Evolving the Standard of Decency

How the Eighth Amendment Reduces the Prosecution of Children as Adults

BY HANNAH SEIGEL PROFF AND MICHAEL STEVENS JUBA

The U.S. Supreme Court recently granted juveniles greater Eighth Amendment protections in several path-marking cases, reasoning that juveniles are constitutionally different from adults for purposes of punishment. During the 2012 and 2016 legislative sessions, the Colorado General Assembly responded with expansive changes to how children are prosecuted and sentenced. This article discusses these protections.

Colorado's juvenile court system was created in 1903 by Denver Judge Benjamin Lindsey, who was appointed to the bench in 1901. Colorado's system, founded on the premise that children are fundamentally different from adults, is based on a philosophy of rehabilitation rather than punishment.[1] However, this rehabilitative philosophy has not applied to all Colorado children charged with offenses. Since its inception, Colorado's juvenile court system has statutorily allowed for the prosecution of children in adult courts in certain circumstances.[2]

Over the years, the prosecution of children in adult courts has been transformed. During the early years, the prosecution of children as adults was limited to 16- to 17-year-olds and was allowed only for the most severe offenses.[3] Between 1968 and 2010, Colorado lawmakers passed several laws expanding the circumstances under which children could be prosecuted in adult court; these laws also required the imposition of adult sentences on children prosecuted as adults.[4] Before reforms in 2012, the decision as to whether a child should be prosecuted as an adult was left to the sole discretion of the prosecuting attorney—a process referred to as "direct filing."[5]

A series of legislative reforms in 2012 and 2016 significantly reduced a prosecutor's

ability to file charges against children in adult criminal court and changed the way the court system must view adolescence in determining punishment.[6] These reforms are consistent with a developing body of social science research and U.S. Supreme Court precedent recognizing significant distinctions between children and adults. This article discusses the research and Eighth Amendment jurisprudence underlying Colorado's legislative reforms, provides a brief overview of the substance of the reforms, describes available data regarding the impact of the reforms, and identifies outstanding questions.

The Adolescent Brain: A Work in Progress

Extensive cognitive and social science research suggests that because adolescence is a transitory stage, youth matters when determining an appropriate punishment.[7] The U.S. Supreme Court has acknowledged that children are in the process of developing both mentally and physically and are constitutionally different than adults.[8] A basic understanding of this common sense recognition of children's differences from adults inspired the creation, at the turn of the 20th century, of a separate justice system for juveniles.[9] The founders of Colorado's juvenile justice system comprehended the prudence of specialized treatment of children by the justice system without the benefit of contemporary research concerning social science or neuroscience.

Research shows that the human brain is not fully developed until a person reaches the mid-20s.[10] While their adolescent brains are still growing, children and young adults are prone to participate in risky behavior.[11] Thanks to advancements in adolescent brain development research, it is now known that "reward pathways" in teen brains are under construction during adolescence and young adulthood.[12] As a result, teens are more likely to make split-second decisions, acting on impulse and without regard for the long-term negative consequences that may result from their actions.[13] As the adolescent brain (specifically, the prefrontal cortex) matures, people develop more control over impulses and can use reason to make better judgments—abilities necessary to make careful decisions when involved in stressful situations.[14] This research and understanding of the characteristics of youth have played an important role in the evolution of the Eighth Amendment as applied to children.

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The Eighth Amendment as Applied to Children

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[15] December 15, 2016 marked the 225th anniversary of the ratification of the Eighth Amendment to the U.S. Constitution. Over time, the "cruel and unusual punishment" clause has transformed as it pertains to the punishment of children in criminal courts. Once interpreted to allow the execution of children, this clause now bars mandatory sentences of life without parole for homicide offenses committed by juveniles.

The original understanding of the Eighth Amendment focused only on the particular methods of punishment, allowing legislatures wide discretion to define punishments without regard to whether a defendant was a juvenile or an adult.[16] The clause was interpreted to forbid "punishments of torture,"[17] punishments involving "a lingering death,"[18] and punishments with a purpose of "inflict[ing] unnecessary pain,"[19] without consideration of whether a punishment was excessive. This wide latitude granted to state legislatures led to the execution of hundreds of children and the lengthy imprisonment of thousands more throughout the United States.[20] The first juvenile known to be executed in America was Thomas Graunger, who was put to death after being found guilty of bestiality in 1642 in Plymouth Colony, Massachusetts.[21] Since that time, an estimated 364 juveniles have been put to death, including George Stinney, who was electrocuted when he was 14, and James Arcene, who was put to death for a crime committed when he was 10.[22]

Initially, the Eighth Amendment allowed for the death penalty as an appropriate punishment for a wide array of offenses. Until 1826, all felonies, except mayhem and petty larceny, were punishable by death.[23] The "cruel and unusual punishment" clause was originally understood to forbid only punishment outside of that proscribed by the common law tradition; whether a punishment was disproportionate was not considered.[24]

Eighth Amendment jurisprudence gradually evolved to incorporate the concept that a punishment can be unconstitutional if it is disproportionate.[25] In 1910, the U.S. Supreme Court reasoned: "Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth."[26] The Court stated for the first time that the "cruel and unusual punishment" clause "may acquire meaning as public opinion becomes enlightened by a humane justice."[27] In 1958, the U.S. Supreme Court recognized

that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[28]

It was another 24 years before the Court began to apply this conception of the Eighth Amendment to cases involving children. In *Eddings v. Oklahoma*, the Court vacated the death sentence imposed upon a 16-year-old, recognizing that "youth is more than a chronological fact."[29] The Court in *Eddings* did not directly confront the constitutionality of executing children, but rather for the first time constitutionalized the mitigating qualities of youth through the Eighth Amendment.[30] However, the U.S. Supreme Court was still closely divided on the application of the "cruel and unusual punishment" clause to children, as seen in two subsequent decisions. Six years later, in 1988, a plurality of the Court in *Thompson v. Oklahoma* held that the Eighth Amendment categorically bars the execution of children who committed crimes when they were 15 years old or younger.[31] The very next year, a different plurality in *Stanford v. Kentucky* held that the clause did not forbid the execution of people who committed offenses when they were 16 years old or older.[32] The concurring vote in each case came from Justice O'Connor, who in 1988 held on very narrow grounds that a person who was "below the age of 16 at the time of their offense may not be executed under the authority of a capital punishment statute that specifies no minimum age at which the commission of a capital crime can lead to the offender's execution."[33] In 1989, O'Connor concluded that "it is sufficiently clear that no national consensus forbids the imposition of capital punishment on 16- or 17-year-old capital murderers."[34]

The Court ultimately left the question of the application of the Eighth Amendment to children unsettled for another 17 years. In those 17 years, public opinion gradually shifted toward abolishing the execution of juvenile offenders, as evidenced through legislative enactments.[35] In 2005, the U.S. Supreme Court followed suit and began a consistent and unified move toward recognizing that the Eighth Amendment creates a constitutional mandate that requires a punishment to consider the mitigating qualities of youth. In *Roper v. Simmons*, Justice Kennedy overruled *Stanford v. Kentucky* (an opinion in which he had joined) and held that the Eighth Amendment categorically bars the execution of a person who committed any offense under the age of 18.[36]

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Roper was founded on the notion that the appropriateness of punishments can evolve based on the "progress of a maturing society."[37] This progress can lead society to conclude that some punishments are so disproportionate as to be categorically cruel and unusual, which is expressed in legislative enactments and state practices forbidding certain punishments.[38]

In three subsequent cases, the Court expanded the application of the Eighth Amendment to the imprisonment of children. After *Roper*, Justice Kennedy in *Graham v. Florida* held that the Eighth Amendment also forbids the imposition of a sentence of life without parole for juveniles who commit non-homicide offenses.[39] In *Miller v. Alabama*, the Court rejected mandatory sentences to life without parole for children convicted of homicide offenses, holding that the Eighth Amendment prohibits courts from automatically imposing life without parole sentences on offenders who committed homicide offenses while they were juveniles.[40] The Court did not categorically bar life without parole sentences for juveniles but stated that a court must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."[41] Next, in *Montgomery v. Louisiana*, the Court applied *Miller* retroactively.[42]

The overarching reasoning in each case stems from the Eighth Amendment's guarantee that punishment for crime should be graduated and proportioned to the offense—and childhood matters in this analysis. The U.S. Supreme Court emphasized three general differences between juveniles and adults mandating a categorical rule that certain punishments are always disproportionate. First, "as any parent knows and as the scientific and sociological studies" confirm, juveniles have a lack of maturity and underdeveloped sense of responsibility that lead to reckless and ill-considered decisions.[43] Second, juveniles are more vulnerable and susceptible to negative influences and outside pressures; juveniles are born into their situations in life and have less control over their own environment.[44] And third, the character of a juvenile is not as well formed as that of an adult; the personality traits of a juvenile are transitory and less fixed than traits of an adult.[45]

These three characteristics of juveniles led the Court to conclude that it is misguided to equate the moral failings of a minor with those of an adult, and thus certain punishments are categorically disproportionate because of the greater possibility that a juvenile's character deficiencies will be reformed.[46] The Court recognized four legitimate penological justifications: retribution, deterrence, incapacitation, and rehabilitation.[47] Applying the characteristics of youth to these penological justifications led the Court to conclude that certain punishments upon juveniles are unjustified and therefore constitutionally disproportionate.[48]

Retribution must be directly related to the "personal culpability of the criminal offender."[49] However, youth always mitigates the offender's conduct, and thus leads to a categorically less blameworthy offender.[50] Deterrence similarly does not apply with equal force, because juveniles are naturally reckless and impulsive, and are less likely to take a possible punishment into consideration when making decisions.[51] Incapacitation cannot apply equally either, because of the changing character traits attendant to youth and the greater possibility for reform.[52] And finally, the concept of rehabilitation greatly favors granting children greater protections and rights, because of their capacity for change.[53]

The cases recognizing greater constitutional protections for children are not "crime-specific."[54] The rationale extends to children not because of the crime, but because "youth matters," and a sentence must always consider the "mitigating qualities of youth."[55] The characteristics of children establish the principle that "children are constitutionally different from adults for purposes of sentencing."[56]

Colorado's Direct-File Reforms

Consistent with the advancement of knowledge regarding adolescent brain development and the U.S. Supreme Court's instruction that the Eighth Amendment requires consideration of the mitigating qualities of youth, Colorado enacted legislation between 2008 and 2012 that significantly curtailed the prosecution of children as adults.[57]

Reforms through 2012

Before 2012, Colorado made modest changes to the laws concerning the prosecution of children in adult court. In 2006, the state enacted legislation that abolished the sentence of juvenile life without parole.[58] In 2009, the legislature modified laws relating to the housing of juveniles in adult jails.[59] And in 2010, changes were made to the direct file statute, allowing time for the child's attorney to collect information about the child, to investigate the alleged criminal act, and present this mitigation to the prosecution before the prosecutor's ultimate decision to prosecute the child in adult court.[60] If the prosecutor, after reviewing the information presented by the defense, decided to prosecute the child in adult court, the 2010 statute required the prosecutor to file a statement with the adult court explaining the prosecutor's reasoning for filing the case directly in adult court.[61] However, the discretion to charge a juvenile as an adult remained solely with the prosecutor.

Substantial reform came to fruition in 2012 with the passage of HB 12-1271. The bill curtailed the prosecution of children as adults by limiting the ages and types of crimes that could lead to direct filing of charges against children in adult criminal court, establishing a procedure through which children filed in adult court could petition for reverse transfer to juvenile court, and expanding the sentencing options for children convicted in adult court.[62]

The 2012 reforms changed the eligibility criteria for charging Colorado children as adults and introduced judicial oversight to the direct-file process. In limited situations, CRS § 19-2-517(1)(a) allows prosecutors to directly file a case in adult court. However, CRS § 19-2-517(3)(a) permits the child to file a "reverse transfer" motion to request a hearing and ask the judge to send the case back to juvenile court. If the child's attorney requests a reverse transfer hearing, the court must set the reverse transfer hearing and permit the prosecution to file a response.[63]

Additionally, the law raised the age for direct-file eligibility from 14 to 16.[64] It also removed several crimes from direct-file eligibility: children can no longer be direct-filed upon for vehicular homicide, vehicular assault, or felonious arson,[65] and children labeled "habitual juvenile offenders" can no longer be direct-filed upon based on any type of felony.[66]

CRS § 19-2-517(1.5) provides that if the court fails to find probable cause after a preliminary hearing for the direct-file eligible crime charged or if the direct-file eligible charge is later dismissed, the case must return to juvenile court. CRS § 19-2-517(3)(b)(I) to (XI) removes the requirement that the prosecutor consider certain criteria in deciding whether to direct file in adult court, replacing it with the requirement that the judge consider the following criteria at the reverse-transfer hearing:

- the seriousness of the offense;
- whether the offense was aggressive, violent, premeditated, or willful;
- whether the offense was one against a person or property, with greater weight being given to offenses against persons;
- the age and maturity of the child;
- the child's prior criminal/adjudicative history;
- the child's mental health status;
- the likelihood of the child's rehabilitation;
- the interest of the community in punishment commensurate with the gravity of the offense;
- any impact on a victim of the offense;
- whether the child has been previously committed to the Department of Human Services for a felony adjudication; and
- whether the child used, possessed, or threatened the use of a deadly weapon during commission of the offense.

The 2012 legislation further modified the sentencing guidelines for children charged as adults, creating a sentencing structure where children receive less severe sentences than under the prior law. Unless convicted of a class 1 felony or subject to an indeterminate sentence on a sex offense conviction, children convicted as adults are no longer subject to mandatory minimum sentencing under the crime of violence statute.[67] Children who are convicted as adults of a felony offense not eligible for direct file may be sentenced as juveniles or as adults.[68] Children convicted of only misdemeanor offense(s) must be prosecuted as juveniles and sentenced as juveniles.[69] Although the Colorado direct-file law articulates factors that must be considered when a court decides whether to prosecute a child in adult court, the Colorado sentencing law does not articulate specific factors that the court must consider when sentencing a child prosecuted in adult court.[70]

2016 Juvenile Life without Parole Reforms

Early in the Colorado General Assembly's 2016 session, the U.S. Supreme Court in *Montgomery v. Louisiana* held that the *Miller* decision's bar on mandatory life sentences for crimes committed in childhood announced a new

substantive rule of constitutional law that must be applied retroactively to cases on collateral review.[71] *Montgomery* overturned the Colorado Supreme Court's opinion in *People v. Tate*, where the Court had ruled that *Miller* was not to be applied retroactively to cases on collateral review.[72] At the time of the U.S. Supreme Court's ruling in *Montgomery*, 48 Colorado individuals were serving life without parole for crimes committed before their 18th birthday, and the majority of these cases were not on collateral review and were therefore ineligible for resentencing under *Tate*.[73] With the ruling in *Montgomery*, the future of these 48 individuals serving illegal mandatory life sentences became ripe for legislative action.[74]

Legislators had previously attempted to address the issue of individuals sentenced to life without the possibility of parole for crimes committed in childhood during the 2015 legislative session, with HB 15-1292.[75] This bill would have provided a new sentencing range for juveniles convicted of class 1 felonies and given a judge discretion to choose between (1) a determinate range of 24 to 48 years followed by a mandatory 10 year-period on parole, or (2) imposition of a sentence of life imprisonment with the possibility of parole after 20 calendar years. This sentencing range would have applied retroactively and to all future cases in which youth were convicted of first-degree murder.[76] However, HB 15-1292 was postponed indefinitely by the House Judiciary Committee on March 26, 2015.[77]

As a result of *Montgomery*, members of the Colorado General Assembly began working on legislation to align Colorado sentencing with the holding in *Miller*. Two bills, SB 16-180 and SB 16-181, were signed into law by the governor on June 10, 2016. SB 16-181 modifies CRS § 18-1.3-401(4)(b)(1) to alter the way Colorado treats juveniles convicted of first-degree murder by retroactively abolishing the sentence of life without parole for all juvenile offenders and requiring a resentencing hearing. At the resentencing hearing, the court must resentence those previously serving life without the possibility of parole to a sentence of life with the possibility of parole after 40 years, with eligibility for earned time. For an individual convicted under a felony murder theory, the sentencing court must consider mitigating factors to determine whether to impose (1) a sentence of life with the possibility of parole after 40 years with earned time, or (2) a determinate sentence of between 30 and 50 years in prison.[78] These changes offered the 48 offenders who had been sentenced to life without parole between 1990 and 2006 an opportunity to be resentenced in a manner that complies with the central tenet of *Miller*.

SB 16-180 created CRS § 17-34-102, which requires the Department of Corrections to develop and implement a program for offenders who were sentenced to an adult prison for a felony offense committed before their 18th birthday and who are determined to be appropriate for placement in the program. Under CRS § 17-34-101(1)(a)(I) and (III), an offender serving a sentence for a felony committed while a juvenile may apply for placement in the program if he has served 20 calendar years (25 years if serving a first-degree murder sentence) of his sentence and has not been released on parole. In determining whether to place an offender in the program, the executive director or the director's designee must consider certain criteria set forth in this statute, including the individual's participation in programming while in prison and whether she has accepted responsibility for the criminal behavior. Under CRS § 17-22-403(4.5), an offender who successfully completes the program may apply to the governor for early parole. The governor may grant early parole if, in the governor's opinion, extraordinary mitigating circumstances exist and release from custody is compatible with the safety and welfare of society. The state board of parole must make a recommendation to the governor concerning whether early parole should be granted. This program began accepting applicants in October 2017. If parole is granted, the individual will remain on parole for the remainder of her natural life.

Other States' Sentencing Models for Children in Adult Court

Colorado is not alone in its efforts to reform laws to come into compliance with the central tenet of the *Roper-Graham-Miller-Montgomery* line of cases. States throughout the nation continue to modify statutes and policies created in the 1990s that placed thousands of children in the adult criminal justice system. In 2015 alone, advocacy, research, and fiscal analyses all led to the introduction of more than 30 bills nationwide to remove children from the adult criminal justice system and give them an opportunity to receive rehabilitative services.[79] Changes are occurring in all regions of the country led by state and local officials of both major parties and supported by a bipartisan group of governors.[80]

In Nevada, for example, the court is now required to consider the differences between juvenile and adult offenders when determining an appropriate sentence for a person convicted as an adult for an offense committed when the person was younger than 18 years of age.[81] A juvenile sentenced as an adult and serving a prison sentence for an offense that did not result in death is eligible for parole after the prisoner has served 15 calendar years.[82]

Similarly, in West Virginia, a child convicted as an adult and serving a prison sentence is eligible for parole after 15 years.[83] However, unlike Nevada's statute, West Virginia's law applies even to children convicted as adults of causing the victim's death.[84] West Virginia also reformed its parole board process for children convicted in adult court. During the parole hearing, the parole board is required to take into consideration the diminished culpability of adolescents as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner during incarceration.[85]

Before determining the sentence for a child charged and convicted of a felony as an adult, West Virginia courts are required to consider: age at the time of the offense; impetuosity; family and community environment; ability to understand the risks and consequences of the conduct; intellectual capacity; the outcomes of a comprehensive mental health evaluation; peer or familial pressure; level of participation in the offense; ability to participate meaningfully in his or her defense; capacity for rehabilitation; school records and special education evaluations; trauma history; faith and community involvement; involvement in the child welfare system; and any other mitigating factor or

circumstance.[86] West Virginia's statute also requires the court to consider the outcomes of any comprehensive mental health evaluation conducted by a mental health professional licensed to treat adolescents. The evaluation must include family interviews, prenatal history, development history, medical history, history of treatment for substance abuse, social history, and a psychological evaluation.[87]

Much like Nevada and West Virginia, Connecticut now requires a court sentencing a juvenile as an adult to consider the defendant's age at the time of the offense, the hallmark features of adolescence, and any scientific and psychological evidence showing the differences between a child's brain development and an adult's brain development.[88] To assist courts in sentencing children, Connecticut law requires the judicial branch's Court Support Services Division to compile reference materials relating to adolescent psychological and brain development.[89]

Unlike Colorado's youth-in-adult-court sentencing schemes, these sentencing statutes mandate that the court take into account individualized characteristics of adolescence when sentencing children in adult court and provide the possibility of early parole for children convicted as adults.

Impact of Juvenile Sentencing Reform in Colorado

According to data from the State Court Administrator's Office shown in the accompanying chart, the prosecution of youth in adult court has declined substantially since reform began in Colorado in 2009.[90]

Over the three-year period from April 20, 2012 to April 20, 2015, 79 children in 100 cases were either directly filed or transferred into adult court in Colorado, a significant reduction from the number of children subjected to direct file in each of the years between 2005 and 2009.[91]

Further breakdown of this data indicates that the prosecution of children as adults is concentrated in a handful of Colorado's 64 counties. Forty-eight counties prosecuted no children in adult court between April 20, 2012 and April 20, 2015.[92] Adams County, Denver County, and El Paso County account for 60% of the cases involving children prosecuted as adults.[93] The data shows that Denver County was by far the most frequent direct filer, having prosecuted more children as adults than Adams County, El Paso County, and Jefferson County combined.[94] Denver also prosecuted more than three times as many children as adults than El Paso County despite the two counties' similar populations.[95]

According to the data, the majority of cases that are direct filed in Colorado involve a high charge of homicide, robbery, assault, or kidnapping. Since April 20, 2012, homicide cases have accounted for 37% of children prosecuted in adult court[96] as compared to only 15% of child prosecutions in adult court between 1999 and 2010.[97]

Outstanding Questions

Despite these recent reforms, Colorado courts would benefit from additional guidance on sentencing options.

Concurrent Sentences

SB 16-181 left unanswered what should happen at a resentencing hearing for individuals sentenced to lengthy consecutive sentences in addition to a life without parole sentence. Many of the 48 individuals currently serving juvenile life without parole sentences are in this situation, having been sentenced to life without the possibility of parole as well as a consecutive sentence for another charge or case. Under SB 16-181, these individuals are entitled to a resentencing hearing on their first-degree murder convictions; however, unless the consecutive sentences are also addressed, such sentences could amount to de facto life sentences without the individualized consideration arguably required by *Miller*.[98]

Colorado practitioners face a current split in authority regarding the reach of *Miller* and *Graham* to consecutive and aggregate sentences. In *Lucero v. People*, the Colorado Supreme Court held that "neither *Graham* nor *Miller* applies to an aggregate term-of-years sentence. . . ."[99] The *Lucero* Court held that "[m]ultiple sentences imposed for multiple offenses do not become a sentence of life without parole, even though they may result in a lengthy term of incarceration."[100] The Court explained that life without parole is a specific sentence imposed for a specific crime and is different than multiple sentences for multiple crimes.[101]

However, two months before *Lucero*, the Tenth Circuit Court of Appeals held in *Budder v. Addison* that *Graham* "announced a categorical rule" prohibiting a life sentence on a juvenile offender who did not commit homicide.[102] If a state sentences a juvenile offender to life, it must provide some realistic opportunity to obtain release before the end of that term. The *Budder* court found that *Graham*'s holding applies to all juvenile offenders who did not commit homicide and applies to all sentences that deny offenders a realistic opportunity to obtain release.[103] The *Budder* court concluded

NUMBER OF CHILDREN PROSECUTED IN ADULT CRIMINAL COURT

2005 Cases	2009 Cases	2010 Cases	2011 Cases	2012 Cases	2013 Cases	2014 Cases	2015 Cases
Prior to direct file reform	Direct File Veto (HB 08-1208)	Direct File Reform (HB 10-1413)		Substantial Direct File Reform (HB 12-1271)			January 1, 2015–April 20, 2015
163	144	76	62	27	37	43	6

its comments by stating that "[n]o fair-minded jurist could disagree with these conclusions."[104] Notwithstanding that comment, in addition to this split between the highest court in Colorado and the Tenth Circuit, which is located in Colorado, there is a direct split of authority across the country on this issue.[105] And the issue of consecutive or aggregate sentences as they relate to homicide offenses under *Miller* is also yet to be resolved.

Youth in Adult Court Sentencing Generally

The 2012 direct-file reform expanded options for sentencing children who are prosecuted as adults. When a child is charged with a direct-file eligible offense but is subsequently convicted of only a misdemeanor offense, the statute mandates that the conviction be treated as a juvenile adjudication and the child be sentenced pursuant to the Children's Code.[106] If the child is convicted of a felony offense that would not, independently, have been direct-file eligible, the court has the discretion to sentence the child as either a juvenile or an adult.[107] When a child is convicted of a direct-file eligible offense, the adult criminal court must hand down an adult sentence, but is not bound by the mandatory minimum prison sentences adults face under the crime-of-violence sentencing statute.[108]

Because of the discrepancy between the transfer and reverse transfer statutes, a 12-year-old judicially transferred from juvenile to adult court could conceivably be bound by the adult mandatory minimum sentencing structure of the adult crime of violence statute [109]—the same mandatory structure that the direct file statute clearly limits for older direct-file children.[110] The Youthful Offender System (YOS) remains a sentencing option for children convicted as adults.[111] Upon the request of either the defense attorney or the prosecutor, a child's presentence report must include a determination by the YOS warden as to whether the child is acceptable for a YOS sentence.[112]

There are a wide range of sentencing options available to a judge when sentencing a child convicted of an offense in adult court. For example, a 17-year-old convicted of attempted murder, a class 2 felony, faces zero to 48 years in prison, between two and seven years in YOS, or probation. While expanding the sentencing options available to the court was an important step forward, courts still lack guidance from the legislature when sentencing juveniles in the adult system. Other states have solved this problem by providing statutory factors that a court must consider when sentencing children in adult court.

Conclusion

Over the 225 years since ratification of the Eighth Amendment, the "cruel and unusual punishment" clause has seen a remarkable evolution as it applies to juveniles. The original understanding of the clause allowed the execution of children for any number of crimes and for crimes committed when the child was as young as 10. As society's standards of decency have evolved, so has the recognition that what was previously acceptable has become constitutionally cruel and unusual. In Colorado, the number of children entering the adult court system has been reduced, and those serving life without the possibility of parole sentences will be resentenced in the coming years. With the protection of the Constitution, the immutable characteristics of children can no longer be ignored. CL


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33. *Thompson*, 487 U.S. at 857–58.

34. *Stanford*, 492 U.S. at 381.

35. From 1989 to 2005, the practice of executing juveniles became increasingly infrequent. *Roper v. Simmons*, 543 U.S. 551, 565 (2005). In 2005, 30 states prohibited the death penalty for juveniles, and only six states had executed a juvenile since 1989. *Id.* at 564. In 2003, the Governor of Kentucky spared the life of Kevin Stanford, the named defendant in *Stanford v. Kentucky*, and refused to sign his death warrant, stating that "'[w]e ought not be executing people who, legally, were children.'" *Roper* at 565. Five states that allowed the juvenile death penalty at the time of Stanford abandoned it by 2005. *Id.*

36. *Id.*

37. *Id.* at 561.

38. *Id.* at 563.

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

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

41. *Id.* at 480.

42. *Montgomery v. Louisiana*, __ U.S. __, 136 S.Ct. 718 (2016).

43. *Roper*, 543 U.S. at 569; *Graham*, 560 U.S. at 68; *Miller*, 567 U.S. at 471; *Montgomery*, 136 S.Ct. at 733.

44. *Roper*, 543 U.S. at 569.

45. *Id.* at 570.

46. *Id.*

47. *Graham*, 560 U.S. at 71.

48. *Id.*

49. *Tison v. Arizona*, 481 U.S. 137, 149 (1987).

50. *Thompson*, 487 U.S. at 835 (reasoning that juveniles' "irresponsible conduct is not as morally reprehensible as that of an adult.").

51. *Miller*, 567 U.S. at 472 (citing *Graham*, 560 U.S. at 72; *Roper*, 543 U.S. at 571).

52. "Deciding that a 'juvenile offender forever will be a danger to society' would require 'mak[ing] a judgment that [he] is incorrigible'—but 'incorrigibility is inconsistent with youth.'" *Miller*, 567 U.S. at 472–73 (quoting *Graham*, 560 U.S. at 72–73).

53. *Miller*, 567 U.S. at 472; *Graham*, 560 U.S. at 74.

54. *Miller*, 567 U.S. at 473.

55. *Id.* at 476, 473; *Johnson*, 509 U.S. at 367.

56. *Montgomery*, 136 S.Ct. at 733 (citing *Miller*, 132 S.Ct. at 2464); *Roper*, 543 U.S. at 569–70. *See also Graham*, 560 U.S. at 68.

57. Dvorchak, *supra* note 3 at 24–26.

58. HB 06-1351; Goodman, *supra* note 1 at 1088–90.

59. HB 09-1321.

60. CRS § 19-2-517(5) (2010–11 ed.).

61. *Id.*

62. HB 12-1271 (effective Apr. 20, 2012).

63. CRS § 19-2-517(3)(a).

64. CRS § 19-2-517(1)(a).

65. HB 12-1271 § 1.

66. *Id.*

67. CRS § 19-2-517(6)(a)(I).

68. CRS § 19-2-517(6)(b).

69. CRS § 19-2-517(6)(c).

70. CRS § 19-2-517(6).

71. *Montgomery*, 136 S.Ct. 718. *See also* "Life after *Miller* and *Montgomery*: Colorado's (Revised) Solution for Unconstitutional Juvenile Sentences," 45 *Colorado Lawyer* 31 (Mar. 2016).

72. *People v. Tate*, 352 P.3d 959, 963 (Colo. 2015); *People v. Wilder*, 371 P.3d 727 (Colo.App. 2016).

73. SB 16-181 at Leg. Council Staff Research Note (Oct. 20, 2016).

74. Juvenile life without parole had been abolished prospectively in 2006 with HB 06-1315, changing the sentence for first-degree murder to a life sentence with the possibility of parole after 40 years (without earned time).

75. HB 15-1292 § 1 (postponed indefinitely on Mar. 26, 2015).

76. *Id.* at § 5.

77. *Id.* at House Committee of Reference Report, Mar. 26, 2015.

78. CRS § 18-1.3-401(4)(c)(I)(A).

79. Daugherty, "State Trends: Legislative Victories from 2011–2013 Removing Youth from the Adult Criminal Justice System" (Campaign for Youth Justice 2013).

80. *Id.*

81. Nev. Rev. Stat. Ann. § 176.017.

82. Nev. Rev. Stat. Ann. § 213.12135(1)(a).

83. W. Va. Code § 61-11-23(b).

84. W. Va. Code § 61-11-23(b).

85. W. Va. Code § 61-11-23(c).

86. *Id.*

87. W. Va. Code § 61-11-23(d).

88. Conn. Gen. Stat. 54-91g(a)(1).

89. Conn. Gen. Stat. 54-91g(d).

90. Proff and Logemann, *supra* note 6 at 17 (calendar year 2005, and 2012–15 cases; fiscal year 2009–11 cases). Prosecuted cases include cases filed in adult court, regardless of whether the case is ultimately resolved in adult or juvenile court.

91. *Id.* at 18.

92. *Id.*

93. *Id.*

94. *Id.*

95. According to the U.S. Census Bureau, Denver County had a 2010 overall population of 600,158 and a 2014 estimated overall population of 663,862; El Paso County had a 2010 overall population of 622,263 and a 2014 estimated overall population of 663,519. *Id.* at n. 89.

96. *Id.* at 19.

97. Dvorchak, *supra* note 3 at 38.

98. *Miller*'s holding can arguably be extended to include any total sentence that denies a juvenile offender a meaningful opportunity for release. *Miller*, 567 U.S. at 479.

99. *Lucero v. People*, 394 P.3d 1128, 1130 (Colo. 2017).

100. *Id.* at 1133. *See also People v. Rainer*, 394 P.3d 1141 (Colo. 2017); *Armstrong v. People*, 395 P.3d 748 (Colo. 2017); *Estrada-Huerta v. People*, 394 P.3d 1139 (Colo. 2017).

101. *Lucero*, 394 P.3d at 1133.

102. *Budder v. Addison*, 851 F.3d 1047, 1053 (10th Cir. 2017) (quoting *Graham*, 560 U.S. at 82).

103. *Id.* at 1053.

104. *Id.* at 1059.

105. *See, e.g.*, *People v. Reyes*, 63 N.E.3d 884 (Ill. 2016) (consecutive sentences totaling 97 years constituted de facto life sentence implicating *Miller*); *Henry v. State*, 175 So.3d 675 (Fla. 2015) (aggregate sentence of 90 years violates *Graham*); *Willbanks v. Dep't of Corr.*, 522 S.W.3d 238 (Mo. 2017) (multiple fixed-term consecutive sentences with parole eligibility at 85 years old do not violate *Graham*); *State v. Kasic*, 265 P.3d 410 (Az. App. 2011) (*Graham* does not apply to consecutive term-of-year sentences).

106. CRS § 19-2-517(6)(b) (2012).

107. *Id.*

108. CRS § 19-2-517(6)(a)(I).

109. CRS § 19-2-518.

110. CRS § 19-2-517(6)(a)(I).

111. CRS §§ 19-2-517(6)(a)(II) and 18-1.3-407.

112. CRS § 18-1.3-407(2)(a)(I).