

LINCOLN MEMORIAL UNIVERSITY LAW REVIEW

VOLUME 10

SUMMER 2023

ISSUE 3

IT'S ABOUT TIME: TENNESSEE'S MODERNIZATION OF JUVENILE SENTENCING AND WHERE TO GO FROM HERE

Blake Lee

I. INTRODUCTION

Tennessee has long been an outlier within the nation regarding its juvenile sentencing schemes and has traditionally been hailed as the harshest in the union with respect to its punishment of minors.¹ However, in November of 2022, the State brought its statutory treatment of juvenile offenders in line with the rest of the country.² In *State v. Booker*, the Tennessee Supreme Court held that the automatic sentencing of juveniles convicted of first-degree murder violates the Eighth Amendments of the Tennessee and United States Constitutions, and that said juveniles deserve individualized sentencing hearings.³ This decision limited a 1995 first-degree murder statute that required judges to automatically sentence convicted juveniles to serve a minimum of fifty-one years.⁴ Although the

¹ See *Tennessee Supreme Court Declares Mandatory Life Sentence for Juvenile Homicide Offender Unconstitutional*, TNCOURTS.GOV (Nov. 18, 2022), <https://www.tncourts.gov/press/2022/11/18/tennessee-supreme-court-declares-mandatory-life-sentence-juvenile-homicide-offender>; *State v. Booker*, 656 S.W.3d 49, 61 (Tenn. 2022).

² See *State v. Booker*, 656 S.W.3d 49, 66 (Tenn. 2022).

³ *Id.*

⁴ See TENN. CODE ANN. § 40-35-501(h)(2) (West 2022) (repealed 2022).

United States Supreme Court invalidated automatic life-without-parole sentences for juveniles in 2012,⁵ the Tennessee sentencing scheme narrowly escaped being overturned because it framed the punishment in “term of years” language and, therefore, did not represent a life sentence. *Booker* effectively recognized Tennessee’s sentencing statute as precedential evasion founded on semantics and brought the State’s jurisprudence within the purview of what the United States Supreme Court determined to be proper nationwide more than a decade ago.⁶

While *Booker* represents a solid step forward for Tennessee’s juvenile law, the opinion provides little procedural guidance and raises questions not answered by Tennessee legislators. Now that individual sentencing hearings are required, what will they look like procedurally? What factors must be considered when determining whether a juvenile deserves parole? What considerations should be given within those factors to fully comply with the intent of the United States and Tennessee Supreme Courts and the state and federal Constitutions? To properly implement the *Booker* decision, Tennessee courts must develop practices and procedures to guarantee constitutional sentencing for future juvenile offenders under the Eighth Amendment. The Court must also ensure that existing convicts, sentenced pre-*Booker*, are afforded the remediation they deserve.

Part I of this note aims to shed light on Tennessee’s most recent activity in bringing its juvenile law up to speed with the rest of the country. Part I also will provide insights on how the State should treat juveniles sentenced under the 1995 sentencing statute, which now has been repealed as to juveniles and replaced with its previous version. Part II reviews the United States’ juvenile jurisprudence regarding mandatory life sentences to lay a foundation for the discussion of *Booker* in Part III. Finally, Part III analyzes the effect of *Booker* on currently incarcerated individuals and discusses what should be done

⁵ *Miller v. Alabama*, 567 U.S. 460, 470 (2012).

⁶ *Booker*, 656 S.W.3d at 69 (Kirby, J., concurring) (“[There] is strong objective evidence that a national consensus has formed against juvenile sentencing statutes like Tennessee’s.”); see also *Miller*, 567 U.S. 460 at 482–84.

with those affected. This is done by surveying neighboring states and developmental psychology to supplement *Booker*'s holding and to provide an early roadmap for how Tennessee should handle juvenile sentencing moving forward.

The *Booker* Court made clear that it reserved sentencing reform for the legislature.⁷ This note, too, does not attempt to redefine legislation. However, in reviewing the Court's final order, this note surveys and compares the current sentencing of juvenile homicide offenders in other states and in Tennessee. This note also will consult contemporary psychological research to inform an understanding of why *Booker* and similar cases—as well as the impact they have on differentiating juveniles from adults—must be at the forefront of consideration when developing juvenile sentencing schemes. This note does not aim to create a perceived hierarchy of “best” laws and practices but instead seeks to establish a foundation of existing law and supporting research to help shape judicial procedure to follow the *Booker* decision.

II. JUVENILE LAW AND MANDATORY LIFE SENTENCES—A COMPLICATED HISTORY

This section will introduce the reader to the regrettably slow journey that Tennessee and the nation took to establish the current state of juvenile first-degree murder sentencing. A few cases stand out for their development of crucial principles of juvenile jurisprudence that frame the legal environment in which *Booker* was decided. A review of these cases will provide a foundation for further discussion post-*Booker* later in the section. This section also will examine why *Booker* was necessary, highlighting the repealed sentencing scheme that was out of step with the rest of the nation. Finally, this section will close with an analysis of *Booker* itself to discuss what will be done following the decision.

A. PRE-BOOKER CASE LAW

⁷ *Booker*, 656 S.W.3d at 66–67; see also *Booker*, 656 S.W.3d at 78 (Bivins, J., dissenting).

Discussions of juvenile sentencing generally are grounded in the constitutional principle of proportionality.⁸ The principle is defined in *Weems v. United States*, where the Supreme Court opined that “punishment for crime should be graduated and proportioned to the offense.”⁹ The Court clarified the principle to prevent only those sentences in extreme cases where the punishment is severely disproportionate to the crime committed.¹⁰ Although the principle was explored at various depths regarding criminal justice,¹¹ the Court did not seriously discuss juvenile justice in relation to proportionality for some time. It was not until 1988 that the Supreme Court first considered the principle of proportionality as applied specifically to youth convicted of criminal acts.¹²

In *Thompson v. Oklahoma*, the United States Supreme Court considered a set of facts involving an especially brutal murder that was so “heinous, atrocious, or cruel,” it resulted in the 15-year-old defendant initially being sentenced to death at the trial court level.¹³ In informing its opinion, the Court examined the eighteen states that, at the time, had individually prohibited executions for criminal offenses committed by defendants under sixteen.¹⁴ The Court also considered other countries’ policies and discovered that the United States was lagging in its “civilized standards of decency” concerning the execution of youthful offenders.¹⁵ The *Thompson* Court discussed how the United States’ ideological enemy at the time, the USSR, had beaten America to the prohibition of juvenile capital punishment.¹⁶ Thus, the Supreme Court officially prohibited the execution of juvenile offenders who had

⁸ See *Booker*, 656 S.W.3d at 56.

⁹ *Weems v. United States*, 217 U.S. 346, 367 (1910).

¹⁰ See *Harmelin v. Michigan*, 501 U.S. 957, 997–98 (1991).

¹¹ *Id.* at 998–99.

¹² See *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988).

¹³ *Id.* at 819–20.

¹⁴ *Id.* at 829.

¹⁵ *Id.* at 830.

¹⁶ *Id.* at 831.

committed their crimes while under the age of sixteen.¹⁷ The Court founded its conclusion on the “conscience of the community” and disregarded the traditional justifications for the death penalty in favor of proportionality applied to the lesser culpability of juveniles.¹⁸

Almost 20 years after *Thompson*, the Court again considered the limitation of juvenile execution in *Roper v. Simmons*.¹⁹ The main holding of *Roper* extended *Thompson*’s prohibition from age sixteen to the age of majority at eighteen.²⁰ This categorical ban on the execution of all juveniles was a great leap forward in the national modernization of juvenile sentencing. Still, perhaps more importantly, the Court set forth factors outlining the “[t]hree general differences between juveniles under eighteen and adults.”²¹ These factors form the basis of subsequent landmark juvenile sentencing decisions, as they illustrate why juveniles are typically less culpable for their acts than adults.²² The *Roper* factors also function as the framework for Tennessee’s consideration of juvenile sentencing post-*Booker* as discussed in Part III.²³ The factors, in short, include consideration of the juvenile’s (1) lack of maturity, (2) impressionability, and (3) character, which is “transitory” and “not as well formed as that of an adult.”²⁴

Graham v. Florida was the next development in juvenile jurisprudence.²⁵ *Graham* earns its place as a foundational predecessor to *Booker* because of its blanket prohibition against life without parole in any case involving a youthful offender in a non-homicide crime.²⁶ The Supreme Court based its reasoning on the proportionality principle, likening life without parole to

¹⁷ *Id.* at 832, 836–38.

¹⁸ *Id.*

¹⁹ 543 U.S. 551, 555 (2005).

²⁰ *Id.* at 578.

²¹ *Id.* at 569.

²² See generally *Graham v. Florida*, 560 U.S. 48, 59 (2010); *Miller v. Alabama*, 567 U.S. 460, 469 (2012); *Montgomery v. Louisiana*, 577 U.S. 190, 207 (2016).

²³ See *infra* note 139.

²⁴ *Roper*, 543 U.S. at 569–70.

²⁵ See *Graham*, 560 U.S. at 48.

²⁶ *Id.* at 82.

the death penalty in terms of punitive value.²⁷ The Court further determined that a sentence of life without parole is much more punitive for a juvenile than it is for an adult offender.²⁸ The Court noted, as it did in *Roper*, that the United States remained a standout on the international stage in terms of its harsh sentencing of juveniles.²⁹ The *Graham* Court's reasoning echoes that of the *Roper* Court: Due to their youth, juveniles generally are less culpable than adults.³⁰ Notably, the Court reiterated that juveniles, as a result of their lessened culpability, are less deserving of punishments as severe as life without parole.³¹ As such, a non-homicide youthful offender, according to *Graham*'s interpretation of the Eighth Amendment, should be guaranteed some "meaningful opportunity to obtain release."³²

The development of the principle of proportionality as applied to juveniles culminated in the landmark case of *Miller v. Alabama*,³³ which established that statutes prescribing mandatory life sentences without parole are unconstitutional for criminal defendants under eighteen.³⁴ *Miller* spawned from two separate cases: *E.J.M. v. State*, 928 So.2d 1077 (Ala. Crim. App. 2004) and *Jackson v. State*, 194 S.W.3d 757 (Ark. 2004).³⁵ In both cases, state statutes required the juvenile defendants, each convicted of murder at the age of fourteen, to be sentenced to life without parole.³⁶ Most of the *Miller* opinion was used to reinforce the principle that a sentencer of a juvenile for first-degree murder must be able to consider the "mitigating factors of youth" prior to imposing such a severe punishment.³⁷ The Court added that culpability may be further diminished by a juvenile offender's mental and emotional background, in

²⁷ *Id.* at 69–70.

²⁸ *Id.* ("A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only.").

²⁹ *Id.* at 81.

³⁰ *See id.* at 72 (citing *Roper*, 543 U.S. at 571).

³¹ *Id.* at 68 (citing *Roper*, 543 U.S. at 569).

³² *Id.* at 75.

³³ 567 U.S. 460 (2012).

³⁴ *Id.* at 470.

³⁵ *Id.* at 465–69.

³⁶ *Id.*

³⁷ *Id.* at 476 (citing *Johnson v. Texas*, 509 U.S. 350, 367 (1993)).

addition to the signature mitigating factors.³⁸ After reflecting on *Graham* and *Roper*, the Court determined that established precedent required that, for a juvenile's life-without-parole sentence to be upheld under the Eighth Amendment, the youthful offender must be afforded an individualized consideration of mitigating factors such as age, related characteristics of youth, and the nature of their crimes.³⁹ Thus, *Miller* required states to provide juvenile offenders with hearings to make the above considerations and prohibited the automatic sentencing of a juvenile to life without parole without first allowing the defendant to present evidence of the mitigating factors.⁴⁰

While *Miller* was the final case to set the stage for a much-needed review of mandatory juvenile convictions, two other pre-*Booker* decisions provide additional constitutional considerations for Tennessee. These considerations are important now that the State's previous sentencing scheme was recognized as effectively imposing an automatic sentence of life without parole on juveniles, contravening the United States precedent despite technically complying with *Miller*.⁴¹ First, in *Montgomery v. Louisiana*,⁴² the Court determined that *Miller*'s prohibition against automatic and mandatory life-without-parole sentences was to apply retroactively, as it represented a new substantive rule of constitutional law as well as a "watershed rule of criminal procedure."⁴³ The retroactive application does not mean that states must relitigate cases or conduct resentencing of each conviction that occurred prior to *Miller*. Instead, courts are required to give each defendant

³⁸ *Id.* (citing *Eddings v. Oklahoma*, 455 U.S. 104, 110-12 (1982) (finding that evidence of the defendant's "neglectful and violent family background" and "emotional disturbance" was more relevant than it would have been had the case involved an adult offender)).

³⁹ *See id.* at 489.

⁴⁰ *See id.*

⁴¹ Recall that Tennessee's sentencing structure did not call for an automatic sentence of life without parole, but rather an automatic sentence of a minimum of fifty-one years to be served. TENN. CODE ANN. § 40-35-501(h)(2) (West 2022) (repealed 2022).

⁴² 577 U.S. 190 (2016).

⁴³ *Id.* at 212-14 (quoting *Teague v. Lane*, 489 U.S. 288, 311 (1989)).

affected by the *Miller* decision a chance for a parole hearing.⁴⁴ In so holding, the Court determined that the remediation of a *Miller* violation effectively synthesized the goal of the opinion—to afford those whose crimes were truly products of their “transient immaturity” a proportionate sentence—with the maintenance of the finality of state convictions.⁴⁵ Second, in *Jones v. Mississippi*,⁴⁶ the Court clarified that, while *Miller* relieved the severity of an automatic life sentence without parole for juvenile offenders, it did not forbid the sentence if the *Miller* requirements were met.⁴⁷ Specifically, the *Jones* Court held that *Miller* did not require a separate, on-the-record factual finding of a juvenile’s incapacity for reformation to sentence those convicted of murder to life without parole.⁴⁸

B. TENNESSEE CODE § 40-35-501(H)(2) — AN OUTLIER FROM ITS INCEPTION

While most states dealt with the repercussions of *Miller* and its progeny by amending their juvenile homicide sentencing schemes to conform with the Eighth Amendment, Tennessee did nothing. In fact, in the time between the *Miller* and *Booker* decisions, Tennessee continued to impose what were effectively life-without-parole sentences on juveniles convicted of first-degree murder.⁴⁹ This is because Tennessee’s relevant sentencing statute, active since 1995, allowed the State to narrowly escape the grasp of *Miller*’s sweeping juvenile sentencing reform. The statute at issue states:

There shall be no release eligibility for a person committing first-degree murder, on or after July 1, 1995, and receiving a sentence of

⁴⁴ *Id.*

⁴⁵ *Id.* (referencing *Teague*, 489 U.S. at 307, 310 (1989)).

⁴⁶ 141 S.Ct. 1307 (2021).

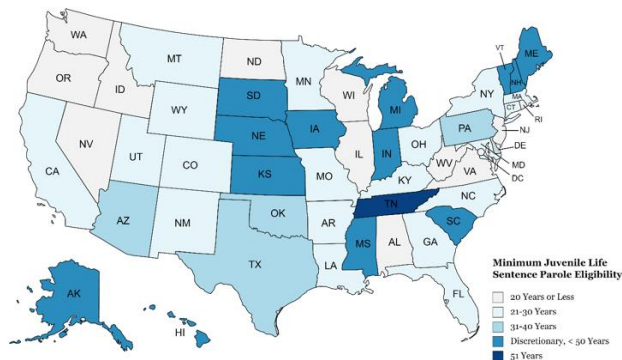
⁴⁷ *See id.* at 1318–19.

⁴⁸ *Id.* at 1321.

⁴⁹ *See* Anita Wadhvani and Adam Tamburin, *Special Report: In Tennessee, 185 People are Serving Life for Crimes Committed as Teens*, THE TENNESSEAN (Mar. 6, 2019, 9:33 PM), <https://www.tennessean.com/story/news/2019/03/07/juvenile-sentencing-tennessee-cyntoia-brown-clemency-life/2848278002/>.

imprisonment for life. *The person shall serve one hundred percent (100%) of sixty (60) years less sentence credits earned and retained.* However, no sentence reduction credits authorized by § 41-21-236 or any other law, shall operate to reduce the sentence imposed by the court by more than fifteen percent (15%).⁵⁰

If a person were to accumulate all applicable sentencing credits as provided in the statute, the minimum sentence would be fifty-one years, or 15 percent of sixty years.⁵¹ This sentencing scheme represents the “most draconian” in the country for juvenile defendants convicted of first-degree murder.⁵² To illustrate this point, the map below shows a comparison of minimum sentences for juveniles convicted of first-degree murder prior to *Booker* in November of 2022.⁵³



⁵⁰ TENN. CODE ANN. § 40-35-501(h)(2) (West 2022) (repealed 2022) (emphasis added).

⁵¹ *State v. Booker*, 656 S.W.3d 49, 55 (Tenn. 2022); see generally TENN. CODE ANN. § 41-21-236 (West 2018).

⁵² *Tennessee Supreme Court Strikes Down Mandatory 51-Year Prison Sentences for Children*, BASS, BERRY & SIMS PLC (Nov. 22, 2022), <https://www.bassberry.com/news/tennessee-supreme-court-strikes-down-mandatory-51-year-prison-sentences-for-children/>; *Booker*, 656 S.W.3d at 61.

⁵³ The map, “Minimum Juvenile Life Sentence Parole Eligibility Across the Country,” was created using MapChart.net and is licensed under CC BY-SA 4.0. See *Booker*, 656 S.W.3d at 61–63.

As evident in the above map, Tennessee was the single standout in the country concerning minimum juvenile life sentence parole eligibility. Notably, none of the “discretionary” states above truly has a fifty-year minimum sentence.⁵⁴ These states are classified as such because their sentencing statutes allow for a discretionary range of sentences, with most generally capping their minimums below the fifty-year mark.⁵⁵ This data further highlights the sheer disparity between Tennessee and the rest of the country prior to *Booker* by providing “objective indicia suggest[ing] that every other state in the nation has decided that a mandatory sentence of more than fifty years for juveniles convicted of first-degree murder, with no aggravating factors, creates an unacceptable risk of a disproportionate sentence.”⁵⁶

The harsh prescription of a term of years that set Tennessee apart from the rest of the country allowed Tennessee to evade the Supreme Court’s ruling in *Miller*. This is because the minimum of fifty-one years is not technically a life sentence, and parole is available once a prisoner has been incarcerated for just over five decades if they have accumulated the necessary sentencing credits.⁵⁷ However, available data shows that no individual, regardless of their age of incarceration, has made it to a parole hearing at the end of a fifty-one-year sentence.⁵⁸ This effectively causes the Tennessee statute to prescribe a life sentence without the possibility of parole. Because of this, Tennessee’s automatic sentencing for defendants convicted of first-degree murder was the harshest in the country. However,

⁵⁴ See *Booker*, 656 S.W.3d, at 61–63 (Tenn. 2022).

⁵⁵ See *id.*

⁵⁶ *Id.* at 74 (Kirby, J., concurring).

⁵⁷ See TENN. CODE ANN. § 40-35-501(h)(2) (West 2022) (repealed 2022).

⁵⁸ *Booker*, 656 S.W.3d 49, 90 n.13 (Tenn. 2022) (Bivens, J., dissenting); see also Katelyn Keenehan, *Prison Reform Advocates Push to Reverse Length of Life-Sentence in Tennessee*, WBIR (Feb. 16, 2022, 10:07 P.M.), <https://www.wbir.com/article/news/crime/prison-reform-advocates-push-to-reverse-length-of-life-sentence-in-tennessee/51-2b9b6061-a46f-42ca-b794-424b038e4b02> (citing Tennessee Department of Corrections statistics that the average Tennessee inmate has a life expectancy twenty-four years shorter than that of a non-incarcerated individual, at only fifty-nine years of age).

in February of 2022, an appeal from the Court of Criminal Appeals at Knoxville gave the Tennessee Supreme Court a chance to examine the statute under the lens of contemporary juvenile jurisprudence.

C. *STATE V. BOOKER*

In 2015, sixteen-year-old Tyshon Booker shot and killed G'Metrik Caldwell from the backseat of Caldwell's car.⁵⁹ Booker claimed he acted in self-defense, testifying at trial that a third party, Bradley Robinson, exclaimed, "He got a gun, bro," while in the middle of an altercation with Caldwell in the front seat.⁶⁰ After Booker fled the scene, law enforcement found him with Caldwell's cellphone, and he attempted to explain that he had borrowed it to call his girlfriend and forgot he had it following the shooting.⁶¹ Booker was charged with, and convicted of, two counts of first-degree felony murder and two counts of especially aggravated robbery.⁶² Booker received the statutorily mandated sentence of sixty years with a minimum of fifty-one years to be served for the merged convictions of the two counts of felony murder, absent any hearing on the matter.⁶³ Due to the automatic application of the sentence pursuant to Tennessee Code section 40-35-501(h)(2), no consideration could be afforded to Booker's "poor, unstable, and chaotic" upbringing.⁶⁴ The court also imposed a concurrent twenty-year sentence for the merged convictions of especially aggravated robbery.⁶⁵

⁵⁹ *Booker*, 656 S.W.3d at 54.

⁶⁰ *Id.* at 55.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 64.

⁶⁵ *Id.* at 55. The Tennessee Supreme Court made evident in its opinion that this sentence is less than the maximum punishment available for the crime. *Id.* The maximum sentence available for especially aggravated robbery in Tennessee can be twenty-five, forty, or sixty years, depending on the range classification of the offender. TENN. CODE ANN. §§ 39-13-403, 40-35-112 (West 2023).

The Tennessee Supreme Court reviewed precedent that Tennessee had yet to consider in relation to its own life sentence statute, such as *Thompson*, *Roper*, *Graham*, and *Miller*.⁶⁶ From this review, “three essential rules” were synthesized: (1) punishment must be proportionate to the crime, pursuant to the Eighth Amendment; (2) when a juvenile is facing the State’s harshest punishments, steps must be taken to ensure proportionality; and (3) those steps must allow for the *Roper* factors to be considered in the sentencing process.⁶⁷ The Court then turned its attention to Tennessee Code section 40-35-501(h)(2) to determine whether the statute was proportional under controlling constitutional precedent.⁶⁸ This analysis recognized Tennessee as a true outlier in its juvenile sentencing, with the Court finding in certain cases, the automatic imposition of fifty-one years on a youth can “offend contemporary standards of decency.”⁶⁹ Additionally, it was noted that, where mitigating factors were allowed to be considered for the robbery conviction, the harshest sentence available was not ordered.⁷⁰ The Court immediately followed this by listing the significant amount of childhood trauma that Booker had experienced and by emphasizing that none of it was considered with regard to his murder sentence.⁷¹ In doing so, the Court seemed to opine that, had the consideration of those events been allowed, Booker would have received a lesser sentence for the murder than what was automatically mandated by law. The analysis concluded by stating that the automatic life sentence for juvenile homicide offenders accomplished no “sufficient penological objectives.”⁷²

⁶⁶ *Booker*, 656 S.W.3d at 56–60.

⁶⁷ *Id.* at 60 (citing *Miller v. Alabama*, 567 U.S. 460, 471 (2012)). As a review, the *Roper* factors are: (1) a juvenile’s lack of maturity, (2) a juvenile’s impressionability, and (3) the fact that a juvenile’s character is still in development. *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005).

⁶⁸ *Booker*, 656 S.W.3d at 61.

⁶⁹ *Id.* at 61, 63.

⁷⁰ *Id.* at 64.

⁷¹ *Id.* at 64–65.

⁷² *Id.* at 65 (citing *Miller*, 567 U.S. at 472–74 (“These objectives are generally considered to be retribution, deterrence, preventing crime through incarceration, and rehabilitation.”)).

The Court went on to announce that Tennessee Code section 40-35-501(h)(2) violated the Eighth Amendment as applied to juveniles.⁷³ The Court chose not to resentence Booker, instead complying with *Montgomery*, which advocated for courts to grant Booker the opportunity for parole “at the appropriate time.”⁷⁴ The remedy for the violation was determined to be the application of the unrepealed previous sentencing statute, Tennessee Code section 40-35-501(h)(1).⁷⁵ The statute states, in relevant part:

Release eligibility for a defendant committing the offense of first-degree murder on or after November 1, 1989, but prior to July 1, 1995, who receives a sentence of imprisonment for life occurs after service of sixty percent (60%) of sixty (60) years less sentence credits earned and retained by the defendant, but in no event shall a defendant sentenced to imprisonment for life be eligible for parole until the defendant has served a minimum of twenty-five (25) full calendar years of the sentence, notwithstanding the governor’s power to reduce prison overcrowding pursuant to title 41, chapter 1, part 5, any sentence reduction credits authorized by § 41-21-236, or any other provision of law relating to sentence credits.⁷⁶

The Court made clear that its holding in *Booker* applied only to juveniles.⁷⁷ The new sentencing scheme under Tennessee Code section 40-35-501(h)(1) imposes a quarter-century minimum sentence, turning Tennessee from the state with the nation’s harshest minimum sentence into one with a minimum sentence closer to the nation’s average.⁷⁸ Tennessee Supreme Court Justice Kirby applauded the State’s move toward the “national consensus” of more lenient juvenile

⁷³ *Booker*, 656 S.W.3d at 66.

⁷⁴ *Id.* at 68.

⁷⁵ *Id.*

⁷⁶ TENN. CODE ANN. § 40-35-501(h)(1) (West 2022).

⁷⁷ *Booker*, 656 S.W.3d at 68.

⁷⁸ See Map, *supra* note 53.

sentencing schemes overall.⁷⁹ Tyshon Booker's fifty-one-year minimum sentence was reduced by more than half, assuming the proper sentencing credits are earned and maintained for a twenty-five-year parole hearing, and Tennessee jurisprudence for juvenile first-degree murder sentencing was transformed. Additionally, inmates sentenced under the old scheme were given the opportunity for parole at a time that is more attainable than it was when they were convicted.

III. BOOKER'S IMPACT ON THE TENNESSEE JUVENILE JUSTICE SYSTEM—IMMEDIATE AND FUTURE EFFECTS

The Tennessee Supreme Court ultimately determined that it did not need to address any additional issues or concerns related to *Miller* or other, adjacent precedents because *Booker* was decided based on Tennessee's own violation of the Eighth Amendment.⁸⁰ However, the issue of how Tennessee courts should implement the now-mandatory sentencing hearings remains. Indeed, the Court itself said the conversation surrounding juvenile sentencing should not end with the *Booker* opinion.⁸¹ This portion of the note aims to survey those convicts previously affected by the now-defunct (as applied to juveniles) portion of Tennessee Code section 40-35-501(h). This portion also attempts to prescribe procedures regarding existing and future juvenile homicide convicts. To do so, this section first looks to established case law and legislation from neighboring states to provide a basis for considerations in determining applicable factors to sentencing hearings post-*Booker*. Once the survey of other jurisdictions is complete, the *Roper* factors will be revisited with a new comprehension of how other states have applied them and similar factors following *Miller*. To better reinforce that understanding, developmental psychology will be paired with the factors to provide a workable knowledge of why the factors are the best formulation of general considerations of youth, and what else should be weighed in a post-*Booker* sentencing hearing.

⁷⁹ *Booker*, 656 S.W.3d at 69 (Kirby, J., concurring).

⁸⁰ *Id.* at 66.

⁸¹ *Id.* at 68.

A. CURRENTLY AFFECTED AND INCOMING JUVENILE OFFENDERS

As a preliminary matter, and to facilitate immediate relief for those deserving it, the people who are already in the custody of the Tennessee Department of Corrections and who are affected by *Booker* must be identified and categorized according to their newly established parole eligibility under Tennessee Code section 40-35-501(h)(1). Logic dictates that they should be divided into three groups based on the sentencing timeline in the statute: (1) those who have yet to serve twenty-five years, (2) those who have served between twenty-five and thirty-six years, and (3) those who have served thirty-six years or more. However, because the now-modified Tennessee Code section 40-35-501(h)(2) was enacted in 1995, only the first two of the above-mentioned groups will be populated.

According to the newly repealed version of the sentencing statute, there were approximately 130 convicts sentenced as juvenile offenders and in state custody when *Booker* was issued on November 18, 2022.⁸² As of the decision date, approximately 100 of these inmates had not yet served twenty-five years.⁸³ Under *Booker*, these individuals are ineligible for parole until they complete their twenty-fifth year of incarceration. That leaves approximately thirty convicts who served at least twenty-five years of their sentence and who are potentially eligible for parole.⁸⁴ Assuming the acquisition and retention of time-reduction credits, these inmates will soon stand before a parole board. Therefore, it is vital for Tennessee to timely develop an effective and consistent manner of providing these inmates with a constitutional hearing.

Until this point, Tennessee has not had occasion to examine mitigating the severity of a sentence for a juvenile homicide offender. The question, then, is what factors and

⁸² *Tennessee Supreme Court Strikes Down Mandatory 51-Year Prison Sentences for Children*, BASS, BERRY & SIMS PLC (Nov. 22, 2022), <https://www.bassberry.com/news/tennessee-supreme-court-strikes-down-mandatory-51-year-prison-sentences-for-children/>.

⁸³ Wadhvani and Tamburin, *supra* note 49.

⁸⁴ *Id.*

considerations should be implemented in a *Booker* sentencing/parole hearing to give convicts the meaningful chance for freedom advocated for in *Graham* and *Miller*?⁸⁵ To answer this question, it is necessary to examine sources from neighboring jurisdictions and psychological surveys. It is worth discussing exactly *how* the process of properly considering a juvenile offender's youth should play into a new sentencing scheme for Tennessee because *Booker* does not just apply retroactively to those inmates discussed above. The decision also applies to all future juvenile defendants convicted of first-degree murder. Therefore, Tennessee courts and attorneys should have an adequate understanding of the factors and circumstances to be considered in initial juvenile sentencing hearings and parole hearings.

B. HOW OTHER STATES HAVE HANDLED NON-LWOP LAW

When comparing Tennessee's sentencing scheme with those of other states, the *Booker* opinion specifically mentions a few of Tennessee's immediate neighbors.⁸⁶ In developing and implementing the future of Tennessee's now-mandated individualized sentencing schemes for juveniles, we look to the same surrounding jurisdictions. The states named in the *Booker* include Alabama, Arkansas, and Georgia,⁸⁷ all of which have attempted to respond to *Miller* and its progeny in various ways. These states provide a solid basis in constitutional jurisprudence for a survey of available data and resources to help shape Tennessee law post-*Booker*.

i. ALABAMA

⁸⁵ *Graham v. Florida*, 560 U.S. 48, 79 (2020); *Miller v. Alabama*, 567 U.S. 460, 479 (2012).

⁸⁶ *State v. Booker*, 656 S.W.3d 49, 61–62 (2022) (“[H]ad Mr. Booker committed felony murder in nearby Alabama, he would have been eligible for release in fifteen years; twenty years in Virginia; twenty-five years in North Carolina, Kentucky, and Missouri; thirty years in Georgia; and twenty-five to thirty years in Arkansas.”).

⁸⁷ *Id.*

As briefly mentioned in the earlier discussion of pre-*Booker* juvenile law, Alabama courts contributed to the landmark case of *Miller v. Alabama*.⁸⁸ Following the decision of the United States Supreme Court, Alabama quickly worked on redesigning its approach to juvenile justice. The result was a comprehensive set of factors that Alabama courts now utilize in individualized juvenile sentencing hearings, providing an excellent checklist for Tennessee to now consider.

More than a year after the *Miller* decision, the Alabama Supreme Court had the opportunity to apply the precedent in two cases challenging the very statute that contributed to the *Miller* opinion. In *Ex parte Henderson*, the Alabama Supreme Court considered writs of mandamus filed by two juvenile offenders, Larry Henderson and Rashad Stoves.⁸⁹ The juveniles based their arguments largely on the then-newly issued *Miller* opinion, contending that the holding contravened an Alabama statute that mandated punishments of either death or life imprisonment for capital offenses.⁹⁰ The petitioners averred that, because juveniles are proscribed from being sentenced to death under *Thompson v. Oklahoma*,⁹¹ *Miller* effectively prohibited the only other punishment available for capital juvenile offenders under Alabama law at the time: life without parole.⁹² In response, the Alabama Supreme Court restated the clarification from *Miller*: A sentence of life without parole is not entirely proscribed, but the sentencer must at least “consider the juvenile’s age and age-related characteristics before imposing such a sentence.”⁹³ As a result, the Court formulated a list of fourteen factors for Alabama trial courts to consider when determining the appropriate sentence.⁹⁴ The factors, in an abridged form, include an offender’s (1) age and “the hallmark

⁸⁸ Recall that the Alabama case, *E.J.M. v. State*, dealing with Alabama’s application of mandatory capital murder sentences, was one of the two cases consolidated in *Miller v. Alabama*. 567 U.S. 460, 467-78 (2012).

⁸⁹ *Ex parte Henderson*, 144 So.3d 1262, 1264-65 (Ala. 2018).

⁹⁰ *Id.*; see also ALA. CODE § 13A-5-40(a) (2022).

⁹¹ 487 U.S. 815, 838 (1988).

⁹² ALA. CODE § 13A-5-45 (2022).

⁹³ *Henderson*, 144 So.3d at 1280.

⁹⁴ *Id.* at 1284.

features of youth, such as immaturity, impetuosity, and failure to appreciate risks and consequences"; (2) diminished culpability; (3) the circumstances of the offense; (4) participation in the crime; (5) environment; (6) emotional maturity; (7) familial and/or peer pressure; (8) past exposure to violence; (9) drug and alcohol history; (10) ability to deal with the police; (11) ability to assist his attorney; (12) mental-health history; (13) potential for rehabilitation; and (14) any other relevant factor related to youth.⁹⁵ Upon consideration of the factors and in light of the *Miller* holding, the Alabama Supreme Court denied the writs of mandamus applied for by the juveniles.⁹⁶

The *Henderson* factors have since gained traction in Alabama's juvenile homicide sentencing considerations. A few years after *Miller* and *Henderson*, the Alabama Criminal Code was updated to reflect the decisions and Alabama's compliance with them.⁹⁷ The Alabama Code now requires courts to consider "all relevant mitigating circumstances" when imposing life or life without parole on a juvenile capital offender.⁹⁸ An analysis of compliance with the new sentencing scheme and a consideration of the *Henderson* factors can be found in *Wilkerson v. State*.⁹⁹ There, the Court considered a trial court's resentencing of a defendant who previously committed capital murder as a juvenile.¹⁰⁰ After serving twenty-three years of a life sentence, the defendant received a resentencing hearing pursuant to *Miller* and *Montgomery*, which resulted in a sentence of life without parole.¹⁰¹ The defendant challenged the resentencing, in part, based on the circuit court's consideration of certain *Henderson* factors.¹⁰² The Court, after reviewing each

⁹⁵ *Id.* (citing *Com. v. Knox*, 50 A.3d 732, 745 (Pa. Super. Ct. 2012)).

⁹⁶ *Id.*

⁹⁷ Compare ALA. CODE § 13A-5-43(e) (2016), with ALA. CODE § 13A-5-43(e) (2015).

⁹⁸ ALA. CODE § 13A-5-43(e) (2022).

⁹⁹ 284 So.3d 937, 948-49 (Ala. Crim. App. 2018).

¹⁰⁰ *Id.* at 943.

¹⁰¹ *Id.* at 944, 946.

¹⁰² *Id.* at 957-61. Specifically, *Wilkerson* argued the court did not consider his youth at the time of the offense in general, placed too much emphasis on the circumstances of the offense, did not consider

of the defendant's contentions and the circuit court's actions that spawned them, determined that Wilkerson was not entitled to relief.¹⁰³ Alabama generally requires courts to reduce their considerations to writing.¹⁰⁴ The Court of Criminal Appeals noted that the circuit court did just that, in addition to considering a vast amount of evidence at the resentencing hearing, which resulted in a finding of irreparable corruption that allowed for a sentence of life without parole.¹⁰⁵

Alabama provides a solid field of case law to base post-*Booker* procedure. Being one of the subject jurisdictions upon which *Miller* was based, Alabama has properly redesigned its juvenile sentencing schemes to reflect what Tennessee has finally made a truly national consensus—juveniles must be afforded proper individualized sentencing hearings before a punishment as harsh as life without parole may be imposed. Alabama seems to have found a fine line between applying *Miller* and dispensing harsh penalties when warranted. This is due in large part to its excellent enumeration of factors considered when sentencing juvenile capital offenders, its requirement that the specific findings be in writing to ensure proper consideration is made, and the clarification that juvenile cases meeting these procedural requirements may still result in a youthful offender being sentenced to life without parole. All these considerations work together to present a revised sentencing scheme that both comports with newly interpreted constitutionality and continues to encourage the proper function of a punitive justice system. Alabama represents a well-rounded model that Tennessee should look toward as it considers redefining its own juvenile justice sentencing procedures post-*Booker*.

ii. ARKANSAS

his "diminished intellectual capacity," and failed to consider other age-related aspects of his character at the time of the offense.

¹⁰³ *Id.* at 961.

¹⁰⁴ *Betton v. State*, 292 So.3d 398, 406 n.2 (Ala. Crim. App. 2018).

¹⁰⁵ *Wilkerson*, 284 So.3d at 961-62.

Like Alabama, Arkansas also contributed a case for the United States Supreme Court's consideration in *Miller: Jackson v. Norris*.¹⁰⁶ Arkansas has since heavily revised its sentencing jurisprudence for juvenile defendants convicted of capital murder. After Jackson's case was remanded pursuant to the order in *Miller*, the Arkansas Supreme Court determined that Jackson qualified for resentencing.¹⁰⁷ In doing so, the Court reiterated findings from *Miller* in the context of Jackson's case, reasoning that his age at the time might have affected his judgment in relation to the offense and discussing his "family background and immersion in violence."¹⁰⁸ When remanding the case to the county that originally convicted Jackson, the Court provided that certain provisions of the then-existing Arkansas Code should be severed for juveniles.¹⁰⁹ The Court also noted the punishment should fall within the range prescribed for a Class Y felony, with a minimum sentence of ten years and a maximum of forty years or life.¹¹⁰

The Fair Sentencing of Minors Act of 2017 ("FSMA") followed the remediation of *Jackson*.¹¹¹ The relevant portion of the Act amended the Arkansas life-without-parole statute to delete the option of life without parole for juvenile capital offenders, enacting the severance of language ordered in *Jackson*. It also extended the minimum sentence to "life imprisonment with the possibility of parole after serving a minimum of thirty (30) years' imprisonment."¹¹² Judicial clarifications, however, quickly supplemented this Act. *Harris v. State* and *Robinson v. State* both added qualifications to Arkansas' *Miller*-centric legislative action.¹¹³

¹⁰⁶ 278 S.W.3d 103 (Ark. 2011); *see also* *Miller v. Alabama*, 567 U.S. 460, 465–66 (2012).

¹⁰⁷ *Jackson v. Norris*, 426 S.W.3d 906, 907 (Ark. 2013).

¹⁰⁸ *Id.* at 909 (citing *Miller*, 567 U.S. at 477–78 (2012)).

¹⁰⁹ *Id.* at 910–11.

¹¹⁰ *Id.* at 911 (citing ARK. CODE ANN. § 5–4–401(a)(1) (Repl. 1997) (2023)).

¹¹¹ Act of Mar. 20, 2017, No. 539, 2017 ARK. ACTS 2615 (codified at ARK. CODE ANN. § 5–4–104(b)).

¹¹² *Id.*

¹¹³ *See Harris v. State*, 547 S.W.3d 64, 71 (Ark. 2018); *State v. Robinson*, 563 S.W.3d 530, 531 (Ark. 2018).

Pursuant to *Miller*, the defendant in *Harris* was granted resentencing in 2018.¹¹⁴ Instead of resentencing Harris under *Jackson*, the State of Arkansas moved to resentence him under the newly enacted FSMA, arguing that the Act applied retroactively.¹¹⁵ *Harris* thus represents an intersection of penal and developmental interests in juvenile capital offender sentencing. Resentencing Harris under *Jackson* and *Miller*, after consideration of the factors of his youth that contributed to his crime, could have resulted in a sentence as short as ten years.¹¹⁶ In contrast, resentencing under the then-two-month-old FSMA would carry a minimum sentence of thirty years.¹¹⁷ The Arkansas Supreme Court, after construing the FSMA, determined that the statute did not apply retroactively.¹¹⁸ Therefore, any juvenile capital offender sentenced prior to March 20, 2017, in violation of the Eighth Amendment under *Miller*, must be remediated under *Jackson*. Similarly, in *Robinson*, the Arkansas Supreme Court determined that a defendant facing resentencing for a capital offense occurring before the FSMA was enacted is entitled to a *Miller* hearing, where evidence of his youth may be considered.¹¹⁹

Arkansas provides an interesting look at legislative action following *Miller*. Through the FSMA, it appears the Arkansas legislature sought to codify a more serious punishment than the Arkansas Supreme Court had provided for in *Jackson*. The *Jackson* Court, in its haste to remediate on remand, developed a sentencing scheme that the legislature sought to redefine in a more punitive manner. Arkansas thus reinforces an important consideration for developing a post-*Miller* sentencing procedure: The defendants affected by *Miller* still are capital offenders who deserve punishment proportionate to the offense. It is important to remember that, according to *Miller*, a proportionate sentence for a juvenile convicted of first-degree murder is founded on considerations of youth. And although youth is considered, it does not

¹¹⁴ *Harris*, 547 S.W.3d, at 65-66.

¹¹⁵ *Id.* at 68.

¹¹⁶ *Jackson v. Norris*, 426 S.W.3d 906, 911 (citing ARK. CODE ANN. § 5-4-401(a)(1) (Repl. 1997) (2023)).

¹¹⁷ See ARK. CODE ANN. § 5-4-104(b).

¹¹⁸ *Harris*, 547 S.W.3d, at 71.

¹¹⁹ *Robinson*, 563 S.W.3d 530 (Ark. 2018).

necessarily result in a lesser sentence. Furthermore, Arkansas's development of the FSMA and related case law shows it is vital that Tennessee courts and legislature act in unison from the beginning of the post-*Booker* process to ensure an accurate and efficient remediation of unconstitutional sentencing and to avoid unduly disproportionate sentencing of past and future convicts.

iii. GEORGIA

As a final jurisdictional consideration, Georgia provides some further limiting case law in the aftermath of *Miller* and its progeny. The majority of Georgia cases after these decisions highlight that states are not required to radically change their sentencing of juveniles, so long as individualized consideration of a defendant's youth is given.¹²⁰ It appears that Georgia's hesitance to expand its juvenile jurisprudence stems from the abrogation of a Georgia Supreme Court decision by post-*Miller* clarifications from the United States Supreme Court; as a result, many of the legal issues following it were decided in a more conservative manner.¹²¹

The relevant history of Georgia's juvenile sentencing post-*Miller* begins with *Veal v. State*, in which the defendant challenged his life sentence without parole for a first-degree murder that he committed in 2010.¹²² On review of *Veal*'s case in light of *Miller* and *Montgomery*, the Georgia Supreme Court originally determined that a sentencing hearing must be accompanied by a finding that a juvenile is irreparably corrupt.¹²³ This led to Georgia precedent that limited life-without-parole sentences only to the "worst-of-the-worst juveniles," and only in those instances where such a determination was made distinctly on the record.¹²⁴ Less than two years ago, however, the Court abandoned *Veal* in response

¹²⁰ See *Holmes v. State*, 859 S.E.2d 475, 480 (Ga. 2021); *Sillah v. State*, 883 S.E.2d 756, 769 (Ga. 2023).

¹²¹ See *Holmes*, 859 S.E.2d at 480 (Ga. 2021).

¹²² *Veal v. State*, 784 S.E.2d 403, 405 (Ga. 2016).

¹²³ *Id.* at 411.

¹²⁴ *Id.* at 412.

to the United States Supreme Court's decision in *Jones*,¹²⁵ and Georgia redrew its juvenile sentencing scheme for the second time in less than a decade.¹²⁶

Existing Georgia jurisprudence provides clarification as to what a proper consideration of youthful factors looks like prior to imposing life without parole on a juvenile for a murder committed within the state. This is exemplified in *Moss v. State*.¹²⁷ Decided pre-*Jones* (and thus, pre-abrogation of *Veal*), the facts and procedural history in *Moss* nevertheless provide an illustration of what invariably passes for a juvenile murder case deserving life without parole, regardless of whether the sentencing court is constrained by *Miller* or a more restrictive state scheme. In its review, the Georgia Supreme Court noted that the trial court, under *Veal* requirements, properly adjudged life without parole after an explicit consideration of the defendant's youth.¹²⁸ Specifically, the Court recited the trial court's findings that the facts: "[do] not reflect an immature youth who merely makes impulsive and reckless decisions on occasion, or has an underdeveloped sense of responsibility; rather, [they] betray[] one who is deliberate, malevolent, and exhibits a depraved heart."¹²⁹ This description of *Moss* prefaced a discussion of the defendant's escalating criminal behavior throughout his adolescence, culminating in the seemingly ruthless and emotionless killing that resulted in the sentence at issue.¹³⁰ *Moss* serves as an example that, even under unnecessary additional parameters placed in *Miller*, the function of individualized sentencing remains the same—to ensure that each juvenile offender is given full and fair consideration of their youth in relation to their culpability for their crime.

¹²⁵ See *Jones v. Mississippi*, 141 S.Ct. 1307, 1319 (2021).

¹²⁶ *Holmes*, 859 S.E.2d at 477.

¹²⁷ 856 S.E.2d 280, 282 (Ga. 2021).

¹²⁸ *Id.* at 287.

¹²⁹ *Id.*

¹³⁰ *Id.* (reviewing the trial court's considerations of the defendant's prior arrests for burglary, prior possession of drugs, admitted gang affiliation, and a separate shooting during an attempted robbery the night before the murder of the victim in the *Moss* case itself).

Following the United States Supreme Court's decision in *Jones*, Georgia in *Holmes v. State* revisited *Veal* and the requirements for sentencing a youth to life in prison without parole.¹³¹ *Holmes* was seventeen at the time of the felony murder that resulted in his sentence of life without parole.¹³² He argued *Veal* held that the Court should explicitly consider the characteristics of his youth before sentencing him.¹³³ The Georgia Supreme Court refuted this by invoking the holding of the newly decided *Jones* case, which "made clear that the Eighth Amendment does not require sentencing judges to say anything on the record" regarding their considerations of a defendant's youth.¹³⁴ This is reinforced by the fact that *Jones* creates a presumption that the trial court considers "relevant criteria" of youth unless the record indicates otherwise.¹³⁵ The Court further supports *Jones*' application to *Holmes* by stating that, because the record indicated that *Holmes*' trial counsel introduced arguments hinging on his youth and childhood environment, the trial court was presumed to have considered them in his sentencing.¹³⁶

In a more recent example, the Georgia Supreme Court reviewed *Sillah v. State*, a case in which a defendant challenged the sufficiency of consideration given to his juvenile life-without-parole sentence.¹³⁷ In *Sillah*, the issue hinged on whether the trial court had enough evidence to properly consider the defendant's youth under *Miller*.¹³⁸ The Court reiterated the presumption from *Jones* that a trial court properly considers a defendant's youth in sentencing, adding that there is no reason to require a court to "seek out" mitigating evidence that the defendant does not provide to it.¹³⁹ Further, the Court specified that there is no requirement for a sentencer to "receive a certain quantum of evidence or spend a certain amount of

¹³¹ *Holmes*, 859 S.E.2d at 477.

¹³² *Id.* at 479.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 481 (quoting *Jones v. Mississippi*, 141 S.Ct. 1307, 1321 (2021)).

¹³⁶ *Id.*

¹³⁷ 883 S.E.2d 756, 768 (Ga. 2023).

¹³⁸ *Id.*

¹³⁹ *Id.* at 768–69.

time reflecting upon that evidence” before a discretionary sentence of life-without-parole is proper under the Eighth Amendment.¹⁴⁰

C. NECESSARY PSYCHOLOGICAL UNDERPINNINGS OF JUVENILE JURISPRUDENCE

With a solid understanding of neighboring jurisdictions’ frameworks for juvenile first-degree-murder sentencing, we turn to a limited discussion of the psychology that underlies the issues. This subsection aims to ground legal decisions in scientific, peer-reviewed research to provide psychological connections between the varying approaches and underlying themes of juvenile sentencing in the post-*Miller* era. The research discussed below also should help synthesize the above rules and decisions into a tentative and rudimentary framework for Tennessee law post-*Booker*. As a foundation, the research is explored under the umbrella of the three factors that kickstarted the movement towards *Miller* and *Booker*: (1) a child’s lack of maturity; (2) impressionability; and (3) the transient nature of his character as discussed in *Roper*.¹⁴¹

The intersection of law and psychology is not a new phenomenon. In fact, many cases discussed in this note mentioned the link between developmental psychology and juvenile law.¹⁴² However, most courts do not go any further than acknowledging that link and the weight it carries in a decision. For a facet of law to be truly practicable—especially where that facet is novel in a jurisdiction, such as that of individualized first-degree murder sentencing in post-*Booker* Tennessee—an understanding of all components at play is necessary. Within their newfound discretion, courts need to develop an understanding not only of *what* factors to consider regarding the differences between juveniles and adults, but also *why* those factors matter, as well as the hierarchy of factors as

¹⁴⁰ *Id.* at 769.

¹⁴¹ See *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005).

¹⁴² See generally *Thompson v. Oklahoma*, 487 U.S. 815, 834 (1988); *Roper*, 543 U.S. at 573 (2005); *Graham v. Florida*, 560 U.S. 48, 68 (2010); *Miller v. Alabama*, 567 U.S. 460, 476 (2012).

they relate to the severity of punishment. The psychological underpinnings of factors also can help parties and their counsel better understand what courts consider when imposing sentences.

The *Roper* factors, differentiating juveniles from adults, were briefly introduced in Part II.¹⁴³ Before we discuss these factors further, it is worth examining exactly what the Supreme Court had to say about them when they were set forth in *Roper v Simmons*. The first factor, “lack of maturity,” focuses on a juvenile’s propensity for “impetuous and ill-considered actions and decisions.”¹⁴⁴ The Court reasons that this is why most states prohibit juveniles from voting, serving on juries, and marrying without parental consent.¹⁴⁵ The second difference between juveniles and adults relates to a child’s increased impressionability, seemingly based on their perceived lack of control over their own environment.¹⁴⁶ The final factor the *Roper* Court introduced is that of the juvenile’s “transitory” character, which allows for an individual’s personality traits to fluctuate with age.¹⁴⁷ While these factors form the basis for most of the considerations developed within the realm of *Miller* and adjacent case law, courts hardly expound on these factors beyond using them to perform case-specific fact analyses. To understand how the *Roper* factors affect juvenile sentencing schemes and explain why they still function as an excellent basis for considerations regarding the imposition of juvenile life-without-parole sentences, a closer look at the underlying psychology is necessary.

The *Roper* Court, in determining the three differences between juveniles and adults, utilized a joint study between the Temple University Department of Psychology and the University of Virginia School of Law (the “Steinberg and Scott study”), which laid out the contemporary research and theory

¹⁴³ See *Roper*, 543 U.S. at 569–70 (2005).

¹⁴⁴ *Id.* at 569 (citing *Johnson v. Texas*, 509 U.S. 350, 367 (1993)).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 570.

underlying the criminal culpability of juveniles.¹⁴⁸ Although the research in the study seems to directly influence the Court's conclusions, the article is only cited five times in the opinion and is directly discussed in only one of the three *Roper* factors.¹⁴⁹ While the study is nearly twenty years old, the information presented remains relevant to the discussion here and is echoed in many of the more recent studies cited in this note. Therefore, a discussion of the Steinberg and Scott study, as the scholarship that influenced *Roper* itself, will be included. The Steinberg and Scott study serves as a baseline of the country's understanding of developmental psychology and its impact on juvenile justice at the turn of the century.

i. LACK OF MATURITY

The Steinberg and Scott study, while absent from *Roper*'s discussion of a juvenile's inherent lack of maturity, nonetheless provides an excellent background for the Court's first enumerated difference between juveniles and adults. The authors make an important distinction between the *process* of decision-making, which is based on the cognitive capabilities of an individual, and the *outcomes* of decision-making, which are influenced by the psychosocial maturity of the individual.¹⁵⁰ Arguably, an individual's psychosocial maturity (or lack thereof) forms the basis of any consideration for a juvenile's lack of maturity according to *Roper*. The authors also provide that, while cognitive capabilities (*i.e.*, those involved with general reasoning) may develop quickly, psychosocial development (*i.e.*, dealing generally with an individual's valuation of that reasoning in comparison with peer influence and perception of risk) often takes longer and can influence a juvenile's overall values, preferences, and cost-benefit analyses

¹⁴⁸ *Id.* at 569; see also Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCH. 1009, 1009 (2003).

¹⁴⁹ See *Roper*, 543 U.S. at 569.

¹⁵⁰ Steinberg & Scott, *supra* note 148, at 1012.

in ways that are deemed deficient when compared to an adult's decision-making.¹⁵¹

This observation holds true under more modern studies. It seems that the part of the brain that develops the slowest controls our “uniquely human” traits, such as impulse control and planning.¹⁵² In fact, the growth and development of white matter – the composition of nerves and tissue within the brain that allow for communication between different parts of the brain (such as those more primitive, impulse-driven regions and those that house more “mature” reasoning functions) – do not fully develop until as late as twenty-two years of age.¹⁵³ Research demonstrates that the brain does not generally become mature, especially in the context of those functions related to criminal culpability, until after age twenty.¹⁵⁴ While the age of brain maturity varies depending on the individual, there is generally no “break” or delineating milestone achieved between ages eighteen and nineteen that provides any greater difference in maturity than that achieved between seventeen and twenty-one generally.¹⁵⁵ Thus, the fact that individuals psychosocially mature at different rates adds to the necessity of individualized sentencing hearings for capital offenders under the age of eighteen, as required by *Booker*.

Notably, the biological development of the brain is largely set by human nature and normative development, so juveniles can be expected to act impulsively and without

¹⁵¹ *Id.* at 1011–12.

¹⁵² Ruben C. Gur, *Development of Brain Behavior Integration Systems Related to Criminal Culpability from Childhood to Young Adulthood: Does it Stop at 18 Years?*, 7 J. OF PEDIATRIC NEUROPSYCH. 55, 57 (2021).

¹⁵³ *Id.* at 60.

¹⁵⁴ *Id.* at 61, 63 (the functions discussed include “the control of aggression and other impulses, the process of planning for long-range goals, organization of sequential behavior, consideration of alternatives and consequences, the process of abstraction and mental flexibility, and aspects of episodic memory and ‘working memory.’”); see also Caitlin Cavanagh, *Healthy Adolescent Development and the Juvenile Justice System: Challenges and Solutions*, 26 CHILD DEV. PERSP. 141, 142 (2022); B. J. Casey, *Healthy Development as a Human Right: Lessons from Developmental Science*, 102 NEURON 724, 725 (2019).

¹⁵⁵ *Id.* at 61–62.

consideration of consequences despite the individual's environment.¹⁵⁶ A survey of eleven countries revealed the existence of the same gap in intellectual and psychosocial maturity between adolescents and adults.¹⁵⁷ Therefore, the lack of maturity and the speed at which one matures is largely an innate and internal characteristic of youth, rather than something that can be altered or sped up by external factors.¹⁵⁸ Thus, an individual's lack of maturity should always be considered when determining factors of youth that contribute to criminal culpability.

ii. IMPRESSIONABILITY

The impressionability of youth might best be prefaced by a case review of an inmate in the custody of the Tennessee Department of Corrections who will be affected by *Booker*. Like Tyshon Booker, Kevin Buford was sixteen years old when he committed first-degree murder.¹⁵⁹ Unlike *Booker*, the incident in the *Buford* case was not instigated by a peer; it was instigated by the defendant's father and uncle.¹⁶⁰

On the day of the murder, Buford rode around with individuals that were arguably central to his psychosocial

¹⁵⁶ *Id.* at 62.

¹⁵⁷ G. Icenogle et al., *Adolescents' cognitive capacity reaches adult levels prior to their psychosocial maturity: Evidence for a "maturity gap" in a multinational, cross-sectional sample*, 43 L. AND HUMAN BEHAV. 69, 70 (2019).

¹⁵⁸ Cavanagh, *supra* note 154, at 142. This refers to the time period generally required for physical brain maturation, not the effect of stimuli on the development of any one individual's regions or processes. Studies show that specific environmental input can have significant consequences on a growing brain's development of processes such as risk-taking and regions contributing to psychosocial behavior. *See generally id.* at 143; Michael D. De Bellis & Abigail Zisk A. B., *The Biological Effects of Childhood Trauma*, 23 CHILD AND ADOLESCENT PSYCHIATRIC CLINICS OF N. AM. 185, 201-05 (2014).

¹⁵⁹ *State v. Buford*, No. M2010-02160-CCA-R3-CD, 2011 WL 6916443, at *3 (Tenn. Crim. App., Dec. 28, 2011).

¹⁶⁰ *See id.* at *3, *6.

development: his father, his brother, his uncle, and a friend.¹⁶¹ The crew drove around most of the day while Buford's father attempted to arrange various robberies.¹⁶² Eventually, the group staged a marijuana deal at which Buford's uncle robbed the dealer at gunpoint.¹⁶³ The crew then spotted the victim of Buford's crime, Billy Tudors, counting money while walking from his job.¹⁶⁴ Buford's father told him to rob Tudors and sent Buford's uncle along with him.¹⁶⁵ After the uncle armed Buford with a gun, the pair crossed the street with the intent to rob Tudors.¹⁶⁶ Tudors attempted to defend himself from the pair, which prompted Buford's uncle to instruct Buford to shoot Tudors, after which Buford fired a single shot and ran back across the street to his father's waiting car.¹⁶⁷ After his conviction, Buford was sentenced to life in prison for felony murder and had an additional ten years added, to be served concurrently, for attempted especially aggravated robbery.¹⁶⁸

Kevin Buford only knew his father for approximately six months before he committed murder.¹⁶⁹ Buford stated that meeting his father was incredibly important to him, despite his mother advising him against it.¹⁷⁰ Buford would often sneak away from his mother's house to spend time with his father.¹⁷¹ The day of the murder began normally.¹⁷² Buford, his brother, and his father ran errands, got haircuts, and ate lunch.¹⁷³ When Buford's father suggested they commit a robbery, Buford responded he did not know how, to which his father said he would teach him.¹⁷⁴ Buford stated that he feared attempting a

¹⁶¹ See *id.* at *2-3.

¹⁶² See *id.* at *5.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at *6.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at *1.

¹⁶⁹ *Id.* at *4.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* at *5.

¹⁷⁴ *Id.*

robbery and even “made up a story” as to why one could not be completed.¹⁷⁵ Additionally, Buford stated that he was relieved when a separate robbery was abandoned.¹⁷⁶ When Buford returned home after the murder, he recalled feeling scared and crying.¹⁷⁷ Due to Tennessee Code § 40-35-501(h)(2) still being valid at the time, the court in *Buford* was prohibited from considering any of the evidence in sentencing of Buford for a crime that arguably would not have happened if not for the defendant’s susceptibility to pressure from his friends and family.

The Steinberg and Scott study referenced in the *Roper* opinion states that heightened impulsivity, lesser regard for future consequences, and overall developmental immaturity combine to promote an adolescent’s increased susceptibility to external pressure, especially peer pressure.¹⁷⁸ Peer pressure, in the juvenile context, is so strong that it affects them not only directly but also indirectly, prompting them to make decisions based on what their peers might think, even in the absence of proximity to those peers.¹⁷⁹ While the article provides several foundational points for the role of impressionability in youth, the authors conceded that, at the time of writing in 2003, “far more research” was needed in the area.¹⁸⁰

Modern research on impressionability in youth has since reinforced the points made in Steinberg and Scott’s original study. Impressionability has been broken down into three defining attributes: (1) susceptibility to external forces; (2) incapability of reasonable thinking; and (3) flexibility to change one’s attitude or behavior.¹⁸¹ These mental limitations have prompted some to classify juvenile delinquency as more

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at *6.

¹⁷⁸ *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (citing Steinberg & Scott, *supra* note 148, at 1014) (referencing the study’s conclusion that juveniles exhibit less control over their environment).

¹⁷⁹ *Id.* at 1012.

¹⁸⁰ *Id.* at 1014.

¹⁸¹ Seok Hyun Gwon & Suyong Jeong, *Concept Analysis of Impressionability Among Adolescents and Young Adults*, 5 NURSING OPEN 601, 605 (2018).

typically related to youthful risk-taking rather than a form of antisocial behavior that contributes to adult criminality.¹⁸²

The impressionability of youth is bolstered by the social learning theory, which holds that attitude and behavior are influenced largely by those around us.¹⁸³ The groups that are most influential to a juvenile's social learning are identified as "key socializing units," such as those that exist within the family and at school.¹⁸⁴ It follows, then, that youth with criminal-leaning family members or delinquent social groups will be susceptible to delinquency themselves.¹⁸⁵ Peers are an especially influential group because adolescents generally spend the majority of their time with them.¹⁸⁶ Peer groups generally and normatively function to structure an individual's socialization throughout adolescence and into early adulthood.¹⁸⁷ However, because of its powerful impact, especially during the earlier adolescent years, peer influence can very easily morph from a beneficial and healthy development supplement to a contributor to delinquency and crime, depending on the group an individual finds themselves associated with.¹⁸⁸

Additionally, research suggests that the need to belong is highly influential on juveniles. All humans have been determined to need to belong to a social group at some level, but that need is generally experienced at a much higher level in one's youth.¹⁸⁹ The *Buford* case exemplifies this. For example, Kevin Buford testified that he had not consumed alcohol prior to the fateful day he drove around with his father, let alone

¹⁸² Cavanagh, *supra* note 154, at 142.

¹⁸³ Gwon & Jeong, *supra* note 181, at 602.

¹⁸⁴ Cavanagh, *supra* note 154, at 143.

¹⁸⁵ See NATIONAL RESEARCH COUNCIL, REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 102 (Julie A Schuck et al. eds., 2013).

¹⁸⁶ *Id.* at 105.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ N. Leibovich, V. Schmid, & A. Calero, *The Need to Belong (NB) in Adolescence: Adaptation of a Scale for its Assessment*, 8 PSYCH. AND BEHAV. SCI. INT'L J. 1, 5 (2018).

committed a robbery.¹⁹⁰ However, because of Buford's enhanced need to belong as a result of his age, compounded by the fact that he was in a group composed of key figures in his life, it can be argued that his impressionability led him to take actions he likely would not have undertaken on his own.

A heightened level of impressionability has been found in young research subjects surveyed as late as college.¹⁹¹ This reflects the discussion in the above section of mental maturation continuing well past the age of eighteen. Similarly, the fact that an individual can remain impressionable in their beliefs and actions into their twenties lends further credence to the necessity of individualized sentencing hearings. While juvenile impressionability had yet to be studied in as great of depth as the other two *Roper* factors at the time of the decision, contemporary research shows that its adoption as a major consideration of youth was more than proper. Impressionability should continue to be utilized as a major demarcation between childhood and adulthood for sentencing purposes.

iii. CHARACTER STILL IN DEVELOPMENT

As with impressionability, the effect of a juvenile's liquid character may best be framed by an account of an inmate who is currently affected by *Booker*. The story of Howard Atkins, an inmate in Tennessee convicted of first-degree murder as a juvenile, provides an inside look at just how transient a child's character can be. In 2000, Atkins was convicted of the murder of his stepfather.¹⁹² According to the facts recited in the appellate record, Atkins went to ask his emotionally and physically abusive stepfather to leave the house for a few days so that Atkins and his mother could gather their things and leave.¹⁹³ Atkins brought a baseball bat with him

¹⁹⁰ State v. Buford, No. M2010-02160-CCA-R3-CD, 2011 WL 6916443, at *6 (Tenn. Crim. App., Dec. 28, 2011).

¹⁹¹ Gwon & Jeong, *supra* note 181, at 605.

¹⁹² State v. Atkins, No. W2001-02427-CCA-R3-CD, 2003 WL 21339263, at *1-2 (Tenn. Crim. App., May 16, 2003).

¹⁹³ *Id.* at *1.

for protection.¹⁹⁴ After pleading with his stepfather and being denied, Atkins believed his stepfather was starting to reach for a gun in the nightstand, so he swung at him with the bat and continued to hit him “nine to twelve times in the head,” smashing in his skull and killing him.¹⁹⁵ Atkins denied a plea deal that would have lowered his charge of first-degree murder and was automatically sentenced to the fifty-one-year minimum.¹⁹⁶ Had he accepted the deal, he would have been out of prison a decade ago.¹⁹⁷ However, because no consideration was given to his youth at the sentencing stage of his first-degree murder conviction, he was looking at serving another thirty years before *Booker* was decided.¹⁹⁸ This is despite his existence as an objectively “model prisoner” producing art and short stories, performing in a band, and lacking a single mark on his disciplinary record during the twenty-two years he has been incarcerated.¹⁹⁹

Atkins stated that every “juvenile life” he met experienced some overriding circumstances that led to their crime, and, according to him, none of them set out to kill someone.²⁰⁰ In the context of the sentencing scheme that he was subjected to, Atkins went on to say that, while crimes like the one he was convicted of are tragedies, other tragedies concurrently exist in the fact that the children that committed those crimes can become completely different people and still not be given a second chance.²⁰¹ He analogizes the situation as

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at *2; Anita Wadhvani, *Howard Atkins was sentenced to life at age 16; a TN Supreme Court ruling could soon free him*, TENNESSEE LOOKOUT (Nov. 30, 2022, 6:04 A.M.), <https://tennesseelookout.com/2022/11/30/howard-atkins-was-sentenced-to-life-at-age-16-a-tn-supreme-court-ruling-could-soon-free-him/>.

¹⁹⁷ Wadhvani, *supra* note 196.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ Paige Pflieger, *Tennessee’s juvenile lifers ‘have hope again’ after their sentences are ruled unconstitutional*, WPLN NEWS (Nov. 30, 2022), <https://wpln.org/post/tennessees-juvenile-lifers-have-hope-again-after-their-sentences-are-ruled-unconstitutional/>.

essentially a second death to come out of a single murder, as those who are capable of redemption and repent for their crimes were, prior to *Booker*, to be incarcerated for what would likely be the rest of their lives.²⁰²

While not expressly referenced in *Roper*, the Steinberg and Scott study certainly helped to inform the Court's "transitory" classification of juvenile personality and character.²⁰³ The study states that the culpability of a minor is lessened by the fact that they are still forming their personal identity; therefore, the choices they make are less likely to stem from a bad character that the juvenile is stuck with.²⁰⁴ This malleability of character begins in childhood and continues into early adulthood.²⁰⁵ The development of character is often accompanied by varying levels of risk-taking and antisocial behavior, which wanes as a person grows out of adolescence and into adulthood.²⁰⁶

At the time of the Steinberg and Scott study, juveniles already were classified based on the observed tentative character development scheme: those whose antisocial behavior was simply a fleeting trait of adolescence resulting from peer pressure or youthful risk taking ("adolescent-limited offenders"), and those whose behavior represented a more longstanding trend resulting from more serious influences, such as improper environments and neurobiological deficiencies ("life-course-persistent offenders").²⁰⁷ The well-intentioned but ill-fated *Veal v. State* decision from Georgia, discussed in Part III, attempted to require courts to distinguish between adolescent-limited and life-course-persistent offenders by mandating an on-the-record finding of "permanent incorrigibility," which would signify that a

²⁰² *Id.*

²⁰³ *Roper v. Simmons*, 543 U.S. 551, 570 (2005).

²⁰⁴ Steinberg & Scott, *supra* note 148, at 1011.

²⁰⁵ *Id.* at 1014.

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 1015 (citing Terrie E. Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 PSYCH. REV. 674, 676 (1993)).

defendant is a life-course-persistent offender.²⁰⁸ However, as echoed in the Supreme Court's decision in *Jones* abrogating *Veal*,²⁰⁹ that distinction is fairly hard to make; juvenile character is simply too difficult to pin down due to its innate fluctuation.²¹⁰

Steinberg and Scott's 2003 observations of the transitory nature of juvenile character hold true under modern research. Contemporary articles continue to support the fact that an individual's proclivity to crime cannot adequately be predicted based on their actions as a juvenile.²¹¹ A number of scholars agree that adolescent-limited offenders make up at least 90 percent of the juvenile-delinquent population.²¹² Therefore, the vast majority of juveniles who exhibit antisocial behavior will grow out of it. Pinpointing exactly which youth fall into this category is an issue that cannot readily be solved. Thus, the transient nature of youth must not be subrogated to the other factors simply because it was the final *Roper* factor to be listed. All factors should work together to create a holistic approach to individualized sentencing of juveniles.

iv. ADDITIONAL FACTORS

As of March 2023, the *Roper* factors will have reached the age of majority, as they were announced in 2005. While the discussion above indicates that the *Roper* factors are still very effective in considering the differences between juveniles and

²⁰⁸ *Veal v. State*, 784 S.E.2d 403, 408 (Ga. 2016).

²⁰⁹ *Jones v. Mississippi*, 141 S.Ct. 1307, 1315 (2021) (quoting *Roper v. Simmons*, 543 U.S. 551, 573 (2005) ("For one thing, the Court has recognized that it 'is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'").

²¹⁰ Steinberg & Scott, *supra* note 148, at 1014.

²¹¹ Elizabeth S. Scott et al., *The Supreme Court and the Transformation of Juvenile Sentencing*, MODELS FOR CHANGE: SYSTEMS REFORM IN JUVENILE JUSTICE, PUBLICATION NO. 778 (2015); see also Laurence Steinberg et al., *Psychosocial Maturity and Desistance From Crime in a Sample of Serious Juvenile Offenders*, JUV. JUST. BULL. 3 (2015).

²¹² Steinberg et al., *supra* note 212, at 3.

adults, it also shows that a vast amount of research has been and continues to be done regarding developmental psychology and its impact on juvenile justice. Therefore, it is reasonable to think that the *Roper* factors should be supplemented with additional considerations, especially when the goal of *Booker* and *Miller* is to give sufficient regard to a child's individualized situation and circumstances during sentencing.

One of the fields of research that has gained significant traction since the *Roper* decision is that of adverse childhood experiences ("ACEs"). ACEs are generally defined as "potentially traumatic events that occur in childhood."²¹³ These events have been determined to comprise trauma accumulated from sources such as physical abuse, substance abuse in the household, and discrimination.²¹⁴ The study of ACEs was first recognized in 1998 as an assessment of childhood experiences and their effect on health problems later in life.²¹⁵ More recently, ACEs have been examined in relation to a juvenile's proclivity for delinquency and crime.²¹⁶ Statistics show that youth

²¹³ *Fast Facts: Preventing Adverse Childhood Experiences*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Apr. 6, 2022), <https://www.cdc.gov/violenceprevention/aces/fastfact.html>.

²¹⁴ Christopher Freeze, *Adverse Childhood Experiences and Crime*, L. ENF'T BULL. (Apr. 9, 2019), <https://leb.fbi.gov/articles/featured-articles/adverse-childhood-experiences-and-crime>. A full list of "conventional" and "expanded" ACEs includes emotional and sexual abuse, physical and emotional neglect, violence toward one's mother or stepmother, household mental illness, a household member incarcerated, parental separation or divorce, witnessing violence, an unsafe neighborhood, racism, and poverty. *Id.* (citing Vincent J. Felitti et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study*, 14 AM. J. OF PREVENTATIVE MED. 245, 246 (1998); Peter F. Cronholm et al., *Adverse Childhood Experiences: Expanding the Concept of Adversity*, 49 AM. J. OF PREVENTATIVE MED. 354, 358 (2015)).

²¹⁵ Vincent J. Felitti et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults*, 14 AM. J. OF PREVENTATIVE MED. 245, 248 (1998).

²¹⁶ Freeze, *supra* note 214.

experiencing one of the abuse- or neglect-based ACEs are 47 percent more likely to commit delinquent acts.²¹⁷

ACEs already have been identified as potentially helpful in formulating and implementing juvenile justice policy, as there are several recent studies that correlate childhood exposure to trauma with risky behavior.²¹⁸ It also has been suggested that heightened ACE exposure correlates with other juvenile justice-adjacent issues, such as trauma symptomatology, substance abuse in the ACE-exposed youth, and behavioral problems on both a social and emotional level.²¹⁹ This research tends to show that ACEs generally reflect a much more all-encompassing issue that affects every part of a juvenile offender's life.²²⁰ Specifically, it shows the importance of implementing a holistic approach when dealing with juveniles in the justice system.²²¹ Further, these environmental influences seldom occur in single manifestations. Trauma and other ACEs generally stack upon and interact with each other, creating a much more debilitating experience for a child dealing with them.²²² The frequency and intensity of ACEs and related trauma, therefore, bear heavily on a juvenile's development.

²¹⁷ Samantha M. Brown & Audrey M. Shillington, *Childhood Adversity and the Risk of Substance Use and Delinquency: The Role of Protective Adult Relationships*, 63 CHILD ABUSE AND NEGLECT 211, 212 (2017).

²¹⁸ Gloria Huei-Jong Graf et al., *Adverse Childhood Experiences and Justice System Contact: A Systematic Review*, 147 PEDIATRICS 1, 2 (2021); Carly B. Dierkhising et al., *Trauma Histories Among Justice-involved Youth: Findings from the National Child Traumatic Stress Network*, 4 EUROPEAN J. OF PSYCHOTRAUMATOLOGY 1, 6-9 (2013); Christopher M. Layne et al., *Cumulative Trauma Exposure and High Risk Behavior in Adolescence: Findings From the National Child Traumatic Stress Network Core Data Set*, 6 PSYCH. TRAUMA: THEORY, RSCH., PRAC., AND POL'Y 40, 44-46 (2014)..

²¹⁹ Catia Malvaso et al., *Adverse Childhood Experiences and Trauma Among Young People in the Youth Justice System*, 651 TRENDS & ISSUES IN CRIME AND CRIM. JUST. 1, 12 (2022).

²²⁰ See *id.*

²²¹ *Id.*

²²² Christopher M. Layne et al., *Cumulative Trauma Exposure and High Risk Behavior in Adolescence: Findings From the National Child Traumatic Stress Network Core Data Set*, 6 PSYCH. TRAUMA: THEORY, RSCH., PRAC., AND POL'Y 40, 41 (2014).

This adds to the importance of curating individualized sentencing hearings under *Booker* and doing it correctly. Arguably, if proper consideration is lacking in any relevant part of the process, the Eighth Amendment is abided to the extent necessary to ensure that punishment is proportional to the crime.

As an example, the Tennessee Supreme Court made a point to list all of the circumstances Booker was subjected to as a result of the “poor, unstable, and chaotic environment” in which he grew up.²²³ In light of the above research, it is clear that Booker was exposed to several of the ACEs that influence a juvenile’s proclivity to crime.²²⁴ Further, of the ACEs experienced by Booker, it seems that those relating to violence were the most prevalent and reoccurring. The *Booker* opinion recites various incidents involving exposure to violence that were not able to be considered in his non-existent sentencing hearing:

Mr. Booker witnessed shootings and often heard gunfire in his neighborhood. Before Mr. Booker was born, his father was murdered . . . he was physically and emotionally mistreated by his mother. He saw his mother being physically abused . . . Mr. Booker and his family were held at gunpoint during a home invasion . . . his grandfather was stabbed to death at his home.²²⁵

Booker also endured physical and emotional abuse from his mother and was exposed to substance abuse within his household.²²⁶ The Court further recited expert testimony from the trial as to the effect such experiences likely had on Booker, though no direct or express mention was made within the opinion of ACEs or the psychological effects thereof.²²⁷

Looking back further, ACEs have been present in varying degrees in every landmark case that forms the basis for

²²³ State v. Booker, 656 S.W.3d 49, 64-65 (Tenn. 2022).

²²⁴ *Id.*

²²⁵ *Id.* at 64.

²²⁶ *Id.*

²²⁷ *Id.* at 65.

the United States' juvenile homicide sentencing jurisprudence. In *Roper*, the defendant was exposed to a large number of ACEs, including physical abuse from his stepfather, psychological abuse from his biological parents, and exposure to substance abuse.²²⁸ Similarly, Terrence Graham of *Graham v. Florida* dealt with exposure to substance abuse within his household, and he himself began abusing substances at a very young age.²²⁹ In *Miller*, defendant Jackson had been "immers[ed] in violence," as his mother and grandmother had shot other individuals.²³⁰ Defendant Miller was exposed to substance abuse by both of his biological parents, was abused by his stepfather, and was a regular charge of the foster care system.²³¹

The existence of such experiences in each of the above defendants' lives adds credence to the necessity of considering the experiences in the now-mandatory discretionary sentencing hearings. Apart from their convictions for first-degree murder, the above defendants have little in common except for their youth and their exposure to ACEs. This correlation serves to supplement the studies discussed above in that it bolsters the impact that ACEs should have on post-*Booker* sentencing and parole hearings in Tennessee. The *Roper* factors, considered alone, cannot be enough under today's understanding of developmental psychology to provide adequate, individualized sentencing hearings for juveniles convicted of first-degree murder.

D. ROADMAP FOR FUTURE CONSIDERATION IN TENNESSEE

Tennessee has a sparse collection of youth-related sentencing considerations for crimes other than murder. While few other convictions carry the punitive force of first-degree murder,²³² the lack of general recognition of the effects of youth in most crimes in Tennessee criminal jurisprudence further highlights the point that familiarization with contemporary

²²⁸ *State v. Simmons*, 944 S.W.2d 165, 183 (Mo. 1997).

²²⁹ *Graham v. Florida*, 560 U.S. 48, 52 (2010).

²³⁰ *Miller v. Alabama*, 567 U.S. 460, 478 (2012).

²³¹ *Id.* at 467, 479.

²³² *See Graham*, 560 U.S. at 69-70.

understandings of the “hallmark” characteristics of youth,²³³ and the development of a sentencing scheme consistent with them, are necessary steps to properly comply with Booker’s new constitutional interpretation of juvenile punishment. For an example of the limitations of existing state law, the Tennessee Criminal Sentencing Reform Act of 1989 provides that youth, along with old age, is considered a mitigating factor only if the age played a part in creating a substantial lack of judgment.²³⁴ Case law citing the Act does not clarify what exactly youth’s effect on judgment means, but it does provide general guidance to consider it in the context of “education, maturity, experience, mental capacity, or development, and any other pertinent circumstance.”²³⁵ Other than these limited and general parameters, consistent considerations for a court’s deliberation on the mitigating factors of youth are lacking in existing criminal precedent. Further, the fact that sentencing for first-degree murder carries the harshest of punishments available under state law implies that individualized sentencing, performed by a sentencer apprised of all factors that affect or are affected by one’s youth, is the most just method of implementing *Booker*.

The field of developmental psychology is still relatively new when compared with more established facets of study, but the amount of research available points that it should be considered, if not used as the basis, when developing juvenile justice law and policy.²³⁶ The varying rates of cognitive and psychosocial maturation indicate a need for the consideration of one’s overall mental development each time an individualized sentencing hearing is held, as required by *Booker*. Similarly, the impressionability of youth plays a large role in juvenile decision-making and should not be discounted in the consideration. Additionally, the character of youth, as stated in *Roper* and echoed in the various studies cited above, is a transient thing that represents the essence of what the developmental stage of childhood, adolescence, and even

²³³ *Miller*, 567 U.S. at 477.

²³⁴ TENN. CODE ANN. § 40-35-113(6) (2023).

²³⁵ *State v. Adams*, 864 S.W.2d 31, 33 (Tenn. 1993) (superseded by statute on other grounds); see, e.g., *State v. Love*, No. W2010-00334-CCA-R3-CD, 2011 WL 977566, *3 (Tenn. Crim. App., Mar. 21, 2011).

²³⁶ NATIONAL RESEARCH COUNCIL, *supra* note 185, at 117.

young adulthood is designed to accomplish – transforming the impulsive and immature individual into a responsible and productive member of society. Further, developments in the fields of psychology and physiology show that there are physical, biological, and mental reasons for the necessary legal separation of juveniles from adults when it comes to culpability for their crimes. There will always be those who offend because of their ingrained depravity and incorrigibility, but the evidence shows that many juveniles who commit delinquent and criminal acts do so due to their innate immaturity and/or their environments' effects on that immaturity. To consider only surface-level factors such as chronological age and experience, without a deeper understanding of their implications on a juvenile, would be to perform a disservice to the mandate of *Booker*. Youth must be considered not only for *what* it is, but also for *why* it is, to fully provide a holistic examination of its mitigating and differentiating effect on the juvenile offender when compared to an adult counterpart. The *Roper* factors are more than adequate to serve as a foundation for consideration in individualized punishments for youthful first-degree murder offenders. However, implementing them in practice requires a deeper understanding of why they are effective. Defense attorneys, prosecutors, and judges who interact with juvenile offenders must all be aware of the underlying psychology that influences the *Roper* factors to properly implement them in practice and in the furtherance of constitutional juvenile justice.

This note does not purport to occupy a position from which to espouse a particular route forward following *Booker*. However, it is vital for Tennessee, moving in this new direction, to do so in a way that ensures the State gets it right the first time. Because juvenile first-degree murder convicts in Tennessee have effectively been denied a chance at parole for ten years longer than similarly situated juvenile offenders throughout the rest of the country, it is arguably that much more important to quickly and accurately design a sentencing scheme that complies with *Booker*. Therefore, Tennessee should look at the path other states have taken to avoid any setbacks and errors made in jurisdictions that have already spent a decade revising and implementing a constitutionally compliant juvenile sentencing jurisprudence. Guidance exists in the form of legal

and legislative history from those jurisdictions so that Tennessee can avoid the pitfalls of its neighbors and potentially steer toward those practices and precedents that establish the law of individualized juvenile sentencing as it should be. Further, it is of the utmost importance for Tennessee courts, practitioners, and lawmakers to understand the differences between juveniles and adults that make a ruling like the one in *Booker* so important. While the judicial reasoning for the decision was to square Tennessee's sentencing scheme with the Eighth Amendment, the opinion is grounded in the foundational principle of proportionality. To best utilize this principle, it must be accompanied by an adequate comprehension of the differences between juveniles and adults. These differences necessarily will impact what procedures and evidence are implemented in *Booker* hearings from this point forward.

It is not enough to simply understand that a youthful offender is immature because of their chronological age; it must be considered that the reason an adolescent acts a certain way is that their brain physically does not allow them to process information in the same way an adult can. The fact that a child heeded the advice of a family member and shot someone during a robbery must not be simply categorized as the effect of the child's impressionability; to properly be considered in sentencing, impressionability should be further distilled to look at the child's innate desire to belong and be recognized by his family and friends. Similarly, a juvenile's "transient youth" should not be considered only as a mitigating factor but should underscore a survey of the entirety of a juvenile offender's situation and environment to best curate a punishment to provide the opportunity for rehabilitation and maturation. Moreover, it must be kept in mind that all the above factors are subject to significant variance between defendants because of differing individual rates of maturation and development. All these considerations should be evaluated while maintaining a mindful observance of the currently peer-reviewed developmental psychology so that punishment stays truly proportionate to the offense and, most importantly, to the offender.

IV. CONCLUSION

Importantly, at the root of all the issues discussed in this note, all current inmates and future defendants affected by the *Booker* decision are, or will be, convicted for the same reason: committing first-degree murder. It is easy to get lost in statistics, statutes, and studies, focusing only on the numbers and theories, and forgetting that on the other side of the case text is a person who, for a variety of different reasons, ended the life of another human being. It may also be too easy to disregard the fact that the culprit was, at the time of the offense, a juvenile who carried with them the entirety of their experiences up to the time of the murder. The point of this note is not to advocate for the punishment or non-punishment of these defendants. Rather, the point is to remind the audience that juvenile sentencing should be grounded in reason and just consideration of all the factors of youth, while hopefully providing an understanding of how to go about doing so.