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Negotiating Miller Madness: Why North Carolina Gets Juvenile Resentencing Right While Other States Drop the Ball

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INTRODUCTION

Every loyal citizen of the Tar Heel state is a basketball fan. With schools like UNC, Duke, Wake Forest, and NC State, it is nearly impossible to live in North Carolina without gaining a love and appreciation for the sport. After watching and studying the game, the rules become obvious, and if you play by the rules and score the most points, your team wins. But, basketball would be a whole different game if no one knew the rules. In the game of post-conviction litigation, the Supreme Court of the United States interprets the rules, and lower courts and litigants play along hoping for the ultimate win—a new sentence. After the Supreme Court's decision in *Miller v. Alabama*,[1] though, no one knows the rules of the game. The *Miller* Court stated the desired result, yet left the rest to be sorted out by the lower courts. Specifically, the *Miller* Court left the issue of the retroactivity of its holding unresolved, spurring huge amounts of confusion at the state level. If the lower courts do not come to a consensus on how to apply *Miller*, litigants across the country will be forced to play by different rules, the results of which will inevitably be unfair because the constitutional rights granted by *Miller* will not be afforded to all litigants uniformly.

On June 25, 2012, in a divided 5-4 decision, the United States Supreme Court held in *Miller* and its companion case *Jackson v. Hobbs*,[2] that any mandatorily imposed sentence of life imprisonment without the possibility of parole ("LWOP") for juvenile offenders constitutes cruel and unusual punishment in violation of the Eighth Amendment.[3] In doing so, the Court deemed unconstitutional the sentencing laws of twenty-six states and the federal government.[4] As a result, states must now tailor their criminal sentencing structures to meet the requirements of *Miller*, but they are aided by practically no guidance from the Supreme Court. Specifically, the Court was silent on the issue of whether lower courts should apply its holding retroactively to juveniles sentenced to LWOP prior to June 25, 2012.

1. 132 S. Ct. 2455 (2012).
2. *Id.*
3. *See id.* at 2460.
4. *See* Brief for Respondent at 17, *Miller*, 132 S. Ct. 2455 (No. 10-9647).

This Comment focuses on the fate of the nearly 2,500 prisoners throughout the country who, prior to the Court's decision in *Miller*, received LWOP sentences for crimes committed before their eighteenth birthdays.[5] This Comment argues that the Court's decision in *Miller* must be applied retroactively and that other states should follow North Carolina's lead in enacting legislation that reflects such a retroactive application. The analysis proceeds in four parts. Part I provides an overview of the two lines of cases that led up to the Court's holding in *Miller*, an overview of *Miller*, and a description of the challenge that *Miller* poses to the states regarding its retroactivity. Part II articulates the constitutional argument for retroactivity—that *Miller* represented a substantive change in Eighth Amendment jurisprudence and therefore must be applied to defendants whose sentences are already final. Part III provides a comparative analysis of various states' reactions to *Miller*, and argues that as a policy matter, the *Miller* decision must be applied retroactively. Part III also highlights North Carolina's approach and argues that it is the most likely to pass constitutional muster in light of *Miller*'s promise to treat juveniles differently. Finally, Part IV analyzes the practical effects of retroactivity by focusing on a select number of North Carolina juveniles sentenced to mandatory LWOP. This analysis shows the benefits of North Carolina's response to *Miller* in contrast to other states' responses. Part IV demonstrates that retroactive resentencing hearings in accordance with *Miller* have and will affect juvenile LWOP sentences in North Carolina in a manner that is consistent with the spirit of the Eighth Amendment. This analysis will highlight the potential benefits of North Carolina's response to *Miller* in contrast to other states' approaches.

I. *MILLER* AND ITS ANCESTRY

A. *The Facts of* Miller *and* Jackson

The Supreme Court heard *Miller* and *Jackson* together as companion cases because the two cases raised identical issues. In both *Miller* and *Jackson*, the juvenile defendants were fourteen years old when they were charged with murder.[6] In Jackson's case, he and two other boys set out to rob a video store in Blytheville, Arkansas.[7]

5. *See* HUMAN RIGHTS WATCH, THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR YOUTH OFFENDERS IN THE UNITED STATES IN 2008, at 3 (2008).

6. *See Miller*, 132 S. Ct. at 2460.

7. *See* Jackson v. State, 194 S.W.3d 757, 758 (Ark. 2004), *habeas corpus denied sub nom.* Jackson v. Norris, 378 S.W.3d 103 (Ark. 2011), *rev'd sub nom. Miller*, 132 S. Ct. 2455.

However, on the way to the store, Jackson discovered that one of the other boys had a sawed-off shotgun concealed in his coat sleeve.[8] Jackson stayed outside while the other two boys went inside.[9] At some point, however, Jackson entered the store.[10] The facts thereafter are in dispute, but Jackson either stated "we ain't playin' " to the store clerk, or "I thought you all was playin' " to his friends.[11] Regardless of his exact words, after the clerk refused to hand over the money and threatened to call the police, one of Jackson's companions shot and killed her, and the three boys fled the store empty-handed.[12]

Similarly to Jackson, Miller committed murder in a failed robbery attempt.[13] Miller was at home in Lawrence County, Alabama, with a minor friend when Cole Cannon came to his house to make a drug deal with Miller's mother.[14] Cannon then invited the two boys to come to his trailer, and after the trio spent hours drinking and using drugs together, Cannon passed out.[15] Miller and his friend stole Cannon's wallet and split the $300 they stole, but Cannon awoke unexpectedly when Miller tried to return the wallet to his pocket.[16] A fight ensued, ending with Miller beating Cannon with a baseball bat until he could not stand up or move.[17] Miller then "placed a sheet over Cannon's head, told him 'I am God, I've come to take your life,' " and delivered an additional blow.[18] The boys then retreated to Miller's home.[19] Later, though, they decided to return to Cannon's trailer and light a fire to cover up the evidence of their crime.[20] Cannon died from a combination of his injuries and smoke inhalation.[21]

Arkansas and Alabama law give prosecutors in both states the discretion to charge fourteen-year-olds as adults if they commit certain crimes.[22] The prosecutors in both Jackson's and Miller's cases

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8. *See Miller*, 132 S. Ct. at 2461.
9. *See id.*
10. *See id.*
11. *Id.*
12. *Id.*
13. *See id.* at 2462.
14. *Id.*
15. *See id.*
16. *See id.*
17. *See id.*
18. *Id.* (quoting Miller v. State, 63 So. 3d 676, 689 (Ala. Crim. App. 2010), *rev'd sub nom. Miller*, 132 S. Ct. 2455).
19. *Id.*
20. *See id.*
21. *Id.*
22. *See id.* at 2461–62; ALA. CODE § 12-15-203(a) (LexisNexis Supp. 2011); ARK. CODE ANN. § 9-27-318(c)(2) (2009).

exercised that authority, and eventually, juries convicted both juveniles of capital murder and the judge sentenced them to LWOP.[23] The laws of both Arkansas and Alabama mandated either LWOP or death upon conviction for capital murder; however, neither Miller nor Jackson could be sentenced to death after 2005, when the Supreme Court banned the death penalty for minors under the age of eighteen.[24] Therefore, the sentencing authorities in Miller's and Jackson's cases had no discretion to impose a punishment other than LWOP upon conviction of first-degree murder.[25] In both cases, the state appellate courts upheld the mandatory LWOP sentence,[26] and the United States Supreme Court subsequently combined the cases and granted certiorari.[27]

B. The Eighth Amendment and the Miller *Court's Precedential Web*

Generally, in determining whether a punishment is cruel and unusual, the Supreme Court looks beyond historical conceptions and allows changing morals of society to affect the standard.[28] Central to

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23. *See Miller*, 132 S. Ct. at 2460–62. Jackson was convicted of capital felony murder under the theory of accomplice liability. *Id.* at 2477 (Breyer, J., concurring). Under Arkansas law, "[a] defendant convicted of capital murder . . . shall be sentenced to death or life imprisonment without parole . . . ." ARK. CODE ANN. § 5-4-104(b) (Supp. 2011). Similarly, Miller was convicted of murder in the course of arson and sentenced to mandatory LWOP in accordance with Alabama law which dictates that "the punishment for murder . . . is death or life imprisonment without parole." ALA. CODE § 13A-6-2(c); *see Miller*, 132 S. Ct. at 2463; *see also* ALA. CODE § 13A-5-40(a)(9) ("The following are capital offenses: . . . [m]urder by the defendant during arson.").

24. *See* Roper v. Simmons, 543 U.S. 551, 574 (2005) ("The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.").

25. In fact, during Jackson's sentencing hearing the judge pointedly stated, "in view of [the] verdict, there is only one possible punishment." *Miller*, 132 S. Ct. at 2461 (alteration in original) (internal quotation marks omitted).

26. Jackson v. Norris, 378 S.W.3d 103, 105 (Ark. 2011), *rev'd sub nom. Miller*, 132 S. Ct. 2455; Miller v. State, 63 So. 3d 676, 682 (Ala. Crim. App. 2010), *rev'd sub nom. Miller*, 132 S. Ct. 2455. In Jackson's case, two justices of the Arkansas Supreme Court dissented, pointing out that it is "of great concern" that "[a]t the time of sentencing, the circuit court could not consider the defendant's age or any other mitigating circumstances—the circuit court only had jurisdiction to sentence Jackson to life imprisonment without the possibility of parole." *Jackson*, 378 S.W.3d at 109 (Danielson, J., dissenting). Miller's life sentence was unanimously upheld by the Alabama Court of Criminal Appeals, which noted that "[a]lthough 'life without parole is an especially harsh punishment for a juvenile,' such a sentence is not overly harsh when compared to the crime of which Miller was convicted." *Miller*, 63 So. 3d at 690 (quoting Graham v. Florida, 130 S. Ct. 2011, 2028 (2010)).

27. Miller v. Alabama, 132 S. Ct. 548 (Nov. 7, 2011) (No. 10-9646) (granting certiorari).

28. *See* Kennedy v. Louisiana, 554 U.S. 407, 419 (2008) ("[T]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The

the Court's Eighth Amendment jurisprudence is the concept of proportionality—the punishment must fit the crime.[29] In the context of criminal sentencing structures for juveniles, the Eighth Amendment issue is whether juvenile offenders (because of their age) are sufficiently less culpable than adults, so as to render them constitutionally barred from receiving the state's harshest sentences.[30] In deciding whether the punishment in question violates the Constitution, the Court will consider "objective indicia of society's standards, as expressed in legislative enactments and state practice,"[31] yet ultimately, the Court uses its own independent judgment, guided by controlling precedents, to determine the confines of the Eighth Amendment.[32]

In order to supply its precedential basis for holding that sentencing schemes mandating juvenile LWOP are unconstitutional, the *Miller* Court wove together two lines of Eighth Amendment cases.[33] The first line, the *Graham/Roper* line, demands that children be viewed as fundamentally different from adults in the context of criminal culpability.[34] The second line, the *Woodson* line, requires an individualized assessment of every criminal defendant prior to the imposition of a mandatory death sentence.[35] Taken together, these two lines of cases form the basis of the Court's conclusion in *Miller* that mandatory LWOP sentences for juvenile offenders violate the Eighth Amendment.[36] This conclusion, along with the Court's discussion of constitutional precedent, has important implications for the retroactivity debate.

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standard itself remains the same, but its applicability must change as the basic mores of society change." (internal quotation marks omitted)).

29. *See* Graham v. Florida, 130 S. Ct. 2011, 2028 (2010); *see also* Weems v. United States, 217 U.S. 349, 367 (1910) ("[I]t is a precept of justice that punishment for crime should be graduated and proportioned to offense.").

30. *See Miller*, 132 S. Ct. at 2460.

31. Roper v. Simmons, 543 U.S. 551, 563 (2005).

32. *See id.* at 575 ("[T]he task of interpreting the Eighth Amendment remains [the Supreme Court's] responsibility."); *see also Graham*, 130 S. Ct. at 2022 (discussing the guiding precedents in Eighth Amendment jurisprudence).

33. *See Miller*, 132 S. Ct. at 2468.

34. *See id.* at 2465 ("*Roper* and *Graham* emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes.").

35. *See id.* at 2467 (citing Woodson v. North Carolina, 428 U.S. 280 (1976) (plurality opinion)).

36. *See id.* at 2468 ("So *Graham* and *Roper* and our individualized sentencing cases alike teach that in imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult.").

Graham v. Florida[37] and *Roper v. Simmons*[38] represent the end of the Court's long refusal to categorically bar certain punishments for juvenile offenders. First, the Court held in *Roper* that it is cruel and unusual punishment to sentence a defendant to death for a crime committed before his eighteenth birthday.[39] As in Miller's case, the juvenile defendant in *Roper* committed an extremely violent and undoubtedly horrendous crime.[40] However, the Court looked past the mere facts of the gruesome crime and issued a watershed decision that, at its core, dictated that age matters in criminal sentencing, and the age of the defendant alone can preclude certain punishments.[41]

The *Roper* Court set forth three "general differences" between juveniles and adults that demonstrate the criminal culpability of a juvenile cannot be equated with that of an adult.[42] First, juveniles have a "lack of maturity and an underdeveloped sense of responsibility" that often results "in impetuous and ill-considered actions and decisions."[43] Second, "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure."[44] Third, "the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed."[45] Taken together, the *Roper* Court held that these inherent characteristics of juvenile offenders require special consideration of a defendant's age during the sentencing process and even a categorical ban on capital punishment.[46]

Five years later, the Supreme Court extended its decision in *Roper*, imposing an additional categorical ban on certain punishments for juvenile offenders. In *Graham*, the Court held that the Eighth Amendment disallows the imposition of LWOP for juveniles who

37. 130 S. Ct. 2011 (2010).

38. 543 U.S. 551 (2005).

39. *Id.* at 575.

40. Seventeen-year-old Christopher Simmons kidnapped a woman with whom he had previously been in a car wreck, bound her hands and feet, wrapped her whole face in duct tape and threw her over a bridge to drown. *See id.* at 556–57. The next day, Simmons bragged about the killing at school. *See id.* at 557.

41. *See id.* at 573–74 ("When a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity.").

42. *See id.* at 569–70.

43. *Id.* at 569 (internal quotation marks omitted).

44. *Id.*

45. *Id.* at 570.

46. *See id.* at 572–73 ("The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability.").

commit non-homicide offenses.[47] The Court asserted that LWOP sentences share some characteristics with death sentences because "the sentence alters the offender's life by a forfeiture that is irrevocable" and "deprives the convict of the most basic liberties without giving hope of restoration."[48] In doing so, the *Graham* Court reasoned that a LWOP sentence for a juvenile offender is impermissibly disproportionate to his criminal culpability when no homicide is committed,[49] given the "differences of youth" highlighted by *Roper*[50] and the severity of a LWOP sentence.[51]

Taken together, *Roper* and *Graham* form the "foundational principle" for the *Miller* Court's conclusion that age matters in the context of the Eighth Amendment's proportionality requirement.[52] *Miller* insists that it is constitutionally impermissible to remove factors of youth from the proportionality balance by mandatorily subjecting juveniles to the same LWOP sentence as adults.[53] The *Miller* Court reiterated the lessons of *Roper* and *Graham*, mandating that the "imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children."[54]

The line of cases culminating in *Woodson v. North Carolina*[55] dictates that the Eighth Amendment requires an individualized consideration of the "character and record" of each convicted defendant before the death penalty may be imposed.[56] In *Woodson*, as in *Miller*, state law provided for the mandatory imposition of a particular sentence upon conviction of first-degree murder.[57] The

47. *Id.* at 2034.

48. *Id.* at 2027.

49. *See id.* at 2029 ("A life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity. Incapacitation cannot override all other considerations, lest the Eighth Amendment's rule against disproportionate sentences be a nullity.").

50. *See supra* notes 41–46 and accompanying text.

51. *See Graham*, 130 S. Ct. at 2026 ("*Roper* established that because juveniles have lessened culpability they are less deserving of the most severe punishments.").

52. Miller v. Alabama, 132 S. Ct. 2455, 2466 (2012).

53. *See id.* at 2468.

54. *Id.* at 2466.

55. 428 U.S. 280 (1976).

56. *Woodson*, 428 U.S. at 303 (plurality opinion); *see also* Furman v. Georgia, 408 U.S. 238, 309–10 (1972) (White, J., concurring) (noting that the vesting of standardless sentencing power in the jury violated the Eighth Amendment); Winston v. United States, 172 U.S. 303, 313–14 (1899) (holding that the discretionary power of a jury to choose not to impose the death penalty may not be hindered).

57. In *Woodson*, the mandatory sentence was death, and in *Miller*, the mandatory sentence was LWOP. *See Woodson*, 428 U.S. at 286–87; *Miller*, 132 S. Ct. at 2462–63. *Compare* Act of Apr. 8, 1974, ch. 1201, sec. 1, § 14-17, 1973 N.C. Sess. Laws 323, 323 (passed in 1974 Second Session) ("A murder which shall be perpetrated by means of

Woodson plurality noted that a sentencing law that "treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass" violates the "fundamental respect for humanity underlying the Eighth Amendment."[58] Particularly troubling to the *Woodson* plurality was that the mandatory sentencing law precluded the judiciary from checking for any potentially arbitrary exercise of the state's harshest punishment.[59] The plurality emphasized that because of the severity of the proposed punishment (in Woodson's case, death), there is an increased "need for reliability in the determination that" the imposed punishment is appropriate, all factors considered.[60]

Miller's reliance on the *Woodson* line begins with the proposition originally set forth in *Graham*: LWOP and death sentences have certain similarities that allow for the categorical bar of LWOP in certain, distinct circumstances.[61] In *Graham*, juvenile LWOP sentences were treated as analogous to capital punishment for non-homicide crimes because "the sentence alters the offender's life by a forfeiture that is irrevocable."[62] The *Miller* Court cited *Woodson* and extended the death sentence analogy, dictating that when LWOP sentences are on the table, just as in capital punishment cases, the sentencing authority must not " 'exclude[ ] from consideration . . . the possibility of compassionate or mitigating factors.' "[63] Thus, the *Miller* Court held that "a sentencer [must] have the ability to consider the 'mitigating qualities of youth' " present in juvenile LWOP cases.[64]

C. *The Emergence of the* Miller *Hearing*

After *Miller*, it is clear that criminal sentencing structures that mandatorily impose LWOP for juvenile offenders are unconstitutional.[65] However, unlike *Graham* and *Roper*, where

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poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death."), *with* ALA. CODE § 13A-6-2(c) (LexisNexis Supp. 2011) ("[T]he punishment for murder . . . is death or life imprisonment without parole.").

58. *Woodson*, 428 U.S. at 304.

59. *See id.* at 303.

60. *Id.* at 305.

61. *See Miller*, 132 S. Ct. at 2466–67.

62. Graham v. Florida, 130 S. Ct. 2011, 2027 (2010).

63. *Miller*, 132 S. Ct. at 2467 (second alteration in original) (quoting *Woodson*, 428 U.S. at 304).

64. *Id.* (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).

65. *See id.* at 2475.

particular sentences were categorically disallowed for juveniles, the *Miller* Court specified that juvenile LWOP sentences are still permissible as long as "mitigating qualities of youth" are analyzed and accounted for by the sentencing authority.[66] The *Miller* Court dictated that, in cases where juvenile LWOP is a possibility, the sentencing authority must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."[67] In order for the "mitigating factors of youth" to be properly addressed, the Court emphasized five factors that the sentencing authority should take into account: (1) the ability of the juvenile defendant to "appreciate the risks and consequences of his actions"; (2) the juvenile defendant's family and home environment; (3) the circumstances of the offense, "including the extent of [the juvenile defendant's] participation in the conduct and the way familial and peer pressures may have affected him"; (4) any potential "incompetencies associated with youth" (i.e. inability to deal with police officers or to assist in his own defense); and (5) "the possibility of rehabilitation."[68]

Practically speaking, the aforementioned "mitigating qualities of youth" would presumably be considered during a sentencing hearing, after which the sentencing authority would choose whether to impose LWOP, or a lesser sentence, based on the factors presented. This new juvenile sentencing scheme seems straightforward. However, the Court confused this seemingly simple process by stating a somewhat haphazard, but meaningful, caveat to the general rule that juvenile LWOP is still constitutionally permissible. Justice Kagan, writing for the majority, stated "[b]ut given all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to [the] harshest possible penalty will be *uncommon*."[69] Thus, the *Miller* Court insisted that the decision "do[es] not foreclose a sentencer's ability to make [the juvenile LWOP] judgment in homicide cases," but specified that such judgments should be "uncommon."[70] On their own, the *Miller* factors

66. *Id.* at 2467.
67. *Id.* at 2469.
68. *Id.* at 2468.
69. *Id.* at 2469 (emphasis added).
70. *Id.*

are relatively straightforward, but when the "uncommonality" element enters the mix, the result is less clear.[71]

Lower courts' interpretations of the force behind *Miller*'s "uncommonality" specification will have important implications for the future sentencing of juveniles and for retroactivity. For example, in Jackson's case, he did not fire the fatal shot,[72] and his behavior was likely influenced at least in part by the group-think mentality of the other boys involved in the robbery. Additionally, Jackson had a violent family background[73]—both Jackson's mother and his grandmother had previously shot other individuals.[74] Similarly, in Miller's case, he was high on drugs and alcohol he had consumed with the adult victim—his mother's drug dealer.[75] Moreover, Miller's stepfather physically abused him, his alcohol and drug-addicted mother neglected him, and he spent much of his childhood in and out of foster homes.[76] Furthermore, Miller was undoubtedly a disturbed individual at the time of his offense; he had previously attempted suicide four times, the first of which when he was only six years old.[77]

Thus, on remand, should the resentencing authority treat Jackson as a "common" juvenile offender, ineligible for LWOP because of his life-long immersion in violence? On the other hand, was Miller's crime so abhorrent that, despite his horrendous family life, he should be one of the "uncommon" cases where juvenile LWOP is appropriate? These questions must be answered by the states, which are now saddled with the heavy burden, post-*Miller*, of doling out juvenile LWOP sentences at a vaguely defined, constitutionally appropriate rate: sometimes, but not too often.

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71. While opponents of the *Miller* decision argue that the Court's "uncommonality" mandate is merely dicta, such a conclusion flies in the face of the fundamental premise of the Court's decision. The Court insists that children are psychologically and sociologically less culpable for criminal acts; therefore, that children should be held to the same exact standard for criminal culpability as adults should be an *uncommon* occurrence. *See* Summary, *The Supreme Court, 2011 Term—Leading Cases*, 126 HARV. L. REV. 176, 286 (2012) ("At heart, an implementation of procedural safeguards true to *Miller*'s underlying premises amounts to something close to a de facto substantive holding: children should be sorted from adults and, except when indistinguishable from adults, be spared LWOP. Considering the underlying psychological premise, Justice Kagan's suggestion that 'appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon' sounds less like dicta." (footnotes omitted) (quoting *Miller*, 132 S. Ct. at 2469)).

72. *See Miller*, 132 S. Ct. at 2461.

73. *See id.* at 2468.

74. *See id.*

75. *See id.* at 2469.

76. *See id.*

77. *Id.*

D. A Challenge to the States: Addressing Retroactivity

The challenge for the states is to determine not only how to sentence future juvenile offenders appropriately after *Miller*, but also what must be done with the nearly 2,500 prisoners, as of 2008, already serving life sentences for crimes committed as a juvenile before the Court's decision in *Miller*.[78] This Comment argues that although the *Miller* Court is unclear on the overarching effects of its holding and fails to give the states much direction on how to apply its decision, states should look to the spirit of *Miller* and apply its holding retroactively. It is clear that in future cases, sentencing authorities must consider the *Miller* factors on an individualized basis in every case where juvenile LWOP is on the table before a sentence of LWOP may be imposed. Therefore, the sentencing laws of twenty-six states (including North Carolina) and the federal government must be changed.[79] But in the course of changing their sentencing laws, the challenge to the states will be whether or not to write these new laws in a manner that allows for already convicted juveniles to relitigate their LWOP sentences.

II. LEGAL ARGUMENTS FOR AND AGAINST RETROACTIVITY

Parts II and III detail two arguments for retroactivity. First, as a matter of constitutional law, courts should apply *Miller* retroactively because it reflects a substantive change in Eighth Amendment jurisprudence. Second, as a policy matter, state legislatures should enact laws which allow for *Miller* to be applied retroactively, because such an application is most true to the changing cultural and societal values noted by the *Miller* majority.[80]

A. The Constitutional Test for Retroactivity

This Part discusses the Supreme Court precedent for determining whether new rules should be applied retroactively and argues that

78. *See* HUMAN RIGHTS WATCH, *supra* note 5, at 3.

79. *See* Brief for Respondent (reprint) at 17–18, *Miller*, 132 S. Ct. at 2455 (No. 10-9646) (listing the twenty-seven jurisdictions in which LWOP is mandated for fourteen-year-old aggravated murderers transferred from the juvenile system: United States federal system, Alabama, Arizona, Arkansas, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Iowa, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, North Carolina, Ohio, Pennsylvania, South Dakota, Vermont, Virginia, Washington, and Wyoming).

80. *Miller*, 132 S. Ct. at 2463 ("[W]e view [the] concept [of Eighth Amendment proportionality] less through a historical prism than according to 'the evolving standards of decency that mark the progress of a maturing society.' " (quoting Estelle v. Gamble, 429 U.S. 97, 102 (1976))).

because the Court's holding in *Miller* constitutes a substantive rule, it should apply retroactively. As previously noted, the Supreme Court did not mention the issue of retroactivity in its decision in *Miller*.[81] Therefore, lower courts must look to other precedent to determine whether the *Miller* rule should apply retroactively. Generally, a new rule articulated by the Supreme Court is applied retroactively if the rule is either substantive in nature (as opposed to procedural),[82] or if it falls within a narrow retroactivity exception set forth by the Supreme Court in *Teague v. Lane*[83] and its progeny.

In *Teague*, the Supreme Court recognized as a general rule that defendants' cases on collateral review should not be afforded the benefit of having new rules apply retroactively to already final convictions.[84] However, the *Teague* Court articulated a three-step test for determining which exceptional new rules may be applied retroactively. First, the reviewing court "must determine when the defendant's conviction became final."[85] "Second, it must ascertain the 'legal landscape as it then existed' . . . . That is, it must decide whether the rule [to be applied retroactively] is actually 'new.' "[86] Finally, if the rule is new, the court must decide whether the new rule falls into one of two narrow exceptions to the general rule of nonretroactivity.[87] It is exceedingly difficult to meet all of the aforementioned criteria and overcome the presumption of nonretroactivity; however, this Part argues that the *Miller* case was sufficiently groundbreaking in the context of Eighth Amendment jurisprudence to justify an exception to the general rule of nonretroactivity.

81. It is fairly typical in Supreme Court jurisprudence for the Court to remain silent on the particular issue of retroactivity. *See* Teague v. Lane, 489 U.S. 288, 299 (1989) (plurality opinion) ("In the past, the Court has, without discussion, often applied a new constitutional rule of criminal procedure to the defendant in the case announcing the new rule, and has confronted the question of retroactivity later when a different defendant sought the benefit of that rule.").

82. *See* Schriro v. Summerlin, 542 U.S. 348, 351–52 (2004) ("New *substantive* rules generally apply retroactively. . . . New rules of procedure, on the other hand, generally do not apply retroactively.").

83. 489 U.S. 288 (1989).

84. *See id.* at 310 ("Unless [cases on collateral review] fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.").

85. Beard v. Banks, 542 U.S. 406, 411 (2004).

86. *Id.* (quoting Graham v. Collins, 506 U.S. 461, 468 (1993)).

87. *Id.*; *see infra* Part II.A.3.

1. Establish the Date of Final Decision

The issue of *Miller*'s retroactivity will only be salient to defendants whose convictions were final prior to June 25, 2012, the date of the *Miller* decision, because *Miller* will automatically apply to those defendants whose convictions were pending on direct review when *Miller* was decided.[88] "[C]onvictions are final 'for the purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied.' "[89] Thus, any defendant previously sentenced to mandatory juvenile LWOP who wishes to bring his case to be resentenced on collateral review must first establish that his conviction was final prior to June 25, 2012.

2. Determine Whether the Rule Is New

After establishing the date upon which a defendant seeking a retroactive application of the *Miller* decision was finally convicted, the reviewing court will analyze whether the rule set forth in *Miller* was a "new" rule in comparison to the legal landscape at the time of the defendant's final conviction. According to *Teague*, "a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government."[90] Stated differently, "a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final."[91] The rule announced by the Supreme Court in *Miller* was a new rule for the purpose of retroactivity because it altered the existing juvenile sentencing laws of many jurisdictions throughout the country. For example, the laws set by the legislatures of Alabama and Arkansas previously dictated that, if convicted of first-degree murder, juvenile defendants received mandatory sentences of LWOP.[92] The Supreme Court explicitly overruled this mandatory sentencing scheme—instead setting forth a *new* rule, that juvenile defendants may *not* be sentenced to mandatory LWOP, regardless of the nature of the offense.[93] Furthermore, the *Miller* decision places a new

88. *See* Griffith v. Kentucky, 479 U.S. 314, 328 (1987) ("[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final . . . .").

89. *Beard*, 542 U.S. at 411 (quoting Caspari v. Bohlen, 510 U.S. 383, 390 (1994)).

90. Teague v. Lane, 489 U.S. 288, 301 (1989).

91. *Id.* (emphasis omitted).

92. *See* discussion *supra* Part I.A.

93. Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012).

obligation on twenty-six states and the federal government, namely, that juvenile defendants must be given the opportunity to present to the sentencing authority mitigating factors of youth before they may be sentenced to LWOP.[94] Therefore, the *Miller* Court's prohibition of mandatory juvenile LWOP, and the requirement of a special sentencing hearing, amounts to a new rule for the purposes of further retroactivity analysis.

3. Assess Whether an Exception Applies

The final retroactivity consideration is whether the new *Miller* rule falls within either of the two exceptions to nonretroactivity. A new rule will be applied retroactively only if it is either substantive in nature or if it is a " 'watershed rule[] of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.' "[95]

a. The Procedural Versus Substantive Debate

In *Schriro v. Summerlin*,[96] the Court stated that "[n]ew *substantive* rules generally apply retroactively. This includes decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish."[97] The debate as to whether the *Miller* rule is procedural or substantive for purposes of retroactivity is undoubtedly a close one. Opponents of retroactivity argue that the *Miller* rule is procedural because it simply requires an additional sentencing procedure for juvenile offenders, namely, a *Miller*-style hearing.[98] Were the *Miller* Court to create a categorical bar on LWOP sentences for all juvenile offenders (as the Court did in *Roper* and *Graham*),[99] the corresponding rule would be definitively substantive and apply retroactively, because LWOP

94. *See id.*

95. Schriro v. Summerlin, 542 U.S. 348, 352 (2004) (quoting Saffle v. Parks, 494 U.S. 484, 495 (1990)).

96. 542 U.S. 348 (2004).

97. *Id.* at 352 (citation omitted).

98. *See, e.g.*, Geter v. State, No. 3D12-1736, 2012 WL 4448860, at *1 (Fla. Dist. Ct. App. Sept. 27, 2012) ("[T]he procedural determination in *Miller* ... merely requires consideration of mitigating factors of youth in the sentencing process.").

99. Recall that *Roper* categorically barred the death penalty for all juvenile offenders, and *Graham* prohibited LWOP sentences for juvenile offenders who commit non-homicide crimes. *See* Graham v. Florida, 130 S. Ct. 2011, 2030 (2010); Roper v. Simmons, 543 U.S. 551, 574 (2005).

would be "a punishment that the law cannot impose upon [juvenile defendants]."[100]

After *Miller*, courts can still impose juvenile LWOP sentences; however, a close analysis of the case law suggests the conclusion that the *Miller* rule is still substantive because it categorically bars *mandatory* LWOP for juvenile offenders. The Supreme Court's discussion in *Schriro* exemplified the substantive versus procedural tension arising in the context of the *Miller* case. The Court dictated that a rule is substantive if it " 'prohibit[s] the imposition of ... punishment on a particular class of persons[.]' In contrast, rules that regulate only the *manner of determining* the defendant's culpability are procedural."[101] In fact, *Miller* does both. *Miller* categorically prohibits mandatory LWOP punishments for a particular class of persons—juvenile offenders—*and* regulates the manner of determining whether a young defendant is sufficiently culpable to be one of the uncommon juvenile offenders deserving of LWOP.

While it is true that *Miller* requires a particular "procedural" type of sentencing hearing, the case actually does much more than that—*Miller* crosses the threshold into a substantive rule. The Court made two particular holdings that render the rule substantive in nature. First, the Court stated that the instances of juveniles serving LWOP sentences should be "uncommon."[102] Such a prediction by the Court is not procedural; it is substantive. It articulates a value judgment, rather than a procedural requirement, and effectively makes LWOP "a punishment that the law cannot [or, according to the Court, should not] impose" *upon most juveniles*.[103] Second, in addition to the uncommonality value judgment, the *Miller* Court categorically bars the imposition of mandatory LWOP for juvenile offenders. Such a categorical bar puts *Miller* in the same substantive arena as *Roper* and *Graham*, holding that the state cannot constitutionally impose a certain punishment on certain classes of people (in these cases, juveniles). It is a substantive change in the law because it "puts

100. *Schriro*, 542 U.S. at 352.

101. *Id.* at 353 (alteration in original) (quoting Saffle v. Parks, 494 U.S. 484, 495 (1990)); *see also* Penry v. Lynaugh, 492 U.S. 302, 330 (1989) ("[T]he first exception set forth in *Teague* should be understood to cover not only rules forbidding criminal punishment of certain primary conduct but also rules prohibiting a certain category of punishment for a class of defendants because of their status or offense."), *abrogated by* Atkins v. Virginia, 536 U.S. 304 (2002).

102. Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012).

103. *Schriro*, 542 U.S. at 352.

matters outside the scope of the government's power."[104] *Miller* does not simply require that the sentencing authority look at a juvenile defendant's age-related characteristics before imposing a sentence. This would be a procedural rule. Rather, *Miller* speculates that only in the uncommon case should a juvenile be sentenced to LWOP despite full disclosure of his mitigating factors of youth. Practically, the only way to ensure that this new, substantive rule is followed is for the states to reopen old cases and examine them with the proportionality lessons of *Miller* in mind.

b. Miller Is a Watershed Rule of Criminal Procedure

Even if the *Miller* rule is found to be procedural, rather than substantive, it should still be applied retroactively because it constitutes a "watershed rule[ ] of criminal procedure,"[105] which is the other exception to the general rule of nonretroactivity. In *Teague*, the plurality formally adopted the "watershed rule" exception as it was previously articulated by Justice Harlan in his concurring opinion in *Mackey v. United States*.[106] In describing the possibility of such a watershed rule arising in the future, Justice Harlan imagined that one day, "growth in social capacity, as well as judicial perceptions of what [society] can rightly demand of the adjudicatory process, [might] properly alter our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction."[107]

The Court has consistently likened this exception to the right to counsel at trial, which is now considered " 'a necessary condition precedent to any conviction for a serious crime.' "[108] Over time, the Court has articulated various formulations of the "watershed rule" exception.[109] Most often, the Court describes the exception as pertaining only to the "small core of rules requiring observance of those procedures that ... are implicit in the concept of ordered

104. Erwin Chemerinsky, *Juvenile Life-Without-Parole Case Means Courts Must Look at Mandatory Sentences*, A.B.A. J. (Aug. 8, 2012, 8:30 AM), http://www.abajournal.com/news/article/chemerinsky_juvenile_lifewithoutparole_case_mans_courts_must_look_at_sen/.

105. Teague v. Lane, 489 U.S. 288, 311 (1989) (plurality opinion) (stating it was desirable to blend the *Mackey* requirement with a principle from another case).

106. 401 U.S. 667 (1971); *see Teague*, 489 U.S. at 311–12 (discussing the Harlan concurrence from *Mackey*).

107. *Mackey*, 401 U.S. at 693 (Harlan, J., concurring) (emphasis added).

108. *Teague*, 489 U.S. at 311–12 (quoting *Mackey*, 401 U.S. at 694); *see also* Jessica Smith, *Retroactivity of Judge-Made Rules*, ADMIN. OF JUST. BULL. (N.C. Sch. of Gov't), Dec. 2004, at 7 n.80.

109. *See* Smith, *supra* note 108, at 6–7 (noting the formulations of the "watershed rule" exception in *Schriro* and *Beard*).

liberty."[110] Additionally, "[t]hat a new procedural rule is 'fundamental' in some abstract sense is not enough; the rule must be one 'without which the likelihood of an accurate conviction is *seriously* diminished.' "[111] Therefore, while the Court freely recognizes the "watershed rule" exception, it has set a very high standard for the existence of such an exception.[112]

Just as Justice Harlan predicted, though, there came a time in the mid-summer of 2012, when the "growth in social capacity . . . alter[ed] our understanding"[113] of the culpability of juvenile offenders in the criminal justice system.[114] In *Miller*, five Supreme Court Justices acknowledged that, despite the violent nature of Miller's crime, he is fundamentally less blameworthy than he would have been in four years' time.[115] The majority recognized that to impose a sentence upon Miller which does not take into account his diminished culpability would violate the bedrock Eighth Amendment principle of proportionality.[116] *Miller* dictates that juveniles are inherently less culpable because of their age, and therefore, additional safeguards are needed to protect their interests and prevent the type of disproportionate sentencing prohibited by the Eighth Amendment. The notion of proportionality—the punishment must fit the crime—is at the heart of our criminal justice system and " 'implicit in the concept of ordered liberty.' "[117] *Miller* effectively held that to sentence a juvenile offender to die in prison without taking into account his mitigating factors of youth would circumvent a bedrock principle of

110. Beard v. Banks, 542 U.S. 406, 417 (2004) (alteration in original) (quoting O'Dell v. Netherland, 521 U.S. 151, 157 (1997)).

111. Schriro v. Summerlin, 542 U.S. 348, 352 (2004) (quoting *Teague*, 489 U.S. at 311).

112. In fact, the Court has not yet recognized any rule as falling into the "watershed" exception articulated in *Teague*. *See Beard*, 542 U.S. at 417 ("[W]e have yet to find a new rule that falls under the second *Teague* exception."). However, lower courts (including the Supreme Court of North Carolina) have recognized certain "watershed" exceptions under *Teague*. *See, e.g.*, State v. Zuniga, 336 N.C. 508, 513–14, 444 S.E.2d 443, 446–47 (1994) (allowing retroactive application of the *McKoy* rule which invalidated the unanimity requirement of North Carolina's capital sentencing scheme).

113. Mackey v. United States, 401 U.S. 667, 693 (1971).

114. *See supra* text accompanying note 69.

115. Miller v. Alabama, 132 S. Ct. 2455, 2465 (2012).

116. *Id.* at 2466.

117. Teague v. Lane, 489 U.S. 288, 307 (1989) (quoting *Mackey*, 401 U.S. at 693); *see Miller*, 132 S. Ct. at 2463 (noting that the Eighth Amendment's guarantee that individuals not be subjected to excessive punishments " 'flows from the basic precept of justice that punishment for crime should be graduated and proportioned' to both the offender and the offense" (quoting Weems v. United States, 217 U.S. 349, 367 (1910))).

our criminal justice system,[118] and it therefore constitutes a watershed change in our understanding of criminal procedure.

Furthermore, the rule set forth in *Miller* is not simply fundamental in an abstract sense. Rather, it is a rule without which the fairness of juvenile sentencing would be seriously diminished. Specifically, the *Miller* Court held that it is unconstitutional to impose a sentence of LWOP on a juvenile defendant without considering whether his age-related characteristics might have diminished his culpability.[119] Juveniles who are currently serving mandatory LWOP sentences were never given an opportunity to present mitigating factors of youth, and if *Miller* is not applied retroactively, they never will. Therefore, these pre-*Miller* mandatory LWOP sentences are unconstitutional and will remain so without a renewed application of *Miller* to already-final mandatory LWOP sentences.

III. REACTIONS TO *MILLER*: A COMPARATIVE ANALYSIS

As the confusion spurred by the *Miller* decision has trickled down to the states, the legislative and legal reactions have varied drastically. Some states, like North Carolina, reacted quickly to *Miller* and reworked their criminal sentencing laws, eliminating mandatory LWOP sentences for juveniles as well as filling in some of the holes left by the *Miller* decision.[120] Other states have left the application of *Miller* and the question of its retroactivity for the courts to sort out.[121] The differing legislative and legal reactions to the *Miller* decision generally fall into one of two categories: the reactions either reflect a willingness to embrace the basic principle of *Miller*—namely, that children are fundamentally less culpable than adults for even the most abhorrent crimes—or they exploit the Supreme Court's vagueness and circumvent the demands of *Miller*.[122]

In the same vein, states also differ on the issue of the retroactivity of *Miller*. This Part argues that those states with mandatory juvenile LWOP sentencing structures should amend their

118. *Miller*, 132 S. Ct. at 2466 (" 'An offender's age,' we made clear in *Graham*, 'is relevant to the Eighth Amendment,' and so 'criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed.' " (quoting Graham v. Florida, 130 S. Ct. 2011, 2031 (2010))).

119. *See id.* at 2469.

120. *See infra* Part III.C.

121. *See infra* Part III.B.

122. *See* Craig S. Lerner, *Sentenced to Confusion:* Miller v. Alabama *and the Coming Wave of Eighth Amendment Cases*, 20 GEO. MASON L. REV. 25, 39 (2012) ("At least in some jurisdictions, a possible development from *Graham* and *Miller* is to retard, rather than spur, the movement toward a justice system more sympathetic to juveniles.").

laws to allow for *Miller*-style sentencing hearings for future juvenile defendants as well as those previously sentenced to mandatory LWOP. Such a retroactive application of *Miller* is consistent with the Constitution[123] and reflects sound public policy.

A. The Legislative Reaction

1. Post-*Miller* Legislation in the State with the Most Juvenile Lifers: Pennsylvania

Not long after the *Miller* decision came down, the Pennsylvania legislature passed a bill that explicitly disallows resentencing hearings for juveniles already serving mandatory LWOP.[124] The implications of this legislation are huge because Pennsylvania currently has 444 prisoners serving LWOP sentences for crimes committed as juveniles—the most of any state in the country.[125]

For currently pending and future juvenile sentencing hearings, the Pennsylvania bill allows the sentencing authority to choose to impose either juvenile LWOP or a term of years imprisonment, with a *minimum* term of thirty-five years for defendants aged between fifteen and eighteen who are convicted of first-degree murder.[126] Therefore, while juvenile LWOP is no longer mandatory upon conviction of first-degree murder in Pennsylvania, the sentencing authority is free to impose a large term of years sentence (say, ninety-nine years) until parole eligibility—the functional equivalent of a life sentence. In such a circumstance, the juvenile has been sentenced to die in prison before he could possibly become parole-eligible, but he has not been deemed by the sentencing authority to fall into one of the "uncommon" cases where juvenile LWOP is appropriate under *Miller*. In fact, under the Pennsylvania law, if the sentencing authority decides to impose a term of years sentence, there is no requirement for a *Miller*-style hearing whatsoever, as the requirement for particular findings only applies "[i]n determining whether to impose a

123. *See supra* Part II.

124. *See* Act of Oct. 25, 2012, Pub. L. No. 1655-204, sec. 2, § 1102.1(a), 2012 Pa. Laws __, __ (2012) (codified at 18 PA. CONS. STAT. ANN. § 1102.1(a) (West Supp. 2013)) ("A person who has been convicted *after June 24, 2012*, of a murder of the first degree . . . and who was under the age of 18 at the time of the commission of the offense shall be sentenced as follows . . . ." (emphasis added)).

125. *See* Michelle Leighton & Brian Foley, *State-by-State Legal Resource Guide*, U.S.F. SCH. OF L., http://www.usfca.edu/law/jlwop/resource_guide/ (last updated November 28, 2012).

126. *See* Act of Oct. 25, 2012, sec. 2, § 1102.1(a)(1) (codified at 18 PA. CONS. STAT. ANN. § 1102.1(a)).

sentence of life without parole."[127] Crafty Pennsylvania judges, then, are fully authorized under the new law to impose summarily a term of years sentence without hearing evidence or making findings of any age-related characteristic of the defendant, thus circumventing the Supreme Court's most fundamental demand in *Miller*.[128]

The Pennsylvania bill lists specific age-related factors to be taken into consideration during a *Miller*-style sentencing hearing only if the sentencing authority is considering imposing a sentence of juvenile LWOP.[129] Interestingly, though, the bill requires the court to simultaneously make aggravating findings of victim and community impact, including the potential "threat to the safety of the public or any individual posed by the defendant['s]" eventual release from prison.[130] Such aggravating factors are not discussed in *Miller*, which requires only that the lower courts consider mitigating factors of youth.[131]

The enacted Pennsylvania legislation certainly eliminates mandatory juvenile LWOP sentences—a clear demand of *Miller*—but the practical results of the legislation are a far cry from the goals set forth in *Miller*. Not only will nearly twenty percent of the total number of convicted juveniles serving LWOP sentences remain imprisoned in Pennsylvania without rehearing,[132] but future juveniles could be given effective life sentences without the opportunity for a *Miller*-style hearing. Therefore, while the new Pennsylvania legislation conforms the state sentencing rules to be technically in compliance with *Miller* (by eliminating mandatory LWOP sentences for juveniles), the legislation actually circumvents *Miller* and reflects the harsh juvenile sentencing culture in Pennsylvania which is sure to remain post-*Miller*. Now, the 444 juvenile LWOP prisoners in Pennsylvania will remain behind bars for life, completely unaffected by the Supreme Court's decision in *Miller*.

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127. *See id.*

128. In comparison, North Carolina's legislation mandates a *Miller*-style hearing in all cases. *See* Act of July 12, 2012, ch. 148, sec. 1, § 15A-1477(a)(2), 2012 N.C. Sess. Laws 713, 713 (codified as amended at N.C. GEN. STAT. §§ 15A-1477(a)(2), recodified at N.C. GEN. STAT. §§ 15A-1340.19B(a)(2) (Supp. 2012)) ("The hearing . . . shall be conducted by the trial judge as soon as practicable after the guilty verdict is returned.").

129. *See* Act of Oct. 25, 2012, sec. 2, § 1102.1(d)(7) (codified at 18 PA. CONS. STAT. ANN. § 1102.1(d)(7)) (listing *Miller*'s typical age-related factors including "age," "mental capacity," "maturity," "[t]he degree of criminal sophistication exhibited," and possibility of rehabilitation).

130. *Id.*

131. *See* Miller v. Alabama, 132 S. Ct. 2455, 2467 (2012).

132. *See* Leighton & Foley, *supra* note 125.

B. The Legal Reaction

1. Florida and Michigan Courts Refuse to Allow for Retroactive *Miller* Hearings

Intermediate courts of appeals in Florida and Michigan have held that *Miller* should not be applied retroactively.[133] If these decisions are upheld by higher courts, the 612 prisoners already sentenced for crimes committed as juveniles in Florida and Michigan will die in prison,[134] without an opportunity to be heard on how their particular age-related characteristics "counsel against irrevocably sentencing them to a lifetime in prison."[135] Such a result flies in the face of the Court's admonition in *Miller* that juvenile LWOP be uncommon, as the 612 prisoners in those two states alone account for almost one quarter of the currently imprisoned juvenile lifers in the country.[136]

In *Geter v. State*,[137] a panel of the Florida District Court of Appeals rejected Drewery Geter's contention that he should be resentenced in accordance with *Miller*; his mandatory LWOP conviction became final on May 12, 2010, after numerous appeals.[138] On the night before Geter's seventeenth birthday, he murdered his neighbor with a disturbing amount of violence and rage.[139] Similarly, in *People v. Carp*,[140] the Michigan Court of Appeals held that Raymond Carp was not entitled to a retroactive application of *Miller*; his sentence became final on November 20, 2006, when he was mandatorily sentenced to life without parole under Michigan law.[141]

Unlike Geter's case, though, Carp's crime was laden with indications of youth-related mitigating characteristics. Carp was fifteen years old when he acted as an accomplice to a murder that was primarily perpetrated by his twenty-two-year-old half-brother.[142] After numerous police interviews wherein Carp told many different stories about the night of the crime, Carp eventually admitted to

133. *See* Geter v. State, No. 3D12-1736, 2012 WL 4448860, at *1 (Fla. Dist. Ct. App. Sept. 27, 2012); People v. Carp, 828 N.W.2d 685 (Mich. Ct. App. 2012).

134. *See* Leighton & Foley, *supra* note 125 (stating that 266 juveniles in Florida and 346 in Michigan are serving LWOP sentences).

135. *Miller*, 132 S. Ct. at 2469.

136. *See* Leighton & Foley, *supra* note 125 (adding the totals from every state shows that there are currently 2,571 juveniles serving LWOP sentences as of this writing).

137. No. 3D12-1736, 2012 WL 4448860 (Fla. Dist. Ct. App. Sept. 27, 2012).

138. *Id.* at *1.

139. *See id.*

140. 828 N.W.2d 685 (Mich. Ct. App. 2012).

141. *See id.* at 691, 723.

142. *See id.* at 690.

"throw[ing] a mug at the victim," without "knowing whether it made contact because his eyes were closed . . . , clos[ing] the blinds and windows," and handing his half-brother a knife upon his half-brother's request.[143] Carp's half-brother proceeded to stab the victim twenty-three times.[144]

Both the Florida and Michigan courts of appeals gave similar reasoning for their decisions not to apply *Miller* retroactively. Both courts explored the constitutional issue of retroactivity,[145] and subsequently found that the rule in *Miller* was procedural and not a "watershed ruling."[146] The Florida and Michigan courts both highlighted two principal concerns about retroactivity: the expenditure of state resources and concerns about the finality of criminal cases.[147] Both courts asserted that limited state resources would make a retroactive application of *Miller* impracticable and uneconomical, as the state would have to foot the bill for the costs of new sentencing hearings.[148] Further, the courts argued that there is a legitimate interest in maintaining the finality of criminal cases, for victims of crimes and the public in general, which outweighs any benefits of resentencing.[149]

While both of these concerns are understandable and relevant, they do not outweigh the state's post-*Miller* obligation to address the diminished culpability of juvenile offenders and ensure that criminal sentences adhere to the Eighth Amendment's proportionality requirement.

It is true that states will have to take on the costs of additional resentencing hearings if *Miller* is applied retroactively. However, in

143. *Id.* at 691.

144. *See id.* at 690–91.

145. *See id.* at 704–08; *Geter*, 2012 WL 4448860, at *3–9.

146. *Carp*, 828 N.W.2d at 723; *Geter*, 2012 WL 4448860, at *8 (replacing *Teague*'s "watershed" language with similar language of "development[s] of fundamental significance").

147. *Carp*, 828 N.W.2d at 714–15; *Geter*, 2012 WL 4448860, at *4.

148. *See Carp*, 828 N.W.2d at 714–15; *Geter*, 2012 WL 4448860, at *8 ("[R]etroactive application would destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit." (citations omitted) (internal quotation marks omitted)).

149. *See Carp*, 828 N.W.2d at 714; *Geter*, 2012 WL 4448860, at *8 ("[A]pplying *Miller* retroactively would undermine the perceived and actual finality of criminal judgments and would consume immense judicial resources without any corresponding benefit to the accuracy or reliability of the [underlying criminal case]." (second alteration in original) (internal quotation marks omitted)).

the context of criminal sentencing, there are additional important costs to consider other than monetary costs:

> Although finality of criminal sentences may provide some benefits for society, finality certainly imposes costs. There are the obvious costs: first, to the prisoner who is serving more time than he or she should under the relevant sentencing laws, and second, to the state for the fiscal cost of continuing to incarcerate the prisoner. But broader questions about the legitimacy of the system are also raised when the system does not correct clear injustices that are easy to fix . . . Failing to fix these injustices undermines public confidence in the justice system, fosters a sense that the system is unfair, and can ultimately diminish the deterrent effect of the criminal law.[150]

The liberty costs of keeping a prisoner behind bars for life for a crime for which he has an inherently diminished level of culpability are immeasurable, not to mention unconstitutional under the proportionality principle of the Eighth Amendment.[151]

Furthermore, confining juveniles to life in prison precludes society from gaining any benefits from rehabilitated juvenile offenders. The *Miller* Court highlighted this potential for rehabilitation and societal contribution, indicating that "[l]ife without parole 'forswears altogether the rehabilitative ideal[ ]' [and] . . . reflects 'an irrevocable judgment about [an offender's] value and place in society,' at odds with a child's capacity for change."[152] *Miller*, *Graham*, and *Roper* together represent a fundamental belief of the Supreme Court that juvenile offenders are inherently capable of rehabilitation. Such potential for rehabilitation is completely disregarded by the Florida and Michigan courts in favor of the more abstract notion that finality in criminal cases is beneficial to society.

Miller demands recognizing that certain factors can drive children to commit crimes that they would not have committed had they been older. Concerns of state resources and sentencing finality are legitimate, but they are far outweighed by concerns of the fundamental fairness of the criminal justice system. After *Miller*, it is simply unfair to keep a juvenile imprisoned for life without taking into account his diminished culpability. Consider the case of

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150. Sarah French Russell, *Reluctance to Resentence: Courts, Congress, and Collateral Review*, 91 N.C. L. REV. 79, 87–88 (2012) (footnotes omitted).

151. See *supra*, Part I.B.

152. Miller v. Alabama, 132 S. Ct. 2455, 2465 (2012) (second alteration in original) (citation omitted) (quoting Graham v. Florida, 130 S. Ct. 2011, 2030 (2010)).

Raymond Carp.[153] Certainly his victim's family rests easier knowing that the two perpetrators are behind bars for life. However, the sentencing authority in Carp's case never considered if, as an adult, Carp would have acted differently. Would Carp have succumbed to the pressures of his older brother to hand him a knife if he had been three years older? *Miller* demands an answer to this question, but if *Carp* is upheld in Michigan, it will never be answered—in fact, the question will never even be posed.

2. Illinois Courts Hold That *Miller* Should Be Applied to Previously Sentenced Juvenile Defendants

Florida and Michigan are not the only state courts that have ruled on the retroactivity of the *Miller* holding. Two separate panels of the Illinois Appellate Court have held that *Miller* is retroactive, thus requiring the state of Illinois to take on 103 resentencing hearings in accordance with *Miller*.[154] In both cases, the courts cited the *Geter* and *Carp* decisions, yet refused to follow their lead.

The first case, *People v. Morfin*,[155] executed a *Teague* analysis and concluded that because "*Miller* mandates a sentencing range broader than that provided by statute for minors convicted of first degree murder," the *Miller* rule is substantive and therefore should be applied retroactively.[156] Similarly, in the second case, *People v. Williams*,[157] the court held that *Miller* "made a *substantial* change in the law in holding under the Eighth Amendment that the government cannot constitutionally apply a mandatory sentence of life without parole for homicides committed by juveniles."[158] Furthermore, *Williams* explicitly recognized *Miller* as a "watershed rule of criminal procedure."[159] Therefore, under a *Teague* analysis, both *Morfin* and *Williams* require *Miller* to be applied retroactively in Illinois.

Interestingly, the *Williams* court addressed the cost and finality concerns raised in *Geter* and *Carp*, and dismissed them summarily.[160] The court acknowledged that its holding will mandate over 100 resentencing hearings, but stated "[t]his is not such a great number of cases for us to conclude that it is an unreasonable burden for the

153. *Carp*, 828 N.W.2d 685.
154. Leighton & Foley, *supra* note 125.
155. 981 N.E.2d 1010 (Ill. App. Ct. 2012).
156. *Id.* at 1022.
157. 982 N.E.2d 181 (Ill. App. Ct. 2012).
158. *Id.* at 197 (emphasis added).
159. *Id.* at 198.
160. *Id.* at 197–98.

State and the courts to reopen their cases for resentencing."[161] Furthermore, the court recognized the concerns of the families of victims in having to endure an additional court proceeding.[162] However, the court found that complying with *Miller* outweighs such concerns, explaining that a new sentencing hearing requires "only one further proceeding" and "[the victims' families] will have another opportunity to make a statement as to the impact the crime has had upon them before a new sentence is given."[163] Overall, the court in *Williams* seems to take a hard and fast approach to retroactivity, flatly requiring resentencing hearings because the previous sentencing authority did not take age-related mitigating factors into account at the time of sentencing.[164] State courts in Illinois, therefore, have directly taken on the cost-benefit analysis of allowing for resentencing hearings under *Miller* and unwaveringly determined that the proportionality concerns of the Eighth Amendment outweigh the "costs" incurred by the state in resentencing.

3. Other Reactions to the *Miller* Decision: Iowa's Governor Pushes Back

Instead of allowing the legislature to enact new laws in compliance with *Miller*, or permitting the courts to interpret the constitutionality of the Iowa state sentencing laws, Iowa Governor Terry Branstad decided to take *Miller* retroactivity matters into his own hands. On July 16, 2012, three weeks after the *Miller* decision was announced, Governor Branstad commuted the sentences of all thirty-eight previously sentenced juveniles serving LWOP in Iowa.[165] The catch, though, is that those juvenile LWOP sentences were reduced to life *with* the possibility of parole, but only after sixty years imprisonment.[166] Therefore, a seventeen-year-old who was previously sentenced to juvenile LWOP in Iowa will not be eligible for parole until he is seventy-seven years old and will not be given an opportunity for resentencing. In a press release explaining his decision, the Governor stated that "[j]ustice is a balance and these

161. *Id.* at 198.
162. *Id.* at 198–99.
163. *Id.* at 199.
164. *Id.* at 198 ("[T]he sentencing court did not graduate and proportion punishment for [the] defendant's crime considering his status as a juvenile at the time of the offense. This violates the eighth amendment's prohibition on cruel and unusual punishment.").
165. Press Release, Office of the Governor of Iowa Terry Branstad, Branstad Moves to Prevent the Release of Dangerous Murderers in Light of Recent U.S. Supreme Court Decision (July 16, 2012).
166. *Id.*

commutations ensure that justice is balanced with punishment for those vicious crimes."[167] The press release further purports that the commutation "gives the opportunity for parole in compliance with the recent Supreme Court decision [in *Miller*]."[168]

Despite the governor's claim that his decision serves "justice," it represents a complete perversion of the rule of *Miller* and an injustice to the thirty-eight juveniles serving LWOP in Iowa.

Allowing convicted first-degree murderers the opportunity to seek parole is undoubtedly a bitter pill to swallow for all states. Resentencing hearings certainly come with costs, both monetary and emotional. Critics of *Miller*'s retroactivity claim that new *Miller* hearings for already convicted defendants would be heartbreaking for victims' families and burdensome on the finality concerns of the justice system.[169] As discussed previously, these propositions are surely accurate.[170] But, as a Connecticut appellate judge bluntly pointed out, while retroactivity comes with heavy burdens to both the state and to victims, after *Miller*, "that is how it should be."[171] *Miller* demands that the justice system takes a second look at closed cases through a new lens of diminished juvenile culpability. By its holding in *Miller*, the Supreme Court has forced the nation to reevaluate its perception of juveniles in the justice system, and reexamine the culpability of juveniles who commit even the most horrible crimes. This landmark in the evolution of our juvenile justice system should not be confined by arbitrary lines of conviction dates.

C. *North Carolina Legislates for Retroactivity*

Less than three weeks after the *Miller* decision, North Carolina's General Assembly approved a bill aptly titled "An Act to Amend the State Sentencing Laws to Comply with the Supreme Court Decision in *Miller v. Alabama*" (the "Act").[172] Governor Perdue signed the bill into law on July 12, 2012.[173] Prior to this Act, North Carolina was one

167. *Id.*

168. *Id.*

169. *See* Brief for National Organization of Victims of Juvenile Lifers as Amicus Curiae Supporting Respondents at 22–23, Miller v. Alabama, 132 S. Ct. 2455 (2012) (Nos. 10-9646, 10-9647).

170. *See supra* Part III.B.1.

171. State v. Riley, No. 33506, 2013 Conn. App. LEXIS 9, at *65 (Conn. App. Ct. Jan. 1, 2013) (Borden, J., dissenting).

172. *See* Act of July 12, 2012, ch. 148, sec. 1, 2012 N.C. Sess. Laws 713, 713–14 (codified as amended at N.C. GEN. STAT. §§ 15A-1476 to 1479, recodified at N.C. GEN. STAT. §§ 15A-1340.19A to 19D (Supp. 2012)).

173. *Id.*

of the twenty-six states that imposed mandatory LWOP sentences on juveniles convicted of first-degree murder in adult court.[174] The Act eliminates mandatory LWOP for juvenile offenders and replaces it with a discretionary sentence of life imprisonment *with* the possibility of parole. This "life imprisonment" with the possibility of parole sentence is mandatory for juveniles convicted of first-degree murder under a felony-murder theory, and optional for juveniles convicted of first-degree murder under any other theory.[175] The Act defines "life imprisonment" as a minimum of twenty-five years prior to becoming eligible for parole.[176] The Act further articulates that a *Miller*-style hearing shall be held prior to sentencing for any juvenile convicted of first-degree murder and lists a number of potentially mitigating circumstances which the defense may submit to the court, mirroring many of the age-related factors set forth in the *Miller* decision.[177]

Finally, the Act treats *Miller* as applying retroactively, and explicitly allows for resentencing hearings for juvenile defendants who have already been sentenced to mandatory LWOP.[178] The language of the Act leaves no doubt that the legislature intended that each already-convicted juvenile defendant be allowed to have a resentencing hearing wherein the *Miller* factors of youth could be considered, and his or her sentence potentially reduced to life with the possibility of parole.[179]

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174. *See supra* note 79 and accompanying text.

175. *See* Act of July 12, 2012, sec. 1, § 15A-1477(a), 2012 N.C. Sess. Laws at 713 (codified as amended at N.C. GEN. STAT. § 15A-1477(a), recodified at N.C. GEN. STAT. § 15A-1340.19B(a)).

176. *See id.* at § 15A-1476, 2012 N.C. Sess. Laws at 713 (codified as amended at N.C. GEN. STAT. § 15A-1476, recodified at N.C. GEN. STAT. § 15A-1340.19A).

177. *See id.* at § 15A-1477(c), 2012 N.C. Sess. Laws at 713 (codified as amended at N.C. GEN. STAT. § 15A-1477(c), recodified at N.C. GEN. STAT. § 15A-1340.19B(c)) ("The defendant or the defendant's counsel may submit mitigating circumstances to the court, including, but not limited to the following factors: (1) Age at the time of the offense. (2) Immaturity. (3) Ability to appreciate the risks and consequences of the conduct. (4) Intellectual capacity. (5) Prior record. (6) Mental health. (7) Familial or peer pressure exerted upon the defendant. (8) Likelihood that the defendant would benefit from rehabilitation in confinement. (9) Any other mitigating factor or circumstance.").

178. *See id.* at § 15A-1478(d), 2012 N.C. Sess. Laws at 714 (codified as amended at N.C. GEN. STAT. § 15A-1478(d), recodified at N.C. GEN. STAT. § 15A-1340.19C(d)) ("All motions for appropriate relief filed in superior court seeking resentencing under the provisions of this Article *shall*, when filed, be referred to the senior resident superior court judge, who *shall* assign the motion as provided by this section for review and administrative action . . . .") (emphasis added).

179. *See id.* at § 15A-1476 to 1479, 2012 N.C. Sess. Laws at 713–14 (codified as amended at N.C. GEN. STAT. § 15A-1476 to 1479, recodified at N.C. GEN. STAT. § 15A-1340.19A to 19D).

As compared to the reactions of the other mandatory LWOP jurisdictions, the bill passed by the North Carolina legislature is truly groundbreaking.[180] Practically, as will be discussed in Part IV, the result of the Act will be resentencing hearings for the approximately forty-four North Carolina prisoners serving mandatory LWOP sentences for crimes committed before their eighteenth birthdays.[181] However, the North Carolina Act is most consistent with the foundational principle of *Miller*. The Supreme Court demands that children must be treated differently from adults when facing the state's harshest punishments, and the sentencing authority must take into account "how those differences counsel *against* irrevocably sentencing them to a lifetime in prison."[182] At the time of their sentencing, the forty-four juvenile LWOP prisoners in North Carolina were treated exactly the same as their adult first-degree murder counterparts, and their mandatory life sentences allowed for absolutely no mitigating factors to be considered. Now, in North Carolina, all forty-four of those prisoners will have the opportunity to have their sentences reduced to life with the possibility of parole if the mitigating factors of their youth are found to be compelling by the sentencing authority.

IV. THE PRACTICAL EFFECTS OF RETROACTIVITY: A NORTH CAROLINA STUDY

In the weeks following the *Miller* decision, the North Carolina legislature enacted arguably the most comprehensive sentencing reforms of all the mandatory LWOP states in reaction to the Supreme Court's decision in *Miller*.[183] However, as discussed previously, many other states are not following its lead.[184] This Part analyzes the practical effects of retroactivity in North Carolina and demonstrates that North Carolina's allowance of *Miller* retroactivity is most consistent with the newly established requirements of the Eighth

180. This is especially true given the fact that North Carolina is not one of the most juvenile-friendly states in the nation. For a thorough analysis of North Carolina's reluctance to reform its unique juvenile justice system, see generally Tamar R. Birckhead, *North Carolina, Juvenile Court Jurisdiction, and the Resistance to Reform*, 86 N.C. L. REV. 1443, 1445 (2008) ("North Carolina is the only state in the United States that treats all sixteen- and seventeen-year-olds as adults when they are charged with criminal offenses and then denies them the ability to appeal for return to the juvenile system.").

181. *See* Leighton & Foley, *supra* note 125.

182. Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012) (emphasis added).

183. *See* Act of July 12, 2012, sec. 1.

184. *See supra* Part III.

Amendment in terms of both criminal procedural process and constitutional sentencing results.

Currently, there are approximately forty-four prisoners in North Carolina serving LWOP sentences for crimes committed before their eighteenth birthdays.[185] Under North Carolina's new law, each prisoner whose sentence was mandatory will be entitled to be heard on a motion for appropriate relief to have the *Miller* factors applied and considered during a new sentencing hearing, wherein the presiding judge must keep in mind the defendant's mitigating age-related characteristics.[186] This Part analyzes four cases of North Carolina juveniles sentenced to mandatory LWOP prior to the *Miller* decision. The facts of the four cases represent a broad spectrum of the presence of age-related characteristics in the commission of the crime. This Part discusses the likelihood of reduced sentences in each case and thus illustrates the practical effects of retroactivity in a state where *Miller*-style resentencing hearings will inevitably occur.

*A. North Carolina's Juvenile LWOP Jurisprudence Pre-*Miller

Before *Miller*, two cases were controlling in North Carolina on the issue of the constitutionality of the imposition of mandatory juvenile LWOP: *State v. Lee*[187] and *State v. Stinnett*.[188] In both cases, teenagers were convicted of first-degree murder, sentenced to mandatory LWOP, and had their sentences upheld by the court of appeals despite claims that such a mandatory sentencing scheme violated the cruel and unusual punishment clause of the Eighth Amendment.[189]

In *Lee*, a fourteen-year-old defendant and his friend murdered a mentally disabled man whom they had met at a party that night.[190] Evidence at trial showed that the victim's apartment was "ransacked" as well.[191] Lee was convicted of "first-degree murder based on [both] premeditation and deliberation and felony murder," two alternative theories of first-degree murder under North Carolina law.[192] On appeal, the *Lee* court stated that the mandatory life sentence "is

185. Leighton & Foley, *supra* note 125.

186. *See* Act of July 12, 2012, sec. 1.

187. 148 N.C. App. 518, 558 S.E.2d 883 (2002).

188. 129 N.C. App. 192, 497 S.E.2d 696 (1998).

189. *See Lee*, 148 N.C. App. at 525, 558 S.E.2d at 888; *Stinnett*, 129 N.C. App. at 200, 497 S.E.2d at 701.

190. *See Lee*, 148 N.C. App. at 519–20, 558 S.E.2d at 885.

191. *Id.* at 520, 558 S.E.2d at 885.

192. *Id.*

severe but it is not cruel or unusual in the constitutional sense."[193] Similarly, in *Stinnett*, the evidence at trial tended to show that after his mother sent him away to live with his absentee father, fifteen-year-old Stinnett shot his father to death.[194] The jury convicted Stinnett of first-degree murder.[195] On appeal, Stinnett argued that the North Carolina mandatory life imprisonment law, coupled with a law mandating transfer of juveniles charged with first-degree murder to adult court, violated the Eighth Amendment.[196] In fact, Stinnett specifically argued that "construing [the two statutes] together ... does not allow the judge or fact finder an opportunity to consider defendant's age or rehabilitative potential."[197] However, the court of appeals rejected this contention, insisting that "when a punishment does not exceed the limits fixed by statute, the punishment cannot be classified as cruel and unusual in a constitutional sense."[198]

The *Miller* decision, coupled with the new North Carolina juvenile sentencing law, has rendered this line of juvenile LWOP cases invalid. Mandatory LWOP sentences for juveniles are now unconstitutional, and in North Carolina, any defendant previously sentenced to mandatory LWOP will be entitled to a resentencing hearing.[199] However, it remains to be seen how liberally North Carolina courts will apply *Miller* and whether the resentencing hearings will actually amount to reduced sentences for already convicted juveniles serving LWOP.

B. Felony-Murder Cases

Under the new North Carolina law, if the juvenile defendant was convicted of first degree murder *solely* on the basis of the felony murder rule, his sentence *shall* be reduced to life imprisonment with parole.[200] The law further defines "life imprisonment with parole" as "a minimum of 25 years imprisonment."[201] This approach is most

193. *Id.* at 525, 558 S.E.2d at 888 (internal quotation marks omitted) (citing State v. Green, 348 N.C. 588, 612, 502 S.E.2d 819, 834 (1998).

194. *See Stinett*, 129 N.C. App. at 193–95, 497 S.E.2d at 697–98.

195. *See id.* at 195–96, 497 S.E.2d at 699.

196. See *id.* at 199, 497 S.E.2d at 701.

197. *Id.*

198. *Id.* at 200, 497 S.E.2d at 701.

199. *See* N.C. GEN. STAT. § 15A-1340.19B(a)(2) (Supp. 2012).

200. *See id.* § 15A-1340.19B. This provision of the North Carolina law is consistent with the concurring opinion in *Miller*, written by Justice Breyer, which points out that the type of "transferred intent" which is present in felony murder cases "is not sufficient to satisfy the intent to murder that could subject a juvenile to a sentence of life without parole." Miller v. Alabama, 132 S. Ct. 2455, 2476 (2012) (Breyer, J., concurring).

201. N.C. GEN. STAT. § 15A-1340.19A.

consistent with the Eighth Amendment's proportionality requirement and the *Miller* holding. A defendant can be convicted of murder under a felony-murder theory without having any intent to kill, as opposed to the alternative first-degree murder conviction that requires premeditation and deliberation.[202] Furthermore, based on the sociological and psychological differences between juveniles and adults highlighted in *Miller*, juveniles are more susceptible to be pressured into situations that ultimately culminate in a felony-murder conviction.[203]

The case of Matthew Lawrence Taylor is an informative example of the effect of the new North Carolina law on convicted juvenile felony-murderers. Taylor was sixteen years old when he participated in a murder in Durham in 2004.[204] He was convicted of first-degree murder in Durham County Superior Court in July of 2005, under a felony-murder theory for the underlying felony of robbery.[205] As in Jackson's case, the evidence presented at trial showed that the gunshots to the victim's head were not delivered by Taylor, but rather by one of the older men with whom Taylor associated.[206] The evidence showed that Taylor was present for the murder and helped his friends dispose of the victim's body, but both Taylor and another witness indicated that Taylor's twenty-one-year-old friend actually shot the victim.[207] Based on his conviction of first-degree murder, Taylor was sentenced to mandatory LWOP in accordance with the prior North Carolina sentencing laws.[208] On appeal, Taylor argued that his LWOP sentence for a crime committed at age sixteen constituted cruel and unusual punishment, but the court of appeals dismissed this argument summarily.[209]

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202. The intent element for felony murder relates to the intent to commit the underlying felony. *See id.* § 14-17.

203. *See* Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 NOTRE DAME L. REV. 89, 133 (2009) (arguing that juvenile defendants should be subject to a different mental state requirement in criminal proceedings because "minors are unable (or less able) to form 'specific intent,' [and] do not consider future consequences in the manner contemplated by the felony murder doctrine").

204. *See* State v. Taylor, 178 N.C. App. 395, 415, 632 S.E.2d 218, 231 (2006).

205. *See id.* at 399, 632 S.E.2d at 222.

206. *See id.* ("Defendant was convicted of first-degree murder under the Felony Murder Rule rather than on the basis of malice, premeditation, and deliberation.").

207. *See id.* at 407, 632 S.E.2d at 226–27.

208. *See id.* at 399–400, 632 S.E.2d at 222.

209. *See id.* at 416, 632 S.E.2d at 232 ("Defendant has failed to show his life in prison without parole sentence rises to the level of cruel and unusual punishment.").

Now, the new law will automatically reduce Taylor's LWOP sentence and he will be eligible for parole at the age of forty-one.[210] The facts of Taylor's case and the circumstances surrounding his offense seem to be laden with *Miller* factors, underscoring the appropriateness of the reduced sentence. First, Taylor had a relatively minor role in the homicide, and was likely influenced by the pressure of his older peers to participate in the crime.[211] Second, as compared to the other juvenile defendants, Taylor has a higher potential for rehabilitation. Taylor had no prior record at the time of the murder,[212] and would be far-removed from the negative influences of his peers after serving twenty-five years in prison.

Given the Supreme Court's admonition in *Miller*, Taylor, and all juveniles previously convicted of first-degree murder solely under a felony-murder theory, should not be considered one of those "uncommon" juveniles deserving of a sentence of LWOP. A retroactive application of *Miller* is required to rectify unconstitutional, disproportionate sentences such as the one imposed on Matthew Taylor.

C. Premeditation and Deliberation Cases

Unlike Taylor's case, the following three cases represent instances in which the defendants, despite their youth, were convicted of premeditated and deliberate first-degree murder. Upon resentencing, North Carolina courts will likely view these cases in a different light than the felony-murder defendants, and be more hesitant to resentence based on the jury's finding of an intent to kill. According to the new law, courts must hear and consider mitigating factors of youth for each previously sentenced defendant, but the court will not be required to reduce any defendant's sentence if he was convicted based on premeditation and deliberation.[213] Such discretion in resentencing is consistent with the holding in *Miller*, as each defendant's youth will be considered in the context of his crime,

210. Since Taylor was sixteen at the time of his crime, and the North Carolina law allows for parole eligibility after twenty-five years imprisonment for those defendants sentenced solely under felony-murder theory, Taylor will be eligible for parole at age forty-one. *See* N.C. GEN. STAT. § 15A-1340.19A (Supp. 2012).

211. Taylor was the youngest member of the trio involved in the murder. Brief for Appellant at 43, State v. Taylor, 178 N.C. App. 395, 632 S.E.2d 218 (2006) (No. COA05-1580).

212. *See id.* at 41.

213. *See* Act of July 12, 2012, ch. 148, sec. 1, 2012 N.C. Sess. Laws 713, 713–14 (codified as amended at N.C. GEN. STAT. §§ 15A-1476 to 1479, recodified at N.C. GEN. STAT. §§ 15A-1340.19A to 19D (Supp. 2012)).

and he will be sentenced according to his level of culpability in light of his individual mitigating factors.[214]

1. Harry James

Harry James was sixteen years old when he committed murder.[215] He was later convicted in Mecklenburg County of first-degree premeditated murder under an acting-in-concert theory, as well as felony-murder.[216] He was sentenced to mandatory LWOP in June 2010.[217] On the night of the murder, James accompanied his twenty-one-year-old friend to the home of James's church-sponsored mentor, where they intended to commit a robbery.[218] James's friend, Morene, told James that all he needed to do was convince the victim to open the door, and he would do the rest.[219] The robbery escalated to murder, and the evidence at trial showed that James assisted his older friend by searching the house for valuables, writing down the victim's ATM pin number, retrieving pillows that Morene ultimately used to smother the victim, and driving the getaway car.[220] James also suggested to Morene at least once that they should leave the house and not continue with the murder.[221]

The facts of James's case indicate the presence of many potential *Miller* mitigating factors of youth. James arguably had a low extent of participation in the murder, or at least in the planning of such,[222] and will likely present evidence that he experienced a high degree of peer pressure from his older friend Morene.[223] In fact, James testified that

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214. *See* Miller v. Alabama, 132 S. Ct. 2455, 2468 (2012).

215. State v. James, No. COA11-244, 2011 WL 4917045, at *1 (N.C. Ct. App. Oct. 18, 2011).

216. *See id.* at *3. In North Carolina, under the acting-in-concert theory:

> [I]f two persons join . . . to commit a crime, each of them . . . is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose.

State v. Barnes, 345 N.C. 184, 231, 481 S.E.2d 44, 71 (1997) (first alteration in original) (quoting State v. Erlewine, 328 N.C. 626, 637, 403 S.E.2d 280, 285 (1991)). Therefore, the court of appeals found that James "did not need the specific intent to kill Jenkins." *James*, 2011 WL 4917045, at *5.

217. *See James*, 2011 WL 4917045, at *3.

218. *See id.*

219. *See id.*

220. *See id.* at *1–2.

221. *See id.* at *1.

222. The evidence showed that James was not the killer; nevertheless, the court found that James' specific intent to kill was not required based on the acting in concert theory. *See id.* at *5.

223. *See id.* at *1.

Morene threatened to hurt his family if he refused to help with the robbery.[224] Additionally, the possibility of rehabilitation, which the *Miller* Court so strongly emphasized, is a cogent factor for James, as he had no prior arrests or convictions at the time of the murder.[225] If the resentencing authority in James's case properly accounts for the *Miller* mitigating factors of youth, it is likely the authority will reduce James's sentence to a possibility of parole after a term of years. The facts of the *James* case highlight the types of crimes for which *Miller* sought to reduce mandatory life sentences—those characterized by peer pressure, bad decision-making, and particularly for James, an "[in]ability to extricate [himself] from horrific, crime-producing settings."[226]

2. Jhalmar Medina

Jhalmar Medina was sixteen years old when he shot one of his friends eight times.[227] He was convicted of premeditated first-degree murder in 2004, and sentenced to mandatory LWOP.[228] The evidence presented at trial showed that Medina was angry with the victim because the victim had not returned some of Medina's belongings which he stored at the victim's house.[229] Medina hid in the woods, waiting for the victim to walk past, as he did nightly, and ambushed the victim.[230]

Although there was no testimony at trial as to Medina's family life and upbringing, his actions surrounding the murder indicate a lessened presence of *Miller* mitigating qualities of youth, and a heightened degree of culpability for the crime. Unlike in James's and Taylor's cases, Medina was the killer, and the mastermind of the murder.[231] Additionally, Medina's potential for rehabilitation is lessened, as evidence at trial indicated that Medina had been in and out of prison prior to the murder.[232] Medina also failed to return from a lunch break during his murder trial, and asked his girlfriend to run

224. *See id.*
225. *See* Brief for Defendant-Appellant at 18, *James*, 2011 WL 4917045 (No. COA11-244).
226. Miller v. Alabama, 132 S. Ct. 2455, 2464 (2012).
227. *See* State v. Medina, 174 N.C. App. 723, 725, 727, 622 S.E.2d 176, 177, 179 (2005).
228. *See id.* at 724, 727, 622 S.E.2d at 177–78.
229. *See id.* at 726–27, 622 S.E.2d at 178.
230. *See id.* at 725, 622 S.E.2d at 177.
231. *See id.*
232. *See id.* at 732, 622 S.E.2d at 181.

away with him,[233] demonstrating a lack of willingness to participate in the rehabilitative process and a general continued disregard for the law. He was apprehended the next day.[234] Based on the lessened presence of mitigating factors of youth for Medina, it is more likely that the resentencing authority will uphold his LWOP sentence. However, such a sentence would still be consistent with *Miller*. The *Miller* Court was careful to allow juvenile LWOP under certain, albeit uncommon, circumstances.[235] Given the nature of Medina's crime and his malicious actions following the crime, his could be an uncommon case where juvenile LWOP is appropriate.

3. Laurence Lovette

In 2008, the University of North Carolina Student Body President, Eve Carson, was brutally murdered.[236] One of her convicted murderers, Laurence Lovette, was seventeen years old at the time of the murder.[237] The evidence at trial showed that Lovette and his older friend, twenty-one-year-old Demario Atwater, kidnapped Carson, drove her to multiple ATMs to withdraw cash, then shot her multiple times.[238] Lovette delivered five shots to Carson's body, which were not immediately fatal, then Atwater delivered the fatal shot to Carson's head.[239] Lovette was convicted of the first-degree murder of Carson in December, 2011,[240] and was sentenced to mandatory LWOP.[241] Subsequently, Lovette was granted a new sentencing hearing by the North Carolina Court of Appeals in accordance with *Miller* and the new North Carolina juvenile sentencing law.[242]

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233. *See* Brief for Defendant-Appellant at 11, *Medina*, 174 N.C. App. 723, 622 S.E.2d 176 (No. COA 05-216).

234. *See id.*

235. *See* Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012).

236. *See* State v. Lovette, __ N.C. App. __, __, 737 S.E.2d 432, 434 (2013).

237. *See id.* at __, 737 S.E.2d at 441.

238. *See* Brief for the State at 13–14, *Lovette*, __, N.C. App. __, 737 S.E.2d 442 (No. COA 12-794).

239. *See id.* at 14.

240. *See Lovette*, __ N.C. App at __, 737 S.E.2d at 434.

241. *See id.* at __, 737 S.E.2d at 436.

242. *See id.* at __, 737 S.E.2d at 441–42 ("Here, as conceded by the State, the Act applies to Defendant, who was seventeen years old at the time of Eve Carson's murder . . . . Accordingly, we must vacate Defendant's sentence of life imprisonment without parole and remand to the trial court for resentencing as provided in the Act."); *see also* Chelsey Delaney, *Carson's Killer to Get New Sentence*, DAILY TAR HEEL (Chapel Hill, NC), Feb. 6, 2013, at 1 (discussing the implications of the *Miller* decision on Lovette's conviction as a minor).

Lovette's resentencing hearing was held in June of 2013, and heard by the same judge who sentenced him to LWOP just eighteen months prior.[243] During the hearing, Lovette presented one witness—a psychologist—in an attempt to prove that he should be granted the opportunity for eventual parole.[244] The psychologist testified that he had originally found Lovette to be cold.[245] He believed Lovette may not be so "irretrievably corrupted" as to preclude rehabilitation in prison.[246] At the same time, however, the psychologist conceded there was also a possibility that Lovette would not improve while in prison.[247]

Lovette was unable to take advantage of many of the *Miller* mitigating factors during his resentencing hearing. First, the evidence at trial showed that he had a high extent of participation in the kidnapping and murder of Carson. Lovette drove Carson's car to the ATM while she was held hostage in the back seat and later shot her five times.[248] Lovette also participated in covering up the crime after the fact.[249] Second, Lovette presented a weak case of potential for rehabilitation. He had an extensive criminal history prior to Carson's murder, and even has another pending, unrelated murder charge.[250] Additionally, Lovette displayed absolutely no remorse at his resentencing hearing, stating that "[n]obody's perfect" and "I'm not the monster y'all made me out to be."[251]

The prosecutor in Lovette's case successfully argued that, despite his age at the time of the murder, Lovette's crime was deserving of the punishment of life without parole. Quoting language directly from *Miller*, the prosecutor insisted "Laurence Lovette is the uncommon case. He's a predator. He was a predator on March 5, 2008 (when Carson was killed). He's a predator today. He will be a predator until

243. *See* Anne Blythe, *Judge Again Sentences Laurence Lovette to Life Without Parole for Murdering Eve Carson*, NEWS & OBSERVER (Raleigh, NC), June 3, 2013, http://www.newsobserver.com/2013/06/03/2936604/jude-again-sentences-laurence.html.

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *See* Brief for the State at 13–14, *Lovette*, __, N.C. App. __, 737 S.E.2d 442 (No. COA12-794).

249. *See id.* at 12 (explaining that the defendant broke the handgun he used on Carson into many pieces, and disposed of the pieces in various locations throughout Durham, North Carolina).

250. Lovette was on probation at the time of Carson's murder, and has been indicted for the robbery and murder of another college-aged student. *See* Joseph Neff, *Court System Failed to Curb Lovette*, NEWS & OBSERVER (Raleigh, N.C.), Apr. 4, 2008, at A1.

251. *See* Blythe, *supra* note 243.

the end of his life."[252] In his discretion, the judge upheld Lovette's LWOP sentence.[253]

The discretion to make the choice that the judge in Lovette's case made—to uphold a juvenile LWOP sentence—is exactly what the *Miller* Court intended. Lovette's mitigating factors of youth were considered, yet found to be outweighed by the nature of the crime and his involvement in the crime. This balancing act is the essence of the *Miller* decision, and goes to the heart of the Eighth Amendment's proportionality demand. Thus, the North Carolina legislature has created the framework for cases to be reevaluated in accordance with *Miller*, and the outcome of the Lovette case demonstrates that the process is working.

D. Retroactivity in North Carolina

North Carolina's retroactive application of *Miller* is most consistent with the constitutional demands of the Supreme Court. The aforementioned potential changes in each defendant's sentence reflect the defendant's degree of culpability, in light of his age-related characteristics. Without a retroactive application of *Miller* in North Carolina, juvenile defendants like Matthew Taylor would continue to serve the same life-long sentence as adults, without ever having the opportunity to present mitigating factors of youth. North Carolina's retroactivity approach should act as a model for other states in their attempts to comply with the demands of *Miller*.

CONCLUSION

Although the Supreme Court left many questions unanswered in *Miller*, it clearly answered one question that is undoubtedly on the minds of the 2,500 juveniles currently serving LWOP in the United States. To those minors who were previously sentenced to die in prison, the Court said loudly and clearly—age matters. Age did matter at the time of the offense, and it does matter now, as the lower courts set out to decide each defendant's level of culpability in accordance with the Eighth Amendment. Although *Miller* left the retroactivity issue unresolved, there are both constitutional and policy reasons for applying the decision retroactively. North Carolina should be a model for other states, as its courts dutifully abide by *Miller* under the new North Carolina law, and reopen closed cases in an

252. *Id.*
253. *Id.*

attempt to balance old crimes with new, constitutionally appropriate punishments.

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