

intellectually disabled; however, the court recognized that the expansion of intellectually disabled to include other individuals who think, act, or behave “as if” they are intellectually disabled did not apply in this case, as Mr. Clayton offered no evidence for why it should be expanded to include a neurocognitive disorder caused by traumatic brain injury.

The U.S. Supreme Court denied his application for a stay of execution, and Mr. Clayton was executed on March 17, 2015.

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## Sentence of Life Without Parole for a Juvenile Convicted of Homicide Upheld

**Cashena Hastie, MD**  
Fellow in Forensic Psychiatry

**Richard L. Frierson, MD**  
Professor of Psychiatry and Vice Chair for Education  
Director, Forensic Psychiatry Fellowship

University of South Carolina School of Medicine  
Columbia, SC

### The Georgia Supreme Court Held That a Nonmandatory Sentence of a Juvenile to Life Without Parole for Homicide Is Not Cruel and Unusual Punishment and That the Code Of Judicial Conduct Did Not Prohibit a Former Judge From Testifying in the Sentencing Phase

In *Bun v. State*, 769 S.E.2d 381 (Ga. 2015), the defendant, Veasa Bun, appealed his life-without-parole (LWOP) sentence arguing that it constituted cruel and unusual punishment under both the federal and Georgia constitutions and that his trial counsel provided ineffective assistance by not objecting to the testimony of a former juvenile judge who had presided over Mr. Bun’s juvenile cases but who was no longer acting in a judicial capacity at the time of the instant case.

#### Facts of the Case

On July 20, 2011, Deputy Richard Daly and several other law enforcement officers pulled over a vehicle in which 17-year-old Mr. Bun was a passenger. Mr. Bun had been identified as a passenger by another officer who knew that there was an outstanding warrant for Mr. Bun’s arrest in connection with a

robbery and aggravated assault. When Deputy Daly and the other officers approached the stopped vehicle, Mr. Bun grabbed a gun, stepped out of the car, and fatally shot Deputy Daly twice in the abdomen. Mr. Bun then shot at other officers as he fled into the nearby woods.

At trial, Mr. Bun was found guilty and sentenced to LWOP, plus an additional 70 years of imprisonment. His motion for a new trial was denied, and he appealed, arguing that his sentence constituted cruel and unusual punishment under both the federal and Georgia constitutions and that his trial counsel provided ineffective assistance of counsel by not objecting to testimony of a former family court judge. He cited *Roper v. Simmons*, 543 U.S. 551 (2005), *Graham v. Florida*, 560 U.S. 48 (2010), *Miller v. Alabama*, 132 S. Ct. 2455 (2012), and *Foster v. State*, 754 S.E.2d 33 (Ga. 2014).

#### Ruling and Reasoning

In a five-to-two decision, the Georgia Supreme Court held that evidence was sufficient to support a homicide conviction, a discretionary sentence of LWOP on a juvenile for homicide was not cruel and unusual punishment, and the code for judicial conduct did not prohibit the former judge from testifying in the sentencing phase.

The appropriate punishment for juvenile offenders has been an evolving area of law. In 2005 the U.S. Supreme Court held in *Roper* that juvenile offenders could not receive the death penalty. Five years later, in *Graham*, the U.S. Supreme Court held that a juvenile offender who had not committed a homicide could not be sentenced to LWOP. In 2012 in *Miller*, the Supreme Court struck down mandatory sentences of LWOP for juveniles who had committed homicide. Therefore, lower courts must use discretion when considering whether to impose a sentence of LWOP on a juvenile offender who has committed homicide, because mandatory LWOP sentences violate the Eighth Amendment’s ban on cruel and unusual punishment. Adolescents are biologically and emotionally immature and are therefore less culpable than adults for their actions. Therefore, they are also less deserving of the most severe punishment. The Supreme Court of Georgia denied Mr. Bun’s motion for a new trial, stating that the U.S. Supreme Court’s decisions in *Roper*, *Graham*, and *Miller* do not prevent juveniles who have committed homicide from being sentenced to life imprisonment without the

possibility of parole when the sentence was decided with discretion that accounts for proportionality.

Mr. Bun also claimed that he was entitled to a new trial because his defense attorney failed to object to the testimony of Judge Tracy Graham Lawson, a former family court judge who had presided over some of Mr. Bun's juvenile cases. She had testified that Bun was a "menace to society" and that she was convinced that he could not be rehabilitated. Mr. Bun objected to the judge's testimony, because he thought it should not have been allowed under Canon 2 of the Georgia Code of Judicial Conduct, which stated that judges "shall avoid impropriety and appearance of impropriety in all their activities and should not testify voluntarily as character witnesses" (*Bun*, p 384). The Supreme Court of Georgia explained that Judicial Code of Conduct applied to officers "of a judicial system performing judicial functions" (*Bun*, p 384). Therefore, it did not apply in this case, because the judge was no longer a judge or judicial candidate at the time of her testimony.

#### Dissent

The dissent argued that, although federal law allows discretionary LWOP sentences for juvenile offenders who commit homicide, federal law does not stop the states from disallowing such sentences for juvenile offenders as a matter of state constitutional law. The dissent argued that the Georgia Constitution "affords our citizens broader rights than the federal constitution" (*Bun*, p 386). Because juveniles are biologically and emotionally immature, they should have the possibility of rehabilitation and redemption for their crimes. There is nothing lost by leaving the possibility of redemption and rehabilitation open to juveniles, and eligibility for parole does not mean a person will be automatically released, it simply means there will be a consideration for parole by the State Board of Pardons and Paroles. In Georgia, a person could still spend his natural life in prison although eligible for parole. In this case, Mr. Bun was given LWOP plus 70 years. This sentence constitutes cruel and unusual punishment and it indicates that the justice system has given up hope of rehabilitating Mr. Bun. This position is contradictory to the ruling in *Roper* that juvenile offenders cannot with reliability be classified among the worst offenders.

In addition the dissent argued that the defense counsel was deficient by failing to object to the tes-

timony of Judge Lawson at the sentencing hearing. This deficiency was prejudicial to Mr. Bun. She was allowed to testify "under the guise of her professional status" and to give her personal opinions about Mr. Bun while admitting that she was not impartial where Mr. Bun was concerned. Defense counsel's failure to object to this testimony constitutes ineffective assistance; therefore, Mr. Bun should be entitled to relief.

#### Discussion

For the past decade the punishment of juvenile offenders has been an evolving area of law on both the federal and the state levels, because juveniles are viewed as biologically and emotionally immature and therefore less culpable than adults for their actions. As the law stands under *Miller*, lower courts are allowed to exercise discretion when considering imposing LWOP on a juvenile who has committed homicide. Georgia's law in regard to punishment for juveniles who commit homicide has also evolved. In April of 2009 the General Assembly amended the Official Code of Georgia Annotated (OCGA) to state that life in prison without the possibility of parole was one of the punishments for murder. At that time, there was nothing in the legislative history to indicate that OCGA considered the impact of this legislation on juveniles in 2009. Before April 2009, the sentence of LWOP was not a sentencing option for any defendant, regardless of his age, in a noncapital murder case.

It is clear that under *Miller*, federal law allows for juveniles who commit homicide to be sentenced to LWOP, but it also allows judicial discretion to be used in applying this sentence to juveniles in state courts. The laws and policies that set the appropriate punishment for juveniles who are inherently immature, more impulsive, and more vulnerable are evolving. In this case, the state of Georgia used its discretion when sentencing a juvenile convicted of homicide to LWOP, and the sentence was not in violation of the Eighth Amendment or the Georgia Constitution.

Although the testimony of the family court judge who had presided over proceedings involving the defendant was not a violation of Canon 2 of the Georgia Code of Judicial Conduct, her testimony was highly prejudicial to Mr. Bun. The admission of her testimony may be a ground for future appeal.