

JUVENILE LIFE WITHOUT PAROLE AFTER *MILLER v.* *ALABAMA*

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Preface

“Josh’s actions when he was an underage teen are, as he described them himself, ‘inexcusable,’ but that doesn’t mean ‘unforgivable.’ . . . The reason that the law protects disclosure of many actions on the part of a minor is that the society has traditionally understood something that today’s blood-thirsty media does not understand—that being a minor means that one’s judgment is not mature.”

-- Gov. Mike Huckabee

“[A]s any parent knows . . . [a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.”

-- Justice Anthony Kennedy

Across the country, we are beginning to turn the page on juvenile justice policies that are out of step with science, medicine, and common sense. They were informed by the popular myth of the juvenile superpredator. The prophesied generation of superpredators has never materialized, and the promised benefits of criminalizing childhood never arrived. The policies the myth spawned, however, remain.

The results of these policies have been troubling. They created a straight line from poorly funded schools to juvenile hall and on to the institutions of adult mass incarceration. Our nation’s least-advantaged children, the children of poverty, mental illness, and historically discriminated against groups, have fared the worst under these policies. Children of color have been disproportionately adjudicated as delinquents and institutionalized while their peers were far more frequently allowed to work things out without involving courts and jails. We stripped courts and prosecutors of the discretion required to provide treatment tailored to juveniles’ individual needs, blinding our institutions to the reality that children are fundamentally different than adults. And we have sentenced thousands of our nation’s youth to die in prison for crimes they committed before they were old enough to vote.

The time for change has come. Courts and legislatures are rejecting the most extreme policies that were the product of this era. The use of life without parole sentences for children is waning. Solitary confinement for children is ending. Legislators are promulgating laws permitting courts and prosecutors to treat children differently than adults. And courts are now being required to exercise discretion in light of the unique aspects of the individual child before imposing the most severe sentences authorized for juveniles.

This report focuses on this last development. The report catalogues how U.S. jurisdictions have responded to the Supreme Court’s mandate to provide individualized sentencing of juveniles before sentencing them to life without possibility of parole. Even

as we developed this report, states abandoned the practice of sentencing children to die in prison. We hope that the applicability of this report to juvenile life without parole sentencing will continue to decrease as juvenile life without parole sentences become exceedingly rare.

However, we have focused on this mandate because it is premised on the need for individualized consideration at sentencing. We are each more than the worst thing we have ever done, a reality particularly salient for impetuous youth. When sentencing judges are able to consider a juvenile for who that person is as a unique individual and are able to tailor treatment accordingly, the mythical superpredator disappears, and a juvenile justice system very different than the one we currently have will emerge.

Thus, it is our hope that this report will provide assistance to practitioners as they marshal arguments that will require sentencing judges to view juveniles as individuals. The report will be particularly useful for practitioners who represent children facing the harshest sentences authorized by law. However, we hope that providing a snapshot of the fundamental changes currently underway in juvenile justice will illumine the path forward to a system that recognizes the basic humanity present in all of us.

If you have updates to any state's law and practices on juvenile life without parole, please do not hesitate to contact us via e-mail: miller@phillipsblack.org.

Introduction

The last ten years have brought significant changes in the Supreme Court's Eighth Amendment jurisprudence with regard to juveniles. The Eighth Amendment's prohibition on cruel and unusual punishment is measured against the "evolving standards of decency that mark the progress of a maturing society" by assessing whether there is a "national consensus" for or against a certain punishment. *Trop v. Dulles*, 356 U.S. 86, 101 (1958); *Atkins v. Virginia*, 536 U.S. 304, 314 (2002). In 2005, the Court barred death sentences for crimes occurring prior to the defendant's eighteenth birthday. *See Roper v. Simmons*, 543 U.S. 551, 578 (2005). In 2010, the Court held that sentencing juvenile offenders to life without parole (JLWOP) for non-homicide offenses was out of step with the national consensus on juvenile justice and barred by the Eighth Amendment. *See Graham v. Florida*, 560 U.S. 48, 82 (2010). Finally, in 2012, the Court required individualized consideration of the mitigating features of youth before exercising discretion in sentencing juveniles to die in prison. *See Miller v. Alabama*, 132 S.Ct. 2455, 2460 (2012).

In *Miller*, the Court concluded that imposing mandatory JLWOP sentences "contravenes *Graham's* (and also *Roper's*) foundational principle; that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." 132 S.Ct. at 2466. The *Miller* majority concluded that JLWOP sentencing proceedings must therefore include consideration of a child's age and "its hallmark features" – namely, "immaturity, impetuosity, and failure to appreciate risks and consequences." *Id.* at 2468. The sentencing body should also take into account the defendant's "family and home environment," the "circumstances of the homicide offense, including the extent of [the defendant's] participation," and the impact of "familial and peer pressures." *Id.* Finally, the sentencer should take into account a minor's "inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys," and the compelling "possibility of rehabilitation" for someone sentenced so young. *Id.*

The Court stressed that even discretionary JLWOP should be rare. "Given all that we have said in *Roper*, *Graham*, and this decision about children's diminished culpability, and heightened capacity for change, we think the appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Id.* at 2469.

While *Miller* limited the use of JLWOP, the United States remains among a minority of nations that continues to sentence juveniles as young as thirteen to die in prison. Currently, there are over 2,700 juveniles serving such sentences in the United States. However, the vast majority of these sentences are being served in only five states: Pennsylvania, Michigan, Florida, California, and Louisiana.¹

¹ See The Sentencing Project, *Juvenile Life Without Parole: An Overview* (2015) available at http://sentencingproject.org/doc/publications/jj_Juvenile_Life_Without_Parole.pdf.

At the time of *Miller*, twenty-nine jurisdictions authorized mandatory JLWOP, leaving fifteen jurisdictions that allowed for discretionary JLWOP, and eight jurisdictions that had no form of JLWOP at the time of *Miller*. *Id.* at 2471.

Far reaching changes followed the Court's decision in *Miller*, both in the courts and legislatures. Since *Miller*, eight states – Connecticut, Hawaii, Massachusetts, Nevada, Texas, West Virginia, Wyoming, and Vermont – have abolished JLWOP entirely. *See*, H.B. 4210, 81st Leg., 2d Sess. (W. Va. 2014); S.B. 138, 62d Leg. (Wyo. 2013); H.B. 2116, 27th Leg. (Haw. 2014); S.B. 1083, 84th Leg. (Tex. 2015); Mass. Gen. Laws Ann. Ch. 265, § 2 (2015); H. 62, 73rd Sess. (2015), *enacting* Vt. Stat. Ann. 13, § 7045 (2015); A.B. 267, 78th Reg. Sess. (Nev. 2015). Additionally, Delaware's legislative response to *Miller* effectively abolishes JLWOP because it allows for judicial sentencing review in every case, meaning there is *always* a possibility of release. S.B. 9, 147th Gen. Assemb., Reg. Sess. (Del. 2013). Two states – California and Florida – have since enacted bills that allow for judicial sentencing review in nearly all cases of JLWOP, with few narrow exceptions. Cal. Pen. Code § 1170(d)(2); Fla. Stat. §§ 775.081(1)(b); 921.1402. Three states – North Carolina, Pennsylvania, and Washington – have since eliminated JLWOP for a major class of juveniles. N.C. Gen. Stat. §§ 15A-1340.19A, 15A-1340.19B (felony murder); 18 Pa. C.S.A. § 1102.1 (under age fifteen at time of offense); Wash. Rev. Code § 10.95.030 (3)(a)(1) (2015) (under age sixteen at time of offense). Other states have significantly narrowed its use, eliminating mandatory JLWOP and/or requiring the sentencer to consider the unique attributes of youth before imposing JLWOP. *See, e.g.*, Mich. Comp. Laws § 769.25(6) (2014) (“the trial court shall consider the factors listed in *Miller v. Alabama* . . . and may consider any other criteria relevant to its decision[.]”); Ariz. Rev. Stat. §§ 13-716, 41-1604.09(I)(2) (reinstating parole for major class of juvenile offenders); H.B. 2471, 99th Reg. Sess. (Ill. 2015), *enacting* 730 Ill. Comp. Stat. 5/5-4.5-105 (a) (requiring the judge to consider youth-related factors prior to sentencing any defendant whose offense occurred before he or she turned eighteen); La. Rev. Stat. Ann. §§ 15:574.4, 878.1 (La. 2013) (creating parole eligibility for certain juveniles sentenced to life without parole and requiring courts to reserve JLWOP to “the worst offenders and the worst cases.”); Neb. Rev. Stat. §§ 28-105.02, 83-1, 110.04 (Neb. 2013) (requiring “comprehensive mental health evaluation” of juvenile facing sentence JLWOP).

A significant issue currently facing courts is whether *Miller* applies retroactively to juveniles whose sentence became final before the Court's ruling. Next term, the Supreme Court will resolve whether federal law requires retroactive application of *Miller*'s mandate. *See Montgomery v. Louisiana*, 135 S.Ct. 1546, 1546 (2015) (mem.). States are split on this federal question. Regardless of the Supreme Court's answer, states will retain the authority to provide retroactive relief under their own retroactivity doctrines, a choice some state courts and legislatures have already made.

In outlawing mandatory JLWOP, *Miller* prompted a shift in the national consensus towards sentencing juveniles to die in prison. This report catalogues that shift in each U.S. jurisdiction. It covers whether each jurisdiction retains JLWOP, the number of

people serving such a sentence, how each jurisdiction has responded to *Miller*, and any pending legislation or litigation related to JLWOP.

Alabama

Alabama was among the twenty-nine jurisdictions that had mandatory JLWOP at the time of *Miller*. See *Miller v. Alabama*, 132 S. Ct. 2455, 2460 (2012). While it has not since altered its laws, the Alabama Supreme Court has mandated courts' consideration of the *Miller* factors in sentencing juveniles convicted of capital murder in light of *Miller*'s prohibition on mandatory JLWOP. See *State v. Henderson (Ex parte Henderson)*, 144 So. 3d 1262, 1283-84 (Ala. 2013). There are sixty-two individuals serving a JLWOP sentence in Alabama.²³

The minimum age at which the courts may transfer juveniles to adult court is fourteen. Ala. Code § 12-15-203(a). In Alabama, a juvenile convicted of murder⁴ with an aggravating circumstance⁵ in adult court must be sentenced to either death or LWOP. § 13A-6-2(c). Because juveniles cannot constitutionally be sentenced to death, aggravated murder carries an automatic sentence of LWOP. See *Henderson*, 144 So. 3d at 1278.

The Alabama Supreme Court outlawed mandatory JLWOP in Alabama, applying *Miller*. *Id.* at 1281. The court recognized that “[JLWOP] cannot be automatically imposed as a sentence on a juvenile homicide offender based on the heightened protections established for sentencing juveniles as set out in the Supreme Court’s jurisprudence.” *Id.* Thus, the court held that in sentencing a juvenile to a capital offense, the court must now consider the juvenile’s age and “the hallmark features of youth . . . ; (2) the juvenile’s diminished culpability; (3) the circumstances of the offense; (4) the extent of the juvenile’s participation of the crime; (5) the juvenile’s family, home, and neighborhood environment; (6) the juvenile’s emotional maturity and development; (7) whether familial

² See The Human Rights Watch, *State Distribution of Estimated 2,589 Juvenile Offenders Serving Juvenile Life Without Parole* (2009) available at http://www.hrw.org/sites/default/files/related_material/updatedJLWOP10.09_final.pdf.

³ A public records request with the Alabama Department of Corrections pending. The remainder of this report relies on Human Rights Watch numbers where a Department of Corrections or state advocate request is pending.

⁴ In Alabama, a person commits murder where that person: (1) intentionally causes the death of another; (2) causes the death of another under circumstances manifesting extreme indifference to human life; (3) causes the death of another during the course of an enumerated felony; (4) commits arson and a firefighter dies as a result. Ala. Code § 13A-6-2(a).

⁵ Aggravated circumstances, which make a juvenile defendant eligible for LWOP, include the following: (1) the defendant was imprisoned at the time of the crime; (2) the defendant had a previous capital murder or felony conviction involving a threat of violence; (3) the defendant knowingly created a great risk of death to a number of persons; (4) the offense was committed while defendant was perpetrating a rape, robbery, burglary, or kidnapping; (5) the offense was committed to avoid lawful arrest or escape from custody; (6) the offense was committed for pecuniary gain; (7) the offense was committed to disrupt or hinder the lawful exercise of governmental function or enforcement of the laws; (8) the offense was especially heinous, atrocious, or cruel; (9) the defendant caused the death of two or more persons by one act or pursuant to a scheme; (10) the offense was one of a series of killings by the defendant. § 13A-5-49.

and/or peer pressure affected the juvenile; (8) the juvenile's past exposure to violence; (9) the juvenile's drug and alcohol history; (10) the juvenile's ability to deal with the police; (11) the juvenile's capacity to assist his or her attorney; (12) the juvenile's mental health history; (13) the juvenile's potential for rehabilitation; and (14) any other relevant factor related to the juvenile's youth." *Id.* at 1284; *see also Foye v. State*, 153 So. 3d 854, 862-63 (Ala. Crim. App. 2013) (reversing and remanding appellant's mandatory JLWOP sentence with instructions that the sentencing court consider the factors announced in *Henderson*); *Miller v. State*, 148 So. 3d 78, 78 (Ala. Crim. App. 2013) (holding the same).

In *Ex parte Williams*, No. 1131160, 2015 Ala. LEXIS 42, 2015 WL 1388138 (Ala. Mar. 27, 2015), the Alabama Supreme Court held that *Miller* did not apply retroactively to cases on collateral review. The court held that *Miller* did not create a substantive rule, but rather announced a procedural rule by delineating the method by which states could impose JLWOP. *Id.* at *27. And because the rule was not a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding, it did not apply retroactively. *Id.* at *31-32. Thus, petitioner's mandatory JLWOP sentence for a capital murder committed when he was fifteen did not violate the Eighth Amendment. *Id.* at *38.

Although Alabama's sentencing laws violate *Miller*, the Alabama Supreme Court has recognized the unconstitutionality of mandatory JLWOP and has mandated consideration of mitigating evidence in sentencing juveniles.

Alaska

Alaska was among the eight states that did not have JLWOP at the time *Miller* was decided.⁶ Alaska does not authorize LWOP, even for adults,⁷ although they authorize mandatory ninety-nine year sentences for certain crimes. Alaska Stat. § 12.55.125(a). Alaska has zero JLWOP prisoners and zero prisoners serving the ninety-nine years for a crime committed as a juvenile.⁸

The maximum sentence a defendant can receive in Alaska is ninety-nine years. § 12.55.125. A defendant convicted of first-degree murder is sentenced to a term of at least twenty years, but not more than ninety-nine years. § 12.55.125(a). A defendant convicted of first-degree murder “shall be sentenced to a mandatory term of imprisonment of ninety-nine years” where: (1) defendant murdered a police officer, firefighter, or correctional employee engaged in performance of official duties; (2) the defendant has a previous first-degree murder, second-degree murder, or homicide conviction; (3) defendant subjected the murder victim to substantial physical torture; (4) the defendant committed murder during the course of a robbery; or (5) defendant is a police officer who used his authority to facilitate the murder. § 12.55.125(a). A defendant convicted of attempted first-degree murder, solicitation to commit first-degree murder, or conspiracy to commit first-degree murder “shall be sentenced to a definite term of at least 5 years but not more than 99 years.” § 12.55.125(b). A defendant convicted of second-degree murder “shall be sentenced to a definite term of imprisonment of at least 10 years but not more than 99 years.” § 12.55.125(b).

Alaska has no cases addressing *Miller* or juveniles sentenced to LWOP or *de facto* LWOP sentences. While Alaska does not have JLWOP, it continues to authorize mandatory ninety-nine year punishments for certain crimes.

⁶ See The Sentencing Project, *Slow to Act: State to 2012 Supreme Court Mandate on Life Without Parole* (2014) available at

http://sentencingproject.org/doc/publications/jj_State_Responses_to_Miller.pdf.

⁷ See Death Penalty Information Center, *Life Without Parole* (2015) available at <http://www.deathpenaltyinfo.org/life-without-parole>.

⁸ According to the Alaska Department of Corrections.

Arizona

Arizona was among the twenty-nine jurisdictions that had mandatory JLWOP at the time *Miller* was decided. See *Miller v. Alabama*, 132 S. Ct. 2455, 2473 n.13 (2012). The state has since amended its laws to comply with *Miller*. H.B. 2593, 51st Leg. Reg. Sess. 2014 (Ariz. 2014), amending Ariz. Rev. Stat. §§ 13-716, § 41-1604.09(I)(2).

Juveniles as young as fourteen-years-old can be tried as adults in Arizona. Ariz. Rev. Stat. Ann. § 13-501(B). Under Arizona’s laws at the time of *Miller*, a defendant convicted of first-degree murder⁹ “shall be sentenced to imprisonment in the custody of the state department of corrections for life or natural life.” § 13-751(A)(2). A “defendant sentenced to life shall not be released on any basis until the completion of service of twenty-five calendar years if the murdered person was fifteen or more years of age and thirty-five years if the murdered person was under fifteen years of age or was an unborn child.” *Id.* A “defendant sentenced to natural life is not eligible for commutation, parole, work furlough, work release or release from confinement on any basis,” *i.e.*, LWOP. *Id.* In deciding whether to impose life or natural life (LWOP), the court “shall consider” a number of aggravating¹⁰ and mitigating¹¹ circumstances that it must consider in deciding any felony sentence. § 13-701. Mitigating circumstances include the defendant’s age. *Id.*

While the above statute technically allowed for parole after twenty-five or thirty-five years for defendants sentenced to LWOP, and gives the sentencer the discretion to pick between either, the *Miller* court categorized Arizona as having mandatory JLWOP because the state eliminated parole in 1994. See Ariz. Rev. Stat. § 41-1604.09(I) (2011)

⁹ A defendant commits first-degree murder where the defendant: (1) intentionally causes the death of another (including an unborn child) with premeditation; (2) causes the death of another during the perpetration of or attempted perpetration of an enumerated felony; or (3) intentionally or knowingly causes the death of a police officer in the line of duty. § 13-1105(A).

¹⁰ Aggravating circumstances include: (1) infliction or threatened infliction of serious physical injury; (2) threatened use or possession of deadly or dangerous weapon; (3) taking or damaging property; (4) presence of accomplice; (5) especially heinous, cruel, or depraved offenses; (6) offenses motivated by pecuniary gain; (7) defendant was public servant and offense involved conduct related to employment; (8) the victim’s family suffered physical, emotional or financial harm; (9) death of unborn child at any stage of development occurred; (10) previous felony conviction; (11) defendant was wearing body armor; (12) the victim was at least sixty-five years old or had disability; (13) defendant was appointed as fiduciary and offense was related to fiduciary duties; (14) hate crime; (15) defendant committed crime while driving while intoxicated; (16) lying in wait; (17) offense committed in presence of child; (18) offense committed in retaliation for reporting criminal activity; (19) defendant was impersonating a peace officer; (20) defendant was in violation of enumerated federal crime; (21) defendant used a remote stun gun; (22) defendant involved in hit and run; (23) defendant found victim in shelter designed to serve runaway youth or similar facility; and (25) any other relevant factor. § 13-701 (D).

¹¹ Mitigating circumstances include: (1) defendant’s age; (2) defendant’s capacity to appreciate the wrongfulness of the defendant’s conduct or conform defendant’s conduct to the law; (3) defendant was under unusual or substantial duress; (4) defendant’s participation in the crime was minor; (5) defendant was complicit after commission of the offense; and (6) any other relevant factor. § 13-701 (C).

(stating that parole is only available to ‘persons who commit[ed] felony offenses before January 1, 1994.’) Individuals given sentences with parole between 1994 and 2014 were eligible for release only by “commutation” by the Board of Executive Clemency. *See* § 31-402.

In *Graham v. Florida*, 560 U.S. 48, 57 (2010), the United States Supreme Court stated that Florida’s statutory scheme, which similarly abolished parole life sentences and only provided release based on executive clemency, did not provide a meaningful opportunity for a juvenile to obtain release from a life sentence. *Id.* at 732. In Arizona, there are currently thirty-four prisoners serving sentences of natural life (LWOP)¹² and thirty-five individuals serving sentences of “twenty-five to life” imposed between 1994 and 2014 for offenses committed when they were juveniles.¹³

In 2014, the Arizona legislature passed House Bill 2593 in response to *Miller* and *Graham*. H.B. 2593, 51st Leg., 2nd Reg. Sess. (Ariz. 2014). The bill first added section 13-716, which dictates that “a person who is sentenced to life imprisonment with the possibility of release after serving a minimum number of calendar years for that offenses that was committed before the person attained eighteen years of age is eligible for parole on completion of service of the minimum sentence, regardless of whether the offense was committed on or after January 1, 1994.” Ariz. Rev. Stat. § 13-716. In addition, the bill amended section 41-1604.09(I), which had eliminated parole, stating that parole now applies to “[a] person who is sentenced to life imprisonment and who is eligible for parole pursuant to section 13-716.” § 41-1604.09(I)(2).

In *State v. Randles*, 334 P.3d 730 (Ariz. Ct. App. 2014) an Arizona intermediate appellate court evaluated the constitutionality of section 13-751 in light of *Miller*. Randles was convicted of first-degree murder for an offense he committed when he was seventeen-years old and sentenced to life without parole for twenty-five years pursuant to section 13-751. *Id.* at 732. Because Arizona’s sentencing statutes had abolished parole when Randles was sentenced and therefore did not provide a mechanism for imposing parole, Randles argued that his sentence was unconstitutional pursuant to *Miller*. *Id.* The court disagreed, holding that the plain language of sections 13-716 and 41-1604.09(I)(2) satisfy the requirements of the Eighth Amendment by expressly providing that juvenile offenders sentenced to life imprisonment shall be eligible for parole upon completion of their minimum sentence “regardless of whether the offense was committed on or after January 1, 1994.” *Id.* at 732-33. The court found that because the change in law is applicable to all such sentences, it applies retroactively. *Id.* at 733. Thus, the court modified Randles’ sentences “in accordance with the recently enacted legislation,” mooting his constitutional claim. *Id.* The case is currently under review before the Arizona Supreme Court. *State v. Randles*, CR-14-0306-PR.

In *State v. Vera*, 334 P.3d 754 (Ariz. Ct. App. 2014), an Arizona appellate court also interpreted Arizona’s sentencing scheme in light of *Miller*. Vera was convicted of first-degree murder and related crimes and was sentenced to life without parole for twenty-

¹² According to the Arizona Department of Corrections in response to a request for information.

¹³ Interview with Arizona practitioner, Mar. 10, 2015. Notes on file.

five years. *Id.* at 755. Vera filed a post-conviction petition, arguing that *Miller* constituted a significant change in the law that entitled him to relief. *Id.* The trial court found that although the sentencing court exercised some discretion in deciding the sentence, “the abolition of parole by the legislature essentially [made his sentence mandatory JLWOP].” *Id.* at 756. The trial court therefore concluded that Vera’s sentence violated the Eighth Amendment, granted his petition for post-conviction relief, and remanded the case for resentencing. *Id.* The state appealed. *Id.* On appeal, the court held that the recently enacted section 13-716 provided an “adequate remedy” for a *Miller* claim. *Id.* at 759. Thus, the court explained that it needed not decide whether Arizona law was consistent with the rule announced in *Miller*, or whether *Miller* applies retroactively to cases on collateral review. *Id.* This case is also currently under review before the Arizona Supreme Court. *State v. Vera*, CR-14-0356-PR.

Because Arizona did not have a parole mechanism in place when *Miller* was decided, the Court categorized it as having mandatory JLWOP. While Arizona has since amended its laws, the state has seventy individuals serving sentences imposed when they were juveniles under the prior scheme. An intermediate court in *Randles*, however, interprets *Miller*’s statutory fix to apply retroactively to people serving such sentences. That case, along with *Vera*, is currently pending review in the Arizona Supreme Court.

Arkansas

Arkansas was among the twenty-nine jurisdictions that had mandatory JLWOP at the time of *Miller*. See *Miller v. Alabama*, 132 S. Ct. 2455, 2461 (2012). Following *Miller*, Arkansas amended its laws to revise the punishments authorized for juveniles when they commit capital murder. H.B. 1993, 89th Gen. Assemb., Reg. Sess. (Ark. 2013), amending Ark. Code Ann. §§ 5-4-104(b), 5-10-101(c) (Ark. 2014). While the bill specified that the revised laws apply prospectively only, the Arkansas Supreme Court recently held that *Miller* applies retroactively on collateral review. H.B. 1993, Section 1(b); *Kelley v. Gordon*, Slip Op. No. CV-14-1082, 2014 Ark. 277, at *7, 2015 WL 3814825 (Ark. June 18, 2015). Arkansas has fifty-eight individuals serving JLWOP sentences.¹⁴

Prior to the passage of House Bill 1993, a juvenile defendant¹⁵ convicted of capital murder¹⁶ or treason¹⁷ was automatically sentenced to JLWOP. Ark. Code Ann. § 5-4-104 (2011). Under the amended laws, a defendant who “was younger than eighteen (18) years of age at the time he or she committed capital murder . . . shall be sentenced to: (1) Life imprisonment without parole [or]; (2) Life imprisonment with the possibility of parole after serving a minimum of twenty-eight years’ imprisonment.” § 5-4-104(b) (2014). Thus, a juvenile defendant under the amended laws can now be sentenced to either LWOP or life with parole after serving a minimum term, and only for the crime of capital murder. The statutes provide no special criteria for the sentencer to consider in reaching this decision. The Arkansas Supreme Court, however, has consistently held that courts must consider the *Miller* factors in sentencing juveniles to JLWOP. See *Jackson v. Norris*, 426 S.W.3d 906, 911 (Ark. 2013); *Whiteside v. State*, 426 S.W.3d 917, 921 (Ark. 2013).

In *Jackson*, the Arkansas Supreme Court evaluated petitioner’s JLWOP sentence on remand from the United State’s Supreme Court. 436 S.W.3d at 906; see *Jackson v. Norris*, 378 S.W.3d 103, cert. granted, 132 S. Ct. 2455 (2012) (companion case to *Miller v. Alabama*, 132 S. Ct. 2455 (2012)). On remand, the Arkansas Supreme Court reversed the denial of the writ of habeas corpus and remanded to the trial court with instructions

¹⁴ According to information provided by the Arkansas Department of Corrections in response to a request for public information. Notes on file.

¹⁵ In Arkansas, juveniles as young as fifteen-years-old can be transferred to adult court and sentenced as adults. Ark. Code Ann. § 9-27-318.

¹⁶ In Arkansas, capital murder includes: (1) killing in perpetration of enumerated felony; (2) killing while committing arson; (3) premeditated and deliberate killing of law enforcement officer, jailer, prison official, firefighter, judge, probation officer, parole officer, military personnel, teacher, school employee, or person acting in line of duty; (4) premeditated and deliberate killing of another; (5) premeditated and deliberate killing of public official; (6) premeditated and deliberate killing of another while incarcerated; (7) killing for pecuniary gain; (8) killing for hire; (9) knowingly causing the death of a victim under fourteen-years-old under circumstances manifesting extreme indifference to human life when the defendant is over eighteen-years-old; and (10) killing by discharging a firearm from a vehicle under circumstances manifesting extreme indifference to human life. Ark. Code Ann. § 5-10-101 (a).

¹⁷ Arkansas defendants have been sentenced to JLWOP only for murder, never treason. Interview with Arkansas practitioner, March 16, 2015. Notes on file.

that Jackson “may present for consideration evidence that would include that of his age, age-related characteristics, and the nature of his crime.” *Id.* at 907 (internal quotations omitted). The court further held that Jackson’s new sentence must fall within the statutory discretionary sentencing range for a Class Y felony, which includes a “discretionary sentencing range of not less than ten years and not more than forty years, or life.” *Id.* at 911.

In *Whiteside*, the Arkansas Supreme Court similarly considered appellant’s mandatory JLWOP sentence on remand from the United States Supreme Court in light of *Miller*. 426 S.W.3d at 917. The court first held that the rule announced in *Miller* applied to *Whiteside* because his case was still on direct appeal. *Id.* The court further held that under *Miller*, defendant’s JLWOP sentence pursuant to the former section 5-10-101(c) was illegal under the Eighth Amendment. *Id.* at 919. As in *Jackson*, the court held that *Whiteside*’s capital-murder sentence should be reversed and remanded for resentencing under the discretionary range of a Class Y felony. *Id.* at 921. The court likewise instructed the circuit court to hold a sentencing hearing where *Whiteside* could “present *Miller* evidence for consideration.” *Id.* at 922.

In *Pennington v. Hobbs*, 451 S.W.3d 199 (Ark. 2014), the Arkansas Supreme Court held that *Miller* applies only to mandatory JLWOP sentences. There, a juvenile defendant received concurrent life sentences for first-degree murder and aggravated robbery pursuant to a negotiated guilty plea. *Id.* at 200. The court concluded that “appellant was not subjected to a mandatory sentence of [JLWOP], and his sentences, therefore, are not illegal under *Miller*.” *Id.* at 202; *see also Hobbs v. Turner*, 431 S.W.3d 283 (Ark. 2014) (holding that *Miller* is inapplicable where juvenile homicide sentence was not mandatory); *Brown v. Hobbs*, 2014 Ark. 267 (Ark. 2014) (unreported) (holding same); *Smith v. State*, 2014 Ark. 204 (2014) (unreported) (holding same); *Britt v. State*, 2014 Ark. 134 (2014) (unreported) (holding same).

The Arkansas Supreme Court recently held that *Miller* applies retroactively. It did not address whether the federal retroactivity standard applied. Instead, it held that “fundamental fairness” and “evenhanded justice” required retroactive application of *Miller* to Arkansas prisoners serving JLWOP sentences. *See Kelley v. Gordon*, 2014 Ark. 277, at *7. It noted that the high Court applied *Miller* to Kuntrell Jackson, the Arkansas petitioner in the companion case to *Miller v. Alabama*, 132 S. Ct. 245 (2012), even though he was on collateral review. *Kelley*, 2014 Ark. 277, at *7. The Arkansas Supreme Court reasoned that it would be unfair for Mr. Jackson to receive *Miller* relief but for other similarly situated Arkansas inmates not to receive it. Thus, they ruled that *Miller* would apply retroactively in Arkansas. *Id.*

The laws amended by House Bill 1993 coupled with the Arkansas Supreme Court’s rulings in *Jackson* and *Whiteside* have brought Arkansas’ juvenile sentencing laws into compliance with *Miller*. Its recent ruling on retroactivity means that the fifty-eight inmates serving JLWOP sentences should receive new sentencing hearings.

California

California was among the fifteen jurisdictions that had discretionary, but not mandatory, JLWOP at the time of *Miller*. Cal. Pen. Code § 190.5. The state has since passed two juvenile sentencing bills – Senate Bill 9 (SB 9) and Senate Bill 260 (SB 260)—that give an opportunity for retroactive relief to most juveniles sentenced to LWOP by allowing them to petition for resentencing hearings, as well as providing for meaningful parole consideration once they receive sentences of less than life-without-parole. See S.B. 9, 2011-12 Reg. Sess. (Cal. 2012), *amending* § 1170; S.B. 260, 2013-14 Reg. Sess. (Cal. 2013), *amending* Cal. Pen. Code §§ 3041, 3046, 4801 and *enacting* § 3051. Furthermore, the state supreme court recently clarified a previously misinterpreted rule, explaining that there is no presumption in favor of life without parole at the time of sentencing in juvenile first-degree murder cases. The California Supreme Court is currently considering *Miller*'s retroactivity, which is particularly significant for those juveniles exempt from retroactive relief through SB 9. California has approximately 310 JLWOP prisoners, among one of the five largest groups of such inmates in the country.¹⁸

California retains discretionary JLWOP: “The penalty for a defendant found guilty of murder in the first degree, in any case in which one or more special circumstances enumerated in Section 190.2 or 190.25 has been found to be true under Section 190.4, who was 16 years of age or older and under the age of 18 years at the time of the commission of the crime, shall be confinement in the state prison for life without the possibility of parole or, at the discretion of the court, 25 years to life.” § 190.5. However, with the passage of SB 9, there is an opportunity for sentencing review in almost every case.

SB 9, passed in September 2012, provides a mechanism for already sentenced juvenile offenders to seek resentencing. § 1170. It authorizes a prisoner sentenced to JLWOP who has already served fifteen years to submit a petition for recall and resentencing. *Id.* If the recall is not granted, a subsequent petition may be made after serving twenty years, and an opportunity to petition occurs after serving twenty-four years. *Id.* This mechanism, however, is unavailable to juveniles convicted of first-degree murders of law enforcement officials or murders involving torture. *Id.*

SB 260, passed in September 2013 establishes new parole eligibility rules that require parole hearings for juvenile offenders with less than LWOP sentences at certain points in their incarceration. §§ 3041, 3046, 3051, and 4801. Depending on the original sentence, it requires parole review after 15, 20, and 25 years for offenders who were under 18 at the time of their crimes. § 3051(b). It specifies the criteria the parole board must use in reviewing juvenile sentences, including the “diminished culpability of juveniles.” § 3051(f). It further requires the parole board to meet with the inmate six years prior to the

¹⁸See Marisa Gerber, *California Inmate's Parole Reflects Rethinking of Life Terms for Youths*, L.A. Times, March 24, 2015 available at <http://www.latimes.com/local/crime/la-me-juvenile-lwop-20150325-story.html#page=1>.

minimum eligibility parole release date to provide specified information, such as recommendations on rehabilitative programs. § 3041(a).

In California, once a parole board decision is final (generally after 120 days), the Governor is authorized to review the decision. § 3041.1-.2. Up to ninety days before an inmate's scheduled release, the Governor may request that the parole board review its panel decision. *Id.* If the inmate was convicted of murder, the Governor may reverse or modify the parole board's decision without referring it back to the parole board for review. *Id.*

Together, these two bills make it possible for juveniles serving LWOP sentences in California to be resentenced to less than life-without-parole (with the exception of cases involving murders of law enforcement officials or involving torture), and to receive meaningful parole consideration once resentenced. For instance, Edel Gonzalez was 16 when he was sentenced to LWOP for a carjacking that resulted in a murder. Following the passage of SB 9, he received a resentencing hearing in 2013 and had his LWOP sentence reduced to life with parole. A year later, Mr. Gonzalez received a hearing before the parole board, which unanimously agreed to grant his release. The governor did not intervene and Mr. Gonzalez was released from prison.¹⁹

A defendant between ages sixteen and eighteen found guilty of first-degree murder with one or more special circumstances is sentenced to either LWOP or twenty-five years to life. *See* § 190.5 (2015).²⁰ Upon a finding of one of twenty-two enumerated "special circumstances"—including felony murder—a sixteen to eighteen year old is eligible for LWOP or twenty-five to life.²¹ To determine the appropriate sentence, the court "shall" consider enumerated mitigating factors, including the defendant's age and "any other relevant circumstance." § 190.3(i).

¹⁹ *Seer Gerber, supra* note 17.

²⁰ First-degree murder is defined as a killing "perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of [an enumerated felony], or any murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death." § 189.

²¹ Special circumstances which render LWOP eligible include the following: (1) murder for financial gain; (2) prior murder conviction; (3) multiple murders; (4) murder via hidden explosive; (5) murder committed to avoid lawful arrest; (6) murder by means of destructive or explosive device via mail; (7) murder of a peace officer; (8) murder of federal law enforcement officer; (9) murder of firefighter; (10) murder of witness to prevent testimony in criminal or juvenile proceeding; (11) retaliatory murder of prosecutor; (12) retaliatory murder of judge; (13) murder of appointed official to prevent performance of duties; (14) especially heinous, atrocious, or cruel murder; (15) murder by lying in wait; (16) murder motivated by race, color, religion, or nationality; (17) murder during the commission of an enumerated felony; (18) murder involving torture; (19) murder by poison; (20) retaliatory murder of juror; (21) murder by discharging firearm from car; and (22) murder in furtherance of street gang. Cal. Pen. Code. § 190.2.

In *People v. Gutierrez*, 324 P.3d 245 (Cal 2014), the California Supreme Court reviewed the LWOP sentences of two defendants who were convicted of murders committed when they were age seventeen. The state argued that Penal Code section 190.5(b) permissibly created a presumption in favor of LWOP; that is, that “16- or 17-year-olds who commit special circumstances murder *must* be sentenced to LWOP, *unless* the court, in its discretion, finds good reason to choose the less severe sentence of 25 years to life.” *Id.* at 262. The California Supreme Court explained that that to construe section 190.5(b) as the State suggested would “raise serious constitutional concerns” under *Miller* and its progeny. *Id.* at 267. Because section 190.5(b) is reasonably susceptible to multiple interpretations, the court clarified that the law “confers discretion on the sentencing court to impose either life without parole or a term of 25 years to life on a 16- or 17-year-old juvenile convicted of special circumstance murder, with no presumption in favor of life without parole.” *Id.*

The defendants argued that even without such a presumption, the statute was nonetheless in violation of *Miller*’s mandate to consider the mitigating circumstances of youthfulness. The court disagreed because “Section 190.5(b) authorizes and indeed requires consideration of the *Miller* factors.” *Id.* Specifically, section 190.3(i), requiring consideration of “any . . . relevant circumstance,” provides a basis for the court to consider that “youth is more than a chronological fact” and to take into account any mitigating relevance of “age and the wealth of characteristics and circumstances attendant to it” as *Miller* requires. *Id.* at 268 (quoting *Miller*, 132 S. Ct. at 2467). Regarding the specific defendants, the court held that because “the trial courts decided [their sentences] without proper guidance on the sentencing discretion conferred by section 190.5(b) and the considerations that must inform the exercise of that discretion,” both cases must be remanded for resentencing. *Id.* at 270.

Miller’s retroactivity in California is currently pending. A California Court of Appeal in the First Appellate District held that *Miller* should be applied retroactively because it constitutes a new substantive rule. *In Re Rainey*, 224 Cal. App. 4th 280, __ (Cal. Ct. App. 2014). The decision is currently under review by the California Supreme Court. *See In re Rainey*, 326 P.3d 251 (Cal. 2014). The lower court decision has been depublished in the interim. *Id.* The result of the court’s ruling will be particularly significant for juveniles convicted of first-degree murders of law enforcement officials or involving torture, who are not eligible for relief under SB 9.

California has made great progress in its juvenile sentencing laws since *Miller*. The enactment of SB 9 and SB 260 establish an opportunity for juveniles sentenced to LWOP to petition to have their sentences reviewed in almost every case. Moreover, *Gutierrez* makes clear that the court must consider the unique characteristics of youth emphasized in *Miller* in sentencing juveniles convicted of murder. While *Miller*’s retroactivity is still pending, SB 9 and SB 260 render the decision less crucial than in most other states because the vast majority of defendants are likely already entitled to petition for sentencing review. However, unlike some legislative reactions to *Miller*, California’s new laws do not entitle inmates to automatic resentencing, but rather enables them to petition for resentencing.

Colorado

When *Miller* was decided, Colorado was among the eight jurisdictions that had already abolished JLWOP.²² The state abolished JLWOP in 2006. *See* Colo. Rev. Stat. § 18-1.3-401(4)(b)(I) (2006) *amending* § 18.1-3-401(4) (2002). Forty-eight individuals are currently serving JLWOP sentences under the old law.²³

In Colorado, a juvenile aged sixteen or older may be charged as an adult²⁴ and a juvenile as young as twelve²⁵ may be transferred to adult court. *See* §§ 19-2-517, 19-2-518 (2014). Prior to 2006, a juvenile convicted as an adult of a class one felony was automatically sentenced to life imprisonment without the possibility of parole, the same sentence that applied to an adult convicted of the same crime. *See* § 18-1.3-401(4) (2002), *amended by* H.B. 1315, 65 Leg., 2d Sess. (Colo. 2006). In 2006, Colorado changed this practice. The legislature found it against “the best interests of the state to condemn juveniles . . . to a lifetime of incarceration without the possibility of parole.” *Id.* The new law made juveniles convicted as adults of a class one felony eligible for parole after serving forty calendar years of their sentences. *Id.*; *see also* § 17-22.5-104(2)(d) (2014).

Under the new laws, a juvenile defendant in adult court who is convicted of a class one felony is automatically sentenced to life with the possibility of parole after forty years. § 17-22.5-104(2)(d). Class one felonies include first-degree murder, first-degree kidnapping where the person kidnapped suffered bodily injury, and assault with intent to commit bodily injury during an escape. *See* §§ 18-3-102, 18-3-301(2), 18-8-206.

In *People v. Rainer*, No. 10-CA-2414, 2013 Colo. App. LEXIS 509, 2013 WL 1490107 (Colo. App. April 11, 2013) (unreported), a Colorado appellate court considered the

²² *See* The Sentencing Project, *Slow to Act: State Responses to 2012 Supreme Court Mandate on Life Without Parole* (2014) available at http://sentencingproject.org/doc/publications/jj_State_Responses_to_Miller.pdf.

²³ According to information provided by the Colorado Department of Corrections in response to a request for public information. Notes on file.

²⁴ “A juvenile may be charged by the direct filing of an information in the district court or by indictment only if: (a) The juvenile is sixteen years of age or older at the time of the commission of the alleged offense and; (I) Is alleged to have committed a class 1 or class 2 felony; or (II) Is alleged to have committed a sexual assault that is a crime of violence . . . ; or (III) (A) Is alleged to have committed a felony enumerated crime of violence . . . ; and (B) Is found to have a prior adjudicated felony offense; or (IV) Has been subject to proceedings in district court as a result of a direct filing pursuant to this section or a transfer pursuant to section 19-2-518 [with two exceptions].” § 19-2-517.

²⁵ “(1)(a) The juvenile court may enter an order certifying a juvenile to be held for criminal proceedings in the district court if: (I) . . . the juvenile is: (A) Twelve or thirteen years of age at the time of the commission of the alleged offense and is a juvenile delinquent by virtue of having committed a delinquent act that constitutes a class 1 or class 2 felony or crime of violence . . . ; or (B) Fourteen years of age or older at the time of the commission of the alleged offense and is a juvenile delinquent by virtue of having committed a delinquent act that constitutes a felony; and (II) After investigation and a hearing, the juvenile court finds it would be contrary to the best interests of the juvenile or of the public to retain jurisdiction.” Colo. Rev. Stat. § 19-2-518.

constitutionality of a defendant's 112-year sentence in light of *Graham v. Florida*, 560 U.S. 48 (2010). Following a jury trial in 2000, Mr. Rainer was convicted of several non-homicide offenses. *See Rainer*, 2013 LEXIS at *2. In 2010, he filed a motion for post-conviction relief in light of *Graham*'s newly established constitutional prohibition on JLWOP sentences for non-homicide offenders. *Id.* at *5. The court held that Rainer's 112-year aggregate sentence did not offer him "a meaningful opportunity to obtain release before the end of his expected lifespan" and therefore "improperly" denied him "a chance to demonstrate growth and maturity." *Id.* at *17, *51 (internal quotations omitted). The court found his sentence to constitute functional LWOP, rendering it unconstitutional under *Graham*. *Id.* at *17. Accordingly, the court reversed and remanded for resentencing "consistent [with the] principles announced in both *Graham* and *Miller*." *Id.* at *1. In December 2014, Colorado Supreme Court granted certiorari of *Rainer* and it is currently under review. *See People v. Rainer*, No. 13-SC-408, 2014 Colo. LEXIS 1085, 2014 WL 7330977 (Colo. Dec. 22, 2014).

While Colorado appellate courts agree that mandatory JLWOP sentences are unconstitutional, they are split about the remedy. *Compare People v. Banks*, No. 08CA0104, 2012 WL 4459101, at *21 (Colo. App. Sept. 27, 2013) (unreported), *cert. granted*, No. 12SC1022, 2013 WL 3168752 (Colo. Jun. 24, 2013) (remanding to the trial court to modify the sentence by including a provision for the possibility of parole after forty years), *with People v. Gutierrez-Ruiz*, No. 11CA0511, 2014 WL 4242887 (Colo. App. Aug. 28, 2014) (unreported) (remanding for resentencing for individualized *Miller* analysis).

In June 2015, the Colorado Supreme Court held that *Miller* did not apply retroactively to cases on collateral review. *People v. Tate*, Nos. 12SC932, 12SC1022, 13SC211, 2015 WL 3452609 (Colo. 2015) (unreported). The court reasoned that *Miller* was procedural because it did not bar a penalty for a class of offenders or a type of crime but rather mandated only that the sentencer follow a certain process before imposing a particular penalty. *Id.* at *60. "Because *Miller* is procedural in nature, and is not a 'watershed' rule of procedure, it does not apply retroactively to cases on collateral review of a final judgment." *Id.* at *61.

While Colorado outlawed JLWOP in 2006, its laws mandate an automatic sentence of life with the possibility of parole after forty years for juveniles as young as twelve convicted of a class one felony. This is problematic in light of *Miller*'s call for individualized sentencing. The question of whether Colorado's fifty-one juveniles will receive resentencings following *Miller* is expected to be resolved this year, either through a ruling from the state supreme court or the passage of legislation.

Connecticut

Connecticut was among the twenty-nine jurisdictions that had mandatory JLWOP at the time *Miller* was decided. *See Miller v. Alabama*, 132 S. Ct. 2455, 2473 n.13 (2012). Although Connecticut was slow to alter its statutes, the Connecticut Supreme Court mandated that courts comply with *Miller*'s mandate of considering the unique features of youth in sentencing juveniles to all juvenile prison terms amounting to functional life sentences. *See State v. Riley*, 110 A.3d 1205, 1207-08 (Conn. 2014). In June 2015, Connecticut passed a bill that retroactively outlawed JLWOP. S.B. 796, Jan. Sess. (Conn. 2015), *amending* Conn. Gen. Stat. § 54-125a. Connecticut has four individuals serving sentences of JLWOP²⁶ and at least eighteen individuals serving sentences of sixty or more years without parole for offenses they committed as juveniles.²⁷

Before amending its laws, Connecticut law prescribed that a defendant convicted of a capital felony²⁸ committed prior to April 25, 2012 shall be sentenced to “a term of life imprisonment without the possibility of release unless a death sentence is imposed” and that a defendant convicted of the class A felony of murder with special circumstances²⁹ committed on or after April 25, 2012 be sentenced to “a term of life imprisonment without the possibility of release.” Conn. Gen. Stat. § 53a-35a(1) (2014). Recent legislation, however, retroactively banned LWOP for all juveniles.

In *Riley*, the Connecticut Supreme Court reviewed defendant's 100-year sentence for crimes committed when he was seventeen in light of *Miller*. 110 A.3d at 1207-08. Riley was convicted of murder and sentenced under section 53a-35a (2), which provides a discretionary sentencing scheme for murder and felony murder. *Id.* The court found it “undisputed that [defendant's 100-year] sentence is the functional equivalent to life without the possibility of parole.” *Id.* at 1207. In concluding the court below failed to consider the factors *Miller* requires, the Connecticut Supreme Court noted that “the trial court made no reference to the defendant's age at the time he committed the offenses.” *Id.* The Connecticut Supreme Court held that “the dictates set forth in *Miller* may be violated even when the sentencing authority has discretion to impose a lesser sentence than life without parole if it fails to give due weight to evidence that *Miller* deemed constitutionally significant before determining that such a severe punishment is appropriate.” *Id.* at 1213. The court therefore held that the defendant was entitled to a new sentencing proceeding at which the court “must consider as mitigation the defendant's age at the time he committed the offenses and the hallmarks of adolescence

²⁶ According to the Connecticut Department of Corrections.

²⁷ Interview with Connecticut practitioner, Jan. 23, 2015. Notes on file.

²⁸ These include: (1) murder of a police officer, state marshal, or judicial marshal, corrections officer, or firefighter performing official duties; (2) murder for pecuniary gain or for hire; (3) murder by someone with prior murder conviction; (4) murder by someone serving sentence of life imprisonment; (5) murder by kidnapper of kidnapped person during course of kidnapping; (6) murder committed during course of first-degree sexual assault; (7) murder of multiple victims in same transaction; or (8) murder of victim under sixteen years old. § 53a-54b.

²⁹ *Id.*

that *Miller* deemed constitutionally significant when a juvenile offender is subject to a potential life sentence.” *Id.* at 1206.

Following *Riley*, the Connecticut Supreme Court found that *Miller* was retroactive applying the federal standard. *See Casiano v. Comm’r of Corr.*, slip op. No. 19345, 2015 Conn. LEXIS 151, 2015 WL 3388481 (Conn. May 26, 2015). Unlike most jurisdictions to give *Miller* retroactive effect, the Connecticut Supreme Court did not hold that *Miller* announced a substantive rule, but rather that it announced a watershed rule of criminal procedure. *Id.* at *2. The court further held that *Miller* applied to the petitioner’s mandatory fifty-year without parole sentence: “[we are] persuaded that the procedures set forth in *Miller* must be followed when considering whether to sentence a juvenile offender to fifty years imprisonment without parole.” *Id.* at 43. Accordingly, the court reversed and remanded for further sentencing proceedings. *Id.* The opinion also urges legislative action: “we have every reason to expect that our decisions in *Riley* and in the present case will prompt our legislature to renew earlier efforts to address the implications of the Supreme Court’s decisions in *Graham* and *Miller*.” *Id.* at 42.

In June 2015, Connecticut passed a law that retroactively eliminated life-without parole sentences for juveniles. S.B. 796. Juveniles may no longer be convicted of capital felony, murder with special circumstances, or arson murder—offenses which carry mandatory life-without-parole sentences. §§ 53a-54a, 53a-54d. Under the revised laws, the most serious offense for juveniles is murder, which carries a minimum sentence of twenty-five years (with parole eligibility after fifteen years) and a maximum sentence of sixty years (with parole eligibility after thirty years).

The bill retroactively applies to juvenile offenders currently serving sentences, and provides that juveniles are eligible for parole after serving 60% of the sentence, or twelve years, whichever is greater. § 54-125a(f). Those serving more than fifty years are eligible for parole after thirty years. *Id.* The parole board must apply special criteria in considering juvenile cases.³⁰

A year before the parole hearing, counsel will be appointed for indigent individuals to help them prepare for the hearing. When sentencing juveniles transferred to adult court and convicted of A or B felonies, judges must consider “the defendant’s age at the time of the offense, the hallmark features of adolescence, and any scientific and psychological

³⁰ The criteria include whether “such person has demonstrated substantial rehabilitation since the date such crime or crimes were committed considering such person’s character, background and history, as demonstrated by factors, including, but not limited to, such person’s correctional record, the age and circumstances of such person as of the date of the commission of the crime or crimes, whether such person has demonstrated remorse and increased maturity since the date of the commission of the crime or crimes, such person’s contributions to the welfare of other persons through service, such person’s efforts to overcome substance abuse, addiction, trauma, lack of education or obstacles that such person may have faced as a child or youth in the adult correctional system, the opportunities for rehabilitation in the adult correctional system and the overall degree of such person’s rehabilitation considering the nature and circumstances of the crime or crimes.” *Id.*

evidence showing the differences between a child's brain development and an adult's brain development." *Id.* The probation office "shall compile reference materials relating to adolescent psychological and brain development to assist courts in sentencing children" and must include information relating to youth-related factors in the presentence report. *Id.*

The Connecticut Supreme Court has mandated that sentencing courts adhere to the requirements of *Miller* in sentencing juveniles to life-equivalent prison terms, and Connecticut recently passed retroactively applicable legislation eliminating JLWOP, including for the state's four JLWOP prisoners.

Delaware

Delaware was among the twenty-nine jurisdictions that had JLWOP at the time *Miller* was decided. *See Miller v. Alabama*, 132 S. Ct. 2455, 2473 n.13 (2012). The state has since functionally abolished JLWOP. Delaware's amended statutes make JLWOP discretionary and provide an opportunity for sentencing review in every JLWOP case. S.B. 9, 147th Gen. Assemb., Reg. Sess. (Del. 2013), *amending* Del. Code Ann. tit. 11, §§ 4209, 4209-A, 4209-217(f), 3901(d). Therefore, the sixteen Delaware prisoners who were automatically sentenced to JLWOP prior to *Miller* have been or are in the process of being resentenced pursuant to the new laws.³¹

Prior to the passage of Senate Bill 9, Delaware law provided for automatic JLWOP for individuals convicted of first-degree murder³² for crimes they committed as juveniles. Del. Code Ann. tit. 11, § 4209 (2011). Senate Bill 9 amended the state's laws to "bring Delaware into compliance with the *Miller* holding by removing juvenile offenders from the mandatory sentencing scheme for first-degree murder . . . [and by requiring the judge] to exercise his or her discretion . . . using individualized criteria suggested by the Supreme Court." *See* S.B. 9. The bill explains that a judge's consideration of such factors while sentencing a defendant in his discretion is "already an integral part of Delaware's sentencing procedures." *Id.*, *citing* SENTAC Benchbook (Jan 2012) pp. 123-26.

Under the new laws, a defendant convicted of first-degree murder for an offense that was committed before he turned eighteen "shall be sentenced" to a term of between twenty-five years and LWOP. Del Code Ann. tit. 11, § 4209A. The bill provided that individuals sentenced to JLWOP prior to the bill's enactment will now be resentenced pursuant to this scheme; thus, the bill applies retroactively. *See* S.B. 9. Moreover, the new law allows juveniles serving sentences of more than twenty years to petition for sentence modification. § 4204A(d). At the sentence modification stage, the court may use its discretion to "modify, reduce, or suspend [the offender's] sentence, including any minimum or mandatory sentence." *Id.* Modification requests may be filed after thirty years in first-degree murder cases and after twenty years for all other cases. *Id.* Prisoners may receive subsequent reviews at five-year intervals, and the court has discretion to lengthen the time between petitions. *Id.* Thus, juveniles sentenced to lengthy prison terms will always have an opportunity for sentence review.

Delaware has brought its laws into compliance with *Miller* through a series of statutory changes that apply retroactively. While Delaware laws facially provide for discretionary

³¹ Interview with Delaware practitioner, Feb. 5, 2015. Notes on file.

³² A Delaware defendant is guilty of first degree murder where he: (1) intentionally causes the death of another; (2) recklessly causing the death of another while engaged in the commission of an enumerated felony; (3) intentionally causing another person to commit suicide by force or duress; (4) recklessly causing the death of a police officer, corrections employee, fire fighter, or paramedic engaged in his official duties; (5) causing the death of another using a bomb or similar device; (6) causing the death of another to prevent the lawful arrest of any person, or in the course of commission of second degree escape after conviction. Del. Code Ann., tit. 11, § 636.

JLWOP, the amended laws actually provide an opportunity for sentence review in every case.

District of Columbia

Although the District of Columbia has been counted among the eight jurisdictions that did not have JLWOP at the time *Miller* was decided,³³ its laws in fact authorize *de facto* JLWOP for certain crimes. However, D.C. has zero JLWOP prisoners.³⁴

On August 5, 2000, D.C. eliminated parole, transitioning from an indeterminate sentencing system to a determinate sentencing scheme (although individuals who committed an offense prior to that date remain parole eligible). D.C. Code § 24-403.1. Thus, statutes authorizing a sentence of life now effectively authorize LWOP because parole is no longer an option.³⁵ *De facto* LWOP is now available for first-degree murder,³⁶ second-degree murder,³⁷ first-degree sexual abuse,³⁸ and first-degree child sexual abuse.³⁹ §§ 22-2104(a), -2014(c), -3002(a), -3008. Of these offenses, only the first-degree murder statute specifies that “no person who was less than 18 years of age at the time the murder was committed shall be sentenced to life imprisonment without release.” § 22-2104(a). The second-degree murder and sexual abuse statutes contain no such limitations. §§ 22-2014(c), -3002(a), -3008. Because such sentences are discretionary, the laws do not violate *Miller*’s ban on mandatory JLWOP. Perhaps for this reason, the D.C. Court of Appeals⁴⁰ has yet to interpret these laws in light of *Miller*.

In *James v. United States*, 59 A.3d 1233, 1234 (D.C. 2013), the D.C. Court of Appeals⁴¹ considered whether petitioner’s thirty-year mandatory minimum imposed for first-degree murder he committed as a juvenile violated the Eighth Amendment pursuant to *Roper*, *Graham*, and *Miller*. *Id.* Petitioner argued that the mandatory nature of his sentence did

³³ See, e.g., The Sentencing Project, *Slow to Act: State to 2012 Supreme Court Mandate on Life Without Parole* (2014) available at

http://sentencingproject.org/doc/publications/jj_State_Responses_to_Miller.pdf.

³⁴ See The Sentencing Project, *Juvenile Life Without Parole: An Overview* (2015) available at http://sentencingproject.org/doc/publications/jj_Juvenile_Life_Without_Parole.pdf.

³⁵ Interview with District of Columbia practitioner, Apr. 20, 2015. Notes on file.

³⁶ First-degree murder occurs where an individual “kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate an offense punishable by imprisonment in the penitentiary, or without purpose to do so kills another in perpetrating or in attempting to perpetrate [an enumerated felony].” § 22-2101.

³⁷ “Whoever with malice aforethought . . . kills another is guilty of murder in the second degree.” § 22-2103.

³⁸ First-degree sexual abuse occurs where a person engages in or causes another person to engage in or submit to a sexual act in the following manner: (1) by using force; (2) by threatening or placing person in reasonable fear of being subjected to death, bodily injury, or kidnapping; (3) by rendering the other person unconscious; or (4) after administering by force, threat of force, or without the other person’s knowledge, a drug that impairs the person’s ability to appraise or control his conduct. § 22-3002.

³⁹ “Whoever, being at least 4 years older than a child, engages in a sexual act with that child or causes that child to engage in a sexual act shall be imprisoned for any term of years or for life” § 22-3008.

⁴⁰ The D.C. Court of Appeals is the highest court in the District of Columbia. See <http://www.dccourts.gov/internet/appellate/main.jsf>.

⁴¹ See *supra*, note 31.

not allow the sentencer to take into account the “mitigating qualities of youth.” *Id.* at 1237. The D.C. Court of Appeals held, however, that pursuant to the D.C. Code, the D.C. Council and the Executive Branch had already considered youth and its attendant factors by limiting the minimum sentence to thirty years for offenders under the age of eighteen at the time of their offense, as compared to LWOP which is available against adults. *Id.* at 1238. Addressing *Miller*’s mandate that it is the *sentencer*, not the legislature, who must make an individualized determination taking into consideration the offender’s youth, the court weakly reasoned that in D.C., “sentencing is a joint exercise by the legislative, executive, and judicial branches.” *Id.* The court therefore concluded: “Because the sentencing statute already takes a juvenile offender’s youth into account, the mandatory nature of appellant’s sentence does not violate the Cruel and Unusual Punishment Clause of the Eighth Amendment.” *Id.* The court did not address the availability of JLWOP for certain crimes pursuant to the August 5, 2000 amendments, likely because such a sentence is never mandatory and petitioner was sentenced under a different statute.

Despite the fact that D.C. has been characterized having outlawed JLWOP, its laws still allow the possibility that a juvenile offender be sentenced to die in prison. Neither the legislature nor the D.C. Court of Appeals have addressed this fact in light of *Miller*. Reports indicate, however, that D.C. has no JLWOP prisoners. Therefore, it appears the punishment is rarely, if ever, imposed.

Federal Government

The Federal Government was among the twenty-nine jurisdictions that had mandatory JLWOP at the time *Miller* was decided. 11 U.S.C. §§ 1111, 5032. The Federal Government has not altered its laws in response to *Miller*. There are approximately thirty-eight individuals serving JLWOP sentences in the federal system.⁴²

Offenders as young as thirteen years old can be tried as adults in federal court. 18 U.S.C. § 5032. Individuals as young as fifteen have been tried and sentenced to JLWOP in the federal system.⁴³ Defendants charged with first-degree murder⁴⁴ in the federal system “shall be punished by death or by imprisonment for life.” 18 U.S.C. § 1111. Because parole was eliminated, this statute provides for mandatory JLWOP for juveniles convicted of first-degree murder. See *United States v. LaFleur*, 971 F.2d 200 (9th Cir. 1991) (en banc) (“as part of the Reform Act, Congress eliminated all federal parole.”)

There are only a handful of federal cases analyzing federal sentencing laws in light of *Miller*, and only one recognizing that section 1111 violates *Miller*. In *Pete v. United States*, No. 13-8149, 2014 U.S. Dist. LEXIS 2559, at *2, 2014 WL 88015 (D. Ariz., Jan. 9, 2014), petitioner filed a motion to correct his mandatory JLWOP sentence in light of *Miller*. The United States district court agreed that at “petitioner’s sentencing, this court was statutorily mandated by 18 U.S.C. § 1111 to impose a sentence of [JLWOP].” *Id.* at *2-3.

The U.S. Department of Justice has taken the position that *Miller* applies retroactively. Thus, in challenges to federal JLWOP sentences, the federal courts have provided sentencing relief. *Id.* at *3-4; see also Supp. Resp. *Wright v. United States*, No. 13-1638 (the position of the Department of Justice is “that *Miller* is retroactively applicable to cases on collateral review and may be asserted in a successive motion seeking resentencing under § 2255.”). Thus, as long as this policy is in place, all federal inmates under a sentence of JLWOP should be able to obtain a resentencing hearing.

Federal juveniles subject to functional life sentences have not been successful in having *Miller* apply to their sentences. In *Long v. United States*, No. 13-1012, 2014 U.S. Dist. LEXIS 51147, at *2, 2014 WL 1453312 (D.S.D. 2014), at trial, the defendant was sentenced to 540 months imprisonment for kidnapping, aggravated sexual abuse, and burglary. On collateral review, the court held that *Miller* did not apply because “the

⁴² The Campaign for the Fair Sentencing of Youth, *Federal Stats: Juveniles Serving Life Without Parole Sentences in the Federal System* (June 2011) available at <http://fairsentencingofyouth.org/the-issue/federal-stats>.

⁴³ *Ibid.*

⁴⁴ “(a) Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of [an enumerated felony]; or perpetrated as part of a pattern or practice of assault or torture against a child or children; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.” 18 U.S.C. § 1111.

Supreme Court’s decisions creating a bar on [JLWOP] sentences only addressed defendants in state court proceedings who received an actual life sentence, not its mathematical ‘functional equivalent.’” *Id.* at *9. Therefore, “relief should not be granted using the same meaning of a life sentence as was used in the context of *Miller*.” *Id.* at 10; *see also Friedlander v. United States*, No. 13-70918, 2013 U.S. App. LEXIS 20812, at *2, 2014 (9th Cir. 2013) (“*Miller* is inapplicable because Friedlander⁴⁵ was not sentenced to life without parole”); *United States v. Shill*, 740 F.3d 1347 (9th Cir. 2014) (holding *Miller* did not apply because defendant was not sentenced to JLWOP, but instead to a ten-year mandatory minimum for sexual assault); *United States v. Vallejo*, No. 12-C-1051, 2014 U.S. Dist. LEXIS 87212, at *3 (E.D. Wis. June 25, 2014) (holding *Miller* did not apply to Vallejo’s life sentence for RICO crimes because court had discretion in scheme under which defendant was sentenced); *United States v. Davis*, No. 11-3472, 2013 U.S. App. LEXIS 16603 (6th Cir. August 6, 2013) (holding *Miller* did not apply to appellant’s life sentence because defendant was not a juvenile).

In *Johnson v. United States*, 720 F.3d 720 (8th Cir. 2013), the Eighth Circuit held that petitioner made a *prima facie* showing that *Miller* announced a new rule of constitutional law that applied retroactively. As in *Long*, the government “conceded that *Miller* is retroactive and that Mr. Johnson may be entitled to relief under the case.” *Id.* at 721. The Eighth Circuit therefore concluded that petitioner made a sufficient showing to “warrant the district court’s further exploration of the matter.” *Id.*

Federal sentencing laws continue to violate the Supreme Court’s mandate with little recognition by federal courts. The federal government, however, seems willing to concede that *Miller* applies retroactively, relevant to the thirty-eight prisoners serving a federal JLWOP sentence.

⁴⁵ Friedlander was sentenced to life with parole before parole was eliminated and admitted that he had seen the parole board eight times and had a forthcoming hearing at the time of his motion. *Id.* at 577.

Florida

Florida was among the twenty-nine jurisdictions that had mandatory JLWOP at the time of *Miller*. See *Miller v. Alabama*, 132 S. Ct. 2455, 2473 n.13 (2012). In July 2014, Florida amended its laws to comply with *Miller*. H.B. 7035, 2014 Reg. Sess. (Fla. 2014), amending Fla. Stat. §§ 775.082(1)(b), 921.1401, 921.1402. The new laws narrow the possibility of JLWOP considerably by establishing judicial sentencing review for every juvenile not previously convicted of certain enumerated felonies. § 921.1402(2)(a). Nearly all of Florida’s 218 prisoners currently serving mandatory JLWOP sentences imposed under the former law are expected to benefit from the recent reforms.⁴⁶ Moreover, the new laws extend *Miller*’s mandate to consider the mitigating feature of youth to all lengthy sentences, not merely JLWOP. *Id.*

Prior to the amended laws, a Florida defendant convicted of a capital felony⁴⁷ was automatically sentenced to either death or LWOP, meaning juveniles were sentenced to mandatory LWOP. § 775.082(1). The amended laws provide that a defendant convicted of a capital felony committed before age eighteen “shall be punished by a term of imprisonment for life if, after a sentencing hearing conducted by the court in accordance with s. 921.1401, the court finds that life imprisonment is an appropriate sentence.” § 775.082(1)(b). Pursuant to section 921.1401, a juvenile may only be sentenced to JLWOP where he “actually killed, intended to kill, or attempted to kill the victim” and was previously convicted of certain offenses,⁴⁸ or conspiracy to commit those offenses. § 921.1402(2)(a). If the judge finds that the juvenile did not actually kill, intend to kill, or attempt to kill the victim, then the juvenile may still be sentenced to life, but will be eligible for sentence review after fifteen years. *Id.*

Section 921.1401 dictates that upon a juvenile’s conviction of a capital offense committed on or after July 1, 2014, the court may conduct a separate sentencing hearing to determine whether LWOP is appropriate. § 921.1401(1). In determining whether a life sentence is appropriate, the court “shall consider” the following factors, echoing those outlined in *Miller*: (1) the nature and circumstances of the offense; (2) the effect of the crime on the victim’s family and community; (3) the defendant’s age, maturity, intellectual capacity, and emotional health; (4) the defendant’s background; (5) the effect of immaturity, impetuosity, or failure to appreciate risks and consequences on defendant’s participation in the offense; (6) the extent of defendant’s participation in the offense; (7) the effect of familial pressure or peer pressure on the defendant’s actions; (8)

⁴⁶ Based on data provided by a Florida practitioner, June 30, 2015. Data on file.

⁴⁷ Capital felonies include: (1) trafficking 150 or more kilograms of cocaine in a manner that causes death; and (2) murder. §§ 893.135, 782.04. “Murder” includes: (1) the unlawful and premeditated killing of a human being; (2) killing of another during the perpetration of an enumerated felony; and (3) death resulting from the unlawful distribution of a controlled substance. § 782.04(1)(a).

⁴⁸ These offenses include: murder; manslaughter; sexual battery; armed burglary; armed robbery; armed carjacking; home-invasion robbery; human trafficking for commercial sexual activity with a child under 18 years of age; false imprisonment; or kidnapping. § 921.1402(2)(a).

the nature and extent of defendant's prior criminal history; (9) the effect of characteristics attributable to defendant's youth; and (10) the possibility of rehabilitating the defendant. § 921.1401(2).

The amended statutes also provide for a sentence review mechanism for juveniles sentenced to substantial prison terms. §§ 775.081(1)(b); 921.1402. A juvenile offender sentenced to LWOP is entitled to review of his or her sentence after twenty-five years unless the juvenile has previously been convicted of an enumerated offense. § 921.1402(2)(a). Moreover, juveniles sentenced to fifteen, twenty, or twenty-five years are also entitled to review after serving a prescribed number of years. §§ 921.1402(2)(b), (2)(d), (2)(c).

Florida intermediate courts have been willing to reverse and remand for resentencing mandatory JLWOP sentences in light of *Miller* where the case is on direct appeal. *Washington v. State*, 103 So. 3d 917 (Fla. Dist. Ct. App. 2012). In *Washington*, the court remanded appellant's mandatory JLWOP sentence for resentencing, stating: "[I]f the state again seeks imposition of a life sentence without the possibility of parole, the trial court must conduct an individualized examination of mitigating circumstances in considering the fairness of imposing such a sentence." *Id.* at 920; *see also Johnson v. State*, 131 So. 3d 804 (Fla. Dist. Ct. App. 2013) (vacating JLWOP sentence for first-degree murder and remanding for resentencing to conduct individualized examination of Johnson's mitigating circumstances as required by *Washington* and *Miller*); *Walling v. State*, 105 So. 3d 660 (Fla. Dist. Ct. App. 2013) (mandatory JLWOP sentence imposed on sixteen-year-old offender for first-degree murder reversed and remanded for resentencing pursuant to *Washington* and *Miller*).

On March 19, 2015, the Florida Supreme Court held that *Miller* applies retroactively and remanded for resentencing the cases of four prisoners serving JLWOP sentences. *Falcon v. State*, No. SC13-865, 2015 Fla. LEXIS 534 (Fla. March 19, 2015); *see also Horsley v. State*, No. SC13-1938, 2015 Fla. LEXIS 535 (Fla. March 19, 2015); *Henry v. Florida*, No. SC12-578; *Gridine v. Florida*, No. SC12-1223. In *Falcon*, the Florida Supreme Court held that the rule announced in *Miller* constituted a "development of fundamental significance" as a matter of state law pursuant to the rule articulated in *Witt v. State*, 387 So.2d 922, 931 (Fla. 1980). 2015 Fla. LEXIS 534, at *2. The court held that it would reach the same conclusion as a matter of federal law pursuant to the *Teague* analysis. *Id.* Accordingly, the court held that the rule announced in *Miller* applies retroactively to juvenile offenders whose convictions and sentences were final at the time *Miller* was decided. *Id.* In *Horsley*, the court concluded that the appropriate remedy for any juvenile offender whose sentence is now unconstitutional under *Miller* is a resentencing pursuant to the framework established in Florida's amended statutes. *Id.* at *20-39. Thus, the court held that the new laws apply retroactively. *Id.*

Florida has amended its laws to comply with *Miller* and provides an opportunity for sentencing review for juveniles sentenced to substantial prison terms in almost every case. Moreover, the court found the laws and *Miller* to apply retroactively, meaning all of the 218 prisoners serving JLWOP sentences in Florida are scheduled to be resentenced.

Georgia

Georgia was among the fifteen states that had discretionary, but not mandatory, JLWOP at the time of *Miller*. See Ga. Code Ann. §16-5-1 (2011). Georgia has forty-one inmates serving a JLWOP sentence.⁴⁹

In Georgia, a child as young as thirteen years old can be transferred to adult court if he “either committed an act for which the punishment is loss of life or confinement in a penal institution or committed aggravated battery resulting in serious bodily injury to a victim.” Ga. Code. Ann. § 15-11-561 (2014).

A Georgia defendant convicted of murder “shall be punished by death, imprisonment for life without parole, or imprisonment for life.” Ga. Code Ann. § 16-5-1(e)(1). A defendant commits murder when “he unlawfully and with malice aforethought, either express or implied, causes the death of another human being” or when “in the commission of a felony, he or she causes the death of another human being irrespective of malice.” § 16-5-1(a),(c). “Express malice” is defined as a “deliberate intention unlawfully to take the life of another human being which is manifested by external circumstances capable of proof.” § 16-5-1(b). Implied malice occurs where “no considerable provocation appears and where all circumstances of the killing show an abandoned and malignant heart.” *Id.* The court has discretion over which penalty to impose. See *Foster v. State*, 754 S.E.2d 33, 37 (Ga. 2014).

Prior to *Roper v. Simmons*, Georgia law made clear that “the State could seek a sentence of life without the possibility of parole only in those cases where the State could, consistent with federal laws, impose a sentence of death.” *Moore v. State*, 749 S.E.2d 660, 662 (Ga. 2013); Ga. Code Ann. 17-10-32.1 (2001). After *Roper* eliminated the death penalty as a sentencing option for juveniles, Georgia changed its laws in 2009 so that prosecutors could ask for LWOP even if they were not seeking or could not seek a death sentence. Ga. Code. Ann. § 17-10-32.1 (2014). Because *Roper* mandated retroactive application, the Georgia Supreme Court held that juveniles sentenced to LWOP under the former statute must be resentenced. *Moore*, 749 S.E.2d at 663.

Shortly before *Miller* was decided, the Georgia Supreme Court found that sentencing a defendant to LWOP requires no consideration of the factors outlined in *Miller*. *Williams v. State*, 727 S.E.2d 95 (Ga. 2012). “Unlike the decision to impose the death penalty, a determination that a defendant should be sentenced to life imprisonment without possibility of parole does not require a consideration of mitigating factors.” *Id.* at 97 (quoting *Ortiz v. State*, 470 S.E. 874 (Ga. 1996)). While the court may permit the defendant to submit mitigating evidence at his sentencing hearing, as the trial court did in *Williams*, the Georgia Supreme Court has made clear that the court’s consideration of mitigating factors is not required. *Id.* Georgia courts ought to create an exception to *Williams* for juveniles in light of the requirements of *Miller*, but they do not appear to have done so

⁴⁹ According to the Georgia Department of Corrections.

In *Foster v. State*, 754 S.E.2d 33 (Ga. 2014), the Georgia Supreme Court held that Georgia's sentencing scheme does not violate *Miller*. There, defendant appealed his JLWOP sentence. *Id.* at 37. Without further explanation, the Georgia Supreme Court held: "[*Miller*] does not mandate life without parole, but instead gives the sentencing court discretion over the penalty. Accordingly, Foster's contention lacks merit." *Id.* at 38. Likewise, in *Bun v. State*, 769 S.E.2d 381 (Ga. 2015), appellant challenged his sentence of JLWOP plus additional seventy years for murder and related crimes. *Id.* at 382-83. Citing *Foster*, the Georgia Supreme Court held that Georgia's statute "does not under any circumstance *mandate* [JLWOP] but gives the sentencing court discretion over the sentence to be imposed after consideration of all circumstances in a given case, including the age of the offender and the mitigating qualities that accompany youth." *Id.* at 383. Thus, the court held that *Miller* did not provide appellant relief. *Id.* at 384.

While Georgia did not have mandatory JLWOP at the time of *Miller* and still does not, its statute does not require an individualized consideration featuring the mitigating qualities of youth. Moreover, *Williams*' troubling proclamation that the sentencing court need not consider any mitigating factors in sentencing a defendant to LWOP remains good law, reinforced by *Foster* and *Bun*. However, juveniles sentenced to JLWOP under the pre-*Roper* statute are entitled to re-sentencing pursuant to *Moore*.

Hawaii

Hawaii was among the twenty-nine jurisdictions that had mandatory JLWOP at the time of *Miller*. *Miller v. Alabama*, 132 S. Ct. 2455, 2459 (2012). Hawaii has since abolished JLWOP. H.B. 2116, 27th Leg. Sess. (Haw. 2014), *amending* Haw. Rev. Stat. §§ 706-656(1), -657 (2014). Hawaii has no JLWOP prisoners.⁵⁰

When *Miller* was decided, LWOP was mandatory for juveniles convicted of first-degree murder, attempted first-degree murder, and second-degree murder committed in an “especially heinous, atrocious, or cruel” manner or where the defendant had a previous murder conviction. *See* Haw. Rev. Stat. §§ 706-656; 706-657 (2013).

In July 2014, Hawaii abolished JLWOP. H.B. 2116 (“The legislature acknowledges and recognizes that children are constitutionally different from adults and that these differences must be taken into account when children are sentenced for adult crimes”). Under the amended laws, “persons under the age of eighteen years at the time of the offense who are convicted of first-degree murder⁵¹ or first-degree attempted murder shall be sentenced to life with the possibility of parole.” Haw. Rev. Stat. § 706-656(1) (2014). Moreover, the new laws outlaw LWOP as an option for second-degree murder where the defendant was under eighteen at the time of the offense. § 706-657.

Under existing Hawaii law, once individuals become eligible for parole, they are entitled to review every twelve months. They are also entitled to counsel and there is a presumption in favor of parole if they have been “assessed” as having a low likelihood of reoffending. § 706-670.

Hawaii has officially outlawed JLWOP, which it never used to begin with.⁵² However, its laws still impose mandatory life with the possibility of parole for first-degree murder and attempted first-degree murder. Hawaii has no cases addressing its laws in light of *Miller*.

⁵⁰ According to the Hawaii Department of Corrections.

⁵¹ In Hawaii, a person commits first-degree murder where he “intentionally or knowingly” commits one of the following offenses: (1) murder of multiple victims in the same incident; (2) murder of a law enforcement officer, judge, or prosecutor; (3) murder of a witness; (4) murder for hire; (5) murder while defendant was imprisoned; (6) murder of person from whom defendant has been restrained; (6) murder of a person being protected by a police officer ordering the defendant to leave the premises. *See* Haw. Rev. Stat. § 707-701 (2014).

⁵² No one in Hawaii has ever been sentenced to JLWOP. Interview with Hawaii practitioner, Jan. 28, 2015. Notes on file.

Idaho

Idaho was among the twenty-nine jurisdictions with mandatory JLWOP at the time of *Miller*. See *Miller v. Alabama*, 132 S. Ct. 2455, 2473 n.13 (2012). The state has not since altered its laws. Approximately four individuals are serving JLWOP in Idaho.⁵³

In Idaho, juveniles as young as fourteen years old can be charged as adults. Idaho Code Ann. § 20-508. When a person is found guilty of first-degree murder,⁵⁴ and the prosecutor seeks the death penalty and a statutory aggravating factor is found beyond a reasonable doubt, he may be sentenced to either death or a “fixed life sentence,” which is the equivalent of LWOP. § 18-4004. Post-*Roper*, a juvenile in this situation would receive mandatory JLWOP. *Id.* If the prosecutor does not seek death, or the statutory aggravating factor is not found beyond a reasonable doubt, the court must impose a life sentence with a minimum period of ten years before the offender can be eligible for parole. *Id.*

Neither the Idaho legislature nor the Idaho courts have addressed Idaho’s sentencing statutes after *Miller*. However, a pre-*Miller* case addresses the role of age at sentencing in JLWOP cases. See *State v. Draper*, 261 P.3d 853 (Idaho 2011). In that case, the Idaho Supreme Court addressed whether the defendant’s JLWOP sentence violated the Eighth Amendment. Because the sentence fell within the statutory limits, the court reviewed for an abuse of discretion. *Id.* at 876. The court explained that in reviewing a fixed life sentence, “the primary factors considered are the gravity of the offense and/or the need to protect society from the defendant.” *Id.* at 877 (internal quotations omitted).

The defendant’s challenge focused on the sentencing judge’s statements that “[t]eenage killers perhaps should receive no mercy” and “I’m not unmindful of how young you fellows are, but you commit a crime of this nature and it’s got to be . . . known, not only by those who commit it, but to others in the community that punishment . . . will not be so merciful.” *Id.* The Idaho Supreme Court rejected the defendant’s claim that these statements suggested the trial court viewed his age as an aggravating factor. It noted that the statements “directly address Draper’s age as a potentially mitigating circumstance” and that the “entire sentencing hearing was focused on the planning and execution of [the] murder and the important of protecting society.” *Id.* In this context, the Idaho Supreme Court explained that the trial court found that petitioner’s danger to society

⁵³ According to information provided by the Idaho Department of Corrections in response to a request for public information. Notes on file.

⁵⁴ In Idaho, first-degree murder includes: (a) murder perpetrated “by means of poison, lying-in-wait, or torture [inflicted with the intent to cause suffering, execute vengeance, to extort, or to satisfy some sadistic inclination, or murder which is willful, deliberate, and premeditated]”; (b) knowingly murdering “a peace officer, executive officer, officer of the court, fireman, judicial officer, or prosecuting attorney who was acting in lawful discharge of an official duty;” (c) murder committed by a person serving a sentence for first- or second-degree murder, including persons on parole or probation from sentence; (d) murder committed in perpetration of enumerated felony; (e) murder committed by person incarcerated in penal institution upon person employed by institution, another inmate, or visitor; and (f) murder committed while escaping or attempting to escape penal institution. Idaho Code § 18-4003.

outweighed the potentially mitigating circumstance of his youth. *Id.* The court therefore concluded: “Viewed in light of the gravity of the offense and the need to protect society from the defendant, we find that the district court’s imposition of a fixed life sentence was not an abuse of discretion.” *Id.* at 878.

Idaho’s laws remain unaltered since *Miller* and Idaho courts have not interpreted these laws in light of *Miller*. Idaho courts have not considered *Miller*’s retroactivity, relevant to the four individuals serving the sentence.

Illinois

Illinois was among the twenty-nine jurisdictions that had mandatory JLWOP at the time of *Miller*. See 705 Ill. Comp. Stat. 405/5-805 (2012). While Illinois has not since altered its laws, a pending bill would bring Illinois into compliance with *Miller*. H.B. 2471, 99th Reg. Sess. (Ill. 2015), to enact 730 Ill. Comp. Stat. 5/5-4.5-105 (a). Moreover, the Illinois Supreme Court has recognized that mandatory JLWOP sentences are unconstitutional and has held that *Miller* applies retroactively on collateral review. *People v. Davis*, 6 N.E. 3d 709, 722 (Ill. 2014). There are approximately ninety-four individuals serving JLWOP sentences in Illinois;⁵⁵ eighty of those were imposed mandatorily.⁵⁶

Under Illinois' unaltered laws, JLWOP is mandatory for first-degree murder⁵⁷ convictions in the following circumstances: (1) the defendant has a previous murder conviction; (2) the defendant, if over the age of sixteen, murdered someone under the age of twelve; (3) the defendant murdered multiple victims; (4) the defendant murdered a police officer performing his official duties; (5) the defendant murdered a correctional facility employee; (6) the defendant murdered an emergency medical technician; (7) the defendant, if over the age of sixteen, murdered a person under the age of twelve during the course of an aggravated or criminal sexual assault or aggravated kidnapping; and (8) the murder of a community policing volunteer. Ill. Comp. Stat. 5/5-8-1. Where the defendant was convicted of first-degree murder and the trier of fact finds beyond a reasonable doubt that "the murder was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty," LWOP is discretionary. *Id.*

Illinois courts have routinely vacated mandatory JLWOP sentences and remanded for resentencing in accordance with *Miller*. In *Davis*, the Illinois Supreme Court considered Illinois's sentencing scheme in light of *Miller* and determined whether *Miller* applied retroactively. 6 N.E. 3d at 722. The court first held that "*Miller* did not render the statutory scheme under which defendant was sentenced facially unconstitutional" because it also applied to adults. *Id.* at 720; see also Ill. Rev. Stat. 1989, ch. 37, § 805-4; § 703 Ill. Comp. Stat. 5/5/81-1(a)(1)(c). The court stressed that *Miller* does not invalidate the penalty of JLWOP: "only its *mandatory* imposition on juveniles." 6 N.E. 3d at 723. The court held, however, that the juvenile's mandatory sentence of LWOP was unconstitutional and remanded for a new sentencing hearing. *Id.* at 723; see also *People v. Baker*, 2015 Ill. App. 110492 (Ill. App. Ct. 2015); *People v. Johnson*, 998 N.E.2d 185 (Ill. App. Ct. 2013); *People v. Morfin*, 981 N.E.2d 1010 (Ill. App. Ct. 2012); *People v. Arrieta*, 2014 Ill.App. 130035-U (Ill. App. Ct. 2014).

⁵⁵ According to the Illinois Department of Corrections.

⁵⁶ Interview with Illinois practitioner, Jan. 29, 2015. Notes on file.

⁵⁷ In Illinois, a defendant can be charged with first degree murder where he: (1) either intends to kill or do great bodily harm to an individual or another, knowing the acts will cause death to that individual or another; or (2) knows that such acts create a strong possibility or great bodily harm to that individual or another; or (3) is attempting or committing a forcible felony other than second-degree murder. See 720 Ill. Comp. Stat. 5/9-1.

In remanding the defendant's case for a new sentencing hearing, the *Davis* court held that, as a matter of state law, *Miller* is a substantive rule and should be applied retroactively. 6 N.E. 3d at 723. The court reasoned that because *Miller* "places a particular class of persons covered by the statute—juveniles—constitutionally beyond the State's power to punish with a particularly category of punishment—mandatory sentences of natural life without parole." *Miller* therefore "declares a new substantive rule." *Id.* at 722. The court used the basic *Teague* framework, but stressed that Illinois applied the *Teague* framework as a matter of state law. Because *Miller* is a "new substantive rule, it falls outside of *Teague*, rather than an exception thereto." *Id.*; see also *People v. Cooks*, No. 1-11-2991, 2012 Ill. App. 112991-U (2013) (holding the same). This ruling should apply to the eighty individuals serving mandatory JLWOP sentences.

A pending bill would bring Illinois law into compliance with *Miller*. H.B. 2471. The new laws first outlaw mandatory JLWOP, establishing a minimum of forty years for first-degree murder. 5/5-4.5-105(a). The new laws require the court to consider factors akin to those outlined in *Miller* in sentencing an individual for an offense he or she committed under the age of eighteen. 5/5-4.5-105(c). Finally, the laws allow the court in its discretion to decline to impose sentencing enhancement based on the use of a firearm during the commission of the offense, which are typically mandatory. 5/5-4.5-105(b).

According to the Illinois Coalition for the Fair Sentencing of Children, JLWOP has been used primarily as a response to urban gang violence and fear of an upward spiral in youth crime beginning in the late 1970's in Illinois.⁵⁸ The vast majority of JLWOP sentences were handed down in the 1980's and 1990's and relied on the multiple murder aggravator. A significant majority of JLWOP sentences (73) come out of a single county, Cook County, where Chicago is located.

While the Illinois Supreme Court has recognized the unconstitutionality of mandatory JLWOP, Illinois's sentencing scheme continued to violate *Miller* pending the passage of a new bill.

⁵⁸ See http://webcast-law.uchicago.edu/pdfs/00544_Juvenile_Justice_Book_3_10.pdf

Indiana

Indiana was among the fifteen jurisdictions that had discretionary, but not mandatory, JLWOP at the time of *Miller*, and has not since altered its laws. Burns. Ind. Code. Ann. § 35-50-2-3.

There are currently zero defendants serving JLWOP in Indiana,⁵⁹ and one serving a *de facto* JLWOP sentence.⁶⁰ Three were charged capitally prior to *Roper v. Simmons*, 543 U.S. 551 (2005); two pled to LWOP and the third was sentenced to LWOP after a jury trial and a penalty phase.⁶¹ The first has a pending post-conviction petition, the second lost in state post-conviction and has a federal habeas petition pending, and the third never sought post-conviction relief.⁶² The fourth was charged with LWOP three years ago after pleading guilty to murder.⁶³ The Indiana Supreme Court affirmed his conviction in *Conley v. State*, 972 N.E.2d 864 (Ind. 2012), discussed below, and he has a pending state post-conviction petition.⁶⁴ The defendant serving *de facto* JLWOP also has a state post-conviction petition pending.⁶⁵

In Indiana, a person who commits murder shall be imprisoned to a minimum of forty-five years. *Id.* A defendant between sixteen and eighteen years of age at the time of the crime may be sentenced to JLWOP. Burns. Ind. Code. Ann. § 35-50-2-3; § 35-50-2-9. A sentence of LWOP is subject to the same statutory standards and requirements as the death penalty. § 30-20-2-9. Before a sentence of LWOP may be imposed, the sentencer must determine that the state has proven the existence of at least one aggravating factor⁶⁶ beyond a reasonable doubt, and also that the mitigating circumstances are outweighed by

⁵⁹ According to information provided by the Indiana Department of Corrections in response to a request for public information. Notes on file.

⁶⁰ Interview with Indiana practitioner, Jan. 29, 2015. Notes on file.

⁶¹ *Supra*, note 59.

⁶² *Supra*, note 60.

⁶³ *Supra*, note 59.

⁶⁴ *Supra*, note 60.

⁶⁵ *Supra*, note 60.

⁶⁶ Aggravating circumstances include the following: (1) murder during the course of an enumerated felony; (2) murder by explosive device with intent to damage person or property; (3) murder by lying in wait; (4) murder for hire; (6) murder of a corrections employee, probation officer, parole officer, fireman, judge, or law enforcement officer; (7) defendant has a previous murder conviction; (8) defendant was either incarcerated, in custody, on probation, or on parole at the time of the murder; (9) the defendant dismembered the victim; (10) the defendant tortured the victim; (11) the victim was under twelve years old; (12) the defendant was also convicted of battering, kidnapping, criminally confining, or sexually abusing the victim; (13) murder of a witness against the defendant; (14) murder by intentional discharge of firearm into an inhabited dwelling or from a vehicle; or (15) the victim was pregnant and the victim intentionally killed a viable fetus. *Id.* Mitigating factors include the following: (1) defendant's criminal history; (2) influence of extreme mental or emotional disturbance at time of crime; (3) the victim participated or consented; (4) defendant's degree of participation in the murder; (5) duress; (6) substantial impairment of defendant's ability to appreciate the criminality of his conduct and/or to conform that conduct to the requirements of the law; and (7) any other appropriate circumstance. *Id.*

the aggravating circumstances. *Id.* If the defendant was convicted in a jury trial, the jury sentences the defendant; if there was a bench trial or judgment was entered on a guilty plea, the judge sentences the defendant. § 35-50-2-9.

In *Conley*, the Supreme Court of Indiana considered a juvenile defendant's LWOP sentence in light of *Miller*. 972 N.E.2d at 864. The court upheld the sentence, finding that the sentencing judge took into consideration the factors required in *Miller* – the “mitigating qualities of youth,” “how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” *Id.* at 876 (quoting *Miller*, 132 S. Ct. at 2467, 2469). Because Indiana's JLWOP is discretionary, as the Supreme Court recognized in *Miller*, the court found that the statute is “not unconstitutional in violation of the Eighth Amendment.” *Id.*

In *Brown v. State*, 10 N.E.3d 1 (Ind. 2014) (and its companion case, *Fuller v. State*, 9 N.E. 3d 654 (Ind. 2014)), the Indiana Supreme Court held that 150-year aggregate sentences imposed for two counts of murder and one count of robbery on the juvenile defendants were unconstitutional in light of *Miller*. “Similar to a life without parole sentence, Brown's 150 year sentence ‘forfeits altogether the rehabilitative ideal.’” *Brown*, 10 N.E. 3d at 8, (quoting *Miller*, 132 S. Ct. at 2465). The court found that Brown's 150-year sentence essentially equaled a “denial of hope” – “it means that whatever the future might hold in store for the mind and spirit of the [juvenile] convict, he will remain in prison for the rest of his days.” *Id.* (quoting *Graham v. Florida*, 560 U.S. 48, 70 (2010)). While the court found that the sentencing court did not err, it nonetheless felt compelled to use its “constitutional authority to review and revise sentences.” *Id.* Using its “collective sense of what is appropriate,” the court decided that Brown should receive an enhanced count of sixty years for each count of murder and an enhanced sentence of twenty years for robbery, for a total of eighty years. *Id.* The court did the same in *Fuller*. 9 N.E.3d at 654. Precedent cited in *Brown* suggests the court is willing to reduce *de facto* JLWOP sentences in Indiana with some regularity. However, the court has yet to do so in a JLWOP case.

JLWOP is rarely used in Indiana, and the Indiana Supreme Court has demonstrated a willingness to reduce *de facto* JLWOP sentences in light of the unique features of youth outlined in *Graham* and *Miller*. Nevertheless, JLWOP is still on the books in Indiana and that would be difficult to change given the conservative politics of the state.

Iowa

Iowa was among the twenty-nine jurisdictions that had mandatory JLWOP at the time of *Miller*. *Miller v. Alabama*, 132 S. Ct. 2455, 2480 (2012) (Roberts, C.J., dissenting) (Iowa “made especially clear that it *does* intend juveniles who commit first-degree murder to receive mandatory life without parole.”). While the legislature was initially slow to alter its laws, the Iowa Supreme Court has consistently held that mandatory JLWOP sentences violate *Miller* and has directed sentencers to consider the mitigating features of youth. *See, e.g., State v. Ragland*, 836 N.W.2d 107, 110 (Iowa 2013). The Iowa Supreme Court has also found that *Miller* applies retroactively on collateral review, relevant to the state’s forty-five JLWOP prisoners.⁶⁷ *Id.*

Prior to *Miller*, an Iowa defendant convicted of a class “A” felony⁶⁸ was automatically sentenced to LWOP. Iowa Code § 902.1(1) (2011). Shortly after *Miller*, the Governor of Iowa commuted the sentences of thirty-eight Iowa inmates serving statutorily mandated JLWOP sentences. *Ragland*, 836 N.W.2d at 110. The Governor commuted the sentences of all defendants to life with no possibility of parole for sixty years. *Id.* at 111. However, the Iowa Supreme Court thereafter ruled that these commutations were unconstitutional under *Miller* because they constituted the functional equivalent of JLWOP. *Id.*

In April 2015, the Iowa legislature passed Senate Bill 448. S.B. 228, 86th Gen. Assemb., 1st Sess. (Iowa 2015), *amending* Iowa Code §§ 902.1, 903A.2. The new laws provide that a person convicted of first-degree murder for an offense committed when he was under eighteen shall be sentenced to one of three options: (1) JLWOP (except by commutation by the governor); (2) life with the possibility of parole after serving a minimum term as determined by the court; and (3) life with the possibility of parole, undetermined. § 902.1(2). The bill also requires the sentencer to consider factors akin to those outlined in *Miller* before sentencing a juvenile to LWOP or life. *Id.*

In *Ragland*, the Iowa Supreme Court considered petitioner’s sentence in light of *Miller*. 836 N.W.2d at 108. Petitioner was originally sentenced to mandatory JLWOP and thereafter the Iowa Governor commuted his sentence to sixty years without parole. *Id.* at 109-10. Petitioner challenged the new sentence under *Miller* and the district court agreed that the Governor’s “commutation circumvented the individualized sentencing required under *Miller* and deprived Ragland of a meaningful opportunity to demonstrate maturity and rehabilitation.” *Id.* at 112. The district court accordingly resentenced Ragland to life with the possibility of parole after twenty-five years and the state sought discretionary review. *Id.* at 113.

The *Ragland* court first held that *Miller* was retroactive as a matter of federal law pursuant to *Teague*. *Id.* at 114. The court reasoned that while *Miller* does mandate a new procedure, “the procedural rule for a hearing is the result of a substantive change in the

⁶⁷ According to information provided by the Iowa Department of Corrections in response to a request for public information. Notes on file.

⁶⁸ Class “A” felonies include first-degree murder, first-degree kidnapping, first-degree sexual abuse, and enhanced sexual abuse. Iowa Code §§ 707.2, -10.2, -09.2, 902.14, (2013).

law that prohibits mandatory [LWOP].” *Id.* at 115. Thus, the rule “bars the state from imposing a certain type of punishment on certain people” and therefore falls within the *Teague* exception. *Id.* The court next found that the rule announced in *Miller* applied retroactively to Ragland. *Id.* at 122. Ragland was originally sentenced “without the benefit of an individualized sentencing hearing.” *Id.* While the Governor’s commutation “lessened his sentence slightly,” it did so “without the court’s consideration of any mitigating factors as demanded by *Miller*.” *Id.* Thus, Mr. Ragland was entitled to be resentenced with consideration of the *Miller* factors. *Id.*; *see also State v. Pearson*, 836 N.W.2d 88 (2013) (holding that the Iowa constitution requires an individualized sentencing hearing where a juvenile offender receives a minimum of thirty-five years without the possibility of parole).

In *State v. Null*, 836 N.W.2d 41 (Iowa 2013), the Iowa Supreme Court held that a “52.5-year minimum prison term for a juvenile . . . triggers the protections to be afforded under *Miller*, namely, an individualized sentencing hearing to determine the issue of parole eligibility.” 836 N.W.2d at 71. The court held that while a minimum of 52.5 years imprisonment was not “technically” an LWOP sentence, “such a lengthy sentence imposed on a juvenile was sufficient to trigger *Miller*-type protections.” *Id.* Accordingly, the court remanded to the district court in light of *Miller*’s requirement that the court weigh the “distinctive qualities of youth.” *Id.* at 76. Following *Null*, the Iowa Supreme Court went a step further and held that any statute mandating a sentence of incarceration in prison for a juvenile offender with no opportunity for parole until a minimum time period has been served violates the Iowa constitution. *See State v. Lyle*, 854 N.W.2d 378 (Iowa 2014); *see also State v. Taylor*, 854 N.W.2d 420 (Iowa 2014).

While Iowa retains mandatory JLWOP, its laws now comply with *Miller*’s mandate of discretionary, individualized sentencing. The Iowa Supreme Court has held that *Miller* applies retroactively and has struck down all mandatory minimum sentences for juveniles.

Kansas

Kansas was among the eight jurisdictions that did not have JLWOP at the time *Miller* was decided.⁶⁹ The state has zero JLWOP prisoners.⁷⁰

Kansas abolished JLWOP in 2011 by enacting the following statute: “Upon conviction of a defendant of capital murder⁷¹ and a finding that the defendant was less than 18 years of age at the time of the commission thereof, the court shall sentence the defendant as otherwise provided by law, and no sentence of death or life without the possibility of parole shall be imposed hereunder.” Kan. Stat. Ann. § 21-6618 (2011), *repealing* § 21-4622. All defendants, including juveniles, convicted of first-degree murder⁷² “shall be sentenced to imprisonment for life” and “shall not be eligible for parole prior to serving 25 years’ imprisonment.” § 21-6620(b)(1). Thus, while Kansas has outlawed JLWOP, juveniles convicted of capital or first-degree murder are automatically sentenced to mandatory life with the possibility of parole after twenty-five years.

Kansas courts have been unwilling to extend *Miller* to mandatory life with parole sentences. In *Jones v. State*, 321 P.3d 799 (Kan. Ct. App. 2014) (unpublished), the petitioner challenged his life sentence imposed for first-degree murder, relying on *Graham* and *Miller*. The Kansas appellate court summarily concluded that *Miller* and *Graham* did not apply because petitioner was not sentenced to JLWOP. *Id.* at 8. Likewise in *State v. Brown*, 331 P.3d 781, 796 (Kan. 2014), appellant argued that her sentence of mandatory life with the possibility of parole after twenty years violated the Eighth Amendment pursuant to *Miller*. 564. As in *Jones*, the Kansas Supreme Court held that “*Miller*’s rationale is inapplicable.” *Id.* at 797. The court reasoned that a “hard 20 life sentence does not irrevocably adjudge a juvenile offender unfit for society” but, rather, “gives the offender a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation by permitting parole after the mandatory 20-year minimum prison term is served.” *Id.* at 564 (internal quotation omitted). Thus, the court held that appellant’s Eighth Amendment challenge lacked merit. *Id.* Finally, in *Ellmaker v. State*, 329 P.3d 1253, *18 (Kan. 2014) (unpublished), petitioner argued that the imposition of

⁶⁹See The Sentencing Project, *Slow to Act: State Responses to 2012 Supreme Court Mandate on Life Without Parole* (2014), available at http://sentencingproject.org/doc/publications/jj_State_Responses_to_Miller.pdf.

⁷⁰According to information provided by the Kansas Department of Corrections in response to a request for public information. Notes on file.

⁷¹Capital murder includes: (1) murder in commission of kidnapping or aggravated kidnapping committed with intent to hold person for ransom; (2) murder pursuant to contract; (3) murder by inmate in correctional institution; (4) murder in commission of enumerated felony; (5) murder of law enforcement officer; (6) murder of more than one person as part of same act or transaction or through multiple acts connected by common scheme; (7) murder of victim under fourteen in commission of kidnapping or aggravated kidnapping with intent to commit a sex act upon the child. § 21-5401.

⁷²“Murder in the first-degree is the killing of a human being committed: (1) intentionally, and with premeditation; or (2) in the commission of, attempt to commit, or flight from any inherently dangerous felony.” § 21-5402.

his “hard 50 sentence”⁷³ violated *Miller* because it was the functional equivalent of JLWOP. The Kansas intermediate disagreed, reasoning that while a “hard 50 sentence is a severe sentence that carries with it a long term of mandatory imprisonment,” it is “unlike a sentence of [LWOP] or the death penalty” because “it is not mutually exclusive with eventual release.” *Id.* at *24. Thus, the court rejected appellant’s argument that his sentence violated *Miller*. *Id.* at 25.

While Kansas statutes do not authorize JLWOP, they allow for mandatory life *with* the possibility of parole sentences, which Kansas courts maintain do not violate *Miller*. Kansas courts have not ruled on retroactivity, as it has no JLWOP prisoners.

⁷³ The statute under which Ellmaker was sentenced, section 21-4635, has since been repealed. *See State v. Soto*, 322 P.3d 334, 351 (2014) (noting repeal).

Kentucky

Kentucky is among the eight jurisdictions that did not authorize JLWOP at the time of *Miller*. See Ky. Rev. Stat. 640.040(1), (3). The statute prohibiting JLWOP has been in effect since 1987⁷⁴ and remains unchanged since *Miller*. However, Kentucky has two prisoners serving JLWOP sentences.⁷⁵

Kentucky law provides, in relevant part: “A youthful offender convicted of a capital offense regardless of age may be sentenced to a term of life imprisonment appropriate for one who has committed a Class A felony and may be sentenced to life imprisonment without benefit of parole for twenty-five (25) years.” See § 640.040(1). Section 532.060(2)(a) provides that a defendant convicted of a Class A felony may be sentenced to “not less than twenty (20) years nor more than fifty (50) years, or life imprisonment.” § 532.060(2)(a). Capital offenses include kidnapping, where the victim is not released alive or when the victim is released alive but subsequently dies as a result, and murder. §§ 509.040(2), 507.020. Murder is defined as intentionally causing the death of another (except when acting under an extreme, but reasonable, emotional disturbance) or causing the death of another while operating a motor vehicle under circumstances manifesting extreme indifference to human life and wantonly engaging in conduct which creates a grave risk of death. § 507.020(1). The minimum sentence for a defendant convicted of murder in Kentucky is twenty years. § 532.030.

The Kentucky Supreme Court has confirmed that JLWOP is not available in Kentucky. See *Shepherd v. Commonwealth*, 251 S.W.3d 309, 321 (Ky. 2008) (“Although KRS 532.030(1) does allow a person convicted of a capital offense to also be sentenced to [LWOP], . . . the youthful offender chapter governs his appropriate sentencing considerations.”). In *Shepherd*, the defendant was convicted of murder, robbery, and tampering with evidence for offenses that occurred when he was sixteen years old. *Id.* at 311-12. The court explained that his statutorily authorized penalties were twenty to fifty years, life in prison, or life without parole for twenty-five years. *Id.* at 321. The court held that because the trial court included the fourth option of LWOP, “it erred in the penalty phase instructions.” *Id.*

Although Kentucky has not had JLWOP since 1989, it has two prisoners serving the sentence, and Kentucky courts have not considered *Miller*’s retroactivity. There are no Kentucky cases interpreting its statutes in light of *Miller*.

⁷⁴ 1986 Leg., 423d Sess., § 137 (Ky. 1986).

⁷⁵ Interview with Kentucky practitioner, Feb. 2, 2015. Notes on file. According to the practitioner, one defendant was originally sentenced to death prior to *Roper v. Simmons*, 543 U.S. 551 (2005), which outlawed the death penalty for juvenile defendants, and his sentence was subsequently commuted to LWOP. The other defendant was facing a death sentence (prior to *Roper*) and was sentenced to LWOP under the capital sentencing scheme, now inapplicable to juveniles. *Commonwealth v. Phon*, 17 S.W.3d 106, 108 (Ky. 2000).

Louisiana

Louisiana was among the twenty-nine jurisdictions that had mandatory JLWOP when *Miller* was decided. See La. Rev. Stat. Ann. § 15:574.4 (2011). In 2013, Louisiana altered its laws to comply with *Miller* in 2013. H.B. 152, 2013 Leg., Reg. Sess. (La. 2013), enacting La. Rev. Stat. Ann. §§ 15:574.4(E), 878.1. There are approximately 300 defendants serving JLWOP sentences in Louisiana.⁷⁶

Louisiana's amended laws provide for a new sentencing procedure for juveniles convicted of first-degree or second-degree murder, providing that "a hearing shall be conducted prior to sentencing to determine whether the sentence shall be imposed with or without parole eligibility." § 878.1(A). At the hearing, the "prosecution and defense shall be allowed to introduce any aggravating and mitigating evidence [including] the facts and circumstances of the crime, the criminal history of the offender, the offender's level of family support, social history, and such other factors as the court may deem relevant." § 878.1(B). While not precisely mimicking *Miller*'s mandate that the court consider the unique attributes of youth, the statute renders JLWOP discretionary in Louisiana.

Louisiana also enacted a statute following *Graham v. Florida*, 560 U.S. 48 (2010), providing that anyone serving an LWOP sentence for a crime committed under the age of eighteen, except in first and second-degree murder cases, will be eligible for parole after serving thirty years if various criteria relating to rehabilitation have been met. La. Rev. Stat. Ann. § 15:574(D)(1). The statute applies retroactively to inmates already serving such sentences. *Id.*

In *State v. Tate*, the Louisiana Supreme Court considered *Miller*'s retroactivity applying the framework set forth in *Teague v. Lane*, 489 U.S. 288 (1989). Louisiana courts have adopted *Teague* as a matter of state policy. *State ex rel. Taylor v. Whitley*, 606 So.2d 1292, 1296 (1992) ("we recognize that we are not bound to adopt the *Teague* standards."). In *Tate*, the petitioner filed a motion seeking resentencing in light of *Miller*. See *Tate*, 130 S.3d at 831. The court held that *Miller* "does not apply retroactively in cases on collateral review as it merely sets forth a new rule of criminal procedure, which is neither substantive nor implicative of the fundamental fairness and accuracy of . . . criminal proceedings." *Id.* at 831. Applying *Teague*, the court held that because *Miller* merely "altered the *permissible methods* by which the State could exercise its continuing power," the ruling was "procedural, not substantive in nature." *Id.* at 838. Moreover, the court could not construe the rule "to qualify as being in the same category with *Gideon* in having effected a profound and sweeping change." *Id.* at 841 (internal quotations omitted). Accordingly, *Tate* and those similarly situated were not entitled to the retroactive benefit of *Miller* in post-conviction proceedings. *Id.* at 841. The United States Supreme Court has accepted for review another Louisiana case addressing *Miller*'s retroactivity. See *Montgomery v. Louisiana*, 135 S. Ct. 1546 (2015) (mem.).⁷⁷

⁷⁶ Interview with Louisiana practitioner, Feb. 13, 2015. Notes on file.

⁷⁷ The Court also certified its own additional question for review: "Do we have jurisdiction to decide whether the Supreme Court of Louisiana correctly refused to give retroactive effect in this case to our decision in *Miller v. Alabama*, 567 U.S. ___ (2012)?" *Id.*

The Louisiana Supreme Court, however, has been willing to vacate mandatory JLWOP sentences and remand for resentencing in accordance with *Miller* when the case is on direct appeal. See *State v. Williams*, 145 So. 3d 230 (La. 2013) (reversing and remanding appellant's JLWOP sentence for sentencing hearing conducted in accordance with the principles enunciated in *Miller*); *State v. Jones*, 134 So. 3d 1164 (La. 2014) (holding the same); *State v. Fletcher*, 112 So. 3d 1031 (La. Ct. App. 2013).

While Louisiana has legislatively banned mandatory JLWOP, its amended laws do not explicitly require the sentencer to consider the unique attributes of youth as required under *Miller*. Moreover, there are 300 defendants serving sentences of JLWOP and the Louisiana Supreme Court has found that *Miller* does not apply retroactively.

Maine

Maine was among the eight jurisdictions that had discretionary, but not mandatory, JLWOP at the time *Miller* was decided. See Brief for Respondent at 25, *Miller v. Alabama*, 132 S. Ct. 2455 (2012), No. 10-9646. Maine currently has zero JLWOP prisoners,⁷⁸ and has shown no inclination to ever use the sentence.⁷⁹

Under Maine law, “A person convicted of the crime of murder^[80] shall be sentenced to imprisonment for life or for any term of years that is not less than 25.” Me. Rev. Stat. tit. 17-A, § 1251 (2014). Because Maine has abolished parole, a life sentence is the functional equivalent of JLWOP. See *Fernald v. Maine State Parole Bd.*, 447 A.2d 1236, 1238 (Me. 1982) (“the Criminal Code abolished the institution of parole except as applied to prisoners sentenced prior to the Code’s effective date”). Maine’s sentencing statute does not require the sentencer to consider the factors outlined in *Miller* before imposing such a sentence. *Id.*

Even though Maine’s laws likely violate *Miller* for failing to direct the sentencer to consider the mitigating features of youth, Maine courts have not interpreted its laws in light of *Miller* and its legislature has not enacted a response to *Miller*. However, it appears that Maine courts have rarely, if ever, imposed JLWOP.

⁷⁸ According to information provided by the Maine Department of Corrections in response to a request for public information. Notes on file.

⁷⁹ See The Sentencing Project, *Slow to Act: State to 2012 Supreme Court Mandate on Life Without Parole* (2014) available at

http://sentencingproject.org/doc/publications/jj_State_Responses_to_Miller.pdf.

⁸⁰ A person is guilty of murder if the person: (A) intentionally or knowingly causes the death of another human being; (B) engages in conduct manifesting a depraved indifference to the value of human life and that in fact causes the death of another human being; or (C) intentionally or knowingly causes another human being to commit suicide by use of force, duress or deception. Me. Rev. Stat. tit. 17-A, § 201 (2014).

Maryland

Maryland was among the states that had discretionary, but not mandatory, JLWOP when *Miller* was decided. See Brief for Respondent at App. A, B, *Miller v. Alabama*, 132 S. Ct. 2455 (2012), No. 10-9646. Maryland has approximately eighteen defendants serving a sentence of JLWOP.⁸¹

A Maryland defendant found guilty of first-degree murder may be sentenced to LWOP if: (1) at least thirty days before the trial, the state gave written notice to the defendant of its intention to seek LWOP; and (2) the sentence of LWOP is imposed in accordance with section 2-304. Md. Code Ann., Crim. Law § 2-203 (2014). First-degree murder includes: (1) a deliberate, premeditated, and willful killing; (2) committed by lying in wait; (3) committed by poison; or (4) committed in the perpetration or attempted perpetration of an enumerated felony. § 2-201.

If a juvenile defendant is found guilty of first-degree murder, the jury must determine whether the defendant is sentenced to LWOP or life with the possibility of parole. § 2-304(a). If the jury is unable to unanimously agree, the court “shall impose a sentence of imprisonment for life [with parole].” § 2-304(b). Thus, LWOP is discretionary, with a minimum sentence of life with the possibility of parole. However, the statutes do not require the sentencer to consider any mitigating factors.

This year, proposed Senate Bill 366, cross-filed with House Bill 337, would have rendered defendants previously sentenced to JLWOP in Maryland eligible for parole. H.B. 337, 435th Cong. (Feb 5, 2015). The bill would have established that unless subject to earlier parole eligibility, any inmate who had been sentenced for an offense committed while the inmate was a juvenile must be eligible for parole when the inmate has served the lesser of fifteen years or one-fourth of the inmate’s aggregate sentence. *Id.* Unfortunately, the bill has not passed.⁸²

Maryland courts have neither interpreted its laws in light of *Miller* nor assessed *Miller*’s retroactivity, likely because JLWOP is discretionary. However, its laws do not require the sentencer to consider the mitigating factor of youth as mandated by the Supreme Court, so they arguably contravene *Miller*. The question of whether *Miller* is retroactive continues to be relevant to the eighteen Maryland prisoners serving discretionary JLWOP sentences.

⁸¹ According to information provided by the Maryland Department of Corrections in response to a request for public information. Notes on file. See also James Brochin, Scott Schellenberger, *Will Maryland Go Back on Its Word*, The Baltimore Sun, Mar. 18, 2015) (noting that there are “approximately 17 defendants in Maryland’s Division of Correction who are serving a life without parole sentence” for crimes committed as juveniles.) available at <http://www.baltimoresun.com/news/opinion/oped/bs-ed-paroling-lifers-20150318-story.html>.

⁸² See Report on House Bill 377 available at <http://mgaleg.maryland.gov/webmga/frmMain.aspx?pid=billpage&stab=03&id=hb0337&tab=subject3&ys=2015RS>.

Massachusetts

Massachusetts was among the twenty-nine jurisdictions with mandatory JLWOP at the time of *Miller*. See *Miller v. Alabama*, 132 S. Ct. 2455, 2474 n.15 (2012). Massachusetts has since abolished all forms of JLWOP, has significantly amended its juvenile sentencing laws, and has provided retroactive application of *Miller*. See *Diatchenko v. District Attorney for the Suffolk Dist.*, 1 N.E.3d 270 (2013) (*Diatchenko I*); *Diatchenko v. District Attorney for the Suffolk Dist.*, 471 Mass. 12 (Mass. 2015) (*Diatchenko II*); *Commonwealth v. Okoro*, 471 Mass. 51 (Mass. 2015); Mass. Gen. Laws Ann. ch. 265, § 2 (2015), amended by 2014 Mass. Acts ch. 189, § 5; Mass. Gen. Laws Ann. ch. 279, § 24 (2015), amended by 2014 Mass. Acts ch. 189, § 6. Prior to *Diatchenko*, Massachusetts had sixty-seven inmates serving a sentence of JLWOP.⁸³ Given that JLWOP has since been retroactively abolished, the state currently has zero JLWOP prisoners.⁸⁴

At the time of *Miller*, Massachusetts law imposed mandatory LWOP for any person convicted of first-degree murder.⁸⁵ Mass. Gen. Laws ch. 265, § 2 (2012). Before the legislature responded to *Miller*, the Massachusetts Supreme Court abolished JLWOP in *Diatchenko I*. After *Diatchenko I*, the Massachusetts legislature made substantial changes to its juvenile sentencing laws. While the mandatory punishment for first-degree murder for an adult remains LWOP, a juvenile convicted of this crime is now guaranteed parole eligibility. Mass. Gen. Laws Ann. ch. 265, §§ 2, 24. And although an adult convicted of second-degree murder⁸⁶ can be punished for up to twenty-five years before becoming eligible for parole, juvenile offenders become eligible after fifteen years. Mass. Gen. Laws ch. 279, §24, amended by 2014 Mass. Acts ch. 189, § 2. Additionally, the legislature has ensured that incarcerated juveniles are fully able to take part in educational and treatment programs or to be placed in a minimum-security facility; protections which are not afforded to adult inmates. Mass. Gen. Laws ch. 119, § 72B, amended by 2014 Mass. Acts ch. 189, §2.

In *Diatchenko I*, the Massachusetts Supreme Court held that *Miller* applied retroactively to petitioners on collateral review and, under state constitutional law, proscribed both mandatory and discretionary JLWOP. 1 N.E.3d at 276. There, petitioner challenged his 1981 mandatory JLWOP sentence in light of *Miller*. *Id.* Applying *Teague*, the court first found that *Miller* applied retroactively because it announced a substantive rule, reasoning that it “explicitly forecloses the imposition of a certain category of punishment – mandatory [JLWOP] – on a specific class of defendants.” *Id.* at 281.

⁸³ According to information provided by the Massachusetts Department of Corrections in response to a request for public information. Notes on file.

⁸⁴ *Ibid.*

⁸⁵ First-degree murder is defined in Massachusetts as murder “committed with deliberately premeditated malice aforethought, or with extreme atrocity or cruelty, or in the commission or attempted commission of a crime punishable with death or imprisonment for life.” Mass. Gen. Laws Ann. ch. 265, § 1 (2015).

⁸⁶ “Murder which does not appear to be in the first degree is murder in the second degree.” *Id.*

The court next held that the mandatory scheme under which Diatchenko was sentenced violated both the Eighth Amendment and the “analogous provision of the Massachusetts Declaration of Rights.” *Id.* at 282. While noting that *Miller* did not ban discretionary JLWOP, the court used its “inherent authority to interpret State constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution.” *Id.* (quotations omitted). The court concluded that “because the brain of a juvenile is not fully developed, either structurally or functionally, by the age of eighteen, a judge cannot find with confidence that a particular offender, at that point in time, is irretrievably deprived.” *Id.* at 284. Accordingly, given “the unique characteristics of juvenile offenders,” they should always be afforded a “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation” through consideration for release on parole. *Id.* at 284-87. Thus, the court held both that *Miller* applied retroactively and that JLWOP violated the Massachusetts constitution.

In March 2015, the Massachusetts Supreme Court held that some juveniles are entitled to certain due process protections in parole hearings that are not available to adult defendants. Specifically, the court held that juveniles convicted of first- and second-degree murder are entitled to counsel and expert services. *Diatchenko II*, 471 Mass. at 14; *Okoro*, 471 Mass. at 63. In *Diatchenko II*, the petitioners argued that to ensure their opportunity for release through parole promised through *Diatchenko I* is meaningful, they must be entitled to certain procedural safeguards. 471 Mass. at 14.

The court explained that because parole hearings for juvenile offenders are not discretionary but rather are constitutionally mandated, they require “certain protections not guaranteed in all postconviction procedures.” *Id.* at 27. The court first held that “given the challenges involved for a juvenile homicide offender serving a mandatory life sentence to advocate effectively for parole release on his or her own, and in light of the fact that the offender’s opportunity for release is critical to the constitutionality of the sentence,” these juveniles are entitled to counsel. *Id.* at 24. The court next concluded that while expert witnesses may not be necessary at every juvenile homicide offender’s parole hearing, “in some cases such assistance may be crucial to the juvenile’s ability to obtain a meaningful chance of release.” *Id.* at 25.

The court also held that it was appropriate for the superior court judge, upon the parole-eligible indigent offender’s motion, to allow for the payment of fees to hire an expert witness – “specifically, where it is shown that the juvenile offender requires an expert’s assistance in order effectively to explain the effects of the individual’s neurobiological immaturity and other personal circumstances at the time of the crime, and how this information relates to the individual’s present capacity and future risk of reoffending.” *Id.* at 27. The judge must exercise discretion to determine whether an expert is reasonably necessary to protect the offender’s meaningful opportunity for release. *Id.* In *Okoro*, the Massachusetts Supreme Court found that these protections should extend to juvenile offenders convicted of second-degree murder. 471 Mass. at 62-63.

In *Okoro*, the Massachusetts Supreme Court further concluded that a mandatory life sentence with parole eligibility after fifteen years for a juvenile homicide offender

convicted of second-degree murder did not offend the Eighth Amendment. 471 Mass. at 52. Mr. Okoro argued that his sentence was cruel and unusual in light of *Miller* and *Diatchenko I* – specifically, that due to his young age, he should be entitled to individualized consideration at resentencing at which his age would be taken into account. *Id.* at 55.

Although the Massachusetts Supreme Court agreed with defendant that certain language in *Miller* suggests that individualized sentencing is required whenever a juvenile homicide offender is facing a life sentence, *Miller*'s holding was narrower: "This court has construed *Miller* and its consideration of individualized sentencing to be limited to the question whether a juvenile homicide offender can be subjected to a mandatory sentence of life in prison without parole eligibility." *Id.* at 56-57. While embracing the "critical tenet of *Miller*" that "children are constitutionally different from adults for the purposes of sentencing," the court was not persuaded that *Miller* "bar[s] a mandatory sentence of life with parole eligibility after fifteen years for a juvenile convicted of murder in the second degree." *Id.* at 58-59. Noting the legislature's overhaul of juvenile sentencing laws in response to *Miller*, the court held that Okoro's punishment did not violate the Eighth Amendment. *Id.* at 62. Thus, the Supreme Court rejected his challenge to the mandatory minimum.

Although Massachusetts had mandatory JLWOP at the time *Miller* was decided, it has since abolished all forms of the practice and has made significant strides in the juvenile justice arena, both judicially and legislatively. Nonetheless, Massachusetts has rejected the argument that *Miller* requires the abolition of all mandatory minimums.

Michigan

Michigan was among the jurisdictions that had mandatory JLWOP at the time *Miller* was decided. See *Miller v. Alabama*, 132 S. Ct. 2455, 2474 n.13 (2012). The state has since altered its laws to comply with *Miller*. See S.B. 319, 97th Leg. Reg. Sess. (2014); Mich Comp. Laws §§ 769.25, -a (2014). Michigan has approximately 360 JLWOP prisoners.⁸⁷

Under Michigan’s laws at the time of *Miller*, any individual convicted of first-degree murder⁸⁸ was automatically punished with LWOP. Mich. Comp. Laws § 750.316 (1) (2012). Shortly following *Miller*, the Michigan legislature amended its laws to comply with the Supreme Court’s mandates. See §§ 769.25, .25a; *People v. Carp*, 852 N.W.2d 801, 812 (Mich. 2014).

Under the new laws, a prosecutor may file a motion for *Miller* compliant sentencing proceedings if the prosecutor wishes to seek JLWOP for an enumerated homicide.⁸⁹ § 769.25(2). “The motion shall specify the grounds on which the prosecuting attorney is requesting the court to impose a sentence of imprisonment for life without the possibility of parole.” § 769.25(3). If the prosecutor files such a motion, the court must conduct a hearing on the motion as part of the sentencing process, at which it “shall consider the factors listed in [*Miller*] and may consider any other criteria relevant to its decision, including the individual’s record while incarcerated.” § 769.25(6). At the hearing, the court “shall specify on the record the aggravating and mitigating circumstances considered by the court and the court’s reasons for supporting the sentence imposed.” § 769.25(7). If the court opts not to sentence the defendant to JLWOP, the sentence is a maximum term of not less than sixty years and a minimum term of not less than twenty-five and not more than forty years. § 769.25(9). The new laws specify that they apply prospectively – “the procedures set forth in section 2 of this chapter do not apply to any case that is final for purposes of appeal on or before June 24, 2012” – unless “the state supreme court or the United States supreme court finds that [*Miller*] applies retroactively.” § 769.25a(1),(2).

In *People Carp*, the Michigan Supreme Court held that the rule announced in *Miller* was not retroactive as a matter of federal or state law. 852 N.W.2d at 528. The court first held that *Miller* is not retroactive pursuant to the federal framework because it does not

⁸⁷ Interview with Michigan practitioner, Apr. 15, 2015. Notes on file.

⁸⁸ First-degree murder includes the following: (a) murder perpetrated by means of poison, lying in wait, or any other willful, deliberate, and premeditated killing; (b) murder committed in the perpetration or attempted perpetration of an enumerated felony; or (c) murder of a peace officer or corrections officer lawfully engaged in official duties. § 750.316.

⁸⁹ (a) A violation of 17764(7) of the public health code, 1978 PA 368, MCL 333.17764 (murder while selling or manufacturing misbranded or adulterated drugs); (b) A violation of section 16(5), 18(7), 316, 436(2)(e), or 543f of the Michigan penal code, 1931 PA 328, MCL 750.15, 750.18 (murder in course of committing various drug-related crimes), 750.316 (first-degree murder), 750.436 (murder by poisoning medicine, pharmaceutical, or water supply), and 750.543f (terrorism); (c) A violation of chapter XXXIII of the Michigan penal code, 1931 PA 328, MCL 750.200 to 750.212a (explosives crimes); and (d) Any violation of law involving death of another person for which parole eligibility is expressly denied under state law. § 769.25(2).

“categorically bar a penalty,” but instead requires the sentencer only to “follow a certain process,” and the procedural rule is not watershed. *Id.* at 832.

The court next held that *Miller* is not retroactive under the state law standard, derived from *Linkletter v. Walker*, 381 U.S. 618 (1965), which examines: (1) the purpose of the new rule; (2) general reliance under the old rule, and (3) the effect of retroactive application on the administration of justice. *Id.* at 833. Concluding that the second and third factors did not favor retroactive application, the court held that *Miller* was not retroactive under state law. *Id.* at 841. Thus, the court held that *Miller* should not be given retroactive application on collateral review and affirmed the judgments. *Id.*

In January 2013, a United States District Court in Michigan held that Michigan prisoners serving unconstitutional mandatory JLWOP sentences were, in light of *Miller*, eligible for parole. *See Hill v. Snyder*, No. 10-14568, 2013 U.S. Dist. LEXIS 12160 (E.D. Mich. Jan. 30, 2013). The ruling does not directly conflict with *Carp* because *Carp* decided whether juveniles had a right to be resentenced, whereas the federal case dealt with whether they must be considered for parole. Accordingly, in November 2013, the *Hill* court ordered all Michigan prisoners serving life sentences for crimes committed while they were juveniles to be provided an opportunity for parole. Order, *Hill*, 2013 U.S. Dist. LEXIS 12160 at *1-2, (E.D. Mich. Nov 16, 2013). Specifically, the court ordered Michigan to “[c]reate an administrative structure” entitling all JLWOP prisoners who have served ten years imprisonment to have their parole eligibility “considered in a meaningful and realistic manner.” *Id.* at *2. The state appealed and the case is currently pending in the Sixth Circuit. *See Hill v. Snyder*, No. 13-2705 (6th Cir. 2013).

Michigan’s laws are now in compliance with *Miller*. Although the state supreme court held that *Miller* does not apply retroactively, a federal district court ordered the state to provide all prisoners serving mandatory JLWOP sentences to have a realistic opportunity at parole. The Sixth Circuit’s ruling on this matter will have a meaningful impact on the state’s 360 JLWOP prisoners.

Minnesota

Minnesota was among the twenty-nine jurisdictions that had mandatory JLWOP at the time *Miller* was decided. *See Miller v. Alabama*, 132 S. Ct. 2455, 2474 n.13 (2012). Although its legislature has not responded to *Miller*, the Minnesota Supreme Court has recognized the unconstitutionality of its current sentencing scheme and has outlined a remedy for sentencing courts to apply. *See State v. Ali*, 855 N.W.2d 235, 253-56 (Minn. 2014). Minnesota has seven individuals serving JLWOP sentences.⁹⁰

According to Minnesota law, the “court shall sentence a person to life imprisonment without the possibility of release” where: (1) the person is convicted of some forms of first-degree murder⁹¹; (2) the person is convicted of first-degree murder in the course of a kidnapping under section 609.185, clause (3); (3) the person is convicted of first-degree murder under section 609.185, clause (3), (5), or (6), and the person has one or more previous convictions for a heinous crime. Minn. Stat. Ann. § 609.106 (Minn. 2014). For all other forms of first-degree murder, the defendant “shall be sentenced to imprisonment for life [with the possibility of parole].” § 609.185. Defendants sentenced to life with the possibility of parole for first-degree murder must serve at least thirty years of their life sentences before becoming eligible for release. § 244.05, subd. 4(b).

The Minnesota Supreme Court has held that *Miller* does not apply retroactively to cases on collateral review. In *Chambers v. State*, 831 N.W.2d 311, 316 (Minn. 2013), petitioner challenged his mandatory LWOP sentenced imposed for first-degree murder pursuant to *Miller* and *Graham*. The Minnesota Supreme Court first dismissed petitioner’s *Graham* argument because Chambers’ was convicted of a homicide. *Id.* at 321. Regarding petitioner’s *Miller* challenge, the court agreed that Chambers was sentenced to “[LWOP] under a mandatory sentencing scheme that allowed no discretion or consideration of Chambers’ age or the unique characteristics of his background or his offense.” Because the conviction was final, the court was required to determine whether *Miller* applied retroactively to Chambers. *Id.* at 323.

⁹⁰ According to information provided by the Minnesota Department of Corrections in response to a request for public information. Notes on file.

⁹¹ First-degree murder includes the following: (1) killing a human being with premeditation and with intent; (2) killing human being while committing or attempting to commit first or second degree criminal sexual conduct with force or violence; (3) killing a human being with intent to effect the death during the commission of an enumerated felony; (4) intentionally killing a peace officer, prosecuting attorney, judge, or prison guard performing official duties; (5) killing a minor while committing child abuse, when the perpetrator has engaged in a past pattern of child abuse upon a child under circumstances manifesting an extreme indifference to human life; (6) killing a human being while committing domestic abuse, when the perpetrator has engaged in a past pattern of domestic abuse under circumstances manifesting an extreme indifference to human life; or (7) killing a human being while committing, conspiring to commit, or attempting to commit a felony crime to further terrorism under circumstances manifesting an extreme indifference to human life. § 609.185(a). A person is subject to a mandatory life without parole sentence for first degree murder defined in clauses (1), (2), (4), or (7). § 609.106.

Pursuant to *Teague v. Lane*, 489 U.S. 288 (1989), the court concluded that the rule announced in *Miller* was procedural, not substantive, reasoning that it requires “that the sentencer follow a *certain process*” before imposing LWOP. *Id.* at 328. The court held that the new procedural rule was not watershed because it did not alter the court’s “understanding of the bedrock procedural elements essential to the fairness of a proceeding.” *Id.* at 330. Thus, *Miller* did not apply retroactively to cases on collateral review. *Id.*; see also *Roman Nose v. State*, 845 N.W.2d 193 (Minn. 2014) (holding that the post-conviction court erred in resentencing petitioner based on the flawed conclusion that *Miller* applied retroactively).

Although it held *Miller* does not apply retroactively, the Minnesota Supreme Court has recognized that its current sentencing scheme offends *Miller* and, on direct review, has reversed appellants’ mandatory JLWOP sentences and remanded for resentencing. See, e.g., *Ali*, 855 N.W.2d at 256. In *Ali*, the Minnesota Supreme Court conceded that it was “faced with a sentencing scheme that does not comply with the new rule of constitutional criminal procedure announced in *Miller* and the Legislature has remained silent on how to fix it.” *Id.* The court concluded that the appropriate remedy was to “remand to the district court for resentencing following a *Miller* hearing at which the court would consider among other factors, [appellant’s] age and his family and home environment.” *Id.*

Finally, the Minnesota Supreme Court has held that *Miller* does not apply to life sentences *with* the possibility of parole after thirty years. See *Ouk v. State*, 847 N.W.2d 698, 699 (Minn. 2014) (concluding that “a statutory scheme mandating a sentence of life imprisonment *with* the possibility of release is materially different from a statutory scheme mandating a sentence of life imprisonment *without* the possibility of release”); *State v. Vang*, 847 N.W.2d 248, 263 (Minn. 2014) (concluding that petitioner’s mandatory sentence of life with the possibility of parole after thirty years did not violate the Eighth Amendment pursuant to *Miller*).

Although Minnesota’s sentencing scheme remains unconstitutional, the Minnesota Supreme Court has ordered district courts to resentence juveniles according to *Miller*. The court has also found *Miller* not to apply retroactively on collateral review, and has narrowly construed it not to extend to mandatory life sentences with the possibility of parole.

Mississippi

Mississippi was among the twenty-nine jurisdictions that had mandatory JLWOP at the time of *Miller*. Brief for Respondent at App. A, B, *Miller v. Alabama*, 132 S. Ct. 2455 (2012), No. 10-9646. While the state has not enacted a legislative response, its supreme court has recognized that its current scheme violates *Miller* and has held *Miller* to apply retroactively to cases on collateral review. *See Parker v. State*, 119 So. 3d 987, 997-98 (Miss. 2013); *Jones v. State*, 122 So. 3d 698, 700 (Miss. 2013). Mississippi had eighty prisoners serving mandatory JLWOP sentences at the time of *Miller*, but pursuant to *Parker* and *Jones*, these individuals are in the process of being resentenced.⁹² Post-*Parker*, four individuals have been sentenced to discretionary JLWOP, and nine juveniles have been sentenced to discretionary life with parole sentences.⁹³

Mississippi law dictates that upon conviction of capital murder⁹⁴ or another capital offense,⁹⁵ the court shall conduct a separate sentencing hearing to determine whether the defendant should be sentenced to death, life imprisonment without eligibility for parole, or life imprisonment with eligibility for parole. Miss. Code Ann. § 99-19.101(1). Although facially it appears this statute complies with *Miller*, section 47-7-3(e) states that: “No person shall be eligible for parole who is charged, tried, convicted and sentenced to life imprisonment under the provisions of Section 99-19-101.” § 47-7-3(e) (2014). Thus, post-*Roper*, a juvenile convicted of a capital offense is automatically sentenced to JLWOP, because regardless of whether he is sentenced to life or LWOP, the defendant is not eligible for parole. *See Flowers v. State*, 842 So. 2d 531, 556-57 (Miss. 2003).

Mississippi law also dictates: “Every person who shall be convicted of first-degree murder⁹⁶ shall be sentenced by the court to imprisonment for life in the State Penitentiary.” Miss. Code Ann. § 97-3-21(1). Every person convicted of second-degree murder⁹⁷ shall also be imprisoned for life, unless the jury fails to agree on fixing the penalty at life, in which case “the court shall fix the penalty at not less than twenty (20) nor more than forty (40) years.” § 97-3-21(2). Unlike with capital murder, however, there is no corresponding statute precluding parole.

⁹² Interview with Mississippi practitioner, Apr. 27, 2015. Notes on file.

⁹³ *Ibid.*

⁹⁴ Capital murder is defined as (a) knowing murder of a peace officer or fireman while acting in his official capacity; (b) murder by a person who is under sentence of life imprisonment; (c) murder by use or detonation of a bomb or explosive device; (d) murder for pecuniary gain; (e) killing by person engaged in enumerated felony; (f) murder on educational property; and (g) knowing murder of any elected official. Miss. Code Ann. § 97-3-19 (2).

⁹⁵ The other capital offenses are (a) killing with deliberate design to effect the death of the person killed; (c) killing during commission of enumerated felony; and (d) killing with deliberate design to effect the death of an unborn child. § 97-3-19 (1)(a),(c),(d).

⁹⁶ “(b) When done in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular individual, shall be second-degree murder.” § 97-3-19 (1)(b).

In *Parker*, the Mississippi Supreme Court evaluated its sentencing scheme in light of *Miller*. 119 So. 3d at 989. Parker was sentenced to imprisonment for life for a crime he committed when he was fifteen. *Id.* at 966. The court held that “[d]espite the fact that murder does not carry a *specific* sentence of life without parole,” section 47-7-3 renders his sentence *de facto* JLWOP. *Id.* The court therefore held that the “legislative mandates, when read together, are tantamount to [LWOP] and fail to consider Parker’s youth.” *Id.* at 997. Thus, “the present statutory scheme . . . contravenes the dictates of *Miller*.” *Id.* The court therefore vacated Parker’s sentence and remanded to the trial court for a new sentencing hearing in which it must consider “all circumstances required by *Miller*.” *Id.* at 999.

In *Jones*, the Mississippi Supreme Court decided, that *Miller* applied retroactively to cases on collateral review. 122 So. 3d at 699. Jones was convicted of murder and was thereafter sentenced to life pursuant. *Id.* In post-conviction, Jones argued that because he was fifteen years old at the time of the murder, his life sentence violated the Eighth Amendment’s prohibition against cruel and unusual punishment. *Id.* The court concluded that *Miller* created a new, substantive rule: “When the *Miller* Court announced a new obligation prohibiting the application of our existing substantive law, it modified Mississippi substantive law.” *Id.* at 702. Thus, the court remanded for resentencing “to be conducted consistently with this Court’s opinion in *Parker*.” *Id.* at 703; *see also Thomas v. State*, 130 So. 3d 157 (Miss. Ct. App. 2014) (same).

Although Mississippi laws continue to violate *Miller*, its supreme court has instructed lower courts to comply with *Miller* and has found *Miller* to apply retroactively to cases on collateral review.

Missouri

Missouri was among the twenty-nine jurisdictions that had mandatory JLWOP at the time of *Miller*. *Miller v. Alabama*, 132 S. Ct. 2455, 2474 n.15 (2012). Although it has not since altered its laws, two bills that would bring Missouri statutes into compliance with *Miller* are currently pending. S.B. 280, 98th Gen. Assemb., Reg. Sess. (Mo. 2015); S.B. 200, 98th Gen. Assemb., Reg. Sess. (Mo. 2015). Missouri currently has eighty-four inmates serving JLWOP sentences.⁹⁸

Under Missouri's current law, an individual convicted of first-degree murder⁹⁹ is sentenced to either death or LWOP. Mo. Rev. Stat. § 565.020 (2012). Thus, post-*Roper*, juvenile first-degree murder offenders are automatically sentenced to LWOP. *Id.*

Two bills in the Missouri Senate, Bills 280¹⁰⁰ and 200,¹⁰¹ address non-compliance with *Miller*. Proposed Senate Bill 280 would alter Missouri law by setting a maximum sentence of thirty years and a minimum sentence of fourteen years for a sixteen and seventeen-year-olds convicted of first-degree murder. S.B. 280. For an offender under sixteen-years-old, the minimum sentence would be twelve years (and the maximum still thirty years). *Id.* Under Senate Bill 200, the maximum sentence for a sixteen- or seventeen-year-old offender would be from fifty years to LWOP, and thirty-five-years to LWOP for an offender under sixteen-years-old. S.B. 200. Under S.B. 200, inmates who have already exhausted their appeals are not entitled to review, while S.B. 280 contains no such restriction. S.B. 200, 280. Senate Bill 200 has passed the Senate and it is currently pending in the House.

Although the legislature has not changed Missouri statutes to comply with *Miller*, the Missouri Supreme Court has recognized that Missouri's current scheme is unconstitutional. *State v. Nathan*, 404 S.W.3d 253, 269-71 (Mo. 2013). Nathan committed murder when he was sixteen-years-old and was sentenced to automatic LWOP. *Id.* at 269-70. While his appeal was pending, *Miller* was decided. *Id.* at 270. The Missouri Supreme Court held that Nathan's sentence "violates the Eighth Amendment because it was imposed with no individualized consideration of the *myriad* factors discussed in *Miller*." *Id.* (emphasis added). Thus, the court ordered that Nathan be re-sentenced "in accordance with *Miller*'s requirement that the sentencer consider whether such a sentence is just and appropriate in light of Nathan's age and other factors discussed in *Miller*." *Id.*; see also *State v. Hart*, 404 S.W.3d 232, 238-39 (Mo. 2013) (holding the same and rejecting argument that all JLWOP sentences are invalid).

⁹⁸ According to the Missouri Office of the State Public Defender. See Klyle Loeithen, *Bills Would Address Missouri Juvenile Sentencing*, KOLR10 News, (Feb. 16, 2015) available at <http://www.ozarksfirst.com/news/bills-would-address-missouri-juvenile-sentencing-..>

⁹⁹ "A person commits the crime of murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter." Mo. Rev. Stat. § 565.020.

¹⁰⁰ Available at <https://legiscan.com/MO/bill/SB280/2015>.

¹⁰¹ Available at <https://legiscan.com/MO/bill/SB200/2015>.

Although the Missouri Supreme Court has yet to rule on *Miller*'s retroactivity, the Missouri Court of Appeals for the Western District held that *Miller* applies retroactively to cases on collateral review. *Branch v. Cassady*, No. WD77788, ___ S.W.3d ___, 15 Mo. App. LEXIS 34, 2015 WL 160718 at *6 (Mo. Jan. 13, 2015). There, petitioner plead guilty to first-degree murder and related crimes committed when he was seventeen-years-old and was therefore sentenced to mandatory JLWOP. *Id.* at *3. Citing *Danforth v. Minnesota*, 552 U.S. 264 (2008) for the proposition that it was free to apply its own retroactivity analysis, the court applied not *Teague v. Lane*, 489 U.S. 288 (1989), but rather the broader *Linkletter v. Walker*, 381 U.S. 618 (1965), which looks to the following factors in determining retroactivity: (1) the purpose to be served by the new rule; (2) the extent of reliance by law enforcement on the old rule; and (3) the effect on the administration of justice of retroactive application of new standards.” *Id.* at *6-7 (citations omitted).

The *Branch* court held that the first factor favored retroactivity, as *Miller*'s purpose – to prohibit mandatory JLWOP and “afford constitutional protection against sentences imposed without consideration of mitigation evidence” – “goes to the very integrity of the fact finding process by which liberty is taken.” *Id.* at *8 (internal quotation and citation omitted). The court held that the second factor was neutral, as there was no evidence that law enforcement relied on the mandatory imposition of sentence in performing its duties. *Id.* The court held that the third factor favored retroactivity, because balancing “the public interest against the gravity of the right involved, we cannot sacrifice to mere expediency the wise restraints and constitutional safeguards which make men free and advance the quality of criminal justice.” *Id.* at *8-9. Thus, the court held that on the whole the factors favored applying *Miller* retroactively. *Id.*. The court further held that a sentence of JLWOP is “no longer a possible sentencing option, *unless and until* a ‘mitigating factors’ hearing has taken place.” *Id.* at *9. The state has sought review before the Missouri Supreme Court. *Branch v. Cassady*, No. SC 94870 (Mar. 31, 2015) available at <https://www.courts.mo.gov/casenet/cases/searchDockets.do>.

Although Missouri's current statutes offend *Miller*, its supreme court has recognized that mandatory JLWOP violates the Eighth Amendment. Moreover, pending legislation would bring Missouri's laws into compliance with *Miller*. And although the Missouri Supreme Court has not yet decided *Miller*'s retroactivity, a Missouri intermediate court has found *Miller* to apply retroactively to cases on collateral review, relevant to the state's eighty-four JLWOP prisoners. That decision is pending before the Missouri Supreme Court.

Montana

Montana was among the eight jurisdictions that did not permit JLWOP when *Miller* was decided. *See* Mont. Code Ann. § 46-18-222 (2014). Montana outlawed JLWOP in 2007. S.B. 547, 60th Leg. (Mont. 2007). Montana has one JLWOP prisoner.¹⁰²

In Montana, a person convicted of an deliberate homicide¹⁰³ shall be punished by death, unless the person is less than eighteen at the time of the commission of the offense, in which case he is punished by life imprisonment, or by imprisonment in the state prison for a term of not less than ten years or more than one hundred years. § 45-5-102(2). A defendant convicted of an enumerated serious offense with an enumerated serious prior is sentenced to automatic life in prison, unless the death penalty is applicable and imposed. § 46-18-219. However, mandatory minimums do not apply if “the offender was less than 18 years of age at the time of the commission of the offense for which the offender is being sentenced.” § 46-18-222(1).

The Montana Criminally Convicted Youth Act (CCYA), enacted in 1999, provides juveniles convicted in adult court with certain protections and benefits not available to adult offenders. §§ 41-5-206; -2502(2)-(3). For example, the district court retains jurisdiction over the case until the youth reaches age twenty-one, during which the court may suspend all or part of any sentence imposed. §§ 41-5-2503(1)(b); -2504; -2510. Thus, a youth convicted in adult court has sentence review available until they turn twenty-one. *Id.* While any adult offender whom the court determines warrants more than five years of supervision must be incarcerated at Montana State Prison, any youth offender whom the court determines warrants more than five years of supervision may be committed to the Montana Department of Corrections (DOC). §§ 46-18-201(3)(c), -(d)(i), -(3)(d)(ii). DOC commitment has been characterized by the Montana Supreme Court as “less onerous” than commitment to Montana State Prison. *State v. Strong*, 203 P.3d 848, 851 (Mt. 2009). Youth convicted of a serious offense are entitled to “the possibility of a DOC commitment in a variety of settings that range from imprisonment to boot camp.” *Id.* The Montana Supreme Court has explained that the CCYA’s “enhanced flexibility with regard to treatment of youth offenders comports with the goals [of ensuring] rehabilitation of youth offenders rather than solely retribution.” *Id.*

In May 2015, Montana Supreme Court held that *Miller* does not apply retroactively on collateral review. *See Beach*, 348 P.3d at 631. Mr. Beach was convicted of a deliberate homicide for a crime he committed in 1979, when he was seventeen years old. *Id.* The court imposed the maximum sentence, a discretionary sentence of JLWOP. *Id.* Although Beach conceded that his sentence was not mandatory, he argued that his sentence violated *Miller* because the sentencer did not consider the mitigating features of Beach’s age at the

¹⁰² According to information provided by the Montana Department of Corrections in response to a request for public information. Notes on file.

¹⁰³ A person commits deliberate homicide if the person: (a) knowingly causes the death of another human being; (b) kills another during the perpetration or attempted perpetration of an enumerated felony; or (c) purposely or knowingly causes the death of a fetus of another with knowledge that the woman is pregnant. § 45-5-102.

time of the offense. *Id.* at 638. The Montana Supreme Court found it “clear” that *Miller* established two rules – first, that sentencing schemes that mandate automatic JLWOP are unconstitutional, and second, that the sentencer must “follow a certain process” before imposing JLWOP on a juvenile. *Id.* Mr. Beach invoked the second rule. *Id.* Applying *Teague v. Lane*, 489 U.S. 288 (1989) , the court held that the new rule Mr. Beach invoked was neither substantive nor a watershed rule of criminal procedure. *Id.* Thus, it did not apply to Beach on collateral review. *Id.*

Other than *Beach*, Montana has no cases interpreting its laws in light of *Miller*, likely because it does not retain JLWOP.

Nebraska

Nebraska was among the twenty-nine jurisdictions that had mandatory JLWOP at the time *Miller* was decided. *Miller v. Alabama*, 132 S. Ct. 2455, 2473 n.13 (2012). In May 2013, Nebraska amended its laws to comply with *Miller*. See L.B. 44, 103 Leg., 2d Sess. (Neb. 2013), *enacting* Neb. Rev. Stat. §§ 28-105.02, 83-1,110.04 (2014). There are approximately nine inmates serving JLWOP sentences in the state.¹⁰⁴

Nebraska's amended statute provides that "the penalty for any person convicted of a Class IA felony for an offense committed when such person was under the age of eighteen years shall be a maximum sentence of not greater than life imprisonment and a minimum sentence of not less than forty years' imprisonment." § 28-105.02(1). "Class IA" felonies include first-degree murder and kidnapping (unless the kidnapping victim was voluntarily released). §§ 28-303, -313. The amended statute requires the sentencing judge to consider the following mitigating factors in sentencing a juvenile: (a) defendant's age at the time of the offense; (b) defendant's impetuosity; (c) defendant's family and community environment; (d) defendant's ability to appreciate the risks and consequences of the conduct; (e) defendant's intellectual capacity; and (f) the outcome of a comprehensive mental health evaluation by an adolescent mental health professional. § 28-105.02(2).

Moreover, the new statute provides that an offender who was under eighteen years old when he or she was convicted and incarcerated "shall, if the offender is denied parole, be considered for release on parole by the Board of Parole every year after the denial." Neb. Rev. Stat. Ann. § 83-1,110.04(1). During each hearing, the parole board is required to consider and review the following information about the inmate: (a) education and court documents; (b) participation in rehabilitative programs while incarcerated; (c) age at the time of the offense; (d) level of maturity; (e) ability to appreciate the risks and consequences of his conduct; (f) intellectual capacity; (g) level of participation in the offense; (h) efforts toward rehabilitation; and (i) any other mitigating factor. § 83-1,110.04(2).

The Nebraska Supreme Court considered the effect of *Miller* on JLWOP sentences in *State v. Castaneda*, 842 N.W.2d 740 (Neb. 2014) and *State v. Mantich*, 842 N.W.2d 716 (Neb. 2014) *cert. denied Nebraska v. Matnich*, 135 S.Ct. 67 (2014). In the first case, the defendant appealed his mandatory JLWOP sentence for first-degree murder. *Castaneda*, 842 N.W.2d at 757. The court did not need to decide *Miller*'s retroactivity because Mr. Castaneda was on direct review. *Id.* at 759. His JLWOP sentence was vacated and his case remanded for resentencing. *Id.* at 760; *see also State v. Ramirez*, 842 N.W.2d 694 (Neb. 2014) (holding the same); *State v. Taylor*, 842 N.W.2d 771 (Neb. 2014).

¹⁰⁴ According to information provided by the Nebraska Department of Corrections in response to a request for public information. Notes on file. The number is approximate because Nebraska tracks only sentence date and not offense date. Thus, there are nine inmates serving LWOP who were eighteen or younger at the date of sentencing.

In *State v. Mantich*, 842 N.W.2d 716 (Neb. 2014), the Nebraska Supreme Court found that the rule announced in *Miller* should be given retroactive effect as a matter of federal law. Mr. Mantich was convicted of first-degree murder and sentenced to LWOP for a crime he committed when he was sixteen years old. *Id.* at 719. In his supplemental appeal from the denial of post-conviction relief, Mantich argued that his sentence violated *Miller*. *Id.* at 721. Applying *Teague*, the court found the new rule announced in *Miller* was “more substantive than procedural” as evidenced by the fact that “*Miller* required Nebraska to change its substantive punishment for the crime of first degree murder when committed by a juvenile . . . ” *Id.* at 731. The court was also persuaded by the fact that the sentencing scheme under which Manitch was sentenced failed to give the “sentencer a choice between [LWOP] and something lesser.” *Id.* Thus, the court vacated defendant’s LWOP sentence and remanded for resentencing in accordance with section 28-105.02. *Id.*

Nebraska has made significant changes to its juvenile sentencing laws in response to *Miller*, both legislatively and judicially. Its laws are now in compliance with *Miller* and *Miller* has been found to apply retroactively.

Nevada

Nevada was among the states that had discretionary, but not mandatory, JLWOP at the time *Miller* was decided. Nev. Rev. Stat. Ann. § 200.030. In May 2015, Nevada's legislature eliminated JLWOP. A.B. 267, 78th Reg. Sess. (Nev. 2015). The bill will render Nevada's approximately sixteen JLWOP prisoners¹⁰⁵ eligible for parole after serving a certain number of years. *Id.*

Under Nevada's former laws, an individual convicted of first-degree murder¹⁰⁶ "shall be punished . . . (a) by death, if one or more aggravating circumstances are found that are not outweighed by the mitigating circumstances . . .; or (b) [b]y imprisonment . . . : (1) for life without parole; (2) for life with the possibility of parole after serving a minimum of 20 years are served; or (3) for a definite term of 50 years, with eligibility for parole beginning when a minimum of 20 years has been served." Nev. Rev. Stat. Ann. § 200.030(4). The statute contained no requirement that the sentencer consider the mitigating features of youth.

Prior to A.B. 267, the Nevada Supreme Court refused to require sentencers to consider those features before imposing discretionary JLWOP. In *Castillo v. McDaniel*, No. 62188, 2015 Nev. Unpub. LEXIS 183, 2015 WL 667917 (Nev. Feb. 12 2015), petitioner argued on collateral review that his consecutive JLWOP sentences violated the Eighth Amendment because his sentencing hearing failed to comply with *Miller*'s requirement to consider the mitigating features of youth. *Id.* at *2. The Nevada Supreme Court held that neither *Graham* nor *Miller* applied, because petitioner was charged with homicide, and the jury had discretion to impose LWOP, life with the possibility of parole after twenty years, or a definite term of fifty years with parole eligibility after twenty years. *Id.* at *3. The court did not address petitioner's argument about consideration of youthfulness. *Id.*; see also *Harvey v. State*, No. 64566, 2014 Nev. Unpub. LEXIS 597, at *2, 2014 WL 1430380 (Nev. Apr. 20, 2014) ("We also note that *Miller* does not apply to appellant's case. The jury had discretion to sentence appellant to death, [JLWOP], and life with the possibility of parole after ten years."); *Williams v. State*, No. 62871, 2014 Nev. Unpub. LEXIS 74, *2, 2014 WL 504771 (Nev. 2014) ("Appellant did not face a mandatory [JLWOP] sentence, and therefore, the *Miller* decision had no bearing on appellant's sentence.")

In May 2015, Nevada abolished JLWOP and ruled that life with the possibility of parole is the maximum sentence an individual who was under eighteen at the time of his crime may receive. Nev. Rev. Stat. § 176.025. Moreover, Nevada's amended laws enacted a

¹⁰⁵ See The Human Rights Watch, *State Distribution of Estimated 2,589 Juvenile Offenders Serving Juvenile Life Without Parole* (2009), available at http://www.hrw.org/sites/default/files/related_material/updatedJLWOP10.09_final.pdf.

¹⁰⁶ First-degree murder is murder: "(a) [p]erpetuated by poison, lying in wait, torture, or any kind of willful, deliberate, and premeditated killing; (b) [c]ommitted in perpetration or attempted perpetration of [an enumerated felony]; (c) [c]ommitted to avoid lawful arrest or to escape custody; (d) [c]ommitted on school property or school-sponsored activity; (e) [c]ommitted in perpetration or attempted perpetration of an act of terrorism. § 200.030(1).

new section indicating that wherever a person is convicted as an adult for an offense that he or she committed when he or she was less than eighteen years of age, “the court shall consider the differences between juvenile and adult offenders, including, without limitation, the diminished culpability of juveniles as compared to that of adults and the typical characteristics of youth.” § 176. Finally the laws make prisoners who are currently serving JLWOP sentences eligible for parole as follows: (A) if the offense did not result in death, the prisoner is eligible for parole after fifteen years incarcerated; (B) if the offense did result in death, after twenty years. § 213. However, these provisions do not apply to a prisoner who killed two or more victims. *Id.*

While initially slow to react to *Miller*, Nevada’s legislature has now outlawed JLWOP, requires consideration of the *Miller* factors whenever a juvenile is sentenced as an adult, and renders current JLWOP prisoners eligible for parole after fifteen or twenty years provided that they did not kill two or more people.

New Hampshire

New Hampshire was among the twenty-nine jurisdictions that had mandatory JLWOP at the time of *Miller*. See *Miller v. Alabama*, 132 S. Ct. 2455, 2473 n.13 (2012). It is also among the fifteen states that have not passed legislation to make its juvenile sentencing laws comply with *Miller*. Five inmates are currently serving mandatory JLWOP sentences there.¹⁰⁷

A juvenile convicted of first-degree murder in New Hampshire is mandatorily sentenced to LWOP. See N.H. Rev. Stat. Ann. § 620:1-a(III) (“A person convicted of murder in the first degree shall be sentenced to life imprisonment and shall not be eligible for parole at any time”). To be convicted of first-degree murder, an individual must have (a) purposely caused the death of another, or (b) knowingly cause the death of (1)-(3) another while engaged in the perpetration of an enumerated felony or (4) an elected official where the killing is motivated by knowledge of the individual’s status. § 630:1-a.

In *Petition of State of N.H.*, 103 A.3d 227, 235-36 (N.H. 2014), the New Hampshire Supreme Court held four of the five juveniles’ mandatory LWOP sentences were unconstitutional under *Miller*. The fifth was not a petitioner in the case and was sentenced after *Miller* was decided.

The court applied *Teague*—as a matter of federal law—to hold that *Miller* applied retroactively as a “new, substantive rule.” The court reasoned that *Miller* “altered the range of outcomes for juveniles convicted of homicide by allowing a sentencer to consider a punishment other than life in prison without the possibility of parole.” Thus, the respondents were “entitled to the retroactive benefit of the *Miller* rule in post-conviction proceedings.” *Id.* at 236. The four petitioners serving JLWOP in the state are being resentenced pursuant to this opinion.¹⁰⁸ The resentencing judge must sentence each defendant based on the factors outlined in *Miller*. The court’s opinion, however, does not specify how this procedure will work.¹⁰⁹ The fifth juvenile, Steven Spader was sentenced to life without parole after being given an opportunity to present evidence as required by *Miller*. Order, *State of New Hampshire v. Steven Spader*, Nos. 10-S-240-245 (Hillsborough Super. Ct. Apr. 26, 2013) available at <http://www.courts.state.nh.us/caseinfo/pdf/mtvernon/spader/index.htm>. The sentencing court, however, did not explain how it was exercising discretion or what other sentencing options were available. *Id.*

Proposed House Bill 1624 makes several reforms in the realm of juvenile justice including the following: (1) changing the age of minority for juvenile delinquency proceedings from seventeen to eighteen years of age; (2) clarifying competency determination in juvenile proceedings; (3) clarifying the right to counsel in juvenile

¹⁰⁷ According to information provided by the New Hampshire Department of Corrections in response to a request for public information. Notes on file.

¹⁰⁸ Interview with New Hampshire practitioner, Feb. 3 2015. Notes on file.

¹⁰⁹ New Hampshire limits juveniles’ statutory right to post-conviction counsel to parole revocation hearings. § 170-H:10-a(I).

hearings; (4) changing waiver of counsel procedure for juvenile proceedings; (5) directing the New Hampshire Department of Health and Human Services to collect certain data regarding juvenile justice program; (6) requiring the New Hampshire Judicial Council to adopt standards relative to the appointment and qualification of juvenile defense counsel; and (7) requiring the Department of Health and Human Services to submit a juvenile justice services report to the legislature. There is nothing in the bill, however, regarding JLWOP.

New Hampshire's sentencing statutes are still in violation of *Miller* because they provide for mandatory LWOP regardless of age upon a first-degree murder conviction. However, *Petition of State of N.H.* dictates that *Miller* announced a substantive rule to be applied retroactively, and all four individuals serving JLWOP sentences predating *Miller* are being resentenced. However, it remains unclear how trial courts will exercise discretion to enter sentences less than LWOP since there has not been a change in the state's sentencing statute.

New Jersey

New Jersey was among the twenty-nine jurisdictions with mandatory JLWOP at the time of *Miller*. See Brief for Respondent at App. A, B, *Miller v. Alabama*, 132 S. Ct. 2455 (2012), No. 10-9646. New Jersey has not since altered its laws to comply with *Miller*. However, New Jersey has no inmates serving a JLWOP sentence.¹¹⁰

As before *Miller*, JLWOP remains available to juveniles as young as fourteen who have been charged as adults. See N.J. Stat. Ann. § 2C:11-3. New Jersey retains mandatory JLWOP under the following circumstances: (1) first-degree murder where the victim was a law enforcement officer performing his official duties or the victim was killed because of his status as law enforcement officer; or (2) first-degree murder where the victim was less than fourteen years old and the act was committed in the commission of sex assault or criminal sexual contact. § 2C:11-3b(2), (3).

Furthermore, once a defendant has been convicted of murder, “a mandatory sentence of life without parole must be imposed ‘if a jury finds beyond a reasonable doubt that any of’ certain ‘aggravating factors¹¹¹ exist.’” See *State v. Troxwell*, 85 A.3d 408, 414 (N.J. 2014) (quoting § 2C:11-3b(4)). Although sentencing is a function left to the judge, the finding of aggravating factors is performed by the jury. *Id.* There are no juveniles in New Jersey, however, serving a sentence imposed under this mandatory scheme.¹¹²

JLWOP is discretionary when the defendant is convicted of the murder of a victim other than a police officer or an individual under fourteen during a sexual assault, and where no aggravating factor has been found. See § 2C:11-3(b)(1). Criminal homicide constitutes murder when the defendant causes the victim’s death purposely, knowingly, or during the commission of an enumerated felony. See § 2C:11-3(a).

New Jersey intermediate courts have held that *Miller* does not apply to discretionary JLWOP sentences or aggregate term-of-years sentences that are effectively JLWOP. See *State v. James*, No. 02082875, 2012 WL 3870349 at *13 (N.J. Super. Ct. App. Div. Sept. 7, 2012) (unreported) (holding that *Miller* did not apply to juvenile defendant’s aggregate sentences of 268 years without parole did not violate *Miller* because they were not mandatory); *State v. Houseknecht*, No. 89-08-000605, 2013 WL 5729829 at *3 (N.J. Super. Ct. App. Div. Oct. 23, 2013) (unreported) (holding that *Miller* did not apply to

¹¹⁰ Brief for ACLU at 55 n. 18, *State v. Comer*, No. 03-01-0231.

¹¹¹ These aggravating factors include the following: (1) defendant has a previous murder conviction; (2) defendant created a grave risk of death to someone else in addition to the victim; (3) the murder was “outrageously . . . vile” or involved torture or aggravated assault; (4) defendant committed the murder for pecuniary gain; (5) the murder was committed to escape punishment; (6) the murder was committed while the defendant was engaged in the commission of an enumerated felony; (7) defendant murdered a public servant engaged in the performance of his official duties; (8) defendant was the leader of a narcotics trafficking network; (9) defendant caused explosion or similar form of widespread destruction; (10) the victim was under fourteen years old; and (11) the murder was committed during an act of terrorism. See § 2C:11-3 (4).

¹¹² Interview with New Jersey practitioner, Dec. 22, 2014. Notes on file.

juvenile's life sentence with thirty years before he became eligible for parole because it was not LWOP and was not mandatory); *State v. Brack*, No. 08-10-0851, 2014 WL 5343765 (N.J. Super. Ct. App. Div. Oct. 22, 2014) (*Miller* did not apply to defendant's sentence of thirty years without parole).

The question of whether *Miller* is retroactive has yet to be decided, but is at issue in a pending post-conviction case. See Brief of ACLU as *Amicus Curiae*, *State v. Comer*, No. 03-01-0231. In 2003, James Comer was sentenced to seventy-five years in prison and exhausted his appeals 2008. See *State v. Adams*, 943 A.2d 851 (2008). After *Miller*, Comer filed a *pro se* Motion for an Order (1) Correcting Defendant's Illegal Sentence and (2) Assigning Counsel. The motion has been pending since June 2014. Brief of ACLU at 7.

Likewise, the scope of mitigation allowed to be presented in sentencing juveniles to LWOP in New Jersey has yet addressed in light of *Miller*. But New Jersey's capital and general sentencing jurisprudence suggest that a wide degree of latitude should be given in presenting mitigation. See *State v. Loftin*, 680 A.2d 677, 740 (N.J. 1996) ("Any restriction on the rights of defendants to present evidence in support of individualized consideration and in mitigation is troubling"). Every defendant sentenced to LWOP in New Jersey has the right to an attorney in the first post-conviction proceeding, but the right to counsel in subsequent petition proceedings is at the discretion of the court. See N.J. Court Rules, R. 7:10-2. However, these petitions are liberally granted.¹¹³

The ACLU's brief in *State v. Comer* indicates that no individual in New Jersey is currently serving a formal term of JLWOP. Brief of ACLU at 55 n. 18. The brief also notes, however, that the state Department of Corrections (DOC) does not keep statistics on which individuals are serving *de facto* JLWOP. *Id.* "[A]ccording to DOC statistics, of the individuals sentenced and admitted at age 19 or younger, 50 are serving mandatory minimums between 30 and 45 years; only 17 are serving mandatory minimum sentences in excess of 45 years." *Id.*

The trajectory of *Comer* will have a substantial impact on the state of JLWOP and *de facto* JLWOP in New Jersey.

¹¹³ See *supra*, note 111.

New Mexico

New Mexico had discretionary JLWOP at the time of *Miller*. See *Miller v. Alabama*, 132 S.Ct. 2455, 2471 n.10 (2012). The state has zero JLWOP prisoners.¹¹⁴

New Mexico authorizes life without parole or life with parole for capital felonies committed by juveniles. N.M. Stat. §§ 31-18-13(B), 31-18-14, 31-18-15.2. Capital felonies include first-degree murders involving the death of a child, aggravated criminal sexual penetration, a third violent felony, or a second violent sexual offense. §§ 31-18-14, -15, -23, -25.

The New Mexico Supreme Court has held that a sentence of life with the possibility of parole imposed upon a juvenile does not violate *Miller*. See *State v. Gutierrez*, No. 33, 354, 2013 WL 6230078 (N.M. Dec. 2, 2013) (unreported). In *Gutierrez*, appellant argued that his sentence of “life plus eighteen years” for first-degree murder, aggravated burglary, and armed robbery committed as a juvenile violated the Eighth Amendment because his sentencing hearing “did not take into account the unique mitigating circumstances of adolescence as required by the United States Supreme Court under *Miller*.” *Id.* at *2. The court held that because petitioner was not sentenced to JLWOP and because the court “took the unique circumstances of [the appellant] and the crime into account before determining the appropriate sentence,” *Miller* did not apply. *Id.* at *4.

New Mexico does not authorize JLWOP and has zero prisoners serving the sentence. However, it continues to authorize sentences of life with the possibility of parole to be imposed on juveniles, which the New Mexico Supreme Court has held does not violate *Miller*.

¹¹⁴ According to information provided by the New Mexico Department of Corrections in response to a request for public information. Notes on file.

New York

New York has never authorized LWOP for juveniles, except in the narrow case of terrorism. The U.S. Supreme Court did not count New York among the twenty-nine jurisdictions that authorized the sentence. *See Miller v. Alabama*, 132 S. Ct. 2455, 2471 (2012). Furthermore, no juvenile in New York has been sentenced to mandatory LWOP under this statute.¹¹⁵ Thus, New York courts have had no reason to address *Miller*'s effect on the law or *Miller*'s retroactivity.

In New York, mandatory JLWOP only applies “when a person is convicted of a crime of terrorism.” N.Y. Penal Law § 490.25. A person is guilty of terrorism when, “with the intent to intimidate or coerce a civilian population, influence the policy of a unit of government by intimidation or coercion, or affect the conduct of a unit of government by murder, assassination or kidnapping, her or she commits a specified offense.” *Id.* No juvenile has been sentenced under this statute.

New York has discretionary LWOP for first-degree murder, second-degree murder, and aggravated murder, but these statutes require that the defendant be at least eighteen to be tried under these statutes. *See* §§ 70.00, 125.27, 125.25, 125.26. Thus, there is no discretionary LWOP available for juveniles in New York.

Under New York's Juvenile Offender law, juveniles as young as thirteen can be automatically transferred to adult court if charged with certain crimes. N.Y. Fam. Ct. Act. § 301.2(1) (2006). Moreover, New York is one of two states where the age of adult criminal responsibility is sixteen years old. *Id.* The 2015-16 New York State Executive Budget seeks to raise the age of juvenile jurisdiction and change the age of criminal responsibility from sixteen to eighteen years old.¹¹⁶ However, this bill does not reference or address *Miller* or JLWOP.

Although New York is making changes to its juvenile sentencing laws, the state has taken no action regarding *Miller* and, in contravention of *Miller*'s mandate, retains mandatory JLWOP in very limited circumstances. However, no juvenile in New York is serving a sentence of JLWOP, and there is no discretionary LWOP available for juveniles.

¹¹⁵ Interview with New York practitioner, Jan. 30, 2015. Notes on file.

¹¹⁶New York State Executive Budget: Education, Labor and Family Assistance Article VII Legislation, Part J, “Raise the Age of Juvenile Jurisdiction” *available at* http://publications.budget.ny.gov/eBudget1516/fy1516artVIIbills/ELFA_ArticleVII.pdf.

North Carolina

North Carolina was among the twenty-nine jurisdictions that had mandatory JLWOP at the time of *Miller*. See *Miller v. Alabama*, 132 S. Ct. 2455, 2474 n.15 (2012). It has since altered its statutes to comply with *Miller*. S.B. 635, 2011 Gen. Assemb. Reg. Sess. (N.C. 2012); N.C. Gen. Stat. §§ 15A-1340.19A, 15A-1340.19B, 15A-1340.19C (2012). There are seventy-seven prisoners serving life with parole sentences imposed when they were juveniles and seventy-nine prisoners serving JLWOP sentences in North Carolina.¹¹⁷

Prior to *Miller*, a juvenile convicted of first-degree murder¹¹⁸ was automatically sentenced to JLWOP. See N.C. Gen. Stat. § 14-17 (2013). Shortly after *Miller*, the North Carolina legislature amended its laws. See S.B. 635. The amended laws provide that if the defendant was convicted of first-degree murder¹¹⁹ solely on the basis of the felony murder rule, the sentence shall be life imprisonment with parole. See § 15A-1340.19B(a)(1) (2012). In all other cases, the trial court is directed to hold a hearing to consider any mitigating circumstances, including those related to defendant's age at the time of the offense, immaturity, and ability to benefit from rehabilitation, echoing the factors prescribed in *Miller*. See §§ 15A-1340.19B, -19C. Following the hearing, the trial court is directed to make findings regarding the mitigating factors and is given the discretion to sentence the defendant to life imprisonment with or without parole. §§ 15A-1340.19B(a)(2), 15A-1340.19C(a). The new laws are silent as to retroactivity.

The North Carolina Court of Appeals has been willing to vacate mandatory JLWOP sentences and remand for resentencing pursuant to *Miller* and North Carolina's amended statutes when the case is on direct appeal. See *State v. Pemberton*, 743 S.E.2d 719, 728 (N.C. Ct. App. 2013); *State v. Jefferson*, 758 S.E.2d 186 (N.C. Ct. App. 2014) (unpublished). In *State v. Lovette*, 758 S.E.2d 399, 401 (N.C. Ct. App. 2014), the North Carolina Court of Appeals upheld appellant's JLWOP sentence after a post-*Miller* resentencing proceeding because the trial court thoroughly weighed all relevant factors.

The North Carolina legislature has amended its laws to comply with *Miller* and its court of appeals has been willing to resentence defendants charged under the prior statute while their cases are on direct appeal. The issue of *Miller*'s retroactivity is currently pending before the North Carolina Supreme Court. *State v. Young*, No. 13-646,¹²⁰ relevant to North Carolina's seventy-nine prisoners serving JLWOP.

¹¹⁷ According to information provided by the North Carolina Division of Adult Corrections and Juvenile Justice, Rehabilitative Programs and Services Section in response to a request for public information. Notes on file.

¹¹⁸ In North Carolina, first-degree murder includes murder "perpetrated by means of a nuclear, biological, or chemical weapon of mass destruction . . . lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing, or [a killing] committed in the perpetration or attempted perpetration [of an enumerated felony]." §14-17(a).

¹¹⁹ Life with parole means the defendant "shall serve a minimum of 25 years imprisonment prior to becoming eligible for parole." § 15A-1340.19A.

¹²⁰ *Young* and its companion cases were transferred to the North Carolina Supreme Court "on its own initiative" without further explanation.

North Dakota

North Dakota was among the jurisdictions that had discretionary, but not mandatory, JLWOP at the time *Miller* was decided. See Brief for Respondent at App. A, B, *Miller v. Alabama*, 132 S. Ct. 2455 (2012), No. 10-9646. Only one person is serving a JLWOP sentence in North Dakota.¹²¹

In North Dakota, the most serious felony is a Class AA felony, punishable by life imprisonment with parole or LWOP. A person is first eligible for parole after thirty years, “less sentence reduction for good conduct, after that person’s admission to the penitentiary.” N.D. Cent. Code § 12.1-32-01. Murder, as well as at least one non-homicide offense, is a class AA offense. §§ 12.1-16.01 (murder), 12.1-20.03 (child rape).

The only North Dakota case citing *Miller* is a federal habeas corpus challenge to a sentence of discretionary JLWOP. See *Garcia v. Bertsch*, No. 1:13-cv-021, 2013 WL 1533533 (D. N.D. Apr. 12, 2013). In that case, the inmate, proceeding pro se, challenged the sentencing court’s lack of “statutory standards . . . to provide a meaningful basis for imposing the most severe sentence of as opposed to life with possibility of parole.” *Id.* at *1. Put another way, the inmate challenged the lack of a requirement to consider the “distinctive attributes of youth” before he was sentenced to life without parole. *Miller*, 132 S.Ct. at 2465.

In *Bertsch*, the court declined to address the inmate’s claim because he had previously sought habeas corpus relief and was, therefore, barred from filing a successive petition without first obtaining permission from the Eighth Circuit. Because he had not obtained such permission, he was barred from filing a successive petition.¹²² See *Bertsch*, 2013 WL 1533533 at *4.

North Dakota does not have mandatory JLWOP, but it also lacks a requirement to consider the unique characteristics of youth before sentencing a person to JLWOP. Some of its sentencing procedure also appears to violate *Graham v. Florida*, 130 S. Ct. 2011 (2010) (barring life without parole sentences for juveniles convicted of non-homicide offenses). Moreover, no case has addressed the merits of *Miller*’s application to North Dakota’s sentencing procedures.

¹²¹ According to information provided by the North Dakota Department of Corrections in response to a request for public information. Notes on file.

¹²² According to the docket, petitioner has not since applied for permission.

Ohio

Ohio was among the twenty-nine jurisdictions that had mandatory JLWOP at the time of *Miller*. See *Miller v. Alabama*, 132 S. Ct. 2455, 2474 n.15 (2012). It also had discretionary JLWOP in certain cases. See Ohio Rev. Code Ann. § 2929.03(E)(1). Although Ohio has not since altered its statute, mandatory JLWOP is only available in very narrow circumstances. §§ 2929.03(E)(2), 2971.03(A)(2). Moreover, the Ohio Supreme Court has recently mandated that the sentencing court consider youth as a mitigating factor before ever imposing a sentence of JLWOP, even in cases where discretionary LWOP was imposed. See *State v. Long*, 8 N.E.3d 890 (Ohio 2014). Though mandatory JLWOP is no longer available in Ohio, the state still has five prisoners serving the sentence.¹²³

An Ohio offender under eighteen at the time of the offense who has been convicted of aggravated murder¹²⁴ with one or more aggravating circumstance¹²⁵ may be sentenced to one of the following: (a) LWOP; (b) life with parole after twenty-five years; or (c) life with parole after thirty years. § 2929.03(E)(1).

There are two situations in which Ohio statutes provide for mandatory JLWOP. The first is where an offender who was under eighteen at the time of his offense is convicted of aggravated murder with a “a sexual motivation specification”¹²⁶ or a “sexually violent predator specification.”¹²⁷ § 2929.03(E)(2). The second is a rape offense where: (1) the offender “purposely compelled the victim to submit by force or threat of force;” (2) “the victim was less than ten years of age;” (3) the offender has a prior rape conviction; or (4) if the “offender during or immediately after the commission of the rape caused serious physical harm to the victim.” § 2971.03(A)(2).

¹²³ According to information provided by the Ohio Department of Corrections in response to a request for public information. Notes on file.

¹²⁴ Aggravated murder includes the following offenses: (A) killing with purpose and prior calculation of design of human being or fetus; (C) killing in perpetration of enumerated felony of human or fetus; (C) killing of a victim under thirteen years old; (D) killing by offender under detention or who broke detention; and (E) killing of law enforcement officer engaged in official duties with specific intent to kill the officer. Ohio Rev. Code § 2903.01.

¹²⁵ Aggravating circumstances include: (1) assassination of political figure; (2) murder for hire; (3) murder to escape detention or punishment; (4) murder while defendant was under detention or at large after having broken detention; (5) prior intentional murder conviction; (6) murder of a law enforcement officer engaged in official duties; (7) murder in perpetration of enumerated felony; (8) murder of witness to prevent testimony in criminal proceeding; (9) victim was under thirteen years old; and (10) murder in perpetration of terrorism offense. § 2929.04(A).

¹²⁶ “‘Sexual motivation specification’ means a specification . . . that charges that a person charged with a designated homicide, assault, or kidnapping offense committed the offense with a sexual motivation.” § 2971.01(K).

¹²⁷ “‘Sexually violent predator specification’ means a specification . . . that charges that a person charged with a violent sex offense, or a person charged with a designated homicide, assault, or kidnapping offense and a sexual motivation specification, is a sexually violent predator.” § 2971.01(I).

However, the Ohio Supreme Court has barred juveniles from being sentenced to mandatory JLWOP under either statute. *See Long*, 8 N.E.3d at 898-99. *Graham v. Florida*, 560 U.S. 48 (2010) bars LWOP sentences under the second statute..

In *State v. Long*, the Ohio Supreme Court held in exercising its discretion under section 2929.03(A), that the court must consider the juvenile's youth as a mitigating factor before imposing a sentence of JLWOP. 8 N.E.3d at 895. Long was sentenced to JLWOP after being convicted of aggravated murder and related crimes stemming from an offense he committed when he was seventeen. *Id.* at 892. Relying on *Roper*, *Graham*, and *Miller*, the Ohio Supreme Court held that despite the fact that Long's JLWOP sentence was discretionary, it violated the Eighth Amendment because the trial court did not consider his youth as a mitigating factor. *Id.* at 893-99. The court held that in future cases, the "record must reflect that the court specifically considered the juvenile offender's youth as a mitigating factor at sentencing when a prison term of [LWOP] is imposed." *Id.* Moreover, the court cautioned that given the "severity" of LWOP, and "because youth and its attendant circumstances are strong mitigating factors, the sentence should rarely be imposed on juveniles." *Id.* at 899. For these reasons, the court remanded Long's case for resentencing. *Id.* Although *Long* doesn't create a new rule entitling individuals serving JLWOP to resentencing hearings, it is being used to challenge a number of JLWOP and *de facto* JLWOP sentences.¹²⁸

For the first time after *Miller* and *Graham*, the Ohio high court is reviewing a *de facto* life sentence given to a juvenile in a non-homicide case. The sentence of 112 years was given to a fifteen year old for a conviction of rape, robbery, and kidnapping. *State v. Moore*, S.C. 2014-0120 (2014).

Although Ohio law still calls for mandatory JLWOP in certain, narrow circumstances, the Ohio Supreme Court has outlawed the practice and cautioned that JLWOP should be imposed very rarely.

¹²⁸ *See, e.g., State v. Lane*, No. 2013-G-3144, 2014 WL 1900459 (Ohio Ct. App. May 12, 2014) (holding that defendant's sentencing hearing fully complied with *Miller* and *Long* because it considered the *Miller* factors in fashioning defendant's sentence).

Oklahoma

Oklahoma was among the fourteen states that had discretionary, but not mandatory, JLWOP at the time *Miller* was decided, and it has not since altered its laws. *See* Brief for Respondent at App. A, B, *Miller v. Alabama*, 132 S. Ct. 2455 (2012), No. 10-9646. The state has approximately eighteen individuals serving a JLWOP sentence.¹²⁹

Under Oklahoma law, a defendant convicted of first-degree murder¹³⁰ “shall be punished by death, by imprisonment for life without parole or by imprisonment for life [with parole].” Okla. Stat. tit. 21 § 701.9. Where the defendant is convicted of first-degree murder and “state is not seeking the death penalty but has alleged that the defendant has prior felony convictions, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to [LWOP] or life imprisonment, wherein the state shall be given the opportunity to prove any prior felony convictions beyond a reasonable doubt.” § 701.10-1 (A). The proceeding is conducted before the same trial jury “as soon as practicable without presentence investigation.” *Id.* If the trial jury is waived or the defendant pleaded guilty, the sentencing proceeding is before the court. § 701.10-1(B).

Oklahoma’s legislature has not altered its laws since *Miller*, and Oklahoma courts have not interpreted the statute in light of *Miller*. Although the statute is discretionary, it does not mandate consideration of the mitigating features of youth, as was required by the Supreme Court in *Miller*. Specifically, the statute reads: “In the sentencing proceeding, evidence may be presented as to any mitigating circumstances or as to any of the aggravating circumstances enumerated in Section 701.7 et seq. of this title.” § 701.10 (C). The state is permitted to introduce evidence about the victim and victim impact evidence at this stage. *Id.* Oklahoma law does not define mitigating circumstances and does not clearly require the sentencing court to consider them.

In *T.G.L. v. State*, 344 P.3d 1098 (Okla. Crim. App. 2015), the Oklahoma Court of Criminal Appeals¹³¹ established that a juvenile defendant’s age for the purpose of a criminal proceeding is measured at the time of the trial rather than the time of the alleged offense. In *T.G.L.*, due to delayed reporting, the defendant was charged at age twenty-five

¹²⁹ According to information provided by the Oklahoma Department of Corrections in response to a request for public information. Notes on file. The number is approximate because the Oklahoma DOC tracks only conviction date and not offense date.

¹³⁰ First-degree murder includes: (A) lawfully and with malice causing the death of another human being, with malice defined as the “deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances of capable proof;” (B) felony murder; (C) causing death of a child by willful or malicious injuring, torturing, maiming, or use of unreasonable force; (D) unlawfully and with malice aforethought soliciting another to cause the death of another to in furtherance of manufacturing or distributing dangerous substances; and (E) intentionally causing the death of a law enforcement officer, correctional officer, or corrections employee. Okla. Stat. tit. 21, § 701.7(A), (B).

¹³¹ The Oklahoma Court of Criminal Appeals is the highest court in the State of Oklahoma with appellate jurisdiction in criminal cases. *See* State of Oklahoma, *The Oklahoma Court of Criminal Appeals*, available at <http://occa.state.ok.us>.

for a sexual assault he allegedly committed when he was fifteen years old. *Id.* at 1099. The court held that appellant “should not be allowed to benefit from any delay in reporting” and that “Appellant should be charged as an adult.” *Id.* at 1100. The court explained that pursuant to its precedent, “juvenile certification is a statutory and not a constitutional right.” *Id.* at 1099 (citing *Edwards v. State*, 591 P.2d 313, 317-18 (Okla. Crim. App. 1979)). The court reasoned that the Oklahoma Juvenile Code and Youthful Offender Act do not consider the age of the child when a crime occurred, but rather the age of the defendant when charged with the crime. *Id.* (citing Okla Stat. tit 10A, §§ 2-5-202(A)(1), 2-5-205(A), 2-5-206(A),(B)). Thus, there were “no statutory provisions prohibiting Appellant . . . from being charged as an adult.” *Id.*

Although Oklahoma’s laws provide for discretionary, and not mandatory, JLWOP, there is no requirement that the sentencer consider the mitigating features of youth as required by *Miller*. The state has forty-eight individuals serving JLWOP with no established mechanism to have their sentences reconsidered in light of *Miller*.

Oregon

Oregon was among the eight jurisdictions that did not have JLWOP at the time *Miller* was decided.¹³² The state legislature outlawed JLWOP in 1985. *See* Or. Rev. Stat. Ann. § 161.620 (1985). However, Oregon still has five inmates serving JLWOP sentences imposed under the old statute.¹³³

Before 1985, a juvenile defendant convicted of aggravated murder¹³⁴ could be sentenced to LWOP or to a mandatory term of twenty or thirty years. *See* Or. Rev. Stat. § 163.105 (1985); *former* Or. Rev. Stat. 419.533 (1983), *repealed by* Or. Laws 1993, ch. 33, § 373. In 1985, the Oregon legislature reinstated the death penalty through a number of enactments. One of those prohibited a trial court from imposing a death sentence or mandatory minimum sentence on any remanded juvenile,¹³⁵ with the exception of a mandatory minimum sentence for aggravated murder if the juvenile committed the murder as a seventeen year old. § 161.620 (“a sentence imposed upon any person waived from the juvenile court . . . shall not include any sentence of death or life imprisonment without the possibility of release or parole nor imposition of any mandatory minimum sentence . . .”).

Since 1985, Oregon courts have consistently held that the statute prohibiting mandatory minimums overrides the statutes that facially permit it. *See Engweiler v. Persson*, 316 P.3d 264, 275 (Or. 2013) (explaining that section 161.620 precludes the imposition of a thirty-year mandatory minimum sentence otherwise authorized for juveniles under seventeen when they commit aggravated murder); *see also Engweiler v. Bd. of Parole*, 175 P.3d 408 (Ore. 2007) (holding the same). Seventeen year olds, however, are subject to mandatory minimums.

Oregon courts are split regarding *de facto* life sentences. *Compare State v. Davilla*, 972 P.3d 22 (Ore. Ct. App. 2010), *with Sexton v. Persson*, 341 P.3d 881 (Or. Ct. App. 2014). In *Davilla*, an Oregon Court of Appeals reviewed the 1,394-month (approximately 116 years) sentence imposed on defendant for a murder he committed at sixteen. *Davilla*, 972

¹³² *See* The Sentencing Project, *Slow to Act: State Responses to 2012 Supreme Court Mandate on Life Without Parole* (2014) available at http://sentencingproject.org/doc/publications/jj_State_Responses_to_Miller.pdf.

¹³³ According to information provided by the Oregon Department of Corrections in response to a request for public information. Notes on file.

¹³⁴ Aggravated murder is murder committed under or accompanied by any of the following circumstances: (1) murder for pecuniary value; (2) defendant has previous murder conviction; (3) multiple victims in the same criminal episode; (4) murder in the course of torture or maiming; (5) victim was under fourteen-years-old; (6) victim was a police officer, correctional officer, parole officer, probation officer, judge, juror, witness, court employee, or liquor enforcement inspector performing official duties; (7) defendant committed offense while confined in correctional facility or in custody; (8) murder by means of explosive; (8) murder committed during perpetration of enumerated felony; (9) murder to conceal crime; (10) murder after defendant escaped from penal or correctional facility. *See* § 163.095 (2014).

¹³⁵ An individual charged with aggravated murder when age fifteen through seventeen at the time of the offense “shall be prosecuted as an adult in criminal court.” § 137.701(1) (1997).

P.2d at 903. The court held that “the plain language of the statutes that the legislature intended that remanded juveniles not be sentenced to imprisonment for the duration of their lives without having the possibility of release. A departure sentence of 116 years is in practical effect imprisonment for life without the possibility of release or parole.” *Id.* at 904. Thus, the court remanded for resentencing. *Id.*

In *Sexton*, an Oregon appellate court considered petitioner’s consecutive life sentences with a minimum prison term of twenty-five years for crimes committed when he was seventeen years old. 341 P.3d at 882. The court held that petitioner’s sentence was not disproportionate because it was not as severe as the sentence he could have received. *Id.* at 887. The court further noted that petitioner’s sentence did not offend *Miller* because the sentencing scheme under which petitioner was sentenced did not involve mandatory LWOP. *Id.* at 887 n. 8; *see also State v. Link*, 317 P.3d 298, 300 (Or. Ct. App. 2013) (distinguishing juvenile sentencing scheme outlawed in *Miller* from that in Oregon).

Although Oregon has not had JLWOP since 1985 and has only five individuals serving the sentence, it allows for *de facto* life sentences, which recent appellate cases have upheld, even in light of *Miller*.

Pennsylvania

Pennsylvania was among the twenty-nine jurisdictions that had mandatory JLWOP at the time *Miller* was decided. *See Miller v. Alabama*, 132 S. Ct. 2455, 2473 n.13 (2012). The legislature swiftly thereafter altered its laws to comply with *Miller*. S.B. 850, 2011 Gen. Assemb. Reg. Sess. (Pa. 2012), 18 Pa. Stat. Ann. § 1102.1 (2014). Pennsylvania has 450 JLWOP prisoners, more than any other United States jurisdiction.¹³⁶

Under Pennsylvania's prior laws, any defendant convicted of first-degree murder¹³⁷ was sentenced to either death or LWOP.¹³⁸ *See* 42 Pa. Const. Stat. Ann. § 9711(a)(1). After the United States Supreme Court held that a juvenile defendant cannot be sentenced to death, the statute mandated automatic JLWOP for juvenile offenders. Moreover, under the prior laws, any individual convicted of second-degree murder¹³⁹ was automatically sentenced to LWOP. § 1102(b). Shortly after *Miller* was decided, in October 2012, the Governor signed into law a new sentencing scheme for persons under eighteen convicted of murder. *See Commonwealth v. Batts*, 66 A.3d 286, 293 (Penn. 2013); 18 Pa. Stat. Ann. § 1102.1. The new scheme applies only to juveniles convicted of murder on or after the date of *Miller*. *See Batts*, 66 A.3d at 293.

Under the new laws, an individual convicted of first-degree murder who was under the age of eighteen at the time of the crime shall be sentenced as follows: (1) if the defendant is fifteen or older, to a maximum of LWOP and a minimum of thirty-five years to life; and (2) if the defendant is under fifteen, to a maximum of LWOP and a minimum of twenty-five years to life. § 1102.1(a). Thus, JLWOP remains available, even for defendants under fifteen years old, but it is discretionary for all juveniles. Further, under the new law, second-degree murder no longer carries a sentence of LWOP for defendants eighteen years old at the time of the offense. § 1102.1(c). A defendant between fifteen and eighteen years old at the time the defendant commits second-degree murder is sentenced to a minimum of thirty years to life, and a defendant under fifteen is sentenced to a term of at least twenty years to life. *Id.* Finally, the new law mandates the sentencer's consideration of the mitigating circumstances of youth, and to "make findings on the record" thereof, in determining whether to impose JLWOP. § 1102.1(d).

In *Commonwealth v. Cunningham*, 81 A.3d 1 (Penn. 2013), the Pennsylvania Supreme Court held that the rule announced in *Miller* did not apply retroactively on collateral

¹³⁶ *See* Juvenile Law Center, *Juvenile Life Without Parole in Pennsylvania* available at <http://jlc.org/current-initiatives/promoting-fairness-courts/juvenile-life-without-parole/jlwop-pennsylvania>.

¹³⁷ "A criminal homicide constitutes murder of the first degree when it is committed by an intentional killing." tit. 18 § 2502(a) (2014).

¹³⁸ Although the statute uses the term "life," courts have made clear that "life" means LWOP. *See Bronshtein v. Horn*, No. 99-2186, 2001 U.S. Dist. LEXIS 9310 at *60 n.25 (E.D. Pa. July 5, 2001) (unreported), affirmed in part and reversed in part on other grounds 2005 U.S. App. LEXIS 6158 (3d Cir. Apr. 14, 2005) (unreported).

¹³⁹ "A criminal homicide constitutes murder of the second degree when it is committed while defendant was engaged as a principal or an accomplice in the perpetration of a felony."

review, applying the retroactivity standard set forth in *Teague v. Lane*, 489 U.S. 288 (1989). The court held that the rule announced in *Miller* is procedural, not substantive, because it does not categorically bar a penalty for a class of offenders, and it is not watershed because it is not on par with the “sweeping” procedural rule announced in *Gideon v. Wainwright*, 372 U.S. 225 (1983). See *Cunningham*, 91 A.3d at 10.

Supreme Court Judge Ronald Castille concurred separately in *Cunningham* to explore his view of what “might be done to mitigate the seeming inequity” resulting from the majority’s decision. Specifically, he was concerned that whether a defendant LWOP for an offense committed as a juvenile is entitled to relief depends “solely upon the happenstance of the moment that the defendant’s conviction became final.” 81 A.3d at 11 (Castille, C.J., concurring).

Judge Castille’s concurrence leaves open the possibility that the Pennsylvania Constitution’s Cruel Punishment Clause provides a different and broader retroactivity doctrine than does *Teague*. *Id.* at 9 (Castille, C.J., concurring). He explained that a “new federal rule, if sufficiently disruptive of state law – such as by requiring the state to treat identically situated defendants differently – may pose an issue of Pennsylvania constitutional law independent of the federal rule.” *Id.* at 14. He concluded that absent legislative action, he would “remain open to considering whether there is a basis in the Pennsylvania constitutional law – specifically, under Article I, Section 13 – to afford global retroactive effect to *Miller*.” *Id.* at 17.

Even though Pennsylvania has altered its laws to comply with *Miller*, it still allows juveniles under fifteen years old to be sentenced to JLWOP. It did, however, eliminate LWOP as a sentence for juveniles convicted of second-degree murder. The Pennsylvania Supreme Court has held that *Miller* is not retroactive, leaving hundreds of JLWOP prisoners without recourse for relief. However, Judge Castille’s concurrence provides hope that the Pennsylvania Supreme Court may change its mind on *Miller*’s retroactivity in the future in the face of compelling arguments.

Rhode Island

Rhode Island was among the fifteen jurisdictions that had discretionary, but not mandatory, JLWOP at the time *Miller* was decided. See Brief for Respondent at App. A, B, *Miller v. Alabama*, 132 S. Ct. 2455 (2012), No. 10-9646. The state has not changed its laws since *Miller*. No person in Rhode Island is serving JLWOP.¹⁴⁰

Under Rhode Island law, an individual found guilty of first-degree murder¹⁴¹ shall serve, at minimum, life with the possibility of parole after fifteen years. R.I. Gen. Laws § 11-23-2 (2014).

Once the jury returns a verdict of first-degree murder, the court instructs the jury to determine whether the state has proven beyond a reasonable doubt that the murder was committed involving one of the following circumstances: (1) intentional murder committed during commission of an enumerated felony; (2) murder committed in a manner creating a great risk of death to more than one person by means of weapon or harmful device; (3) murder for pecuniary gain; (4) murder involving torture or aggravated battery; (5) murder committed against a member of the judiciary, law enforcement, corrections, attorney general, or firefighter; (6) murder committed by a defendant confined in a correctional facility; or (7) murder committed during the course or perpetration of felony manufacture, sale, or delivery of controlled substance. R.I. Gen. Laws §§ 11-23-2, 11-23-2.1, 12-19.2.1. If the jury finds one or more of these circumstances beyond a reasonable doubt, the court “shall conduct a presentence hearing.” § 12-19.2.1. At this hearing, the court must allow the prosecution and the defense to present additional evidence relevant to a determination of the sentence, including “the nature and circumstances of the offense and personal history, character, record, and propensities of the defendant which are relevant to the sentencing determination.” §§ 12-19.2.1, 12-19.2-4. After hearing evidence and argument, the court in its discretion can sentence the defendant to either life or LWOP. § 12-19.2.1.

In order to abolish JLWOP in Rhode Island, an amendment could be made to section 12-19.2.1 exempting defendants under eighteen years of age from a life-without-parole sentence.

¹⁴⁰ According to information provided by the Rhode Island Department of Corrections in response to a request for public information. Notes on file.

¹⁴¹ First-degree murder includes any murder “perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious and premeditated killing,” murder committed in the perpetration attempted perpetration of an enumerated felony, murder of a law enforcement officer or prosecutor, or murder “perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him or her who is killed.” R.I. Gen. Laws § 11-23-1.

South Carolina

South Carolina was among the fifteen states that had discretionary, but not mandatory, JLWOP at the time of *Miller*. See S.C. Code Ann. § 17-25-45 (2013). The legislature has not since altered its laws, but the South Carolina Supreme Court has held that *Miller* applies retroactively and that courts must consider the unique factors of youth outlined in *Miller* in sentencing juveniles to LWOP. See *Aiken v. Byars*, 765 S.E.2d 572 (S.C. 2014) cert. denied 135 S.Ct. 2379 (2015) (mem.). The South Carolina Supreme Court recognizes that *Miller* applies to its state’s discretionary regime. *Id.* Thirty-seven juveniles are serving JLWOP sentences in South Carolina and are entitled to a resentencing hearing under *Aiken*.¹⁴²

In South Carolina, a person who is convicted of murder¹⁴³ must be punished by death or by a mandatory minimum term of imprisonment for thirty years to life. § 16-3-20(A). If the State seeks the death penalty and a statutory aggravator is found beyond a reasonable doubt and a recommendation of death is not made, the trial judge must impose a sentence of LWOP. *Id.* It appears on its face that this statute provides for mandatory JLWOP where a juvenile is convicted of murder and an aggravator is found, but the death penalty is not imposed. *State v. Morgan*, 626 S.E.2d 888 (S.C. 2006), however, makes clear that this portion of the statute does not apply to juveniles after *Roper v. Simmons*, 543 U.S. 551 (2005). Therefore, although the court juveniles cannot be sentenced to mandatory LWOP under subsection (A) of section 16-3-20 (A), the court did not specify the basis for distinguishing between LWOP and the term of years sentence. *Morgan*, 626 S.E.2d at 889

In *Aiken*, the South Carolina Supreme Court considered the JLWOP sentenced of fifteen inmates in light of *Miller*. 765 S.E.2d 572. The petitioners were sentenced prior to *Miller* under South Carolina’s non-mandatory statutory scheme. *Id.* at 576. Applying *Teague v. Lane*, 489 U.S. 288 (1989) the court first found that *Miller* created a new, substantive law that should therefore apply retroactively. *Id.* at 575. The court reasoned that the “rule plainly excludes a certain class of defendants – juveniles – from specific punishment – life without parole absent individualized considerations of youth.” *Id.* at 575. The court next considered whether *Miller* applied to the petitioners’ non-mandatory sentences. *Id.* at 576.

While recognizing that the *Miller* Court “did not expressly extend its ruling to states such as South Carolina whose sentencing scheme *permits* a life without parole sentence to be imposed on a juvenile offender but does not *mandate* it,” the court found that it also “must give effect to the proportionality rationale integral to *Miller*’s holding – youth has constitutional significance.” *Id.* The court reasoned that *Miller* “does more than ban mandatory life sentencing schemes for juveniles; it establishes an affirmative requirement that courts fully explore the impact of the defendant’s juvenility on the sentence

¹⁴² According to information provided by the South Carolina Department of Corrections in response to a request for public information. Notes on file.

¹⁴³ “Murder” is defined as “the killing of any person with malice aforethought, either express or implied.” § 16-3-10 (2013).

rendered.” *Id.* at 576-77. The court found that with regard to petitioners, the absence of the courts’ “inquiry into the characteristics of youth produced a facially unconstitutional sentence.” *Id.* at 577. The court held that the “petitioners and those similarly situated are accordingly entitled to resentencing to allow the inmates to present evidence specific to their attributes of youth and allow the judge to consider such evidence in light of its constitutional weight.” *Id.* at 577.

On June 1, 2015, the United States Supreme Court declined to review *Aiken*, establishing that all thirty-seven inmates serving JLWOP sentences in South Carolina are entitled to resentencing. South Carolina, however, has not passed legislation implementing *Miller*’s mandates.

South Dakota

South Dakota was among the states imposing mandatory JLWOP at the time *Miller* was decided. See *Miller v. Alabama*, 132 S. Ct. 2455, 2473 n.13 (2012). The legislature thereafter altered its laws to comply with *Miller*. S.B. 39, 2013 Leg. Assemb., 88th Sess. (S.D. 2013), amending S.D. Codified Laws §§ 22-6-1, 23A-27-1. Three people are serving JLWOP sentences in South Dakota.¹⁴⁴

At the time of *Miller*, South Dakota provided for mandatory life sentences for juveniles convicted of Class A and B felonies. S.D. Codified Laws § 22-6-1 (2015). A life sentence in South Dakota constitutes JLWOP: “No inmate sentenced to life imprisonment is eligible for parole by the Board of Pardons and Paroles.” § 24-15-4. Class A and B felonies include murder and kidnapping. §§ 22-16-12, -19-1. For Class C and Class 1 felonies, the *maximum* sentence is, respectively, life without parole and fifty years. § 22-6-1.

Senate Bill 39 added the following to section 22-6-1: “If the defendant is under the age of eighteen years at the time of the offense and found guilty of a Class A or B felony, the maximum sentence may be life imprisonment in the state penitentiary.” § 22-6-1. An inmate given less than life is, in the judge’s discretion, sentenced as if he or she was convicted of a Class C felony. § 24-15A-32. Thus, South Dakota retains JLWOP, but it’s discretionary.

Moreover, the following was added to section 23A-27-1: “If the defendant is a juvenile convicted as an adult of a class A or class B felony, prior to imposing a sentence, the court shall conduct a presentence hearing. § 23A-27-1. At the hearing, the court must consider mitigating circumstances via witness testimony in open court or deposition. *Id.* The new law does not specify that the judge must consider the mitigating features of youth.

Only one case addresses South Dakota’s juvenile sentencing regime in light of *Miller* or *Graham v. Florida*, 560 U.S. 48 (2010) (prohibiting juvenile life without parole sentences for non-homicide offenses).¹⁴⁵ See *State v. Springer*, 856 N.W.2d 460 (S.D. 2014). There, the prisoner filed a *pro se* post-conviction challenge to his “261-year term-of-years sentence with the possibility of parole after he serves 33 years of his sentence.” *Id.* at 466. He was sixteen years old at the time of sentencing.

The court considered, and rejected, three challenges to Mr. Springer’s sentence. First, the court held that Mr. Springer did not receive a sentence of JLWOP, reasoning that the mere possibility that Mr. Springer would not receive parole did not make his sentence JLWOP. *Id.* at 467.

¹⁴⁴ According to information provided by the South Dakota Department of Corrections in response to a request for public information. Notes on file.

¹⁴⁵ One additional case, *State v. Berget*, 826 N.W.2d 1 (2013), cites *Miller* in the context of its discussion of whether the death penalty violates the Eighth Amendment. *Berget* concludes it is constitutional. *Id.*

Next, the court held that Mr. Springer did not receive a *de facto* life sentence, distinguishing the situation where a defendant's age at parole exceeded his life expectancy. *Id.* at 469 (distinguishing *State v. Ragland*, 836 N.W.2d 460 (Iowa 2013)). The court noted that Mr. Springer would be eligible for parole at age forty-nine and had not presented evidence of his life expectancy, leaving open the question of whether a person with a lower than normal life expectancy might be constitutionally entitled to an earlier potential parole.

Finally, the court held that Mr. Springer did receive a "meaningful opportunity for release," noting that the trial court commented on Mr. Springer's age at the time of the offense suggested greater opportunity for rehabilitation and parole. *Id.* at 469-70. Because the court rejected the substance of Mr. Springer's arguments, it declined to address *Miller's* retroactivity.

South Dakota's juvenile sentencing procedures do not appear to have been challenged subsequent to *Miller* or *Graham v. Florida*, 580 U.S. 48 (2010) (prohibiting LWOP for juveniles convicted of non-homicide offenses) and facially violate both.

Tennessee

Tennessee was among the fifteen jurisdictions that had discretionary, but not mandatory JLWOP at the time of *Miller*. See Brief for Respondent at 66-67, *Miller v. Alabama*, 132 S. Ct. 2455 (2012), No. 10-9647, 2012 LEXIS 720. There are currently thirteen prisoners serving JLWOP in Tennessee.¹⁴⁶

In Tennessee, when a defendant is convicted of first-degree murder,¹⁴⁷ the jury “shall fix the punishment in a separate sentencing hearing to determine whether the defendant shall be sentenced to death, to [LWOP], or to imprisonment for life.” Tenn. Code. Ann. § 39-13-204(a). Thus, a juvenile convicted of first-degree murder in Tennessee is sentenced to either JLWOP or life with parole, in the jury’s discretion. A defendant sentenced to life is eligible for parole after serving fifty-one years. § 40-35-501(i)(1).

Before sentencing a defendant to death or LWOP, the jury must find that the state proved beyond a reasonable doubt the existence of one or more statutory aggravating circumstances.¹⁴⁸ In determining a punishment, the jury “shall consider” a number of prescribed mitigating circumstances,¹⁴⁹ including defendant’s age at the time of the crime.

In *Darden v. State*, the Tennessee Court of Criminal Appeals considered *Miller*’s retroactivity as a matter of state law. No. M2013-01328, 2014 Tenn. Crim. App. LEXIS 230, 2015 WL 992097 (Tenn. Crim. App. Mar. 13, 2014) (unreported); see § 40-30-122 (2012) (retroactivity rule); *Derrick Brandon Bush v. State*, 428 S.W.3d 1 (Tenn. 2014)

¹⁴⁶ According to information provided by the Tennessee Department of Corrections in response to a request for public information. Notes on file.

¹⁴⁷ First-degree murder includes: (1) a premeditated and intentional killing of another; (2) a killing of another committed in the perpetration of or attempted perpetration of an enumerated felony; or (3) a killing of another using a destructive device or bomb. § 39-13-202(a).

¹⁴⁸ Statutory aggravators include: (1) the victim was under twelve and the defendant was over eighteen; (2) the defendant has a prior violent felony conviction; (3) the defendant knowingly create a great risk of death to two or more persons other than the victim; (4) murder for remuneration or murder for hire; (5) especially heinous, atrocious, or cruel murder involving torture or serious physical abuse; (6) murder to avoid or interfere with lawful arrest; (7) murder during perpetration of enumerated offense; (8) murder while defendant was in custody; (9) murder of law enforcement officer, corrections official, probation officer, EMT, paramedic, or firefighter engaged in performance of official duties; (10) murder of former judge or state attorney because of status; (11) murder of elected official; (12) murder of three or more persons within a forty-eight-month period; (13) defendant mutilated the body after death; (14) the victim was over seventy years old or the victim was otherwise particularly vulnerable; (15) murder in an act of terrorism; (16) murder against a pregnant woman; and (17) murder at random for not understandable reasons. Tenn. Code Ann. § 29-13-204(i).

¹⁴⁹ Statutory mitigators include: (1) no significant prior criminal history; (2) defendant was under extreme mental or emotional disturbance; (3) victim participated or consented; (4) defendant reasonably believed his conduct was morally justified; (5) defendant’s participation was relatively minor; (6) defendant acted under extreme duress; (7) defendant’s age; (8) defendant’s capacity to appreciate the wrongfulness of his conduct or conform his conduct to the law was impaired by mental disease or defect or intoxication; and (9) any other mitigating factor. § 29-13-204(j).

(applying same). “A new rule of constitutional criminal law shall not be applied retroactively in a post-conviction proceeding unless the new rule places primary, private individual conduct beyond the power of criminal law-making authority to proscribe or requires the observances of fairness safeguards that are implicit in the concept of ordered liberty.” *Darden*, 2014 Tenn. Crim. App. LEXIS 230, at *24-5 (quoting § 40-30-122).

Using this standard, which the court noted is substantially similar to the standard set forth in *Teague v. Lane*, 489 U.S. 288 (1989), the court concluded that *Miller* announced a rule that should be “applied retroactively because it forbids the criminal punishment of a mandatory sentence of [LWOP] for a certain class of defendants because of their status as juveniles.” *Id.* at *28. Although the court held *Miller* applied retroactively, the court concluded that *Miller* did not afford petitioner relief. *Id.* at *29. The court reasoned that because Tennessee’s statutory scheme gives the sentencer the discretion to impose LWOP or life with parole on juvenile defendants convicted of first-degree murder, and because the petitioner in this case received a life sentence, petitioner was not entitled to post-conviction relief. *Id.* at 29-30.

In *Dickerson v. State*, No. W2013-01766-CCA-R3-PC, 2014 Tenn. Crim. App. LEXIS 740, 2014 WL 3744454 (Tenn. Crim. App. 2014), the court considered petitioner’s JLWOP sentence in light of *Miller*. Although noting that *Darden* held *Miller* to apply retroactively, the court found it “need[ed] not resolve” that issue because “even a retroactive application of *Miller* would not afford the Petitioner relief.” *Id.* at *8. The court reasoned that the trial judge who sentenced petitioner, who waived his right to a jury, considered petitioner’s youth as a mitigating factor: “Clearly, the trial court thoroughly considered the Petitioner’s age at the time of the commission of the crime and gave detailed reasoning as to why it believed [LWOP] was the appropriate sentence, despite Petitioner’s youth.” *Id.* at *9-11. Thus, the trial court “provided the exact consideration that the Supreme Court called for in *Miller*.” *Id.* at *11. The state sought discretionary review in both *Dickerson* and *Darden*, and in each case the application was denied. *See Dickerson v. State*, No W2013-01766, 2014 Tenn. LEXIS 945 (Tenn. Nov. 19, 2014); *Darden v. State*, No. M2013-01328, 2014 Tenn. LEXIS 691 (Tenn. Sept. 22, 2014).

In *Perry v. State*, No. W2013-901-CCA-RS-PC, 2014 Tenn. Crim. App. LEXIS 237 2014 WL 1377579 (Tenn. 2014), the Tennessee Court of Criminal Appeals held that *Miller* did not apply to juvenile defendant’s sentence of life with the possibility of parole after 51 years. The court reasoned that “*Miller* stands for the proposition that a sentence of [LWOP] may not mandatorily imposed upon a defendant who was a juvenile at the time of the crime without individual consideration of the mitigating circumstances.” *Id.* at *14. Because defendant was not sentenced to mandatory JLWOP, the court found that *Miller* did not apply. *Id.*

Tennessee’s statutes, unaltered since 2012, are in compliance with *Miller*’s prohibition on mandatory JLWOP and mandate that the sentencer consider the mitigating factor of youth. While neither *Miller* nor its retroactivity have been considered by the Tennessee

Supreme Court, a state intermediate court has held *Miller* to apply retroactively, and two appellate courts have held that Tennessee's statutory scheme does not offend *Miller*.

Texas

Texas was among the twenty-nine jurisdictions that had mandatory JLWOP at the time of *Miller*, though it was only available for seventeen-year olds. *See Miller v. Alabama*, 132 S. Ct. 2455, 2474 n.15 (2012). Texas has since abolished JLWOP altogether. S.B. 2, 83rd Leg. Special Sess. (Texas 2013); Tex. Penal Code Ann. §12.31(a) (2011). As of April 2015, there were seventeen individuals serving JLWOP in Texas.¹⁵⁰

Under the former law, a defendant found guilty of a capital felony¹⁵¹ “shall be punished” by LWOP or death. § 12.31(a) (2011). When the state did not seek the death penalty, there was an automatic sentence of LWOP. *Id.* In 2009, Texas eliminated LWOP as a sentencing option for individuals convicted of a capital felony committed at age sixteen and younger. § 508.145(b). This statute applies prospectively. *Id.*

In 2013, Texas eliminated LWOP for seventeen-year olds convicted of a capital felony. § 12.31(a)(1) (2013). Under the new statute, a defendant who commits a capital felony when under the age of eighteen “shall be punished” for “life.” *Id.* Thus, although the statute abolishes JLWOP, it now provides for a mandatory life with parole sentence for juveniles convicted of a capital felony. *Id.* An inmate serving a life sentence is not eligible for release on parole until he has served forty calendar years. Tex. Govt. Code. § 508.145 (2013).

In *Ex Parte Maxwell*, 424 S.W.3d 66 (Tex. Crim. App. 2014), the Texas Court of Criminal Appeals¹⁵² held that *Miller* applies retroactively to petitioners as a matter of federal law. Applying *Teague v. Lane*, 489 U.S. 288 (1989), the court held that *Miller*

¹⁵⁰ According to information provided by the Texas Department of Corrections in response to a request for public information. Notes on file

¹⁵¹ Capital felonies include capital murder and repeated sex offender crimes, despite the United States Supreme Court’s ban on death sentences for non-homicide offenses in *Kennedy v. Louisiana*, 554 U.S. 407 (2008). *See* §§ 19.02(b)(1), 12.42 (2013). According to an interview with a Texas practitioner, however, the repeat sex offender statute has never been used to sentence an individual to death or JLWOP. *See* Interview with Texas practitioner, Feb. 26, 2015. Notes on file. Murder is elevated to a capital felony when the state can prove one of the following nine aggravators: (1) murder of a peace officer or fireman performing official duties; (2) murder during the perpetration of an enumerated felony; (3) murder for remuneration; (4) murder while escaping a penal institution; (5) murder of a penal institution employee or murder in a penal institution in the furtherance of a conspiracy; (6) murder while offender is incarcerated for an enumerated offense; (7) multiple murders during the same transaction or pursuant to the same criminal conduct; (8) murder of a victim under ten years old; or (9) retaliatory murder of a judge. §19.03. A Texas defendant commits murder where he (1) intentionally or knowingly causes the death of an individual; (2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual; or (3) commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual during the perpetration of a felony. Tex. Penal Code § 19.02(b)(1)

¹⁵² The Texas Court of Criminal Appeals is the court of last resort for all criminal matters in Texas. *See* Tex. Rule. App. Proc. 68.2(a); *In re Reece*, 341 S.W.3d 360 (Tex. 2011); *Gonzalez v. Thaler*, 132 S. Ct. 641 (2012).

announced a new substantive rule because it altered “the range of criminal outcomes available for certain criminal conduct,” putting a mandatory JLWOP sentence “outside the ambit of the State’s power.” *Id.* at 75 (internal quotations omitted).

Texas courts have vacated mandatory JLWOP sentences and remanded the cases for individualized *Miller* resentencing hearings where the case is on direct appeal. The only available sentences on remand are: (1) life with parole or (2) LWOP, after considering the defendant’s individual conduct, circumstances, and character. *See, e.g., Turner v. State*, 414 S.W.3d 791 (Tex. App. 2013); *Ex Parte Sandoval*, No. WR-81,545-01, 14 Tex. Crim. App. Unpub. LEXIS 720 (Tex. 2014).

Although Texas has close to thirty prisoners serving JLWOP sentences, the legislature has prospectively banned the practice and the highest criminal court in Texas has given *Miller* retroactive effect. However, Texas’s amended statute dictates mandatory life sentences with parole after forty years for juveniles convicted of capital murder, with no requirement that the sentencer consider the unique features of youth. Texas courts have held this does not violate *Miller*. *See, e.g., Derrick Lewis v. State*, 428 S.W.3d 860 (Tex. Crim. App. 2014); *Jor’dan Lewis v. State*, 448 S.W.3d 138 (Tex. Crim. App. 2014).

Utah

Utah was among the jurisdictions with discretionary, but not mandatory, JLWOP at the time *Miller* was decided. See Brief for Respondent at App. A, B, *Miller v. Alabama*, 132 S. Ct. 2455 (2012), No. 10-9646. There are four prisoners serving a JLWOP sentence in Utah.¹⁵³

In Utah, when a defendant has pled guilty or has been found guilty of a capital felony, there shall be sentencing proceedings conducted before a jury or, upon request of the defendant and with the approval of the court and the consent of the prosecution, before the court that accepted the plea. Utah Code Ann. § 76-3-207(1). The sentencer shall consider a number of aggravating and mitigating factors. § 76-3-207(2)-(4). The penalty options include: death, LWOP, life with the possibility of parole, or an indefinite prison term of not less than twenty-five years. § 76-3-207(5).

In 2013, Utah enacted legislation in response to *Graham* and *Roper*. S.B. 228, 2013 Leg., Gen. Sess. (Utah 2013). The new laws provide that if a defendant was younger than eighteen years of age at the time the offense of capital murder was committed, the offense is not a capital felony. § 76-5-202(e). They further provide that when a person commits a non-homicide felony normally subject to a penalty of LWOP, the person may not be sentenced to LWOP if the person is younger than eighteen at the time of the offense. § 76-5-301.1, -302, -402, -402.1, -402.2, -402.3, -403, -403.1, -404.1, -405.

A single case addresses *Miller*'s application to Utah's sentencing procedures. See *State v. Houston*, No. 20080625, 2015 Utah LEXIS 129, 2015 WL 773718 (Utah Mar. 13, 2015) (unreported). In *Houston*, the Utah Supreme Court considered whether Utah's sentencing procedure violated the Eighth Amendment. It concluded it did not: "LWOP is neither a mandatory sentence nor the presumptive sentence under Utah's sentencing statute. And the statute directs the sentencing authority to consider any relevant mitigating circumstances." *Id.* at *34. The court emphasized that Utah's sentencing procedure creates a presumption of twenty years and that after considering "any and all relevant factors" which would affect the sentencing decision, LWOP may only be imposed if ten or more jurors agree it is appropriate. *Id.* at *41; see also Utah Code Ann. § 76-3-207.

No case has addressed *Miller*'s retroactivity in Utah.

¹⁵³ According to information provided by the Utah Department of Corrections in response to a request for public information. Notes on file.

Vermont

Vermont was among the twenty-nine jurisdictions that had mandatory JLWOP at the time of *Miller*. See *Miller v. Alabama*, 132 S. Ct. 2455, 2473 n.13 (2012). In April 2015, Vermont eliminated JLWOP. H. 62, 73rd Sess. (2015), *enacting* Vt. Stat. Ann. 13, § 7045 (2015). The state has zero prisoners serving JLWOP sentences.¹⁵⁴

At the time of *Miller*, under Vermont law, an individual convicted of aggravated murder is sentenced to automatic LWOP. Vt. Stat. Ann. tit. 13, § 2311(c) (2015) (“The punishment for aggravated murder shall be imprisonment for life and no lesser term. . . . A person sentenced under this section shall not be eligible for parole . . .”). A person is guilty of aggravated murder in Vermont where he commits murder in the presence of one or more of the following circumstances: (1) he was in custody at the time; (2) he had a prior murder conviction; (3) he committed multiple murders at the same time; (4) he knowingly created a great risk of death to another person or persons; (5) he committed the murder to prevent or avoid lawful arrest or while effecting escape from lawful custody; (6) he murdered for hire; (7) he knowingly murdered a correctional facility employee or law enforcement officer engaged in official duties; and (8) he committed murder while perpetrating or attempting to perpetrate sexual assault or aggravated sexual assault. *Id.*

In April 2015, House Bill 62 ended JLWOP in Vermont, adding the following to the Vermont code: “A court shall not sentence a person to life imprisonment without the possibility of parole if the person was under 18 years of age at the time of the commission of the offense.” Vt. Stat. Ann. 13, § 7045. This section “shall take effect upon passage.” *Id.*

Vermont courts have not interpreted its laws in light of *Miller* and have not ruled on *Miller*’s retroactivity, and the state has no JLWOP prisoners. Although it appears JLWOP is not used in Vermont, the passage of recent legislation puts an official end to the practice.

¹⁵⁴ According to information provided by the Vermont Department of Corrections in response to a request for public information. Notes on file.

Virginia

Virginia was counted among the twenty-nine jurisdictions that had mandatory JLWOP at the time of *Miller*. See *Miller v. Alabama*, 132 S.Ct. 2455, 2474 n.15 (2012). Despite this characterization by the United States Supreme Court, the Virginia Supreme Court has held that Virginia’s sentencing scheme does not violate *Miller* because the trial court always has the ability to suspend a life sentence. See *Jones v. Commonwealth*, 763 S.E.2d 823 (Va. 2014). However, a federal district court recently held that this decision was a clearly unreasonable application of *Miller* and *Graham v. Florida*, 560 U.S. 48 (2010). Virginia has approximately twenty-two individuals serving JLWOP sentences.¹⁵⁵

Under Virginia law, capital murder¹⁵⁶ is a Class 1 felony, punished as follows: “If the person was under 18 years of age at the time of the offense [. . .] the punishment shall be imprisonment for life.” Va. Code Ann. § 18.2-10. Because Virginia abolished parole in 1994, a life sentence effectively amounts to LWOP. Va. Code Ann. § 19.2-295; *Lamb v. Commonwealth*, 557 S.E.2d 530, 532 (Va. Ct. App. 2003). Class 2 felonies, including first-degree murder¹⁵⁷ and a number of non-homicide crimes,¹⁵⁸ are punishable by a range of twenty years to life imprisonment. § 18.2-10(b). Thus, under Virginia’s laws, a juvenile defendant can be effectively sentenced to LWOP for a number of offenses, including non-homicide offenses.

In *Johnson v. Commonwealth*, 755 S.E.2d 468 (Va. 2014), the Virginia Court of Appeals reviewed defendant’s JLWOP sentence imposed for first-degree murder in light of *Miller*. *Miller* was decided before appellant’s trial, and, in response, the Commonwealth amended its indictment from capital murder to first-degree murder, which calls for a

¹⁵⁵ See Louis Hanson, *Bill Would Help Virginia Juveniles Reduce Life Sentences*, The Virginian-Pilot (Jan. 9, 2014) available at <http://hamptonroads.com/2014/01/bill-would-help-va-juveniles-reduce-life-sentences>.

¹⁵⁶ Capital murder includes: (1) murder in the commission of an abduction; (2) killing for hire; (3) killing by someone in a correctional facility; (4) murder during the commission of robbery, attempted robbery, rape, attempted rape, forcible sodomy, attempted forcible sodomy, or object sexual penetration; (5) murder of a law enforcement officer or fire marshal to interfere with official duties; (6) murder of multiple victims as part of the same transaction; (7) murder of more than one person within a three-year period; (8) murder during commission or attempted commission of controlled substance manufacturing; (10) murder as part of continuing criminal enterprise; (11) murder of pregnant woman with knowledge that woman is pregnant and with intent to terminate pregnancy; (12) murder of victim under fourteen years old by defendant over twenty-one; (13) murder of judge for purpose of interfering with official duties; and (15) murder of witness in criminal case for purpose of interfering with person’s duties in case. Va. Code Ann. § 18.2-31.

¹⁵⁷ “Murder, other than capital murder, by poison, lying in wait, imprisonment, starving, or by any willful, deliberate, and premeditated killing, or in the commission of, or attempt to commit [an enumerated felony], is murder in the first degree, punishable as a Class 2 felony.” §18.2-32.

¹⁵⁸ Including, but not limited to, aggravated malicious wounding, armed burglary, certain interference with life-prolonging procedures, attempted capital murder, murder of another’s fetus, and certain terrorism crimes. Va Code Ann. §§ 18.2-51-2, 18.2-90, 54.1-2989(B.), 18.2-25, 18.2-46.5, 18.2-46.6.

range in punishment from twenty years to life and renders those sentenced under this scheme eligible to apply for conditional release.¹⁵⁹ §§ 18.2-32, -10(b), 53.1-40.01. At sentencing, the trial judge considered a series of articles addressing adolescent brain development, as well as aggravating evidence detailing appellant’s lengthy criminal past. *Id.* at 469-70. The Virginia intermediate court concluded that because defendant was sentenced under the discretionary first-degree murder statute and because the judge considered the mitigating features of youth, it was “plainly evident that [defendant’s sentence passed] the United States Supreme Court’s test for constitutionality that it expressed in *Miller*.” *Id.* at 472.

In *Jones*, petitioner argued on collateral review that *Miller* should apply retroactively to his JLWOP sentence. 763 S.E.2d at 823. Despite his status as a juvenile, Jones was sentenced under the capital murder statute, which allows for punishment “by death or imprisonment for life.” *Id.* at 824 (citing § 18.20-10). Unlike in *Johnson*, the Commonwealth did not charge him under the discretionary first-degree murder statute instead the capital murder statute. The Virginia Supreme Court nonetheless did not reverse his sentence.

Instead, it noted that section 19.2-303 of the Virginia code indicates that “[a]fter conviction, whether with or without jury, the court may suspend imposition of sentence or suspend the sentence in whole or in part.” *Id.* (citing § 19.2-303). The court stressed that “[u]nlike the statutes in Alabama and Arkansas found unconstitutional in *Miller*, [Virginia’s statute contained] no language limiting the power of the court to suspend a portion of the sentence.” *Id.* at 825. Further, the it noted that trial court continued to have authority to suspend part or all of petitioner’s sentence pursuant to section 19.2-303. *Id.* Concluding that the sentencing scheme under which petitioner was sentenced did not violate *Miller*, the court did not address *Miller*’s retroactivity: “*Miller* is not applicable to the statute at issue here because one convicted of capital murder does not receive a mandatory sentence of [LWOP].” *Id.* at 826.

In July 2015, a federal court in Virginia’s eastern district court held that petitioner’s sentence of JLWOP for non-homicide offenses was sufficiently contrary to *Graham* to warrant federal habeas relief. *LeBlanc v. Mathena*, No. 2:12cv340, 2015 U.S. Dist. LEXIS 86090, *2 (July 1, 2015). Petitioner was convicted in Virginia state court of rape and abduction with intent to defile for offenses he committed in 1999. *Id.* After *Graham* held that the Eighth Amendment prohibits JLWOP for a non-homicide offense, petitioner moved to vacate his sentences in Virginia state court. *Id.* The state court denied relief,

¹⁵⁹ Conditional release refers to Virginia’s Geriatric Parole Provision, which provides:

Any person serving a sentence imposed upon a conviction for a felony offense, other than a Class 1 felony, (i) who has reached the age of sixty-five or older and who has served at least five years of the sentence imposed or (ii) who has reached the age of sixty or older and who has served at least ten years of the sentence imposed may petition the Parole Board for conditional release.

Va. Code. § 53.1-40.01 (2014).

concluding that Virginia's Geriatric Release Provision rendered the sentence complicit with *Graham*. *Id.* at *3. Petitioner appealed to the Virginia Supreme Court, which found no reversible error. *Id.* at *5. The federal court, however, held that the state court's decision was contrary to and an unreasonable application of clearly established federal law. *Id.* at *29-49. Regarding the state court's conclusion that geriatric release was sufficient to satisfy *Graham*, the federal court stated: "The distant and minute chance at geriatric release at a time when the offender has no realistic opportunity to truly reenter society or have any meaningful life outside of prison deprives the offender of hope." *Id.* at *48. Thus, the court remanded for resentencing, specifically ordering that petitioner not be sentenced to JLWOP. *Id.* at *48-9.

Although *Johnson* demonstrates that some Virginia defendants are being charged and sentenced under the discretionary first-degree murder statute after *Miller*, the Virginia Supreme Court has also held that a defendant's JLWOP sentence imposed under the mandatory capital murder scheme does not violate *Miller* and that, therefore, *Miller*'s retroactivity need not be decided. This holding is not only relevant to Virginia's approximately twenty-two inmates serving JLWOP sentences, but also to future juvenile offenders. The federal court's intervention in *LeBlanc*, however, might push Virginia state courts and legislators to take more seriously the mandates of *Graham* and *Miller*.

Washington

Washington was among the twenty-nine jurisdictions that had mandatory JLWOP at the time *Miller* was decided. *See Miller v. Alabama*, 132 S. Ct. 2455, 2473 n.14 (2012). Washington has since amended its laws to comply with *Miller*, and the laws apply retroactively. *See* S.B. 5064, 63d Leg., 2013 Reg. Sess. (Wash. 2013), *amending* Wash. Rev. Code §§ 9.94A.510, -.540, -.6332, -.729, 9.95.425, -.430, -.435, -.440, 10.95.030. Prior to the passage of SB 6054, there were twenty-two prisoners in Washington serving JLWOP sentences.¹⁶⁰ Five individuals have since been resentenced to a lesser sentence.¹⁶¹

Senate Bill 5064 amended a number of statutes to bring Washington law in compliance with *Miller*. A new section was added to chapter 10.95 of the Washington Revised Code prescribing that a person “sentenced prior to June 1, 2014 to a term of [LWOP] for an offense committed prior to their eighteenth birthday, shall be returned to the sentencing court or the sentencing court’s successor for sentencing consistent with RCW 10.95.030.” S.B. 5064. Thus, the new laws are retroactive, and everyone serving a JLWOP sentence is entitled to resentencing.

Amended section 10.95.030 dictates that a person convicted of aggravated first-degree murder¹⁶² for an offense committed when defendant was between sixteen and eighteen years old “shall be sentenced to a maximum term of life imprisonment and a minimum term of total confinement of no less than twenty-five years.” § 10.95.030(3)(a)(ii). If a term of life is imposed, the defendant “will be ineligible for parole or early release.” *Id.* Thus, JLWOP is still available at the sentencer’s discretion. However, section 10.95.030 prescribes that in setting a minimum term, the court “must take into account the mitigating factors that account for the diminished culpability of youth as provided in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), including, but not limited to, the age of the individual, the youth’s childhood and life experience, the degree of responsibility the youth was capable of exercising, and the youth’s chances of being rehabilitated.” § 10.95.030(b).

A defendant serving a crime of JLWOP for an offense committed prior to the prisoner’s sixteenth birthday “shall be sentenced to a maximum term of life imprisonment and a minimum term of total confinement of twenty-five years.” § 10.95.030(3)(a)(i). Thus, individuals under sixteen years old can no longer be sentenced to JLWOP, and anyone serving such a sentence is automatically resentenced to an indeterminate twenty-five-to-life term, and will be parole eligible after serving twenty-five years. *Id.* Three individuals have been resentenced pursuant to this provision.¹⁶³

¹⁶⁰ According to information provided by the Washington Department of Corrections in response to a request for public information. Notes on file.

¹⁶¹ *See supra*, note 160.

¹⁶² Aggravated first-degree murder is a first-degree murder where one or more enumerated aggravating circumstances are found to exist. *See* § 10.95.020 (enumerating aggravating circumstances).

¹⁶³ *See supra*, note 160.

Finally, the new laws guarantee parole eligibility to individuals serving substantial determinate sentences for crimes committed as juveniles. § 9.94A.641. Any person sentenced to a sentence of more than twenty years as a juvenile may seek parole after serving twenty years. *Id.* This portion of the new law affects 166 Washington prisoners.¹⁶⁴

In *In re Pers. Restraint of McNeil*, 334 P.3d 548 (Wash. 2014), two prisoners argued that their mandatory JLWOP sentences were unlawful pursuant to *Miller*. The Washington Supreme Court held that the offenders were not entitled to relief because an adequate remedy existed in the newly enacted legislation in response to *Miller*. *Id.* at 586. The court noted that pursuant to the new statutes, “[a]ny juvenile offender who was given a mandatory sentence of life without the possibility of early release before the *Miller* fix became effective is automatically entitled to resentencing consistent with the new guidelines.” *Id.* at 589. Thus, the court denied the petitions. *Id.*

Although Washington had mandatory JLWOP at the time of *Miller*, it has since altered its laws to comply with *Miller*. The laws apply retroactively to the thirty prisoners serving the sentence at the time Senate Bill 5064 was enacted. The law also applies to individuals serving lengthy sentences imposed for crimes committed when they were juveniles.

¹⁶⁴ See *supra*, note 160.

West Virginia

West Virginia was among the states that had discretionary, but not mandatory, JLWOP at the time *Miller* was decided. See Brief for Respondent at 25, *Miller v. Alabama*, 132 S.Ct. 2455 (2012), No. 10-9646. In 2014, West Virginia abolished JLWOP. H.B. 4210, 81 Leg., 2d Sess. (W.V. 2014), enacting W. Va. Code §§ 61-2-2, -14a, 62-3-15, -22, -23, 62-12-13b. The laws apply retroactively, and West Virginia now has zero JLWOP prisoners.¹⁶⁵

At the time of *Miller*, West Virginia law provided for discretionary JLWOP upon a conviction of first-degree murder.¹⁶⁶ W. Va. Code Ann. § 62-3-15. In 2014, West Virginia outlawed JLWOP. H.B. 4210 (“The purpose of this bill is to prevent juveniles convicted of first-degree murder from being sentenced to [JLWOP], and to provide considerations for courts to make when sentencing juveniles tried as adults.”). The new laws provide that a juvenile convicted of first-degree murder or felony kidnapping¹⁶⁷ “shall be punished by a term of imprisonment of not less than fifteen years or for life.” W. Va. Code § 61-2-2, -14a (2015). Juveniles are no longer subject to LWOP sentences.

The law applies retroactively, rendering current juvenile prisoners eligible for parole after serving fifteen years. § 62-12-13B. West Virginia enacted new section entitled: “Factors to be considered prior to sentencing a juvenile convicted as an adult,” which requires the court to consider mitigating circumstances akin to those outlined in *Miller*. § 62-4-23(A). The court must also “consider the outcomes of a comprehensive mental health evaluation conducted by a mental health professional licensed to treat adolescents in the state of West Virginia.” § 62-4-23(B). Likewise, parole authorities must consider similar circumstances in reviewing juvenile offenders to determine whether they should be given parole. § 62-12-13(B) (“During a parole hearing involving a prisoner who was convicted and sentenced as a juvenile, the parole board shall take into consideration the diminished culpability of juveniles as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner during incarceration.”). The new laws comply with *Miller*’s mandate to consider the mitigating circumstances of youth.

West Virginia has abolished JLWOP in laws that apply retroactively. Its new laws require both the sentencer and parole board to consider the mitigating features of youth. Its laws are, therefore, in compliance with *Miller*. West Virginia has zero JLWOP prisoners.

¹⁶⁵ According to information provided by the West Virginia Department of Corrections in response to a request for public information. Notes on file.

¹⁶⁶ “Murder by poison, lying in wait, imprisonment, starving, or by any willful, deliberate and premeditated killing, or in the commission of, or attempt to commit [an enumerated felony] is murder of the first degree.” § 61-2-1.

¹⁶⁷ “Any person who unlawfully restrains another person with the intent . . . (3) To use another person as a shield or hostage, shall be guilty of a felony . . .” § 61-2-14a.

Wisconsin

Wisconsin was among the states that had discretionary, but not mandatory, JLWOP at the time *Miller* was decided. *See* Wis. Stat. § 973.014. Wisconsin retains discretionary JLWOP. There are approximately eight individuals serving a JLWOP sentence in Wisconsin.¹⁶⁸

Discretionary JLWOP is available for juveniles who, “on or after the juvenile’s tenth birthday” commit first-degree intentional homicide. *State v. Ninham*, 797 N.W.2d 451, 463 (Wis. 2011). First-degree intentional homicide refers to causing “the death of another human being with intent to kill” that person. § 940.01(1)(a). A person convicted of first-degree intentional homicide is subject to life with parole after twenty years, life with parole beginning on a particular date, or life without parole.

Before sentencing any defendant, the court must consider “[a]ny mitigating factors,” including the “rehabilitative needs of the defendant.” § 973.017(2). There is no particular provision requiring the court to consider the mitigating factors identified by the Court in *Miller*.

Three times, Wisconsin courts have assumed *arguendo* that *Miller* is retroactive. Each time, they have also denied relief to the inmate seeking it *pro se*. In the first case, the defendant received a sentence of life with parole eligibility in 2098. *See State v. Hampton*, 842 N.W.2d 536 (Wis. Ct. App. 2013) (table decision). The court held that because the trial court had discretion to impose a lesser sentence, *Miller* was not violated. *Id.* at *2. It rejected the argument that Wisconsin’s sentencing scheme did not adequately require the trial court to consider the defendant’s youth and that, in this case, the trial court had considered the inmate’s youth to be an *aggravating* factor. *Id.*

In the second case, the court rejected an inmate’s claim that a parole eligibility date that would make him fifty years old was not a meaningful opportunity for release as required by *Graham v. Florida*, 560 U.S. 48 (2010). The court rejected the inmate’s claim that juveniles should be given the opportunity for release in their late twenties after their brains had matured. *See State v. Sanders*, 855 N.W.2d 720, *3 (Wis. Ct. App. 2014) (table decision). It also noted that the inmate claimed he had a life expectancy of 63.2 years. Based on that claim, the court held that he had failed to show he would be denied a meaningful opportunity for release within his natural life because his eligibility date was when he would be fifty years old. *Id.*

Finally, in a third case, the court rejected an inmate’s claim that Wisconsin had “mandatory” life sentences. *See State v. Hampton*, 857 N.W.2d 487, *2 (Wis. Ct. App. 2014) (table decision). The court noted that for first-degree intentional homicide, a life sentence was mandatory. It, however, held that *Miller* only proscribed mandatory sentences of life *without parole*. Because Wisconsin’s sentencing scheme provided for discretion to impose life with parole, it did not violate *Miller*. *Id.*

¹⁶⁸ According to information provided by the Wisconsin Department of Corrections regarding data collected in 2012. Notes on file.

Wisconsin has retained discretionary JLWOP and has rejected claims that its sentencing scheme does not adequately account for the mitigating aspects of youth. Wisconsin has sixteen individuals serving a JLWOP sentence.

Wyoming

Wyoming was among the twenty-nine jurisdictions that had JLWOP at the time of *Miller*. See Brief for Respondent at App. A, B, *Miller v. Alabama*, 132 S. Ct. 2455 (2012), No. 10-9646. Wyoming has since statutorily abolished the practice. See Wyo. Stat. Ann. §§ 6-2-101(b), -10-301(c) (2013). Moreover, the Wyoming Supreme Court has found *Miller* to apply retroactively on collateral review. See *State v. Mares*, 335 P.3d 487 (Wyo. 2014). Wyoming has four prisoners serving JLWOP.¹⁶⁹

Prior to amending its laws, Wyoming statutes provided that juveniles convicted of first-degree murder be automatically sentenced to JLWOP or the functional equivalent thereof. Wyo. Stat. Ann. § 6-2-101 (2011); see also *Mares*, 335 P.3d at 495 (explaining that although the statute facially allowed for a life sentence, because a defendant sentenced to life was eligible for parole “only upon commutation of his sentence by the governor,” it was “the functional equivalent of [LWOP].”) In Wyoming, first-degree murder includes: (1) killing another purposely with premeditated malice; or (2) killing another during the perpetration of an enumerated felony. § 6-2-101 (2014).

In 2013, the Wyoming Supreme Court held that the state’s first-degree murder sentencing and parole scheme violated the Eighth Amendment when applied to a juvenile defendant due to their practical effect of mandating JLWOP. See *Bear Cloud v. State*, 294 P.3d 36 (2013). Shortly thereafter, the Wyoming legislature amended its sentencing scheme for juveniles convicted of first-degree murder. §§ 6-2-101(b), -10-301(c) (2013).

The revised statutes make life with parole the mandatory sentence for first-degree murder: “a person convicted of murder in the first degree who was under the age of eighteen years at the time of the offense shall be punished by life imprisonment,” and that “[a] person sentenced to life imprisonment for an offense committed before the person reached the age of eighteen (18) years shall be eligible for parole after commutation of his sentence to a term of years or after having served twenty-five (25) years of incarceration.” See *id.* The amended statutes also provide that the Board of Parole may grant parole to a juvenile offender sentenced to life imprisonment, meaning juvenile defendants sentenced to life with parole are no longer only eligible for parole upon commutation by the governor. See Wyo. Stat. Ann. § 7-13-402(a) (2013).¹⁷⁰ The new statutes contain no requirement that the sentencer consider the unique features of youth, and the sentence of life with parole is mandatory.

In *Mares*, the Wyoming Supreme Court reviewed defendant’s functional mandatory JLWOP sentence in light of *Miller*. 335 P.3d at 492. After *Miller* was decided, *Mares*

¹⁶⁹ According to information provided by the Wyoming Department of Corrections in response to a request for public information. Notes on file.

¹⁷⁰ However, “(b) A prisoner is not eligible for parole on a sentence if, while serving that sentence, he has: (i) Made an assault with a deadly weapon upon any officer, employee or inmate of any institution; or (ii) Escaped, attempted to escape or assistant others to escape from any institution.” § 7-13-402(b). For this reason, Wyoming still has four prisoners still serving JLWOP.

filed a motion to correct his sentence. *Id.* The court held that although Mares was originally sentenced to functional life without parole by operation of law, the new laws render Mares “eligible for parole on that sentence after twenty-five years of incarceration.” *Id.* at 498. Thus, his sentence was no longer in violation of *Miller*. *Id.* Accordingly, the court held: “Any juvenile offender sentenced to life imprisonment under the former law is now, by operation of the amended parole statutes, serving a sentence of life imprisonment with eligibility for parole in twenty-five years, and a juvenile offender serving such a sentence is not required to file a Rule 35 motion to implement that revised sentence.” *Id.*

The *Mares* court then went on to decide whether the rule announced in *Miller* applied retroactively as a matter of federal law pursuant to *Teague*. *Id.* at 504-08. The court concluded that *Miller* announced a substantive rule. *Id.* at 507. The court reasoned that *Miller* bans a sentence of mandatory JLWOP and “substantively changes the conditions under which a sentence of [LWOP] may be imposed.” *Id.* Thus, the court concluded that the rule announced in *Miller* applies retroactively to cases on collateral review. *Id.* at 508.

Although Wyoming has retroactively eliminated JLWOP since *Miller*, relevant to its four JLWOP prisoners, the new statutes provide for automatic life with parole with no requirement that the sentencer consider the unique features of youth. Nevertheless, all juveniles convicted of first-degree murder in Wyoming are now eligible for parole after twenty-five years.