Cruel and Unusual Punishment: Adult Prison for Florida's Children

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I. Introduction

As he was sentenced to prison for sex crimes, 15-year-old Michael Myers exclaimed in court, "I do need help. I really want help. Please help me."

Instead of receiving the help for which he cried out, Michael was sent to Martin Correctional Institution, an adult male correctional facility within the Florida Department of Corrections. At the time, Martin housed 6' 03" Christopher Soule, a 23-year-old serving a 10-year sentence for armed robbery.¹ Seven months before Michael's arrival, Soule had complained, "I cannot be confined in a room with anybody at this institution." As Michael entered the adult prison system, Soule made it clear, "I will do my best to injure my roommate," and shortly thereafter 115-pound Myers was assigned as Soule's roommate. On June 5 at 9:39 a.m. Michael was found murdered in his cell having been strangled by Soule.²

Each year approximately 500 Florida juveniles are sent to adult prisons.³ Although the Florida Department of Corrections is chartered to make reasonable efforts to keep convicted juvenile offenders physically separate from adult offenders, there is no mandate the children will be housed separate from older, stronger, and more experienced criminals.⁴

Once incarcerated, the children soon discover that adult prisons speak to order, control, and cost-saving measures while providing fewer educational opportunities, counseling, or

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¹ Florida Department of Corrections (last visited September 27, 2011), http://www.dc.state.fl.us/
² Fred Grimm, Inept Lawmakers Put Kids at Risk, Miami Herald (April 21, 2000).
treatment staff.\textsuperscript{5} The Florida legislature recognizes that sentencing of juveniles in adult court should be accomplished "within the full framework of constitutional standards of fundamental fairness and due process" and in keeping with a child's need for rehabilitation.\textsuperscript{6} Yet the Florida courts have consistently upheld Florida's right to send juvenile offenders to adult prisons by adjudicating them and sanctioning them in adult criminal court,\textsuperscript{7} without any guarantee of a meaningful opportunity for rehabilitation for the approximately 3600 Florida juveniles transferred to adult court each year.\textsuperscript{8}

Recent Supreme Court of the United States holdings suggest Florida laws and policies are misaligned with prohibitions against adult sanctions for juveniles that disregard the substantial differences between juveniles and adults.\textsuperscript{9} Bolstering the judiciary's holdings and in recognition of the scientific community's long-held view that youth are

\textsuperscript{5} Donna M. Bishop, \textit{Juvenile Offenders in the Adult Criminal Justice System}, 27 Crime & Just. 81, 143 (2000) (The author visited eight Florida prisons in 1997 and found "security concerns tend to become all-consuming" with the vast majority of staff "focused exclusively on enforcing rules, maximizing surveillance, and displaying their power." Fewer than 10% of the inmates were involved in counseling or treatment).
\textsuperscript{7} \textit{State v. Cain}, 381 So.2d 1361, 1364 (Fla. 1980) ([T]he transfer scheme is entirely reasonable"); \textit{see also Reyna v. State}, 866 So.2d 214, 215 (Fla. Dist. Ct. App. 2004) ([W]e conclude that Cain remains dispositive…").
\textsuperscript{8} \textit{Five Year Juvenile Delinquency Trends and Conditions}, Florida Department of Juvenile Justice (last updated April 11, 2011), http://www.djj.state.fl.us/Research/Trends.html; \textit{see also} Patrick Griffin, Sean Addie, Benjamin Adams, & Kathy Firestone, \textit{Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting}, Office of Juvenile Justice and Delinquency Prevention National Report Series Bulletin (September 2011) https://www.ncjrs.gov/pdffiles1/ojjdp/232434.pdf, (The U.S. Department of Justice describes Florida as the "clear outlier" in transferring 165 per 100,000 juveniles to criminal court at a rate higher than any other state in the nation); \textit{see also} Office of Juvenile Justice and Delinquency Prevention, \textit{Easy Access to Juvenile Populations} (last updated December 13, 2010), http://www.ojjdp.gov/ojstatbb/ezapop/ (This rate is eight times the rate of California despite California's juvenile population being six times that of Florida's).
\textsuperscript{9} \textit{J.D.B. v. N. Carolina}, 131 S. Ct. 2394, 2403 (U.S.N.C. 2011).
developmentally distinct, additional studies demonstrate society is no more protected or benefited when juveniles are prosecuted as adults. As the once impressionable juveniles emerge hardened from their experience in adult prisons, they are now more likely to reoffend. The juveniles marked with a prison record are also more likely to be a burden on society, foreclosed from opportunities for employment, military enlistment, and civic participation through voting disenfranchisement. The disproportionate minority over-representation of juveniles prosecuted as adults serves to further reinforce the cycle of poverty limiting the opportunities for oppressed Americans.

The Supreme Court of the United States dictates that malleable and unformed incarcerated juveniles cannot be foreclosed from an opportunity for rehabilitation. In 2009, the Court held in Graham v. State that it is cruel and unusual punishment in violation of the Eighth Amendment to foreclose a juvenile convicted of a non-homicide crime from the possibility of release based on opportunities to mature and reform. Graham followed on the heals of Roper v. Simmons wherein the Court held that because youth are more vulnerable and less mature, they are less culpable than adults and have a

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12 For Minors in Florida –Consequences of Your Plea or Finding of Guilt, Law Offices of Public Defender Carlos J. Martinez, (revised September 15, 2010).
14 U.S. Census Bureau, About Poverty Highlights (last visited October 4, 2011), http://www.census.gov/hhes/www/poverty/about/overview/index.html (The national poverty rate for Blacks and Hispanics is 27% compared to a 10% rate for non-Hispanic whites).
17 Id. at 2030.
"greater claim to be forgiven." Consequently juvenile offenders are barred from imposition of the same sanctions as would be imposed upon an adult for the same crime. Roper further recognized that it is nearly impossible for courts to determine those very few juveniles who are beyond reform, further implicating Florida statutes that allow for the subjective judgment of the judiciary and prosecution untrained in juvenile psychology to make such determinations.

This essay asserts that the recent decisions of Roper and Graham prohibit Florida from sending its juvenile non-homicide offenders to adult prisons without a mandate to provide meaningful opportunities to rehabilitate. Without such a proviso Florida statutes lack a justifiable penological function and are therefore violative of the Eight Amendment's prohibition against cruel and unusual punishment. In sending its children to be incarcerated as adults, it is unrealistic for Florida to assume that the most vulnerable and impressionable of inmates exposed to the violence of adult prison culture will somehow find a way to emerge reformed having been denied all hope of restoration.

In Part I, I have introduced some of the concerns with sanctioning Florida youth in adult criminal courts. Part II then provides a brief history of the juvenile justice system in the United States and Florida. Part III summarizes Florida laws allowing for juveniles to be directly filed into the criminal court system and the consequences of such a process. Part IV describes how science and the law converge to implicate Florida direct file

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18 Id. at 553 n. 15.  
19 Id. at 554.  
20 Id. at 573.  
22 Fla. Stat. §§ 985.557(1) and (2) (2011).
II. Sanctioning Juveniles Offenders

Historically, American courts have grappled with how to properly sanction its wayward youth. Prior to the nineteenth century juvenile offenders were subject to prosecution in criminal courts without deference to their age or the seriousness of their offense. As an influx of immigrants was drawn to the vastly expanding opportunities provided by the American Industrial Revolution, increasing number of parents were confined to long working hours. Lacking child care options and absent compulsory education, many of the children of the working poor remained unsupervised and prone to mischief. The burgeoning wayward youth placed pressure on the courts to confront juvenile delinquency and truancy.23

As increasing number of juveniles were subjected to the harsh treatment of the criminal courts, society began to recognize juveniles as peculiarly vulnerable and less capable than adults to make informed, critical decisions.24 A consensus grew endorsing a separate juvenile justice system founded on the notion that the evils of adult incarceration warrant disparate treatment for at least some children.25 Ultimately in 1899, Illinois implemented a juvenile court system whereupon many other jurisdictions followed. In

23 Ruth E. Stone, History and Philosophy of the Juvenile Court, Juvl Fl-CLE 1-1 (2009).
24 Id. at 82 n. 5.
adopting juvenile delinquency adjudication, courts took on the role of *in loco parentis* viewing wayward youth as needing to be saved “from a downward career.” In this new role the juvenile courts emphasized rehabilitation of the offenders and provided juvenile suspects with informal proceedings based on civil law.

As early as 1885, Florida housed its juvenile offenders separate from adults. As of 1911, Florida allowed for the transfer of juveniles from criminal court treating them as delinquents if the child was less than 16-years-old; not charged with committing rape, murder, manslaughter, robbery, arson, or burglary; and was not considered incorrigible. By 1915, Florida created the first juvenile correctional institution. In separating juvenile offenders from adult criminals, Florida recognized a disparate treatment of its children in alignment with society's acknowledgement of the danger of exposing malleable youth to adult criminals unless the youth were seen as irredeemable.

In 1950, the Florida Constitution was amended to define crimes committed by juveniles as "acts of delinquency" allowing children the opportunity to be subject to juvenile court jurisdiction with the definition of "children" changing over the ensuing years. Five years later, Florida determined that children of any age charged with an offense subject to life imprisonment or death were mandated for prosecution in criminal court, which by 1973 was prohibited unless an indictment for the charge had been returned.

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26 *Application of Gault*, 387 U.S. 1, 45, 47 (1967).
28 Id. at n. 25.
29 Id. at 83 n. 26.
30 Id. at n. 25.
from the grand jury.\textsuperscript{31} Also in 1973, state attorneys were given the authority to request the transfer of a juvenile 14-years or older to criminal court for crimes if committed by an adult would constitute a misdemeanor or felony.\textsuperscript{32} By 1978, state attorneys were required to prosecute juveniles 14-years or older in criminal court if the juvenile had previously been adjudicated delinquent for murder, sexual battery, armed robbery, aggravated battery, or aggravated assault and were charged with a similar second offense.\textsuperscript{33} Finally, by 1996, Florida had amended its laws to authorize state attorneys to direct file juveniles of any age convicted of participating in a carjacking that resulted in bodily injury or death.\textsuperscript{34}

III. Prosecuting Florida's Juvenile Offenders as Adults

Florida's legislative intent is to adjudicate children who violate Florida laws in keeping with the seriousness of the offense and the child's need for treatment.\textsuperscript{35} The justification for sanctioning its youth as adults is based upon the need to ensure the protection of society.\textsuperscript{36} Juvenile offenders in Florida can be waived out of the juvenile justice system

\textsuperscript{31} Id. at 253 n. 27.
\textsuperscript{32} A. D. T. v. State, 318 So.2d 478 (Fla. Dist. Ct. App.) footnote 2: "F.S. 39.09(2)(a) provides: ‘The state attorney may, within five days of the date a delinquency petition has been filed and before a hearing on the petition on its merits, and following consultation with the intake officer, file a motion requesting the court to transfer the child for criminal prosecution if the child was fourteen or more years of age at the time of the conduct charged and is alleged to have committed an act which would be in violation of law if committed by an adult.’"
\textsuperscript{33} Id. at 270 n. 27.
\textsuperscript{34} Id. at 271 n. 27.
\textsuperscript{35} Fla. Stat. § 985.01 (2011) ("The purposes of this chapter are: (a) to assure that the adjudication and disposition of a child alleged or found to have committed a violation of Florida law be exercised with appropriate discretion and in keeping with the seriousness of the offense and the need for treatment services, and that all findings made under this chapter be based upon facts presented at a hearing that meets the constitutional standards of fundamental fairness and due process").
\textsuperscript{36} Fla. Stat. § 985.01 (2011) ("The purposes of this chapter are: (c) To ensure the protection of society, by providing for a comprehensive standardized assessment of the child’s needs so that the most appropriate control, discipline, punishment, and treatment can be administered consistent with the seriousness of the
and into adult criminal courts primarily through three mechanisms: voluntary waiver, discretionary waiver, and mandated waiver. Voluntary waiver is exercised when a juvenile offender or state attorney requests waiver to criminal court, triggering the court to conduct a hearing and make findings in consideration of the seriousness of the offense, the maturity of the offender, and the offender's previous encounters with the court.37

For certain offenses the judicial waiver is effectively bypassed giving the state attorney the authority to directly file a 14- or 15-year-old offender into criminal court if the charges include arson; sexual battery; robbery; kidnapping; aggravated child abuse; aggravated assault; aggravated stalking; murder; manslaughter; unlawful throwing, placing, or discharging of a destructive device or bomb; armed burglary or specified burglary of a dwelling or structure, or burglary with an assault or battery; aggravated battery; any lewd or lascivious offense committed upon or in the presence of a person less than 16 years of age; carrying, displaying, using, threatening, or attempting to use a weapon or firearm during the commission of a felony; grand theft; possessing or discharging any weapon or firearm on school property; home invasion robbery; carjacking; or grand theft of a motor vehicle or grand theft of a motor vehicle valued at $20,000 or more if the child has a previous adjudication for grand theft of a motor vehicle.38 Florida also gives the state attorney plenary power to directly file any 16- or 17-year-old offender even if the charge is

a misdemeanor as long as the offender received at least two previous adjudications or adjudications withheld one of which was a felony.\textsuperscript{39}

If the juvenile offender is 16- or 17-years-old and if the current charge is for a forcible felony or a violent crime against a person and the offender has a prior felony for murder, sexual battery, armed or strong-armed robbery, carjacking, home-invasion robbery, aggravated battery, or aggravated assault,\textsuperscript{40} or multiple prior felonies\textsuperscript{41} the state attorney is required to directly file the youth. The state attorney is further mandated to direct file any juvenile offender of any age who during the commission of a carjacking or grand theft of a motor vehicle or who was a willing passenger in the stolen vehicle, and a person not involved in the offense suffers serious bodily injury or death.\textsuperscript{42} Mandatory direct filing is also required if a 16- or 17-year-old offender possessed a firearm while committing: murder; sexual battery; robbery; burglary; arson; aggravated assault; aggravated battery; kidnapping; escape; aircraft piracy; aggravated child abuse; aggravated abuse of an elderly person or disabled adult; unlawful throwing, placing, or discharging of a destructive device or bomb; carjacking; home-invasion robbery; aggravated stalking; or trafficking in controlled substances.\textsuperscript{43}

Once transferred to criminal court, all other pending felonies are prosecuted along with the current charge.\textsuperscript{44} However, upon sentencing in criminal court, the judge has discretion

\textsuperscript{39} Fl. Stat. § 985.557(1)(b) (2011).
\textsuperscript{40} Fl. Stat. § 985.557(2)(a) (2011).
\textsuperscript{41} Fl. Stat. § 985.557(2)(b) (2011).
\textsuperscript{42} Fl. Stat. § 985.557(2)(c) (2011).
\textsuperscript{43} Fl. Stat. § 985.557(2)(d) (2011).
\textsuperscript{44} Fl. Stat. § 985.557(3)(b) (2011).
to commit the juvenile to treatment "outside the adult correctional system or place the child on juvenile probation."\textsuperscript{45} In considering non-adult sanctions the court takes into consideration the seriousness of the offense, the youth's maturity or lack thereof, the youth's prior contact with the law, and the youth's potential for treatment or rehabilitation.\textsuperscript{46} However, if the crime allows for punishment by death or life imprisonment or if the youth is being prosecuted by mandatory waiver or mandatory direct file, the court is required to impose adult sanctions.\textsuperscript{47} If a youth eligible for adult sanctions is sentenced outside the adult correctional system and is subsequently found "unsuitable" for juvenile sanctions, the court may revoke the juvenile sanctions and transfer the child into the adult correctional system.\textsuperscript{48}

When considering involuntary waivers of an offender to criminal court, among the many other statutory factors taken into account is the likelihood of reasonable rehabilitation of the child.\textsuperscript{49} However, when the state exercises its ability to direct file a juvenile offender into criminal court, no particular weight is given to the availability of rehabilitative opportunities nor are there bars to adult sanctions when rehabilitative prospects are nonexistent.\textsuperscript{50}

\textbf{A. Incarceration in Adult Prisons}

\textsuperscript{50} Fla. Stat. §§ 985.557(1) and 985.557(2) (2011).
Juveniles sent to adult prisons are exposed to an extremely unsafe environment where they sleep excessively, receive inadequate nutrition and exercise, and have little or no access to education or counseling.\(^{51}\) Confronted with adult career criminals the "[c]hildren in adult institutions are 500% more likely to be sexually assaulted, 200% more likely to be beaten by staff, and 50% more likely to be attacked with a weapon than those confined in juvenile facilities"\(^{52}\) and are consequently 165 times more likely to commit suicide than their counterparts outside adult correctional facilities.\(^{53}\) Gangs are so prevalent in state prisons that it's all but impossible for inmates to complete their sentences without becoming involved in violence. As one prison official testified, "An inmate who wants to rehabilitate himself cannot. Not when he has an inmate, like the people we have in [isolation], telling him to go stab somebody or he will be killed".\(^{54}\) Exacerbating the woes of children incarcerated with adults and consistent with a juvenile's lack of maturity is a higher likelihood the juvenile will be subjected to discipline. Age is the single best predictor of misconduct in prison.\(^{55}\)

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\(^{55}\) *Id.* at 144 n. 5.
During the fiscal year 2009-2010, Florida admitted 504 children into the Florida Department of Corrections' prisons,\textsuperscript{56} which is moving towards privatizing its prisons.\textsuperscript{57} For-profit prisons will only serve to further reduce the opportunities available for juveniles to reform and return to society as contributing law-abiding members.\textsuperscript{58} The mission for private contractors operating Florida's adult prisons is to provide cost-effective facilities. If the private contractor determines that any of the department's rules, policies, or procedures are inconsistent with that mission, they can propose waiving compliance.\textsuperscript{59} 

Supporting the concern that financial incentives associated with for-profit prison systems are incompatible with effective rehabilitation, one recent comprehensive study of Florida's juvenile correctional facilities concluded that although privatized facilities detained their inmates longer\textsuperscript{60} they had a higher recidivism rate than non-profit facilities.\textsuperscript{61} Indeed, studies show that privatized-prisons have a decreased incentive to provide meaningful rehabilitative opportunities for juvenile reform\textsuperscript{62} especially where

\begin{footnotes}
\item[56] Florida Department of Corrections, 2010 Annual Report (last visited September 18, 2011), www.dc.state.fl.us/pub/annual/0910/pdfs/AR_09-10_Final.pdf.
\item[58] Lucas Anderson, Kicking the National Habit: The Legal and Policy Arguments for Abolishing Private Prison Contracts, 39 Pub. Contract L.J. 113, 117 (2009). ("Privatization overall negatively impacts the treatment, rehabilitation, and care of prisoners, indicating that the market-driven business model is fundamentally incompatible with an effective and humane corrections system").
\item[60] Patrick Bayer & David E. Pozen, The Effectiveness of Juvenile Correctional Facilities: Public Versus Private Management, 48 J.L. & Econ. 549, 566 (2005) ("[I]ndividuals released from for-profit facilities are expected to spend an average of 223 additional days in a correctional facility by their 18th birthday… A comparable individual released from a nonprofit facility is expected to spend only 194 future days in a correctional facility").
\item[61] Id. ("[W]e find that youths released from for-profit facilities have the highest probability of being readjudicated — 57.3 percent of them are readjudicated within 1 year of release. Youths released from county and nonprofit facilities are, respectively, 8.8 and 7.9 percentage points less likely to recidivate…. Youths released from state facilities are 6.3 percentage points less likely to recidivate").
\end{footnotes}
decreased recidivism rates brought about by rehabilitated youth reduces the inmate population and creates a concomitant reduction in profits. It certainly begs the question as to how for-profit privatized prisons that benefit from increasing number of inmates can remain aligned with a society best served by minimizing the number of recalcitrant and hardened criminals cycling in and out of its prisons.

B. Recidivism of Juveniles Sanctioned as Adults

Once released back into society, juveniles emerging from adult prisons are destined to become more costly to society. The consequences of a felony conviction in Florida include: the loss of the ability to obtain State of Florida college financial aid such as Bright Futures, the loss of voting rights and the ability to participate in a jury, the risk of a mandatory prison sentence if convicted of a subsequent charge, the inability to be employed by the state or municipality if the felony was for drug trafficking or if the felony is "directly related" to the job; the inability to be employed by a law enforcement agency that works with the children or elderly; the inability to be employed in a public school system or a seaport or airport; and the possibility of being denied an occupational or business license such as required for nursing and paramedics if civil rights have not been restored.63

The sense of unfairness juveniles harbor as a result of their tougher sentences, the lack of rehabilitative opportunities, the pressure to develop more advanced criminal behavior, and the acceptance of violence undermines the legitimacy of the legal system and serves to

63 For Minors in Florida – Consequences of Your Plea or Finding of Guilt, Law Offices of Public Defender Carlos J. Martinez, (revised September 15, 2010); Bishop at 148 n. 24.
increase the likelihood of recidivism. Indeed, even the Florida legislature acknowledges the pitfalls of transferring children to criminal courts where they face sentencing to adult prisons:

   In addition, a significant number of children have been adjudicated in adult criminal court and placed in this state’s prisons where programs are inadequate to meet their rehabilitative needs and where space is needed for adult offenders. Recidivism rates for each of these classes of offenders exceed those tolerated by the Legislature and by the citizens of this state.

   A 2002 Florida study sponsored by the Florida Department of Juvenile Justice used seven matching criteria (type of offense, prior offenses, seriousness of prior offenses, number of prior offenses, age, gender, and race) to compare the outcome of one set of 475 youth sentenced to criminal court with another set of 475 youth retained in the juvenile courts. The report concluded that "transferred youth, compared with the matched juvenile justice system youth, re-offended more quickly and were re-arrested for felonies more often." Those transferred were more likely to commit a serious felony offense than the non-transferred youth with 50% of the transferred youth committing a felony as compared to 35% of the non-transferred youth.

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As is the case in Florida, numerous other studies support findings that adult prosecution of juveniles negatively impacts society. A 2006 landmark study sponsored by the MacArthur Foundation examined two thousand adolescents from a single metropolitan area straddling New York and New Jersey. Both groups had similar economic opportunities and access to weapons and were matched by similar felony offenses but New York juveniles were transferred to adult court whereas New Jersey juvenile offenders were processed in juvenile court. The juveniles processed in adult court were more likely and more frequently re-arrested for more serious offenses for which they were more likely to be re-incarcerated than those processed by the juvenile courts.67

A recent analysis of six large-scale studies looking at the deterrent effect of juveniles transferred to adult court concluded that transfer laws have little or no effect on generally deterring would-be juvenile offenders.68 The study cited to Florida data analyzing all felony arrests between 1989 and 2002, indicating the mere possibility of adult criminal sanctions does not act as a general deterrent for juveniles. In terms of a specific deterrent, i.e. the recidivism rates of specific offenders, the six large-scale studies consistently demonstrated that transferring youth to criminal court resulted in higher recidivism rates for those transferred to criminal court as compared to those who were processed by the juvenile system.

IV. Youth is Different

68 Id. n. 11.
A. The Science of Juveniles

The overwhelming consensus amongst behavioral scientists is that youth are categorically less able to consider the cost-benefits of risk versus reward in making alternative choices, less conscious of the future consequences of their acts, and consequently are more prone to engage in risky behavior that frequently morphs into the commission of crimes.\(^\text{69}\) Juveniles consistently score lower than adults in their ability to control their impulses and suppress aggression.\(^\text{70}\) Whereas adults tend to weigh both rewards and risks, juveniles are more likely to focus exclusively on rewards.\(^\text{71}\) With fewer life experiences, juveniles are less capable than adults in envisioning how the future will unfold as a result of their conduct.\(^\text{72}\)

Recent advances in brain imaging science support the behavioral observations that youth are developmentally distinct. Magnetic Resonance Imaging of adolescent brains indicates that the last area of the human brain to mature as adolescents reach adulthood is the very part of the child's brain associated with risky behavior – the prefrontal cortex.\(^\text{73}\) As the prefrontal cortex continues to develop through adolescence\(^\text{74}\) it impacts behavior

\(^{69}\) Id. n. 10.
\(^{71}\) Elizabeth Cauffman et al., Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Test, 46 Developmental Psychol. 1, 193, 206 (2010).
\(^{72}\) Laurence Steinberg et al., Age Differences in Future Orientation and Delay Discounting, 80 Child. Dev. 28, 30, 35-36 (2009).
associated with control and inhibition,75 risk assessment,76 and impulse control.77 The prefrontal cortex also serves to modulate another part of the evolving adolescent brain, the amygdala, which is associated with gut reactions and impulsive behavior.78 Another important physiological transformation experienced by adolescents involves increasing levels of the neurotransmitter dopamine motivating reward-seeking, risky behavior.79

Compounding the biological changes rendering juveniles less capable of seasoned behavior is the impact of their surroundings. Juveniles are highly susceptible to external influences and by law and nature have less control over the environment into which they are born.80 Humans are by design creatures of imitation81 and therefore as children accumulate experiences of their external world they receive positive reinforcement by

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76 Facundo Manes et al., Decision-Making Processes Following Damage to the Prefrontal Cortex, 125 Brain 624 (2002).
77 Antoine Bechara et al., Characterization of the Decision-Making Deficit of Patients with Ventromedial Prefrontal Cortex Lesions, 123 Brain 2189, 2198-99 (2000).
79 Samantha Schad, Adolescent Decision Making: Reduced Culpability in the Criminal Justice System and Recognition of Capability in Other Legal Contexts, 14 J. Health Care L. & Policy 375, 378 (2011) ("Puberty causes a restructuring of dopamine levels within the brain and 'dopamineergic activity in the prefrontal cortex increases significantly in early adolescence.' Dopamine is 'a key monoamine neurotransmitter modulating reward circuitry' and 'has been associated with multiple aspects of reward processing ...' Dopamine influences reward seeking, strongly motivating individuals to seek rewards or engage in rewarding behavior").
80 Id. at 569 n. 15.
correctly mimicking others.\textsuperscript{82} The more successful this process, the more the child subconsciously adapts their behavior in alignment with their environment.\textsuperscript{83}

Studies show that career criminals share a common childhood infused with poverty, instability, deprivation, abandonment, neglect, violence, and abuse.\textsuperscript{84} Such environments promote antisocial forces that outweigh the legal norms developed outside the neighborhood. Consequently, street culture shapes youth more than the social controls of law enforcement. The law of the jungle rules such that status is achieved through physical power and domination, toughness, and gang affiliation all glorified by challenging and beating the system through truancy, theft, property damage, etc. In such a world, a youth's choice of lawlessness and violence becomes the rational choice for survival.\textsuperscript{85} In fact, in such an environment it may actually be "aberrant to refrain from crime during adolescence."\textsuperscript{86} If the child's environment is fraught with negative role models, the youth in progress will result in a less than perfect product.

Juveniles born into poverty effectively are punished by the poverty that is not of their making. Malleable and transitory youth immersed in poverty-stricken, crime-infested neighborhoods find themselves not only socially and culturally isolated from mainstream America but also more susceptible to stress, which further clouds their ability to make the

\textsuperscript{82} Id. at 782.
\textsuperscript{83} Id. at 783.
\textsuperscript{86} Terrie E. Moffitt, Adolescent-Limited and Life-Course-Persistent Antisocial Behavior: A Development Taxonomy, 100 Psychol. Rev. 674 (1993).
logical choices to avoid risky behavior. Further, those juveniles who conform to the law of the jungle and resort to crime are more likely to be developmentally impaired by mental illness, abuse, or a low-IQ. Consistent with trends of poverty and race, 57% of Florida's 10 to 17-year-old referred to the juvenile justice system are Black or Hispanic, and of those in that age group transferred to adult court, 69% are either Black or Hispanic, although Blacks and Hispanics make up only 45% of this age group in Florida.

There is hope. The vast majority of juvenile offenders abandon their criminal activities by the time they reach adulthood. It is the very nature of youth's heightened susceptibility to external forces and transitory quality that provides them the greatest capacity to reform and conform to society's norms especially when provided the opportunities and rewards for good behavior. Indeed, studies show that reform as measured by reduce rates of recidivism is most likely when treatment programs target the

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very youth\textsuperscript{91} that Florida marks as irredeemable. It is a very small percentage of youth who will become entrenched in their incorrigibility.\textsuperscript{92}

The judiciary is ill equipped to act as gatekeepers in determining which among the many wayward youth will become calcified irredeemable such that they are deserved of adult sanctions devoid of any real effort spent on reform. Both the courts\textsuperscript{93} and scientists\textsuperscript{94} agree that it is nearly impossible to predict which adolescents will fall into the incorrigible camp. Indeed, one recent study demonstrates that diagnostic scores used to predict which 13-year-olds will be psychopathic at 24-years will be wrong 86 percent of the time.\textsuperscript{95} Florida, nonetheless, gives the courts and law enforcement the very authority behavioral scientists do not support: allowing them to make determinations as to which juvenile offenders are transferred to the criminal justice system relying heavily on the child's age and the type of crime charged.\textsuperscript{96}

B. Juveniles are Categorically Distinct from Adults

The courts have long endorsed separate treatment for juveniles recognizing juveniles are peculiarly vulnerable and less capable than adults to make informed, critical

\begin{itemize}
\item \textsuperscript{91}Christopher Slobogin, \textit{Treating Kids Right: Deconstructing and Reconstructing the Amenityability to Treatment Concept}, 10 J. Contemp. Legal Issues 299, 315-16 (1999).
\item \textsuperscript{92} Id. at 2026 n. 16; see also Laurence Steinberg, \textit{Adolescent Development and Juvenile Justice}, 5 Ann. Rev. Clinical Psychol. 459, 478 (2009) ("[M]ost juvenile offenders will mature out of crime ... and ... will desist whether or not they are caught, arrested, prosecuted, or sanctioned").
\item \textsuperscript{93} Id. at 574 n.15.
\item \textsuperscript{95} Donald R. Lamm et al., \textit{Longitudinal Evidence That Psychopathy Scores in Early Adolescence Predict Adult Psychopathy}, 116 J. Abnormal Psychol. 155, 160, 162 (2007).
\item \textsuperscript{96} Fla. Stat. § 985.557(2) (2011) (Florida state attorneys are required to directly file all 16- and 17- year old offenders who commit felonies with a prior felony record, forcible felonies, firearm in possession offenses, or committed a carjackings resulting in serious bodily injury).
\end{itemize}
Concerned with taking malleable and impressionable youth and molding them into career criminals through exposure to hardened adult criminals, the courts have consistently favored treatment and rehabilitation over retributive punishment for juveniles. In keeping with this philosophy, the states generally heed this advice as evidenced by the fact that approximately two-thirds of all arrested juveniles or nearly two million cases annually are processed as delinquency cases in juvenile courts.

*Thompson v. Oklahoma* established for the first time disparate sentencing of juvenile offenders based upon the Eighth Amendment's prohibition against cruel and unusual punishment. *Thompson* addressed whether the U.S. Constitution barred imposing the death penalty on a child who was 15-years-old at the time he participated in the brutal murder of his former brother-in-law for which he was subsequently found guilty of first-degree murder. *Thompson* relied upon the evolving standards of decency and the judicial exercise of independent judgment to conclude that executing a person who was less than 16-years old at the time of the offense was cruel and unusual punishment and thus unconstitutional. The Court recognized "there are differences which must be accommodated in determining the rights and duties of children as compared with those of adults" since juveniles "are less mature and responsible than adults." *Thompson* held

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98 *Id.* at 1437 n. 26.
101 *Id.* at 832.
102 *Id.* at 848.
103 *Id.* at 838.
104 *Id.* at 823.
the juveniles' lack of experience, education, and ability to engage in a cost-benefit analysis to chart a course of conduct, render them less culpable and therefore their conduct is less morally reprehensible as compared to an adult. Limited by the case before them, the Thompson Court did not consider whether older juveniles were death penalty eligible, drawing the line at 16-years of age.

Seventeen years later and after 19 more juvenile offenders were executed the Court moved the line to 18-years of age in Roper v. Simmons. Roper involved 17-year-old Christopher Simmons who planned and executed the cold-blooded murder of a woman Simmons had targeted after encountering her during an earlier automobile accident. Simmons bragged about the murder and was quickly arrested at his high school whereupon he waived his Miranda rights, confessed, and provided a videotaped reenactment of the crime. Missouri law precluded Simmons from the jurisdiction of juvenile court and consequently Simmons was tried as an adult and found guilty of the murder. During the penalty phase the defense brought forth the fact that Simmons had no prior convictions or charges and that the legislature had decided that 17-year-old's weren't responsible enough. In rebuttal the prosecutor asserted that Simmons youth did not mitigate his crime and was

105 Id. at 834.
106 Id. at 835, 837.
107 Id. at 838.
109 Id. at 551 n. 15.
111 Richard Rogers, Lisa L. Hazelwood, Kenneth W. Sewell, Daniel W. Shuman, & Hayley Blackwood, The Comprehensibility and Content of Juvenile Miranda Warnings, 14 Psychol. Pub. Pol’y & L. 63, 66 (2008) (In keeping with juveniles' susceptibility to external forces, one study showed that only 10% of all juveniles exercise their Miranda rights while 75% of the youth provide false confessions).
more appropriately considered as an aggravator. The court followed the jury's recommendation and imposed a sentence of death upon Simmons.112

Simmons moved to set aside his conviction by presenting the testimony of a clinical psychologist who opined Simmons was very impulsive, immature, and very easily manipulated and influenced.113 Other experts testified to Simmons's truancy, poor school performance, and abuse of alcohol and drugs.114 The trial court denied the motion and the Missouri Supreme Court subsequently affirmed Simmons's conviction but set aside Simmons's death sentence resentencing him to life imprisonment without the possibility of parole. In so doing the Missouri Supreme Court applied the Supreme Court of the United States holding in Atkins v. Virginia115 to Simmons.116 Atkins held that the diminished culpability of a mentally impaired offender did not comport with retribution and deterrence and thus the imposition of the ultimate form of punishment upon such an offender was too excessive a sanction.117

In affirming the prohibition against executing juvenile offenders, the Roper court referred to Thompson's reasoning that youth are less morally reprehensible than adults.118 Roper considered juveniles as a class and determined they could not be classified as "among the worst offenders" based upon three general differences distinguishing juveniles from adults: their lack of maturity, their vulnerability to external influences, and their

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112 Id. at 555-59 n. 15.
113 Id. at 559.
114 Id.
116 Id. at 559 n. 15.
117 Id. at 318-320 n. 115.
118 Id. at 561 n. 15.
transitory, unformed nature.\textsuperscript{119} The \textit{Roper} court asserted juveniles "have a greater claim than adults to be forgiven,"\textsuperscript{120} are less "irretrievably depraved,"\textsuperscript{121} are less culpable,\textsuperscript{122} and are less susceptible to deterrence.\textsuperscript{123}

The \textit{Roper} court addressed the difficulties with distinguishing between a juvenile with rehabilitative potential and the rare child who is beyond reform.\textsuperscript{124} In finding that even expert psychologists cannot reliably make such a distinction with certainty, \textit{Roper} held that juveniles should not be foreclosed from maturing into more humane persons.\textsuperscript{125} Following on the heels of \textit{Roper, Graham v. State}\textsuperscript{126} extended even further a directive for disparate treatment of juveniles barring the sentencing of juveniles to life with out parole for their non-homicide crimes.

\textit{Graham} concerned 16-year-old Terrance Jamar Graham who entered a plea agreement with a Florida trial court for among other things the crime of armed burglary for which he was placed on probation.\textsuperscript{127} Graham subsequently violated his probation. After revoking probation for the then 19-year-old Graham, the court sentenced Graham to life imprisonment for the original burglary charge. The \textit{Graham} court held that the Eight Amendment's prohibition against cruel and unusual punishment prohibited such a severe

\begin{footnotes}
\item[119] \textit{Id.} at 569-570
\item[120] \textit{Id.} at 570
\item[121] \textit{Id.}
\item[122] \textit{Id.} at 571 n. 15.
\item[123] \textit{Id.}
\item[124] \textit{Id.} at 573 n. 15.
\item[125] \textit{Id.} at 574.
\item[126] \textit{Id.} n. 16.
\item[127] \textit{Id.} at 2014 n. 16.
\end{footnotes}
sentence for a non-homicide crime based upon juveniles' limited culpability.\textsuperscript{128} Graham's categorical rule for juveniles was necessary because of the dangers of foreclosing a "capacity for change" and a chance to mature or reform based upon the subjective, discretionary judgment by a judge or jury that a juvenile offender who lacks "moral culpability" is "irredeemably depraved."\textsuperscript{129} Although a juvenile who commits a non-homicide crime need not be provided a guarantee of freedom, the sentence imposed "must provide[] some meaningful opportunity for release based on demonstrated maturity and rehabilitation."\textsuperscript{130}

Subsequent to Graham, the Supreme Court of the United States reiterated the historical "assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them" in the matter of J.D.B. v. N. Carolina.\textsuperscript{131} J.D.B. concerned the juvenile's understanding of a custodial situation within the school context and emphasized the law should not ignore "the very real differences between children and adults"\textsuperscript{132} recognizing children "characteristically lack the capacity to exercise mature judgment."\textsuperscript{133}

V. Florida Law Does not Comport with the Eighth Amendment's Prohibition Against Cruel and Unusual Punishment

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\item[\textsuperscript{128}] Id. at 2016.
\item[\textsuperscript{129}] Id. at 2017.
\item[\textsuperscript{130}] Id. at 2016 (emphasis added).
\item[\textsuperscript{131}] J.D.B. v. N. Carolina, 131 S. Ct. 2394, 2400 (U.S.N.C. 2011).
\item[\textsuperscript{132}] Id. at 2408.
\item[\textsuperscript{133}] Id. at 2397.
\end{itemize}
\end{footnotesize}
Florida has repeatedly upheld its authority to adjudicate juvenile offenders as adults relying upon the Supreme Court of Florida's 1980 decision in *State v. Cain*.  

*State v. Cain* involved a juvenile who, charged with two counts of armed burglary and two counts of grand theft, challenged the constitutionality of Florida statutes allowing for children to be charged as an adult if the offender was at least 16 years of age and had committed two prior delinquent acts one of which was a felony. In upholding the state attorney's power to directly file a juvenile in adult court, the *Cain* court relied on a finding that there was no constitutional right for preferred treatment as juvenile delinquents.

*Cain* cannot be reconciled with Supreme Court of the United States holdings consistently speaking to a constitutionally relevant and differential treatment of wayward youth. These subsequent holdings require additional and preferential treatment of juvenile offenders, bar the imposition of adult sanctions where opportunities for reform are lacking, and caution the judiciary from making determinations as to who is unworthy of reform. In Florida, rehabilitation is just one of the many factors the judiciary considers when making subjective determinations as to whether a juvenile will be punished as an adult. However, in contrast to juvenile sanctions where treatment, education, adequate nutrition, and rehabilitation are required there is no mandate that such opportunities are made available to juveniles sent to adult prisons.

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135 *Cain*, 381 So. 2d at 1363.

136 *Id*. n. 100; *Id*. at 573 n. 15; *Id*. n. 16, *Id*. n. 131.


138 *Fla. Stat*. § 985.02 (2011)
The courts have long held that punishment absent a "measurable contribution to acceptable goals of punishment" is nothing more than the "purposeless and needless imposition of pain and suffering." Penalties are found disproportionate when they fail to meet one of the acceptable goals of punishment: retribution, deterrence, incapacitation, and rehabilitation. Thompson, Graham, and Roper reasoned that deterrence and retribution are inadequate justifications for imposing adult sanctions on juvenile offenders who are recognized as unformed, vulnerable, and lacking maturity. Juvenile adjudication and adult incarceration serve incapacitation equally but "incapacitation cannot override all other considerations" and is an excessive sanction when lacking the fourth penological justification, rehabilitation as is the case for Florida youth imprisoned as adults.

With Cain’s reasoning now called into question, it is unlikely Florida's direct transfer laws will survive a renewed constitutional challenge. Specifically, Florida laws allowing for criminal sanctions to be imposed upon its non-homicide juvenile offenders without the provision for meaningful rehabilitative opportunities are misaligned with Graham, where such sanctions were found excessive and accordingly disproportionate. The same lack of a proviso for rehabilitative opportunities may also implicate Florida

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140 Id. at 2028 n. 16.
141 Id. at 553 n. 15.
142 Id. at 2029 n. 16.
143 Id. at 2030 n. 16.
144 Id. n. 140.
145 Id. at 2030 n. 16. (Denying a juvenile who has committed a non-homicide offense the right to reenter the community is inappropriate punishment in light of the "offender's capacity for changed and limited culpability...." Rejecting rehabilitation for those "who are most in need of and receptive to rehabilitation" is a disproportionate sanction).
statutes that allow for the imposition of adult sanctions even for juveniles convicted of capital offenses.\textsuperscript{146}

Adult sanctions imposed on juveniles based upon the age of the youth and the seriousness of the offense\textsuperscript{147} do not pass the logic litmus test. There is nothing in a juvenile's impulsive, shortsighted nature to suggest that their culpability scales with the type of crime perpetrated. An ill-formed, impulsive, myopic youth is no more forward thinking and calculating when committing unarmed burglary than when committing felony murder. To sanction the one offender with incapacitation and treatment and the other with incarceration devoid of rehabilitative programs is nonsensical and incompatible with the teachings of recent Supreme Court holdings. As long as Florida equates "the failings of a minor with those of an adult"\textsuperscript{148} and allows its wayward youth to be treated as the worst of offenders, Florida laws are repugnant to the Constitution's Eighth Amendment prohibiting disproportionate criminal sanctions.\textsuperscript{149}

There is precedent in Florida for the legal recognition that juveniles lack accountability and warrant disparate treatment through restrictions on voting, contract rights, and the ability to direct medical services.\textsuperscript{150} It would be a small step for Florida to afford its children the same latitude when it comes to punishment. Florida could maintain its right to impose adult sanctions upon juveniles and align itself with the constitutional directive by

\textsuperscript{146} Fl. Stat. § 985.56 (2011).
\textsuperscript{147} Fl. Stat. §§ 985.557(1)(a), (2)(b), and (2)(c) (2011)
\textsuperscript{148} Id. at 2026 n. 16.
\textsuperscript{149} Id. at 2021 n. 16.
\textsuperscript{150} Fl. Stat. §§ 97.041 (2011) (restricting voting rights to 18 years or older), 743.01 and 743.05 (restricting the ability of minors to contract), 743.064 (restricting the ability for minors to receive medical treatment absent parental consent), 743.07 (requiring minors to petition for emancipation).
implementing mandatory rehabilitative opportunities for at least its non-homicide juvenile offenders housed within adult prisons. However, consideration must be given to the cost involved with refitting adult prisons for the sake of 1.4% of the population who are juveniles.\textsuperscript{151} Furthermore, these services would be redundant to those already available and fine-tuned within juvenile detention facilities that serve incapacitation as well as adult imprisonment.

VI. Conclusion

The unequivocal message from the Supreme Court of the United States is that juvenile offenders must be treated as categorically distinct from adults.\textsuperscript{152} The Court has repeatedly emphasized juveniles' lack of maturity\textsuperscript{153} and susceptibility render them less culpable than adults\textsuperscript{154} requiring that juvenile sanctions must not deprive a once wayward youth convicted of a non-homicide crime from an opportunity to demonstrate maturity and reform.\textsuperscript{155} Arguments can be made to further provide these same opportunities for juveniles who commit capital crimes based upon the holdings that children are categorically less culpable and a lack of evidence that a child's culpability scales with the seriousness of the crime. Further, science bolsters the Court's assessment that there is no accurate or reliable method to determine \textit{a priori} which youthful offenders are part of the

\textsuperscript{151} Id. n. 3.
\textsuperscript{153} Thompson, 487 U.S. at 834, \textit{Roper}, 543 U.S. at 569-70, \textit{J.D.B.}, 131 S. Ct. at 2400.
\textsuperscript{155} Application of Gault, 387 U.S. at 26; Graham, 130 S. Ct. at 2016.
very small percentage of irredeemably depraved\textsuperscript{156} such that efforts of reform are unwarranted.

At the very minimum it is cruel to confine those we recognize as the most vulnerable and impressionable of our society to a world where they are denied treatment and opportunities to reform while faced with relentless violence, forced gang initiations, and assaults on their persons. It is unusual in that of the 75,382 juveniles Florida annually treats as delinquent only a very small percentage are incarcerated in adult prisons.\textsuperscript{157} Florida’s message to these wayward youth is that they are irredeemable and are deserved of nothing more than retribution, while expecting the least powerful of our society to somehow rise above their adult oppressors and achieve what their oppressors have not — rehabilitation. By sending its unformed youth into adult prisons, Florida fails to recognize that the very nature of juveniles rendering them less culpable than adults also leaves them more amenable to rehabilitation and reform.

Law, logic, and economics compels Florida to cease transferring juveniles to adult court so that the youth remain tracked and adjudicated in a juvenile justice system designed, resourced, and funded for the specific purpose of rehabilitation and treatment. Penalizing its children through juvenile adjudication is compatible with the acceptable goals for punishment and if focused on treatment and rehabilitation, can be very cost-

\textsuperscript{156} Roper, 543 U.S. at 573, Graham, 130 S. Ct. at 2017.
\textsuperscript{157} Five Year Juvenile Delinquency Trends and Conditions (last updated April 11, 2011), Florida Department of Juvenile Justice, http://www.djj.state.fl.us/Research/Trends.html.
effective.¹⁵⁸ Juvenile offenders will be no less incapacitated as they would be in adult prison while providing for the very real possibility for the youth to shed their immaturity and emerge reformed to society's benefit.

If Florida had recognized the very real distinction between juveniles and adults and treated young Michael Myers as the vulnerable child that he was by providing him with the very treatment he alone seemed to recognize was needed, Michael might have emerged from his incapacitation a reformed and contributing member of society instead of ending his days brutalized in an adult prison.

¹⁵⁸ Richard A. Mendel, The Missouri Model, The Annie E. Casey Foundation. (2010) http://www.aecf.org/KnowledgeCenter/~/media/Pubs/Initiatives/Juvenile%20Detention%20Alternatives%20Initiative/MOModel/MO_Summary_webfinal.pdf (Missouri has a recidivism rate of 8.5% as a result of its emphasis on education, treatment, and support over coercion while focusing on the underlying problems and engaging the families towards solutions); see also Mark A. Cohen & Alex R. Piquero, New Evidence on the Monetary Value of Saving a High Risk Youth, 25 J. Quant. Criminol. 25, 46-47 (2009) (One juvenile who is denied treatment and subsequently evolves into a career criminal is estimated to cost society $3-6 million for expenses associated with victim costs, lost resources due to the manufacture and sale of drugs, drug rehabilitation, lost wages and productivity, premature death, and criminal justice costs).