MISSISSIPPI'S *MILLER* MIRE: THE MISAPPLICATION OF *MILLER V. ALABAMA* IN MISSISSIPPI AND A PROPOSED MODERN MODEL STATUTE

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INTRODUCTION

In 2005, Joey Chandler was convicted for the murder of his cousin, Emmitt Chandler, and he was sentenced to life without parole ("LWOP") as mandatorily required by statute.[1] Emmitt Chandler's homicide occurred in August 2003.[2] At the time of the homicide, Joey Chandler was a seventeen-year-old senior in high school.[3] On appeal, the Mississippi Supreme Court affirmed his conviction.[4] In 2015, Chandler received a resentencing hearing of his LWOP sentence pursuant to the United States Supreme Court's decision in *Miller v. Alabama*.[5] On October 9, 2015, the trial court judge entered a sentencing order that repeated the facts surrounding the case and stated he had considered the *Miller* factors, before resentencing Chandler to LWOP.[6]

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[1] Chandler v. State, 242 So. 3d 65, 67 (Miss. 2018) ("In 2005, Joey Montrell Chandler was convicted for the murder of his cousin Emmitt Chandler and sentenced to life in prison under Mississippi Code Section 97-3-21 (2005).").

[2] Chandler v. State, 946 So. 2d 355, 357-58 (Miss. 2006).

[3] Brief of Appellant at 2, Chandler v. State, 242 So. 3d 65 (Miss. 2018) (No. 2015-KA-01636-SCT).

[4] *Chandler*, 946 So. 2d at 366.

[5] *Chandler*, 242 So. 3d at 67 ("In 2015, Chandler received a new sentence hearing for his murder conviction in light of the United States Supreme Court's decision in *Miller v. Alabama*, [567 U.S. 460 (2012)].").

[6] Describing the facts and the sentencing order, the Supreme Court stated:

> Chandler had been selling because his girlfriend was pregnant and he needed to earn money to help pay for expenses. Chandler observed his cousin Emmitt exiting Chandler's vehicle with Chandler's marijuana. The next day, Chandler armed himself and confronted Emmitt. Chandler shot Emmitt two times with a pistol and the wounds were lethal. Chandler disposed of the murder weapon by throwing it in a pond.
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> At the time of the murder, Chandler was seventeen years, six months, and thirteen days old. Upon resentencing, the trial court found that Chandler's actions on the day of the murder showed premeditation, planning, and an attempt to dispose of the murder weapon. Noting that the victim was not armed, the trial court described the murder as "heinous" under the facts of the case.
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> The trial court's order included a discussion of *Miller* and our subsequent cases applying *Miller*, including *Parker* [*v. State*, 119 So. 3d 987 (Miss. 2013)] and *Jones v. State*, 122 So. 3d 698 (Miss. 2013). The trial court's order verified that it had reviewed the transcripts of the case, the court file, and Chandler's presentence investigation report. After carefully reviewing the evidence in the case and the matters presented in the resentencing hearing, the trial court found that

Chandler then appealed to the Mississippi Supreme Court, arguing that the resentencing judge did not properly consider all of the *Miller* factors.[7] Specifically, Chandler argued that the resentencing judge did not make a finding on the final *Miller* factor: a finding on the defendant's "possibility of rehabilitation," or whether he is "irreparably corrupt."[8] Though the circuit court was exposed to the character witnesses that Chandler marshaled for the resentencing hearing and his own testimony,[9] it made no reference to the facts that during his ten years of incarceration, Chandler got married, obtained his GED, earned certification in HVAC, and remained completely RVR free for the five years preceding the hearing; nor was there any explicit finding that Chandler was irreparably corrupt, irretrievably depraved, or permanently incorrigible.[10]

The Mississippi Supreme Court held that the circuit court did not err, because United States Supreme Court's holding in *Miller*, along with the Mississippi Supreme Court's *Parker* decision, only require the sentencing court to consider the factors:

> The Supreme Court also addressed what *Miller* does not require. The *Montgomery* Court confirmed that *Miller* does not require trial courts to make a finding of fact regarding a child's incorrigibility. Moreover, after reviewing *Miller* and *Montgomery*, we discern that no rebuttable presumption exists in favor of parole eligibility for juvenile homicide offenders. Rather, *Miller* explicitly foreclosed imposition of a *mandatory* sentence of life without parole on juvenile offenders. . . .
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> Neither *Miller* nor *Parker* mandates that a trial court issue findings on each factor. Regardless, the trial court certainly "considered" and "took into account"

> Chandler should be sentenced to life in prison for the murder of his cousin Emmitt.

Id.

[7] *Id.* at 68 (Chandler argues that the trial court failed to address all of the sentencing considerations mandated by *Miller* and *Parker*.").

[8] Brief of Appellant at 9, Chandler v. State, 242 So. 3d 65 (Miss. 2018) (No. 2015-KA-01636-SCT).

[9] Chandler v. State, 242 So. 3d 65, 70 (Miss. 2018).

[10] Brief of Appellant at 9-10, Chandler v. State, 242 So. 3d 65 (Miss. 2018) (No. 2015-KA-01636-SCT).

> rehabilitation. The trial court exceeded the minimum requirements of *Miller* and *Parker* by specifically identifying every *Miller* factor in its order.[11]

In the majority's opinion, the trial court adequately considered Chandler's potential for rehabilitation when it noted on the record that the executive branch has the ability to pardon Chandler should it deem him worthy.[12]

Chief Justice Waller dissented, emphasizing that the sentencing court failed to consider *Miller*'s primary concern: the potential for the juvenile offender to be rehabilitated.[13] Chief Justice Waller mused that "[c]onsideration of the defendant's capacity for rehabilitation is a crucial step in the *Miller* analysis, because a life-without-parole sentence reflects an irrevocable judgment about [an offender's] value and place in society, at odds with a child's capacity for change."[14] He went on to highlight that the United States Supreme Court had recently held that LWOP sentences should be reserved for only the rarest of juvenile offenders: juvenile offenders who are beyond hope for rehabilitation.[15]

Justice King's dissent likened a juvenile offender's LWOP sentence to capital punishment, in that both sentences permanently remove a person from society, and therefore asserted the standard of review should be heightened scrutiny as in capital punishment cases to ensure only the rarest juvenile offender receives such a severe punishment.[16]

The Mississippi Supreme Court denied Chandler's motion for rehearing on May 17, 2018, although Chief Justice Waller, Presiding Justice Kitchens, and Justices King and Ishee would

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[11] *Chandler*, 242 So. 3d at 69-70 (internal citations omitted).

[12] *Id.* at 70.

[13] *Id.* at 71 (Waller, C.J., dissenting).

[14] *Id.* (internal quotation marks omitted).

[15] *Id.* ("More recently, in *Montgomery*, the Supreme Court [of the United States] underscored the importance of considering a juvenile's capacity for rehabilitation when it recognized that '*Miller* did bar life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect *permanent* incorrigibility.'" (quoting Montgomery v. Louisiana, 136 S. Ct. 718, 734 (2016))).

[16] *Id.* at 73-74 (King, J., dissenting).

have granted the motion.[17] The United States Supreme Court denied Chandler's petition for writ of certiorari on January 7, 2019.[18]

Chandler is viewed as the Mississippi judiciary completely ignoring the United States Supreme Court's mandates in *Miller* and *Montgomery*.[19] One commenter described the Mississippi Supreme Court's approach in *Chandler* as exploitative of the United States Supreme Court's deference to states regarding implementation of its holding in *Miller* and a complete failure to grasp the central premises to the Court's holdings in *Miller* and *Montgomery*.[20]

The United States is the only developed nation that still allows juvenile LWOP sentences.[21] Several states, however, have themselves eliminated LWOP sentences for juveniles.[22] "Of the states that have considered the question of whether a finding of permanent incorrigibility is required, a greater number have found in the affirmative."[23] Those states are Arizona, Florida, Georgia, Iowa, Michigan, Oklahoma, and Pennsylvania.[24] The states that do not require a finding of permanent incorrigibility

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[17] Chandler v. State, No. 2015-KA-01636-SCT, 2018 Miss. LEXIS 220 (May 17, 2018).

[18] Chandler v. Mississippi, 139 S. Ct. 790 (2019) (mem.).

[19] *Criminal Law — Life Sentences Without Parole — Supreme Court of Mississippi Affirms a Sentence of Life Without Parole for a Juvenile Offender* — Chandler v. State*, 242 So. 3d 65 (Miss. 2018) (en banc).*, 132 HARV. L. REV. 1756, 1759 (2019) ("The Mississippi Supreme Court has . . . used three tools to procedurally undermine the grant of substantive rights: implementing the strictest possible standard for immaturity, finding no presumption in favor of parole, and not requiring sentencing judges to make a finding of permanent incorrigibility before sentencing a juvenile homicide offender to LWOP.").

[20] *Id.* at 1763 ("Mississippi has interpreted the mandates so narrowly that they have become all sizzle and no steak.").

[21] Caroline Maass, *A Meaningful Opportunity to Obtain Release: A Practical Impossibility*, 8 WAKE FOREST J.L. & POL'Y 503, 506 (2018).

[22] Those jurisdictions are Alaska, Arkansas, California, Connecticut, Delaware, the District of Columbia, Hawaii, Iowa, Kansas, Massachusetts, Nevada, New Jersey, North Dakota, South Dakota, Vermont, West Virginia, and Wyoming. Alice Reichman Hoesterey, *Confusion in* Montgomery*'s Wake: State Responses, the Mandates of* Montgomery*, and Why a Complete Categorical Ban on Life Without Parole for Juveniles Is the Only Constitutional Option*, 45 FORDHAM URB. L.J. 149, 189 (2017).

[23] *Id.* at 164.

[24] *Id.* at 190-92.

are Tennessee, Virginia, Washington, and now, Mississippi.[25] California and Illinois courts are split on the issue.[26]

Mississippi is in the minority of jurisdictions, failing to give full effect to the United States Supreme Court's holdings in *Miller* and *Montgomery* by not requiring an on-the-record finding of permanent incorrigibility. States are trending away from draconian sentencing for juvenile offenders by eliminating LWOP altogether for juvenile offenders or requiring a finding of permanent incorrigibility before a LWOP sentence. The international trend acknowledges a juvenile's reduced mental culpability and higher capacity for rehabilitation when compared to adult offenders.[27] I propose that Mississippi join this trend. Logically, it does not follow for the most developed nation on the planet to adhere to antiquated, inhumane standards.

I do not go so far as to suggest an outright abolition of LWOP for juvenile offenders. Rather, I propose Mississippi take a moderate approach and join the majority, interpreting *Miller* and *Montgomery* to require a finding of permanent incorrigibility on the record before sentencing juvenile offenders to LWOP.

In short, the Mississippi Legislature can remedy the *Chandler* problem by passing legislation to conform juvenile sentencing to both the letter and spirit of *Miller*'s command.

In this Comment, I begin by discussing seminal cases in the arena of juvenile justice, specifically focusing on United States Supreme Court jurisprudential views on rehabilitative theory with regard to the juvenile offender, as Mississippi's current approach does not give true, full consideration of the question of whether the juvenile offender being sentenced is capable of being reformed

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[25] *Id*. at 192.

[26] *Id*. at 190-193.

[27] In his dissent, Chief Justice Waller noted:

> Indeed, the *Miller* Court stressed that the imposition of this sentence would be uncommon due to children's diminished culpability and heightened capacity for change. More recently, in *Montgomery*, the Supreme Court underscored the importance of considering a juvenile's capacity for rehabilitation when it recognized that *Miller* did bar life without parole . . .for all but the rarest of juvenile offenders, those whose crimes reflect *permanent* incorrigibility.

Chandler v. State, 242 So. 3d 65, 71 (Miss. 2018) (Waller, C.J., dissenting) (internal citations and quotation marks omitted).

or irretrievably depraved. I consider, first, the state's historic, paternalistic view of juvenile offenders from the *parens patriae* doctrine, then move on to more pressing, precedential modern cases from the United States Supreme Court which have impacted the states' jurisprudence significantly. Second, I delve into the effects of those modern cases on Mississippi; or, more accurately, how the Mississippi judiciary interpreted and implemented the precedents. I then provide an example of a statute from which the following proposed statute is modeled. Third, and finally, I support my arguments with scientific facts and accepted legal theory.

I. BACKGROUND

A. In re Gault *and a Foundation of Rehabilitative Theory in Juvenile Justice*

One of the most revolutionary cases to impact the rights of juveniles was *In re Gault*, a United States Supreme Court decision handed down in 1967.[28] There, the Court held that the Constitution extends due process rights to juveniles in the same manner as that of adults.[29]

The Court's opinion details the reasons why certain constitutional guarantees are coextensive to both juveniles and adults, but also discusses the history of juveniles in the legal system. Of note, the *In re Gault* opinion delves into the philosophical attitudes towards juvenile defendants.

Originally, juvenile criminal defendants were treated as adult defenders.[30] Early reformers were unnerved that children were being incarcerated with dangerous, hardened, adult offenders.[31] Those reformers advocated for rehabilitative theory with regard to juvenile offenders, asserting that the government act *in loco parentis* under the *parens patriae* doctrine:[32]

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[28] *In re* Gault, 387 U.S. 1 (1967).

[29] *Id.* at 13 (quoting Haley v. Ohio, 332 U.S. 596, 601 (1948) ("Neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law.")).

[30] *Id.* at 15.

[31] *Id.*

[32] *Id.* at 16.

> They were profoundly convinced that society's duty to the child could not be confined by the concept of justice alone. They believed that society's role was not to ascertain whether the child was 'guilty' or 'innocent,' but 'What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career.' The child—essentially good, as they saw it—was to be made 'to feel that he is the object of (the state's) care and solicitude,' not that he was under arrest or on trial. The rules of criminal procedure were therefore altogether inapplicable. The apparent rigidities, technicalities, and harshness which they observed in both substantive and procedural criminal law were therefore to be discarded. The idea of crime and punishment was to be abandoned. The child was to be 'treated' and 'rehabilitated' and the procedures, from apprehension through institutionalization, were to be 'clinical' rather than punitive.[33]

The early reformers acknowledged that juvenile defendants are different, capable of reformation, and—at least from a humanitarian perspective—deserving of society's grace.[34] In the context of *Gault*, the Court revisited this history to emphasize the original purposes of juvenile courts and philosophies surrounding the treatment of juvenile offenders.

B. Modern Developments in Juvenile Justice: Roper*,* Graham*,* Miller*, and* Montgomery

The decades following *In re Gault* saw a strong societal move away from the rehabilitative model; likely based on the thought that nothing could treat juvenile criminal offenders and that severe punishment was the only effective method of dealing with them. Modern, 21st century jurisprudence indicates a societal

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[33] *Id.* at 15-16 (footnotes omitted).

[34] *See* Chad Flanders, *The Supreme Court and the Rehabilitative Ideal*, 49 GA. L. REV. 383, 400 (2015); *id.* at 401 ("Your time in prison was meant to help *cure* you . . . in the sense that you were morally corrupt and now you are morally pure (or more pure).").

trend away from the more severe attitudes towards criminal sentencing of the late 20th century.[35]

1. *Roper v. Simmons*

In 2005, the United States Supreme Court narrowly decided *Roper v. Simmons*, wherein a seventeen-year-old high school junior planned and executed a chilling murder.[36] The offender was not sentenced until he was eighteen years old. The jury sentenced him to the death penalty.[37] On appeal, the Missouri Supreme Court acknowledged the then-controlling precedent from *Stanford v. Kentucky* in 1989, which permitted the execution of a seventeen-year-old juvenile criminal defendant; but, the Missouri court then held that a national consensus had been reached condemning the execution of juvenile criminal defendants, set aside the sentence, and resentenced Simmons to LWOP.[38]

In its opinion, the United States Supreme Court affirmed the Missouri Supreme Court's holding. The Court gave three reasons why juvenile offenders cannot be considered among the worst offenders: the immaturity, irresponsibility, and impetuosity inherent in youth; the vulnerability and susceptibility of youths to outside, negative influences; and, the young are more capable of change, less fixed in their behavior.[39] The Court concluded that "[those] differences render suspect any conclusion that a juvenile falls among the worst offenders."[40]

The majority opinion was influenced by rehabilitative theory: "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed."[41] As

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[35] *See generally* Perry L. Moriearty, *Implementing Proportionality*, 50 U.C. DAVIS L. REV. 961 (discussing how the United States Supreme Court is reviving substantive proportionality with regard to sentencing).

[36] Roper v. Simmons, 543 U.S. 551, 556 (2005).

[37] *Id*.

[38] State *ex rel.* Simmons v. Roper, 112 S.W.3d 397, 399 (Mo. 2003) (en banc).

[39] *Roper*, 543 U.S. at at 569-70.

[40] *Id.* at 570.

[41] *Id*.

such, it was evident early in the new millennium that societal attitudes toward juvenile sentencing were changing.[42]

2. *Graham v. Florida*

In 2008, the United States Supreme Court considered whether the Eighth Amendment permits LWOP sentences for juvenile offenders for non-homicide offenses in *Graham v. Florida*.[43] There, sixteen-year-old Graham was charged with armed robbery with assault or battery, a first-degree felony carrying a maximum penalty of life imprisonment without the possibility of parole; and, attempted armed robbery, a second-degree felony carrying a maximum sentence of fifteen years' imprisonment.[44] In 2003, Graham pled guilty to both charges under a plea agreement, which the trial court accepted, sentencing Graham to concurrent three-year terms of probation.[45] Approximately six months later, "Graham's probation officer filed with the trial court an affidavit asserting that Graham had violated the conditions of his probation by possessing a firearm, committing crimes, and associating with persons engaged in criminal activity."[46] And the trial court found that Graham had, in fact, violated his parole for the reasons proposed by his probation officer.[47]

The minimum sentence Graham could receive under Florida law was five years' imprisonment, while the maximum sentence was life imprisonment.[48] Graham requested the minimum sentence of five years' imprisonment, the Florida Department of Corrections requested a sentence lower than the minimum sentence of at most four years' imprisonment, and the prosecution requested Graham receive thirty years for the armed burglary and fifteen years for the attempted armed robbery.[49] The trial court

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[42] *See generally* Meghan J. Ryan, *Death and Rehabilitation*, 46 U.C. DAVIS L. REV. 1231 (2013) (discussing how capital punishment completely forecloses the rehabilitative justification for punishment).

[43] 560 U.S. 48, 52-53 (2010).

[44] *Id.* at 53-54.

[45] *Id.* at 54.

[46] *Id.* at 55.

[47] *Id.*

[48] *Id.* at 55-56.

[49] *Id.* at 56.

sentenced Graham to the maximum sentence authorized by law for each charge, which was life imprisonment for the armed burglary and fifteen years of imprisonment for the attempted armed robbery.[50] Because Florida had abolished its parole system, Graham's sentence was LWOP.[51]

Graham appealed his sentence, claiming it was grossly disproportionate thus violating the Eighth Amendment.[52] Justice Kennedy's opinion quoted the *Roper* Court's discussion of juveniles' lessened culpable mental state, transient immaturity, and the fact that most juvenile offenders cannot be considered beyond rehabilitation.[53] Justice Kennedy highlighted the disproportionate manner in which LWOP sentences relate to juveniles as opposed to adults.[54] He compared the facts to the various justifications for punishment, holding that LWOP for juvenile nonhomicide offenders does not serve retributive justice or incapacitation.[55] In backhanded advocacy for the rehabilitative justification for punishment, Justice Kennedy wrote:

> A sentence of life imprisonment without parole, however, cannot be justified by the goal of rehabilitation. The penalty forswears altogether the rehabilitative ideal. By denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person's value and place in society. This judgment is not appropriate in light of a juvenile nonhomicide offender's capacity for change and limited moral culpability. A State's rejection of rehabilitation, moreover, goes beyond a mere expressive judgment.[56]

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[50] *Id.* at 57.

[51] *Id.*

[52] *Id.* at 58.

[53] *Id.* at 68.

[54] Justice Kennedy wrote:

Life without parole is an especially harsh punishment for a juvenile. Under this sentence a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender. A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only.

Id. at 70.

[55] *Id.* at 72-73 (stating LWOP cannot be justified "for juveniles who did not commit homicide").

[56] *Id.* at 74.

After determining that no penological theory was adequate to justify LWOP for juvenile nonhomicide offenders, the Court held that the Eighth Amendment forbids LWOP for juvenile nonhomicide offenders.[57] Justice Kennedy noted that the United States is the only nation in the world that was sentencing juveniles to LWOP for nonhomicide offenses, which, though not dispositive of the Court's opinion, was also not irrelevant.[58]

The *Graham* opinion emphasizes the cruelty in labeling a juvenile offender as irredeemable, and that the Constitution requires giving juveniles the opportunity to obtain release based on demonstrated rehabilitation.[59]

3. *Miller v. Alabama*

A watershed event in juvenile criminal sentence structuring was *Miller v. Alabama* in 2012.[60] Two fourteen-year olds, one in Arkansas and one in Alabama, had been sentenced to mandatory LWOP in their respective states and appealed their sentences to the United States Supreme Court (one through direct review, and the other through habeas corpus proceedings).[61] In neither case did the trial judge possess any discretion to impose a lesser sentence.[62]

In reaching the Court's holding, Justice Kagan examined two lines of precedent, eventually stating the holdings from *Roper* and *Graham*:

> Several of the cases in this group have specially focused on juvenile offenders, because of their lesser culpability. Thus, *Roper* held that the Eighth Amendment bars capital punishment for children, and *Graham* concluded that the Amendment also prohibits a sentence of life without the possibility of parole for a child who committed a nonhomicide offense. *Graham* further likened life without parole for juveniles to the death penalty itself, thereby evoking a second line of our precedents. In those cases, we have prohibited

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[57] *Id.*

[58] *Id.* at 80-81.

[59] Flanders, *supra* note 34, at 414-15.

[60] 567 U.S. 460 (2012).

[61] *Id.* at 465-69.

[62] *Id.* at 467 n.2, 469.

> mandatory imposition of capital punishment, requiring that sentencing authorities consider the characteristics of a defendant and the details of his offense before sentencing him to death.[63]

This led the Court to hold that "mandatory life-without-parole sentences for juveniles violate the Eighth Amendment."[64] Specifically, the Court relied on *Graham*'s extensive reasoning about the essential blameworthiness of juveniles to suggest that the *Graham* holding could be extended to bar all juvenile LWOP sentences, not just juvenile nonhomicide LWOP sentences.[65]

The Court held that, at sentencing, the mitigating qualities of youth must be taken into account.[66] Those mitigating qualities of youth are a juvenile's chronological age and its hallmark features of immaturity, impetuosity, and failure to appreciate risks and consequences; his family and home environment; the circumstances of the offense; the extent to which the juvenile was subject to peer pressure; and, the juvenile's inability to deal with law enforcement or attorneys, be they the prosecution or his own representation.[67] The above-listed mitigating qualities of youth will be relevant to the proposed model statute. Applying the mitigating qualities of youth to Miller's circumstances, the Court listed several factors that should have been considered, including physical abuse from his stepfather; neglect from his substance-abusing mother; failed suicide attempts; history in the foster-care system; and, his criminal history.[68] The Court concluded that Miller clearly deserved punishment, but maintained that the sentencing judge needed to be able to consider those factors before handing down the harshest penalty.[69]

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[63] *Id.* at 470 (citations omitted).

[64] *Id.*

[65] *Id.* at 473 ("But none of what it said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific. Those features are evident in the same way, and to the same degree, when (as in both cases here) a botched robbery turns into a killing. So *Graham*'s reasoning implicates any life-without-parole sentence imposed on a juvenile, even as its categorical bar relates only to nonhomicide offenses.").

[66] *Id.* at 476.

[67] *Id.* at 477-78.

[68] *Id.* at 479.

[69] *Id.* at 479-80.

Justice Kagan's opinion in *Miller* is focused on the individualization of punishment for juvenile offenders, and not necessarily forward-looking with regard to potential rehabilitation like the *Roper* and *Graham* opinions.[70] Regardless, the *Miller* holding caused a ripple effect across the nation, resulting in subsequent appeals and responsive legislative action.

4. *Montgomery v. Louisiana*

After *Miller*, there was no consensus among state courts regarding whether the new rule applied retroactively.[71] If the *Miller* holding was substantive constitutional law, it had to be applied retroactively; but, if the new rule was procedural, then it had to be applied prospectively.[72] Predictably, states were reluctant to apply *Miller* retroactively.[73] However, determination of retroactivity is of special importance when the new rule is of constitutional effect.[74] The United States Supreme Court decided

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[70] One commenter noted:

> Justice Kagan in *Miller* says almost nothing about the possible future rehabilitation of offenders. She is not worried about expressing the judgment that some juveniles will be beyond redemption, because some of them will be; that is, some of them will really deserve to be in prison for the rest of their lives, and die in prison. She is worried, rather, that the state be certain that those who are sentenced to die in prison will be the right ones.

Flanders, *supra* note 34, at 422-23.

[71] *See, e.g.*, Commonwealth v. Cunningham, 81 A.3d 1, 11-12 (Pa. 2013) (Castille, C.J., concurring) ("[T]he *Miller* Court did not address the inevitable aftermath in states, such as Pennsylvania, with an existing (and substantial) roster of defendants currently serving LWOP for murders committed while they were juveniles; some of these defendants no doubt have already served decades in prison.").

[72] Alexandra Fahringer, *Disturbing the Finality of a Sentence: How States with High Rates of Juvenile Life Without Parole ("JLWOP") Responded to* Montgomery v. Louisiana, 70 RUTGERS U. L. REV. 1271, 1271 (2018) ("If the change was substantive, states would be required to apply the rule retroactively. However, if the change was procedural, states would apply the rule prospectively.").

[73] Douglas A. Berman, *Re-Balancing Fitness, Fairness, and Finality for Sentences*, 4 WAKE FOREST J. L. & POL'Y 151, 169 (2014) ("[T]here is a pervasive modern view that governments and society at large have a strong interest in preserving final criminal judgments because any re-litigation is costly and likely inefficient, may not be more accurate, and may damage the reputation of the criminal justice system.").

[74] Recognizing retroactivity is important for three reasons:

> First, recognizing retroactivity is necessary to ensure that the Constitution protects every citizen. Second, retroactive application of the

the question in *Montgomery v. Louisiana*, where it had to determine whether the State of Louisiana correctly refused to give *Miller* retroactive effect.[75]

The Court applied Justice O'Connor's plurality opinion from *Teague v. Lane* to analyze whether the *Miller* rule was retroactive.[76] In application of the *Teague* rule, the Court held that the *Miller* rule was substantive and therefore retroactive because it carried the significant risk that a large class of defendants faced punishments the life had no authority to impose upon them.[77] The Court conceded that *Miller* contained a procedural element, but held that *Miller* was no less substantive than *Roper* and *Graham* because *Miller* barred LWOP sentences for all but the rarest of juvenile offenders, those that demonstrate permanent incorrigibility.[78] The Court held that the procedure

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> law can reflect changing "societal perspectives on just punishment." Third, reviewing old criminal laws can be more efficient in considering long-term punishment costs, "may result in a more accurate assessment of a fair and effective punishment," and might even change the public perception of a criminal justice system that is willing to reconsider old decisions.

Fahringer, *supra* note 72, at 1274-75 (internal citations omitted).

[75] Montgomery v. Louisiana, 136 S. Ct. 718, 727 (2016).

[76] The Court stated:

> Under *Teague*, a new constitutional rule of criminal procedure does not apply, as a general matter, to convictions that were final when the new rule was announced. *Teague* recognized, however, two categories of rules that are not subject to its general retroactivity bar. First, courts must give retroactive effect to new substantive rules of constitutional law. Substantive rules include rules forbidding criminal punishment of certain primary conduct, as well as rules prohibiting a certain category of punishment for a class of defendants because of their status or offense. Although *Teague* describes new substantive rules as an exception to the bar on retroactive application of procedural rules, this Court has recognized that substantive rules are more accurately characterized as . . . not subject to the bar. Second, courts must give retroactive effect to new watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.

Id. at 728 (internal citations and quotation marks omitted).

[77] *Id.* at 734.

[78] *Id.* The Court added:

> The only difference between *Roper* and *Graham*, on the one hand, and *Miller*, on the other hand, is that *Miller* drew a line between children whose crimes reflect transient immaturity and those rare children

required by *Miller* was a hearing where the juvenile offender's youth and attendant characteristics are to be considered prior to sentencing.[79] The Court also noted that, though the *Miller* opinion expressly declined to instruct the states in how to apply its holding out of respect to federalism, they were not empowered to ignore it either:

> When a new substantive rule of constitutional law is established, this Court is careful to limit the scope of any attendant procedural requirement to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems. Fidelity to this important principle of federalism, however, should not be construed to demean the substantive character of the federal right at issue. That *Miller* did not impose a formal factfinding requirement does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole. To the contrary, *Miller* established that this punishment is disproportionate under the Eighth Amendment.[80]

Finally, the Court discussed retroactive application of *Miller*. The Court reasoned that giving *Miller* retroactive effect did not require the State to relitigate every juvenile LWOP sentence, but, rather simply, the State could remedy any *Miller* violation by allowing juvenile homicide offenders to be considered for parole.[81] This remedy would ease any burden on the State because those "who have shown an inability to reform will continue to serve life sentences. The opportunity for release will be afforded to those who demonstrate the truth of *Miller*'s central intuition—that

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> whose crimes reflect irreparable corruption. The fact that life without parole could be a proportionate sentence for the latter kind of juvenile offender does not mean that all other children imprisoned under a disproportionate sentence have not suffered the deprivation of a substantive right.

Id.

[79] *Id.* at 735 ("The hearing does not replace but rather gives effect to *Miller*'s substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity.").

[80] *Id.* (internal citations omitted).

[81] *Id.* at 736.

children who commit even heinous crimes are capable of change."[82]

C. Miller *in Mississippi*

1. *Parker v. State*

The first major case in Mississippi to tackle the *Miller* revolution in juvenile sentencing and resentencing was *Parker v. State*.[83] Lester Parker was sentenced at age fifteen for murder pursuant to Mississippi Code Section 97-3-21 which mandated life imprisonment; and, under the parole statute, Mississippi Code Section 47-7-3, the sentence was tantamount to LWOP.[84] In other words, Parker was not sentenced to LWOP via the murder statute, but rather through operation of law via the parole statute. Because the murder statute under which Parker was sentenced did not authorize a LWOP sentence, the Mississippi Supreme Court reasoned that it did not violate *Miller*.[85]

The Mississippi Supreme Court went on to consider the implications of the parole statute in light of *Miller*. The court turned to a Wyoming case, *Bear Cloud v. State*, for guidance because there were substantial similarities between the Mississippi and Wyoming parole statutes.[86] In *Bear Cloud*, the juvenile defendant Bear Cloud pled guilty to murder and received life imprisonment according to law.[87] The Wyoming parole statute stated that a parole board "may grant parole to any person imprisoned in any institution under sentence, except a sentence of life imprisonment without parole or a life sentence."[88] Bear Cloud appealed but the Wyoming Supreme Court held that the statutes were constitutional.[89] The United States Supreme Court reversed

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[82] *Id.*

[83] 119 So. 3d 987 (Miss. 2013).

[84] *Id.* at 996-97.

[85] *Id.* at 996 ("Parker was not sentenced by the trial court to life without the possibility of parole. Our courts have not been empowered by the Legislature to sentence a criminal defendant to life without parole save for the crime of capital murder and for certain habitual offenders.").

[86] *Id.* at 997.

[87] Bear Cloud v. State, 294 P.3d 36, 39-40 (Wyo. 2013).

[88] *Id.* at 44 (emphasis omitted).

[89] *Id.* at 40.

the Wyoming Supreme Court's judgment and remanded for further consideration in light of *Miller*.[90] The Wyoming Supreme Court, on remand and in consideration of *Miller*, held that "life imprisonment according to law" is the same as LWOP, thus violating *Miller*; therefore the Wyoming Supreme Court remanded the case back to the trial court for consideration of whether Bear Cloud was eligible for parole.[91]

Following Wyoming's lead, the Mississippi Supreme Court held that the parole statute violated *Miller*, and in the absence of relevant legislation, the court had to put in place a stopgap measure until the legislature took corrective action.[92] Therefore, the court vacated Parker's sentence and remanded for resentencing compliant with *Miller*.[93]

The majority in *Parker* declined to declare any Mississippi statute as unconstitutional; however, as Presiding Justice Kitchens noted, the majority did not truly follow Wyoming's lead because the Wyoming court declared its parole statute unconstitutional:

> The majority goes to great lengths to avoid the word *unconstitutional*, struggling to persuade the reader that its analysis is more restrained. Yet, calling it a "stopgap mechanism to annul application of Section 47-7-3(1)(h)" does not change the nature of the majority's holding. If Mississippi's statutory scheme "contravenes the dictates of *Miller*," as the majority finds, then our statutory scheme is necessarily unconstitutional, for there can no other reason for this Court to tamper with legislative enactments. It would be less than judicious for an appellate court to announce a holding based on a presumption that legislative action is forthcoming.[94]

2. *Jones v. State*

In *Jones v. State*, decided shortly after *Parker v. State*, the Mississippi Supreme Court sought to determine whether *Miller*

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[90] *Id.*

[91] *Id.* at 45-48.

[92] Parker v. State, 119 So. 3d 987, 998 (Miss. 2013).

[93] *Id.*

[94] *Id.* at 1001 (Kitchens, P.J., concurring in part and dissenting in part).

applied retroactively.[95] The court was saddled with this decision without the benefit (or burden) of the precedent set in *Montgomery* because *Jones* was decided three years before *Montgomery*.[96] The court applied the *Teague* test in the same manner in which the United States Supreme Court would in *Montgomery* years later and held that *Miller* announced a new substantive rule and thus must be applied retroactively, despite the court's admitted very limited retroactive standard.[97]

Presiding Justice Kitchens dissented, echoing his concerns about the unconstitutionality of the parole scheme.[98] He also predicted that the court's application of *Miller* rendered it toothless: "Finally, I find the majority's holding to be a purely procedural pronouncement that fails to provide any meaningful solution. If, on remand, the trial court imposes 'life imprisonment notwithstanding the provisions of Mississippi Code Section 47-7-3(1)(h),' the revised sentence will have no effect."[99]

At the resentencing hearing, the judge said that he had considered the *Miller* factors, but he did not actually discuss them on the record; rather, the judge recounted the facts surrounding the incident.[100] The sentencing judge failed to make findings of whether Jones was the rare individual who was beyond rehabilitation.[101] The judge again sentenced Jones to LWOP.[102]

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[95] Jones v. State, 122 So. 3d 698, 701 (Miss. 2013) ("Thus, the issue presented today is whether *Miller* applies to cases which already have become final. Stated differently, we must determine if *Miller* applies retroactively to cases on collateral review.").

[96] One has to wonder if the outcome in *Jones* would have been different had the United States Supreme Court already handed down its *Montgomery* opinion, considering the Mississippi Supreme Court's handling of the *Miller* rule.

[97] *Jones*, 122 So. 3d at 701-03.

[98] *Id.* at 706 (Kitchens, P.J., dissenting) ("[R]ather than our disturbing the existing possible statutory sentence for murder under Mississippi Code Section 97-3-21, finding the parole statute unconstitutional as applied to juveniles convicted of murder minimizes our intrusion into any legislative function, while preserving distinct sentences for murder and capital murder." (internal quotation marks omitted)).

[99] *Id.* at 707.

[100] Jones v. State, No. 2015-CT-00899-SCT, 2018 Miss. LEXIS 463, at *18-22 (Miss. Nov. 27, 2018) (Kitchens, P.J., dissenting from en banc order dismissing certiorari) (discussing the trial court's ruling).

[101] Julie Burke, *De-Facto-Life And The Rare Juvenile*, 37 MISS. C. L. REV. 264, 285 (2019) (discussing Jones v. State, 285 So. 3d 626, 634-39 (Miss. Ct. App. 2017) (Westbrooks, J., concurring in part and dissenting in part)); *see id.* ("There is no mention by the court in considering whether this juvenile was capable of being

Jones appealed to the Mississippi Court of Appeals, which affirmed the lower court's ruling.[103] Jones filed a petition for writ of certiorari with the Mississippi Supreme Court, and was granted an oral argument.[104] Jones argued that he was not "the rare, permanently incorrigible offender who must be sentenced to a lifetime in prison."[105] In an en banc order, the court dismissed Jones's petition, to which Presiding Justice Kitchens dissented with a separate written opinion in which he advocated for an on-the-record analysis of the *Miller* factors:

> In light of the fact that a sentence of life without parole is disproportionate under the Eighth Amendment for a juvenile whose crime reflects transient immaturity, Mississippi should exercise its authority to impose a formal fact finding requirement for *Miller* decisions. For a juvenile offender, a sentence of life without parole is the harshest penalty allowed by law; consequently, the decision whether to impose that penalty is of the utmost seriousness. Judicial review of such a decision can be enhanced only by the presence of fact findings on each *Miller* factor and on the ultimate question of whether the juvenile's crime reflects transient immaturity or permanent incorrigibility. This Court's concern for child welfare has led it to impose strict fact finding requirements for child custody determinations. No reason exists to eschew formal fact findings in the context of determining whether a

rehabilitated or that he was so beyond corrupted that he could not be saved. If the court does not consider rehabilitation, then how can it deem a juvenile is irreparably corrupt and resentence the juvenile to life without parole?").

[102] Jones v. State, No. 2015-CT-00899-SCT, 2018 Miss. LEXIS 463, at *22 (Miss. Nov. 27, 2018) (Kitchens, P.J., dissenting from the en banc order dismissing certiorari) (discussing the trial court's ruling).

[103] *See Jones*, 285 So. 3d at 634 ("The judge's bench ruling was sufficient to explain the reasons for the sentence. The judge recognized the correct legal standard ("the *Miller* factors"), his decision was not arbitrary, and his findings of fact are supported by substantial evidence. Therefore, the judgement of the circuit court is affirmed.").

[104] *See* Jones v. State, 250 So. 3d 1269 (Table) (Miss. 2018) (granting certiorari); Jones v. State, No. 2015-CT-00899-SCT, 2018 Miss. LEXIS 463, at *23 (Miss. Nov. 27, 2018) (Kitchens, P.J., dissenting from en banc order dismissing certiorari) ("Jones filed a petition for writ of *certiorari*, which this Court granted with oral argument.").

[105] Jones v. State, No. 2015-CT-00899-SCT, 2018 Miss. LEXIS 463, at *23 (Miss. Nov. 27, 2018) (Kitchens, P.J., dissenting from en banc order dismissing certiorari).

> juvenile offender will suffer the harshest penalty imposed by law for a crime committed as a child.[106]

Presiding Justice Kitchens concluded that in light of the copious testimony presented at the resentencing hearing, Jones's childhood circumstances, and Jones's conduct while incarcerated, that Jones was not the rare, permanently incorrigible offender; and, further, that his LWOP was unconstitutional.[107]

My proposed amended statute addresses and resolves Presiding Justice Kitchens' concerns from *Jones*: it would impose an on-the-record fact-finding requirement for any sentencing authority in Mississippi, so as to eliminate any potential unconstitutional sentences for juvenile offenders.

II. ARGUMENT

A. The Proposed Statute

1. Model Statute from Pennsylvania

At the time of *Miller*, Pennsylvania had the highest number of juvenile lifers.[108] In a direct response to *Miller*, the Pennsylvania legislature passed a sentencing scheme specifically addressing the *Miller* factors.[109] The statute, Title Eighteen, Pennsylvania Consolidated Statutes, Section 1102.1: Sentence of persons under the age of 18 for murder, murder of an unborn child and murder of a law enforcement officer, states in relevant part:

> (d) *Findings.*—In determining whether to impose a sentence of life without parole under subsection (a), the court shall consider and make findings on the record regarding the following:
>
> > (1) The impact of the offense on each victim, including oral and written victim impact statements made or submitted by family members of the victim detailing the physical, psychological and economic effects of the crime

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[106] *Id.* at *30 (emphasis and internal citation omitted).

[107] *Id.*

[108] Fahringer, *supra* note 72, at 1281.

[109] *Id.*

> on the victim and the victim's family. A victim impact statement may include comment on the sentence of the defendant.
>
> (2) The impact of the offense on the community.
>
> (3) The threat to the safety of the public or any individual posed by the defendant.
>
> (4) The nature and circumstances of the offense committed by the defendant.
>
> (5) The degree of the defendant's culpability.
>
> (6) Guidelines for sentencing and resentencing adopted by the Pennsylvania Commission on Sentencing.
>
> (7) Age-related characteristics of the defendant, including:
>
> > (i) Age.
> >
> > (ii) Mental capacity.
> >
> > (iii) Maturity.
> >
> > (iv) The degree of criminal sophistication exhibited by the defendant.
> >
> > (v) The nature and extent of any prior delinquent or criminal history, including the success or failure of any previous attempts by the court to rehabilitate the defendant.
> >
> > (vi) Probation or institutional reports.
> >
> > (vii) Other relevant factors.[110]

In addition to passing legislation, Pennsylvania authorities took further steps to give *Miller* effect. In *Commonwealth v. Batts*, the Pennsylvania Supreme Court announced a new rule that created a presumption against juvenile LWOP sentences, quoting *Miller* and *Montgomery*.[111] Meanwhile, the city of Philadelphia,

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[110] 18 PA. STAT. AND CONS. STAT. ANN. § 1102.1 (West 2020).

[111] Commonwealth v. Batts, 163 A.3d 410, 452 (Pa. 2017) (citations omitted) ("[I]n Pennsylvania, a faithful application of the holding in *Miller*, as clarified in

which had sentenced the highest percentage of juvenile lifers over any other city in the country, announced it would no longer seek LWOP for juvenile offenders and planned to resentence all juvenile LWOP prisoners who had been convicted in Philadelphia courts.[112] The Philadelphia Court of Common Pleas created the "Juvenile Lifers Without the Possibility of Parole Program" to provide procedures to ensure sentences in compliance with *Miller* and *Montgomery*.[113] The Philadelphia Court of Common Pleas even established an en banc panel of Common Pleas judges to specifically to address all juvenile LWOP matters.[114]

2. Proposed Amended Statute, and an Example of the Statute at Work

I propose an amendment to Mississippi Code Section 97-3-21: Homicide; penalty for first- or second-degree murder or capital murder, to include language modeled after Section 1102.1 of Title Eighteen of the Pennsylvania Consolidated Statutes. I do not propose to enact an entirely new statute, but rather an amendment so as to not upset the status quo more than necessary. In other words, my proposal would not change the law with regard to murder, but simply with regard to how *juveniles* are sentenced under the statute. My proposal will require the factfinder, before sentencing a minor to LWOP, to conduct an on the record analysis of the *Miller* factors listed out by the amended statute, in the same manner that a chancellor must do an on the record analysis of the various factors in domestic relations matters.

The proposed amendment to § 97-3-21 is as follows:

> (4) *Required Findings for Persons Under the Age of Eighteen*.—In determining whether to impose a sentence of life without parole under this Section for persons under the age of eighteen, the court shall consider and make findings on the record regarding the following:

Montgomery, requires the creation of a presumption against sentencing a juvenile offender to life in prison without the possibility of parole.").

[112] Fahringer, *supra* note 72, at 1283.

[113] *Id.* at 1284.

[114] *Id.*

(a) The impact of the offense on each victim, including oral and written victim impact statements made or submitted by family members of the victim detailing the physical, psychological and economic effects of the crime on the victim and the victim's family. A victim impact statement may include comment on the sentence of the defendant.

(b) The impact of the offense on the community.

(c) The threat to the safety of the public or any individual posed by the defendant.

(d) The nature and circumstances of the offense committed by the defendant.

(e) The degree of the defendant's culpability.

(f) Guidelines for sentencing and resentencing under this Section.

(g) Age-related characteristics of the defendant, including:

(i) Chronological age and its relation to immaturity, impetuosity, and failure to appreciate risks and consequences.

(ii) Family and home environment.

(iii) Impact of familial and peer pressures.

(iv) Incompetency to engage with law enforcement or the prosecution.

(v) Inability to assist his or her own attorneys.

(vi) Possibility for rehabilitation.

(vii) Other relevant factors.

If the factfinder does the proper analysis and determines LWOP is not appropriate, the judge may then sentence either to a term-sentence or life *with* the possibility of parole.[115]

An example of the proposed statute at work can be found in the Pennsylvania case, *Commonwealth v. Elliott*:

> Finally, the trial court explicitly recognized his obligation to "take into account how children are different and how their differences counsel against irrevocably sentencing them to a lifetime in prison," and determined a 50-year minimum sentence was appropriate. In so doing, the court considered the Section 1102.1(d) factors, specifically: (1) *the impact on the victim*, finding "that this greatly affected the family of the victim and it has long lasting effects," (2) *the impact to the community*, finding that "for approximately two years it was unclear who had committed the offenses," (3) *the threat of public safety*, finding there was no threat to anybody else at the time and Elliott would not be a threat if he were released from prison — "[B]ased on . . . reports from the institution, [Elliott's] chance of recidivism is very, very little," (4) *the nature and circumstances of the offense*, finding Elliott entered the victim's home to commit a robbery and there was not "a lot of sophistication" as Elliott panicked and killed the victim, and Elliott's efforts to try to cover up the murder with a fire showed "a juvenile mind" and an "immature effort," (5) *the degree of culpability*, finding there was no one else to blame except Elliott, (6) *the guidelines for sentencing*, finding the trial court was allowed to set a minimum sentence under the circumstances, (7) *age*, finding the fact Elliott was just three and one-half months shy of 18 at the time of the incident weighed against him to determine an appropriate minimum, (8) *mental capacity*, finding Elliott had an above average IQ and "good mental capacity," (9) *maturity*, finding maturity was hard to judge, but Elliott was able to rise in the military to the level of corporal prior to his arrest, (10) *the degree of criminal sophistication*, finding Elliott's crime was not "'a particularly sophisticated crime[,"] (11) *prior criminal history*, finding there was none, (12) *probation or institutional*

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[115] Providing possibility of parole does not guarantee the juvenile offender parole, but instead shifts the decision to the parole board who is more than capable of determining whether the offender has demonstrated sufficient reformation

> *reports*, finding the institutional reports over the 40-plus years Elliott has been incarcerated described Elliott as "average or above average with the exception of one misconduct," and (13) *other relevant factors*, finding remorse is not a relevant factor against Elliott.
>
> The trial court also considered "family and home environment," and found Elliott's home environment was "good" and "[t]here's no indication . . . there was anything bad in [Elliott's] home that would have caused [him] to go down the path [he] did with drinking and drugs and ultimately committing the burglary and attempted theft that led to the murder[, and t]here was no other pressure for [Elliott] to do this . . . ." Accordingly, on this record, which reflects the trial court properly considered the all relevant sentencing factors, including the factors listed in 18 Pa.C.S. § 1102.1(d) and Section 9721(b), there is no basis upon which to disturb the trial court's decision.[116]

Very simply, the sentencing judge goes on the record, compares and contrasts the *Miller* factors to the facts of the case, and hands down a corresponding sentence. This requirement is readily capable of being handled by Mississippi's circuit judges, as chancellors of Mississippi's chancery courts, for instance, carry similar burdens in family law matters.[117] Further, it would add better protection to their sentences when on appeal because the State could point to exactly how the judges come to their conclusions; as long as the *Miller* analysis is legitimate and genuine, performing the above on-the-record analysis would actually make it more difficult for offenders to challenge their sentences.

B. Behavioral and Biological Scientific Theories

As discussed earlier, prior to *Miller*, six states and the District of Columbia had already recognized a juvenile offender's

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[116] Commonwealth v. Elliott, No. 1769 WDA 2017, 2018 WL 3764983, at *6 (Pa. Super. Ct. Aug. 9, 2018) (internal citations omitted) (alterations in original).

[117] *See, e.g.*, Ferguson v. Ferguson, 639 So. 2d 921, 928 (Miss. 1994) (requiring chancellors to make findings of fact based on guidelines for division of marital property); Albright v. Albright, 437 So. 2d 1003, 1005 (Miss. 1983) (providing factors for child custody cases).

lesser mental culpability and thus prohibited LWOP for juvenile offenders.[118] After *Miller*, several states followed suit and prohibited LWOP for juvenile offenders altogether.[119]

These differing approaches show that courts have evolving opinions regarding the culpability of minors. This sea change is due to developments in behavioral and biological sciences. Behavioral science research evidences that young people have diminished decision-making skills because they are more likely to take risks, more susceptible to peer pressure, more impulsive, more sensation-seeking, and more short-term focused.[120] Studies show that risk-taking and risky decision-making decrease significantly between adolescence and adulthood, and that people aged twenty-two and younger were more susceptible to peer-pressure in risky situations.[121]

Another study's findings evidence that sensation-seeking and impulsivity follow different developmental trajectories.[122] The MacArthur Juvenile Capacity Study's findings conclude that, though adolescent cognitive abilities are close to those of adults, adolescent psychosocial maturity is significantly less mature than adults.[123] In terms of context, the MacArthur Juvenile Capacity Study authors concluded that adolescents can likely make decisions similar to adults when the risky situation: (1) "allows time for deliberate thought," (2) "is divorced from emotional or social pressures," and (3) "provides for the opportunity to consult with an individual who can provide information about the costs and benefits associated with a particular [risky] decision."[124] On the other hand, if the risky "situation calls for a quick decision, involves excitement or peer pressure, or does not permit consultation with someone more experienced," the MacArthur

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[118] Kallee Spooner & Michael S. Vaughn, *Sentencing Juvenile Homicide Offenders: A 50-State Survey*, 5 VA. J. CRIM. L. 130, 151 (2017).

[119] *Id.*

[120] EDUARDO FERRER, RIGHTS, RACE, AND REFORM: 50 YEARS OF CHILD ADVOCACY IN THE JUVENILE JUSTICE SYSTEM 55 (Kristen Henning et al., eds. 2018).

[121] *Id.* at 57.

[122] *Id.* ("The data . . . demonstrated that sensation seeking increases between ages 10 and 15 before stabilizing or declining while impulsivity declined steadily after age 10.").

[123] *Id.* at 58.

[124] *Id.*

Juvenile Capacity Study concluded that adolescents are likely to display less mature decision-making capabilities.[125]

There are also biological explanations for a juvenile's diminished mental culpability. MRI technology shows that as an adolescent develops, his brain's white matter increases while his grey matter decreases significantly.[126] This results in the adolescent having a net decrease of gray matter in the brain prior to adulthood.[127] The resulting effect is the adolescent brain's "heightened ability (relative to adults) to change, adapt, and respond to experience and environment."[128] MRI imaging also reveals "the parts of the brain most associated with incentive-processing, risk-taking, and sensation-seeking develop earlier than the parts of the brain most responsible for regulating impulses and behavior."[129] The same research shows the parts of the brain most associated with executive functioning and attention are among the last to develop. When viewed together, behavioral and biological scientific research prove psychosocial immaturity and diminished decision-making are traits that should be imputed to youths generally.[130]

C. Rehabilitative Theory

There are two overarching theories justifying punishment: retributive theory and utilitarian theory. Retributive theory justifies punishing offenders because they deserve it from a moral standpoint.[131]

Utilitarian theory provides three justifications for punishment: deterrence, incapacitation, and rehabilitation.[132] Deterrence under utilitarian theory means society punishes

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[125] *Id.*

[126] *Id.* at 59.

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *Id.*

[131] Taggart v. State, 957 So. 2d 981, 994 (Miss. 2007) (explaining the philosophical basis of retribution as the defendant "'pay[ing]' for that crime").

[132] *See id.*; Ronald J. Rychlak, *Society's Moral Right to Punish: A Further Exploration of the Denunciation Theory of Punishment*, 65 TUL. L. REV. 299, 333 (1990) ("The effects of punishment a utilitarian will identify (deterrence, incapacitation, and rehabilitation), all focus on decreased criminal activity by modifying the behavior of potential lawbreakers.").

offenders to dissuade them and the general public from committing the same offense.[133] Incapacitation means punishment is justified so as to remove dangerous offenders from circulation in the general population.[134] Rehabilitative theory justifies punishment in that punishment can change an offender into a more productive member of society.[135] The Mississippi Supreme Court, in *Taggart*, advised trial judges that they "should consider" each of these justifications and philosophical backbones of punishment.[136]

As Judge Westbrooks wrote in her concurring opinion in *Cook v. State*, "transformation should be encouraged amongst those incarcerated."[137] In fact, offender reformation is an ancient goal of criminal justice; the term "penitentiary" itself indicates jails were intended for offenders to repent for their wrongdoings.[138] Criminal reformation is an American social goal dating back to the nation's earliest days.[139] Reform and rehabilitation were the predominant justifications for punishment until the 1970s when retributive tough-on-crime philosophy rose in popularity.[140] In the present,

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[133] *Taggart*, 957 So. 2d at 994-95.

[134] *Id.* at 994.

[135] *Id.*

[136] *Id.*

[137] Cook v. State, 282 So. 3d 760, 763 (Miss. Ct. App. 2019) (Westbrooks, J., concurring).

[138] Flanders, *supra* note 34, at 400. As Flanders explains:

> The idea of rehabilitation as moral reform is in fact a very old idea, and possibly the oldest association between punishment and rehabilitation. It is at least as old as the penitentiary, where convicts were meant to go and, in solitude, reflect on their wrongs and show penance for them. We punish with the hope that this will induce the offender to reflect and become a morally better person; but of course punishment is neither necessary nor sufficient for a person to reform. You can be punished but not reform, and you can reform without being punished. Reform does not happen by punishing, rather, it is what punishing is supposed to spur.

Id. (footnotes omitted).

[139] GUSTAVE DE BEAUMONT & ALEXIS DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE 22 (Francis Lieber trans., Augustus. M. Kelley 1970 (1833) ("Thrown into solitude he reflects. Placed alone, in view of his crime, he learns to hate it; and if his soul be not yet surfeited with crime, and thus have lost all taste for any thing better, it is in solitude, where remorse will come to assail him."); *see* Flanders, *supra* note 34, at 400-01.

[140] *See* Martin H. Pritikin, *Punishment, Prisons, and the Bible: Does "Old Testament Justice" Justify Our Retributive Culture?*, 28 CARDOZO L. REV. 715, 715 (2006)

trial court jurisprudence, United States Supreme Court jurisprudence, and state legislation show a modern trend toward embracing the rehabilitative ideal.[141] Even the most Biblically-motivated retributivist must yield to rehabilitative theory because the Jews of the Old Testament acknowledged that man cannot exact "perfect justice" and, therefore, their criminal justice system was designed to make victims whole while helping offenders atone for their sins so that they would be less culpable for punishment in the afterlife.[142]

Without requiring a sentencing authority to make an on the record finding of fact that the juvenile offender is the rare offender beyond reformation, Mississippi is not giving effect to its own precedent.[143] Instead, Mississippi's interpretation of *Miller* actually hinders many juvenile offenders' opportunities for rehabilitation because offenders sentenced to LWOP are ineligible for many development programs.[144] Rehabilitation incentivizes the potential reward of parole; without that, most juveniles sentenced to LWOP lose all hope in their reformation, thus exemplifying Mississippi's failure to adhere to the rehabilitation justification for punishment.[145]

Imposition of a fact-finding requirement that the juvenile offender is irretrievably depraved or permanently incorrigible is consonant with rehabilitative theory because it does not follow to

("Rehabilitation of the prisoner had been the primary justification for utilizing prisons (as opposed to other forms of punishment) until the 1970s, when retribution and incapacitation gained ascendancy. The rise of retributive theory was accompanied by a dramatic increase in the prevalence and severity of prison sentences.").

[141] *See* Meghan J. Ryan, *Science and the New Rehabilitation*, 3 VA. J. CRIM. L. 261, 289-304 (2015).

[142] Pritikin, *supra* note 140, at 740.

[143] Taggart v. State, 957 So. 2d 981, 994 (Miss. 2007).

[144] *See* John Coleman, *LWOP for Juveniles Is Morally Wrong*, *in* SHOULD JUVENILES BE GIVEN LIFE WITHOUT PAROLE? 25, 28 (Olivia Ferguson ed., 2011) ("Paradoxically, prisoners sentenced as juveniles to life-sentence without parole are actually less eligible for rehabilitation programs, for limited spaces in GED . . . programs, substance abuse programs etc. . . . Nearly half of those surveyed said they could not attend various educational or rehabilitation programs offered in prison.").

[145] *Id.* (explaining that one prisoner noted: "It makes you feel that life is not worth living because nothing you do, good or bad, matters to anyone. You have nothing to gain, nothing to lose. You are given absolutely no incentive to improve yourself as a person. It is hopeless.").

continue to punish the reformed, or to punish with finality those offenders capable of reformation.[146]

D. Mississippi Public Policy

To require a sentencing authority to determine, on the record, that a juvenile offender is permanently incorrigible and beyond hope for rehabilitation aligns with Mississippi's public policy with regards to young people. Treating juvenile offenders as if their lives do not matter and that they are beyond hope for reformation speaks more to the morals and values of the state of Mississippi than it does of the child.[147] Mississippi's reputation is as such that Bennie Thompson, United States Representative for the Second District of Mississippi, once skeptically described Mississippi as demonstrating no interest in improving juvenile justice systems.[148]

Indeed, state intervention may yield positive results in juvenile offenders' lives; put another way, if one rejects rehabilitative theory as a justification for punishment, then it leaves punishment as retribution as the alternative, which, again, paints Mississippi public policy in an unkind light.[149]

One must ask oneself why is it statutorily required for Mississippi chancellors to make specific findings of fact with regard to child support or child custody determination for a child's best interests, but not required when a judge must determine if a

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[146] Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011, 1046 (1991).

[147] Maass, *supra* note 21, at 506.

[148] Douglas E. Abrams, *Reforming Juvenile Delinquency Treatment to Enhance Rehabilitation, Personal Accountability, and Public Safety*, 84 OR. L. REV. 1001, 1050 (2005).

[149] One commenter stated:

> When rehabilitation is eliminated as the guiding correctional theory, will the alternative paradigm and its accompanying policies be better? Until this point, I had lacked the reflexivity to question the received wisdom about rehabilitation. But once the question was posed, the answer seemed stunningly obvious—No. Why would a system that overtly intends to inflict pain on offenders be preferable to one that at least pretends to try to improve their lives? I strained to find any reason to believe that the explicit embrace of punishment would yield a more humane and effective system than the embrace of rehabilitation.

Francis T. Cullen, *Rehabilitation: Beyond Nothing Works*, 42 CRIME & JUST. 299, 303 (2013).

child is the rare offender who is beyond hope for rehabilitation?[150] To be clear, the United States Supreme Court left it up to the individual states to implement *Miller*'s holding as they saw fit out of respect to principles of federalism; but if the states deliberately sidestep the spirit of a United States Supreme Court holding, then has any principle of American federalism really been served?[151]

E. Disproving the "Tough on Crime" Fallacy

American mid-century counterculture eroded public faith in the rehabilitative model.[152] As the decades rolled on, public attitudes toward juvenile offenders became much more cynical:

> Violence and homicide in the late 1980s and early 1990s enabled conservative politicians to promote a stereotype of dangerous superpredators—cold-eyed young killers suffering from moral poverty—rather than traditional images of disadvantaged youths who needed help. Based on erroneous demographic projections, they predicted a bloodbath of youth crime, even as juvenile violence declined precipitously. Relying on those flawed predictions, legislators preemptively enacted laws that emphasized suppression of crime—punishment, deterrence, and incapacitation—rather than efforts to rehabilitate children. Juvenile justice shifted from a welfare to a penal orientation and assumed responsibility to manage and control delinquents rather than to treat them. Beginning in the 1970s, just deserts and retribution displaced rehabilitation as rationales for adult and juvenile sentencing policy. Judges focused primarily on offenders' present offense and criminal history.[153]

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[150] Albright v. Albright, 437 So. 2d 1003, 1005 (Miss. 1983).

[151] Akhil Reed Amar, *Of Sovereignty and Federalism*., 96 YALE L.J. 1425, 1429 (1987) (explaining that "federalism and sovereignty" "were originally understood to be, often have been, and can become once again, the very tools to right government wrongs").

[152] Barry C. Feld, *Competence and Culpability: Delinquents in Juvenile Courts, Youths in Criminal Courts*, 102 MINN. L. REV. 473, 480 (2017).

[153] *Id.* at 480-81 (footnote omitted).

The justice system has greatly strayed from *parens patriae* approach to juvenile justice, instead focusing on getting "tough on crime."[154]

States have reconsidered the tough-on-crime stance of the 1980s and 1990s with regard to public policies that expose juveniles to the criminal justice system.[155] The myth of the "superpredator" has been disproven; statistically, during that time period, the increase in violent crime was overwhelming caused by adults.[156]

Today, the "moral panic" of the 1980s and 1990s has given way to more realistic, rehabilitation-focused policy with regard to juvenile delinquency.[157] Lawmakers in Arizona, Colorado, Connecticut, Delaware, Illinois, Maryland, Nevada, Ohio, Utah, Virginia, and Washington have enacted legislation making it less likely that juveniles will be transferred into the criminal justice system.[158] Additionally, California, Colorado, Georgia, Indiana, Missouri, Ohio, Texas, and Washington have changed their sentencing laws "to take into account the developmental differences between youths and adults."[159]

CONCLUSION

Children are different from adults. Specifically, "children are constitutionally different from adults for purposes of sentencing."[160] There is no denying it. As demonstrated above, science, as well as common sense and life experience,[161] proves

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[154] Burke, *supra* note 101, at 266 ("Essentially, courts today are using a 'get tough' approach and handing out punishments. Courts are applying this 'get tough' approach without considering the original philosophy of the juvenile courts, which was to help these children when no one else would." (footnote omitted)).

[155] Michard Mora & Mary Christianakis, *Fit to be T(r)ied: Ending Juvenile Transfers and Reforming the Juvenile Justice System*, *in* A NEW JUVENILE JUSTICE SYSTEM: TOTAL REFORM FOR A BROKEN SYSTEM 227, 232 (Nancy E. Dowd ed., 2015).

[156] Danielle Petretta, *Juveniles Make Bad Decisions, But Are Not Adults & Law Continues to Account For This Difference: The Supreme Court's Decision to Apply* Miller v. Alabama *Retroactively Will Have a Significant Impact on Many Decades of Reform and Current Debate Around Juvenile Sentencing*, 37 PACE L. REV. 765, 768-769 (2017).

[157] Cara H. Drinan, *The* Miller *Revolution*, 101 IOWA L. REV. 1787, 1831 (2016).

[158] Mora & Christianakis, *supra* note 55, at 232.

[159] *Id.*

[160] Miller v. Alabama, 567 U.S. 460, 471 (2012).

[161] *Id.*

that juveniles and adolescents are not yet fully baked bread, but instead they are dough with potential (although it may be difficult for some to accept it, for purposes of the law, minors are juveniles until they turn eighteen years old). Aristotle even asserted that adolescence continued until age twenty-one.[162]

Juveniles and adolescents are more vulnerable to negative, antisocial, outside influences.[163] However, even juveniles who have committed crimes have a much greater potential for change and reformation.[164] Rehabilitation as a justification for punishment has regained traction over the last few decades.[165] The Supreme Court, in *Graham*, breathed new life into rehabilitative theory.[166] It is time to step away from retributive justifications for punishment.[167] Mississippi has an opportunity to get on board with this sweeping trend towards rethinking approaches toward juvenile justice.[168] By adopting the proposed

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[162] Burke, *supra* note 101, at 266.

[163] *See generally* Lois A. Weithorn, *A Constitutional Jurisprudence of Children's Vulnerability*, 69 HASTINGS L.J. 179 (2017).

[164] Laura Cohen, *Freedom's Road: Youth, Parole, and the Promise of* Miller v. Alabama *and* Graham v. Florida, 35 CARDOZO L. REV. 1031, 1055 (2014).

[165] Elizabeth S. Scott, Miller v. Alabama *and the (Past and) Future of Juvenile Crime Regulation*, 31 LAW & INEQ. 535, 541 (2013) ("Many lawmakers and politicians—from the Supreme Court to big city mayors—appear ready to rethink the punitive approach of the 1990s, and recent surveys indicate strong public support for a rehabilitative approach to teenage crime.").

[166] Flanders, *supra* note 34, at 402 ("Both in rhetoric and in substance, the Court held out prison as a place where moral reform might happen or at least not frustrate the possibility for moral reform.").

[167] *See* Pritikin, *supra* note 140, at 778.

[168] One commenter stated:

> Both *Graham* and *Miller* spring from an extraordinary epoch in American juvenile justice, in which the question of juvenile culpability has taken statutory and case law developments in opposite directions. Since the mid-1990s, nearly every state legislature has enacted punitive juvenile crime measures, leading more youth to be tried and incarcerated in the adult system than ever before. Paradoxically, however, in the seven years since *Roper v. Simmons* outlawed the juvenile death penalty, the United States Supreme Court has forged a new, more humane jurisprudence of youth. Erected on a solid foundation of neuroscience and developmental psychology, this still-emergent doctrine makes clear that "youth matters," that developmental immaturity is a core consideration in determining the constitutionality of certain police and sentencing procedures. *Miller* and *Graham* are the latest bricks in the wall.

amendment to the homicide statute, Mississippi has an opportunity to give proper effect to United States Supreme Court holdings while empowering Mississippi circuit court judges to better protect their sentences because the on-the-record analysis would better survive appellate challenge.

Cohen, *supra* note 164, at 1033-34 (footnotes omitted).