered by the criminal justice system. *See, e.g., id.* at 72 (“the same characteristics that render juveniles less culpable than adults suggest ... that juveniles will be less susceptible to deterrence.”) (quoting *Roper*, 543 U.S. at 571).

Not only are their offenses likely to reflect their immaturity, children must be afforded rehabilitative opportunities because they are “more capable of change” than are adults. *Id.* at 68. Children who commit multiple offenses undergo the same brain development and emotional maturation as juveniles who commit a single offense. The upshot is that over a period of years—or even decades—a child who commits multiple serious violent offenses may emerge as a profoundly different person. Thus, while courts may consider, in certain circumstances, the number of offenses as evidence of “permanent incorrigibility,” the sentencer must also respect these known scientific facts about juvenile development and consider the juvenile’s biological, psychological, and social history before depriving the child of any meaningful “chance to later demonstrate that he is fit to rejoin society.” *Graham*, 560 U.S. at 79.

The circumstances of the offense alone cannot foreclose a child’s entitlement to potential release. Because a juvenile’s character is still developing, the severity of offense – or number of offenses – he has committed cannot conclusively demonstrate that he is irreparably corrupt. *See Adams v. Alabama*, 136 S. Ct. 1796, 1800 (2016) (Sotomayor, J., concurring) (“[T]he gruesomeness of a crime is not sufficient to demonstrate that a juvenile offender is beyond redemption: ‘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.’”)(quoting *Roper v. Simmons*, 543 U.S. 551, 570 (2005)). Instead, a court cannot impose a lifetime of incarceration – in any form – without fully considering his potential for rehabilitation.

In addition, both *Graham* and *Miller* involved juveniles who committed multiple serious, violent felonies. *Graham*, 560 U.S. at 53-54; *Miller*, 132 S. Ct. at 2461. Mr. Graham was first convicted of armed burglary with an assault and battery and attempted armed robbery in one

criminal episode. *Id.* at 53. Six months after his release, and while still on probation, he committed a separate, unrelated, armed home invasion robbery. *Id.* at 54. It was only after his commission of the second serious, violent offense that a judge imposed a life sentence for the first, citing “an escalating pattern of criminal conduct.” *Id.* at 57.<sup>1</sup> Nevertheless, the Court found that Mr. Graham must be given a meaningful opportunity for release.

The defendants in *Miller* also committed multiple offenses. Kuntrell Jackson was sentenced to life without parole after his conviction for two offenses: capital felony murder and aggravated robbery. *Miller*, 132 S. Ct. at 2461. Evan Miller also committed multiple serious offenses—a murder, followed by arson. *Id.* at 2462. However, Miller, unlike Jackson, was convicted of a single crime: “murder in the course of arson.” *Id.* at 2463. Unsurprisingly, this distinction between the commission of one offense and two, which appears to be no more than an accident of statutory drafting, played no role in the Court’s proportionality analysis.

Similarly flawed is the conclusion that consecutive sentences do not violate the Eighth Amendment so long as each individual sentence is constitutionally tolerable. Exempting effective life sentences from the reach of *Graham* and *Miller*, as long as they result from the commission of more than one criminal offense, is another distinction resting in form-over-substance. The definition of a single criminal offense is entirely determined by the legislature, and whether a child’s particular course of conduct is charged as one or multiple offenses is often at the complete discretion of the prosecutor. *See, e.g., Miller*, 136 S.Ct. at 2463. The Supreme Court has never permitted these types of distinctions to determine the scope of an individual’s constitutional rights. *See Umbehr*, 518 U.S. at 679; *Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring)(“the fundamental meaning of the jury-trial guarantee of the Sixth

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<sup>1</sup> Each of these offenses carried potential life sentences. *See* §§ 810.02(1)(b), (2)(a), Fla. Stat. (burglary while armed or with an assault and battery is a first-degree felony carrying a maximum penalty of life imprisonment) and 812.135 (2)(a) (armed home invasion robbery is a first-degree felony carrying a maximum penalty of life imprisonment).

Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt.”).

### **CONCLUSION**

The protections of *Graham* and *Miller* must apply to aggregate sentences for multiple offenses that operate to deprive a juvenile of any “meaningful opportunity for release.” The central question for the sentencer does not focus on the severity or quantity of offenses committed, but instead hinges on whether, for the particular child, “rehabilitation is impossible.”

### **ACKNOWLEDGEMENTS**

We would like to thank Amy Weber for her research, writing and analysis. Rachel Barkow, Tamar Birckhead, Jessica Brand, Brianne Gorod, Latonia Keith, Miriam Krinsky, Leah Litman, Daniel Medwed, David Menschel and James Sigel provided invaluable feedback on this issue brief.