St. Thomas Law Review

Volume 25
Issue 2 *Spring 2013*

Article 3

2013

The Growing Pains of Graham v. Florida: Deciphering Whether Lengthy Term-of-Years Sentences for Juvenile Defendants Can Equate to the Unconstitutional Sentence of Life without the Possibility of Parole

Therese A. Savona
Florida Department of Health, Prosecution Services Unit

THE GROWING PAINS OF *GRAHAM V. FLORIDA*: DECIPHERING WHETHER LENGTHY TERM-OF-YEARS SENTENCES FOR JUVENILE DEFENDANTS CAN EQUATE TO THE UNCONSTITUTIONAL SENTENCE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE

THERESE A. SAVONA*

"We must reject the idea that every time a law is broken, society is guilty rather than the lawbreaker. It is time to restore the American precept that each individual is accountable for his actions."

- *Ronald Reagan*

On December 4, 2010, Eric Sandefur, a seventeen-year-old living in Jacksonville, Florida, attacked Jason Jerome, a twenty-eight-year-old homeless man.[1] At the time of the attack, Jerome was asleep behind an office building.[2] Sandefur stabbed Jerome "in his hip, chest, stomach and neck," as well as "nearly amputat[ing] [Jerome's] middle finger . . . ."[3] Caught on a security camera of the office building, Sandefur wore a suit during the attack.[4] Within minutes of the stabbing, the surveillance video depicted an overwhelming amount of blood on Jerome's blanket.[5]

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* Therese A. Savona worked as an Assistant Attorney General in the Criminal Appeals Division of the Office of the Attorney General in Tallahassee, Florida. Currently, Ms. Savona is the Chief Appellate Counsel for the Prosecution Services Unit of the Florida Department of Health in Tallahassee. She received her Juris Doctorate from St. Thomas University School of Law in 2009 and her Bachelor of Science from the University of Miami in 2006. Ms. Savona would like to thank Joshua Heller, Jyllian Guerriero, and Patrick Delaney for their assistance with this article, as well as the Editorial Board and members of the *St. Thomas Law Review* for their passion, dedication, and hard work. The views and opinions expressed in this article are those of the author and should not be associated with the Office of the Attorney General, the Florida Department of Health, or the State of Florida in any way.

1. *Teen Gets 40 Years In Transient Stabbing*, NEWS4JAX.COM (Oct. 3, 2011), http://www.news4jax.com/news/Teen-Gets-40-Years-In-Transient-Stabbing/-/475880/1946822/-/fhlp7vz/-/index.html.

2. *Id.*

3. *Id.*

4. *Teen Pleads Guilty To Stabbing Transient*, NEWS4JAX.COM (Oct. 19, 2011), http://www.news4jax.com/news/Teen-Pleads-Guilty-To-Stabbing-Transient/-/475880/1953342/-/9b85p2z/-/index.html.

5. *Id.*

Confessing to the stabbing, Sandefur told investigators that he drew his knife "and decided to cut [Jerome's] throat."[6] Sandefur disturbingly stated that he "want[ed] to kill someone to see what it felt like."[7] The confession video portrayed a cool, calm Sandefur who did not hesitate to inform investigators: "I pretty much made my decision about what I was going to do that night, I intended to kill him. Just thinking about how to do it if I find someone."[8] During his confession, Sandefur indicated he had no regrets of trying to kill his victim.[9]

After being charged as an adult for the crime of attempted first-degree murder, Sandefur entered a plea of guilty.[10] At Sandefur's sentencing hearing, the trial court judge told Sandefur that she reviewed his "sentencing video twice, and [was] deeply concerned about the safety of the citizens of the state of Florida."[11] The judge imposed a sentence of forty years, the maximum sentence for the crime of attempted first-degree murder.[12]

In *Graham v. Florida*,[13] the United States Supreme Court created a categorical ban on juveniles being sentenced to life without the possibility of parole for nonhomicide crimes.[14] This ruling spurred the national question of whether a term-of-years sentence amounted to a *de facto* life sentence.[15] Defendants argue that a variety of sentences for a myriad of

6. *Confessions of an Attempted Thrill Kill*, ACTIONNEWSJAX.COM (Oct. 25, 2011), http://www.actionnewsjax.com/mostpopular/story/Confessions-of-an-attempted-thrill-kill/1Mtwq0l7WUKOjwGmoXdXow.cspx.

7. *Id.*

8. *Id.*

9. *See A Cold-Blooded Confession*, ACTIONNEWSJAX.COM (Oct. 25, 2011, 10:32 PM), http://www.actionnewsjax.com/content/topstories/story/Confessions-of-an-attempted-thrill-kill/1Mtwq0l7WUKOjwGmoXdXow.cspx.

10. *Teen Pleads Guilty To Stabbing Transient*, *supra* note 4.

11. *Teen Gets 40 Years In Transient Stabbing*, *supra* note 1.

12. *Id.*

13. Graham v. Florida, 130 S. Ct. 2011 (2010) (determining that the Eighth Amendment does not permit a juvenile nonhomicide offender to be sentenced to life in prison without parole).

14. *See id.* at 2034.

15. *Compare* Goins v. Smith, No. 4:09-CV-1551, 2012 WL 3023306, at *6–7 (N.D. Ohio July 24, 2012) (denying Goins's petition for writ of habeas corpus because Goins's eighty-four-year sentence was not a sentence of life without the possibility of parole and did not properly rely on *Graham*), *and* State v. Kasic, 265 P.3d 410, 415 (Ariz. Ct. App. 2011) (finding Kasic's sentence of 139.75 years not equivalent to life without the possibility of parole), *and* People v. Wills, No. B223216, 2011 WL 3278689, at *4 (Cal. Dist. Ct. App. Aug. 2, 2011) (finding Wills' sentence of ninety-two years to life valid under *Graham*), *and* People v. Ruiz, No. B220619, 2011 WL 2120123, at * 11 (Cal. Dist. Ct. App. May 31, 2011) (finding Ruiz's sentence of eighty-two years to life was not tantamount to a sentence of life without the possibility of parole and did not constitute cruel and unusual punishment), *and* Henry v. State, 82 So. 3d 1084, 1089 (Fla. Dist. Ct. App. 2012) (finding Henry's ninety-year sentence constitutional pursuant to *Graham*), *and*

crimes violate *Graham* because those sentences guarantee the defendants will die in prison. Thus, it is no different than the outlawed sentence of life without the possibility of parole.[16]

This article will provide a basic understanding of Eighth Amendment jurisprudence and then explores how the most recent United States Supreme Court cases of *Graham v. Florida*[17] and *Miller v. Alabama*[18] affect juvenile resentencing.[19] Additionally, this article addresses the most recent trend presented in juvenile cases where the juvenile defendant is charged as an adult, tried as an adult, and sentenced accordingly.[20] Specifically, the issue of a lengthy term-of-years sentence in states such as California and Florida appear to be the battleground of diverse opinions, more so perhaps than other states.[21]

I. EIGHTH AMENDMENT OVERVIEW

At the heart of this discussion is the Eighth Amendment to the United States Constitution, which preserves that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments

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Adams v. State, 707 S.E.2d 359, 365 (Ga. 2011) (finding "no categorical Eighth Amendment restriction applies" to Adams' sentence of twenty-five years followed by life on probation), *and* Middleton v. State, 721 S.E.2d 111, 113 (Ga. 2011) (finding *Graham* inapplicable to Middleton's Eighth Amendment claim concerning his thirty-year sentence since Middleton was sentenced to a defined term of years and not life without the possibility of parole), *and* State v. Ward, 21 A.3d 1033, 1039 (Me. 2011) (finding Ward's aggregate fifty-year sentence not to be grossly disproportionate), *and* Rogers v. State, 267 P.3d 802, 804–05 (Nev. 2011) (noting that "the district court did not address whether multiple consecutive sentences also amounted to cruel and unusual punishment under *Graham.* This omission leaves unresolved the complicated issue of whether *Graham* applies only to a sentence of life without parole or whether *Graham* applies to a lengthy sentence structure that imposes a total sentence that is the functional equivalent of life without parole."), *with* United States v. Mathurin, No.09-21075-Cr., 2011 WL 2580775, at *3 (S.D. Fla. June 29, 2011) (finding Mathurin's 307 year sentence violated *Graham* because Mathurin had "no possibility of release based on demonstrated maturity and rehabilitation"), *and* People v. J.I.A., 127 Cal. Rptr. 3d 141, 149 (Dist. Ct. App. 2011) (finding J.I.A.'s sentence of fifty years to life followed by two consecutive sentences of life with the possibility of parole to be a *de facto* life sentence under *Graham* and unconstitutional under the Eighth Amendment), *and* People v. Nunez, 125 Cal. Rptr. 3d 616, 624 (Dist. Ct. App. 2011) (finding that *Graham* applied to Nunez's sentence of 175 years before becoming parole eligible because Nunez's sentence was a *de facto* life sentence and therefore, unconstitutional), *and* People v. Mendez, 114 Cal. Rptr. 3d 870, 882–83 (Dist. Ct. App. 2010) (finding that *Graham* did not apply to Mendez's sentence of eighty-four years to life but applied the rationale of *Graham* to hold that Mendez's sentence constituted cruel and unusual punishment).

16. *See infra* Parts II.A–B; cases cited *supra* note 15.
17. *See Graham*, 130 S. Ct. at 2021, 2028.
18. Miller v. Alabama, 132 S. Ct. 2455, 2463–64 (2012).
19. *See infra* Parts I–II.
20. *See infra* Part II.
21. *See infra* Part IV.

inflicted."[22] Even though the Eighth Amendment is no stranger to discussion, the underpinnings of this amendment provide valuable, necessary insight to comprehend why this protection was sought to be included when our Founding Fathers forged this country.[23]

Punishments for committing crimes are found throughout history. Perhaps first mentioned in religious writings, "[o]ne of the laws given to Moses by the God of the Jewish nation, Yahweh, was the *lex talionis* – an eye for an eye, a tooth for a tooth."[24] Even though many believed this to be

22. U.S. CONST. amend. VIII, XIV; *see* United States v. Cruikshank, 92 U.S. 542, 552 (1875); Barron v. Baltimore, 32 U.S. 243, 250–51 (1833); *Constitution of the United States*, U.S. GOV. ARCHIVES (Sept. 25, 2012), http://www.archives.gov/exhibits/charters/constitution_amendments_11-27.html. This article will focus specifically on the Cruel and Unusual Punishment Clause. This provision, along with the remaining rights outlined by the Bill of Rights, is applicable to the states through the Due Process Clause of the Fourteenth Amendment. U.S. CONST. amend. XIV § 1 (ensuring that "nor shall any state deprive any person of life, liberty, or property, without due process of law"). The Fourteenth Amendment was proposed on June 13, 1866 and ratified on July 9, 1868. *Barron*, 32 U.S. at 250–51. Before the Fourteenth Amendment, the Bill of Rights applied exclusively to the federal government, not the states. *Id.* The *Barron* court held the Fifth Amendment inapplicable to the states noting that "[i]n compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained, amendments were proposed by the required majority in congress, and adopted by the states. These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them." *Id.* In *Cruikshank*, the Court stated:

> The first amendment to the Constitution prohibits Congress from abridging "the right of the people to assemble and to petition the government for a redress of grievances." This, like the other amendments proposed and adopted at the same time, was not intended to limit the powers of the State governments in respect to their own citizens, but to operate upon the National government alone.

Cruikshank, 92 U.S. at 552. Thus, even after the Fourteenth Amendment was incorporated, the Court did not apply the Bill of Rights automatically to the states. *See id.*

23. MERRILL D. PETERSON, THOMAS JEFFERSON AND THE NEW NATION: A BIOGRAPHY 124 (1970); Thomas H. Burnell, *A Story of Privileges and Immunities: From Medieval Concept to the Colonies and United States Constitution*, 34 CAMPBELL L. REV. 7, 97–98 (2011). During the American Revolution, patriots

> inherited privileges and immunities language from various sources, and when they felt they were denied rights enjoyed by neighbors or fellow Englishmen, the claim for equal privileges and immunities was a natural response. Grieved colonists often argued that such language meant that they too enjoyed the benefit of binding English common and statutory law such as the Magna Carta, the Petition of Right, and other fundamental statutes securing, for example, trial by jury and taxation by consent or representation.

Burnell, *supra* at 97–98. In addition to the Magna Carta, Thomas Jefferson drew insight from Cesare Beccaria's work, *On Crimes and Punishments*. PETERSON, *supra* at 124. "Similarly, *The Principles of Penal Law* by William Eden, a pioneer English reformer and collaborator with the great humanitarian John Howard. Montesquieu, Helvetius, Kames, even Blackstone put ideas of penal reform in Jefferson's head." *Id.*

24. Anthony F. Granucci, *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57 CAL. L. REV. 839, 844 (1969), *available at* http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=2752&context=californialawreview; *see Exodus* 21:25–27; *Leviticus* 24:17–22. The issue of punishment in the biblical sense first presented itself in the *Book of*

"the product of a vengeful deity," the translation of *lex talionis* "prescribe[s] a maximum limit on punishment.[25] '*Talio*' is Latin for 'equivalent to' or 'equal.'"[26] This concept of proportionality continued to emerge through antiquity, with the philosopher Aristotle teaching that "[t]he law never looks beyond the question, [w]hat damage was done? [A]nd it treats the parties involved as equals. All it asks is whether an injustice has been done or an injury inflicted by one party on the other."[27]

During the Age of Enlightenment, Cesare Beccaria's treatise, *On Crimes and Punishments*, addressed (as its title suggests) the unjust punishments readily associated with crimes throughout Europe.[28] As described by Beccaria, "[l]aws are the terms by which independent and isolated men united to form a society, once by the tired of living in a perpetual state of war where the enjoyment of liberty was rendered useless by the uncertainty of its preservation."[29] Beccaria believed sacrificing aspects of liberty ensured that society "could enjoy the remainder in security and peace. The sum of all these portions of liberty sacrificed for each individual's benefit constitutes the sovereignty of a nation, and the sovereign is the legitimate keeper and administrator of those portions."[30] However, "it was not enough to create this depository; it had to be defended from the private usurpations of each particular individual, since everyone always tries to withdraw not only his own share but also to usurp

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Exodus. *See Exodus* 21:25–27. According to this passage, referenced by Granucci, the proper punishment for a crime would be:

> Burning for burning, wound for wound, stripe for stripe. And if a man smite the eye of his servant, or the eye of his maid, that it perish; he shall let him go free for his eye's sake. And if he smite out his manservant's tooth, or his maidservant's tooth; he shall let him go free for his tooth's sake.

Id. A similar notion is echoed in the *Book of Leviticus*:

> Whoever takes a human life shall surely be put to death. Whoever takes an animal's life shall make it good, life for life. If anyone injures his neighbor, as he has done it shall be done to him, fracture for fracture, eye for eye, tooth for tooth; whatever injury he has given a person shall be given to him. Whoever kills an animal shall make it good, and whoever kills a person shall be put to death. You shall have the same rule for the sojourner and for the native, for I am the Lord your God.

Leviticus 24:17–22. This symbolizes both the longevity of the issue at hand as well as the evolution of determining the proper punishment for a crime. *See id.*

25. Granucci, *supra* note 24, at 844.

26. *Id.* (quoting THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 825, 1450 (unabridged ed. 1967)).

27. J.A.K. THOMPSON, THE ETHICS OF ARISTOTLE 148 (1955) (internal quotation marks omitted).

28. CESARE BECCARIA, ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS xv (Aaron Thomas ed. & trans., Jeremy Parzen trans., Univ. of Toronto Press 2008).

29. *Id.* at 10.

30. *Id.*

that belonging to others."[31] Punishment against lawbreakers or "tangible measures" became necessary "to prevent the despotic spirit of every individual from plunging the laws of society back into primeval chaos."[32]

The evolution of many types of punishments can be traced from the biblical era[33] through the Middle Ages,[34] and across the Atlantic Ocean to the formation of this country,[35] and the nature of punishment within the American legal system still continues to evolve. Before the solidification of the right to be free from cruel and unusual punishment, death by hanging remained a common sentence for crimes of the simplest form, including mere speculation of witchcraft.[36] However, since the Eighth Amendment's ratification, the United States Supreme Court continually demarcates the permissible boundaries of this right to adequately reflect our society's "evolving standards of decency."[37]

The Eighth Amendment is grounded by its requirement of proportionality.[38] Two categories of proportionality are considered: 1) a challenge premised on a "length[y] term-of-years sentence given all the circumstances of a particular case,"[39] and 2) categorical constraints in the capital context.[40] However, "[t]he Eighth Amendment does not require

31. *Id.*

32. *Id.* at 10–11.

33. *See* Granucci, *supra* note 24, at 844.

34. *Id.* at 844–47.

35. *Id.* at 850–53.

36. CAROL F. KARLSEN, THE DEVIL IN THE SHAPE OF A WOMAN: WITCHCRAFT IN COLONIAL NEW ENGLAND 2 (1998). Initiated in 1542, the British Parliament "made witchcraft a capital crime." *Id.* Since then, "witchcraft trials and executions had been regular features of the social landscape" in England. *Id.* In fact, "between 1645 and 1647, several hundred people had been hanged in the wake of England's most serious witchcraft outbreak." *Id.*

37. Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion).

38. Weems v. United States, 217 U.S. 349, 367 (1910) ("[I]t is a precept of justice that punishment for crime should be graduated and proportioned to offense."); *see* Graham v. Florida, 130 S. Ct. 2011, 2021 (2010) ("For the most part, however, the Court's precedents consider punishments challenged not as inherently barbaric but as disproportionate to the crime. The concept of proportionality is central to the Eighth Amendment.").

39. *Graham*, 130 S. Ct. at 2021; *see, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 1005 (1991) (Kennedy, J., concurring in part and concurring in judgment) (stating that to challenge a sentence of a lengthy term of years, only in the atypical instance where the "threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality," will the scrutiny shift to examine the "intrajurisdictional and interjurisdictional" differences); Solem v. Helm, 463 U.S. 277 (1983); Hutto v. Davis, 454 U.S. 370, 373 (1982); Rummel v. Estelle, 445 U.S. 263, 270–71 (1980); Weems v. United States, 217 U.S. 349, 367 (1910).

40. *Graham*, 130 S. Ct. at 2021 ("The classification in turn consists of two subsets, one considering the nature of the offense, the other considering the characteristics of the offender."); *see also* Kennedy v. Louisiana, 554 U.S. 407, 446–47 (2008) (holding that it was cruel and unusual punishment to impose the death penalty on a defendant who raped a child); Roper v. Simmons, 543 U.S. 551, 568–70 (2005) (holding a juvenile cannot be sentenced to a death

strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime."[41] This underlying theory "reserves a constitutional violation for only the extraordinary case."[42] In the context of a term-of-years sentence, the Supreme Court admitted that "in determining whether a particular sentence for a term of years can violate the Eighth Amendment, we have not established a clear or consistent path for courts to follow."[43]

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penalty); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding mentally retarded persons cannot be sentenced to death penalty); Thompson v. Oklahoma, 487 U.S. 815, 838 (1988) (holding the sentencing of a minor under the age of sixteen to capital punishment was unconstitutional); Enmund v. Florida, 458 U.S. 782, 797 (1982) (finding that the Eighth Amendment does not permit the death penalty for a defendant "who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed"); Coker v. Georgia, 433 U.S. 584, 592 (1977) (holding that "a sentence of death is grossly disproportionate and excessive punishment for the crime of rape [of an adult woman] and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment"). Regarding this type of offense, it is unconstitutional for an individual who commits a nonhomicide crime to receive the death penalty. *See Kennedy*, 554 U.S. at 438, 446–47. When involving distinctive qualities of a defendant, the Supreme Court held that a juvenile defendant could not receive the death penalty. *Roper*, 543 U.S. at 568–70. Prior to *Roper*, the High Court found it unconstitutional for a juvenile defendant under the age of sixteen years old at the time of the underlying offense to be sentenced to death. *See Thompson*, 487 U.S. at 838. In addition to juveniles, defendants who are mentally retarded cannot be executed. *Atkins*, 536 U.S. at 321. The Court in *Atkins* specified, "[A]n IQ between 70 and 75 or lower . . . is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition." *Id.* at 309 n.5.

41. *Harmelin*, 501 U.S. at 1001; *see, e.g.*, Ewing v. California, 538 U.S. 11, 20 (2003) (upholding a sentence of twenty-five years to life pursuant to California's "three strikes" law for shoplifting three golf clubs); Lockyer v. Andrade, 538 U.S. 63, 68–70 (2003) (upholding a sentence of "two consecutive terms of 25 years to life for stealing approximately $150 in videotapes" pursuant to California's "three strikes" law); *Hutto*, 454 U.S. at 376–75 (Powell, J., concurring in judgment) (upholding a sentence of two consecutive terms of twenty years for possession with intent to distribute nine ounces of marijuana and distribution of marijuana, which had a street value of $200); *Rummel*, 445 U.S. at 263, 266 (upholding a sentence of life in prison with the possibility of parole for a three-time offender whose triggering offense was "obtaining $120.75 by false pretenses").

42. *See Lockyer*, 538 U.S. at 77; Beaupierre v. Virgin Islands, No. 2009-0005, 2011 WL 3585507, at *7 (V.I. Aug. 10, 2011) ("In sum, it is clear from the United States Supreme Court precedents that the Eighth Amendment as-applied challenges are successful only when a defendant has been convicted of a non-violent, less serious and more passive offense that carries an incredibly steep punishment.").

43. *Lockyer*, 538 U.S. at 72.

II. MEETING AT THE CROSSROADS: THE INTERSECTION BETWEEN JUVENILES WHO COMMIT ADULT CRIMES AND THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT

Within the past decade, the parameters of juvenile sentencing have been revisited so that what is permitted or prohibited under the Eighth Amendment has been reestablished. First, the Supreme Court held that juveniles could not receive the death penalty.[44] Then, in *Graham*, life imprisonment without the possibility of parole for nonhomicide crimes was prohibited under the Eighth Amendment when sentencing a juvenile.[45] More recently, the *Miller* court found the mandatory imposition of life without the possibility of parole for juveniles who commit any crime, regardless of its homicidal nature.[46]

A. *GRAHAM V. FLORIDA*

At the age of sixteen, Terrance Graham attempted to rob a restaurant with several of his friends.[47] Graham and one of his friends wore masks when they entered the restaurant through a back door that was previously unlocked by one of Graham's friends who was an employee at the restaurant.[48] Graham's masked friend "twice struck the restaurant manager in the back of the head with a metal bar."[49] When the restaurant manager yelled at Graham and his accomplice, they ran out of the restaurant and

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44. *Roper*, 543 U.S. at 568. In so holding, the Supreme Court reestablished the import associated with not only the Constitution, but also the precious rights that separate this country from many others:

> Over time, from one generation to the next, the Constitution has come to earn the high respect and even, as Madison dared to hope, the veneration of the American people. The document sets forth, and rests upon, innovative principles original to the American experience, such as federalism; a proven balance in political mechanisms through separation of powers; specific guarantees for the accused in criminal cases; and broad provisions to secure individual freedom and preserve human dignity. These doctrines and guarantees are central to the American experience and remain essential to our present-day self-definition and national identity. Not the least of the reasons we honor the Constitution, then, is because we know it to be our own. It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.

Id. at 578 (internal citation omitted). Even though the author is not focusing on the Court's decision in *Roper*, the author does not intend to underscore the significance of that decision, merely that the death penalty issue is not the focus of this article.

45. *See infra* Part II.A.

46. *See infra* Part II.B.

47. *See* Graham v. Florida, 130 S. Ct. 2011, 2018 (2010).

48. *Id.*

49. *Id.*

jumped into a getaway car driven by a fellow assailant.[50]

Based on these criminal actions, Graham was charged as an adult[51] with armed burglary with an assault or battery and attempted armed robbery.[52] Pleading guilty to the charges, Graham received three years of probation for each count to run concurrently,[53] avoiding a maximum sentence of life imprisonment without the possibility of parole.[54]

Within six months of receiving probation and thirty-four days shy of his eighteenth birthday, Graham and two others forcibly entered a home and ransacked the residence in search of money.[55] During the home invasion robbery, Graham held a gun to the chest of one of the residents.[56] In fact, Graham and his two accomplices held the two residents at gunpoint for a half hour while they pillaged through the home.[57] Afterward, Graham and his accomplices attempted a different robbery, during the course of which one of Graham's accomplices was shot.[58] Police apprehended Graham as he fled from his father's car after engaging law enforcement in a

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50. *Id.*

51. *See* FLA. STAT. § 985.557 (2003). Like many states, Florida provides for the transfer of a juvenile to adult court. *See id.* Section 985.557 lays out instances where a prosecutor must direct file a juvenile and where a prosecutor maintains the discretion to transfer a juvenile defendant. *See id.* Transfer to adult court is mandatory where a juvenile defendant

> who was 16 or 17 years of age at the time the alleged offense was committed, the state attorney shall file an information if the child has been previously adjudicated delinquent for an act classified as a felony, which adjudication was for the commission of, attempt to commit, or conspiracy to commit murder, sexual battery, armed or strong-armed robbery, carjacking, home-invasion robbery, aggravated battery, or aggravated assault, and the child is currently charged with a second or subsequent violent crime against a person.

§ 985.557(2)(a); *see also* §§ 985.557(2)(d)1.a–c. Additionally, if a juvenile defendant commits a forcible felony when the juvenile is sixteen or seventeen years old and "has previously been adjudicated delinquent or had adjudication withheld for three acts classified as felonies each of which occurred at least 45 days apart from each other," the prosecutor is required to direct file the juvenile. § 985.557(2)(b). Regardless of age, a Florida prosecutor must direct file a juvenile who is charged with a crime that

> involves stealing a motor vehicle, including, but not limited to, a violation of s. 812.133, relating to carjacking, or s. 812.014(2)(c)6., relating to grand theft of a motor vehicle, and while the child was in possession of the stolen motor vehicle the child caused serious bodily injury to or the death of a person who was not involved in the underlying offense.

§ 985.557(2)(c).

52. *Graham*, 130 S. Ct. at 2018.

53. *Id.*

54. *See* FLA. STAT.§ 810.02(2)(a) (2003). Under Florida law, burglary committed when an assault or battery is committed on another person is classified as a first-degree felony and carries a maximum punishment of life without the possibility of parole. *Id.*

55. *Graham*, 130 S. Ct. at 2018–19.

56. *Id.* at 2018.

57. *Id.*

58. *Id.* at 2019.

high-speed chase.[59] "Three handguns were found in the car."[60]

As a result of Graham's participation in the home invasion robbery, possession of a firearm, and "associating with persons engaged in criminal activity," the trial court found that Graham violated his probation.[61] Graham admitted he violated his probation by fleeing from law enforcement.[62] The trial court then sentenced Graham to fifteen years for the charge of attempted armed robbery and to life without the possibility of parole for the charge of armed burglary.[63]

Granting certiorari, the United States Supreme Court's decision addressed "whether the Constitution permits a juvenile offender to be sentenced to life in prison without parole for a nonhomicide crime."[64] For the first time, the Court tackled "a categorical challenge to a term-of-years sentence."[65] In its analysis, the *Graham* court articulated that "[a] State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[66] The Court also noted that the responsibility resides with the states "to explore the means and mechanisms for compliance."[67]

Applying this categorical rule, the Court ultimately held that "for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole."[68] Still, the Court emphasized that even though the Eighth Amendment prevents the states "from imposing a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life."[69] When juvenile defendants commit truly horrific crimes, those defendants may, despite their age, deserve to be in prison "for the duration of their lives."[70] *Graham* clarified that the Cruel and Unusual Punishment Clause of the Eighth Amendment "does not foreclose the possibility that persons convicted of nonhomicide crimes committed before

59. *Id.*
60. *Id.*
61. *Graham*, 130 S. Ct. at 2019.
62. *Id.*
63. *Id.* at 2020.
64. *Id.* at 2017–18.
65. *Id.* at 2022.
66. *Id.* at 2030.
67. *Graham*, 130 S. Ct. at 2030.
68. *Id.*
69. *Id.*
70. *Id.*

adulthood will remain behind bars for life. It does forbid States from making the judgment at the outset that those offenders never will be fit to reenter society."[71]

By applying the categorical rule to juvenile defendants who commit nonhomicide offenses, juvenile defendants who are tried as adults are provided with "a chance to demonstrate maturity and reform."[72] In concluding, the Court reiterated its holding that life without parole for a juvenile who committed a nonhomicide crime is unconstitutional, but re-enforced the notion that "[a] State need not guarantee the offender eventual release . . . ."[73] Only when a life sentence without the possibility of parole is imposed must a juvenile offender be provided "with some realistic opportunity to obtain release before the end of that term."[74]

However, notably absent from the majority opinion was any mention or indication that "the Court's opinion affects the imposition of a sentence to a term of years without the possibility of parole."[75] In fact, the crux of Justice Alito's dissenting opinion was to highlight that the Court's holding did not involve a defined term of years.[76] Not presented with the issue of a defined term of years, the majority remained steadfastly silent even in light of Justice Alito's dissent. Yet, during oral argument, defense counsel for Graham conceded that the possibility of parole after forty years was constitutional.[77]

B. *MILLER V. ALABAMA*

Two years after *Graham*, the Supreme Court reacquainted itself with juvenile sentences. In one of its last opinions[78] to be released during the 2012 term, the Court revisited the issue of juvenile sentencing by deciding *Miller v. Alabama*.[79] Accompanied by a companion case, the Court encountered two different factual scenarios for two juvenile defendants who each received a mandatory sentence of life without the possibility of parole.[80] The Court turned on this similarity to deem the mandatory

71. *Id.*
72. *Id.* at 2032.
73. *Graham*, 130 S. Ct. at 2034.
74. *Id.*
75. *Id.* at 2058 (Alito, J., dissenting).
76. *Id.*
77. Transcript of Oral Argument at 6–7, *Graham*, 130 S. Ct. 2011 (No. 08-7412).
78. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012). The High Court also released the health care opinion at the end of its 2012 term. *Id.*
79. Miller v. Alabama, 132 S. Ct. 2455, 2457 (2012).
80. *Id.* at 2458.

imposition of life without the possibility of parole for a juvenile to be unconstitutional under the Cruel and Unusual Punishment Clause of the Eighth Amendment, regardless of the crime committed.[81] The Court analyzed the cases of Kuntrell Jackson and Evan Miller to arrive at this determination.[82] Even though both Jackson and Miller were fourteen years old when they committed homicidal crimes, their cases involve great factual dissimilarities.[83]

Looking at Jackson's case, Jackson agreed to rob a video store with two of his friends, one being Derrick Shields.[84] On the way to the video store, Jackson discovered that Shields was carrying a sawed-off shotgun.[85] When they arrived at the store, Jackson did not enter the store but decided to remain outside; Shields and the other friend went into the video store.[86] Once inside, Shields pointed the shotgun at the clerk, Laurie Troup, and demanded money.[87] However, Troup refused to give Shields any money.[88] Jackson entered the store and witnessed Shields persistently demanding money from Troup.[89] "When Troup threatened to call the police, Shields shot and killed her. The three boys fled empty-handed."[90]

Jackson was charged as an adult[91] with aggravated robbery and capital

81. *Id.*
82. *Id.* at 2460–62.
83. *Id.*
84. *Id.* at 2461.
85. *Miller*, 132 S. Ct. at 2461.
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.* In its recitation of the facts, the Court indicated that "[a]t trial, the parties disputed whether Jackson warned Troup that '[w]e ain't playin',' or instead told his friends, 'I thought you all was playin'.'" *Id.* (quoting Jackson v. State, 194 S.W.3d 757, 759 (Ark. 2004)).
90. *Id.*
91. *See* ARK. CODE ANN. § 9-27-318(c)(2) (1998); *see, e.g.*, FLA. STAT. § 985.557(1) (2012); MICH. COMP. LAWS § 712A.2(a)(1) (2012); VA. CODE ANN. §§ 16.1–241(A), 16.1–269.1(C), (D) (2012) (providing a prosecutor the discretion to charge a juvenile as an adult for enumerated crimes). In Arkansas, a prosecutor may charge a juvenile if he or she is:

> Fourteen (14) or fifteen (15) years old when he or she engages in conduct that, if committed by an adult, would be:
>
> (A) Capital murder, § 5-10-101;
> (B) Murder in the first degree, § 5-10-102;
> (C) Kidnapping, § 5-11-102;
> (D) Aggravated robbery, § 5-12-103;
> (E) Rape, § 5-14-103;
> (F) Battery in the first degree, § 5-13-201; or
> (G) Terroristic act, § 5-13-310.

ARK. CODE ANN. § 9-27-318(c)(2).

felony murder.[92] At trial, a jury found Jackson guilty as charged.[93] The trial court sentenced Jackson to life without parole and the Arkansas Supreme Court affirmed Jackson's convictions.[94]

The Supreme Court also considered the facts of Miller's case, indicating that not only was Miller fourteen years old when he committed his crimes, but that he had "been in and out of foster care because his mother suffered from alcoholism and drug addiction and his stepfather abused him. Miller, too, regularly used drugs and alcohol; and he had attempted suicide four times, the first when he was six years old."[95] Miller's crimes arose after Cole Cannon, a drug dealer, came to sell drugs to Miller's mother.[96] Miller, along with his friend Colby Smith, followed Cannon to his trailer where they all played drinking games and smoked marijuana.[97]

"When Cannon passed out, Miller stole his wallet, splitting about $300 with Smith. Miller then tried to put the wallet back in Cannon's pocket, but Cannon awoke and grabbed Miller by the throat."[98] Taking a baseball bat, Smith hit Cannon, causing him to release Miller.[99] "Miller then climbed onto Cannon and began hitting him in the face with his fists. Despite Cannon's pleas to stop, Miller picked up the bat, which Smith had dropped, and continued to attack Cannon by striking him with it repeatedly."[100] Miller took a sheet, covered Cannon's head, and said, "I am God, I've come to take your life."[101] Miller delivered one last blow to Cannon's head with the baseball bat.[102] Miller and Smith returned to Miller's trailer where they decided it prudent to return to Cannon's trailer to destroy the evidence.[103] Once there, they started several fires in the

92. *Miller*, 132 S. Ct. at 2461.
93. *Id.*
94. *Id.* As indicated in the opinion, "Jackson did not challenge the sentence on appeal . . . ." *Id.*
95. *Id.* at 2462.
96. *Id.*
97. *Id.*
98. *Miller*, 132 S. Ct. at 2462.
99. *Id.*
100. Miller v. State, 63 So. 3d 676, 683 (Ala. Crim. App. 2010).
101. *Miller*, 132 S. Ct. at 2462 (quoting *Miller*, 63 So. 3d at 689) (internal quotations omitted).
102. *Id.*
103. *Id.*

trailer.[104] Cannon later died as a result of smoke inhalation and the injuries inflicted from being continually hit with the baseball bat.[105]

The state of Alabama charged Miller as an adult[106] with murder in the course of arson.[107] After a trial by jury, Miller was found guilty of

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104. *Id.*; *see also Miller*, 63 So. 3d at 685. While the Supreme Court indicated that two fires were started, a deputy fire marshal testified at Miller's trial that there were

> four points of origin for the fires, including a large one in the south bedroom, which spread down the hallway; a second one on the bed, which had been completely consumed by fire; a third one on the couch; and a fourth one, which originated from a cushion that had been placed on the floor before being set on fire.

Miller, 63 So. 3d at 685.

105. *Miller*, 132 S. Ct. at 2462.

106. *Id.* at 2462–63; *see* ALA. CODE § 12-15-34(a), (b), (d) (2003). Alabama's code contains a provision to transfer a juvenile to adult court. § 12-15-34(a). This section provides a prosecutor with the discretion to file a motion "before a hearing on the petition on its merits and following consultation with probation services" seeking "the court to transfer the child for criminal prosecution, if the child was 14 or more years of age at the time of the conduct charged and is alleged to have committed an act which would constitute a crime if committed by an adult." *Id.* In addition to seeking transfer to adult court, Alabama requires a hearing for the court to determine "whether it is in the best interest of the child or the public to grant the motion." § 12-15-34(b). "If the court finds and there are no reasonable grounds to believe the child is committable to an institution or agency for the mentally retarded or mentally ill, it shall order the case transferred for criminal prosecution." *Id.* At the hearing, the following is considered to determine whether the motion to transfer shall be granted:

> (1) The nature of the present alleged offense.
>
> (2) The extent and nature of the prior delinquency record of the child.
>
> (3) The nature of past treatment efforts and the nature of the response of the child to the efforts.
>
> (4) Demeanor.
>
> (5) The extent and nature of the physical and mental maturity of the child.
>
> (6) The interests of the community and of the child requiring that the child be placed under legal restraint or discipline.

ALA. CODE § 12-15-34(d).

107. *Miller*, 132 S. Ct. at 2462–63; *see* § 13A-6-2(a)(1)–(4). The Alabama code defines murder as follows:

> (a) A person commits the crime of murder if he or she does any of the following:
>
> (1) With intent to cause the death of another person, he or she causes the death of that person or of another person.
>
> (2) Under circumstances manifesting extreme indifference to human life, he or she recklessly engages in conduct which creates a grave risk of death to a person other than himself or herself, and thereby causes the death of another person.
>
> (3) He or she commits or attempts to commit arson in the first degree, burglary in the first or second degree, escape in the first degree, kidnapping in the first degree, rape in the first degree, robbery in any degree, sodomy in the first degree, any other felony clearly dangerous to human life and, in the course of and in furtherance of the crime that he or she is committing or attempting to commit, or in immediate flight therefrom, he or she, or another participant if there be any, causes the death of any person.
>
> (4) He or she commits the crime of arson and a qualified governmental or volunteer firefighter or other public safety officer dies while performing his or her duty resulting from the arson.

§ 13A-6-2(a)(1)–(4).

murder.[108] Miller received a sentence of life imprisonment without parole, as mandated by statute.[109]

With the facts of these cases, the Supreme Court analyzed the Eighth Amendment claim by looking to its opinions in *Roper v. Simmons*[110] and *Graham v. Florida*[111] for guidance.[112] Yet, the Court pointed to *Graham*'s shortcomings to arrive at its holding by stating that *Graham* demonstrated "the flaws of imposing mandatory life-without-parole sentences on juvenile homicide offenders."[113] Such mandatory sentences were deemed to "preclude a sentencer from taking into account of an offender's age and the wealth of characteristics and circumstances attendant to it."[114]

The majority further indicated that occasions where juveniles receive the sentence of life without the possibility of parole should be "uncommon."[115] The Court reasoned that this "is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'"[116] Although the *Miller* court outlawed mandatory sentences of life without the possibility of parole for juveniles, it did not set forth a categorical rule as in *Roper* and *Graham*.[117] By eliminating the compulsory imposition of life sentences without parole for juveniles, *Miller* removed another unconstitutional sentence for juveniles, leaving the question of lengthy defined sentences unanswered.[118]

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108. *Miller*, 132 S. Ct. at 2463.
109. *Id.* Murder in the course of arson is classified as a capital offense. *Id.*
110. Roper v. Simmons, 543 U.S. 551 (2005).
111. Graham v. Florida, 130 S. Ct. 2011 (2010).
112. *Miller*, 132 S. Ct. at 2461–69.
113. *Id.* at 2467.
114. *Id.* The Court reasoned that pursuant to mandatory sentencing schemes,

> every juvenile will receive the same sentence as every other—the 17–year–old and the 14–year–old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one. And still worse, each juvenile (including these two 14–year–olds) will receive the same sentence as the vast majority of adults committing similar homicide offenses—but really, as *Graham* noted, a *greater* sentence than those adults will serve.

Id. at 2467–68 (emphasis in original).
115. *Id.* at 2469.
116. *Id.* (quoting Roper v. Simmons, 543 U.S. 551, 573 (2005)).
117. *Id.* at 2471.
118. *Miller*, 132 S. Ct. at 2471.

III. CHURNING THE WATERS: LENGTHY TERM-OF-YEARS SENTENCES FOR JUVENILES

Since *Graham*, juveniles have been resentenced, exchanging the unconstitutional sentence of life without the possibility of parole for nonhomicide crimes to a lengthy sentence.[119] As evidenced by the inquiries of the Supreme Court justices during the *Miller* oral argument, lengthy sentences for juveniles were addressed as an emerging issue in the Eighth Amendment context.[120] While the Court did not discuss these sentences in its opinion, the issue continues to present itself for various courts throughout the country to consider, namely, whether a lengthy term of years sentence for a juvenile equates to a sentence of life without the possibility of parole.[121] However, the Court's decision in *Miller* only exacerbates this issue, which several courts throughout the country continue to struggle with.[122]

Still, *Miller* does not serve as a cleaver for courts or state legislatures seeking to impose a life sentence on a juvenile since *Miller* only prevents the mandatory imposition of the indeterminate sentence of life without the possibility of parole.[123] But how does *Miller* relate to the discussion of term of years?

Unquestionably, *Miller*'s holding resulted in finding numerous state statutes unconstitutional, namely those statutes mandating life without parole when imposed on a juvenile defendant.[124] Difficulty arises when the states are left to their devices when deciphering how to comply with *Miller*.[125] In light of the holding in *Miller*, the states utilizing a mandatory

119. *See* Cara H. Drinan, *Graham on the Ground*, 87 WASH. L. REV. 51, 65–72 (2012) (discussing the effects of *Graham* on juvenile resentencing). *But see* O'Neil v. Vermont, 144 U.S. 323, 331 (1892) (stating that if a defendant "subjected himself to a severe penalty, it is simply because he has committed a great many such offenses. It would scarcely be competent for a person to assail the constitutionality of the statute prescribing a punishment for burglary on the ground that he had committed so many burglaries that, if punishment for each were inflicted on him, he might be kept in prison for life.").

120. Transcript of Oral Argument at 4–5, *Miller*, 132 S. Ct. 2455 (No. 10-9646). Justice Scalia inquired that "once you depart from the principle that we've enunciated that death is different, why is life without parole categorically different from 60 years or 70 years or -- you know, you'd be back here next term with a 60-year sentence?" *Id.* at 5. Justice Scalia also asked if the line was to be drawn at a fifty-year sentence. *Id.* at 4. As to a fifteen-year-old defendant, Justice Scalia asked if a sixty-year sentence was too great or if a seventy-year sentence was too much for a fourteen-year-old defendant. *Id.* at 6.

121. *See* cases cited *supra* note 15; *see infra* Part IV.

122. *See* cases cited *supra* note 15; *see infra* Part IV.

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

124. *Id.* at 2473.

125. *Id.* at 2486–88.

life imprisonment sentencing scheme face an interesting predicament: how to sentence a juvenile defendant under a statute condemned as unconstitutional where resentencing is not provided for or allowed under the statutory provisions.

One such solution emerged quite shortly after *Miller* was decided. Taking center stage, Governor Terry Branstad of Iowa encountered a now unconstitutional mandatory sentence for juveniles.[126] Iowa did not stand idly by when addressing how its legislature and judiciary should handle a juvenile sentenced to life in prison.[127] Instead, Governor Branstad commuted the life sentences of thirty-eight juvenile defendants to a term-of-years sentence of sixty years, at which time these defendants would become parole eligible:[128] All thirty-eight of these juvenile defendants committed first-degree murder.[129]

Governor Branstad's decisive action occurred with the knowledge that these "38 dangerous juvenile murderers in Iowa will seek resentencing and more lenient sentences."[130] On behalf of the state of Iowa, Governor Branstad highlighted the victims' roles in resentencing, noting that "the victims are all too often forgotten by our justice system, and are forced to re-live the pain of the tragedies . . . . These victims have had their loved ones violently taken away from them."[131] His commutation of the thirty-eight sentences aimed "to protect these victims, [to protect] their loved ones' memories, and to protect the safety of all Iowans."[132]

Undoubtedly, Iowa introduced a *Miller*-friendly solution that one day could be found to violate *Graham*.[133] Even with *Miller*, the issue of a term-of-years sentencing for a juvenile lingers in limbo. While *Miller* adds a

126. Press Release, Office of the Governor of Iowa, Branstad Moves to Prevent the Release of Dangerous Murderers in Light of Recent U.S. Supreme Court Decision (July 16, 2012) (on file with author), *available at* https://governor.iowa.gov/2012/07/branstad-moves-to-prevent-the-release-of-dangerous-murderers-in-light-of-recent-u-s-supreme-court-decision/.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *See* Press Release, Office of the Governor of Iowa, *supra* note 127. Governor Branstad further described that "[j]ustice is a balance and these commutations ensure that justice is balanced with punishment for those vicious crimes and taking into account public safety . . . . First degree murder is an intentional and premeditated crime and those who are found guilty are dangerous and should be kept off the streets and out of our communities." *Id.*

133. *See id.* The author does not take issue with Iowa's decision to commute juvenile sentences after the decision in *Miller*. *Id.* In fact, the author commends the Iowa governor for being proactive on this transforming area of law. *See id.* It is only the amount of time, specifically sixty years, that the author views as problematic under *Graham*. *See id.*

further wrinkle in Eighth Amendment precedent, it does not alleviate all matters subsumed in juvenile sentencing. Instead, *Miller* further thrusts the term-of-years issue into the limelight.[134]

IV. STATE COURTS ADDRESS THE DE FACTO LIFE ARGUMENT UNDER *GRAHAM*

Both *Graham* and *Miller* leave a trail of breadcrumbs down a path[135] leading back to the Supreme Court addressing the issue of lengthy term-of-years sentences for juveniles. Despite the fairly widespread presentation of this issue, courts fall on both sides of the argument.[136] Although certain aspects of *Graham* remain unshakeable,[137] appellate courts within the same state have arrived at adverse conclusions.[138] California and Florida appellate courts question the applicability of *Graham* to terms-of-years sentences, creating conflicting and curious case law.[139]

134. Miller v. Alabama, 132 S. Ct. 2455, 2474 (2012).

135. *See* Cooper Edens, *Hansel and Gretel, in* TALES FROM THE BROTHERS GRIMM: A CLASSIC ILLUSTRATED EDITION 35 (Chronicle Books 2007). In this Grimm brother's story, Hansel and Gretel dropped breadcrumbs along a path in the forest to find their way back home based on the fear that their parents would abandon them deep in the forest. *Id.*

136. *See* cases cited *supra* note 15.

137. *See* United States v. Jones, No. 11-6054, 2012 WL 3264403, at *1 (6th Cir. Aug. 10, 2012); Silas v. Pennsylvania, No. 08-0659, 2011 WL 4359973, at *2 (E.D. Pa. Sept. 19, 2011); Winchester v. Jones, No. CIV-10-307-R, 2011 WL 2636540, at *3 (W.D. Okla. July 6, 2011); Brown v. Horel, No. C 08-4673 LHK (PR), 2011 WL 900547, at *13 (N.D. Cal. March 15, 2011); Biggs v. Evans, No. C 08-3856 RMW (PR), 2010 WL 2629869, at *8 (N.D. Cal. June 29, 2010); People v. Tabios, No. F061371, 2012 WL 1899652 (Cal. Ct. App. May 25, 2012); People v. Belmonte, No. F059761, 2012 WL 1269183, at *12 (Cal. Ct. App. April 26, 2012); Jean-Michel v. State, No. 4D11-616, 2012 WL 3711438, at *2 (Fla. Dist. Ct. App. Aug. 29, 2012) ("This contention is completely refuted by *Graham* itself."); Williams v. State, No. S12A0594, 2012 WL 1392601, at *2 (Ga. April 12, 2012) ("There is no state or federal constitutional prohibition against sentencing an adult, albeit a young adult, to a term of life in prison without parole for the commission of a homicide."); Gandy v. State, 718 S.E.2d 287, 292 (Ga. 2011) (finding *Graham* inapplicable to an adult defendant); Commonwealth v. Lesko, 15 A.3d 345, 408 n.31 (Pa. 2011); State v. Brown, No. M2010-00437-CCA-R3-CD, 2011 WL 4489410, at *10 (Tenn. Crim. App. Sept. 28, 2011); Schmidt v. State, No. 14-10-00713-CR, 2012 WL 912791, at *8 (Tex. Crim. App. Mar. 15, 2012); Wilkerson v. State, 347 S.W.3d 720, 723 (Tex. Crim. App. 2011); Codrington v. People, No. 2009-0002, 2012 WL 2949139, at *11 (V.I. July 20, 2012).

138. *See infra* Part II.A–B. Courts throughout the country unfailingly decline to expand *Graham*'s rationale to defendants who are eighteen years of age or older. *See id.*

139. Paul Elias, *Many Question Life Sentences for Juveniles*, USA TODAY (Aug. 18, 2012), http://www.usatoday.com/news/nation/story/2012-08-18/juvenile-life-sentences/57130414/1; *see infra* Part II.A–B. "Meanwhile, courts in Florida, California and elsewhere are beginning to examine yet another wrinkle of 'extreme' sentences for juveniles: the 'de facto' life sentence." Elias, *supra*.

A. THE CALIFORNIA SUPREME COURT DECIDES *PEOPLE V. CABALLERO*

Until fairly recently, California appellate courts disagreed with whether a term-of-years sentence could equate to a life sentence under *Graham*.[140] In *People v. Caballero*,[141] the California Supreme Court found that a sentence of 110 years to life was unconstitutional as it "contravenes *Graham*'s mandate against cruel and unusual punishment under the Eighth Amendment."[142] Caballero, a sixteen-year-old, received this sentence after being convicted of "three counts of attempted murder" with specific findings that Caballero "personally and intentionally discharged a firearm . . . and inflicted great bodily harm on one victim . . . and that [Caballero] committed the crimes for the benefit of a criminal street gang . . . ."[143] At trial, Caballero testified both that "he was straight trying to kill somebody" as well as "that he did not intend to kill anyone" when he shot at three other juveniles from a rival gang.[144]

Acknowledging *Graham* and *Miller*, the California Supreme Court indicated that Caballero's sentence would not allow him to be considered for parole until more than 100 years had passed from the time he was sentenced.[145] The court found that this sentence failed to provide Caballero with the "opportunity to 'demonstrate growth and maturity' to try to secure his release, in contravention of *Graham*'s dictate."[146] Based on this mandate of *Graham*, the California Supreme Court found that "sentencing a juvenile offender for a non-homicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy, constitutes cruel and unusual punishment in violation of the Eighth Amendment."[147] The court recognized that *Graham* applies not

140. *See* People v. Caballero, 119 Cal. Rptr. 3d 920, 926 (Ct. App. 2011) (finding that a sentence of 110 years to life imposed on a juvenile defendant was constitutional under *Graham*); People v. Mendez, 114 Cal. Rptr. 3d 870, 882–83 (Ct. App. 2010) (finding that under *Graham* or the proportionality review under the Eighth Amendment, Mendez's sentence of eighty-four years to life was unconstitutional).

141. People v. Caballero, 55 Cal. 4th 262, 269 (Cal. 2012).

142. *Id.* at 265.

143. *Id.*

144. *Id.*

145. *Id.* at 268 (citing CAL. PENAL CODE § 3046(b) (2007) ("If two or more life sentences are ordered to run consecutively to each other pursuant to section 669, no prisoner so imprisoned may be paroled until he or she has served the term specified in subdivision (a) on each of the life sentences that are ordered to run consecutively.")).

146. *Id.* (quoting Graham v. Florida, 130 S. Ct. 2011, 2029 (2010)).

147. *Caballero*, 55 Cal. 4th at 268. The court also held that "[a]lthough proper authorities may later determine that youths should remain incarcerated for their natural lives, the state may not deprive them at sentencing of a meaningful opportunity to demonstrate their rehabilitation and fitness to reenter society in the future." *Id.*

only to life sentences without the possibility of parole but also to sentences that are the functional equivalent of life without the possibility of parole.[148]

Despite its holding that there could be a *de facto* life sentence under *Graham*, the California Supreme Court admitted that "*Graham*'s analysis does not focus on the precise sentence meted out."[149] Still, Caballero's sentence was reversed.[150] With the court deciding that there can be a *de facto* life sentence under *Graham*, the focus shifts to Florida.[151] Florida appellate courts position themselves with opposing views by understanding and interpreting *Graham* differently.[152]

B. THE DIVERGENCE OF THE FLORIDA APPELLATE COURT CASES

Being the first to decide the issue of lengthy juvenile sentences in the state, the First District Court of Appeal released *Thomas v. State*[153] and *Gridine v. State*[154] on the same day. The *Thomas* opinion paved the way for the First District's outlook on term-of-years sentencing pursuant to *Graham*. There, Thomas committed armed robbery[155] and aggravated battery[156] when he shot Alphonso Fly in the back over $100.[157] For these crimes, Thomas received concurrent fifty-year sentences, both of which also carried a twenty-five year minimum mandatory.[158] On appeal, Thomas claimed that his sentence fell within the auspices of *Graham* and that his concurrent fifty-year sentences transformed into "the functional equivalent of life sentences."[159]

148. *Id.*

149. *Id.*

150. *Id.* at 269.

151. *See* FLA. STAT. § 921.002(1)(e) (2003) ("The provisions of chapter 947, relating to parole, shall not apply to persons sentenced under the Criminal Punishment Code."). California and Florida courts differ in that California has parole whereas Florida abolished parole. *See id.*

152. *See infra* Part II.B.

153. Thomas v. State, 78 So. 3d 644 (Fla. Dist. Ct. App. 2011).

154. Gridine v. State, 89 So. 3d 909 (Fla. Dist. Ct. App. 2011).

155. *See* FLA. STAT. § 812.13(1) (2009) (identifying robbery as "the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear").

156. *See* FLA. STAT. § 784.045(1)(a)1–2 (2009) (classifying aggravated battery as battery where someone "[i]ntentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement; or [u]ses a deadly weapon").

157. *Thomas*, 78 So. 3d at 645.

158. *Id.* Originally, Thomas received concurrent sentences of life in prison without parole. *Id.* After *Graham*, Thomas sought and received resentencing since Thomas's initial sentence was unconstitutional. *Id.* Even though Thomas received *Graham* relief, he then challenged the fifty-year concurrent sentences under *Graham*. *Id.*

159. *Id.* at 646.

Turning to *Graham*, the First District acknowledged that *Graham*'s narrow holding affected "juvenile offenders sentenced to life without parole solely for a non-homicide offense."[160] Despite this recognition, the court questioned the extent of *Graham*'s holding by indicating that "at some point, a term-of-years sentence may become the functional equivalent of a life sentence" even though the court did not find that to be the case in *Thomas*.[161] Still, the First District was not remiss in admitting the lack of guidance "on how trial courts should proceed with claims such as [Thomas'] because the United States Supreme Court has yet to address the issue of whether and at what point a term-of-year sentence would violate the Eighth Amendment. However, the language of *Graham* provides a solution to this problem."[162] The First District found Thomas' fifty-year concurrent sentences not to be equivalent to life without parole and not in violation of *Graham* or the Eighth Amendment.[163]

Mimicking *Thomas*, the First District applied its exact reasoning in *Gridine*.[164] Even grimmer than *Thomas*, Gridine

> approached his victim, pointed a loaded shotgun at him and demanded

160. *Id.* (quoting Graham v. Florida, 130 S. Ct. 2011, 2023 (2010)).

161. *Id.* at 647; *see* United States v. Mathurin, No. 09-21075-Cr., 2011 WL 2580775 (S.D. Fla. June 29, 2011); People v. Mendez, 114 Cal. Rptr. 3d 870 (Ct. App. 2010). For this proposition, the First District cited to a federal case from the Southern District of Florida. *See Thomas*, 78 So. 3d at 646. In *Mathurin*, the Southern District held that the minimum mandatory sentence of 307 years for

> one count of conspiracy to commit a robbery . . . one count of conspiracy to carry a firearm in furtherance of a crime of violence . . . one count of conspiracy to commit a carjacking . . . one count of attempted robbery . . . twenty-three counts of possession of a firearm in furtherance of a crime of violence . . . eighteen counts of robbery . . . and four counts of carjacking [provided Mathurin with] no possibility of release based on demonstrated maturity and rehabilitation.

Mathurin, 2011 WL 2580775, at *1–3. Based on this finding, the Southern District ordered Mathurin to be sentenced to forty-one years. *Id.* at *6. The First District also cited to *People v. Mendez*, where a California appellate court overturned a sentence of eighty-four years to life imposed on a sixteen-year-old defendant for nine charges, including seven counts of second-degree robbery, one count of carjacking, and one count of assault with a firearm, all of which contained enhancements for use of a firearm and criminal street gang affiliation. *See Mendez*, 114 Cal. Rptr. at 883. Interestingly, the California court noted that "Mendez's sentence is not technically [a life without the possibility of parole] sentence, and therefore not controlled by *Graham*. We are nevertheless guided by the principles set forth in *Graham* in evaluating Mendez's claim that his sentence is cruel and unusual." *Id.*

162. *Thomas*, 78 So. 3d at 646. While the First District stated that the answer to the issue resided in *Graham*, the court's decision appears to waiver between following *Graham* and yearning for guidance. *Id.* at 647. Notably, the court noted that it "lacks the authority to craft a solution to this problem" and "encourage[d] the Legislature to consider modifying Florida's current sentencing scheme to include a mechanism for review of juvenile offenders sentenced as adults as discussed in *Graham*." *Id.*

163. *Id.* at 646–47.

164. Gridine v. State, 89 So. 3d 909, 911 (Fla. Dist. Ct. App. 2011).

> he hand over whatever money and/or property he had on his person. When the victim attempted to run, Mr. Gridine fired the shotgun at him, "striking [him] on his face, head, neck, shoulder, side and back." Security cameras at a nearby gas station recorded Mr. Gridine fleeing from the scene of the shooting. He was fourteen years old on the date he shot the victim.[165]

After Gridine was filed to be tried as an adult for the charges of attempted first-degree murder,[166] attempted armed robbery,[167] and aggravated battery,[168] he pled guilty to these crimes.[169] The trial court sentenced Gridine to seventy years for the attempted first-degree murder charge and twenty-five years for the charge of attempted armed robbery, with each charge carrying a twenty-five year mandatory minimum.[170] Gridine challenged his sentence by arguing that it was a "de facto life sentence" under *Graham*.[171] The trial court rejected this argument and the First District agreed with the trial court's ruling.[172] Citing *Thomas*, the First District primarily mirrored its reasoning and rationale described in its earlier opinion.[173] Notably, the *Gridine* court repeated that "[a]s in *Thomas*, we agree that at some point, a term-of-years sentence may become the functional equivalent of a life sentence."[174]

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165. *Id.* at 910.

166. *See* FLA. STAT. § 782.04(1) (2009) (listing robbery as an enumerated robbery under felony murder and defining attempted first-degree murder as the "unlawful killing of a human being . . . when committed by a person engaged in the perpetration of, or in the attempt to perpetrate" any of the enumerated felonies listed in this subsection).

167. *See* FLA. STAT. § 812.13(1) (2009) (identifying robbery as "the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear").

168. *See* FLA. STAT. § 784.045(1)(a) (2009) (classifying aggravated battery as battery where someone "[i]ntentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement; or [u]ses a deadly weapon").

169. *Gridine*, 89 So. 3d at 910.

170. *Id.* After Gridine pled guilty, the State announced a *nolle prosequi* on the aggravated battery charge. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 910–11.

174. *Id.* at 911; *see* FLA. R. CRIM. P. 9.030(2)(A)(vi)–(v). Subsequently, Gridine moved for rehearing and certification to the Florida Supreme Court. *Gridine*, 89 So. 3d at 910. The First District denied Gridine's motion for rehearing but granted the motion for certification to the Florida Supreme Court, certifying the following question as one of great public importance:

> DOES THE UNITED STATES SUPREME COURT DECISION IN *Graham v. Florida*, —U.S. —, 130 S. Ct. 2011, 176 L.Ed.2d 825 (2010), PROHIBIT SENTENCING A FOURTEEN–YEAR–OLD TO A PRISON SENTENCE OF SEVENTY YEARS FOR THE CRIME OF ATTEMPTED FIRST–DEGREE MURDER?

Id. The Florida Supreme has the discretion to accept jurisdiction on cases including, among other

Between *Thomas* and *Gridine*, the First District held that neither a fifty-year sentence[175] nor a seventy-year sentence[176] equated to life without the possibility of parole. Still, in *Gridine*, one of the judges voiced trepidation regarding how to address a term-of-years challenge under *Graham* since the court could not "provide parole opportunities."[177] In his dissent, Judge Wolf disagreed with the application of *Graham* to a lengthy term-of-years sentence:

> Absent the option of parole, I am at a loss on how to apply the *Graham* decision to a lengthy term of years. Is a 60–year sentence lawful, but a 70–year sentence not? Regardless, it is clear to me that appellant will spend most of his life in prison. This result would appear to violate the spirit, if not the letter, of the *Graham* decision. I, therefore, must respectfully dissent. However, in doing so, I note that absent a legislative solution, I look for guidance from either the United States or Florida Supreme Courts.[178]

This apprehension of the application of *Graham* to these juvenile cases highlights not only the uncertainty of how a term-of-years case should be analyzed, but also the pressing nature of these cases which requires action by the state legislature or a higher judiciary.[179] Several months later, in *Henry v. State*,[180] Florida's Fifth District Court of Appeal addressed a ninety-year sentence received by a seventeen-year-old defendant who committed

> three counts of sexual battery with a deadly weapon or physical force, one count of kidnapping with intent to commit a felony (with a firearm), two counts of robbery, one count of carjacking, one count of burglary of a dwelling, and one count of possession of twenty grams or less of cannabis.[181]

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reasons, when a case is "certified to be in direct conflict with decisions of other district courts of appeal," or where a district court of appeal certifies a question of great public importance. *See* FLA. R. CRIM. P. 9.030(2)(A)(v).

175. Thomas v. State, 78 So. 3d 644, 646 (Fla. Dist. Ct. App. 2011).

176. *Gridine*, 89 So. 3d at 911.

177. *See id.* (Wolf, J., dissenting). "The Legislature, not the judiciary, is empowered to create a provision for parole." *Id.*

178. *Id.*

179. *See id.*

180. Henry v. State, 82 So. 3d 1084, 1084 (Fla. Dist. Ct. App. 2012).

181. *Id.* at 1085; *see* FLA. R. CRIM. P. 3.800(b)(2) ("If an appeal is pending, a defendant or the state may file in the trial court a motion to correct a sentencing error."). Due to the type of offenses, Henry was sentenced as a sexual predator. *Henry*, 82 So. 3d at 1085. Initially, Henry received life sentences on the three counts of sexual battery, thirty years for the charge of kidnapping with the intent to commit a felony, and fifteen years for the robbery charge. *Id.* These sentences were to run concurrently. *Id.* The trial court also sentenced Henry to thirty years for carjacking, fifteen years for robbery, and fifteen years for burglary of a dwelling, all of which would run consecutive with each other and consecutive to the previous listed charges. *Id.* Henry

Under Florida law, Henry and all other criminal defendants must serve at least 85% of their sentences,[182] which means that the least amount of time Henry would serve of his ninety-year sentence would be 76.5 years.[183] Henry argued that his sentence fell within the auspices of *Graham* as a *de facto* life sentence.[184] He cited the "National Vital Statistics Report as supplemental authority, suggesting that his life expectancy at birth by race and sex is 64.3 years" for the proposition that "because he is going to have to serve more years in prison than, statistically, he is expected to live, his sentence is an unconstitutional *de facto* life sentence."[185]

In addition to citing to *Thomas* and *Gridine*, the Fifth District highlighted the "significant split" among appellate courts on the issue of *de facto* sentencing.[186] When analyzing these cases, the court did not

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received time served for the possession charge. *Id.* Appellant was sentenced in 2008. *Id.* After the *Graham* decision, Henry sought relief from his life sentences for the sexual battery counts. *Id.* at 1086. The circuit court resentenced Henry to thirty years on each of the sexual battery counts with the sentences to run concurrently with one another but consecutively to Henry's others charges. *Id.* The addition of these consecutive sentences amounted to ninety years. *Id.*

182. FLA. STAT. § 921.002(1)(e) (2008) ("The sentence imposed by the sentencing judge reflects the length of actual time to be served, shortened only by the application of incentive and meritorious gain-time as provided by law, and may not be shortened if the defendant would consequently serve less than 85 percent of his or her term of imprisonment as provided in s. 944.275(4)(b) 3. The provisions of chapter 947, relating to parole, shall not apply to persons sentenced under the Criminal Punishment Code.").

183. *Henry*, 82 So. 3d at 1086.

184. *Id.*

185. *Id.*

186. *Id.* at 1088 (explaining how some courts, such as those in Georgia, have consistently held that "*Graham* is not implicated in a term-of-years sentence"); *see* State v. Kasic, 265 P.3d 410 (Ariz. Ct. App. 2d 2011); Graham v. Florida, 130 S. Ct. 2011, 2023 (2010); Adams v. State, 707 S.E.2d 359 (Ga. 2011) (finding that Adams' mandatory sentence of 25 years followed by life on probation for committing aggravated molestation on a four-year-old victim does not fall under the purview of *Graham*'s categorical ban since Adams received a term-of-years sentence and Adams' sentence was not grossly disproportionate under the Eighth Amendment); Middleton v. State, 721 S.E.2d 111, 113 (Ga. Ct. App. 2011) ("Middleton's sole argument before the trial court was that his sentence violated the categorical restriction imposed in *Graham*. But the juvenile offender in *Graham* was sentenced to life imprisonment without the possibility of parole, whereas Middleton was sentenced to a definite term of years without the possibility of parole. And as our own Supreme Court recently emphasized, 'nothing in [*Graham*] affects the imposition of a sentence to a term of years without the possibility of parole.' Thus, the categorical restriction imposed in *Graham* is inapplicable to the present case, and the trial court committed no error in denying Middleton's motion to correct a void sentence.") (internal citations and punctuation omitted). Along with these Georgia cases, the *Henry* court acknowledged *State v. Kasic*, an opinion from an Arizona appellate court. *Henry*, 82 So. 3d at 1089 (citing *Kasic*, 265 P.3d 410). Kasic received a 139.75 year sentence for crimes he committed when he was 17-years-old, including "thirty-two felonies arising from six arsons and one attempted arson committed over a one-year period beginning when he was seventeen years of age." *Kasic*, 265 P.3d at 411. "Of the 139.75 consecutive years, 80.5 were for arsons Kasic committed as a juvenile." *Id.* at 411 n.1. The Arizona court noted that the Supreme Court in *Graham* commented that "[t]he instant case

flippantly disregard the looming uncertainty hanging over a term-of-years sentence post-*Graham*:

> If we conclude that *Graham* does not apply to aggregate term-of-years sentences, our path is clear. If, on the other hand, under the notion that a term-of-years sentence can be a *de facto* life sentence that violates the limitations of the Eighth Amendment, *Graham* offers no direction whatsoever. At what number of years would the Eighth Amendment become implicated in the sentencing of a juvenile: twenty, thirty, forty, fifty, some lesser or greater number? Would gain time be taken into account? Could the number vary from offender to offender based on race, gender, socioeconomic class or other criteria? Does the number of crimes matter? There is language in the *Graham* majority opinion that suggests that no matter the number of offenses or victims or type of crime, a juvenile may not receive a sentence that will cause him to spend his entire life incarcerated without a chance for rehabilitation, in which case it would make no logical difference whether the sentence is "life" or 107 years. Without any tools to work with, however, we can only apply *Graham* as it is written. If the Supreme Court has more in mind, it will have to say what that is.[187]

The Fifth District upheld Henry's ninety-year sentence as not cruel and unusual under the Eighth Amendment.[188]

Within months of *Henry*, the First District again confronted the issue of whether a lengthy term-of-years sentence failed to provide a meaningful opportunity for a juvenile defendant to obtain release on several other occasions.[189] In *Floyd v. State*,[190] the seventeen-year-old defendant committed two counts of armed robbery with a firearm and one count of grand theft auto.[191] Floyd appealed his consecutive forty-year sentences, totaling eighty years, for the two counts of armed robbery.[192] Following its previous indication that at some point a lengthy term of years could

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concerns only those juvenile offenders sentenced to life without parole solely for a nonhomicide offense." *Id.* at 414 (quoting *Graham*, 130 S. Ct. at 2023) (internal quotation marks omitted). Ultimately, the appellate court found that the categorical bar erected in *Graham* did not affect the term-of-years sentence received by Kasic and declined to extend the reasoning and rationale of *Graham* to such a sentence. *Id.* at 415.

187. *Henry*, 82 So. 3d at 1089 (footnotes omitted).

188. *See id.*

189. *See* Floyd v. State, 87 So. 3d 45, 46 (Fla. Dist. Ct. App. 2012).

190. *Id.* at 45.

191. *Id.*

192. *Id.*; *see* FLA. R. CRIM. P. 3.800(b)(2). Initially, Floyd received two life sentences for the armed robbery counts since these crimes were committed in 1998. *Id.* Once the Supreme Court decided *Graham*, Floyd was resentenced to "consecutive forty-year sentences on the two armed robbery counts." *Id.* at 45–46. Floyd moved to correct the sentencing error, arguing that his consecutive forty-year resentence amounted to a *de facto* life sentence in violation of *Graham* since it did not provide him with a meaningful opportunity to obtain release. *Id.* at 46.

become a life sentence, the First District found Floyd's eighty-year sentence to violate *Graham*, reasoning that "[t]his situation does not in any way provide Appellant with a meaningful or realistic opportunity to obtain release, as required by *Graham*."[193] The appellate court also articulated that "[i]n this case, we are faced with a situation where . . . [Floyd], if he serves the entirety of his sentence, will be ninety-seven when he is released. Even if . . . [Floyd] received the maximum amount of gain time, the earliest he would be released is at age eighty-five."[194] In its holding, the First District noted that "common sense dictates that Appellant's eighty-year sentence, which, according to the statistics cited by Appellant, is longer than his life expectancy, is the functional equivalent of a life without parole sentence and will not provide him with a meaningful or realistic opportunity to obtain release."[195] However, the court repeated its previous concerns with the application of *Graham* to lengthy term-of-years sentences, stating that "the uncertainty that has arisen . . . since *Graham* . . . will undoubtedly continue" until "the Legislature or a higher court addresses the issue . . . ."[196]

Even though the First District found that an eighty-year sentence was the functional equivalent to life without the possibility of parole in *Floyd*, a different conclusion was reached in *Smith v. State*.[197] There, the court faced a different set of facts not presented in its earlier opinions. Smith was sentenced on April 22, 1986, after pleading nolo contendere to "two counts of sexual battery, two counts of burglary, one count of aggravated assault, one count of kidnapping, one count of possession of a weapon during the commission of a felony, and one count of possession of burglary tools," which Smith had committed in two days in 1985 at the age of sixteen.[198] On the charges of sexual battery, kidnapping, and burglary, the trial court sentenced Smith to life without the possibility of parole along with five years on each of the counts of aggravated assault, possession of a firearm,

193. *Floyd*, 87 So. 3d at 46.

194. *Id.*

195. *Id.* at 47.

196. *Id.* The First District "encourage[d] the Legislature to follow the Supreme Court's guidance in *Graham* and to 'explore the means and mechanisms for compliance' of its opinion." *Id.*

197. *Compare id.* at 47 (ruling that because the defendant's eighty-year sentence surpassed his life expectancy, it was *de facto* life without parole, and it failed to give him a realistic chance of release), *with* Smith v. State, 93 So. 3d 371, 374–75 (Fla. Dist. Ct. App. 2012) (holding that defendant's access to overall gain time for good behavior would demonstrate maturity and rehabilitation, providing him with a realistic chance of being released).

198. *Floyd*, 87 So. 3d at 372. These charges arose from two cases filed against Smith. *Id.*

and possession of burglary tools.[199] After *Graham*, Smith was resentenced on his five life sentences receiving a forty-year sentence on four counts that would run concurrently, as well as a forty-year sentence on the remaining life sentence, which resulted in an aggregate eighty-year sentence.[200]

The argument advanced by the defendant in *Smith* paralleled those in *Thomas*, *Gridine*, *Henry*, and *Floyd*, but unlike the defendants in those cases, the *Smith* court incorporated the detail of gain time into the functional equivalent debate.[201] Since Smith committed his crimes in 1985, his sentence was not subject to the 85% rule.[202] Instead, pursuant to the statutes in effect during 1985,[203] Smith received basic gain time[204] as well as incentive gain time[205] based on good behavior.[206] "Considering both the basic and incentive gain time available to him, and assuming no forfeiture of gain time earned, it is evident that Smith was eligible to serve a sentence significantly less than the sixty-three years he would serve if only basic gain time were applied."[207] Based on the amount of gain time Smith received, the First District found that gain time "afforded the requisite 'meaningful opportunity to obtain release based upon demonstrated maturity and rehabilitation' mandated by *Graham*."[208]

Having considered the most recent cases regarding life equivalence under *Graham*,[209] the First District's latest opinion in *Adams v. State*[210] took

199. *Id.*

200. *Id.*

201. *Id.* at 374.

202. *Id.*

203. Phillips v. State, 69 So. 3d 951, 956 n.6 (Fla. Dist. Ct. App. 2010) (per curiam) (noting that the "ability to earn gain time is based on the statutes in effect at the time of the offense"); *see also* Weaver v. Graham, 450 U.S. 24, 33 (1981) (holding that the prohibition of ex post facto laws pertained to statutory changes of gain time).

204. *See* FLA. STAT. § 944.275(4)(a) (1985). According to the 1985 gain time statute, the Florida Department of Corrections was required to "grant basic gain-time at the rate of 10 days for each month of each sentence imposed . . . ." *Id.* This statute was to "encourag[e] satisfactory behavior . . . ." *Id.*

205. *See Id.* § 944.275(4)(b). The 1985 incentive gain time statute provided that "[f]or each month in which a prisoner works diligently, participates in training, uses time constructively, or otherwise engages in positive activities, the department may grant up to 20 days of incentive gain-time, which shall be credited and applied monthly." *Id.* Essentially, when combining the amount of basic gain time and the total amount of potential incentive gain time available to Smith, he could receive a maximum of thirty days per month in gain time based upon good behavior. *Id.* § 944.275(4)(a)–(b).

206. Smith v. State, 93 So. 3d 371, 374 (2012).

207. *Id.*

208. *Id.*

209. *See* Floyd v. State, 87 So. 3d 45 (Fla. Dist. Ct. App. 2012); Thomas v. State, 78 So. 3d 644 (Fla. Dist. Ct. App. 2012); Gridine. v. State, 89 So. 3d 909 (Fla. Dist. Ct. App. 2011).

210. Adams v. State, No. 1D113225, 2012 WL 3193932, at *1 (Fla. Dist. Ct. App. Aug. 8,

measures to seek assistance. There, the First District contemplated a sixty-year sentence imposed on a sixteen-year-old who committed the crimes of attempted first-degree murder, armed burglary, and armed robbery.[211] Adams' charges stemmed from Adams robbing his victim at point-blank range and shooting the victim multiple times, including once in the mouth.[212] "The rule of law established by these cases is twofold: first, *Graham* applies not only to life without parole sentences, but also to lengthy term-of-years sentences that amount to de facto life sentences; and second, a de facto life sentence is one that exceeds the defendant's life expectancy."[213] Adams, who would be required "to serve at least 58.5 years in prison," would be approximately seventy-six-years-old when he would be released.[214] Not only did the First District find Adams' sentence unconstitutional under *Graham*, but also the court certified conflict with the Fifth District's opinion in *Henry* and certified two questions of great public importance to the Florida Supreme Court.[215]

The issue of where to draw the line on when an individual's life will end presents a daunting and, more than likely, improbable task. Courts have considered a defendant's life expectancy under the National Vital Statistics Report from the Centers for Disease Control and Prevention.[216] The Centers for Disease Control and Prevention also supplies guidelines to determine an individual's life expectancy ascertained by one's age and race.[217] Yet, the lacuna in these scientific studies does not account for the

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2012).

211. *Id.* at *1.

212. *Id.*

213. *Id.* at *2. *But see* Alvarez v. State, 358 So. 2d 10, 12 (Fla. 1978).

> We reject the notion that an individual's life expectancy should be used, or was intended by the Legislature to be used, to mark the longest term which a particular defendant should serve. Any sentence, no matter how short, may eventually extend beyond the life of a prisoner. Mortality and life expectancy are irrelevant to limitations on the terms of incarceration set by the Legislature for criminal misconduct.

Alvarez, 358 So. 2d at 12 (footnote omitted).

214. *Adams*, 2012 WL 3193932, at *2.

215. *Id.* at *2–3. The following questions were certified by the First District:

> 1. DOES *GRAHAM V. FLORIDA*, —— U.S. ——, 130 S. Ct. 2011, 176 L.Ed.2d 825 (2010), APPLY TO LENGTHY TERM–OF–YEARS SENTENCES THAT AMOUNT TO DE FACTO LIFE SENTENCES?
>
> 2. IF SO, AT WHAT POINT DOES A TERM–OF–YEARS SENTENCE BECOME A DE FACTO LIFE SENTENCE?

Id.

216. *See, e.g.*, People v. J.I.A., 127 Cal. Rptr. 3d 141, 149 (Dist. Ct. App. 2011).

217. ELIZABETH ARIAS, NAT'L CTR. FOR HEALTH STATISTICS, NAT'L VITAL STATISTICS REPORT, UNITED STATES LIFE TABLES, 2008, at 1 (2012), *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61_03.pdf.

health, environment, genetic disposition, as well as geographical and socioeconomic influences that could lean towards a longer or shorter life span.[218]

V. FACTORS AFFECTING LIFE EXPECTANCY

More so than ever before, people are living longer lives.[219] Still, factors exist that could decrease one's life expectancy such as smoking, high blood pressure, obesity, and diabetes.[220] For those incarcerated, life spans may be shortened due to "infectious diseases, mental health conditions, and substance use."[221] However, for some prisoners, incarceration can be a positive influence for their overall "health by providing food and shelter as well as opportunities for exercise and health education. For some inmates, prisons also provide a refuge from the substance use and violence endemic in their communities . . . ."[222] One study "assessed all deaths of state prisoners, aged 15–64 years, for the years 2001–2004" and "found that prisoners had lower death rates than in the general population."[223] Perhaps more astounding than a prisoner living

218. *See id.*

219. *People are Living Longer and Healthier: Now What?*, SCIENCE DAILY (Mar. 24, 2010), http://www.sciencedaily.com/releases/2010/03/100324142121.htm.

220. *Four Preventable Risk Factors Reduce Life Expectancy in US and Lead to Health Disparities, Study Finds*, SCIENCE DAILY (Mar. 24, 2010), http://www.sciencedaily.com/releases/2010/03/100322211829.htm; *see* Goodarz Danaei et al., *The Promise of Prevention: The Effects of Four Preventable Risk Factors on National Life Expectancy and Life Expectancy Disparities by Race and County in the United States*, 7 PLOS MED 3, 1 (2010), *available at* http://www.plosmedicine.org/article/info%3Adoi% 2F10.1371%2F journal.pmed.1000248. It is estimated that these four factors "reduce life expectancy in the U.S. by 4.9 years in men and 4.1 in women." Danaei, *supra* at 4. Specifically, the removal of smoking alone adds the greatest amount to the life expectancy of males of any ethnicity and to Caucasian and Native American females. *Id.* at 5. Even if not entirely removed, decreasing smoking "accounted for 42%–58% of the years gained by all four risks in men and 12%–46% in women in these Americas (noting that the effects of individual risk factors on life expectancy are not additive due to multicausality and competing risk from other diseases)." *Id.* Similarly, the diminution in blood pressure, glucose levels, and obesity signified higher life expectancies:

> Lowering blood pressure to its optimal distribution would have achieved between 27% (men in America 4) and 69% (women in America 1) of the benefits of all four risk factors. The largest benefit from any single risk factor among black women was from lower blood pressure, alone explaining about one-half of the life expectancy gain from all four risks (47%–49%). Adiposity was the second single most important risk factor in black women (40%–48%).

Id.

221. David L. Rosen et al., *All-Cause and Cause-Specific Mortality Among Black and White North Carolina State Prisoners, 1995–2005*, 21 ANNALS OF EPIDEMIOLOGY 10, 719 (2011).

222. *Id.*

223. *Id.* at 719–20. Rosen's study references a report conducted by the U.S. Bureau of Justice Statistics. *Id.*

a longer life while incarcerated is the break down that occurs depending upon the race of the prisoner.[224] "The crude mortality rate for black prisoners was 57% less than that of black people in the general population (206 versus 484 per 100,000), whereas the crude mortality rate of white prisoners was 10% greater than white people in the general population (343 versus 312 per 100,000)."[225]

Two state-specific studies echo a similar finding of longevity while incarcerated. One study that focused on Georgia prisoners discovered that "imprisoned black men had lower mortality rates than black men in the general population . . . ."[226] Another study analyzing prisoners in North Carolina looked at prisoners between the ages of twenty and seventy-nine that entered the North Carolina Department of Corrections between 1995 and 2005.[227] During this decade, 120,959 individuals were incarcerated in North Carolina, of which 105,237 (87%) were male.[228] Of the male prisoners, "94% (98,870/105,237) were classified as either white or black."[229]

The North Carolina study set forth the mortality differences detected between prisoners who were either black or white:

> Black prisoners experienced about one-half the expected number of all-cause deaths . . . . For several causes, the number of deaths among blacks was 80% less than the expected number . . . . These causes included alcohol or drugs, diabetes, chronic lower respiratory disease, mental and behavioral disorders, and accidents. There were at least 60% fewer than expected homicide and suicide deaths, and 36% and 31%, respectively, fewer than expected deaths from cardiovascular disease and cancer . . . . The only cause for which black prisoners experience an excess number of deaths was viral hepatitis . . . .
>
> In contrast, among white male prisoners there was an excess number of expected deaths . . . for all-cause-mortality . . . . By cause, white prisoners experienced the greatest relative excess of deaths for viral hepatitis . . . and liver cancer . . . . Cancer and infections accounted for the greatest absolute excess in deaths, 37 and 21, respectively . . . . Among white prisoners, the greatest absolute difference between observed and expected deaths was for accidental causes, in which the number of deaths observed was 45 fewer than the expected.[230]

224. *Id.* at 720.
225. *Id.*
226. *Id.*
227. Rosen, *supra* note 221, at 721.
228. *Id.*
229. *Id.*
230. *Id.* at 721–22.

Overall, the North Carolina study "found that the number of deaths among black male prisoners was 48% less than the expected. In contrast, the number of deaths among white male prisoners was only modestly greater than expected . . . ."[231] Interestingly, black males who were not incarcerated had a 40% higher mortality rate than white males who were not incarcerated.[232] Certain continual supplies such as "food, shelter, security, and medical and ancillary services" could be pivotal items that positively or negatively influence an individual's life expectancy.[233] The study showed that deaths resulting from "accidents, homicides, and alcohol and drugs" were much lower in incarcerated black males than those in the general population, which is probable based on the inherent restrictions of incarceration.[234] "Because these causes are among the leading causes of death among young men in the community, it follows that the relatively low number of prisoner deaths from these causes helped to drive down the all-cause mortality rates among the youngest age group of both black and white prisoners."[235] From these several studies, a court could glean the difficultly in establishing a juvenile's life expectancy when imposing a lengthy sentence.

VI. EVOLVING STANDARDS OF DECENCY?

"[T]he evolving standards of decency that mark the progress of a maturing society"[236] are treated as beacons of an Eighth Amendment analysis of a sentence under the Cruel and Unusual Punishment Clause.[237] The need for guidance incorporates the moral judgment necessarily attached to a punishment in conjunction with "[t]he standard of extreme cruelty."[238] Although "evolving standards of decency" can be understood as what is to be considered by the legal system when imposing a sentence,

231. *Id.* at 722.

232. *Id.* "These findings suggest that incarceration may play a role in equalizing the mortality experience across race." *Id.*

233. Rosen, *supra* note 221, at 722.

234. *Id.* at 723.

235. *Id.* at 723–24.

236. Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion).

237. *See* Estelle v. Gamble, 429 U.S. 97, 102 (1976) (stating that the concepts of "dignity, civilized standards, humanity, and decency" are at the heart of Eighth Amendment evaluations of punishment) (citation omitted) (internal quotation marks omitted).

238. Furman v. Georgia, 408 U.S. 238, 382 (1972) (Burger, C.J., dissenting).

> A punishment is inordinately cruel, in the sense we must deal with it in these cases, chiefly as perceived by the society so characterizing it. The standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.

Id.

it appears as though what the legal system views as a standard of decency and the actions of those members of society persist on diverging paths.[239] In a perfect world, it would be simple to assume that attached to youth is inherent innocence and that no juvenile would knowingly and intentionally commit a heinous crime, much less murder. However, it is questionable as to what evolving standards of decency have been demonstrated by juveniles in recent times.[240]

Specifically, the horrific and alarming trend of young individuals bullying[241] others to the point of suicide indicates characteristics far from innocence or misunderstanding of what their actions lead to.[242] On March 10, 2011, in direct response to the nationwide surge, the White House released a statement by President Barack Obama and First Lady Michelle

239. The author does not suggest that the legal system revert to a time where punishment is too swift or a defendant is not accorded due process. Instead, the author questions whether the view of the legal system is aligned with a more informed and connected generation of young individuals.

240. *See, e.g.*, John Barry, *Hillsborough Judge Gives 'Juvenile' Offender 100-Year-Sentence*, TAMPA BAY TIMES (Aug. 8, 2012), http://www.tampabay.com/news/courts/criminal/hillsborough-judge-gives-juvenile-offender-100-year-sentence /1244791. For example, Jere Walker

> was the youngest member of a gang that had ridden around Tampa in a pickup truck in the spring of 1988 looking for people to rob. On June 29, they accosted former state attorney E.J. Salcines and his wife as they returned from a dinner with their friend, oral surgeon Antonio Castro.
>
> Castro described how Walker stuck a pistol in his face and tried to fire, except the gun jammed. He credited Salcines with saving his life by grabbing Walker's hand. Salcines fended off slashes from a box cutter's knife, saying his wedding band saved the tendons in his ring finger. He broke his thumb trying to rip away their license tag as the robbers drove off.
>
> Later in the evening, Walker and the others accosted a couple on vacation from Texas, forcing them into their motel room on Busch Boulevard. Walker raped a 31-year-old mother of two while her children were kept in a bathroom and her husband was held at gunpoint.

Id. Originally, Walker received five life sentences for these crimes, which he committed when he was seventeen years old. *Id.* In the wake of *Graham*, Walker was resentenced to one hundred years. *Id.*

241. *Bullying Definition*, STOPBULLYING.GOV, http://www.stopbullying.gov/what-is-bullying/definition/index.html (last visited Sept. 11, 2012) (defining three types of bullying as: (1) verbal bullying; (2) social bullying; and (3) physical bullying); *Cyberbullying*, STOPBULLYING.GOV, http://www.stopbullying.gov/cyberbullying/index.html (last visited Sept. 14, 2012) (stating that cyberbullying transpires on any mode of electronic technology, such as "mean text messages or emails, rumors sent by email or posted on social networking sites, and embarrassing pictures, videos, websites, or fake profiles.").

242. *See* Press Release, The White House, President and First Lady Call For a United Effort to Address Bullying (Mar. 10, 2011), http://www.whitehouse.gov/the-press-office/2011/03/10/president-and-first-lady-call-united-effort-address-bullying. Detailing courses of action to be taken to combat bullying, MTV announced "the forthcoming premiere of a poignant new feature film inspired by the true, tragic tale of Abraham Biggs—a 19-year-old who battled bipolar disorder and ultimately webcast his suicide after being egged on by a digital mob." *Id.*

Obama seeking "a united effort to address bullying at the White House Conference on Bullying Prevention."[243] This conference aspired to "'dispel the myth that bullying is just a harmless rite of passage or an inevitable part of growing up. It's not,' said President Obama."[244] An estimated thirteen million school-aged children are bullied by others.[245] Though, those bullied are far from the only ones who experience harm.[246] Bullies themselves "are more likely to have challenges in school, to abuse drugs and alcohol, and to have health and mental health issues."[247] Among those committed to assist in preventing and combating bullying, the federal government launched programs such as StopBullying.gov,[248] as well as initiatives by Formspring,[249] MTV networks,[250] Facebook,[251] SurveyMonkey,[252] the National Education Association,[253] the American Federation of Teachers,[254]

243. *Id.* This conference included "[a]pproximately 150 students, parents, teachers, non-profit leaders, advocates, and policymakers [who] came together to discuss how they can work together to make our schools and communities safe for all students." *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *See* Press Release, The White House, *supra* note 242. The website StopBullying.gov was launched the same day as the President's press release. *Id.* This website provides

> information from various government agencies on how children, teens, young adults, parents, educators and others in the community can prevent or stop bullying. The website will provide information on what bullying is, its risk factors, its warning signs and its effects. It will also provide details on how to get help for those that have been victimized by bullying.

Id.

249. *See id.* Along with the Massachusetts Institute of Technology Media Lab, Formspring, a social networking website boasting more than twenty-two million members, is establishing "new approaches to detect online bullying, and designing interfaces which help prevent it or mitigate it when it does occur. This approach uses a collection of common sense knowledge and reasoning techniques from artificial intelligence to understand online bullying at a deeper level than just words." *Id.*

250. *See id.* MTV's campaign, "A THIN LINE," promoted "a new anti-digital discrimination coalition" that includes "cyberbullying and digital discrimination public service announcements" in the hope that the information would "encourag[e] bullying bystanders to support their friends, connect victims of digital abuse to resources, and drive home the serious impact typewritten words can have." *Id.*

251. *See id.* Facebook, a popular social networking website, "revamped [its] multimedia Safety Center to incorporate multimedia, external resources from renowned experts, and downloadable information for teens" as well as designed an innovative "'Social Reporting' system to enable people to report content that violates Facebook policies so that it can be removed as soon as possible, while notifying parents or teachers of the content so that the reasons for its posting can be addressed." *Id.*

252. *See id.* SurveyMonkey, a digital provider for online surveys, designed a webpage to detect bullying by utilizing a free, "10 question survey that students can adopt in order to distribute and disseminate via email, on fliers, through Facebook, and elsewhere." *Id.*

253. *See id.* As stated in the President's press release, the National Education Association

the National PTA,[255] the National Association of Student Councils,[256] and the National School Boards Association.[257]

Having organizations aspiring to positively influence and mold the lives of youths through initiatives hopefully will alter the paths of some juveniles. Although bullying education may seem irrelevant and attenuated from issues addressed in *Graham*, juvenile concerns present themselves in a ramose fashion, reaching in different directions yet stemming from a common source. Indeed, "[w]e as a society need to be thinking about what we're doing to make it possible to be so disconnected that [juveniles are] able to commit a very adult crime."[258]

VII. CONCLUSION

The weighty questions surrounding juvenile sentencing continue to ripple throughout the country. More so than ever before, "the frequency and severity of juvenile crimes has seen sharp increases in recent years."[259] The quarrel over whether a lengthy sentence is equivalent to a life sentence and whether that lengthy sentence provides a juvenile defendant "a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation"[260] necessitated by *Graham* is answered inconsistently by the states.[261] In particular, the overall unresolved question of term-of-years

("NEA") commenced "*Bully-Free: It Starts With Me*," a national, online campaign that identifies and assists "adults in each school who will listen and act on behalf of bullied students in schools across America." *Id.* At the time of the press release, NEA also indicated it would engage in a ground breaking study "of teachers' and education support professionals' perspectives on bullying and bullying prevention efforts." *Id.*

254. *See* Press Release, The White House, *supra* note 242. The American Federation of Teachers initiated a countrywide campaign, "*See a Bully, Stop a Bully, Make a Difference*," hosted summits and webinars on the issue of bullying, and worked with a host of other organizations in an effort to disseminate and "amplify an anti-bullying message." *Id.*

255. *See id.* The National PTA began a nationwide campaign, "*Connect for Respect*," to provide resources to parents to help them understand the signs of bullying and how to prevent bullying. *Id.* The National PTA also re-released its PTA.org/bulling website. *Id.*

256. *See id.* Through its "*Raising Student Voice and Participation Bulling Challenge*," the National Association of Student Councils ("NASC") assembled a nationwide summit of students "to identify strategies and projects that address the problem of bullying." *Id.*

257. *See id.* Similar to the NASC, the National School Boards Association ("NSBA") also initiated a conversation among students and educational boards of both middle and high schools. *Id.*

258. *Confessions of an Attempted Thrill Kill*, *supra* note 6.

259. Prateek Shukla, *The Criminal Child and its Potential for Change: A Presumption in Favor of Rehabilitation in Sentencing Juvenile Offenders*, 38 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 379, 380 (2012) (footnote omitted).

260. Graham v. Florida, 130 S. Ct. 2011, 2030 (2010).

261. *See* Bunch v. Smith, 685 F.3d 546, 552 (6th Cir. 2012) (pointing out that *Graham* did not address the constitutionality of lengthy term-of-years sentences, which is highlighted "by the fact

sentencing for juveniles under *Graham* presents divergence from the Supreme Court's holding.[262]

However, states need to look no further than the limited holding of *Graham* to uncover the answer. Establishing a categorical rule, state courts should not apply *Graham* to term-of-years sentences because *Graham* solely applies to indefinite sentences of life without the possibility of parole.[263] By considering a term-of-years sentence to be a *de facto* life sentence presupposes that a fixed term-of-years sentence equates to an imprecise sentence of life without the possibility of parole.

Indeed, other factors that a sentencing court does not account for provide an incorrect determination of a defendant's life expectancy.[264] A defendant's life expectancy based on gender, race, and age assists courts in this issue to approximate the length of one's life. Yet, the presence of *Graham* persists since a state neither needs "to guarantee eventual freedom to a juvenile defendant"[265] nor is required "to release that offender during his natural life."[266] *Graham* has become a catalyst for Eighth Amendment claims, leaving many questions unanswered and leading to further discussion and discrepancy by muddying the waters of the purpose of the criminal justice system for juveniles tried as adults.[267] The advent of term-

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that courts across the country are split over whether *Graham* bars a court from sentencing a juvenile nonhomicide offender to consecutive, fixed terms resulting in an aggregate sentence that exceeds the defendant's life expectancy"); *see also* cases cited *supra* note 15.

262. *See Bunch*, 685 F.3d at 552 ("Perhaps the Supreme Court, or another federal court on direct review, will decide that very lengthy, consecutive, fixed-term sentences for juvenile nonhomicide offenders violated the Eighth Amendment. But until the Supreme Court rules to that effect, Bunch's sentences does not violate clearly established federal law."); *In re* Welfare of K.B.K., No. A-12-0218, 2012 WL 3641355, at *7 (Minn. Ct. App. Aug. 27, 2012) (stating that "policy-based arguments concerning the juvenile-justice system are for the legislature or a policy-making court").

263. *Bunch*, 685 F.3d at 552.

> The [*Graham*] Court, however, did not analyze sentencing laws or actual sentencing practices regarding consecutive, fixed-term sentences for juvenile non-homicide offenders. This demonstrates that the Court did not even consider the constitutionality of such sentences, let alone clearly establish that they can violate the Eighth Amendment's prohibition on cruel and unusual punishments. Thus, in light of the Court's analysis in *Graham*, Bunch's sentence does not violate clearly established federal law.

Id.

264. *See supra* Part V and note 220 and accompanying text.

265. *Graham*, 130 S. Ct. at 2034.

266. *Id.* at 2030. This statement does not pertain to mandatory sentences of life without the possibility of parole as addressed in *Miller*. *See* discussion *supra* Part II.B.

267. *But see* Martin Guggenheim, Graham v. Florida *and a Juvenile's Right to Age-Appropriate Sentencing*, 47 HARV. C.R.-C.L. L. REV. 457, 457 (2012) ("In an unprecedented way, Graham paves the way toward a new jurisprudence based on what is special about children.").

of-years challenges under *Graham* and the variance in its analysis needs to be addressed by the Supreme Court, the beacon to which state courts consistently defer to for guidance and instruction.