Not-So-Sweet Sixteen: When Minor Convictions Have Major Consequences Under Career Offender Guidelines

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I. INTRODUCTION

Imagine Rick is fifteen years old. After leaving school one day, he joins his friends and heads down to the local grocery store. On a dare, he shoves a bag boy and steals thirty dollars from an open cash register, but is caught running out the door. The prosecutor assigned to Rick's case decides to prosecute him in adult criminal court, which she is permitted to do under a state statute. Rick is convicted as an adult of felony robbery, but sentenced to serve his time in a facility that houses fifteen- to twenty-five-year-olds. Rick spends one year and one month in the facility.

After staying out of trouble for a few years, Rick is again arrested when he is nineteen, this time charged with possession with intent to deliver marijuana. He is prosecuted as an adult and sentenced to serve three years in the same facility as before. A few years after his release, Rick sells cocaine to a federal agent near a housing project and is indicted on a number of drug-related charges. He is convicted of this federal crime.

When sentencing Rick for this most recent crime, the district court judge turns to the United States Sentencing Guidelines ("Guidelines"). Considering Rick's two previous arrests, the judge determines that Rick is a "career offender" and is thus eligible for the commensurate sentencing enhancement.[1] Because he stole thirty dollars when he was fifteen, and even though he served his sentence among other juveniles, Rick's sentence is enhanced from ten years to thirty. Instead of getting out of prison at age thirty five, he will be over fifty five.

Rick's situation is not as unbelievable as one may think. The facts of this hypothetical loosely mirror a recent Seventh Circuit case,[2] and similarly predicated sentencing enhancements have been upheld by the Third and Ninth Circuits.[3] All three circuits reasoned that adult convictions stemming from crimes committed before the age of eighteen can count toward the career offender sentencing provisions of the Guidelines ("Career Offender Guidelines"), regardless of whether the prior sentence was served in a juvenile facility.[4] The Fourth and Eleventh Circuits stand in opposition; they apply the Career Offender

1. U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 (2012).

2. United States v. Gregory, 591 F.3d 964, 965–66 (7th Cir. 2010).

3. United States v. Moorer, 383 F.3d 164, 166 (3d Cir. 2004); United States v. Carrillo, 991 F.2d 590, 591 (9th Cir. 1993).

4. *E.g.*, *Gregory*, 591 F.3d at 967–68 (holding that the location of where a sentence is served is "unimportant;" what matters is "the nature of the underlying conviction").

Guidelines by inquiring into the nature of the sentence served.[5] If a prior conviction resulted in a sentence served in a juvenile facility, this conviction cannot be counted toward a career offender determination.[6]

At first blush, it may seem more just to adopt the Fourth and Eleventh Circuits' interpretation of the Guidelines, but the full scope of the problem is more complicated. How would the Fourth Circuit, for example, characterize Rick's first two sentences, served in a facility that houses both juveniles and adults? What if Rick had been in a jurisdiction that altogether prohibited adult courts from sentencing offenders to juvenile confinement facilities? Discrepancies among the states mean that similar offenses may lead to completely different convictions and sentences.[7] Adopting the Fourth and Eleventh Circuits' approach does not provide a uniform resolution to the problems arising with these types of enhancements.

This Note looks beyond the circuit split to the larger juvenile justice issues implicated by these sentencing practices. Part II provides a brief overview of the juvenile justice system, juvenile transfer statutes, and the Guidelines. Part III explores the interpretive issues that have led to this circuit split. Part IV explains why resolving this circuit split requires more than choosing one side, and expands the discussion by analyzing the impact of recent judicial and scientific trends on the treatment of juvenile offenders in the adult system. Part V proposes that convictions occurring before the age of eighteen should not be factored into a career offender enhancement, regardless of the nature of the conviction or sentence. Ultimately, this solution creates a judicially manageable rule supported by Supreme Court precedent, state law, and the overall rehabilitative goals of the juvenile justice system.

II. TENSION WITHOUT RELEASE: A BRIEF LOOK AT JUVENILE JUSTICE, JUVENILE TRANSFER STATUTES, AND FEDERAL SENTENCING GUIDELINES

A discussion of these sentencing practices begins with recognizing the complexity of issues involved in the intersection of the juvenile and adult judicial systems. There is a fundamental tension

5. United States v. Mason, 284 F.3d 555, 561–62 (4th Cir. 2002); United States v. Pinion, 4 F.3d 941, 944 (11th Cir. 1993).

6. *Mason*, 284 F.3d at 944–45.

7. *See infra* Part IV.A (discussing in more detail some of these state-to-state differences and how they affect this circuit split).

between the goals of the juvenile justice system, the existence of transfer statutes allowing juveniles to be tried in adult court, and the often-harsh nature of adult federal sentencing enhancements. By establishing this baseline tension, we can better understand not only this circuit split, but also the nuanced approach to juvenile justice recently taken by the Supreme Court. Section A provides a brief history of the juvenile justice system, Section B discusses trends in juvenile transfer laws, and Section C explains the Career Offender Guidelines.

A. A Brief History of Juvenile Justice

The first juvenile court system was established in 1899 with the aim to rehabilitate those young offenders deemed less culpable than their adult counterparts.[8] Until the early nineteenth century, American criminal courts punished juveniles and adults in much the same way,[9] and it was not until the Progressive era that the idea of juvenile courts gained traction.[10] Changes in ideological assumptions about both crime and social constructions supported this movement.[11] Criminologists and social scientists alike began to embrace rehabilitation as the proper treatment for young offenders in an effort to isolate and rectify the newly identified "antecedent causes of criminal behavior."[12] Additionally, new theories about social development framed adolescence as a distinct stage before adulthood, leading to the increasingly accepted view that children were less culpable and needed preparation for life.[13]

The first juvenile proceedings were not adversarial; rather, the state acted as *parens patriae*, reinforcing parental authority and control over juveniles while making discretionary determinations on their behalf.[14] The state would seek "not so much to punish as to

8. *In re* Gault, 387 U.S. 1, 14–16 (1967); *see also* Melanie Deutsch, Note, *Minor League Offenders Strike Out in the Major League: California's Improper Use of Juvenile Adjudications as Strikes*, 37 SW. U. L. REV. 375, 376 (2008) (providing further detail on the history of the juvenile justice system and these early courts).

9. BARRY C. FELD, CASES AND MATERIALS ON JUVENILE JUSTICE ADMINISTRATION 2 (3d ed. 2009).

10. *Id.* at 1, 3.

11. *Id.* at 3.

12. *Id.* at 4.

13. *Id.*

14. Joseph I. Goldstein-Breyer, *Calling Strikes Before He Stepped to the Plate: Why Juvenile Adjudications Should Not Be Used to Enhance Subsequent Adult Sentences*, 15 BERKELEY J. CRIM. L. 65, 66 (2010).

reform, not to degrade but to uplift, not to crush but to develop."[15] For example, a juvenile offender was characterized as a "delinquent," not a "criminal," preserving the possibility of rehabilitation and signifying a lower degree of culpability.[16] The state placed juvenile offenders under its "care and solicitude," not under arrest or on trial.[17] But in return for a court which focused on their best interests, early juvenile offenders received minimal constitutional protections.[18]

In its landmark 1967 opinion, *In re Gault*, the Supreme Court clarified this constitutional gray area by imposing certain procedural safeguards on juvenile proceedings.[19] The Court observed that "unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure."[20] Fearing that *parens patriae* would promote procedural arbitrariness, the Court held that the rights to notice of charges, counsel, confrontation, and cross-examination, as well as the privilege against self-incrimination, were all essential to the juvenile justice system.[21] Four years later, however, the Court held that the right to a jury did not attach to juvenile proceedings, reasoning that the presence of a jury would recast the juvenile proceeding in a decidedly adversarial light, and in so doing, detract from its rehabilitative purpose.[22] In order to protect a juvenile system that "eschew[s] blameworthiness and punishment" against encroachment from an adult system based upon retribution, the Court has interpreted due process requirements differently in each system.[23]

But the Supreme Court has also looked beyond the mere distinction between rehabilitation and retribution. In three recent cases, the Court recognized an extensive and nuanced distinction between young offenders and their adult counterparts, and used this difference to strike down both the juvenile death penalty and juvenile life without parole.[24] Focusing on issues such as developmental

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15. Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107 (1909).

16. *In re* Gault, 387 U.S. 1, 23 (1967).

17. *Id.* at 15.

18. *Id.* at 17; *see also* Alissa Malzman, Note, *Juvenile Strikes: Unconstitutional Under* Apprendi *and* Blakely *and Incompatible with the Rehabilitative Ideal*, 15 S. CAL. REV. L. & WOMEN'S STUD. 171, 175 (2005) (reiterating this point and providing more information on its relationship to the rehabilitative ideal).

19. *Gault*, 387 U.S. at 17.

20. *Id.* at 18.

21. *See generally id.*

22. McKeiver v. Pennsylvania, 403 U.S. 528, 547 (1971).

23. *Id.* at 552 (White, J., concurring).

24. *See* Miller v. Alabama, 132 S. Ct. 2455, 2475 (2012) (holding that the Eighth Amendment prohibits the imposition of life without parole on two juvenile offenders who

differences and reduced culpability, the Court has clearly not forgotten the roots of the juvenile justice system.[25]

B. Juvenile Transfer

Despite the arguments for their special treatment, juvenile offenders are not always processed through the juvenile justice system. In every state, such offenders can be transferred to adult courts, removing them from a system catered to their unique characteristics and placing them among the general population of offenders. This mechanism makes juvenile offenders eligible for adult convictions and sentences, and gives rise to the circuit split discussed below. This intersection of the juvenile and adult systems is crucial to understanding why this circuit split implicates larger issues.

Transfer can be effected through a number of different judicial and legislative mechanisms. Some jurisdictions give the juvenile court judge transfer authority ("judicial waiver"); others give the prosecutor discretion to file certain cases in either system ("concurrent jurisdiction"); and some state statutes exclude certain offenses from juvenile court jurisdiction altogether ("statutory exclusion").[26] Furthermore, many states have "once an adult, always an adult" provisions, requiring that juveniles who have been tried as adults will continue to be tried as adults for any subsequent offenses.[27] The Supreme Court has only weighed in on the constitutionality of these procedures once, almost fifty years ago in *Kent v. United States*.[28] In considering the first of these three methods of transfer (judicial waiver), the *Kent* Court determined that a transfer from juvenile to adult court was a "critically important" event and held that a juvenile was entitled to a hearing before transfer was effected.[29]

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committed homicides); Graham v. Florida, 130 S. Ct. 2011, 2034 (2010) (holding that the Eighth Amendment prohibits the imposition of life without parole on a juvenile offender who did not commit homicide and, further, that the states must give a juvenile nonhomicide offender a meaningful opportunity to obtain release); Roper v. Simmons, 543 U.S. 551, 578 (2005) (holding unconstitutional the execution of individuals who were under eighteen when they committed their capital crimes).

25. *See, e.g.*, *Roper*, 543 U.S. at 569 (identifying developmental differences between juveniles and adults).

26. *See* HOWARD N. SNYDER AND MELISSA SICKMUND, DEP'T OF JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 110 (2006) (providing a good background on these three main sources of transfer).

27. *Id.* (noting that as of 2006, thirty-four states had such provisions).

28. 383 U.S. 541, 557–65 (1966).

29. *Id.* at 557, 561 (holding only applied to a particular District of Columbia transfer statute, in the context of juvenile-judge determined transfers).

Kent laid out eight determinative factors to be weighed by a judge when considering juvenile transfer, including the seriousness of the offense, the maturity of the offender, and the possibility of rehabilitation.[30] Some states have incorporated these factors into legislation,[31] while others have added new criteria.[32] Presumably, this emphasis on maturity and rehabilitation is a nod toward two of the major tenets of the juvenile justice system[33] and suggests that a transferred offender would not benefit from this system.

But states have recently been moving away from *Kent* and promulgating transfer practices that prioritize retribution over rehabilitation.[34] This shift occurred in the 1980s and early 1990s, as fear of the juvenile "super predator"—a term often used by the media to describe a growing generation of young violent criminals—popularized maxims such as "old enough to do the crime, old enough to do the time."[35] Rising youth homicide and gun violence rates led many states to question the goals of juvenile justice. States enacted new laws making it easier to transfer juvenile offenders and began to prosecute larger numbers of juveniles in adult court.[36] Such state legislation increased the number of eligible charges, the original jurisdiction of the adult courts, and the discretionary powers of the prosecutor to file in adult court.[37] As recently as 2009, for example,

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30. *Id.* at 566–67. The factors in their entirety are: (1) the seriousness of the offense; (2) whether the offense was premeditated, willful, or aggressively violent; (3) whether the offense was against persons or property, with greater weight given to those against persons; (4) whether there is enough evidence for the Grand Jury to pass an indictment; (5) desirability of trying the entire offense in one court when the juvenile's associates in the offense are adults; (6) sophistication and maturity of the juvenile, determined by environmental and emotional evidence; (7) juvenile's prior history with trouble; and (8) the prospects for protecting the public and the likelihood of rehabilitation within the juvenile system. *Id.*

31. *See* FLA. STAT. ANN. § 985.556 (West 2013) (using a condensed version of the same eight factors).

32. *See* COLO. REV. STAT. ANN. § 19-2-518 (West 2012) (taking into account the juvenile's use of a weapon).

33. Those two being the reduced culpability of an adolescent and the possibility for rehabilitation.

34. *See* Franklin E. Zimring, *The Power Politics of Juvenile Court Transfer: A Mildly Revisionist History of the 1990s*, 71 LA. L. REV. 1, 2 (2010) (providing a brief history of transfer statutes and their recent trends of the 1990s).

35. *See* FELD, *supra* note 9, at 29–30 (discussing the historical background of the 1960s–1990s that gave way to this increased fear of the juvenile criminal).

36. *Id.* at 30; *see also* Barry C. Feld, *Race, Politics and Juvenile Justice: The Warren Court and the Conservative "Backlash,"* 87 MINN. L. REV. 1447, 1502–23 (2003) (summarizing the context in which the states enacted "get tough" statutory reforms).

37. *See* Zimring, *supra* note 34, at 6 (breaking down the types of transfer legislation enacted during the 1990s).

almost half of the states did not require a minimum age for transfer.[38] Generally, the justifications for this recent shift have focused more on the nature of the offense than the particular characteristics of the offender, overlooking the developmental differences and diminished culpability of many juvenile offenders.[39]

Judicial and political scrutiny of these new transfer laws is both rare and, when it occurs, narrow in scope.[40] *Kent*'s holding was limited to judicial waiver laws and has been easily circumvented both by statutes that limit the overall jurisdiction of juvenile courts and by prosecutors armed with discretion to file directly in adult criminal court.[41] Challenges to juvenile transfer laws on constitutional grounds have been mostly unsuccessful,[42] and most judges have merely deferred to state legislatures when evaluating transfer statutes.[43] Moreover, politicians are wary of advocating more juvenile-friendly transfer statutes for fear of appearing weak on crime.[44] And while this expansion of transfer laws has slowed since the turn of the century,[45] juvenile transfer is a much simpler prospect now than it was fifty years ago.

C. Federal Sentencing Guidelines and the Career Offender

Once in the adult system, juvenile offenders become eligible for the Guidelines, including sentencing enhancements for career

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38. *Statistical Briefing Book, Juvenile Justice System Structure & Process: Juveniles Tried as Adults*, OFF. JUV. JUST. & DELINQ. PREVENTION (Apr. 22, 2011), http://ojjdp.gov/ojstatbb/structure_process/qa04105.asp?qaDate=2009.

39. *See* Feld, *supra* note 36, at 1503 (going into more depth on this point).

40. *See* Zimring, *supra* note 34, at 2–4 (describing the waiver of serious cases into a criminal court as "practice in search of a theory," and arguing that many cases embrace transfer to indict the juvenile justice system, leading to a lack of "probing analysis" in judicial opinions about transfer).

41. *See* Neelum Arya, *Using* Graham v. Florida *to Challenge Juvenile Transfer Laws*, 71 LA. L. REV. 99, 144–48 (2010) (providing a great overview of the effects of *Kent*, the deference of the courts to legislation that punishes youth without constraint, and the relative lack of success of the challenges brought against transfer laws).

42. *See, e.g.*, State v. Angel C., 715 A.2d 652, 672–73 (Conn. 1998) (holding that prosecutorial discretion statutes do not violate the separation of powers doctrine because one of a prosecutor's core functions is determining which cases to prosecute, and choosing *where* to prosecute flows from that principle).

43. Arya, *supra* note 41, at 145.

44. *See* Tamar R. Birckhead, *North Carolina, Juvenile Court Jurisdiction, and the Resistance to Reform*, 86 N.C. L. REV. 1443, 1497–98 (2008) (discussing the effects of sensational news coverage on juvenile crime, often leading to more punitive reforms and thus disincentivizing any attempt to create more lenient juvenile laws).

45. *See* SNYDER & SICKMUND, *supra* note 26, at 113 (observing that the rapid expansion of transfer laws in the 1980s and 1990s has somewhat slowed more recently).

offenders. These harsh penalties—especially the Career Offender Guidelines—are supported less by rehabilitation or developmental differences than by retribution and deterrence.[46]

The Career Offender Guidelines originated from an unusually explicit statutory directive from Congress to the independent United States Sentencing Commission ("Commission"),[47] as part of the Sentencing Reform Act of 1984.[48] Specifically, Congress instructed the Commission to create sentencing guidelines that imposed sentences "at or near the maximum term authorized" for defendants previously convicted of one or more enumerated types of felonies.[49] This diverged from the more conventional guideline-development process, which required the Commission to consider *average* pre-Guidelines sentences.[50]

As a result of these congressional demands, repeat offenders saw significantly longer sentences after the Guidelines than before.[51] For example, a criminal convicted of trafficking five grams of crack *before* the Guidelines would have received a sentence averaging twenty-seven to thirty-three months; under the Career Offender Guidelines, this criminal could serve from 262 months to life.[52] In addition, the Commission went beyond its statutory directive by broadening the type of felonies that would count toward the enhancement, most notably including several drug offenses that

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46. *See* U.S. SENTENCING GUIDELINES MANUAL ch. 4, pt. A, introductory cmt. (2012) (identifying one of the rationales behind the Career Offender Guidelines as the limited likelihood of rehabilitation); *see also* United States v. Carrillo, 991 F.2d 590, 595 (9th Cir. 1993) (reasoning that especially punitive career offender enhancements are justified because repeat offenders are likely beyond the reach of rehabilitation).

47. 28 U.S.C. § 994(h) (2006).

48. 18 U.S.C. § 3551 *et seq.* (2006).

49. 28 U.S.C. § 994(h) (specifying the inclusion of a "crime of violence" or "an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46").

50. *See* AMY BARON-EVANS ET AL., DECONSTRUCTING THE CAREER OFFENDER GUIDELINE 11 (2011), *available at* http://www.fd.org/navigation/select-topics-in-criminal-defense/sentencing-resources/supporting-pages/deconstructing-the-career-offender-guideline (providing an extensive empirical and policy analysis of the development and implementation of the Career Offender Guidelines).

51. *Id.* at 5–7.

52. *Id.* at 2. The chart contained in this report also notes that an individual caught with fifty grams of heroin *before* the Guidelines would have received a sentence averaging 37–46 months; as a career offender under the Guidelines, this criminal would serve between 210–262 months. *Id.* Furthermore, a pre-Guidelines 37–46 month sentence for a $2,000 bank robbery turned into a 210–262 month sentencing range under the Guidelines. *Id.*

Congress did not originally intend to have included.[53] In a 2004 report, the Commission itself even acknowledged that the Career Offender Guidelines led to some of the most severe sentences, questioning whether they promoted important sentencing goals.[54]

Though acknowledging the severity of these enhancements, the Commission continues to promulgate the Career Offender Guidelines and justifies them[55] through reference to Congress's enumerated sentencing purposes.[56] First, a repeat offender is more culpable than a first-time offender, and thus deserving of greater punishment.[57] Second, repeated criminal behavior aggravates the need for strict sentences that will serve as a deterrent.[58] Third, the recidivism demonstrated by repeat offenders requires increased incapacitation to protect the public.[59] Finally, repeat offenders are all but beyond rehabilitation, and thus this consideration should have limited impact on sentencing.[60]

The main guideline for career offenders is found under § 4B1.1 of the U.S. Code, which provides the general requirements for the sentencing enhancement. A defendant is a career offender if (1) he was at least eighteen years old at the time he committed the most recent crime, (2) his most recent crime is a felony that is either a "crime of violence" or a "controlled substance offense," and (3) he has at least two prior felony convictions of either a crime of violence or a controlled-substance offense.[61] Having satisfied these requirements, a defendant is given the highest possible "criminal history"

53. *See id.* at 11 (explaining that the Commission: (1) included certain drug offenses not listed in the statute; (2) adopted a broader definition of "crime of violence" than intended by Congress; and (3) included offenses that were not considered felonies by Congress). Note how this coincides with the increase in juvenile transfer laws discussed above. *See supra* Part II.B.

54. HOFER ET AL., U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 133–34 (2004).

55. *See* U.S. SENTENCING GUIDELINES MANUAL ch. 4, pt. A, introductory cmt. (2012) (laying out the policy rationales behind the Career Offender Guidelines).

56. 18 U.S.C. § 3553(a)(2) (2006) (stating the purposes for imposing criminal sentences: (1) to provide just punishment for the offense; (2) to adequately deter criminal conduct; (3) to protect the public; and (4) to provide rehabilitative correctional treatment).

57. *See* U.S. SENTENCING GUIDELINES MANUAL ch. 4, pt. A, introductory cmt. (2012) (describing the purposes for criminal sentencing).

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* § 4B1.1(a).

enhancement for the most recent conviction, effectively authorizing the statutory maximum sentence.[62]

The subsequent provision—§ 4B1.2—delineates which prior convictions can be used in a career offender determination.[63] The Commission defines a "prior felony conviction" as an *adult* federal or state conviction whose potential punishment exceeds one year, regardless of whether the offense is actually designated a felony.[64] A juvenile can receive an adult conviction only if the "laws of the jurisdiction in which the defendant was convicted" classify it as an adult conviction.[65] Thus, this guideline permits federal courts to defer to state-law categorization when necessary.[66]

Section 4A1.2(d) specifically addresses which offenses committed prior to the age of eighteen can be later counted against a defendant, shifting the focus from the conviction to the sentence received.[67] This guideline distinguishes prior adult convictions that led to "sentence[s] of imprisonment" from an "adult or juvenile sentence" that resulted in "confinement."[68] The Guidelines treat the former more seriously than the latter.[69] The commentary to this guideline goes into greater detail, noting that it will only count those offenses that resulted in: (1) an "adult sentence of imprisonment" exceeding one year and one month; or (2) an adult or juvenile sentence, or release from confinement on that sentence, within five years of committing the instant offense.[70]

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62. *Id.* There are six criminal history categories, reflecting the seriousness of previous transgressions. *Id.* § 4A1.1(a). The lowest level is Category I, which will not enhance the baseline sentence for the instant offense; Category VI is the highest, and imposes the most punitive enhancement. *Id.* at ch. 5, pt. A.

63. *Id.* § 4B1.2. For example, a "crime of violence" means, among other things, any offense punishable by a prison term exceeding one year that includes the use, attempted use, or threatened use of physical force, or is burglary, arson, or extortion, involves the use of explosives, or otherwise involves certain other risky conduct. *Id.* § 4B1.2(a). A "controlled substance offence" includes the manufacture, import, export, distribution, dispensing or possession of a controlled or counterfeit substance. *Id.* § 4B1.2(b). Note that both state and federal offenses count under these definitions. *Id.*

64. *Id.* at cmt. 1.

65. *Id.*

66. This becomes important when considering the move away from the harms of potential state-law discrepancies in § 4A1.2.

67. *Id.* § 4A1.2(d)

68. *Id.* § 4A1.2(d)(1)–(2).

69. *Id.* (noting that an adult "sentence of imprisonment" that exceeded one year and one month adds three points to the criminal history determination, while an adult or juvenile sentence to "confinement" adds one or two points, depending on how long the sentence was and when it occurred).

70. *Id.* at cmt. 7.

The Commission justifies the provisions of § 4A1.2 as avoiding sentencing discrepancies,[71] an overall goal of the Guidelines.[72] By confining the nature of predicate offenses, the Commission limits the universe within which the sentencing judge can operate and avoids discrepancies that arise when attempting to track down juvenile adjudications across differing state-law jurisdictions.[73] In further support of this purpose, the Commission applies § 4A1.2 to all offenses committed prior to age eighteen, regardless of the age at which a defendant is no longer considered a "juvenile" in a particular jurisdiction.[74]

III. VERY LITTLE GUIDANCE: A CIRCUIT SPLIT OVER JUVENILE SENTENCES AND THE CAREER OFFENDER GUIDELINES

Although an express purpose of the Guidelines is to avoid sentencing discrepancies,[75] the Courts of Appeals have nonetheless varied in determining if certain offenses committed prior to age eighteen count toward a career offender determination.[76] Specifically, the circuit courts are split as to whether the conviction of a juvenile in adult court, leading to a sentence served in a juvenile facility, can count as a predicate offense under the Career Offender Guidelines.[77] When similar convictions have led to sentences served in adult facilities, the circuits agree that this can legitimately count as a

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71. *Id.*

72. *See* 28 U.S.C. § 991(b) (2006) (noting that one of the major purposes of the Guidelines is to "avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct"). Interestingly, another purpose of the Guidelines is "to reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process," an issue that will be discussed in Part III of this Note when addressing changes in juvenile psychology and neuroscience. § 991(b)(1)(c).

73. U.S. SENTENCING GUIDELINES MANUAL § 4A1.2, cmt. n.7 (2012).

74. *Id.*

75. *See* 28 U.S.C. § 991(b) (outlining the three purposes of the Sentencing Commission and the Guidelines).

76. *Compare* United States v. Mason, 284 F.3d 555 (4th Cir. 2002) (refusing to count one such prior conviction as a predicate felony to a career offender determination), *with* United States v. Gregory, 591 F.3d 964 (7th Cir. 2010) (upholding the use of a similar felony for a career offender determination).

77. *Gregory*, 591 F.3d at 968; *Mason* 284 F.3d at 562; *see also* Cassandra S. Shaffer, Comment, *Inequality Within the United States Sentencing Guidelines: The Use of Sentences Given to Juveniles by Adult Criminal Court as Predicate Offenses for the Career Offender Provision*, 8 ROGER WILLIAMS U. L. REV. 163, 172–75 (2002) (providing an excellent breakdown of this circuit split).

predicate offense under the Guidelines.[78] But when the sentence is served in a juvenile facility, the circuits are split over how to interpret and reconcile the conviction-specific language of § 4B1.2 and the sentence-specific language of § 4A1.2.[79] Simply put, this difference in opinion revolves around whether or not the Guidelines distinguish between adult and juvenile *convictions*, as well as adult and juvenile *sentences*.[80]

A. The Nature of the Conviction Alone

The Ninth Circuit was one of the first to address this issue when it refused to read an additional "nature of the sentence" requirement into the Guidelines.[81] The court in *United States v. Carrillo* reasoned that the Commission's use of "adult sentences of imprisonment" in note 7 of § 4A1.2 was merely a shorthand reference to a defendant who was "'convicted as an adult and received a sentence of imprisonment,' " *not* a way to distinguish between so-called "adult" and "juvenile sentences."[82] The court further emphasized that a "juvenile sentence" only referred to confinements resulting from juvenile adjudications.[83] Under this reading, any conviction taking place in an adult criminal court would count toward a career offender determination, regardless of where the ensuing sentence was served and contingent upon meeting the other two requirements of § 4B1.1. Though minors convicted as adults may be sentenced to juvenile facilities with the hopes of rehabilitation, the court reasoned that they should not be rewarded after developing into repeat offenders.[84]

The Third Circuit adopted a similar approach, focusing on the nature of the conviction and reasoning that "where or for how long the

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78. *See, e.g.*, United States v. Hazelett, 32 F.3d 1313, 1320 (8th Cir. 1994) (holding that a conviction as an adult for an offense committed at age seventeen satisfied the Guideline requirements as a predicate offense for a career offender).

79. *See, e.g.*, United States v. Moorer, 383 F.3d 164, 169 (3d Cir. 2004) (implicitly acknowledging the importance of commentary note 1 to § 4B1.2 when it refused to adopt a reading of § 4A1.2 that might contradict it).

80. *See, e.g.*, *Gregory*, 591 F.3d at 967 (providing a breakdown of the genesis behind this circuit split, and ultimately siding against the Fourth Circuit's belief that the Guidelines intended to distinguish between types of sentences).

81. United States v. Carrillo, 991 F.2d 590, 594 (9th Cir. 1993) (reasoning that a different reading would "ignore the plain language of § 4A1.2(d)" and would imply that the commentary and Guidelines were inconsistent).

82. *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(d) (2012)).

83. *Id.*

84. *Id.* at 595; *see also Gregory*, 591 F.3d at 967 (noting that juveniles who persist in a "life of crime" deserve stricter sentences).

defendant is *actually* sentenced is of no import."[85] The court in *United States v. Moorer* emphasized the conviction-specific language of note 1 to § 4B1.2, which defines a "prior felony conviction" solely in terms of the defendant's prior conviction and without reference to his sentence.[86] Addressing the sentence-specific language of note 7 to § 4A1.2(d), the court adopted the reasoning of *Carrillo* and further held that reading this note to require an inquiry into the sentence would be inconsistent with the focus on conviction in note 1 to § 4B1.2.[87]

The Seventh Circuit adopted this "nature of the conviction" approach in *United States v. Gregory*, upholding the use of a thirty-dollar robbery to enhance the defendant's sentence from roughly 130 to 327 months under the Career Offender Guidelines.[88] The defendant, Isaiah Gregory, was only fifteen at the time of the robbery and, though sentenced to a juvenile facility, was convicted in an adult court.[89] Echoing *Moorer,*[90] the court reasoned that the location of the sentence was unimportant and relied entirely on the nature of the underlying conviction.[91] The court also held that if the Commission had intended to create such a sharp distinction between the nature of the sentences served, it would have done so with more clarity than the subtle linguistic differences between § 4B1.2 and § 4A1.2.[92] Finally, the court reinforced the policy concerns of *Carrillo*, reasoning that providing leniency to repeat offenders beyond the reach of rehabilitation defeats the punitive purpose of the Career Offender Guidelines.[93]

B. Expanding To Consider the Nature of the Sentence

The Eleventh Circuit, on the other hand, has taken a more expansive approach to this issue, not only focusing on the type of conviction, but also inquiring into the nature of the sentence received.[94] In *United States v. Pinion*, the court grappled with a South

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85. United States v. Moorer, 383 F.3d 164, 167 (3d Cir. 2004).

86. *Id.*

87. *Id.* at 168.

88. 591 F.3d 964 (7th Cir. 2010).

89. *Id.* at 965.

90. 383 F.3d at 941.

91. *Gregory*, 591 F.3d at 968.

92. *Id.* at 967.

93. *Id.*

94. *See* United States v. Pinion, 4 F.3d 941, 944 (11th Cir. 1993) (holding that, notwithstanding South Carolina's treatment of criminal defendants under age twenty-five as "youthful offenders," a previous conviction at age seventeen was still predicate to a career offender determination because: (1) he was convicted in adult court; (2) received an adult sentence; and (3) served this adult sentence).

Carolina law that treated all criminal defendants under the age of twenty-five as "youthful offenders."[95] When considering whether one of the defendant's prior offenses—committed when he was seventeen—should have factored into a career offender determination, the court sought to determine whether the conviction *and* the sentence were "adult."[96] The court held that both the conviction and sentence satisfied the plain language of § 4A1.2 as "adult,"[97] and like the court in *Carrillo,*[98] it reasoned that the defendant further deserved this enhancement because of his unwillingness and inability to rehabilitate.[99]

The Fourth Circuit expanded this approach in *United States v. Mason*, striking down a career offender enhancement because a predicate conviction had resulted in a juvenile detention.[100] Interpreting the Guidelines' text, the court noted that use of the term "imprisonment" could only refer to a sentence served in an adult facility.[101] Supporting this reading, the court noted that § 4A1.2(d)(1) uses the term "imprisonment" when discussing adult convictions, while § 4A1.2(d)(2) uses the term "confinement" in reference to both juvenile and adult dispositions.[102] Since note 7 stipulates that only "adult sentences of imprisonment" should be counted as predicate, the court reasoned that the use of any conviction that resulted in a juvenile confinement violated the Guidelines.[103] Because the defendant had been sentenced to a juvenile facility under West Virginia law, the court held that this could not be used as one of two predicate offenses to a career offender enhancement.[104] Delving deeper into the statute's text than the court did in *Pinion*, the *Mason* court came to the same conclusion: a prior offense can only be used against a defendant if it resulted in *both* an adult conviction and an adult sentence.[105]

95. *Id.*

96. *Id.* at 944–45.

97. *Id.* at 945. Without much explanation, the court bolstered its reasoning by looking to *Carrillo*, which, as discussed, only focused on the nature of the conviction, not the sentence.

98. United States v. Carrillo, 991 F.2d 590 (9th Cir. 1993).

99. *Pinion*, 4 F.3d at 945.

100. United States v. Mason, 284 F.3d 555, 562 (4th Cir. 2002).

101. *Id.* at 560.

102. *Id.* at 560; *see also* U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(d)(1)–(2) (2012) (distinguishing between "confinement" and "imprisonment").

103. *Mason*, 284 F.3d at 560.

104. *Id.* at 562.

105. *Id.* at 559.

IV. THE KIDS REALLY ARE DIFFERENT: LARGER JUVENILE JUSTICE ISSUES IMPLICATED BY THE CIRCUIT SPLIT

The implications of this judicial disagreement reach far beyond the Guidelines themselves. Simply put, harsh sentencing enhancements do not consider the nature of the offender at the time of the predicate offenses. In terms of rehabilitation, culpability, and overall development, juvenile offenders differ from their adult counterparts. These differences led to the creation of the juvenile justice system in the first place and, in many ways, are ignored by wide-reaching transfer statutes that thrust juveniles into adult court.[106] As a result, Courts struggle to uniformly interpret the Guidelines because the purposes of the career offender enhancements and a juvenile-specific justice system often diverge.[107]

This Part exposes these tensions by analyzing recent judicial and scientific trends. First, Section A discusses why simply choosing one side of the circuit split over the other fails to provide a sufficient solution to this sentencing problem. Then, Section B uses recent Supreme Court jurisprudence to examine the Court's renewed interest in protecting the juvenile offender. Finally, Section C discusses the importance of neuroscience and developmental psychology in addressing juvenile sentencing.

Since the emergence of this circuit split, significant strides have been made toward a more lenient view of juvenile offenders.[108] This Part will also analyze these developments and show why the line should not be drawn between adult and juvenile *convictions* or *sentences*, but rather, between adult and juvenile *offenders*.

A. Why Resolving the Circuit Split Alone Is Insufficient

Simply adopting the Fourth and Eleventh Circuits' approach[109] is not enough to remedy the tension between the Guidelines and the juvenile justice system. Although the nature-of-the-sentence

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106. *See supra* Parts II.A–B (elaborating on how the inherent differences between juvenile and adult offenders resulted in the creation of an independent juvenile justice system and transfer scheme).

107. *See supra* Parts III.A–B (explaining the circuit split that emerged in attempting to interpret the Guidelines).

108. *See, e.g.*, United States v. Graham, 130 S. Ct. 2011, 2034 (2010) (abolishing juvenile life without parole for nonhomicide offenses).

109. *See supra* Part II.C (explaining that the Fourth and Eleventh Circuits analyze both the nature of the conviction *and* the sentence in evaluating prior offenses under a career offender enhancement, creating the possibility that adult convictions that led to juvenile sentencing may not count against a repeat offender).

interpretation adopted by these courts purportedly preserves sentencing uniformity while promoting juvenile justice,[110] in reality, it does little to accomplish either.[111] In fact, there is still much disparity among the states regarding correctional facilities, juvenile transfer statutes, and the adjudication of juveniles in adult court.[112] Beyond its inability to effect sentencing uniformity, this approach does not serve the goals of the juvenile justice system; focusing solely on the nature of the sentence necessarily fails to account for some of the largest differences between adult and juvenile offenders.

The Fourth and Eleventh Circuits' approach does not remedy the vast discrepancies between juvenile justice programs across the states, and thus it would not promote the Guidelines' goal of avoiding sentencing disparities between defendants convicted of similar crimes.[113] For example, correctional facilities are not all characterized as "adult" or "juvenile," creating difficulties in determining what kind of sentence was served. While the defendant in *Mason* served a prior sentence in a juvenile home for boys,[114] the defendant in *Moorer* served a prior sentence in a facility that housed both older juveniles and young adults.[115] Ultimately, conducting a nature-of-the-sentence inquiry would neither add any clarity nor guarantee sentence uniformity.

States also have dramatically different laws for juvenile transfer and sentencing—differences that cannot be reconciled by simply inquiring into the nature of a prior sentence.[116] Some states determine transfer based on age, others based on the nature of the crime, and others by combining the approaches.[117] These disparities

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110. *See* Shaffer, *supra* note 77, at 175 (arguing that "[t]he approach of the Fourth and Eleventh Circuits best carries out the purpose of the Guidelines, to promote uniformity in sentencing," and going on to argue additional juvenile justice benefits).

111. *See, e.g.*, United States v. McGhee, 651 F.3d 153, 158 (1st Cir. 2011) (refusing to enter the nature-of-the-sentence debate but nonetheless struggling to determine whether a *conviction* was adult or not).

112. *See generally supra* Part II (discussing some of these jurisdictional discrepancies).

113. *See* 28 U.S.C. § 991(b) (2006) (noting that one of the major purposes of the Guidelines is "avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct").

114. *See* United States v. Mason, 284 F.3d 555, 557 (4th Cir. 2002) (defendant had been previously confined to the Industrial Home for Boys until he turned eighteen).

115. *See* United States v. Moorer, 383 F.3d 164, 166 (3d Cir. 2004) (defendant had previously been housed at the Yardville Youth Reception Center, which housed those under and over age eighteen).

116. *See supra* Part II.B (providing a more comprehensive discussion of the various mechanics of transfer laws).

117. *See* FELD, *supra* note 9, at 516–23 (describing a sample of transfer statutes and how they differ across the states).

affect the makeup of juvenile offenders in the adult systems and the sentences they receive.[118] Further complicating the picture is that some states allow juveniles transferred to the adult system to be sentenced as juveniles,[119] while others refuse to provide this option.[120] A nature-of-the-sentence approach will never help a defendant in one of these latter jurisdictions, because a prior adult conviction will always result in an adult sentence.

Moreover, a nature-of-the-sentence approach cannot be used until the Court determines that the conviction was deemed "adult," which is not always a straightforward inquiry.[121] Recently, the First Circuit struggled to reconcile Massachusetts state law with the Guidelines, ultimately relying on its own intuition to determine that a prior conviction was not "adult" under § 4B1.2.[122] The court altogether refused to weigh in on the circuit split, opting instead to remand the case based on its nature-of-the-conviction determination.[123] Thus, even if a nature-of-the-sentence approach could clarify a particular application of the Guidelines, determining the nature of the conviction itself may result in additional confusion.

From a policy perspective, the Fourth and Eleventh Circuits' approach does not adequately advance the goals of the juvenile justice system.[124] For example, recent jurisprudence suggests that to best preserve the possibility of juvenile rehabilitation, courts should differentiate between juvenile and adult *offenders*, rather than *sentences*.[125] The nature-of-the-sentence approach does nothing to help the offender who, as a juvenile, was sentenced to an adult facility and never given the chance to rehabilitate. Merely focusing on which approach better conforms to the text and purpose of the Guidelines

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118. *Id.*

119. *See, e.g.*, W. VA. CODE ANN. § 49-5-13 (West 2012) (stipulating that if it serves the best interest of the juvenile and/or the public, adult courts may sentence juvenile offenders to custody of the Division of Juvenile Services in lieu of sentencing them as adults).

120. *See Moorer*, 383 F.3d at 169 (concluding that New Jersey did not allow a judge to impose a juvenile sentence based on an adult conviction for a crime, citing N.J. STAT. ANN. § 2A:4A-41).

121. *See supra* Part II.B (explaining the Guidelines and their requirements); *see also* UNITED STATES SENTENCING GUIDELINES MANUAL § 4B1.2 (2012) (requiring a prior adult conviction as a predicate for the career offender guideline).

122. *See* United States v. McGhee, 651 F.3d 153, 158 (1st Cir. 2011) (holding that a prior conviction was not "adult" per the Guidelines).

123. *Id.* at 154.

124. *See supra* Part II.A (discussing rehabilitation as one of the overall purposes of the juvenile justice system).

125. *See, e.g.*, J.D.B. v. North Carolina, 113 S. Ct. 2394, 2399 (2011) (holding that a child's age properly informs *Miranda* custody analysis, and tracing the recent increase of cases differentiating juveniles from adults).

ignores the fact that perhaps the motivations behind the Guidelines themselves need to be reevaluated in light of the unique characteristics of juvenile offenders.[126]

B. The Supreme Court and Differentiating Juveniles from Adults

In lieu of focusing on juvenile and adult sentences, the Supreme Court has recently focused on the differences between juvenile and adult offenders, according juveniles distinct treatment under the Constitution.[127] These cases demonstrate the Court's deep interest in juvenile justice and its willingness to reframe traditional constitutional jurisprudence to account for the specific attributes that set juvenile offenders apart from their adult counterparts.[128] Overall, the Court has indicated that juvenile offenders are less culpable[129] and, thus, less deserving of retributive punishment.[130] This development-driven jurisprudence is gaining more traction, calling into question whether any sentence served before the age of eighteen should count toward sentencing enhancements.

Three key cases comprise the Court's recent jurisprudence. First, *Roper v. Simmons* struck down the juvenile death penalty.[131] Second, *Graham v. Florida* held that juvenile life-without-parole sentences are unconstitutional for nonhomicide offenses.[132] Finally, *Miller v. Alabama* struck down mandatory life-without-parole sentences for juveniles, even for homicide crimes.[133] These three cases illustrate the marked distinction between juvenile and adult offenders and the impropriety of one-size-fits-all sentencing practices.

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126. *See supra* Part II.C (discussing the particular severity of the Career Offender Guidelines, both in terms of the statutory mandate and the Commission's response).

127. *See, e.g.*, *J.D.B.*, 113 S. Ct. at 2399; *see also* Marsha Levick, *Kids Really Are Different: Looking Past* Graham v. Florida, CRIM. L. REP., July 12, 2010, at 1, 2 (providing a discussion of the implications of recent Supreme Court jurisprudence on juvenile law doctrines).

128. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 569 (2005) (identifying and exploring three general differences between juveniles under eighteen and adults).

129. *See* Graham v. Florida, 130 S. Ct. 2011, 2027 (2010) (comparing an adult murderer to a juvenile nonhomicide offender and finding that the latter has a "twice diminished moral culpability" due to the natures of the respective ages and crimes).

130. *See Roper*, 543 U.S. at 571 ("[T]he case for retribution is not as strong with a minor as with an adult . . . .").

131. 543 U.S. 551 (2005).

132. 130 S. Ct. 2011 (2010).

133. 132 S. Ct. 2455 (2012).

1. *Roper v. Simmons*

In *Roper v. Simmons*, the Supreme Court considered the case of Christopher Simmons, a seventeen-year-old high school junior, sentenced to death for first-degree murder.[134] The Court struck down the juvenile death penalty as unconstitutional under the Eighth Amendment,[135] finding such young offenders less culpable than adults, and thus incapable of deserving the harshest penalty that the law can impose.[136] Informed by medical, psychological, and sociological studies, the Court articulated three general differences between juveniles and adults.[137] First, juveniles are less mature and have an underdeveloped sense of responsibility, leading to recklessness and a relative lack of forethought.[138] Second, juveniles are more vulnerable to negative influences and peer pressure because they have less control over their own environments.[139] Third, a juvenile's personality and character are more transitory and less fixed than an adult's.[140] These differences reduce the culpability of juvenile offenders and "render suspect any conclusion that a juvenile falls among the worst offenders."[141]

The Court cited these differences to underscore why traditional sentencing and punishment justifications do not apply to juveniles with the same force. Retribution is not proportional if the most severe penalty is "imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity."[142] Furthermore, imposing the most final and irrevocable penalty on an offender with the capacity for significant mental maturation and change seems inherently inappropriate.[143] An additional justification for the death penalty—deterrence—is similarly inapplicable: juvenile offenders are less likely to weigh the costs and

134. *Roper*, 543 U.S. at 556–57.

135. *Id.* at 579 (holding that the juvenile death penalty is cruel and unusual punishment under the Eighth Amendment).

136. *Id.* at 568–79.

137. *Id.* at 569.

138. *Id.* (noting that almost every state addressed this impetuousness by prohibiting those under eighteen from drinking, voting, or serving on juries).

139. *Id.*

140. *Id.* at 570.

141. *Id.*

142. *Id.* at 571.

143. *See* Levick, *supra* note 127, at 2 (remarking that the Court had stressed this incongruity).

benefits of their actions and are unlikely to be deterred by the threat of a punishment so remote that it barely exists in their minds.[144]

The *Roper* Court additionally emphasized the force of these developmental differences by categorically applying its holding to all offenders under the age of eighteen, regardless of the particular details of their crimes.[145] That the brutality or cold-blooded nature of a crime could supersede the juvenile offender's age was "unacceptable" to the majority,[146] who refused to rely on unproven medical attempts to distinguish a juvenile offender who could be rehabilitated from one who could not.[147] The Court stressed that the state could not revoke a juvenile's "potential to attain a mature understanding of his own humanity,"[148] reemphasizing the differences between juvenile and adult offenders.

2. *Graham v. Florida*

In *Graham v. Florida*, the Court further developed its view that juveniles and adults are fundamentally different.[149] Considering the case of Terrance Graham, convicted of armed burglary, the Court held that the Constitution prohibited juvenile life-without-parole ("JLWOP") sentences for nonhomicide crimes.[150] Building off the reasoning in *Roper*,[151] the Court argued that juveniles are less culpable and retain the ability to change, and that JLWOP effectively

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144. *Roper*, 543 U.S. at 572 (citing Thompson v. Oklahoma, 487 U.S. 815, 837 (1988)) (prohibiting the death penalty for any offender under the age of sixteen).

145. *Id.* at 572–73. This categorical commitment is underscored by the particular crime that gave rise to the case in *Roper*. The defendant and a friend, hoping to commit a murder, randomly broke into the house of the victim, used duct tape to cover her mouth and eyes and to bind her feet and arms, and took her to a nearby park. *Id.* at 557. Covering her head with a towel, secured onto her face with more duct tape, they threw her from a bridge, drowning her in the water below. *Id.*

146. *Id.* at 573.

147. *Id.* (noting several medical and scientific barriers to this type of distinction, the details of which will be discussed in more detail later in *supra* Part IV.C of this Note).

148. *Id.* at 574; *see also* Levick, *supra* note 127, at 2 (providing an overview of the implications of juvenile treatment after *Roper*).

149. 130 S. Ct. 2011 (2010).

150. *See id.* at 2034 (holding that where a life sentence is imposed, the State must give the prisoner "some realistic opportunity to obtain release").

151. *See, e.g.*, *id.* at 2026 (embracing the same three general differences between juveniles and adults discussed earlier, and focusing especially on the "twice-diminished" culpability of a juvenile, nonhomicide offender); *see also* Tamar R. Birckhead, Graham v. Florida*: Justice Kennedy's Vision of Childhood and the Role of Judges*, 6 DUKE J. CONST. L. & PUB. POL'Y 66, 71–72 (2010) (providing an extensive analysis of Justice Kennedy's approach to juvenile offenders and victims and tracing the similarities between Kennedy's reasoning in *Roper* and *Graham*).

glosses over these differences.[152] No matter what the defendant did to demonstrate growth and maturity, he would die in prison under his original sentence.[153] Informed by medical, scientific, and sociological studies, the Court held that this result violated the Eighth Amendment.[154]

Just as in *Roper*, the Court adopted a categorical ban on JLWOP for nonhomicide crimes, again demonstrating the overriding importance of distinguishing juvenile from adult offenders, regardless of aggravating factors.[155] Justice Kennedy, writing for the Court, seemed particularly concerned by the comments of the trial court judge who, upon sentencing the defendant (a repeat offender), observed: "[Y]ou decided that this is how you were going to live your life and that there is nothing we can do for you . . . . [W]e can't help you any further. We can't do anything to deter you."[156] But this is exactly what the Court sought to avoid—a judge using the fact that the defendant was a career offender to overlook the notion that he was just a juvenile and still capable of rehabilitation. Courts cannot necessarily "distinguish the few incorrigible juvenile offenders from the many that have the capacity for change."[157]

By extending the focus on developmental differences to strike down nonhomicide JLWOP, the *Graham* Court solidified the shift from the nature of the sentence to the nature of the offender. Chief Justice Roberts, in dissent, noted that the Court had moved beyond its longstanding view that the "death penalty is different" and had relied instead on the category of the particular offender.[158] In a separate dissent, Justice Thomas observed that the Court could now immunize any class of offenders from any punishment.[159] As one commentator

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152. *See Graham*, 130 S. Ct. at 2026, 2033 (noting that many prisons withhold rehabilitation and education programs from those sentenced to life without parole).

153. *Id.*

154. *See id.* at 2034; *see also* Arya, *supra* note 41, at 124 (arguing that *Graham* establishes that youth have a constitutional right to rehabilitation because the main holding explicitly mentions rehabilitation and because the Court refused to use incapacitation as a legitimate goal for JLWOP).

155. *Graham*, 130 S. Ct. at 2032; *see also* Levick, *supra* note 127, at 2 (providing a nice synthesis of the holding and reasoning in this case, paying particular attention to how it built off of *Roper*).

156. *Graham*, 130 S. Ct. at 2020 (quoting the record); *see also* Birckhead, *supra* note 151, at 72 (discussing the implications of the categorical rules in both *Roper* and *Graham*).

157. *Graham*, 130 S. Ct. at 2032.

158. *Id.* at 2039–40 (Roberts, J., dissenting).

159. *Id.* at 2046 (Thomas, J., dissenting).

has put it, the Court moved from the "death is different" approach to the "kids are different" approach.[160]

3. *Miller v. Alabama*

In the summer of 2012, the Court once again demonstrated that juveniles are "constitutionally different"[161] from adults when it struck down mandatory JLWOP sentences altogether.[162] At issue in *Miller* were the sentences of two fourteen-year-olds convicted of homicide crimes: Kuntrell Jackson for felony murder stemming from a video-store robbery[163] and Evan Miller for murder.[164] Despite the nature of these offenses, the Court invalidated the JLWOP sentences as unconstitutional because they failed to account for the unique characteristics of juvenile offenders.[165]

Further developing the analysis in *Roper* and *Graham,* the *Miller* Court took an even more nuanced approach to juvenile sentencing. First, the Court reemphasized that traditional justifications for punishment do not neatly apply to juveniles. Diminished juvenile culpability weakens the case for retribution, while a juvenile's inherent recklessness makes deterrence unlikely.[166] Moreover, rehabilitation could not justify a sentence of permanent imprisonment.[167] Although the Court in *Graham* drew the line at nonhomicide crimes, the *Miller* Court rejected such line drawing. None of the distinctive traits of juveniles are crime specific;[168] rather, the differences between juveniles and adults demand specialized consideration by the sentencing authority regardless of the crime. To further support this point, the Court analogized JLWOP to the death penalty, which, according to *Roper*, requires courts to consider the defendant's youth through individualized sentencing.[169] The "imposition of a state's most severe penalties on juvenile offenders," wrote Justice Kagan for the Court, "cannot proceed as though they were not children."[170]

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160. Levick, *supra* note 127, at 3.

161. Miller v. Alabama, 132 S. Ct. 2455, 2464 (2012) (reasoning that, *for the purposes of sentencing*, juveniles and adults are constitutionally different).

162. *Id.* at 2475.

163. *Id.* at 2461.

164. *Id.* at 2462.

165. *Id.* at 2464, 2465, 2475.

166. *Id.* at 2465.

167. *Id.*

168. *Id.*

169. *Id.* at 2467.

170. *Id.* at 2466.

The Court also noted that discretionary transfer statutes did not adequately address the unique characteristics of juvenile offenders. First, many states actually use *mandatory* transfer systems, meaning juveniles in these jurisdictions cannot rely on their age to avoid adult sentencing schemes.[171] Moreover, even when states give judges the discretion to transfer, the Court has found limited utility in such schemes. In *Miller*, for example, the lower court denied petitioner's request to have his own mental-health expert at his transfer hearing, leaving the judge with only partial information about Miller's background and the circumstances of his offense.[172] Transfer decisions often leave the judge a choice between the light punishment of the juvenile system and the standardized sentencing for adults.[173] Since a judge making the transfer decision will likely determine that a minor deserves a harsher sentence than he would receive in juvenile court,[174] the importance of a sentencing judge's consideration of juvenile mitigation becomes paramount.

Unlike in *Roper* or *Graham*, however, the Court did not adopt a categorical ban on the juvenile sentencing practice at issue. While the Court struck down *mandatory* JLWOP schemes, it still allowed discretionary JLWOP to continue so long as the sentencing process took into account "how children are different."[175] This caveat is not as great a departure from the prior two cases as it may seem, however, and it still preserves the stark distinctions between juvenile and adult offenders. First, the Court did not foreclose a categorical ban on JLWOP, rather it merely determined that this holding was sufficient to decide the cases at hand.[176] Second, the Court observed that there would be few cases where JLWOP would ever be imposed, noting the difficulty in identifying those rare juvenile offenders who are beyond repair.[177] Practically, then, *Miller* should have the effect of all but categorically banning JLWOP, preserving the same bright-line distinctions established in *Roper* and *Graham*.

Because of the Court's recent jurisprudence, sentencing practices that fail to consider the unique nature of the juvenile

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171. *Id.* at 2474.

172. *Id.*

173. *See id.* (comparing a release from custody at the age of twenty-one, on the one hand, with mandatory life without parole on the other).

174. *See id.* at 2474–75 ("It is easy to imagine a judge deciding that a minor deserves a (much) harsher sentence than he would receive in juvenile court . . . .").

175. *Id.* at 2469.

176. *See id.* (noting, however, that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon").

177. *Id.* (echoing the reasoning of both *Roper* and *Graham*).

offender seem dubious.[178] *Graham*, *Roper*, and *Miller* show not only the Court's different treatment of juveniles and adults, but also its reluctance to apply harsh sentences for juvenile offenses. This necessarily implicates Career Offender Guideline enhancements based on juvenile convictions. Though still several steps removed from the death penalty or JLWOP, career offender enhancements can still impose significant penalties on juvenile offenders.[179] Since the Supreme Court has shown no signs of backing away from its special treatment of juveniles,[180] it may soon address the question of whether juvenile sentences can constitutionally impose such punitive consequences for an offender's entire life.

C. Legal Distinction Based on Scientific Differences

Modern advances in juvenile science and medicine support the distinction established in *Roper*, *Graham*, and *Miller*. In recent years, two trends have developed. First, technology and research can now more accurately explain the scientific differences between juveniles and adults with more precision.[181] Second, courts are increasingly willing to incorporate this science into their decisionmaking.[182] By continuing to reinforce that juvenile offenders are truly different from their adult counterparts, these trends will hopefully lead to judicial or legislative review of the Guidelines in favor of ignoring prior juvenile sentences in a career offender enhancement.

Since the 1980s, advances in both developmental psychology and neuroscience have revealed much valuable information about juveniles.[183] Prior to this period, both fields were relatively primitive,

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178. *See* Birckhead, *supra* note 151, at 78–79 (exploring the particular characteristics of a JLWOP that are shared with other sentences).

179. *See supra* note 88 and accompanying text (noting that the sentence in *United States v. Gregory* was enhanced from 130 months to 327 months).

180. *See, e.g.*, J.D.B. v. North Carolina, 131 S. Ct. 2394, 2408 (2011) (holding for the first time that *Miranda* custody analysis must take into account a juvenile's age).

181. *See, e.g.*, Johanna Cooper Jennings, Note, *Juvenile Justice*, Sullivan, *and* Graham: *How the Supreme Court's Decision Will Change the Neuroscience Debate*, 2010 DUKE L. & TECH. REV. no. 6, at 1 (providing an overview of advances in neuroscience and their potential effects on the Supreme Court).

182. *See, e.g.*, Graham v. Florida, 130 S. Ct. 2011, 2026 (2010) (referring expressly to developments in psychology and brain science that demonstrate fundamental differences between juvenile and adult minds). *But see* Terry Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 NOTRE DAME L. REV. 89, 117 (2009) (commenting that neuroscience currently has only a buttressing effect on information considered by the courts).

183. *See* Maroney, *supra* note 182, at 96–97; O. Carter Snead, *Neuroimaging and the "Complexity" of Capital Punishment*, 82 N.Y.U. L. REV. 1265, 1273 (2007) (discussing the growing use of brain imaging technology to explore legally relevant behavior).

focusing almost exclusively on very young children rather than adolescent development.[184] But in the 1980s, scientists began studying teenagers much more comprehensively, assessing their different risk-taking behaviors, attitudes toward authority, and decisionmaking processes.[185] In the early 1990s, advances in technology revolutionized the way neuroscientists studied the juvenile brain, culminating in several well-known studies that revealed adolescent brains are still developing.[186] By the turn of the century, these studies supported the idea that teenage brains are structurally and functionally different from those of adults.[187]

In *Roper*, the Court relied on this twenty-year surge in scientific research to articulate the three general differences between juveniles and adults.[188] Though the full extent of its influence is unclear, many scholars regarded this case as a breakthrough for the reliance on developmental psychology and neuroscience in juvenile justice.[189] Both the defense's oral arguments[190] and the amicus brief from the American Medical Association[191] stressed the importance of psychology and neuroscience in the legal field. This clearly influenced the Court, which cited several medical studies in its opinion.[192] Justice Scalia also acknowledged the Court's extensive reliance on "scientific

184. *See* Maroney, *supra* note 182, at 96–97 (providing an overview of developmental psychology and neuroscience, and their relationship to judges and policymakers).

185. *Id.* at 97.

186. *See id.* at 98 (discussing the studies in more detail and explaining the scientific studies in more detail); Snead, *supra* note 183, at 1273 (tracing the growth of cognitive neuroscience in the 1990s); Jennings, *supra* note 181, at 6 (explaining the science behind the determinations of these MRI and fMRI studies).

187. Maroney, *supra* note 182, at 100.

188. Roper v. Simmons, 543 U.S. 551, 569 (2005); *see also supra* notes 137–41 and accompanying text (enumerating and discussing these three differences).

189. *See* Maroney, *supra* note 182, at 108 ("Developmental neuroscience thus became to be regarded . . . as a major influence on the highest-profile juvenile case in decades."); Jennings, *supra* note 181, at 22 (noting that the "door for neuroscientific research opened in *Roper*" will help juvenile advocates further reform the system).

190. *See* Transcript of Oral Argument at 28–29, *Roper*, 543 U.S. 551 (No. 03-633) (statement of Seth Waxman) ("[W]here you have a scientific community that in Stanford was absent—the American Medical Association, the American Psychological Association, the American Psychiatric Association, the major medical and scientific associations, were not able in 1989, based on the evidence, to come to this Court and say there is scientific, empirical validation for requiring that the line be set at 18.").

191. *See* Brief for the Am. Med. Ass'n et al. as Amici Curiae Supporting Respondents at 2, *Roper*, 543 U.S. 551 (2005) (No. 03-633) ("The adolescent's mind works differently from ours. Parents know it. This Court has said it. Legislatures have presumed it for decades or more. And now, new scientific evidence sheds light on the differences.").

192. *See, e.g.*, *Roper*, 543 U.S. at 569 (citing several developmental psychology studies).

and sociological studies," though he argued that such studies should be considered by the legislatures, not the courts.[193]

Despite Justice Scalia's admonition, the Court again turned to science when striking down JLWOP for nonhomicide offenses in *Graham*. Even more explicitly than in *Roper*, the Court based its decision in *Graham* on the fact that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds."[194] The Court further noted that those parts of the brain that control behavior continue to develop through adolescence and that psychologists themselves could not differentiate between those offenders who were "irreparabl[y] corrupt" and those who merely demonstrated juvenile folly.[195] In case *Roper* left any doubts, the Court's opinion in *Graham* unequivocally supported the use of developmental psychology and neuroscience to differentiate juvenile offenders from their adult counterparts.

Though much remains to be seen, current trends point toward an increased, albeit measured, use of science and medicine in the courtroom. The Supreme Court again acknowledged the developmental differences between juveniles and adults in *J.D.B. v. North Carolina*, noting that cognitive science confirms what was established in *Roper* and *Graham*.[196] And it echoed this approach in *Miller* when it relied on developments in psychology and brain science to identify the attributes that distinguish young people from adults.[197] Furthermore, state courts have relied on these developmental principles when confronting particularly long juvenile sentences. One court turned to the "scientific and sociological studies" cited in *Roper* to decline a sentencing restriction on a juvenile's eligibility for parole.[198] Another discussed the significant differences between the adolescent and adult brain, acknowledging that the defendant's

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193. *See id.* at 617–18 (stating that "[l]egislatures 'are better qualified to weigh and "evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts" ' " (citing McClesky v. Kemp, 481 U.S. 279 (1987))).

194. Graham v. Florida, 130 S. Ct. 2011, 2026 (2010).

195. *Id.*

196. 131 S. Ct. 2394, 2403, n.5 (2011) (holding that a *Miranda* custody analysis must take into account a juvenile's age and echoing the determination in *Graham* that no recent scientific data contradicts the notion that juvenile offenders are developmentally different from adult offenders).

197. Miller v. Alabama, 132 S. Ct. 2455, 2464 (2012).

198. *See* Cotting v. State, No. A-9909, 2008 WL 4059580, at *2 (Alaska Ct. App. Sept. 3, 2008) (upholding a sentencing in which the trial judge considered the "literature regarding juveniles" that was relied on in *Roper*).

"thinking" was in development when he committed the offense, which counseled in favor of a sentence well below the maximum.[199]

The judiciary's increased willingness to consider scientific literature on adolescence suggests that the significance of juvenile offenses will decrease in the eyes of the law. This, in turn, should dramatically decrease the role they play in the Career Offender Guidelines. Though some scholars doubt courts will use adolescent brain research to mitigate juvenile sentencing practices,[200] others believe that the holdings of *Roper*, *Graham*, and *Miller* strengthen the possibility that science will affect juvenile justice policy in the future.[201] And even the detractors acknowledge that, at a minimum, the ongoing progress in brain science will buttress the notion that juveniles and adults should be sentenced differently.[202] Based on these recent trends, it seems reasonable to conclude that science will eventually impact the effect of juvenile sentences on career offender enhancements.

V. CEMENTING THE LINE IN THE SAND

The debate over the Career Offender Guidelines emerged during one of the most reactive times in the history of juvenile justice[203]—before the Supreme Court decided its recent trio of cases and began relying on newly developed scientific evidence.[204] *Roper*,

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199. *See* State v. Carrasquillo, 962 A.2d 772, 775–78 (Conn. 2009).

200. *See* Maroney, *supra* note 182, at 124–28 (providing an overview of juvenile challenges to lengthy or harsh sentences and determining that pre-*Graham*, most challenges were unsuccessful).

201. *See* Jennings, *supra* note 181, at 21–22 (predicting the effects of *Graham*'s categorical ban on JLWOP for nonhomicide offenses).

202. *See* Maroney, *supra* note 182, at 167 ("If this minor buttressing role is less spectacular than some would hope, it is a real one. More, this role could expand if the science eventually were to show stronger connections between neural structure, neural functioning, and externalized behaviors.").

203. As previously discussed, from the 1970s until the turn of the century, courts and legislatures cracked down on youth violence as a result of the growing drug trade. *See* FELD, *supra* note 9, at 29 (describing the " 'get tough' crime policies that affected juvenile justice administration throughout the nation").

204. *Roper* was decided in 2005, *Graham* in 2010, and *Miller* in 2012. All but one of the circuit court cases (United States v. Gregory, 591 F.3d 964 (7th Cir. 2010)) were decided before 2005. United States v. Moorer, 383 F.3d 164 (3d Cir. 2004); United States v. Mason, 284 F.3d 555 (4th Cir. 2002); United States v. Carrillo, 991 F.2d 590 (9th Cir. 1993); United States v. Pinion, 4 F.3d 941 (11th Cir. 1993). Even those cases decided after *Roper* considered prior sentences originally handed down during this same time period, which were subject to the same precedent and general public opinion. *See, e.g.*, *Moorer*, 383 F.3d at 166 (stating that the disputed conviction and sentence took place in 1990); Brief of Defendant-Appellant at 4, *Gregory*, 591 F.3d 964 (No. 09-2735), 2009 WL 3459293 (stating that the disputed robbery had taken place in 2000).

Graham, and *Miller* demonstrate the Court's renewed focus on protecting the juvenile offender.[205] These cases cannot be circumscribed to the juvenile death penalty or JLWOP; rather, they broadly implicate the differences between juvenile and adult offenders and call into question sentencing practices that treat them uniformly. It is clear, then, that enhancements based on a minor's prior convictions in adult court need to be reevaluated in light of these recent trends.

This Note proposes that a court should not use any conviction prior to the age of eighteen as a predicate offense for a later career offender enhancement, regardless of whether the conviction and/or sentence have been deemed "adult." Admittedly, this approach is a far cry from where the law currently stands, and it would require amending the Guidelines.[206] But, the Career Offender Guidelines were created during an anti-juvenile period,[207] and the Commission itself recently acknowledged that the Guidelines result in unjustly severe sentences.[208] The solution advocated here looks beyond the semantic argument taken up by the courts of appeals that resulted in the divergent nature-of-the-conviction and nature-of-the-sentence approaches.

Instead, it recognizes that the more apt distinction is between juvenile and adult offenders and that any sentencing scheme that fails to take this into account is fundamentally unfair, particularly given the harsh consequences involved. Excluding all juvenile crimes from career offender calculations provides a bright-line sentencing rule that is consistent with existing state law, recent Supreme Court jurisprudence, developmental science, and the overall goals of the juvenile justice system.

It is worth noting at the outset that this approach has already been implemented in some jurisdictions, suggesting its viability as a solution to the problem of juvenile sentencing. Certain states categorically refuse to apply prior convictions below a certain age to state career offender enhancements.[209] For example, Oregon draws the

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205. For a discussion of these cases, see *supra* Part IV.B.

206. For example, U.S. SENTENCING GUIDELINES MANUAL §§ 4B1.1, 4B1.2, and 4A1.2 would now have to provide more nuanced definitions of "prior felony conviction" and "adult conviction" to incorporate this new requirement.

207. They were created as part of the Sentencing Reform Act of 1984, 18 U.S.C. § 3551 *et seq.* (2006). *See supra* Part II.C (discussing the origins of the Guidelines).

208. *See supra* notes 47–54 and accompanying text (corroborating this point).

209. *See* Deutsch, *supra* note 8, at 390 (breaking down various state approaches to habitual offender statutes, paying particular attention to how convictions before the age of eighteen affect these sentencing enhancements).

line at sixteen, while New Mexico and North Dakota prohibit the use of any prior convictions before eighteen.[210] None of these states rely on the nature of the conviction or the sentence.[211] And as more states begin to recognize the unique nature of adolescence, it is likely that more will come to adopt similar practices.

From a practical standpoint, this solution provides a judicially manageable test that will promote uniformity in sentencing. Courts currently struggle to distinguish juvenile convictions from adult convictions[212] and juvenile sentences from adult sentences.[213] The approach advocated here merely requires that the court determine an offender's age at the time the crime was committed. Such a categorical limitation takes much of the guesswork out of interpreting the Guidelines, rendering moot the vast jurisdictional discrepancies[214] that have led judges to throw up their hands and make "judgment calls" when attempting to parse statutory language.[215] Ultimately, simplicity in judicial application will facilitate the Commission's goal of sentencing uniformity.[216]

Beyond judicial manageability, this solution best reflects the Supreme Court's recent approach toward juvenile justice sentencing. The Court continues to rely on the differences between juveniles and adults to strike down harsh sentencing practices, establishing essentially two classes of offenders.[217] There are several reasons for such a distinction, not the least of which is that juvenile offenders

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210. *See, e.g.*, N.M. STAT. ANN. § 31-18-23(C) (West 2009) ("For the purpose of this section, a violent felony conviction incurred by a defendant before the defendant reaches the age of eighteen shall not count as a violent felony conviction."); N.D. CENT. CODE ANN. § 12.1-32-09(1)(c) (West 2011) ("The court may not make such a finding unless the offender is an adult and has previously been convicted in any state or states or by the United States of two felonies of class C or above committed at different times when the offender was an adult."); OR. REV. STAT. ANN. § 161.725(3)(a) (West 2008) ("An offense committed when the defendant was less than 16 years of age . . . .").

211. *See supra* note 210 (providing text of the statutes).

212. *See, e.g.*, United States v. McGhee, 651 F.3d 153, 156, 158 (1st Cir. 2011) (demonstrating the difficulty in determining whether a conviction can be characterized as "adult").

213. *See supra* Part III (discussing the circuit split over how to interpret the Guidelines in terms of the nature of the sentence).

214. *See supra* Part IV.A (briefly discussing the existence of state-to-state disparities between correctional facilities, juvenile transfer statutes, and the ability to sentence a juvenile in adult court to a juvenile facility).

215. *See, e.g.*, *McGhee*, 651 F.3d at 158 (using this term when trying to parse not only the language of the Guidelines but also the language of the state statute at issue).

216. *See supra* note 72 (stating that avoiding sentencing disparities is a major purpose of the Guidelines).

217. *See supra* Part IV.B (discussing the three major cases contributing to this judicial recognition).

have a "diminished moral culpability."[218] As a result, the Court has required states to consider youthfulness when imposing lengthy prison terms[219] and has on three separate occasions found that juveniles are categorically exempt from harsh sentencing schemes.[220] The current Career Offender Guidelines impose some of the harshest sentences with no consideration of the age at which predicate offenses were committed. It is feasible, then, that the Court could extend its reasoning and decide to preclude any predicate offenses committed when the offender was under eighteen from a career offender calculation.

A *categorical* ban on using predicate convictions is also consistent with the Supreme Court's recent jurisprudence, even though *Miller* refused to ban JLWOP altogether. First, in both *Graham* and *Roper* the Court specifically relied on the differences between juveniles and adults to categorically strike down the juvenile death penalty and JLWOP for nonhomicide offenses.[221] Second, the Court in *Miller* did not rule out the possibility of a categorical ban and further suggested that JLWOP would rarely, if ever, be imposed.[222] Finally, the Court has emphasized that judges cannot sufficiently identify those juvenile offenders without the capacity for rehabilitation,[223] so how can we expect a sentencing judge, many years later, to make an individualized determination about the offender when he was a juvenile? Ultimately, a categorical approach recognizes judges' inabilities to make such distinctions and instead opts for the certainty and predictability that a bright-line rule provides.

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218. Graham v. Florida, 130 S. Ct. 2011, 2027 (2010).

219. *See* Miller v. Alabama, 132 S. Ct. 2455, 2466 (2012) (stating that the mandatory penalty scheme at issue in the case contravened the Court's jurisprudence because it removed youth from the balance).

220. *See supra* Part IV (noting that the juvenile death penalty, JLWOP for nonhomicide crimes, and mandatory JLWOP are all unconstitutional).

221. *See Graham*, 130 S. Ct. at 2030–32 (opining that a categorical ban was necessary because alternative approaches were not adequate to address constitutional concerns); Roper v. Simmons, 543 U.S. 551, 573–74 (2005) (arguing that if it is difficult "even for expert psychologists to differentiate between the juvenile offender whose crime reflects an unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption," then states should not ask judges or jurors to issue a condemnation as grave as the death penalty).

222. *Miller*, 132 S. Ct. at 2469 ("[G]iven all [the Court] ha[s] said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, [the Court] think[s] appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.").

223. *See Graham*, 130 S. Ct. at 2032 ("[I]t does not follow that courts taking a case-by-case proportionality approach could with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change.").

Some might argue that transfer statues adequately account for the unique characteristics of juvenile offenders, but *Miller* holds otherwise, and empirical data further undermines this argument. As the Court noted in its opinion, mandatory transfer statutes ignore the characteristics of the juvenile offender, and discretionary schemes likewise do little to account for these factors.[224] Furthermore, transfer statutes actually *exacerbate* crime rates. In 2007, the Center for Disease Control found that juveniles transferred to the adult system were approximately thirty-four percent more likely to be rearrested for violent crimes than those who were not transferred.[225] The U.S. Department of Justice's Office of Juvenile Justice and Delinquency Prevention determined that a significant factor driving these higher recidivism rates was the stigma and resentment that juveniles experience when they are convicted as felons and punished as adults.[226] Such problems with transfer schemes may be decreased if the conviction can no longer be used to enhance subsequent sentences.

This solution is also consistent with developmental psychology and neuroscience. Juveniles take more risks, blindly follow their peers, and inadequately consider future repercussions.[227] Their brains are structurally and functionally different, and the areas that control impulse, reasoning, and judgment are still developing during adolescence,[228] and the courts have taken notice.[229] These scientific

224. *See Miller*, 132 S. Ct. at 2474 (describing how discretion has limited utility because (a) "the decisionmaker typically will have only partial information at this early, pre-trial stage about either the child or the circumstances of his offense" and (b) "the question at transfer hearings may differ dramatically from the issue at a post-trial sentencing").

225. Angela McGowan et al., *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System: A Systematic Review*, 32 AM. J. PREVENTATIVE MED. s7, s14 (2007).

226. RICHARD E. REDDING, DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE TRANSFER LAWS: AN EFFECTIVE DETERRENT TO DELINQUENCY? 7 (2010).

227. *See* Maroney, *supra* note 182, at 96–97 (discussing the empirical findings of many developmental studies in the 1980s).

228. Jennings, *supra* note 181, at 1; *see also* Maroney, *supra* note 182, at 100 (comparing the brains of teenagers with those of both children and adults).

229. *E.g.*, Graham v. Florida, 130 S. Ct. 2011, 2026 (2010) (noting that advances in science have led to the discovery that "parts of the brain involved in behavior control continue to mature through late adolescence"); Roper v. Simmons, 543 U.S. 551, 569 (2005) (stating that studies of juveniles "tend to confirm a lack of maturity and an undeveloped sense of responsibility"); State v. Carrasquillo, 962 A.2d 772, 775–78 (Conn. 2009) (describing the testimony of a psychiatrist who stated that "new technologies have revealed significant differences between the adolescent brain and the adult brain, including differences in psychosocial functioning"; at sentencing, the judge stated that he accepted the testimony and took age into consideration as a mitigating factor).

findings support the wisdom of criminal justice policies that, like this Note's solution, treat juveniles and adults differently.[230]

Finally, this solution accounts for the goals of juvenile justice, which recently returned to prominence via the Supreme Court.[231] Juvenile justice focuses on rehabilitation and emphasizes diminished culpability, while the Career Offender Guidelines are uncharacteristically punitive[232] and undeniably retributive.[233] By removing juvenile convictions from the reach of the Guidelines, the solution proposed here avoids a conflict between the purposes of these two practices.[234]

VI. CONCLUSION

In the 1980s and 1990s, both the federal and state governments "got tough" on juvenile "super predators." Among the broad, retributive policies enacted during this period was the creation of the Career Offender Guidelines, promulgated under the U.S. Sentencing Guidelines. As interpreted by several federal circuits, these Guidelines recommend draconian enhancements based on prior juvenile convictions in adult court. In some circuits, a thirty-dollar theft, committed as a juvenile with a sentence served in a juvenile facility, can lead to a twenty-year enhancement on a later sentence.

The solution to this overly severe sentencing practice is more complicated than just adopting the minority interpretation of the current circuit split. Rather, the solution lies in reevaluating the Career Offender Guidelines altogether in light of a recent return to the policies that originally undergirded the juvenile justice system. In *Roper*, *Graham*, and *Miller*, the Supreme Court solidified its policy of treating juveniles differently by striking down the application of harsh sentences to juvenile offenders. This jurisprudential move has been

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230. *See supra* note 202 (discussing the buttressing role of brain science).

231. *See, e.g.*, *Graham*, 130 S. Ct. at 2033 ("The state has denied him any chance to later demonstrate that he is fit to rejoin society based solely on a nonhomicide crime he committed while he was a child in the eyes of the law. This the Eighth Amendment does not permit.").

232. *See supra* notes 47–54 and accompanying text (explaining the origin of the Career Offender Guidelines).

233. *See,* U.S. SENTENCING GUIDELINES MANUAL ch. 4, pt. A, introductory cmt. (2012) (identifying one of the rationales behind the career offender Guidelines as the limited likelihood of rehabilitation); *see also* United States v. Carrillo, 991 F.2d 590, 595 (9th Cir. 1993) (reasoning that especially punitive career offender enhancements are justified because repeat offenders are likely beyond the reaches of rehabilitation).

234. For a good analysis of this argument, see Goldstein-Breyer, *supra* note 14, at 94–95, discussing the use of juvenile adjudications in California Three-Strike statutes and pointing out the inherent tension between retribution and rehabilitation.

buttressed by recent developments in both psychology and neuroscience.

Precluding the use of convictions prior to age eighteen as predicate offenses under the Career Offender Guidelines is consistent with this trend. Amending the Guidelines in the name of workable judicial standards, sentencing uniformity, recent Supreme Court jurisprudence, and developmental science does not set the bar prohibitively high. In fact, similar schemes have already been implemented. To be sure, politicians always fear being labeled "weak on crime." Nevertheless, as the nation's highest court continues to chip away at harsh sentences for juvenile offenses, public support for juvenile-friendly policies like the solution proposed in this Note will grow. Perhaps then our criminal justice system will finally reflect what the scientists have known for some time now—the kids really are different.

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