Child’s Play No Longer: Children Charged and Tried as Adults in Florida - Ending up in Prison for Life Without Parole

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CHILD’S PLAY NO LONGER: CHILDREN CHARGED AND TRIED AS ADULTS IN FLORIDA—ENDING UP IN PRISON FOR LIFE WITHOUT PAROLE

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I. INTRODUCTION

A Child of any age may be tried as an adult under Florida law.¹ When charged as an adult, a child is required to be treated “in all respects as an

¹ Section 985.225 of the Florida Statutes states:

(1) A child of any age who is charged with a violation of state law punishable by death or by life imprisonment is subject to the jurisdiction of the court as set forth in s. 985.219(8) unless and until an indictment on the charge is returned by the grand jury. When such indictment is
adult." What this means in reality is that children who are unable to drive, vote, consume alcohol, hold public office, or even fight for our country, face up to imprisonment for life without the possibility of parole. Immature "babies" can become embroiled in Florida's adult criminal justice system; and as the law stands now, judges lack the necessary discretion in certain cases to impose a sentence other than life imprisonment without the possibility of parole, no matter how young the accused. This article addresses how unfairly Florida treats children prosecuted as adults; the prosecution and conviction of twelve-year-old Lionel Tate and the subsequent appellate reversal of the conviction; pending legislative bills regarding the prosecution of juveniles; and a suggestion as to how Florida can rehabilitate children accused or convicted of committing "adult crimes" through treatment and counseling, instead of incarcerating them.

Counsel for children charged or convicted as adults, and juvenile justice organizations throughout Florida and the world have argued that Florida's "juvenile transfer statutes" are unconstitutional on their face and as applied on numerous levels. Unfortunately, thus far the courts have been less than receptive to these arguments. For example, in Brazill v. State, the court noted that child defendants have unsuccessfully argued that section 985.225 of the Florida Statutes is unconstitutional as a violation of due process, equal protection, and separation of powers.

The jurisdiction of the court attaches to the child, and the case, upon service of a summons on the child and a parent, a legal or actual custodian, or guardian of the child. If a child is taken into custody, jurisdiction at-
taches before or after the filing of a petition, whichever occurs first, regardless of whether a summons was served. Appellate tribunals have sloughed off claims that section 985.225 violates the law citing "easy affirmance" language:

The constitutionality of a statute is reviewed de novo. There is a strong presumption that a statute is constitutionally valid. It is well established that where reasonably possible and consistent with constitutional rights, a statute will be interpreted by the courts in a manner that resolves all doubt in favor of its validity.

It is based upon Chapter 985 that unintended results occur. Even prosecutors may deem a life sentence without parole unjust when imposed on a child Defendant who has never before been charged with any criminal offense. In Tate's case, not only the prosecutor but the victim's family, and a warden from the Department of Juvenile Justice Level X facility joined in his quest for a non-mandatory sentence. Luckily, in Tate's case, he was spared from serving a mandatory life imprisonment sentence without the possibility of parole. However, until legislative changes are enacted, children will continue facing the possibility of life in prison without parole upon conviction.

II. FLORIDA'S TRANSFER STATUTES ARE UNCONSTITUTIONAL: YOUNG CHILDREN PROSECUTED UNDER FLORIDA LAW ARE TREATED MORE HARSHLY THAN OTHERS PROSECUTED IN VIOLATION OF THEIR RIGHTS TO EQUAL PROTECTION AND DUE PROCESS OF LAW

Child advocates assert that children's rights to equal protection and due process of law, under both the United States and Florida Constitution, are violated when they are transferred to adult court pursuant to section 985.225 of the Florida Statutes, and are sentenced to life imprisonment without parole for a first degree felony offense. This is the "younger generation,"

6. Id.
7. Id.
8. See Miami v. McGrath, 824 So. 2d 143, 146 (Fla. 2002); Dickerson v. State, 783 So. 2d 1144, 1146 (Fla. 5th Dist. Ct. App. 2001); Lowe v. Broward County, 766 So. 2d 1199, 1203 (Fla. 4th Dist. Ct. App. 2000).
9. See McGrath, 824 So. 2d at 146; In re Estate of Caldwell v. Caldwell, 247 So. 2d 1, 3 (Fla. 1971); Dickerson, 783 So. 2d at 1146.
10. Brazill, 845 So. 2d at 287 (citing DuFresne v. State, 826 So. 2d 272, 274 (Fla. 2002)); see also State v. Mitro, 700 So. 2d 643, 645 (Fla. 1997); McKibben v. Mallory, 293 So. 2d 48, 51 (Fla. 1974).
many of whom are not yet competent to be treated as adults and not yet ma-
ture enough to understand that when adults say "life"—they mean LIFE.
Furthermore, in Florida, a juvenile’s competency to stand trial or be sen-
tenced is assessed by adult standards. Slightly older juveniles, who are
convicted as adults for crimes punishable by life imprisonment, crimes
committed with actual premeditation or malice, are entitled to a pre-
senting hearing to determine whether they will be sentenced as juveniles
or as adults. A child’s transfer to adult court from juvenile court constitutes
a fundamental error, which “reaches down to the validity of the trial itself,”
and it is this type of error where the interests of justice present a compelling
demand for its application.

Section 985.225 fails to comport with minimal due process require-
ments for children under fourteen years of age, and is unconstitutional as
applied to children. The Florida and United States Constitutions each pro-
vide that “[n]o person shall be deprived of life, liberty, or property without
due process of law.” Substantive due process protects the full panoply of
individual rights from unwarranted encroachment by the government; and
procedural due process serves as a vehicle to ensure fair treatment through
the proper administration of justice where substantive rights are at issue.
When basic rights are at stake, the means by which the State can protect its
interest must be narrowly tailored to achieve it’s objectives through the least
restrictive means.

Under the Florida Constitution, the Legislature may restrict or qualify
the right to juvenile treatment, and may conclude that certain juveniles are
not entitled to juvenile procedure and sanctions. This is not, however, a
license to deny the basic requirements of due process of law once in adult
court.

Florida’s transfer statutes offer three charging options to a prosecutor
when a juvenile is fourteen or fifteen years of age, has no prior violent of-

14. FLA. STAT. § 985.225 (2003); Maddox v. State, 760 So. 2d. 89, 96 (Fla. 2000).
15. See Dep’t of Law Enforcement v. Real Prop., 588 So. 2d 957 (Fla. 1991) (providing a
framework for determining whether due process has been violated when substantive rights are
at issue, and restating the proper balancing tests under the Florida Constitution).
16. FLA. CONST. art. 1 § 9; U.S. CONST. amends. V, XIV.
17. Dep’t of Law Enforcement, 588 So. 2d at 959.
18. Id. at 964 (citing FLA. CONST. art. 1, § 9).
19. See FLA. CONST. art. 1, § 15(b); Woodward v. Wainwright, 556 F.2d 781 (5th Cir.
1977).
20. See State v. Harris, 356 So. 2d 315, 317 (Fla. 1978) (holding the Legislature may
have the right to create offenses, but the court has the right to dictate procedures that comply
with due process).
fenses, and is alleged to have committed an offense punishable by life imprisonment: 21 1) the juvenile court retains jurisdiction; 2) the prosecutors may seek an indictment; 22 or 3) the State can prosecute the juvenile as an adult by the direct filing of an information. 23 If, however, the juvenile is under fourteen years of age, only options one and two are available. 24 Section 985.225 is the only statute, which allows for the transfer of children under fourteen years of age to adult court.

From that moment on, the child faces a mandatory life sentence, and the child's circumstances—the child's capacity to form criminal intent, the child's age, the lack of specific intent to harm, and the likelihood of rehabilitation—are all deemed irrelevant.

Compounding the problem is the more lenient treatment afforded older juveniles. Those juveniles are entitled to a hearing to determine the propriety of juvenile versus adult sanctions. The only way to charge a thirteen-year-old child or younger as an adult is by indictment; and therefore, the youngest offenders receive the harshest treatment. 25

The inequity is that juveniles who are indicted pursuant to section 985.225 must be sentenced as adults; while older juveniles, which the court obtains jurisdiction via the filing of an information, 26 may be sentenced as an adult or as a juvenile. 27 When determining whether juvenile sanctions should be imposed, the court is required to consider eight factors, including the sophistication and maturity of the offender, prior adjudications, and prospects for rehabilitation. 28

Adults must account for their criminal actions even when their life circumstances and childhoods were exceptionally difficult. Section 985.225 holds children of any age to this same ideal, without inquiring into any predispositions or environmental challenges, without any standards for mental capacity or ability to form criminal intent, and without a finding of intentional wrongdoing. In addition, section 985.225 is too broad as it does not

21. Section 985.225 states that children who are charged with a violation of state law punishable by death or by life imprisonment may be transferred to adult court once an indictment is returned. See Brennan v. State, 754 So. 2d 1, 6 (Fla. 1999) (stating death sentences for children under seventeen years of age constitute cruel or unusual punishment).
23. § 985.227(1)(a). The State may prosecute a child of fourteen or fifteen by the discretionary direct filing of an information for murder, robbery, kidnapping, and sexual battery. Id.
25. Id.
26. § 985.227(1).
27. § 985.233(4)(2).
28. § 985.233(1)(b).
distinguish between those who commit premeditated murder with a capacity to form criminal intent, and those who commit less culpable life felonies.

While the State may have a compelling interest in promoting public safety, treating children of any age as adults in every way, and punishing the children for punishment sake is inconsistent with public policy. 29 Section 985.225 does not reflect the State's parens patriae interest—promoting the welfare of children involved in criminal activity. 30 "Reprehensible acts by juveniles are not deemed the consequence of mature and malevolent choice but of environmental pressures (or lack of them) or of other forces beyond their control."

Equal protection provides that all persons similarly situated be treated alike. 32 Applying the equal protection clause to state action, the question is whether some rational explanation justifies the disparate treatment of similarly situated children. 33 When an age restriction is attacked on due process or equal protection grounds, it must be shown that: 1) the restriction is reasonable, and 2) the restriction is not discriminatory, arbitrary, or oppressive. 34

Prosecutors have broad discretion in deciding whether to charge or file a decision. The concern is the arbitrary and oppressive treatment of children convicted of crimes punishable by life imprisonment, who committed a crime that did not require the showing of intentional wrongdoing. Compare this to the treatment of older juveniles who were convicted of life felonies, but were initially charged by the direct filing of an information.

A statutory scheme that mandates adult sanctions for our youngest juvenile offenders simply because they were indicted; and permits juvenile sanctions for older offenders who committed crimes with malice or premeditation because the law does not require an indictment, cannot be rationally justified. "[T]he requirement of a grand jury indictment only ensures that

29. It is also at odds with a parents' right to the care and custody of their children, and the children's concomitant rights. Certainly at some point, a child is very young the inquiry into culpability, capacity, and competency so minimal, and the period of incarceration so long, that the parent's rights must also be weighed. See Santosky v. Kramer, 455 U.S. 745, 753 (1982); see also Padgett v. Dep't of Health & Rehab. Servs., 577 So. 2d 565, 570 (Fla. 1991).
33. Eisenstadt, 405 U.S. at 446; State v. Walborn, 729 So. 2d 504, 505 (Fla. 2d Dist. Ct. App. 1999).
34. Walborn, 729 So. 2d at 505.
there is probable cause for the charge it does not determine the propriety of prosecuting a juvenile as an adult.\textsuperscript{35}

In \textit{State v. Cain}, the Supreme Court of Florida rejected the argument that the transfer statutes violated due process and equal protection rights by giving prosecutors unbridled discretion to prosecute juveniles as adults without a hearing.\textsuperscript{36} However, the statutory scheme has changed since \textit{Cain}. In 1980, the transfer statutes gave equal treatment to all juveniles, regardless of age or indictment, by requiring a disposition hearing to determine whether juvenile or adult sanctions were appropriate, and to determine whether to offer the juvenile the benefits of the Youthful Offender Act.\textsuperscript{37} The court reasoned that because juveniles, who are amenable to rehabilitation, will be considered for juvenile sanctions, the transfer statutes did not violate the juvenile’s due process rights.\textsuperscript{38} In \textit{Goodson}, the court reasoned that the Florida Legislature did not intend to treat younger juvenile offenders more harshly than older juvenile offenders; and therefore, juveniles who were indicted and those who waived into adult court were also entitled to the benefits of the Youthful Offender Act.\textsuperscript{39} Such sentencing disparity, based on the discretionary charging authority of a prosecutor, causes disparate results when based solely upon age, because the younger, presumably less culpable offenders, are subject to receive the harshest penalties.

\section*{III. Florida Transfer Statutes Violate the Constitutional Principles of the Separation of Powers and Florida’s Non-Delegation Doctrine}

Defense counsel for children similarly advocate that Florida’s transfer statutes, offend due process and State and Federal law by violating the Separation of Powers and Non-Delegation Doctrines of the United States and Florida Constitution.\textsuperscript{40} The Legislature has unlawfully delegated its authority to define crimes and structure penalties by allowing a state attorney to

\begin{itemize}
  \item \textsuperscript{35} State v. Cain, 381 So. 2d 1361, 1365 (Fla. 1980).
  \item \textsuperscript{36} \textit{Id}.
  \item \textsuperscript{37} See chapter 958 of the Florida Statutes; see also \textit{Cain}, 381 So. 2d at 1366; \textit{Goodson v. State}, 392 So. 2d 1335, 1337 (Fla. 1st Dist. Ct. App. 1980), \textit{decision Approved by State v. Goodson}, 403 So. 2d 1337 (Fla. 1981) (establishing that all juveniles tried as adults are considered for juvenile sanctions, whether jurisdiction was pursuant to an indictment or the filing of an information).
  \item \textsuperscript{38} \textit{Cain}, 381 So. 2d at 1366.
  \item \textsuperscript{39} \textit{Goodson}, 392 So. 2d at 1337.
  \item \textsuperscript{40} \textit{FLA. CONST.} art. II, § 3. Florida’s Constitution “requires a strict separation of powers” analysis on the issue of non-delegation, and therefore this argument will focuses Florida law. \textit{See} B.H. \textit{v. State}, 645 So. 2d 987, 991 (Fla. 1985).
\end{itemize}
seek an indictment for children under fourteen, thereby delegating the decision to charge children "of any age" of a crime punishable by death or life imprisonment. The Florida Legislature has delegated this authority without implementing any guidelines to ensure the executive branch is carrying out the legislature’s intent.

The prosecuting attorney has the discretion to bring charges in juvenile court, or seek an indictment pursuant to section 985.225. If a prosecutor chooses to present a case to a Grand Jury, the Grand Jury will most likely indict the accused because a Grand Jury "would indict a ham sandwich." In Tate’s case, at the age of twelve, he was indicted for premeditated murder in the first degree. Because he was indicted by a Grand Jury, the only available penalties for Tate were either 1) life imprisonment without the possibility of parole, or 2) death. The age of twelve was too young for our society to accept that he should be executed by the State. However, he was also too young to be sentenced to life imprisonment without parole, but he was sentenced to life without parole nonetheless. The court rejected the sentencing argument, instead overturning Tate’s conviction on the competency issue.

Section 985.227 allows a state attorney to charge fourteen or fifteen-year-old children accused of a life felony by the direct filing of an information. The state attorney is only authorized to do this “when in the state attorney’s judgment and discretion the public interest requires that adult sanctions be considered or imposed.” The statute also requires the state attorney to develop written policies and guidelines that will govern the determinations for filing an information against a juvenile, and to submit those guidelines to the Governor and State Legislature. Finally, upon conviction, the court has the discretion to impose either juvenile or adult sanctions based on the consideration of eight statutory criteria. However, unlike section 985.227, section 985.225 provides no similar guidelines or requirements on the state attorney’s office, and fails to provide the Grand Jury with procedures for determining the propriety of adult sanctions for an accused child under the age of fourteen. Once charged by the Grand Jury for a life felony, adult sanctions are mandatory. Open-ended authority is thereby granted to

43. § 784.02.
44. Tate v. State, 864 So. 2d 44, 50 (Fla. 4th Dist. Ct. App. 2003).
45. § 985.227(1)(a).
46. § 985.227(1)(a).
47. § 985.227(4).
48. § 985.233(4)(b).
49. § 985.233(4)(a).
the executive branch to seek an indictment of a child of any age, and treat the child "in every respect as an adult." The requirement that a Grand Jury must indict "only ensures that there is probable cause for the charge; it does not determine the propriety of prosecuting a juvenile as an adult." 

When the juvenile court is vested with original jurisdiction of a child, that jurisdiction confers special rights and immunities by the juvenile code and a transfer or waiver of that jurisdiction must satisfy the basic requirements of due process and fairness. The Supreme Court described the critical importance of the transfer decision: "[t]here is no place in our system of law for reaching a result of such tremendous consequences without ceremony . . ." Prior to Kent, challenges to Florida's juvenile transfer statutes have not been successful; however, critical changes in the statutes illuminate the need to revisit the constitutionality of section 985.225.

It is well established that the Legislature may not delegate the power to exercise unbridled discretion in applying the law. While the Supreme Court of Florida rejected the assertion that Florida law amounted to an unlawful delegation of authority, the statutory scheme has changed drastically since 1980. Most significantly, children of any age, who are indicted for life felonies, are no longer entitled to a hearing to determine whether juvenile or adult sanctions will be imposed. Further, Cain addressed the prosecutor's discretion to charge a sixteen or seventeen-year-old repeat offender as an adult, where that teenager would receive a hearing to determine the propriety of juvenile or adult sanctions upon conviction.

A child's rights to due process of law is violated under both the Florida and United States Constitutions when the child is transferred to adult court for criminal prosecution at age twelve, and treated "in every respect like an adult." A statute that treats a child of any age as an adult in every way,

50. See § 985.225.
51. State v. Cain, 381 So. 2d 1361, 1365 (Fla. 1980).
53. Id.
54. Cain, 381 So. 2d at 1367.
55. Id. at 1368.
56. Id.
57. § 985.225. Section 985.225, provides:
A child of any age who is charged with a violation of state law punishable by death or life imprisonment is subject to the jurisdiction of the court as set fourth in Section 985.219(7) unless and until an indictment on the charge is returned by the grand jury. When such indictment is returned, the petition for delinquency, if any, must be dismissed and the child must be tried and
handled in every respect as an adult.

Id. (emphasis added).
without procedural protections, triggers numerous process concerns, including the intrusion into a child’s right to privacy, where principles of fundamental fairness and Constitutional scrutiny must be reapplied to the facts of each case and the law.

Due process “is not a technical conception with a fixed content unrelated to time, place, and circumstance. Rather the phrase expresses the requirement of ‘fundamental fairness,’ a requirement whose meaning can be as opaque as its importance lofty.” Courts have determined that a child’s due process rights are not violated when the child is denied the “rehabilitative aspect of juvenile court solely because the state decided to procure an indictment.” Unfortunately, there is no absolute right conferred by common law, constitution, or otherwise, requiring children to be treated in a special system for juvenile offenders. The Florida Constitution a “child” as defined by law may be charged “with a violation of law as an act of delinquency instead of [a] crime.” The Supreme Court of Florida has interpreted this provision to mean that “a child has the right to be treated as a juvenile delinquent only to the extent provided by our legislature.” Only the legislature has the power to determine who, if anyone, is entitled to treatment as a juvenile.

Subjecting children under fourteen years of age to the doctrine of transferred intent defies the common law doctrine of incapacity, contemporary scientific research on child and adolescent organic brain structure, and public policy concerning juvenile delinquency. Due process should require that a child have the capacity to form criminal intent for murder before he can be sentenced to life without parole for murder. For example, the State failed to establish Tate’s capacity to form criminal intent. The State did not need to

60. See In Re Gault, 387 U.S. 1, 16 (1967); Johnson v. State, 314 So. 2d 573, 576 (Fla. 1975) (noting that it was within legislative authority pursuant to Article I, Section 15(b) of the Florida Constitution, to create an exception where children would be treated as adults); State v. Cain, 381 So. 2d 1361, 1363 (Fla. 1980).
61. FLA. CONST. art. I, § 15(b).
62. Cain, 381 So. 2d at 1363.
63. Id.; see also Woodard v. Wainwright, 556 F.2d 781, 785 (5th Cir. 1977) (finding that “treatment as a juvenile is not an inherent right but one granted by the state legislature, therefore the legislature may restrict or qualify that right as it sees fit, as long as no arbitrary or discriminatory classification is involved”).
prove premeditation or malice to kill, and therefore it was never clear whether Tate had the capacity to form criminal intent.  

Secondly, the court lacked jurisdiction prohibiting the State from prosecuting Tate for felony murder when he could not be held criminally responsible for the underlying felony. In Florida, the law and legislative intent is that children under fourteen are not criminally responsible in adult court for aggravated child abuse, because it is not a “life felony,” and thus section 985.225 is not implicated. The clear inference is that the Legislature did not intend to prosecute children under fourteen for felony murder when the underlying felony is not also a “life felony” in adult court. While section 985.225, unconstitutionally permits a child of any age to be indicted for a “life felony,” and treated like an adult in every way, it is inconsistent with public policy and legislative intent to include felony murder among the qualifying life felonies.  

Lastly, a child’s right to due process is violated when a child is sentenced as an adult to life without parole for felony murder where the underlying felony did not contain an element of intentional wrongdoing. Tate was never shown to have had any intent to harm. Sentencing a twelve-year-old, whose moral guilt was not established, is at odds with traditional concepts of ordered liberty: “American criminal law has long considered a defendant’s intention—and therefore his moral guilt—to be critical to the ‘degree of [his] criminal culpability.’” Tate was entitled to a reversal of his life sentence on this ground alone.

IV. SO MUCH FOR A CHILD’S RIGHTS TO PRIVACY WHEN THE CHILD IS TREATED AS AN ADULT

The Florida Constitution expressly provides for a strong right to privacy not found in the United States Constitution. Florida’s strong right to privacy is set forth in Article I, Section 23 of the Florida Constitution. When a child is charged as an adult and the child is treated “in every aspect” as an adult, the child’s right to privacy is violated. Children, even juvenile offenders, have unique privacy rights and the adult court does not provide for the

64. Older juveniles may be presumed to have capacity to form criminal intent, and therefore a felony murder conviction may stand with a mere showing of an intent to commit the underlying felony.

65. See People v. Cruz, 225 A.D.2d 790 (1996) (holding a fifteen-year-old could not be held criminally responsible for felony murder when the underlying felony was one for which there was no adult criminal responsibility and therefore no “felonious intent” to transfer).


protection of these rights; however, the juvenile system does. When a child has a legitimate expectation of privacy, the compelling state interest standard of review must be met when assessing a claim of governmental intrusion. Whether an individual has a legitimate expectation of privacy is determined by considering all the circumstances, including subjective and objective manifestations of that expectation and the values society seeks to foster. The juvenile code is evidence that society seeks to foster the privacy rights of children by keeping their school records and court records confidential.

Children have a legitimate expectation of privacy in the confidentiality of their elementary education records. The Legislature has passed laws that make school records inadmissible in juvenile proceedings prior to a disposition hearing. However, once transferred to adult court, there are no evidentiary rules in place to protect these rights.

Unless and until the Florida Legislature passes laws that protect a child's right to privacy in adult court, or makes a compelling showing to treat children as adults in every way, treating our youngest offenders as adults violates this constitutionally protected right. While older juveniles may not have a reasonable expectation of privacy because their status as adults is uncontested, the privacy rights of children under fourteen should be protected at least until a final judgment is rendered. Treating children as adults in this respect is unnecessary because keeping the record confidential would not impair the state's interest in public safety.

V. REVERSAL OF TATE'S CONVICTION AND MANDATORY LIFE SENTENCE BECAUSE OF A FAILURE TO ESTABLISH COMPETENCY

The appellate decision reversing Tate's conviction and sentence was based upon the trial court's failure to establish that Tate was competent to proceed to trial as an adult. Tate contended on appeal that his conviction...
and resultant life sentence without parole violated due process because: 1) it was unfair to apply the felony murder rule to Tate and all children under fourteen without proving capacity to form criminal intent;\textsuperscript{74} 2) felony murder should not apply to children under fourteen in adult court when the court lacks jurisdiction over the predicate felony;\textsuperscript{75} and 3) even if the felony murder rule applied, the jury failed to find that Tate intended to harm anyone.\textsuperscript{76} 

Shortly after Tate’s conviction, yet prior to sentencing, appellate counsel was brought in to “clean up the mess.” When undersigned first met with Tate, it was evident that the child was unable to appropriately assist in his defense, and was not capable of understanding important principles of law relevant to the post-trial proceedings. Counsel immediately requested competency evaluations, and questioned Tate’s pre-trial decisions based upon his lack of competency at the time.\textsuperscript{77} This was done, knowing all along that should the court find Tate incompetent only for sentencing, re-sentencing would result in the same sentence—life imprisonment without parole, despite the fact that Lionel Tate was twelve at the time of the incident. Therefore, counsel continually argued that Lionel Tate was incompetent post-trial, pre-trial, and during trial, requiring a re-trial.

First, the court needed to grapple with the question of whether a retroactive competency evaluation was appropriate.\textsuperscript{78} The court determined that because of the vast amount of time which had elapsed, a retroactive competency hearing would not be beneficial.\textsuperscript{79} Accordingly, the court reversed and remanded for a new trial.\textsuperscript{80}

The question of whether an accused can proceed to trial while a minor is easily distinguishable from the question of whether anyone is competent to be tried. Based upon Tate’s young age, twelve-years-old at the time of the offense, his low IQ of 90, his developmental immaturity, his lack of prior exposure to the criminal justice system, and the overall facts and circum-

\textsuperscript{74} Id. at 53.
\textsuperscript{75} Id. at 51.
\textsuperscript{76} Id. at 53.
\textsuperscript{77} Tate, 864 So. 2d at 47.
\textsuperscript{78} Id. at 51.
\textsuperscript{79} Id.
\textsuperscript{80} Id.

\hspace{1cm} signed respectfully points out the fact that all of the facts were not presented to the appellate tribunal. Based upon the facts presented, the appellate decision is accurate in determining that the cause of death appears to be intentional rather than accidental. However, based upon evidence established and ascertained after undersigned counsel was brought in to assist, strong evidence supports Tate’s assertions of innocence based upon a lack of any criminal intent, and strong evidence, buttressed by expert medical testimony, supports Tate’s claims that Tiffany Eunick’s death was accidental.
stances, the appellate tribunal correctly determined that Tate was not proven to be competent to proceed to trial or to be sentenced. Accordingly, the result in his case was eminently fair.

VI. CHILDREN TRIED AS ADULTS: A PREASSUMPTION OF INHERENT INCOMPETENCY

Tate asserted that his State and Federal constitutional rights to due process of law and his rights to a fair trial were violated by the trial court's failure to order competency evaluations, to conduct a competency hearing on its own initiative or at the repeated requests by the defense. Tate maintained that *bona fide* evidence of his incompetence entitled him to be evaluated for competency and for the court to conduct a competency hearing prior to trial and sentencing, because he was facing a mandatory life sentence if convicted. Tate maintained on appeal that the court's failure to make any inquiry into his competence deprived him of his right to a fair trial and to due process of law.

In light of Lionel Tate's extremely young age and his lack of previous exposure to the judicial system, competency evaluations were warranted. Exacerbating the situation was the complexity of the legal proceedings. In light of the testimony elicited by both parties regarding Tate's developmental immaturity, and the submission of affidavits from lawyers and a neuropsychologist that Tate lacked the necessary competency to proceed, ample evidence existed to appoint psychologists to evaluate Tate and to require a competency hearing.

A defendant is considered competent to stand trial if he "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." The trial court was well aware of the fact that Tate was only thirteen at the time of the trial, and twelve at the time of arrest—when crucial defense decisions were made. The Supreme Court has, in many contexts, commented on the reduced capacities of juveniles,

81. *Id.* at 50.
82. Tate, 864 So. 2d at 50.
83. *Id.* at 46–47; see Pate v. Robinson, 383 U.S. 375 (1966); Hill v. State, 473 So. 2d 1253, 1257 (Fla. 1985).
84. Tate v. State, 864 So. 2d 44, 48–49 (Fla. 4th Dist. Ct. App. 2003). Prior to trial, the court conducted a brief plea colloquy with then thirteen-year-old Tate, which was profoundly inadequate to determine his competence for a decision of such tremendous consequence, given his age, immaturity, and nine or ten-year-old mental age. *Id.* at 50.
including their inability “to think in long-range terms” and inability to understand the costs and benefits of certain decisions.\textsuperscript{86}

The Appellant’s age is even more significant when analyzing the complexity of the proceedings against him. The “level of capacity sufficient to understand simple charges, such as driving without a license, may be grossly insufficient when a more complicated offense is involved.”\textsuperscript{87} Here, the offense was among the most serious of chargeable offenses. Nevertheless, without any court ordered competency evaluations, Tate was asked to make profound decisions throughout the trial process regarding defense strategy, make relevant factual disclosures, intelligently analyze plea offers, and consider waiving important State and Federal constitutional rights.

Tate’s immaturity and developmental delays were very much at the heart of the permitted defense at trial.\textsuperscript{88} Testimony revealed that this particular child was at an even greater intellectual and emotional disadvantage than the average thirteen-year-old. His I.Q. was 90 or 91, meaning that seventy-five percent of children his age scored higher.\textsuperscript{89} Further, the doctors opined Tate had significant mental delays.\textsuperscript{90} Even the State forensic psychologists agreed that Tate was immature, although one state witness did not agree with the concept of using a mental age.\textsuperscript{91}

Appellate counsel requested competency evaluations post-trial, prior to sentencing, both orally and in writing. The evidence presented to the trial court clearly suggested that a competency evaluation was needed due to Tate’s youth and immaturity.\textsuperscript{92} The trial court abused its discretion in denying defense requests for a competency evaluation.\textsuperscript{93}

Appellate counsel requested a competency evaluation during a hearing on Defendant’s Motion for New Trial, stating that Tate “has no clue what we


\textsuperscript{87} Melton et al., PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS, (1997). For example, the Appellant maintains that the felony-murder rule was never intended as a vehicle to prosecute children under fourteen years of age for first degree murder (CFC 4).

\textsuperscript{88} Tate, 864 So. 2d at 50. While the defense attempted a “wrestling intoxication defense,” because of the trial court’s pretrial rulings on state motions in limine, Tate’s defense at trial centered around his lack of knowledge and lack of intent to harm.

\textsuperscript{89} Id. at 50.

\textsuperscript{90} Id. at 48.

\textsuperscript{91} Id. at 49 n.2.

\textsuperscript{92} Id. at 46–47.

\textsuperscript{93} See Kelly v. State, 797 So. 2d 1278 (Fla. 4th Dist. Ct. App. 2001) (reversing the conviction applying abuse of discretion as the proper standard of review in denying request for competency hearing).
are talking about.94 The judge asked Tate if he understood, and Tate shook his head “no.”95 At that time, the court correctly determined that “at a minimum Tate should be evaluated by mental health experts.”96 The court based its ruling on Rule 3.210 of the Florida Rules of Criminal Procedure, stating:

I'm also convinced that if I denied your hearing at this particular point, that I would get ordered by the Fourth District Court of Appeals [sic] to have such a hearing. And I'd rather do that while testimony is fresh, rather than trying to recall what happened three or four or five or six months down the road.97

Minutes later, the judge “changed his mind” and denied Tate’s oral motion for a competency hearing, improperly denying leave for the defense to file a written motion.98 The judge inappropriately based his decision solely on Tate’s demeanor in court.99 A written motion and affidavits were filed nonetheless, maintaining that the Defendant was not competent to proceed.100 The trial court denied Tate’s written Motion to Determine Competency, in large part, because it was incomprehensible to the judge that none of the numerous professionals, who had been in contact with Tate, had previously requested a competency hearing.101

Although the court’s frustration that competency was not raised pretrial or during trial might be justified,102 the cited reasons for denial of the motion are irrelevant.103 Defense counsel’s affidavit specifically stated that “he

95. Id.
96. Id.
97. Id. (emphasis added).
98. Id. at 48.
99. Tate, 864 So. 2d at 48. Dr. Borg-Cater later testified for the state that she administered a twenty minute “competency interview” during her risk assessment evaluation and believed Tate to be competent. Id. at 47 n.2. The psychologist’s testimony was over a defense objection and an uncontroverted Record that the competency interview was not authorized by a court order. Id. The defense maintained any competency evaluation was not permissible under the Florida Rules of Criminal Procedure, and violated the Specialty Guidelines for Forensic Psychology. Id. Even state forensic expert Dr. Brannon admitted that with children you must “go deeper” to test their insights to see if they really understand. Id.
100. Tate, 864 So. 2d at 47.
101. Id. at 48.
102. Id. at 49. Tate’s trial counsel did not question Tate’s competency and learned during discovery that one of the state’s experts, Dr. Bourg-Carter claimed to have had the verbal consent of Tate, his mother, and a defense expert to perform a competency evaluation Id. at 49 n.2.
103. FLA. R. CRIM. P. 3.210; Pate v. Robinson, 383 U.S. 375, 384 (1965); (stating failure of defense to raise competency, mental alertness displayed during “colloquies” with judge and demeanor at trial cannot be relied upon to dispense with a hearing on competency).
[Tate] is unable to communicate with me . . . and he did not and still does not possess an ability to appreciate the gravity of the charges . . .” 104 Neuropsychologist Dr. Mittenberg’s affidavit stated: “Tate has not been able to follow along with the legal proceedings I have been involved with.” 105 In addition, the court’s order (“R 764”) did not apply the proper standard for determining the motions: “the proper inquiry is whether the defendant may be incompetent, not whether he is incompetent.” 106 Therefore, the trial court not only failed to initiate a competency hearing under Pate and Hill, it abused its discretion by denying oral and written motions to determine Tate’s competency. 107

The written motion requested, inter alia, appointment of experts and a hearing to determine whether Tate was competent to reject the plea offer, and whether he had the ability to appreciate the range and nature of the possible penalties that could be imposed. 108 This motion was denied as untimely, and the court refused to consider the merits of the motion. 109 The trial court erred because a competency hearing is required at any material stage of a criminal proceeding or “when necessary for a just resolution of the issues being considered.” 110 Further, Tate’s motion served as yet another reminder to the court of its obligation pursuant to Pate and Rules 3.210 and 3.211 of the Florida Rules of Criminal Procedure to determine Tate’s competence when reasonable grounds exist to believe an accused may be incompetent. 111

Despite the well-founded professional doubts concerning Tate’s competency, the judge denied all defense requests for Tate to be evaluated by appropriate mental health practitioners. 112 The court refused to conduct a hearing, which would have allowed the balancing of factors, an evaluation of the situation, and for the court to make a competency determination based upon the opinions of experts. The court stated that the Defendant’s demeanor and disinterest did not mean that he did not understand the proceedings. 113

104. Defense Counsel’s Affidavit in Support of Motion to Determine Competency, Tate v. State, 864 So. 2d 44 (Fla. 4th Dist. Ct. App. 2003) (No. 4D01-1306).
105. Dr. Mittenberg’s Affidavit in Support of Motion to Determine Competency, Tate (No. 4D01-1306).
107. Tate, 864 So. 2d at 48.
108. Id. at 51; see FLA. R. CRIM. P. 3.211.
109. Tate, 864 So. 2d at 47.
111. Tate, 864 So. 2d at 47, n.2.
112. Id. at 48.
113. Id. at 50.
importantly, the judge relied heavily upon the fact that incompetency was never previously raised by the defense or forensic psychologists.114

The facts focused on by the trial judge are irrelevant.115 As in Pate, there is no justification for ignoring the uncontradicted testimony of Dr. Mittenberg regarding the defendant's reduced mental functioning and his opinion that a competency hearing was necessary.116 There was no reason not to give some weight to the sworn affidavits of experienced counsel and a neuropsychologist who each opined that Tate “did not and still does not possess an ability to appreciate the gravity of the charges” and the possible penalties.117

In Hill v. State,118 applying the United States Supreme Court precedents,119 the Supreme Court of Florida rejected the state's contention that "there was no evidence before the court that was sufficient to raise a bona fide doubt as to Hill's competency to stand trial."120 Indeed, the situation at bar is easily distinguishable from those where competency evaluations were authorized by the court and conducted by appropriate professionals, or where a full competency hearing was conducted.121

Further, Tate’s trial counsel, an officer of the court, offered to directly reveal to the judge Tate’s comments that led him to believe that Tate was not competent.122 However, the court refused to receive the information.123 Without question, reasonable grounds existed to believe that Tate was not mentally competent to proceed, and that he required an evaluation, constituting reversible error.124 The foregoing established a bona fide doubt as to Tate’s competency, and no logical reason supports the trial court’s failure to order evaluations or to initiate a competency hearing. The trial court’s failure to order a competency hearing violated Tate’s State and Federal constitu-

114. Id. at 48.
115. Pate, 383 U.S. at 384–85.
116. Tate v. State, 864 So. 2d 44, 48 (Fla. 4th Dist. Ct. App. 2003); see Pate v. Robinson, 383 U.S. 375, 385 (1965) (stating appropriate demeanor at trial cannot be relied upon to dispense with a hearing on competency).
117. Tate, 864 So. 2d at 46–47, 48.
118. 473 So. 2d 1253 (Fla. 1985).
120. Hill, 473 So. 2d at 1259.
121. See e.g. Mora v. State, 814 So.2d 322 (Fla. 2002).
122. Tate, 864 So. 2d at 48.
123. Id.
tional rights to due process of law and right to a fair trial, requiring reversal of the conviction and a remand for a new trial.\textsuperscript{125}

In a courageous ruling, the Fourth District Court of Appeal reversed Tate's conviction and sentence imposed for first degree murder as an adult, and remanding the cause for re-trial following a determination of competency.\textsuperscript{126}

When judges, prosecutors, victims' families, and juvenile justice organizations throughout the world vocally pronounce the inequity of Florida's juvenile transfer statutes, the way we treat our kids must be addressed and the laws changed.

Presently, two bills are pending before the Florida Senate addressing sentencing of juveniles. Each Bill is sponsored by Democratic Florida Senators. Senator Walter "Skip" Campbell has introduced Senate Bill 1346 ("SB 1346"), which limits the age at which a minor convicted of an offense punishable by death or life imprisonment may be sentenced as an adult.\textsuperscript{127} SB 1346 would amend sections 985.226 and 985.227 of the \textit{Florida Statutes} and revise the requirements of the State Attorney with respect to prosecuting a minor as an adult for violent felonies and for offenses punishable by death or life imprisonment.\textsuperscript{128} SB 1346 would require that the courts commit a child seventeen or younger at the time of the offense to the Department of Juvenile or to a maximum-risk facility following the child's conviction of an offense that, if committed by an adult, would be punishable by death or life imprisonment. The court would be required to conduct a hearing after the child reaches the age of twenty-one to determine whether the child was rehabilitated. If so, the child would be placed on conditional release, if not, the child would be moved to adult prison with the eligibility for parole as an adult offender.

\textsuperscript{125} Tate v. State, 864 So. 2d 44, 51 (Fla. 4th Dist. Ct. App. 2003).
\textsuperscript{126} Id. at 54. Tate, the State of Florida, and the decedent's family all agreed that a negotiated plea was in everyone's best interest. A guilty-best interest plea was negotiated wherein Tate entered a guilty-best interest plea to the reduced charged of murder in the second degree, as an adult, and as a result thereof was adjudicated guilty and sentenced to three (3) years Department of Juvenile Justice, followed by one (1) year of community control, followed by ten (10) years probation, with special conditions that he perform 1000 hours of community service and receive psychological counseling and follow-up treatment if deemed necessary. Susan Candiotti, \textit{Teen's mom agrees to deal for son: Plea bargain would reduce Lionel Tate's sentence to three years}, CNN.com, Dec. 31, 2003, at http://www.cnn.com/2003/LAW/12/31/wrestling.death/ (last visited Apr. 8, 2004).
\textsuperscript{128} Id.
The most "kid friendly" Bill pending is Senate Bill 2104 ("SB 2104"), lodged by Senator Frederica Wilson, Democrat from Miami.\textsuperscript{129} SB 2104 would enable kids to receive scrutiny and potential early release when the child reaches "the ripe old age" of twenty-one.\textsuperscript{130} All offenders under the age of eighteen would be committed to the Department of Juvenile Justice rather than be warehoused in the Florida State Prison system.\textsuperscript{131} SB 2104 calls for "blended" or "mixed" sentencing, wherein the court has discretion to impose juvenile sanctions, or a combination of juvenile and adult sanctions.\textsuperscript{132}

Finally, Senator Steve Geller recently proposed Senate Bill 530 ("SB 530"), which was not passed.\textsuperscript{133} In essence, SB 530 would have provided that a child fifteen or younger, who was found to have committed an offense punishable by death or life imprisonment, would have been eligible for parole if he or she had not previously been adjudicated for certain offenses.\textsuperscript{134} SB 530 would have required that the child be incarcerated in a youthful offender facility for a minimum period.\textsuperscript{135} Lastly, SB 530 would have required the Parole Commission to consult with the child to consider release under section 947.16, by interviewing the child within eight months after confinement.\textsuperscript{136} Thereafter, the child’s case would have been eligible for review every two years to consider possible release. If the child was not granted parole by the time the child reached twenty-five years of age, the child would then be transferred from a youthful offender facility to an adult state prison.

\section*{VII. CONCLUSION}

The best changes in the law should encompass all three aforementioned Bills; kids should not be tried as adults until they are older and more mature; prosecutors should not enjoy such broad discretion in prosecuting minors;

\begin{thebibliography}{9}
\bibitem{Id.} \textit{Id.}
\bibitem{Id.} \textit{Id.}
\bibitem{Id.} \textit{Id.}
\end{thebibliography}
and if children under eighteen years of age are convicted they should be sent to the Department of Juvenile Justice to be rehabilitated. As a society, we must not lock children up and throw away the key. Every child is redeemable.