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GROWING UP IN PRISON: RETHINKING JUVENILE OFFENDER PAROLE HEARINGS TO ELIMINATE ESSENTIAL LIFE SENTENCES

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I. INTRODUCTION

Thomas Franklin Bowling was seventeen-years-old when he was condemned to two life sentences, plus six years and thirty days with the possibility of parole, for robbery, marijuana possession, two counts of use of a firearm, and capital murder that resulted from a botched robbery.[1] Seventeen years later, at the age of thirty-four, he became eligible for parole.[2] Every year since his original parole date of April 26, 2005, the Parole Board has "reviewed and evaluated all available information pertaining to [Thomas's] case and decided not to grant [his] parole."[3] Now, over thirty years since his original sentencing, he continues to stand before a parole board every year to request that it review his case to consider the crimes he committed when he was a minor.[4] Every year, the Board denies his parole.[5]

Since Thomas's sentencing, the Supreme Court has created important and impactful changes to the sentencing practices for juveniles.[6] Primarily centered around the Eighth Amendment's ban on cruel and unusual punishment,[7] the Court held that children "are constitutionally different from adults for purposes of sentencing."[8] This reaffirms the understanding that life sentences have vastly different effects on children and should rarely be employed against

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1. Bowling v. Dir., Va. Dep't of Corr., 920 F.3d 192, 194 (4th Cir. 2019).
2. *Id.*
3. *Id.* at 195.
4. *Id.* at 194–96.
5. *Id.* The Parole Board has repeatedly cited the reason for denial as the serious nature and circumstances leading up to the crime. *Id.* Specifically, at the 2012 hearing, the Board indicated that release of Thomas "would diminish [the] seriousness of [the] crime." *Id.* at 195.
6. *See* Roper v. Simmons, 543 U.S. 551 (2005) (holding that capital punishment is unconstitutional for minors); *see* Graham v. Florida, 560 U.S. 48 (2010) (prohibiting life without parole sentences for juveniles who do not commit homicide); *see* Miller v. Alabama, 567 U.S. 460 (2012) (prohibiting mandatory life sentences of life without parole for juveniles); *see also* Montgomery v. Louisiana, 136 S. Ct. 718 (2016) (applying holding in *Miller* retroactively).
7. U.S. CONST. amend. VIII.
8. *Miller*, 567 U.S. at 471.

them,[9] due to their "diminished culpability and greater prospects for reform" and because "they are less deserving of the most severe punishments."[10]

However, this has led to conflicting responses throughout state courts on proper and constitutional juvenile sentencing practices.[11] In cases like Thomas's, where individuals are given the opportunity of parole but are consistently denied,[12] convicted juveniles will essentially serve a life sentence, never experiencing release in their lifetime.[13] As life without parole sentences for juveniles have been considered cruel and unusual by the Supreme Court,[14] these de facto life sentences should be as well.[15] Through continual parole denials and lengthy sentences that outlast a juvenile's life expectancy, many state courts have circumvented the Supreme Court's holdings that juvenile sentencing to life without parole violates the Eighth Amendment's ban on cruel and unusual punishment by creating de facto life sentences.[16] There is an important need for sentencing and parole reforms specific to juveniles.[17]

This comment will examine de facto life sentences for juveniles and the need to view them in the same way as mandatory life without parole sentencing.[18] Part II examines the historical path the Supreme Court took to implement various juvenile-specific Eighth Amendment protections from cruel and unusual punishment.[19] Part III discusses the circuit split in applying these Supreme Court holdings to juvenile sentences that essentially amount to life sentences.[20] Part IV discusses these sentences and what they mean

9. *Id.* at 479–80.
10. *Id.* (quoting *Graham*, 560 U.S. at 68) (internal quotations omitted).
11. *See* Alice Reichman Hoesterey, *Confusion in* Montgomery's *Wake: State Responses, the Mandates of* Montgomery*, and Why a Complete Categorical Ban on Life Without Parole for Juveniles is the Only Constitutional Option*, 45 FORDHAM URB. L.J. 149, 161 (2017).
12. *See, e.g., infra* notes 128–35 and accompanying text.
13. Bowling v. Dir., Va. Dep't of Corr., 920 F.3d 192, 195 (4th Cir. 2019).
14. *See* Graham v. Florida, 560 United States 48, 82 (2010); *see Miller*, 576 U.S. at 473; *see* Montgomery v. Louisiana, 136 S. Ct. 718, 736–37 (2016).
15. *See* Moore v. Biter, 725 F.3d 1184, 1194 (9th Cir. 2013); *see* McKinley v. Butler, 809 F.3d 908, 914 (7th Cir. 2016); *see also* U.S. v. Grant, 887 F.3d 131, 153 (3d Cir. 2018), *reh'g en banc granted, opinion vacated*, 905 F.3d 285 (3d Cir. 2018).
16. *See Bowling*, 920 F.3d at 197–98; *see* Bunch v. Smith, 685 F.3d 546, 547 (6th Cir. 2012); *see* United States v. Jefferson, 816 F.3d 1016, 1017 (8th Cir. 2016).
17. *See infra* Part V.
18. *See infra* Parts II–VI.
19. *See infra* Part II.
20. *See infra* Part III.

for a juvenile.[21] Finally, Part V will detail what a fair juvenile sentence should entail in order to follow the Supreme Court's ban on certain sentencing procedures for juveniles that constitute cruel and unusual punishment.[22]

II. HISTORICAL BACKGROUND

Since 2005, the Supreme Court has taken substantial steps to protect juveniles from punishments that it considers to be cruel and unusual punishment.[23] From the death penalty to mandatory life sentences, the court has found that some sentencing schemes are too harsh for juveniles because they lack the maturity and mental development to understand the potential repercussions and severity of their actions.[24] Through its holdings, the Court has shown that it considers juveniles to be different from adults and, as a result, they need different sentencing considerations for crimes committed while they were still minors.[25]

A. The Supreme Court's Ban on the Juvenile Death Penalty

The Supreme Court has long found constitutional significance in the biological differences between childhood and adulthood.[26] The Eighth Amendment states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."[27] The Court has analyzed this Amendment as it applies to juveniles and the impact long or extensive sentences will have on them.[28]

The modern understanding of the adolescent brain by the psychological community is that "adolescents are easily susceptible to negative influences and act in an immature way that is, often times, not telling of how they will behave as an adult."[29] Furthermore, there are distinct differences in the development of the

21. *See infra* Part IV.
22 *See infra* Part V.
23. *See* Roper v. Simmons, 543 U.S. 551 (2005); *see* Miller v. Alabama, 567 U.S. 460 (2012).
24. *See Miller*, 567 U.S. at 471–72.
25. *Id.*
26. *See, e.g.*, *Roper*, 543 U.S. at 572–73.
27. U.S. CONST. amend. VIII.
28. *See infra* notes 29–47 and accompanying text.
29. Lindsey A. Phillips, United States v. Grant*: Does a Term-Of-Years Sentence that Meets a Juvenile's Expected Life Span Violate the Eighth Amendment's Ban on Cruel and Unusual Punishment*, 42 AM. J. TRIAL ADVOC. 185, 187 (2018).

juvenile and adult minds, especially in the portion of the brain that controls behavior.[30]

The Supreme Court has adopted this thinking and held in several cases[31] that youth is a mitigating factor that must be considered in sentencing as it relates to capital punishment and life without parole.[32] The Court "derives [this] from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside."[33] This created a framework to be followed by courts during sentencing that understands the "necessity of referring to 'the evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be cruel and unusual."[34]

In *Roper v. Simmons*, the Supreme Court first considered the question of "decency" in sentencing.[35] Christopher Simmons was a seventeen-year-old boy with no prior convictions,[36] who planned and carried out a burglary and murder.[37] The State sought the death penalty.[38]

The central issue at his sentencing was Christopher's age and whether the fact that he was "very immature," "very impulsive," and "very susceptible to being manipulated or influenced" should impact his sentencing.[39] Furthermore, there was evidence that he had an incredibly "difficult home environment" which led him to alcohol and drug abuse.[40] Although originally sentenced to the death penalty, the Supreme Court held that "[b]ecause the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force" and the use of the penalty "must be limited to those offenders who commit 'a narrow category of the most serious crimes' and

30. *See* Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable than Adults*, 18 BEHAV. SCI. & L. 741, 742–43 (2000); *see* Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCH. 1009, 1014 (2003).
31. *See infra* Part II.
32. Miller v. Alabama, 567 U.S. 460, 473–74 (2012).
33. Roper v. Simmons, 543 U.S. 551, 570 (2005) (quoting Johnson v. Texas, 509 U.S. 350, 368 (1993)).
34. *Id.* at 561 (quoting Trop v. Dulles, 356 U.S. 86, 100–01 (1958)).
35. *Id.* at 605.
36. *Id.* at 556–58.
37. *Id.* at 557.
38. *Id.* at 558.
39. *Id.* at 559.
40. *Id.*

whose extreme culpability makes them 'the most deserving of execution.'"[41]

The Court cited three differences between individuals under eighteen and adults that indicate why juveniles should never be classified as "among the worst offenders."[42] "First, as any parent knows and as the scientific and sociological studies . . . tend to confirm, '[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young.'"[43] This can lead to "impetuous and ill-considered actions and decisions."[44] Second, "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure."[45] Finally, "the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed."[46] These differences, distinctly separating them from the list of "worst offenders," are the bases for the Court's belief that the Eighth Amendment forbids the death penalty for any juvenile offenders.[47]

B. The Supreme Court's Review of Juvenile Life Without Parole Sentences

Following *Roper*, the Supreme Court began to review various sentencing schemes for individuals under the age of eighteen that are interpreted as more severe.[48] These principles were applied in *Graham v. Florida*, when the Court determined that the Eighth Amendment prohibits imposing a sentence of life without parole on juveniles who did not commit homicide.[49] Terrance Graham was a juvenile reoffender who was placed on probation when he showed remorse and a willingness to change after a burglary, but later reoffended with a similar crime.[50] Life without parole sentences, the Court held, share comparisons with the death penalty that make them impossible to impose on juveniles:

41. *Id.* at 568 (quoting Atkins v. Virginia, 536 U.S. 304, 319 (2002)).
42. *Id.* at 569–70.
43. *Id.* at 569 (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).
44. *Id.* (quoting *Johnson*, 509 U.S. at 367).
45. *Id.* (citing Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)).
46. *Id.* at 570.
47. *See id.* at 570, 578.
48. *See infra* notes 49, 56–57, 63–64, 68–70 and accompanying text.
49. *See* 560 U.S. 48, 82 (2010).
50. *Id.* at 53–54.

> [L]ife without parole sentences share some characteristics with death sentences that are shared by no other sentences. The State does not execute the offender sentenced to life without parole, but the sentence alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence.[51]

The severity of such sentences on a juvenile in particular—who would end up spending much more time in prison in comparison to an adult sentenced to the same punishment—created a problem that the Court was compelled to correct.[52] With all of the reasons considered during sentencing, the Court held that a life without parole sentence for a nonhomicide juvenile offender is hardly ever proportionate or justifiable.[53] Accordingly, the Supreme Court prohibited its imposition.[54] Notably, the Court also indicated that while there does not need to be a guarantee of eventual release, there must be a realistic opportunity for parole before the end of a life sentence.[55]

In 2012, the Supreme Court reviewed the imposition of mandatory life without parole sentences for juveniles in *Miller v. Alabama*.[56] The Court's focus remained on the differences between juveniles and adults in their development.[57] The impact of the holding in *Graham* is that "youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole."[58]

The Court held that mandatory imposition of life sentences without the opportunity for parole entirely prevents a judge from taking into consideration various important "mitigating qualities of youth," including home life, education, and the background leading up to the

51. *Id.* at 69–70.
52. *Id.* at 70 ("A 16–year–old and a 75–year–old each sentenced to life without parole receive the same punishment in name only.").
53. *See id.* at 74–75.
54. *Id.* at 71–74 (holding a sentence that does not achieve "the goals of penal sanctions that have been recognized as legitimate—retribution, deterrence, incapacitation, and rehabilitation" is too harsh to be imposed.) (citing Ewing v. California, 538 U.S. 11, 25 (2003)).
55. *Id.* at 82.
56. 567 U.S. 460, 465 (2012).
57. *See id.* at 469–70.
58. *Id.* at 473.

crime.[59] Without considering the *Roper* factors that differentiate juveniles from adults[60] and instead imposing mandatory sentences, the Eighth Amendment's "cruel and unusual punishment" clause is violated.[61] Moving forward, all courts must take mitigating factors related to an individual's age during their commission of the crime in question into consideration before the final sentencing.[62]

The Supreme Court emphasized the importance of this holding in *Montgomery v. Louisiana*, where it held that *Miller* should be applied to all cases retroactively.[63] The "foundation stone" for both *Miller* and *Montgomery*, is that "certain punishments [are] disproportionate when applied to juveniles."[64] "Protection against disproportionate punishment is the central substantive guarantee of the Eighth Amendment and goes far beyond the manner of determining a defendant's sentence."[65] The *Montgomery* Court held that all individuals formerly given a mandatory life without parole sentence need not be resentenced, but could be provided relief by being considered for parole:

> Extending parole eligibility to juvenile offenders does not impose an onerous burden on the States, nor does it disturb the finality of state convictions. Those prisoners who have shown an inability to reform will continue to serve life sentences. The opportunity for release will be afforded to those who demonstrate the trust of *Miller*'s central intuition—that children who commit even heinous crimes are capable of change.[66]

As a result, individuals convicted of crimes committed when they were juveniles "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."[67]

Most recently, the Supreme Court has shown that there is still much more to be considered regarding Eighth Amendment

59. *Id.* at 476 (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).
60. *See* 543 U.S. 551, 569 (2005).
61. *Miller*, 567 U.S. at 489.
62. *Id.*
63. 136 S. Ct. 718, 736–37 (2016).
64. *Id.* at 732 (quoting *Miller*, 567 U.S. at 470 n.4).
65. *Id.* at 732–33 (citing Graham v. Florida, 560 U.S. 48, 59 (2010)).
66. *Id.* at 736.
67. *Id.* at 736–37.

protections for juveniles.[68] In Virginia in 2004, Lee Boyd Malvo was convicted of capital murder after he and an adult, later to be referred to as the "D.C. Snipers," terrorized the D.C. Metropolitan area as they went on a random shooting spree throughout the community.[69] Malvo, only sixteen at the time, was later sentenced to two terms of life imprisonment without parole, plus eight years imprisonment.[70]

On appeal, Malvo's attorneys argued that *Miller* and *Montgomery* prohibit all life without parole sentences for juveniles, while the State asserted these holdings only apply to mandatory sentences.[71] The United States Court of Appeals for the Fourth Circuit held that this decision applies not only to mandatory sentences, but also in any instance where a juvenile was given life without the possibility of parole.[72] Virginia's Attorney General appealed to the Supreme Court for a final determination and certiorari was granted.[73] Although certiorari was later dismissed in response to legislation passed in Virginia allowing "all juvenile lifers who committed crimes under the age of 18 to seek parole after serving 20 years,"[74] by initially granting certiorari, the Supreme Court signaled that there is much more to be considered in the realm of Eighth Amendment protections for juveniles and their sentencing.[75]

As these holdings are applied in state courts, *Malvo* reaffirms that the application of certain Eighth Amendment protections have been construed and applied differently throughout the country.[76] In many cases, states fixed this issue by granting an opportunity for parole.[77] However, individuals who were given a sentence that includes the opportunity for parole are repeatedly denied this chance and, as a result, are still condemned to serve an essential life sentence.[78]

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68. *See* Malvo v, Mathena, 893 F.3d 265 (4th Cir. 2018), *cert. granted*, 139 S. Ct. 1317 (2019), *and cert. dismissed*, 140 S. Ct. 919 (2020).
69. *Id.* at 267–68.
70. *Id.* at 266–67.
71. *See id.* at 270.
72. *See id.* at 275.
73. *See Malvo*, 139 S. Ct. at 1317.
74. *Malvo*, 140 S. Ct. at 919; Vanessa Romo, *U.S. Supreme Court Agrees to Dismiss 'D.C. Sniper' Case Following Virginia Parole Law*, NPR (Feb. 27, 2020, 6:30 PM), https://www.npr.org/2020/02/27/810102327/u-s-supreme-court-agrees-to-dismiss-d-c-sniper-case-following-virginia-parole-la [https://perma.cc/3X2C-VL66].
75. *See id.*
76. *See infra* Part III.
77. *See* Romo, *supra* note 73.
78. *See infra* Part IV.

III. THE CIRCUIT SPLIT IN APPLYING JUVENILE-SPECIFIC EIGHTH AMENDMENT PROTECTIONS BEFORE CREATING DE-FACTO LIFE SENTENCES

The Supreme Court has not explicitly stated the constitutionality of a sentencing court's ability to sentence a juvenile to life with possibility of parole.[79] This ambiguity has created disagreement between the Federal Appellate Circuits on whether the sentencing courts must also take the inherent differences of children into account when sentencing a juvenile to a de facto life sentence.[80] In some circuits, courts apply *Miller* and *Montgomery* to lengthy prison terms which deny defendants a "meaningful opportunity to obtain release,"[81] labeled as de facto life sentences.[82] Other circuits hold that Eight Amendment protections are triggered when the sentence is labeled "life without parole."[83]

A. Some Circuits Extend Juvenile-Specific Eighth Amendment Protections to Essential Life Sentences

The Third, Seventh, and Ninth Circuits extend the ideals set forth in *Roper*, *Graham*, *Miller*, and *Montgomery*.[84] This requires every sentencing judge to examine the specifics behind each individual case.[85] These juvenile-specific protections extend to sentences that essentially amount to life in prison.[86]

For example, in *Moore v. Biter*, Roosevelt Moore, then sixteen years old, was sentenced to a 254 years and four months term in prison.[87] Moore submitted evidence that supported he was capable of change, including a psychologist report that indicated, "Moore does not appear to be fixed in his antisocial value system as he displays a sense of motivation to change in overcoming his delinquent

79. *See Bowling*, 920 F.3d at 197.
80. *See id.* at 197–98 (citing Miller v. Alabama, 567 U.S. 460, 480 (2012)).
81. Graham v. Florida, 560 U.S. 48, 75 (2010).
82. *See* Hoesterey, *supra* note 11, at 169–70.
83. *Id.* at 170.
84. *See infra* notes 85–113 and accompanying text.
85. *See infra* notes 86–113 and accompanying text.
86. *See* Bowling v. Dir., Va. Dep't of Corr., 920 F.3d 192, 197–98 (4th Cir. 2019).
87. Moore v. Biter, 725 F.3d 1184, 1186 (9th Cir. 2013). Moore was found guilty of nine counts of forcible rape, seven counts of forcible oral copulation, two counts of attempted second-degree robbery, two counts of second-degree robbery, forcible sodomy, kidnapping with the specific intent to commit a felony sex offense, genital penetration by a foreign object, and the unlawful driving or taking of a vehicle, all while using a firearm. *Id.*

lifestyle," and that he would "benefit from rehabilitation."[88] Moore was not eligible for parole until he served half of his sentence.[89] He would not be permitted an opportunity for parole until he reached 144 years old.[90]

The lower court held that because Moore was serving a term-of-years sentence, the *Graham* holding which banned a life without parole sentence for juvenile non-homicide offenders did not apply.[91] However, on appeal, the United States Court of Appeals for the Ninth Circuit overturned this and held that a "sentence of 254 years is materially indistinguishable from a life sentence without parole because Moore will not be eligible for parole within his lifetime."[92] As a result, the court held that Moore is entitled to these protections under *Graham*.[93]

Similarly, in *McKinley v. Butler*, the United States Court of Appeals for the Seventh Circuit reviewed the sentence of Benard McKinley, a sixteen-year old who was sentenced to two consecutive fifty-year terms, one for murder and one for the use of a firearm while committing the crime.[94] The Illinois sentencing scheme in place at the time did not allow for good-time credits or other early release opportunities for individuals who have committed first-degree murder.[95] McKinley would have been imprisoned for the entire one-hundred years, "unless, of course, he dies before the age of 116."[96]

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88. *Id.* at 1186–87.
89. *Id.* at 1187.
90. *Id.*
91. *Id.* at 1191.
92. *Id.* "Moore must live the remainder of his life in prison knowing that he is guaranteed to die in prison regardless of his remorse, reflection, or growth." *Id.* at 1192.
93. *Id.* at 1194.

> Moore's sentence guarantees that he will die in prison because the trial judge determined at the outset that Moore could not rehabilitate. Moore has now spent over half of his life in prison. Still, he has no hope of reentering society. His past and future efforts to reform are immaterial. Moore's sentence is irreconcilable with *Graham's* mandate that a juvenile nonhomicide offender must be provided "some meaningful opportunity" to reenter society. Thus, Moore's sentence is unconstitutional under Graham.

Id. (quoting Graham v. Florida, 560 U.S. 48, 75 (2010)).

94. 809 F.3d 908, 909 (7th Cir. 2016).
95. *Id.*
96. *Id.* By comparison, his accomplice who handed him the gun and told him to shoot the victim was only sentenced to 17.5 years. *Id.*

This was a discretionary sentence imposed by the judge.[97] However, the Seventh Circuit was not satisfied with this decision.

> [I]t is such a long term of years (especially given the unavailability of early release) as to be—unless there is a radical increase, at present unforeseeable, in longevity within the next 100 years—a de facto life sentence, and so the logic of *Miller* applies. . . But the "children are different" passage that we quoted earlier from *Miller v. Alabama* cannot logically be limited to *de jure* life sentences, as distinct from sentences denominated in number of years yet highly likely to result in imprisonment for life. The relevance to sentencing of "children are different" also cannot in logic depend on whether the legislature has made the life sentence discretionary or mandatory; even discretionary life sentences must be guided by consideration of age-relevant factors.[98]

The Seventh Circuit held that these juvenile-specific considerations must be extended to de facto life sentences and such sentences, upon serious consideration of the individual's age, should only be imposed on those who are truly deserving of such a lengthy term.[99] The court vacated the judgment of the lower court and remanded for instruction to resentence McKinley while keeping in mind *Miller* and the Court's concerns surrounding de-facto life sentences that "resulted in a 100-year prison sentence for a 16-year old."[100]

Finally, in *United States v. Grant*, the United States Court of Appeals for the Third Circuit reviewed the case of Corey Grant, who was given a sentence that would make him eligible for parole at the age of seventy-two, which was also his life expectancy.[101] Grant was convicted for conspiracy and racketeering.[102] He was given a mandatory sentence of life without parole, a concurrent forty-year term, and a five-year consecutive term.[103] After *Miller*, Grant brought his case back before the District Court for resentencing in line with the new holding that mandatory life without parole

97. *Id.* at 911.
98. *Id.* at 911.
99. *Id.* at 913–14.
100. *Id.* at 914.
101. 887 F.3d 131, 135 (3d Cir. 2018), *reh'g en banc granted, opinion vacated*, 905 F.3d 285 (3d. Cir. 2018) (mem.).
102. *Id.* at 134.
103. *Id.*

sentences violate the Eighth Amendment.[104] He was ultimately resentenced to sixty-five years without parole.[105] Grant again appealed his sentencing, arguing that this new sentencing was so lengthy that it still violated *Miller* because it effectively sentenced him to remain in prison with no opportunity for release in his lifetime.[106]

The court referred to social sciences and life expectancy estimates and determined that this sentencing will most likely imprison him for the entirety of his life.[107] The court held that it violated the Eighth Amendment to not consider the length someone's life may be when sentencing a juvenile.[108] Moreover, the court in *Grant* explained what it means for an individual to have a "meaningful opportunity for release."[109] Such a sentence "must provide for 'hope' and a chance for 'fulfillment outside prison walls,' 'reconciliation with society,' and 'the opportunity to achieve maturity of judgment and self-recognition of human worth and potential.'"[110] Clarifying that this does not mean a "meaningful life" but a "meaningful opportunity for release," a juvenile offender capable of reform must be given some opportunity to live outside of prison walls before what would generally be considered the age of retirement.[111]

Regardless of how other courts prevent de facto life sentences,[112] the Third Circuit is very clear: de facto life without parole is irreconcilable with *Graham's* and *Miller's* mandate that sentencing judges must provide non-incorrigible juvenile offenders with a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[113]

B. Some Circuits Do Not Extend Juvenile-Specific Eighth Amendment Protections to Essential Life Sentences

Conversely, other circuits do not extend juvenile-specific Eighth Amendment protections to de facto life without parole sentences.[114] In *Bunch v. Smith*, for instance, the United States Court of Appeals

104. *Id.* at 135–136.
105. *Id.* at 137.
106. *Id.*
107. *Id.* at 147.
108. *Id.*
109. *Id.* at 150.
110. *Id.* (quoting Graham v. Florida, 560 U.S. 48, 79 (2010)).
111. *Id.* at 150–51.
112. *See supra* text accompanying notes 84–100.
113. *See Grant*, 887 F.3d at 142 (quoting *Graham*, 560 U.S. at 75).
114. *See, e.g.*, Bowling v. Dir., Va. Dep't of Corr., 920 F.3d 192, 197–98 (4th Cir. 2019).

for the Sixth Circuit held that it would not extend the holdings of *Roper*, *Miller*, and *Graham* to a de facto life sentence that is the result of consecutive sentences.[115]

Chaz Bunch was sixteen years old when he was sentenced to multiple consecutive fixed terms, totaling eighty-nine years for robbing, kidnapping, and raping a woman.[116] Although conceding that "Bunch's 89-year aggregate sentence may end up being the functional equivalent of life without parole," the court drew a line between Bunch's situation and the juveniles in the Supreme Court holdings.[117] The Supreme Court has not addressed consecutive, fixed-term sentences for juveniles.[118] The Sixth Circuit held the failure to address this matter "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."[119]

In the United States Court of Appeals for the Eighth Circuit, Robert Jefferson was sentenced to life in prison in 1977 for gang related violent criminal activity committed at the age of sixteen.[120] Under state mandatory sentencing guidelines, the sentencing judge was required to give him this sentence without taking into consideration other mitigating factors behind these criminal offenses.[121] After the *Miller* and *Montgomery* holdings,[122] Jefferson appealed his case and

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115. 685 F.3d 546, 549, 551 (6th Cir. 2012).

116. *Id.* at 548. He was found guilty of three counts of complicity to commit rape, one count of aggravated robbery, one count of conspiracy to commit aggravated robbery, one count of kidnaping, one count of misdemeanor menacing, all while carrying a firearm. *Id.*

117. *Id.* at 551.

118. *Id.*

119. *Id.* at 552. The Court goes on to discuss the circuit split as follows:

> This split demonstrates that Bunch's expansive reading of *Graham* is not clearly established. Perhaps the Supreme Court, or another federal court on direct review, will decide that very lengthy, consecutive, fixed-term sentences for juvenile nonhomicide offenders violate the Eighth Amendment. But until the Supreme Court rules to that effect, Bunch's sentence does not violate clearly established federal law.

Id.

120. *See* United States v. Jefferson, 816 F.3d 1016, 1017 (8th Cir. 2016). He was convicted of conspiracy to distribute cocaine, drug trafficking, and the firebombing murder and drive-by shooting of a drug debtor and bystander. *Id.*

121. *Id.*

122. *See* Miller v. Alabama, 567 U.S. 460 (2012); *see* Montgomery v. Louisiana, 136 S. Ct. 718 (2016).

was instead granted a 600 month sentence.[123] He argued that it is a de facto life sentence.[124]

The Eighth Circuit declined to extend the *Miller* holding in this case because it held *Miller* only applied to mandatory sentencing guidelines.[125] The court agreed that "a federal court considering whether to impose a life-without-parole sentence on a juvenile homicide offender under the federal advisory guidelines regime must weigh the [18 U.S.C. § 3553(a)] sentencing factors 'as informed' by the Supreme Court's Eighth Amendment jurisprudence."[126] However, the court held the sentencing adequately addressed his "extraordinary success" that "clearly weighed in [his] favor," but his record detailed crimes too serious to shorten his term.[127]

Most recently, in *Bowling v. Director, Virginia Department of Corrections*, the United States Court of Appeals for the Fourth Circuit reviewed the sentence of a seventeen-year-old who was sentenced to life with parole for capital murder, robbery, marijuana possession, and two counts of use of a firearm.[128] Here, Bowling was actually given a sentence that allowed him the opportunity for parole.[129] However, Bowling argued that although he has this opportunity, his continued denial by the Parole Board amounts to a de facto life sentence.[130] The Fourth Circuit disagrees.[131]

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123. *See Jefferson*, 816 F.3d at 1018.
124. *See id.*
125. *Id.* at 1019.
126. *Id.* at 1020.
127. *Id.*

> Jefferson has demonstrated that he is amenable to rehabilitation. In the time that he has been in prison, approximately sixteen and one-half years, Jefferson has no disciplinary history. In addition, Jefferson completed 24 courses of study, including college-level courses such as logic, ethics and ancient philosophy. He has been continuously employed in prison, working in food service, sanitation and as a medical orderly. In addition, Jefferson convenes a weekly session of Bible study. Prison staff have commented that Jefferson serves as a positive role model for other inmates in the Life Style Intervention Class.

Id.

128. 920 F.3d 192, 194 (4th Cir. 2019).
129. *Id.*
130. *See id*.
131. *Id.* at 198–99.

The Fourth Circuit held that although *Graham* and *Miller* require a meaningful opportunity for release,[132] Bowling's continued proceedings before the Board satisfy that requirement.[133] The court determined that it did not extend the Eighth Amendment juvenile-specific protections to "juvenile offender[s] who [have] and will continue to receive parole consideration."[134] It further asserts that regardless of Bowling's repeated denials for the opportunity of parole, he is receiving the form of relief received by those juveniles remedied by *Miller*, which is simply parole consideration, not release.[135]

The conflicting application and understanding of juvenile-specific Eighth Amendment protections across state courts creates a large discrepancy in juvenile sentencing across the country.[136] With three circuits extending these protections and three others not,[137] juveniles convicted in certain jurisdictions are sentenced in a manner that ensures they will never see release for crimes committed when they were young.[138] However, the Supreme Court has continually held that age should matter in determining an individual's sentence and this should be required in every sentencing hearing for a juvenile.[139] This should also be considered once they come before a parole board.[140]

IV. THE MEANING OF AN ESSENTIAL LIFE SENTENCE

The Supreme Court has repeatedly held that mandatory life sentences for juveniles violate the Eighth Amendment because children are inherently different from adults, and those differences must be taken into account for every individual juvenile.[141] Courts across the country have responded in different ways.[142]

132. *See id.* at 198.
133. *See id.*
134. *Id.*
135. *Id.* at 199 (citing Montgomery v. Louisiana, 136 S. Ct. 718, 736 (2016)).
136. *See supra* Part III.
137. *See supra* Part III.
138. *See supra* Section III.B.
139. *See supra* Part II.
140. *See infra* notes 172–75 and accompanying text.
141. *See supra* Part II.
142. *See generally* Sarah Mehta, *Growing Up and Growing Old in Prison*, ACLU (Nov. 29, 2017, 2:15 PM), https://www.aclu.org/blog/juvenile-justice/youth-incarceration/growing-and-growing-old-prison [https://perma.cc/KPJ3-CJ83] (discussing different prison sentences received by juveniles throughout the country).

The *Roper*, *Graham*, *Miller*, and *Montgomery* holdings,[143] while significant steps, have not stopped many states from sentencing children to spend the rest of their lives in prison with no real opportunity for parole or eventual release.[144] The response in certain jurisdictions has been to eliminate mandatory life sentences that were deemed unconstitutional by the Supreme Court and replace it with sentences so long that the juveniles are destined to spend the rest of their life in prison.[145] This sentencing structure creates these de facto or essential life sentences that arise with a "juvenile homicide offender who might be sentenced to die in prison without a meaningful opportunity to gain early release based on demonstrated rehabilitation."[146]

Life without parole sentences, although not as severe as the death penalty, share many similarities to it.[147] In *Graham*, Justice Kennedy suggested that as juveniles are more capable of change and have lower culpability, they should not be the recipients of the most severe punishments.[148] Similarly, life with the possibility of parole sentences, that present little to no opportunity of release, share a comparable diminished hope of release.[149]

States have begun to implement minimum sentences for juveniles convicted of serious crimes and maximums sentences that include life with the opportunity of parole at a certain number of years.[150] However, these time limits do not give hope to juveniles who know these parole hearings will not grant them a real chance for release.[151]

When juveniles such as Thomas Bowling are given the opportunity of parole, but their rehabilitation efforts since their imprisonment are being dwarfed by the severity of the crime during their parole considerations, this eliminates any real chance that they will ever be released for a crime they committed when still under the age of eighteen.[152] This eliminates all hope for release that is essential for

143. *See supra* text accompanying notes 35–66.
144. *See* Mehta, *supra* note 142.
145. Julie Burke, Comment, *De-Facto-Life and the Rare Juvenile*, 37 MISS. C. L. REV. 264, 278 (2019).
146. State v. Ramos, 387 P.3d 650, 660 (Wash. 2017). The Supreme Court of Washington held that *Miller* clearly applied to a juvenile sentenced to eighty-five years in prison. *See id.*
147. Kallee Spooner & Michael Vaughn, *Sentencing Juvenile Homicide Offenders: A 50-State Survey*, 5 VA. J. CRIM. L. 130, 137 (2017).
148. *See* Graham v. Florida, 560 U.S. 48, 68, 70–71 (2010).
149. *See infra* notes 151–55.
150. *See* Spooner & Vaughn, *supra* note 147, at 146–51.
151. *See infra* notes 152–56 and accompanying text.
152. Bowling v. Dir., Va. Dep't of Corr., 920 F.3d 192, 195 (4th Cir. 2019).

encouraging rehabilitation.[153] For juveniles who will in the end serve more time than any adult convicted, due to the age they began their sentence, Justice Kennedy referred to life in prison as granting "no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope."[154] Repeated denials of parole create similar scenarios to life without parole where "a young person who knows that he or she has no chance to leave prison before life's end has little incentive to become a responsible individual."[155] Without reforming parole hearings to ensure a fair review by the Parole Board that gives a meaningful opportunity for release, there is less encouragement for rehabilitation, and these defendants will essentially spend the remainder of their lives in prison.[156]

V. PROPER JUVENILE SENTENCING

Essential life sentences raise the same issues that are present with mandatory life sentencing and should be treated the same.[157] In *Graham*, the Supreme Court stated a sentence lacking "any legitimate penological justification is by its nature disproportionate to the offense."[158] These penological justifications include incapacitation, rehabilitation, retribution, and deterrence.[159] The length of a term is not a deterrent to a juvenile who is impulsive and immature.[160] Life sentences that repeatedly deny the opportunity for parole or parole considerations inherently reduce any motivation for rehabilitation.[161]

In the case of Thomas Bowling, the Parole Board's repeated denials of his parole have been cited by the Board's members as necessary retribution due to the severity of his crime.[162] However, these continued denials over the past fifteen years indicate that there is no consideration of his rehabilitative efforts.[163] Without raising his attempts at rehabilitation, it ignores the already established idea that juveniles are different from adults.[164] The court in *Graham*

153. Spooner & Vaughn, *supra* note 147, at 137.
154. Graham v. Florida, 560 U.S. 48, 79 (2010).
155. *Id.*
156. *See id*. at 70–71, 74.
157. *See supra* notes 152–56 and accompanying text.
158. *Graham*, 560 U.S. at 71.
159. *Id.* at 72.
160. *Id.*
161. Burke, *supra* note 145, at 283.
162. *See* Bowling v. Dir., Va. Dep't of Corr., 920 F.3d 192, 195 (4th Cir. 2019).
163. *Id*. at 195–96.
164. *See supra* Section II.A.

"emphasized the importance of giving juvenile offenders a chance to become rehabilitated."[165]

As a result, rehabilitation and meaningful opportunities for parole must become the norm in sentencing juveniles across the country.[166] However, juveniles have less access to necessary rehabilitative services than other adult prisoners, and without the opportunity for parole, they may be less motivated to take advantage of ones that are available.[167]

Currently, the parole system uses a risk assessment that anticipates recidivism.[168] The parole board makes determinations by reviewing case summaries, recommendations by analysts, testimony from victims, and in person interviews of the defendant.[169] Often, the parole board members weigh crime severity, victim impact, and the prisoner's offense higher than steps taken for rehabilitation.[170] In juveniles, this is not the most effective manner to consider parole eligibility.[171] In line with the Supreme Court's holdings on juvenile-specific Eighth Amendment protections, someone's age at the time of offense should be recognized as an incredibly mitigating circumstance, as well as steps taken for rehabilitation since incarceration.[172] A meaningful opportunity for parole must include a parole hearing that considers these factors.[173] This can be created with reviews completed by the professional individuals the juveniles work directly with while in prison and reports by psychologists of true rehabilitation and progress.[174] This progress must be given greater weight than the original crime.[175]

Parole hearings must not only consider how children are different but must also review the individual as he or she has matured into an

165. Josh Rovner, *Juvenile Life Without Parole: An Overview*, THE SENTENCING PROJECT (Feb. 25, 2020), https://www.sentencingproject.org/publications/juvenile-life-without-parole/ [https://perma.cc/42Y7-D5BA].
166. *See infra* notes 173–83 and accompanying text.
167. *See* Rovner, *supra* note 165.
168. Matthew Drecun, Note, *Cruel and Unusual Parole*, 95 TEX. L. REV. 707, 711 (2017).
169. *Id.* at 711–12.
170. *See id.* at 712.
171. *See infra* notes 172–79 and accompanying text.
172. *See* Miller v. Alabama, 567 U.S. 460, 473–76 (2012); *see* Graham v. Florida, 560 U.S. 48, 77–79 (2010).
173. *See infra* notes 174–83 and accompanying text.
174. *See* Courtney B. LaHaie, *A Model for Juvenile Parole Reform: California's Youth Offender Parole Hearings Challenge the Modern Parole System and Apply the Fundamental Principles in* Graham *and* Miller *to the Release Decision-Making Process*, 11 CAL. LEGAL HIST. 475, 502–03 (2016).
175. *See id*. at 502.

adult.[176] While the severity of crimes can indicate evil or malice in an individual, they can also be indicative of an immature or irrational juvenile acting without thinking of the consequences.[177] As seen in earlier discussed cases,[178] the Court has held that oftentimes these crimes can be traced to immaturity, impressionability, and a poor home environment, and that rehabilitation can help.[179]

After a certain period of time, there must be a guaranteed opportunity for consideration by a parole board.[180] This opportunity should take into account both the age of the individual at the time of the offense and their actions since imprisonment and entrance into adulthood.[181] Many other countries mandate a parole review after ten to fifteen years and "[i]f adequate rehabilitation has not occurred during these years in prison, as decided by experts, the individual may remain in prison and his/her case be reviewed again in another few years."[182] Some states have taken definitive action to implement such standards.[183]

California is a recent leader in this effort.[184] Beginning in 2013, the California legislature passed a bill that created "Youth Offender Parole Hearings."[185] This law requires that fifteen to twenty-five years after imprisonment, individuals who committed offenses as juveniles automatically come up for parole review.[186] The overall intent and goal of these massive reforms were stated as follows:

> The purpose of this act is to establish a parole eligibility mechanism that provides a person serving a sentence for crimes that he or she committed as a juvenile the opportunity to obtain release when he or she has shown that he or she has been rehabilitated and gained maturity, in accordance with . . . the decisions of the United States Supreme Court in *Graham v. Florida* and *Miller v. Alabama*. . . . It is the intent of the Legislature to create a process by which growth and maturity of youthful offenders

176. *See infra* notes 177–79 and accompanying text.
177. *See supra* Section II.A.
178. *See, e.g.*, Miller v. Alabama, 567 U.S. 460 (2012).
179. *See* Roper v. Simmons, 543 U.S. 551, 559 (2005).
180. *See infra* notes 181–205.
181. *See supra* notes 172–76 and accompanying text.
182. Rovner, *supra* note 165, at 5.
183. *See infra* notes 184–89 and accompanying text.
184. *See infra* notes 185–89 and accompanying text.
185. LaHaie, *supra* note 174, at 502.
186. *See* Rovner, *supra* note 165, at 5.

> can be assessed and a meaningful opportunity for release established.[187]

The primary difference between juvenile parole hearings and adult ones is that the parole board must "give great weight to the diminished culpability of youth . . . and any subsequent growth and increased maturity of the prisoner."[188] Further, all evaluations must be given by licensed psychologist who understand these differences.[189]

Additionally, following the American Psychological Association's findings that brain development continues through late adolescence,[190] the legislature created a timeframe for guaranteed parole eligibility.[191] Even those with the harshest sentences must be up for parole within 15 years of incarceration.[192] Although juveniles are required to show significant rehabilitation during their time prior to the parole hearing, this law now requires the parole board to give immense weight to the age factor.[193]

Granting juveniles the chance for a meaningful opportunity of parole requires more than just a hearing.[194] Following the lead of California, a meaningful opportunity for parole will require that all individuals up for parole undergo evaluation by a psychologist to generate a report which is to be submitted to the parole board in question.[195] The psychologist's report—which should include a recommendation and account for the individual's age and related mitigating circumstances at the time of the offense—should be given the most weight.[196] If a parole board disagrees with the psychologist's recommendation, they must issue a decision detailing reasons that include more than the original severity of the crime.[197] All juveniles should be given the chance for rehabilitation and redemption; thus, evaluations performed by psychologists—with consideration of a juvenile's ability to truly change—should be understood to be the most important factor in granting parole.[198] In

187. LaHaie, *supra* note 174, at 502.
188. CAL. PENAL CODE § 4801(c) (2018).
189. LaHaie, *supra* note 174, at 502.
190. *See id.* at 504.
191. *See id.*
192. *See id.*
193. *See id.* at 505.
194. *See infra* notes 195–200 and accompanying text.
195. *See* CAL. PENAL CODE § 3051(f)(1) (2020).
196. *See supra* notes 172–75, 188–89 and accompanying text.
197. *See supra* notes 165–79 and accompanying text.
198. *See supra* notes 180–95 and accompanying text.

Miller, the Court adopted the American Psychological Association's belief that "children are different."[199] Following the Association's determination that "only 16 percent of young adolescents who scored in the top quintile of a juvenile psychopathy measure would eventually be assessed as psychopathic at age 24,"[200] there should be large weight given to the assessments performed by psychologists trained to see these alerting factors and the possibility of reform.

There must be uniform opportunities for convicted juveniles across the country to have access to meaningful parole opportunities, no matter which the state they are convicted in.[201] The California model is a strong standard all states should look to.[202] Parole hearings should be productive and all encompassing, rather than a show that will hardly ever result in release.[203] With the different circuits split on how to handle the matter of de facto life sentences,[204] there must be mandated requirements across the country that dictate youth as a major and mitigating factor, and grant all juveniles a meaningful opportunity to show all rehabilitative efforts completed throughout their sentence.[205]

VI. CONCLUSION

Over the past twenty years, the Supreme Court has declared that the age of individuals when committing a crime matters and should be considered in overall sentencing.[206] However, this holding has only eliminated mandatory sentencing that does not account for factors of youth, mitigating circumstances, and the use of the death penalty for juvenile offenders.[207] Thus, courts now implement equally egregious essential life sentences that place juvenile offenders behind prison walls for just as long as they would have been prior to *Graham*, *Miller*, and *Montgomery*.[208] There must be a uniform rule granting every juvenile offender the opportunity for a parole hearing that takes into consideration the rehabilitative efforts

199. *See* Miller v. Alabama, 567 U.S. 460, 480 (2012).
200. Hoesterey, *supra* note 11, at 181 (quoting Brief for Am. Psychol. Ass'n et al. as Amici Curiae in Support of Petitioners, Miller v. Alabama, 567 U.S. 460 (2012) (Nos. 10-9646, 10-9647) 2012 WL 174239, at *21).
201. *See supra* notes 147–56 and accompanying text.
202. *See supra* notes 184–95 and accompanying text.
203. *See supra* notes 157–79 and accompanying text.
204. *See supra* Part III.
205. *See supra* notes 157–65.
206. *See supra* Part II.
207. *See supra* Part II.
208. *See supra* Part IV.

and psychological analysis and recommendations of every individual standing before the board.[209] Without it, the disproportionate sentencing practices rejected in *Graham, Miller, and Montgomery* will continue to thrive, only in different forms.[210]

209. *See supra* Part V.
210. *See supra* Section III.B; *see also supra* Parts IV–V.