THE ROAD TO JUSTICE IN JUVENILE SENTENCING: A TALE OF "LEGISLATIVE INACTIVISM," "STATUTORY PRE-VIVAL," AND "JUDICIAL RESCUE"

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In the early morning hours of September 9, 1993, Shirley Crook died. The dawn that followed was not just the dawn of another day, but also the dawn of a new era in our country. Ms. Crook's tragic death—she was the victim of a heinous murder committed by two teenagers—led to fundamental changes in the philosophy guiding our courts with regard to the sentencing of juveniles.

Those changes echoed throughout the nation, perhaps most loudly in Florida, where the road to reform was not a smooth one. It played out on three different stages as developments in the United States Supreme Court, the Florida legislature, and the Florida courts intertwined to shape the process. Twenty-one years after Ms. Crook was murdered, and over four years after the constitutional inadequacies of the state's statutes became obvious, the legislature finally acted. It did so, however, in a manner that left the Florida courts, and many juveniles convicted of serious crimes, in a legal limbo that required the imposition of sentences that either violated the Constitution or were not authorized by statute.

This Article will trace the developments on each of the stages, set forth the legislative changes that occurred, examine the way the

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Florida courts dealt with the legislature’s initial inaction and its later inadequate action, and discuss whether the unique solution—applying a statute that, by its very terms, was prospective in nature to crimes occurring before its adoption—settled upon by the Supreme Court of Florida was the result of judicial activism or was really a “judicial rescue,” implicitly endorsed by the legislature through what could be called “legislative inactivism.”

A. THE SUPREME COURT, ACT I: ROPER V. SIMMONS

Seventeen-year-old Christopher Simmons was the instigator of the murder of Ms. Crook.\(^1\) In the days before its commission, he told his friends, Charles Benjamin, fifteen, and John Tessmer, sixteen, that he wanted to murder someone. In chilling and callous terms, he proposed committing a burglary and a murder by breaking and entering, tying up a victim, and throwing the victim off of a bridge.\(^2\) He also assured his friends that they could “get away with it” because they were minors.\(^3\)

As his potential victim, Simmons initially targeted an individual known as “the voodoo man.”\(^4\) Rumor had it that the voodoo man, despite living in a trailer park,\(^5\) owned hotels and motels, and had lots of money inside his residence.\(^6\)

On September 8, 1993, the trio arranged to meet at 2:00 a.m. the following morning for the purpose of carrying out their plan.\(^7\) They got together at the appointed time at the home of Brian Moomey, a twenty-nine-year-old convicted felon who allowed neighborhood teens to “hang out” at his home.\(^8\) While there, Tessmer refused to accompany the

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2. Id.
3. Id.
5. Id.
6. Id.
7. Id.
8. Id.
other two and instead returned to his own home.\(^9\)

Tessmer was later charged with conspiracy, but the State dropped the charge in return for his testimony against Simmons.\(^10\) That testimony reflected that Simmons discussed his plan with Tessmer three to five times in September and that the voodoo man was always the intended target.\(^11\) The State also presented the testimony of Christie Brooks, who stated that Simmons came by her house about five hours prior to the break-in at Ms. Crook’s residence that led to her murder and told her that he and two others were going to rob the voodoo man.\(^12\)

Despite the constant focus on the voodoo man, when Simmons and Benjamin left Moomey’s home, they went to Ms. Crook’s residence.\(^13\) Upon arrival, the pair found a window cracked open.\(^14\) They opened it further, reached through, unlocked the back door, and entered the house.\(^15\) When Simmons turned on a hallway light,\(^16\) Ms. Crook, who was alone,\(^17\) called out, “Who’s there?”\(^18\) Simmons entered Ms. Crook’s bedroom and recognized her as someone with whom he had previously had an automobile accident.\(^19\) Ms. Crook apparently recognized him as well.\(^20\)

When Ms. Crook failed to comply with Simmons’s order to get out of bed, he and Benjamin forced her to the floor.\(^21\) Simmons found a roll of duct tape in the house and used it to bind Ms. Crook’s hands behind her back.\(^22\) The two teenagers also taped Ms. Crook’s eyes and

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\(^9\) Id.
\(^11\) Simmons, 944 S.W.2d at 177.
\(^12\) Id.
\(^13\) Id. at 169.
\(^14\) Id.
\(^15\) Id.
\(^16\) Id. at 170.
\(^17\) Id.
\(^18\) Id.
\(^19\) Id.
\(^20\) Id.
\(^21\) Id.
\(^22\) Id.
They took her from her home and placed her in the back of her minivan, which Simmons drove from her home to a railroad trestle at a state park.

As they went to unload Ms. Crook from the minivan, the pair found that she had freed her hands and had removed some of the duct tape from her face. Using Ms. Crook’s purse strap, the belt from her bathrobe, a towel from the minivan, and some electrical wire found on the trestle, they bound Ms. Crook, restraining her hands and feet and covering her head with a towel. They walked her to the railroad trestle, where Simmons bound her hands and feet together, hog-tie fashion, with the electrical cable and covered her face completely with duct tape. Simmons then pushed the still alive and conscious Ms. Crook, who was “terrifically scared of height,” off the trestle and into the Meramec River below. The medical examiner later determined that the cause of death was drowning, that Ms. Crook sustained several fractured ribs and considerable bruising, and that the injuries did not result from her fall from the trestle.

Simmons and Benjamin threw Ms. Crook’s purse into the woods and drove her minivan back to the mobile home park across from the subdivision where she had lived. Later that day, Simmons bragged to

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23 Id.
24 Id.
25 Id.
26 Id.
27 Id.
28 Id.
29 Id.
30 Id. at 185. At Simmons’s sentencing, Ms. Crook’s husband testified:

But she was terrifically scared of height. It terrifies me to think of her being blindfolded and knowing that she was—because I feel that they would have talked about where they were going, and to be thrown off of a high spot would be a really a terrible thing for her . . .

31 Simmons, 944 S.W.2d at 170.
32 Id.
33 Id.
34 Id.
Moomey that he had killed a woman “because the bitch had seen my face.” The following day, Simmons was arrested, confessed to the murder, and “agreed to videotape a confession and to take part in a videotaped ‘reenactment’ of the murder at the crime scene.”

Simmons was charged with first-degree murder, burglary, kidnapping, and stealing. The lesser charges were severed, and Simmons proceeded to trial on the first-degree murder count. He was convicted and, consistent with a jury recommendation, sentenced to death.

During the penalty phase of the trial, the trial court instructed the jury that they could consider Simmons’s age “as a mitigating factor.” Defense counsel tried to get the jury to do so, pointing out that juveniles cannot drink alcohol, serve as jurors, or watch some movies because the legislatures have wisely decided that individuals of a certain age aren’t responsible enough, and arguing that “Simmons’[s] age should make ‘a huge difference . . . in deciding just exactly what sort of punishment to make.’”

The prosecutor offered a sharply different take. He began his discussion of age by asking, “Does the defendant’s age outweigh what he did? It doesn’t matter if he was seventeen, twenty-seven, or seventy, the crime is still the same, and it’s just as vicious.” He went on to urge the jury to not “let him use his age to protect himself now, because

35 Id.
36 Id.
37 Id.
38 Id.
39 Id.
40 Id.
41 Id.
42 Id.
43 Id.
45 Id.
46 Id.
47 Simmons v. Bowersox, 235 F.3d 1124, 1136 n.6 (8th Cir. 2001), cert. denied, 534 U.S. 924 (2001).
then he wins." After the defense closing, the prosecutor stated, "Think about age. Seventeen years old. Isn’t that scary? Doesn’t that scare you? Mitigating? Quite the contrary, I submit. Quite the contrary."

Simmons appealed, and the judgment and sentence, as well as the denial of postconviction relief, were affirmed. The United States Supreme Court denied review. His subsequent efforts to obtain federal habeas corpus relief were unsuccessful.

Five years after his conviction and sentence were affirmed, with Simmons on Missouri’s death row awaiting execution, the legal landscape began to shift.

In Atkins v. Virginia, the United States Supreme Court concluded that a national consensus had emerged against the execution of defendants with intellectual disabilities and found that the imposition of death sentences in such cases violates the Eighth Amendment prohibition against cruel and unusual punishments.

Previous opinions of this Court have employed the term “mental retardation.” This opinion uses the term “intellectual disability” to describe the identical phenomenon. See Rosa's Law, 124 Stat. 2643 (changing entries in the U.S. Code from “mental retardation” to “intellectual disability”); Schalock et al., The Renaming of Mental Retardation: Understanding the Change to the Term Intellectual Disability, 45 Intellectual & Developmental Disabilities 116 (2007). This change in terminology is approved and used in the latest edition of the Diagnostic and Statistical Manual of Mental Disorders, one of the basic texts used by psychiatrists and other experts; the manual is often referred to by its initials “DSM,” followed by its edition number, e.g., “DSM-5.” See American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 33 (5th ed. 2013).


Simmons is not intellectually disabled, so the decision in Atkins did not impact him directly. But it gave rise to an argument that a similar conclusion should also apply to juveniles. It did so because Atkins overruled Perry v. Lynaugh, which had found no constitutional bar to the execution of those with intellectual disability, pointing in part to the lack of national consensus in support of such a prohibition. On the same day Perry was decided, the Court also decided Stanford v. Kentucky, which declined to bar the execution of those who were sixteen or seventeen-years-old at the time of their crimes, and which supported its conclusion with the fact that there did not exist a national consensus against those executions.

Simmons therefore returned to the Supreme Court of Missouri, seeking habeas corpus relief and arguing that the United States Constitution prohibits the execution of all juveniles. In an opinion that focused primarily on the emerging national consensus against executing juveniles, that court agreed, set aside Simmons’s death sentence, and resentenced him to life without eligibility for probation, parole, or release, except by an act of the Governor. The court noted that “the parties have cited this Court to numerous current studies and scientific articles about the structure of the human mind, the continuing growth of those portions of the mind that control maturity and decision-making during adolescence and young adulthood, and the lesser ability of teenagers to reason.” In light of its determination, however, the court found no need to extensively deal with this argument, stating that “this Court need not look so far afield.”

The United States Supreme Court agreed with the result reached by the Supreme Court of Missouri. But it did not consider looking at the nature of the juvenile mind to be looking afield. Rather, it did so as a critical aspect of its analysis and, in doing so, injected that concept

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56 The Court had previously held that executing persons younger than sixteen constitutes cruel and unusual punishment. Thompson v. Oklahoma, 487 U.S. 815 (1998).
58 State ex rel. Simmons v. Roper, 112 S.W.3d 397, 400 (Mo. 2003).
59 Id. at 412.
60 Id.
Finding that “juvenile offenders cannot with reliability be classified among the worst offenders,” the Court pointed to three general differences between juvenile and adult offenders. 61 First, a “lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.” 62 The second area of difference noted by the Court was “that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure,” 63 a fact “explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment.” 64 The third area pointed to by the Court was “that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.” 65

Thus, the Court went on to state:

These differences render suspect any conclusion that a juvenile falls among the worst offenders. The susceptibility of juveniles to immature and irresponsible behavior means “their irresponsible conduct is not as morally reprehensible as that of an adult.” Thompson [v. Oklahoma, 487 U.S. 815, 835 (1998)] (plurality opinion). Their own vulnerability and comparative lack

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63 Id. (quoting Eddings, 455 U.S. at 115) and then adding that “[y]outh is more than a chronological fact” because “[i]t is a time and condition of life when a person may be most susceptible to influence and to psychological damage” (quoting Eddings, 455 U.S. at 115).
64 Id. (citing Laurence Steinberg & Elizabeth S. Scott, Less Guilty by Reason of Adolescence; Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 AM. PSYCHOLOGIST 1009, 1014 (2003)) and then adding that “[a]s legal minors, [juveniles] lack the freedom that adults have to extricate themselves from a criminogenic setting” (citing Steinberg & Scott, supra, at 1014).
65 Id. at 570 (citing ERIK H. ERIKSON, IDENTITY: YOUTH AND CRISIS (1968)).
of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. See Stanford [v. Kentucky, 492 U.S. 361, 395 (1989)] (Brennan, J., dissenting). The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed. Indeed, “[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside.” Johnson [v. Texas, 509 U.S. 350, 368 (1993)]; see also Steinberg & Scott, [supra note 64, at 1014] (“For most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood.”).

Given this “diminished culpability of juveniles,” the Court went on to indicate that “the penological justifications for the death penalty apply to them with lesser force than to adults.”

The Court focused on two justifications for the death penalty: retribution and deterrence. As to the first of these rationales, the Court, analogizing to the situation regarding those with intellectual disabilities dealt with in Atkins, stated, “Whether viewed as an attempt to express the community’s moral outrage or as an attempt to right the

66 Id.
67 Id. at 571.
balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult." 69 Indeed, the Court continued, "Retribution is not proportional if the law’s most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." 70

Moving to the second justification for capital punishment, the Court noted that "it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles." 71 The lack of evidence in this respect, the Court stated, "is of special concern because the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence." 72 The Court pointed out that, "[i]n particular, as the plurality observed in Thompson, ‘[t]he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent.’" 73

Although recognizing, but not conceding, that the "rare case might arise in which a juvenile" with "sufficient psychological maturity" might demonstrate "sufficient depravity" to merit a death sentence, 74 the Court refused to treat the concerns it had identified as merely mitigating factors for a jury to consider. Finding that "[a]n unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender’s objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death," 75 the Court found that "[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death

69 Id.
70 Id.
71 Id.
72 Id.
73 Id. at 571-72 (quoting Thompson v. Oklahoma, 487 U.S. 815, 837 (1988) (plurality opinion)).
74 Id. at 572.
75 Id. at 573.
penalty despite insufficient culpability."}\footnote{\textit{Id.} at 572-73.}

Thus, the Court concluded that "the death penalty cannot be imposed upon juvenile offenders."\footnote{\textit{Id.} at 575.} The Court defined juvenile offenders as those under eighteen years of age.\footnote{\textit{Id.} at 574.} The Court recognized that "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18" and that, "[b]y the same token, some under 18 have already attained a level of maturity some adults will never reach."\footnote{\textit{Id.}} But, the Court realized that "a line must be drawn," and therefore stated that because "[t]he age of 18 is where society draws the line for many purposes between childhood and adulthood[,] . . . [i]t is, we conclude, the age at which the line for death eligibility ought to rest."\footnote{\textit{Id.}} The Court found "confirmation"\footnote{\textit{Id.} at 575.} for its "determination that the death penalty is disproportionate punishment for offenders under 18"\footnote{\textit{Id.} at 576} from the fact that Article 37 of the United Nations Convention on the Rights of the Child, which every country in the world except the United States and Somalia has ratified, expressly prohibits capital punishment for crimes committed by juveniles under 18.\footnote{\textit{Id.}}

\section*{B. The Florida Legislature, Act I: Inaction}

The \textit{Roper} decision apparently had no impact on the Florida legislature, which took no action to provide an exception for juveniles convicted of capital felonies. As a practical matter, however, this lack of action had no consequences. At the time \textit{Roper} was decided, Florida law provided that all persons, juvenile or adult, convicted of a capital felony were to be punished by either death or life imprisonment with no possibility of parole.\footnote{\textit{Id.} at 575.} Thus, the legislative inaction meant that a juvenile convicted of such a crime after \textit{Roper} simply received a life
sentence under the statute, or its identical successors, almost certainly the sentence he or she would have received had the statutory scheme been amended to provide an exception to the death penalty for juveniles.

C. THE SUPREME COURT, ACT II: GRAHAM V. FLORIDA

In July 2003, the month before the Supreme Court of Missouri decided *State ex rel. Simmons v. Roper*, sixteen-year-old Terrance Jamar Graham was part of a group of juveniles who attempted to rob a barbeque restaurant in Jacksonville, Florida. In July 2003, the month before the Supreme Court of Missouri decided *State ex rel. Simmons v. Roper*, sixteen-year-old Terrance Jamar Graham was part of a group of juveniles who attempted to rob a barbeque restaurant in Jacksonville, Florida. Near closing time, the back door of the restaurant was left unlocked by a juvenile who worked there. Graham and another youth, both wearing masks, came in through that door, and the masked participant who entered with Graham struck the manager of the restaurant in the back of the head with a metal bar. When the manager started yelling, the juveniles fled without taking any money and escaped in a car driven by another accomplice. The manager survived, although he needed stitches for the injury to his head.

Graham was charged as an adult with armed burglary with assault or battery, a first-degree felony with a maximum penalty of life imprisonment, and attempted robbery, a second-degree felony punishable by up to fifteen years imprisonment.

Pursuant to a plea agreement, Graham pleaded guilty. He wrote a letter to the trial court, stating that this was the first and last time he would be in trouble and that he wanted to turn his life around:

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86 Id.
87 Id.
88 Id.
89 Id.
90 Id. Under Florida law, prosecutors had at the time of Graham’s crime, Florida Statute section 985.227(1)(b) (2003), and still maintain, section 985.557(1)(b) (2015), the discretion as to whether to charge felonies against sixteen and seventeen-year-olds as adults or as juveniles.
93 Graham, 560 U.S. at 54.
"I made a promise to God and myself that if I get a second chance, I'm going to do whatever it takes to get to the [National Football League]."\textsuperscript{94} The trial court accepted the plea agreement, withheld adjudication of guilt, and placed Graham on probation for three years with a requirement that the first twelve months be served in county jail.\textsuperscript{95}

He was released from custody on June 25, 2004.\textsuperscript{96} Less than six months later, on December 2, 2004, thirty-four days before his eighteenth birthday, he was arrested again.\textsuperscript{97} The State asserted that, along with a pair of twenty-year-old men, he participated in a home invasion robbery that involved holding a pistol to the chest of the resident and that, later the same night, the trio attempted a second robbery that resulted in one of Graham's accomplices being shot.\textsuperscript{98}

Graham fled from the police, at first in a vehicle, and then, after a crash, on foot.\textsuperscript{99} After he initially denied involvement in the robberies, he was told by the police that the victims of the home invasion had identified him and he was asked, "Aside from the two robberies tonight, how many more were you involved in?"\textsuperscript{100} He replied, "Two to three before tonight."\textsuperscript{101}

The trial court found that Graham had violated his probation and held a sentencing hearing.\textsuperscript{102} Absent a departure from Florida's sentencing guidelines, Graham faced a minimum sentence of five years imprisonment.\textsuperscript{103} He faced a maximum of life.\textsuperscript{104} His attorney argued for the minimum, while the State asked for thirty years on the armed burglary count and fifteen years on the attempted armed robbery

\textsuperscript{94} \textit{Id.}
\textsuperscript{95} \textit{Id.}
\textsuperscript{96} \textit{Id.}
\textsuperscript{97} \textit{Id.}
\textsuperscript{98} \textit{Id.}
\textsuperscript{99} \textit{Id.} at 54-55.
\textsuperscript{100} \textit{Id.} at 55.
\textsuperscript{101} \textit{Id.}
\textsuperscript{102} \textit{Id.}
\textsuperscript{103} \textit{Id.} at 55-56.
\textsuperscript{104} \textit{Id.} at 56.
A presentence report from Florida’s Department of Corrections recommended a downward departure from the guidelines to a four-year sentence.\textsuperscript{106}

Graham was sentenced to life imprisonment for the armed burglary and to fifteen years for the attempted armed robbery.\textsuperscript{107} Because Florida has abolished parole,\textsuperscript{108} the life sentence gave him no possibility of release barring a grant of executive clemency.\textsuperscript{109}

The trial court expounded at length on the reasons for its sentence:

Mr. Graham, as I look back on your case, yours is really candidly a sad situation. You had, as far as I can tell, you have quite a family structure. You had a lot of people who wanted to try and help you get your life turned around including the court system, and you had a judge who took the step to try and give you direction through his probation order to give you a chance to get back onto track. And at the time you seemed through your letters that that is exactly what you wanted to do. And I don’t know why it is that you threw your life away. I don’t know why.

But you did, and that is what is so sad about this today is that you have actually been given a chance to get through this, the original charge, which were very serious charges to begin with . . . . The attempted robbery with a weapon was a very serious charge.

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[I]n a very short period of time you were back before the Court on a violation of this probation, and

\footnotesize{\textsuperscript{105} Id.\textsuperscript{106} Id.\textsuperscript{107} Id. at 57.\textsuperscript{108} See FLA. STAT. § 921.002(1)(e) (2003).\textsuperscript{109} Graham, 560 U.S. at 57.}
then here you are two years later standing before me, literally the—facing a life sentence as to—up to life as to count 1 and up to 15 years as to count 2.

And I don’t understand why you would be given such a great opportunity to do something with your life and why you would throw it away. The only thing that I can rationalize is that you decided that this is how you were going to lead your life and that there is nothing that we can do for you. And as the state pointed out, that this is an escalating pattern of criminal conduct on your part and that we can’t help you any further. We can’t do anything to deter you. This is the way you are going to lead your life, and I don’t know why you are going to. You’ve made that decision. I have no idea. But, evidently, that is what you decided to do.

So then it becomes a focus, if I can’t do anything to help you, if I can’t do anything to get you back on the right path, then I have to start focusing on the community and trying to protect the community from your actions. And, unfortunately, that is where we are today is I don’t see where I can do anything to help you any further. You’ve evidently decided this is the direction you’re going to take in life, and it’s unfortunate that you made that choice.

I have reviewed the statute. I don’t see where any further juvenile sanctions would be appropriate. I don’t see where any youthful offender sanctions would be appropriate. Given your escalating pattern of criminal conduct, it is apparent to the Court that you have decided that this is the way you are going to live your life and that the only thing I can do now is to try and protect the community from your actions.110

In a postconviction motion, Graham asserted that his sentence was unlawful under the cruel and unusual punishment clause of the

110 Id. at 56-57.
Eighth Amendment. The motion was deemed denied due to the trial court's failure to timely rule on it, and Graham appealed. Florida's First District Court of Appeal affirmed, noting that Graham's initially being placed on probation was "an extremely lenient sentence for the commission of a life felony," that Graham had committed at least a pair of armed robberies and had confessed to three more, that, rather than being a pre-teen, Graham was seventeen years of age [at the time of the events leading to the revocation of probation] and was sentenced when he was nineteen, and that, during the incident leading to the revocation of his probation, Graham personally held a gun to the head of a man.

These "particular facts," the court found, "cut against rehabilitation" for Graham, who, in the court's words, "rejected his second chance and chose to continue committing crimes at an escalating pace." The court went on to say:

It is the tested theory of rehabilitation on [Graham] that sets this case apart from other challenges to a juvenile's life sentence. There is record evidence to support [Graham's] inability to rehabilitate—evidence that is usually not available upon an original sentencing proceeding. The trial court balanced the possibility of [Graham's] rehabilitation with the safety of society in determining his sentence and was well within its discretion to do so.

After the Supreme Court of Florida declined to consider his case, Graham obtained certiorari review in the United States Supreme Court. The Court began its discussion by noting "the essential principle that, under the Eighth Amendment, the State must respect the

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111 Id. at 58.
112 Id.
114 Id. at 52.
115 Id.
116 Id. at 53.
117 Graham v. State, 990 So. 2d 1058 (Fla. 2008).
human attributes even of those who have committed serious crimes.”

It then pointed out that prior precedents primarily dealt with “punishments challenged not as inherently barbaric but as disproportionate to the crime.”  Those cases, the Court noted, fall into two categories, one “involv[ing] challenges to the length of term-of-years sentences given all the circumstances in a particular case” and the other “compris[ing] cases in which the Court implement[ed] the proportionality standard by certain categorical restrictions on the death penalty.”

In the first category, “the Court considers all of the circumstances of the case to determine whether the sentence is unconstitutionally excessive.” The second “has used categorical rules to define Eighth Amendment standards” in capital cases. In that second category, the Court found the death penalty to be impermissible for nonhomicide crimes against individuals and it reached the conclusions noted above in Roper and Atkins.

Graham’s case presented an issue the Court had not previously considered, a categorical challenge to a term-of-years sentence that focused on a sentencing practice rather than the particular sentence itself.

The Court’s analysis of this question began “with objective indicia of national consensus.” At first blush, the consensus appeared to favor allowing life without parole (“LWOP”) sentences for juveniles because thirty-seven states and the federal government did so. The

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120 Id.
121 Id.
122 Id.
123 Id.
124 Id. at 60.
126 Graham, 560 U.S. at 61.
127 Id.
128 Id. at 62.
129 Id.
The Court found Florida’s argument to that effect to be “incomplete and unavailing,” because “an examination of actual sentencing practices in jurisdictions where the sentence in question is permitted by statute discloses a consensus against its use.” The Court pointed to a study finding only 109 juvenile offenders—77 of whom were in Florida—to be serving LWOP sentences for nonhomicide offenses. Noting the State’s objection that the study did not contain information for some states, the Court supplemented the study’s findings with the totals for the omitted states and concluded that there were just 123 juvenile nonhomicide offenders serving LWOP sentences. Moreover, the Court determined that the 46 offenders not in Florida were imprisoned in just ten states.

Recognizing that “[c]ommunity consensus, while ‘entitled to great weight,’ is not itself determinative of whether a punishment is cruel and unusual,” the Court looked to _Roper_ for guidance. It noted that _Roper_ made it clear that juveniles have a lesser culpability, so they do not deserve “the most severe punishments.” After synopsizing the rationale of _Roper_, the Court stated:

No recent data provide reason to reconsider the Court’s observations in _Roper_ about the nature of juveniles. As petitioner’s _amici_ point out, developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence. . . . Juveniles are more capable of change than are adults, and their actions are less likely to be

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130 Id.
131 Id.
132 Id.
133 Id. at 64.
134 Id. at 62-63.
135 Id. at 63-64.
136 Id. at 64.
137 Id. at 67 (quoting Kennedy v. Louisiana, 554 U.S. 407, 434 (2008)).
138 Id. at 67-68.
139 Id.
evidence of "irretrievably depraved character" than are the actions of adults. *Roper v. Simmons*, 543 U.S. 551, 570 (2005)]. It remains true that "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character will be reformed." *Id.*

These matters relate to the status of the offenders in question; and it is relevant to consider next the nature of the offenses to which this harsh penalty might apply.\(^{140}\)

In considering that factor, the Court recognized that "[s]erious nonhomicide crimes 'may be devastating in their harm . . . but "in terms of moral depravity and of the injury to the person and to the public," . . . they cannot be compared to murder in their "severity and irrevocability."'"\(^{141}\) Thus, the Court concluded, "It follows that, when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability."\(^{142}\)

The Court went on to note that "life without parole is 'the second most severe penalty permitted by law'"\(^{143}\) and that such a sentence "is an especially harsh punishment for a juvenile"\(^{144}\) who, under the sentence, "will on average serve more years and a greater percentage of his life in prison than an adult offender."\(^{145}\)

Next, the Court looked to the traditional goals of sentencing, concluding that "none of the goals of penal sanctions that have been recognized as legitimate—retribution, deterrence, incapacitation, and rehabilitation, . . . provides an adequate justification" for imposing LWOP sentences on juveniles convicted of nonhomicide offenses.\(^{146}\)

In light of these factors, the Court found that, while "[a] State is

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140 *Id.* at 68-69.
141 *Id.* at 69 (citing *Kennedy*, 554 U.S. at 438 (quoting *Coker v. Georgia*, 433 U.S. 584, 598 (1977) (plurality opinion))).
142 *Id.*
143 *Id.* (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring in part and concurring in judgment)).
144 *Id.* at 70.
145 *Id.*
146 *Id.* at 71.
not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime,"\textsuperscript{147} it must "give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."\textsuperscript{148}

In reaching this conclusion, the Court stated that "[c]ategorical rules tend to be imperfect, but one is necessary here."\textsuperscript{149} It rejected the State's argument that its statutory limitations were sufficient to address the constitutional concerns and, in doing so, turned to specific examples: the judge in \textit{Graham} stating that "there is nothing that we can do for you. . . . We can't do anything to deter you[;]"\textsuperscript{150} and the judge in a case involving a defendant who committed a sexual assault when he was thirteen, saying that the defendant "had demonstrated himself to be unwilling to follow the law and needed to be kept away from society for the duration of his life."\textsuperscript{151} The Court then found:

As these examples make clear, existing state laws, allowing the imposition of these sentences based only on a discretionary, subjective judgment by a judge or jury that the offender is irredeemably depraved, are insufficient to prevent the possibility that the offender will receive a life without parole sentence for which he or she lacks the moral culpability.\textsuperscript{152}

Rejecting the State's call for a case-by-case approach to sentencing, the Court said:

\begin{quote}
\textit{[E]ven if we were to assume that some juvenile nonhomicide offenders might have "sufficient psychological maturity, and at the same time demonstrat[e] sufficient depravity," . . . to merit a life without parole sentence, it does not follow that courts taking a case-by-case proportionality approach could}
\end{quote}

\begin{flushleft}
\textsuperscript{147} \textit{Id.} at 75. \\
\textsuperscript{148} \textit{Id.} \\
\textsuperscript{149} \textit{Id.} \\
\textsuperscript{150} \textit{Id.} at 76. \\
\textsuperscript{151} \textit{Id.} at 76-77. \\
\textsuperscript{152} \textit{Id.} at 77.
\end{flushleft}
with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change.\(^{153}\)

Applying the language of *Roper*, the Court found that “‘[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive’ a sentence of life without parole for a nonhomicide crime ‘despite insufficient culpability.’”\(^{154}\)

The Court buttressed its approach with a discussion of some additional factors that distinguish juveniles from adults. “Juveniles mistrust adults and have limited understandings of the criminal justice system and the roles of the institutional actors within it.”\(^{155}\) Because of this tendency, juveniles “are less likely than adults to work effectively with their lawyers to aid their defense.”\(^{156}\) Further, “[d]ifficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel, seen as part of the adult world a rebellious youth rejects, all can lead to poor decisions by one charged with a juvenile offense.”\(^{157}\)

The Court also made the point that “a categorical rule gives all juvenile nonhomicide offenders a chance to demonstrate maturity and reform.”\(^{158}\) By contrast, “[l]ife in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope.”\(^{159}\) Thus, “[a] young person who knows that he or she has no chance to leave prison before life’s end has little incentive to become a responsible individual.”\(^{160}\)

Finally, as in *Roper*, the Court looked “beyond our Nation’s borders,” finding that “the United States is the only Nation that imposes

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153 *Id.* (citation omitted).
154 *Id.* at 78 (quoting *Roper v. Simmons*, 543 U.S. 551, 572-73 (2005)).
155 *Id.*
156 *Id.* (citations omitted).
157 *Id.* (citation omitted).
158 *Id.* at 79.
159 *Id.*
160 *Id.*
life without parole sentences on juvenile nonhomicide offenders." It also noted that:

Article 37(a) of the United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990), ratified by every nation except the United States and Somalia, prohibits the imposition of "life imprisonment without possibility of release . . . for offences committed by persons below eighteen years of age." . . . As we concluded in Roper with respect to the juvenile death penalty, "the United States now stands alone in a world that has turned its face against" life without parole for juvenile nonhomicide offenders.162

Leaving it to the affected jurisdictions "to explore the means and mechanisms for compliance" with the guidelines it was establishing, the Court reversed the judgment under review and remanded for further proceedings consistent with its opinion.164

D. THE FLORIDA LEGISLATURE, ACT II: CONTINUED (AND NOW UNJUSTIFIABLE) INACTION

As one of the affected jurisdictions—indeed, the one most affected given the number of juveniles serving LWOP sentences and the fact that Graham himself was one of them—Florida was left to undertake the exploration envisioned by the Court. Because Graham was decided on May 17, 2010, after the year’s legislative session had concluded, it is not surprising that no action was taken that year. But, despite the fact that the need to address the matter was obvious, the 2011 and 2012 sessions came and went with the Florida legislature doing nothing. On June 25, 2012, after two years, one month, and eight days of inaction, the need became even more acute when Miller v. Alabama was decided.165

161 Id. at 81.
162 Id. (citations omitted).
163 Id. at 75.
164 Id. at 82.
E. THE SUPREME COURT, ACT III: MILLER V. ALABAMA

In 2003, fourteen-year-old Evan Miller was in his trailer home when a neighbor came by for the purpose of making a drug deal between himself and Miller's mother.\textsuperscript{166} When the neighbor, Cole Cannon, left, Miller and a visiting friend, Colby Smith, followed him back to his own trailer, where the three smoked marijuana.\textsuperscript{167} Eventually, Cannon passed out.\textsuperscript{168} When he did, Miller stole Cannon’s wallet and split some three hundred dollars with Smith.\textsuperscript{169}

When Miller tried to put the wallet back in Cannon’s pocket, Cannon woke up and grabbed him by the throat.\textsuperscript{170} Smith used a nearby baseball bat to hit Cannon, causing him to release Miller, who then grabbed the bat.\textsuperscript{171} After striking Cannon repeatedly with the bat and covering Canon’s head with a sheet, Miller proclaimed, “I am God, I’ve come to take your life,” and delivered a final blow.\textsuperscript{172} The boys returned to Miller’s trailer, but soon thereafter went back to Cannon’s, where they lit two fires.\textsuperscript{173} As the result of his injuries and smoke inhalation, Cannon died.\textsuperscript{174} Miller was convicted of murder in the course of arson and given an LWOP sentence as required under Alabama law.\textsuperscript{175}

Kuntrell Jackson was fourteen years old in November 1999, when he and two other boys tried to rob a video store.\textsuperscript{176} Jackson stayed outside while the others went in.\textsuperscript{177} One boy, Derrick Shields, had a shotgun in his coat sleeve, a fact known to Jackson.\textsuperscript{178} Shields

\textsuperscript{166} Id. at 2462. \\
\textsuperscript{167} Id. \\
\textsuperscript{168} Id. \\
\textsuperscript{169} Id. \\
\textsuperscript{170} Id. \\
\textsuperscript{171} Id. \\
\textsuperscript{172} Id. \\
\textsuperscript{173} Id. \\
\textsuperscript{174} Id. \\
\textsuperscript{175} Id. at 2463. \\
\textsuperscript{176} Id. at 2461. \\
\textsuperscript{177} Id. \\
\textsuperscript{178} Id.
pointed the gun at the clerk, Laurie Troup, and told her to "give up the money." She refused. Jackson went inside a few minutes later and found Shields still demanding money. There was a dispute at trial as to whether Jackson then told Troup that "[w]e ain't playin'" or told his friends that "I thought you all was playin'." Whatever Jackson said, Troup then threatened to call the police and Shields shot and killed her. Jackson was convicted of capital felony murder and aggravated robbery and was given the only punishment allowed under Arkansas law, an LWOP sentence.

The judgments and sentences imposed upon Miller and Jackson worked their way up to the United States Supreme Court, which, upon granting certiorari, ordered that they be "argued in tandem," and issued a single opinion disposing of both cases.

In assessing the LWOP sentences imposed upon Miller and Jackson, the Court built on the foundation it had established in Roper and Graham, noting that those cases "establish that children are constitutionally different from adults for purposes of sentencing," and pointing out that the two decisions "rested not only on common sense—on what any parent knows—but on science and social science as

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179 Id. (quoting Jackson v. State, 194 S.W.3d 757, 759 (Ark. 2004)).
180 Id.
181 Id.
182 Id. (quoting Jackson, 194 S.W.3d at 760).
183 Id.
184 Id.
185 Id.
186 Id. Miller's case was affirmed by the Alabama Court of Criminal Appeals. Miller v. State, 63 So. 3d 676 (Ala. Crim. App. 2010). After the Alabama Supreme Court denied review, Miller, 63 So. 3d at 676, Miller sought certiorari in the United States Supreme Court. Jackson's route to the Court was less direct. After his case was affirmed, Jackson, 194 S.W.3d at 758, Graham was decided. Jackson therefore sought habeas corpus relief in the trial court. His petition was dismissed, the dismissal was affirmed, Jackson v. Norris, 378 S.W.3d 103 (Ark. 2011), and Jackson filed a petition for certiorari in the United States Supreme Court.
188 Miller, 132 S. Ct. at 2455.
189 Id. at 2464.
The Court went on to say that "Roper and Graham emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes," and that "[m]ost fundamentally, Graham insists that youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole." Turning to the cases under review, the Court noted that the mandatory sentencing schemes of Alabama and Arkansas prevented the sentencer from taking the considerations underlying Roper and Graham into account. "By removing youth from the balance" and thereby "subjecting a juvenile to the same life-without-parole sentence applicable to an adult," the laws under which Miller and Jackson were sentenced "prohibit[ed] a sentencing authority from assessing whether the law’s harshest term of imprisonment proportionally punishes a juvenile offender."

The mandatory penalties proscribed by the statutes at issue "by their nature, preclude a sentencer from taking account of an offender’s age and the wealth of characteristics and circumstances attendant to it." Thus, they require that "every juvenile will receive the same sentence as every other—the 17-year-old and the 14-year-old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one." Moreover, "[a]nd still worse, each juvenile (including these two 14-year-olds) will receive the same sentence as the vast majority of adults committing similar homicide offenses—but really, as Graham noted, a greater sentence than those

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190 Id. (quoting Roper v. Simmons, 543 U.S. 551, 569 (2005)).
191 Id. at 2465.
192 Id.
193 Id. at 2466.
194 Id.
195 Id.
196 Id. at 2467.
197 Id. at 2467-68.
adults will serve."\textsuperscript{198}

The Court pointed to facts in the two cases under review demonstrating the problems in such an approach.

Not only was Jackson not the shooter, but the State never even asserted that he intended for Troup to die.\textsuperscript{199} His conviction, based on an aiding-and-abetting theory, was affirmed only because the jury could have believed that he said "[w]e ain’t playin’" to Troup rather than "I thought you all was playin’" to his friends.\textsuperscript{200} Jackson’s age may well have affected his calculation of the risk posed by Shields having a gun, as well as his willingness to walk away when he learned of that weapon.\textsuperscript{201} His family background gave him an "immersion in violence," as both his mother and grandmother had shot people.\textsuperscript{202} "At the least," the Court stated, "a sentencer should look at such facts before depriving a 14-year-old of any prospect of release from prison."\textsuperscript{203}

Miller was high on drugs and alcohol.\textsuperscript{204} He had a limited criminal history—two instances of truancy and one of second-degree criminal mischief.\textsuperscript{205} He was abused by his stepfather and neglected by his alcoholic and drug-addicted mother, which lead to his being in and out of foster care.\textsuperscript{206} He tried to commit suicide four times, the first occurring when he should have been in kindergarten.\textsuperscript{207} Characterizing these facts, the Court said that "if ever a pathological background might have contributed to a 14-year-old’s commission of a crime, it is here."\textsuperscript{208} And, as with Jackson, the Court made clear that "a sentencer needed to examine all these circumstances before concluding that life without any possibility of parole was the appropriate penalty."\textsuperscript{209}

\textsuperscript{198} \textit{id.} at 2468 (footnote omitted).
\textsuperscript{199} \textit{id.}
\textsuperscript{200} \textit{id.}
\textsuperscript{201} \textit{id.}
\textsuperscript{202} \textit{id.}
\textsuperscript{203} \textit{id. at} 2469.
\textsuperscript{204} \textit{id.}
\textsuperscript{205} \textit{id.}
\textsuperscript{206} \textit{id.}
\textsuperscript{207} \textit{id.}
\textsuperscript{208} \textit{id.}
\textsuperscript{209} \textit{id.}
The Court’s analysis led to the conclusion that the sentencing schemes of Alabama and Arkansas “contravene[] Graham’s (and also Roper’s) foundational principle: that imposition of a State’s most severe penalties on juvenile offenders cannot proceed as though they were not children.”210

The Court therefore held that mandatory LWOP sentences for juvenile offenders violate the cruel and unusual punishment clause of the Eighth Amendment.211 It specifically refrained from finding a categorical bar to the imposition of such sentences, but indicated that “given all we have said in Roper, Graham, and this decision about children’s diminished culpability, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.”212 In this regard, the Court noted “the great difficulty . . . of distinguishing . . . between ‘the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile whose crime reflects irreparable corruption.’”213 It then stated, “Although we do not foreclose a sentencer’s ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.”214

F. THE FLORIDA LEGISLATURE, ACT III: STILL MORE (AND NOW EVEN MORE UNJUSTIFIABLE) INACTION

So, when the 2013 legislative session came around, both Graham and Miller were on the books. The deficiencies in Florida law identified in 2010 by Graham were still in place. Further, Miller had made it clear that the sentencing scheme for capital felonies, which had not been changed in response to Roper, needed to be addressed as well. And the legislature, once again, did nothing.

210 Id. at 2466.
211 Id. at 2469.
212 Id.
213 Id. (quoting Roper v. Simmons, 543 U.S. 551, 573 (2005), and Graham v. Florida, 560 U.S. 48, 68 (2010)).
214 Id. (footnote omitted).
G. THE FLORIDA COURTS, ACT I: REACTION

Left without guidance by their legislature, Florida’s courts struggled to find a way to have sentences conform with both the Constitution and the applicable statutes. Because the State did not offer parole, no meaningful opportunity for release could be provided.

Courts sentencing defendants after *Graham* in cases that might have previously called for life sentences, or resentencing defendants in accord with *Graham*, which was held to apply retroactively, had no way of knowing at what point sentences went beyond the constitutional limits. Their dilemma was summed up in *Henry v. State*, when the court, dealing with four consecutive sentences totaling ninety years imposed upon a juvenile, asked:

At what number of years would the Eighth Amendment become implicated in the sentencing of a juvenile: twenty, thirty, forty, fifty, some lesser or greater number? Would gain time be taken into account? Could the number vary from offender to offender based on race, gender, socioeconomic class or other criteria? Does the number of crimes matter? There is language in the *Graham* majority opinion that suggests that no matter the number of offenses or victims or type of crime, a juvenile may not receive a sentence that will cause him to spend his entire life incarcerated without a chance for rehabilitation, in which case it would make no logical difference whether the sentence is “life” or 107 years. Without any tools to work with, however, we can only apply *Graham* as it is written. If the Supreme Court has more in mind, it will have to say what that is. We conclude that Henry’s aggregate term-of-years sentence is not invalid under the Eighth Amendment and affirm the decision below.

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Other cases took more of a case-by-case approach. For instance, in *Adams v. State*, the court concluded that “*Graham* applies not only to life without parole sentences, but also to lengthy term of years sentences that amount to de facto life sentences” and that “a de facto life sentence is one that exceeds the defendant’s life expectancy.”

In *Thomas v. State*, an earlier case that had recognized the possibility that a term-of-years sentence might constitute a de facto life sentence, the same court that decided *Adams* asked the legislature for help with regard to the dilemma being faced by Florida’s courts: “This Court lacks the authority to craft a solution to this problem. We encourage the legislature to consider modifying Florida’s current sentencing scheme to include a mechanism for review of juvenile offenders sentenced as adults . . . .”

After *Miller*, courts sentencing for capital crimes were truly put in an impossible position. The only sentences authorized by law were death, unconstitutional under *Roper*, and LWOP, unconstitutional under *Miller*. Courts in such situations had to either impose a sentence not authorized by statute or one that violated the cruel and unusual punishment clause. In *Horsely v. State*, the Supreme Court of Florida detailed the approaches taken in this no-win situation. The court began its discussion of the matter by noting that while Florida’s appellate courts recognized the problem, some were short on specifics as to how to resolve it:

Since *Miller* was decided, Florida’s district courts have uniformly observed that *Miller* “opened a breach in Florida’s sentencing statutes.” *Hernandez v. State*, 117 So. 3d 778, 783 (Fla. 3d DCA 2013). However, in general, the district courts have adopted a “measured approach” to crafting an appropriate remedy. *Id.* at 784.

Most district courts have chosen to simply remand cases implicating *Miller* for resentencing, without providing any specific guidance or definitive

219 *Horsley v. State*, 160 So. 3d 393 (Fla. 2015).
direction to trial courts regarding the available sentencing alternatives. See, e.g., Neely v. State, 126 So. 3d 342, 348 (Fla. 3d DCA 2013) (remanding for resentencing so that the trial court could conduct an individualized examination of mitigating circumstances in considering the fairness of imposing a life sentence without parole); Washington v. State, 103 So. 3d 917, 920 (Fla. 1st DCA 2012) (noting that “if the state again seeks imposition of a life sentence without the possibility of parole, the trial court must conduct an individualized examination of mitigating circumstances in considering the fairness of imposing such a sentence”; that a “discourse” regarding the available resentencing options was “premature”; and that the court would “exercise restraint” in considering the remedy).\(^{220}\)

The court went on to note, however, that other cases expressed thoughts as to the appropriate judicial response.

Two specific approaches to the issue of remedy have, however, been suggested by several district court judges. The first is the “statutory revival” approach, initially articulated by Judge Makar’s separate opinion in Partlow v. State, 134 So. 3d 1027 (Fla. 1st DCA 2013), in which he supported the revival of the pre–1994 sentencing statute providing a mandatory sentence of life with the possibility of parole after twenty-five years for any juvenile offender whose sentence is now unconstitutional under Miller. Id. at 1032 (Makar, J., concurring in part and dissenting in part). The Fifth District, in Horsley, fully adopted Judge Makar’s statutory revival approach and held, in certifying the question to this Court, that “the only sentence now available in Florida for a charge of capital murder committed by a juvenile is life with the possibility of parole after twenty-five years.” Horsley, 121 So. 3d at 1131. In addition, other courts and judges have cited

\(^{220}\) Id. at 399-400.
favorably to the statutory revival option. See Rodriguez-Giudicelli v. State, 143 So. 3d 947, 948 (Fla. 2d DCA 2014) (holding that “the trial court did not err when it applied the doctrine of statutory revival to sentence Rodriguez-Giudicelli pursuant to the 1993 version of section 775.082(1) for a premeditated murder committed when he was a minor”); Toye [v. State, 133 So. 3d 540, 547 (Fla. 2d DCA 2014)] (Villanti, J., concurring in part and dissenting in part) (disagreeing with “the majority’s decision to refuse to provide any guidance to the postconviction court concerning the sentencing options available to it on remand” and stating that “this court should address the issue and specifically should utilize the doctrine of statutory revival to authorize the postconviction court to impose a legal sentence on Toye pursuant to the 1993 version of section 775.082(1”)).

The second approach regarding the appropriate remedy allows for “a sentence of a term of years without possibility of parole,” which Judge Wolf’s separate opinion in Washington considered to be the only option that “gives the trial court the discretion mandated by Miller.” Washington, 103 So. 3d at 921-22 (Wolf, J., concurring). Judge Wolf explained that “the only sentencing alternative specifically authorized by the Legislature, a mandatory life sentence without possibility of parole, is unconstitutional” under Miller and the trial court therefore “must have the discretion to impose an alternate sentence based on the facts of an individual case.” Id. at 920.

This general approach that would permit trial courts to sentence juvenile homicide offenders to a term of years up to and including life imprisonment has been embraced in two other separate opinions. See Walling v. State, 105 So. 3d 660, 664 (Fla. 1st DCA 2013) (Wright, Associate Judge, concurring) (relying on “Miller’s emphasis on the availability of discretion by the trial judge” in asserting that a judge “who encounters a Miller
sentencing or resentencing should conduct a separate hearing before sentencing, allow presentations by the State and the defense, and then decide if a life without parole sentence is indicated” in consideration of “the teaching in Miller”); see also Thomas v. State, 135 So. 3d 590, 591 (Fla. 1st DCA 2014) (Osterhaus, J., specially concurring) (explaining his view that “the trial judge’s decision to resentence the juvenile defendant in this case to forty years without parole on the murder charge finds express statutory support in Florida’s sentencing statute” because the defendant could be sentenced as a “life” felon under section 775.082(3)(a)3. since homicide committed by a juvenile is punishable by a maximum term of imprisonment for life). \footnote{221}

\section*{H. The Florida Legislature, Act IV: Action, At Last}

Finally, in 2014, the legislature responded, enacting CS/HB 7035, which became chapter 2014-220, of the Laws of Florida, 2869-2877, and which changed the “criminal penalties applicable to . . . juvenile offender[s] for certain serious felonies”\footnote{222} and established “sentence review proceedings to be conducted after . . . specified period[s] of time . . . [for] certain offenses”\footnote{223} committed by persons under eighteen.\footnote{224} The bill, which took effect on July 1, 2014,\footnote{225} (four years, one month and fourteen days after Graham was decided), and which indicated that it applied only to offenses “committed on or after”\footnote{226} that date, provided opportunities for juveniles to return to the trial court after serving specified portions of lengthy sentences for review of those sentences.

In Horsley, the Supreme Court of Florida set forth the basic structure of the new sentencing scheme:

\footnote{221}{Id. at 400-01.}
\footnote{222}{Ch. 2014-220, Fla. Laws 2869.}
\footnote{223}{Id.}
\footnote{224}{Id. at 2872.}
\footnote{225}{Id. at 2877.}
\footnote{226}{Id. at 2872, codified as Fl. Stat. § 921.140(1) (2014).}
Under the provisions of chapter 2014–220, Laws of Florida, a juvenile convicted of a capital homicide offense who “actually killed, intended to kill, or attempted to kill the victim” must receive an individualized sentencing hearing and must receive a life sentence if the trial court determines that a life sentence is appropriate after considering various age-related factors. Ch.2014–220, § 1, Laws of Fla.\(^{227}\) If the trial court determines that a life sentence is not warranted, the trial court must impose a term-of-years sentence of at least forty years’ imprisonment. \(\text{Id.}\) However, a subsequent judicial review of the sentence is available after twenty-five years,\(^{228}\) as long as the juvenile

\(^{227}\) Those factors include, but are not limited to:

(a) The nature and circumstances of the offense committed by the defendant.
(b) The effect of the crime on the victim’s family and on the community.
(c) The defendant’s age, maturity, intellectual capacity, and mental and emotional health at the time of the offense.
(d) The defendant’s background, including his or her family, home and community environment.
(e) The effect, if any, of immaturity, impetuosity, or failure to appreciate risks and consequences on the defendant’s participation in the offense.
(f) The extent of the defendant’s participation in the offense.
(g) The effect, if any, of familiar pressure or peer pressure on the defendant’s actions.
(h) The nature and extent of the defendant’s prior criminal history.
(i) The effect, if any, of characteristics attributable to the defendant’s youth on the defendant’s judgment.
(j) The possibility of rehabilitating the defendant.

\(\text{Id.}\) at 2872-73, codified as FLA. STAT. § 921.1401(2)(a)-(j) (2014).

\(^{228}\) In conducting such a review, a trial court is to consider any factor it deems appropriate, including all of the following:

(a) Whether the juvenile offender demonstrates maturity and rehabilitation.
(b) Whether the juvenile offender remains at the same level of risk to society as he or she did at the time of the initial sentencing.
(c) The opinion of the victim or the victim’s next of kin.
(d) Whether the juvenile offender was a relatively minor participant in the criminal offense or acted under extreme duress or the
offender was not previously convicted of an enumerated felony, from section three of the legislation, that arose out of a separate criminal transaction or episode. Ch.2014–220, §§ 1, 3, Laws of Fla.Only one subsequent review of the sentence is provided for juvenile offenders in this category.

For those juveniles convicted of a capital homicide offense who “did not actually kill, intend to kill, or attempt to kill the victim,” a life sentence may be imposed if the trial court conducts an individualized sentencing hearing and finds that life imprisonment is an appropriate sentence. Ch.2014–220, § 1, Laws of Fla.

domination of another person.

(e) Whether the juvenile offender has shown sincere and sustained remorse for the criminal offense.

(f) Whether the juvenile offender's age, maturity, and psychological development at the time of the offense affected his or her behavior.

(g) Whether the juvenile offender has successfully obtained a general educational development certificate, or completed another educational, technical, work, vocational, or self-rehabilitation program, if such a program is available.

(h) Whether the juvenile offender was a victim of sexual, physical, or emotional abuse before he or she committed the offense.

(i) The results of any mental health assessment, risk assessment, or evaluation of the juvenile offender as to rehabilitation.

Id. at 2874–75, codified as FLA. STAT. § 921.1402(6)(a)-(i) (2014).

With regard to the factor relating to the opinion of the victim or the victim’s next of kin, the legislation provided that:

[T]he absence of the victim or the next of kin may not be a factor in the court’s determination, that the court shall allow the victim or the next of kin to be heard in person, in writing, or by electronic means, and that if the victim or the next of kin chooses not to participate in the hearing, the court may consider previous statements made by the victim or the next of kin during the trial, initial sentencing phase, or subsequent sentencing review hearings.

Id. at 2875, codified as FLA. STAT. § 921.1402(6)(c) (2014).

Those offenses are murder, manslaughter, sexual battery, armed burglary, armed robbery, armed carjacking, home-invasion robbery, human trafficking for commercial sexual activity with a child under 18 years of age, false imprisonment under section 787.02(3)(a), Florida Statutes, and kidnapping, Ch. 2014–220, Laws of Fla. at 2773–74, codified as section 921.1402(2)(a)1-10, Florida Statutes, as well as conspiracy to commit any of the above crimes. Id. at 2973, codified as FLA. STAT. § 921.1402 (2)(a) (2014).
Any juvenile offender in this category who is sentenced to more than fifteen years’ imprisonment is entitled to a review of his or her sentence after fifteen years. Ch.2014–220, §§ 1, 3, Laws of Fla. Only one subsequent review of the sentence is provided.

A similar sentencing structure applies to those juvenile offenders convicted of life or first-degree felony homicide offenses. Life imprisonment remains a possibility if the trial court conducts an individualized sentencing proceeding, with mandatory subsequent judicial review available for those juvenile offenders who “actually killed, intended to kill, or attempted to kill” that are sentenced to a term of imprisonment of more than twenty-five years. *Id.* For those offenders in this category who “did not actually kill, intend to kill, or attempt to kill,” the subsequent judicial review is available for a sentence of more than fifteen years. *Id.*

Juveniles convicted of nonhomicide offenses, thereby implicating *Graham* rather than *Miller*, also may be sentenced to life imprisonment if the trial court, after considering the specified factors during an individualized sentencing hearing, determines that a life sentence is appropriate. Ch.2014–220, § 1, Laws of Fla. Those juvenile offenders sentenced to a term of imprisonment of more than twenty years for a nonhomicide offense are entitled to subsequent judicial review of their sentences. Ch.2014–220, §§ 1, 3, Laws of Fla. This class of nonhomicide offenders is also eligible for “one subsequent review hearing 10 years after the initial review hearing,” if the juvenile nonhomicide offender is not resentenced at the initial review hearing. Ch.2014–220, § 3, Laws of Fla. This is the only class of juvenile offenders entitled to more than one subsequent sentence review.230

I. **THE FLORIDA LEGISLATURE, ACT V: THE INADEQUACY OF THE ACTION**

CS/HB 7035 did provide some clarity. In some respects,

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230 Horsley v. State, 160 So. 3d 393, 404-05 (Fla. 2015).
however, it is of questionable validity.

One constitutional issue that will have to be addressed arises from the fact that sentence review is available only if an offender who committed a capital offense and who killed, intended to kill, or attempted to kill has not previously been convicted of one or more of the offenses specified in the bill. Because the rationales of Roper, Graham, and Miller focus to such a great extent on the fact that juveniles can change, a strong argument can be made that defendants with prior convictions are just as entitled to sentence review as those without. Moreover, the fact that the legislature’s approach elevates one single factor—a prior conviction—to a level that it automatically outweighs the combined weight of all others is also of great concern. Further, it should be remembered that Graham rejected a case-by-case approach to the need for a meaningful opportunity to obtain release, concluding instead that a categorical rule is necessary and that such a rule gives “all” juvenile nonhomicide offenders a chance to demonstrate maturity and reform. Any attack on Florida’s new approach would undoubtedly assert that a categorical approach is just as compelled for homicide offenders.

Another concern is that the bill calls for the trial judge to make the determination as to whether an offender actually killed, intended to kill, or attempted to kill the victim and the determination as to whether a life sentence is appropriate under the statutory criteria when an offender does fall within one of those categories. A strong argument can be made that these findings must be made by a jury. In Apprendi v. New Jersey, the Court stated, “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” Applying this rule in Blakely v. Washington, the

\[232\] Id. at 79.
\[233\] Such a determination will not always be an easy one. Consider, for example the fact that the evidence at Jackson’s trial was in conflict as to whether he told Troup that “[w]e ain’t playin’” or told his friends, “I thought you all was playin’. “ Miller v. Alabama, 132 S. Ct. 2455, 2461 (2012). Determination of whether Jackson intended to kill could very well turn on resolution of that conflict.
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Court indicated:

[T]he "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. *See Ring* [v. Arizona, 536 U.S. 584, 602 (2002)]. . . . In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," [1 J.] Bishop, Criminal Procedure (2d ed. 1872),] and the judge exceeds his proper authority.235

More recently, in *Hurst v. Florida*, the Court found to be unconstitutional Florida's capital sentencing scheme,236 which called for juries to render advisory verdicts but for judges to make the ultimate sentencing determinations.237 In doing so, it noted that the *Apprendi*-Blakley rationale has been applied to instances involving plea bargains,238 sentencing guidelines,239 criminal fines,240 mandatory minimums,241 and capital punishment.242 It seems quite reasonable to think that it would also apply to determinations as to whether individuals killed, intended to kill, or attempted to kill when such determinations result in earlier or later eligibility for possible release.

These issues will certainly arise and be determined in the context of particular cases. The question that needed a quicker resolution, however, arose from the fact that the legislature made the changes brought about by the bill applicable only to crimes "committed

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237 *Id.* at 620.
238 *Id.* at 621 (citing Blakely, 542 U.S. 296).
239 *Id.* (citing United States v. Booker, 543 U.S. 220 (2005)).
240 *Id.* (citing S. Union Co. v. United States, 132 S. Ct. 2344 (2012)).
241 *Id.* (citing Alleyne v. United States, 133 S. Ct. 2151 (2013)).
242 *Id.* (citing Ring v. Arizona, 536 U.S. 584 (2002)).
on or after July 1, 2014."\textsuperscript{243} This determination created a major problem. The legislature provided no guidance as to what should be done with regard to juveniles whose crimes occurred before July 1, 2014, so the dilemma the courts were facing, while resolved for the future, remained as baffling as ever with regard to earlier cases.

\textbf{J. THE FLORIDA COURTS, ACT II: STATUTORY PRE-VIVAL}

In June 2006, seventeen-year-old Anthony Duwayne Horsley, Jr., participated in the holdup of a convenience store in Palm Bay, Florida, in which an owner of the store was killed.\textsuperscript{244} In late 2011, he was convicted of first-degree felony murder, robbery with a firearm while inflicting death, and two counts of aggravated assault with a firearm.\textsuperscript{245} The jury made a specific finding that Horsley possessed and discharged a firearm in the robbery.\textsuperscript{246} For the murder, Horsley received a sentence of life imprisonment with no possibility of parole.\textsuperscript{247} For the robbery, he was given a thirty-year sentence, with a mandatory minimum of twenty-five years.\textsuperscript{248} Each of the assault counts resulted in a five-year sentence.\textsuperscript{249}

While Horsley’s appeal was pending, \textit{Miller} was decided.\textsuperscript{250} Horsley moved to correct his sentence and the trial court agreed that resentencing was required.\textsuperscript{251} It rejected the argument that it could impose a term of years, concluding instead that it had to either impose an LWOP sentence or a life sentence, with Horsley being eligible under the statutory revival theory for parole after twenty-five years.\textsuperscript{252} It chose to reimpose an LWOP.\textsuperscript{253}

Florida’s Fifth District Court of Appeal vacated the sentence, concluding that the only sentence available was life imprisonment with

\begin{thebibliography}{99}
\item \textsuperscript{243} Ch. 2014-220, Fla. Laws 2873, codified as FLA. STAT. § 921.1401(1) (2014).
\item \textsuperscript{244} Horsley v. State, 160 So. 3d 393, 395 (Fla. 2015).
\item \textsuperscript{245} \textit{Id.}
\item \textsuperscript{246} \textit{Id.} at 395-96.
\item \textsuperscript{247} \textit{Id.} at 396.
\item \textsuperscript{248} \textit{Id.}
\item \textsuperscript{249} \textit{Id.}
\item \textsuperscript{250} \textit{Id.}
\item \textsuperscript{251} \textit{Id.}
\item \textsuperscript{252} \textit{Id.} at 396-97.
\item \textsuperscript{253} \textit{Id.} at 397.
\end{thebibliography}
parole eligibility after twenty-five years. The Supreme Court of Florida granted review and, while the case was pending, the legislature adopted Ch. 2014-220, Laws of Fla. The question before the court, therefore, was to determine "the proper remedy for those juvenile offenders, such as Horsley, whose sentences for crimes committed prior to July 1, 2014, violate Miller." The court was faced with three options and arguments could be made against each of them.

The first option recognized by the court was to fashion its own remedy, presumably the imposition of a sentence to a constitutionally acceptable term of years. The court noted that such an approach had been suggested in the concurring opinion of Judge Wolf in Washington v. State. In that opinion, Judge Wolf stated:

The sentencing option which is the closest to the legislative expression of intent and involves the least rewriting of the statute is a sentence of a term of years without possibility of parole. This option also gives the trial court the discretion mandated by Miller.

A life sentence is merely a term of years equaling the lifespan of a person. Any term of years is necessarily included within the purview of life. Thus, this alternative does not constitute a rewrite of the statute. For the foregoing reasons, I urge the trial court to impose a sentence of a term of years up to life without possibility of parole.

The Horsely court rejected this approach, finding that "[a]lthough this option would satisfy our duty to give effect to the pronouncements of the United States Supreme Court, it would also require us to ignore the primary role of the legislature in criminal

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254 Id.
255 Id.
256 Id.
257 Id. at 405.
258 Id.
260 Id. at 922.
sentencing by crafting a remedy without a statutory basis." \(^{261}\) Doing so, the court continued, would be "inconsistent with our respect for the separation of powers." \(^{262}\)

The second option the court mentioned was the State’s position that it engage in the process of statutory revival \(^{263}\) by breathing life into the 1993 version of the appropriate statutory provision, which allowed for life sentences with parole eligibility after twenty-five years. \(^{264}\) As quoted above, the court noted that this approach had been suggested by several of Florida’s appellate judges. \(^{265}\) It went on to indicate that while applying the doctrine "may have been appealing" \(^{266}\) before the passage of the 2014 statutory changes, those changes rendered it inconsistent with legislative intent. \(^{267}\) The court explained its conclusion as follows:

First, the Legislature has consistently demonstrated its opposition to parole, abolishing this practice for non-capital felonies in 1983, for first-degree murder in 1994, for all capital felonies in 1995, and for any sentence imposed under the Criminal Punishment Code in 1997. While Graham’s requirement of a "meaningful opportunity for release" brought the abolition of parole into focus, in providing for a remedy to Graham and Miller, the Legislature elected to provide for subsequent judicial review in the sentencing court of original jurisdiction, rather than review by a parole board.

The entire doctrine of statutory revival is premised on discerning legislative intent—in other words, attempting to ascertain what the Legislature would have decided had it known that its enacted statute

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\(^{261}\) Horsely, 160 So. 3d at 405.
\(^{262}\) Id.
\(^{263}\) Id.
\(^{264}\) Id. at 406-07.
\(^{265}\) See supra notes 229-30 and accompanying text.
\(^{266}\) Horsely, 160 So. 3d at 405.
\(^{267}\) Id.
was unconstitutional. See Horsley, 121 So. 3d at 1132 ("The advantage of relying upon the doctrine of statutory revival is that we simply revert to a solution that was duly adopted by the legislature itself—thereby avoiding the type of ‘legislating from the bench’ that would be required if we were to essentially rewrite the existing statute with original language which we feel might better meet the policy goals of the current legislature."). But, in light of the enactment of chapter 2014–220, Laws of Florida, we now actually know what the Legislature would do in response to Miller—adopt a remedy that does not provide for parole. Because the rationale for statutory revival is to foster separation of powers principles by returning to the previous statute that best exhibits the Legislature’s intent, reviving a statute that provides for parole as a remedy is clearly inconsistent with how the Legislature itself has remedied the statute.\textsuperscript{268}

After rejecting the above two possibilities, the court turned to and adopted a third, applying the 2014 changes to earlier cases. The court called this approach “the remedy most faithful to the Eighth Amendment principles established by the United States Supreme Court, to the intent of the Florida legislature, and to the doctrine of separation of powers.”\textsuperscript{269} Explaining its conclusion, the court stated:

First and foremost, this is the remedy that is most consistent with the legislative intent regarding how to comply with Miller, as it is the remedy the Legislature itself has specifically adopted. Applying chapter 2014–220, Laws of Florida, does not require this Court to speculate as to what the Legislature would do in response to Miller, nor does it require us to fashion our own remedy out of whole cloth. It respects the separation of powers and acknowledges the Legislature’s role in establishing the sentence for criminal offenses.

\textsuperscript{268} Id. at 407.
\textsuperscript{269} Id. at 406.
Applying chapter 2014–220, Laws of Florida, as a remedy is also faithful to Miller. This legislation was enacted in direct response to the Supreme Court’s decisions in Miller and Graham, and it appears to be consistent with the principles articulated in those cases—that juveniles are different as a result of their “diminished culpability and heightened capacity for change”; that individualized consideration is required so that a juvenile’s sentence is proportionate to the offense and the offender; and that most juveniles should be provided “some meaningful opportunity” for future release from incarceration if they can demonstrate maturity and rehabilitation. See Miller [v. Alabama, 132 S. Ct. 2455, 2469 (2012)]270

So, instead of applying a statute in effect at a time prior to the commission of the offenses in question, as urged by the State, the court applied one that became effective after their commission. In effect, the court engaged in “statutory pre-vival,” rather than statutory revival.

K. CURTAIN CALL: JUDICIAL ACTIVISM OR LEGISLATIVE “INACTIVISM”?

Judge Frank Easterbrook once began an address by saying, “Everyone scorns judicial ‘activism,’ that notoriously slippery term.”271 Commenting on this “ostensibly safe sentence,” one analyst noted that “even this observation cannot go unqualified. Most would agree that judicial activism is indeed slippery. But some scholars, including at least one sitting Supreme Court Justice, have suggested that in some contexts, it is not always a bad thing.”272

270 Id. at 405-06.
272 Keenan D. Kmiec, The Origin and Current Meanings of “Judicial Activism,” 92 CAL. L. REV. 1441, 1442 (2004) (footnotes omitted). The article’s reference to a Supreme Court Justice was supported by a footnote stating, “In a short article, Justice John Paul Stevens describes a series of cases commonly viewed as ‘activist,’ and concludes, ‘[b]ecause I did not participate in any foregoing cases, I cannot be entirely sure about how I would have voted, but with the benefit of hindsight I can say that I now agree with each of those examples of judicial activism.’” Id. at 1443 n.3 (quoting
Did the Supreme Court of Florida engage in judicial activism in deciding *Horsley*? Or, did the Florida legislature engage in “legislative inactivism,” thereby forcing the court to make a decision that the legislature should have made?

To answer, focus should begin with the indisputable facts. The legislature was put on notice in 2010 by the *Graham* decision that Florida’s sentencing scheme needed to be addressed. It did nothing for over four years, even though about midway through that period, *Miller* underscored and intensified the need for action and demonstrated that the action needed to apply to sentences for homicides as well as those for nonhomicide crimes. When it finally acted, it ignored the obvious question of what to do with juveniles whose crimes occurred before July 1, 2014. It is therefore beyond serious dispute that the Supreme Court of Florida was placed in a situation in which anything it might have done would have been subject to being construed as judicial activism.

Had the court endorsed sentences to terms of years, it would have authorized sentences not allowed under the statutes adopted by the legislature. Had it adopted a statutory revival approach, it would have ignored the legislature’s clearly expressed intent over the years to do away with Florida’s parole system. Either of these approaches could be termed “judicial activism.” What it chose to do, engage in “statutory pre-vival,” is not above a judicial activism charge either. It should be remembered that the 2014 amendments specifically stated that they applied only to crimes “committed on or after July 1, 2014.” That is a strong and recent indication that the legislature did not intend for the new procedures to apply to earlier crimes. Thus, it could be said that the court’s choice ignored the legislature’s clearly expressed intent, just as embracing statutory revival would have. The only approach that could have avoided any argument of judicial activism would have been to require that sentences fall within the boundaries of the statutes applicable at the time of the crimes, but doing so would have authorized clearly unconstitutional sentences. Going in that direction would have required the court to assume that the legislature intended the absurd

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result of having the state’s courts impose unconstitutional sentences that would unquestionably be vacated by federal courts. Such an assumption would violate the basic principle of statutory construction that requires courts to avoid interpreting statutes in ways which ascribe to the legislature an intent to create an absurd result.  

So, does Horsley constitute judicial activism? Strictly speaking, if it is assumed that the definition of “judicial activism” encompasses determining matters that should be determined by either the legislative or executive branch of government, it does. The decision as to how to treat juvenile offenders whose crimes occurred before July 1, 2014, was certainly one that fell within the legislative purview.

But, a more basic question is whether a definition of “judicial activism” should include a “legislative inactivism” exception? Can it truly be “judicial activism” if the legislature gives the court no option but to make a choice that either falls outside of the statutory scheme or violates the United States Constitution?

The New Jersey courts, in the wake of Atkins, dealt with circumstances much like those the Horsley court faced. That state’s legislature took no steps to amend a statutory scheme that failed to provide a process for defendants to assert under Atkins that their intellectual disability precluded their execution. In State v. Jimenez, the court pointed to the lack of legislative action and proceeded to establish a process to be used in such cases. In a concurring opinion, Judge Fisher discussed the situation the court found itself in:


[U]nlike most other state legislatures, our Legislature has not amended the capital murder statute, N.J.S.A. 2C-11-3, despite the fact that Atkins renders it overly broad.

274 See, e.g., Warner v. City of Boca Raton, 887 So. 2d 1023, 1033 n.9 (Fla. 2004); McKibben v. Mallory, 293 So. 2d 48, 51 (Fla. 1974); City of St. Petersburg v. Siebold, 48 So. 2d 291, 294 (Fla. 1950); Ferre v. State ex rel. Reno, 478 So. 2d 1077, 1082 (Fla. Dist. Ct. App. 1985), aff’d and opinion adopted, 494 So. 2d 214 (Fla. 1986).
275 The same question would of course also have to be asked if the inaction of the executive branch were to require the judiciary to make such a choice.
277 Id. at 478-88.
Accordingly, we are required to engage in what some may critically refer to as "judicial activism," an enterprise that is, in this circumstance, and quite often others, unavoidable. We are not permitted the luxury of inaction; we are obligated to establish a procedure by which defendant's claim of mental retardation may be constitutionally adjudicated . . .

Other courts have commented generally on the subject of judicial action in similar situations. In People v. Lang, the court pointed out that "[j]udicial activism is the result of legislative inaction." And, in Vulcan Pioneers v. New Jersey Department of Civil Service, in expressing sentiments about a failure of the executive branch that could equally apply to a legislative failure, the court stated, "What is oft described as judicial activism is more accurately described as executive inaction."

While these opinions seem to grudgingly admit that the actions at issue constitute judicial activism, they should not have simply accepted that characterization. When the legislature ignores its obligations and forces the judiciary to do the legislature's job, it has implicitly invited and authorized the judiciary to act. Indeed, judicial action under such circumstances, especially when it ensures compliance with the Constitution, should be viewed as carrying out the legislature's intent—specifically its intent to have the judiciary make the decision the legislature refuses to make.

278 Id. at 490. Although the New Jersey Supreme Court reversed the appellate court's decision in Jimenez, it did so because it found a different procedure to be appropriate. Jimenez, 908 A.2d at 183, 189. The adoption of that alternative procedure, however, plainly demonstrated agreement with the appellate court's basic determination that the judiciary had to take action to compensate for the legislature's failure to address the issue.


281 "[N]o one can blame the courts for enforcing the heck out of the Constitution. Failure to do so, by contrast, amounts to judicial abdication because if the courts don't enforce the Constitution, the other branches of government surely won't." Clint Bolick, Let's Hear it for Judicial Activism, ARIZ ATT'Y, Feb. 2011, at 60.
It could be argued that the question of whether the Supreme Court of Florida engaged in judicial activism is a semantic one. Such an argument would posit that the right result was reached and that the label used to describe the process therefore makes no difference.

Indeed, it is hard to argue that the court did not choose the best alternative available to it. One should ask, if not statutory “pre-vival,” what should the court have done? The alternative selected fits the affected cases into a structure that is envisioned to be in place throughout the lives of the affected juveniles. It meets the constitutional requirement to provide those juveniles with meaningful opportunities for release. It does not require the continuation of a parole system that the legislature clearly wants to eliminate.

But relegating the question to the realm of semantics is a disservice because the term “judicial activism” is viewed in such a negative sense. Even though it can be a good thing or an unavoidable thing, it nonetheless carries with it a stigma. Even though judicial activism may be the only alternative available to the judiciary and the result of a legislative failure, the term is considered to be pejorative in nature. Even though the term is so “slippery” as to really defy definition and thus lack any real meaning, it is almost invariably a term used to attack judges and one which constitutes an implicit accusation that judges instinctively deny.

Because the term is viewed in such a light, action under circumstances such as those faced by the Supreme Court of Florida

282 “Today, a charge of ‘judicial activism’ standing alone means little or nothing because the term has acquired so many distinct and even contradictory meanings.” Kmiec, supra note 272, at 1477. Indeed, even United States Supreme Court Justice Antonin Scalia has referred to the term “judicial activist” as being “totally imprecise” and “nothing but fluff.” Id. “Judicial activism . . . is neither a philosophical concept nor a legal concept, but a non-legal concept that changes with the winds.” Thomas L. Murphy, The Dangers of Overreacting to “Judicial Activism,” 19 UTAH B.J. 38, 41 (2000).

283 “In its early days, the term ‘judicial activist’ sometimes had a positive connotation, much more akin to ‘civil rights activist’ than ‘judge misusing authority.’” Kmiec, supra note 272, at 1451. Nowadays, no matter how the term is used, it is perceived unfavorably. “‘Judicial activism’ has become a nearly universal pejorative.” Bolick, supra note 281, at 60. Indeed, “a pejorative label used to distinguish judges and judicial opinions with which we do not agree.” Murphy, supra note 282, at 41.
should not be called judicial activism. Instead, it could be called “judicial rescue” because the court rescued the legislature and the people of Florida from the legal quagmire the legislature’s inaction created.

By its decision in *Horsley*, the Supreme Court of Florida compensated for the shortcomings of the legislature. It filled a void that had to be filled. But, voids are not unique to the legislature. Any of our three branches can falter. Any can do so with regard to a matter that simply cannot be ignored. When that occurs, at least one of the other branches has to step into the breach. The branches, while separate, are parts of an entity, and that entity has to achieve the necessary goal. If it is left to the branch that is derelict in its duties, the entity will fail. Thus, the entity must recognize that its whole is greater than the sum of its parts and must act accordingly or face the consequences of the void. “We are our own dragons as well as our own heroes, and we have to rescue ourselves from ourselves.”284 When it comes to our government, the role of dragon and hero may change, but the importance of rescuing ourselves will always be critical. It certainly was on the road to justice in juvenile sentencing in Florida.

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284 TOM ROBBINS, STILL LIFE WITH WOODPECKER 99 (Bantam Books, 1980).