JUVENILE LIFE WITHOUT PAROLE SENTENCES: CAN JUVENILES REALLY BE IRREDEEMABLE UNTO DEATH?

STATE V. KELLIHER, 873 S.E.2D 366 (N.C. 2022).

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I. INTRODUCTION

The United States stands alone as the only country in the world that sentences juvenile offenders to life in prison without parole.[1] However, trends in recent years reflect the movement across the nation to change this harsh reality. Currently, twenty-eight states and the District of Columbia prohibit sentencing juvenile offenders to life in prison without

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1. Joshua Rovner, *Juvenile Life Without Parole: An Overview*, SENT'G PROJECT (Apr. 7, 2023), https://www.sentencingproject.org/policy-brief/juvenile-life-without-parole-an-overview/.

the possibility of parole.[2] Additionally, there are five other states where, despite the legality of such sentences, no individuals are presently serving life terms without parole for crimes committed as juveniles.[3] In its national survey of life and virtual life sentences in the United States, the Sentencing Project found that 1,465 individuals were serving juvenile life sentences without parole at the start of 2020.[4] This is a thirty-eight percent decline in the population of offenders serving juvenile life sentences without parole since the Sentencing Project's 2016 count, and a forty-four percent decline from its highest recorded count in 2012.[5]

Beginning in 2005, the Supreme Court of the United States has recognized the behavioral and developmental differences between adolescents and adults in decisions addressing the issue of juvenile life sentences without parole.[6] Current research on adolescent brain development affirms what we all know—and what Supreme Court Justice Kennedy referred to as what "any parent knows"[7]—the fact that children are developmentally different from adults in a myriad of ways.[8] This commonsense notion is critical for courts to be cognizant of when determining what an age-appropriate sentence is for juvenile offenders.

Importantly, there are five key Supreme Court cases—*Roper v. Simmons*,[9] *Graham v. Florida*,[10] *Miller v. Alabama*,[11] *Montgomery v. Louisiana*,[12] and *Jones v. Mississippi*[13]—that establish the proposition that "children are constitutionally different from adults in their level of culpability," which should thus be reflected when it comes to sentencing juvenile offenders.[14] In 2005, *Roper* began the trend of recognizing the differences between juveniles and adults in the criminal law context when the Supreme Court held that the Eighth Amendment prohibits capital punishment for murderers who were under the age of eighteen at the time of their crimes.[15] Five years later, in *Graham*, the Court held

2. *States that Ban Life Without Parole for Children*, CAMPAIGN FOR THE FAIR SENTENCING OF YOUTH, https://cfsy.org/media-resources/states-that-ban-juvenile-life-without-parole/ (last visited Aug. 30, 2024).
3. *Id.*
4. Rovner, *supra* note 1.
5. *Id.*
6. *See* Roper v. Simmons, 543 U.S. 551, 553 (2005).
7. *Id.* at 569.
8. Rovner, *supra* note 1.
9. 543 U.S. 551 (2005).
10. 560 U.S. 48 (2010).
11. 567 U.S. 460 (2012).
12. 577 U.S. 190 (2016).
13. 593 U.S. 98 (2021).
14. *Montgomery*, 577 U.S. at 213.
15. *Roper*, 543 U.S. at 578.

that life without parole sentences for juveniles convicted of non-homicide crimes were unconstitutional.[16] In 2012, *Miller* held that life sentences without parole as a mandatory minimum for any offender under the age of eighteen is unconstitutional, regardless of the crime committed.[17] In doing so, the Court cited *Graham* and *Roper*, specifically relying on the holdings of those cases as well as the reasonings—namely, the significant differences found between children and adults in scientific research:

> [*Graham* and *Roper*] relied on three significant gaps between juveniles and adults. First, children have a 'lack of maturity and an underdeveloped sense of responsibility,' leading to recklessness, impulsivity, and heedless risk-taking. Second, children 'are more vulnerable . . . to negative influences and outside pressures,' including from their family and peers; they have limited 'contro[l] over their own environment' and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child's character is not as 'well formed' as an adult's; his traits are 'less fixed' and his actions less likely to be 'evidence of irretrievabl[e] deprav[ity].'[18]

In 2016, the Court explained that the *Miller* holding applied retroactively in *Montgomery*.[19] Finally, in *Jones*, the Court reaffirmed its holdings in *Miller* and *Montgomery*; however, the Court held that a separate factual finding of "permanent incorrigibility" is not constitutionally required to sentence a juvenile offender to life without parole.[20]

In *State v. Kelliher*,[21] the North Carolina Supreme Court considered a similar question of whether a juvenile homicide offender's consecutive sentences of life without possibility of parole violates the Eighth Amendment's prohibition of cruel *and* unusual punishment, and/or the

16. *Graham*, 560 U.S. at 74.

17. *Miller*, 567 U.S. at 465.

18. *Id.* at 471 (alteration in original) (citations omitted) (quoting *Roper*, 543 U.S. at 569–70); *see also Graham*, 560 U.S. at 68.

19. *Montgomery*, 577 U.S. at 212.

20. *Jones*, 593 U.S. at 104–05 ("[T]he Court has already ruled that a separate factual finding of permanent incorrigibility is not required . . . . In a case involving an individual who was under 18 when he or she committed a homicide, a State's discretionary sentencing system is both constitutionally necessary and constitutionally sufficient."). *But see* David M. Shapiro & Monet Gonnerman, *To the States: Reflections on* Jones v. Mississippi, 135 HARV. L. REV. F. 67, 68 (2021) ("If only permanently incorrigible juveniles can be sentenced to life without parole, then how can a sentencing judge lawfully impose such a sentence without actually deciding if the juvenile before the court is permanently incorrigible?").

21. 873 S.E.2d 366 (N.C. 2022).

North Carolina Constitution's prohibition against cruel *or* unusual punishments.[22] Ultimately, the court held that it violates both the Eighth Amendment of the United States Constitution as well as article I, section 27 of the North Carolina Constitution to sentence a juvenile homicide offender who has been determined to be "neither incorrigible nor irredeemable" to a life sentence without parole.[23] Moreover, the *Kelliher* court explained that any sentence or any combination of sentences that require a juvenile offender to serve *more than forty years in prison* before becoming eligible for parole is "a de facto sentence of life without parole within the meaning of article I, section 27 of the North Carolina Constitution because it deprives the juvenile of a genuine opportunity to demonstrate he or she has been rehabilitated and to establish a meaningful life outside of prison."[24] Thus, the defendant's fifty-year sentence in *Kelliher*—two consecutive twenty-five-year sentences—was a de facto life sentence without parole, and because he was determined to be "neither incorrigible nor irredeemable," such a sentence was unconstitutional.[25]

II. STATEMENT OF THE CASE

In 2001, seventeen-year-old James Ryan Kelliher participated in the murders of Eric Carpenter and his pregnant girlfriend, Kelsea Helton.[26] Given that, at the time Kelliher was indicted, juveniles were still subject to the death penalty, the State originally intended to try Kelliher for capital punishment.[27] Kelliher ultimately pled guilty to various charges, including two counts of first-degree murder, and was subsequently ordered to serve two consecutive sentences of twenty-five years without parole.[28]

The court noted that "[l]ike many juveniles who commit criminal offenses, Kelliher experienced a tumultuous childhood."[29] To that end, Kelliher's father was physically abusive, and Kelliher started regularly using alcohol and marijuana at an early age, attempted suicide by overdose when he was ten years old, and dropped out of high school after completing the ninth grade.[30] By the time Kelliher was just seventeen

22. *Id.* at 370; *see* U.S. CONST. amend. VIII; N.C. CONST. art. I, § 27.
23. *Kelliher*, 873 S.E.2d at 370.
24. *Id.*
25. *Id.*
26. *Id.* at 369.
27. *Id.* at 369–70.
28. *Id.* at 370.
29. *Id.*
30. *Id.*

years old, he was under the influence daily of substances including "ecstasy, acid, psilocybin, cocaine, marijuana, and alcohol."[31] Kelliher resorted to stealing from and robbing others to sustain his drug use.[32]

Over the summer of 2001, Kelliher and a man named Joshua Ballard—someone Kelliher would "regularly 'drink and do drugs'" with—devised a plan to rob Eric Carpenter.[33] Carpenter was "known to sell a large amount of drugs including cocaine and marijuana and would have a large amount of money."[34] Ballard initially came up with the idea to kill Carpenter after the robbery "because Carpenter would know their identities and [would] be able to implicate them in the crime."[35] The pair arranged a drug purchase from Carpenter behind a furniture store to effectuate their plan.[36] Ballard and Kelliher drove to the furniture store together on the day of the arranged drug purchase; however, they encountered a law enforcement officer in a marked vehicle driving around the parking lot.[37] As a result, when Carpenter pulled his vehicle up next to Kelliher's, he told Kelliher to follow him to a different location.[38] "Carpenter led Ballard and Kelliher to his apartment, where they were joined by" Kelsea Helton, Carpenter's girlfriend who was approximately five or six months pregnant.[39]

Kelliher later testified that at some point, Ballard "pulled the weapon" and "got both [Carpenter and Helton] down . . . on their knees facing a wall."[40] While Kelliher continued to gather drugs from around Carpenter's apartment, "he heard two shots, [and] saw two flashes."[41] After the shootings, Kelliher and Ballard fled the apartment and returned to Kelliher's vehicle.[42] There, they proceeded to consume some of the cocaine and marijuana they had stolen from Carpenter's apartment, while also drinking liquor in a nearby park. [43] Ultimately, both "Carpenter and Helton died of gunshot wounds to the backs of their heads."[44]

31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* at 371.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.* (alterations in original).
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*

The trial court found that Kelliher was "a low risk to society" and was "neither incorrigible nor irredeemable," but nevertheless ordered him to serve two consecutive sentences of life with the possibility of parole.[45] Each sentence required Kelliher to serve twenty-five years in prison before becoming eligible for parole—meaning that he would have to serve fifty years in prison before becoming eligible for parole at the age of sixty-seven.[46]

After being ordered to serve two twenty-five-year consecutive sentences without parole, Kelliher argued on appeal that "because the trial court found him to be 'neither incorrigible nor irredeemable,' it violated the Eighth Amendment to the [U.S.] Constitution [as well as] article I, section 27 of the North Carolina Constitution to sentence him to what he contended was a de facto sentence of life without parole."[47] A unanimous panel of the North Carolina Court of Appeals agreed with Kelliher that his sentence violated the Eighth Amendment, but did not separately address the issue of whether or not his sentence was also in violation of the North Carolina Constitution.[48] Instead, the court explained that its "analysis . . . applies equally to both [the defendant's] federal and state constitutional claims."[49]

After the Court of Appeals issued its opinion, but before briefing and oral argument at the North Carolina Supreme Court, the United States Supreme Court decided *Jones v. Mississippi*—another case analyzing the scope of the Eighth Amendment in light of juvenile sentencing.[50] Thus, when the case reached the North Carolina Supreme Court, in addition to arguing the Court of Appeals erred in concluding that Kelliher's consecutive sentences implicated the Eighth Amendment, the State also asserted that *Jones* "completely undermine[d] Kelliher's federal and state constitutional claims."[51]

45. *Id.* at 370, 373 ("[J]uvenile homicide offenders who are neither incorrigible nor irreparably corrupt, are—like other juvenile offenders—so distinct in their immaturity, vulnerability, and malleability as to be outside the realm of [life without parole] sentences under the Eighth Amendment.") (alterations in original) (quoting State v. Kelliher, 849 S.E.2d 333, 344 (N.C. Ct. App. 2020)); *see, e.g.*, Miller v. Alabama, 567 U.S. 460 (2012) (holding that mandatory life without parole for juvenile offenders violated the Eighth Amendment's prohibition on cruel and unusual punishments).

46. *Kelliher*, 873 S.E.2d at 370.

47. *Id.*

48. *Id.*

49. *Id.* at 374.

50. *Id.* at 370; *see* Jones v. Mississippi, 593 U.S. 98, 100 (2021).

51. *Kelliher*, 873 S.E.2d at 370.

III. BACKGROUND

A. The Eighth Amendment of the United States Constitution: Cruel and Unusual Punishment

The Eighth Amendment of the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[52] A prohibition against "cruel and unusual punishment" first appeared in 1689 as part of the English Bill of Rights.[53] In 1791, this prohibition was officially enshrined in the U.S. Bill of Rights as the Eighth Amendment to the United States Constitution.[54] Historically, in the very early years of the republic, the phrase "cruel and unusual punishment" had been interpreted as prohibiting torture and other particularly barbarous punishments.[55] However, at the start of the twentieth century, the Supreme Court of the United States held that excessive punishments disproportionate to the offense could also be considered "cruel and unusual."[56] Although the Supreme Court has consistently refused to hold that capital punishment in and of itself is a violation of the Eighth Amendment,[57] the Court has nevertheless acknowledged that certain applications of the death penalty are "cruel and unusual" under the Eighth Amendment.[58] Moreover, the Court, as previously mentioned, has made special rules concerning juveniles who are sentenced to life without parole in various cases.[59]

52. U.S. CONST. amend. VIII.

53. *Cruel & Unusual Punishment – Conversation Starter*, A.B.A., https://www.americanbar.org/groups/public_education/programs/constitution_day/conversation-starters/cruel-and-unusual-punishment/ (last visited Aug. 30, 2024).

54. *Id.*

55. *Id.*

56. *See* Weems v. United States, 217 U.S. 349, 381–82 (1910).

57. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 187 (1976) ("We hold that the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it.").

58. *See, e.g.,* Atkins v. Virginia, 536 U.S. 304, 318, 320 (2002) (holding that the execution of mentally disabled people is unconstitutionally cruel and unusual within the meaning of the Eighth Amendment because these individuals possess diminished personal culpability); *see also* Thompson v. Oklahoma, 487 U.S. 815, 838 (1988) (holding that the imposition of the death penalty for murders committed by individuals younger than age sixteen at the time of the offense constituted cruel and unusual punishment). *See generally* William W. Berry III, *Cruel State Punishments*, 98 N.C. L. REV. 1201, 1203–04 (2020).

59. *See* Roper v. Simmons, 543 U.S. 551, 578–79 (2005); Graham v. Florida, 560 U.S. 48, 82 (2010); Miller v. Alabama, 567 U.S. 460, 489 (2012); Montgomery v. Louisiana, 577 U.S. 190, 213 (2016); Jones v. Mississippi, 593 U.S. 98, 120–21 (2021).

B. The North Carolina Constitution: Cruel or Unusual Punishment

Article I, section 27 of the North Carolina Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted."[60] It is possible that in 1776, the drafters of the North Carolina Constitution borrowed this provision from either the Virginia or the Maryland Declaration of Rights.[61] Importantly, however, the drafters changed the words slightly to "cruel *nor* unusual punishments," which currently reads and has read "cruel *or* unusual punishments" since 1868.[62] This wording slightly departs from the text of the United States Constitution as well—namely, the use of the phrases "cruel *or* unusual punishments" as opposed to "cruel *and* unusual punishments."[63] Nonetheless, North Carolina courts have traditionally "analyzed cruel and/or unusual punishment claims by criminal defendants the same under both the federal and state Constitutions."[64] In *State v. Conner*, for example, the North Carolina Supreme Court acknowledged that:

> On its face, the Constitution of North Carolina appears to offer criminal defendants—such as juvenile offenders—more protection against extreme punishments than the Federal Constitution's Eighth Amendment, because the Federal Constitution requires two elements of the punishment to be present for the punishment to be declared unconstitutional ("cruel *and* unusual"), while the state constitution only requires one of the two elements ("cruel *or* unusual").[65]

However, the court continued, "this Court historically has analyzed cruel and/or unusual punishment claims by criminal defendants the

60. N.C. CONST. art. I, § 27.

61. JOHN V. ORTH & PAUL MARTIN NEWBY, THE NORTH CAROLINA STATE CONSTITUTION 84 (G. Alan Tarr ed., 2d ed. 2013).

62. *Id.*

63. *See* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); *see also* ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 115–16 (2009) (categorizing this change as "only slightly different textually from [its] federal counterpart[]").

64. State v. Green, 502 S.E.2d 819, 828 (N.C. 1998); *see also* Berry, *supra* note 58, at 1231. *See generally* Earl M. Maltz, *Lockstep Analysis and the Concept of Federalism*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 98, 99 (1988) (identifying this identical federal and state constitutional analysis as "lockstep analysis" and arguing that it is entirely consistent with basic notions of state autonomy). *But see* State v. Kelliher, 873 S.E.2d 366, 384 (N.C. 2022) ("*Green*'s reasoning is starkly inconsistent with contemporary understandings of adolescence which have been recognized by this Court.").

65. 873 S.E.2d 339, 355 (N.C. 2022).

same under both the federal and state Constitutions."[66] Thus, the court employed a lockstep analysis.[67]

IV. THE COURT'S REASONING

Ultimately, the court in *State v. Kelliher* held that it violated both state and federal constitutional law to sentence a juvenile homicide offender who has been determined to be neither incorrigible nor irredeemable to life without parole, and that any sentence which requires a juvenile offender to serve more than forty years in prison before becoming eligible for parole is a de facto sentence of life without parole.[68] Thus, in this case, Kelliher's sentence —which required him to serve fifty years in prison before becoming parole-eligible—was a de facto life sentence without parole under art. I, section 27 of the North Carolina Constitution.[69] Furthermore, "[b]ecause the trial court affirmatively found that Kelliher was 'neither incorrigible nor irredeemable,' he could not constitutionally receive [that] sentence."[70]

A. The Court's Reasoning with Respect to the Eighth Amendment of the United States Constitution

The court began analyzing Kelliher's Eighth Amendment claim by noting that the scope of the Amendment "is not static" and that the Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[71] Moreover, the court continued, "[c]riminal punishment is cruel and unusual within the meaning of the Eighth Amendment when it is disproportionate."[72] To that end, a punishment can, in limited circumstances, "be disproportionate as applied to *all offenders* within a particular category based on 'the nature of the offense' or 'the characteristics of the offender.'"[73] Here, Kelliher argued that his consecutive life sentences were in violation of the Eighth Amendment because he fell in a category of offenders for whom a life sentence without parole is *always*

66. *Id.*

67. *See* Maltz, *supra* note 64, at 99 (defining lockstep analysis as "the theory that state constitutional provisions should be interpreted to provide exactly the same protections as their federal constitutional counterparts").

68. *Kelliher*, 873 S.E.2d at 370.

69. *Id.*

70. *Id.*

71. *Id.* at 374 (quoting Trop v. Dulles, 356 U.S. 86, 100–01 (1958)).

72. *Id.*; *see* Graham v. Florida, 560 U.S. 48, 59 (2010) ("The concept of proportionality is central to the Eighth Amendment.").

73. *Kelliher*, 873 S.E.2d at 374 (emphasis added) (quoting *Graham*, 560 U.S. at 60).

disproportionate—juvenile offenders who are "neither incorrigible nor irredeemable."[74] In cases in which such an argument is presented, courts will employ a two-step inquiry:

> The Court first considers "objective indicia of society's standards, as expressed in legislative enactments and state practice," to determine whether there is a national consensus against the sentencing practice at issue. Next, guided by "the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose," the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution.[75]

Accepting Kelliher's argument regarding the constitutionality of his sentence to life without parole, the *Kelliher* court began its analysis by giving a brief summary of the Supreme Court's holdings and reasonings in *Roper*, *Graham*, *Miller*, *Montgomery*, and *Jones*, emphasizing the principles of the Eighth Amendment.[76] In sum, the court first relied on the ideas presented in *Roper* and *Graham* that there are key differences between juveniles and adults, which justify the proposition that juvenile offenders are "categorically less morally culpable for their criminal conduct than adults who commit[] the same criminal acts."[77] Next, the court discussed the proposition stated in *Graham*, which reaffirmed *Roper*, that "while states are 'not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime,' states must give juvenile nonhomicide offenders 'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'"[78] To continue, the *Kelliher* court observed the following principles from the holdings in *Miller*—"'the Eighth Amendment forbids a sentencing scheme that mandates life without possibility of parole for juvenile offenders,' including juveniles convicted of homicide offenses," and

74. *Id.* at 375.

75. *Id.* at 374–75 (citations omitted) (quoting *Graham*, 560 U.S. at 61).

76. *Id.* at 375–80. *See generally* Roper v. Simmons, 543 U.S. 551 (2005); Graham v. Florida, 560 U.S. 48 (2010); Miller v. Alabama, 567 U.S. 460 (2012); Montgomery v. Louisiana, 577 U.S. 190 (2016); Jones v. Mississippi, 593 U.S. 98 (2021).

77. *Kelliher*, 873 S.E.2d at 375; *see Roper*, 543 U.S at 569–70 (holding that there is sufficient evidence that American society viewed juvenile offenders as less culpable than the average adult criminal, providing three main reasons: (1) "the lack of maturity and an underdeveloped sense of responsibility [] found in youth"; (2) "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure;" and (3) "the character of a juvenile is not as well formed as that of an adult").

78. *Kelliher*, 873 S.E.2d at 376 (quoting *Graham*, 560 U.S. at 75).

"[a]lthough we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."[79] Finally, the court explained that while *Miller* announced the substantive constitutional rule, *Montgomery* clarified that this rule could be applied retroactively in state post-conviction proceedings.[80] Expanding on the substantive constitutional rule, the court stated that "[a]lthough *Miller* did not foreclose a sentencer's ability to impose life without parole on a juvenile, [*Miller*] explained that a lifetime in prison is a disproportionate sentence for all but the rarest of children, those whose crimes reflect irreparable corruption."[81]

The *Kelliher* court also further clarified the impact that *Jones v. Mississippi* had on the relevant examined case law.[82] In doing so, the court rejected the State's argument that *Jones* could be read to suggest that the Eighth Amendment allows courts to sentence *any* juvenile homicide offender to a sentence of life without parole, as long as the sentencing court does so in exercising its discretion after having considered the juvenile's age.[83] Instead, the court noted that "[t]his expansive reading of *Jones* is in significant tension with *Miller* and especially *Montgomery*."[84] The court further explained that:

> The problem with the State's proposed interpretation of *Jones* is that it is irreconcilable with the Supreme Court's own characterization of the question it was answering in *Jones*, the narrowness of its holding, and its description of the relationship between *Jones* and the Supreme Court's prior juvenile sentencing decisions. By its plain terms, *Jones* makes clear that the Supreme Court intended only to reject an effort to append a new procedural requirement to *Miller*'s and *Montgomery*'s substantive constitutional rule; the Court did not intend to retreat from the substantive constitutional rule articulated in those cases.[85]

Thus, consistent with the Supreme Court's precedent, the *Kelliher* court concluded that "the Eighth Amendment categorically prohibits a sentencing court from sentencing any juvenile to life without parole if the

79. *Id.* at 376–77 (quoting *Miller*, 567 U.S. at 479–80).
80. *Id.* at 377.
81. *Id.* (alterations in original) (quoting *Montgomery*, 577 U.S. at 195).
82. *Id.* at 378–80.
83. *Id.* at 378.
84. *Id.* at 379.
85. *Id.*

sentencing court has found the juvenile to be 'neither incorrigible nor irredeemable.'"[86] Being that, in this case, Kelliher was expressly found to be "neither incorrigible nor irredeemable" by the sentencing court, Kelliher could not be sentenced to life without parole under the Eighth Amendment.[87]

The court then turned to the question of whether Kelliher's sentences comprised a de facto life without parole sentence, which is cognizable as cruel and unusual punishment prohibited under the Eighth Amendment. The court accepted Kelliher's argument that "the Eighth Amendment applies to juvenile offenders with lengthy sentences, including sentences allowing a possibility of release before death."[88] It further agreed with Kelliher's argument that "the Eighth Amendment requires granting all juvenile offenders except those who have been deemed incorrigible 'a meaningful opportunity for release before most of their life has passed by,' an opportunity his two consecutive life with parole sentence denies him."[89] Noting that, "when it comes to the Eighth Amendment, 'reality cannot be ignored,'" the court agreed with Kelliher and the Court of Appeals that "a sentence of fifty years before parole eligibility is akin to a de facto sentence of life without parole within the meaning of the Eighth Amendment," and "[a]llowing a juvenile the opportunity to be released on parole only after spending fifty years in prison 'den[ies] the defendant the right to reenter the community' in any meaningful way."[90]

B. The Court's Reasoning with Respect to Art. I § 27 of the North Carolina Constitution

The *Kelliher* court separately addressed Kelliher's claim arising under article I, section 27 of the North Carolina Constitution, which provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted."[91] The court rejected the State's argument that this provision of the North Carolina Constitution should be interpreted in lockstep with the Eighth Amendment.[92] Instead, accepting Kelliher's proposed interpretation of the North Carolina Constitution, the court explained that article I,

86. *Id.* at 380.
87. *Id.*
88. *Id.* 380–81.
89. *Id.* at 381.
90. *Id.* (quoting Graham v. Florida, 560 U.S. 48, 74 (2010)).
91. *Id.* (quoting N.C. CONST. art. I, § 27).
92. *Kelliher*, 873 S.E.2d at 381–82 ("The State argues that ... the protections afforded by article I, section 27 are coextensive with the Eighth Amendment, such that the United States Supreme Court's interpretation of the Eighth Amendment controls [the court's] interpretation of article I, section 27.").

section 27 "offers protections distinct from, and in this context broader than, those provided under the Eighth Amendment."[93] Thus, the court independently construed the scope of the State's Constitution in this case.

In beginning its analysis, the court started by discussing the textual difference between the Eighth Amendment and article I, section 27 of the North Carolina Constitution.

> At the outset, we note the textual distinction between article I, section 27, which prohibits punishment that is "cruel *or* unusual," and the Eighth Amendment, which prohibits punishment that is "cruel *and* unusual." Ordinarily, we presume that the words of a statute or constitutional provision mean what they say. Thus, it is reasonable to presume that when the Framers of the North Carolina Constitution chose the words "cruel *or* unusual," they intended to prohibit punishment that was *either* cruel *or* unusual, consistent with the ordinary meaning of the disjunctive term "or."[94]

The court determined that this textual difference evinced that the people of North Carolina intended to provide a distinct set of protections than those provided by the federal constitution.[95] Additionally, the court stated that "even where a provision of the North Carolina Constitution precisely mirrors a provision of the United States Constitution, 'we have the authority to construe our own constitution differently from the construction by the United States Supreme Court of the Federal Constitution, as long as our citizens are thereby accorded no lesser rights than they are guaranteed by the parallel federal provision.'"[96] Finally, the court explained that "the nature of the inquiry the United States Supreme Court has adopted in resolving cruel and unusual punishment claims itself suggests that state courts should not reflexively defer to United States Supreme Court precedent in assessing similar claims arising under distinct state constitutional provisions."[97] Thus, the court ultimately held Kelliher's sentence was unconstitutional under article I,

93. *Id.* at 382. *But see supra* note 64 and accompanying text.

94. *Kelliher*, 873 S.E.2d at 382 (citation omitted).

95. *Id.*; *see also* William W. Berry III, *Cruel and Unusual Non-Capital Punishments*, 58 AM. CRIM. L. REV. 1627, 1653 (2021) ("In many cases . . . the state constitutional language is different from the Eighth Amendment, and often in significant ways . . . . [T]hese linguistic differences provide the basis for broader, or at least different, coverage of state punishments.").

96. *Kelliher*, 873 S.E.2d at 383 (quoting State v. Carter, 370 S.E.2d 553, 556 (1988)).

97. *Id.*

section 27 of the North Carolina Constitution, *regardless of whether Kelliher's sentence was in violation of the Eighth Amendment*.[98]

In departing from traditional lockstep interpretation,[99] the court overturned its prior precedent, *State v. Green*.[100] In *State v. Green*, the North Carolina Supreme Court held that sentencing a thirteen-year-old defendant to mandatory life imprisonment for a first-degree sexual offense did not violate the prohibition against cruel and unusual punishment under either the United States or North Carolina constitutions.[101] The majority stated that an interest in the "protection of law-abiding citizens from their predators, regardless of the predators' ages, is on the ascendancy in our state and nation."[102] However, in *Kelliher*, the court stated that it "now recognize[s] that our practice of describing children as 'predators' fundamentally misapprehended the nature of childhood and, frequently, reflected racialized notions of some children's supposedly inherent proclivity to commit crimes."[103] In large part, the court's decision to overturn *Green* had to do with the "science-based understanding of childhood development."[104] Additionally, the court noted that its decision in *Green* was "very much a product of its time," which the court itself recognized in the *Green* opinion.[105]

The *Kelliher* court continued its analysis by turning its attention to the state constitutional principles that support its holding. First, the court explained that although the cruel and/or unusual punishment provisions from the U.S. Constitution and the North Carolina Constitution "*need not* be interpreted in lockstep," the court nevertheless decided to apply the Eighth Amendment analytical framework.[106] It draws the meaning of article I, section 27 "from the evolving standards of decency that mark the progress of a maturing society,"[107] and considers

98. *Id.* at 382.

99. *See id.* at 374 ("The Court of Appeals did not separately address Kelliher's argument that his sentence violated article I, section 27 of the North Carolina Constitution. Rather, citing this Court's decision in *State v. Green*, the Court of Appeals stated that its 'analysis . . . applies equally to both' Kelliher's federal and state constitutional claims." (alteration in original) (citation omitted)); *see also* State v. Green, 502 S.E.2d 819, 828 (N.C. 1998).

100. *Kelliher*, 873 S.E.2d at 383–84. *See generally* WILLIAMS, *supra* note 63, at 349–51 (discussing the doctrine of precedent in state constitutional interpretation).

101. *Green*, 502 S.E.2d at 831.

102. *Id.*

103. *Kelliher*, 873 S.E.2d at 384.

104. *Id.*

105. *Id.*; *see Green*, 502 S.E.2d at 831 ("[I]t is the general consensus that serious youthful offenders must be dealt with more severely than has recently been the case in the juvenile system. These tides of thought may ebb in the future, but for now, they predominate in the arena of ideas.").

106. *Kelliher*, 873 S.E.2d at 384 (emphasis added).

107. *Id.* at 385 (quoting Trop v. Dulles, 356 U.S. 86, 100–01 (1958)).

"objective indicia of society's standards" when exercising its "own independent judgment [to decide] whether the punishment in question violates the Constitution."[108] Ultimately, the court identified two main reasons why, "in light of provisions of the North Carolina Constitution not found in the United States Constitution, sentencing a juvenile who is neither incorrigible nor irredeemable to life without parole is cruel within the meaning of article I, section 27."[109]

To begin, the court explained that it must consider provisions that are unique to the North Carolina Constitution in order to assess punishment under article I, section 27.[110] Next, stating its first main reasoning behind its holding, the court reasoned that "sentencing a juvenile who can be rehabilitated to life without parole is cruel because it allows retribution to completely override the rehabilitative function of criminal punishment."[111] The court looked to article XI, section 2, of the North Carolina Constitution, which is "unique" in expressly stating that "[t]he object of punishments" in North Carolina are "not only to satisfy justice, *but also to reform the offender* and thus prevent crime . . . ."[112] To that end, the court explained that a punishment of life without parole cannot be concerned with reforming the offender, but may nevertheless be justified in the context of adult offenders.[113] Alternatively, however, those justifications cannot likewise hold true for juvenile offenders:

> Because juveniles have less than fully developed cognitive, social, and emotional skills, they have lessened moral culpability for their actions as compared to adults. Because juveniles are inherently malleable, they have a greater chance of being rehabilitated as compared to adults. Further, juveniles who become involved in the criminal justice system are disproportionately likely to have experienced various childhood traumas, such as Adverse Childhood Experiences (ACEs), which demonstrably impair their cognitive processing and may be expressed, as ably summarized in an amicus brief by Disability Rights North Carolina, "by the early onset of risk behaviors,

108. *Id.* (alteration in original) (quoting Graham v. Florida, 560 U.S. 48, 61 (2010)).
109. *Id.* at 386.
110. *Id.* at 385.
111. *Id.* at 386.
112. *Id.* (quoting N.C. CONST. art. XI, § 2).
113. *Kelliher*, 873 S.E.2d at 386 ("In the context of an adult defendant, such a punishment can typically be justified—either because the nature of the defendant's crimes means 'justice' requires such a harsh sentence, or because the State has concluded that adults who commit certain of the most egregious criminal offenses cannot possibly be 'reform[ed].'" (alteration in original)).

> dysregulation of biological stress systems, alterations in brain anatomy and function, suppression of the immune system, and potential alterations in the child's epigenome."[114]

Because of the foregoing reasons, the court acknowledged that sentencing a juvenile offender to life without parole is "unjustifiably retributive" and thus at odds with the North Carolina Constitution.[115]

The court's second proffered reason is that sentencing a juvenile offender who may be rehabilitated to life without parole "is cruel because it ignores North Carolina's constitutionally expressed commitment to nurturing the potential of all [the] state's children."[116] The court reasoned that even a child who commits a crime such as homicide can, with exceedingly rare exceptions, eventually acquire the skills and knowledge necessary to develop into a person who can make a positive contribution to society.[117] Accordingly, in light of the State's "constitutional commitment to helping all children realize their potential and our recognition of the interest of all North Carolinians in so doing," the court held that "it is cruel to sentence a juvenile who has the potential to be rehabilitated to a sentence which deprives him or her of a meaningful opportunity to reenter society and contribute to th[e] state."[118]

Finally, because Kelliher argued that his sentence was facially unconstitutional, to prevail on his state constitutional claim, Kelliher also had to establish that his sentence to two consecutive terms totaling fifty years in person before becoming eligible for parole was a de facto sentence of life without parole. The court began analyzing whether Kelliher's sentence was a de facto life sentence by stating that "a fifty-year sentence means there is a distinct possibility that a juvenile offender will not live long enough to have the opportunity to demonstrate that he has been rehabilitated."[119] Importantly, the court cited to the United States Sentencing Commission, which has defined "'a sentence length of 470 months or longer,' or thirty-nine years and two months, as a de facto life sentence because this sentence is 'consistent with the average life

114. *Id.* (citations omitted).
115. *Id.*
116. *Id.* ("This commitment is enumerated in two different provisions of our constitution: article I, section 15, which states that '[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right,' and article IX, section 1, which states that '[r]eligion, morality, and knowledge being necessary to good government and the happiness of mankind, schools, libraries, and the means of education shall forever be encouraged.'" (alteration in original)).
117. *Id.* at 386–87.
118. *Id.* at 387.
119. *Id.* at 388.

expectancy of federal criminal offenders.'"[120] The court's second point on this issue is the fact that juvenile offenders like Kelliher are notably different and distinct from the average person the same age—in large part because of childhood trauma.[121]

Next, the court addressed the harsh reality of when a juvenile offender who spends fifty years in prison tries to re-enter society: "Having spent at least five decades in prison, a juvenile offender released on parole will face overwhelming challenges when attempting to obtain employment, secure housing, and establish ties with family members or the broader community."[122] Thus, the issue of reintegration, combined with the diminished life expectancy of a juvenile offender who spends fifty years of their life in prison, led the court to conclude that a fifty-year sentence of life without parole is a de facto life sentence.[123]

The North Carolina Supreme Court subsequently tackled the question of where to draw the line—after concluding that fifty years was surely over that line— for a sentence or combination of sentences to be considered a de facto life sentence.[124] Ultimately, the court held that:

> [I]n light of the requirements of article I, section 27 and the practical realities as experienced by juvenile offenders recounted above, any sentence or sentences which, individually or collectively, require a juvenile to serve more than forty years in prison before becoming eligible for parole is a de facto sentence of life without parole within the meaning of article I, section 27.[125]

The court identified a number of reasons for its decision to draw the line at a maximum of forty years. First, the forty-year maximum strikes a balance between the court's interest in "respecting the legislature's choice to afford trial courts the discretion to run multiple sentences either concurrently or consecutively," as well as the court's obligation to enforce the prohibition on "cruel or unusual punishment."[126] Additionally, the forty-year maximum supports the rehabilitative goal of punishment by

120. *Id.* (quoting U.S. SENT'G COMM'N, LIFE SENTENCES IN THE FEDERAL SYSTEM 10, 23, n.52 (2015), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20150226_Life_Sentences.pdf).

121. *Id.* ("They are both disproportionately likely to have experienced multiple and often severe childhood traumas, and they will spend the vast majority of their lives within the walls of a prison. Both of these circumstances can significantly reduce an individual's life expectancy.").

122. *Id.* at 389.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 390.

providing juvenile offenders with a "realistic hope of meaningful years of life outside prison walls."[127] This hope, in turn, encourages personal development and social behaviors during incarceration, such as furthering education or gaining professional skills.[128] Finally, the court considered North Carolina's Social Security eligibility guidelines, which suggest that individuals fifty-five and over with limited education and work experience face significant employment challenges, to support its conclusion that a forty-year maximum before parole eligibility would allow juvenile offenders a meaningful opportunity to reenter society and potentially qualify for retirement benefits.[129]

Notably, the *Kelliher* court concluded its opinion by addressing a few incorrect propositions that may have been misconstrued from its holding. First, its holding regarding de facto life sentences and juvenile offenders "*does not extend to the context of adult offenders*."[130] Second, the court's holding "does not dispossess the trial court or other decisionmakers in the criminal justice system of their discretion to weigh the circumstances surrounding a juvenile offender's conduct, including the number of offenses committed, in deciding that juvenile's ultimate fate."[131] Finally, the court clarified that an opportunity for the consideration of parole for juvenile offenders is not a guarantee that parole will actually be granted.[132] Rather, that decision will be made "based on the factors and circumstances present at the most relevant time."[133]

V. AUTHOR'S ANALYSIS

The United States stands alone in allowing life without parole sentences for juvenile offenders.[134] In *Kelliher*, the court acknowledged that new data and research about the stark differences between children and adults warranted a fresh lens on sentencing juvenile homicide offenders to life sentences without the possibility of parole.[135] The court's analysis attempted to strike a balance between holding such juvenile offenders responsible for their actions, while simultaneously taking into account the evolving societal opinions on life imprisonment for juveniles

127. *Id.*
128. *Id.* at 390–91.
129. *Id.* at 391–92.
130. *Id.* (emphasis added).
131. *Id.* at 392–93.
132. *Id.* at 393.
133. *Id.*
134. *Juvenile Life Without Parole (JLWOP)*, JUV. L. CTR., https://jlc.org/issues/juvenile-life-without-parole (last visited Aug. 30, 2024).
135. *Kelliher*, 873 S.E.2d at 375–76.

as well as evolving data, research, and law around the topic.[136] As of February 10, 2023, North Carolina is one of twenty-two states that has not yet banned juvenile life without parole sentences.[137]

The *Kelliher* court correctly overturned *State v. Green*.[138] In *Kelliher*, the court rejected the State's argument that *Green* controls on the issue of interpreting the North Carolina Constitution in lockstep with the Eighth Amendment: "The constitutional text, our precedents illustrating this Court's role in interpreting the North Carolina Constitution, and the nature of the inquiry used to determine whether a punishment violates the federal constitution all militate against interpreting article I, section 27 in lockstep with the Eighth Amendment."[139] The court noted its flawed reasoning in *Green* in the context of present research, which weighs in favor of providing more protection for juvenile offenders:

> [A]t the time that case was decided, the State's argument that *Green* requires us to approach article I, section 27 the same exact way today misses the mark. *Green*'s reasoning is starkly inconsistent with contemporary understandings of adolescence which have been recognized by this Court.[140]

Although it is the case that the doctrine of stare decisis has a profound influence on judicial decisions, in some instances, the operation of the doctrine only functions properly in the event that there is a mechanism for overturning precedents.[141] As Professor Earl M. Maltz correctly notes, "the perceived invulnerability of judicial interpretations of the Constitution is generally viewed as the main justification for taking a more flexible attitude toward overruling precedent . . . ."[142]

Moreover, the court was correct in holding that, taking into consideration the "unique attributes that define childhood," the Eighth Amendment to the United States Constitution and article I, section 27 of the North Carolina Constitution "impose limits on the use of our most severe punishments for juvenile offenders, even for those children who have committed the most egregious crimes imaginable."[143] However, the

136. *Id.* at 369 ("When a child commits a murder, the crime is a searing tragedy and profound societal failure. Even a child has agency, of course; we do not absolve a child of all culpability for his or her criminal conduct. But there are different considerations at issue when sentencing a juvenile offender as compared to an adult criminal defendant.").

137. *See* CAMPAIGN FOR THE FAIR SENTENCING OF YOUTH, *supra* note 2.

138. *Kelliher*, 873 S.E.2d at 383–84.

139. *Id.* at 383.

140. *Id.* at 384.

141. *See* Earl Maltz, *The Nature of Precedent*, 66. N.C. L. REV. 367, 383 (1988).

142. *Id.* at 388.

143. *Kelliher*, 873 S.E.2d at 369.

Kelliher court erred in limiting its holding to juvenile homicide offenders who have been deemed "neither incorrigible nor irredeemable."[144] When afforded the chance to categorically forbid life imprisonment without parole for youth offenders, the court fell short by declining to do so.

The majority spent countless paragraphs in its opinion discussing the differences between children and adults and why those differences render juvenile offenders categorically less morally culpable for their criminal actions and more likely to be rehabilitated.[145] Additionally, the court correctly pointed out that children exposed to childhood trauma are unique in that they are disproportionately more involved in the criminal justice system than children who do not face the same traumas.[146] Nonetheless, the court, following the relevant line of United States Supreme Court precedent, effectively held that juvenile homicide offenders who are deemed to be "incorrigible nor irredeemable" can still face life in prison without even the *possibility* of parole.[147]

However, the court does not give any guidance on what it means to be "incorrigible or irredeemable"—how do we quantify such a standard?[148] What makes a juvenile offender "incorrigible or irredeemable" under North Carolina law? How do we know for certain they will not change or be rehabilitated until *death*? Are we, as a society and as a judicial system, really in a position to say that children can be irredeemable until the day that they die?[149] After all, "the North Carolina Constitution is unique in expressly providing that '[t]he object of punishments' in North Carolina are 'not only to satisfy justice, *but also to reform the offender* and thus prevent crime . . . .'"[150]

Instead, following the *Kelliher* court's own reasoning as to why children offenders are so different from and less morally culpable than adult offenders,[151] the court should have held that a finding of

144. *Id.* at 370.

145. *See id.* at 375–81, 385–87.

146. *Id.* at 388 ("[J]uvenile offenders like Kelliher are distinct from the average person of equivalent age. They are both disproportionately likely to have experienced multiple and often severe childhood traumas, and they will spend the vast majority of their lives within the walls of a prison. Both of these circumstances can significantly reduce an individual's life expectancy.").

147. *See id.* at 370.

148. *See id.* at 405 (Newby, C.J., dissenting) ("[T]he majority ignores the difficulty in determining a defendant's incorrigibility at initial sentencing . . . . [E]ven in the worst of circumstances, is it good policy for a judge to tell a juvenile defendant, 'You are irredeemable?' What psychological impact would that statement have? Would not such a statement be cruel?").

149. *See generally* Dan Korobkin, *Podcast: Irredeemable at 14?*, ACLU (Mar. 20, 2012), https://www.aclu.org/news/criminal-law-reform/podcast-irredeemable-14.

150. *Kelliher,* 873 S.E.2d at 386 (alteration in original) (quoting N.C. Const. art. XI, § 2).

151. *Id.* at 375.

incorrigibility or irredeemability is unavailing and purposeless—joining the twenty-eight other states in the United States which have banned juvenile life sentences without parole altogether.[152] To begin, sentencing *any* juvenile offender to life without parole is cruel since "it allows retribution to completely override the rehabilitative function of criminal punishment."[153] It is essential to allow any juvenile homicide offender the opportunity to be reformed and rehabilitated, and to prove that to a court, rather than to assume they will never and can never change *for the rest of their lives*. In fact, as the *Kelliher* court explained, "[b]ecause juveniles are inherently malleable, they have a greater chance of being rehabilitated as compared to adults."[154] Moreover, the court's required finding of incorrigibility or irredeemability is explicitly and unambiguously at odds with the North Carolina Constitution's "commitment to nurturing the potential of all [the state's] children."[155] Sentencing a child to die in prison is surely inconsistent with such a commitment.

Additionally, research has proven that juvenile life without parole sentences can be extremely discriminatory, in large part due to the discretion placed in the hands of the courts. For instance, Black and Brown juveniles are disproportionately sentenced to life without parole.[156] In fact, sixty-two percent of juveniles serving life sentences without parole are African American.[157] Moreover, "while 23% of juvenile arrests for murder involve an African American suspected of killing a white person, 42% of [juvenile life without parole sentences] are for an African American convicted of this crime."[158] Alternatively, white juvenile offenders with African American victims are only half as likely to receive a juvenile life without parole sentence.[159] These statistics reveal a terrifying reality for Black and Brown juvenile offenders: one mistake as a child can, literally, cost them their entire life.

152. *See* CAMPAIGN FOR THE FAIR SENTENCING OF YOUTH, *supra* note 2.

153. *Kelliher*, 873 S.E.2d at 386.

154. *Id.*; *see also* Miller v. Alabama, 567 U.S. 460, 472 (2012) (stating that adolescence is marked by "transient rashness, proclivity for risk, and inability to assess consequences," all factors that should mitigate the punishment received by juvenile offenders).

155. *Kelliher*, 873 S.E.2d at 386 (noting two sections where this commitment is enumerated: (1) article, section 15, which states: "[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right;" and (2) article IX, section 1, which states: "[r]eligion, morality, and knowledge being necessary to good government and the happiness of mankind, schools, libraries, and the means of education shall forever be encouraged").

156. *See* Rovner, *supra* note 1.

157. *Id.*

158. *Id.*

159. *Id.*

In addition, the court erred in setting too high a threshold for when a juvenile sentence to life without parole becomes unconstitutional. The court held any sentence that requires a juvenile offender to serve more than forty years in prison before becoming eligible for parole is a de facto sentence of life without parole.[160] Despite writing an entire opinion recognizing the cruel and inhumane effects of imprisoning juveniles to life sentences without the possibility of parole, the court held that:

> Ultimately, the forty-year threshold reflects our assessment of the various relevant constitutional and penological considerations in view of the best available data regarding the general life expectancy of juveniles sentenced to extremely lengthy prison sentences, including the United States Sentencing Commission report. As noted above, determining the boundary between a lengthy but constitutionally permissible sentence and an unconstitutional de facto life without parole sentence necessarily requires an exercise of judgment. Although none of the data or other legal frameworks detailed above are determinative, these sources of information—in tandem with broader considerations of penological interests, modern understandings of juvenile development, and the evolving standards of decency that mark the progress of a maturing society—usefully inform our application of the constitutional protections at issue here.[161]

Under the *Kelliher* court's holding, some juvenile offenders may not be afforded the possibility of parole for up to forty years. Not granting the possibility for individualized review before a judge or parole board for a new sentence is arguably cruel in and of itself under article I, section 27 of the North Carolina Constitution. This extended period without the possibility of review fails to account for the potential for rehabilitation and maturation that is particularly significant in juvenile offenders, effectively ignoring their capacity for change and growth. The unique circumstances of each juvenile offender must be taken into consideration long before a forty-year prison sentence is given to a child.

The Sentencing Project recommends a twenty-year cap on sentences for most people found guilty of a crime, juveniles and adults alike.[162] The Sentencing Project's recommendation "recognizes that the age of mass incarceration in America led to extreme and overly harsh sentences that

160. *Kelliher*, 873 S.E.2d at 392–93.
161. *Id.* at 393.
162. Rovner, *supra* note 1.

are often unjust and counterproductive to public safety," and notes that "[a]ll incarceration should further the goals of rehabilitation and reintegration."[163] Extreme sentences, especially for juveniles, are antiquated, counterproductive, and inhumane.

In recent years, some states have begun to align their practices of sentencing with the Sentencing Project's recommendations. For example, in West Virginia, all juvenile criminal defendants have the opportunity for release after fifteen years with a parole hearing.[164] Moreover, Maryland, Nevada, New Jersey, and Virginia all allow juvenile offenders the possibility of release after twenty years.[165] Importantly, in *Montgomery*, the Supreme Court of the United States held that "[a]llowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment."[166] Notably, two states have extended this guidance from the Court in *Montgomery* to offenders who are older than eighteen years old. In the District of Columbia, the legislature has extended the guidance to offenders under the age of twenty-five.[167] In Washington State, courts have extended this guidance to people under the age of twenty-one.[168]

Alternatively, the dissent opinion is seemingly of the opinion that forty years in prison before becoming parole eligible is *not enough*:

> The majority's reasoning is especially troubling in cases where a defendant commits multiple murders in separate instances that occur days to months apart. Under the majority's reasoning, time served before parole eligibility seems to be capped at the same forty-year limitation no matter how many murders were committed and no matter how much time elapsed between the murders. What will keep an individual from killing any potential witnesses before he is caught since the time to be served for multiple murders is capped as the same for one murder? In the majority's view, multiple murders do not require longer time in

163. *Id.*

164. W. VA. CODE § 61-11-23(b) (2022).

165. Rovner, *supra* note 1.

166. Montgomery v. Louisiana, 577 U.S. 190, 212 (2016).

167. *See* 68 D.C. Reg. 001034 (Jan. 22, 2021) ("[T]o allow individuals who have served at least 15 years in prison, and have committed District of Columbia Code offenses on or after their 18th birthday, but before their 25th birthday, to apply to the Superior Court of the District of Columbia for sentence modification . . . .").

168. *See In re* Pers. Restraint of Monschke, 482 P.3d 276, 277 (Wash. 2021) (extending *Miller*'s prohibition on mandatory life without parole sentences to offenders up to age twenty-one).

> prison before parole eligibility. Indeed, the majority's opinion may result in more instances of trial courts exercising discretion to impose life without parole to ensure that defendants who commit multiple murders do not gain parole eligibility in the same amount of time as individuals who commit non-homicide offenses.[169]

This logic is also fatally flawed for the aforementioned reasons. Moreover, the dissent is solely focused on retributivist purposes—not reintegration or rehabilitation, which should be the focus when sentencing juvenile offenders to life in prison.

One alternative that the *Kelliher* court could have explored is the so-called "second look" statute, which would present the opportunity for juveniles to have their lengthy sentences reconsidered before serving the full term of years.[170] Adopting such a statute would address two fatally flawed sentencing problems previously discussed: (1) courts identifying juvenile offenders as "incorrigible" or "irredeemable" until death when they are merely children, and (2) racially discriminatory juvenile sentencing. Regarding the first sentencing flaw, the court predicting a juvenile offender's capacity to change during sentencing is fatally flawed because it requires courts to make a prediction when there is no indication that the future criminal behavior of juveniles can be accurately predicted at all.[171] Research has uncovered that children can have comparable risk markers yet divergent trajectories as law-abiding or violent lawbreaking adults.[172] As to the second flaw, the inaccuracy of judicial determinations when predicting future criminality in children tends to be even more drastic for Black and Brown children.[173] Second look legislation would shift the current forward-looking sentencing model to a backward-looking determination of a juvenile offender's rehabilitation—"replacing speculation with credible evidence."[174] Doing so would not only create incentives for juveniles to enroll in rehabilitative programs, but would also provide a corrective mechanism for discriminatory and/or inaccurate predictions of sentencing judges.[175]

169. State v. Kelliher, 873 S.E.2d 366, 405 (N.C. 2022) (Newby, C.J., dissenting).
170. *See generally* Kathryn E. Miller, *A Second Look for Children Sentenced to Die in Prison*, 75 OKLA. L. REV. 141, 143 (2022).
171. *Id.* at 156–57.
172. *Id.* at 157.
173. *Id.*
174. *Id.* at 158.
175. *Id.*

VI. CONCLUSION

In *State v. Kelliher*, the North Carolina Supreme Court held that it violates both the Eighth Amendment of the United States Constitution as well as article I, section 27 of the North Carolina Constitution to sentence a juvenile homicide offender who has been determined to be "neither incorrigible nor irredeemable" to a life sentence without parole.[176] The court, however, erred in holding that a child who is found to be "incorrigible" or "irredeemable" may face life in prison without the possibility of parole. The court gives no guidance on what it means to be either "incorrigible" or "irredeemable," and thus, should have eliminated the possibility of life in prison without parole for *any* juvenile offender.

To continue, the court in *Kelliher* additionally held that any sentence or any combination of sentences that require a juvenile offender to serve *more than forty years in prison* before becoming eligible for parole is "a de facto sentence of life without parole within the meaning of article I, section 27 of the North Carolina Constitution because it deprives the juvenile of a genuine opportunity to demonstrate he or she has been rehabilitated and to establish a meaningful life outside of prison."[177] However, forty years is still far too long for a child to be in prison without even the *possibility* of parole. Instead, the court should have followed the trend that other states have followed—a maximum of fifteen to twenty years before providing a juvenile offender with the opportunity to have a parole evaluation.

As one of the most vulnerable segments in society, children deserve protection and support to set them up for success. The priority in sentencing youth offenders should be rehabilitation and reentry into the community, rather than retribution. By not adopting more progressive juvenile sentencing policies used in other states, the *Kelliher* court faltered, particularly given the research cited in the case itself on developmental differences proving children's reduced moral culpability.

176. 873 S.E.2d 366, 370 (N.C. 2022).
177. *Id.*