

**What Makes an Opportunity for Release Meaningful? The
Third Circuit Provides and then Vacates Guidance.**

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In 2010, the Supreme Court held that the Eighth Amendment to the United States Constitution prohibits the imposition of life without parole (LWOP) on a juvenile who commits a nonhomicide offense.² The Court held that nonhomicidal juveniles are entitled to a “meaningful opportunity to obtain release” within their lifetimes.³ But does the Eighth Amendment’s ban apply to sentences that are not labeled as LWOP but effectively guarantee that the juvenile will die in prison (de facto LWOP)? And what exactly constitutes a meaningful opportunity for release? Is the Eighth Amendment satisfied if the juvenile is released just days before his natural death? Courts around the country have grappled with these questions, and the current state of juvenile sentencing in this context is one of uncertainty and inconsistency.⁴ In April of 2018, it appeared that

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² *Graham v. Florida*, 560 U.S. 48, 74 (2010).

³ *Id.* at 75.

⁴ See Perry L. Moriearty, *The Trilogy and Beyond*, 62 S.D. L. REV. 539, 543 (2017) (detailing impact of recent Supreme Court decisions

the Third Circuit in *United States v. Grant*⁵ had laid a concrete framework for sentencing authorities to effectuate the Supreme Court’s mandate. Six months later, however, the Third Circuit voted to vacate the opinion and ordered a rehearing en banc.⁶

At the age of sixteen, Corey Grant was convicted of conspiracy and racketeering, drug trafficking, and a gun charge.⁷ He was sentenced to sixty-five years in prison.⁸ Grant argued that his sentence violated the Eighth Amendment because he would be released—at the earliest—at age seventy-two.⁹ Grant contended that he had received a de facto LWOP sentence because his life expectancy was seventy-two, and it deprived him of a meaningful

on juvenile sentencing); Krisztina Schlessel, Note, *Graham’s Applicability to Term-of-Years Sentences and Mandate to Provide a “Meaningful Opportunity” for Release*, 40 FLA. ST. U. L. REV. 1027, 1038 (2013) (examining difference in application of *Graham* in juvenile sentencing throughout country).

⁵ 887 F.3d 131 (3d Cir.), *reh’g granted* 905 F.3d 285 (3d Cir. 2018) (en banc) (mem.).

⁶ *United States v. Grant*, 905 F.3d 285 (3d Cir. 2018) (en banc) (mem.).

⁷ *Grant*, 887 F.3d at 134.

⁸ *Id.* at 135.

⁹ *Id.*

opportunity for release.¹⁰ The Third Circuit agreed, holding that de facto LWOP sentences for nonhomicidal juveniles violate the Eighth Amendment.¹¹ While that holding was progressive compared to some courts,¹² the truly impactful portion of the decision was the framework that the Third Circuit provided for guaranteeing that a nonhomicidal juvenile gets a meaningful opportunity for release. First, a sentencing authority must determine

¹⁰ *Id.*

¹¹ *United States v. Grant*, 887 F.3d 131, 142 (3d Cir.), *reh'g granted* 905 F.3d 285 (3d Cir. 2018) (en banc) (mem.).

¹² *See Bunch v. Smith*, 685 F.3d 546, 547 (6th Cir. 2012) (affirming juvenile's eighty-nine year sentence); *Lucero v. People*, 394 P.3d 1128, 1129-30 (Colo. 2017) (affirming term-of-years sentences aggregating to eighty-four years); *State v. Brown*, 118 So.3d 332, 332-33 (La. 2013) (holding *Graham* inapplicable to term-of-years sentences); *Willbanks v. Dep't of Corr.*, 522 S.W.3d 238, 239-40 (Mo. 2017) (en banc) (holding *Graham* inapplicable to multiple convictions and multiple term-of-years sentences); *Vasquez v. Commonwealth*, 781 S.E.2d 920, 924 (Va. 2016) (upholding juvenile's 133-year sentence for nonhomicide offenses); *State v. Kasic*, 265 P.3d 410, 413-15 (Ariz. Ct. App. 2011) (concluding *Graham* inapplicable to sentence aggregating to 139.75 years for nonhomicidal juvenile).

the juvenile’s life expectancy based on actuary tables and on information relevant to the individual defendant—such as medical examinations and family medical history.¹³ Then, the sentencing authority must presume that the nonhomicidal juvenile be released prior to the nationally-recognized age of retirement.¹⁴ The Third Circuit wrote, “It is indisputable that retirement is widely acknowledged as an earned inflection point in one’s life, marking the simultaneous end of a career that contributed to society in some capacity and the birth of an opportunity for the retiree to attend to other endeavors in life.”¹⁵

Before being vacated, the *Grant* decision was a step towards clarity and uniformity in an area of law where they are lacking. It provided a concrete and reasonable scheme for sentencing authorities to follow. The Third Circuit has scheduled oral arguments for the rehearing in February of 2019. Hopefully, the Third Circuit remains committed to providing a precise sentencing framework to guarantee nonhomicidal juveniles do not receive unconstitutional sentences.

¹³ *Grant*, 887 F.3d at 149-50.

¹⁴ *Id.* at 150.

¹⁵ *Id.*