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NOTES

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INTERNAL REVENUE CODE SECTION 453: "MONETIZING" THE TAX DEFERRED INSTALLMENT SALE OF FARMLAND AND FARM COMMODITIES

DARREN R. CARLSON, J.D.*

I. SETTING THE STAGE

The use of deferred payment reporting on sales of farmland and farm commodities has existed in various forms since its inception in 1918.[1] For farmers who use the cash method of accounting, deferred payment has been a tax strategy utilized to defer the reporting of income into the following tax year. The deferred payment of farmland sales is commonly referred to as an installment sale.[2] The deferred payment on personal property, such as grain and livestock, also qualifies for installment sale reporting.[3]

The term "monetize" refers to the "process of turning a non-revenue-generating item into cash."[4] Thus, the monetization of the deferred payment is simply converting the installment sale of farm real estate or the deferred sale of farm commodities (such as grains and livestock) into cash.[5]

The monetization of installment sales transactions has historically been a tax strategy reserved for multimillion-dollar transactions.[6] These transactions were exclusively orchestrated by the

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1. *See* RICHARD R. POWELL, POWELL ON REAL PROPERTY § 10B.04[2] at 3 (2018) (discussing the Treasury Department's promulgated regulations, which, for the first time, allowed installment reporting in essentially the same form as is currently available under I.R.C. § 453).

2. NEIL E. HARL, FARM INCOME TAX MANUAL 2 (2018).

3. *Id*. (citing Rev. Rul. 58-162, 1958-1 C.B. 234).

4. INVESTOPEDIA, https://www.investopedia.com/terms/m/monetize.asp (last visited Jan. 21, 2019).

5. *See* Scherbart v. Comm'r, 453 F.3d 987, 989 (8th Cir. 2006) (stating that the sale of farm commodity corn qualified for installment sale reporting).

6. *See* Boise Cascade Corp., Asset Purchase Agreement (Form 8-K) (July 29, 2004) (discussing Boise Cascade Corporation's sale of paper, forest products, and timberland assets for $3.7 billion dollars to Madison Dearborn Partners, Inc., with nearly $1.65 billion dollars of sale consisting of a monetized installment sale transaction for the timber properties); *see also* Santiago Solari, *Can MeadWestVaco keep up the cash flow?*, MARKET REALIST (Feb. 6, 2015, 7:07 AM https://marketrealist.com/2015/02/can-mead westvaco-keep-cash-flow (discussing MeadWestvaco's sale of forest lands to Plum Creek

formerly Big Eight accounting firms.[7] A representative sample of the Monetized Installment Sales is set forth below:

Size	Corporate Entity	Transaction Date	Auditor at Time of Transaction
$ 617 M	Kimberly Clark	9/30/1999	Deloitte & Touche LLP
$ 37.90 M	Glatfelter	2003	Deloitte & Touche LLP
$ 22.90 M	Rayonier	3/1/2004	Deloitte & Touche LLP
$ 1.47 B	Office Max	10/29/2004	KPMG
$ 43.25 M	GREIF, Inc.	5/31/2005	Ernst & Young LLP
$ 4.80 B	International Paper	4/4/2006	Deloitte & Touche LLP
$ 744 M	MeadWestvaco	12/6/2013	PricewaterhouseCoopers
$ 183 M	The St. Joe Company	3/5/2014	KPMG

The complexity and cost of structuring these transactions has historically put them beyond the reach of small to midsized farmers. However, recent standardizations of the monetization documentation have made the monetization of deferred payment transactions for the sales of farms and agricultural commodities accessible to nearly all farmers.[8] As a result, the monetization of the deferred sale is no longer reserved for multimillion and billion dollar transactions.

Traditionally, the seller structured the installment sale of farmland so that the seller received a series of equal annual payments over ten, fifteen, twenty, or thirty years. This was designed, in part, so the seller could spread out income taxes on the sale of appreciated farm assets over the life of the contract. So long as the seller received at least one payment from the sale after the close of the taxable year of the sale, the transaction was classified as an installment sale under Internal Revenue Code ("Code") § 453.[9] The farm seller only had to report and pay income taxes for the proportion of the payments received in that year relative to the overall gain on the sale.[10]

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with 860 million dollars paid with a monetized note through a secured financing arrangement to receive 774 million dollars in proceeds).

7. *See* Solari, *supra* note 6; Kimberly-Clark Corp., Annual Report (Form 10-K) (Mar. 14, 2003); Greif, Inc., Current Report (Form 8-K) (June 6, 2005); Plum Creek Timber Co., Inc., Quarterly Report (Form 10-A) (Aug. 10, 2000).

8. *See FAQ,* FARMERS FIRST TRUST, https://www.farmersfirsttrust.com/faq (last visited Jan. 21, 2019) (standardizing the process and documentation for the "Monetized Deferred Payment Transaction").

9. I.R.C. § 453(b) (2012). "The term 'installment sale' means a disposition of property where at least one payment is to be received after the close of the taxable year in which the disposition occurs." *Id*.

10. *Id*. The statute provides, in relevant part:

> For purposes of this section, the term "installment method" means a method under which the income recognized for any taxable year from a disposition is

Contrast this traditional installment sale transaction with a monetization of an installment sale transaction that is available when selling farms and farm products. For illustration purposes, this article segregates this monetization of an installment sale transaction into four steps.

A. Step One

When monetizing an installment sale, the transaction remains a sale of farmland or farm commodities with an installment contract. Thus, we have a traditional agricultural seller and purchaser with terms of the sale that appear very similar to the traditional installment sale transaction. However, the contract must provide that the purchaser may assign its obligations to make installment payments to a third-party obligor. The purchaser pays the entire purchase price less proration, fees and costs at the preliminary closing. When the obligations are assigned by the purchaser to the obligor, the obligor holds the seller's closing proceeds, which allows the obligor to complete the payment to the seller in accordance with the terms of the installment sale contract. Note that this preliminary closing results in the purchaser getting immediate title to the purchased asset or assets, but the funds are not delivered to the seller or to an agent of the seller until the end of the contract term. The funds remain under the custody of the obligor, who will make payments to the seller in accordance with the installment contract until the end of the contract term. The contract term typically runs fifteen, twenty, or thirty years.

This transaction looks somewhat similar to a like-kind exchange under Code § 1031.[11] Similar to how a qualified intermediary steps in to complete the purchase of like-kind property in a § 1031 exchange, the obligor must step into the purchaser's shoes. The documentation makes clear that the obligor is taking receipt of the funds to fulfill the installment payment contract and is stepping into the shoes of the purchaser through an assignment of the purchaser's obligation to complete the transaction pursuant to the installment contract. Immediately following the preliminary closing, the purchaser is out of the transaction and the obligor steps into the purchaser's shoes to fulfill the purchaser's obligation to complete the payments.

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that proportion of the payments received in that year which the gross profit (realized or to be realized when payment is completed) bears to the total contract price.

Id.

11. I.R.C. § 1031 (2012).

B. Step Two

Unlike traditional installment sales contracts, in the monetization of an installment contract the contract typically provides for a one-time payment of the principal balance to the seller in ten, twenty, or thirty years. In addition, the contracts provide for monthly or quarterly interest payments to the seller. To memorialize these regular interest payments and interest terms, a nonnegotiable promissory note is provided to the seller. The obligor will deposit the funds in a segregated investment account that is comprised of United States Treasury bonds. Since the obligor is required to have the purchaser's funds available to complete the transaction at the end of the contract term, it is essential that as much of the investment risk as possible be removed from the transaction. The obligor will pay the interest on the invested funds to the seller in accordance with the terms of the nonnegotiable promissory note. These funds, which are held in United States Treasury instruments, are used to secure an irrevocable standby letter of credit that is provided to the seller to guarantee performance under the installment sales contract by completing all the nonnegotiable promissory note payments.

C. Step Three

Once the nonnegotiable promissory note and the corresponding standby letter of credit are in the seller's hands, the asset (i.e., the promissory note) and the collateral (i.e., the standby letter of credit) are in place for the seller to obtain a loan for nearly the entire installment sale contract price. Since this loan is 100 percent collateralized, the seller can borrow at very favorable interest rates that are slightly above the amount that the seller would receive on the nonnegotiable promissory note. The loan, which is obtained by the seller for nearly the entire sales amount, less transaction fees and costs, is not considered sales proceeds that will trigger income taxes. Rather, the monetization (i.e., getting cash from a loan) for the entire value of the net sales price in the installment sales will receive favorable installment sale income tax reporting under Code § 453.[12]

D. Step Four

Upon the ultimate closing at the end of the installment sales contract, the transaction is closed out. The purchase proceeds held by the obligor are then delivered to the seller in exchange for return and cancellation of the nonnegotiable promissory note. In turn, the seller uses the proceeds to retire the loan with the lender. Once the transaction

12. I.R.C. § 453 (2012).

is closed, the seller will have to report gain on the sale proceeds in excess of seller's basis.[13]

The economic impact to a seller of monetizing the installment sale is substantial. The installment sale permits the sale of property used or produced in the business of farming (i.e., farmland or farm commodities) while enabling the seller to immediately receive the entire sales proceeds, less transaction costs and fees. In addition, the seller defers the income taxes over the duration of the installment sale term. On a monthly or quarterly basis, the seller has payment obligations on the loan, which are offset by the interest received from the obligor. The net interest payments paid by the seller on the loan is, in effect, the spread between the net earnings on the interest received from the obligor and the interest paid on seller's loan from the lending institution.

A monetized deferred sale of farmland or farm commodities with a deferred tax payment, unavoided, for years, even decades, gives the seller tremendous leverage and the opportunity to earn a significant return on the taxes deferred and on the sale proceeds. Since the seller does not have to pay the income taxes for the duration of the contract, the seller has the opportunity to invest the entire loan proceeds, approximately equal to the sales proceeds, instead of just investing the net after-tax proceeds over the contract term.

Another advantage to the seller of the monetized installment sale is that the seller is not subject to the credit risks of the purchaser. Thus, the seller avoids the risk of the purchaser having credit problems or backing out of the purchase if the value of the purchased asset (i.e., land or commodities) declines.

To understand how the monetized installment sale of farmland or farm commodities works, it is necessary to begin by reviewing Code § 453. Because the monetization transaction is the final step in an installment sales transaction, compliance with, and a thorough understanding of, § 453 is essential. Some historical background helps illustrate how installment sales reporting has evolved over the past 100 years. In addition, the history of § 453 makes it clear that this strategy is not new. A review of regulations, Internal Revenue Service ("IRS") memoranda, and case law discussing installment sales and their monetization is necessary to fully understand the requirements to successfully implement this tax savings strategy.

13. I.R.C. § 453(c); 26 C.F.R. § 15A.453-1(b)(1) (2018).

II. LEGISLATIVE HISTORY OF INTERNAL REVENUE CODE SECTION 453

The initial enactment of the installment sales method of reporting income occurred in 1918.[14] Instantly, farmers began using the installment sales method to report their income from the sale of farm machinery.[15] The United States Department of the Treasury promulgated regulations that provided clarity for Code § 453 in 1918.[16] The foundation of these initial regulations has existed since that time. However, in 1925, in *B.B. Todd, Inc. v. Commissioner*,[17] the United States Board of Tax Appeals declared the 1918 regulations to be invalid because of the inconsistencies with the recently passed statute.[18] Therefore, the United States Congress adopted § 212(d) of the Revenue Act of 1926 to address the concerns raised by *B.B. Todd, Inc*.[19]

For over fifty years, the installment sales method of reporting remained fairly consistent. However, the United States Congress passed the Installment Sales Revision Act of 1980, which restructured the installment sales provisions.[20] The Installment Sales Revision Act of 1980 divided the installment rules into three separate code sections.[21] Section 453 covered the sales of real estate and casual sales of personal property.[22] Section 453A covered dealer sales of personal property.[23] Section 453B covered the disposition of installment obligations.[24] The changes also reversed installment sales reporting procedures to automatically apply installment reporting to all qualified sales unless the taxpayer affirmatively opted out of the installment reporting method.[25]

The 1980 revisions, which were critical to the availability of monetized installment sales, overruled the so-called two payment rule that

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14. *See* POWELL, *supra* note 1 (discussing the Treasury Department's promulgated regulations which, for the first time, allowed installment reporting in essentially the same form as is currently available under § 453).

15. *See* DOYLE, TAXATION OF INCOME DERIVED FROM INSTALLMENT SALE, 4 TAXES 53 (1926).

16. *See* POWELL, *supra* note 1 .

17. 1 B.T.A. 762 (1925).

18. B.B. Todd, Inc. v. Comm'r, 1 B.T.A 762, 766 (1925).

19. Revenue Act of 1926 § 212(d), 44 Stat. 9.

20. The Installment Sales Revision Act of 1980, Pub. L. No. 96-471, 96th Cong. 2d Sess.

21. *Id*.

22. *See* I.R.C. § 453 (2012).

23. *See* I.R.C. § 453A.

24. *See* I.R.C. § 453B.

25. *See* The Installment Sales Revision Act of 1980, Pub. L. No. 96-471, 96th Cong. 2d Sess. (repealing the need for an affirmative election to be filed to use the installment method of reporting).

denied installment reporting when the sales price was paid in a one-time lump sum in a tax year subsequent to the year of sale.[26] Previously, in *Baltimore Baseball Club v. United States*,[27] the court concluded that the installment concept by its very name required two or more payments.[28] Now, a single payment in subsequent years is not considered payable in installments and therefore not available for installment reporting.[29]

While the 1980 repeal of the two-payment rule benefitted the taxpayer, it added a new restriction on installment method reporting for related party sales.[30] Under the 1980 revisions, the taxable gain would have to be reported if the property was resold by the related party within two years of the initial transfer.[31]

Additional restrictions were imposed by the Tax Reform Act of 1986.[32] The 1986 legislation denied installment reporting to dealers that sold property under revolving credit plans.[33] Congress reasoned who revolving credit plans generated a continuous flow of cash and did not pose a liquidity problem that might justify favorable installment method reporting.[34] These restrictions were expanded in 1988 when Congress passed the Omnibus Budget Reconciliation Act of 1987, which further restricted the installment method to dealer sales of real property.[35]

Most of the key changes in the Tax Reform Act of 1986 were contained in the repeal of old version of Section 453A and the passage of new Section 453A. It is key to monetized installment sales transactions that the new Section 453A expressly exempted property *used or produced in the trade or business of farming*.[36]

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26. *See* Balt. Baseball Club v. United States, 481 F.2d 1283, 1287 (Ct. Cl. 1973) (discussing the "two-payment rule").

27. 481 F.2d 1283 (Ct. Cl. 1973).

28. *Balt. Baseball,* 481 F.2d at 1286.

29. *Id*.

30. *See generally* Rushing v. Commissioner, 441 F.2d 593 (5th Cir. 1971), aff'd 52 T.C. 888 (1969). The court permitted the installment method of reporting on a transaction between parent and trust established for benefit of parent's children. *Id*.

31. *See* I.R.C. § 453(e).

32. Tax Reform Act of 1986*,* Pub. L. No. 99-514, 99th Cong. 2d Sess.

33. *See id*. (adding I.R.C. §453(k)(1)).

34. *See* JOINT COMM. ON TAXATION, 99TH CONG., GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1986, S. REP. NO. 490-91 (1987).

35. *See* I.R.C. § 453A (2012).

36. *See* I.R.C. § 453A(b)(3) (2012) (exempting from the restrictions of §453A "any property used or produced in the trade or business of farming. . .") (emphasis added).

III. DEFINITIONS AND STATUTORY FRAMEWORK UNDER INTERNAL REVENUE CODE SECTION 453

Subsections 453(a)-(c) of the Code lay out the definitions and general framework.[37] Subsection 453(a) states the general rule that income from an installment sale is accounted for under the installment method.[38] Subsection 453(b) defines installment sale as the disposition of property if at least one payment is received after the close of the taxable year of the sale.[39] Lastly, subsection 453(c) defines installment method as one in which the income recognized for any taxable year is the portion of the total payments received in that year.[40]

Section 453(f)(3) is essential for the viability of monetized installment sales reporting because it provides that "the term 'payment' does not include the receipt of evidences of indebtedness of the person acquiring the property (whether or not payment of such indebtedness is guaranteed by another person)."[41] Thus, this subsection provides the statutory authority for the use of a standby letter of credit as security in a monetized deferred payment transaction without treating the standby letter of credit as a payment received on the installment obligation. In applying Code § 453(f)(3) to monetized installment sales transactions, the obligor or other financial institution providing a standby letter of credit to the seller, as security for the payment and fulfillment of the installment obligation in future years, can do so without disallowing installment sales reporting.[42] Alternatively stated, even in cases where a standby letter of credit is received by the seller as collateral, the seller can still qualify for installment sales reporting of income.

It is essential in a monetized installment sale transaction that the standby letter of credit meets the IRS regulations requiring all standby letters of credit to be nonnegotiable and non-transferable, except together with the evidence of indebtedness which it secures.[43] The regulations go on to require that the letter of credit be issued by a bank or other financial institution, which serves as a guarantor of the evidence of indebtedness that is secured by the letter of credit.[44] The regulations go on to state that a letter of credit is not a standby letter

37. *See* I.R.C. § 453(a) (2012) ("General rule"); I.R.C. § 453(b) ("Installment Sale Defined"); I.R.C. §453(c) ("Installment Method Defined").

38. I.R.C. § 453(a) .

39. *See* I.R.C. § 453(b) (defining installment sale).

40. *See* I.R.C. § 453(c) (defining installment method).

41. I.R.C. § 453(f)(3) (emphasis added).

42. *See generally* I.R.C. § 453(f)(3).

43. 25 C.F.R. §15a.453-1(b)(3)(iii) (2018).

44. *Id*.

of credit if it may is drawn upon in the *absence of default* on payment of the underlying indebtedness.[45]

In evaluating the standby letter of credit in a monetized installment sales transaction, it is not uncommon that the bank letter of credit is drawn upon, even in the absence of default. If it may be drawn upon even in absence of default, the taxpayer is deemed to have taken constructive receipt. If the seller is deemed to have constructive receipt of the proceeds, the installment sales reporting (i.e. tax deferral) of the gain is not available and the seller must immediately recognize all the gain.[46]

IV. DEFINITIONS AND STATUTORY FRAMEWORK UNDER SECTION 453(A)

The Installment Sales Revision Act of 1980 was the initial enactment of Code § 453A.[47] The further restrictions under § 453A, enacted in 1988, were designed to deny the benefits of installment sale treatment on large transactions.[48] Specifically, all transactions over $150,000 were subject to further restrictions: the *interest charge exception*[49] and the *pledge rule*.[50] The pledge rule provided that if an installment obligation is pledged to secure a loan or other indebtedness, the receipt of the proceeds from the loan or other indebtedness is treated as payment on the installment obligation.[51]

In 1988 when Congress passed the Omnibus Budget Reconciliation Act of 1987 it included Code § 453A(b)(3), which exempted farm property from both the interest charge exception and the pledge rule. The exemption extends to "any property used or produced in the trade or business of *farming*, within the meaning of Code § 2032(A)(e)(4) or (5)."[52] The definition of farm includes "stock, dairy, poultry, fruit, furbearing animal, as well as truck farms, plantations, ranches, nurseries, ranges, greenhouses, and other similar structures used primarily for the raising of agricultural or horticultural commodities, orchards, and woodlands."[53]

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45. *Id*. (emphasis added). The regulations state, that "a letter of credit is not a standby letter of credit if it may be drawn upon in the absence of default in payment of the underlying evidence of indebtedness." *Id*.

46. Griffith v. Comm'r, 73 T.C. 933, 942-43 (1980).

47. Installment Sales Revision Act of 1980, Pub. L. No. 96-471 .

48. Technical and Miscellaneous Review Act of 1988, Pub. L. No. 100-647.

49. I.R.C. § 453A(c) (2012) (emphasis added).

50. I.R.C. § 453A(d) (emphasis added).

51. *See* I.R.C. §453A(d).

52. I.R.C. § 453A(b)(3). This provision cross references the definition of "farming" as defined in 26 U.S.C. §2032(A)(e)(4) or (5). *Id*.

53. I.R.C. § 453A(b)(4).

The definition of farming purposes in § 2032(A)(e)(5) has three subsections: A, B, and C.[54] These subsections cover the range of farming-related activities conducted on agricultural land. Subsection A defines farming purposes as "cultivating the soil or raising or harvesting any agricultural or horticultural commodity (including the raising, shearing, feeding, caring for, training, and management of animals) on a farm."[55] Subsection B defines "handling, drying, packing, grading, or storing on a farm any agricultural or horticultural commodity in its unmanufactured state, but only if the owner, tenant, or operator of the farm regularly produces more than one-half of the commodity so treated."[56] Finally, subsection C defines the "planting, cultivating, caring for, cutting, and preparation (other than milling) of trees for market."[57]

The express exception to the pledge rule is what allows monetized installment sales reporting to be available for property used in the trade or business of farming.[58] The availability of this pledge of cash or an irrevocable standby letter of credit to provide security for the future installment obligation is the conduit that permits the seller to secure a current loan without taking constructive or actual possession of the buyer's proceeds.

V. NOTHING NEW FOR THE INTERNAL REVENUE SERVICE

In a 2012 IRS Memorandum, the IRS discussed the application of judicial doctrines to the monetization of installment sales transactions.[59] Although the IRS Memorandum stated that it should not be cited for authority,[60] the analysis and content provide an in-depth look at how two judicial doctrines, the Substance Over Form Doctrine[61] and the Step Transaction Doctrine,[62] were dismissed within the context of a monetized installment sale transaction.

In the Memorandum, with the IRS National Tax Office concurring, the Associate Area Counsel (Large Business & International) concluded that:

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54. I.R.C. § 2032(A)(e)(5) (2012).

55. I.R.C. § 2032(A)(e)(5)(A).

56. I.R.C. § 2032(A)(e)(5)(B).

57. I.R.C. § 2032(A)(e)(5)(C).

58. *See* I.R.C. § 453(A)(b)(3)(B) (providing an express exception for property used in the trade or business of farming, as defined in I.R.C. § 2032(A)(e)(4)(5)).

59. I.R.S. G.C.M. 20123401F (Aug. 24, 2012).

60. *See id*. (stating, "[t]his advice may not be used or cited as precedent").

61. *See id*. at 2 (defining first issue as "[w]hether the Service should assert the substance over form doctrine to disregard the form of Taxpayer's Transaction and disallow the taxpayer's deferral of gain recognition on its sale of Asset").

62. *Id*.

> [T]he steps in the Transaction accomplished legitimate business purposes and the independent economic significance. Taxpayer needed to sell its Asset and structured the sale in a way that minimized its taxes. Taxpayer did not create transactions with no substance merely to obtain tax benefits. Substantively, the steps of the Transaction matched their form: an installment sale coupled with a monetization loan. The Transaction allowed Taxpayer to take advantage of tax deferral on the Asset sale, which is a permitted result under I.R.C. §§ 453 & 453A.[63]

Because the IRS utilizes the Substance Over Form doctrine and Step Transaction doctrine to disallow a desired tax outcome, both doctrines need to be considered in every monetized installment sale transaction to ensure legitimate economic significance at each step of the transaction.

A. Substance Over Form Doctrine

In *Gregory v. Helvering*,[64] the United States Supreme Court held that when a transaction has no substantial business purpose other than the avoidance or reduction of tax, the tax law will not respect the transaction.[65] Simply put, the IRS and the courts contend the tax results of a transaction are best determined by reviewing the underlying substance of the transaction rather than the formal steps or documentation of the transaction.[66] Thus, a critical and factual analysis is required to determine if the Substance Over Form doctrine converts the transaction from the documented steps into what the IRS determines substantively occurred.

The United States Court of Appeals for the Second Circuit in *Newman v. Commissioner*[67] set out four relevant criteria in applying the Substance Over Form doctrine. First, there must be an existence of a legitimate non-tax business purpose. Second, a determination of whether the transaction has changed the economic interests of the parties. Third, a determination of whether the parties dealt with each other at arm's length. Lastly, fourth, a determination of whether the parties disregarded their own form.[68]

When the Substance Over Form doctrine applies, the IRS will recast the transaction according to the underlying substance of the

63. *Id*. at 11.
64. 293 U.S. 465 (1935).
65. Gregory v. Helvering, 293 U.S. 465, 470 (1935).
66. *Id*.
67. 902 F.2d 159 (2d Cir. 1990).
68. Newman v. Comm'r, 902 F.2d 159, 163-64 (2d Cir. 1990) (citing Frank Lyon v. United States, 435 U.S. 561 (1978)).

transaction and basically ignore, and not be bound by, the mere form of the transaction. Regrettably, taxpayers are not given the same deference. Taxpayers are typically bound by their chosen legal form of transaction.[69] In practice, the Substance Over Form doctrine has been used as a sword by the IRS, but it is unavailable to be used as a shield by the taxpayer.[70]

It is essential in drafting and structuring monetized installment sales transactions that each and every one of the steps have a legitimate non-tax business purpose that changes the economic interests of the parties.[71] Further, the parties to the monetized installment sale transaction should all deal at arm's length to guard against IRS claims that the transaction should be recast because the Substance Over Form doctrine applies and the IRS should not be bound by the written documentation of the transaction.

B. Step Transaction Doctrine

The *Penrod v. Commissioner*[72] court defined the step transaction doctrine as a situation in which one "treats a series of formally separate steps as a single transaction if such steps are in substance integrated, interdependent, and focused toward a particular result."[73] In effect, the IRS will disregard the taxpayer's path and the transaction's unnecessary steps.

The courts have developed three methods to identify when the step transaction doctrine should apply: End Result Test, Interdependence Test, and Binding Commitment Test. The End Result Test evaluates whether it is evident that each of a series of steps is undertaken for the purpose of achieving the ultimate result.[74] The Interdependence Test requires that each step be so interdependent that the completion of an individual step would be meaningless without the completion of the remaining steps. Alternatively stated, the step transaction doctrine applies if "the steps are so interdependent that the legal relations created by one transaction would have been fruit-

69. *See, e.g.*, Comm'r v. Danielson, 378 F.2d 771, 777 (3d Cir. 1967), *cert. denied*, 389 U.S. 858 (1967); Matter of Insilco Corp., 53 F.3d 95, 98-100 (5th Cir. 1995).

70. *See Danielson*, 378 F.2d at 777; *see also Insilco Corp*., 53 F.3d at 98-100.

71. *See* Boca Investerings P'ship v. United States, 167 F. Supp. 2d 298, 388 (D.D.C. 2001), *rev'd,* 314 F.3d 625 (D.C. Cir. 2003) (holding that each sale or purchase must have some purpose beyond simply tax avoidance, and must have at least a reasonable possibility of profits or some form of economic substance); *see also* ACM P'ship v. Comm'r, 157 F.3d 2331 (3d Cir. 1998) (disallowing an installment sale because the transaction lacked economic substance when it was solely entered into for purposes of generating a loss).

72. 88 T.C. 1415 (1987).

73. Penrod v. Comm'r, 88 T.C. 1415, 1428 (1987).

74. King Enters. v. United States, 418 F.2d 511, 516 (Ct. Cl. 1969)

less without a completion of the series."[75] The Binding Commitment Test requires an evaluation of whether, at the time the first step is entered into, there is a legally binding commitment to complete the remaining steps.[76]

Two additional factors have developed from case law to determine whether to invoke the step transaction doctrine, the intent of the taxpayer and the temporal proximity of the separate steps. Excluding cases involving a legally binding agreement, if each of a series of steps has independent economic significance, the transactions should not be stepped together.[77]

VI. THE DOCUMENTS FOR A MONETIZED INSTALLMENT SALE TRANSACTIONS

The starting point for drafting a monetized installment sale transaction is the installment sales contract. For the installment sale of real estate, the contract will contain standard real estate provisions similar to the traditional land contract. However, for the monetization to be successfully executed, the installment contract must contain language permitting the assignment of the buyer's performance and obligations to a third-party obligor.

The installment sales contract should clearly state that the transaction is an installment sale between the buyer and seller, providing that the buyer will make periodic payments that are intended to qualify for the installment sales treatment under Code § 453 for the benefit of the seller. A savings clause stating that the obligor and the seller may make reasonable modifications or revisions as necessary to confirm the seller's intention to obtain § 453 income tax treatment is an appropriate addition to the installment sales contract. The savings clause will be beneficial if future tax law changes cast doubt on an element in the transaction.

The transition of the buyer's obligations to the third-party obligor is accomplished by an assignment. In addition to standard assignment provisions, the assignment should include the direction that the closing agent will deliver the net purchase price for the future installment payments to the third-party obligor. The obligor will, in turn, agree to make the installment payments and fulfill the buyer's obligations as set forth in the Installment Sales Contract.

At the initial closing, when the assignment is delivered, and the buyer delivers the full installment purchase amount to the third-party obligor, the deed or bill of sale is delivered to the buyer. Typical real

75. Redding v. Comm'r, 630 F.2d 1169, 1177 (7th Cir. 1980).
76. Comm'r v. Gordon, 391 U.S. 83, 96 (1968).
77. Reef Corp. v. Comm'r, 368 F.2d 125, 133 (5th Cir. 1966).

estate prorations, title insurance, title costs, and other recording fees are all reflected on the initial closing statement. The closing statement should clearly reflect the payment to the obligor and the closing statement status as merely preliminary due to the transaction's structure as an installment sale.

At the initial closing, the seller, purchaser, and obligor jointly execute an "Assignment and Assumption of Nonnegotiable Promissory Note," which confirms the responsibilities of the substitute obligor. By reference, this document incorporates the initial installment sales contract and the nonnegotiable promissory note, which set forth the installment payment schedule. Sometimes the nonnegotiable promissory note is also referred to by attorneys as an installment note. Regardless of terminology, it is essential that the installment note be nonnegotiable. If the installment note is negotiable, the tax deferral under Code § 453 fails because the seller is treated as receiving cash, as a negotiable promissory note can by its very terms be negotiated for cash.[78]

The obligor must be an actual third party and not a mere agent of the seller.[79] The cases make it clear that the seller cannot directly or indirectly have control over the proceeds from the sale.[80] However, the mere substitution or change of one third-party obligor for a new or different obligor in the future will not disqualify installment sale tax treatment.[81]

For a monetized installment sale, once the initial closing is complete and the funds are in the custody of the obligor, the loan phase of the transaction is the distinct next step. The loan portion is primarily comprised of the letter of credit and loan agreement.

A bank or financial institution[82] issues an irrevocable standby letter of credit that can only be drawn upon in the event of default.[83] This standby letter of credit is the collateral that makes the loan relatively risk-free. It is backed by the buyer's cash that is deposited with the obligor.

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78. *See* Champy v. Comm'r, 68 T.C.M (CCH) 242 (T.C. 1994) (disallowing installment method when promissory note given by the buyer in the transaction was payable on demand and not an installment notice).

79. *See* Scherbart v. Comm'r, 453 F.3d 987 (8th Cir. 2006) (confirming that the disposition of farm commodity by a co-op would qualify for installment sale reporting because the co-op sold the commodities as an agent for the farmer).

80. Rushing v. Comm'r, 441 F.2d 593, 598 (5th Cir. 1971).

81. *See generally* Wynne v. Comm'r, 47 B.T.A. 731 (1942) (stating that the substitution of a new obligor in the place of the former obligor did not require immediate recognition of the deferred gain).

82. *See* 25 C.F.R. § 15a.453-1(b)(3)(iii) (2018) (requiring a bank or financial institution as issuer).

83. *See* 25 C.F.R. § 15a.453-1(b)(3)(iii) (stating that a letter of credit cannot be drawn upon in the absence of default).

The standby letter of credit has been one of the problem areas in monetizing the installment sale. The IRS acknowledges that a standby letter of credit can be used as the collateral to successfully monetize an installment sale.[84] Furthermore, Code § 453(f)(3) provides the statutory authority for the use of a standby letter of credit as security in a monetized deferred payment transaction without it being reclassified as a payment received on the installment obligation.[85] However, the limitations and conditions contained in the standby letter of credit should match the requirements enumerated in IRS regulations.[86]

An experienced and knowledgeable obligor will have relationships with lenders. These relationships put the obligor in the best position to negotiate and secure the loan for the seller. This is the point when the obligor's contacts and relationships should assist the seller in securing favorable loan terms. Frankly, this is most likely where a good obligor adds significant value to the overall transaction. Without the obligor's contacts, finding a lender that has the knowledge to appreciate that the transaction is relatively risk-free and should carry a low interest rate is difficult. Many lenders do not fully understand monetized installment sale transactions, thus they are not willing to commit to long-term loans with rates that are often at or below prime.

Once the third-party obligor provides the irrevocable standby letter of credit and the nonnegotiable promissory note to the seller, the seller can proceed with obtaining the loan agreement with a lender. The lender will require a pledge agreement in which the borrower/seller (i.e. pledgor) is pledging to lender (pledgee) a security interest in certain assets of the pledgor. Namely, the pledgor or borrower is granting a security interest in its collateral, which is the standby irrevocable letter of credit. When working with a knowledgeable third-party obligor the pledgor can secure the loan agreement and negotiate the loan terms for the borrower/seller.

When the loan portion of the transaction is closed the seller will, in effect, have received approximately ninety-five percent of the sale proceeds in the form of a loan. The five percent is an estimate of the fees and costs for the obligor and lender fees that are paid at the time of the installment sale's initial closing. The periodic interest pay-

84. I.R.S. Tech. Adv. Mem. 200105061 (2000). The IRS approved installment sale where buyer's installment obligation was secured by standby letter of credit.

85. I.R.C. § 453(f)(3).

86. 25 C.F.R. §15a.453-1(b)(3)(iii). These regulations state that "a letter of credit is not a standby letter of credit if it may be drawn upon in the absence of default in payment of the underlying evidence of indebtedness." The regulations require all standby letters of credit to be nonnegotiable and non-transferable except together with the evidence of indebtedness which it secures, and also to be issued by a bank or other financial institution.

ments are received by the seller from the obligor who is paying interest on the buyer's proceeds held and invested by the obligor. In turn, the seller/borrower will make periodic interest payments to the lender from the proceeds received by the seller/borrower from the obligor.

In the final step of the transaction it is recommended to have an attorney knowledgeable about Code § 453 provide the seller with an attorney's tax opinion. This opinion provides a basis to avoid potential penalties for underpayment of income tax if the transaction is not structured properly. In addition, tax opinions are typically issued only by law firms that are conversant with the tax matters they are reviewing. As such, the attorney's tax opinion does not guarantee success, but it does provide additional assurance that the steps and documentation for the tax deferral under § 453 have been satisfied.

The monetization of the installment sale contract provides sellers of farm realty and farm commodities with the advantages of immediate receipt of cash and deferral of the income taxes for decades. It also permits the seller to avoid the financial risks associated with long-term contractual relationships with buyers that are inherent in traditional installment sale transactions. As sellers of farmland and farm commodities are looking for methods to liquidate these types of assets without immediate income taxation, the monetized installment sale transaction will become a standard in the agricultural community.

DE JURE EQUATES TO DE FACTO: THE UNCONSTITUTIONALITY OF LIFE-WITHOUT-PAROLE SENTENCING FOR NON-HOMICIDAL JUVENILE OFFENDERS

I. INTRODUCTION

The Eighth Amendment to the United States Constitution states that the government shall not inflict cruel and unusual punishment.[1] The United States Supreme Court addressed juvenile sentencing in relation to the Eighth Amendment repeatedly from 2005 to 2012.[2] The United States Courts of Appeals for the Third and Ninth Circuits followed suit, expanding the findings of the Supreme Court.[3] However, not all circuits agree on de jure versus de facto life sentencing for non-homicidal juvenile offenders.[4] Regarding juvenile punishment, circuit courts' opinions vary as to what constitutes a de facto life sentence and to what degree the Supreme Court's decisions bind the lower courts.[5]

In 2014, the United States Court of Appeals for the Sixth Circuit determined that sentencing a non-homicidal juvenile offender to eighty-four years' imprisonment did not violate the Eighth Amendment pursuant to Supreme Court precedent.[6] In *Goins v. Smith*,[7] the

1. U.S. CONST. amend. XIII.

2. *See* Roper v. Simmons, 543 U.S. 551, 578-79 (2005) (holding that courts cannot sentence juveniles to the death penalty); *see also* Graham v. Florida, 560 U.S. 48, 82 (2010) (finding that courts cannot sentence non-homicidal juvenile offenders to life imprisonment without the possibility of parole); Miller v. Alabama, 567 U.S. 460, 489 (2012) (holding that courts cannot sentence juveniles to a mandatory minimum imprisonment of life without the possibility of parole).

3. *See Graham*, 560 U.S. at 48 (holding that courts cannot sentence non-homicidal juvenile offenders to life imprisonment without the possibility of parole); United States v. Grant, 887 F.3d 131, 153 (3d Cir. 2018) (finding that *Graham* applied to de facto and de jure non-homicidal juvenile life sentences); Moore v. Biter, 725 F.3d 1184, 1186 (9th Cir. 2013) (holding that *Graham* applied retroactively to juvenile cases sentenced prior to its decision).

4. *Compare* United States v. Jefferson, 816 F.3d 1016 (8th Cir. 2016) (finding that a 600-month sentence for a crime the defendant committed at age 17 was constitutional), *with* Bunch v. Smith, 685 F.3d 546 (2012) (holding that a non-homicidal juvenile offender's 89-year sentence was constitutional).

5. *See Grant*, 887 F.3d at 149-50 (determining that courts must take into account the juvenile offender's life expectancy); *see also Moore*, 725 F.3d at 1191 (finding that *Graham* blatantly applied to all non-homicidal juvenile offender cases); *Bunch*, 685 F.3d at 552 (explaining that the circuits' "split demonstrates that *Bunch's* expansive reading of *Graham* is not clearly established"); Goins v. Smith, 556 F. App'x 434, 438-39 (6th Cir. 2014) (arguing that *Graham* does not apply to a "consecutive, fixed-term sentence for multiple offenses").

6. *Goins*, 556 F. App'x at 440 (6th Cir. 2014).

7. 556 F. App'x 434 (6th Cir. 2014).

Sixth Circuit reasoned that because the defendant was eligible for parole after forty-two years, this did not create a life sentence for the sixteen-year-old defendant.[8] The Sixth Circuit also found that Supreme Court precedent did not apply to Goins' case, as Goins was given a meaningful opportunity for parole.[9]

First, this Note will present the facts and holdings of *Goins*.[10] Then, this Note will explain the judicial history of juvenile sentencing leading to *Goins*.[11] Finally, this Note will argue that the Sixth Circuit erred in upholding the lower court's de facto life sentence for a nonhomicidal juvenile offender, which is prohibited by the Eighth Amendment.[12]

II. FACTS AND HOLDING

In *Goins v. Smith*,[13] juvenile offenders James Goins and Chad Barnette attacked eighty-four-year-old William Sovak at Sovak's home in Youngstown, Ohio.[14] Goins and Barnette forced Sovak inside, hit and kicked him repeatedly, shoved him downstairs to the basement, and took a set of keys from the house.[15] They then locked Sovak in his fruit cellar, where he was later discovered by a neighbor.[16] The attack on Sovak by Goins and Barnette left Sovak severely injured.[17]

Later that same day, Goins and Barnette broke into the house of Louis and Elizabeth Luchisan.[18] The assailants carried a sawed-off shotgun and threatened to kill the Luchisans if the married couple did not give the perpetrators money.[19] The assailants hit Mr. Luchisan on the head with a plate and Mrs. Luchisan on the head with a telephone.[20] They stole the keys to Mr. Luchisan's Chevy Malibu, the car itself, and a television from the home.[21]

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8. *Id*. at 439-440.
9. *Id*. at 440.
10. *See infra* notes 13-57 and accompanying text.
11. *See infra* notes 58-154 and accompanying text.
12. *See infra* notes 155-210 and accompanying text.
13. No. 4:09-CV-1551, 2012 U.S. Dist. LEXIS 102418, at *2 (N.D. Ohio July 24, 2012).
14. Goins v. Smith, No. 4:09-CV-1551, 2012 U.S. Dist. LEXIS 102418, at *2 (N.D. Ohio July 24, 2012) [hereinafter *Goins IV*]. Both juveniles were 16-years-old at the time of the incident, January 29, 2001. *Goins IV*, 2012 LEXIS 102418, at *2.
15. *Id*.
16. *Id*.
17. *Id*. Sovak suffered from multiple broken bones and a punctured lung. *Id*.
18. State v. Goins, No. 02 CA 68, 2005 LEXIS 1439, at *3 (Ohio Ct. App. Mar. 21, 2005) [hereinafter *Goins I*] (stating Louis was 64 and wheelchair-bound at the time).
19. *Goins I*, 2005 LEXIS 1439, at *3.
20. *Id*.
21. *Id*. at *3-4. The Luchisans gave the assailants $167. *Id.* at *3.

As a result of these incidents, an Ohio state court convicted Goins of attempted murder, aggravated burglary, aggravated robbery, kidnapping, felonious assault, and receiving stolen property.[22] The Mahoning County Court sentenced Goins to consecutive prison terms for the various offenses, totaling eighty-five years and six months.[23]

Goins filed a writ of habeas corpus, alleging that the Mahoning County Court of Common Pleas did not have jurisdiction over him and therefore unlawfully detained Goins.[24] The Court of Appeals of Ohio, Seventh District, Mahoning County denied Goins' petition for writ of habeas corpus, as Goins was not unlawfully or wrongfully detained in the Mahoning County Jail.[25]

The Ohio Court of Appeals modified the Mahoning County Court's decision regarding sentencing.[26] The court modified two of Goins' sentences, aggravated robbery and receiving stolen property, to run concurrently with the remaining sentences.[27] Due to these sentencing modifications, Goins' prison sentence was reduced to seventy-four years.[28]

The Ohio Supreme Court vacated and remanded the lower courts' decisions for resentencing under *State v. Foster*[29] upon appellate review.[30] In *Foster*, the Ohio Supreme Court found judges' abilities to act as factfinders to permit harsher sentencing in jury trials was unconstitutional.[31] Therefore, the Ohio Supreme Court stated that Ohio's felon-sentencing practices violated the Sixth Amendment of the United States Constitution.[32] As such, any pending cases on direct review at the time of the *Foster* decision and subsequent cases required resentencing in conjunction with *Foster*.[33]

On remand, the trial court resentenced Goins to an aggregate term of eighty-four-years' imprisonment.[34] The Ohio Court of Appeals

22. *Id*. at *1. Four of the counts included gun specifications. *Id*. at *6.
23. *Id*. at *1.
24. Goins v. Wellington, No. 01 CA 208, 2001 LEXIS 5816, at *1 (Ohio Ct. App. Dec. 18, 2001).
25. *Id*. at *20.
26. *Goins I*, 2005 LEXIS 1439, at *1-2.
27. *Id*. at *60, *3.
28. *Id*. at *61.
29. 845 N.E.2d 470 (Ohio 2006).
30. Goins v. Smith, 556 F. App'x 434, 435 (6th Cir. 2014) [hereinafter *Goins V*].
31. *Goins IV*, 2012 LEXIS 102418, at *5. The court's ruling "sever[ed] as unconstitutional portions of Ohio's sentencing statutes permitting harsher sentences based on facts found by the sentencing judge rather than the jury and giving trial courts discretion to impose any sentence within the statutory range without first making findings." *Id*.
32. State v. Foster, 845 N.E.2d 470, 478-79 (Ohio 2006).
33. *Foster*, 845 N.E. 2d at 499.
34. *Goins V*, 556 F. App'x at 435.

affirmed the trial court's sentence.[35] The court stated that the sentence did not constitute cruel and unusual punishment as defined by case law or as outlined by the Eighth Amendment of the United States Constitution.[36] Goins argued his sentence was effectively life-without-parole and that Ohio reserved such sentences solely for murderers and rapists of victims younger than age thirteen.[37] The court rejected Goins' proportionality argument, stating that the punishment's harshness fit the severity of the crime.[38] Goins also argued the court burdened Ohio's resources by sentencing Goins to the equivalent of a life sentence.[39] The court rejected this argument, reasoning that the public benefited from having a violent offender incarcerated, despite the depletion of the state's resources.[40]

Thereafter, the Ohio Supreme Court denied Goins leave to appeal.[41] Subsequently, on July 7, 2009, Goins filed a habeas corpus petition under 28 U.S.C. § 2254, seeking relief from his convictions.[42]

Upon filing a habeas corpus petition in the United States District Court for the Northern District of Ohio, Eastern Division, Goins claimed his lengthy sentence violated his constitutional right to avoid cruel and unusual punishment.[43] The magistrate judge reiterated the Ohio Court of Appeals' analysis, stating that Goins' argument ignored the severity of his crime, which was matched fairly by the harshness of the court's punishment.[44] The magistrate judge recommended Goins' petition be dismissed without further review because no valid constitutional claims existed.[45]

Goins filed an objection to the magistrate judge's imprisonment recommendation, arguing that the judge's eighty-four-year sentence violated the Eighth Amendment.[46] Goins also asserted the recommendation did not follow the United States Supreme Court's decision in *Graham v. Florida,*[47] where the Court held life imprisonment for non-homicidal juvenile offenders unconstitutional.[48] Goins argued

35. State v. Goins, No. 06-MA-131, 2008 Ohio App. LEXIS 985, at *17 (Ohio Ct. App. Mar. 10, 2008) [hereinafter *Goins II*].
36. *Goins II*, 2008 LEXIS 985, at *10.
37. *Id*. at *12.
38. *Id*. at *14-15.
39. *Id*. at *15.
40. *Id*. at *17.
41. *Goins V*, 556 F. App'x at 435.
42. *Id*.
43. Goins v. Smith, No. 4:09-CV-1551, 2010 U.S. Dist. LEXIS 144717, at *22-23 (N.D. Ohio Feb. 11, 2010) [hereinafter *Goins III*].
44. *Goins III*, 2010 LEXIS 144717, at *26.
45. *Id*. at *30.
46. *Goins IV*, 2012 LEXIS 102418, at *7.
47. 560 U.S. 48 (2010).
48. *Goins IV*, 2012 LEXIS 102418, at *7.

that an eighty-four-year imprisonment denied him any worthwhile release since he would be 100-years-old when he completed his sentence.[49] Nonetheless, upon reviewing Goins' habeas corpus petition, the district court adopted the magistrate judge's recommendations.[50] The district court stated that Goins was not actually sentenced to life imprisonment, so *Graham* did not apply to his case.[51] The court explained that Goins could pursue release after forty-two to forty-five years, thereby desynchronizing his case from *Graham*.[52] Since Goins could not rely on *Graham* and could not prove his sentence defied any case law, the court found his argument was without merit and that his petition must be denied.[53]

The United States Court of Appeals for the Sixth Circuit affirmed the district court's sentence of eighty-four years for the crimes Goins committed when he was sixteen-years-old.[54] The Sixth Circuit affirmed the district court's finding that *Graham* did not apply because Goins' sentence was not life imprisonment without parole.[55] Finally, the court stated that Goins' ability to gain parole stopped the court from determining his sentence in alignment with *Graham*.[56] Goins subsequently filed a writ of certiorari, which the United States Supreme Court denied.[57]

III. BACKGROUND

A. *Roper v. Simmons*: Creating the Standard of Cruel and Unusual Punishment for Juveniles

In *State v. Simmons*,[58] the Missouri Supreme Court reviewed the sentence seventeen-year-old Christopher Simmons received following his murder of Shirley Crook on September 9, 1993, in Jefferson County, Missouri.[59] Simmons and two friends broke into Crook's home, bound and kidnapped Crook, and threw her off a bridge into the Meramec River to drown.[60] The State charged Simmons with first-

49. *Id*. at *16. Goins believed the sentence "deprive[d] him of any meaningful opportunity to obtain release during his natural life." *Id*.
50. *Id*. at *19.
51. *Id*. at *17.
52. *Id*. at *18.
53. *Id*. at *19.
54. *Goins V*, 556 F. App'x at 435.
55. *Id*. at 439.
56. *Id*. at 440.
57. *Goins v. Lazaroff*, 135 S. Ct. 144 (2014).
58. 944 S.W.2d 165 (Mo. 1997).
59. State v. Simmons, 944 S.W.2d 165, 169 (Mo. 1997) [hereinafter *Simmons I*]. Simmons' co-conspirators were ages 15 and 16 at the time of the crime. Roper v. Simmons, 543 U.S. 551, 556 (2005) [hereinafter *Simmons III*].
60. *Simmons I*, 944 S.W.2d at 169-70.

degree murder, kidnapping, burglary, and stealing, but the latter three charges were severed for the trial.[61] The jury of the Circuit Court of Jefferson County convicted Simmons of first-degree murder and sentenced him to death, which Simmons subsequently appealed.[62] The Missouri Supreme Court affirmed the circuit court's decision.[63] In considering the aggravating circumstances of the situation, the supreme court found the circuit court's decision to implement the death penalty proportional to similar cases.[64]

Simmons filed a writ of habeas corpus, arguing that his sentence constituted cruel and unusual punishment.[65] Simmons argued that a national consensus existed in barring juveniles from receiving the death penalty.[66] An international consensus against executing juveniles evolved as well.[67] The Missouri Supreme Court also recognized juveniles to be less culpable for their crimes than adults.[68] Based on the national and international consensus, infrequency of the juvenile death penalty, legislative action toward its abolition, and lack of justification for keeping it in place, the Missouri Supreme Court abolished the death penalty for juvenile offenders.[69] Consequently, the court modified Simmons' sentence to life imprisonment without the possibility of release.[70]

The United States Supreme Court subsequently granted certiorari.[71] The Court upheld the Missouri Supreme Court's decision that sentencing juveniles to death constituted cruel and unusual punishment.[72] In his majority opinion, Justice Kennedy explained how the Court often used evolving standards of decency in making decisions.[73] The Supreme Court previously held in *Thompson v. Oklahoma*[74] that

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61. *Id*. at 170.
62. *Id*. at 170-71.
63. *Id*. at 191.
64. *Id*. The aggravating circumstances for Simmons included: "that Simmons committed the murder for pecuniary gain, section 565.032.2(4); that Simmons committed the murder to avoid a lawful arrest, section 565.032.2(10); and that the murder involved depravity of the mind." *Id*.
65. State ex rel. Simmons v. Roper, 112 S.W.3d 397, 399 (Mo. 2003) [hereinafter *Simmons II*].
66. *Simmons II*, 112 S.W.3d at 399. At the time of this decision, 18 states barred execution of juveniles, and 12 states barred the death penalty altogether. *Id*.
67. *Id*. at 402. Germany, France, Portugal, Canada, Spain, Italy, Australia, the United Kingdom, and Switzerland had all abolished juvenile death sentences, with only a few extreme criminal exceptions. *Id*.
68. *Id*.
69. *Id*. at 413.
70. *Id*.
71. *Simmons III*, 543 U.S. at 560.
72. *Id*.
73. *Id*. at 561.
74. 487 U.S. 815 (1988).

juvenile offenders under age sixteen could not be executed.[75] However, in *Stanford v. Kentucky*,[76] the Supreme Court held that the State could legally execute juvenile offenders over age fifteen.[77] Since *Simmons* was decided over a decade after *Thompson* and *Stanford*, Justice Kennedy asserts that the standards of decency had evolved regarding the executions of juvenile offenders under eighteen.[78] Justice Kennedy adopted a similar rationale to the Missouri Supreme Court and recognized that the majority of states had abolished the juvenile death penalty, leading to a national consensus on the matter.[79] The Court heavily emphasized that the United States stood alone in the world in sanctioning the juvenile death penalty.[80]

B. *Graham v. State*: The Supreme Court Defines Juvenile Life Imprisonment Without the Possibility of Parole as Cruel and Unusual Punishment

In *Graham v. State*,[81] the Florida First District Court of Appeals held that a juvenile defendant's life imprisonment without the possibility of parole did not violate the Eighth Amendment of the United States Constitution.[82] The juvenile, Terrance Graham, and two co-defendants committed multiple offenses, including attempted armed robbery and armed burglary with assault or battery.[83] The judge for the Circuit Court for Duval County determined that because Graham had committed prior serious offenses, the court needed to focus on protecting the community from his future actions by sentencing him to life imprisonment without the possibility of parole.[84]

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75. *Simmons III*, 543 U.S. at 561.

76. 492 U.S. 361 (1989).

77. *Simmons III*, 543 U.S. at 562.

78. *Id*. at 568.

79. *Id*.

80. *Id*. at 575. At the time of the opinion, only "Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China" had executed juveniles since 1990. *Id*. at 577.

81. 982 So. 2d 43 (Fla. Dist. Ct. App. 2008).

82. Graham v. Florida, 560 U.S. 48, 75 (2010) [hereinafter *Graham II*].

83. Graham v. State, 982 So. 2d 43, 45 (Fla. Dist. Ct. App. 2008) [hereinafter *Graham I*]. The incident occurred in Jacksonville, Florida. *Graham II*, 560 U.S. at 53. Graham was 17-years-old at the time of the offenses, while the co-defendants were each 20-years-old. *Id*. at 54.

84. *Graham I*, 982 So. 2d 43, 46 (Fla. Dist. Ct. App. 2008). Graham's prior offenses included attempted armed robbery and armed burglary with assault or battery. *Id*. at 45. Graham "pled guilty to [those] offenses in return for the court withholding adjudication and three years probation with the condition that he serve twelve months in a pretrial detention facility." *Id*. The offenses under scrutiny in *Graham* occurred less than six months after Graham's release from prison. *Id*.

On appeal, Graham argued the court's sentencing did not follow the *Roper v. Simmons*[85] standard.[86] Graham contended that the rationale used in *Roper* was applicable to juvenile cases in which offenders received life imprisonment without the possibility of parole.[87] The Florida First District Court of Appeals flatly rejected these claims, stating that the death penalty was inherently different from life imprisonment without the possibility of parole.[88] Instead, the court focused on the proportionality of the crimes and the attached sentences.[89] The court reasoned that the United States Supreme Court never rationalized a term-of-years sentence as being unconstitutional, while multiple jurisdictions held juvenile life sentences to be constitutional.[90] The court also recognized that imprisonment's goal of rehabilitation was extremely unlikely due to Graham's criminal history and the intensely violent nature of his crimes.[91] Thereafter, the Florida Supreme Court denied review, but the United States Supreme Court granted certiorari to review the case regarding a potential Eighth Amendment violation.[92]

The Supreme Court held that courts cannot sentence non-homicidal juvenile offenders to life imprisonment without the possibility of parole.[93] The Court reversed and remanded the Florida appellate court's decision.[94] The Court stated that release does not need to be guaranteed to the offender, but there must be an opportunity for it.[95] The three classifications the Court used to determine if the sentence was excessive were the circumstances of the case, legislative standards, and the Court's understanding of the Eighth Amendment.[96]

Regarding the legislative standards, the Court rejected the state's argument that no national consensus existed regarding juvenile life

85. 543 U.S. 551 (2005).

86. *Graham I*, 982 So. 2d at 46.

87. *Id*. at 46-47.

88. *Id*. at 47.

89. *Id*.

90. *Id*. at 48. *See* People v. Miller, 781 N.E.2d 300, 302-08 (Ill. 2002) (stating that juveniles guilty of particularly heinous crimes may be sentenced to life imprisonment without parole); Tate v. State, 864 So. 2d 44, 54 (Fla. Dist. Ct. App. 2003) (determining that sentencing a twelve-year-old to life imprisonment without the possibility of parole did not violate the Eighth Amendment due to the brutality his offense); People v. Launsburry, 551 N.W.2d 460, 463-64 (Mich. Ct. App. 1996) (finding that life imprisonment without the possibility of parole was not considered violative of the Eighth Amendment when the convicted juvenile committed murder).

91. *Graham I*, 982 So. 2d at 52-53.

92. *Graham II*, 560 U.S. at 58.

93. *Id*. at 82.

94. *Id*.

95. *Id*.

96. *Id*. at 59-61.

imprisonment.[97] At the time of the opinion, twenty-six states with authorization to do so had not imposed life sentences on juveniles for non-homicidal crimes.[98] Additionally, the Court utilized its rationale from *Roper* to state that a juvenile's actions should not be held to the same level of culpability as an adult who committed the same offenses.[99] The Court noted strong similarities existed between the death penalty and life imprisonment.[100] Both required massive deprivations of personal liberties and denied the convicted of hope or need for personal betterment.[101]

The Court contended that the severity of life imprisonment without parole for a juvenile far exceeded that of life imprisonment without parole for an adult.[102] The potential penological justification offered for this sentence did not outweigh the juvenile's limited culpability plus the severity of the sentence.[103] Therefore, the Court held that sentencing juveniles to life imprisonment without the possibility of parole violated the cruel and unusual punishment clause of the Eighth Amendment.[104]

C. *Miller v. Alabama*: The Supreme Court Finds Juvenile Mandatory Minimums of Life Imprisonment Unconstitutional

In *Miller v. Alabama*,[105] fourteen-year-old Evan Miller and his friend went to Miller's neighbor Cole Cannon's house to smoke marijuana.[106] Miller attempted to take $300 from Cannon, and a struggle ensued.[107] Miller beat Cannon with a baseball bat and lit multiple fires to cover up the evidence of his crime, causing Cannon's death.[108] Though Miller was a juvenile during the commission of his crimes, the District Attorney successfully transferred Miller's case out of juvenile court and charged Miller as an adult with murder in the course of

97. *Id*. at 63.
98. *Id*. at 64. Of the 123 inmates in the US sentenced as juveniles to life without parole, 77 of them were in Florida at the time of the opinion. *Id*.
99. *Id*. at 68. In his majority opinion, Justice Kennedy stated that "compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability." *Id*. at 69.
100. *Id*. at 69-70.
101. *Id*.
102. *Id*. at 70 (arguing that "a 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only").
103. *Id*. at 71. The Court's four possible penological justifications included "retribution, deterrence, incapacitation, and rehabilitation." *Id*. at 70.
104. *Id*. at 79.
105. 567 U.S. 460 (2012).
106. Miller v. Alabama, 567 U.S. 460, 468 (2012). The two boys also played drinking games with the neighbor at that time. *Miller*, 567 U.S. at 468.
107. *Id*. at 468.
108. *Id*.

arson.[109] The jury convicted Miller, who was subsequently sentenced to life without parole.[110] The Alabama Court of Criminal Appeals affirmed, and the Alabama Supreme Court denied review.[111]

However, the United States Supreme Court reversed the lower courts' decisions.[112] The Court's main point of contention in *Miller* was the mandatory minimum sentence of life without the possibility of parole for a juvenile offender.[113] The Court reasoned that mandatory sentences did not allow the juvenile's attendant circumstances to be adequately assessed when creating a sentence, thereby denying a right *Graham v. Florida*[114] expressed.[115] Ignoring these circumstances would be equivalent to treating a child as an adult.[116]

The Court, in considering Miller's minimal criminal history, abusive and drug-laden familial history, and chronic suicidal history, believed that the district court did not adequately consider these factors in sentencing Miller.[117] At the time of the *Miller* decision, twenty-nine states mandated juvenile life-without-parole sentences for certain crimes.[118] However, the Court found this precedent irrelevant, as the Court outlawed thirty-nine states' sentencing practices in *Graham*.[119]

D. *Moore v. Biter*: The Ninth Circuit Finds Juvenile Sentences Equivalent to Life Imprisonment Unlawful

In *Moore v. Biter*,[120] the United States Court of Appeals for the Ninth Circuit reviewed the sentence of Roosevelt Brian Moore, a sixteen-year-old juvenile, who harmed four women throughout five weeks in 1991.[121] The jury found Moore guilty of multiple offenses, including forcible rape and robbery.[122] However, each of Moore's con-

109. *Id*. at 468-69. "That crime . . . carries a mandatory minimum punishment of life without parole." *Id*. at 469.
110. *Id*. at 469.
111. *Id*.
112. *Id*. at 489.
113. *Id*. at 474.
114. 560 U.S. 48 (2010).
115. *Miller*, 567 U.S. at 476-77.
116. *Id*. at 477.
117. *Id*. at 478-79.
118. *Id*. at 482.
119. *Id*. at 483.
120. 725 F.3d 1184 (9th Cir. 2013).
121. Moore v. Biter, 725 F.3d 1184, 1186 (9th Cir. 2013) [hereinafter *Moore II*].
122. *Moore II*, 725 F.3d at 1186. The jury Moore guilty of the following:

> [N]ine counts of forcible rape, seven counts of forcible oral copulation, two counts of attempted second degree robbery, two counts of second degree robbery, forcible sodomy, kidnaping with the specific intent to commit a felony sex offense, genital penetration by a foreign object, and the unlawful driving or taking of a vehicle.

victions were non-homicidal offenses.[123] Prior to sentencing, one expert found Moore would continue to be dangerous to the community, while all other experts involved in the case found Moore able and driven to conform his behavior to societal standards.[124] The trial court sentenced Moore to a total of 254 years and four months' imprisonment.[125] According to the California Penal Code, Moore would only be eligible for parole after serving 127 years and two months in prison, thus making him 144-years-old when eligible.[126]

After the United States Supreme Court decided *Graham v. Florida*,[127] Moore filed habeas corpus petitions in each level of the California state court system, and each level denied his petition.[128] In a subsequent habeas corpus filing in the United States District Court for the Central District of California, Western Division, the court dismissed the petition, claiming Moore had not exhausted all his remedies in the state court system.[129] Moore filed for clarification of the decision, stating he had exhausted all state court remedies, and the magistrate judge held that *Graham* did not apply retroactively to Moore's case.[130] The district court followed the magistrate judge's recommendation, after which Moore filed a timely appeal to the Ninth Circuit.[131]

The Ninth Circuit relied heavily on *Graham* in making its determination.[132] The court held that *Graham* did apply retroactively to Moore's case because Moore was a juvenile at the time of his conviction for non-homicidal crimes.[133] Moore's crimes and sentence were materially indistinguishable from those of Graham's.[134] Under the lengthy sentence the trial court imposed, Moore had no reason to show remorse or internal reflection because his sentence guaranteed he

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Id. Moore also used a firearm in the course of committing these crimes. *Id.*

123. *Id*.

124. *Id*. at 1186-87.

125. *Id*. at 1187.

126. *Compare id*. (holding the trial court properly sentenced the juvenile), *with* Bunch v. Smith, 685 F.3d 546, 553 (6th Cir. 2012) (holding that a non-homicidal juvenile offender's eighty-nine-year sentence was constitutional).

127. 560 U.S. 48 (2010).

128. *Moore II*, 725 F.3d at 1187. The Los Angeles County Court, California Court of Appeal, and California Supreme Court each denied the petition, determined *Graham* was inapplicable, and denied review, respectively. *Id*.

129. Moore v. Biter, No. CV 11-4256 JAK (FFM), 2011 U.S. Dist. LEXIS 71438, at *4 (C.D. Cal. July 1, 2011) [hereinafter *Moore I*]. "Moore did not appeal to the California Supreme Court." *Moore II*, 725 F.3d at 1187.

130. *Moore II*, 725 F.3d at 1187.

131. *Id*.

132. *Id*. at 1188-90.

133. *Id*. at 1190-91.

134. *Id*. at 1191-92.

would never re-enter society.[135] Therefore, the Ninth Circuit reversed and remanded the trial court's decision regarding Moore's habeas corpus petition.[136]

E. *United States v. Grant*: The Third Circuit Emphasizes the Importance of Providing Juveniles a Meaningful, Rather Than Theoretical, Opportunity for Release

In *United States v. Grant*,[137] the United States Court of Appeals for the Third Circuit reviewed Corey Grant's life imprisonment sentence.[138] A jury found seventeen-year-old Grant guilty of murder, attempted murder, and drug-related crimes for actions he commenced when he was sixteen years old.[139] Along with these charges, the jury used the Racketeer Influenced and Corrupt Organizations Act[140] to find Grant guilty of two racketeering charges.[141] The trial court sentenced Grant to life imprisonment plus forty-five years, which was affirmed by the United States Court of Appeals for the Third Circuit.[142]

Grant filed a subsequent habeas corpus petition, which was dismissed as untimely and was refiled.[143] Grant's petition argued that *Miller v. Alabama*[144] applied retroactively to his case.[145] The United States District Court for the District of New Jersey agreed that *Miller* applied and ordered Grant's resentencing in accordance with United States Supreme Court precedent.[146] The district court reasoned that since Grant was sentenced in 1992, the court had not taken into account Grant's youthfulness and heightened capacity for change, as required by *Miller*.[147]

On appeal, the Third Circuit affirmed the district court's decision to remand Grant's case for resentencing.[148] The Third Circuit recog-

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135. *Id*. at 1192. The court criticized the trial judge's decision to side with the one opposing expert that believed Moore had no chance of rehabilitation prior to re-entering society, rather than the multiple other experts who disagreed. *Id*. at 1194.

136. *Id*.

137. 887 F.3d 131 (3d Cir. 2018).

138. United States v. Grant, 887 F.3d 131 (3d Cir. 2018) [hereinafter *Grant II*].

139. Grant v. United States, Civil Action No. 12-6844 (JLL), 2014 U.S. Dist. LEXIS 159084, at *1-2 (D.N.J. Nov. 12, 2014) [hereinafter *Grant I*]. The drug convictions included "conspiring to possess cocaine with intent to distribute [and] possession of cocaine with intent to distribute." *Grant I*, 2014 U.S. Dist. LEXIS 159084, at *2.

140. 18 U.S.C. § 1961 (2012).

141. *Grant I*, 2014 U.S. Dist. LEXIS 159084, at *1.

142. *Id*. at *2.

143. *Id*.

144. 567 U.S. 460 (2012).

145. *Grant I*, 2014 U.S. Dist. LEXIS 159084, at *3.

146. *Id*. at *17.

147. *Id*. at *14.

148. *Grant II*, 887 F.3d 131, 155 (3d Cir. 2018). The court also changed the drug conspiracy sentence to 40 years. *Grant II*, 886 F.3d at 155. The Third Circuit assessed

nized that life-without-parole could only be given to juveniles who are incorrigible homicide offenders, as prescribed by *Miller*.[149] The Third Circuit expanded the *Miller* holding to apply to de facto life sentences along with de jure life sentences.[150] The Third Circuit deduced that without this expansion, courts would ignore *Graham*'s consideration of a juvenile's chance of release.[151]

The Third Circuit spent an extensive amount of its opinion discussing what constituted a meaningful prospect of release for juveniles.[152] The court specifically determined that the opportunity for release must be considered after taking into account the national retirement age and the non-incorrigible juvenile offender's life expectancy.[153] The court placed emphasis on juveniles' ability to remain hopeful and to have a sense of purpose in striving to better themselves when they have a chance of leaving prison during their lifetimes.[154]

IV. ANALYSIS

In *Goins v. Smith*,[155] the United States Court of Appeals for the Sixth Circuit affirmed the district court's eighty-four-year sentence imposed upon James Goins, a juvenile at the time of his offenses.[156] On appeal, the Sixth Circuit found that *Graham v. Florida*[157] did not apply to Goins' case because Goins' sentence was not life imprisonment without the possibility of parole.[158] The court also determined that because Goins had the possibility of parole at some point during his sentence, *Graham* did not apply to his case.[159]

First, this Analysis will argue that the United States Supreme Court determined that de jure life sentences for juveniles are unconstitutional.[160] Then, this Analysis will argue that a de facto life sentence for a juvenile is tantamount to a de jure life sentence because the incarcerated is not given a meaningful opportunity for release.[161]

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the Supreme Court's decisions in Roper v. Simmons, 543 U.S. 551 (2005), Graham v. Florida, 540 U.S. 48 (2010), *Miller*, and Montgomery v. Louisiana, 136 S. Ct. 718 (2016). *Id.* at 138-42.

149. *Id*. at 143.

150. *Id*. at 144.

151. *Id*. at 145. The court specifically stated that "those juvenile offenders capable of reform be afforded a meaningful opportunity for release." *Id*.

152. *Id*. at 147-53.

153. *Id*. at 153.

154. *Id*.

155. 556 F. App'x 434 (6th Cir. 2014).

156. Goins v. Smith, 556 F. App'x 434, 435 (6th Cir. 2014).

157. 560 U.S. 48 (2010).

158. *Goins*, 556 F. App'x at 439.

159. *Id*. at 440.

160. *See infra* notes 163-184 and accompanying text.

161. *See infra* notes 185-197 and accompanying text.

Finally, this Analysis will argue that Goins' sentence was unconstitutional because a de facto life sentence for a juvenile is unconstitutional.[162]

A. The Courts Have Determined That De Jure Life Sentences for Non-Homicidal Juvenile Offenders Are Unconstitutional Under the Eighth Amendment

The Eighth Amendment of the United States Constitution prohibits cruel and unusual punishment.[163] The central purpose of the Eighth Amendment was to prohibit disproportionate punishments for offenders.[164] This ever-important amendment granted juvenile offenders a particularly unique degree of protection.[165] The United States Supreme Court has repeatedly acknowledged that life sentences for non-homicidal juvenile offenders were unconstitutional under the Eighth Amendment.[166] The Court's underlying reasoning for finding life sentences without parole for non-homicidal juvenile offenders unconstitutional included three rationales.[167]

First, the Court analyzed the role of the states' evolution in moving away from life without parole for juveniles.[168] The courts, rather than the legislatures, have the role of analyzing state-imposed criminal sentences to determine whether they are constitutional under the Eighth Amendment.[169] The Supreme Court blatantly rejected the assertion that state consensus surrounding sentencing practices was critical in determining practices' constitutionality.[170] Until the *Gra-*

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162. *See infra* notes 198-210 and accompanying text.

163. U.S. Const. amend. XIII (stating, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted").

164. Montgomery v. Louisiana, 136 S. Ct. 718, 733 (2016).

165. United States v. Grant, 887 F.3d 131, 135 (3d Cir. 2018).

166. *See* Graham v. Florida, 560 U.S. 48, 71-72 (2010) (reasoning that "retribution does not justify imposing [life without parole] on the less culpable juvenile nonhomicide offender"). *See also* Miller v. Alabama, 567 U.S. 460, 489 (2012) (holding mandatory life sentences without parole for juveniles unconstitutional).

167. *See* Roper v. Simmons, 543 U.S. 551, 561-64 (2005) (explaining the states' movement away from executing juvenile offenders); *Graham*, 560 U.S. at 63-64 (discussing the low number of juveniles in the United States serving life sentences). *See also Graham*, 560 U.S. at 71 (arguing that "retribution, deterrence, incapacitation, and rehabilitation" do not apply to non-homicidal juvenile offender sentences of life without parole); *Simmons*, 543 U.S. at 569-70 (explaining that juveniles must be held to a lesser standard of culpability than adults).

168. *Compare Simmons*, 543 U.S. at 561-64 (discussing states' transition away from executing juvenile offenders), *with Graham*, 560 U.S. at 63-64 (showing only a small number of juveniles across the country were serving life sentences). *See also Graham*, 560 U.S. at 75 (stating that the Eighth Amendment "prohibit[s] States from making the judgment at the outset that those offenders never will be fit to reenter society").

169. *Graham*, 560 U.S. at 62.

170. *See Miller*, 567 U.S. at 482 (reasoning that simply because multiple states impose life-without-parole sentences on juveniles does not prohibit the Court from finding

ham v. Florida[171] decision, the United States remained the only country in the world to impose life sentences without parole on non-homicidal juvenile offenders.[172]

Next, the Court analyzed the purpose and goal of incarceration.[173] One purpose of incarceration for all prisoners is rehabilitation.[174] While for many adults this must occur without the possibility of re-entering society, the Court found that juveniles must be provided the opportunity for to re-enter society.[175] Granting juveniles the ability to re-enter society affords them the opportunity and motivation for self-betterment, to increase their maturity, and to experience remorse for their actions and life choices that caused their imprisonment.[176] Without the legitimate possibility of re-entry into society, juveniles have no motivation to better themselves while incarcerated.[177]

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those practices unconstitutional); *Graham*, 560 U.S. at 62 (stating that although multiple states allow sentencing juvenile offenders to life without parole, the Court must examine the actual sentencing practices implemented by those jurisdictions rather than what is available to them). *But see Simmons*, 543 U.S. at 564-65 (determining that because there was a majority consensus amongst the states against sentencing juveniles to death, this must be taken into consideration for the Court in determining its constitutionality).

171. 560 U.S. 48 (2010).

172. *Graham*, 560 U.S. at 80 (discussing that while Israel sentences juvenile offenders to life without parole, it only does so to homicidal juvenile offenders, never to non-homicidal offenders); *see also* Connie de la Vega & Michelle Leighton, *Sentencing Our Children To Die in Prison: Global Law and Practice*, 42 U.S.F.L. Rev. 983, 986 (2007) (stating, "[t]he community of nations . . . now condemns the practice of sentencing children to [life without parole] by any state as against modern society's shared responsibility for child protection and, more concretely, as a human right violation prohibited by treaties and expressed in customary international law"). South Africa's latest policy follows the United Nations Convention on the Rights of the Child Article 37(b), which states, "No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time." *Id.* (quoting Convention on the Rights of the Child, G.A. Res. 44/25, art. 37(b) (Nov. 20, 1989)).

173. *See Graham*, 560 U.S. at 71 (indicating that "retribution, deterrence, incapacitation, and rehabilitation" were "penal sanctions . . . recognized as legitimate").

174. *See id*. at 73 (explaining that rehabilitation is "a penological goal that forms the basis of parole systems"); *see also id*. at 75 (stating that "States [are prohibited] from making the judgment at the outset that those offenders never will be fit to reenter society"); Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 Annu. Rev. Clin. Psychol. 459, 469 (2009) (stating that "[o]ver the course of adolescence and into young adulthood, individuals become more future oriented, with increases in their consideration of future consequences, in their concern about the future, and in their ability to plan ahead").

175. *Graham*, 560 U.S. at 80; *see Grant*, 887 F.3d at 148 (arguing that without an opportunity for societal re-entry for juvenile offenders, the juveniles' Eighth Amendment rights are violated, as their sentences constitute cruel and unusual punishment).

176. *Grant*, 887 F.3d at 139-40.

177. *See* Steinberg, *supra* note 178, at 481 (arguing that incarceration must be amenable to helping juveniles, as "it is important that the sanctions to which juvenile offenders are exposed not [*sic*] adversely affect their development"), *see also Graham*, 560

Finally, the Court discussed the moral implications of imprisoning juveniles for life.[178] The Supreme Court found that juveniles' irresponsible actions cannot be considered under the same scrutiny as adults'.[179] The psychological and physiological nature of the juvenile brain differs greatly from that of an adult's.[180] Adults have fully-developed brains, while juveniles' brains are hardwired in a capacity more open to risk-taking.[181] However, juveniles' brains are extremely susceptible to change and rejuvenation.[182] Therefore, the juvenile brain is exceedingly more open to change and self-betterment in prison, giving the juvenile offender a better chance than that of an adult offender to successfully reintegrate back into society upon his or her release.[183] Because juveniles' brains differ from adults', the disproportionality of sentencing juveniles as adults demolished the central theme of the Eighth Amendment.[184]

U.S. at 79 (discussing how "[m]aturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation[;] [a] young person who knows that he or she has no chance to leave prison before life's end has little incentive to become a responsible individual").

178. *See Graham*, 560 U.S. at 79 (recognizing that life-without-parole sentences for juveniles provide no incentive for juveniles to rehabilitate themselves in prison; thus, the court deprives him of hope); *see also Miller*, 567 U.S. at 473 (arguing that juveniles given life without parole sentences are told they never belong in society, thereby depriving them of their desire to rehabilitate themselves).

179. *Simmons*, 543 U.S. at 556 (quoting Thompson v. Oklahoma, 487 U.S. 815, 854 (1988)).

180. *See* Steinberg, *supra* note 178, at 468 (stating that "psychosocial maturation proceeds more slowly than cognitive development [in adolescents than in adults] and that age differences in judgment may reflect social and emotional differences between adolescents and adults that continue well beyond mid-adolescence").

181. *Compare id*. (arguing that adolescents' brains struggle more than adults' "to deploy their cognitive capacities as effectively as adults in exercising judgment in their everyday lives when decisions are influenced by emotional and social variables"), *with Simmons*, 543 U.S. at 569 (stating that juveniles are more susceptible to peer influences and rash decision-making).

182. *See* Steinberg, *supra* note 178, at 466 (explaining how as juveniles age, their brains show "improvements over the course of adolescence in many aspects of executive function, such as response inhibition, planning, weighing risks and rewards . . . and improved emotion regulation").

183. *See id.* at 468-70 (arguing that self-regulation, future-oriented behavior, reward-driven behavior, and a decreased likelihood of susceptibility to peer influences occur as adolescents progress into adulthood); *see also Graham*, 540 U.S. at 79 (stating that "[m]aturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation").

184. *See Simmons*, 543 U.S. at 601 (reasoning that 17-year-olds cannot proportionally be sentenced in the same capacity as adults); *see also* Steinberg, *supra* note 178, at 467 (explaining that "despite the fact that in many ways adolescents may appear to be as intelligent as adults (at least as indexed by performance on tests of information processing and logical reasoning) their ability to regulate their behavior in accord with these advanced intellectual abilities is more limited").

B. A De Facto Life Sentence Is Tantamount to a De Jure Life Sentence Because the Incarcerated Juvenile Is Not Given a Meaningful Opportunity for Release

The United States Supreme Court determined that a non-homicidal juvenile offender must be given a meaningful opportunity for release.[185] A de facto life sentence, even when handed down with the possibility of parole, generally does not give the juvenile a meaningful opportunity for release.[186] Multiple jurisdictions define a *meaningful opportunity for release* in varying capacities.[187] However, the United States Court of Appeals for the Third Circuit correctly identified when juvenile offenders are given a meaningful opportunity for release.[188]

Data shows that imprisonment leads to immensely decreased life expectancy in all inmates.[189] The longer an offender stays imprisoned, the greater the decrease in his or her life expectancy.[190] Courts generally do not take a prisoner's decreased life expectancy into account when contemplating the opportunity for parole; in failing to do so, courts deny offenders a meaningful opportunity for release.[191] Therefore, simply because a juvenile offender may be granted parole prior to the end of his or her life expectancy does not mean the court gave him or her a meaningful opportunity for release.[192] The courts must adequately take a juvenile offender's life expectancy into account to afford the juvenile a meaningful opportunity for release.[193]

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185. Graham v. Florida, 560 U.S. 48, 75 (2010) (indicating specifically that the State must provide this opportunity "based on demonstrated maturity and rehabilitation" by the non-homicidal juvenile offender).

186. United States v. Grant, 887 F.3d 131, 144-45 (3d Cir. 2018).

187. *See Grant*, 887 F.3d at 160 (finding a sentence in which a non-homicidal juvenile offender was eligible for release at age 72 to be unconstitutional); *see also* Moore v. Biter, 725 F.3d 1184, 1194 (9th Cir. 2013) (divulging that the defendant had "no hope of reentering society [so] past and future efforts to reform [were] immaterial"). *But see* Bunch v. Smith, 685 F.3d 546, 553 (6th Cir. 2012) (holding that a non-homicidal juvenile offender's eighty-nine-year sentence was constitutional).

188. *Grant*, 887 F.3d at 145 (determining that the courts must factor in the non-homicidal, non-incorrigible juvenile offender's life expectancy and the national retirement age in determining when the offender should be released from prison).

189. *See* Evelyn J. Patterson, *The Dose-Response of Time Served in Prison on Mortality: New York State, 1989-2003*, 103 Am. J. Pub. Health 523, 525-26 (2013) (examining the post-prison mortality rate of the incarcerated).

190. *See* Patterson, *supra* note 193, at 527, tbl.3 (showing that a prisoner incarcerated for 60 months loses approximately 9.93 years off his or her life expectancy at age 30).

191. *Compare Grant*, 887 F.3d at 135 (stating that the Third Circuit was undertaking a "novel issue of constitutional law" in determining whether a juvenile offender's life expectancy should factor into his sentencing), *with* Patterson, *supra* note 193, at 525 (stating that "for each month served in prison, the odds of dying upon release increased 1.7%, or 20.4% per year").

192. *Grant*, 887 F.3d at 142.

193. *Id*. at 149.

Additionally, just because a sentence includes the possibility of parole does not necessarily mean the juvenile offender will be granted parole.[194] The offender's parole opportunity is not based on the intent of the courts, but rather on the will of the parole board.[195] The parole board may deny parole even if the juvenile offender attempted to rehabilitate himself or herself while in the prison system because release is not mandatory.[196] This potentially slim opportunity for release does not provide adequate enticement for a juvenile's motivation and rehabilitation, which is the goal and purpose of the prison system.[197]

C. The Sixth Circuit Court of Appeals Erred in Finding That Goins' Sentence was Constitutional Because a De Facto Life Sentence for a Non-Homicidal Juvenile Offender is Unconstitutional under the Eighth Amendment

The United States Court of Appeals for the Sixth Circuit erred in upholding James Goins' eighty-four-year sentence with the possibility of parole after forty-two years because it was an unconstitutional de facto life sentence for a non-homicidal juvenile offender.[198]

First, the Sixth Circuit did not adequately take into account Goins' juvenile status, psychological make-up, or receptiveness for rehabilitation.[199] The crimes Goins committed as a sixteen-year-old did not demonstrate incorrigibility or an inability to rehabilitate him-

194. *Id*. at 145.

195. *Id*. (stating that a grant of parole is "entirely discretionary with the Bureau of Prisons and does not assure, subject to judicial review, consideration of youth and attendant circumstances").

196. *Id*.

197. *See Graham*, 560 U.S. at 74 (finding that lifetime incarceration for a non-homicidal juvenile offender "forswears altogether the rehabilitative ideal"); *see also Grant*, 887 F.3d at 146 (stating that life sentences without parole are only for demonstrably incorrigible juvenile offenders).

198. *See* Graham v. Florida, 560 U.S. 48, 82 (2010) (determining that life sentences without the possibility of parole for non-homicidal juvenile offenders are unconstitutional under the Eighth Amendment); Moore v. Biter, 725 F.3d 1184, 1193 (9th Cir. 2013) (discussing that de facto life sentences are unconstitutional under United States Supreme Court's decision in *Graham*); *but see* Goins v. Smith, 556 F. App'x 434, 436 (6th Cir. 2014) (quoting the state trial court as stating, "'It is the intention of this Court that you should not be released from the penitentiary and the State of Ohio during your natural li[fe].'").

199. *Compare Goins*, 556 F. App'x at 440 (asserting that "consideration of a juvenile's diminished culpability is not a clearly established aspect of the proportionality requirement recognized by the Supreme Court"), *with Graham*, 560 U.S. at 73-74 (stating that "[a] sentence of life imprisonment without parole, however . . . forswears altogether the rehabilitative ideal"), *Moore*, 725 F.3d at 1193 (stating that the courts must "take into account all of the psychological limitations and vulnerabilities of juveniles" when looking at sentencing juveniles), *and* Miller v. Alabama, 567 U.S. 460, 478 (2012) (finding that mandatory life imprisonment "disregards the possibility of rehabilitation even when the circumstances most suggest it").

self.[200] Goins, a non-homicidal juvenile offender, did not demonstrate irreparable corruption.[201] Rather, his crimes represented transient immaturity, a fleeting characteristic capable of reparation and rehabilitation after a short incarceration period.[202] According to the United States Supreme Court, consideration of transient immaturity does not produce a sentence equivalent to what a similarly-offending adult would receive.[203] Therefore, failure to incorporate the non-homicidal offender's juvenile status, psychological make-up, and receptiveness for rehabilitation into sentencing violates the Eighth Amendment's prohibition of cruel and unusual punishment.[204]

Lastly, a possible opportunity for release does not equate to a meaningful opportunity for release and, therefore, violates the Eighth Amendment.[205] Goins will not have an opportunity for release until serving a minimum of forty-two years in prison, meaning he will be fifty-eight-years old when first eligible for parole.[206] Based on the life expectancy of an African-American male in the American prison system, Goins is statistically unlikely to live long enough to have a meaningful opportunity for release.[207] When taking into account Goins' life

200. *Compare Goins*, 556 F. App'x at 435 (explaining that Goins robbed two households, took a small amount of money and injured three victims), *with Graham*, 560 U.S. at 69 (stating that juvenile non-homicidal offenders must be punished in a lesser capacity than juvenile homicidal offenders due to their lessened culpability), *and Moore*, 725 F.3d at 1192 (arguing that Moore's violent crimes were still distinguishable from murder, thereby requiring the court to apply *Graham* when considering non-homicidal juvenile offenders).

201. *Compare Goins*, 556 F. App'x at 435 (explaining that the juvenile offender assaulted and robbed three victims), *with Graham*, 560 U.S. at 54-55 (discussing how the juvenile offender Graham robbed a restaurant and assaulted a witness). *Contra* Roper v. Simmons, 543 U.S. 551, 556-57 (2005) (explaining that juvenile offender Simmons murdered a witness to one of his crimes).

202. Montgomery v. Louisiana, 136 S. Ct. 718, 734 (2016) (holding that "transient immaturity" is materially distinguishable from "incorrigible juvenile offenders").

203. *Miller*, 567 U.S. at 461 (acknowledging that "children are constitutionally different from adults for purposes of sentencing").

204. *See Graham*, 560 U.S. at 50 (stating that "none of the legitimate goals of penal sanctions—retribution, deterrence, incapacitation, and rehabilitation . . . —is adequate to justify life without parole for juvenile nonhomicide offenders" and that sentencing juveniles to life imprisonment without the possibility of parole violates the Eighth Amendment); *Miller*, 567 U.S. at 471 (discussing how juveniles must be punished differently than adults when taking into account the juveniles' psychological make-up).

205. *Grant*, 887 F.3d at 142.

206. Goins v. Smith, No. 4:09-CV-1551, 2012 U.S. Dist. LEXIS 102418, at *7 (N.D. Ohio July 24, 2012) (stating that Goins would be eligible for parole after 42-45 years).

207. *Compare* U.S. Dep't of Health and Human Services, Ctr. for Disease Control and Prevention, Nat'l Ctr. for Health Statistics, *Health, United States, 2016: With Chartbook on Long-term Trends in Health*, 116 (2017), https://www.cdc.gov/nchs/data/hus/hus16.pdf (stating that as of 2015, African-American males in the United States had a life expectancy of 72.2 years), *with Grant*, 887 F.3d at 149 (recognizing that the courts must ensure that juvenile offenders "capable of reform [are] not sentenced to a term-of-years beyond . . . expected mortality [and] the [their] life expectanc[ies] provide[

expectancy as an African-American inmate in the prison system for a minimum of forty-two years, his life expectancy will decrease dramatically, thereby depriving him of the ability to enjoy life and fulfill his personal goals prior to his likely death date.[208] Despite Goins' massively decreased life expectancy after serving a minimum of forty-two-years' imprisonment, the court upheld his de facto life sentence, notwithstanding its equivalence to a de jure life sentence.[209] Therefore, since Goins was a juvenile at the time of his non-homicidal offense and was given a de facto life sentence, the Sixth Circuit erroneously upheld Goins' sentence as constitutional.[210]

V. CONCLUSION

In 2012, the United States Court of Appeals for the Sixth Circuit found a sixteen-year-old non-homicidal juvenile offender's sentence of eighty-four-years' imprisonment constitutional.[211] The court reasoned that eligibility for parole after forty-two years offered the offender a meaningful opportunity for release.[212] Therefore, the court found the punishment did not defy *Graham v. Florida*[213] as set forth by the United States Supreme Court.[214]

The Supreme Court determined that de jure life sentences for non-homicidal juvenile offenders were unconstitutional.[215] Specifically, the Court recognized the states' movement away from life without parole for juveniles, the goals of incarceration, and the moral implications of imprisoning a juvenile for life.[216] A de facto life sentence for a juvenile is equivalent to a de jure life sentence because the juvenile is not given a meaningful opportunity for release.[217] Therefore, the Sixth Circuit incorrectly upheld James Goins' sentence, be-

] an informed estimate that allows sentencing courts to calculate the amount of time . . . [they] will have to reenter society after an opportunity for release").

208. Patterson, *supra* note 193, at 525 (stating that on average for every year served in prison, the incarcerated person's life expectancy will decrease by two years).

209. *See Goins*, 556 F. App'x at 440 (finding that the incarcerated juvenile's required meaningful opportunity for release was satisfied); *but see Grant*, 887 F.3d at 142 (arguing that de facto life-without-parole is unconstitutional because it does not necessarily satisfy the Supreme Court's requirement for a juvenile non-homicidal offender's meaningful opportunity for release).

210. *Compare Goins*, 556 F. App'x at 440 (finding a life sentence for a 16-year-old defendant constitutional), *with Graham*, 560 U.S. at 57 (finding a life sentence plus 15 years for a 16-year-old defendant unconstitutional), *and Miller*, 567 U.S. at 469 (finding a life sentence without parole for a 14-year-old defendant unconstitutional).

211. Goins v. Smith, 556 F. App'x 434, 440 (6th Cir. 2014).

212. *Goins*, 556 F. App'x at 440.

213. 560 U.S. 48 (2010).

214. *Goins*, 556 F. App'x at 439-40.

215. *See supra* notes 163-184 and accompanying text.

216. *See supra* notes 168-184 and accompanying text.

217. *See supra* notes 185-197 and accompanying text.

cause a de facto life sentence is unconstitutional under the Supreme Court's analysis of the Eighth Amendment regarding non-homicidal juvenile sentencing.[218]

The Supreme Court asserted that the proportionality of sentences was crucial in applying the Eighth Amendment and that the evolution of sentencing was a sign of a progressing society.[219] Until the Supreme Court makes a response specifically to non-homicidal juvenile offender de facto life sentencing, it is likely the circuit courts will remain split. The decision in *Goins* not only dramatically affects the life of James Goins himself, but also those juvenile offenders, attorneys, and courts with similar cases.

The ramifications of failing to grant a truly meaningful opportunity for release for non-homicidal juvenile offenders will reverberate. If juvenile offenders believe they will never leave prison, they will have less drive to better themselves, which will likely create additional issues for the prison system, such as increased violence and uncouth activities undertaken alongside fellow inmates. Parties adjudicated for similar crimes in other jurisdictions, but given far different sentences, will likely raise the pressing nature of a decision from the Supreme Court in the near future.

Maggie Brokaw—'20

218. *See infra* notes 198-210 and accompanying text.
219. Miller v. Alabama, 567 U.S. 460, 469-70 (2012).

DIMOTT V. UNITED STATES: REQUIRING PETITIONERS PROVE THAT SENTENCE ENHANCEMENT MORE LIKELY THAN NOT RESULTED FROM THE ARMED CAREER CRIMINAL ACT'S RESIDUAL CLAUSE

I. INTRODUCTION

In passing the Armed Career Criminal Act ("ACCA"),[1] Congress established a mandatory sentencing scheme designed to address the issue of career criminals previously convicted for particular drug or violent offenses coming into possession of firearms.[2] The ACCA imposed a minimum fifteen year prison sentence for an individual convicted under 18 U.S.C. § 922(g) for being a felon in possession of a firearm with three or more previous convictions for serious drug offenses or violent felonies.[3] The ACCA defined violent felonies through three clauses: the enumerated clause, the force clause, and the residual clause.[4] The residual clause broadened the definition of violent felonies beyond particular listed felonies and felonies involving force to include felonies consisting of conduct risking physical harm to another.[5]

In *Johnson v. United States*,[6] the United States Supreme Court ruled on the constitutionality of the ACCA's residual clause after multiple attempts to establish a workable framework for the residual clause.[7] The Court found the ACCA's residual clause to be unconstitutionally vague.[8] The Court determined the clause was incapable of rendering adequate notice to defendants and of providing a consistent framework for judges to apply.[9] One year later, the Court reasoned

1. 18 U.S.C. § 924(e) (2012).
2. 18 U.S.C. § 924(e).
3. 18 U.S.C. § 924(e)(1).
4. 18 U.S.C. § 924(e)(2)(B)(i)-(ii). The force clause defines a violent felony as felonies that have "as an element the use, attempted use, or threatened use of physical force against the person of another[.]" 18 U.S.C. § 924(e)(2)(B)(i). The enumerated clause defines a violent felony as felonies that "[are] burglary, arson, or extortion, [or] involves use of explosives[.]" 18 U.S.C. § 924(e)(2)(B)(ii). The residual clause defines a violent felony as a felony that "otherwise involves conduct that presents a serious potential risk of physical injury to another[.]" 18 U.S.C. § 924(e)(2)(B)(ii).
5. 18 U.S.C. § 924(e)(2)(B)(ii).
6. 135 S. Ct. 2551 (2015).
7. *See* Johnson v. United States, 135 S. Ct. 2551, 2558-59 (2015) [hereinafter *Johnson II*] (describing efforts in previous cases attempting to fit the Court's categorical approach for the ACCA's enumerated clause to convictions under the ACCA's residual clause).
8. *Johnson II*, 135 S. Ct. at 2557-58.
9. *Id*.

that *Johnson* created a retroactive substantive rule of law, allowing convicted individuals to contest and potentially correct their ACCA-enhanced sentences if the sentencing court applied the residual clause.[10] A prisoner in federal custody may seek to correct his or her imposed sentence under *Johnson* by asserting that the sentence resulted from the sentencing court's application of the ACCA's residual clause.[11]

When the Court invalidated the ACCA's residual clause in *Johnson*, it left the United States courts of appeal without express guidance in addressing motions to correct ACCA-enhanced sentences alleged to have resulted from courts' application of the residual clause.[12] Where the record clearly indicated that a petitioner's enhanced sentence resulted from the residual clause, an appellate court's examination of the record sufficed to determine whether the claim warranted relief.[13] However, an unclear record complicated the process of determining whether to grant relief and required courts to interpret convictions in the context of the constitutional provisions of the ACCA.[14] A split developed among the circuit courts concerning the burden of proof to be placed on petitioners to show a court ought to address the merits of a petitioner's alleged *Johnson* claim for collateral relief.[15]

In *Dimott v. United States*,[16] the United States Court of Appeals for the First Circuit addressed the burden imposed on petitioners al-

10. Welch v. United States, 136 S. Ct. 1257, 1267 (2016).

11. *See* 28 U.S.C. § 2255(a) (2012) (allowing for motions attacking the constitutional validity of a criminal sentence).

12. *See* United States v. Taylor, 873 F.3d 476, 479-81 (5th Cir. 2017) (noting several approaches to determine whether courts may entertain the merits of an alleged *Johnson* claim where the petitioner's sentence was enhanced pursuant to the residual clause).

13. *See Johnson II*, 135 S. Ct. at 2557 (describing the categorical approach used to define violent felonies according to the elements of a crime rather than the particular circumstances of a crime).

14. *See* Dimott v. United States, 881 F.3d 232, 238 (1st Cir. 2018) [hereinafter *Dimott II*], *cert. denied sub nom. Casey v. United States*, 138 S. Ct. 2678 (2018) (noting that where the record was unclear regarding whether the sentencing court applied the ACCA's residual clause required a different analysis from the analysis required for petitioners with records clearly indicating the sentencing court applied the residual clause).

15. *See Dimott II*, 881 F.3d at 243 (requiring petitioners show it was more likely than not their enhanced sentence resulted from the ACCA's residual clause when the record is unclear); Beeman v. United States, 871 F.3d 1215, 1224 n.6 (11th Cir. 2017) (requiring the petitioner provide affirmative evidence that the district court applied the residual clause at sentencing when the record is unclear); *but see* United States v. Winston, 850 F.3d 677, 682 (4th Cir. 2017) (addressing the merits of petitioner's alleged *Johnson* claim where the record is unclear without requiring further evidence from petitioner); United States v. Geozos, 870 F.3d 890, 896 (9th Cir. 2018) (addressing the merits of petitioner's alleged *Johnson* claim where the record is unclear without requiring further evidence from petitioner).

16. 881 F.3d 232 (1st Cir. 2018).

leging their sentences were enhanced through the ACCA's invalid residual clause when the record is unclear regarding how the trial court determined their sentences.[17] The petitioners in *Dimott* brought claims seeking to correct their sentences and asserted that application of the ACCA's residual clause resulted in their enhanced sentences.[18] After the United States District Court for the District of Maine denied their petitions, the First Circuit affirmed the district court's denials.[19] In the process, the First Circuit held that where the record was unclear, a petitioner must prove by a preponderance of the evidence that the district court enhanced his sentence through application of the ACCA's residual clause before the court fully analyzes the petitioner's *Johnson* claim.[20]

This Note begins with a review of the facts and holding of the First Circuit's decision in *Dimott*.[21] An examination will follow detailing how the United States Congress and the Supreme Court have established the parameters of the collateral relief process through interpretation and application of the presumption of the finality of a criminal conviction.[22] Next, the Court's decision in *Johnson* will be discussed to establish context for collateral relief based on the ACCA's residual clause, and then this Note will examine the approaches of other United States courts of appeal in determining when a court may entertain the merits of a petitioner's alleged *Johnson* claim.[23] This Note will argue that the presumption of finality requires petitioners demonstrate the merits of their collateral claim to establish the court's subject matter jurisdiction before the court fully entertains the petition.[24] Additionally, this Note will then argue that imposing a burden of proof weaker than a preponderance of the evidence on the petitioner subverts the presumption of finality and allows meritless claims to come before the courts.[25] This Note concludes by demonstrating that the First Circuit's requirement that a petitioner prove a *Johnson* claim by a preponderance of the evidence before a court fully entertains its merits is consistent with the presumption of finality in granting collateral relief.[26]

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17. *Dimott II*, 881 F.3d 232, 243 (1st Cir. 2018).

18. *Dimott II*, 881 F.3d at 233-34.

19. *Id*. at 243.

20. *Id*. at 242-43 (noting that the First Circuit's decision departed from the weaker standards established by other circuits).

21. *See infra* notes 27-57 and accompanying text.

22. *See infra* notes 58-89 and accompanying text.

23. *See infra* notes 90-166 and accompanying text.

24. *See infra* notes 178-187 and accompanying text.

25. *See infra* notes 188-203 and accompanying text.

26. *See infra* notes 204-215 and accompanying text.

II. FACTS AND HOLDING

In *Dimott v. United States*,[27] Richard Dimott, Wayne N. Collamore, and Charles H. Casey, Jr. brought individual actions against the United States under 28 U.S.C. § 2255 seeking post-conviction relief.[28] In each action, the petitioners alleged their sentences no longer qualified for enhancement under the ACCA and should therefore be corrected.[29] The United States Court of Appeals for the First Circuit consolidated the claims into a single appeal following each claim's dismissal on procedural grounds.[30]

The United States District Court for the District of Maine convicted Richard Dimott in September 2007 for one count of criminal contempt and one count of being a felon in possession of a firearm.[31] The court determined Dimott to be an armed career criminal due to his eight previous burglary convictions under Maine law.[32] The court subsequently enhanced his sentence under the ACCA to 150 months of incarceration and 5 years of supervised release.[33] After the United States Supreme Court's decision in *Johnson v. United States*,[34] Dimott filed a motion in June 2016 under 28 U.S.C. § 2255 for the district court to correct his sentence in light of the Supreme Court's ruling.[35] Dimott argued his burglary convictions no longer fell within the ACCA's enumerated clause, and his sentencing resulted from the ACCA's invalidated residual clause.[36]

The district court denied Dimott's motion and first found that it properly based his sentence on prior burglary convictions.[37] The court then determined that Dimott's § 2255 motion did not invoke *Johnson*

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27. 881 F.3d 232 (1st Cir. 2018).
28. *Dimott II*, 881 F.3d 232, 234 (1st Cir. 2018).
29. *Dimott II*, 881 F.3d at 234.
30. *Id*.
31. Dimott v. United States, No. 2:16-cv-347-GZS, 2016 WL 6068114, at *1 (D. Me. Oct. 14, 2016) [hereinafter *Dimott I*], *aff'd* 881 F.3d 232 (1st Cir. 2018).
32. *Dimott I*, 2016 WL 6068114, at *1-2.
33. *Dimott II*, 881 F.3d at 234.
34. 135 S. Ct. 2551 (2015).
35. *Dimott I*, 2016 WL 6068114, at *2 (stating that the residual clause of the ACCA was declared unconstitutional in *Johnson*).
36. *Id*. The ACCA's residual clause reads:

> The term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that . . . *otherwise involves conduct that presents a serious potential risk of physical injury to another*.

18 U.S.C. § 924(e)(2)(B)(ii) (emphasis added).
37. *Dimott I*, 2016 WL 6068114, at *2. The district court stated that the ACCA's definition of a violent felony included "'any crime punishable by imprisonment for a term exceeding one year . . . that is . . . burglary.'" *Id.* (quoting 18 U.S.C. § 924(e)(2)(B)(ii)).

and, therefore, was untimely.[38] The court further determined that even if his motion was timely, Dimott's burglary convictions fell under the umbrella of the ACCA's enumerated clause.[39] The district court issued a certificate of appealability following the denial of Dimott's motion.[40]

Similarly, the district court convicted Wayne N. Collamore in March 2011 for one count of escape from federal custody and one count of being a felon in possession of a firearm.[41] The court also determined Collamore to be an armed career criminal and sentenced him to 210 months imprisonment through the ACCA.[42] In May 2016, Collamore filed a § 2255 motion to correct his sentence.[43] In denying his motion, the district court echoed the reasoning adopted by the *Dimott* court by determining that Collamore's motion was untimely because he failed to raise a *Johnson* claim.[44]

The district court also convicted Charles H. Casey, Jr. in April 2012 for one count of being a felon in possession of a firearm.[45] With three prior convictions for burglary under Maine law, the sentencing court determined Casey to be an armed career criminal and enhanced his sentence under the ACCA to 180 months imprisonment.[46] Without appealing the district court's sentence, Casey filed a motion to correct his sentence under § 2255 in June 2016. Casey alleged that sentencing for his prior burglary convictions resulted from the ACCA's residual clause and was unconstitutional in light of the Supreme Court's decision in *Johnson*.[47] The district court rejected this argu-

38. *Id*. The district court, finding that Dimott failed to raise a *Johnson* claim, noted that "*Johnson II* . . . do[es] not provide grounds for relief" where Dimott "was not sentenced pursuant to the now-invalidated residual clause." *Id*.

39. *Id*. at *3-4. Within the First Circuit, "Maine's burglary statute sets forth the definition of 'generic burglary'" and falls under the ACCA's definition of a violent felony. *Id*. at *3 (quoting United States v. Duquette, 778 F.3d 314, 318 (1st Cir. 2015)).

40. *Id*. at *4. The court noted that Dimott's petition raised the issues of (1) whether any petitioner could have the violent felony convictions examined even where the convictions appeared to fall under the umbrella of the enumerated clause and (2) whether the trial court unconstitutionally enhanced Dimott's sentence. *Id*.

41. Collamore v. United States, No. 2:16-cv-259-GZS, 2016 WL 6304668, at *1 (D. Me. Oct. 27, 2016) *aff'd sub nom. Dimott II*, 881 F.3d 232 (1st Cir. 2018).

42. *Collamore*, 2016 WL 6304668, at *1. Collamore had five previous convictions for burglary under Maine law. *Id*.

43. *Id*.

44. *Id*. at *2-3. Similar to *Dimott*, the district court stated that Collamore did not appeal his sentence and found that his motion was untimely and, even if timely, Collamore was not entitled to relief under federal law. *Id*.

45. *Dimott II*, 881 F.3d at 235.

46. United States v. Casey, 2:16-CV-346-DBH, 2016 WL 6581178, at *1, 4 (D. Me. Nov. 3, 2016), *aff'd sub nom. Dimott II,* 881 F.3d 232 (1st Cir. 2018).

47. *Dimott II*, 881 F.3d at 235.

ment and found Casey's sentence constitutionally enhanced through the ACCA.[48]

The First Circuit consolidated the petitioners' claims into a single appeal.[49] In addressing Dimott and Collamore's petitions, the First Circuit determined that the one-year statute of limitations under 28 U.S.C. § 2255(f)(1) barred their § 2255 motions because their convictions clearly did not stem from the residual clause of the ACCA.[50] Deciding Casey's appeal, the court first determined that the Government did not waive the issue of timeliness of a *Johnson* motion by failing to raise the issue at the district court proceeding.[51] In contrast to Dimott and Collamore's petitions, the record did not indicate which clause formed the basis of Casey's sentence.[52] Casey asserted that where the record is silent, the assumption should be that the residual clause guided the sentencing.[53] The First Circuit refused to adopt this rule, finding that it conflicted with First Circuit precedent holding that the presumption of finality attached to a conviction and sentence after the final judgment placed the burden of proof on the petitioner seeking post-conviction relief under § 2255.[54]

The First Circuit held that a *Johnson* petitioner must establish by a preponderance of the evidence that the ACCA's residual clause guided the court's sentencing.[55] The court determined that Casey only indicated the mere prospect that his enhanced sentence resulted from the residual clause.[56] As a result, the First Circuit affirmed the

48. *Id*. at *3-4. The First Circuit stated that a "petitioner must demonstrate 'a reasonable probability' that but for the alleged error, 'the result of the proceeding would have been different.'" *Id*. at *3 (quoting Prou v. United States, 199 F.3d 37, 48-49 (1st Cir. 1999)).

49. *Dimott II*, 881 F.3d at 233-34.

50. *Id*. at 236-37. The First Circuit determined the one-year statute of limitations under 28 U.S.C. § 2255(f)(3) did not apply because the district judges, which sentenced Dimott and Collamore and heard their petitions, stated Dimott and Collamore were sentenced under the enumerated clause of the ACCA and no contrary evidence was presented. *Id*. at 236.

51. *Id*. at 238. Procedural fairness was not at issue because Casey had ample notice of the timeliness of his motion. *Id*. at 239.

52. *Id*. at 238.

53. *Id*. at 240.

54. *Id*. The First Circuit required petitioners to "establish[ ] by a preponderance of the evidence that they are entitled to relief." *Id*. (quoting United States v. DiCarlo, 575 F.2d 952, 954 (1st Cir. 1978)).

55. *Id*. at 243. The First Circuit noted that to hold otherwise would place the burden of proof on the Government in "proving that each *Johnson* . . . claimant does not have a valid *Johnson* . . . claim[,]" weakening the presumption that the trial court's sentence is final. *Id*. at 241.

56. *Id*. at 240.

district court's procedural dismissals of all three petitioners' motions due to timeliness because the petitions were not *Johnson* claims.[57]

III. BACKGROUND

A. The United States Supreme Court and United States Congress Favor the Imposition of a Higher Procedural Obstacle on Petitioners Seeking Collateral Relief

1. United States v. Frady*: The Supreme Court Requires the Petitioner to Overcome the Presumption of Finality in Advancing a Claim for Collateral Relief*

In *United States v. Frady*,[58] the United States Supreme Court reaffirmed the principle that a petitioner is subjected to greater procedural hurdles when advancing a claim for collateral relief.[59] At his criminal trial in 1963, in the United States District Court for the District of Columbia, the jury convicted Joseph Frady for robbery and first-degree murder for the death of Thomas Bennett.[60] The United States Court of Appeals for the District of Columbia Circuit then affirmed his conviction.[61]

Frady filed a motion under 28 U.S.C. § 2255 in September 1979 in the D.C. District Court, asserting that his sentence should be vacated because of defective jury instructions.[62] The district court denied his § 2255 motion, noting that Frady should have raised this issue during the direct appeal process or in one of his earlier motions.[63]

On appeal, the D.C. Circuit first acknowledged that the instructions given at Frady's criminal trial were indeed erroneous.[64] The circuit court also noted that a party is generally barred from raising objections on direct appeal if the objection was not raised at trial.[65] However, the circuit court could consider plain errors or defects in the

57. *Id*. at 243 (finding that petitioners' claims were all subject to the statute of limitations stated in § 2255(f)(1), which ran for one year after each sentencing).

58. 456 U.S. 152 (1982).

59. United States v. Frady, 456 U.S. 152, 164-67 (1982) [hereinafter *Frady II*].

60. *Frady II*, 456 U.S. at 156.

61. United States v. Frady, 636 F.2d 506, 508 (D.C. Cir. 1980) [hereinafter *Frady I*].

62. *Frady II*, 456 U.S. at 157-58. Following Frady's conviction, the D.C. Circuit stated in separate cases that jury instructions akin to the instructions issued in Frady's trial were in error. *Id*.

63. *Frady I*, 636 F.2d at 508. The D.C. Circuit stated the record did not indicate that Frady had ever raised this argument at trial, on appeal, or in previously filed motions. *Id*. at 508 n.3.

64. *Id*. at 509 (noting that the instructions were "identical to the instructions . . . [which] th[e] court found the use of . . . to be reversible error").

65. *Id*. at 510 (citing Fed. R. Crim. P. 30).

judgment on direct appeal that were not objected to at trial.[66] Transplanting this principle to collateral action, the court stated that it had discretion to correct plain errors in the judgment during a petition for collateral relief without the petitioner raising the defect in a prior proceeding.[67]

Having relieved Frady's burden to demonstrate how the erroneous instructions contaminated his trial, the D.C. Circuit found that the issuance of faulty instructions during Frady's original trial amounted to plain error by the trial court.[68] Finding the instructions caused Frady to suffer prejudice by preventing the jury from considering a manslaughter verdict, the D.C. Circuit reversed the district court's denial of Frady's § 2255 motion to vacate his sentence.[69]

Following the United States government's appeal, the Supreme Court examined the D.C. Circuit's application of the plain error standard in the context of collateral relief.[70] The Court found the use of the plain error standard to be improper in collateral attacks on a prisoner's sentence and reversed the D.C. Circuit's holding regarding the trial court's erroneous jury instructions.[71] The Court stated that the use of plain error review in post-conviction proceedings, as opposed to the direct appeals process, subverted the general presumption of finality that attached at the end of the direct appeal process.[72]

In place of plain error review, the Supreme Court applied the cause and actual prejudice standard to Frady's motion, imposing a more stringent burden on Frady.[73] In place of the appellate court addressing the erroneous instructions *sua sponte*, the Court required

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66. *Id*. at 510 (citing FED. R. CRIM. P. 52(b)).

67. *Id*. at 509-10 (citing Davis v. United States, 411 U.S. 233, 240-41 (1973)). The Court held that the plain error standard was appropriate because "the standard for allowing a 28 U.S.C. § 2255 motion on an issue not raised at trial should be no less stringent than the standard in the Federal Rules of Criminal Procedure for review on direct appeal[.]" *Id*. at 510.

68. *Id*. at 511. The court concluded that the instructions regarding malice, intent, and the use of a weapon may have erroneously "precluded the reasonable juror from considering manslaughter as a possible verdict." *Id*.

69. *Id*. at 514.

70. *Frady* II, 456 U.S. at 163. The Court first rejected an assertion from Frady that the Court should exercise discretion in declining to hear the appeal due to the Court's general policy of not interfering with the local law in the District of Columbia. *Id*. at 159.

71. *Id*. at 163-64. The Court stated that the intended purpose of the plain error standard was "to afford a means for the prompt redress of miscarriages of justice" during the appeal process. *Id*. at 163.

72. *Id*. at 164 The Court recognized that society possesses a "legitimate interest in the finality of the judgment [that] has been perfected by the expiration of the time allowed for direct review or by the affirmance of the conviction on appeal." *Id*.

73. *Id*. at 167. The cause and actual prejudice standard required the petitioner to demonstrate to the court both cause for failing to raise the subject of the motion at trial and actual detriment against the petitioner in the outcome of the trial. *Id.* at 167.

Frady to demonstrate both the cause for failing to contemporaneously object to the instructions at trial and actual prejudice in the result of his trial from the failure to object.[74] With the burden shifted to Frady, the Court determined that Frady failed to demonstrate that the errors at trial created an actual and substantial detriment to him during the trial.[75] Due to Frady's failure to carry his burden under the cause and actual prejudice standard, the Court reversed the D.C. Circuit's judgment granting Frady's motion.[76]

2. In Passing the Antiterrorism and Effective Death Penalty Act of 1996, Congress Intended to Procedurally Limit Access to Collateral Relief

Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996[77] ("AEDPA") in part as a response to what it perceived as abuse of post-conviction actions interfering with the sentencing process.[78] The House Committee on the Judiciary provided its report to the United States House of Representatives, noting that the post-conviction petition process needed reform for many years.[79] The report accompanied House of Representatives Bill 729, which was written to amend various provisions of the United States Code concerning post-conviction relief and sentencing.[80] The report provided the amended provisions concerning post-conviction proceedings and outlined the necessity for the bill, highlighting the strain on the judicial system by repetitive habeas petitions.[81] The Judiciary Committee stated the post-conviction provisions of AEDPA were intended to reduce the burden on the judicial system caused by repeated and meritless post-conviction motions.[82] The report identified that abuse of petitions seeking collateral relief frequently caused federal post-conviction liti-

74. *Id*. at 167-68.

75. *Id*. at 170-171. The Court noted that evidence presented at trial led ten judges to conclude that the evidence of malice could support at minimum a second-degree murder conviction. *Id*. at 172.

76. *Id*. at 173-75. The Court cited "society's justified interests in the finality of criminal judgments" to justify the burden placed on Frady to demonstrate the instructions were erroneous and his conviction was impacted by the instructions. *Id*. at 175.

77. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of U.S.C. titles 8, 18, 19, 21, 22, 28, 42, and 49).

78. *See* H.R. REP. NO. 104-23, at 9 (noting that the repetitive filing of habeas corpus petitions caused the judicial system to be substantially slowed).

79. *See id*. at 8 (stating that the proposal was "the culmination of almost 15 years of work in Congress to achieve meaningful habeas corpus reform").

80. *Id*. at 7. The bill amended sections of titles 18, 28, and 42 of the United States Code. *Id*. at 2-7.

81. *Id*. at 9.

82. *Id*.

gation to be drawn out over unnecessary lengths of time.[83] Congress later combined House of Representatives Bill 729 with other bills to enact AEDPA in April, 1996.[84]

In addressing these issues, the bill sought to make proceedings for petitioners' motions for collateral relief more stringent to encourage proactiveness during the direct appeals process.[85] The bill established shorter statutes of limitations on motions seeking collateral relief.[86] AEDPA additionally imposed a higher threshold for federal petitioners to acquire a certificate of appealability to appeal a district court's denial of a motion seeking collateral relief.[87] The report also sought to extend stronger finality rules on federal collateral motions, which allowed the states to carry out criminal sentences in a timely fashion.[88] The committee noted that these changes would further the state and federal judicial systems' interests in preserving courts' final decisions and encouraging parties to address the majority of issues during trial and direct appeals process rather than collateral review.[89]

B. *Johnson v. United States*: The Supreme Court Held the Residual Clause of the Armed Career Criminal Act to be Unconstitutionally Vague

In *Johnson v. United States*,[90] the United States Supreme Court struck down the residual clause of the ACCA, holding the clause to be void for vagueness in violation of the Due Process Clause.[91] The ACCA imposed mandatory enhanced sentences for an individual convicted for being a felon in possession of a firearm with three prior con-

83. *Id*. at 9-10. The committee noted that delays in filing motions and recurring questions of whether a petitioner had exhausted remedies under state law before filing in federal court were the primary causes of lengthy litigation. *Id*.

84. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (combining habeas reform with antiterrorism measures added to the United States Code).

85. *See* H.R. Rep. No. 104-23, at 9-10 (addressing the requirements a petitioner must satisfy for the federal court system to entertain a petition).

86. *Id*. at 9.

87. *See id*. (applying the standard stated by the Supreme Court in Barefoot v. Estelle, 463 U.S. 880 (1983), by requiring petitioners to demonstrate probable cause for their collateral attacks and make a substantial showing that they were denied a federal right).

88. *Id*. at 10. The report noted that this required a "quid pro quo arrangement" in which the states must in turn strengthen the right to counsel for defendants during trial, especially in capital cases. *Id*.

89. *See id*. at 11, 17-18 (stating that the state of affairs before the passage of AEDPA resulted in substantial disruption of the sentencing process in both the state and federal systems, and the new requirements would disincentivize meritless and untimely collateral relief motions).

90. 135 S. Ct. 2551 (2015).

91. *Johnson II*, 135 S. Ct. 2551, 2557 (2015).

victions constituting either serious drug offenses or violent felonies.[92] The residual clause granted the ACCA an expansive scope by including convictions for conduct that posed a serious potential risk of physical harm under the definition of a violent felony.[93]

Following his arrest after showing an undercover officer his AK-47 and large ammunition cache, Samuel Johnson pleaded guilty in 2012 to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g).[94] The United States District Court for the District of Minnesota found that Johnson had three predicate offenses that warranted sentence enhancement under the ACCA.[95] Johnson objected to the classification of his prior convictions for attempted simple robbery and possession of a short-barreled shotgun as violent felonies and further argued that the ACCA's residual clause was unconstitutionally vague.[96] Over his objections, the district court determined that existing precedent defined his prior convictions as violent felonies, stated the residual clause was not unconstitutionally vague, and determined Johnson to be an armed career criminal.[97] The court sentenced Johnson to 180 months imprisonment and five years of supervised release.[98] The United States Court of Appeals for the Eighth Circuit affirmed the ruling of the district court, remarking that the Supreme Court previously held the ACCA's provisions to be constitutionally sound.[99]

On appeal, the Supreme Court held the ACCA's residual clause to be unconstitutionally vague.[100] The majority identified that the process to determine whether a crime posed such risk so as to invoke the residual clause was fraught with uncertainty.[101] The Court noted that it was difficult to reconcile the residual clause with the categorical approach adopted by the ACCA, which required the analysis of an individual's past crimes be constrained to the elements of the crime

92. 18 U.S.C. § 924(e).

93. *See* 18 U.S.C. § 924(e)(2)(B)(ii). Applications of the residual clause included convictions for attempted burglary, failure to report to prison, vehicular flight, driving under the influence, and possession of a short-barreled shotgun. *Johnson II*, 135 S. Ct. at 2558-59.

94. United States v. Johnson, 526 F. App'x 708, 708-09 (8th Cir. 2013) [hereinafter *Johnson I*].

95. *Johnson I*, 526 F. App'x at 709 (noting that Johnson was previously convicted for attempted simple robbery, simple robbery, and possession of a short-barreled shotgun).

96. *Id*. at 709-10.

97. *Id*. at 710.

98. *Id*.

99. *Id*. at 711-12.

100. *Johnson II*, 135 S. Ct. at 2563.

101. *See id*. at 2557-58 (stating that the residual clause left "grave uncertainty about how to estimate the risk posed by a crime" and "about how much risk it takes for a crime to qualify as a violent felony").

defined by state or federal law.[102] Instead, the residual clause required consideration of the individual circumstances of a given offense because the same crime may create different risks depending on the circumstances.[103] The Court further identified the widely inconsistent application of the residual clause in the lower courts, which resulted in sharp disagreement over fundamental matters among the circuit courts.[104] After refusing to jettison the categorical approach for the residual clause, the Court found the ACCA's residual clause to be unconstitutionally vague.[105]

C. *Beeman v. United States*: The Eleventh Circuit Places the Burden of Proof on the Petitioner by Applying the Clear-Unclear Test

In *Beeman v. United States*,[106] the United States Court of Appeals for the Eleventh Circuit required petitioners pass the threshold created by the clear-unclear test to advance a petitioner's *Johnson* claim.[107] The United States District Court for the Northern District of Georgia convicted Jeffrey Beeman in 2009 under 18 U.S.C. § 922(g) for being a felon in possession of a firearm.[108] Finding that Beeman had been convicted of three or more violent felonies or serious drug offenses, the trial court enhanced his sentence pursuant to the ACCA.[109] In June 2016, Beeman filed a motion under 28 U.S.C. § 2255 asserting that his sentence enhancement was invalid under the United States Supreme Court's decision in *Johnson v. United States*[110] deeming the residual clause of the ACCA unconstitu-

102. *Id*. at 2557.

103. *See id*. at 2557-58 (identifying that application of the categorical approach to crimes determined to be violent felonies by the residual clause required abstraction, resulted in speculation, and created no standard).

104. *Id*. at 2560. The majority pointed out that disagreement between the circuit courts was not merely what crimes the residual clause applied to, but rather "pervasive disagreement about the nature of inquiry one is supposed to conduct and the kinds of factors one is supposed to consider." *Id*.

105. *Id*. at 2561-63. The following year, the Court held that *Johnson* created a new substantive rule of law that applied retroactively, allowing individuals previously convicted under the ACCA through the residual clause the opportunity to correct their sentence. Welch v. United States, 136 S. Ct. 1257, 1268 (2016).

106. 871 F.3d 1215 (11th Cir. 2017).

107. *See* Beeman v. United States, 871 F.3d 1215, 1220-21 (11th Cir. 2017) (noting that a § 2255 movant making a *Johnson* claim must provide evidence indicating that the claim is valid where the record is silent).

108. *Beeman*, 871 F.3d at 1217-18.

109. *Id*. at 1217. The court identified that "[i]n 1990 Beeman was convicted in Georgia of aggravated assault[,]" and "[i]n 1999 he was convicted in Georgia of two counts of possession of cocaine with intent to distribute." *Id*.

110. 135 S. Ct. 2551 (2015).

tional.[111] The district court denied the motion, stating that Beeman had not brought a *Johnson* claim and, alternatively, considering the merits, his previous convictions met the requirements for sentence enhancement outside of the residual clause.[112]

The Eleventh Circuit ultimately affirmed the district court's denial, but first found that Beeman had in fact brought forth a *Johnson* claim in his motion.[113] The court applied the clear-unclear test in determining whether Beeman's claim could be heard by the court.[114] This test required the petitioner to present affirmative evidence indicating his sentence enhancement resulted from the residual clause where the record is unclear.[115] The clear-unclear test allowed the circuit court to only deny entertaining the merits of Beeman's motion where the record clearly indicated that the ACCA's residual clause could not possibly have caused his sentence enhancement.[116]

Beeman argued that Georgia's aggravated assault statute was historically placed under the umbrella of the ACCA's residual clause.[117] The Eleventh Circuit proceeded to consider the merits of Beeman's petition after it deemed Beeman had satisfied the initial burden under the clear-unclear test and established the prima facie case for a *Johnson* claim.[118] However, the court found that Beeman's motion could not survive an examination of its merits, as Beeman could not demonstrate that it was more likely than not he was sentenced under the residual clause.[119] As a result, the Eleventh Circuit affirmed the district court's denial of Beeman's § 2255 motion.[120]

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111. *Beeman*, 871 F.3d at 1218. Beeman additionally argued that his aggravated assault conviction did not qualify as a violent felony as defined by the ACCA's constitutional provisions. *Id*.

112. *Id*. at 1219.

113. *Id*. at 1220-21 (noting that Beeman brought a *Johnson* claim despite primarily attacking the aggravated assault conviction).

114. *Id*. at 1224 n.6.

115. *Id*.

116. *Id*.

117. *Id*. at 1220-21. Beeman asserted that aggravated assault in Georgia "'historically qualified as an ACCA predicate under [the ACCA]'s residual clause,' and that 'in recent years, the Eleventh Circuit has been using the residual clause as a default home for many state statutes that might otherwise have been counted under the elements or enumerated crimes clauses.'" *Id*.

118. *Id*. at 1221.

119. *Id*. at 1221-22. Beeman only provided evidence that established the prima facie case for his *Johnson* claim, and the court stated such "general observations . . . [were] not enough to carry his burden of establishing that he . . . was sentenced as an armed career criminal . . . because of the residual clause." *Id*. at 1224.

120. *Id*. at 1225.

D. *United States v. Winston*: The Fourth Circuit Requires only the Possibility of the District Court's use of the Residual Clause

In *United States v. Winston*,[121] the United States Court of Appeals for the Fourth Circuit also addressed the burden a 28 U.S.C. § 2255 petitioner must overcome under *Johnson v. United States*[122] to advance a claim for collateral relief.[123] The United States District Court for the Western District of Virginia convicted Robert Winston for being a felon in possession of a firearm.[124] Since Winston was previously convicted of three violent felonies or serious drug charges, the court enhanced his sentence pursuant to the ACCA.[125] In 2016, Winston filed a motion under § 2255 to vacate his sentence, relying on invalidation of the residual clause of the ACCA in *Johnson*.[126] The district court denied Winston's motions and Winston appealed to the Fourth Circuit.[127]

The Fourth Circuit vacated the judgment of the district court.[128] Holding that Winston's claim was not procedurally barred, the circuit court found that the record was unclear in showing whether Winston's enhanced sentence resulted from application of the ACCA's residual clause.[129] The court determined that it would be unjust to penalize a petitioner for the sentencing court's decision to not specify which ACCA clause resulted in the petitioner's enhanced sentence.[130] The Fourth Circuit believed allowing an unclear record to disadvantage the petitioner would result in selective application of the *Johnson* rule and disparity in the treatment of similarly situated defendants.[131] Winston therefore only had to demonstrate that his sentence may have been enhanced through the residual clause to advance his *John-*

121. 850 F.3d 677 (4th Cir. 2017).
122. 135 S. Ct. 2551 (2015).
123. United States v. Winston, 850 F.3d 677, 679 (4th Cir. 2017).
124. *Winston*, 850 F.3d at 679.
125. *Id*. at 680. Winston's previous convictions included "(1) rape in violation of the Uniform Code of Military Justice (UCMJ), (2) robbery in violation of Virginia law, (3) possession of cocaine with the intent to distribute in violation of Virginia law, and (4) distribution of cocaine base in violation of federal law." *Id.*
126. *Id*. at 681.
127. *Id*. The district court rejected the argument that Winston's claim was procedurally barred due to timeliness and determined that Winston's convictions for robbery and possession of cocaine and cocaine base did not run afoul of the *Johnson* decision. *Id*.
128. *Id*. at 686.
129. *Id*. at 682. The court noted that "[n]othing in the law requires a [court] to specify which clause . . . it relied upon in imposing a sentence." *Id*. (alteration in original) (quoting In re Chance, 831 F.3d 1335, 1340 (11th Cir. 2016)).
130. *See id*. (rejecting the government's argument that Winston was barred because the record did not affirmatively establish his sentence resulted from the residual clause).
131. *Id*.

son motion.[132] The court concluded that the district court erred in denying Winston's motion and found that Virginia common law robbery included conduct outside of the scope of the other valid provisions of the ACCA.[133] On remand, the district court vacated Winston's sentence.[134]

E. *United States v. Geozos*: The Ninth Circuit Analogizes the *Stromberg* Principle to Petitioners Seeking *Johnson* Relief when the Record is Unclear

In *United States v. Geozos*,[135] the United States Court of Appeals for the Ninth Circuit considered the petitioner's burden of proof for advancing a claim for collateral relief under *Johnson v. United States*[136] and reached a conclusion similar to the Fourth Circuit.[137] In 2006, the United States District Court for the District of Alaska convicted David Geozos for being a felon in possession of a firearm and felony possession of cocaine.[138] The district court found that Geozos's previous convictions satisfied the ACCA's requirements for three or more violent felonies or serious drug charges and enhanced his sentence accordingly.[139] On direct appeal, the Ninth Circuit affirmed the district court's sentence.[140] In 2016, Geozos filed a 28 U.S.C. § 2255 motion, asserting that his enhanced sentence resulted from the district court's reliance on the ACCA's residual clause.[141] The Ninth Circuit elected to hear the appeal after the district court denied Geozos's motion.[142]

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132. *Id*.

133. *Id*. at 686. A conviction for common law robbery under Virginia law did "not necessarily include the use, attempted use, or threatened use of 'violent force . . . capable of causing physical pain or injury to another person[.]'" *Id*. at 685 (citing Johnson v. United States, 559 U.S. 133, 140 (2010)).

134. United States v. Winston, 3:01-cr-00079, 2017 WL 1498104, at *2-3 (W.D. Va. Apr. 25, 2017). The parties subsequently voluntarily dismissed the appeal. United States v. Winston, 3:01-cr-00079-NKM-RSB-1, 2017 WL 5891603, at *1 (4th Cir. July 7, 2017).

135. 870 F.3d 890 (9th Cir. 2017).

136. 135 S. Ct. 2551 (2015).

137. *See* United States v. Geozos, 870 F.3d 890, 896-97 (9th Cir. 2017) (determining it to be improper to burden the petitioner with an unclear record).

138. *Geozos*, 870 F.3d. at 893. The charge of cocaine possession was dropped by a plea deal. *Id*.

139. *Id*. Geozos's previous convictions included "assault in the third degree in Alaska" and "possession of cocaine, . . . burglary, . . . armed robbery, . . . robbery and . . . using a firearm in commission of a felony, and . . . another . . . armed robbery in Florida." *Id*.

140. *Id*. The circuit court noted the district court did not specify which offenses justified the district court's sentence enhancement, and the circuit court determined that the robbery and assault convictions qualified as violent felonies. *Id*.

141. *Id*. at 894.

142. *Id*.

On appeal, the Ninth Circuit addressed whether Geozos's motion should be dismissed on procedural grounds and if his motion should succeed on the merits.[143] The court first established that for an alleged *Johnson* claim to advance beyond the procedural hurdle, the claim must indicate that the petitioner's sentence violated the Constitution in light of a retroactive rule of constitutional law.[144] The circuit court noted once more that the sentencing court did not specify what clause of the ACCA it relied on when enhancing Geozos's sentence.[145]

Finding the record unclear, the court adopted the argument proffered by Geozos and applied the *Stromberg* principle.[146] The *Stromberg* principle, derived from *Stromberg v. California*,[147] provides that a conviction from a general verdict where at least one theory of liability is unconstitutionally invalid cannot stand because it may have rested on an unconstitutional theory.[148] Geozos asserted that an unclear record in the face of a potentially constitutionally invalid sentence was akin to a conviction issued by such a general verdict.[149] Agreeing with Geozos's argument, the Ninth Circuit held that if the record is unclear, a petitioner's *Johnson* claim must be addressed on the merits when the sentencing court may have relied on the ACCA's residual clause.[150] In considering Geozos' *Johnson* claim on the merits, the circuit court found that robbery and armed robbery under Florida law included conduct outside of the ACCA's force clause, and therefore could only have qualified under the ACCA through the residual clause.[151] The Ninth Circuit determined that Geozos's convictions for robbery could not sustain his sentence enhancement and ordered his sentence vacated.[152]

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143. *Id*. at 895. The circuit court noted that these questions had frequently arisen in the wake of *Johnson*. *Id*.

144. *Id*. The court stated that "[a] claim necessarily 'relies on' a rule of constitutional law if the claim is that the movant was sentenced in violation of that constitutional rule[,]" and for new and retroactive rules, a § 2255 movant must "show . . . he or she was sentenced in violation of the Constitution[.]" *Id*.

145. *Id*.

146. *Id*. at 895-96.

147. 283 U.S. 359 (1931).

148. *Geozos*, 870 F.3d. at 896.

149. *Id*. The Ninth Circuit asserted that a judicial finding in post-conviction relief should be subject to the same standards as a jury's findings during trial. *Id*.

150. *Id*. The Ninth Circuit noted that robbery or armed robbery under Florida law was not held to be a violent felony under the ACCA, and conflicting interpretations existed between the Seventh, Ninth, and Eleventh Circuits. *Id*. at 897.

151. *Id*. at 901. The court noted that robbery under Florida law may occur "when the force used to take that property is minimal" and not violent. *Id*.

152. *Id*. The record indicated that the sentencing court did not rely on Geozos's conviction for possession of cocaine, and the enhanced sentence could not have successfully relied on three or more violent felonies without the robbery convictions qualifying as violent felonies. *Id*. at 893, 901.

F. *United States v. Taylor*: The Fifth Circuit Applies the Fourth, Ninth, and Eleventh Circuits' Approaches

In *United States v. Taylor*,[153] the United States Court of Appeals for the Fifth Circuit also addressed the burden of proof required for a petitioner to advance a claim under *Johnson v. United States*[154] in the face of an unclear record.[155] In 2006, the United States District Court for the Northern District of Texas convicted Lawrence Taylor of being a felon in possession of a firearm.[156] The district court noted that Taylor had three or more convictions resulting from violent felonies, including causing injury to a child.[157] The district court enhanced his sentence under the ACCA, and on appeal, the Fifth Circuit affirmed Taylor's sentence.[158] Following the United States Supreme Court's decision in *Johnson*, Taylor filed a 28 U.S.C. § 2255 motion seeking to vacate his sentence.[159] The district court denied Taylor's motion because he failed to raise arguments attacking the ACCA's applicability at trial or on appeal.[160]

On appeal, the Fifth Circuit turned to the decisions of the Fourth, Ninth, Tenth, and Eleventh Circuits to determine the burden of proof placed on *Johnson* petitioners.[161] Upon examining the decisions of the other circuit courts, the Fifth Circuit determined there was no need for the court to adopt any particular standard.[162] The circuit court concluded that Taylor's § 2255 claim, attacking his conviction for injury to a child under the ACCA, both overcame the procedural hurdle and succeeded on the merits under the Fourth and Ninth Circuits' standards where uncertainty favored the petitioner.[163] Additionally, precedent indicated that at the time of Taylor's firearm conviction a conviction for injury of a child could only be applied through the ACCA's residual clause.[164] The Fifth Circuit concluded that the showing of this precedent satisfied the standards of the Tenth and Eleventh Circuits, which required a petitioner to provide affirmative

153. 873 F.3d 476 (5th Cir. 2017).
154. 135 S. Ct. 2551 (2015).
155. United States v. Taylor, 873 F.3d 476, 477 (5th Cir. 2017).
156. *Taylor*, 873 F.3d at 477.
157. *Id*. Taylor's previous convictions included two convictions for burglary of a building and one conviction for causing injury to a child. *Id*.
158. *Id*.
159. *Id*. at 478.
160. *Id*. The district court further asserted the trial court did not apply the residual clause in Taylor's sentencing. *Id*.
161. *Id*. at 479-81.
162. *Id*. at 481-82.
163. *Id*. The Fifth Circuit concluded that under recent precedent a conviction for injury to a child under Texas law was not a violent felony for the purposes of the ACCA. *Id*. at 482.
164. *Id*.

evidence before the court examines the merits of his *Johnson* claim.[165] Therefore, the court vacated Taylor's enhanced sentence.[166]

IV. ANALYSIS

In *Dimott v. United States*,[167] the United States Court of Appeals for the First Circuit required a petitioner bringing a claim under *Johnson v. United States*,[168] to prove it was more likely than not his sentence enhancement was based on the ACCA's residual clause.[169] In *Dimott*, Richard Dimott, Wayne N. Collamore, and Charles H. Casey, Jr. alleged their previous sentence enhancements resulted from the sentencing court's application of the residual clause, which had been declared unconstitutional by the United States Supreme Court.[170] The First Circuit found that the record clearly indicated Dimott and Collamore's sentences did not result from the residual clause.[171] For Casey's claim, where the record was unclear, the court found that Casey could not prove by a preponderance of the evidence that the sentencing court applied the residual clause in determining his sentence.[172] The First Circuit determined that the imposition of a lesser burden on the petitioner would subvert the presumption of the finality of criminal convictions after a trial and the direct appeal process concluded.[173] Finding petitioners could not meet these burdens, the First Circuit affirmed the United States District Court for the District of Maine's dismissal of all three 28 U.S.C. § 2255 petitions.[174]

This Analysis will argue that the presumption of finality requires a petitioner to demonstrate the merits of a claim for collateral relief as a jurisdictional predicate for the courts.[175] This Analysis will further argue that application of standards weaker than a preponderance of the evidence subverts the presumption of finality by effectively shifting the burden of proof onto the state after it already satisfied its burden at trial.[176] Finally, this Analysis will argue that the First Circuit properly required petitioners prove by a preponderance of the evi-

165. *Id*.
166. *Id*. The court noted Taylor had already served his statutory maximum sentence of 10 years and ordered his release. *Id*.
167. 881 F.3d 232 (1st Cir. 2018).
168. 135 S. Ct. 2551 (2015).
169. *Dimott II*, 881 F.3d 232, 243 (1st Cir. 2018).
170. *Dimott II*, 881 F.3d at 233-34.
171. *Id*. at 236.
172. *Id*. at 243.
173. *Id*. at 240 (noting that Congress' intent in passing AEDPA and the Supreme Court's disposition towards collateral relief indicated that final judgments are presumed to be final after the appeal process concludes).
174. *Id*. at 243.
175. *See infra* notes 178-187 and accompanying text.
176. *See infra* notes 188-203 and accompanying text.

dence the district court enhanced their sentences through the ACCA's residual clause before the court fully entertains petitioners' *Johnson* claims.[177]

A. The Presumption of Finality Requires a Petitioner to Establish the Merits for Collateral Relief

Collateral proceedings operate within a different context than a defendant's criminal trial and any subsequent direct appeals.[178] During the criminal trial, the state bears the burden of proving the defendant's guilt beyond a reasonable doubt and justifying the sentence imposed on the defendant.[179] Collateral proceedings occur after the point where the state met its burden at trial and the presumption of finality has attached to the conviction and sentence.[180] The presumption of finality stipulates that once the trial and direct appeals process finalizes a defendant's conviction and sentence, the courts may presume that the defendant's conviction complies with the law.[181] Even where substantive changes in the law occur between the sentencing and the petition for collateral relief, the presumption of finality persists as an obstacle to a petitioner's claim.[182]

The burden of proof is on the petitioner seeking collateral relief in the face of an otherwise legitimate conviction.[183] The United States Supreme Court stated in *Frady v. United States*[184] that proceedings seeking collateral relief were not to be treated as though they were extensions of the appellate process.[185] In contrast, petitioners must bear the burden of demonstrating that the merits of their claims warrant the court to first hear their collateral claims and then to grant

177. *See infra* notes 204-215 and accompanying text.

178. *Compare Frady II*, 456 U.S. 152, 165 (1982) (reversing the holding of the United States Court of Appeals for the District of Columbia Circuit and noting that Congress "did not purport to modify the basic distinction between direct review and collateral review" with regards to the presumption of finality attached to the final judgment), *with* H.R. Rep. No. 104-23, at 10 (1995) (noting the goal of strengthening the presumption of finality attached after direct review concludes).

179. *See generally Frady II*, 456 U.S. at 170. The Court addressed Frady's assertion that the trial court's erroneous instructions relieved the state of its burden at trial to prove all elements of murder beyond a reasonable doubt by stating erroneous instructions alone did not mitigate the jury's finding of malice. *Id*. at 170-72.

180. *See id*. at 164 (noting that the perfection of trial and appellate proceedings "afford[s] their completed operation . . . binding effect").

181. *Id*.

182. *See id*. at 169-71 (addressing the full merits of Frady's claim because the record clearly demonstrated that the original jury instructions were declared erroneous by other decisions of the D.C. Circuit).

183. *See id*. at 165 (stating that "a final judgment commands respect").

184. 456 U.S. 152 (1982).

185. *See id*. at 165 (stating the Court has "long and consistently affirmed that a collateral challenge may not do service for an appeal").

relief.[186] The Court's favoring of the presumption of finality does not permit courts to entertain a collateral petitioner's claim when the claim's sole merit is the possibility of error at trial.[187]

B. Congressional Intent Discourages Applying a Burden of Proof Weaker than a Preponderance of the Evidence to Petitioners' *Johnson* Claims

In contrast to trial and direct appellate proceedings, collateral actions are subject to stronger procedural hurdles that a petitioner must overcome by demonstrating that the petition merits examination and then relief.[188] In passing AEDPA, the United States Congress intended, in part, to strengthen the finality of conviction by restricting the flow of meritless collateral relief claims to federal courts.[189] To comply with Congress' intent to prevent courts from entertaining meritless claims, the courts must require petitioners to overcome the presumption of finality by providing sufficient evidence that their claims merit relief.[190] For collateral action to be fully entertained by the courts, petitions must demonstrate their merits are enough to weigh the proceedings in favor of petitioners.[191] Requiring less than a preponderance of the evidence to establish subject matter jurisdiction for petitioners' collateral claims subjects the courts to entertaining petitions for collateral relief that would not survive a full examination of their merits.[192] Even where the facts demonstrate the petitioner's

186. *See id*. at 166 (holding that a petitioner seeking collateral relief "must clear a significantly higher hurdle than would exist on direct appeal"); *see also Dimott II*, 881 F.3d 232, 240 (1st Cir. 2018) (noting that when the final judgment is perfected, 28 U.S.C. § 2255 petitioners bear the burden of proof in post-conviction proceedings).

187. *Cf. Frady II*, 456 U.S. at 170 (holding that in the case of a collateral attack on erroneous jury instructions not objected to at trial, the petitioner must show "not merely that the errors . . . created a *possibility* of prejudice, but . . . worked to his *actual* and substantial disadvantage").

188. *See Frady II*, 456 U.S. 152, 165 (1982) (noting the distinction in the circumstances between direct and collateral review).

189. *See* H.R. Rep. No. 104-23, at 9 (noting the burden imposed on federal courts by overwhelming numbers of meritless collateral claims); *see also Dimott II*, 881 F.3d 232, 242-43 (citing Turner v. United States, 699 F.3d 578, 587 (1st Cir. 2012)) (noting the goal of AEDPA was to "further [the] finality of convictions").

190. *Compare* H.R. Rep. No. 104-23, at 9 (requiring a § 2255 petitioner make a "substantial showing of the denial of a Federal right" to receive a certificate of appealability), *with Dimott II*, 881 F.3d at 243 (requiring petitioner establish a *Johnson* claim by a preponderance of the evidence to establish the court's subject matter jurisdiction)

191. *Compare Frady II*, 456 U.S. at 167-68 (finding erroneous jury instructions given at trial merited the Court to address the question of whether Frady's conviction resulted from illegitimate prejudice), *with Dimott II*, 881 F.3d at 243 (noting that Casey failed to warrant the court address whether his convictions resulted from the ACCA's residual clause because he only proved there was a possibility the residual clause was applied at his sentencing).

192. *Compare* Beeman v. United States, 871 F.3d 1215, 1224 n.6 (11th Cir. 2017) (applying the clear-unclear test and permitting a *Johnson* claim to be fully analyzed

claim merits relief, establishing jurisdiction for the petitioner's claim remains the burden of the petitioner and is not for the court to establish on the petitioner's behalf.[193]

A court that imposes a burden less than a preponderance of the evidence on *Johnson* petitioners blurs the distinction between direct review and collateral review.[194] In *United States v. Geozos*,[195] the United State Court of Appeals for the Ninth Circuit eroded the distinction between direct review and collateral review when it applied a variation of the principle created by *Stromberg v. California*[196] to the collateral context.[197] This principle treats uncertainty in favor of the defendant at trial by maintaining that a verdict that may have rested on unconstitutional grounds is invalid.[198] The Ninth Circuit applied the *Stromberg* principle to a petitioner filing a *Johnson* claim to correct allegedly invalid sentences.[199] To establish subject matter jurisdiction, the court only required the petitioner to demonstrate that the record was unclear regarding whether his sentence resulted from the ACCA's residual clause.[200] A court accords little, if any, significance to the presumption of finality attached to the rendered final judgment when it shifts the burden of proof back to the state because of a mere possibility that sentencing rested on invalid grounds.[201] Placing the state's conviction and sentence under scrutiny after it already demon-

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when petitioner provided general affirmative evidence his sentence may have been enhanced by the ACCA's residual clause only to hold that the petitioner failed to establish his claim's validity by a preponderance of the evidence), *with Dimott II*, 881 F.3d at 243 (holding that petitioner failed to establish jurisdiction by failing to prove by a preponderance of the evidence his sentence was enhanced through the residual clause).

193. *Compare Frady II*, 456 U.S. at 167-68 (reasoning that plain error review, where an appellate court may correct errors not objected to at trial, was inappropriate in the context of collateral relief and petitioner must prove his own case for both subject matter jurisdiction and the merits), *with* United States v. Geozos, 870 F.3d 890, 896 (9th Cir. 2017) (establishing jurisdiction by recognition of the unclear record regarding the categorization of petitioner's prior offenses).

194. *Cf. Frady II*, 456 U.S. at 165 (stating that "a collateral challenge may not do service for an appeal").

195. 870 F.3d 890 (9th Cir. 2017).

196. 283 U.S. 359 (1931).

197. *Compare Geozos*, 870 F.3d at 896-97 (holding that an unclear record should favor the petitioner by application of a doctrine created to address an error during direct review), *with Frady II*, 456 U.S. at 165-66 (stating that standards and doctrines created for direct appellate proceedings are generally not to be applied to collateral claims following the conclusion of appellate review).

198. *Geozos*, 870 F.3d at 896 (citing Stromberg v. California, 283 U.S. 359, 367-68 (1931)).

199. *See id*. at 897 (stating that an unclear record regarding classification of felonies warranted application of the *Stromberg* principle to fully examine Geozos's petition).

200. *Id*.

201. *Compare Frady II*, 456 U.S. at 165-66 (holding that the standards used on direct appeal are not to be transplanted into collateral proceedings), *and Dimott II*, 881 F.3d at 241 (noting that *Stromberg* did not implicate any standard in the context of collateral review), *with Geozos*, 870 F.3d at 896-97 (applying a variation of the

strated guilt beyond a reasonable doubt at trial and direct appeal undermines the presumption of finality.[202] In undermining the presumption of finality, opens the collateral review procedure to abuse and requires the state to mount resources to affirmatively assert the clarity of the record and, once more, address the merits of the case after the trial's conclusion.[203]

C. The First Circuit Adopted the Proper Standard by Requiring Petitioners to Show the Enhancement of Their Sentences more Likely than not Resulted from Application of the ACCA's Residual Clause

In *Dimott v. United States*,[204] the United States Court of Appeals for the First Circuit gave proper deference to the presumption of finality when it concluded that a petitioner must prove a *Johnson* claim by a preponderance of the evidence before a court may properly hear the petition.[205] This standard is appropriate within the collateral relief context of criminal proceedings because it affords due recognition to the fact that the state proved its case at trial beyond reasonable doubt.[206] Requiring a petitioner to prove a claim by a preponderance of the evidence further carries out congressional intent in culling the abuse of petitions for collateral relief burdening the federal courts.[207]

The First Circuit's preponderance of the evidence standard maintains the distinction between direct review and collateral review by

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Stromberg principle during collateral review proceedings to establish subject matter jurisdiction for petitioner's collateral attack).

202. *See Frady II*, 456 U.S. at 164-65 (stating that "a final judgment commands respect" and "[o]ur trial and appellate procedures are not so unreliable that we may not afford their completed operation any binding effect beyond the next in a series of endless postconviction collateral attacks").

203. *Id*.

204. 881 F.3d 232 (1st Cir. 2018).

205. *Compare Frady II*, 456 U.S. 152, 164, 166 (noting that after the final judgment, the presumption of finality entitles courts "to presume [the petitioner] stands fairly and finally convicted" and the petitioner seeking collateral relief "must clear a significantly higher hurdle" than on direct appeal to acquire relief), *and* H.R. Rep. No. 104-23, at 11 (1995) (noting the United States Congress' interest in strengthening the presumption of finality by increasing the requirements a petitioner must satisfy to seek and be granted collateral relief), *with Dimott II*, 881 F.3d 232, 240 (1st Cir. 2018) (stating that any standard less than the preponderance of the evidence would "undercut an animating principle of AEDPA: the presumption of finality").

206. *Compare Frady II*, 456 U.S. at 164 (stating the United States Court of Appeals for the District of Columbia Circuit failed to give proper deference to the presumption of finality in its vacation of Frady's sentence through the plain error standard), *with Dimott II*, 881 F.3d at 240 (placing the burden on the petitioner to show the district court more likely than not enhanced the sentence through the residual clause).

207. *Compare* H.R. Rep. No. 104-23, at 9 (stating the abuse of habeas motions and other collateral actions are of significant concern in the passage of AEDPA), *with Dimott II*, 881 F.3d at 243 (dismissing petitioners' claims on jurisdictional bases rather than engaging in analysis of the petitioners' convictions used to enhance their sentences).

deferring to the presumption of finality.[208] The First Circuit placed the onus on the petitioner to justify why the court ought to entertain his or her *Johnson* petition.[209] In doing so, the court afforded proper significance to the state's establishment that the petitioner's conviction was warranted beyond a reasonable doubt.[210] Applying a standard weaker than the preponderance of the evidence, particularly with the use of a doctrine created for the direct review process, such as the principle from *Stromberg v. California*,[211] undermines the distinction between direct and collateral review by effectively forcing the state to remake its argument for sentencing.[212] Further, requiring a preponderance of the evidence does not create an unobtainable standard for petitioners bearing meritorious claims.[213] In giving due deference to the presumption of finality that guides the parameters of the collateral relief process, the First Circuit properly established that petitioners seeking to correct their sentences under *Johnson v. United States*[214] must prove their claims by a preponderance of the evidence to enable courts to exercise jurisdiction and fully analyze collateral claims.[215]

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208. *See id*. at 240 (quoting Teague v. Lane, 489 U.S. 288, 309 (1989)) (noting that "[w]ithout finality, the criminal law is deprived of much of its deterrent effect").

209. *See id*. (noting that the First Circuit's precedent concerning collateral review required such allocation of the burden of proof).

210. *Id*.

211. 283 U.S. 359 (1931).

212. *Compare Frady II*, 456 U.S. at 165 (stating that the same standards and rules regarding the burden of proof applicable during the direct review process do not generally translate into the collateral review context), *and Dimott II*, 881 F.3d at 240 (construing uncertainty against the petitioner because the petitioner bears the burden to prove his claim by a preponderance of the evidence), *with* United States v. Geozos, 870 F.3d 890, 897 (9th Cir. 2017) (construing uncertainty in favor of the petitioner as the court would on direct review through the *Stromberg* principle), United States v. Winston, 850 F.3d 677, 682 (4th Cir. 2017) (construing uncertainty in favor of the petitioner so as to not treat similarly situated defendants differently), *and* Beeman v. United States, 871 F.3d 1215, 1224 n.6 (11th Cir. 2017) (construing uncertainty in favor of the petitioner where a petitioner can assert some affirmative evidence not contradicted by the record).

213. *Compare Geozos*, 870 F.3d at 896 (asserting that a petitioner only needs to demonstrate uncertainty over whether his sentence was enhanced pursuant to the ACCA's residual clause), *and Winston*, 850 F.3d at 682 (asserting that requiring more than a demonstration of uncertainty would "violat[e] 'the principle of treating similarly situated defendants the same'") (internal citations omitted), *with* United States v. Taylor, 873 F.3d 476, 481-82 (5th Cir. 2017) (determining that the petitioner established his claim by a preponderance of the evidence before the court fully entertained his claim and granted relief by arguing that it was more likely than not that the offenses used to predicate sentence enhancement under the ACCA were applied through the ACCA's residual clause).

214. 135 S. Ct. 2551 (2015).

215. *Compare Dimott II*, 881 F.3d at 240 (noting that allowing "mere possibility" to advance a petitioner's *Johnson* claim would undermine the finality afforded to criminal sentencing), *with Frady II*, 456 U.S. at 166 (reaffirming that a final conviction warrants the petitioner to meet greater standards when seeking collateral relief).

V. CONCLUSION

If a petitioner alleges his or her ACCA-enhanced sentence resulted from application of the invalid residual clause, the United States Court of Appeals for the First Circuit held in *Dimott v. United States*[216] that the petitioner must prove by a preponderance of the evidence that the trial court utilized the residual clause at sentencing.[217] When the trial and direct review process conclude, the presumption of finality attaches to the judgment, and the petitioner seeking collateral relief must demonstrate the merits of his or her claim to overcome the finality of a sentence.[218] Further, a court imposing a standard weaker than a preponderance of the evidence disregards this presumption of finality and treats direct review and collateral review as interchangeable.[219] Therefore, the First Circuit gave the presumption of finality and the distinction between direct and collateral review due deference in requiring, as a predicate to jurisdiction, a petitioner to prove by a preponderance of the evidence that his or her enhanced sentence resulted from the ACCA's residual clause.[220]

The First Circuit's approach requires petitioners to support their claims that their sentences resulted from the ACCA's residual clause by a preponderance of the evidence before courts may establish subject matter jurisdiction. Though it adds to the circuit court split over which standard to apply to petitioners seeking to correct ACCA-enhanced sentences, the First Circuit's standard in *Dimott* both effectuates the United States Congress' intent to restrict access to collateral relief to truly meritorious petitions and preserves the presumption of finality in criminal proceedings.

The lower standards crafted by the United States Courts of Appeals for the Fourth, Ninth, and Eleventh Circuits were unnecessary, as their analysis of the merits mirrored the requisites identified by the First Circuit in *Dimott*. A court that grants jurisdiction by using a standard lower than a preponderance of the evidence to a claim under *Johnson v. United States*,[221] only to determine that the petitioner failed to establish the merits of his or her petition, arbitrarily disregards congressional intent and federal precedent favoring the presumption of finality. However, the First Circuit's approach avoids creating an unnecessary exception for a *Johnson* claim by giving due deference to the presumption of finality, thereby simplifying the anal-

216. 881 F.3d 232 (1st Cir. 2018).
217. *Dimott II*, 881 F.3d 232, 242-43 (1st Cir. 2018).
218. *See supra* notes 178-187 and accompanying text.
219. *See supra* notes 188-203 and accompanying text.
220. *See supra* notes 204-215 and accompanying text.
221. 135 S. Ct. 2551 (2015).

ysis and consuming less of the federal courts' time and resources. To prevent further arbitrary exceptions to the petitioner's burden in claims for collateral relief, the United States Supreme Court should step in and affirm the notion that a *Johnson* claim is no different from other claims for collateral relief. Following the presumption of finality, the Court should hold that it is the burden of the petitioner to establish by a preponderance of the evidence that the petitioner's ACCA-enhanced conviction rested upon the ACCA's residual clause.

Ryan Baker—'20

CHILDREN AS PREDATORS: COURTS SHOULD HANDLE JUVENILE SEX OFFENDERS AND ADULT SEX OFFENDERS DIFFERENTLY

I. INTRODUCTION

What if a childhood mistake punished you for the rest of your life?[1] This was the case for Jacob C., who was tried and found guilty of criminal sexual conduct at the mere age of eleven.[2] Jacob was placed on the sex offender registry at the age of eleven for touching, not penetrating, his sister's genitals.[3] Jacob, initially placed on the public registry when he turned eighteen, faced relentless humiliation and harassment from his school peers.[4] Eventually, Jacob married and had a daughter, but later divorced.[5] Although Jacob initially had joint custody of his daughter, he lost custody when he violated registration requirements by living too close to a school and by failing to register a new address after a period of homelessness.[6] Jacob could not fight his felony conviction for failure to register because he could not afford a lawyer.[7] The mistake he made at the age of eleven now and forever defines his life.[8]

This Note will discuss the dangerous and controversial practice of sentencing juvenile sex offenders.[9] First, this Note will discuss the Bush administration's Adam Walsh Child Protection and Safety Act of 2006,[10] ("Adam Walsh Act") which includes the Sex Offender Registration and Notification Act ("SORNA")[11] creating the sex offender

1. *See generally Raised on the Registry: the Irreparable Harm of Placing Children on Sex Offender Registries in the US*, HUMAN RIGHTS WATCH (May 1, 2013), https://www.hrw.org/report/2013/05/01/raised-registry/irreparable-harm-placing-children-sex-offender-registries-us#page (discussing the story of Jacob C.).

2. HUMAN RIGHTS WATCH, *supra* note 1.

3. *Id*.

4. See *id*. (noting that Jacob also dropped out of college due to the same humiliation and harassment from peers).

5. *Id*.

6. *Id*.

7. *See id*. (explaining that Jacob could not afford a lawyer because of his inability to find employment.)

8. *Id*.

9. *See infra* notes 23-230 and accompanying text.

10. Pub. L. No. 109-248, 120 Stat. 587 (2006) (codified as amended in scattered sections of 18 and 34 U.S.C.).

11. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, tit. I, 120 Stat. 587 (codified as amended at 34 U.S.C. §§ 20911 through 20932 (West Supp. 2017)).

registry.[12] Since the United States Supreme Court has yet to hear a juvenile sex offender case, this Note will discuss what the Court has said on the topic of juvenile offenders.[13] This Note will then discuss the Pennsylvania Supreme Court's determination regarding the punitive effects of SORNA on juvenile sex offenders.[14] Next, this Note will look at the split between the United States Court of Appeals for the Eighth and Eleventh Circuits regarding whether a juvenile offender may be required to register as a sex offender under SORNA.[15] This Note will also discuss what some state courts have determined when addressing lifetime registration requirements for juvenile sex offenders.[16]

Ultimately, this Note will argue that a lifetime registration requirement for a juvenile sex offender constitutes, for all intents and purposes, a life sentence.[17] This Note will examine SORNA's punitive effects and the purpose of juvenile court system.[18] Next, this Note will consider Pennsylvania's process of assessing juvenile offenders as a solution to the problem of how to handle juvenile sex offenders in the justice system.[19] This Note will address the potential objection from within SORNA, which states that only juveniles aged fourteen years and older who have committed aggravated sex abuse, or higher crime, will be required to register.[20] However, this Note will rebut this objection by examining why an irrebuttable presumption that a juvenile offender is at a high risk of reoffending is inappropriate.[21] Finally, this Note will address why a juvenile does not fall within the meaning of the term *sex offender*.[22]

II. BACKGROUND

A. Congress Passes The Sex Offender Registration and Notification Act

In October 1989, Jacob Wetterling was on his way home from the store with his brother, Trevor, and his friend, Aaron.[23] The three boys were accosted by a masked stranger who told both Aaron and Trevor

12. *See infra* notes 23-51 and accompanying text.
13. *See infra* notes 52-63 and accompanying text.
14. *See infra* notes 64-84 and accompanying text.
15. *See infra* notes 85-109 and accompanying text.
16. *See infra* notes 110-142 and accompanying text.
17. *See infra* notes 143-156 and accompanying text.
18. *See infra* notes 157-168 and accompanying text.
19. *See infra* notes 169-174 and accompanying text.
20. *See infra* notes 175-189 and accompanying text.
21. *See infra* notes 190-212 and accompanying text.
22. *See infra* notes 213-218 and accompanying text.
23. Joanna C. Enstice, *Remembering the Victims of Sexual Abuse: The Treatment of Juvenile Sex Offenders in In re J.W.*, 35 Loy. U. Chi. L.J. 941, 946 (2004).

to run into the woods and not look back or else he would shoot them.[24] Jacob Wetterling was never seen again.[25] In 1994, Jacob's parents successfully lobbied Congress to include the Wetterling Act[26] within the Violent Crime Control and Law Enforcement Act of 1994.[27] The Wetterling Act requires States to maintain registries of those convicted of sexually violent crimes against children and offenders to continuously update their addresses.[28] Although the Wetterling Act mandated registration at the government level, it fell short because it did not require the registry be disseminated to the public.[29]

In 1994, seven-year-old Megan Kanka was murdered in her New Jersey neighborhood by a neighbor who happened to be a convicted sex offender.[30] Megan's family petitioned the New Jersey legislature to enact legislation that would require the state to notify communities of any sex offenders living in the community.[31] As a result, the United States Congress passed an amendment to the Wetterling Act in May 1996.[32] This amendment, known as Megan's Law,[33] changed the wording of the Wetterling Act from *may* release registration information to *shall* release registration information.[34]

In July 1981, six-year-old Adam Walsh was abducted seventy-five feet away from his mother at a shopping center.[35] Adam's family created the National Center for Missing and Exploited Children and worked with Congressmen to draft legislation to establish a national sex offender registry and implement mandatory notification laws.[36] The Adam Walsh Act was signed into law by President Bush.[37] The

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24. *Id*. at 947.

25. *Id*.

26. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, tit. XVII, 108 Stat. 1796 (1994) (codified as amended at 42 U.S.C. § 14071), *repealed by* Pub. L. No. 109-248, tit. I, § 129(A), 120 Stat. 600 (2006).

27. *Id*.

28. *Id.* Under the Wetterling Act, an offender must update his or her address once a year for ten years, and a sexually violent predator must update his or her address four times a year for life. *Id*.

29. Enstice, *supra* note 23, at 951.

30. *Id*.

31. *Id*. at 952.

32. *Id*. The Amendment is known more commonly as "Megan's Law." *Id*.

33. Pub. L. No. 104-145 110 Stat. 1345 (1996) (codified as amended at 42 U.S.C. § 14071), *repealed by* Pub. L. No. 109-248, tit. I, § 129(A), 120 Stat. 600 (2006).

34. 42 U.S.C. § 14071(e)(2) (1996). The wording was changed from "the State agency *may* release relevant information that is necessary to protect the public" to "the State agency *shall* release relevant information that is necessary to protect the public." *Id*.

35. Brittany Enniss, *Quickly Assuaging the Public Fear: How the Well-Intended Adam Walsh Act Led to Unintended Consequences,* 2008 Utah L. Rev. 697, 701 (2008).

36. *Id*. at 701-02.

37. *Id*. at 702. President Bush stated that the purpose of the legislation was society's "duty to protect our children from exploitation and danger." *Id*.

Adam Walsh Act expands both the definition of sexual offenses and the number of individuals that fall under its purview.[38]

SORNA is contained within Title I of the Adam Walsh Act.[39] SORNA defines the term *sex offender* as one who has been convicted of a sex offense, and provides three classifications of sex offenders.[40] The first classification is a tier III sex offender, which includes those who have committed an offense punishable by more than a one year imprisonment.[41] The tier III sex offender classification also requires the offense be either (1) comparable to an aggravated sexual abuse, sexual abuse, or abusive sexual contact; or (2) involve the kidnapping of a minor.[42]

The second classification is a tier II sex offender, which includes those who have committed an offense that is punishable by more than a one year imprisonment.[43] This offense must also (1) be comparable to sex trafficking, coercion and enticement, transportation with intent to engage in criminal sexual activity, abusive sexual contact; or (2) involve the use of a minor in a sexual performance, solicitation of a minor to participate in prostitution, or the production or distribution of child pornography.[44]

The last classification is a tier I sex offender, which serves as the catch all for sex offenders who are neither a tier II nor a tier III sex offender.[45] SORNA requires every sex offender to register in the juris-

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39. 34 U.S.C. §§ 20911-20932. Under the Adam Walsh Act, relevant offenses include sex trafficking, coercion, transportation with intent to engage in criminal sexual activity, abusive sexual contact, use of a minor in a sexual performance, solicitation of a minor to participate in prostitution, production or distribution of child pornography, aggravated sexual abuse, abusive sexual contact, or kidnapping. 34 U.S.C. § 20911(1)-(4). Under the Wetterling Act, relevant offenses included kidnapping, false imprisonment, criminal sexual conduct, solicitation of a minor to engage in sexual conduct, use of a minor in a sexual performance, solicitation of a minor to practice prostitution, any conduct that is sexual in nature toward a minor, aggravated sexual abuse. 34 U.S.C. § 20902.

40. 34 U.S.C. § 20911.

41. 34 U.S.C. § 20911(4).

42. *Id*. The statute provides:

> The term "tier III sex offender" means a sex offender whose offense is punishable by imprisonment for more than 1 year and (A) is comparable to or more severe than the following offenses, or an attempt or conspiracy to commit such an offense: (i) aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of Title 18); or (ii) abusive sexual contact (as described in section 2244 of Title 18) against a minor who has not attained the age of 13 years; (B) involves kidnapping of a minor (unless committed by a parent or guardian); or (C) occurs after the offender becomes a tier II sex offender.

Id.

43. 34 U.S.C. § 20911(3).

44. *Id*.

45. 34 U.S.C. § 20911(2). An offender will become a tier II offender if he or she is already a tier I offender, and a tier III offender if he or she is already a tier II offender. *Id*. 34 U.S.C. § 20911.

diction where he or she lives and keep the registration current.[46] The length of time that an offender must continue to register as a sex offender differs depending on which tier he or she falls in.[47] The registration period is fifteen years for Tier I sex offenders, twenty five years for Tier II sex offenders, and lifetime for Tier III sex offenders.[48]

As previously indicated, SORNA defines the term *sex offender* as one who has been convicted of a sex offense.[49] SORNA specifies that the term *convicted* includes juveniles who have been adjudicated delinquent.[50] The caveat is that this only applies if the offender is at least fourteen years old and the offense was comparable to aggravated sexual abuse.[51]

B. The Supreme Court's Take On Juvenile Sentencing

While the United States Supreme Court has not addressed the issue of lifetime registration requirements for juvenile sex offenders, the Court has addressed the issue of life-without-parole sentences for juveniles in *Miller v. Alabama*.[52] In *Miller,* the United States Supreme Court held that imposing life sentences without the possibility of parole on juveniles was unconstitutional because it violated the

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46. *Id.* The sex offender is required to provide certain information to be included in the sex offender registry, including:

> (1) The name of the sex offender (including any alias used by the individual). (2) The Social Security number of the sex offender. (3) The address of each residence at which the sex offender resides or will reside. (4) The name and address of any place where the sex offender is an employee or will be an employee. (5) The name and address of any place where the sex offender is a student or will be a student. (6) The license plate number and a description of any vehicle owned or operated by the sex offender. (7) Information relating to intended travel of the sex offender outside the United States, including any anticipated dates and places of departure, arrival, or return, carrier and flight numbers for air travel, destination country and address or other contact information therein, means and purpose of travel, and any other itinerary or other travel-related information required by the Attorney General. (8) Any other information required by the Attorney General.

34 U.S.C. § 20914.

47. 34 U.S.C. § 20915.

48. *Id.* The frequency of registration also differs depending on the tier: a tier I offender must register every year, a tier II offender must register every six months, and a tier III offender must register every three months. 34 U.S.C. § 20915(a).

49. 34 U.S.C. § 20911.

50. 34 U.S.C. § 20911(8). The statute provides:

> (8) The term "convicted" or a variant thereof, used with respect to a sex offense, includes adjudicated delinquent as a juvenile for that offense, but only if the offender is 14 years of age or older at the time of the offense and the offense adjudicated was comparable to or more severe than aggravated sexual abuse (as described in section 2241 of title 18), or was an attempt or conspiracy to commit such offense.

Id.

51. *Id*.

52. 567 U.S. 460 (2012).

Eighth Amendment right against cruel and unusual punishment.[53] Two fourteen-year-old boys, in two separate cases, were convicted of murder and sentenced to life without the possibility of parole.[54] For one boy, petitioner Jackson, the Arkansas Supreme Court disagreed with the argument that a life-without-parole sentence for a fourteen-year-old violated the Eighth Amendment.[55] For the other boy, petitioner Miller, the Alabama Court of Criminal Appeals held that Miller's life-without-parole sentence was not overly harsh in light of the nature of his crime.[56]

Both petitioners Jackson and Miller appealed to the United States Supreme Court, which granted certiorari and consolidated the cases.[57] The petitioners argued that the lower courts erred in affirming their life-without-parole sentences because those sentenced violated the Eighth Amendment.[58] The Court reversed and held that the Eighth Amendment forbids life-without-parole sentences for juveniles.[59] The Court reasoned that juveniles are different than adults for purposes of legal proceedings because juveniles have diminished culpability and greater possibility for reform and rehabilitation.[60] For these reasons, the Court determined that juveniles are less deserving of severe punishments.[61] Specifically, the Court relied on precedent that noted significant differences between juveniles and adults.[62] In light of the neurological differences between juveniles and adults, the Court reasoned that the imposition of life-without-parole sentences on juveniles prevents courts from considering juveniles ages and the hallmark features associated with those ages.[63]

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53. Miller v. Alabama, 567 U.S. 460, 465 (2012).

54. *Miller*, 567 U.S. at 461.

55. *Id*. Jackson accompanied two boys, who had plans to rob a video store. When Jackson entered the store after the other boys, he witnessed one of the boys shoot and kill the store clerk. Jackson was charged as an adult with capital felony murder and aggravated robbery. *Id*.

56. *Id*. Miller, along with his friend, drunkenly beat his neighbor and set fire to his neighbor's trailer, killing the neighbor. Miller was tried as an adult and charged with murder in the court of arson. *Id*.

57. *Id*.

58. *Id*. at 469.

59. *Id*. at 479.

60. *Id*. at 471.

61. *Id*.

62. *See id*. (stating that because children have a lesser culpability and a greater potential for rehabilitation, they are less deserving of punishment since (1) children lack maturity and are reckless, (2) children are more vulnerable to influence, and (3) a child's character is not fixed and can be changed (citing Graham v. Florida, 560 U.S. 48 (2009); Roper v. Simmons, 543 U.S. 551 (2005))).

63. *Id*. at 477.

C. Pennsylvania's Take On SORNA

The Pennsylvania Supreme Court in *Commonwealth v. Muniz*[64] addressed the issue of whether the effects of SORNA were punitive.[65] Pursuant to Megan's Law III,[66] Jose Muniz was convicted of indecent assault on a minor and ordered to register as a sex offender for ten years.[67] The District Court ordered Jose Muniz to comply with lifetime sex offender registration requirements.[68] Jose Muniz filed a post-sentence motion to request application of the ten-year registration requirement under Megan's Law III, which was the law at the time of his offense and conviction.[69] Muniz's motion was denied.[70]

Jose Muniz then appealed to the Superior Court of Pennsylvania, arguing that retroactive application of SORNA violated both the Pennsylvania and federal constitutions.[71] After the superior court affirmed the ruling of the lower court, Jose Muniz appealed to the Pennsylvania Supreme Court.[72] The Pennsylvania Supreme Court held that its analysis weighed in favor of finding that SORNA was punitive in nature.[73] The court applied the *Mendoza-Martinez* factors in its analysis, which was set forth in *Kennedy v. Mendoza-Martinez*[74] to determine whether SORNA was sufficiently punitive to overcome the legislature's non-punitive purpose.[75]

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64. 164 A.3d 1189 (Penn. 2017).

65. Commonwealth v. Muniz, 164 A.3d 1189 (Penn. 2017).

66. 18 Pa. Cons. Stat. § 4915 (2000) (current version at 18 Pa. Cons. Stat. §§ 4915.1-4915.2 (2012)).

67. *Muniz*, 164 A.3d at 1193. The court observed that Jose Muniz failed to appear for his hearing and was not absconded until several years later. It was during his absence that Megan's Law III was replaced by SORNA, which required lifetime registration. *Id*.

68. *Id*. at 1193.

69. *Id*.

70. *Id*.

71. *Id*.

72. *Id*. at 1193-94.

73. *Id*. at 1218 (holding that the retroactive application of SORNA violated the ex post facto clause of the Constitution because the sanctions and requirements of SORNA promote the traditional aims of punishment).

74. 372 U.S. 144 (1961).

75. *Muniz*, 164 A.3d at 1210 (stating that the legislature's nonpunitive purpose was stated to be protection of the public). *See generally* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1961). The court stated:

> Whether the sanction involves an affirmative disability or restraint, whether it has been historically regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment – retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may be rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.

Id.

The Pennsylvania Supreme Court reasoned that SORNA was a direct restraint on Jose Muniz because it required him to appear in person to register multiple times every year.[76] The court noted that SORNA served two aims: retribution and deterrence.[77] First, retribution is achieved through exposing registrants to additional punishment by requiring registrants to disclose personal information to the public.[78] Second, deterrence is achieved by imposing a substantial period of incarceration for violations of SORNA.[79]

The court further determined that SORNA has a nonpunitive purpose of protecting the public.[80] However, the court reasoned that SORNA was substantially overbroad in achieving its stated purpose of protection of the public because it was over inclusive in the individuals it affected.[81] The court reasoned that SORNA was over-inclusive because it applied to individuals convicted of offenses that did not necessarily relate to sexual acts.[82] The court reasoned the *Mendoza-Martinez* factors indicated that SORNA was punitive.[83] The Supreme Court of Pennsylvania ultimately held that a retroactive application of SORNA was unconstitutional.[84]

76. *Muniz*, 164 A.3d at 1210-11.

77. *Id*. at 1200.

78. *Id*. at 1212-13. Shaming as punishment is prevalent online because the personal information of registrants is publicly displayed, thus allowing registrants to become targets for people who seek out their information online. *Id*.

79. *Id*. at 1214-15.

80. *Id*. at 1217. The expressed purpose of SORNA was to protect the public from sex offenders, namely to protect children. *Id*.

81. *Id*. at 1218. The Pennsylvania Supreme Court reasoned that the registration requirements were excessive and over-inclusive in regards to the stated purpose of protecting the public. *Id*.

82. *See id*. (noting that these individuals include those who were convicted of false imprisonment, interference with custody, filing factual statement about an alien, etc.).

83. *Id*.

84. *See id*. (reasoning retroactive application violated the ex post facto clause of the Constitution and that SORNA was punitive because it imposed criminal prosecution for failure to register).

D. The Split between the United States Court Appeals for the Eighth and Ninth Circuits on Whether Juvenile Sex Offenders Should be Subject to SORNA's Registration Requirements

1. United States v. Juvenile Male*: The United States Court of Appeals for the Ninth Circuit Determined SORNA was not Punitive and did not Meet the High Standard of Cruel and Unusual Punishment*

In *United States v. Juvenile Male*,[85] the United States Court of Appeals for the Ninth Circuit addressed the issue of juvenile sex offenders.[86] Three juveniles were charged with aggravated sexual abuse of a child and were required to register pursuant to SORNA.[87] The juveniles appealed to the Ninth Circuit, arguing that SORNA's registration requirement violates the Federal Juvenile Delinquency Act[88] ("FJDA") and the United States Constitution.[89] The Ninth Circuit affirmed the decision of the district court, holding that SORNA's registration requirement was constitutional, in part, because Congress had carved out a juvenile exception from the FJDA.[90] Recognizing the differences between juvenile delinquents and adult offenders, the court reasoned that the FJDA was intended to provide a separate judicial system for juvenile delinquents to promote treatment and rehabilitation.[91]

The court recognized that there was a conflict between the FJDA's prohibition against the release of juvenile information and SORNA's requirement of registration and notice.[92] The court reasoned that SORNA prevailed over the FJDA because when two statutes conflict the more recent and more detailed provision applies.[93] The court recognized that SORNA was both more recent and more detailed due to its carve out of a narrow category of juvenile delinquents who must

85. 670 F.3d 999 (9th Cir. 2012).

86. United States v. Juvenile Male, 670 F.3d 999 (9th Cir. 2012).

87. *Juvenile Male*, 670 F.3d at 1002; *see also* 34 U.S.C. § 20911(8).

88. ch. 486, 52 Stat. 764 (1938), *repealed* with provisions now in 18 U.S.C. §§ 5031-5037 (2012).

89. *Juvenile Male*, 670 F.3d at 1002. The FJDA aims to protect juvenile delinquents from negative labeling and provide a separate judicial system from the adult criminal justice system. *Id*. at 1004.

90. *Id*. at 1002.

91. *See id*. at 1004 (reasoning that the FJDA prevents the release of a juvenile record when requested for employment, license, bonding, etc., in order to prevent negative labelling and that delinquency adjudication under FJDA is not a criminal conviction).

92. *See id*. at 1007 (reasoning that SORNA's registration requirements make information public that would otherwise remain confidential under FJDA).

93. *Id*. at 1008.

disclose their offenses through registration.[94] Additionally, the court reasoned that the effects of SORNA, which may expose the juvenile to shame and humiliation, did not meet the high standard of cruel and unusual punishment prohibited by the Eighth Amendment.[95]

2. A.W. v. Nebraska*: The United States Court of Appeals for the Eighth Circuit Held that Juveniles did not fall under SORNA's Definition of Sex Offender*

In *A.W. v. Nebraska*,[96] the United States Court of Appeals for the Eighth Circuit came to a different conclusion than the Ninth Circuit regarding how juvenile sex offenders should be handled in the justice system.[97] A.W., an eleven-year-old, was charged with first-degree criminal sexual conduct in Minnesota.[98] Although A.W. was required to register as a predatory sex offender, the Minnesota law requiring public disclosure did not apply to him because A.W. was adjudicated as a juvenile delinquent.[99] A.W. was granted a transfer from Minnesota to Nebraska, where he was required to comply with Nebraska's sex-offender registry law.[100] Nebraska maintains its own version of SORNA, the Sex Offender Registration Act ("SORA"),[101] which requires every offender to release certain personal information on a public website.[102]

A.W. commenced an action against the State of Nebraska, asserting that the legislature did not intend for SORA to apply to juveniles and, therefore, the application of SORA to A.W. violated both the Nebraska and federal constitutions.[103] The district court granted A.W.'s motion for summary judgment, reasoning that the plain meaning of sex offender did not include a juvenile delinquent.[104] The State appealed to the Eighth Circuit, which affirmed the decision of the lower

94. *See id*. at 1008 (holding that SORNA directs juveniles to register when they are over the age of 14 and convicted of certain aggravated sex crimes).

95. *See id*. at 1010 (noting that the Eighth Amendment prohibits barbaric punishments and sentences that are disproportionate to the crime committed).

96. 865 F.3d 1014 (8th Cir. 2017).

97. A.W. v. Nebraska, 865 F.3d 1014 (8th Cir. 2017).

98. *A.W.*, 865 F.3d at 1016. *See* 34 U.S.C. § 20911(8) (denoting a class of juvenile offenders that are required to comply with registration requirements).

99. *Id*. The Minnesota law requiring public disclosure does not apply when the offender was adjudicated as a delinquent. *Id*.

100. *Id*. The Nebraska State Patrol told A.W. to register in Nebraska or he would face a criminal referral to the county sheriff and attorney. *Id*.

101. NEB. REV. STAT. §29-4013 (2018).

102. *A.W.*, 865 F.3d at 1016. Juveniles adjudicated in Nebraska are required to register, therefore, A.W.'s registration information would be public in Nebraska. *Id*.

103. *Id*.

104. *See id*. at 1016-17 (reasoning that the term *sex offender* meant one who was convicted of a sex crime, which does not include a juvenile offender because juvenile proceedings do not result in convictions).

court.[105] The Eighth Circuit acknowledged that juvenile adjudication was not a criminal proceeding or a conviction.[106] The Eighth Circuit reasoned that a delinquency adjudication occurred when a court found that a juvenile committed an offense that would be a crime if the juvenile were an adult.[107] The court further reasoned that SORA emphasized that sex offenders were individuals that have been found or pleaded guilty to a sex offense.[108] Additionally, the Eighth Circuit concluded that A.W. was an adjudicated juvenile delinquent and did not fall under SORNA's definition of sex offender.[109]

E. The Difference of Opinion Between Ohio, Illinois, and Pennsylvania State Courts

1. In Re C.P.*: The Ohio Supreme Court Weighed in on SORNA's Application to Juveniles*

In *In re C.P.*,[110] the Ohio Supreme Court held that the Ohio state law mandating registration for juvenile sex offenders violated the Eighth Amendment's prohibition of cruel and unusual punishment.[111] The court recognized that a two-step process was required to determine whether the state law on registration was punitive.[112] The two-step process required the court to consider whether there was a national opposition to the sentencing practice and whether the punishment in question was unconstitutional based on the court's independent judicial opinion.[113]

In applying the two-step test, the court first recognized that states responded negatively to SORNA's application to juvenile sex offenders.[114] Second, using the findings from past cases, the court reasoned that registration requirements imposed on juveniles violated

105. *Id*. at 1017.

106. *Id*. at 1018; *see also* Neb. Rev. Stat. § 43-280 (2018) (stating "[n]o adjudication by the juvenile court upon the status of a juvenile shall be deemed a conviction nor shall the adjudication operate to impose any of the civil disabilities ordinarily resulting from conviction").

107. *Id*.

108. *Id*. at 1019.

109. *Id*. at 1020. The court defined sex offender as "[a] person who has been convicted of a crime involving sex." *Id*. at 1019 (quoting *Sex Offender*, Merriam-Webster, https://www.merriam-webster.com/dictionary/sex%20offender (last visited July 5, 2017)).

110. 967 N.E.2d 729 (Ohio 2011).

111. In re C.P., 967 N.E.2d 729, 738 (Ohio 2011). The Ohio Supreme Court also held that the statute violated the Ohio Constitution and the Fourteenth Amendment. *C.P.*, 967 N.E.2d at 732.

112. *Id*. at 738.

113. *Id*.

114. *Id*. at 738-39. When the United States Attorney General issued supplemental guidelines for SORNA the biggest barrier to state compliance was that SORNA included sex offenders as young as fourteen years old. *Id*. at 738.

the Constitution's prohibition on cruel and unusual punishment.[115] The court also acknowledged the registration requirements were inconsistent with the juvenile court's goal of rehabilitation.[116] The court reasoned that juvenile courts were created because of the assumption that children were not as culpable for their acts as adults and juveniles' bad actions were unlikely to show an unredeemable corruptness.[117]

Additionally, the court recognized that a mandatory registration requirement was a lifetime penalty that implied a juvenile's culpability and redemptive capability were of particular interest.[118] The court reasoned that a registration requirement differed from a jail sentence because lifetime registration and notification requirements impose punishment that does not end.[119] The court noted that when the label of sex offender attaches to a juvenile at the beginning of adulthood, it hampers many aspects of his or her life, including education, employment, and relationships.[120] Even a twenty-five-year registration requirement would mean a lifetime sentence to a juvenile.[121]

The court also articulated that imposing lifetime registration and notification requirements on juveniles was contrary to the purpose of the juvenile system in rehabilitating juvenile offenders both mentally and physically.[122] The court reasoned that registration and notification requirements conflicted with the purpose of the juvenile system because such requirements only served to ensure that juvenile sex offenders would encounter difficulties long into adulthood.[123]

115. *Id*. at 740 (citing Graham v. Florida, 560 U.S. 48, 67 (2010); Roper v. Simmons, 543 U.S. 551, 575 (2005)).

116. *Id*. at 744. *See Graham,* 560 U.S. at 75 (finding that it is unconstitutional to sentence juveniles to life without parole for non-homicidal crimes); Miller v. Alabama*,* 567 U.S. 460, 462 (2012) (extending the decision in *Graham* to include juveniles who commit homicidal crimes); Roper*,* 543 U.S. at 578 (finding that it is unconstitutional to subject juveniles to capital punishment).

117. *C.P.*, 967 N.E.2d at 740.

118. *Id*. at 740-41. Since juveniles have a greater capacity for change than adults they respond better to the rehabilitative methods of the juvenile justice system. *Id*. at 741.

119. *Id*. at 741.

120. *Id*.

121. *Id*.

122. *Id*. at 742.

123. *Id*.

2. People v. J.W.*: The Illinois Supreme Court Determined SORNA's Application to Juveniles was Constitutional Because SORNA was Reasonably Related to the State End of Achieving Public Safety*

In *People v. J.W. (In re J.W.),*[124] the Illinois Supreme Court confronted a case involving a twelve-year-old sex offender.[125] J.W., an adjudicated delinquent, was a twelve-year-old boy who admitted to two counts of aggravated criminal sexual assault.[126] J.W. appealed his adjudication, arguing that requiring a twelve-year-old to register on a sex offender registry was unconstitutional.[127]

The Illinois Court of Appeals affirmed the decision of the juvenile court and J.W. appealed to the Illinois Supreme Court, which granted his petition for leave.[128] The court acknowledged that J.W. came within the meaning of sexual predator and, therefore, was required to register for the rest of his life.[129] The court reasoned that a juvenile sex offender's personal information may be disseminated to an individual if that individual's safety was at risk and, even then, only at the discretion of the appropriate agency.[130]

Utilizing rational basis review, the Illinois Supreme Court further reasoned that there was no constitutional violation because registration of juvenile offenders was reasonably related to the legitimate state end of protecting the public.[131]

3. In the Interest of J.B.*: The Supreme Court of Pennsylvania held that SORNA did not Apply to Juveniles Because the Presumption Used Under SORNA was Unconstitutional*

The Pennsylvania Supreme Court in *In the Interest of J.B*,[132] also looked at the dilemma of juvenile sex offenders.[133] *In the Interest of J.B.* allowed the court to reviewed various trial court decisions that

124. 787 N.E.2d 747 (2003).
125. People v. J.W. (In re J.W.), 787 N.E.2d 747 (Ill. 2003).
126. *J.W.*, 787 N.E.2d at 750. J.W. was required to register as a sex offender as a term of his probation. *Id*.
127. *Id*. J.W. also argued that the condition prohibiting him from residing in the town of South Elgin was overly broad and, therefore, void. *Id*.
128. *Id*. at 751. J.W. asserted that the registration requirement constituted cruel and unusual punishment. *Id*.
129. *Id*. at 754-55. Under SORNA, all sexual predators are subject to lifetime registration requirements. *Id*.
130. *Id*. at 760. The court stated that personal information includes the offender's name, address, date of birth, and offense. *Id*.
131. *Id*. Juveniles' personal information was not disseminated or made available over the internet. Therefore, personal information would only be disseminated in extreme circumstances. *Id*.
132. 107 A.3d 1 (Penn. 2014).
133. In the Interest of J.B., 107 A.3d 1 (Penn. 2014).

found SORNA's application to juveniles violated the Constitution.[134] The court held that SORNA violated the juvenile offenders' due process rights because it utilized an irrebuttable presumption that an adjudication for a sex crime equates to an increased risk of recidivism, which ultimately leads to a requirement of registration with a sex offender registry.[135] The court reasoned that under the irrebuttable presumption doctrine, a presumption is unconstitutional when the presumption is not universally true and when there is a way of establishing the presumed fact without simply assuming it.[136]

The court reasoned that SORNA registration requirements, under a presumption that all sex offenders will reoffend, violated a juvenile offender's fundamental right to his or her reputation guaranteed by the Pennsylvania Constitution.[137] The court further reasoned that SORNA did not provide a juvenile offender with an opportunity to challenge the presumption because a delinquency hearing did not consider of a juvenile's risk of recidivating.[138]

Additionally, the court determined that the irrebuttable presumption violated a juvenile's right to due process because there was a method to determine whether a juvenile offender is at a high risk of recidivating, without simply assuming that a juvenile offender is at a high risk of recidivating.[139] The court pointed to an alternative method that was already in place in Pennsylvania.[140] Additionally, the court recognized that SORNA required individual assessments of juvenile offenders currently institutionalized and approaching their twentieth birthdays to determine if continued commitment was needed.[141] Therefore, the court determined that a similar procedure

134. *J.B.*, 107 A.3d at 9.

135. *Id*. at 2.

136. *Id*. at 14. "[R]egistration requirements violate juvenile offenders' due process rights by utilizing the irrebuttable presumption that all juvenile offenders 'pose a high risk of committing additional sexual offenses,' because that presumption is not universally true and a reasonable alternative means currently exists for determining which juvenile offenders are likely to reoffend." *Id*. *See also* Commonwealth Dep't of Transp., Bureau of Driver Licensing v. Clayton, 684 A.2d 1060, 1063 (Penn. 1996) (recognizing the irrebuttable presumption that all juvenile offenders pose a high risk of recidivism).

137. *Compare J.B.*, 107 A.3d at 16-17 (reasoning that SORNA explicitly states that all sex offenders pose a high risk of committing additional sexual offenses), *and* 42 PA. CONS. STAT. § 9799.11(a)(4) (indicating "[s]exual offenders pose a high risk of committing additional sexual offenses and protection of the public from this type of offender is a paramount government interest"), *with* PA. CONST. art. I, § 11 (stating "[a]ll men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, or acquiring, possessing and protecting property and reputation, and of pursuing their own happiness").

138. *J.B.*, 107 A.3d at 16-17.

139. *Id*. at 10.

140. *Id*. at 19.

141. *J.B.*, 107 A.3d at 19. SORNA provides individual assessment of all sexual offenders and categorizes offenses into three tiers. *Id*. *See also* 34 U.S.C. § 20911(1)-(4).

could be used to determine which juvenile offenders had a higher risk of reoffending.[142]

III. ANALYSIS

A. Lifetime Registration Requirements: Life Sentences in Disguise

Under SORNA, an adult sex offender falls into one of three categories: Tier I, Tier II, or Tier III.[143] Each tier varies in severity and length of punishment.[144] Tier III offenders are those who have committed a crime comparable to an aggravated sexual abuse or sexual abuse, and must continue to register as sex offenders for the rest of their lives.[145]Additionally, under SORNA, registration requirements can be applied to a juvenile if, and only if, the juvenile is at least fourteen-years-old and has committed an offense comparable to an aggravated sexual abuse or a sexual abuse.[146] Therefore, every juvenile who is forced to register as a sex offender pursuant to SORNA is automatically subject to lifetime registration requirements.[147] Lifetime registration requirements in conjunction with the label of being a sex offender attach to a juvenile and hamper many aspects of a juvenile offender's life, for the rest of his or her life.[148] Therefore, lifetime registration requirements are, for all intents and purposes, life sentences.[149]

A thorough understanding of *Miller v. Alabama*,[150] is relevant to understanding why SORNA is unconstitutional when applied to juveniles.[151] *Miller* was a landmark decision in which the United States Supreme Court highlighted three neurological differences be-

142. *J.B.*, 107 A.3d at 19.

143. 34 U.S.C. § 20911(1)-(4).

144. 34 U.S.C. § 20915(a); 34 U.S.C. § 20915(b)(2)-(3); 34 U.S.C. § 20918.

145. 34 U.S.C. § 20911(4). Tier III offenders are subject to a lifetime registration requirement and must update their registration every three months. 34 U.S.C. § 20915(a)(3); 34 U.S.C. § 20918(3).

146. 34 U.S.C. § 20911(8).

147. *See* In re C.P., 967 N.E.2d 729, 741 (Ohio 2012) (stating that juveniles fall under the definition of *sex offender* if they have committed an offense comparable to an aggravated sexual abuse, and offenders that commit such offenses are tier III offenders, which are subject to lifetime registration requirements).

148. *See C.P.*, 967 N.E.2d at 741 (stating that a sex offender label will hamper a juvenile's education, employment, and relationships long into his or her adulthood life).

149. *See id*. (reasoning that registration requirements are different from jail sentences because a lifetime of registration requirements imposes a punishment that does not end).

150. 567 U.S. 460 (2012).

151. *See generally* Miller v. Alabama, 567 U.S. 460, 490 (2012) (discussing the constitutionality of imposing life without parole sentences on juveniles).

tween adolescents and adults.[152] In light of these neurological differences, it is clear that juveniles are less deserving of the most severe forms of punishment because of their diminished culpability and greater propensity for rehabilitation.[153] In fact, the Supreme Court determined that imposing life sentences on juveniles prevented the consideration of a juvenile's youthful age and the features associated with that age.[154] Further, the Supreme Court found such life sentences to be unconstitutional when imposed on juveniles.[155] Therefore, it is clear that subjecting juvenile offenders to lifetime registration requirements under SORNA is unconstitutional.[156]

B. Internal Conflict: A Punitive SORNA Meets a Rehabilitative Juvenile System

The United States Supreme Court held that imposing life without parole sentences on juveniles was unconstitutional because it amounted to cruel and unusual punishment under the Eighth Amendment of the United States Constitution.[157] Although cruel and unusual punishment is a high standard to meet, the Court's reasoning in *Miller v. Alabama*[158] leads to the logical conclusion that subjecting

152. *See Miller*, 567 U.S. at 471 (listing the three differences as: (1) juveniles' lack of a sense of maturity; (2) juveniles' vulnerability to peer pressure; and (3) juveniles' unformed character can be fixed. The court also states that these distinctions address and coincide with the specific issues that are addressed in juvenile court and because of a juvenile's amenability to rehabilitation).

153. *See id.* at 477 (reasoning that juveniles have a separate justice system because they have a diminished culpability and a greater possibility for reform).

154. *See id.* The court stated:

> 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 . . . . 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].

Id. (quoting Roper v. Simmons, 543 U.S. 551, 569-70 (2005)).

155. *Id*. at 465 (determining that imposing life without parole sentences on juveniles violate the Eighth Amendment protection against cruel and unusual punishment).

156. *See* 34 U.S.C. § 20911(8) (stating that juveniles who are at least fourteen years old that have committed an offense comparable to aggravated sex abuse are classified as tier III offenders; and tier III offenders are subject to a lifetime registration requirement). *Compare Miller*, 576 U.S. at 465 (finding that imposing a life sentence on a juvenile is unconstitutional as it violates the Eighth Amendment's protection against cruel and unusual punishment), *with C.P.*, 967 N.E.2d at 741 (explaining that when a person is subject to lifetime registration requirements, he or she will be punished for the rest of his or her life).

157. Miller v. Alabama, 567 U.S. 460, 465 (2012).

158. 567 U.S. 460 (2012).

juveniles to SORNA's lifetime registration requirements also amounts to cruel and unusual punishment.[159]

The effects of SORNA are punitive primarily because of the negative stigma that results from being labeled a sex offender.[160] Further, the effects of SORNA are also punitive because failure to comply with registration and notification requirements can lead to criminal prosecution or jail time.[161] In fact, in *In re C.P.*, the Ohio Supreme Court determined that forcing a juvenile to register as a sex offender was the equivalent of giving the juvenile a life sentence because punished the juvenile by affecting all aspects of his or her future.[162]

The FJDA was created with the purpose of providing a separate judicial system for juveniles in order to provide a separate treatment system for them.[163] Such a juvenile justice system safeguards juveniles against unnecessary stigmas of a prior conviction and promotes rehabilitation and treatment.[164] It is important to note that a prosecution made under the FJDA results in a civil adjudication, not a

159. *See Miller*, 567 U.S. at 489 (holding requiring juveniles who have been convicted of homicide to a life without parole sentence violates the Eighth Amendment's protection against cruel and unusual punishment because a fact-finder must have the occasion to consider "mitigating circumstances" before imposing such a harsh punishment). These "mitigating circumstances" are the differences between an adult mind and a juvenile mind. *Id*. at 477. *Compare* In Re C.P., 967 N.E.2d 729, 732, 741-42 (Ohio 2012) (holding imposing sex offender registration requirements on adjudicated juveniles violated the Eighth Amendment because juvenile's are more culpable and open to rehabilitation and the severity of a lifetime registration requirement will "define [the juvenile's] adult life before it has a chance to truly begin."), *and* In the Interest of J.B., 107 A.3d 1, 2-3, 19 (Penn. 2014) (determining that SORNA's application to juveniles violated the Due Process Clause because an irrebuttable presumption unfairly branded all juvenile offenders with the label of a violent recidivist), *with* United States v. Juvenile Male, 670 F.3d 999, 1002 (9th Cir. 2012) (holding that SORNA is constitutional as applied to juveniles because the effects of SORNA do not meet the high standard of cruel and unusual punishment).

160. *See C.P.*, 967 N.E.2d at 525 (reasoning SORNA's application to juveniles offenders was severe because the stigma of being labelled a sex offender remained with a juvenile for the rest of his or her life); *see also J.B.*, 107 A.3d at 11 (reasoning that being labeled a sex offender violated a juvenile's right to reputation and stigmatized the offender later in life); People v. J.W. (In re J.W.), 787 N.E.2d 747, 762 (Ill. 2003) (reasoning that a reformed adult should not have to carry the negative stigma for a juvenile offense committed in his or her youth).

161. *See* Commonwealth v. Muniz, 164 A.3d 1189, 1213 (Penn. 2017) (noting that the *Mendoza-Martinez* factor test suggests finding SORNA to be punitive, in part, due to the criminal prosecution stemming from a violation of SORNA).

162. *See C.P.*, 967 N.E.2d at 525 (acknowledging that if a juvenile offender is labelled a sex offender that label will stick with him or her for life and will affect every aspect of his or her life).

163. *See Juvenile Male*, 670 F.3d at 1004 (stating "the purpose of the FJDA is to enhance the juvenile system by removing juveniles from the ordinary criminal justice system and by providing a separate system of treatment for them" (quoting United States v. Frasquillo-Zomosa, 626 F.2d 00, 101 (9th Cir. 1980))).

164. *See Juvenile Male*, 670 F.3d at 1004. (citing United States v. Doe, 94 F.3d 532, 536 (9th Cir. 1996)).

criminal conviction.[165] In fact, many courts seem to agree that the purpose of a juvenile court is to treat and rehabilitate, not to punish.[166] Therefore, if a course of action is intended to punish a juvenile, it is inconsistent with the juvenile court's goal of rehabilitation.[167] Therefore, it is clear that SORNA's registration requirements as applied to juveniles is inconsistent with the juvenile court's goal of rehabilitation and treatment because it is punitive in nature and serves to punish juvenile offenders.[168]

C. Following Pennsylvania's Lead

To determine whether an irrebuttable presumption is invalid it is necessary to examine whether there exists another method of determining the validity of the fact that is presumed to be true.[169] A reasonable alternative exists in Pennsylvania.[170] in Pennsylvania, under SORNA, an individualized assessment is mandated for juveniles who have committed specific crimes, are institutionalized, and are nearing their twentieth birthdays.[171] Likewise, Pennsylvania's interpretation

165. *See id*. (citing United States v. Doe, 53 F.3d 1081, 1083 (9th Cir. 1995)).

166. *See C.P.*, 967 N.E.2d at 517 (reasoning that juvenile courts were developed because of the assumption that children are not as culpable for their acts as adults and that their bad acts are less likely to reveal an unredeemable corruptness). *See also Miller*, 567 U.S. at 465 (holding that the three differences between juveniles and adults are: (1) juveniles lack a sense of maturity; (2) juveniles are more vulnerable to peer pressure; (3) a juvenile's character is not well-formed and can be fixed); *J.W.*, 787 N.E.2d at 758 (noting that the purpose of the juvenile court system is to rehabilitate minors and protect the best interests of minors).

167. *See Juvenile Male*, 670 F.3d at 1004 (indicating that the FJDA created a juvenile court system to promote treatment and rehabilitation of juvenile offenders outside of the ordinary criminal justice system); *C.P.*, 967 N.E.2d at 744 (finding juvenile registration requirements violated the Constitution's prohibition on cruel and unusual punishment, therefore such requirements were inconsistent with the juvenile court's goal of rehabilitation).

168. *See C.P.*, 967 N.E.2d at 525 (reasoning that I SORNA imposed severe effects because the stigma of being labelled a sex offender remained with juveniles for the rest of their lives; *Muniz*, 164 A.3d 1189, 1213 (Penn. 2017) (noting that the *Mendoza-Martinez* factor test leaned towards finding SORNA to be punitive, in part, due to the criminal prosecution that would stem from a violation of SORNA); *Juvenile Male*, 670 F.3d at 1004 (indicating that the FJDA created a juvenile court system to promote treatment and rehabilitation for juvenile offenders outside of the ordinary criminal justice system).

169. In the Interest of J.B., 107 A.3d 1, 10 (Penn. 2014). The court stated: "registration requirements violate juvenile offenders' due process rights by utilizing the irrebuttable presumption that all juvenile offenders 'pose a high risk of committing additional sexual offenses,' because that presumption is not universally true and a reasonable alternative means currently exists for determining which juvenile offenders are likely to reoffend." *Id*. at 14. (quoting 42 Pa. Cons. Stat. § 9799.11(a)(4)).

170. *See J.B.*, 107 A.3d at 19-20. (stating that individualized assessments exist in Pennsylvania for different crimes and a similar process could be applied to juvenile offenders to assess their risk of recidivating).

171. *See id*. (noting that this assessment determines whether involuntary commitment is necessary).

of SORNA requires an individual assessment of all sex offenders to determine whether they are sexually violent predators.[172]

The Pennsylvania Supreme Court reasoned that such a process could be adapted to apply to juvenile sex offenders in assessing their risk of recidivism.[173] Not only did the Pennsylvania Supreme Court find the effects of SORNA unconstitutional when applied to juveniles, it also determined that an individualized assessment process should be put in place to determine whether a juvenile offender has a high risk of reoffending.[174]

D. Objections: The Exception Within SORNA And Protecting the Public

Despite the recent landmark decision in *Miller v. Alabama*[175] there has been pushback to changing how juvenile sex offenders are treated.[176] For example, a public safety argument succeeded in *In re J.W.*[177] in which the Illinois Supreme Court upheld the registration requirement for a juvenile sex offender.[178] The court analyzed Illinois' sex offender registration statute under a rational basis review and noted that the purpose of the act was to protect children from sexual assault and abuse.[179] Proponents of imposing registration requirements on juveniles will argue that such requirements are not unconstitutional because is the requirements are reasonably related to the legitimate end of protecting the public.[180]

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172. *See id*. at 5 (identifying that SORNA classifies adult offenders in three tiers based on their offenses).

173. *See id*. at 19-20 (concluding that an individual assessment of each juvenile sex offender is a reasonable alternative means of ascertaining whether he or she poses a high risk of reoffending).

174. *See id*. (reasoning that such a process could determine whether a juvenile is likely to recidivate and whether he or she should be required to register as a sex offender in adulthood).

175. 576 U.S. 460 (2012).

176. *See* Miller v. Alabama, 576 U.S. 460, 465 (2012) (holding that imposing life without parole sentences on juveniles was unconstitutional because such sentences violated the Eighth Amendment's ban against cruel and unusual punishment). *But see* In re J.W., 787 N.E.2d 747, 764 (Ill. 2003) (upholding SORNA's application to a juvenile because there was no reasonable alternative of attaining the end of public safety); United States v. Juvenile Male, 670 F.3d 999, 1005 (9th Cir. 2012) (pointing out the juvenile exception in SORNA only requires registration requirements for juvenile offenders aged fourteen years or older that have committed an offense comparable to an aggravated sexual abuse).

177. 787 N.E.2d 747 (Ill. 2003).

178. In re J.W. (People v. J.W.), 787 N.E.2d 747, 750 (Ill. 2003).

179. *J.W.*, 787 N.E.2d at 757.

180. *See id*. (finding that it was not unconstitutional to impose registration requirements on a juvenile because the state's registration statute was intended to protect the public from sex offenders).

In fact, the Supreme Court of Illinois noted that sex offenders of any age present a problem and that sex offender statutes are intended to protect the public from both adult and juvenile sex offenders.[181] Further, the court bolstered its argument by acknowledging that a juvenile sex offender's personal information was never made readily available on the internet and was only disseminated if an individual's safety was at risk and the appropriate agency directed the information be released.[182]

Perhaps the biggest obstacle to changing the narrative on juvenile offenders is found within SORNA itself.[183] SORNA maintains an exception for juveniles under Title I, subtitle A, section 111 (8) of the Adam Walsh Act.[184] Although juveniles cannot be convicted of a crime, Congress carved out an exception for a small class of juveniles who can be found guilty of a sex crime under the Adam Walsh Act.[185] The United States Court of Appeals for the Ninth Circuit suggests that not only does SORNA takes priority over the FDJA, but that by inserting a juvenile exception within SORNA, Congress intended to limit protections of juvenile offenders under the FDJA.[186]

It has also been suggested that the rights of juvenile sex offenders should no longer outweigh the rights of victims and the rights of the community to be protected from any additional sex crimes.[187] The

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181. *See id*. (citing Helman v. State, 784 A.2d 1058, 1079 (Del. 2001)).

182. *See id.* (iterating that juveniles' personal information is not made available over the internet and is only disseminated when a member of the public's safety is compromised).

183. *See* 34 U.S.C. § 20911(8). The statute provides:

> The term 'convicted' or a variant thereof, used with respect to a sex offense, includes adjudicated delinquent as a juvenile for that offense, but only if the offender is 14 years of age or older at the time of the offense and the offense adjudicated was comparable to or more severe than aggravated sexual abuse . . . or was an attempt or conspiracy to commit such an offense.

Id. See also Juvenile Male, 670 F.3d at 999 (highlighting the importance of the juvenile exception within SORNA).

184. *See* 34 U.S.C. § 20911(1) (defining *sex offender* as one who has been convicted of a sex offense and indicating that ajuvenile in juvenile court receives a delinquency adjudication, not a conviction)

185. 34 U.S.C. § 20911(8). The statute provides:

> The term 'convicted' or a variant thereof, used with respect to a sex offense, includes adjudicated delinquent as a juvenile for that offense, but only if the offender is 14 years of age or older at the time of the offense and the offense adjudicated was comparable to or more severe than aggravated sexual abuse . . . or was an attempt or conspiracy to commit such an offense.

Id.

186. *Juvenile Male*, 670 F.3d at 999. The court determined that SORNA should be followed priority because it was more recent and more detailed. The court also acknowledged that Congress unambiguously directed a small class of juveniles to register under SORNA. *Id*. *See also* 18 U.S.C. § 5032 (aiming to protect juvenile delinquents from absorbing a negative stigma by providing them a separate judicial system from the adult criminal justice system).

187. *See Juvenile Male*, 670 F.3d at 1007-08. The court stated:

Eighth Amendment to the United States Constitution protects against cruel and unusual punishments, as well as, disproportionate sentences, which is a high standard to meet.[188] It could be argued that SORNA's application to juvenile offenders is not unconstitutional because the shame and humiliation that a juvenile offender may face after being forced to register under SORNA does not meet the high standard of cruel and unusual punishment.[189]

E. Rebuttal: SORNA is Inapplicable to Juveniles, Regardless of Age

Some opponents of change advocate for the protection of victims over the protection of a juvenile offender's identity.[190] The United States Court of Appeals for the Ninth Circuit has suggested that the rights of juvenile offenders should not take priority over the safety of the community and rights of the victims to be free from additional sex crimes.[191] However, in asserting this, the Ninth Circuit essentially reinforces the dangerous irrebuttable presumption that all juvenile sex offenders pose a high risk of recidivating in the future.[192] This irrebuttable presumption is dangerous and fallible in this context because it fails to account for the differences between juvenile and adult offenders and assumes all juvenile offenders will reoffend in the future.[193]

> While the Committee recognizes that States typically protect the identity of a juvenile who commits criminal acts, in the case of sexual offenses, the balance needs to change; no longer should the rights of the juvenile offender outweigh the rights of the community and victims to be free from additional sexual crimes . . . H.R. 3132 strikes the balance in favor of protecting victims, rather than protecting the identity of juvenile sex offenders.

Id. (quoting H.R. Rep. 109-218, pt. 1, at 25 (2005)).

188. *See id.* at 1010 (recognizing that a violation of the Eighth Amendment is a high bar to meet).

189. *See id*. (determining that SORNA's registration requirement as applied to juveniles did not meet the high standard of cruel and unusual punishment prohibited by the Eighth Amendment).

190. *See id*. at 1008 (noting "no longer should the rights of the juvenile offender outweigh the rights of the community and victims to be free from additional sexual crimes" (citing H.R. Rep. 109-218, pt. 1, at 25 (2005))). *See also* 152 Cong. Rec. S8012, S8023 (daily ed. July 20, 2006) (statement of Sen. Kennedy) (stating "[t]his compromise allows some offenders over 14 to be included on registries, but only if they been convicted of very serious offenses").

191. United States v. Juvenile Male*,* 670 F.3d 999, 1008 (9th Cir. 2012).

192. *Compare Juvenile Male*, 670 F.3d at 1008 (determining that the community's and victims' rights to be free from additional sexual crimes should be given priority), *with* In the Interest of J.B., 107 A.3d 1, 2 (Penn. 2014) (noting that the irrebuttable presumption incorrectly assumes that all juvenile offenders pose a high risk of recidivating in the future).

193. *J.B.*, 107 A.3d at 2. The court recognized that an irrebuttable presumption is unconstitutional when it is not universally true and a reasonable alternative to ascertain that fact exists. *Id*.

The percentage of reoffending juvenile offenders is half that of the percentage of reoffending adults because juvenile offenders are often motivated to offend by impulsivity and sexual curiosity.[194] Therefore, while an irrebuttable presumption may be valid when applied to adult sex offenders, it cannot be a valid when applied to juvenile offenders.[195] SORNA targets sex offenders that pose a high risk of committing additional sex offenses in the future and, therefore, maintains the presumption that all sex offenders, adult and juvenile, pose a high risk of reoffending.[196] This irrebuttable presumption is also unfair to juvenile offenders who do not have an opportunity to challenge the presumption at their delinquency hearings because juvenile courts do not consider the risk of reoffending.[197] This process and presumption eliminates the ability to discern a juvenile offender's actual risk of reoffending.[198]

The Ninth Circuit suggested that SORNA prevailed over the FDJA because SORNA was more recent and more detailed.[199] However, this understanding fails to take into consideration the language and purpose of the FDJA.[200] The FJDA prohibits the name or picture of juveniles that have been tried and convicted from being made available to the public in connection with the case.[201] Additionally, the

194. *See id*. at 10 (noting that juvenile offenders recidivate at the low rate of 2-7%, compared to 13% for adult offenders); *see also* Miller v. Alabama, 567 U.S. 460, 490 (2012) (Breyer, J., concurring) (listing the three neurological differences between juveniles and adults and noting that the differences coincide with the specific issues addressed in juvenile courts).

195. *J.B.*, 107 A.3d at 435-36 (comparing low rate of juvenile offenders that recidivate to the rate of adults that recidivate).

196. *See* 34 U.S.C. § 20901 (indicating the purpose of the Act is to protect the public against convicted sex offenders); *J.B.*, 107 A.3d at 16 (noting that the nature of SORNA seeks to prevent sex offenders from reoffending, which supports the presumption that all offenders will reoffend).

197. *See J.B.*, 107 A.3d at 17 (stating that SORNA does not give juvenile offenders an opportunity to challenge the presumption because juvenile courts do not take the risk of recidivism into account); 34 U.S.C. § 20911(8) (indicating that a juvenile offender who is adjudicated delinquent of a sex crime comparable to aggravated sex abuse will be considered to have been convicted of a sex crime under SORNA).

198. *See J.B.*, 107 A.3d at 17 (indicating a juvenile offender is automatically labeled a sex offender based on the result of his or her delinquency adjudication). *See e.g.* 42 PA. CONS. STAT. § 9799.12(1) (stating a juvenile offender is "[a]n individual who was 14 years of age or older at the time the individual committed an offense which, if committed by an adult, would be classified as an offense . . . [r]elating to rape, . . . involuntary deviate sexual intercourse or . . . aggravated indecent assault").

199. *See Juvenile Male*, 670 F.3d at 1008 (9th Cir. 2012) (noting that where SORNA and the FJDA conflict the more recent and more detailed statute prevails).

200. *See* 18 U.S.C. § 5038(a) (stating "the [delinquency adjudication] records shall be safeguarded from disclosure to unauthorized persons."). *See also Juvenile Male*, 670 F.3d at 1007-08 (acknowledging that the public release of juvenile records under SORNA is prohibited under the FJDA, which predated SORNA).

201. 18 U.S.C. § 5038(e). "Unless a juvenile who is taken into custody is prosecuted as an adult neither the *name* nor picture of any juvenile shall be made public in connec-

FJDA prohibits information about a juvenile's record from being released except in very limited circumstances.[202] The purpose of the FDJA is to care for juvenile delinquents and minimize negative labeling of juveniles by providing a separate judicial system for juveniles.[203] Therefore, the purpose of the FDJA is frustrated by the imposition of registration requirements on juvenile offenders.[204]

Those that support SORNA's application to juvenile sex offenders argue that registration requirements for juvenile offenders does not amount to cruel and unusual punishment.[205] However, this view fails to take into consideration the recent Supreme Court finding in *Miller v. Alabama*[206] and the holding in *In re C.P.*[207]by the Ohio Supreme Court.[208] A juvenile sex offender will automatically be subjected to lifetime registration requirements under SORNA.[209] A lifetime registration requirement is equivalent to a life sentence for a juvenile offender because it affects the offender for the rest of his or her life.[210]

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tion with a juvenile delinquency proceeding." *Id. See also Juvenile Male*, 670 F.3d at 1008 (stating that the FJDA prohibits disclosing a juvenile's identity and image, even when the proceedings are released).

202. 18 U.S.C. § 5038(a). "Unless otherwise authorized by this section, information about the juvenile record may not be released when the request for information is related to an application for employment, license bonding, or any civil right or privilege." *Id. See Juvenile Male*, 670 F.3d at 1004 (noting that such information may not be released for employment, license, bonding, or any other privilege except for situations related to court proceedings, treatment, investigations, or national security).

203. *See* United States v. Frasquillo-Zomosa, 626 F.2d 99, 101 (9th Cir. 1980) (noting "the purpose of the [Federal Juvenile Delinquency] Act, as amended in 1974, was to enhance the juvenile system by removing juveniles from the ordinary criminal justice system and by providing a separate system of 'treatment' for them." (quoting S. REP. NO. 93-1011, *as reprinted in* 1974 U.S.C.C.A.N. 5283, 5283.

204. *Compare Juvenile Male*, 670 F.3d at 1004 (iterating that the objective of the FJDA is to minimize negative labeling, avoid the stigma of a conviction, and promote rehabilitation), *with* 34 U.S.C. § 20911(8) (carving out a class of juveniles who come within the meaning of sex offender and are subject to lifetime registration requirements).

205. *See Juvenile Male*, 670 F.3d at 1010 (holding that the standard of cruel and unusual punishment is a high bar to meet and SORNA's effects on juvenile offenders do not satisfy that high standard).

206. 567 U.S. 460 (2012).

207. 967 N.E.2d 729 (Ohio 2012).

208. *See* Miller v. Alabama, 567 U.S. 460, 465 (2012) (finding that imposing life without parole sentences on juveniles amounted to cruel and unusual punishment); In re C.P., 967 N.E.2d 729, 741 (Ohio 2012) (recognizing that subjecting a juvenile to lifetime registration and notification requirements imposes an endless punishment on the juvenile).

209. 34 U.S.C. §20911(8). Juveniles who are at least fourteen years old and have committed an offense comparable to an aggravated sex abuse, can fall within the definition of *sex offender;* and sex offenders who commit an offense comparable to an aggravated sex abuse are categorized as tier III offenders; and tier III offenders are subjected to lifetime registration requirements. *Id*.

210. *See C.P.*, 967 N.E.2d at 741-42 (emphasizing that lifetime registration requirements impose endless punishment on juvenile offenders and will affect all aspects of offenders' lives).

Additionally, the United States Supreme Court's recent determination that life sentences for juveniles amounts to cruel and unusual punishment must be taken into account.[211] Therefore, it necessarily follows that subjecting juvenile offenders to lifetime registration requirements constitutes cruel and unusual punishment.[212]

The strongest opposition to changing the narrative on how juvenile sex offenders are treated is centered on the juvenile exception in SORNA.[213] However, by definition, a juvenile, regardless of age, cannot fall within the meaning of the term *sex offender*.[214] According to dictionary definitions of sex offender, one must be convicted or found guilty of a sexual offense in order to be considered a sex offender.[215] Juveniles receive delinquency adjudications in juvenile courts, which do not provide for criminal convictions and are recognized as a separate classification from a conviction.[216] The Eighth Circuit acknowledged that the Nebraska Sex Offender Registry defines a sex offender as a person who has been found guilty of, or has pled guilty to, a sex crime.[217] Therefore, because a delinquency adjudication is not a criminal proceeding that can result in a criminal conviction, a juvenile cannot be guilty of a sex crime and does not come within the definition of "sex offender."[218]

IV. CONCLUSION

Congress enacted SORNA to protect children.[219] However, both Congress and the United States Supreme Court have not decided how

211. *Miller*, 567 U.S. at 465. The Court determined that imposing life without parole sentences on juveniles amounted to cruel and unusual punishment.

212. *Compare C.P.*, 967 N.E.2d at 741-42 (recognizing that lifetime registration requirements will serve to affect every aspect of juvenile offenders' lives for the rest of their lives), *with Miller*, 567 U.S. at 465 (finding that life sentences imposed on juveniles amounted to cruel and unusual punishment).

213. *See* 34 U.S.C. §20911(8) (indicating that juveniles fourteen years old and older who have committed an offense comparable to an aggravated sex abuse can be found to come within the meaning of the term *sex offender*).

214. *See* A.W. v. Neb., 865 F.3d 1014, 1020 (8th Cir. 2017) (holding that juveniles do fall within the meaning of sex offender and therefore cannot be punished and treated as one).

215. *Sex Offender,* MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/sex%20offender (last visited Nov. 13, 2018). The Merriam-Webster dictionary defines a sex offender as "a person who has been convicted of a crime involving sex." *Id*.

216. *See A.W.*, 865 F.3d at 1018 (holding that an adjudication of juvenile delinquency is a finding that a juvenile has committed an offense that would be a crime if the juvenile were an adult).

217. *Id*. at 1017.

218. *Id*. at 1018.

219. 34 U.S.C. § 20901.

to confront the issue of protecting those children who prey on other children.[220]

The irrebuttable presumption discussed by the Pennsylvania Supreme Court maintains that all juvenile offenders are at a high risk of recidivating.[221] However, the problem with this presumption is that it fails to account for the differences between juveniles and adults that were discussed in *Miller v. Alabama*[222] by the Supreme Court.[223] Some state courts have found SORNA to be punitive because it forces a juvenile to register as a sex offender, which in turn imposes a stigma and label on the juvenile that will hinder him or her far into adulthood.[224]

The purpose of the juvenile court system is to rehabilitate juvenile delinquents both mentally and physically.[225] Forcing juvenile offenders to subject themselves to a lifelong label as sex offenders runs contrary to that purpose.[226] Instead, in order to stray far from the dangers presented by the irrebuttable presumption, courts should subject juvenile sex offenders to individualized assessments to gauge their risk of recidivating.[227]

There remain strong objections to any solution that would take juveniles off sex offender registries the most prominent one being public safety.[228] However, the rebuttal to that objection is that juveniles do not fall under the definition of a sex offender because adjudications in juvenile court do not result in criminal convictions.[229] Since juveniles cannot be punished for a crime and the effects of SORNA's registration requirements are punitive, imposing these requirements on juveniles is unconstitutional.[230]

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220. *See id*. (failing to include language or address the issue of offenses relating to sexual acts committed by juveniles).
221. *See supra* notes 132-142 and accompanying text.
222. 567 U.S. 460 (2012).
223. *See supra* notes 52-63 and accompanying text.
224. *See supra* notes 143-156 and accompanying text.
225. *See supra* notes 85-95 and accompanying text.
226. *See supra* notes 85-95 and accompanying text.
227. *See supra* notes 169-174 and accompanying text.
228. *See supra* notes 175-189 and accompanying text.
229. *See supra* notes 190-218 and accompanying text.
230. *See supra* notes 143-168 and accompanying text.