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De-Facto-Life and the Rare Juvenile

Julie Burke

De-Facto-Life And The Rare Juvenile

Julie Burke[*]

I. Introduction

We have all been young once. We all remember doing stupid things with our friends growing up. Now imagine if one of those decisions caused you to be thrown into prison for the rest of your life. Despite the United States Supreme Court's decisions that sentencing juveniles to life in most cases is unconstitutional, lower courts are still giving juveniles de-facto-life sentences.

The United States Supreme Court has recognized that children are different from adults in several recent cases. In 2005, *Roper v. Simmons*, the Court held that it is unconstitutional to sentence a juvenile to death.[1] More pertinent to this paper, the Court said in 2010 in *Graham v. Florida* and in 2012 in *Miller v. Alabama* that it is unconstitutional to mandatorily sentence a juvenile to life without parole without considering mitigating factors, such as how children are different from adults.[2] Then in 2016 in *Montgomery v. Louisiana*, the Court said sentencing authorities must consider not only the factors in *Miller*, but can only sentence the juvenile to life without parole after consideration of whether the juvenile is the "rare juvenile whose crime reflects irreparable corruption."[3] The Court deemed that life without parole did not provide juveniles with a "meaningful opportunity" for release.[4] De-facto-life sentences are sentences that "exceed the defendant's life expectancy."[5] "Exceeding life expectancy" and "for life" both mean that a juvenile will never have a "meaningful opportunity" to return to society; thus, the sentences are the same.

De-facto-life sentences, like life without parole sentences, go against the *parens patriae* and earlier philosophies of the juvenile court, which focused on helping children rather than punishing them. These sentences also go against the idea that children are different from adults by giving them an adult sentence. Because de-facto-life sentences are essentially life without parole sentences, *Graham* and *Miller* should apply and also make de-facto-life sentences unconstitutional. Part I provides the necessary background on the defining United States Supreme Court cases that this issue arises from. Part II has two sections. The first section will discuss how de-facto-life sentences are in fact life without parole sentences and should be deemed unconstitutional as well. The second section will discuss the ways courts should apply factors discussed in

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1. Roper v. Simmons, 543 U.S. 551, 578 (2005).
2. Graham v. Florida, 560 U.S. 48, 82 (2010). *See also* Miller v. Alabama, 567 U.S. 460, 479–80 (2012).
3. Montgomery v. Louisiana, 136 S. Ct. 718, 726 (2016).
4. *Graham*, 560 U.S. at 75.
5. Adams v. State, 188 So. 3d 849, 851 (Fla. Dist. Ct. App. 2012).

Miller and other considerations to avoid issuing a de-facto-life sentence. Part III will conclude by reaffirming that de-facto-life sentences should be found unconstitutional and that the focus for sentencing juveniles should be on helping them rather than punishing them.

II. BACKGROUND

A. *History of the Juvenile Justice System and How Juveniles Are Different From Adults*

The first juvenile court was established in 1899 in Cook County, Illinois.[6] The main purpose of the first juvenile court was *parens patriae*.[7] *Parens patriae* is Latin for "parent of his or her country."[8] Black's Law dictionary defines it as "the state in its capacity as provider of protection to those unable to care themselves."[9] Essentially, *parens patriae* recognized that children need to be supervised, which should be done by the child's family.[10] However, *parens patriae* also recognized that when the child's family fails and the child is at risk, the state should take over the child's best interests.[11] One of the early juvenile court leaders, Judge Ben Lindsey, "preached the virtues of community treatment, probation, and a juvenile court fueled by optimistic compassion."[12] Judge Lindsey believed and drafted legislation which provided that, "as far as practicable any delinquent child should be treated, not as a criminal, but as misdirected and misguided and needing aid, encouragement, and help and assistance."[13] In 1909, Judge Julian Mack wrote that the purpose of juvenile courts is "not so much to punish as to reform, not to degrade but to uplift, not to crush but to develop, not to make him a criminal but a worthy citizen."[14] In 1959, the Standard Juvenile Court Act established a new purpose for juvenile courts, which was that each child the courts deal with should be given the "care, guidance, and control" that will better him and society.[15] Later, this act along with additional standards established by the American Bar Association extended the juvenile courts jurisdiction to include conduct that would be "designated a crime if committed by an adult."[16]

In the latter part of the twentieth century, violent youth crime rates rose, and some critics began to depict these youths as no longer children, but as "super-predators," who would hurt and kill anyone in their paths.[17] Politicians and

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6. THOMAS J. BERNARD & MEGAN C. KURLYCHEK, THE CYCLE OF JUVENILE JUSTICE 143 (Oxford University Press eds., 2d ed. 2010).
7. *Id.*
8. *Parens Patriae*, BLACK'S LAW DICTIONARY (5th pocket ed. 2016).
9. *Id.*
10. FRANKLIN E. ZIMRING, AMERICAN JUVENILE JUSTICE 6 (Oxford University Press eds., 2005).
11. *Id.*
12. *Id.* at 9.
13. *Id.* at 11.
14. *Id.* at 10–11.
15. BERNARD & KURLYCHEK, *supra* note 6, at 144.
16. *Id.*
17. ELIZABETH S. SCOTT & LAURENCE D. STEINBERG, RETHINKING JUVENILE JUSTICE 94, 96 (Harvard University Press eds., 2008).

critics used this label of children as being "super-predators" as a way of shedding the presumption of leniency that was the previous philosophy of dealing with children.[18] Critics exploited this label as a means to steer the juvenile courts' focus away from helping juveniles to instead prioritize protecting the public and punishing juveniles, which has now become the modern approach of the juvenile justice system.[19] Essentially, courts today are using a "get tough" approach and handing out punishments.[20] Courts are applying this "get tough" approach without considering the original philosophy of the juvenile courts, which was to help these children when no one else would.[21]

Philosophers and educators for years have recognized that there is a distinctive stage of life between childhood and adulthood called adolescence.[22] Aristotle described this stage as a seven-year time frame from the age of fourteen to twenty-one.[23] Even the United States Supreme Court has recognized that children are different from adults.[24] The Court found that juveniles lack maturity, have an underdeveloped sense of responsibility, are more vulnerable to outside or peer pressure, and that juveniles characters are not completely formed.[25] The Court relied on science and social science.[26] The Court relied on research which showed that the brain continues maturation all the way through the end of the adolescent period.[27] Research done after the Court's decision showed that maturity of the brain leads to changes that affect a juvenile's advanced thinking process, which consists of a juvenile's ability to plan ahead, control impulses, and weigh costs and benefits of decisions before acting.[28]

Beyond what the Supreme Court has found, research has shown that a juvenile's psychological distinctions such as intellectual, emotional, behavioral, and interpersonal functions change during this time.[29] These changes include a change in reasoning abilities and personality, as well as problem behavior, psychological distress, change in family and peer relationships, and maturity.[30] The psychological factors believed to be the most relevant for criminal conduct include a juvenile's susceptibility to peer influence, a juvenile's ability to evaluate risk and rewards, a juvenile's ability to assess short and long-term consequences, and a juvenile's capacity for self-management and self-regulation.[31] A juvenile's susceptibility to peer pressure means that they are more likely than adults to change their decisions and alter their behavior in the

18. *Id.* at 96.
19. *Id.*
20. BERNARD & KURLYCHEK, *supra* note 6, at 145.
21. *Id.*
22. SCOTT & STEINBERG, *supra* note 17, at 28.
23. *Id.*
24. Miller v. Alabama, 567 U.S. 460, 471 (2012).
25. *Id.*
26. *Id.*
27. Graham v. Florida, 560 U.S. 48, 68 (2010).
28. SCOTT & STEINBERG, *supra* note 17, at 44.
29. *Id.* at 32.
30. *Id.* at 33–34.
31. *Id.* at 37.

"face of pressure."[32] Also, juveniles are more impulsive and volatile in their emotional responses.[33] Judge Stevens in *Thompson v. Oklahoma* commented on a juvenile's immature judgment stating, "inexperience, less intelligence, and less education make a teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is more apt to be motivated by mere emotion or peer pressure than is an adult."[34]

B. Graham v. Florida*: The First Example of the Court Limiting Life Without Parole for Juveniles*

In 2010, the United States Supreme Court heard the case of Terrance Graham, a sixteen-year-old juvenile who was sentenced to life imprisonment for armed burglary and fifteen years for attempted armed robbery.[35] Terrance's early life was not an easy one. His parents were drug addicts.[36] Terrance began using alcohol and tobacco at age nine, then escalated to marijuana-use at age thirteen.[37]

In July 2003, Terrance decided to attempt to rob a restaurant with three others.[38] During the robbery attempt, one of Graham's accomplices hit the restaurant manager twice in the head; then the group fled with nothing.[39] The group was later apprehended, and Terrance was charged, as an adult, with armed burglary with assault or battery and attempted armed robbery.[40] Later, Terrance accepted a plea deal to plead guilty to the charges in return for concurrent three-year terms of probation.[41] At this time, Terrance wrote a letter to the court stating he was going to take advantage of this "second chance" and "do whatever it takes to get to the National Football League."[42]

Not even six months later, Terrance Graham and two accomplices committed a home invasion robbery, where they held the homeowners at gun point and forced the owners into a closet.[43] The group left the home and then later attempted another robbery.[44] At this robbery, one of Terrance's accomplices was shot.[45] After his accomplice was shot, Terrance fled from the scene of the robbery and was later apprehended after a car chase with police.[46] Terrance was found guilty of violating his probation for his earlier crimes.[47] At his sentencing hearing, the minimum he could receive was five years and the

32. *Id.* at 38.
33. *Id.* at 131–32.
34. *Id.* at 133–34.
35. Graham v. Florida, 560 U.S. 48, 57 (2010).
36. *Id.* at 53.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* at 54.
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.* at 54–55.
47. *Id.* at 57.

maximum he could receive was life imprisonment.[48] Terrance's attorney requested a sentence of five years and a Florida Department of Corrections presentence report stated Terrance should get a four-year sentence.[49] The State asked the court to sentence Terrance to thirty years on the armed burglary charge and fifteen years on the attempted armed robbery charge.[50] The court sentenced Terrance Graham to life imprisonment and an additional fifteen years.[51]

Since Florida does not have a parole system, a life imprisonment sentence is a sentence given to a defendant who will have no opportunity to be released.[52] The sentencing court's rationale for Terrance's life sentence was that Terrance's life choices and escalating pattern of criminal conduct meant the court could not help Terrance any further because he chose to throw his life away.[53] The court felt that its only option was to protect the community from Terrance.[54]

Terrance filed a motion in the trial court challenging that his sentence violated the Eighth Amendment.[55] His motion was later denied by the trial court, which did not rule on his motion within the allotted sixty-day time limit, and the sentence was affirmed by the appellate court.[56] The Florida Supreme Court declined to review Terrance's sentence.[57] The United States Supreme Court granted certiorari to determine whether Terrance's sentence violated the Eighth Amendment.[58]

The Court stated that in order to determine if something is cruel and unusual, courts need to look "beyond historical conceptions to the 'evolving standards of decency that mark the progress of a maturing society.'"[59] There are two general classifications for considering the constitutional proportionality of a sentence: circumstances and categorical rules.[60] The Court found that the categorical rules are the appropriate classification to use in this case.[61] For a categorical approach, the Court looks at the "objective indicia of society's standards, as expressed in legislative enactments and state practice," to determine whether there is a "national consensus against the sentencing practice at issue."[62] In *Roper*, the Court established that since juveniles have lessened culpability they are less deserving of the major, severe punishments.[63] Life without parole is the "second most severe" punishment allowed by law.[64] A life without parole

48. *Id.*
49. *Id.* at 56.
50. *Id.*
51. *Id.* at 57.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.* at 58.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* at 59.
61. *Id.* at 60–61.
62. *Id.* at 61.
63. *Id.* at 68.
64. *Id.* at 69.

sentence shares similarities with the death penalty, which had already been deemed unconstitutional for a juvenile sentence.[65] When a juvenile is sentenced to life without the chance of parole, the juvenile will "on average serve more years and a greater percentage of his life in prison then an adult offender."[66] Courts have recognized that juveniles lack maturity, have an underdeveloped sense of responsibility, are more susceptible to negative influences and outside pressures, and do not have well-formed characteristics.[67] The age of the juvenile and the nature of the crime is also relevant in this analysis.[68]

The Court also found that one must also "consider[] whether the challenged sentencing practice serves legitimate penological goals."[69] A sentence that lacks "any penological justification is by its nature disproportionate to the offense."[70] The recognized goals of penal sanctions—retribution, deterrence, incapacitation, and rehabilitation—do not provide "adequate justification" for sentencing a juvenile to life without parole.[71]

The Court broke down and analyzed each penal goal as it applied to juveniles who had been sentenced to life without parole and determined that each penal goal fails to justify the sentence.[72] It said retribution is not an adequate reason to issue this sentence, because juveniles do not have the required "personal culpability" to restore the "moral imbalance caused by the offense."[73] Deterrence was deemed inadequate as well, because of juveniles' youth and their lack of consideration of the possible punishments of their actions.[74] Incapacitation, the Court said, can be a legitimate reason, but fails to justify the sentence in the case of non-homicidal juveniles, because it asks courts to consider "incorrigibility" of juveniles, which is "inconsistent with youth."[75] In this particular case, the Court deemed that Terrance Graham deserved to be incarcerated for a time for his crimes and escalation, but that did not mean that Graham "would be a risk to society for the rest of his life."[76] A sentence of life without parole improperly denies a juvenile a chance to demonstrate growth and maturity.[77] Lastly, rehabilitation does not provide an adequate justification for sentencing a juvenile to life without parole, because "by denying the defendant the right to reenter the community the State makes an irrevocable judgment about the person's value and place in society."[78]

Terrance's sentence guaranteed that he would die in prison without having

65. *Id.*
66. *Id.* at 70.
67. *Id.* at 68 (citing Roper v. Simmons, 543 U.S. 551, 569–70 (2005)).
68. *Id.* at 69.
69. *Id.* at 67 (citing Kennedy v. Louisiana, 554 U.S. 407, 443 (2008); *Roper*, 543 U.S. at 571–72; Atkins v. Virginia, 536 U.S. 304, 318–20 (2002)).
70. *Id.* at 71.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.* at 72.
75. *Id.* at 72–73 (quoting Workman v. Commonwealth, 429 S.W.2d 374, 378 (Ky. Ct. App. 1968)).
76. *Id.* at 73.
77. *Id.*
78. *Id.* at 74.

an opportunity to be released back into society to prove that his teenage actions were a thing of his past and that he could rightfully rejoin society.[79] Therefore, the United States Supreme Court held that sentencing juveniles to life imprisonment without parole for non-homicidal crimes constitutes a violation of the Eighth Amendment.[80] The Court held that the State must provide a juvenile a "realistic opportunity to obtain a release" if it issues a life without parole sentence.[81]

C. Miller v. Alabama: *The Second Example of the Court Limiting Life Without Parole for Juveniles*

In 2012, the United States Supreme Court heard the case of *Miller v. Alabama*.[82] This case involved two fourteen-year-olds who were convicted of murder and sentenced to life without the possibility of parole.[83]

In 1999, Kuntrell Jackson, at the age of fourteen, went with two of his friends to rob a store.[84] Upon learning that one of his friends had brought a gun with him, Kuntrell chose to stay outside of the store during the robbery.[85] Kuntrell would eventually enter the store during the progress of the robbery, which turned deadly when Kuntrell's friend shot and killed the store clerk.[86] Kuntrell was later captured, charged with capital felony murder and aggravated robbery, and found guilty of the charges.[87] He was sentenced to life without the chance of parole.[88]

In 2003, Evan Miller, at the age of fourteen, went over to his drug-dealing neighbor's house with his friend, Smith.[89] The two juveniles smoked marijuana and played drinking games with the neighbor, until the neighbor passed out.[90] Evan then took his neighbor's wallet and stole the cash that was inside.[91] When Evan attempted to put the wallet back, the neighbor woke up and started choking Evan.[92] Evan's friend, Smith, picked up a baseball bat and struck the neighbor to get him to release Evan.[93] Once freed, Evan then began attacking the neighbor with the baseball bat, striking him several times.[94] In an attempt to cover up their crimes, the two juveniles set the neighbor's house on fire.[95] It was later determined that the neighbor died from his injuries and from smoke

79. *Id.* at 79.
80. *Id.* at 82.
81. *Id.*
82. Miller v. Alabama, 567 U.S. 460, 460 (2012).
83. *Id.* at 465.
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.* at 466.
89. *Id.* at 468.
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*

inhalation.[96] Evan was charged as an adult for murder in the course of arson, which has a mandatory minimum punishment of life without parole.[97] He was found guilty and sentenced to life without the possibility of parole.[98]

Kuntrell Jackson's home life was not stable.[99] His mother and grandmother had shot other people.[100] Evan Miller's home life was also very tumultuous.[101] Evan was consistently in and out of foster care because his mother was an alcoholic and a drug addict.[102] In addition, his stepfather abused him and Evan also abused drugs and alcohol.[103] He also had attempted to commit suicide several times; the earliest attempt was at the age of six.[104]

Both juveniles appealed their sentences, arguing that a life imprisonment without parole sentence is a violation of the Eighth Amendment.[105] The Supreme Court relied on its previous analysis in *Roper* and *Graham*, which was that children are different from adults.[106] In *Roper*, the Court held that the Eighth Amendment bars capital punishment for juveniles.[107] In *Graham*, the Court held that it was a violation of the Eighth Amendment to sentence juveniles to life without the possibility of parole for non-homicidal crimes.[108] *Graham* also extended the Supreme Court's precedent by likening life without parole for juveniles to the death penalty.[109] Both cases established that children are constitutionally different from adults when it comes to sentencing, because children have "diminished culpability" and "greater prospects for reform."[110] Both cases also emphasized how the distinctive attributes of youths diminish the penological justification of life without parole sentences for juveniles.[111] Nothing about a juvenile's mental traits and environmental vulnerabilities are crime specific, which is evident in the same way and degree as when a botched robbery becomes a killing.[112] *Graham* fundamentally established that youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole.[113] "An offender's age is relevant to the Eighth Amendment, and so, criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed."[114]

Mandatory life without parole for juveniles precludes considerations of age

96. *Id.*
97. *Id.* at 469.
98. *Id.*
99. *Id.* at 478.
100. *Id.*
101. *Id.* at 468.
102. *Id.*
103. *Id.*
104. *Id.* at 467.
105. *Id.* at 467–469.
106. *Id.* at 470–71.
107. *Id.* at 470 (citing Roper v. Simmons, 543 U.S. 551, 570–71 (2005)).
108. *Id.* (citing Graham v. Florida, 560 U.S. 48, 48 (2010)).
109. *Id.*
110. *Id.* at 471.
111. *Id.* at 472.
112. *Id.* at 473.
113. *Id.*
114. *Id.* at 473–74.

and prevents taking the family and home environment into account.[115] When considering life without parole, a sentencing authority needs to look at these circumstances to determine whether this penalty is appropriate.[116] If a sentence makes youth irrelevant to the imposition of the harshest prison sentence, such a scheme poses "too great a risk of disproportionate punishment."[117] Thus, the United States Supreme Court expanded on its prior precedents to hold that the "Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders" regardless of the crime, without allowing the judge or jury to consider mitigating circumstances before imposing such a sentence.[118]

D. Montgomery v. Louisiana*: Expansion of* Miller v. Alabama *and the Third Example of the Court Limiting Life Without Parole Sentences for Juveniles*

This case stems from the 1963 conviction of Henry Montgomery.[119] In 1963, at age seventeen, Henry killed a deputy sheriff in Louisiana.[120] He was later convicted of murder and originally sentenced to death.[121] After a finding of an unfair trial, Henry was retried, found guilty, and automatically resentenced to life without parole.[122] Since the sentence was automatic, Henry was never allowed to present mitigating circumstances to "justify a less severe sentence."[123]

Fifty years later, *Miller v. Alabama* was decided and held that, "mandatory life without parole for juvenile homicide offenders violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'"[124] At this point, Henry Montgomery was sixty-nine years old and had spent almost his entire life in prison.[125] *Miller* required that at sentencing, courts consider a "child's 'diminished culpability and heightened capacity for change' before condemning him or her to die in prison."[126] Although *Miller* did not foreclose a sentencer's ability to impose life without parole on a juvenile, the Court explained that a lifetime in prison is a disproportionate sentence for "all but the rarest of children, those whose crimes reflect 'irreparable corruption.'"[127] After the decision in *Miller*, Henry sought collateral review of his mandatory life-without parole sentence.[128] The trial court denied Henry's motion for review on the ground that *Miller* was not retroactive on collateral review.[129] The Supreme Court of

115. *Id.* at 477.
116. *Id.* at 479
117. *Id.*
118. *Id.* at 479–80.
119. Montgomery v. Louisiana, 136 S. Ct. 718, 725 (2016).
120. *Id.*
121. *Id.*
122. *Id.* at 726.
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.* at 727.

Louisiana declined to hear Henry's case on its earlier decision that held *Miller* does not apply retroactively.[130]

On appeal to the United States Supreme Court, *Montgomery* addressed the question the decision in *Miller* created, which was whether *Miller*'s holding established a new substantive rule that applied "retroactive[ly] to juvenile offenders whose convictions and sentences were final when *Miller* was decided."[131] The Court held that *Miller* does apply retroactively.[132] However, that is not the entire holding the Court established. The Court held that *Miller* did establish a new substantive rule, which was "sentencing a child to life without parole is excessive for all but 'the rare juvenile offender whose crime reflects irreparable corruption,'" and that rule was to be applied retroactively.[133]

The *Miller* Court's analysis began based on the principle established in *Roper* and *Graham*, which is, "children are constitutionally different from adults for purposes of sentencing."[134] The Court also agreed with its past precedent and again stated, "'the distinctive attributes of youth diminish the penological justifications' for imposing life without parole on juvenile offenders."[135] The Court used these considerations to form its holding in *Miller* that mandatory life without parole sentences for juveniles "pose too great a risk of disproportionate punishment."[136] Therefore, *Miller* requires that, before a juvenile can be sentenced to life without parole, the sentencing authority needs to "take into account 'how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.'"[137] The Court in *Miller* took into consideration that the sentencing authority might encounter the "rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified," but that this harshest penalty is only appropriate for uncommon occasions.[138]

Miller did more than require a sentencing authority to consider a juvenile offender's youth before imposing a life without parole sentence.[139] The Court found that *Miller* also established that the penological justifications for life without parole collapsed in light of the "distinctive attributes of youth."[140] The *Montgomery* Court stated that, "Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects 'unfortunate yet transient immaturity.'"[141] The *Miller* Court held that sentencing a juvenile to life without parole is excessive for all but "the rare juvenile offender whose crime reflects

130. *Id.*
131. *Id.* at 725–727.
132. *Id.* at 732.
133. *Id.* at 734.
134. *Id.* at 733 (citation omitted) (citing Roper v. Simmons, 543 U.S. 551, 569–70 (2005); Graham v. Florida, 560 U.S. 48, 68 (2010)).
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.* at 733–34.
139. *Id.* at 734.
140. *Id.*
141. *Id.*

irreparable corruption," which renders life without parole unconstitutional because it is a penalty for a "class of defendants because of their status."[142] The class here consists of juvenile offenders whose crimes reflect the transient immaturity of youth.[143] Thus, *Miller* created a new substantive rule.[144]

In *Montgomery*, Louisiana argued that *Miller* did not apply since *Miller* "does not categorically bar a penalty for a class of offenders or type of crime," but it simply mandates that a sentence follow a certain process before imposing life without parole.[145] The Court dismissed this, noting that, while it is true *Miller* did not bar a punishment for all juveniles, it did bar life without parole for all but the rarest of juvenile offenders whose crimes reflect permanent incorrigibility.[146] Before *Miller*, every juvenile convicted of a homicide offense could be sentenced to life without parole.[147] After *Miller*, the sentence was reserved for the "rare juvenile offender."[148] *Miller* essentially "drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption."[149] The Court stated in *Montgomery* that the fact that life without parole could be a proportionate sentence for the "rare juvenile whose crimes reflect irreparable corruption" does not mean that all other children imprisoned under a disproportionate sentence have not suffered the deprivation of a substantive right.[150]

Miller requires a sentencing authority to consider a juvenile offender's youth and attendant characteristics before determining that life without parole for a juvenile is a proportionate sentence.[151] This involves a hearing where the "youth and attendant characteristics" are considered as sentencing factors, which is necessary to separate those juveniles who may be sentenced to life without parole from those who may not.[152] The hearing does not replace, but rather gives effect to, *Miller*'s substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity.[153]

The Court mentioned that a state may remedy a *Miller* violation by offering the juvenile the opportunity for "parole, rather than by resentencing them."[154] Allowing juveniles a chance for parole "ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence" which violates the Eighth Amendment.[155] The opportunity for release will be afforded to those who demonstrate the truth of *Miller*'s central tenet, "that children who commit even

142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id* at 735.
153. *Id.*
154. *Id.* at 736.
155. *Id.*

heinous crimes are capable of change."[156] In *Montgomery*, Henry used his "evolution" from a troubled youth to a model prisoner as a way to demonstrate rehabilitation.[157]

The Court ultimately held in *Montgomery* that, considering past precedent on how children are different that adults, prisoners like Henry "must be given the opportunity to show their crime did not reflect irreparable corruption; and if it did not, their hope for some years of life outside prison walls must be restored."[158]

E. Cases Expanding Graham *and* Miller *to De-facto-life Sentences*

1. *State v. Null*

In 2010, Denem Anthony Null was charged with the first-degree murder of Kevin Bell.[159] Denem was sixteen years and ten months old when he and two others went to Bell's apartment to rob him of a pound of marijuana.[160] During the robbery, Denem shot Bell in the head before the group fled the scene.[161] Under Iowa state law, the State was required to charge Denem as an adult.[162] Denem decided to enter into a plea agreement where he would plead guilty to second-degree murder and first-degree robbery in exchange for not being charged with first-degree murder.[163] In Iowa, second-degree murder carries a maximum sentence of fifty years and first-degree robbery carries a maximum sentence of twenty-five years.[164] Both charges carry a mandatory minimum sentence of seventy percent if convicted of the charges.[165] The district court decided, as well, that these two sentences should run consecutively, but the court also mentioned that he would have "an opportunity to seek parole down the road."[166] Since he accepted the plea agreement, he was sentenced to a total of seventy-five-years.[167] The sentence required that he must serve no less than 52.5 years of that sentence before seeking parole.[168] Also, Denem's initial action occurred before *Miller*, meaning Denem would have been sentenced to life without parole if he had been convicted of first-degree murder.[169]

Denem Null had a very tough childhood.[170] His home life was tumultuous.[171] His parents fought, and his father did not live with them.[172]

156. *Id.*
157. *Id.*
158. *Id.* at 736–37.
159. State v. Null, 836 N.W.2d 41, 41 (Iowa 2013).
160. *Id.* at 45–46.
161. *Id.* at 46.
162. *Id.* at 45.
163. *Id.*
164. *Id.*
165. *Id.* at 46.
166. *Id.* at 47.
167. *Id.* at 45.
168. *Id.*
169. *Id.* at 46.
170. *Id.*
171. *Id.*

Denem was bounced from home-to-home and was considered a "child in need of assistance" since 2006.[173] Because of this, he was placed in several shelters and treatment programs, which Denem ran away from.[174] Denem also had been arrested four times, the earliest time being when he was only eleven years old.[175] He had been expelled from school for altercations and placed in behavior classes before he dropped out of school completely in the eleventh grade.[176]

Denem argued that his 52.5 year mandatory minimum sentence was a de-facto-life sentence in violation of the Eighth Amendment.[177] Denem acknowledged that, although his sentence was not formally a life sentence, his sentence was essentially the equivalent of a life sentence.[178] Denem stated that even if he were to live to be paroled, he would be "elderly and infirm" when released and would "die on the streets after spending all of his adult years in prison."[179] Denem argued that being released at that age to die on the streets "would be little, if at all, better than dying in prison."[180] Denem also argued that the district court failed to give "adequate consideration to his status as a juvenile and the teachings of *Roper*, *Graham*, and *Miller*" when imposing consecutive sentences.[181] The State argued that the *Graham* and *Miller* holdings are only for "juvenile offenders sentenced to life without parole" and not for term-of-year sentences.[182]

The *Null* court considered the evolution of the treatment of juveniles and juveniles' diminished culpability.[183] The court acknowledged that the law and modern sciences have recognized adolescents as being different from adults.[184] The *Null* court analyzed the United States Supreme Court's expansion of its past holdings and demonstrated how those cases build on one another to demonstrate that the Court's rationale is not "crime-specific."[185] The court in *Null* also focused on *Graham*'s "meaningful opportunity" holding.[186]

When the court applied its analysis of the United States Supreme Court's past holdings and reasonings to Denem's circumstances, it found that the rationale of *Graham* and *Miller* should apply to de-facto-life sentences and Denem should be resentenced.[187] The case below, *Henry v. State*, is likely one of the most important cases that extends the Court's holdings to de-facto-life sentences.

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172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.* at 50.
178. *Id.*
179. *Id.* at 51.
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.* at 52–53.
184. *Id.* at 54.
185. *Id.* at 67–68.
186. *Id.* at 67.
187. *Id.* at 72.

2. *Henry v. State*

Leighdon Henry was seventeen when he was convicted of multiple offenses and sentenced to life plus sixty years.[188] Henry filed for a reconsideration of his sentence based on *Graham*.[189] At the resentencing hearing, the trial court granted Henry's motion and resentenced him to thirty years for each sexual battery offense.[190] Therefore, Henry was essentially serving a total of ninety years of prison.[191] Henry then appealed his new sentence, stating that this was a de-facto-life sentence and "it [met] the test of cruel and unusual punishment under *Graham*."[192] The Court of Appeals of Florida affirmed Henry's new sentence.[193] The appellate court ruled that the court can "only apply *Graham* as it is written" and it is up to the United States Supreme Court to state otherwise.[194] In 2015, Henry appealed to the Florida Supreme Court.[195] The Florida Supreme Court considered how the different districts have applied *Graham* to de-facto-life sentences.[196] The Florida Supreme Court ultimately held that the "constitutional prohibition against cruel and unusual punishment under *Graham* is implicated when a juvenile nonhomicide offender's sentence does not afford any 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'"[197] The Florida Supreme Court found that since Henry's ninety-year sentence does not afford him a meaningful opportunity for release, it was therefore unconstitutional under *Graham*.[198]

III. ANALYSIS

A. De-Facto-Life Sentences are the Same as Life Without Parole Sentences, Therefore De Facto Cases Should Fall Under the Graham *and* Miller *Standards and be Held Unconstitutional*

Graham and *Miller* have established that sentencing a juvenile to a mandatory life without parole sentence is a violation of the Eighth Amendment and unconstitutional.[199] The Court in *Graham* said that there must be a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[200] A few years later, the *Miller* Court agreed with the *Graham* Court that there must be a "meaningful opportunity" for release.[201] But *Miller* also acknowledged that this "harsh penalty" may be applied only after the

188. Henry v. State, 175 So. 3d 675, 676 (Fla. 2015) [hereinafter *Henry II*].
189. *Id.*
190. *Id.*
191. *Id.*
192. Henry v. State, 82 So. 3d 1084, 1086 (Fla. Dist. Ct. App. 2012) [hereinafter *Henry I*].
193. *Id.* at 1089
194. *Id.*
195. *Henry II*, *supra* note 188, at 675.
196. *Id.* at 679.
197. *Id.*
198. *Id.* at 679–680.
199. Graham v. Florida, 560 U.S. 48, 82 (2010) (citing Miller v. Alabama, 567 U.S. 460, 479–80 (2012)).
200. *Id.* at 51.
201. *Miller*, 567 U.S. at 479.

sentencing authority considers "mitigating circumstances" like how children are different from adults and "how these differences counsel against irrevocably sentencing them to a lifetime in prison."[202] Then in 2016, the Court held in *Montgomery v. Louisiana* that courts must consider not only the youth characteristics in *Miller* when sentencing juveniles, but also consider whether the juvenile is one of the rare juveniles whose crimes reflect irreparable corruption and only those types of juveniles can be sentenced to life without parole.[203] In each case the Court discussed how life sentences without parole for juveniles are to be for the uncommon instances.[204] The Court also agreed in each case that juveniles are different from adults.[205]

With these cases in mind, courts are now required to resentence juveniles who had been previously sentenced to this constitutionally improper sentence.[206] Courts are supposed to hold resentencing hearings where the court takes into consideration certain factors concerning the differences between juveniles and adults and then issue a new sentence which provides for a "meaningful opportunity" for release.[207] But in reality, these courts are simply taking away these improper life without parole sentences and replacing them with lengthy term-of-year sentences, such as forty or fifty consecutive years.[208] Essentially, courts are just ripping off one label to replace it with another that is virtually the same. These lengthy term-of-year sentences are de-facto-life sentences, the functional equivalent of life without parole sentences.[209] A de-facto life sentence is defined as a sentence "that exceeds the defendant's life expectancy."[210] These *new* sentences of forty or fifty years still provide juveniles with no "meaningful opportunity of release," which violates *Graham* and *Miller*.[211] If a thirteen-year-old juvenile is sentenced to a total of fifty years, this would mean that the juvenile would not be released or eligible for parole until he was in his sixties. At sixty years old, a juvenile would have been in prison for the majority of his life and would have nothing else to gain from or provide to society. This is not a meaningful release. If anything, a juvenile released at sixty years old after spending his whole life in prison would be a burden on society, because he would likely have no family left and no societal skills. All he has known for the past forty or fifty years is prison life and other criminals. He would likely have never had a job in the real world. His family and support on the outside would likely be gone by this time, essentially leaving him with no one to associate with. This scenario is a burden, not a meaningful

202. *Id.* at 479–80.

203. Montgomery v. Louisiana, 136 S. Ct. 718, 734 (2016).

204. *Id.*

205. *E.g.*, Roper v. Simmons, 543 U.S. 551, 569 (2005); *Graham*, 560 U.S. at 68; *Miller*, 567 U.S. at 471–72; *Montgomery*, 136 S. Ct. 718 at 724.

206. *Montgomery*, 136 S. Ct. at 735.

207. *Graham*, 560 U.S. at 82; *Miller*, 567 U.S. at 479–80.

208. *See* State v. Null, 836 N.W.2d 41 (Iowa 2013); *Henry II*, *supra* note 188.

209. Daniel Jones, *Technical Difficulties: Why A Broader Reading of Graham and Miller Should Prohibit De Facto Life Without Parole Sentences For Juvenile Offenders*, 90 ST. JOHN'S L. REV. 169, 170 (2016).

210. Adams v. State, 188 So. 3d 849, 851 (Fla. Dist. Ct. App. 2012).

211. *Null*, 836 N.W.2d at 71.

opportunity.

One argument against applying *Graham* and *Miller* to de-facto-life sentences that some courts have applied is that the two cases only apply to mandatory life-without-parole sentences.[212] Some state courts have held that since the Court in *Graham* and *Miller* explicitly state that it is for mandatory sentences of life without parole" in their holdings, *Graham* and *Miller* do not extend to term-of-year sentences.[213] However, there have been some state courts that have deemed *Graham* and *Miller* to apply to discretionary term-of-year sentences.[214] These courts argued that any situation that deals with the sentencing of children should involve the consideration of youth as a factor regardless of whether the sentence is mandatory or discretionary.[215]

Another argument against applying *Graham* and *Miller* to de-facto-life sentences is that since *Graham* and *Miller* do not expressly state that they should be applied to de-facto-life sentences, then they should not be.[216] These courts are essentially waiting on legislature or the United States Supreme Court to tell them it is appropriate to apply *Graham* and *Miller* to de-facto-life sentences. The United States Supreme Court has yet to acknowledge this problem of de-facto-life sentences.[217] It would seem to be common sense that the Court's continuing expansion would deem that these cases should apply to de-facto life sentences. Common sense is one concept the Court used when it established the standards for juvenile life sentences.[218] The Court used the common sense approach of "what any parent knows" to acknowledge that children are different from adults and deserve a meaningful release.[219] The Court not only relied on the "what any parent knows" common sense approach, but also on science and social science.[220] The Court found that when comparing adults and juveniles, juveniles lack maturity, have an underdeveloped sense of responsibility, are more vulnerable to outside or peer pressure, and have characters that are not completely formed.[221] Juveniles are in the developmental stage called adolescence, which is marked by "rapid and dramatic change within the individual in the realms of biology, cognition, emotion, and interpersonal

212. Mason v. State, 235 So. 3d 129, 136–37 (Miss. Ct. App. 2017) (en banc) (Barnes, J., concurring in part and dissenting in part) (examining the split of authority on the application of *Graham* and *Miller*).

213. *Id.*; United States v. Walton, 537 F. App'x 430, 437 (5th Cir. 2013); Foster v. State, 754 S.E.2d 33, 37 (Ga. 2014); Arrendondo v. State, 406 S.W.3d 300, 306 (Tex. Crim. App. 2013).

214. State v. Riley, 110 A.3d 1205, 1213–14 (Conn. 2015); Casiano v. Comm'rs of Corrections, 115 A.3d 1031, 1043 (Conn. 2015); McKinley v. Butler, 809 F.3d 908, 911 (7th Cir. 2016).

215. *Id.*

216. Jones, *supra* note 209, at 187 (referencing Thomas v. State, 78 So. 3d 644 (Fla. Dist. Ct. App. 2011) & State v. Brown, 118 So. 3d 332 (La. 2013)).

217. There was a case that recently was submitted for writ of certiorari, Bostic v. Dunbar, 138 S. Ct. 1593 (2018), but this case was denied certiorari on April 23, 2018. The issue in *Bostic* was whether *Graham* would apply to a juvenile's case where the juvenile would not be eligible for parole until he was 112 years old. See Petition for Writ of Certiorari, Botic v. Pash, No. 17912, 2017 WL 6606886 (Mo. Dec. 20, 2017), *cert. denied*, Bostic v. Dunbar, 138 S. Ct. 1593 (2018).

218. Miller v. Alabama, 567 U.S. 460, 471 (2012).

219. *Id.*

220. *Id.*

221. *Id.*

relationships."[222]

Also, lower courts should look at how the United States Supreme Court has continually extended its past rulings of when a juvenile sentence is unconstitutional.[223] First, the Court removed the death penalty for juveniles in *Roper*.[224] Second, the Court removed mandatory life without parole sentences for non-homicide juvenile offenders in *Graham*.[225] Then in *Miller* the Court extended *Graham*'s holding to include juvenile homicide offenders and further stated courts can only sentence juveniles to life without parole if youth characteristics were considered first.[226] Lastly, the Court held in *Montgomery* that sentencing authorities have to consider *Miller*'s factors and can only resentence a juvenile to the "harshest penalty" when the juvenile is one of the rare kind whose crimes reflect irreparable corruption.[227] As declared in *Miller*, there is nothing in any of these past cases about juveniles that is "crime specific."[228] It would logically flow that the Court is extending this rationale to include any sentence that does not provide a "meaningful release" to a juvenile. Also, courts should infer by the United States Supreme Court's constant refusal to hear a case on this topic that the Court wants the lower courts to develop the law by using the rationales of *Graham* and *Miller* and apply those to de facto cases. Some courts have used the Court's rationale and applied it to de-facto-life sentence cases.[229]

A prime example is the case of *State v. Null*, discussed above. Denem was sixteen when he was sentenced to seventy-five years and required to serve at least 52.5 years.[230] Denem argued this sentence was a de-facto-life sentence, which was the "equivalent of a life sentence."[231] The court in *Null* focused on the issue of whether a 52.5-year mandatory minimum sentence was afforded the protections under *Miller*.[232] The court thought it was.[233] The court noted that nothing in *Miller* or *Graham* is "crime-specific."[234] Although Denem's sentence was technically not a life without parole sentence, such a lengthy sentence, like Denem's, imposed on a juvenile "is sufficient to trigger *Miller*-type protections."[235] The court found that a "juvenile's potential release in his or her late sixties after a century of incarceration" was not "sufficient to escape the rationales of *Graham* and *Miller*." It does not provide the juvenile with a "meaningful release."[236] The court in *Null* concluded that *Miller*'s principles

222. SCOTT & STEINBERG, *supra* note 17, at 32.
223. State v. Null, 836 N.W.2d 41, 67 (Iowa 2013).
224. Roper v. Simmons, 543 U.S. 551, 551 (2005).
225. Graham v. Florida, 560 U.S. 48 (2010).
226. *Miller*, 567 U.S. at 509.
227. Montgomery v. Louisiana, 136 S. Ct. 718, 734 (2016).
228. *Null*, 836 N.W.2d at 67.
229. *E.g.*, *Henry II*, *supra* note 188; *Null*, 836 N.W.2d at 45.
230. *Null*, 836 N.W.2d at 45–46.
231. *Id.* at 50.
232. *Id.* at 71.
233. *Id.*
234. *Id.* at 67.
235. *Id.* at 71.
236. *Id.* at 80–81.

should apply to de-facto-life sentences because "an offender sentenced to a lengthy-term-of-years sentence should not be worse off than an offender sentenced to life in prison without parole who has the benefit of an individualized hearing under *Miller*."[237] This conclusion by the *Null* court could not speak more strongly to this issue. Why should someone who is essentially serving the same sentence but just with a different label not be allowed the same protections and benefits as someone who has the proper label?

Also discussed earlier, probably one of the most important cases that extends *Graham* and *Miller* to de-facto-life sentences is the case of *Henry v. State*.[238] Leighdon Henry was seventeen when he was convicted of multiple offenses and sentenced to life plus sixty years.[239] After *Graham*, Henry was resentenced to thirty years for each charged offense.[240] Henry was essentially to serve a total of ninety years in prison.[241] Henry claimed his new sentence was a de-facto-life sentence and appealed to the state appellate court, which said *Graham* did not apply in this case.[242] In 2015, Henry appealed to the Florida Supreme Court, which ultimately held that the "constitutional prohibition against cruel and unusual punishment under *Graham* is implicated when a juvenile nonhomicide offender's sentence does not afford any 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'"[243] The Florida Supreme Court found that since Henry's ninety-year sentence does not afford him a meaningful opportunity for release, it is therefore unconstitutional under *Graham*.[244]

Henry v. State is a significant case for this topic because at first the lower court seemed to want to apply *Graham*, but would not without approval from the United States Supreme Court.[245] Then just two years later, the Florida Supreme Court ruled that *Graham* should apply to *Henry*.[246] This case illustrates courts, in this case the Florida Supreme Court, taking the initiative and applying the United States Supreme Court's rationales established in *Graham* and *Miller* to de-facto-life sentences. The trial court in *Henry* discussed how the language in *Graham* demonstrated that the majority seemed to want a juvenile to receive a meaningful opportunity for release regardless of number of offenses or victims or type of crime.[247] This would mean that the Court did not want a juvenile 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."[248] The lower court in *Henry* discussed each path of applying and not

237. *Id.* at 72.
238. *See Henry II*, *supra* note 188, at 679–680.
239. *Id.* at 676.
240. *Id.*
241. *Id.*
242. *Henry I*, *supra* note 192, at 1086.
243. *Henry II*, *supra* note 188, at 679.
244. *Id.* at 680.
245. *Henry I*, *supra* note 192, at 1089.
246. *Henry II*, *supra* note 188, at 680.
247. *Henry I*, *supra* note 192, at 1089.
248. *Id.*

applying *Graham*.[249] It deemed that if *Graham* did not apply to this kind of situations then its "path is clear."[250] The court then went on to discuss how, if it were to apply *Graham* to de-facto-life sentences, the court would be without direction and it would be too difficult for it to apply *Graham*.[251] The lower court followed the United States Supreme Court's logic, but failed to follow through. However, two years later, the Florida Supreme Court did. The Florida Supreme Court concluded that, based on *Graham* and other United States Supreme Court precedent, the Eighth Amendment will not tolerate prison sentences that lack a review of the juvenile's maturity and reform in the future because *any* term of imprisonment for a juvenile is qualitatively different than an imprisonment term for an adult.[252]

The Court also factored into its analysis the penological justifications for sentencing a juvenile.[253] The penological goals are incapacitation, rehabilitation, retribution, and deterrence.[254] In *Graham*, the Court decided that a sentence of life without parole for a non-homicide juvenile did not have any penological justifications.[255] The Court then went on to clarify in *Miller* that the penological justifications for a life without parole sentence for any juvenile are "weaken[ed]" by the "characteristics of youth" and can "render life-without-parole sentence[s] disproportionate."[256]

The Court in *Graham* analyzed each penological goal individually.[257] As stated above, the penological goals are incapacitation, rehabilitation, retribution, and deterrence.[258] As for incapacitation, the Court determined that the justification was lacking here because it would require courts to deem a juvenile to be a danger to society and be labeled as incorrigible forever, which "denies the juvenile offender a chance to demonstrate growth and maturity."[259] The Court deemed that rehabilitation provides no justification for life without parole because the sentence virtually "forswears altogether the rehabilitative ideal" and is not appropriate considering a juvenile's "capacity for change and limited moral culpability."[260] The Court determined that retribution did not support juvenile life without parole sentences because personal culpability of the offender, the rationale behind retribution, was "not as strong with a minor as with an adult."[261] Lastly, when the Court analyzed the justification of deterrence, it found that because of their age, children lack maturity and a sense of responsibility and deterrence did not justify this sentence.[262]

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249. *Id.*
250. *Id.*
251. *Id.*
252. *Henry II*, *supra* note 188, at 680.
253. Graham v. Florida, 560 U.S. 48, 71 (2010).
254. *Id.*
255. *Id.*
256. Miller v. Alabama, 567 U.S. 460, 473 (2012).
257. *Graham*, 560 U.S. at 71–74.
258. *Id.* at 71.
259. *Id.* at 72–73.
260. *Id.* at 74.
261. *Id.* at 71.
262. *Id.* at 72.

The Court said that any sentence that lacks "any legitimate penological justification is by its nature disproportionate to the offense."[263] De-facto-life sentences provide "no legitimate penological justification" because they fail in the same way as life without parole. The sentence does not provide any justification for incapacitation, rehabilitation, retribution, or deterrence. De-facto-life sentences fail to justify the incapacitation goal, because it is a sentence which does not allow a juvenile a meaningful opportunity for release. Sentencing a juvenile to serve fifty or sixty years is still labeling the juvenile as being incorrigible and a "danger to society." Since the juvenile will be in jail for the majority of his life with no "meaningful opportunity of release" there is no chance for the juvenile to demonstrate that he has changed and matured into a model citizen who can contribute back to society. De-facto-life sentences fail to justify the penological goal of rehabilitation. Sentencing a juvenile to serve the rest of his or her life in prison provides no "meaningful opportunity of release" to show that the juvenile has been rehabilitated. Sentencing juveniles to de-facto-life sentences goes against the rationale of the rehabilitation penological goal. The rationale behind rehabilitation is that the person transforms from a criminal to a model citizen that can re-enter society and provide value.[264] When or if the juvenile gets out of prison fifty or sixty years later, he will have nothing of value to provide to society, because he has been in prison for the majority of his life. The retribution justification for de-facto-life sentences does not provide an adequate justification for the sentence. It has been well-established that children are different from adults.[265] It is these differences that the Court in *Roper* established that since juveniles "have lessened culpability they are less deserving of the most severe punishments."[266] De-facto-life sentences are just as severe a punishment as life without parole. The juvenile will still be sentenced to a lengthy term-of-year sentence that will not allow for a "meaningful opportunity for release." The final penological justification, deterrence, also fails to adequately justify a de-facto-life sentence. Juveniles do not consider long term consequences of their actions.[267] Plainly put, juveniles do not consider whether their actions will cause them to be locked up in prison for the rest of their lives. Therefore, sentencing one juvenile to a de-facto-life sentence will not deter other juveniles from doing the same action. De-facto-life sentences do not provide for any adequate penological justifications and, like life without parole sentences, are not appropriate for juveniles.

A de-facto-life sentence is essentially the same as a life without parole sentence.[268] These de-facto-life sentences do not provide juveniles with any "meaningful opportunity of release."

263. *Id.*

264. *Id.* at 74.

265. Graham v. Florida, 560 U.S. 48 (2010); Miller v. Alabama, 567 U.S. 460 (2012).

266. *Graham*, 560 U.S. at 68 (citing Roper v. Simmons, 543 U.S. 551, 569 (2005)).

267. SCOTT & STEINBERG, *supra* note 17, at 37.

268. Adams v. State, 188 So. 3d 849, 851 (Fla. Dist. Ct. App. 2012)..

B. *Courts Should Consider the* Miller *Factors with the Original Purpose of the Juvenile Justice System and Only Sentence Juveniles to the Extreme When They are the "Rare Juvenile Who is Incorrigible"*

The Court in *Miller* deemed that sentencing authorities must first consider how a juvenile is different from an adult and how those differences weigh against a life without parole sentence.[269] In *Miller*, the Court listed several factors that sentencing authorities should consider when resentencing juveniles.[270] The Court stated that the sentencing authorities should consider the following: the juvenile's age, immaturity, impetuosity, failure to appreciate risks and consequences, family and home environmental situation, participation in the crime, peer pressure, and rehabilitation.[271] As stated above, however, most courts are failing to give these factors the full consideration that *Miller* demands and either resentencing the juveniles to life without parole or to de-facto-life sentences.

Also, in 2016, the Court decided to extend *Miller*'s holding in the *Montgomery v. Louisiana* case.[272] In *Montgomery*, the Court held that not only did *Miller* require courts to consider how children are different from adults, but also it must consider whether the juvenile's crime "reflects the transient immaturity of youth" or "reflects irreparable corruption."[273] The Court in *Montgomery* found that *Miller* only barred a sentence of life without parole "for all but the rarest of juvenile offenders," which is a juvenile "whose crimes reflect permanent incorrigibility."[274] The Court in *Montgomery* found that *Miller* essentially "drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption."[275] The line the Court is referencing is that on one side there are children whose crime reflect transient immaturity who are considered to be capable of being rehabilitated, whereas the child on the other side of the line is considered to be un-rehabilitative because he has been irreparably corrupted.

State appellate courts have recognized *Montgomery*'s expansion of *Miller*, such that a juvenile homicide offender may not be sentenced to life without parole unless a sentence first makes a properly informed finding that the juvenile is irreparably corrupt.[276] Justice Sotomayor discussed in her concurring opinion in the case of *Tatum v. Arizona* that *Montgomery* made clear that "even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects unfortunate yet transient immaturity."[277] Justice Sotomayor also provided an example of where a sentencing authority clearly fails to consider if the juvenile is

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269. Miller v. Alabama, 567 U.S. 460, 480 (2012).
270. *Id.* at 477.
271. *Id.* at 477–78.
272. Montgomery v. Louisiana, 136 S. Ct. 718, 734 (2016).
273. *Id.*
274. *Id.*
275. *Id.*
276. *See* Veal v. State, 784 S.E.2d 403, 412 (Ga. 2016); Luna v. State, 387 P.3d 956, 961 (Okla. Crim. App. 2016); Landrum v. State, 192 So. 3d 459, 469 (Fla. 2016).
277. Tatum v. Arizona, 137 S. Ct. 11, 12 (2016) (Sotomayor, J., concurring).

the rare juvenile before being resentenced.[278] In *Najar v. Arizona*, the sentencing judge did consider some mitigating factors from *Miller*, like the petitioner's age and level of immaturity.[279] However when the sentencing judge considered the sixteen-year-old petitioner's efforts to rehabilitate, he commended the petitioner for his efforts but eventually deemed those efforts as "nothing significant."[280] The sentencing judge was commending the juvenile on his rehabilitation efforts, which indicated that the juvenile must have been capable of rehabilitation. The judge's deeming rehabilitative efforts as "nothing significant" is a clear indicator that this judge did not understand the holdings in *Miller* and *Montgomery*. If a juvenile is making rehabilitative efforts, to such extent that a judge commends him for it, how does that not, when factored in with his other youth characteristics, show that he does not fall into the rare juvenile category? Yet, the judge decided to resentence the juvenile back to a life without parole.[281] This is a clear violation of *Montgomery*. The juvenile in this case could not have been a rare juvenile because he was being rehabilitated, which means he was not irreparably corrupt. This juvenile did not fall into the rare juvenile whose crimes reflect irreparable corruption category and did not deserve to be resentenced to life without parole.

Another example of courts hearing *Miller* mitigating factors and still failing to consider whether the juvenile is to be deemed to fall within the rare juvenile category is the case of *Jones v. State*.[282] In *Jones*, the court considered several mitigating factors, such as his mental health, the medications he was taking, his intimacy with his girlfriend, his abusive childhood, and the manner of his crime.[283] The court deemed that these mitigating factors were "not compelling enough to sentence Jones to less than life imprisonment without parole."[284] However, even though the court considered these mitigating factors, again a sentencing authority failed to find whether the juvenile was one of the rare juveniles whose crimes reflected irreparable corruption.[285] There is no mention by the court in considering whether this juvenile was capable of being rehabilitated or that he was so beyond corrupted that he could not be saved. If the court does not consider rehabilitation, then how can it deem a juvenile is irreparably corrupt and resentence the juvenile to life without parole? Courts must consider the juvenile's ability to be rehabilitated in order to determine whether the juvenile falls into the rare juvenile category or not. Other mitigating factors should also be considered, but the ability to be rehabilitated is essentially the foundation on whether a juvenile is a rare juvenile or not.

In order to prevent this, courts should consider the *Miller* factors and what

278. *Id.*

279. *Id.*

280. *Id.*

281. State v. Najar, No. 1 CA-CR 13-0686 PRPC, 2015 Ariz. App. Unpub. LEXIS 714 (Ct. App. June 2, 2015).

282. Jones v. State, No. 2015-KA-00899-COA, 2017 WL 6387457 (Miss. Ct. App. Dec. 14, 2017), *reh'g denied* (Apr. 24, 2018), *cert. granted*, 2015-CT-00899-SCT (Aug. 2, 2018).

283. *Id.* at *8–10 (Westbrooks, J., concurring in part and dissenting in part).

284. *Id.* at *29.

285. *Id.*

constitutes a rare juvenile with the original purpose of the juvenile courts in mind. The original purpose of the juvenile courts system was *parens patriae*.[286] This focused on helping the youth when the child was at risk.[287] We need to focus more on helping and rehabilitating these juveniles, rather than punishing them. Judge Julian Mack described the purpose of juvenile courts as "not so much as to punish as to reform, not to degrade but to uplift, not to crush but to develop, not to make him a criminal but a worthy citizen."[288] This quote by Judge Julian Mack should be installed in every juvenile sentencing authority's mind, especially the part of "not to make him a criminal but a worthy citizen." This quote encompasses the holding in *Miller* and *Montgomery*, which is the harshest penalty should only be used for the rarest juvenile who is so corrupt he cannot be helped. Juvenile sentencing authorities should not be sentencing juveniles who can be rehabilitated to life without parole or de-facto life because they can still become a "worthy citizen." Not every juvenile is going to be the "rare juvenile." Children make mistakes because they are young and immature, and those mistakes should not deem them to be so corruptible that they cannot be rehabilitated.

IV. CONCLUSION

Children are different from adults. The United States Supreme Court and science have agreed to such. However, courts still want to punish juveniles as adults. *Graham* and *Miller* make it unconstitutional to sentence juveniles to life without parole without considering mitigating circumstances first.[289] *Montgomery* demands that the sentencing authority consider not only *Miller* mitigating factors, but also can only impose the "harshest sentence" for those rare juveniles who are irreparably corrupt.[290] But some courts do not want to expand this protection to de-facto-life sentences.[291] De-facto-life sentences are the "equivalent of life sentence." If de-facto-life sentences are the equivalent, then why are some courts so reluctant to expand *Graham* and *Miller* to include de-facto-life sentences? There have been some courts, such as the courts in *Null* and in *Henry*, that have expanded *Graham* and *Miller* to include de-facto-life sentences. These courts have clearly understood the United States Supreme Court's rationale that juveniles must have a "meaningful opportunity" for release and only be sentenced to this "harsh penalty" when the juvenile is the "rare juvenile whose crimes reflect irreparable corruption."[292]

In order to avoid sentencing juveniles to de-facto-life sentences, courts need to focus more on the original purpose of the juvenile courts. These courts are here to help and reform children, not lock them up forever. Courts need to accept that its main focus for resentencing should be on whether the juvenile can

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286. BERNARD & KURLYCHEK, *supra* note 6, at 143.

287. *Id.*

288. ZIMRING, *supra* note 10, at 10–11.

289. Graham v. Florida, 560 U.S. 48, 82 (2010); Miller v. Alabama, 567 U.S. 460, 479–80 (2012).

290. Montgomery v. Louisiana, 136 S. Ct. 718, 734 (2016).

291. *See, e.g.*, State v. Logan, 160 Conn. App. 282 (Conn. App. Ct. 2015); Mason v. State, 235 So. 3d 129 (Miss. Ct. App. 2017).

292. *Graham*, 560 U.S at 82; *Montgomery*, 136 S. Ct. at 733–34.

be rehabilitated.