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“Juveniles Are Different”: Easier Said Than Done Resolving Disparities Among Courts Regarding the Constitutionality of Sentencing Juveniles to De Facto Life-Without-Parole

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**“JUVENILES ARE DIFFERENT”: EASIER SAID THAN DONE
RESOLVING DISPARITIES AMONG COURTS REGARDING
THE CONSTITUTIONALITY OF SENTENCING JUVENILES TO
DE FACTO LIFE-WITHOUT-PAROLE**

*Audrey Fernandez**

ABSTRACT

This comment addresses the Eighth Amendment violation inherent in sentencing juvenile offenders to a lengthy term of years constituting a de facto life-without-parole (LWOP) sentence. The Supreme Court has held that the Eighth Amendment categorically prohibits sentencing juvenile offenders to the death penalty, LWOP for non-homicide offenses, and mandatory LWOP for homicide offenses. Recently, the Court granted certiorari in the case of *Mathena v. Malvo* to determine whether the Court’s precedent can be used to upend discretionary life-without-parole sentences. However, circuit courts remain divided on the issue of whether a de facto LWOP sentence violates the Eighth Amendment. This comment argues that the reason for the divide lies in the sentencing courts’ inability to fully appreciate and implement the Court’s juvenile sentencing precedent and the reasoning behind those holdings. In an effort to resolve the discord among lower courts on the issue of de facto LWOP, this note proposes recommendations aimed at bridging the gap between Supreme Court case law and federal sentencing factors and guidelines.

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I. INTRODUCTION

The American criminal justice system recognizes a fundamental difference between adult and juvenile offenders for sentencing purposes.¹ As compared to adults, juveniles—including those who have committed terrible crimes—lack maturity, are vulnerable to negative influences, and have a greater capacity for rehabilitation.² These differences present Eighth Amendment proportionality concerns in instances where juveniles face the possibility of receiving the harshest possible sentences, typically imposed on offenders who are all morally culpable and irreparably corrupt.³ The Supreme Court has held that the Eighth Amendment's proscription against cruel and unusual punishment categorically prohibits sentencing juvenile offenders to the death penalty,⁴ life without parole (LWOP) for non-homicide offenses,⁵

* J.D. 2020, Florida International University College of Law. I would like to thank my parents, Odalys and Juan Carlos, for always reminding me that gold has a price, but an education is priceless. I would also like to thank Professor Rima Mullins for her guidance throughout the writing process and for our shared enthusiasm on this topic. Finally, a special thanks to the editors of the *FIU Law Review* for publishing my note.

¹ *Miller v. Alabama*, 567 U.S. 460, 474 (2012).

² *Id.* at 471.

³ The Eighth Amendment right not to be subjected to excessive sanctions “flows from the basic ‘precept of justice that punishment for crime should be graduated and proportioned’” to the offender and the offense. *Roper v. Simmons*, 543 U.S. 551, 560 (2005) (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)).

⁴ *See id.* at 568.

⁵ *Graham v. Florida*, 560 U.S. 48, 74 (2010).

and mandatory LWOP for homicide offenses.⁶ However, the Court’s precedent does not outright preclude a juvenile offender from receiving lengthy term-of-years sentences for both homicide and non-homicide offenses.⁷ These lengthy term-of-years sentences can be likened to a death penalty or LWOP sentence because they place the juvenile’s first opportunity at release well beyond the age of retirement⁸ or, in more extreme instances, beyond the average life expectancy of the juvenile.⁹ In light of this similarity, these sentences effectively constitute de facto LWOP sentences.

Responses in the lower courts to this issue of de facto LWOP sentences vary depending on a particular court’s construction of what the Court’s juvenile sentencing cases stand for and what they apply to. For instance, some state courts have held that *Miller* applies equally to LWOP and de facto LWOP for juvenile homicide offenders.¹⁰ These courts move beyond a strict interpretation of *Miller* and its predecessors, focusing instead on the spirit behind the “juveniles are different” mantra repeatedly espoused by the Court.¹¹ However, other courts opt to interpret *Miller* strictly, and thereby see no problem imposing lengthy term-of-years sentences because such sentences do not have the LWOP label explicitly denied in *Miller*.¹²

This note argues that de facto LWOP sentences¹³ pose constitutional concerns for juvenile offenders similar to those posed by a death penalty sentence or a LWOP sentence.¹⁴ For one, imposing de facto LWOP sentences seems to be at odds with the Supreme Court’s transition towards individualized sentencing consideration of the mitigating circumstances

⁶ *Miller*, 567 U.S. at 479.

⁷ *See, e.g.*, *United States v. Grant*, 887 F.3d 131, 151–52 (3d Cir. 2018).

⁸ “Full retirement age (also called ‘normal retirement age’) had been 65 for many years. However, beginning with people born in 1938 or later, that age gradually increases until it reaches 67 for people born after 1959.” *Retirement Age Calculator*, SOC. SECURITY, <https://www.ssa.gov/planners/retire/ageincrease.html>.

⁹ In 2017, life expectancy at birth was 78.6 for the entire U.S. population. This represents a decrease from 78.7 years in 2016. Sherry L. Murphy, Dr. Jiaquan Xu, Kenneth D. Kochanek & Dr. Elizabeth Arias, *Mortality in the United States, 2017*, NCHS DATA BRIEF NO. 328 (Nov. 2018), <https://www.cdc.gov/nchs/data/databriefs/db328-h.pdf>.

¹⁰ *See infra* Part I (C).

¹¹ *Id.*

¹² *Id.*

¹³ While no strict legal definition for a de facto life sentence exists, the U.S. Sentencing Commission defines the cutoff for de facto life at 470 months, just a few months shy of 40 years. GLENN R. SCHMITT & HYUN J. KONFRST, *LIFE SENTENCES IN THE FEDERAL SYSTEM* (2015), <https://www.ussc.gov/research/research-publications/life-sentences-federal-criminal-justice-system>.

¹⁴ Kelly Scavone, Note, *How Long Is Too Long?: Conflicting State Responses to De Facto Life Without Parole Sentences After Graham v. Florida and Miller v. Alabama*, 82 *FORDHAM L. REV.* 3439, 3442 (2014).

surrounding youth.¹⁵ The Supreme Court seems to suggest that consideration of a juvenile's diminished culpability and heightened capacity for change will rarely result in imposing harsh penalties such as LWOP.¹⁶ This, however, has not proven true with harsh penalties such as de facto LWOP sentences. Courts imposing de facto LWOP sentences seem to avoid the "basic thrust" of *Roper*, *Graham*, and *Miller* by refusing to recognize that the underlying rationale of the Supreme Court centers around individualized sentencing for juveniles, not the particular crime that juveniles commit.¹⁷

Additionally, de facto LWOP sentences do not provide a juvenile offender "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation,"¹⁸ in direct contradiction to the purpose behind the juvenile criminal system.¹⁹ Imprisoning juvenile offenders up until or past their life expectancy alters the remainder of his life "by a forfeiture that is irrevocable."²⁰ With a de facto LWOP sentence, a juvenile surrenders any "meaningful opportunity to obtain release."²¹

This note seeks to provide an explanation for why juveniles still receive de facto LWOP sentences in light of the Supreme Court's rationale in *Roper*, *Graham*, and *Miller* directing sentencing authorities to take an individualized approach to juvenile sentencing and prohibiting the imposition of the harshest penalties on juveniles. The reason, this note argues, lies in the reality that sentencing procedures and policies fail to consider the Supreme Court's observations regarding the rehabilitative nature of juveniles. First, all states have one or more transfer statutes providing for the transfer of juvenile offenders from state court to federal court.²² Once in federal court, the applicable sentencing guidelines and factors taken into account by the

¹⁵ *Miller v. Alabama*, 567 U.S. 460, 489 (2012) ("*Graham*, *Roper*, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.>").

¹⁶ *Id.* at 479 ("But given all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.>").

¹⁷ See *State v. Null*, 836 N.W.2d 41, 72–73 (Iowa 2013).

¹⁸ *Graham v. Florida*, 560 U.S. 48, 75 (2010).

¹⁹ Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 804–05 (2003) ("Two related claims were at the heart of the rehabilitative model of juvenile justice: that young offenders were misguided children rather than culpable wrongdoers, and that the sole purpose of state intervention was to promote their welfare through rehabilitation."); Kim Taylor-Thompson, *States of Mind/States of Development*, 14 STAN. L. & POL'Y REV. 143, 146 (2003) ("[T]he state could best address the resulting inappropriate conduct of these children through remedial rather than punitive measures.>").

²⁰ *Miller*, 567 U.S. at 474–75 (quoting *Solem v. Helm*, 463 U.S. 277, 300–01 (1983)).

²¹ *Graham*, 560 U.S. at 75.

²² Anne Teigen, *Juvenile Age of Jurisdiction and Transfer to Adult Court Laws*, NAT'L CONF. ST. LEGIS. (Jan. 11, 2019), <http://www.ncsl.org/research/civil-and-criminal-justice/juvenile-age-of-jurisdiction-and-transfer-to-adult-court-laws.aspx>.

sentencing authority fail to provide sufficient means for considering the juvenile’s age and other mitigating circumstances surrounding juvenile status.²³ In an effort to resolve the discord among lower courts on the issue of de facto LWOP, this note proposes recommendations to bridge the gap between Supreme Court case law and sentencing factors.

This note proceeds in three parts. Part I discusses how the Supreme Court has analyzed the prohibitions on cruel and unusual punishment under the Eighth Amendment as applicable to juvenile sentencing. This section also details how the lower courts have responded to de facto LWOP for homicide and non-homicide juvenile offenders in light of the Supreme Court’s holding in *Miller*. Part II discusses sentencing procedures and statutes applicable to juveniles and how these policies facilitate the imposition of de facto LWOP sentences on juvenile offenders. Finally, Part III recommends statutory amendments and implementations aimed at eliminating the imposition of de facto LWOP sentences for juveniles.

II. THE HISTORY OF JUVENILE SENTENCING UNDER THE EIGHTH AMENDMENT

This part will provide an overview of the factors considered by the courts when conducting an Eighth Amendment analysis of juvenile sentencing, as well as the history and development of juvenile sentencing jurisprudence in the context of the Eighth Amendment. Finally, this part will introduce the problem faced by lower courts in trying to reconcile the Supreme Court’s decisions in *Miller* and *Graham* with the imposition of de facto LWOP sentences on juvenile offenders.

A. *Constitutional Analysis of Punishment under the Eighth Amendment*

The Eighth Amendment of the U.S. Constitution reads, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”²⁴ Central to understanding the scope of cruel and unusual punishment under the Eighth Amendment are the concepts of proportionality and decency.

A punishment violates the Eighth Amendment when it is “grossly disproportionate” to the crime committed.²⁵ Punishment for crime should be graduated and proportioned to both the nature of the offense and the

²³ See *infra* Part III (B).

²⁴ U.S. CONST. amend. VIII.

²⁵ *Harmelin v. Michigan*, 501 U.S. 957, 997 (1991) (Kennedy, J., concurring).

characteristics of the offender.²⁶ Generally, the Supreme Court's cases addressing the proportionality of sentences fall within one of two classifications. The first classification involves challenges to the duration of a term-of-years sentence in light of all relevant circumstances in a particular case.²⁷ This classification requires courts to compare the gravity of the offense and the severity of the sentence to determine if the sentence imposed is unconstitutionally excessive.²⁸ The second classification involves placing categorical restrictions on the death penalty.²⁹ This classification uses categorical rules to define Eighth Amendment standards, and considers both the nature of the offense and the characteristics of the offender.³⁰

Another factor considered in evaluating the constitutionality of punishment under the Eighth Amendment is the "evolving standards of decency that mark the progress of a maturing society."³¹ The Supreme Court has adopted the position that it is free to interpret the Cruel and Unusual Punishment Clause in accordance with current moral standards and is thereby not bound by the clause's original meaning.³² These standards are measured by "objective factors to the maximum possible extent."³³ The factors primarily consist of legislative enactments and state practice,³⁴ sentencing jury determinations,³⁵ and the views of relevant expert entities.³⁶ In addition to these factors, the Court employs its own independent judgement, as informed by its understanding of the Eighth Amendment's text, history, meaning, and purpose.³⁷

²⁶ *Weems v. United States*, 217 U.S. 349, 367 (1910).

²⁷ *Graham v. Florida*, 560 U.S. 48, 59 (2010).

²⁸ *Id.* at 60 (citing *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring)).

²⁹ *Id.* at 59.

³⁰ *Id.* at 60.

³¹ *Estelle v. Gamble*, 429 U.S. 97, 102 (1976).

³² *See Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

³³ *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

³⁴ *See, e.g., Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (describing state laws as "the clearest and most reliable objective evidence of contemporary values." Applying this standard, the Court in *Atkins* counted eighteen states that had abolished the death penalty for "mentally retarded" persons during the decade and a half following a controversial execution in Georgia in 1986. The Court also derived a consensus of contemporary value in the infrequency with which states permitting such executions actually carried them out.)

³⁵ *Id.* at 324 (Rehnquist, J., dissenting).

³⁶ *See, e.g., Roper v. Simmons*, 543 U.S. 551, 570 (2005) (citing amici briefs from both the American Medical Association and the American Psychological Association, which stated that juveniles are more capable of change than are adults, and that their actions are less likely to be evidence of "irretrievably depraved character" than are the actions of adults).

³⁷ *Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008).

B. Juvenile Sentencing Jurisprudence

Children have been classified differently under the law since the early 1800s.³⁸

In recent years, the Supreme Court has developed a line of cases that has transformed the Eighth Amendment analysis of severe juvenile sentencing practices.³⁹ At the core of each of the Court’s decisions is the understanding that “juveniles are different,” and this difference impacts the constitutionality of juvenile punishment.⁴⁰

1. *Thompson v. Oklahoma*: “Juveniles are Different”

The Supreme Court first addressed the issue of permissible sentences for juvenile offenders in *Thompson v. Oklahoma*.⁴¹ In this case, a fifteen-year-old boy was convicted of first-degree murder and sentenced to death.⁴² The Court held that the Eighth Amendment categorically prohibited imposing the death penalty for juvenile offenders who were under the age of sixteen at the time they committed the offense.⁴³ The Court reasoned that offenders under sixteen years of age have limited criminal culpability, as compared to their adult counterparts.⁴⁴ The court noted that, as compared to adults, adolescents are more vulnerable, impulsive, and less self-disciplined.⁴⁵ Because of this, the Court determined that juveniles deserve less severe punishment because they innately have less capacity to control their conduct and think in term of long-range outcomes.⁴⁶ Through its reasoning in *Thompson*, the Court highlighted the disproportionality present in sentencing juveniles with limited criminal culpability to the most severe sentencing possible.

³⁸ See Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1189–90 (1970). Early in American history, state law explicitly treated children under the age of seven differently because those below that age were believed to lack the maturity necessary to understand their criminal behavior.

³⁹ See generally *Miller v. Alabama*, 567 U.S. 460 (2012); *Graham v. Florida*, 560 U.S. 48 (2010); *Roper*, 543 U.S. at 578.

⁴⁰ See, e.g., *Miller*, 567 U.S. at 483 (“[Y]outh matters for purposes of meting out the law’s most serious punishments.”).

⁴¹ *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

⁴² *Id.* at 818.

⁴³ *Id.* at 838.

⁴⁴ *Id.* at 833–34.

⁴⁵ *Id.* at 834.

⁴⁶ *Id.* at 835.

2. *Roper v. Simmons*' Categorical Ban on Capital Punishment for Juvenile Offenders

In *Roper v. Simmons*, the Supreme Court expanded its ruling in *Thompson* by holding that the Eighth Amendment invalidated death sentences for offenders who were under the age of eighteen when their crimes were committed.⁴⁷ Christopher Simmons committed murder at the age of seventeen.⁴⁸ Nine months later, after he had turned eighteen, Simmons was tried as an adult and sentenced to death.⁴⁹ After the Supreme Court held that the Eighth and Fourteenth Amendments prohibit the execution of a mentally retarded person,⁵⁰ Simmons filed a petition for state postconviction relief. Simmons argued that the reasoning the court applied to find that the death penalty did not apply to the mentally retarded also applied to juveniles who committed their crimes while under the age of eighteen.⁵¹ The Supreme Court agreed.

The Court supported its holding with an account of juvenile characteristics which fundamentally distinguish the mental state of juvenile offenders from that of adults committing the same crimes.⁵² First, the Court found that a "lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young."⁵³ Second, "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure."⁵⁴ Third, "the character of a juvenile is not as formed as that of an adult."⁵⁵ The *Roper* Court reasoned that these differences demonstrate that juveniles have a diminished capacity, making a death penalty sentence grossly disproportional to the juvenile's culpability.⁵⁶ As such, any penological justification for the death penalty applicable to adults must apply with lesser force to juveniles.⁵⁷

⁴⁷ *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

⁴⁸ *Id.* at 556.

⁴⁹ *Id.*

⁵⁰ *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

⁵¹ *Roper*, 543 U.S. at 559.

⁵² *Id.* at 569–70.

⁵³ *Id.* at 569 (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)).

⁵⁴ *Id.* (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)).

⁵⁵ *Id.* at 570 (citing ERIK H. ERIKSON, *IDENTITY: YOUTH AND CRISIS* (1968)).

⁵⁶ *Id.* at 572–73 ("The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability.").

⁵⁷ *Id.* at 571 (The Court could not definitively determine whether capital punishment had a significant or measurable deterring or retributory effect on juveniles justifying its imposition at sentencing).

3. *Graham v. Florida*'s Categorical Ban on LWOP for Non-Homicide Juvenile Offenders

The *Roper* Court's categorical ban of capital punishment for juveniles served as the basis for the Supreme Court's ruling in *Graham v. Florida*, banning LWOP sentences for non-homicide juvenile offenders.⁵⁸ When he was sixteen years old, Terrance Graham attempted to rob a restaurant with three other school-age youths.⁵⁹ During the attempted robbery, one of Graham's accomplices struck the restaurant manager with a metal bar.⁶⁰ Graham was arrested for the robbery attempt and, at the election of the prosecutor, charged as an adult.⁶¹ Graham's charges amounted to a first-degree felony carrying a maximum penalty of LWOP, and a second-degree felony carrying a maximum penalty of fifteen years' imprisonment.⁶² In exchange for a guilty plea, the sentencing court withheld adjudication of guilt and sentenced Graham to concurrent three-year terms of probation.⁶³ Graham ultimately violated his probation when he became involved in another attempted robbery.⁶⁴ The trial court, expressing its view that Graham was incorrigible and beyond the point of rehabilitation, sentenced him to the maximum sentence authorized under each felony charge.⁶⁵ Graham challenged his sentenced under the Eighth Amendment.⁶⁶

The issue which most concerned the *Graham* Court with LWOP sentencing for juvenile offenders was the fact that nothing in Florida's laws prevented its courts from sentencing non-homicide juveniles to LWOP based on a court's subjective judgement that the juvenile offender is incorrigible and his actions demonstrate an "irretrievably depraved character."⁶⁷ The Court began its Eighth Amendment analysis of Graham's LWOP sentence by noting that, as applied to juvenile offenders, LWOP sentences are

⁵⁸ *Graham v. Florida*, 560 U.S. 48, 81–82 (2010).

⁵⁹ *Id.* at 53.

⁶⁰ *Id.*

⁶¹ *Id.* (under Fla. Stat. § 985.227(1)(b), it was within a prosecutor's discretion whether to charge sixteen- and seventeen-year-olds as adults or juveniles or juveniles for most felony crimes).

⁶² *Id.* at 53–54.

⁶³ *Id.* at 54.

⁶⁴ *Id.*

⁶⁵ *Id.* at 57 (“I don’t see where any further juvenile sanctions would be appropriate. I don’t see where any youthful offender sanctions would be appropriate . . . [I]t is apparent to the Court that you have decided that this is the way you are going to live your life.”).

⁶⁶ *Id.* at 52.

⁶⁷ *Id.* at 76 (quoting *Roper v. Simmons*, 543 U.S. 551, 570 (2005)).

fundamentally analogous to capital punishment.⁶⁸ Even though the state does not execute a juvenile sentenced to LWOP, the sentence irrevocably alters the offender's life in the same way that a death penalty sentence does.⁶⁹ A LWOP sentence deprives the individual of the "most basic liberties without giving hope of restoration."⁷⁰ The Court observed that imposing a LWOP sentence on a juvenile offender "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."⁷¹ The Court also noted that recent developments in psychology and brain science continued to support a finding of fundamental differences between juvenile and adult minds, including those differences discussed in both the *Thompson* and *Roper* decisions.⁷² In terms of the proportionality of a LWOP sentence for a non-homicide offender, the Court stated that "defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers."⁷³ It follows then, that a juvenile offender who does not kill or intend to kill has a twice diminished culpability.⁷⁴

The Court in *Graham* emphasized the ramifications of a LWOP sentence on any offender—ramifications that are only more pronounced in juveniles who ultimately spend more time incarcerated under a LWOP sentence because they are younger when sentenced.⁷⁵ In considering the penological justifications typically associated with a LWOP sentence (retribution, deterrence, incapacitation, and rehabilitation), the Court noted that none proved sufficient to justify sentencing juvenile offenders to LWOP.⁷⁶ In fact, the Court observed that imposing a LWOP sentence on a juvenile offender chipped away at these penological goals by refusing

⁶⁸ *Id.* at 69 ("It is true that a death sentence is 'unique in its severity and irrevocability,' . . . yet life without parole sentences share some characteristics with death sentences that are shared by no other sentences.").

⁶⁹ *Id.*

⁷⁰ *Id.* at 69–70.

⁷¹ *Id.* at 70.

⁷² *Id.* at 68 ("No recent data provide reason to reconsider the Court's observations in *Roper* about the nature of juveniles.").

⁷³ *Id.* at 69.

⁷⁴ *Id.*

⁷⁵ The State does not execute the offender sentenced to life without parole, but the sentence 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.

Id. at 69–70.

⁷⁶ *Id.* at 71 (noting that LWOP sentences contradict the penological notion of rehabilitation when applied to juveniles because they are the group most receptive to and in need of rehabilitation).

juvenile offenders the chance to demonstrate growth and maturity.⁷⁷ Thus, sentencing juveniles to LWOP without “any legitimate penological justification is by its nature disproportionate to the offense.”⁷⁸ After *Graham*, juveniles cannot receive LWOP sentences for non-homicide offenses.⁷⁹

4. *Miller v. Alabama*’s Shift Towards Individualized Considerations of Age

Two years after the Court’s decision in *Graham*, the Court addressed the issue of mandatory LWOP sentences imposed on juvenile homicide offenders.⁸⁰ With this case, the Court shifted its focus from the actual penalty imposed on a juvenile to the means of imposing it. *Roper* and *Graham* placed categorical bans on certain punishments for juveniles. In *Miller*, the Court applied its previous observations of juvenile character traits from its holdings in *Roper* and *Graham*, noting that nothing previously said about children was crime-specific.⁸¹ The decision in *Miller* was based on two consolidated cases, each involving fourteen-year-olds tried and convicted as adults for murder and sentenced to a mandatory term of LWOP.⁸² In neither case did the sentencing authority have the power to depart from LWOP, as mandated by state law.⁸³ In both cases, state law gave either the prosecutor or district attorney the discretion to charge juveniles as adults when they were alleged to have committed a serious offense, such as murder.⁸⁴ Both juveniles challenged their sentences.⁸⁵ Applying its previous observations on the nature of juveniles, the Court held that before imposing a LWOP sentence on a juvenile homicide offender, sentencers must consider the offender’s youth and other attendant circumstances.⁸⁶ The Court considered this ruling to flow naturally from its precedents, specifically the idea that youth matters for purposes of sentencing juveniles to the most severe sentences.⁸⁷

⁷⁷ *Id.* at 74–75.

⁷⁸ *Id.* at 71.

⁷⁹ *Id.* at 82.

⁸⁰ *See Miller v. Alabama*, 567 U.S. 460 (2012).

⁸¹ By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory-sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment’s ban on cruel and unusual punishment.

Id. at 489.

⁸² *Id.* at 465.

⁸³ *Id.*

⁸⁴ *Id.* at 466–68.

⁸⁵ *Id.* at 469.

⁸⁶ *Id.*

⁸⁷ *Id.* at 483.

In *Miller*, the Court's major concern was the lack of discretionary consideration in mandatory sentencing schemes affecting juvenile homicide offenders.⁸⁸ The Court held that by subjecting juveniles to the same mandatory sentencing schemes as adults, the laws prohibited a sentencing court from considering whether a LWOP sentence is proportionate punishment, in direct violation of the Eighth Amendment's proportionality principle.⁸⁹ Although the case at hand involved a mandatory LWOP sentence, the Court mentioned that youth is a mitigating factor that must always be used when considering severe sentences for juveniles.⁹⁰ As it did in *Graham*, the Court pointed out that juveniles sentenced under a mandatory scheme also used for adults will receive the same sentence as adults but will ultimately serve more time than their adult equivalents because they are younger when sentenced.⁹¹ Thus, in *Miller* the Court articulated the need for unique juvenile sentencing procedures.

5. *Montgomery v. Louisiana* Expands the Reach of *Miller*

In 1973, at the age of seventeen, Henry Montgomery killed a deputy sheriff in Baton Rouge, Louisiana.⁹² The court automatically sentenced Montgomery to LWOP upon the jury returning a verdict of "guilty without capital punishment."⁹³ Fifty years later, when the Supreme Court decided *Miller*, Montgomery sought collateral review of his mandatory life-without-parole sentence.⁹⁴

The Court cited heavily to its reasoning in *Miller*: "*Miller* requires that before sentencing a juvenile to life without parole, the sentencing judge take into account 'how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.'"⁹⁵ According to the Court, "*Miller* announced a substantive rule of constitutional law," and is therefore retroactive because it carries a significant risk that the vast majority of juvenile offenders face punishments that the law cannot impose upon

⁸⁸ *Id.* at 476 ("Such mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it.").

⁸⁹ *Id.* at 474.

⁹⁰ *Id.* at 489 ("[O]ur individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.").

⁹¹ *Id.* at 477.

⁹² *Montgomery v. Louisiana*, 136 S. Ct. 718, 725 (2016).

⁹³ *Id.*

⁹⁴ *Id.* at 726.

⁹⁵ *Id.* at 733.

them.⁹⁶ Thus, *Miller*'s holding requiring that sentencing courts consider the juvenile's youth and its attendant characteristics applies retroactively to juveniles who received a mandatory LWOP sentence prior to the Court's decision in *Miller*.

6. The Supreme Court Grants Certiorari in the Case of *Mathena v. Malvo*

On March 18, 2019, the Supreme Court agreed to decide whether its decision in *Miller* banning mandatory sentences of life without parole for juveniles can be used to upend discretionary life-without-parole sentences imposed on teens.⁹⁷ Lee Boyd Malvo was one of the two snipers behind the Beltway sniper attacks in Washington, D.C.⁹⁸ Between September 5, 2002, and October 22, 2002, Malvo and his accomplice murdered ten people and wounded numerous others.⁹⁹ Malvo was seventeen at the time he committed these offenses for which he was sentenced to LWOP in 2004.¹⁰⁰ Neither the court, prosecutor, nor Malvo's counsel ever suggested that there was any possibility Malvo could be sentenced to anything less than LWOP.¹⁰¹ Following Malvo's convictions, the Supreme Court largely developed its Eighth Amendment juvenile sentencing jurisprudence.¹⁰² Following the Court's decision in *Miller*, Malvo filed two federal habeas petitions seeking to vacate his LWOP sentences.¹⁰³

On appeal, the Fourth Circuit held that the Supreme Court's holding in *Miller* is a substantive constitutional guarantee that applies regardless of whether the LWOP sentence was mandatorily imposed or discretionary.¹⁰⁴ The Fourth Circuit explained that under *Miller*, the Eighth Amendment bars LWOP sentences for all but those rare juvenile offenders whose crimes reflect permanent incorrigibility.¹⁰⁵ The court determined Malvo was entitled to resentencing since the prior sentencing authority in Malvo's case never

⁹⁶ *Id.* at 734.

⁹⁷ Petition for Writ of Certiorari at 1, *Mathena v. Malvo*, No. 18-217 (U.S. Aug. 16, 2018) [hereinafter *Mathena* Petition].

⁹⁸ *Id.*

⁹⁹ *Id.* at 4.

¹⁰⁰ Respondent's Brief in Opposition at 2, *Mathena v. Malvo*, No. 18-217 (U.S. Oct. 19, 2018) [hereinafter *Malvo* Opposition].

¹⁰¹ *Id.* at 4.

¹⁰² It was during this time that the Court handed down its decisions in *Roper*, *Graham*, and *Miller*.

¹⁰³ *Malvo* Opposition, *supra* note 100, at 6.

¹⁰⁴ *Id.* at 2.

¹⁰⁵ *Id.* at 9.

considered whether to impose a lesser sentence or whether Malvo's crimes reflected irreparable corruption or permanent incorrigibility.¹⁰⁶

In his brief in opposition of writ of certiorari, Malvo argues that Eighth Amendment concerns surrounding a LWOP sentence imposed on a juvenile exist whether that juvenile is sentenced under a mandatory scheme or a discretionary scheme.¹⁰⁷ Malvo relies on the Court's reasoning in *Miller*, arguing that the reason the Court there invalidated the LWOP sentences was because the sentences failed to "distinguish juveniles whose crimes reflect the transient immaturity of youth from those whose crimes reflect irreparable corruption."¹⁰⁸ Mere discretion is not enough to combat this failure.¹⁰⁹ The Eighth Amendment only permits imposing a LWOP sentence after the sentencer considers the juvenile offender's "diminished culpability and heightened capacity for change" to determine if they are "the rare juvenile offender whose crime reflects irreparable corruption."¹¹⁰

C. *Reconciling Miller and Graham with the Imposition of De Facto LWOP Sentences on Juvenile Offenders.*

The Court's decision in *Graham* placed a categorical ban on the practice of sentencing non-homicide juvenile offenders to LWOP. The Court's decision in *Miller* held that a homicide juvenile offender cannot receive an automatic LWOP sentence without the sentencing authority first considering the juvenile's age and the attendant circumstances surrounding his offense. However, to date, the Supreme Court has not explicitly addressed whether the reasoning behind *Graham* and *Miller* extends to juvenile offenders receiving discretionary sentences for a term of years that effectively constitutes LWOP.¹¹¹ However, the Court has now agreed to decide this issue by granting certiorari in the case of *Mathena v. Malvo*.¹¹²

As Supreme Court case law on juvenile sentencing currently stands, courts still have the discretion to sentence juveniles to lengthy term-of-years sentences, effectively constituting a life sentence, in violation of the Eighth

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 22.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* (citing *Miller v. Alabama*, 567 U.S. 460, 479–80 (2012)).

¹¹¹ During oral arguments in *Miller*, the Court addressed lengthy sentences for juveniles as an emerging issue under the Eighth Amendment. Transcript of Oral Argument at 4–5, *Miller v. Alabama*, 576 U.S. 460 (2012) (No. 10-9646). "[O]nce you depart from the principle that we've enunciated that death is different, why is life without parole categorically different from 60 years or 70 years . . . ?" *Id.* at 5.

¹¹² *Mathena v. Malvo*, No. 18-217, 2019 U.S. LEXIS 1905 (Mar. 18, 2019).

Amendment’s bar against disproportionate punishment. Although recent studies suggest a national consensus against the use of juvenile LWOP and highlight the consistency with which lower courts have responded to *Miller*,¹¹³ the fact remains that states are still imposing lengthy sentences that are the functional equivalent of a LWOP sentence.

A number of lower courts have recognized that, given the Court’s emphasis on the characteristics of juveniles in *Graham* and its holding in *Miller* focusing on individual sentencing, lengthy or de facto life-without-parole sentences violate the Eighth Amendment.¹¹⁴ In *Budder v. Addison*, the Tenth Circuit struck down a 155-year sentence consisting of three life-with-parole sentences plus 20 years imposed on a juvenile non-homicide offender.¹¹⁵ The juvenile would have had to serve 131.75 years before becoming eligible for parole.¹¹⁶ Building off of the Supreme Court’s decision in *Graham*, the Tenth Circuit held that the juvenile’s sentence denied him any real opportunity to obtain release, regardless of the label that the sentencing authority placed on the sentence.¹¹⁷ “In this context, there is no material distinction between a sentence for a term of years so lengthy that it “effectively denies the offender any material opportunity for parole” and one that will imprison him for “life without the opportunity for parole—both are equally irrevocable.”¹¹⁸

Still, there are other federal courts that have adopted a narrower interpretation of the Court’s ruling in *Miller* and *Graham*, thereby upholding de facto life sentences for juveniles.¹¹⁹ For instance, two years after the

¹¹³ See Brief for The Charles Hamilton Houston Institute for Race & the Justice & the Criminal Justice Institute as Amici Curiae in Support of Neither Party at 12, *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) (No. 14-280) (arguing that a national consensus exists against sentencing juveniles to LWOP).

¹¹⁴ See, e.g., *McKinley v. Butler*, 809 F.3d 908 (7th Cir. 2016) (holding that the sentencing court did not abide by the requirements set forth in *Miller* by sentencing a homicide juvenile offender to two consecutive 50-year prison terms without first considering how juveniles are different. The Seventh Circuit also held that the logic of *Miller* applies wherever a lengthy term of years sentence constitutes de facto LWOP); *Moore v. Biter*, 725 F.3d 1184 (9th Cir. 2013) (holding that a cumulative sentence of 254 years and a denial of parole for 127 years violates the Supreme Court’s holding in *Graham* because the juvenile will not be eligible for parole until well beyond his life expectancy).

¹¹⁵ *Budder v. Addison*, 851 F.3d 1047, 1049 (10th Cir. 2017).

¹¹⁶ *Id.* at 1050 (“Under Oklahoma law, a prisoner must serve 85% of his sentence before he will be eligible for parole.”).

¹¹⁷ *Id.* at 1056 (reasoning that “[t]he Court in *Graham* focused, not on the label attached to the sentence, but on the irrevocability of the punishment.”).

¹¹⁸ *Id.*

¹¹⁹ See, e.g., *United States v. Jefferson*, 816 F.3d 1016, 1019 (8th Cir. 2016) (Juvenile defendant’s “600-month sentence does not fall within *Miller*’s categorical ban on mandatory life-without-parole sentences” because the juvenile was “resentenced under now-advisory federal guidelines after a hearing in which the district court carefully and thoroughly applied the teaching of *Roper*, *Graham*, and *Miller*.”); *Davis v. McCollum*, 798 F.3d 1317 (10th Cir. 2015); *Croft v. Williams*, 773 F.3d 170, 171 (7th Cir. 2014) (“[L]ife sentences for murder are discretionary under Illinois law. This is a critical difference from the

Supreme Court's ruling in *Graham*, the Sixth Circuit held that a non-homicide sixteen-year-old offender receiving a consecutive, fixed-term sentence of 89 years did not violate federal law.¹²⁰ The Sixth Circuit held that neither the Supreme Court's decision in *Graham* nor its decision in *Miller* applied to consecutive, fixed-term sentences for juveniles that had committed multiple non-homicide offenses.¹²¹ However, in so ruling, the Sixth Circuit overlooked the essence of the Supreme Court's holding in *Graham* that juvenile offenders must be afforded some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.¹²² Even the Sixth Circuit, in its holding, agrees that the juvenile offender's 89-year sentence is the functional equivalent of life without parole.¹²³ However, the court provides a technical interpretation of the Supreme Court's holding in *Graham* to distinguish between a de facto life sentence and an actual life sentence.¹²⁴ By focusing so intently on the letter of the law, the Sixth Circuit disregarded the spirit of the law embodied in the Supreme Court's *Graham* decision which centered on providing juvenile offenders with a meaningful chance at rehabilitation, regardless of the exact labeling of the juvenile's sentence.

III. EXPLAINING THE DISPARITY AMONG COURTS REGARDING THE CONSTITUTIONALITY OF JUVENILE DE FACTO LIFE SENTENCES

This section will explain various factors arguably contributing to the existing circuit split regarding the constitutionality of sentencing juveniles to lengthy term-of-years sentences in which the possibility of parole occurs considerably past the juvenile's average life expectancy.

A. Automatic Transfer Laws Result in Adult Treatment of Juvenile Offenders

One factor creating disparities in juvenile sentencing practices is automatic transfer statutes requiring that juveniles charged with certain offenses be transferred to adult court for sentencing. Transferring a juvenile's case into adult court makes it possible for juveniles to receive mandatory

situation presented in *Miller*, which considered only 'mandatory life-without-parole sentences for juveniles.'").

¹²⁰ *Bunch v. Smith*, 685 F.3d 546, 550 (6th Cir. 2012).

¹²¹ *Id.* ("Graham is not clearly applicable to this case.").

¹²² *Graham v. Florida*, 560 U.S. 48, 75 (2010).

¹²³ *Bunch*, 685 F.3d at 551.

¹²⁴ *Id.* ("[I]n *Graham*, the Court said that a juvenile is entitled to such a 'realistic opportunity to obtain release' if a state imposes a sentence of 'life.' . . . That did not happen in this case.").

LWOP sentences because mandatory LWOP sentences are still permissible for adults. The transfers also make it more likely that a juvenile will receive a lengthy term-of-years sentence constituting a de facto LWOP sentence because sentencing authorities in adult courts will be less likely to consider age as a factor diminishing the applicable sentencing range.¹²⁵ As of 2014, 29 states had automatic transfer statutes and essentially all states allow judges to waive juveniles to the adult system.¹²⁶ When juveniles are transferred to adult court, they are subject to mandatory sentencing schemes applicable to adults and are only afforded the sentencing considerations given to adult offenders.¹²⁷ In light of this possibility, the Supreme Court’s precedent for juvenile sentencing, with the exception of the Court’s decision in *Roper*, is virtually without implementational force.¹²⁸

The ability to automatically transfer a juvenile’s case to adult court upon satisfaction of the transfer statute requirements undermines the Court’s holding in *Miller* calling for individualized considerations of a juvenile offender’s age and attendant circumstances. Discretionary transfer statutes placing the decision to transfer in the hands of the prosecutor or judge are also problematic, given that these statutes do not require transferring authorities to take the offender’s age into account when deciding to transfer, and usually, prosecutors are making the decision to transfer based solely off of the facts of the case.¹²⁹ Whether automatic or discretionary, transfer statutes disregard a juvenile’s unique ability to rehabilitate.¹³⁰ Once in adult court, the penological justifications typically inapplicable to a juvenile offender form the basis for the juvenile’s lengthy term-of-years sentence.¹³¹ It is possible for juveniles to receive de facto LWOP sentence in adult court because the requirement that the juvenile receive a meaningful opportunity

¹²⁵ In *Miller*, Justice Kagan explained that states allowing juvenile LWOP sentences do so through “two independent statutory provisions,” one allowing the transfer of juvenile cases to adult court, the other setting general penalties applicable to all offenders tried in adult court. *Miller v. Alabama*, 567 U.S. 460, 485 (2012).

¹²⁶ CAMPAIGN FOR YOUTH JUSTICE, KEY FACTS: YOUTH IN THE JUSTICE SYSTEM 4 (2012), <http://www.campaignforyouthjustice.org/documents/KeyYouthCrimeFacts.pdf>.

¹²⁷ *Id.* at 3; see also Charles Doyle, Cong. Research Serv., RL30822, *Juvenile Delinquents and Federal Criminal Law: The Federal Juvenile Delinquency Act and Related Matters* 16 (2004) (“Juveniles transferred for trial as adults in federal court are essentially treated as adults, with few distinctions afforded or required because of their age.”).

¹²⁸ See 18 U.S.C. § 3591(a) (“A defendant who has been found guilty of [a capital offense] shall be sentenced to death if . . . it is determined that imposition of a sentence of death is justified, except that no person may be sentenced to death who was less than 18 years of age at the time of the offense.”).

¹²⁹ *Miller*, 567 U.S. at 487–88 (citing DEPT. OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, P. GRIFFIN, S. ADDIE, B. ADAMS, & K. FIRESTONE, TRYING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER LAWS AND REPORTING 5 (2011)).

¹³⁰ Ioana Tchoukleva, Note, *Children Are Different: Bridging the Gap Between Rhetoric and Reality Post Miller v. Alabama*, 4 CALIF. L. REV. CIR. 92, 94 (2013).

¹³¹ *Supra* Part II (B).

for release espoused under *Graham* no longer applies in an adult court, where a juvenile is tried as an adult.¹³²

Additionally, it is possible that a juvenile in a particular state is automatically considered an adult for criminal justice purposes because they reached the statutorily defined age at which they are legally considered an adult.¹³³ The overwhelming majority of jurisdictions—41 states and the District of Columbia—define age 17 as the oldest age that an individual can have a case originate in juvenile court.¹³⁴ In two states, the youngest age at which a juvenile is considered an adult for criminal justice purposes is 15.¹³⁵ In those states, the juvenile's trial originates in adult criminal court.¹³⁶

B. Sentencing Factors and Guidelines Fail to Adequately Account for Youth Characteristics Discussed in Supreme Court Cases

Contributing to the disparity among courts in determining how to approach juvenile de facto LWOP sentencing is the fact the advisory sentencing guidelines, which sentencing courts are required to consult, provide relatively little to no recommendations pertinent to juvenile offenders. As explained below, once transferred to federal court, the recommendations applicable to juveniles fail to reflect both the spirit of the law as well as the transition towards individualized considerations of youth characteristics espoused in the Supreme Court's juvenile sentencing cases.

Sentencing authorities follow a three-step process when sentencing defendants. First, the court calculates the applicable guideline range and sentence enhancement by referring to the Sentencing Commission's sentencing table.¹³⁷ On one axis of the table is a range quantifying the seriousness of an offense, and on the other axis of the table is the offender's

¹³² See generally Patrick Griffin, Sean Addie, Benjamin Adams & Kathy Firestone, *Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting*, U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION (September 2011), <https://www.ncjrs.gov/pdffiles1/ojjdp/232434.pdf> (discussing how juvenile offenders transferred to adult court face the possibility of receiving sentences decades longer than what they would have received in juvenile court).

¹³³ Nicole Scialabba, *Should Juveniles Be Charged as Adults in the Criminal Justice System?*, A.B.A. (Oct. 3, 2016), <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2016/should-juveniles-be-charged-as-adults/>.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ U.S. SENTENCING COMM'N, AN OVERVIEW OF THE FEDERAL SENTENCING GUIDELINES 1, http://www.ussc.gov/sites/default/files/pdf/about/overview/Overview_Federal_Sentencing_Guidelines.pdf.

prior criminal history.¹³⁸ The applicable sentencing range arises from the point at which the offense level intersects the offender’s criminal history classification.¹³⁹ Second, the court considers motions to depart from the applicable sentencing range by assessing the sentencing guidelines and official commentary of the Commission.¹⁴⁰ Third, the court considers the factors in Section 3553(a) of Title 18 of the United States Code.¹⁴¹

When a defendant is convicted of a federal offense, the sentencing authority, although not bound to the Federal Sentencing Guidelines, must consult and take them into account when sentencing a defendant.¹⁴² In *Kimbrough v. United States*, the Supreme Court held that sentencing courts are free to disregard the policies of the Guidelines and may find that a sentencing recommendation is “greater than necessary.”¹⁴³ Thus, the Guidelines continue to stand as a required and fundamental starting point in federal sentencing.

As pertaining to juveniles, relatively few sections from the Guidelines offer a sentencing court guidance with how to proceed in sentencing. Section 5H1.12 provides that “[l]ack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing are not relevant grounds in determining whether a departure is warranted.”¹⁴⁴ This is due to the fact that the sentencing guidelines are crafted for adult offenders, not juveniles.¹⁴⁵ However, as the Supreme Court has noted time and again, juveniles and adults are not the same and should not be treated the same for sentencing purposes.¹⁴⁶ Juveniles have a diminished culpability level and a heightened capacity for change.¹⁴⁷ These capacities differ substantially from the capacities of adults.¹⁴⁸

Section 5H1.12 inherently discourages sentencing courts from considering a juvenile’s upbringing in determining whether to depart from the recommended sentencing range. This directly contravenes *Miller*, which

¹³⁸ FEDERAL SENTENCING TABLE, https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2016/Sentencing_Table.pdf.

¹³⁹ U.S. SENTENCING COMM’N, *supra* note 137, at 3.

¹⁴⁰ 18 U.S.C. § 3553(b) (2012).

¹⁴¹ *Id.* § 3553(a)(1).

¹⁴² *United States v. Booker*, 543 U.S. 220, 264 (2005).

¹⁴³ *Kimrough v. United States*, 552 U.S. 85, 110 (2007).

¹⁴⁴ U.S. SENTENCING GUIDELINES MANUAL § 5H1.12 (U.S. SENTENCING COMM’N 2018).

¹⁴⁵ Note, *Mending the Federal Sentencing Guidelines Approach to Consideration of Juvenile Status*, 130 HARV. L. REV. 994, 1010 (2017).

¹⁴⁶ *See, e.g., Miller v. Alabama*, 567 U.S. 460, 471 (2012).

¹⁴⁷ *See Graham v. Florida*, 560 U.S. 48, 74 (2010); *see also Miller*, 567 U.S. at 460.

¹⁴⁸ Emily Steiner, *Mandatory Minimums, Maximum Consequences*, JUV. L. CTR. (Aug. 17, 2017), <https://jlc.org/news/mandatory-minimums-maximum-consequences>.

required an individualized consideration of a juvenile's characteristics.¹⁴⁹ The Court in *Miller* implicitly touched upon the juvenile offender's lack of guidance in discussing and referencing back to the child's upbringing in its holding.¹⁵⁰ Therefore, Miller's lack of guidance as a youth factored into the Court's analysis of his sentence.

Even more problematic is the Commission's Departure and Variance Primer, explicitly stating that, "[a] defendant's guideline sentence is to be based on the offense the defendant committed, not the character of the defendant."¹⁵¹ This runs contrary to the notion espoused by the Supreme Court that "juveniles are different."¹⁵² Thus, the Commission's failure to advise sentencing courts to consider a juvenile defendant's character disregards the Court's transition towards individualized considerations of age and other attendant circumstances as espoused in *Miller*.

The Commission's only other age-related guidance is found in Section 5K2.22 of the Guidelines and is limited in its application to sentencing for a defendant convicted of an offense involving a minor victim.¹⁵³ Section 5K2.22(1) provides that the defendant's age may be reason to depart downwards from the applicable sentencing range to the extent permitted by Section 5H1.1.¹⁵⁴ However, as discussed above, the Commission discourages consideration of age as a mitigating factor under Section 5H1.1.¹⁵⁵

The Commission's policy statements discouraging the consideration of age further complicate juvenile sentencing when considering the statutory requirement under 18 U.S.C. Section 3553(a) that sentencing judges consider all relevant characteristics of an offender.¹⁵⁶ Section 3553(a) is a catch-all provision providing for consideration of numerous factors, including: "the

¹⁴⁹ See, e.g., *Miller*, 567 U.S. at 460.

¹⁵⁰ *Id.* at 479 ("Miller's stepfather physically abused him; his alcoholic and drug-addicted mother neglected him; he had been in and out of foster care as a result; and he had tried to kill himself four times, the first when he should have been in kindergarten.").

¹⁵¹ OFFICE OF GEN. COUNSEL, U.S. SENTENCING COMM'N, DEPARTURE AND VARIANCE PRIMER 31 (2013), https://www.ussc.gov/sites/default/files/pdf/training/primers/2014_Primer_Departure_Variance.pdf (discouraging consideration of age under §5H.1. of the Guidelines).

¹⁵² See *supra* Part II (B).

¹⁵³ U.S. SENTENCING GUIDELINES MANUAL § 5K2.22 (U.S. SENTENCING COMM'N 2018).

¹⁵⁴ *Id.* at § 5K2.22(1).

¹⁵⁵ Section 5H1.1 of the Guidelines provides that age "may be relevant in determining whether a departure is warranted, if considerations based on age, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines." However, the Commission does not explain what constitutes an unusual degree warranting consideration of age.

¹⁵⁶ 18 U.S.C. § 3553(a)(1).

need for the sentence imposed,”¹⁵⁷ “the kinds of sentences available,”¹⁵⁸ “the need to provide restitution to any victims of the offense,”¹⁵⁹ and “the nature and circumstances of the offense and the history and characteristics of the defendant.”¹⁶⁰ It follows, logically, that age would be one such characteristic that the court is required to consider.¹⁶¹ However, Congress failed to define under Section 3553 what exactly constitutes the “characteristics of the defendant.”¹⁶²

The disparity between Supreme Court precedent urging consideration of youth and the Guidelines discouraging consideration of the offender’s youth and other attendant circumstances contributes to the existing circuit splits regarding the constitutionality of de facto LWOP sentences for juvenile offenders. As demonstrated above, the Guidelines are ambivalent in their treatment of juvenile and adult offenders, affording both groups the same considerations when determining whether to reduce an applicable sentencing range. However, the penological goals applicable to adult offenders, which the Guidelines take into account, are not applicable to juvenile offenders who lack the level of moral culpability that an adult offender possesses and who demonstrate a greater rehabilitation capability than their adult counterparts.¹⁶³ Because the Commission discourages consideration of youth characteristics, courts analyzing lengthy juvenile terms often are left to apply strict interpretations of the guidelines and Supreme Court precedent.¹⁶⁴

As discussed, the Commission’s Guidelines for sentencing and transfer statutes removing juvenile offenders from juvenile to adult court systems do not preclude the possibility that a juvenile offender receive a sentence extending well beyond average life expectancy. Rather, they facilitate the

¹⁵⁷ *Id.* § 3553(a)(2).

¹⁵⁸ *Id.* § 3553(a)(3).

¹⁵⁹ *Id.* § 3553(a)(7).

¹⁶⁰ *Id.* § 3553(a)(1).

¹⁶¹ The Supreme Court’s precedent in *Roper*, *Miller*, and *Graham* suggest that an offender’s juvenile status is a characteristic that sentencing courts must consider. This is evidenced in the Court’s observations of general characteristics pertaining to all juveniles.

¹⁶² Note, *supra* note 145, at 1011.

¹⁶³ See *Miller v. Alabama*, 567 U.S. 460, 461 (2012) (“[D]istinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes.”); *Graham v. Florida*, 560 U.S. 48, 74–75 (2010); see also Note, *supra* note 145, at 1012 (“A court applying the Guidelines without considering ratcheting a sentence down based on youth applies a system premised on the sufficient and necessary penological purposes of sentencing the typical offender: an adult.”).

¹⁶⁴ See, e.g., *United States v. Jefferson*, 816 F.3d 1016, 1019 (8th Cir. 2016) (interpreting the Supreme Court’s decision in *Miller* as constituting a categorical ban on Mandatory LWOP sentences while disregarding the Court’s larger holding that sentencing courts must take into account a juvenile’s age and other attendant circumstances prior to receiving a LWOP sentence).

imposition of such sentences because the sentencing courts are not assessing the juvenile's youth characteristics when determining sentences.¹⁶⁵

IV. RECOMMENDATIONS

With its decision in *Miller*, the Supreme Court took juvenile sentencing in a new direction by holding that juvenile offenders have a right to have their age taken into consideration before being sentenced to LWOP. However, as discussed in the preceding section, lower courts encounter difficulty reconciling the Court's holding in *Miller* with the Guidelines and transfer statutes which both discourage consideration of an offender's age and treat juveniles as adults with the same aptitude for moral culpability. The result of sentencing courts attempting to reconcile these two factors is that juveniles receive lengthy term-of-years sentences placing their first opportunity of release well beyond the average life expectancy. What follows are suggestions and recommendations that would ensure sentencing courts apply the Supreme Court's reasoning when examining the Guidelines and statutory provisions for juvenile sentencing.

A. *Extending Graham's Analysis of Penological Goals to De Facto LWOP Sentences*

In *Graham*, the Supreme Court largely based its decision to categorically ban LWOP sentences for non-homicide juvenile offenders by reasoning that the penological goals typically served by such a sentence did not apply to juvenile offenders with the same force with which they applied to adults.¹⁶⁶ The Court's considerations regarding the applicability of the penological goals to juvenile offenders was not crime specific and centered more on the nature of juveniles as well as the nature of a LWOP sentence. These elements are both present in instances where juveniles are sentenced to lengthy term-of-years sentences effectively constituting LWOP, but for their label.

Extending the Court's assessment of the penological goals to analyze potential justifications for de facto LWOP sentences renders them unconstitutional in violation of the Eighth Amendment. Lengthy sentencing terms which place a juvenile's first opportunity at release well beyond

¹⁶⁵ See Note, *supra* note 145, at 1012 ("The resultant sentence for a youth offender convicted as an adult then is likely 'greater than necessary' under § 3553(a) when youth status is not accounted for.").

¹⁶⁶ *Graham*, 560 U.S. at 70–71.

average life expectancy are incompatible with the goals of retribution, deterrence, and incapacitation.¹⁶⁷

The Court in *Graham* held that the goal of retribution is based on the idea that a “criminal sentence must be directly related to the personal culpability of the criminal offender.”¹⁶⁸ Society is entitled to impose severe sanctions on a criminal offender to express its condemnation of the crime and seek restoration of the moral imbalance brought about by the crime.¹⁶⁹ However, sentencing a juvenile to a term effectively constituting LWOP cannot be said to be proportional to the juvenile’s personal culpability when, as the Court acknowledges, juveniles have a diminished moral culpability.¹⁷⁰ The case for this argument is stronger in instances where juveniles committing non-homicide offenses are sentenced to de facto LWOP. In those cases, there is a proportionality concern triggering Eighth Amendment considerations that a virtual LWOP sentence constitutes cruel and unusual punishment.

The Court in *Graham* did not believe that the penological justification of deterrence justified LWOP for juvenile offenders, and its reasoning for so believing also applies to de facto LWOP sentences.¹⁷¹ The deterrence justification is effective when individuals are capable of taking into account possible punishment. However, this is not the case with juveniles who “lack maturity” and have “an underdeveloped sense of responsibility” and are therefore more likely to engage in poor decision-making.¹⁷² Thus, punishing a juvenile under the penological justification of deterrence through a LWOP sentence or a sentence effectively constituting LWOP is grossly disproportional to a juvenile offender’s ability to make responsible decisions.

Incapacitation is yet another penological goal that cannot be justified under either a LWOP sentence or a de facto LWOP sentence.¹⁷³ The purpose of the incapacitation goal is to segregate individuals who repeatedly commit criminal offenses from the rest of society for an extended period of time.¹⁷⁴ As the Court noted in *Graham*, the characteristics associated with youth make incapacitation a questionable justification for sentencing juveniles to life

¹⁶⁷ *Id.* at 71.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 71–72.

¹⁷¹ *Id.* at 72 (“[T]he same characteristics that render juveniles less culpable than adults suggest . . . that juveniles will be less susceptible to deterrence.”).

¹⁷² *Id.*

¹⁷³ *Id.* (“To justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible.”).

¹⁷⁴ *Id.*

sentences, whether explicitly or implicitly. This is due to the difficulty in assessing the level of risk a juvenile offender poses to society.¹⁷⁵

Finally, rehabilitation is a penological goal, which, in the case of juveniles, is best served outside of incarceration. The Court defines Rehabilitation as the right to reenter society.¹⁷⁶ By sentencing juveniles to LWOP or de facto LWOP, courts are denying juveniles the right to a meaningful opportunity for release. In the case of de facto LWOP, an offender's first opportunity for release often comes at a point when the juvenile is beyond the age of retirement or the average life expectancy. In *Graham*, the Court noted that defendants serving LWOP sentences are often denied access to vocational training and other rehabilitative services.¹⁷⁷

Thus, by assessing the extent to which the traditional penological justifications apply to a juvenile offender, sentencing courts can ensure that the sentence imposed on a juvenile comports with the Supreme Court's observations regarding the juvenile's unique nature.

B. Adopt Additional Sentencing Factor Considerations; Define Those Factors Which Are Ambiguous

Sentencing courts are required to consider the factors listed in 18 U.S.C. Section 3553(a) in imposing a sentence. The factors listed include the characteristics of the defendant. However, Congress has failed to provide any further explanation as to which specific aspects of the defendant's characteristics must be considered.¹⁷⁸ As discussed above, this ambiguity makes virtual LWOP for juveniles possible because sentencing courts are not provided with a clear indication of the factors they must consider pertaining to an offender's age. As such, the factors fail to account for the Supreme Court's focus on the unique nature of juvenile offenders and how that nature should be taken into account at sentencing.

The Third Circuit's decision in *United States v. Grant* recommending two new factors for sentencing courts to consider, in addition to the Section 3553(a) factors, is a step in the right direction: first, courts must calculate the juvenile's average life expectancy, and, second, courts must shape a sentence that properly accounts for a "meaningful opportunity for release."¹⁷⁹ In 1992, sixteen-year-old Grant was convicted of conspiracy and racketeering under

¹⁷⁵ *Id.* at 73.

¹⁷⁶ *Id.* at 74.

¹⁷⁷ *Id.* ("For juvenile offenders, who are most in need of and receptive to rehabilitation . . . the absence of rehabilitative opportunities or treatment makes the disproportionality of the sentence all the more evident.").

¹⁷⁸ See Note, *supra* note 145.

¹⁷⁹ *United States v. Grant*, 887 F.3d 131, 148–49 (3d Cir. 2018).

the RICO Act, as well as various drug trafficking charges and a gun charge. At sentencing, the district court, in its own discretion, determined that Grant would never be fit to reenter society and therefore sentenced him to life in prison without the possibility of parole.¹⁸⁰ At resentencing, in light of the Supreme Court’s decision in *Miller*, the district court determined that Grant’s upbringing and debilitating characteristics of youth demonstrated his capacity to reform, thereby making a LWOP sentence inappropriate.¹⁸¹ Instead of a LWOP sentence, the District Court now sentenced Grant to sixty-five years without parole.¹⁸² On appeal, Grant argued that his sentence constituted a de facto LWOP because his earliest opportunity for release is at age seventy-two, the same age as his life expectancy.¹⁸³

The Third Circuit held that the Eighth Amendment prohibits the imposition of a term-of-years sentence lasting for the duration of a juvenile’s life expectancy, particularly in instances where the juvenile’s crimes demonstrate immaturity rather than irreparable corruption. In so holding, the court instructed sentencing courts to first conduct individualized evidentiary hearings to determine the juvenile’s life expectancy and whether there exists within the applicable sentence a meaningful opportunity for release.¹⁸⁴ The Third Circuit reasoned that, by considering the juvenile’s average life expectancy, courts prevent sentencing juveniles that are capable of reform to a term of years that denies them a meaningful opportunity at release.¹⁸⁵

The Third Circuit also required that sentencing courts assess whether there exists a meaningful opportunity for release.¹⁸⁶ In order to do this, the court recommends considering the age of retirement as a sentencing factor for juveniles determined to be capable of reform.¹⁸⁷ According to the court, the age of retirement constitutes a transitional life stage where an individual permanently leaves the work force after contributing to society over the course of their work life.¹⁸⁸ The court defined a meaningful opportunity for release stating, “a non-incorrigible juvenile offender must be afforded an opportunity for release at a point in his or her life that still affords ‘fulfillment outside prison walls,’ ‘reconciliation with society,’ ‘hope,’ and ‘the opportunity to achieve maturity of judgment and self-recognition of human

¹⁸⁰ *Id.* at 136.

¹⁸¹ *Id.* at 136–37.

¹⁸² *Id.* at 137.

¹⁸³ *Id.* at 142.

¹⁸⁴ *Id.* at 144–45.

¹⁸⁵ *Id.* at 148.

¹⁸⁶ *Id.* at 147.

¹⁸⁷ *Id.* at 150.

¹⁸⁸ *Id.*

worth and potential.”¹⁸⁹ A sentence preserving the juvenile’s ability to contribute productively to society by placing the point of release prior to the age of retirement allows a juvenile to accomplish all of this.

The *Grant* court noted that they were bound by the Supreme Court’s mandate and that juvenile offenders whose crimes reflect “transient immaturity of youth” had a right to a meaningful opportunity for release.¹⁹⁰ Sentencing Courts should follow the same analysis laid out by the Third Circuit in *Grant* because the court’s analysis there comported with the Supreme Court’s observations regarding the nature and characteristics of juveniles.¹⁹¹ Considering the juvenile’s average life expectancy and whether a sentence affords the juvenile a meaningful opportunity for release fills the gaps left by the sentencing guidelines and factors, which, as explained above, fail to adequately take into account a juvenile’s youth and attendant circumstances.

V. CONCLUDING REMARKS

The Supreme Court’s juvenile sentencing cases ensure that a juvenile offender’s sentence does not run afoul of the Eighth Amendment, to a certain extent. Currently, the Court’s precedent does not outright preclude juvenile offenders from receiving lengthy term-of-years sentences for both homicide and non-homicide offenses. These lengthy sentences are the clear equivalent of a LWOP sentence because they place the juvenile’s first opportunity at release well beyond the age of retirement or, in more extreme instances, beyond average life expectancy. With a de facto LWOP sentence, a juvenile is not afforded a meaningful opportunity for release. Under the Eighth Amendment, this punishment is disproportionate to that which such an immature and vulnerable class as juveniles can be deemed to deserve.

Lower courts are split on the issue of whether a de facto LWOP sentence violates the Eighth Amendment. This discord among the courts can be attributed to the lack of guidance sentencing courts receive when sentencing juveniles. Once a juvenile is transferred to federal court, the applicable sentencing guidelines and factors that the sentencing authority considers fail to provide sufficient means through which to account for the juvenile’s age and other mitigating circumstances surrounding juvenile status. Thus, the sentencing factors and guidelines applicable to juveniles in federal court do not comport with Supreme Court precedent. This deficiency provides the

¹⁸⁹ *Id.* at 147 (citing *Graham v. Florida*, 560 U.S. 48, 79 (2010)).

¹⁹⁰ *Id.* at 148.

¹⁹¹ *Id.* (“[W]e elect to fashion a principled legal framework that carries out the Supreme Court’s holdings but goes no further.”).

grounds for courts to view the constitutionality of de facto LWOP sentences differently. One sentencing court following the strictest interpretation of the Supreme Court’s holdings and abiding by the limited sentencing guidelines and factors may find that a de facto LWOP sentence does not violate the Eighth Amendment. However, another sentencing court recognizing the importance of the reasoning behind the Supreme Court’s holdings and the inability of the sentencing guidelines and factors to account for the mitigating circumstances of youth may find a de facto LWOP sentence unconstitutional.

In an effort to resolve this disparity, sentencing courts should engage in an analysis of the traditional penological justifications applicable to juvenile offenders. This analysis would enable courts to ensure that the imposed sentence comports with the Supreme Court’s observations regarding the unique characteristics of juveniles. Additionally, sentencing courts should mirror the Third Circuit’s approach to juvenile de facto LWOP sentences by considering, in addition to the sentencing guidelines and factors, the juvenile’s average life expectancy and whether a proposed sentence affords the juvenile a meaningful opportunity for release.