NOTES AND COMMENTS

THE END OF AN ERROR: HOW OHIO ABOLISHED JLWOP THROUGH SENATE BILL 256 AND HOW THE LEGISLATION COMPARES TO OTHER JURISDICTIONS

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INTRODUCTION

Imagine for a moment: You're fourteen years old, living in government-subsidized housing in a small urban town in middle America. Your single mother works two jobs to help make ends meet, so even when you arrive home from school, she is not there to greet you. You don't really have a role model around; you have your teachers, but they don't seem to understand you. To make up for your lack of consistent familial relationships, you develop a brotherly relationship with one of the older kids, a nineteen-year-old from your neighborhood.

This nineteen-year-old has always looked out for you. One time, he put a few dollars in your pocket because he knows about your mother's struggles. He even taught you how to defend yourself. As time goes on, your sibling-like relationship forges a sense of loyalty within you. This is the one person you know you can count on, after all.

One day, your "brother" explains a plan to commit a burglary. He, along with a few of his other friends, assures you that it's "going to be easy" and "no one will get hurt." You trust them because your brother trusts them, and you know your mother could use the money—the electric company just turned off the power to your apartment. Of course, you're afraid—you've never held a gun before, let alone used one to commit a burglary. With a steely resolve, you agree to play your role in hopes that you appease one of the few people in your life that has shown you some form of companionship.

Unbeknownst to any of you, the homeowner is home, sleeping in his bed. As you and your group enter the home, a lamp is knocked over, waking the homeowner. Fearing there is an intruder in his home, he grabs a gun he keeps in

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the top drawer of his nightstand and goes to investigate the noise. Already trembling with fear, hands wet from nervous sweat, the homeowner walks clear into your line of sight. Both of your fears have become reality. Unsure of what to do and in a panic, you try to lower the gun you instinctively raised upon seeing the homeowner. Instead, your body tenses up, resulting in you squeezing the trigger, killing the person in front of you.

Prior to Senate Bill 256, if you were this teen, you faced the possibility of dying in prison. With the enactment of Senate Bill 256, youths in Ohio are no longer subjected to excessive sentences or face the possibility of dying while incarcerated. Senate Bill 256 brings Ohio in line with more than half of American jurisdictions that have eliminated juvenile life without parole (herein "JLWOP") sentences, either through legislation or court decision.[1]

Ohio was not always on the path to eliminate such sentences for youthful offenders. In truth, Ohio courts had produced case law that made it obvious that courts were drawing a proverbial line in the sand: that juveniles could be punished with such sentences, if the presiding judge so chose.

Part I of this note will take a historical look at juvenile life sentences—both at the national level and through Ohio's jurisprudence. Part II will introduce Senate Bill 256, as the legislative end to discretionary life without parole sentences imposed on juveniles. Part III will explore the effects of Senate Bill 256 and look at where these effects leave Ohio with respect to the rest of the country in its respective juvenile life without parole jurisprudence. Part IV will discuss why Senate Bill 256 is important as well as whether it goes far enough to eliminate the harm felt by children who were sentenced to life without parole in Ohio courts.

I. HISTORY

A. *Three Supreme Court Cases Set the Tone for JLWOP Sentencing*

Since 2005, three fundamental United States Supreme Court cases have either ruled on or expanded on a minor's culpability in a crime and addressed whether the punishments handed down to the children in those cases violated the Cruel and Unusual Punishment Clause of the Eighth Amendment.[2]

The line of cases began with *Roper v. Simmons*, where the Court determined that the death penalty imposed on a juvenile was forbidden by the Eighth Amendment.[3] The *Roper* court noted three reasons why juveniles were less

1. *Juvenile Life Without Parole: An Overview*, THE SENT'G PROJECT (May 24, 2021), https://www.sentencingproject.org/publications/juvenile-life-without-parole; *see also Legislation Eliminating Life-Without-Parole Sentences for Juveniles*, JUV. SENT'G PROJECT, https://juvenilesentencingproject.org/legislation-eliminating-lwop/ (last visited Aug. 7, 2020).

2. On April 22, 2021, the Supreme Court of the United States declined to expand the protection afforded to juveniles by the court in Miller v. Alabama when, in a six-to-three decision, it held judges were not required to determine if juveniles faced with a life sentence are "permanently incorrigible". *See* Jones v. Mississippi, 141 S. Ct. 1307, 1311 (2021).

3. Roper v. Simmons, 543 U.S. 551, 578 (2005).

culpable than their adult counterparts – their lack of maturity, their vulnerability to negative influences, and their undeveloped character in comparison with adults.[4]

Next, in *Graham v. Florida,* the Court considered a juvenile's culpability in a non-homicide crime and whether a life sentence imposed on that juvenile was unconstitutional.[5] In a 6-3 decision, the Court held that the Eighth Amendment "prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide."[6] Furthermore, the Court noted that a juvenile offender does not have to be guaranteed an eventual release from the sentence but must have some realistic chance to obtain release before the end of their life.[7]

Finally, in *Miller v. Alabama*, the Court addressed whether a mandatory life sentence imposed on two fourteen-year-old defendants convicted of murder violated the Eighth Amendment's prohibition on cruel and unusual punishment.[8] In determining that the mandatory sentencing schemes that subjected juveniles to life without parole were unconstitutional, the Court found that such a sentence did not consider youth-related factors that could have mitigated the sentence, including the offender's relationship with their family, environment, circumstances of the offense, and possibility of rehabilitation.[9]

B. *Ohio's Foray into JLWOP, Post-Miller*

In 2014, Ohio had its first chance to review the constitutionality of a life without parole sentence imposed on a juvenile.[10] Eric Long, seventeen, and "his two codefendants were charged . . . with several offenses stemming from two separate shootings in March 2009." [11] His two codefendants were twenty-five and twenty-six years of age.[12] All three were found guilty of various crimes, most notably two counts of aggravated murder.[13] Long was sentenced to consecutive life sentences without parole for the murder counts, along with an additional nineteen years on the other charges and gun specifications.[14] Long challenged the constitutionality of his sentences in the First District Court of Appeals, arguing that "the trial court failed to consider his youth as a mitigating factor," and that the sentence amounted to cruel and unusual punishment, a violation of the Eighth Amendment.[15] The *Long* court reviewed the decision in *Miller*, noting that the court reviewed its previous decisions regarding juveniles by acknowledging

4. *Id.* at 569-70.
5. Graham v. Florida, 560 U.S. 48, 52-53 (2010).
6. *Id.* at 82.
7. *Id.*
8. Miller v. Alabama, 567 U.S. 460, 465 (2012).
9. *Id.* at 477-78.
10. State v. Long, 8 N.E.3d 890, 892 (2014).
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 892-93.

children are "constitutionally different from adults for the purposes of sentencing."[16]

The court in *Long* went on to note that Ohio's sentencing is discretionary and that such discretion allows for a sentencing court to state its own reasoning in a sentence imposed, provided there is no mandatory prison term at issue.[17] That said, there are various factors laid out in the Ohio Revised Code for a sentencing court to use when imposing a sentence on an offender. Specifically, the court notes how R.C. 2929.12(C)(4), R.C. 2929.12(C), and (E) allow a trial court to consider undefined factors "to determine that an offense is less serious or that an offender is less likely to recidivate."[18] The court read this as to include the offender's youth.[19] The court found that "Ohio's sentencing scheme does not fall afoul of *Miller*, because the sentence of life without parole is discretionary[,]" and that "youth is a mitigating factor for the court to consider . . ." thus putting Ohio's sentencing scheme in line with *Graham* and *Miller.*[20] Additionally, and maybe most importantly, the court held that a sentencing court must have its reasoning for a life without parole sentence "clear on the record" because a LWOP sentence implies the impossibility of rehabilitation.[21]

After the *Long* court established the standard for applying the *Miller* rule in Ohio, the Second District Court of Appeals read the *Long* decision to be limited strictly to sentences of life without parole.[22] Following the Supreme Court of Ohio's holding in *Long* that a sentencing court must note its reasoning when imposing a sentence of life without parole on a juvenile, the Second District took a step further in its juvenile life without parole jurisprudence by holding aggregate sentences with a life tail (two or more sentences that have been combined, with a life designation) did not fall under the *Miller* rule because the trial court did not specifically impose a life without parole sentence. This narrowed the cases that fell under *Miller* as those only where life without parole sentences were imposed.[23]

In *State v. Jones*, the Second District Ohio Court of Appeals was faced with the question of whether an aggregate sentence of thirty-six years to life imposed on a juvenile homicide offender violated the Eighth Amendment's Cruel and Unusual Punishment Clause.[24] The defendant relied on the Supreme Court's ruling in *Graham*, arguing that while that case was about a non-homicide offender, the same rationale should apply in his case.[25] The court found this argument unpersuasive, stating that *Graham* had no applicability because his sentence was not life without parole.[26] "With regard to juvenile homicide offenders such as

16. *Id.* at 894 (quoting Miller v. Alabama, 567 U.S. 460, 471 (2012)).
17. *Id.* at 895.
18. *Id.* at 896.
19. State v. Long, 8 N.E.3d 890, 892 (2014).
20. *Id.*
21. *Id.*
22. State v. Jones, No. 26333, 2015 WL 5084751, at *3 (Ohio Ct. App. 2015).
23. *Id*. at *3-4.
24. *Id.* at *3.
25. *Id.*
26. *Id.*

Jones, the only sentences that have been found to violate the Eighth Amendment are death sentences and *mandatory* sentences of life without parole."[27]

The court also noted that one of Jones' assignments of error—his argument that the trial court did not consider his youth at sentencing—was without merit.[28] Though the appellate court found the trial court had in fact considered the defendant's youth, they continued to note that the Ohio Supreme Court in *Long* held that a sentencing court must consider youth as a mitigating factor before imposing a sentence of life without parole, effectively saying that even if the trial court had not considered his youth, he still would not have succeeded in his argument.[29]

The court reiterated this belief when another defendant, Tyrin Hawkins, was sentenced to life with the possibility of parole after thirty-three years.[30] In his appeal to the Second District, he argued that the trial court erred in not considering his youth at sentencing.[31] The court cited to its opinion in *Jones*, fortifying its reasoning that a sentencing court only has to consider youth as a mitigating factor when the defendant is sentenced to life without parole.[32] While the court noted *Long* could "be read more expansively to mean that an offender's youth always must be considered as a mitigating factor," the court instead cited to *State v. Hammond*, which refused to extend the *Long* decision to every sentence involving a juvenile offender.[33]

The following year, the Second District court found that a mandatory sentence of fifteen years to life, without consideration of the defendant's youth, also did not violate the defendant's Eighth Amendment rights.[34] The defendant Raymond Zimmerman argued that R.C. 2929.02(B)(1), which states in relevant part, "whoever is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code shall be imprisoned for an indefinite term of fifteen years to life," did not allow for a trial court to take his youthfulness into account.[35] The court found this argument unavailing, stating Zimmerman was aware that the only applicable sentence was a mandatory life sentence with parole eligibility after fifteen years when he accepted his plea deal.[36] The court further noted that Zimmerman's argument fell short because—as it was in the Jones case—it did not involve a sentence of life without parole.[37]

December 2020 brought an end to the question of whether a trial court must consider youth as a mitigating factor where a life sentence with parole eligibility was imposed on a juvenile.[38] In *State v. Patrick*, the Ohio Supreme Court noted

27. *Id.*
28. *Id.* at *1.
29. *Id.* at *2-3.
30. State v. Hawkins, 55 N.E.3d 505, 508 (Ohio Ct. App. 2015).
31. *Id.* at 507.
32. *Id.* at 509.
33. *Id.* at 509 (quoting State v. Jones, 2015 WL 5084751, at *3).
34. *See generally* State v. Zimmerman, 63 N.E.3d 641 (Ohio Ct. App. 2016).
35. *Id*. at 644.
36. *Id.* at 646.
37. *Id*.
38. *See generally* State v. Patrick, 2020-Ohio-6803 (2020).

that the differences in a life sentence parole eligibility after a term of years and a flat life sentence with no parole eligibility were immaterial.[39] "Parole eligibility does not guarantee a defendant's release from prison. As noted in the brief of amici curiae Office of the Ohio Public Defender et al., Ohio's parole-release rate was only 10.2% between 2011 and 2018."[40]

Because Ohio's sentencing scheme is discretionary, more specific situations were left unattended, with questions as to whether the sentences imposed on juveniles were violative of the Eighth Amendment as the natural opposite end of the offense spectrum. In 2016, the Supreme Court of Ohio ruled that a term-of-years sentence exceeding the non-homicide defendant's life expectancy violates the Eighth Amendment.[41] In *State v. Moore*, the defendant Brandon Moore, who was convicted of twelve charges (including three counts of robbery and three counts of rape) was sentenced to a total of 141 years, including gun specifications.[42] After an appeal, the defendant's total sentence had been reduced to 112 years.[43] Due to the length of his sentence, Moore was eligible for judicial release after serving 77 of his 112-year sentence.[44] Judicial release is a relief mechanism that allows an offender to file for release five years after the completion of the mandatory portions of their sentence.[45]

Noting that (1) the fifteen-year-old Moore would be eligible for release at age ninety-two; and (2) as a Black male, his life expectancy was just an additional 54.9 years, Moore's life expectancy fell well short of his date of eligibility for release.[46] The court thus considered whether a minimum seventy-seven-year sentence that extended beyond a fifteen-year-old non-homicide offender's life expectancy was constitutional.[47]

In relying on the three factors enumerated in *Graham*: (1) the limited moral culpability of juvenile non-homicide offenders, (2) the inadequacy of justifications for life without parole sentences, and (3) the severity of such sentences, the Ohio Supreme Court held that those same factors applied when a non-homicide offender is sentenced to prison for a term that exceeds their life expectancy.[48] The court noted that under the sentence imposed, Moore would likely die in prison or, if he lived beyond the seventy-seven years required before he became eligible for release, his sentence "likely would be among the longest ever served in Ohio."[49]

Recently, in 2019, two district courts were faced with the question of whether sentences significantly shorter than the one imposed on the defendant in *Moore* were unconstitutional. In *State v. Wiesenborn*, the Second District Court of

39. *Id.* at ¶ 33.
40. *Id.*
41. State v. Moore, 76 N.E.3d 1127, 1149 (Ohio 2016).
42. *Id.* at 1130.
43. *Id.* at 1131.
44. *Id.* at 1133.
45. OHIO REV. CODE ANN. § 2929.20 (LexisNexis 2019).
46. *Moore*, 76 N.E.3d at 1133-34.
47. *Id.* at 1134.
48. *Id.* at 1138-39.
49. *Id.* at 1140.

Appeals found that a combined sentence of 78.5 years (for crimes committed as both a juvenile and adult) did not violate the decision in *Moore* because the non-homicide defendant was eligible for release when he was fifty-two years old thanks to the sentence from his juvenile crimes.[50] The Eighth District Court of Appeals made a similar determination in *State v. Strowder*, holding that a thirty-four years to life sentence did not amount to a functional life sentence and thus did not constitute cruel and unusual punishment.[51]

The outcomes of the related cases since *Long* left crucial questions unanswered. While questions like whether a sentence exceeding a non-homicide juvenile offender's life expectancy is unconstitutional or whether *only* life sentences without parole imposed on juvenile homicide offenders are unconstitutional have been answered, Ohio had yet to definitively answer whether an aggregate sentence exceeding the life expectancy of a homicide offender, resulting in a de facto life without parole sentence, is unconstitutional. After the passage of Senate Bill 256, the Ohio Legislature has answered the question unequivocally.

II. INTRODUCTION TO SENATE BILL 256

Although Ohio courts have produced vague rules from their application of *Miller* and *Long*, progressive change is on the horizon in Ohio when it comes to prison reform and more specifically, prison reform as it relates to juveniles. On April 12, 2021, Senate Bill 256 took effect, taking the decision of whether a child is so morally corrupt that they should be caged for the rest of their life, completely from the hands of the courts.[52] This retroactive Bill, which amended several Ohio criminal statutes and has received support from professional athletes, local businesspeople, and nonprofit organizations committed to criminal legal reform, will reshape parole eligibility for current and future juvenile offenders, add safeguards for parole board denials, and perhaps most importantly, firmly abolish the imposition of a sentence of life without parole for juveniles.[53]

With Senate Bill 256, a juvenile serving a prison sentence for a non-aggravated homicide offense or serving consecutive prison sentences for multiple non-aggravated homicide offenses will be eligible for parole after serving eighteen years.[54] An aggravated homicide is defined as:

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50. State v. Wiesenborn, 135 N.E.3d 812 (Ohio Ct. App. 2019).

51. *See generally* State v. Strowder, 147 N.E.3d 1253 (Ohio Ct. App. 2019).

52. OHIO REV. CODE ANN. § 2967.132(C)(1) (LexisNexis 2021).

53. OHIO REV. CODE ANN. §§ 2151.35, 2907.02, 2909.24, 2929.02, 2929.03, 2929.06, 2929.14, 2929.19, 2967.13, 2971.03, 5149.101, 2929.07, 2967.132 (2021); *see also* Guest Columnist, *Ohio Must Stop Sentencing Kids to Die in Prison: Chris Hubbard, Kendall Lamm and Justin Morrow*, CLEVELAND.COM (Aug. 21, 2020), https://www.cleveland.com/opinion/2020/08/ohio-must-stop-sentencing-kids-to-die-in-prison-chris-hubbard-kendall-lamm-and-justin-morrow.html; Guest Columnist, *Ohio Bill Would Prevent the Cruel Practice of Sentencing Juveniles to Life with No Parole: John C. Rush*, CLEVELAND.COM (July 19, 2020), https://www.cleveland.com/opinion/2020/07/ohio-bill-would-prevent-the-cruel-practice-of-sentencing-juveniles-to-life-with-no-parole-john-c-rush.html.

54. § 2967.132(C)(1).

> any of the following that involved the purposeful killing of three or more persons, when the offender is the principal offender in each offense: (a) aggravated murder; (b) any other offense or combination of offenses that involved the purposeful killing of three or more persons.[55]

If the juvenile is sentenced to one or more homicide offenses (with none being aggravated homicide offenses), the juvenile is eligible for parole after serving twenty-five years.[56] Homicide offenses are to include "a violation of section 2903.02, 2903.03, 2903.04, or 2903.041 of the Revised Code or a violation of section 2903.01 of the Revised Code that is not an aggravated homicide offense."[57] The sections listed are statutes in reference to murder, voluntary manslaughter, involuntary manslaughter, or reckless homicide or the offense of aggravated murder, respectively.[58]

If the offender has committed an act of terrorism where the most serious underlying offense is murder or a first-degree felony, the bill creates a mandatory sentence of thirty years to life. [59] Similarly, if the juvenile offender was sentenced for the aggravated murder, murder, or forcible rape of a young child, the bill requires the court to sentence the offender to an indefinite term of thirty years to life.[60] Under previous law, both scenarios would have resulted in a mandatory sentence of life without parole.[61]

At sentencing, the court is required to consider, among other things, the offender's: (1) chronological age at time of offense along with that age's "hallmark features" like immaturity, failure to appreciate risks, and impulsivity, (2) the offender's participation in the offense, and (3) whether the offender might have been charged with and convicted of a lesser crime were it not for incompetencies related to a youth's inability to deal with police and prosecutors, as mitigating factors.[62] These same factors must also be considered mitigating at the parole for a juvenile who has been convicted or pleads guilty to a felony offense.[63]

Additionally, the parole board must also notify the state public defender, the appropriate prosecuting attorney, and the victim at least sixty days before the board begins review or proceedings to the offender seeking parole.[64] If parole is denied, the parole board must conduct a subsequent release review no later than five years after the denial.[65]

Senate Bill 256 is the culmination of a bipartisan effort on behalf of attorneys, juvenile justice advocates, and others who have realized the national trend toward abolishing life without parole sentences after *Miller* and the necessity for creating

55. § 2967.132(A)(1).
56. OHIO REV. CODE ANN. § 2967.132(C)(2).
57. § 2967.132(A)(2).
58. § 2967.132(C)(1).
59. OHIO REV. CODE ANN. § 2909.24(B)(6) (LexisNexis 2021).
60. OHIO REV. CODE ANN. § 2971.03(A)(5) (LexisNexis 2021).
61. *See* § 2971.03(A)(4); *see also* § 2909.24(B)(4).
62. OHIO REV. CODE ANN. §§ 2929.19(B)(1)(b)(i)-(v) (LexisNexis 2021).
63. OHIO REV. CODE ANN. §§ 2967.132(E)(2)(a)-(e) (LexisNexis 2021).
64. § 2967.132(H).
65. § 2967.132(G).

laws that protect children—even those who have made terrible mistakes. Of course, where there are proponents there are also opponents. One argument proffered to the Ohio Legislature is that the bill is superfluous, as Ohio is already currently in line with *Roper*, *Miller*, and *Graham*.[66] Louis Tobin, Executive Director of the Ohio Prosecuting Attorney's Association argued as much and claimed that under Senate Bill 256, offenders like Brandon Moore would be eligible for parole after serving eighteen years, which "demeans the seriousness" of the crime.[67]

Tobin is not alone in his opposition. In 2016, the death of sixteen-year-old Ronnie Bowers was covered continuously in the Dayton area. Kylen Gregory, also sixteen, testified at his trial that he drew a stolen gun and fired a shot into the back of Ronnie's car to make "a statement" as Ronnie drove away.[68] The shot hit Ronnie in the back of the head, who succumbed to his injury two days later.[69]

Bowers' mother, Jessica Combs, offered testimony to the Criminal Justice Committee as a parent with firsthand experience in dealing with the aftermath of losing someone at the hands of a juvenile offender.[70] She testified that she has experienced complications with post-traumatic stress disorder, recurring nightmares, anxiety attacks, and other mental afflictions which have all but eliminated her ability to work.[71] She argued that Senate Bill 256 would inevitably reopen the emotional wounds of the victims and families who have suffered, just as she has suffered.[72]

While Combs and Tobin are not the only opposers of Senate Bill 256, they represent two of the most common types of opposition offered to the Senate Committee's testimony hearings: a victim's advocate and someone who has been, or is, a criminal prosecutor. While Combs' testimony is powerful and Tobin makes a seemingly valid point, Senate Bill 256 is not the "get out of jail free card" they seem to believe.

State Senator Peggy Lehner, co-sponsor of Senate Bill 256, noted as much in her testimony to the House Criminal Justice Committee.[73] Although Senator Lehner highlighted the differences between children and adults in their brain development and argued that punishing children as if they were an adult is unfair,[74] she conceded that this "does not mean the child should be automatically forgiven,

66. *Regards Sentencing Offenders Under 18 When Committed Offense: Hearing on S.B. 256 Before Criminal Justice Comm.,* 134th Gen. Assemb. (Ohio 2020) [hereinafter *Hearing*] (statement of Louis Tobin).

67. *Id.*

68. Nick Blizzard, *Kettering Deadly Shooting Victim's Mother Finds Relief After 4-year Court Ordeal*, DAYTON DAILY NEWS (Nov. 29, 2020), https://www.daytondailynews.com/news/kettering-deadly-shooting-victims-mother-finds-relief-after-4-year-court-ordeal/HE7WBONJWFCKRDSU73U3X2UQSY/.

69. *Id.*

70. *Hearing, supra* note 66 (statement of Jessica Combs).

71. *Id.*

72. *Id.*

73. *Id.* (statement of Sen. Peggy Lehner).

74. *Id.*

especially when a severe crime has been committed."[75] Senate Bill 256 reduces the time needed to attain parole for juveniles who commit serious offenses (including homicide offenses), but just as there are safeguards in the Bill to protect children from being over-punished by a sentencing court, so too are there safeguards that account for an offender who shows little-to-no-signs of change for the better and thus does not demean the seriousness of the crime. Nothing in Senate Bill 256 argues for the automatic release of a serious juvenile offender, nor does it suggest such an event be possible. The parole board acts as the tribunal that determines whether release of the offender at the time they become eligible is not a risk "to public safety and/or would not further the interest of justice nor be consistent with the welfare and security of society."[76]

III. SENATE BILL 256 PUTS OHIO IN LINE WITH *MILLER* RULE BUT IS STILL A MIDDLE GROUND FOR JURISDICTIONS WHO HAVE ELIMINATED JLWOP SENTENCES

Ohio is not the only state in the union to address JLWOP legislatively. Including Ohio, twenty-five states and the District of Columbia that have eliminated life without parole sentences for juveniles, either through court decision or legislation.[77] In fact, several states elected to apply their statutes retroactively, including California, Colorado, and Connecticut.[78] While half of the jurisdictions in America have completely eliminated juvenile life without parole sentences, Ohio's new amendments puts them nearly square in the middle of other jurisdictions in terms of when parole eligibility is achieved and what factors are considered during mitigation.

A. *Ohio's Temporal Requirements for Parole Are Among Some of the Most Progressive*

Legislation that eliminates JLWOP sentences can be generally analyzed under two categories, based on what the legislation covers: (1) the term of years a juvenile must serve before they are eligible for parole; and (2) any mitigating factors the parole board must consider once eligibility is attained.[79] Many of the jurisdictions that have eliminated JLWOP sentences have varying degrees of sentences that are now applicable to juveniles, much like Ohio, that result in different parole eligibility dates. For example, states like Arkansas, Connecticut, Nevada, and Massachusetts allow for parole eligibility after serving varying lengths of time, based on the crime committed.[80] Conversely, states like California

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75. *Id.*

76. OHIO ADMIN. CODE 5120:1-1-07 (A)(2) (Lexis Advance through updates effective May. 25, 2021).

77. *Legislation Eliminating Life-Without-Parole Sentences for Juveniles*, *supra* note 1.

78. *Legislation Eliminating Life-Without-Parole Sentences for Juveniles*, *supra* note 1.

79. *Id.*

80. Amy Gina Kim, *State-by-State Abolition of Juvenile Life without Parole Sentences in the United States Since* Miller v. Alabama (2012), COLUM. U. GRADUATE SCH. OF ARTS & SCI., Jan. 2019, at 58-59, https://academiccommons.columbia.edu/doi/10.7916/d8-a13s-cy54/download.

and Texas do not provide for degrees of criminality and instead have taken a simpler approach with a single threshold for parole eligibility.[81]

On the high end, juveniles convicted of crimes in states like Colorado or Texas face life sentences with parole eligibility after forty years of incarceration.[82] More forgiving states like Oregon and West Virginia allow for parole eligibility after fifteen years—currently the lowest stated time frame among states with JLWOP eliminated.[83] Hawaii, South Dakota, and Vermont each have eliminated JLWOP sentences, but have not declared a minimum amount of time required to become eligible for parole. [84]

JLWOP Eliminated Through Legislation – Parole Eligibility

Arkansas (2017) - Retroactive – Juveniles convicted of capital murder or treason are eligible after thirty years; Juveniles convicted of first-degree murder serving life sentences are eligible after twenty-five years; non-homicide offenders are eligible for parole after a maximum of twenty years.

California (2017) - Retroactive – Juveniles sentenced to LWOP are eligible for parole during their twenty-fifth year of incarceration.

Colorado (2016) - Retroactive – Juveniles convicted of class 1 felonies, including first degree murder, were sentenced to life with parole eligibility after forty years, less any earned time; juveniles convicted of felony murder may be sentenced to life with parole eligibility after forty years or a determinate sentence within a range of thirty to fifty years, less earned time. The court must find extraordinary mitigating circumstances to impose the determinate sentence.

Connecticut (2015) - Retroactive – Juveniles serving sentences of ten years or more were eligible for parole after serving sixty percent of the sentence or twelve years, whichever is greater. Those serving more than fifty years are eligible for parole after thirty years.

Delaware (2013) - Retroactive – Juveniles serving life without parole sentences were resentenced to parole eligible after twenty-five years; juveniles sentenced to more than twenty years can petition for resentencing.

District of Columbia (2016) - Eliminates JLWOP; juvenile offenders may receive a sentence less than the minimum term otherwise required by law. The court may reduce a term of imprisonment imposed upon a defendant for an offense committed before age eighteen if, among other considerations, the defendant received a sentence of at least twenty years in prison, is found not to be a danger to the safety

81. *Legislation Eliminating Life-Without-Parole Sentences for Juveniles*, *supra* note 1.
82. *Id.*
83. *Id.*
84. Kim, *supra* note 80, at 32-39.

of any person or the community, and the interests of justice warrant a sentence modification.

Hawaii (2014) - Juveniles convicted of first-degree murder or first-degree attempted murder shall be sentenced to life with the possibility of parole. There was no minimum number of years required to attain parole eligibility. Parole eligibility is determined after the parole board establishes a rehabilitation plan. Once eligible, the offender is eligible for review every twelve months.

Massachusetts (2014) - Juveniles aged fourteen to seventeen convicted of first-degree murder shall be sentenced to life with parole eligibility set between twenty and thirty years. If the first-degree murder is committed by the juvenile "with extreme atrocity or cruelty" parole eligibility is fixed at thirty years; if the crime is committed with "deliberately premeditated malice aforethought," parole eligibility will be between twenty-five and thirty years.

Nevada (2015) - Juveniles convicted of non-homicide offenses are eligible for parole after fifteen years; juveniles convicted of crimes that resulted in the death of one victim will be eligible after twenty years.

New Jersey (2017) - Juveniles must either be sentenced to a term of thirty years, with no parole eligibility or life sentence with parole eligibility after thirty years.

North Dakota (2017) - Juveniles are eligible for sentence reduction after serving at least twenty years.

Oregon (2019) - Parole eligibility available for juvenile offenders after serving fifteen years.

South Dakota (2016) - Sentences of life without parole for juveniles are eliminated, but for juveniles convicted of a Class A, B, or C felony, the maximum sentence may be a term of years.

Texas (2013) - Amended to include seventy-two-year-olds from being subject to life without parole sentences. In 2009, Texas eliminated such sentences as an option for juveniles age sixteen or younger who were convicted of capital felonies. Juveniles achieve parole eligibility after serving forty years.

Utah (2016) - The maximum sentence that may be imposed on a juvenile offender is an indeterminate prison term of not less than twenty-five years and that may be for life with the possibility of parole.

Vermont (2015) - The law simply states a juvenile may not be sentenced to life without the possibility of parole. There is no specified number of years required for parole eligibility.

West Virginia (2014) - Juvenile offenders serving life sentences must be eligible for parole after serving fifteen years. The parole board must ensure a meaningful opportunity for the juvenile offender to obtain release.

Wyoming (2013) - Juveniles convicted of first-degree murder are eligible for parole after serving twenty-five years.[85]

If Texas and Oregon or Colorado and West Virginia represent opposite ends of the eligibility spectrum, Ohio's legislation falls somewhere roughly in the middle. Ohio's twenty-five-years-served requirement for homicide offenses aligns with states like Delaware and California, while the eighteen-year requirement for non-homicide offenders make it more progressive than most, but not as tolerant as Oregon, West Virginia, or Nevada.[86]

Representative John Ellem for the state of West Virginia co-sponsored the bill that marked fifteen years as the required time served before a juvenile sentenced to a life term could be eligible for parole.[87] In an opinion piece, Ellem noted how the bill recognizes youths have the potential for growth and rehabilitation.[88] Conversely, Texas's forty-year minimum has received scrutiny because it does not afford the same opportunity for growth and rehabilitation one would expect from a bill eliminating JLWOP.[89]

In terms of length of time required to achieve parole eligibility, Ohio's new sentencing scheme is similar to both the most lenient and the harshest legislation. On one hand, it allows for the growth and rehabilitation for juveniles convicted of crimes—even homicide offenses—while also acknowledging homicide crimes are some of the most serious crimes deserving of greater punishment. By creating a sentencing scheme that allows for another chance at life as a valuable member of society, even when the offender commits a homicide crime, Ohio has found the "Goldilocks" zone for juvenile offenders.

B. *Factors Listed for the Parole Board Also Leave Ohio as One of the More Progressive States*

If Ohio has found an adequate temporal balance that offers an early opportunity for juveniles to reach parole eligibility compared to other jurisdictions, the same may also be said for the factors the parole board will use when faced with parole decisions. Eliminating JLWOP sentences is a critical step in ensuring children are treated as children. Arguably, however, the most important step in this

85. The information compiled in this table contains a mixture of information provided by the Juvenile Sentencing Project, which has kept track of juvenile life without parole legislation throughout the country, and *State-by-State Abolition of Juvenile Life Without Parole Sentences in the United States Since* Miller v. Alabama, which examines both legislation and court decisions from states that have eliminated JWLOP sentences. Kim, *supra* note 80; JUV. SENT'G PROJECT, *supra* note 1.

86. Kim, *supra* note 80, at 25-30.

87. *Id.* at 40.

88. *Id.* at 40.

89. *Id.* at 37.

quest is ensuring that the length of years served before parole eligibility is achieved is not a meaningless, hollow promise. Amendments that allow a juvenile to achieve parole eligibility after serving eighteen, twenty-five, or thirty years depending on the crime is pointless if no path exists through which parole may actually be achieved. Senate Bill 256 provides that pathway in a way that not only aligns with the Supreme Court rationale in *Roper*, *Graham*, and *Miller*, but that speaks to the heart of the issue in recognizing children are both constitutionally and physically different from their adult counterparts. The bill requires the parole board assigned with evaluating the juvenile offender's eligibility for release to consider five specific factors as mitigating factors, along with any other factors the board previously considered.[90] These new mitigating factors mirror the reasoning of the Supreme Court in *Miller* and *Roper*, as well as other states that have eliminated JLWOP. The factors listed in the bill include:

1. The prisoner's chronological age at the time of the offense and that age's hallmark features, including intellectual capacity, immaturity, impetuosity, and a failure to appreciate risks and consequences;
2. The prisoner's family and home environment at the time of the offense, the prisoner's inability to control the prisoner's surroundings, a history of trauma regarding the prisoner, and the prisoner's school and special education history;
3. The circumstances of the offense, including the extent of the prisoner's participation in the conduct and the way familial and peer pressures may have impacted the prisoner's conduct;
4. Whether the prisoner might have been charged and convicted of a lesser offense if not for the incompetencies associated with youth such as the prisoner's inability to deal with police officers and prosecutors during the prisoner's interrogation or possible plea agreement, or the prisoner's inability to assist the prisoner's own attorney;
5. Examples of the prisoner's rehabilitation, including any subsequent growth or increase in the offender's maturity during imprisonment.[91]

The factors enumerated in Senate Bill 256 resemble other states' attempts to revamp their juvenile legal system. For example, Arkansas, whose legislature created a retroactive ban on JLWOP sentences, requires the circuit court to ensure a comprehensive mental health evaluation is conducted.[92] This examination includes looking into the juvenile's family, prenatal history, treatments for substance abuse, social history, and a psychological evaluation.[93] Additionally, the parole board is required to consider similar factors enumerated in Ohio's S.B. 256, including "the diminished culpability of minors," "community circumstances at the time of offense," and "any history of abuse or trauma."[94]

90. OHIO REV. CODE ANN § 2967.132.
91. OHIO REV. CODE ANN § 2967.132(E)(2).
92. Kim, *supra* note 80, at 23.
93. *Id.*at 23.
94. *Id.*at 23 (citing S.B. 294, 91st Gen. Assemb., Reg. Sess. (Ark. 2017)).

Connecticut, another state with a retroactive ban on JLWOP, lists youth-related factors for the parole board to consider including, but not limited to, "the age and circumstances" as of the date the crime was committed, whether the offender "demonstrated remorse and increased maturity since the date of the commission of the crime or crimes," and "trauma, [and the] lack of education or obstacles that such person may have faced as a child or youth in the adult correctional system . . . ."[95]

Where states like Connecticut and Arkansas have built in safeguards for juveniles once they reach parole eligibility, some other states appear to have overlooked the diminished culpability of juveniles, leaving the door wide open for a juvenile offender to spend the rest of their natural life in prison. For example, while Delaware has a retroactive "ban" on JLWOP sentences, the text of the bill states a period of time where a juvenile offender may "petition" the court for resentencing, creating a potential loophole for courts and prosecutors to use against the petitioner.[96] Texas, in eliminating JLWOP sentences, implemented a mandatory life sentence with eligibility after forty years.[97] With a mandatory sentence set at forty years, the law leaves no opportunity for the court to consider any of the *Miller* factors as mitigating. Also, while Texas has various factors the parole board considers, there is no specific mention of the offender's youth as a mitigating factor when evaluating parole for a juvenile serving the 40-to-life sentence.[98]

However, just because a state has not explicitly stated factors that a parole board must consider does not automatically bring cause for alarm. Hawaii states, simply, that a juvenile convicted of first-degree murder or first-degree attempted murder will be sentenced to life imprisonment with the possibility of parole.[99] While no date of eligibility is listed, the bill itself notes JLWOP violates Article 37 of the United Nations Convention on the Rights of the Child.[100] One prosecutor, Kauai County Prosecuting Attorney Justin Kollar declared "putting a child in prison and throwing away the key is not a humane or cost-effective solution to this problem" in support of the bill.[101]

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95. *Id.* at 29 (citing S.B. 796, Jan. Sess. (Conn. 2015)).

96. *Id.* at 30 (citing S.B. 9, 147th Gen. Assemb., Reg. Sess. (Del. 2013)).

97. *Id*. at 37.

98. *Revised Parole Guidelines*, TEX. BD. OF PARDONS AND PAROLES, https://www.tdcj.texas.gov/bpp/parole_guidelines/parole_guidelines.html (Mar. 29, 2021).

99. Kim, *supra* note 80, at 32.

100. *Id.* at 32-33 (citing H.B. 2116, 27th Leg. Sess. (Haw. 2014), https://www.capitol.hawaii.gov/session2014/bills/HB2116_CD1_.pdf).

101. *Id.* at 32-33 (citing *Hawaii Legislature Abolishes JLWOP*, CAMPAIGN FOR THE FAIR SENT'G OF YOUTH, https://www.fairsentencingofyouth.org/hawaii-legislature-abolishes-jlwop/ (last visited Aug. 11, 2021)).

IV. SENATE BILL 256 ALLOWS FOR THE RECOGNITION OF A CHILD'S UNDERDEVELOPED BRAIN, ENVIRONMENTAL CIRCUMSTANCES, AND ENDS INCREDULOUS DEBATES ABOUT LIFE EXPECTANCY WHILE STILL HOLDING JUVENILE OFFENDERS ACCOUNTABLE.

Acknowledging and accounting for the physical differences between children and adults in changing parole eligibility and listing the factors that must be considered when juvenile offenders are in front of the parole board is important because of the stark differences. During the *Roper*, *Graham*, and *Miller* cases, great attention was paid to the argument that children are not just physically different from adults, but also neurologically different, which, as the defendants in those cases argued, reduced their culpability in their crimes, ultimately resulting in the Court finding their sentences were violative of the Eighth Amendment.[102]

A. *What Senate Bill 256 Does Right*

A child's brain is under frequent change as the child ages, even more prominently during the teenage years.[103] While the size of a child's brain is roughly ninety percent of the size of an adult's brain by age six, it is still in the raw, early stages of development.[104] During the formative teen years, youths become more susceptible to impulsive behavior, learning as they experiment with things like drugs, alcohol, and sex.[105] While American society has largely acknowledged impulsive teenage behavior, there is a disconnect when it comes to impulsive behavior and crime, even though studies suggest the developmental changes occurring in a teen's brain are attributable to their lack of maturity, heightened sensitivity to external influences, and lessened ability to weigh the costs of decisions before acting.[106] Peer pressure and parental guidance, or lack thereof, are factors that, when combined with brain development, paint a clearer picture of what may contribute to juveniles exhibiting antisocial behavior, like committing crimes.[107]

A risk-taking study conducted on minors, where subjects played a driving simulation while having their brain activity monitored through an MRI, found that when alone, the subjects played the game no different than adults.[108] However, when the subjects' friends were brought into the room, the subjects took greater

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102. Laurence Steinberg, *Adolescent Brain Science and Juvenile Justice Policymaking*, 23 PSYCH. PUB. POL'Y & L. 410, 412 (2017).

103. Gretchen M. Colón-Fuentes, *Teenage Brain Development: Its Impact on Criminal Activity and Trial Sentencing*, 88 REVISTA JURÍDICA UNIVERSIDAD DE PUERTO RICO, 1062, 1064 (2019).

104. *Id.* at 1066.

105. Reforming Juvenile Justice: A Developmental Approach, NAT'L RSCH. COUNCIL OF THE NAT'L ACAD., 90-91 (2013).

106. Colón-Fuentes, *supra* note 102, at 1068.

107. *Id.* at 1070-72.

108. Emily Kaiser, *6 Facts About Crime and the Adolescent Brain*, MPRNEWS (Nov. 14, 2012, 9:00 PM), https://www.mprnews.org/story/2012/11/15/daily-circuit-juvenile-offenders-brain-development.

risks during the simulation.[109] The research also showed that there was greater activity in the brain regions associated with rewards when the adolescent subjects' peers were watching.[110] The adult subjects showed no change in their behavior nor brain activity when their friends were present.[111]

When it comes to parental guidance, the presence and influence of a child's parent during these vulnerable periods where the brain is undergoing developmental changes is not to be understated. Because teens are already at a stage where impulsivity and immaturity are heightened, having their lack of self-control tempered by adults they trust—namely parents or guardians—would be integral to an adolescent refraining from impulsive, uniformed behavior.[112] Impulsivity, whether due to lack of parental involvement or because of a desire to impress friends, is therefore a major catalyst for the commission of crimes by adolescents.

The fact that a teen's brain is underdeveloped and under a near constant state of change until about age twenty-five, coupled with the social factors that results in teens acting in ways that previously allowed an Ohio court to believe the behavior is so reprehensible that the youth should be incarcerated for the rest of their lives, should be reason enough to find that the determination of whether a youth is a lost cause must be left to the parole board. Thankfully, Senate Bill 256 accounts for those differences.

In addition to the physical developments undergone in a child's brain, the parole board factors also recognize the varying circumstances surrounding children and influences that give rise to criminal activity. Courts have acknowledged that children are scientifically different and are thus legally (and perhaps morally) less culpable than their adult counterparts.[113] Prior to Senate Bill 256, it appeared that courts, in their evaluation of children and whether a sentence of life (with or without parole) was necessary, did not truly acknowledge they were dealing with actual *children*. One of the hallmark features of Senate Bill 256 is for the parole board—and the sentencing court—to take into consideration the environment in which the juvenile lived.[114]

In a 2012 study, juvenile lifers surveyed nationwide experienced high levels of violence in their homes and communities, with seventy-nine percent witnessing violence at home.[115] Juveniles serving life sentences also experienced significant social, economic, and educational disadvantages, while also reporting high rates of physical and sexual abuse in their lives.[116] Nearly two-thirds (62.8 percent) of youths saw their neighborhood as unsafe while over seventy percent reported

109. *Id.*
110. *Id.*
111. *Id.*
112. Colón-Fuentes, *supra* note 102, at 1071-72.
113. *Id.* at 1079-80.
114. OHIO REV. CODE ANN. § 2967.132(E)(2)(b).
115. Ashley Nellis, *The Lives of Juvenile Lifers: Findings from a National Survey*, THE SENT'G PROJECT 2 (Mar. 1, 2012), https://www.sentencingproject.org/publications/the-lives-of-juvenile-lifers-findings-from-a-national-survey/.
116. *Id.* at 2-3.

seeing drugs openly sold where they lived.[117] More than half of the youths surveyed reported witnessing acts of violence at least weekly.[118]

The fact that juvenile lifers are more likely to have experienced some level of trauma in their young lives prior to their incarceration is an important factor to consider for sentencing courts and parole boards. A juvenile whose environment is polluted with toxicities like violence, physical and sexual abuse, coupled with financial and educational disadvantages, is not a lost cause when they still have room to grow and learn from their mistakes.

Senate Bill 256 also eliminates the ugly side of legal debates, where prosecutors defend their positions as best they can within the confines of the applicable law, only with Bikram yoga-like stretches of arguments designed to keep youths-turned-adults incarcerated. For example, in 2015, a California appellate court held that a sentence of fifty-six years to life imposed on a Hispanic juvenile amounted to a de facto life sentence and was therefore eligible for resentencing.[119] Both the petitioner and the attorney general argued that the fifty-six year prison sentence, making him eligible for release at age seventy-three, exceeded the juvenile's life expectancy and thus was a de facto life sentence.[120] The juvenile defendant cited to a report that stated the life expectancy of a male born in 1990 was 71.8 years at the time of birth.[121] He also cited to a study that found due to the conditions of prison confinement, his life expectancy would be significantly reduced.[122] By contrast, the attorney general argued that the petitioner's life expectancy could be as high as 79.3 years, based on different statistics.[123]

While the court found that the juvenile's reliance on the more favorable statistics fell short of a valid argument, the court went on to state that the "'functional equivalent' of an LWOP sentence is one in which the juvenile offender has no 'meaningful opportunity to demonstrate [his or her] rehabilitation and fitness to reenter society.'"[124] In the eyes of the court, the defendant's sentence disregarded any possibility of rehabilitation and was therefore a de facto sentence of life without parole.[125]

In Iowa, a defendant who had his mandatory LWOP sentence commuted to life with the possibility of parole after sixty years argued that his sentence was also the functional equivalent of life without parole.[126] In applying a similar fact-specific inquiry, analogous to the California court in *In Re Aguilar*, the Supreme Court of Iowa examined the defendant's life expectancy of 78.6 years and held that

117. *Id.* at 11.
118. *Id.*
119. *In re Aguilar*, No. H040784, 2015 WL 1956412, at *8 (Cal. Ct. App. Apr. 30, 2015).
120. *Id.* at *7.
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.* at *7-8 (citing People v. Caballero, 282 P.3d 291, 295 (Cal. 2012)).
125. *Id.* at *8.
126. State v. Ragland, 836 N.W.2d 107, 109-110, 119 (Iowa 2013).

the commuted sentence constituted cruel and unusual punishment because it was equivalent to a sentence of life without parole.[127]

Although the Supreme Courts of Iowa and California saw the arguments of the prosecutors fail, some state courts would be more willing to accept those positions, either holding the doctrine from *Miller* strictly applies to sentences where life without parole was imposed, or that the sentence imposed did not equate to the functional equivalent of a life sentence. For example, the Supreme Court of Minnesota held that a juvenile defendant sentenced to an aggregate sentence of seventy-four years to life at age sixteen did not have a constitutional claim against his sentence.[128] The court based its reasoning on the sentence being within the trial court's discretion.[129] In Tennessee, an appellate court held that a sentence of life with the possibility of parole after fifty-one years imposed on a juvenile homicide offender did not violate the Eighth Amendment.[130] A seventeen-year-old defendant in New York received mandatory minimum sentences exceeding fifty years.[131] There, the court held that the teen could not rely on *Miller* because the sentencing court had not imposed a sentence of life without parole.[132]

The unconscionable arguments presented in the above cases exemplify the lengths state attorneys are prepared to go to make certain convictions stick. The argument that because someone's life expectancy is seventy-nine years, as opposed to seventy-one, in an effort to persuade the court to rule in favor of upholding a sentence that would keep a juvenile imprisoned from age seventeen to age seventy-three, is both indefensible and incomprehensible. Whether a sentence ends six years early is of no actual value when the claim is that the juvenile will have time to reform in the time they have left on earth as a free person at age seventy-three.

Senate Bill 256 not only eliminates heinous and egregious miscarriages of justice, like those carried out in Tennessee, Minnesota, and New York, but it prevents prosecutors from having to argue that someone who has spent fifty years in prison since childhood to spend an additional six years incarcerated. The Ohio Department of Rehabilitation and Corrections would indeed allow for very little rehabilitation or correction if children were made to live the rest of their days behind bars.

Another issue addressed by Senate Bill 256 is when a sentencing court declares a juvenile defendant "permanently incorrigible." As discussed in the *Miller* case, juveniles have "diminished culpability and greater prospects for reform" which make them "less deserving of the most severe punishments."[133] By this, the Supreme Court in *Montgomery v. Louisiana* explained that "a lifetime in

127. *Id.* at 119, 122; s*ee also* State v. Null, 836 N.W.2d 41, 71-72 (Iowa 2013) (ruling a 52.5-year sentence imposed on a juvenile defendant triggers *Miller*-type protection, even though the case was not a technical life-without-parole sentence).

128. State v. Williams, 862 N.W.2d 701 (Minn. 2015).

129. *Id.*

130. Darden v. State, No. M2013-01328-CCA-R3-PC, 2014 WL 992097 (Tenn. Crim. App. Mar. 13, 2014) (Holding that a trial court's ruling that a life sentence with release eligibility after fifty-one years is not unconstitutional).

131. People v. Aponte, 981 N.Y.S.2d 902, 903, 906 (N.Y. Sup. Ct. 2013).

132. *Id.* at 905.

133. Miller v. Alabama, 567 U.S. 460, 471 (quoting Graham v. Florida, 560 U.S. 48, 68).

prison is a disproportionate sentence for all but the rarest of children, those whose crimes reflect 'irreparable corruption.'"[134] The Court in *Montgomery* also noted that while *Miller* barred life without parole sentences, the exception was for crimes that "reflect permanent incorrigibility."[135]

What constitutes permanent incorrigibility that shows a juvenile is irreparably corrupted? According to the Sixth District Ohio Court of Appeals, the stabbing of a victim seventeen times, the killing of the victim's son, the rape and killing of the victim's daughter, and the theft of the victim's vehicle evidenced the sixteen-year-old's irreparable corruption.[136]

The appeals court in *Brown* rejected the argument from the defendant that finding a youth irreparable is impossible due to a youth's brain being undeveloped.[137] In relying on the Supreme Court of Iowa accepting the underdeveloped brain argument offered by the juvenile, a qualified expert's testimony that the juvenile could be redeemed, and that the determination of irreparable corruption should be a determination made by the parole board, Brown argued that Ohio should make a similar determination.[138]

The Sixth District's dismissal of this argument—and their subsequent reasoning that such a finding would undermine the court's power to sentence while limiting its "statutorily granted discretion"—spoke more to the feeling that retention of the power to sentence is necessary. This position, regardless of the impact that power has on youthful offenders, does not lend the necessary credence to the scientific evidence that suggests such power is disproportional.[139]

For the economist, Senate Bill 256 not only alleviates some of the pressures weighing down juveniles within the legal system, but there are also financial benefits to be gained from reducing the time required to reach parole eligibility. A 2014 survey showed Ohio spent over $200,000 annually, per person, for youths housed in correctional facilities, the tenth highest figure of the forty-six jurisdictions surveyed.[140] Once a juvenile comes of age, the cost decreases significantly.[141] However, by the time the juvenile offender reaches their eighteenth year of incarceration (the earliest period available under Senate Bill 256), the cost for their incarceration reaches over $920,000.[142] Estimates show that under Senate Bill 256, Ohio stands to potentially save between $2.6 and $3.2

134. Montgomery v. Louisiana, 577 U.S. 190, 195 (2016) (quoting Roper v. Simmons, 543 U.S. 551, 573 (2005)).

135. *Id.* at 209.

136. State v. Brown, No. L-16-1181, 2018 WL 388537, ¶¶ 3, 49 (Ohio Ct. App. Jan. 12, 2018).

137. *Id*. at ¶¶ 61-62.

138. *Id*. at ¶¶ 55-61.

139. *Id*. at ¶ 62.

140. Denise G. Callahan, *Ohio Spends $202,502 to Jail Each Juvenile Offender*, DAYTON DAILY NEWS (Dec. 12, 2014), https://www.daytondailynews.com/news/crime--law/ohio-spends-202-502-jail-each-juvenile-offender/3yJc7TzcbWDdnOOC0H3rIJ/.

141. Ohio Dep't of Rehab. and Corr., *Average Cost Per Inmate FY2018* (January 2020), https://drc.ohio.gov/Portals/0/Jan%20fact%20sheet.pdf.

142. *Hearing, supra* note 66 (statement of Kevin Werner, Policy Director, Ohio Justice and Policy Center).

million per offender.[143] While cost-saving should not be considered a major factor in ending JLWOP sentences, it is at the very least a positive side effect.

B. *What Senate Bill 256 Doesn't—and Can't—Address*

While Senate Bill 256 addresses several issues related to the juvenile legal system, there are still aspects of the system that are left unaddressed by the bill. From increased mental and physical health issues in adult prisons to the specific targeting of Blacks and other disfavored racial groups, there is still much to be done in ensuring the criminal justice system gets more out of the "justice" and less out of the "criminal system."

The history the criminal legal system and the countless inequities endured by Black Americans are both protracted and undeniable. Whereas Blacks represent just thirteen percent of the American population, forty-one percent of incarcerated youths are Black.[144] Additionally, Blacks make up roughly twenty-eight percent of all offenders serving a life sentence, fifty-six percent of those serving a sentence of life without parole, and fifty-six percent of those who received LWOP sentences as a juvenile.[145] Other data supports the conclusion that Blacks are sentenced disproportionately to white juvenile offenders.[146]

When a homicide victim is white, a Black offender represents 43.4 percent of the life sentences imposed, though Black offenders only accounted for 23.2 percent of offenders.[147] Conversely, when a homicide victim is Black, white offenders account for 3.6 percent of JLWOP sentences while representing 6.4 percent of arrests in Black homicide crimes.[148] This data shows that Blacks are twice as likely to receive a life sentence when the victim is white, while whites are half as likely to receive a life sentence when the victim is Black.[149]

In Ohio, children as young as fourteen are allowed to be held in adult facilities.[150] Three avenues exist that lead youths to serve their sentences in adult facilities: being bound over, being classified as serious youthful offenders (SYOs), and being involved with the juvenile legal system after age eighteen.[151] These

143. *Id.*

144. Josh Rovner, *Black Disparities in Youth Incarceration*, THE SENT'G PROJECT (July 15, 2021), http://www.sentencingproject.org/publications/black-disparities-youth-incarceration/.

145. *Hearing on Reps. of Racism in the Just. Sys. of the U.S. Before Inter-Am. Comm'n. H.R.*, 153rd Sess. 1, 2 (2014) (Written Submission of the American Civil Liberties Union on Racial Disparities in Sentencing).

146. Nellis, *supra* note 114, at 15.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Falling Through the Cracks: A New Look at Ohio Youth in the Adult Criminal Justice System*, CHILDREN'S LAW CTR. 1, 4 (May 2012), https://static1.squarespace.com/static/571f750f4c2f858e510aa661/t/57d97b37d2b8578c2ccbe572/1473870660296/Falling-Through-The-Cracks-A-New-Look-at-Ohio-Youth-in-the-Adult-Criminal-Justice-System-May-2012.pdf [hereinafter *Falling Through the Cracks*].

151. *Id.*

routes allow for mandatory and discretionary entry into adult facilities, which can have damning effects on the juvenile offender.

For starters, juveniles are far more to prone mental health issues.[152] The rate of juveniles with mental disorders within the juvenile legal system is higher than the general population of minors.[153] It is estimated that between fifty to seventy-five percent of children who have been involved with the juvenile legal system "meet criteria for a mental health disorder[,]" and "forty to eighty percent of incarcerated juveniles have at least one diagnosable mental health disorder."[154]

Unfortunately, when juveniles are sentenced to terms where they are institutionalized for longer than they were alive when they committed the crime that placed them in prison, their lives only go from bad to worse. Reports from the Bureau of Justice Statistics in 2005 and 2006 show that youth under the age of eighteen represented twenty-one percent and thirteen percent of all victims of inmate-on-inmate sexual violence, respectively. Those same reports showed juveniles comprise less than one percent of the jail populace.[155]

A higher rate of suicide is another issue created by placing youths in adult facilities.[156] Youths placed in adult facilities are thirty-six times more likely to commit suicide than their counterparts housed in juvenile detention facilities. To that same point, the suicide rate for youths in adult prisons is eight times that of youths in juvenile correctional facilities.[157] Additionally, adult facilities are less likely to provide access to age-appropriate mental health services or staff who could provide adequate assistance to youths.[158]

Inadequate access to education is another issue plaguing children in adult facilities.[159] While school districts in Ohio are required to provide services for youths in jail, a 2012 survey found that sixty-eight percent of the fifty-three school districts who responded to the survey had not provided educational services to youths in adult jails.[160] Additionally, youths are frequently placed in isolation in adult prison, which can exacerbate underlying mental health issues and lead to anxiety and paranoia.[161] Essentially, youth offenders come from and then are placed in environments that are antithetical to nurturing. To truly overcome the criminal and juvenile legal system, greater attention should be placed on *where* we are sending children for their rehabilitation and correction, not just for how long their stays will be for the punishment to be deemed adequate in fitting the crime.

Senate Bill 256 may be able to address the evils of juvenile life without parole sentences, but the systemic inequalities that plague the criminal legal system, in Ohio and elsewhere, is too large a task for one bill to address. To address the

152. Lee Underwood & Aryssa Washington, *Mental Illness and Juvenile Offenders*, INT'L. J. ENV'T RSCH. PUB. HEALTH, at 2-3 (Feb. 18, 2016).

153. *Id.*

154. *Id.*

155. *Falling Through the Cracks*, *supra* note 149, at 2.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

injustices present throughout our criminal legal system, there is simply more work to be done—both inside and outside of the walls of a prison.

V. CONCLUSION

In 2020, Myron Burrell, a man from Minnesota incarcerated at sixteen years old, was released after eighteen years behind bars.[162] Myron was pegged as the shooter in a homicide involving eleven-year-old Tysha Edwards, who had been struck by a stray bullet while doing her homework in the comfort of her own home.[163] After the Associated Press conducted an investigation that put serious doubt into both the legitimacy of how the prosecution obtained their conviction, and Myron's actual guilt, an independent panel of legal experts recommended Myron's immediate release.[164] While the Minnesota Board of Pardons did not pardon Myron's sentence, his sentence was reduced to twenty years, with the remainder of his time served under supervision.[165]

Part of the rationale behind the panel's decision to request immediate release included Myron's age at the time of the offense, his lack of a record prior to the incident, and his behavior while incarcerated.[166] "'In considering the sentence, we became profoundly aware of how our nation has changed in the way we consider juveniles who become enmeshed in the criminal justice system,' Mark Osler, who chaired the panel, wrote in the Minneapolis Star Tribune."[167]

While Tysha's family still believes Myron is at fault, this is not a review of guilt or innocence.[168] Surely, it is possible Myron is the actual culprit. Families like Tysha's and Ronnie Bowers' have experienced unimaginable pain. The criminal legal system accounts for that pain by employing a system that imprisons those responsible as a means of deterrence, correction, rehabilitation, or a hybrid of all three.

Determinations like those that find Kylen Gregory "morally incorrigible," Myron Burrell "guilty" and thus destined to spend the rest of his life in prison, or the fourteen-year-old boy *you* began this note as is certain to kill again are not determinations to be made at sentencing. This system is also attempting to account for are the ways that it over punishes those who are less culpable, while also acknowledging some people (and by extension some children) are beyond redemption. Just as there are families hurt by the actions of some juveniles, some juveniles and their families have been hurt by the system that would permanently

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162. Robin McDowell & Margie Mason, *'Clemency and Mercy': Minnesota to Free Myron Burrell, Convicted in 2002 Death of 11-Year-Old Girl*, USA TODAY: NATION (Dec. 15, 2020, 8:03 PM), https://www.usatoday.com/story/news/nation/2020/12/15/myon-burrell-minnesota-free-man-2002-death/3914850001/.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id* (quoting Mark Osler, *'Imperative of Freedom' Should Guide Review of Myron Burrell Case*, STAR TRIB.: OP. EXCH. (Dec. 11, 2020, 5:50 PM), https://www.startribune.com/imperative-of-freedom-should-guide-review-of-myon-burrell-case/573373771/).

168. *Id.*

treat them as adults for genuine mistakes, ignoring the ability to change and appreciate their errors.

No system in America that purports to deal in "justice" is perfect, no matter what safeguards are in place or what committees have been selected for oversight. But simply because a system is imperfect does not lend itself to be imperfect by design. For this reason, even for the problems left unaddressed by Senate Bill 256, the bill is undoubtedly a step in the right direction.