

STIFLING THE SHOT AT A SECOND CHANCE: FLORIDA'S RESPONSE TO *GRAHAM* AND *MILLER* AND THE MISSED OPPORTUNITY FOR CHANGE IN JUVENILE SENTENCING

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I. INTRODUCTION

In *Miller v. Alabama*,¹ the Supreme Court of the United States ruled that “the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders.”² Rendered in June 2012, this decision struck down twenty-eight state laws and one federal law requiring mandatory life sentences for juveniles convicted of homicide offenses.³ Since the *Miller* decision was handed down, thirteen of these twenty-eight states—including Florida—have passed legislation setting a minimum number of years to which a juvenile convicted of such offenses can be sentenced.⁴ Most of these laws still allow a judge to sentence a juvenile to life without parole “as long as the sentence is imposed through individual review.”⁵

The *Miller* decision followed a string of cases decided by the Supreme Court that affected juvenile sentencing practices. In 2005, the Court ruled in *Roper v. Simmons*⁶ that death sentences for juveniles are cruel and unusual punishment, thus beginning a “children are different”⁷

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1. 132 S. Ct. 2455 (2012).

2. *Id.* at 2469.

3. *Slow to Act: State Responses to 2012 Supreme Court Mandate on Life Without Parole*, SENT'G PROJECT 1 (June 25, 2014), http://sentencingproject.org/doc/publications/jj_State_Responses_to_Miller.pdf [hereinafter *Slow to Act*].

4. *Id.*

5. *Id.* But some of these laws, including Florida's, as discussed in Part V, greatly limit a judge's discretion in sentencing options even with individualized review. For further discussion and examples of individual state legislation passed in the wake of *Miller*, see *id.*

6. 543 U.S. 551 (2005).

7. *Miller v. Alabama*, 132 S. Ct. 2455, 2470 (2012).

approach in Eighth Amendment jurisprudence.⁸ The Court continued with this approach in 2010 in *Graham v. Florida*,⁹ in which the Court ruled that life without parole sentences for juveniles convicted of non-homicide offenses constitutes cruel and unusual punishment.¹⁰

Until 2014, Florida courts had no guidance on how to sentence juveniles in accordance with *Graham* and *Miller*.¹¹ No legislation had been passed to change mandatory sentences for juveniles convicted as adults.¹² In particular, the law remained that anyone—including juveniles charged as adults—convicted of first-degree murder faced a mandatory sentence of death or life without parole.¹³ This was so despite the fact that both such sentences had been ruled unconstitutional.¹⁴ Courts throughout the state handed down either illegal or unconstitutional sentences, and varied greatly in how they did so.¹⁵ Courts further faced the dilemma of what to do with the more than 250 people who had been sentenced to life without parole as juveniles before these decisions were rendered.¹⁶

The 2014 legislative session finally brought guidance to courts on how to sentence juveniles in accordance with *Graham* and *Miller*. Under threat of action by the court system,¹⁷ the Legislature passed House Bill

8. In *Roper*, the Court noted “[t]hree general differences between juveniles under [eighteen] and adults [that] demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders.” 543 U.S. at 569. These differences are “[a] lack of maturity and an underdeveloped sense of responsibility,” “that juveniles are more vulnerable or susceptible to negative influences and outside pressures,” and “that the character of a juvenile is not as well formed as that of an adult.” *Id.* at 569–70 (internal quotations omitted).

9. 560 U.S. 48 (2010).

10. *Id.* at 74 (“[P]enological theory is not adequate to justify life without parole for juvenile nonhomicide offenders. This determination; the limited culpability of juvenile nonhomicide offenders; and the severity of life without parole sentences all lead to the conclusion that the sentencing practice under consideration is cruel and unusual. This Court now holds that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole.”).

11. Editorial, *End Confusion on Juvenile Sentencing*, TAMPA BAY TIMES (Oct. 11, 2013, 5:18 PM), <http://www.tampabay.com/opinion/editorials/editorial-end-confusion-on-juvenile-sentencing/2146771>.

12. *Id.*

13. State’s Sentencing Memorandum from Bernie McCabe, State Attorney, Sixth Judicial Circuit of Fla., to Dennis Watson, Reg’l Counsel, *State v. Moyer* 1 (Apr. 2, 2014) (copy on file with the author) [hereinafter State’s Sentencing Memorandum].

14. *Id.* at 2.

15. *See id.* (detailing various circuits’ attempts to sentence juveniles convicted of first-degree murder in the wake of *Miller*).

16. Matt Dixon, *Rob Bradley Again Trying to Change Florida’s Juvenile Sentencing Laws*, FLA. TIMES-UNION (Nov. 30, 2013, 8:35 AM), <http://members.jacksonville.com/news/crime/2013-11-30/story/rob-bradley-again-trying-change-floridas-juvenile-sentencing-laws>.

17. Lloyd Dunkelberger, *Lawmakers Committed to Solving Juvenile Sentencing*, SARASOTA HERALD-TRIBUNE (Sept. 29, 2013), <http://politics.heraldtribune.com/2013/09/29/lawmakers-committed-to-solving-juvenile-sentencing/> [hereinafter Dunkelberger, *Lawmakers Committed*]. Because Florida legislators could not come to an agreement for three years, Florida Supreme Court

7035, amending Florida Statute Section 775.082, which provides penalties for criminal offenses.¹⁸ The amended section provides that juveniles can only be sentenced to life without parole after a mandatory sentencing hearing, with guidelines for such sentencing hearings laid out in newly-created Florida Statute Section 921.1401.¹⁹ The amended Florida Statute Section 775.082 also provides minimum penalties for youth convicted of various offenses.²⁰ Additionally, some youth are eligible to appear before a judge again for a sentence review, the procedure for which is outlined in the new Florida Statute Section 921.1402, also created by House Bill 7035.²¹ The measures laid out by House Bill 7035 were to apply prospectively, but provided no relief to those already sentenced.²²

Although House Bill 7035 finally provided a technically constitutional sentencing option for juveniles convicted of serious crimes, Florida lawmakers missed the mark of the mandate of *Graham* and *Miller* and wasted an opportunity to embrace the Supreme Court's "children are different" reasoning. The Legislature could have taken, but did not, the opportunity to provide youth with second chances. This Article argues that House Bill 7035 does not comport with the spirit of *Graham* and *Miller*, decisions that focused on mandatory sentencing schemes that precluded a judge from taking into account a juvenile offender's youth and other factors relating to the juvenile's age.²³

Part II of this Article provides a brief history of juvenile sentencing and the Eighth Amendment jurisprudence that led to the invalidation of mandatory life without parole sentences for juveniles. Part III describes the Court's decisions in *Graham* and *Miller* and discusses the struggles faced by the states as they attempt to implement these decisions. Part IV examines Florida's struggle to implement *Graham* and *Miller* and Florida's legislative response to these decisions. Part V analyzes House Bill 7035 under *Graham* and *Miller* and discusses the possible application of the law. Part VI describes what Florida could have done differently

justices had suggested that they "impose a parole system to review lengthy sentences for juveniles in light of the Legislature's inaction." *Id.*

18. H.R. 7035, 2014 Leg., Reg. Sess. 1–2 (Fla. 2014), available at <http://www.flsenate.gov/Session/Bill/2014/7035/BillText/er/PDF>.

19. FLA. STAT. § 775.082 (2014); Fla. H.R. 7035, at 2–3.

20. FLA. STAT. § 775.082(1)(b)(1)–(2).

21. Fla. H.R. 7035, at 1.

22. Lloyd Dunkelberger, *Florida Lawmakers Reach Agreement on Juvenile Sentencing*, SARASOTA HERALD-TRIBUNE (Apr. 23, 2014), <http://politics.heraldtribune.com/2014/04/23/florida-lawmakers-reach-agreement-juvenile-sentencing/> [hereinafter Dunkelberger, *Lawmakers Reach Agreement*]; see *supra* Part V (discussing the retroactive application of the statutes as mandated by the Florida Supreme Court).

23. *Miller v. Alabama*, 132 S. Ct. 2455, 2466 (2012).

and makes predictions and recommendations for the future of juvenile sentencing.

II. HISTORY

A. Superpredator Theory and Juvenile Sentencing Laws

Many juvenile offenders were subjected to lengthy adult sentencing terms because of the “superpredator” fear that developed in the 1980s and 1990s.²⁴ The phenomenon of charging and punishing juveniles as adults was a new development in the late twentieth century.²⁵ Gaining popularity in the early 1990s, the superpredator theory “predicted a wave of juvenile violent crime in the following decade.”²⁶ Social scientists promulgated the idea that a “new breed” of violent, remorseless youth, “born of crack-addled mothers and absent fathers,” would be responsible for this surge in juvenile crime.²⁷ The theory gained popularity in the media and incited panic in the wake of several “highly publicized heinous crimes committed by juvenile offenders.”²⁸

In reaction to this theory, many states began treating juvenile offenders “as if they were adults.”²⁹ Forty-eight states increased the sanctions for juveniles convicted of violent offenses between 1992 and

24. Editorial, *Echoes of the Superpredator*, N.Y. TIMES (Apr. 13, 2014), http://www.nytimes.com/2014/04/14/opinion/echoes-of-the-superpredator.html?_r=0.

25. See BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION 157 (2014) (“In an earlier era, if you were thirteen or fourteen when you committed a crime, you would find yourself in the adult system with a lengthy sentence only if the crime was unusually high-profile—or committed by a black child against a white person in the South.”); *Branded For Life: Florida’s Prosecution of Children as Adults Under Its “Direct File” Statute*, HUMAN RTS. WATCH (Apr. 10, 2014), <https://www.hrw.org/report/2014/04/10/branded-life/floridas-prosecution-children-adults-under-its-direct-file-statute> [hereinafter *Branded For Life*] (“Prior to the 1980s, and consistent with the preference for treating children in the juvenile court, such waivers [of juveniles into adult court] were rarely used.”).

26. Maggie Clark, *After Supreme Court Ruling, States Act on Juvenile Sentences*, PEW CHARITABLE TR. (Aug. 26, 2013), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2013/08/26/after-supreme-court-ruling-states-act-on-juvenile-sentences>.

27. *Echoes of the Superpredator*, *supra* note 24. The social scientists that promoted this theory linked the predicated rise of the “superpredators” in part with the crack cocaine boom of the 1980s. JAMES C. HOWELL, PREVENTING AND REDUCING JUVENILE DELINQUENCY 5 (2d ed. 2009). However, in recent years, the theory has been criticized for being based on “junk science and inaccurate predications based on demographics.” Steve Drizin, *The ‘Superpredator’ Scare Revisited*, HUFFINGTON POST (Apr. 9, 2014, 1:17 PM EDT), http://www.huffingtonpost.com/steve-drizin/the-superpredator-scare_b_5113793.html.

28. *The Superpredator Myth, 20 Years Later*, EQUAL JUST. INITIATIVE (Apr. 7, 2014), <http://www.eji.org/node/893>.

29. Clark, *supra* note 26. It is worth noting that these harsh sentences “are disproportionately imposed on children of color.” STEVENSON, *supra* note 25, at 272.

1995 and many enacted laws allowing children as young as thirteen or fourteen to be tried as adults.³⁰

However, the superpredator theory “proved to be nonsense.”³¹ The predicted wave of violent juvenile crime never came. In fact, juvenile crime began declining in the 1990s and has since continued to decline.³² Yet, as a result of this misguided fear, many juveniles were removed from the juvenile justice system and subjected to adult sentences.³³ Many laws predicated on the superpredator myth are still in effect, and juveniles continue to be charged as adults and subjected to steep penalties.³⁴ However, despite the determination of many states to keep these laws in effect, the Supreme Court has in a new line of cases “begun to dismantle their constitutional foundations.”³⁵

B. The Evolution of Eighth Amendment Law

The evolution of Eighth Amendment jurisprudence has allowed the Court to invalidate many of the draconian sentencing laws for juveniles enacted in the late twentieth century.³⁶ In determining what constitutes a punishment “so disproportionate as to be cruel and unusual,”³⁷ the Supreme Court considers “the evolving standards of decency that mark

30. Clark, *supra* note 26; Clyde Haberman, *When Youth Violence Spurred ‘Superpredator’ Fear*, N.Y. TIMES (Apr. 6, 2014), http://www.nytimes.com/2014/04/07/us/politics/killing-on-bus-recalls-superpredator-threat-of-90s.html?_r=0.

31. Haberman, *supra* note 30.

32. Clark, *supra* note 26. “The harsher juvenile sentencing laws likely were not a factor in the decline, since data show there was no difference in the crime rate for states with mandatory life without parole sentences and those without.” *Id.* In fact, “[a] 2007 study by the Centers for Disease Control found that ‘evidence indicates that transfer to the adult criminal justice system typically increases rather than decreases rates of violence among transferred youth.’” *Branded For Life*, *supra* note 25 (footnote omitted) (quoting Robert Hahn et al., *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System: A Report on Recommendations of the Task Force on Community Preventive Services*, DEP’T OF HEALTH & HUM. SERVS., CTRS. FOR DISEASE CONT. & PREVENTION 6–9 (Nov. 30, 2007), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5609a1.htm>).

33. STEVENSON, *supra* note 25, at 159, 272.

34. *Echoes of the Superpredator*, *supra* note 27.

35. *Id.*

36. Several changes in legislation were responsible for the steep increase in penalties for juvenile offenders. In response to the superpredator fear, “[m]any states lowered or eliminated the minimum age for trying children as adults, leaving children as young as eight vulnerable to adult prosecution and imprisonment.” STEVENSON, *supra* note 25, at 159. “[S]tates also initiated mandatory transfer rules,” forcing juvenile offenders into the adult system and subjecting them to adult punishments. *Id.* Additionally, in the late twentieth century, many states and the federal government enacted “truth-in-sentencing laws,” requiring the majority of a term-of-years sentence to be served and eliminating parole boards, making a life sentence one without any chance of release. Paula M. Ditton & Doris James Wilson, *Truth in Sentencing in State Prisons*, U.S. DEP’T OF JUST. (Jan. 1999), available at <http://bjs.gov/content/pub/pdf/tssp.pdf>.

37. *Roper v. Simmons*, 543 U.S. 551, 561 (2005).

the progress of a maturing society.”³⁸ The Court additionally considers whether the “punishment for crime [is] graduated and proportioned to [the] offense.”³⁹ The Court has considered the proportionality principle in regard to particular sentences, in which it compares “the gravity of the offense and the severity of the sentence.”⁴⁰ In addition, the Court has made categorical decisions regarding certain punishments imposed on certain classes of offenders.⁴¹

In the 1988 *Thompson v. Oklahoma*⁴² decision, the Court determined that because no state had set a minimum age for the death penalty below sixteen, executing a person who committed his or her crime under that threshold age “would offend civilized standards of decency.”⁴³ The Court recognized that juveniles under sixteen are unlikely to partake in “the kind of cost-benefit analysis that attaches any weight to the possibility of execution” and, therefore, the death penalty would be an ineffective deterrent for juveniles under sixteen.⁴⁴

In the 1989 *Stanford v. Kentucky*⁴⁵ decision, the Supreme Court rejected a categorical bar on capital punishment for juvenile offenders.⁴⁶ Because twenty-two of the thirty-seven states with the death penalty allowed the execution of sixteen-year-old offenders, and twenty-five of the thirty-seven allowed the execution of seventeen-year-old offenders, the Court determined that “there was no national consensus ‘sufficient to label a particular punishment cruel and unusual.’”⁴⁷ On the same day it decided *Stanford*, the Court also determined in *Penry v. Lynaugh*⁴⁸ that because only two states had laws prohibiting the execution of a mentally retarded offender, there was not a national consensus that executing a mentally retarded offender was cruel and unusual. The Court summarily rejected a categorical ban on such executions.⁴⁹

The “evolving standards of decency”⁵⁰ began to severely modify the Court’s interpretation of the Eighth Amendment beginning in 2002,

38. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

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

40. *Graham v. Florida*, 560 U.S. 48, 60 (2010) (citing *Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991)).

41. *Id.* at 61.

42. 487 U.S. 815 (1988).

43. *Id.* at 830.

44. *Id.* at 837.

45. 492 U.S. 361 (1989), *abrogated by* *Roper v. Simmons*, 543 U.S. 551 (2005).

46. *Id.*

47. *Roper*, 543 U.S. at 562 (quoting *Stanford*, 492 U.S. at 371).

48. 492 U.S. 302 (1989), *abrogated by* *Atkins v. Virginia*, 536 U.S. 304 (2002).

49. *Roper*, 543 U.S. at 562–63. The Author notes that “mentally retarded” was the term chosen and used by the Court.

50. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

when the Court revisited the issue addressed in *Penry* and determined in *Atkins v. Virginia*⁵¹ that executing a mentally retarded offender violates the evolving standards of decency and thus constitutes cruel and unusual punishment.⁵² *Atkins* was the first in a line of cases in which the Court would “bar a punishment for a class of offenders based on either offender characteristics or the particular crime.”⁵³ The Court determined that the national consensus had shifted, as at this time only a few states allowed execution of mentally retarded offenders.⁵⁴ Additionally, determining that mental retardation makes an offender less culpable, and therefore the purpose of retribution less defensible and the potential penalty less likely to have a deterrent effect, the Court held that the death penalty imposed on a mentally retarded offender was an excessive sanction.⁵⁵

The Court continued to recognize the “evolving standards of decency”⁵⁶ when it revisited the issue in *Stanford* in *Roper v. Simmons*⁵⁷ in 2005. The Court determined that while twenty states did not have any prohibition on the execution of juveniles, the practice itself was now infrequent.⁵⁸ Additionally, the Court—noting that it had previously considered international authorities in determining what constitutes cruel and unusual punishment—acknowledged that the United States was the only country that continued to sanction the death penalty for juvenile offenders.⁵⁹

Roper was the first of the line of cases in which the Court would acknowledge that children stand alone as their own class of offenders, and, thus, need to be treated differently in sentencing matters. The Court recognized that, similar to a mentally retarded offender, a juvenile offender is less culpable due to his or her lack of maturity, greater vulnerability, susceptibility “to negative influences and outside pressures,” and his or her undeveloped character.⁶⁰ Because of this diminished culpability, the Court held that a juvenile’s conduct is “not as

51. 536 U.S. 304 (2002).

52. *Id.* at 321 (holding that “the execution of mentally retarded criminals . . . is excessive [punishment] and that the Constitution ‘places a substantive restriction on the State’s power to take the life’ of a mentally retarded offender”) (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)).

53. Paul J. Litton, *Symposium: Bombshell or Babystep? The Ramifications of Miller v. Alabama for Sentencing Law and Juvenile Crime Policy*, *Symposium Foreward*, 78 MO. L. REV. 1003, 1003 (2013) (footnote omitted).

54. *Roper*, 543 U.S. at 563.

55. *Id.*

56. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

57. 543 U.S. at 564.

58. *Id.*

59. *Id.* at 575–76.

60. *Id.* at 569–70.

morally reprehensible as that of an adult.”⁶¹ The Court was admittedly hard pressed to find that “even a heinous crime committed by a juvenile is evidence of irretrievably depraved character,” as it could be in the case of an adult offender, because “greater possibility exists that a minor’s character deficiencies will be reformed” since the “signature qualities of youth,” such as “impetuosity and recklessness . . . can subside.”⁶²

Additionally, the Court considered the penological justifications of the death penalty, namely retribution and deterrence, and found that because of juveniles’ diminished culpability, these justifications apply with less force to juveniles than to adults.⁶³ The Court therefore categorically barred the death penalty as a punishment for any juvenile offender.⁶⁴

III. MILLER AND GRAHAM

A. Explanation

The Court continued with the “children are different” approach in 2010 in *Graham v. Florida*.⁶⁵ In *Graham*, the Court ruled that a life without parole sentence for a juvenile offender convicted of any non-homicide crime constitutes cruel and unusual punishment and is therefore unconstitutional.⁶⁶ *Graham* saw, for the first time, two lines of Eighth Amendment jurisprudence—a categorical ban on a certain punishment for a certain class of offenders and a proportionality analysis—merged into one.⁶⁷ Before *Graham*, the Court had held the death penalty unconstitutional only for a certain class of offenders, and had considered

61. *Id.* at 570 (internal quotations omitted) (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988)).

62. *Id.* (internal quotations omitted) (quoting *Johnson v. Texas*, 509 U.S. 350, 368 (1993)).

63. *Id.* at 571.

64. *Id.* at 570–71, 575, 578.

65. 560 U.S. 48 (2010). Seventeen-year-old Terrance Graham participated with two accomplices in a home invasion while on probation for armed burglary with assault and battery and attempted armed robbery, two charges to which he had pled guilty a year earlier. *Id.* at 53–54. Graham held a gun to the resident’s chest and forcibly entered the home where the three ransacked the house in search of money while holding the resident and his friend at gunpoint and barricading them in a closet before leaving. *Id.* at 54. Graham and his accomplices attempted another robbery later that evening, at which time one of the accomplices was shot. *Id.* The trial court found Graham to be in violation of probation for and guilty of his earlier offenses of armed burglary and attempted armed robbery and sentenced Graham to life without parole. *Id.* at 57.

66. *Id.* at 74. *Graham* represented a new approach to sentencing jurisprudence that some feel could be applied in adult contexts as well. “A major focus of the extensive commentary on the case has been on its application of the ‘evolving standards of decency’ test to a punishment outside of the death penalty, and to whether *Graham* might apply also to adults.” Chad Flanders, *The Supreme Court and the Rehabilitative Ideal*, 49 GA. L. REV. 383, 384 (2015) (footnote omitted).

67. *Graham*, 560 U.S. at 61.

non-death penalty sentences in other cases in a case-specific proportionality context.⁶⁸

In considering the “evolving standards of decency,” the Court found that the majority of states at the time of *Graham* allowed for juveniles to be sentenced to life without parole for non-homicide offenses. However, the Court took into account the actual sentencing practices of the states, as it had in *Thompson*, and noted that at that time there were only 123 juveniles serving life without parole for a non-homicide offense nationwide.⁶⁹ Seventy-seven of those juveniles were sentenced to life without parole in Florida, while ten states had sentenced the other forty-six.⁷⁰ The Court thus found a national consensus against sentencing juveniles to life without parole for non-homicide offenses.⁷¹

Extending the *Roper* reasoning of juveniles’ lessened culpability, the Court found that the penological goals were not being served by life without parole sentences for juveniles convicted of non-homicide offenses.⁷² In considering the proportionality of the sentence to the crime, the Court held, as it had in prior cases,⁷³ 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.”⁷⁴ Therefore, the Court found that a juvenile who does not kill has “a twice diminished moral culpability” and thus that a life without parole sentence for such an offender is never warranted.⁷⁵

Additionally, in *Graham*, the Court noted the severity of a life without parole sentence, likening it to the death penalty in its irrevocability and acknowledging that it is particularly harsh when imposed on a juvenile, as a juvenile is likely to serve a longer term in prison than a more culpable adult due to the average life expectancy.⁷⁶

Therefore, the Court ruled that a juvenile convicted of a non-homicide crime may not only be sentenced to life without parole, but also must have a meaningful opportunity for release.⁷⁷ If a life sentence is

68. *Id.*

69. *Id.* at 64.

70. *Id.*

71. *Id.* at 67.

72. *Id.* at 68, 74.

73. See *Kennedy v. Louisiana*, 554 U.S. 407, 413 (2008) (finding that a death sentence “for the rape of a child where the crime did not result, and was not intended to result, in death of the victim” violated the Eighth Amendment); *Enmund v. Florida*, 458 U.S. 782, 797 (1982) (prohibiting the death penalty for an accomplice who did not participate in, was not present at, and did not intend the killing).

74. *Graham*, 560 U.S. at 69.

75. *Id.* at 69, 71.

76. *Id.* at 69–70.

77. *Id.* at 74–75.

imposed on a juvenile for a non-homicide offense, the state must provide some “realistic opportunity to obtain release before the end of that term.”⁷⁸ Accordingly, while life without the possibility of parole for a juvenile convicted of a non-homicide offense is unconstitutional under *Graham*, a life sentence *with* the possibility of parole or sentence modification is permissible for this class of juvenile offenders, as a state need not guarantee that a juvenile offender will eventually be released, but must give the offender the “realistic opportunity” for such.⁷⁹ However, the Court failed to define what constitutes such a “realistic opportunity.”

The Court continued with the “children are different” approach most recently in 2012 in *Miller v. Alabama*.⁸⁰ While the Court did not go so far as to categorically bar life without parole sentences for all juvenile offenders, the Court extended the diminished culpability reasoning of *Roper* and *Graham* and held that *mandatory* life without parole sentences for juveniles convicted of homicide constitute cruel and unusual punishment.⁸¹

The Court additionally extended *Graham*’s likening of a life without parole sentence in severity to the death penalty, and acknowledged that because juveniles cannot be sentenced to death under *Roper*, a life without parole sentence is the most severe sentence that can be imposed on a juvenile offender.⁸² Just as the death penalty cannot be imposed mandatorily on adults,⁸³ the Court held that this most severe sentence for juveniles cannot be without first considering certain factors.⁸⁴ The Court

78. *Id.* at 82.

79. *Id.*

80. 132 S. Ct. 2455 (2012). Evan Miller and a friend, Colby Smith, followed a neighbor, Cole Cannon, back to Cannon’s trailer after Cannon came over for a drug deal with Miller’s mother. *Id.* at 2462. Miller and his friend drank alcohol and smoked marijuana with Cannon until Cannon passed out, at which point Miller stole Cannon’s wallet out of Cannon’s pocket and took the money out. *Id.* When Miller attempted to put the wallet back in Cannon’s pocket, Cannon woke up and grabbed Miller. *Id.* Smith hit Cannon once with a bat, and Miller then grabbed the bat and hit Cannon repeatedly, placing a sheet over Cannon and saying, “I am God, I’ve come to take your life.” *Id.* (internal quotations omitted). After beating Cannon with the bat, Miller and Smith left but later returned to cover up their crime by setting fire to Cannon’s trailer. *Id.* Cannon died of his injuries and smoke inhalation, and Miller was charged as an adult, convicted of murder in the course of arson, and, as required by Alabama statute, sentenced to life without parole. *Id.* at 2462–63. In *Miller*’s companion case, *Jackson v. Hobbs*, fourteen-year-old Kuntrell Jackson accompanied two other boys, one of whom was carrying a sawed-off shotgun, to rob a video store. *Id.* at 2461. When the store clerk refused to give the boys money and threatened to call the police, Jackson’s accomplice shot her, and the boys fled. *Id.* Jackson was tried as an adult, convicted of capital felony murder and aggravated robbery, and, as required by Arkansas statute, was sentenced to life without parole. *Id.*

81. *Id.* at 2469.

82. *Id.* at 2466.

83. *Id.* at 2463–64 (citing *Lockett v. Ohio*, 438 U.S. 586, 597–98 (1978); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)).

84. *Id.* at 2475.

determined that in sentencing a juvenile convicted of homicide, a trial court must take into account an offender's "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences," in addition to the juvenile offender's home life, family history, and circumstances regarding the offense.⁸⁵

The Court, while not categorically barring the punishment of life without parole for juvenile offenders convicted of homicide, thought that "children's diminished culpability and heightened capacity for change [would make] appropriate occasions for sentencing juveniles to this harshest possible penalty . . . uncommon."⁸⁶

At the time that *Miller* was decided, more than 2,500 people were serving life sentences without the possibility of parole for crimes committed as juveniles.⁸⁷ Two-thirds were sentenced in Pennsylvania, Michigan, Florida, California, and Louisiana.⁸⁸ About forty percent of "juvenile lifers" are in Florida, Louisiana, and Pennsylvania alone.⁸⁹ As of November 2013, in Florida, "[t]here [were] 265 inmates in custody of the Department of Corrections that were given life sentences as juveniles."⁹⁰

B. State Responses to *Graham* and *Miller*

States have struggled to implement these recent landmark changes in juvenile sentencing law. Bryan Stevenson, who argued both *Graham's* companion case and *Miller* before the Supreme Court, stated in his 2014 memoir: "The total ban on life-without-parole sentences for children convicted of non-homicides should have been the easiest decision to implement, but enforcing the Supreme Court's ruling was proving much more difficult than I had hoped."⁹¹ Despite the rulings and the Supreme Court's acknowledgement that children are different, many state courts and legislatures have been hesitant to provide children with second chances and less severe punishments than adults.⁹²

As juvenile offenders who had been sentenced to life without parole for non-homicide offenses were resentenced following *Graham*, many judges chose to implement term-of-years sentences that were as close to

85. *Id.* at 2468.

86. *Id.* at 2469.

87. *Slow to Act*, *supra* note 3.

88. *Id.*

89. *Id.*

90. Dixon, *supra* note 16.

91. STEVENSON, *supra* note 25, at 302.

92. *Id.*; *Echoes of the Superpredator*, *supra* note 27.

life as possible.⁹³ Some state courts, such as those in California and Iowa, recognized that lengthy term-of-years sentences for juveniles convicted of non-homicide crimes result in a virtual life without parole sentence and do not allow the “realistic opportunity to obtain release”⁹⁴ as mandated by *Graham*.⁹⁵ Conversely, some state courts in Florida and Louisiana held that these virtual life sentences were permissible under *Graham*.⁹⁶

Miller directly invalidated the laws of twenty-eight states that required a mandatory life without parole sentence for anyone convicted of first-degree homicide, including a juvenile offender.⁹⁷ As of December 2014, fifteen of these twenty-eight states had not yet enacted legislation to comport with *Miller*.⁹⁸ While the thirteen states that have enacted new legislation now provide their courts with guidance on how to sentence juvenile offenders, courts in the other fifteen states still grapple with how to sentence juveniles convicted of homicide and now subject to an unconstitutional sentencing scheme.

In the thirteen states that have enacted new legislation to comply with *Miller*, including Florida, the minimum sentence for juveniles convicted of homicide now ranges from twenty-five to forty years.⁹⁹ Additionally, the amount of time before a juvenile offender can obtain sentence modification or parole review varies greatly amongst the states with new legislation.¹⁰⁰ However, the majority of the states that have enacted new legislation “have either discouraged the use of life without parole sentences for juveniles, or scrapped them altogether.”¹⁰¹ Conversely, several states, including Florida, continue to sentence juvenile offenders to life without parole.¹⁰²

93. STEVENSON, *supra* note 25, at 302. By July 2012, roughly half of the juvenile offenders sentenced to life without parole for non-homicide crimes in Florida had been resentenced. Maggie Lee, *Florida Struggles with Youth Life Sentences*, JUV. JUST. INFO. EX. (July 30, 2012), <http://jjie.org/florida-struggles-youth-life-sentences/>. The new sentences ranged from four to 170 years, with the longest sentence for a single offense being ninety-nine years. *Id.*

94. *Graham v. Florida*, 560 U.S. 48, 82 (2010).

95. 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, 3456–57 (2014).

96. *Id.*

97. *Slow to Act*, *supra* note 3.

98. Tamar Birckhead, *Juvenile Lifers: Reason for Hope?*, JUV. JUST. INFO. EX. (Dec. 10, 2014), <http://jjie.org/op-ed-juvenile-lifers-reason-for-hope/>.

99. *Slow to Act*, *supra* note 3.

100. Birckhead, *supra* note 98; *Slow to Act*, *supra* note 3. Eleven of the thirteen states that have passed legislation “require young offenders to serve lengthy terms ranging from [fifteen] to [forty] years before parole review can even be considered.” Birckhead, *supra* note 98.

101. Clark, *supra* note 26.

102. *State Legislative Roundup One Year After Miller v. Alabama*, CAMP. FOR FAIR SENT'G OF YOUTH (June 2013), <http://fairsentencingofyouth.org/wp-content/uploads/2013/06/Final-Legislative-Roundup.pdf>.

While the new legislation provides courts guidance in these states for juvenile offenders convicted after its enactment, many of the states have struggled with what to do with juvenile offenders who committed crimes or were convicted of crimes prior to the enactment of the new legislation. Only four of the states that passed new legislation allow for those juvenile offenders sentenced to life without parole under the previous mandatory sentencing schemes to be resentenced under the new statutory provisions.¹⁰³ However, the Supreme Courts of Arkansas, Connecticut, Illinois, Iowa, Massachusetts, Mississippi, Nebraska, Texas, Wyoming, and now Florida, have all ruled that the *Miller* decision applies retroactively and therefore juveniles sentenced under the previous mandatory sentencing schemes in those states must be resentenced.¹⁰⁴

Complicating matters further, state and federal courts are divided on the issue of whether *Miller* applies retroactively to juvenile offenders whose mandatory life without parole sentences were finalized prior to the June 2012 decision.¹⁰⁵ After refusing several petitions to consider the issue in the past two and a half years, the Supreme Court finally agreed in December 2014 to hear *Toca v. Louisiana*¹⁰⁶ to consider the retroactivity of *Miller*.¹⁰⁷

Some commentators predicted that in *Toca*, the Court would rule that *Miller* applies retroactively.¹⁰⁸ However, in January 2015, George Toca reached an agreement with prosecutors in which he took a plea deal that allowed him to be released from prison.¹⁰⁹ Thus, the issue of his

103. *Slow to Act*, *supra* note 3.

104. Stell Simonton, *Arkansas Supreme Court Rules Miller v. Alabama Is Retroactive*, JUV. JUST. INFO. EX. (June 22, 2015), <http://jjie.org/arkansas-supreme-court-agrees-miller-v-alabama-is-retroactive/>; *Slow to Act*, *supra* note 3; *Wyoming Supreme Court Joins Group Deciding SCOTUS Miller Ruling Is Retroactive*, SENT'G L. & POL'Y (Oct. 10, 2014), http://sentencing.typepad.com/sentencing_law_and_policy/2014/10/wyoming-supreme-court-joins-group-deciding-scotus-miller-ruling-is-retroactive.html. The U.S. Department of Justice has also determined that *Miller* should be applied retroactively, and juvenile offenders sentenced to life without parole in the federal system can now be resentenced. *Facts and Infographics About Life Without Parole for Children*, CAMP. FOR FAIR SENT'G OF YOUTH, <http://fairsentencingofyouth.org/what-is-jlwp/> (last visited Apr. 21, 2016).

105. *Slow to Act*, *supra* note 3.

106. 135 S. Ct. 781 (2014).

107. Lyle Denniston, *Court to Look Again at Juvenile Life Sentences*, SCOTUSBLOG (Dec. 12, 2014, 3:49 PM), <http://www.scotusblog.com/2014/12/court-to-look-again-at-juvenile-life-sentences/>; *Slow to Act*, *supra* note 3.

108. James Alan Fox, *Give Juvenile Lifers a Second Chance: Column*, USA TODAY (Dec. 18, 2014, 5:11 PM EST), <http://www.usatoday.com/story/opinion/2014/12/18/juvenile-life-without-parole-james-alan-fox-youth-criminal-justice-reform-column/20444725/>.

109. Marcia Coyle, *Juvenile Murderers Must Wait for Answer on Sentencing*, NAT'L L.J. (Feb. 4, 2015), <http://www.nationallawjournal.com/supremecourtbrief/home/id=1202716982168/Juvenile-Murderers-Must-Wait-for-Answer-on-Sentencing?mcode=1202615432992&curindex=0&back=NLJ&slreturn=20150115154820>. Toca had maintained his innocence in the death of his friend, of which Toca was convicted when he was seventeen years old. John Simerman, *George Toca*,

mandatory life without parole sentence became moot, and the Court dismissed the case.¹¹⁰

In March 2015, the Court agreed to hear the case of *Montgomery v. Louisiana* to determine the retroactivity issue.¹¹¹ On January 25, 2016, the Court determined that *Miller* is retroactive.¹¹²

IV. FLORIDA'S RESPONSE: HOUSE BILL 7035

A. Juvenile Sentencing in Florida Before House Bill 7035: Complete Chaos

The Florida Legislature did not provide any guidance on how to sentence juveniles under *Graham* and *Miller* from the time *Graham* was decided in 2010 until the 2014 legislative session, leaving Florida courts to figure things out on their own.¹¹³ Florida courts sentencing juvenile offenders convicted of non-homicide offenses and resentencing juvenile offenders who had earlier been sentenced to life without parole for non-homicide offenses struggled to implement the *Graham* Court's ruling. The District Courts of Appeal were split on whether a lengthy term-of-years sentence—comprising a virtual life without parole sentence—was unconstitutional under *Graham*.¹¹⁴ The Fourth and Fifth District Courts of Appeal upheld lengthy term-of-years sentences and ruled that such sentences did not violate *Graham* while the First District Court of Appeal found such sentences impermissible under *Graham*.¹¹⁵

Florida courts continued to struggle after *Miller*, particularly because there was no viable sentencing option for juveniles convicted of murder

La. Inmate at Center of Debate on Juvenile Sentences, to Go Free, NEW ORLEANS ADVOC. (Jan. 29, 2015, 11:25 AM), <http://www.theneworleansadvocate.com/news/11462053-123/george-toca-louisiana-inmate-at>. Toca's persistent innocence claim as well as his "productive years behind bars" led to the district attorney's office allowing Toca to take an *Alford* plea to lesser charges. *Id.*

110. Mark Wilson, *La. Prisoner Released, Dismissing Juvenile Life-Without-Parole Case*, FINDLAW (Feb. 3, 2015, 3:47 PM), http://blogs.findlaw.com/supreme_court/2015/02/la-prisoner-released-dismissing-juvenile-life-without-parole-case.html.

111. *Montgomery v. Louisiana*, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/montgomery-v-louisiana/?wpmp_switcher=desktop (last visited Apr. 21, 2016).

112. *Montgomery v. Louisiana*, 2016 WL 280758, at *11 (2016). The Court determined that *Miller* announced a new substantive rule and not a procedural rule, and therefore must be retroactive under *Teague v. Lane*, 489 U.S. 288 (1989). *Montgomery*, 2016 WL 280758, at **11, 15.

113. Dunkelberger, *Lawmakers Reach Agreement*, *supra* note 22; Lloyd Dunkelberger, *Should Ruling on Juvenile Sentences Be Retroactive?*, Ocala STARBANNER (Mar. 6, 2014 8:02 PM), <http://www.ocala.com/article/20140306/ARTICLES/140309781/0/APJ?template=printpicart> [hereinafter Dunkelberger, *Retroactive*]; *End Confusion on Juvenile Sentencing*, *supra* note 11.

114. Scavone, *supra* note 95, at 3463.

115. *Id.* See also *Gridine v. State*, 175 So. 3d 672 (Fla. 2015) (holding that a seventy-year sentence for a fourteen-year-old convicted of a non-homicide offense did not provide a meaningful opportunity for release and thus violates *Graham*).

in the first-degree. Florida Statute Section 775.082(1) only allowed for a sentence of death or life without parole.¹¹⁶ Under *Roper*, because the death penalty is no longer an option for juveniles, both the “sentencing floor” and the “sentencing ceiling” for juveniles convicted of first-degree homicide was life without parole, a mandatory—and thus unconstitutional—sentence.¹¹⁷

The Florida State Attorney’s Sentencing Memorandum in the Pasco County case of Adam Moyer¹¹⁸ highlights the confusion apparent as different circuits attempted to sentence juveniles convicted of first-degree murder in a way that is constitutional under *Miller*, but without any legal pathway under Florida law.¹¹⁹ In *Moyer*, the State urged the court not to “vitate the statute in toto,” but to construe the statute in a way that was “both fair and reasonable” by removing the mandatory nature and allowing the sentence of life without parole to be discretionary.¹²⁰ This posed quite a problem because this option would have directly conflicted with the statute.¹²¹

The State urged the court to follow the doctrine of “statutory revival,” in which the court turns to a previous version of the statute for guidance.¹²² In this case, the 1993 version of the statute provided for a minimum sentence of life with the possibility of parole after twenty-five years.¹²³ However, allowing for the revival of this version of the statute would pose a particular problem because parole was abolished in Florida in 1994.¹²⁴ The State argued that the “statutory revival” concept had become the law of Florida in this context as the Fifth District Court of Appeal had applied this principle in *Horsley v. State*,¹²⁵ stating, “Applying the principle of statutory revival, we hold that the only sentence now

116. See State’s Sentencing Memorandum, *supra* note 13, at 1 (discussing the lack of a constitutional statutory sentencing option for a juvenile convicted of murder in the first-degree).

117. *Id.* at 2.

118. Adam Moyer and his codefendant robbed a 7-11 in New Port Richey, Florida. *Id.* at 1. During the robbery, Moyer’s codefendant wrestled with the store clerk and caused fatal blunt force trauma to the clerk’s head. *Id.* Moyer was eighteen days away from his eighteenth birthday at the time of the offense. *Id.* at 8.

119. See *id.* at 9 (citing *Cook v. State*, 35 So. 665, 677 (Fla. 1903), *Denham v. State*, 22 Fla. 664, 677 (1886), *Holton v. State*, 2 Fla. 476, 506 (1849)).

120. *Id.* at 2.

121. *Id.* at 3.

122. *Id.*

123. *Id.* at 3–4.

124. Dunkelberger, *Retroactive*, *supra* note 113. However, Florida still has a parole board for those offenders who were sentenced prior to 1994. *Id.* In 1995, the statute was amended and “all capital felonies now became mandatory life offenses, without parole eligibility, when the sentence of death was not imposed.” State’s Sentencing Memorandum, *supra* note 13, at 5.

125. 121 So. 3d 1130 (Fla. 5th Dist. Ct. App. 2013) *review granted*, SC13-1938, 2013 WL 6224657 (Fla. Nov. 14, 2013) *and decision quashed*, 160 So. 3d 393 (Fla. 2015).

available in Florida for a charge of capital murder committed by a juvenile is life with the possibility of parole after twenty-five years.”¹²⁶ The Fifth District Court of Appeal then certified to the Florida Supreme Court the question of whether this is the method that should be applied to juvenile sentences going forward.¹²⁷ The State went on to argue that any sentence less than life with the possibility of parole after twenty-five years would be directly contrary to *Horsley*.¹²⁸

The State additionally recognized that *Miller* requires an individualized sentencing hearing, but that *Miller* provided no “parameters or guidance for such a hearing.”¹²⁹ However, the State argued that the sentence of life with the possibility of parole at twenty-five years could be imposed without such a hearing as the parameters of *Miller* only apply to the sentence of life without parole.¹³⁰

Florida courts also struggled with how and whether to resentence hundreds of juvenile offenders serving life without parole sentences under the now-illegal mandatory sentencing scheme.¹³¹ Just as various states have come to different conclusions regarding the retroactivity of *Miller*, so have the various District Courts of Appeal in Florida. The First District Court of Appeal¹³² and Third District Court of Appeal¹³³ ruled that the *Miller* decision does not apply retroactively. However, the Second District Court of Appeal¹³⁴ and the Fourth District Court of Appeal ruled that *Miller* does apply retroactively.¹³⁵ Upon review in a later case, the First District Court of Appeal affirmed its decision that *Miller* does not apply retroactively, but recognized that federal and state courts are divided on the issue and certified the question of retroactivity to the Florida Supreme Court.¹³⁶

126. State’s Sentencing Memorandum, *supra* note 13, at 7 (quoting *Horsley*, 121 So. 2d at 1131). The *Horsley* court had applied the “last constitutional version of Florida’s sentencing scheme—§ 775.082, Fla. Stat. (1993).” *Id.* at 8.

127. *Hooper v. State*, 2014 WL 2217333, at *1 (Fla. 5th Dist. Ct. App. May 30, 2014) *review granted, decision quashed*, SC14-1203, 2015 WL 5178593 (Fla. Sept. 4, 2015).

128. State’s Sentencing Memorandum, *supra* note 13, at 9.

129. *Id.* at 4.

130. *Id.* at 8 (citing *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012)).

131. Dunkelberger, *Retroactive*, *supra* note 113.

132. *Gonzalez v. State*, 101 So. 3d 886, 888 (Fla. 1st Dist. Ct. App. 2012) *review granted, decision quashed*, SC13-16, 2015 WL 5545491 (Fla. Sept. 21, 2015).

133. *Geter v. State*, 115 So. 3d 375, 385 (Fla. 3d Dist. Ct. App. 2012) *review granted, decision quashed*, SC13-1480, 2015 WL 5545489 (Fla. Sept. 21, 2015).

134. *Toye v. State*, 133 So. 3d 540, 547 (Fla. 2d Dist. Ct. App. 2014).

135. *Cotto v. State*, 141 So. 3d 615, 620 (Fla. 4th Dist. Ct. App. 2014).

136. *Falcon v. State*, 111 So. 3d 973, 974 (Fla. 1st Dist. Ct. App. 2013) *review granted*, 137 So. 3d 1019 (Fla. 2013) *and decision quashed*, 162 So. 3d 954 (Fla. 2015).

B. House Bill 7035: The Remedy

1. *Legislative History*

In the 2013 legislative session, multiple bills were introduced to amend Florida's sentencing laws to comport with *Graham* and *Miller*.¹³⁷ Senator Robert Bradley's 2013 bill allowed a judge to consider factors before sentencing a juvenile offender convicted of homicide to life without parole, but provided for a minimum fifty-year sentence for such an offender and a maximum sentence of fifty years for non-homicide offenses.¹³⁸ Child advocates argued that this bill violated both the letter and spirit of *Miller*.¹³⁹ When senators who felt the bill was too harsh attached an amendment that would have allowed for a sentence review hearing every twenty-five years for juveniles given life sentences, Senator Bradley halted the bill on the Senate floor.¹⁴⁰

Without any legislative guidance, the Florida Supreme Court suggested in September 2013 that the State "impose a parole system to review lengthy sentences for juveniles in light of the Legislature's inaction,"¹⁴¹ utilizing the Parole Commission that still exists to review offenders who were sentenced before parole was abolished.¹⁴² Lawmakers expressed hesitancy at the prospect of a parole system¹⁴³ and at having the Florida Supreme Court write the law.¹⁴⁴ Fearing what Florida courts would do, the Legislature finally came to an agreement in 2014.¹⁴⁵

In the next legislative session, Senator Bradley introduced a new version of his bill. In this version, he allowed parole hearings for juveniles

137. Larry Hannan, *Lawmakers Differ on How to Fix Juvenile Sentencing Laws*, FLA. TIMES-UNION (Apr. 6, 2013 10:45 PM), <http://members.jacksonville.com/news/crime/2013-04-06/story/lawmakers-differ-how-fix-juvenile-sentencing-laws>.

138. Dunkelberger, *Lawmakers Committed*, *supra* note 17.

139. *State Legislative Roundup One Year After Miller v. Alabama*, *supra* note 102.

140. Dixon, *supra* note 16.

141. Dunkelberger, *Lawmakers Committed*, *supra* note 17.

142. *Id.*

143. *Hannan*, *supra* note 137. Senator Rob Bradley said on the issue of bringing back parole and having multiple opportunities for review: "I am not comfortable with a hearing occurring every five years or so where a family shows up and argues about why the defendant who killed their loved one should stay in jail. . . . A parole-like system is not in the best interests of Florida." *Id.* (internal quotations omitted).

144. Fla. Bar, *Juvenile Sentencing Compromise in the Works*, FLA. B. NEWS (May 1, 2014), <http://www.floridabar.org/DIVCOM/JN/JNNews01.nsf/RSSFeed/457FE697C0B4B69885257CC10045105B> [hereinafter *Juvenile Sentencing Compromise in the Works*]. Representative James Grant stated, "Understand, that if we do not get something done this year the [Florida] Supreme Court will be writing the law, and we don't know what we will get." *Id.* (alterations in original).

145. Dunkelberger, *Lawmakers Committed*, *supra* note 17; Dunkelberger, *Lawmakers Reach Agreement*, *supra* note 22.

convicted of non-homicide offenses after serving twenty-five years.¹⁴⁶ He also proposed capping those sentences at thirty-five years.¹⁴⁷ However, this version of the bill still did not allow any sentence review hearings for “murderers,”¹⁴⁸ and the Senator stated that he would strongly resist any type of review process for juveniles convicted of murder.¹⁴⁹ The bill allowed for sentencing hearings for juveniles convicted of capital offenses in which a judge would first determine if life without parole was an appropriate sentence, and then, if the judge determined life without parole was not an appropriate sentence, a juvenile offender convicted of a capital offense would be sentenced to no less than thirty-five years.¹⁵⁰

This version of the bill passed through the Senate¹⁵¹ as its companion bill, Representative James Grant’s House Bill 7035, made its way through the House of Representatives.¹⁵² This bill differed from the Senate bill in that it provided review for juvenile offenders convicted of homicide.¹⁵³ The Senate version did not provide review for those convicted of homicide who did the actual killing.¹⁵⁴ Senator Bradley and Representative Grant reached a compromise, and the House bill was substituted for the Senate bill.¹⁵⁵ The Senate passed the bill unanimously.¹⁵⁶ On June 20, 2014, Florida governor Rick Scott signed into law House Bill 7035.¹⁵⁷

2. *Function of House Bill 7035*

House Bill 7035 amended Florida Statute Section 775.082, which provides penalties for criminal offenses.¹⁵⁸ Florida Statute Section 775.082(1)(b)(1) now states that juveniles convicted of a capital felony under Florida Statute Section 782.04 can be sentenced to life without

146. Dixon, *supra* note 16.

147. *Id.*

148. *Id.*

149. Dunkelberger, *Lawmakers Committed*, *supra* note 17.

150. S. 384, 2014 Leg., Reg. Sess. 1–2 (Fla. 2014), available at <https://www.flsenate.gov/Session/Bill/2014/0384/BillText/Filed/PDF>.

151. *Lawmakers Tweak Juvenile-Sentencing Rules*, FLA. TIMES UNION (Apr. 23, 2014, 6:49 PM), <http://jacksonville.com/news/crime/2014-04-23/story/lawmakers-tweak-juvenile-sentencing-rules>.

152. *Week 2*, FLA. CHILD.’S COUNCIL, <http://flchildrenscouncil.org/newsletters/week-2-3/> (last visited Apr. 21, 2016).

153. *Juvenile Sentencing Compromise in the Works*, *supra* note 144.

154. *Id.*

155. *Id.*

156. Dunkelberger, *Lawmakers Reach Agreement*, *supra* note 22.

157. H.R. 7035, 2014 Leg., Reg. Sess. 16 (Fla. 2014), available at <http://www.flsenate.gov/Session/Bill/2014/7035/BillText/er/PDF>.

158. *Id.* at 1.

parole only after a sentencing hearing is conducted in accordance with Florida Statute Section 921.1401, a new statute created by House Bill 7035.¹⁵⁹ Florida Statute Section 921.1401 provides that “sentencing proceedings for determining if life imprisonment is an appropriate sentence for a juvenile offender convicted of certain offenses” and “certain factors a judge shall consider when determining if life imprisonment is appropriate for a juvenile offender.”¹⁶⁰

Florida Statute Section 775.082(1)(b)(1) also states that, if after such a sentencing hearing, the court determines that a life sentence is improper, a juvenile offender who “actually killed, intended to kill, or attempted to kill the victim” shall be sentenced to no less than forty years in prison.¹⁶¹ Under the amended Florida Statute Section 775.082(1)(b)(2), a juvenile offender who “did not actually kill, intend to kill, or attempt to kill the victim” must also have a sentencing hearing to determine if a life sentence is appropriate, and if not, shall be sentenced to no less than fifteen years in prison.¹⁶² Juveniles convicted of first-degree murder who “did not actually kill, intend to kill, or attempt to kill the victim,” would be subject to a term of no less than twenty years.¹⁶³

These sentences are subject to review in accordance with Florida Statute Section 921.1402, also created by House Bill 7035.¹⁶⁴ Florida Statute Section 921.1402 provides for a one-time review of a sentence under Florida Statute Section 775.082(1)(b)(1) after twenty-five years, if the juvenile offender has not previously been convicted of any of the listed felonies.¹⁶⁵ A juvenile offender sentenced under Florida Statute Section 775.082(1)(b)(2) to a term of more than fifteen years may have a sentence review after fifteen years.¹⁶⁶ A juvenile convicted of a non-homicide offense may have a subsequent review hearing ten years after their first review hearing if the juvenile is not released after the first review.¹⁶⁷

159. *Id.* at 2–3.

160. *Id.*

161. FLA. STAT. § 775.082(1)(b)(1) (2014).

162. *Id.* § 775.082(b)(2).

163. *Juvenile Sentencing Compromise in the Works*, *supra* note 144. Such might occur, for example, in the case of a felony murder conviction.

164. H.R. 7035, at 1.

165. FLA. STAT. § 921.1402(2)(a). Juveniles that are convicted of murder and who have previously been convicted in adult court of “felonies such as sexual battery, armed robbery or kidnapping would not receive reviews.” Tonya Alanez, *Juvenile-Sentencing Bill Establishes Reviews, Minimums*, SUN SENTINEL (Apr. 23, 2014, 5:41 PM), <http://www.sun-sentinel.com/news/local/florida/politics-blog/sfl-juvenilesentencing-bill-establishes-reviews-minimums-20140423-post.html>; *Florida Legislature Provides Review Opportunities for All Children*, CAMP. FOR FAIR SENT'G OF YOUTH (May 6, 2014), <http://fairsentencingofyouth.org/2014/05/06/florida-legislature-provides-review-opportunities-for-all-children/>.

166. FLA. STAT. § 921.1402(2)(c).

167. Dunkelberger, *Lawmakers Reach Agreement*, *supra* note 22.

Florida Statute Section 921.1402 also sets forth the proceedings for such sentence review hearings.¹⁶⁸ If the court finds that the juvenile offender has been rehabilitated, the court may modify the sentence.¹⁶⁹ The review before the court “differs significantly from that provided by the parole commission.”¹⁷⁰ Eighteen months before the time that a juvenile offender is eligible for sentence modification, the juvenile offender must be sent notice of this eligibility.¹⁷¹ At a sentence review hearing, a juvenile offender “is entitled to representation by private counsel or a public defender if the juvenile cannot afford counsel.”¹⁷²

The Legislature chose to have House Bill 7035 apply to juvenile offenders who commit crimes after July 1, 2014.¹⁷³ However, when considering the retroactive application of *Miller* in March 2015, the Florida Supreme Court unanimously determined that *Miller* not only applies retroactively in Florida, but also that the new legislation should be applied retroactively “to all juvenile offenders whose sentences are unconstitutional [under] *Miller*.”¹⁷⁴ In *Falcon v. State*,¹⁷⁵ the Florida Supreme Court determined that *Miller* applies retroactively under Florida’s test for retroactivity set forth in *Witt v. State*.¹⁷⁶ The Florida Supreme Court also determined that under the federal test for retroactivity set forth in *Teague v. Lane*,¹⁷⁷ it would reach the same conclusion.¹⁷⁸

In *State v. Horsley*, the Florida Supreme Court again unanimously rejected the State’s argument for statutory revival and found that the new legislation demonstrated the Legislature’s intent for how juvenile offenders should not only be sentenced going forward, but also resentenced for crimes they had committed prior to the enactment of the

168. FLA. STAT. § 921.1402(2)(d), (3)–(7).

169. *Id.* § 921.1402(7).

170. Supplemental Reply Brief of Petitioner at 4, *Falcon v. State*, http://www.floridasupremecourt.org/clerk/briefs/2013/801-1000/13-865_SuppRplyBriefMerits_061914.pdf (Fla. June 19, 2014) (No. SC13-865).

171. *Id.*

172. *Id.*

173. Jacob Carpenter, *Sentencing Will Test Supreme Court Ban on Life Terms for Juvenile Killers*, NAPLES DAILY NEWS (Nov. 2, 2014), http://www.naplesnews.com/news/watercooler/sentencing-will-test-supreme-court-ban-on-life-terms-for-juvenile-killers_61621924.

174. *Horsley v. State*, 160 So. 3d 393, 394–95 (Fla. 2015). The Florida Supreme Court determined that in the case at hand, *Horsley* was considered a juvenile offender “who actually killed, intended to kill, or attempted to kill” and was therefore subject to a minimum sentence of forty years. *Id.* at 408 (internal quotations omitted).

175. 162 So. 3d 954, 956 (Fla. 2015).

176. 387 So. 2d 922, 931 (Fla. 1980).

177. 489 U.S. 288, 307 (1989).

178. *Falcon*, 162 So. 3d at 956.

new legislation.¹⁷⁹ As a result of these decisions, approximately 1,700 juvenile offenders in Florida qualify for new sentencing hearings.¹⁸⁰ Because the Florida Supreme Court determined *Miller's* retroactivity under Florida's test for retroactivity and the State did not petition the United States Supreme Court for certiorari, the issue of retroactivity is final in Florida and will stand regardless of the outcome in *Montgomery v. Louisiana*.

3. Response to House Bill 7035

The response to House Bill 7035 has been mixed. Although the bill was less harsh than its predecessor considered in the 2013 session, it still provides stiff penalties for juvenile offenders. Because something needed to be done to give courts a clear and legal sentencing option for juvenile offenders, House Bill 7035 had "the support of juvenile advocates, defense attorneys[,] and state prosecutors."¹⁸¹ However, after the bill passed, Families Against Mandatory Minimums¹⁸² perfectly expressed the juvenile advocate community's sentiment toward the bill by placing it in the "Could-Have-Been-Better/Could-Have-Been-Worse" section of the year's new legislation roundup.¹⁸³

Juvenile advocates expressed that waiting fifteen to twenty-five years, depending on the crime, to hold the first review hearing is "still harsh"¹⁸⁴ and that they would have liked to see more sentence review opportunities for juvenile offenders.¹⁸⁵ One juvenile advocate acknowledged, "[W]hile the bill that ultimately passed is not optimal, it could have been *much worse*."¹⁸⁶ Additionally, though the bill passed

179. *Horsley*, 160 So. 3d at 394–95.

180. Anna M. Phillips, *Killer at 17, Hope at 38: Court Ruling Lets Juvenile Offenders Be Resentenced*, TAMPA BAY TIMES (Sept. 26, 2015, 6:29 PM), <http://www.tampabay.com/news/courts/criminal/killer-at-17-hope-at-38-court-ruling-lets-juvenile-offenders-be-resentenced/2247243>.

181. Dunkelberger, *Lawmakers Reach Agreement*, *supra* note 22.

182. Families Against Mandatory Minimums is "a nonprofit, nonpartisan organization fighting for smart sentencing laws that protect public safety." *About FAMM*, FAMILIES AGAINST MANDATORY MINIMUMS (2014), <http://fammm.org/about>.

183. *2014 Florida Legislative Session Sentencing Policy Round-up: The Good, the Bad, the Ugly, and More*, FAMILIES AGAINST MANDATORY MINIMUMS (May 16, 2014), <http://fammm.org/2014-florida-legislative-session-sentencing-policy-round-up-the-good-the-bad-the-ugly-and-more/>.

184. Lloyd Dunkelberger, *Legislature Settles on Sentencing Plan for Juveniles*, GAINESVILLE SUN (Apr. 23, 2014, 7:13 PM), <http://www.gainesville.com/article/20140423/ARTICLES/140429802?tc=ar>.

185. *Id.*

186. *2014 Florida Legislative Session Sentencing Policy Round-up*, *supra* note 183 (emphasis in original).

unanimously, some legislators expressed disappointment that the bill did not go further to protect juveniles from severe sentences.¹⁸⁷

V. ANALYSIS OF HOUSE BILL 7035 UNDER MILLER AND GRAHAM

A. Following the Letter but Missing the Spirit

While House Bill 7035 follows the letter of the *Graham* and *Miller* decisions by eliminating mandatory life without parole sentences for juveniles convicted of homicide offenses and allowing other sentencing options for juveniles convicted of non-homicide offenses, it does not follow the spirit of these decisions.¹⁸⁸

Miller focused on the fact that mandatory sentencing schemes do not allow a judge to take into account an offender's youth.¹⁸⁹ While the new provisions set out by House Bill 7035 allow for individualized sentencing—in which a judge must take into account factors such as the juvenile offender's age and maturity at the time of the offense, family and home background, and role in the offense—the judge is limited to sentencing a juvenile who intended to kill or did kill a victim to no less than forty years.¹⁹⁰ A judge can consider the individual factors of a juvenile offender, but cannot sentence a juvenile offender convicted of a capital offense to any less than forty years, even if the judge believes that in consideration of these factors the juvenile offender should be given a shorter sentence. In *Miller*, the Court stressed the importance of a judge having various options when determining the sentence of a juvenile offender.¹⁹¹ Yet, the new sentencing structure under the provisions of House Bill 7035 does not give judges much discretion at all in sentencing.

Especially troubling, considering this lack of sentencing discretion, is Florida law, as it permits a child of any age to be charged as an adult, convicted of first-degree murder, and thus be subjected to the minimum

187. Representative Darryl Rouson said that he did not believe “the bill goes far enough to protect juveniles from harsh sentences,” but that it was an improvement. Jim Saunders, *Legislature 2014: Juvenile Sentencing Bill Moves to Senate*, FLA. TIMES-UNION (Apr. 1, 2014, 9:22 PM), <http://jacksonville.com/breaking-news/2014-04-01/story/legislature-2014-juvenile-sentencing-bill-moves-senate>.

188. *Miller v. Alabama*, 132 S. Ct. 2455, 2466 (2012); H.R. 7035, 2014 Leg., Reg. Sess. 1–2 (Fla. 2014), available at <http://www.flsenate.gov/Session/Bill/2014/7035/BillText/er/PDF>; Cara H. Drinan, *Misconstruing Graham & Miller*, 91 WASH. U. L. REV. 785, 793 (2014) (“Removing mandatory LWOP, as some states have done, is a start, but replacing that sentence with new, steep mandatory minimums, contravenes the spirit of *Miller* if not its holding.” (typeface altered)).

189. *Miller*, 132 S. Ct. at 2458.

190. FLA. STAT. §§ 775.082(1)(b)(1); 921.1401 (2014).

191. *Miller*, 132 S. Ct. at 2474–75.

sentence of forty years.¹⁹² Miller’s counsel presented the alternative argument that there should at least be a categorical bar on sentencing juveniles fourteen-years-old and younger to life without parole, but the Court did not consider that argument.¹⁹³ In refusing to consider that argument, the Court specifically stated, “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.”¹⁹⁴

The *Miller* Court emphasized how a mandatory sentence for all juvenile offenders would be the same for less-culpable fourteen-year-old defendants as it is for more-culpable seventeen-year-old defendants.¹⁹⁵ The Court further expounded upon the issue of a fourteen-year-old juvenile offender compared to a seventeen-year-old juvenile offender stating, “Our holding requires factfinders to attend to exactly such circumstances—to take into account the differences among defendants and crimes.”¹⁹⁶

While Florida courts will have to take the juvenile’s age into consideration when imposing a sentence,¹⁹⁷ the mandatory minimum sentences force a judge to impose at least the same minimum sentence for a fourteen-year-old defendant as for a seventeen-year-old defendant. Even if a judge wanted to sentence a fourteen-year-old juvenile offender to less than forty years, the Florida Legislature prohibited the judge from having any discretion by replacing one mandatory sentence with another, contrary to the Court’s mandate in *Miller*. This remains especially troubling in Florida, as Florida has a common practice of trying very

192. *Graham v. Florida*, 560 U.S. 48, 75 (2010). Florida Statute Section 985.56(1) reads:

A child of any age who is charged with a violation of state law punishable by death or by life imprisonment is subject to the jurisdiction of the court as set forth in [Section] 985.0301(2) unless and until an indictment on the charge is returned by the grand jury. When such indictment is returned, the petition for delinquency, if any, must be dismissed and the child must be tried and handled in every respect as an adult

FLA. STAT. § 985.56(1). Florida is not alone in this practice. “In twenty-three states, there is no minimum age for which children can be tried as adults in at least some circumstances.” STEVENSON, *supra* note 25, at 319. *See infra* note 199 (discussing Florida’s practice of charging children as young as twelve with first-degree murder).

193. *Miller*, 132 S. Ct. at 2469.

194. *Id.*

195. *Id.* at 2467–68.

196. *Id.* at 2469 n.8.

197. FLA. STAT. § 921.1401(2)(c) (2014).

young juveniles as adults and has even sentenced a twelve-year-old, believed to be the youngest person ever,¹⁹⁸ to life without parole.¹⁹⁹

Furthermore, forty years is still a lengthy term for a mandatory sentence. While forty years may not be considered by all a de facto life sentence for a juvenile considering average life expectancy, it is still an extreme sentence,²⁰⁰ particularly in the wake of *Miller*.²⁰¹ While eventual release is a possibility for a juvenile offender sentenced to a mandatory term of forty years, what sort of opportunities would a juvenile offender have for a real and productive life after being caged for so many years?²⁰² Commenting on Colorado's sentencing scheme, Jody Kent Lavy, Director of the Campaign for the Fair Sentencing of Youth,²⁰³ noted that juveniles typically age out of criminal behavior in their twenties and said

198. *Leniency for Lionel Tate?*, ABC NEWS, <http://abcnews.go.com/2020/story?id=123746&page=1&singlePage=true> (last visited Apr. 16, 2016).

199. Lionel Tate was convicted of first-degree murder in the death of a six-year-old playmate and sentenced to life without parole at the age of twelve in Broward County. Terry Aguayo, *Youth Who Killed at 12 Will Return to Prison, but Not for Life*, N.Y. TIMES (Mar. 2, 2006), http://www.nytimes.com/2006/03/02/national/02tate.html?_r=0. Tate's sentence was upheld upon appeal. *Excessive Sentencing*, NAT'L ASS'N CRIM. DEF. LAW., <http://www.nacdl.org/usmap/res/26304/36622/d/#FL> (last updated Oct. 16, 2014) (citing *Tate v. State*, 864 So. 2d 44, 55 (Fla. 4th Dist. Ct. App. 2003)). More recently twelve-year-old Christian Fernandez was charged as an adult with first-degree murder in Duval County. Crimesider Staff, *Christian Fernandez, 13-Year-Old Fla. Boy, Faces Life in Prison for Allegedly Murdering His 2-Year-Old Half-Brother*, CBS NEWS (Sept. 17, 2012, 5:19 PM), <http://www.cbsnews.com/news/cristian-fernandez-13-year-old-fla-boy-faces-life-in-prison-for-allegedly-murdering-his-2-year-old-half-brother/>. Fernandez avoided a life without parole sentence, which was still the only legal sentencing option at the time, when he was allowed to plead guilty as a juvenile. *Christian Fernandez Pleads Guilty in Death of 2-Year-Old Half Brother*, NEWS 4 JAX (Feb. 8, 2013, 11:55 AM EST), <http://www.news4jax.com/news/Cristian-Fernandez-pleads-guilty-in-death-of-2-year-old-half-brother/18466846>. Instead of life without parole in adult prison, Fernandez will remain in juvenile detention until his nineteenth birthday, to be followed by five years of probation. *Id.*

200. Mandatory fifty- or thirty-five-year sentences may be "effectively the same thing as a life sentence and thereby unconstitutional under *Graham* and *Miller*, especially if the sentence is fifty years before a parole review rather than fifty years with periodic parole reviews throughout." Drinan, *supra* note 188, at 789 (typeface altered).

201. *Slow to Act*, *supra* note 3.

202. Discussing a proposed Massachusetts law that would set parole eligibility for juvenile offenders convicted of homicide at thirty-five years, Director of the Youth Advocacy Division of the Committee for Public Counsel Josh Dohan stated: "[Thirty-five] years is way past what research says is necessary to grow into law-abiding citizens." Jean Trounstine, *Brutal Crimes Don't Justify Bad Laws*, TRUTHOUT (Oct. 26, 2014, 12:00 AM), <http://truth-out.org/news/item/26951-brutal-crimes-don-t-justify-bad-laws>. The proposal stemmed from outcry after Massachusetts found all life sentences for juveniles unconstitutional and in the wake of several particularly heinous crimes committed by juveniles. *Id.*

203. "The Campaign for the Fair Sentencing of Youth is a national coalition and clearinghouse that coordinates, develops and supports efforts to implement fair and age-appropriate sentences for youth, with a focus on abolishing life without parole sentences for youth." *Vision and Mission*, CAMP. FOR FAIR SENT'G OF YOUTH, <http://fairsentencingofyouth.org/our-vision/> (last visited Apr. 21, 2016).

that a forty-year sentence is “the equivalent of a life sentence.”²⁰⁴ Thus, Florida’s minimum sentence of forty years is merely replacing one life sentence with another and providing little opportunity for children who have aged out of criminal behavior to have a second chance at life outside of prison.

Other states have been criticized for giving juveniles de facto life sentences in response to *Graham* and *Miller*.²⁰⁵ Following the *Miller* decision, the governor of Iowa commuted the sentences of all juveniles who had been sentenced to life without parole under Iowa’s mandatory sentencing scheme to life with the possibility of parole after sixty years.²⁰⁶ In *State v. Ragland*,²⁰⁷ the Iowa Supreme Court said that, assuming the governor even had the authority to commute these sentences, the new sentences violated *Miller* because they did not take into account individual factors, but rather just replaced one mandatory sentence with another. The court further noted that “the [sixty-year] sentences were the ‘practical equivalent’ of a mandatory life sentence.”²⁰⁸ Additionally, the Supreme Court of Iowa acknowledged that “it is important that the spirit of the law not be lost in the application of the law. . . . The spirit of the constitutional mandates of *Miller* and *Graham* instruct that much more is at stake in the sentencing of juveniles than merely making sure that parole is possible.”²⁰⁹

While the new Florida procedures do require an individualized sentencing hearing, one mandatory sentence is being replaced with another just as was done by the governor of Iowa’s sentence commutations. A Florida judge can consider the individual factors of a juvenile offender, but cannot sentence this juvenile to any less than forty years, even if the judge believes that in consideration of these factors the juvenile offender should be given a shorter sentence. Just as the spirit of *Miller* and *Graham* was lost in the mandatory sixty-year sentences in

204. Hannah Garcia, *Two Years, No Cert, More Confusion*, LAW WK. COLO. (Nov. 18, 2014), <http://www.lawweekonline.com/2014/11/two-years-no-cert-more-confusion/> (internal quotation marks omitted).

205. Drinan, *supra* note 188, at 789.

206. Scavone, *supra* note 95, at 3460.

207. 836 N.W.2d 107 (Iowa 2013).

208. Sarah Schweitzer & Michael Levenson, *Mass. SJC Bars No-Parole Life Terms for Youths*, BOS. GLOBE (Dec. 24, 2013), <http://www.bostonglobe.com/metro/2013/12/24/mass-high-court-strikes-down-life-without-parole-sentences-for-juveniles/eyJKrVSE2EXD0KF7wQXX5M/story.html>.

The Supreme Court of Iowa also struck down a sentence of fifty years with parole eligibility at the age of thirty-five for a seventeen-year-old offender convicted of two counts of first-degree robbery and two counts of first-degree burglary. Lauren Kinell, Note, *Answering the Unanswered Questions: How States Can Comport with Miller v. Alabama*, 13 CONN. PUB. INT. L.J. 143, 154 (2013) (citing *State v. Pearson*, 836 N.W.2d 88 (Iowa 2013)).

209. *Ragland*, 836 N.W.2d at 121.

Iowa, so too is the spirit of these decisions lost in the new Florida sentencing scheme requiring steep minimum sentences for juvenile offenders.

Additionally, forcing those juvenile offenders convicted of homicide eligible for sentence review to wait twenty-five years for their first and only sentence review is an extreme amount of time. This one-time sentence review leaves little opportunity to display rehabilitation and diminishes the possibility of sentence modification. Requiring juvenile offenders to serve twenty-five years in prison before having one, single opportunity for sentence modification does not constitute a “meaningful” opportunity for release.²¹⁰ Denying the possibility of any sentence review to juveniles previously convicted of the listed felonies in Florida Statute Section 775.082(1)(b)(1) is also particularly unforgiving.

The language of House Bill 7035 is also not in line with the spirit of *Miller*. The *Miller* Court stated that, taking into account “children’s diminished culpability and heightened capacity for change, . . . appropriate occasions for sentencing juveniles to this harshest possible penalty [would] be uncommon.”²¹¹ Yet Florida Statute Section 775.082 begins with the phrase, “[i]f the court finds that life imprisonment is not an appropriate sentence,”²¹² suggesting that the preferred punishment indeed is life without parole and that only special circumstances will warrant a different sentence. This procedure is directly contrary to the Supreme Court’s statement that the most extreme sentence should not be the norm, but rather should be left for extraordinary circumstances.²¹³

Further, as discussed in *Roper*, *Graham*, and *Miller*, just as the penological justifications of retribution, deterrence, incapacitation, and rehabilitation were not being met by the death penalty and life without parole sentences for youth, neither are they being met by the new Florida sentencing structure.²¹⁴

210. Trounstine, *supra* note 202. One commentator called legislation passed in Massachusetts requiring youth convicted of first-degree murder to wait thirty years before a chance to go before the parole board “hardly a ‘meaningful’ shot at parole for those who committed crimes in their youth.” *Id.*

211. *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012).

212. FLA. STAT. § 775.082(1)(b)(1) (2014).

213. However, the Supreme Court of California considered the issue of whether California Penal Code Section 190.5(b) created a presumption in favor of life without parole. *People v. Gutierrez*, 324 P.3d 245, 249 (Cal. 2014). Section 190.5(b) “provide[d] that the penalty for [sixteen]- or [seventeen]-year-old juveniles who commit special circumstance murder ‘shall be confinement in the state prison for life without the possibility of parole or, at the discretion of the court, [twenty-five] years to life.’” *Id.* The *Gutierrez* court found the statute did not create a presumption in favor of life without parole. *Id.* Because the statute additionally required the “consideration of the distinctive attributes of youth highlighted in *Miller*,” it was constitutional under *Miller*. *Id.*

214. *Miller*, 132 S. Ct. at 2465.

Roper focused primarily on retribution and deterrence and on “whether the death penalty was proportional punishment for children who are found guilty of murder.”²¹⁵ Retribution is based upon blameworthiness, and therefore the rationale for retribution is not as strong with juveniles as it is with adults.²¹⁶ Because of the way they think and reason, juveniles “are not as deterred by the threat of criminal punishment as adults are.”²¹⁷ Additionally, because juveniles have diminished culpability and are often not deterred by the threat of punishment, these lengthy mandatory sentences and possible life without parole sentences allowed under the legislation do not promote retribution or deterrence.

The only rationale served by this legislation is incapacitation. While in some cases incapacitation may be a concern, many juveniles commit crimes out of “unfortunate yet transient immaturity”²¹⁸ that they soon outgrow.²¹⁹ As the Court discussed in *Graham*, when a juvenile offender is sentenced to life without parole, or even a lengthy term of years on the basis of incapacitation, the juvenile offender is essentially branded incorrigible forever or, in the case of a forty-years or longer sentence, for that period of time.²²⁰ The *Graham* Court acknowledged that “incorrigibility is inconsistent with youth”²²¹ and furthermore stated that it is impossible to determine at the time of sentencing which youths’ actions are the result of this “unfortunate yet transient immaturity” and which are the result of “irreparable corruption.”²²² Therefore, the rationale of incapacitation is not properly served in lengthy sentences for juvenile offenders, as many of these youths do not require incapacitation once they have matured. This rationale is even further diminished for those youths convicted of homicide who are not eligible for the one-time sentence review because of a prior conviction for one of the listed felonies.²²³

215. Flanders, *supra* note 66, at 412 (footnote omitted).

216. *Miller*, 132 S. Ct. at 2465.

217. *Branded For Life*, *supra* note 25 (footnote omitted). Juveniles do not consider the “long-term consequences of important decisions.” *Id.* (footnote omitted). They also have a greater tendency to “make decisions based on emotions, such as anger or fear, rather than logic and reason.” *Id.* (footnote omitted).

218. *Graham v. Florida*, 560 U.S. 48, 73 (2010) (quoting *Roper v. Simmons*, 543 U.S. 551, 573 (2005)).

219. *See Garcia*, *supra* note 204 (acknowledging that juvenile offenders typically outgrow their criminal behavior in their twenties).

220. *Graham*, 560 U.S. at 72–74.

221. *Id.* at 73 (quoting *Workman v. Commonwealth*, 429 S.W.2d 374, 378 (Ky. 1968)).

222. *Id.* (quoting *Roper*, 543 U.S. at 573).

223. FLA. STAT. § 775.082(1)(b)(1) (2014).

For juvenile offenders, rehabilitation is both the most necessary and appropriate rationale for punishment, as juveniles are those most likely to be rehabilitated.²²⁴ In *Graham*, the Court said that a life sentence without the possibility of parole “forfeits altogether the rehabilitative ideal.”²²⁵ Under the new law, Florida still allows juveniles to be sentenced to life without parole, a sentence the Court has acknowledged serves no rehabilitative purpose. Additionally, a sentence of forty years or more, especially for those juvenile offenders who do not meet the qualifications for a one-time sentence review, does not promote the idea of rehabilitation and reintegration with society.²²⁶

B. The Uncertain Application of House Bill 7035

It remains to be seen how the provisions set out by House Bill 7035 will apply in Florida. In the coming years, we will see whether judges will impose more moderate sentences for juvenile offenders convicted of first-degree murder. Time will also tell whether judges will consider modifying their sentences or releasing juveniles from prison.

Because the provisions of House Bill 7035 originally applied to crimes committed after July 1, 2014,²²⁷ there have not yet been many instances in which the provisions have come into play. What appears to be the first sentencing under the new laws occurred in November 2014, with the sentencing of Juan Barrientos, who was seventeen when he participated in a 2008 killing that resulted in a first-degree murder

224. *Graham*, 560 U.S. at 74.

Literature show[s] that children, including [sixteen]- and [seventeen]-year-old juveniles, are different . . . and more amenable to rehabilitation, a key objective that the juvenile system is designed to achieve. . . . Rather than being prosecuted in the juvenile justice system, which is intended to be rehabilitative . . . [juveniles tried as adults] are shunted off to the adult criminal justice system, which values punishment over everything else.

Branded for Life, *supra* note 25. “Indeed, the nation’s juvenile court system was established 115 years ago out of a belief, as Justice Elena Kagan noted in the majority opinion, in ‘children’s diminished culpability and heightened capacity for change.’” Rubén Rosario, *Resentencing in 1994 St. Paul Firebombing Stirs Emotion*, PIONEER PRESS (Dec. 11, 2014, 12:01 AM CST), http://www.twincities.com/crime/ci_27120998/resentencing-man-who-killed-five-kids-teen-stirs (referring to *Miller*). While the Court used rehabilitation in its juvenile sentencing jurisprudence, its increasing reliance on rehabilitation is promising for adult sentence reform as well. See Flanders, *supra* note 66, at 386–87 (noting that the Supreme Court decided two cases dealing with the Sentencing Reform Act in 2011 in which it considered rehabilitation as a factor to use in deciding sentences).

225. *Graham*, 560 U.S. at 74. “Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope.” *Id.* at 79.

226. See Garcia, *supra* note 204 (acknowledging that juvenile offenders typically outgrow their criminal behavior in their twenties).

227. Carpenter, *supra* note 173.

conviction.²²⁸ Despite the uncertainty of how to sentence Barrientos,²²⁹ the trial court chose to follow the guidelines of the new legislation.²³⁰

In the sentencing hearing, defense counsel introduced several witnesses including peers, the defendant's sister, a teacher, and a psychologist.²³¹ The court took into account the defendant's background and his codefendant's participation in the crime.²³² Despite the fact that Barrientos was seventeen at the time of the crime, he was described as a "calculating killer."²³³ The court chose to sentence Barrientos to the minimum of forty years, with eligibility for a one-time sentence review after twenty-five years.²³⁴ Seeing that a court sentenced a seventeen-year-old "calculating killer" to the minimum sentence under the statute raises the question of how a court would sentence a younger, less-culpable defendant if it had true discretion to consider mitigating factors.

Since the Florida Supreme Court's decisions regarding the retroactivity of *Miller* and the March 2015 legislation, there have not yet been any sentence reviews in which the provisions laid out by the new Florida Statute Section 921.1402 have come into play. However, there have been a few resentencing proceedings invoking the new legislation which may indicate how judges may view juvenile offenders in sentence review hearings. Additionally, the resentencing proceedings involving juveniles convicted under *Graham* and *Miller* prior to the enactment of House Bill 7035 can be instructive on how judges may consider some of the factors required under Florida Statute Section 921.1402.

Following the retroactive application of the new legislation, one such resentencing hearing was held in Fort Myers in June 2015. Ashley Toye and Roderick Washington, both seventeen at the time of the

228. *Convicted Naples Killer Sentenced to 40 Years*, NBC-2 (Nov. 20, 2014, 2:21 PM EST), <http://www.nbc-2.com/story/27441421/convicted-naples-killer-sentenced-to-40-years#.VKbL1MYirzJ>.

229. Barrientos committed his crime before *Miller* and before the enactment of the new legislation. Carpenter, *supra* note 173. Prosecutors argued that Barrientos should be sentenced according to the 1993 guidelines, under which he would be subject to a sentence of life with the possibility of parole after twenty-five years. Jessica Lipscomb, *Former Lely High Student Sentenced to 40 Years in Murder of Migrant Worker*, NAPLES DAILY NEWS (Nov. 20, 2014), http://www.naplesnews.com/news/crime/former-lely-high-student-sentenced-to-40-years-in-murder-of-migrant-worker_39417920. The judge chose not to follow the 1993 guidelines, stating that the 1993 law would not allow him to consider mitigating factors as required by *Miller* and recognizing the abolition of parole in Florida. *Id.*

230. *Id.*

231. Sentencing Order, *State v. Barrientos*, 3–4, Nov. 20, 2014, Case No. 09-CF-154.

232. *Id.*

233. Carpenter, *supra* note 173.

234. *Convicted Naples Killer Sentenced to 40 Years*, *supra* note 228.

offense, were resentenced to life without parole.²³⁵ Toye and Washington had been convicted of felony murder in the death of an eighteen-year-old and a fourteen-year-old whom they had “tied up, Tasered, carved with knives, doused with bleach, shot and burned.”²³⁶ The judge noted the “horrific” nature of the offense and stated that the aggravators outweighed the mitigators in explaining his choice to reimpose life sentences for Toye and Washington.²³⁷

In resentencing proceedings prior to the enactment of House Bill 7035, some judges were extremely reluctant to release even those juvenile offenders who had exemplified model behavior while in prison and were convicted of non-homicide offenses. For example, Kenneth Young, who was given four life-without-parole sentences for non-homicide offenses at the age of fifteen, was granted a resentencing hearing in 2011 following the *Graham* decision.²³⁸ Young came from a particularly troubled home, had no previous criminal record, had participated in his crimes with his mother’s crack dealer after the dealer had threatened to kill Young’s mother over her debt, and had even prevented the dealer from raping one of the robbery victims.²³⁹ In prison Young was a model inmate, earning certificates, learning a trade, and receiving only one disciplinary report in his eleven years of incarceration.²⁴⁰ However, while the court recognized that Young had been rehabilitated, the judge did not take Young’s rehabilitation into account when considering a new sentence and resentenced Young to thirty years in prison.²⁴¹ If this is the sort of sentence that judges impose on a juvenile offender with such a sympathetic background, who has not even committed a homicide and has an exemplary prison record, is there any hope for release for juvenile offenders convicted of homicide at the one-time sentence review after twenty-five years?

Additionally, if the courts do end up using the provisions laid out in Florida Statute Section 921.1402 in resentencing or reviewing the

235. Jacob Carpenter, *Two Defendants in Infamous “Cash Feenz” Killings in 2006 Re-Issued Life Sentences*, NAPLES DAILY NEWS (June 22, 2015, 9:27 PM), http://www.naplesnews.com/news/crime/two-defendants-in-infamous-cash-feenz-killings-in-2006-reissued-life-sentences_00535543.

236. *Id.*

237. *Id.*

238. Paul Guzzo, *Tampa Man’s Crimes as Youth Yield ‘15 to Life,’ a Documentary*, TAMPA TRIBUNE (July 20, 2014), <http://tbo.com/movies/tampa-mans-crimes-as-youth-yield-15-to-life-a-documentary-20140720/>.

239. *Id.*

240. *Id.*

241. *Id.* This decision, however, came before House Bill 7035 was passed, and under the resulting Florida Statute Section 921.1402(6)(a), judges are required in sentence review proceedings to consider rehabilitation as a factor. FLA. STAT. § 921.1402(6)(a) (2014).

sentences of juvenile offenders sentenced to life without parole before *Miller* or *Graham*, the prospect of those juvenile offenders being judged on rehabilitation based on their prison records is troubling.²⁴² Bryan Stevenson expressed disappointment that judges were relying on prison behavior reports in the resentencings under *Graham*, acknowledging that, because of “[t]he horrible conditions of confinement and their constantly being told that they would die in prison no matter how well they behaved,” many of these juvenile offenders have “long lists of disciplinaries.”²⁴³ Furthermore, most juvenile offenders sentenced to life without parole are not participating in rehabilitative programs in prison, mostly because prison policies do not allow “lifers” to do so.²⁴⁴ For youths that once felt little hope for release and likely saw no point in participating in rehabilitative efforts to be judged based on their rehabilitation may provide little relief in the way of release or sentence modification.²⁴⁵

VI. APPROPRIATE FLORIDA SOLUTION

A. What Florida Should Have Done

While the new provisions of House Bill 7035 do provide some hope and relief to juvenile offenders in Florida, the Florida Legislature missed the mark on the spirit of *Graham* and *Miller* and wasted an opportunity to make real change in the area of juvenile sentencing. Florida should have allowed judges more discretion in the term of years for sentencing and more opportunities for sentence review.

Florida could have followed the example of California’s legislation, which extends *Graham*’s mandate for a meaningful opportunity for release to all juveniles.²⁴⁶ California law gives all juveniles sentenced to life without parole or a lengthy term of years multiple opportunities for

242. It is likely that prison disciplinary reports will be used in the determination of whether the juvenile offender “demonstrates maturity and rehabilitation.” *Id.*

243. STEVENSON, *supra* note 25, at 303.

244. Ashley Nellis, *The Lives of Juvenile Lifers: Findings from a National Survey*, SENT’G PROJECT (Mar. 2012), available at http://sentencingproject.org/doc/publications/jj_The_Lives_of_Juvenile_Lifers.pdf (charting explanations for the lack of participation).

245. The struggles of juvenile offenders who are released should not be forgotten. These people will have been incarcerated for much of their youth and developmental years. They will also have adult felony records with collateral consequences that will make it more difficult to obtain jobs and housing and will limit their rights. See *Branded For Life*, *supra* note 25, at 57 (discussing collateral consequences for juveniles charged and convicted as adults). “Florida disenfranchises convicted felons for life.” *Id.* at 71.

246. S. 260, 2013 Leg. Reg. Sess. (Cal. 2013), available at http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb_0251-0300/sb_260_bill_20130916_chaptered.pdf; Scavone, *supra* note 95, at 3477.

sentence review or parole, and also establishes provisions to help ensure that juvenile offenders are on the right track in prison to obtaining resentencing or parole.²⁴⁷ Additionally, South Dakota's 2013 legislation, allowing judges broad discretion to give any term-of-years sentence up to life after a sentencing hearing considering several enumerated factors, provides an excellent example of what Florida could have done by way of discretion.²⁴⁸

Another option for Florida that would have made the juvenile sentencing practices more in the spirit of *Graham* and *Miller* would have been to follow Pennsylvania's model and require lower mandatory sentences for juvenile offenders fourteen-years-old and younger.²⁴⁹ Washington similarly passed legislation eliminating life without parole entirely as a sentencing option for juvenile offenders under sixteen.²⁵⁰ While this still would have limited judges' discretion, it would have provided for different sentences for the less-culpable younger juvenile offenders than the more-culpable older juvenile offenders as the Court imagined in mandating discretion in *Miller*.²⁵¹

Furthermore, while *Miller* did not mandate the complete abolition of life without parole sentences for juveniles, Florida should have followed in the footsteps of other states and taken this opportunity to completely abandon life without parole as a sentencing option for any juvenile offender.²⁵² The Massachusetts Supreme Judicial Court decided in

247. Scavone, *supra* note 95, at 3477. California places juvenile offenders in the best position to obtain resentencing or parole by having juvenile offenders meet with the Board of Parole Hearings six years prior to their first parole eligibility date. *Id.*

248. S. 39, 2013 Leg. Assemb. 88th Sess. (S.D. 2013), available at <http://legis.sd.gov/docs/legsession/2013/Bills/SB39P.pdf>; *State Legislative Roundup One Year After Miller v. Alabama*, *supra* note 102.

249. S. 850, 2012 Gen. Assemb., Reg. Sess. (Pa. 2012), available at <http://www.legis.state.pa.us/WU01/LI/LI/US/HTM/2012/0/0204..HTM>; Matthew T. Mangino, *One More Shot for Those with Juvenile Life Sentences*, LEGAL INTELLIGENCER (Jan. 13, 2015), <http://www.thelegalintelligencer.com/home/id=1202714515207/One-More-Shot-for-Those-With-Juvenile-Life-Sentences?mcode=1202615324341&curindex=3&slreturn=20150018154442>.

250. S. 5064, 63d Leg., 2014 Reg. Sess. (Wash. 2014), available at <http://lawfilesexxt.leg.wa.gov/biennium/2013-14/Pdf/Bills/Senate%20Passed%20Legislature/5064-S2.PL.pdf>.

251. *Miller v. Alabama*, 132 S. Ct. 2455, 2467–68 (2012).

252. In the wake of *Miller*, eleven states have completely abolished life without parole sentences for juvenile offenders. *Study Finds Life Without Parole Sentences for Juveniles Increasingly Rare, Setting Stage for Supreme Court Review*, INSIGHTNEWS.COM (Sept. 22, 2015, 1:13 PM), <http://www.insightnews.com/news/14067-study-finds-life-without-parole-sentences-for-juveniles-increasingly-rare-setting-stage-for-supreme-court-review> [hereinafter *Life Without Parole for Juveniles Increasingly Rare*]. These states include Connecticut, Delaware, Hawaii, Massachusetts, Nevada, Texas, West Virginia, Wyoming, and Vermont. *Id.* See S. 796, Jan. Sess. (Conn. 2015); S. 9, 147th Gen. Assemb., Reg. Sess. (Del. 2013); H.R. 2116, 27th Leg. Sess. (Haw. 2014); Assemb. 267, 78th Reg. Sess. (Nev. 2015); S.2, 83d Leg. Special Sess. (Tex. 2013); H.R. 4210, 81st Leg., 2d Sess. (W.V. 2014); WYO. STAT. ANN. §§ 6-2-101(b), 6-10-301(c) (2013); H.R. 62, 73d Sess. (Vt. 2015). South Dakota followed suit and banned life without parole sentences for juveniles in March, 2016. *South Dakota Bans Life-Without-Parole Sentences for Youth*, CAMP. FOR FAIR SENT'G OF YOUTH (March 17,

December 2013 that all life without parole sentences for juveniles constitute cruel and unusual punishment because “their brains are ‘not fully developed.’”²⁵³ Considering this as well as the rationales in both *Graham* and *Miller* against requiring the sentence of life without parole for any juvenile, as well as the mandate in *Miller* that life without parole be reserved as an “uncommon” sentence,²⁵⁴ Florida should have abandoned the practice altogether and, at the very least, included provisions that require the sentence of life without parole to actually be uncommon and not the presumed sentence.

B. The Future of Juvenile Sentencing

Roper, *Graham*, and *Miller* represent the Court’s first steps in entirely eliminating mandatory sentences for juveniles.²⁵⁵ Under the reasoning of these cases, all mandatory sentences for juveniles should be abolished and judges should be given discretion when sentencing juveniles for even the most serious crimes. Additionally, states should adopt restorative justice regimes in handling juvenile sentencing.²⁵⁶

Furthermore, considering the “the evolving standards of decency that mark the progress of a maturing society,”²⁵⁷ which shapes the Court’s determination of what constitutes cruel and unusual punishment under the Eighth Amendment, life without parole should be categorically abolished for juvenile offenders. The United States now stands alone in sending juveniles to prison for life without the possibility of parole.²⁵⁸ Because of this practice, the United States and Somalia are the only two

2016), <http://fairsentencingofyouth.org/2016/03/17/south-dakota-bans-life-without-parole-for-children/>; S. 140, 91st Sess. (S.D. 2016); H.R. 405, 2016 Gen. Leg. Sess. (Utah 2016), available at <http://le.utah.gov/~2016/bills/static/HB0405.html>, incorporated into 2016 Utah Laws ____.

253. Sarah Schweitzer & Michael Levenson, *Mass. SJC Bars No-Parole Life Terms for Youths*, BOS. GLOBE (Dec. 24, 2013), <http://www.bostonglobe.com/metro/2013/12/24/mass-high-court-strikes-down-life-without-parole-sentences-for-juveniles/ejKrvSE2EXD0KF7wQXX5M/story.html> (quoting *Diatchenko v. Dist. Att’y for Suffolk Dist.*, 1 N.E.3d 270, 284 (Mass. 2013)).

254. *Miller*, 132 S. Ct. at 2469.

255. Michael Walton, Note, *Like Taking Candy from a Baby: The Effects of Removing Juvenile Sentencing Authority from the Legislature*, 45 U. TOL. L. REV. 675, 676 (2014).

256. See Courtney Amelung, Comment, *Responding to the Ambiguity of Miller v. Alabama: The Time Has Come for States to Legislate for a Juvenile Restorative Justice Sentencing Regime*, 72 MD. L. REV. ENDNOTES 21, 35 (2013) (discussing the need for restorative sentencing practices that emphasize “the repair of harm caused by criminal behavior” for juvenile offenders convicted of even the most serious crimes).

257. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

258. Hanna Kozłowska, *Should a Child Offender Be Treated as an Adult?*, N.Y. TIMES (Oct. 24, 2014, 11:33 AM), http://op-talk.blogs.nytimes.com/2014/10/24/should-a-child-offender-be-treated-as-an-adult/?_php=true&_type=blogs&_r=0. “For years, we’ve been the only country in the world that condemns children to life imprisonment without parole; nearly three thousand juveniles have been sentenced to die in prison.” STEVENSON, *supra* note 25, at 15.

member states of the United Nations “that have not ratified the Convention on the Rights of the Child—which bans life imprisonment for minors.”²⁵⁹ The United Nations’ March 2015 report on torture criticized the United States for being the only country that continues to use life without parole sentences for youth.²⁶⁰ The report stated, “[L]ife sentences without the possibility of release for children are expressly prohibited by international law,” and called such sentences “cruel, inhuman or degrading when imposed on a child.”²⁶¹ Additionally, Pope Francis recently called for “the elimination of life sentences and abolition of all criminal penalties for children.”²⁶²

While the international community has made clear where it stands on the United States’ practice of sentencing juveniles to life without parole, American views of extreme sentences for children are changing as well. In October 2014, the American Bar Association’s Criminal Justice Section “passed a resolution . . . calling on states and the federal government to abolish juvenile life without parole.”²⁶³ The ABA approved and adopted this resolution in February 2015.²⁶⁴ Additionally, recent surveys show that Americans’ views toward the juvenile sentencing practices have changed. While polls conducted in the 1980s and early 1990s indicated that most respondents “believed children who commit crimes should be held to the same standards as their adult counterparts,” the majority of respondents in a 2007 survey conducted by the Center for Children’s Law and Policy indicated that they believed “almost all youth who commit crimes have the potential to change” and “incarcerating youthful offenders without rehabilitation is the same as

259. Christopher Moraff, *10-Year-Old Murder Defendant Shows Failure of U.S. Juvenile Justice System*, DAILY BEAST (Oct. 18, 2014, 6:45 AM ET), <http://www.thedailybeast.com/articles/2014/10/18/10-year-old-murder-defendant-shows-failure-of-u-s-juvenile-justice-system.html>. “[C]ondemning children violates international law, which bans these sentences for children.” STEVENSON, *supra* note 25, at 272.

260. UNITED NATIONS GEN. ASSEMBLY, REPORT OF THE SPECIAL RAPPORTEUR ON TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (Mar. 5, 2015), available at http://fairsentencingofyouth.org/wp-content/uploads/2015/03/UN-Report-of-the-Special-Rapporteur-on-torture-and-other-cruel-inhuman-or-degrading-treatment-or-punishment-March-2015.pdf?utm_source=Special+Rapporteur+blasts+US+for+JLWOP&utm_campaign=Special+Rapporteur+condemns+JLWOP&utm_medium=email.

261. *Id.* at 8, 16.

262. Jody Kent Lavy, *Both Pope Francis, U.N. Call on Us to Do Better by Our Children*, YOUTH TODAY (Nov. 20, 2014), <http://youthtoday.org/2014/11/both-pope-francis-anniversary-call-on-us-to-do-better-by-our-children/>. Pope Francis stated: “Life imprisonment is a death sentence.” *Id.*

263. Birckhead, *supra* note 98.

264. *ABA Calls for End to Life-Without-Parole Sentences for Kids*, CAMP. FOR FAIR SENT’G OF YOUTH (Feb. 9, 2015), <http://fairsentencingofyouth.org/2015/02/09/aba-calls-for-end-to-life-without-parole-sentences-for-kids/>.

giving up on them.”²⁶⁵ In the three years since *Miller*, states have been abandoning life without parole sentences for youth at a rapid pace.²⁶⁶ Considering the “number of states that allow the punishment, the direction and rate of legislative change, and the rarity with which the sentence is imposed in practice,” there is now a national consensus against juvenile life without parole and the Court should find that this practice now constitutes cruel and unusual punishment under the evolving standards of decency.²⁶⁷

Furthermore, the United States should fully embrace the “children are different” mentality and halt the practice of charging juveniles, at least very young juveniles, as adults.²⁶⁸ Violation of due process is a serious concern in trying young juvenile offenders as adults.²⁶⁹ Bryan Stevenson argues that “[n]o child of twelve, thirteen, or fourteen can defend him- or herself in the adult criminal justice system” as these children are “vulnerable to all sorts of problems that increase the risk of a wrongful conviction.”²⁷⁰ Because of the inability of young teens to defend themselves in adult court, when given the chance, the Court should continue to make strides in juvenile jurisprudence and rule that it is a violation of due process for young juveniles to be tried as adults.²⁷¹

States may also consider extending protections for juvenile offenders to young adults. Neuroscience indicates that “the brain is still developing

265. Tim Bates, *Debate Continues Over When, If to Try Juveniles as Adults*, ROME SENTINEL (Nov. 2, 2014, 9:00 AM), <http://romesentinel.com/sevenday/debate-continues-over-when-if-to-try-juveniles-as-adults/QBqjC!ZTSZlIf@yFiZofRGH84Wjg/> (internal quotation marks omitted).

266. *Life Without Parole for Juveniles Increasingly Rare*, *supra* note 252.

267. *Id.*

268. STEVENSON, *supra* note 25, at 296; *Adolescent Offenders Shouldn't Be Tried as Adults*, HARTFORD COURANT (May 15, 2013, 7:05 PM), <http://www.courant.com/opinion/editorials/hc-ed-adolescent-offender-parole-20130515-story.html>. Children are not allowed to “smoke, drink, vote, drive without restrictions, give blood, buy guns, and a range of other behaviors because of their well-recognized lack of maturity and judgment.” STEVENSON, *supra* note 25, at 270. Yet we “simultaneously treat[] some of the most at-risk, neglected, and impaired children exactly the same as full-grown adults in the criminal justice system.” *Id.*

269. “Due process in a criminal prosecution is meaningless if the person charged does not understand the proceedings.” *Branded For Life*, *supra* note 25, at 48 (detailing conversations with youth charged as adults and recounting their experience and confusion during their adult court proceedings).

270. STEVENSON, *supra* note 25, at 296; Moraff, *supra* note 259 (“Legal experts say trying children as adults is not only bad policy, but it raises serious competency and due process issues. Research sponsored in 2003 by the MacArthur Foundation found that more than a third of incarcerated juveniles between the ages of [eleven] and [thirteen] exhibited poor reasoning about trial-related matters, and children under [fourteen] are less likely to focus on the long-term consequences of their decisions.”).

271. It would not be unheard of for the Court to treat younger juveniles differently than older juveniles. Recognizing that young juveniles deserve different treatment from older juveniles, the Court ruled that juvenile offenders under the age of sixteen may not be sentenced to death, while leaving untouched the question of whether juveniles between the ages of sixteen and eighteen may be sentenced to death. *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988).

into the mid [twenties.]”²⁷² In October 2015, California acknowledged that young adults whose brains are developing should be treated as less culpable than older offenders and extended its juvenile parole provisions passed in the wake of *Miller* to persons between the ages of eighteen and twenty-two.²⁷³ Emerging science suggests that eighteen is an arbitrary age for holding young people culpable as adults and that young adults in their early twenties, even up to age twenty-four, could be deserving of the same protections as those under the age of eighteen.²⁷⁴

Florida also should seek to limit the transfers of juveniles into the adult system, as Florida currently “transfers more children out of the juvenile system and into adult court than any other state.”²⁷⁵ The Department of Justice labeled Florida a “clear outlier” in a 2011 report about “the number of juveniles prosecuted as adults between 2003 and 2008.”²⁷⁶ Florida prosecuted juveniles as adults at a rate about five times higher than that of the other twelve states in the study.²⁷⁷ Once in the adult system, juveniles are removed from the system with safeguards and sentences designed particularly for young offenders and then become subject to extreme sentences and lifelong consequences.²⁷⁸ Under Florida’s direct file system, prosecutors have a great deal of discretion in which juveniles they choose to prosecute as adults. These decisions have been criticized as “arbitrary and unfair”²⁷⁹ and reflecting racial bias.²⁸⁰ Refusing to prosecute young juveniles as adults as well as amending the

272. *California: New Hope for Young Offenders*, HUM. RTS. WATCH (Oct. 5, 2015), <https://www.hrw.org/news/2015/10/05/california-new-hope-young-offenders>.

273. *Id.*

274. For a more in-depth discussion of young adult brain science and the social factors that support young adults’ diminished culpability, see Vincent Schiraldi, Bruce Western & Kendra Bradner, *Community-Based Responses to Justice-Involved Young Adults*, NEW THINKING IN COMMUNITY CORRECTIONS (Sept. 2015), available at <https://www.ncjrs.gov/pdffiles1/nij/248900.pdf>.

275. *Branded For Life*, *supra* note 25, at 1.

276. Adam Sacasa & Marc Freeman, *14-Year-Old Boy Accused of West Boynton Double Homicide Charged as Adult, Held Without Bond*, SUN SENTINEL (May 1, 2015, 8:47 PM), <http://www.sun-sentinel.com/local/palm-beach/fl-west-boynton-homicide-teen-first-appearance-20150501-story.html> (internal quotations omitted); U.S. Dep’t of Justice, Office of Juvenile Justice and Delinquency Prevention, *Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting*, NCJRS.GOV 18 (Sept. 2011), <https://www.ncjrs.gov/pdffiles1/ojjdp/232434.pdf> (2011).

277. *Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting*, *supra* note 276, at 18.

278. Natalie Kato, *Reform for Juvenile Sentencing*, TALLAHASSEE DEMOCRAT (June 30, 2014, 6:25 PM EDT), <http://www.tallahassee.com/story/opinion/columnists/2014/06/30/natalie-kato-reform-juvenile-sentencing/11807647/>.

279. *Id.*

280. *Id.* (“[B]lack boys are transferred at a disproportionately higher rate than white boys.”); *Branded For Life*, *supra* note 25, at 29.

direct file system would help to ensure that juvenile offenders receive due process and are not subject to laws and sentences designed for adults.²⁸¹

VII. CONCLUSION

While House Bill 7035 brought Florida law into line with the Court's determination that mandatory life without parole sentences are unconstitutional for juvenile offenders, the new legislation is not in line with the spirit of *Graham* and *Miller* and the Supreme Court's "children are different" jurisprudence. The Florida Legislature missed an opportunity to change Florida law, recognize that children are different, and give second chances to juveniles who have been convicted of serious crimes.

As the Supreme Court continues to take into account the "evolving standards of decency"²⁸² in interpreting the Eighth Amendment, life without parole for juveniles should be categorically barred and all mandatory sentences for juveniles should become unconstitutional. Additionally, there should be a ban on very young children being charged as adults. As such, the provisions set out in House Bill 7035, while constitutional under the current interpretation of the Eighth Amendment, will likely become unconstitutional upon further development of the "children are different" ideal. Florida should continue to take into account the unique qualities of youth in decisions regarding trying juveniles as adults and subjecting them to severe sentences. Florida should seek to implement further safeguards against such practices and seek to provide youth convicted of serious crimes with second chances.

281. See Carlos J. Martinez, *Public Defender: Don't Put Kids in Adult Prisons*, MIAMI HERALD (Mar. 11, 2015), http://www.miamiherald.com/opinion/op-ed/article13575173.html?utm_source=Weekly+News+Roundup+3%2F13%2F15&utm_campaign=WNR8-1-2014&utm_medium=email (discussing the need for direct file reform in Florida).

282. For a discussion regarding the "evolving standards of decency," see *supra* Part II.