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RESENTENCING JUVENILES: STATES' IMPLEMENTATION OF *MILLER* AND *MONTGOMERY* THROUGH RESENTENCING HEARINGS

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I. INTRODUCTION

Adolofo Davis's childhood was marked by poverty and an absent family.[1] He became heavily involved in gang activity when he was only fourteen years old.[2] In response to a gang related dispute, Adolofo and two others went to the home of rival gang members and shot at those inside.[3] The shooting left two dead.[4] Adolofo's level of participation in the shooting was questioned at trial.[5] Evidence was presented that he did not shoot a weapon at all,[6] but he was still found guilty and sentenced to life without parole — the only sentence available.[7]

Growing up, Kuntrell Jackson was surrounded by violence.[8] Kuntrell was involved in a botched robbery when he was fourteen years old.[9] He and two others attempted to rob a video store.[10] Kuntrell stayed outside but eventually entered the store.[11] After he entered the store, the store's clerk was shot and killed by one of the individuals Kuntrell was with.[12] At trial, Kuntrell was found guilty and sentenced to life without parole — the only sentence available.[13]

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1. Erik Eckholm, *A Murderer at 14, Then a Lifer, Now a Man Pondering a Future*, N.Y. TIMES (Apr. 10, 2015), www.nytimes.com/2015/04/12/us/justices-ruling-allows-illinois-man-jailed-at-14-to-reconsider-his-future.html (discussing that from age six or seven Adolfo had the choice of going hungry or finding a way to feed himself, and at age twelve joined the Gangster Disciples).

2. People v. Davis, 6 N.E.3d 709, 714 (Ill. 2014).

3. People v. Davis, 904 N.E.2d 149, 152 (2009).

4. *Id.* The bullets recovered from the two bodies were from a .38 caliber and .32 caliber gun, and .22 caliber bullets were found only in a window of the apartment. *Id.*

5. *Id.*

6. *Id.* at 152-53. One eyewitness testified he knocked the gun out of Adolofo's hand after he entered the apartment while another eyewitness testified he saw all three individuals, including Adolfo, fire their guns. *Id.* at 152.

7. *Davis*, 6 N.E.3d at 714 (discussing the rationale behind the sentencing – as Adolofo was convicted of murdering more than one victim, Illinois required him to be sentenced to life without parole).

8. Miller v. Alabama, 567 U.S. 460, 478 (2012) (adding that both his mother and grandmother were perpetrators of shootings).

9. *Id.* at 465.

10. *Id.* Only on the way to the video store did Kuntrell learn that one of the other individuals had a gun. *Id.*

11. *Id.*

12. *Id.* at 465-66. At trial there was a dispute as to whether, when Kuntrell went into the store, he said "we ain't playin'" or said to his friends "I thought you all was playin.'" *Id.* at 465.

13. *Id.* at 466. *(*discussing that the only punishment available for Kuntrell's crimes was life without parole since Kuntrell was tried as an adult and found guilty of capital felony murder and aggravated robbery).

Andrew Anderson was raised in a neighborhood riddled with gang activity.[14] At a young age he became involved with the gang in his neighborhood, whose members taught him how to sell crack cocaine.[15] When Andrew was just seventeen years old, he saw another gang member reach for a gun.[16] Andrew, fearing for his life, shot first.[17] He was found guilty of first degree murder and sentenced to sixty years in prison.[18]

After Adolofo, Kuntrell, and Andrew were sentenced, the Supreme Court ruled, in *Miller v. Alabama*, that juveniles cannot be mandatorily sentenced to life without parole.[19] This holding left around 2,000 juveniles across the United States serving unconstitutional sentences that needed to be addressed.[20] Adolofo and Kuntrell eventually received resentencing hearings, and were resentenced in accordance with the holding in *Miller v. Alabama*.[21] While the crimes and the levels of participation that these two juveniles engaged in were similar, the new sentencing outcomes from these hearings were not. Adolofo was resentenced in an Illinois Circuit Court to life in prison, although his sentence was later reduced to a term of years.[22] Kuntrell was resentenced in an Arkansas lower court to twenty years in prison and was released in February 2017.[23]Although Andrew was not sentenced to life without parole, his sixty-year sentence makes it probable that he

14. Emily Hoerner & Jeanne Kuang, *Less Than Life*, INJUSTICE WATCH (May 6, 2018), www.injusticewatch.org/features/illinois-juvenile-offenders-life-without-parole/ [hereinafter Hoerner & Kuang, *Less Than Life*]

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Miller,* 567 U.S. at 479.

20. Josh Rovner, *Juvenile Life Without Parole: An Overview*, SENT'G PROJECT (Feb. 25, 2020), www. sentencingproject.org/publications/juvenile-life-without-parole/.

21. *Davis*, 6 N.E.3d at 714; *Miller*, 567 U.S. at 489.

22. Annie Sweeny & Jason Meisner, *Resentencing Forced by U.S. High Court Ends in Life in Prison Again*, CHI. TRIB. (May 4, 2015), www.chicagotribune.com/news/local/breaking/ct-mandatory-life-juvenile-resentencing-met-20150504-story. html. Yet, two years after his resentencing hearing, when a different state's attorney headed the prosecutorial office, prosecutors agreed to reduce Adolofo's sentence. Patrick Smith, *In Major Reversal, Cook County Prosecutors Agree to Reduce Sentence of Addolfo Davis*, WBEZ CHI. (Sept. 25, 2017), www.wbez.org/shows/wbez-news/in-major-reversal-cook-county-prosecutors-agree-to-reduce-sentence-of-addolfo-davis/9febd9f5-36fd-4611-8af2-3296990c49dc; Addolfo Davis, ILL. DEP'T CORRECTIONS INMATE SEARCH, www2.illinois.gov/idoc/Offender/pages/inmatesearch.aspx (select IDOC Number, search "B55374") (last visited March 30, 2020).

23. *Miller v. Alabama and Jackson v. Hobbs*, ASSOCIATED PRESS (July 31, 2017), www.ap.org/explore/locked-up-for-life/Miller-v-Alabama-and-Jackson-v-Hobbs.

will die in prison.[24] While his sentence has the practical effect of life without parole, the Illinois court he was tried in has not yet addressed his sentence under *Miller*.[25] He remains in prison, eligible to be released when he is seventy-eight.[26]

States have been given wide latitude in implementing the rulings in *Miller* and its companion case, *Montgomery v. Louisiana*—which made the *Miller* ruling retroactive.[27] This includes how individuals are eligible to be resentenced and what must be considered in a resentencing hearing. This wide latitude helps explain the disparate outcomes for the three juveniles discussed above. Each state has its own statutes, case law, and pending legislation regarding what should be done with juveniles whose sentences now violate *Miller*.[28] Some states have allowed for these juveniles to be given parole immediately[29] or given parole after a term of years has been served.[30] Some states have passed no legislation on the topic specifically and rely solely on case law.[31] Other states have limited the number of juveniles serving life without parole sentences and therefore have no need to address these issues.[32] In every state, the outcomes for these juveniles have

24. Hoerner & Kuang, *Less Than Life*, *supra* note 14; Andrew Anderson, ILL. DEP'T CORRECTIONS INMATE SEARCH, www2.illinois.gov/idoc/Offender/pages/inmatesearch.aspx (select IDOC Number, search "M35076") (last visited March 30, 2020).

25. Hoerner & Kuang, *Less Than Life*, *supra* note 14. Andrew has submitted a resentencing request but it has not been heard by the court yet. *Id.*

26. *Id.*

27. Montgomery v. Louisiana, 136 S. Ct. 718, 732 (2016) (giving retroactivity to *Miller v. Alabama*).

28. *Compare* 725 ILL. COMP. STAT. 5/122 (2018) (allowing juveniles to file post-conviction petitions), *with* FLA. STAT. § 921.1402 (2018) (allowing juveniles sentenced to have their sentences reviewed after serving a number of years).

29. This approach has been criticized by victims' rights' groups, who state multiple parole hearings force families of victims to relive the pain of losing their loved one. Emily Hoerner & Jeanne Kuang, *167 Illinois Prisoners Serving Life Sentences for Crimes Committed as Juveniles*, CHI. SUN-TIMES (May 6, 2018), chicago.suntimes.com/crime/injustice-watch-department-corrections-167-illinois-prisoners-serving-life-sentences-for-crimes-committed-as-juveniles/.

30. *A State-By-State Look at Juvenile Life Without Parole*, ASSOCIATED PRESS (July 31, 2017), apnews.com/9debc3bdc7034ad2a68e62911fba0d85 [hereinafter *State-By-State Look*]. Arkansas law mandates that juveniles serving life without parole are now eligible for parole after twenty-five years (for first degree murder) or thirty years (for capital murder). *Id.* Connecticut law mandates that minors who received more than fifty years be eligible for parole after thirty years, and minors who received ten to fifty years be eligible for parole after twelve years or after sixty percent of their sentence is served. *Id.*

31. *Id.* In Arizona, life without parole for juveniles was never mandatory for any crime; now cases where juveniles received these sentences are being reviewed, without any legislation passed to mandate this. *Id.*

32. *Id.* (describing that Hawaii, Kansas, Maine, New Mexico, Rhode Island, Vermont, West Virginia, and Wyoming currently have no juveniles serving life

varied, from new sentences to the same sentence to parole eligibility.

This Comment analyzes how states' differing procedural and substantive laws regarding resentencing hearings after *Miller* have impacted individuals serving juvenile life without parole. These laws are analyzed to determine how they impact who is eligible to be resentenced, the length of new sentences received, and the states' pace in resentencing. This Comment focuses only on states that have implemented *Miller* through resentencing hearings, not those states that give parole or parole eligibility to juveniles serving unconstitutional sentences. Part II of this Comment explains the origins and developments of Eighth Amendment juvenile jurisprudence and the genesis of cases relating to juvenile sentencing and adolescent development. These cases culminated in the holding in *Miller*, which concludes that states cannot mandatorily sentence juveniles to life without parole.[33] Part III explores both the substantive and procedural laws that states have adopted to comport with *Miller* and the state court cases which impact the implementation of juvenile resentencing. Part III focuses specifically on three states: Illinois, Florida, and Michigan. Part IV proposes four different laws and regulations states should adopt in order to address resentencing issues states like Illinois, Florida, and Michigan are experiencing. These laws are proposed so states can justly and expediently address these sentences and be in accord with the Eighth Amendment, avoiding lengthy litigation and confusion for the juveniles serving these sentences.

II. BACKGROUND

A. Evolution of the Eighth Amendment

Courts use the Eighth Amendment to interpret the constitutionality of punishments that the government has imposed on individuals convicted of crimes and the constitutionality of legislation that imposes punishment on individuals.[34] This Amendment has been used to determine the constitutionality of corporal punishment in schools[35] and to determine the constitutionality of fines.[36] Yet the vast majority of Eighth

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without parole sentences).

33. *Miller,* 567 U.S. at 465.

34. Weems v. United States, 217 U.S. 349, 387 (1909) (stating that the Eighth Amendment "limits the legislative discretion in determining to what degree of severity an appropriate and usual mode of punishment may, in a particular case, be inflicted").

35. Ingraham v. Wright, 430 U.S. 651, 664 (1977) (finding the Eighth Amendment applies to criminal proceedings, not to discipline in public schools).

36. Waters-Pierce Oil Co. v. Texas, 212 U.S. 86, 111 (1909) (holding a fine is

Amendment cases pertain to the cruel and unusual punishment clause, which addresses specifically the type of punishments the government is constitutionally allowed to impose.[37]

During the adoption of the Bill of Rights, politicians debated the merits of each proposed constitutional amendment.[38] While debating the Eighth Amendment, one politician opined that this amendment must be adopted to guarantee that punishments will not be inflicted just because they are cruel.[39] Other politicians challenged the potential amendment on different grounds, suggesting the proposed words of the amendment were "too indefinite."[40] Yet the Eighth Amendment passed and has been the United States' standard for determining the constitutionality of punishments since 1791.[41]

The Eighth Amendment originates from the English Bill of Rights.[42] In fact, the language of the Eighth Amendment came directly from Article Ten of the English Bill of Rights, which states that "excessive Baile [sic] ought not to be required nor excessive Fines imposed nor cruell [sic] and unusuall [sic] Punishments inflicted."[43] The Supreme Court has interpreted the adoption of the English Bill of Rights language to include the adoption of traditionally English principles surrounding punishment, including the common law tradition of proportionality in punishment.[44] The

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not a violation of the Eighth Amendment unless it is so "grossly excessive as to amount to a deprivation of property without due process of law"); United States v. Bajakajian, 524 U.S. 321, 334 (1998) (holding that "a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense").

37. U.S. CONST. amend. VIII. "Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted*" *Id.* (emphasis added).

38. Kenneth R. Bowling, *"A Tub to the Whale": The Founding Fathers and Adoption of the Federal Bill of Rights*, 8 J. EARLY REPUBLIC 223, 224 (1988).

39. 1 ANNALS OF CONG. 754 (1789) (stating "it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in the future to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it would be invented, it would be very prudent in the Legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind.").

40. *Id.*

41. Bowling, *supra* note 38, at 250.

42. John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 912 (2011) (stating that The English Bill of Rights Cruel and Unusual Punishments clause was based on common law tradition).

43. Celia Rumann, *Tortured History: Finding Our Way Back to the Lost Origins of the Eighth Amendment*, 31 PEPP. L. REV. 661, 670 (2004). The only difference between the English Bill of Rights and the Eighth Amendment is that the Eighth Amendment has the word "shall" instead of "ought". *Id.*

44. *See* Solem v. Helm, 463 U.S. 277, 285-86 (1983).

Supreme Court has held in most cases involving cruel and unusual punishment,[45] the Eighth Amendment must be applied so that the punishment is proportional to the offense.[46]

Over time, the Supreme Court developed a test to analyze laws and statutes under the Eighth Amendment. In *Trop v. Dulles*, the Supreme Court held the meaning of cruel and unusual punishment must change over time and "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[47] The Supreme Court has looked at the consensus of state laws to determine the evolving standards of decency[48] and also looked to international consensus on punishment.[49] Yet the Court has held that each case must be ultimately determined by a court's independent judgment to decide if a punishment violates the Eighth Amendment and goes beyond our nation's standards of decency.[50] Courts repeatedly apply this test in order to uphold the core value of the Eighth Amendment—the dignity of man.[51]

B. Abolishing the Juvenile Death Penalty: Roper v. Simmons

One of the first applications of the evolving standards of decency test in relation to juvenile sentencing was in *Roper v. Simmons*.[52] In this 2005 case, the Supreme Court held that sentencing a juvenile to death is a violation of the Eighth Amendment's prohibition on cruel and unusual punishment.[53] The Court discussed that the evolving standards of decency, evidenced

45. *See* Harmelin v. Michigan, 501 U.S. 957, 965 (1991) (stating that the "Eighth Amendment contains no proportionality guarantee").

46. *See Weems*, 217 U.S. at 367 (finding that a punishment proportional to the offense is a "precept of justice"); Atkins v. U.S., 536 U.S. 304, 311 (2002) (quoting *Weems*, 217 U.S. at 367); Graham v. Florida, 560 U.S. 48, 59 (2010) (citing *Weems*, 217 U.S. at 367).

47. Trop v. Dulles, 356 U.S. 86, 100-01 (1958) (stating that this must be the test in order to ensure that the state's power to punish "be exercised within the limites [sic] of civilized standards").

48. Roper v. Simmons, 543 U.S. 551, 564-68 (2005) (finding the majority of states did not allow the death penalty for juveniles who committed their crimes when they were under eighteen and using this rationale to determine this type of punishment for this group was unconstitutional).

49. *Id.* at 577-78 (finding the United Kingdom's ban on the juvenile death penalty particularly instructive, as the United States Constitution's Eighth Amendment was modeled on the English Bill of Rights, but also stating that the world's consensus is only persuasive, not controlling).

50. *Graham*, 560 U.S. at 61.

51. *Trop*, 356 U.S. at 100 (discussing that the court may have few opportunities to find punishment cruel and unusual but should not waiver in its decision when it does).

52. *Roper*, 543 U.S. at 551.

53. *Id.* at 578.

by state law[54] and international law,[55] led them to this decision. The court also stressed that the differences in maturity and development between adults and juveniles led them to their conclusion.[56]

Roper sets out three main reasons why juveniles should be treated differently under the law.[57] These three reasons are supported both by amici curiae briefs and scientific and psychological studies.[58] First, the Court discussed juveniles' "lack of maturity" and "underdeveloped sense of responsibility[.]"[59] Second, juveniles are much more impressionable and more swayed by peer pressure and outside forces than adults.[60] Third, the Court discusses that the identity and character of juveniles are underdeveloped.[61]

The Court used these three reasons to show that the conduct of juveniles cannot be held to the same standard of culpability as that of an adult.[62] These reasons show that juveniles have a higher chance at reform than adults and therefore cannot be sentenced to death.[63] No theory of punishment justifies the death penalty for a group with a high potential for rehabilitation.[64]

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54. *Id.* at 564-68 (discussing that thirty states prohibit the death penalty for juveniles, which includes twelve states that have abolished the death penalty entirely and eighteen other states that have made an exception for juveniles in regards to the death penalty, and additionally emphasizing that even in states that allowed the death penalty for juveniles, it was given as a punishment very infrequently).

55. *Id.* at 576-78 (discussing Article 37 of the United Nations Convention on the Rights of Child, which prohibits the death penalty for those under eighteen, and that every single country in the world had ratified, except for the United States and Somalia, and that only seven countries in the world have put any juveniles to death since 1990).

56. *Id.* at 569-72.

57. *Id.* at 569-70.

58. *Id.*

59. *Id.* at 569 (discussing that these two qualities result in reckless behavior and are the reasons why many states do not allow minors to engage in various activities such as voting, marriage, or being on a jury).

60. *Id.* (citing studies which state minors have less freedom and control over their lives and over their own environments than adults do).

61. *Id.* at 570 (citing E. ERIKSON, IDENTITY: YOUTH AND CRISIS (1968) to show the personality traits of juveniles are more likely to change and shift as they become adults).

62. *Id.*

63. *Id.* (discussing that because of these traits, juveniles are more likely to reform and there is less evidence that a juvenile is a morally irreprehensible individual that cannot be reformed and deserves punishment).

64. *Id.* at 571 (discussing that the penological justifications, including retribution and deterrence, for punishment are not applicable as these juveniles do not understand their actions as well as adults and have a high probability of reform).

C. No Life Sentences for Juveniles' Non-Homicide Crimes: Graham v. Florida

Five years after *Roper*, the case of Terrance Graham came before the Supreme Court.[65] Terrance had been found guilty of a non-homicide crime, armed burglary, and attempted robbery, and sentenced to life without parole.[66] The Court determined that life without parole sentences for juveniles who have committed non-homicide crimes violate the Eighth Amendment.[67] The Court discussed four main reasons for this holding.[68] First, the Court referenced *Roper* and stated that all of the juvenile psychological development research put forth in that case remains true,[69] and since juveniles committing non-homicide crimes do not intend to kill, their culpability is "twice diminished."[70] Second, the Court looked at the national consensus surrounding juvenile resentencing laws and determined that states are against this type of punishment, based both on state law and the actual punishments that states were meting out at that time.[71] Third, in analyzing the proportionality of the punishment itself, the Court discussed that life without parole is much more serious for juveniles than for adults because a juvenile with this sentence will be spending more of their life incarcerated than any adult would.[72] Finally, the Court discussed at length that no theory of punishment—retribution, deterrence, incapacitation, or rehabilitation—can support a sentence of life without parole for a juvenile, as none of these

65. *Graham*, 560 U.S. at 53 (discussing that Terrence's parents were addicted to crack cocaine during his childhood, he suffered from ADHD, and he began using drugs at age thirteen).

66. *Id.* at 57 (describing that Terrence's sentence was the maximum available for these crimes, and since Florida had abolished parole, his life sentence gave him no possibility for release at all).

67. *Id.* at 82.

68. *Id.* at 74.

69. *Id.* at 68 (discussing that *Roper* found juveniles have lessened culpability, lack of maturity, more vulnerable to negative influences, and therefore "cannot be classified among the worst offenders" and additionally, minor's brain development continues far through their teen years).

70. *Id.* at 69 (discussing that non-homicide crimes are morally different than homicide crimes and those that do not intend to kill do not deserve as serious of a punishment).

71. *Id.* at 62-63 (finding that six states do not allow life without parole for juveniles for any offense, seven do, but only for homicides, and thirty-seven allow life without parole for juveniles, but only in certain circumstances. Yet the court also looked to actual implementation and found that only 109 juveniles across the United States were serving life without parole sentences for a non-homicide crime).

72. *Id.* at 70 (giving an example that a sixteen-year-old and a seventy-five-year-old who were both sentenced to life without parole would not in practice be receiving the same type of sentence at all, even though on paper the sentence is the same).

theories would be served by this type of punishment.[73]

Graham builds on the findings in *Roper*, giving further credence to the idea that juveniles are different from adults,[74] a recognition the Court has emphasized in other cases as well.[75] The case found that beyond the death penalty, there are other punishments that are disproportionate when applied to juveniles. Beyond the substantive impact on juvenile sentencing, *Graham* discussed how this ruling should and can be applied in state courts. The Court held that juveniles with these sentences must have some "meaningful opportunity for release."[76] This implies that state courts have a wide range of options when resentencing these juveniles. The Court even indicated that "[i]t is for the State . . . to explore the means and mechanisms for compliance."[77] The Court gives no other direction on the types of new sentences states can give, or how to implement this new prohibition on life without parole for juveniles convicted of non-homicide offenses.

D. Juveniles Mandatorily Sentenced to Life Without Parole: Miller v. Alabama

Just two years after *Graham*, a similar case was presented to the Supreme Court, in *Miller v. Alabama*. This case centered on two juveniles convicted of murder and mandatorily sentenced to life without parole.[78] The Court found that a mandatory sentence of life without parole for a juvenile in any type of case is unconstitutional.[79] The court deferred substantially to *Roper* and *Graham* in order to emphasize the differences between adults and juveniles,[80] including the "diminished culpability [of children] and

73. *Id.* at 71-75.

74. *Contra* Craig S. Lerner, *Juvenile Criminal Responsibility: Can Malice Supply the Want of Years?* 86 TUL. L. REV. 309, 311 (2011) (arguing the categorical assumptions in *Graham* and similar cases regarding the maturity and culpability of juveniles are false).

75. J.D.B. v. North Carolina, 564 U.S. 261 (2011) (holding that "a child's age properly informs the *Miranda* custody analysis); McKeiver v. Pa., 403 U.S. 528, 550 (1971) (holding that juveniles have no constitutional right to a jury trial in juvenile court, in part because a jury trial would ignore "every aspect of fairness, of concern, of sympathy, and of paternal attention that the juvenile court system contemplates").

76. *Graham*, 560 U.S. at 75 (stating that these juveniles do not have to be promised eventual freedom, just a meaningful opportunity for release, based on how they have matured and grown in their time in prison since their crime).

77. *Id.*

78. *Miller*, 567 U.S. at 465 (discussing that the two individuals, Evan Miller and Kuntrell Jackson, both were involved in killings that stemmed from botched robberies).

79. *Id.*

80. *Id.* at 470-73.

[their] greater prospects for reform[.]"[81] The Court also referred to these previous cases to highlight that mandatory life without parole for juveniles is not rational under any theory of punishment.[82] The Court concluded that, in sentencing juveniles, a trier of fact must be able to consider both the characteristics of the juvenile and the type of offense they committed in order for the sentence to be proportional and constitutional.[83] Therefore, any mandatory sentence of life without parole for juveniles is unconstitutional, as that type of sentence does not allow courts to take into account the individual characteristics of a juvenile or the circumstances of the specific crime in question.[84]

While *Miller* held that this specific mandatory sentencing scheme for juveniles was unconstitutional, the practical implementation of this ruling varies. The case does not completely prohibit life without parole sentences for juveniles – if a court has the ability to take into account the circumstances of these juveniles in their sentencings, they could be sentenced to life without parole again.[85] This case only mandates that this category of offenders have the characteristics of their youth and background analyzed to determine a proportionate sentence.[86] Logistically, this could be accomplished through many different avenues, and *Miller* did not give states any hint of how to implement this ruling.[87] This left states to figure out how this ruling should be applied in each state court, including its application to juveniles already sentenced under this scheme.

E. Retroactivity of Miller: Montgomery v. Louisiana

After *Miller*, states came to different conclusions on the retroactivity of the ruling in *Miller*. Some states applied the ruling to juveniles sentenced to life without parole before 2012,[88] and some states only applied the ruling going forward.[89] The question of

81. *Id.* at 471.

82. *Id.* at 472-73 (discussing these theories of retribution, deterrence, and rehabilitation).

83. *Id.* at 489.

84. *Id.* at 465.

85. *Id.* at 480. "Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different . . . ." *Id.*

86. *Id.* at 489.

87. *Id.* at 480. Only stating that "appropriate occasion for sentencing juveniles to this harshest possible penalty will be uncommon." *Id.* at 479.

88. Diatchenk v. District Attorney for Suffolk Dist., 1 N.E. 3d 270, 276 (Mass. 2013) (including Massachusetts); Aiken v. Byars, 765 S.E.2d 572 (S.C. 2014) (including South Carolina); *Davis*, 6 N.E. at 722 (including Illinois); State v. Mares, 335 P.3d 487, 508 (Wy. 2014) (including Wyoming).

89. Martin v. Symmes, 782 F.3d 939 (8th Cir. 2015) (including Minnesota); Johnson v. Ponton, 780 F.3d 219, 226 (Va. 2015) (including Virginia); State v.

retroactivity was brought up over and over again in state courts until a case on this issue was brought to the Supreme Court in 2016, *Montgomery v. Louisiana*.[90] The case set out that "substantive rules of constitutional law" and "watershed rules of criminal procedure" must be given retroactive effect.[91] The Court then ruled that *Miller* did set out such a substantive rule and was, therefore, to be applied retroactively,[92] as the case made a certain punishment unconstitutional for a certain class of offenders.[93]

The overarching ruling of the case, that *Miller* must be interpreted to apply retroactively, meant mandatory life without parole sentences given to juveniles before 2012 were now unconstitutional.[94] This meant that now states must address these sentences in some way. The Court discussed that even when new constitutional substantive rules are announced, the Court does not want to burden the states with a court ordered procedural implementation,[95] especially regarding sentencing laws.[96]

The Court gave few options for implementation by states, including giving these individuals new sentences,[97] but the Court also stated this may not be necessary in all cases.[98] The Court went on to suggest that in fact, deeming these individuals eligible for parole would be enough to comport with the Court's ruling.[99] This section of the opinion gave states wide latitude in implementing the holding in *Miller* and *Montgomery*. While states do have to implement this retroactively, how they go about this is up to the individual state, and states have addressed this issue with widely different rules and holdings. With such a wide range of possible ways to address the issue, individuals waiting to be resentenced in each state have had disparate outcomes, and some state courts have already had to change the rulings they have made in order to

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Tate, 130 So. 3d 829, 831 (La. 2013) (including Louisiana).

90. *Montgomery*, 136 S. Ct. at 725.

91. *Id.* at 728 (discussing that *Teague v. Lane* set out the test to determine whether a new analytical framework is retroactive) (quoting Schriro v. Summerlin, 543 U.S. 348, 352 (2004)).

92. *Id.* at 732.

93. *Id.* at 734.

94. *Id.*

95. *Id.* at 735 (stating this was done in order "to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems").

96. *Id.* (citing Ford v. Wainwright, 477 U.S. 399, 416-17 (1986) ("we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences")).

97. *Id.* at 736.

98. *Id.*

99. *Id.* (stating that this "ensures that juveniles whose crimes reflected only transient immaturity – and who have since matured – will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment").

adequately address the issue of resentencing.[100]

III. ANALYSIS

The laws and decisions states have made in order to implement *Miller* have a direct impact on each individual juvenile's resentencing hearing and the eventual new sentence itself. Analyzing the laws and decisions of different states shows the different paths states can take and how these laws and decisions have worked in practice regarding resentencing. This section contains a comparative analysis of procedural and substantive laws and decisions in Illinois, Michigan, and Florida concerning juvenile resentencing after *Miller* and *Montgomery*. This section also discusses the sentencing outcomes for juveniles that were serving mandatory life without parole in each of the three states when *Miller* and *Montgomery* were decided. This Comment will focus on specific topics regarding resentencing in each state, first focusing on how juveniles sentenced to life without parole are eligible to be considered for resentencing under *Miller*. Next, this Comment will focus on the mechanics of a resentencing hearing itself, concentrating on two different questions courts must address within these hearings. First, whether there must be a finding of permanent incorrigibility if a juvenile is to be resentenced to life without parole.[101] Second, whether states take into account an individual's behavior in prison when considering their resentencing. Next, this Comment will analyze how these states define a de facto life sentence, as this impacts the term of years juveniles can be resentenced to, and who is eligible to be resentenced.[102] Finally, this section will discuss the resentencing outcomes of actual individuals in these states who have been resentenced since *Miller*. Overall, this analysis seeks to show what types of laws and decisions increase or decrease eligibility to be resentenced, and what types of laws and decisions increase or decrease the actual resentence that juveniles receive.

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100. Dan Sullivan, *Florida Supreme Court Reverses Course on Re-Sentencing for Juvenile Offenders*, TAMPA BAY TIMES (Nov. 25, 2018), www.tampabay.com/news/publicsafety/florida-supreme-court-reverses-course-on-re-sentencing-for-juvenile-offenders-20181126/.

101. *Montgomery*, 136 S. Ct. at 734 (discussing that since *Montgomery* stated that *Miller* barred life without parole for "all but the rarest juvenile offenders, those whose crimes reflect permanent incorrigibility" – some states mandate a finding of incorrigibility before a new sentence of life without parole is given to a juvenile).

102. If a certain term of years sentence given to a juvenile is equivalent to a life sentence without parole – then the individual's sentence could be reviewed as if it were a life without parole sentence. People v. Buffer, 137 N.E.3d 763, 771 (Ill. 2019).

A. Illinois' Implementation of Miller and Montgomery

1. Resentencing Eligibility of Juveniles

The Illinois Post-Conviction Hearing Act sets out the parameters for individuals seeking a review of their conviction or sentence.[103] A post-conviction petition can be filed if an individual's conviction resulted from a denial of their constitutional rights.[104] The type of relief individuals seek under this act is not an appeal but a collateral proceeding.[105] Post-conviction petitions to address resentencing under *Miller* and *Montgomery* fall under this act.[106] There are time constraints on the eligibility of individuals to file these petitions; if the individual never filed an appeal, they have three years from the date of their conviction to file a post-conviction petition, unless the delay was not due to their own "culpable negligence."[107] Additionally, the Act states that "only one petition may be filed by a petitioner . . . without leave of the court."[108] A court will grant leave if the petitioner can demonstrate there is a reason for failing to bring a certain claim in a previous post-conviction petition and prejudice resulted from failing to bring that claim.[109] Many individuals in Illinois, who filed post-conviction petitions before *Miller*, were able to file a successive post-conviction petition alleging a *Miller* violation under this subsection of the law.[110] Based on Illinois law, individuals who would be eligible for resentencing under *Miller* must file petitions for themselves and are not

103. 725 ILL. COMP. STAT. 5/122.

104. Patrick J. Quinn & John J. Hynes, *Impact of Recent Decisions Upon Proceedings Under the Post-Conviction Hearing Act*, 34 LOY. U. CHI. L.J. 639, 640 (2003); 725 ILL. COMP. STAT. 5/122-1(a)(1) (stating the denial of rights may be either under the U.S. Constitution or the Illinois Constitution).

105. Quinn & Hynes, *supra* note 104 (quoting *People v. Montgomery*, 763 N.E.2d 369, 372 (Ill. 2001)).

106. *Davis*, 6 N.E.3d at 716.

107. 725 ILL. COMP. STAT. 5/122-1(c) (2020).

108. *Id.* § 5/122-1(f) (2020).

109. People v. Pitsonbarger, 793 N.E.2d 609, 621 (Ill. 2002) (affirming that the cause-and-prejudice test is the test to determine whether a claim raised in a later petition can be considered by the court on the merits).

110. People v. Williams, 982 N.E.2d 181, 196 (Ill. App. 2012) (discussing that this "cause-and-prejudice test" was satisfied in *Miller* as it was a new rule of criminal procedure, therefore no legal foundation for this argument was laid when previous petitions were filed, therefore satisfying the cause part of the cause-and-prejudice test, and satisfying the prejudice part of the test as *Miller* retroactively applies to his case); People v. Craighead, 39 N.E.3d 1037, 1041 (Ill. App. 2015) (discussing that cause was established because *Miller* was not an legal argument previously available, and prejudice is established because the Miller ruling applies retroactively).

automatically entitled to any type of resentencing.[111] In early 2019, the Illinois Legislature passed a bill—later signed by the governor—which allows for certain juveniles to petition for parole after a certain number of years, depending on their crime and the term of years that they were sentenced.[112] While this new law does not directly relate to resentencing eligibility, it gives those who could be resentenced another route for release from prison.[113]

2. Making a Finding of Incorrigibility

In *Montgomery v. Louisiana*, the Supreme Court laid out language indicating that only rarely should juveniles be sentenced to life without parole, and only those showing "permanent incorrigibility" should receive such sentences.[114] Based on this language, state courts have discussed whether minors must be found to be permanently incorrigible in order to receive a new sentence of life without parole.[115] The Supreme Court has not offered strict guidelines in regard to this requirement.[116] In fact, there are only a few sentences devoted to this issue in *Montgomery*.[117] The Illinois Supreme Court ruled in September 2017 that a juvenile can only be sentenced to life without parole if the trial court that imposes the sentence determines that the minor's conduct "showed irretrievable depravity, permanent incorrigibility, or irreparable corruption beyond the possibility of rehabilitation."[118] This means that future sentences for juveniles and future re-sentences of those convicted of crimes as juveniles must have this finding in order to hand down a sentence of life without parole. Three juveniles have been resentenced to life without parole after *Miller* in Illinois, one was sentenced after a finding of incorrigibility had to be made,[119] and two were sentenced

111. 725 ILL. COMP. STAT. 5/122-1.

112. Dan Petrella, *Gov. J.B. Pritzker Signs Law Creating Parole Review for Young Offenders with Lengthy Sentences*, CHI. TRIB. (Apr. 1, 2019), www.chicagotribune.com/news/local/politics/ct-met-jb-pritzker-parole-reform-20190401-story.html.

113. 730 ILL. COMP. STAT. 5/5-4.5-115 (2019).

114. *Montgomery*, 136 S. Ct. at 734.

115. People v. Holman, 91 N.E.3d 849, 863 (Ill. 2017).

116. *Id.* at 861 (stating that "[t]he Court remained hesitant to create more procedural requirements for state trial courts, such as a requirement that courts make findings of fact regarding a juvenile's incorrigibility, before imposing a life sentence").

117. *Montgomery*, 136 S. Ct. at 734.

118. *Holman*, 91 N.E.3d at 863.

119. Kaitlyn Schwers, *Convicted Murderer Re-Sentenced in Madison County After Reversal*, BELLEVILLE NEWS-DISPATCH (May 25, 2016), www.bnd.com/news/local/article79732552.html (reporting that Terril Williams was resentenced in May 2016 to life without parole).

before this rule was put into place.[120]

3. Impact of Prison Behavior on Resentencing

The Illinois Supreme Court has held that when deciding if an individual is eligible for resentencing under *Miller*, a court cannot look at a prisoner's behavior since the crime.[121] A court can take neither bad conduct in prison nor good conduct in prison into account.[122] In determining whether the individual is eligible for resentencing, the court must only look at the facts present when the individual was originally sentenced, not at any ensuing changes in their personality or behavior.[123] To support this finding, the Illinois Supreme Court quoted *Graham* which stated that even if a finding of incorrigibility was "corroborated" by bad conduct in prison – "the sentence was still disproportionate because that judgment was made at the outset."[124] This ruling could be interpreted to apply to the evidence presented at the actual resentencing hearing, not just at a hearing regarding eligibility for resentencing, but this has not been the case in Illinois. Many resentencing hearings in Illinois have discussed the juvenile's life in prison in order to determine an appropriate new sentence.[125] In fact, the Illinois law that codifies *Miller* and *Montgomery*, states that "the person's potential for rehabilitation or evidence of rehabilitation, or both" shall be considered in determining an appropriate sentence.[126] Evidence to support this factor must almost necessarily include behavior in prison, as this is where these juveniles have spent their entire adult

120. Francesca Gattuso, *Man Convicted of 1995 Double Murder at Age Seventeen Resentenced to Life*, CHI. SUN-TIMES (Oct. 10, 2017), chicago.suntimes.com/crime/man-convicted-of-1995-double-murder-at-age-17-resentenced-to-life/ (reporting that Joseph Arietta was resentenced October 2017 to life without parole); Tony Reid, *Decatur Man Re-Sentenced to Life in Prison for 1994 Murders*, DECATUR HERALD & REV. (Oct. 2, 2018), herald-review.com/news/local/crime-and-courts/decatur-man-re-sentenced-to-life-in-prison-for-murders/article_f58899e4-5a7c-5ac1-a8f5-0e1856857024.html (reporting that Contrell Williams was resentenced October 2018 to life without parole).

121. *Holman*, 91 N.E.3d at 864.

122. *Id.*

123. *Id.*

124. *Id.* (quoting *Graham*, 560 U.S. at 73).

125. People v. Croft, 100 N.E.3d 577, 581 (Ill. App. Ct. 2018) (discussing Croft's high school records while imprisoned, and testimony from a Reverend who spoke with Croft twice a week while he was awaiting trial); People v. Williams, 2019 IL App (5th) 160367-U ¶ 34 (discussing the evidence presented at resentencing, including his prison disciplinary violations, his demeanor around prison guards, and his behavior in the juvenile detention center); People v. Helgesen, 2018 IL App (2d) 160823-U ¶ 19 (discussing Helgesen's minor disciplinary actions while imprisoned, and the testimony at his resentencing from prison guards regarding his behavior while incarcerated).

126. 730 ILL. COMP. STAT. 5/5-4.5-105(a)(4) (2016).

lives.

4. Definition of a De Facto Life Sentence

In Illinois, if an individual is not incorrigible, then they must be resentenced to a term of years.[127] How a state defines life sentences has two different impacts on juveniles serving time. First, it can impact what a new sentence of an individual serving life without parole can be, as they cannot be re-sentenced to life without parole in some states if they are not found to be permanently incorrigible. Second, it can also impact who is eligible to be resentenced under *Miller*. If a term of years sentence is equivalent to a sentence of life without parole – then a juvenile may be able to be resentenced under *Miller*.[128] Before 2019, the Illinois Supreme Court had heard one main case that dealt with the definition of de facto life.[129] In *People v. Reyes*, a minor was sentenced to ninety-seven years and would only be eligible for parole after serving eighty-nine of those years.[130] While this was not life without parole on paper, the court found that this sentence had the "same practical effect" as a life without parole sentence.[131] This meant that a juvenile could not be sentenced to an "unsurvivable" prison term without complying with *Miller*.[132] Yet the Illinois Supreme Court gave no specific definition of unsurvivable other than the example in the case of eighty-nine years.[133] Between 2016 and 2019, the lower courts in Illinois had to individually determine what other sentence lengths are equivalent to a de facto life sentence.[134] In April 2019, the Illinois Supreme Court heard an appeal of an individual who was sentenced to fifty years as a juvenile and who argued this was a de facto life sentence.[135] The Court determined that a forty-year sentence for a juvenile is the equivalent of a de facto life sentence without parole, and the protections of *Miller* must apply to any sentence that is forty years or higher.[136] This ruling will impact many individuals convicted as juveniles in Illinois,

127. *Holman*, 91 N.E.3d at 863.

128. *Buffer*, 137 N.E.3d at 771.

129. Dana Vollmer, *Is 50 Years a Life Sentence for a Teenager?*, NPR ILL. (Jan. 15, 2019), www.nprillinois.org/post/50-years-life-sentence-teenager.

130. People v. Reyes, 63 N.E.3d 884, 886 (Ill. 2016).

131. *Id.* at 888.

132. *Id.*

133. *Id.*

134. People v. Buffer, 75 N.E.3d 470, 471, 483 (Ill. App. Ct. 2017) (finding that a fifty-year sentence given when defendant was sixteen years old was a de facto life sentence); People v. Morris, 78 N.E.3d 429, 436 (Ill. App. Ct. 2017) (finding that a 100-year sentence for a sixteen-year-old was a de facto life sentence).

135. *Buffer*, 137 N.E.3d at 767.

136. *Id.* at 774 (determining this number from an analysis of the legislature's intent and current statutes).

especially since the mandatory minimum for murder with a firearm was forty-five years until 2016.[137]

5. Outcomes for Juvenile Resentencing in Illinois

There were an estimated 103 juveniles serving life without parole when the decision in *Miller* was announced.[138] Before *Montgomery*, the Illinois Supreme Court found that *Miller* retroactively applied to juveniles serving sentences of life without parole.[139] Since then, at least thirty-five of these 103 juveniles have been resentenced.[140] At least four have been sentenced to life without parole again,[141] at least three have been resentenced to fifty years or less,[142] at least nine have been resentenced between fifty-one and seventy-four years,[143] and at least two have been

137. Emily Hoerner, *Illinois Supreme Court Rules That 41-Year Term for Juvenile Offender Amounts to Life*, INJUSTICE WATCH (Apr. 18, 2019), www.injusticewatch.org/news/2019/illinois-supreme-court-rules-that-41-year-term-for-juvenile-offender-amounts-to-life/.

138. ILL. COALITION FOR THE FAIR SENTENCING OF CHILDREN, CATEGORICALLY LESS CULPABLE: CHILDREN SENTENCED TO LIFE WITHOUT THE POSSIBILITY OF PAROLE IN ILLINOIS 19 (2008).

139. *Davis*, 6 N.E.3d at 722.

140. *State-By-State Look*, *supra* note 30.

141. Schwers, *supra* note 119; Gattuso, *supra* note 120; Reid, *supra* note 120; Isaac Smith, *Union County Man Convicted in 1992 Slaying of His Parents Sentenced to Life in Prison Again*, SOUTHERN ILLINOISIAN (Nov. 23, 2019), thesouthern.com/news/local/crime-and-courts/union-county-man-convicted-in-slaying-of-his-parents-sentenced/article_e44a11d9-c746-5dbf-9090-4aa7a6dea638.html.

142. Duaa Eldeib & Steve Mills, *New Hope of Freedom for Those Given Mandatory Life Sentences as Juveniles*, CHI. TRIB. (Feb. 22, 2017), www.chicagotribune.com/news/ct-juveniles-life-in-prison-new-hope-met-20170221-story.html (reporting that Lindsey Crittle was resentenced to fifty years); Staff Report, *Former Gang Member Gets 50 Years in Prison for Aurora Murder*, AURORA BEACON-NEWS (Feb. 8, 2017), www.chicagotribune.com/suburbs/aurora-beacon-news/news/ct-abn-luciano-sentence-st-0210-20170208-story.html (reporting that Michael Luciano was resentenced to fifty years); Edith Brady-Lunny, *Life Sentence Reduced for Sex Offender*, PANTAGRAPH (Apr. 27, 2017), www.pantagraph.com/n ews/local/crime-and-courts/life-sentence-reduced-for-sex-offender/article_8fd27c6d-96dd-5dc5-8303-abf56540ed05.html (reporting that Brett Wilson was resentenced to forty-five years).

143. Megan Crepeau, *Killer Resentenced Because of High Court Ruling Given 60 Years in Prison*, CHI. TRIB. (May 23, 2017), www.chicagotribune.com/news/local/breaking/ct-juvenile-killer-resentenced-decades-later-met-20170523-story.html (reporting that Eric Anderson was resentenced to sixty years and Wayne Antusas resentenced to fifty-five years); Erin Chan Ding, *Prison Sentences Reduced for Men Who Killed Two in Chicago as Teenagers*, CHI. TRIB. (June 6, 2016), www.chicagotribune.com/news/local/breaking/ct-double-murder-new-sentence-chicago-met-20160606-story-html (reporting that Javell Ivory was resentenced to fifty-four years, and Darnell Foxx to seventy-three years); Annie Sweeny, *Man Convicted of Double Murder as Juvenile is Freed After 21 Years in Prison*,

resentenced to seventy-five years or more.[144]

B. Michigan's Implementation of Miller and Montgomery

1. Resentencing Eligibility of Juveniles

The Michigan legislature passed a law solely to address resentencing issues under *Miller* in their state criminal procedure code.[145] The law went into effect March 2014, and it sets out what procedures must happen if the Michigan Supreme Court or the U.S. Supreme Court finds that *Miller* is retroactive.[146] The first procedure is that within thirty days of the higher court's final decision—that *Miller* is retroactive—the prosecuting attorney must give the chief circuit judge of each particular county in Michigan a list of all the individuals who are both subject to that court's jurisdiction, and who must be resentenced.[147] Then, within 180 days of the higher court decision becoming final, that prosecuting attorney must file motions for resentencing on all of the cases in which the prosecuting attorney will be seeking a resentence of life without parole.[148] Michigan prosecutors have abided by this process and filed these motions.[149]

CHI. TRIB. (Jan. 18, 2018), www.chicagotribune.com/news/local/breaking/ct-met-juvenile-murderer-freed-20180118-story.html (reporting that Jamie Hauad was resentenced to seventy years); Eldeib & Mills, *supra* note 142 (reporting that Steven Hawthorne was resentenced to sixty-eight years, Jacqueline Montanez was resentenced to sixty-three years); Jeff Bonty, *Life Sentence Overturned for Convicted Kankakee Killer*, KANKAKEE DAILY J. (July 31, 2015), www.daily-journal.com/news/local/life-sentence-overturned-for-convicted-kankakee-killer/article_3d1fac0b-367f-5372-ac59-4042e5bd1418.html (reporting that Nicholas Tang was resentenced to seventy years); Associated Press, *U.S. High Court Ruling Could Affect 100 Illinois Inmates*, CHI. SUN-TIMES (Jan. 26, 2016), chicago.suntimes.com/crime/u-s-high-court-ruling-could-affect-100-illinois-inmates/ (reporting that Gerald Rice was resentenced to sixty years); Smith *supra* note 22 (reporting on Addolfo Davis' decreased sentence).

144. Megan Crepeau, *Gang Member Given 75 Years in Prison for Killing Honor Student on CTA Bus in 2007*, CHI. TRIB. (Jan. 10, 2018), www.chicagotribune.com/news/local/breaking/ct-met-blair-holt-murder-sentence-20180109-story. html (reporting that Michael Pace received a new seventy-five-year sentence).

145. MICH. COMP. LAWS § 769.25 (2018).

146. *Id.* § 769.25a (4) (2018). These procedures are now in place as the Supreme Court has found *Miller* to be retroactive. *Montgomery*, 136 S. Ct. at 732.

147. MICH. COMP. LAWS § 769.25a (4)(a) (2020).

148. *Id.* § 769.25a (4)(b) (2020).

149. Ryan Grimes, *Prosecutors Ignoring Supreme Court Call to Give Juvenile Lifers a New Sentence, Says ACLU*, MICH. RADIO (Dec. 12, 2016), www.michiganradio.org/post/prosecutors-ignoring-supreme-court-call-give-

If a motion is not filed, the court will have resentencing hearings for any other individual that was sentenced to life without parole as a juvenile – and the new sentences given during these hearings will be for a term of years between sixty and twenty-five years.[150] The statute then details the order of priority for these resentencing hearings.[151] First priority is given to individuals who have been imprisoned for twenty years or more,[152] second priority is given to those cases where the prosecutor is requesting life without parole as the resentence,[153] and cases not falling into either of these categories have last priority for a judge to hear.[154] This section of the code allows for individuals to be resentenced without necessarily having to file petitions themselves in order to be resentenced.[155]

2. Making a Finding of Incorrigibility

Before 2018, the Michigan Courts of Appeals were split on how to apply the "incorrigibility" standard mentioned in the Supreme Court's opinions.[156] The Michigan Supreme Court settled this state appellate court split when it decided two cases together in *People v. Skinner*.[157] *Skinner* held that while *Miller* and *Montgomery* could be read to impose a requirement that juveniles are found incorrigible before they are resentenced to life without parole,[158] those U.S. Supreme Court cases ultimately did not hold as such.[159] Therefore, the Michigan Supreme Court concluded that trial courts are not required to make a finding[160] that an individual is incorrigible before sentencing them to life without parole.[161] The Court ruled that states can develop their own procedural rules to

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juvenile-lifers-new-sentence-says-aclu (discussing that Michigan prosecutors filed motions to re-sentence individuals to life without parole in approximately sixty percent of eligible cases).

150. MICH. COMP. LAWS § 769.25a (4)(c) (2020).

151. *Id.* § 769.25a (5) (2020).

152. *Id.* § 769.25a (5)(a) (2020).

153. *Id.* § 769.25a (5)(b) (2020).

154. *Id.* § 769.25a (5)(c) (2020).

155. *Id.* § 769.52a (2020).

156. *Compare* People v. Skinner, 877 N.W.2d 482, 505 (Mich. Ct. App. 2015) (holding the trial court must find a juvenile to be irreparably corrupt before imposing a life without parole sentence), *with* People v. Hyatt, 891 N.W.2d 549, 576-77 (Mich. Ct. App. 2016) (holding that there should be a "heightened degree of scrutiny" when imposing life without parole on a juvenile).

157. People v. Skinner, 917 N.W.2d 292 (Mich. 2018).

158. *Id.* at 307.

159. *Id.* at 307-08.

160. *Id.* This court found that "whether a juvenile is 'irreparably corrupt' is not a factual finding" *Id.* at 310-11. It is a moral judgment made by the court. *Id.* at n. 11.

161. *Id.* at 309.

enforce *Miller*.[162]

3. Impact of Prison Behavior on Resentencing

As discussed above, Michigan passed a bill to address the many different aspects of the U.S. Supreme Court's holding in *Miller*.[163] This law specifies which traits, characteristics, and behaviors of the individual that shall and may be taken into account to determine an appropriate resentence.[164] Section(a)(6) of the statute details that while the factors listed in *Miller shall* be considered, the court *may* consider other factors, "including the individual's record while incarcerated."[165] The Michigan Supreme Court has pointed out that since "may" is permissive, the language of this statute does not force the trial court to inquire into facts beyond what is presented to them and therefore courts are not required to consider the individual's record in prison if it is not presented to them.[166]

4. Definition of a De Facto Life Sentence

Michigan sentencing statutes allow for an individual to be sentenced within a specific range of years (i.e. forty to sixty years).[167] Due to this, individuals who argue their sentences constitute de facto life sentence must argue that the low end of their sentencing range is a de facto life sentence.[168] Courts in Michigan have held sentences are not de facto life when the individual has the possibility of release after thirty-five or forty years in prison, even if their maximum sentence is a much higher term of years.[169]

5. Outcomes for Resentences in Michigan

When *Miller* was decided in 2012, Michigan had the second highest number of juveniles serving life without parole sentences in the United States.[170] There were 363 individuals serving life

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162. *Id.*

163. Hill v. Snyder, 821 F.3d 763, 768 (6th Cir. 2016).

164. MICH. COMP. LAWS § 769.25 (a)(6) (2020).

165. *Id.*

166. *Skinner*, 917 N.W.2d at n.9.

167. MICH. COMP. LAWS § 769.34 (2018).

168. People v. Bryant, No. 339925, 2018 Mich. App. LEXIS 3225, at *18 (Mich. Ct. App. Sept. 25, 2018).

169. *See id.* (finding a thirty-five-year minimum sentence constitutional, as defendant could be released at age fifty-five, and "defendant has not shown that there is no reasonable possibility of him living to [fifty-five] years old"); People v. Howard, No. 337589, 2018 Mich. App. LEXIS 3018, at *6 (Mich. Ct. App. Aug. 14, 2018) (holding a forty- to sixty-year sentence constitutional, as the defendant was only fifty-three and could be potentially released in 2018).

170. Emma Winowiecki & Kaye Lafond, *Update: How Many of Michigan's "Juvenile Lifers" Have Been Re-Sentenced?*, MICH. RADIO (Aug. 25, 2017),

without parole sentences for crimes committed as juveniles.[171] Some have argued that Michigan's laws which grant automatic transfer to adult court in certain circumstances[172] for certain crimes, and for juveniles as young as fourteen, contributed to this high number of juvenile life without parole sentences.[173] As of August 2017, ninety-one of the original 363 individuals had been resentenced, twenty-four of those individuals to a term of years.[174]

C. Florida's Implementation of Miller and Montgomery

1. Resentencing Eligibility of Juveniles

In 2014, the Florida legislature passed a comprehensive law regarding juvenile resentencing.[175] Section 921.1402 governs the eligibility of juveniles sentenced to life without parole to have their sentences reviewed.[176] This section allows juveniles sentenced to over twenty-five years to have their sentences reviewed after twenty-five years.[177] Additionally, those juveniles sentenced to over fifteen years can have their sentences reviewed after fifteen years, and those sentenced to over twenty years can have their sentence reviewed after twenty years.[178] The statute also mandates that the Florida Department of Corrections notify these juveniles eighteen months before they are eligible to request a hearing to review their sentence.[179] After the juvenile is notified they must submit an application to the court to ask for a hearing to review their sentence.[180] Under the law, the resentencing court *shall* hold a hearing after they receive an application from a juvenile.[181]

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www.michiganradio.org/post/update-how-many-michigans-juvenile-lifers-have-been-re-sentenced.

171. *Id.*

172. MICHIGAN ACLU, SECOND CHANCES: JUVENILES SERVING LIFE WITHOUT PAROLE IN MICHIGAN PRISONS 9-10 (2004), www.aclumich.org/sites/default/files/field_documents/juv_lifers_v8.pdf.

173. *Id.* at 10 (discussing that these laws also "eliminated judicial consideration of a juvenile's mental capabilities or level of involvement in the crime before transfer" to adult court).

174. Winowiecki & Lafond, *supra* note 170.

175. 2014 FLA. LAWS ch. 220.

176. FLA. STAT. § 921.1402 (2018).

177. *Id.* § 921.1402 (2)(b). The law also states that if those juveniles sentenced to twenty years or more do not receive a resentence at their first hearing, they are entitled to another hearing ten years later. *Id.* at § 921.1402 (2)(d).

178. *Id.* § 921.1402 (2)(c)-(d) (2020).

179. *Id.* § 921.1402 (3) (2020).

180. *Id.* § 921.1402 (4) (2020).

181. *Id.* § 921.1402 (6) (2020).

2. Making a Finding of Incorrigibility

The Florida Supreme Court has not yet made a conclusion regarding a finding of incorrigibility with the same precision as courts in Illinois and Michigan.[182] The Florida Supreme Court has only held that each sentence given to a juvenile must be individualized in order to separate juveniles who are irreparably corrupt from those "whose crimes reflect 'transient immaturity.'"[183] While not explicitly mandating a finding of permanent incorrigibility, the Court held that life without parole sentences should be rare and only given when a crime reflects "irreparable corruption."[184] Subsequent Florida cases have given weight to this language and remanded cases in order to allow juveniles to show that their crime did not reflect irreparable corruption.[185] Other trial courts have gone so far to find that while a juvenile's behavior "could be the definition of irreparable corruption" he was still entitled to a resentencing hearing.[186] This leaves the lower courts in Florida in flux, with no clear directive on whether there is the need to make a determination of permanent incorrigibility.

3. Impact of Prison Behavior on Resentence

The Florida statute governing juvenile resentencing directly addresses the topic of behavior in prison as a factor to take into account at a resentencing hearing.[187] The statute describes that at the resentencing hearing of a juvenile that received life without parole, the factors mentioned in *Miller* must be analyzed, along with other factors the Florida legislature has deemed important.[188] Three of these additional factors to be analyzed include examining the individual's behavior while they have been imprisoned.[189]

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182 *Compare Holman*, 91 N.E.3d at 863 (pronouncing there must be a finding of incorrigibility before resentencing a juvenile to life without parole), *with Skinner*, 917 N.W.2d at 309 (stating there does not have to be a finding of incorrigibility before resentencing a juvenile to life without parole).

183. Landrum v. State, 192 So.3d 459, 466 (Fla. 2016) (quoting *Montgomery*, 136 S. Ct. at 734).

184. *Landrum*, 192 So.3d at 469 (permitting that "sentencing of a juvenile offender to life imprisonment only in the most 'uncommon' and 'rare' case where the juvenile offender's crime reflects 'irreparable corruption.'") (quoting *Miller*, 567 U.S. at 479-480).

185. Atwell v. State, 197 So. 3d 1040, 1050 (Fla. 2016).

186. Horsley v. State, 160 So. 3d 393, 395-97 (Fla. 2015) (finding a hearing was still required when the juvenile participated in a robbery where a convenience store owner was shot in the chest and killed, where the juvenile was the one who shot the firearm).

187. FLA. STAT. § 921.1402 (2020).

188. *Id.* § 921.1402 (6)(a)-(i) (2020) (including the opinion of the victim or their family).

189. *Id.* § 921.1402 (6) (2020) (stating that these factors are "(a) [w]hether

Section Seven of the statute shows the importance Florida has put on the rehabilitation of the imprisoned individual, as the section states that the juvenile can be resentenced if the court finds that he or she "has been rehabilitated and is reasonably believed to be fit to reenter society."[190]

4. Definition of a De Facto Life Sentence[191]

Florida has yet to set concrete rules on what specifically constitutes a de facto life sentence.[192] In 2015, the Florida Supreme Court found that a ninety-year aggregate sentence, where the earliest release could occur when the juvenile was ninety-five years old, was a de facto life sentence.[193] In other rulings, Florida courts have found a fifty-seven-year sentence to be a de facto life sentence[194] but conversely found that a fifty-year sentence was not a de facto life sentence.[195] Florida courts encounter fewer questions than other states pertaining to this issue since the legislature passed Section 921.1402, which allows most juveniles sentenced to long terms to have their sentences reviewed after a number of years.[196] In *Atwell v. State*, the Florida Supreme Court ruled that a juvenile sentenced to life, but with parole eligibility after twenty-five years still needed to be resentenced.[197] Due to the practical application of Florida parole laws, he would not have the opportunity to be released until 2130, therefore being forced to serve a 140-year sentence.[198] Yet in 2018, the Florida Supreme Court

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the juvenile offender demonstrates maturity and rehabilitation[,]" "(b) [w]hether the juvenile offender remains at the same level of risk to society as he or she did at the time of the initial sentencing[,]" and "(g) [w]hether the juvenile offender has successfully obtained a high school equivalency diploma or completed another educational, technical, work, vocational, or self-rehabilitation program, if such a program is available").

190. *Id.* § 921.1402 (7) (2020).

191. Adams v. State, 188 So. 3d 849, 851 (Fla. Dist. Ct. App. 2012) (defining a de facto life sentence as "one that exceeds the defendant's life expectancy").

192. Peterson v. State, 193 So. 3d 1034, 1037 (Fla. Dist. Ct. App. 2016) (stating that "Florida Supreme Court has not specifically answered the question of when a lengthy term-of-years sentence becomes a de facto life sentence").

193. Henry v. State, 175 So. 3d 675, 680-81 (Fla. 2015).

194. *Peterson*, 193 So. 3d 1034 (holding that the constitutionality of a juvenile's sentence does not only depend on the juvenile's life expectancy and the age he or she will be when they are released).

195. Williams v. State, 197 So. 3d 569, 571-72 (Fla. App. 2016) (finding that even if the defendant had to serve all fifty years of his sentence, he would be released at age sixty-eight, therefore his sentence was not a de facto life sentence).

196. Montgomery v. State, 230 So. 3d 1256, 1263 (Fla. App. 2017) (holding a twenty-five-year minimum sentence was constitutional, as after twenty-five years the juvenile's sentence will be mandatorily reviewed).

197. *Atwell*, 197 So. 3d at 1041.

198. *Id.*

overruled this finding, stating that juveniles who received life with the possibility of parole after twenty-five years are not entitled to a resentencing as they do have a meaningful opportunity for release.[199] These disparate rulings have left many juveniles in Florida unclear on if they will be eligible for a resentence or not.[200]

5. Outcomes for Resentencing in Florida

Florida had approximately 600 juveniles serving sentences of life without the possibility of parole when *Miller* was decided, the highest number of any state.[201] By 2017, eighty-five of those juveniles who committed homicide offenses had been resentenced.[202] Additionally, eighty individuals serving life without parole for non-homicide crimes had been resentenced since the 2010 Supreme Court ruling in *Graham*.[203] Various factors have been discussed for the slow pace of resentencing in Florida including lack of funds, confusion surrounding which types of sentences must be reviewed, and prosecutors adapting and understanding the new laws.[204] State public defenders have asked the state for additional funds to support this re-sentencing process, but the state budget did not include the additional requested funds in 2017.[205]

IV. PROPOSAL

As evidenced above, states have addressed resentencing juveniles under *Miller* and *Montgomery* in a myriad of ways. These different laws and rulings have impacted the efficiency and speed of resentencing as well as the eligibility of individuals to be resentenced and the level of fairness that accompanies these sentences. In many cases, states have been left with unclear laws that make the juveniles who could be eligible for resentencing under *Miller* unclear of how or when they will be resentenced, and to what type of new sentence.

Below are recommendations that every state should adopt to address juvenile resentencing in order to implement *Miller* and *Montgomery* in the most just and most efficient way, making judges,

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199. State v. Michel, 257 So. 3d 3, 7 (Fla. 2018).

200. Sullivan, *supra* note 100.

201. *State-By-State Look*, *supra* note 30.

202. Gary Fineout, *Resentencing Try Stalled for Most Florida Juvenile Lifers*, TAMPA BAY TIMES (July 31, 2017), www.tampabay.com/incoming/resentencing-try-stalled-for-most-florida-juvenile-lifers/2332050 (according to Roseanne Eckert, the coordinating attorney at the Florida Juvenile Resentencing and Review Project at Florida International University).

203. *Id.*

204. *Id.*

205. *Id.* They had requested eight million dollars for implementation. *Id.*

lawyers, and individuals imprisoned very clear on what is expected of them to be resentenced, what type of evidence to present, and what types of rulings can be made. The laws below are proposed so that juveniles will be resentenced fairly and without years and years of waiting to find out their fate.

A. Automatic Eligibility for Resentencing

Illinois, Michigan, and Florida have addressed eligibility in different ways. From having each individual file a post-conviction petition in Illinois,[206] to an automatic review of sentences after a term of years in Florida,[207] to an automatic resentencing by a pre-determined order of priority in Michigan.[208] These states also have varying levels of success in the number of juveniles that have been resentenced, Michigan has resentenced twenty-five percent of their juveniles since the rulings in *Miller* and *Montgomery*,[209] Florida has resentenced fourteen percent,[210] and Illinois has resentenced thirty-five percent.[211]

Although Illinois has the highest percentage of juveniles resentenced, laws and precedent in Illinois present the least petitioner-friendly eligibility rules. Even the Illinois courts have said that "a defendant faces immense procedural default hurdles when bringing a successive post-conviction petition"[212] as under Illinois law only one post-conviction petition can be brought without leave of the court.[213] An individual subject to an unconstitutional sentence should not be subject to "immense"[214] procedural hurdles in order to be resentenced. Even the procedural laws in Florida, while on their face are seemingly more efficient, they still allow individuals mandatorily sentenced to life without parole to be imprisoned for fifteen to twenty-five years without a review of their sentence.[215] This is not fair to the individuals serving these sentences, as they do not deserve to be serving an unconstitutional sentence.

States should adopt two different procedures regarding eligibility – modeled after laws in Florida and Michigan – for

206. 725 ILL. COMP. STAT. 5/122 (2020).

207. FLA. STAT. § 921.1402 (2020).

208. MICH. COMP. LAWS § 769.25a (2020).

209. Winowiecki & Lafond, *supra* note 170.

210. *State-by-State Look*, *supra* note 30 (reporting that Florida has resentenced 85 of its juvenile lifers out of 600, therefore fourteen percent have been resentenced).

211. *Id.* (describing how Illinois has resentenced thirty-five percent of its juveniles serving life without parole).

212. *Davis*, 6 N.E.3d at 716.

213. 725 ILL. COMP. STAT. 5/122-1(f) (2020).

214. *Davis*, 6 N.E.3d at 716.

215. FLA. STAT. § 921.1402(2) (2020).

efficiency in resentencing and fairness to the incarcerated individuals. First, like in Florida, all individuals eligible for resentences should be notified by the government itself.[216] This will allow individuals to be aware of the rights they have and be aware that they can assert them. If individuals are unaware they are serving an unconstitutional sentence, there is little chance they will seek to change it. Without an official governmental notification, individuals are left to their own research or word of mouth to learn they can even be resentenced. A law requiring governmental notification will allow individuals to assert their rights as they will be informed of what they are.

Secondly, states should adopt laws based on Michigan's automatic resentencing hearing laws.[217] Individuals should not have to file a petition themselves like in Illinois,[218] in order to have their sentences addressed. Michigan law requires that these cases are put back on the docket,[219] and other states should adopt this type of law as well. This will help eliminate the confusion that many juvenile lifers have regarding their sentence after *Miller*, and it will also jump-start the process for all of these individuals, making sure they are resentenced as soon as possible, not when they individually figure out they can be.

Michigan's laws also give a sort of resentencing hierarchy, stating which types of prisoners should be granted resentencing hearings first, second, and third.[220] Other states should adopt this hierarchy as well, as it allows those who have been in prison the longest and those who are facing life without parole again to have their sentences reviewed first.[221] This brings a level of justice and efficiency to this system, as those suffering the longest or with the highest possible resentences are able to have their sentences addressed as soon as possible.[222] This priority order for resentencing allows a group that has suffered the most injustice to be at the front of the line. This does not seek to diminish the suffering or injustice of those serving life without parole who are not first in line for resentencing, but procedurally there must be a priority system in

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216. *Id.* § 921.1402(3) (2020).

217. *See* MICH. COMP. LAWS § 769.25a (4)-(5) (2020) (mandating the prosecuting attorney file motions regarding juvenile life without parole cases and setting forth an order in which resentencing hearing will take place).

218. 725 ILL. COMP. STAT. 5/122 (2020).

219. MICH. COMP. LAWS § 769.25(4) (2020).

220. *Id.* § 769.25a (5) (2020).

221. *Id.* § 769.25 (2020).

222. *See, e.g.*, Samantha Melamed, *Philly's Oldest Juvenile Lifer Resentenced, but Is It Too Late?*, PHILA. INQUIRER (May 17, 2017), www.philly.com/philly/news/crime/phillys-oldest-juvenile-lifer-resentenced-but-is-it-too-late-20170517.html (describing the resentencing of Joseph Ligon, then eighty years old, who was sentenced to life without parole in 1953 for a crime committed when he was fifteen).

order for justice to be best served.

B. Mandated Finding of Incorrigibility in Resentencing Hearing

Courts should be forced to find that an individual is incorrigible before they are resentenced to life without parole.[223] In Michigan, there does not have to be a finding of incorrigibility to resentence an individual to life without parole.[224] In Michigan, out of the ninety-one juveniles that have been resentenced, sixty-seven of them, or seventy-three percent, have been resentenced to life without parole.[225] At almost three-fourths, this is an overwhelming percentage of those resentenced. While many factors are taken into account to determine the resentence, courts may find it easier to hand down a resentence of life without parole if they are not required to find that individual is incorrigible in order to do so.

It is difficult to prove that an individual is incorrigible and has no prospects for rehabilitation or for reform. When the incorrigibility of an individual doesn't have to be addressed, it is far easier both to argue and to find they should be resentenced to life without parole. Life without parole for a crime committed as a juvenile is not a light sentence—it is a death sentence. There must be high bars of evidence and procedure that courts have to meet in order to sentence a juvenile to life without parole. The Supreme Court has cited studies on brain development and impulse control of minors and found that they are less culpable than adults for the same crimes.[226] Juveniles are more likely to be rehabilitated, making a life without parole sentence inefficient and cruel. A sentence of life without parole for juveniles should not be given out lightly and in order for any sentence of life without parole to be even remotely just, there must be a mandated finding of incorrigibility.

C. Prison Behavior Must Be Taken into Account

In a resentencing hearing, courts should take into account the individual's behavior while they have been in prison and the rehabilitation that has taken place there. In Illinois, courts have ruled that prison behavior cannot be considered at all when evaluating an individual for a resentence under *Miller*.[227] This can

223. This position does have its detractors. *Montgomery*, 136 S. Ct. at 744 (Scalia, J., dissenting) (discussing the impossibility of demanding state courts find incorrigibility, as this would be "impossible in practice" and referring to it as "silliness").

224. *Skinner*, 917 N.W.2d at 309.

225. Winowiecki & Lafond, *supra* note 170.

226. *Miller*, 567 U.S. at 471-72.

227. *Holman*, 91 N.E.3d at 864.

lead to those who have been rehabilitated still forced to spend years of their life in prison. Adolofo Davis, who was resentenced to life in prison, made great changes, reforms, and achievements while imprisoned – all evidence brought up at his resentencing hearing.[228] He was still resentenced to life in prison. While at the time of his hearing in 2015, Illinois had no rule that prison conduct could not be used to determine resentences.[229] Outcomes similar to his are bound to happen if judges are not allowed to see how an individual has changed their life while imprisoned.

An important theory of punishment is rehabilitation[230] and if an individual has been rehabilitated by their time in prison, that should be taken into account when determining their new sentence. The language of *Miller* and *Montgomery* discuss that an individual should only be sentenced to life without parole if he or she has no chance for reform and is permanently incorrigible.[231] If an individual has shown a vast improvement in behavior, gotten their GED, or held a prison job, this can show an individual is not permanently incorrigible. When courts are limited to look at an individual's behavior as a juvenile, this doesn't take into account the reality of who they are.[232] A problem with sentencing juveniles is that courts do not know how they will mature and change as they grow. Being able to look at an individual's behavior in prison can show if they are or are not incorrigible and how harsh their new sentence should be. Therefore, courts must take this factor into account when determining a resentence.

D. De Facto Life Sentence Must be Specifically Defined

States must adopt legislation that details what numerical term of years sentence is equal to a life sentence. This way, three

228. Eckholm, *supra* note 1 (reporting that while in prison, Adolofo earned his GED, became a teacher's aide, became a mentor for young men, and began working closely with a Reverend in Chicago who counsels individuals who have been both offenders and victims of crimes).

229. *Holman*, 91 N.E.3d at 864 (establishing this rule two years later, in 2017).

230. Craig S. Lerner, *Life Without Parole as a Conflicted Punishment,* 48 WAKE FOREST L. REV. 1101, 1126, 1141 (2013) (arguing that while those participating in the criminal justice system often frame a sentence of life without parole as one with "the possibility of hope, self-improvement, and rehabilitation" in reality, a sentence of life without parole completely "denies the possibility of rehabilitation" as the individual will never again enter society).

231. *Montgomery*, 136 S. Ct. at 734.

232. Brianna Boone, *Treating Adults Like Children: Re-Sentencing Adult Juvenile Lifers After Miller v. Alabama*, 99 MINN. L. REV. 1159, 1180 (2015) (arguing that reviewing only juvenile characteristics at a re-sentencing hearing creates a paradox and inequitable results in sentencing).

problems the courts encounter will be resolved. One, courts will know when individuals with a term of years sentence must be resentenced under *Miller*. Two, courts will know when the *Miller* factors must be analyzed in terms of year sentences in the future. Third, courts will know what new terms of years sentences can be given out if an individual is found not to be incorrigible. When states and courts have not set out an exact number of years that constitutes a de facto life sentence, this brings about confusion and uncertainty in many different situations, for judges, counsel, and the juvenile lifers themselves.[233] If there is no set term of year number, individuals who bring petitions for resentencing have no idea what the outcome will be. Judges will independently determine what they believe a de facto life sentence is, and there will be inconsistent outcomes across the states and across different counties.

These types of problems would be solved if states and courts set out an exact term of years that equals a de facto life sentence. While some states have found that a ninety-year sentence is de facto life[234] and others that eighty-nine years is de facto life,[235] the bar should be much lower.[236] Cases across the U.S. have cited[237] the United States Sentencing Commission Preliminary Quarterly Data Report to show that the average life expectancy of a prisoner in the general prison population is sixty-four years.[238] This number may even be too high for those sentenced as children, as it was calculated using the "median age of federal prisoner at the time of sentencing[,]" which was twenty-five years at the time.[239] The

233. *Graham*, 560 U.S. at 124 (Alito, J., dissenting) (discussing that in oral arguments counsel for the petitioner conceded that a forty-year sentence without parole would "probably" be constitutional).

234. *Henry*, 175 So. 3d at 680-81.

235. *Reyes*, 63 N.E.3d at 888.

236. Bear Cloud v. State, 334 P.3d 132, 140-43 (Wy. 2014) (discussing that in a series of cases in Wyoming, the Wyoming Supreme Court determined that a forty-five-year sentence handed down to a juvenile who was sixteen years old at the time of the crime was enough to trigger the protections of *Miller* and the court on remand had to consider the factors of the individual's youth and immaturity when deciding his sentence).

237. Adele Cummings & Stacie Nelson Colling, *There is No Meaningful Opportunity in Meaningless Data: Why It Is Unconstitutional to Use Life Expectancy Tables in Post-Graham Sentences*, 18 U.C. DAVIS J. JUV. L. & POL'Y 267, 269 (2014) (discussing that in some state cases, specifically in Colorado, cited life expectancy tables created by CDC or specific life expectancy tables in the Colorado Revised Statutes in order to determine if a juvenile's sentence was constitutional or not in regards to when they would be eligible for parole and what their life expectancy according to these tables would be).

238. *Buffer*, 75 N.E.3d at 481; People v. Sanders, 56 N.E.3d 563, 571 (Ill. App. Ct. 2016) (containing statistics and analysis through June 30, 2012).

239. *Buffer*, 137 N.E.3d at 778 (Burke, A., concurring) (citing Deborah LaBelle, *Michigan Life Expectancy Data for Youth Serving Natural Life Sentences* (2013), available at www.lb7.uscourts.gov/documents/17-12441.pdf).

conditions in prison, including the level of violence, the transmission of communicable diseases, poor diets, and low-quality healthcare all contribute to a prisoner's lessened life expectancy and are exacerbated for those sentenced as children, as they spend a higher percentage of life imprisoned.[240] Due to this lessened life expectancy, the term of years that states should adopt for de facto life sentences should be a calculation.[241] A term of years that equals a life sentence should be calculated by subtracting the juvenile's age, at the time of the crime, from the average life expectancy of a prisoner, which is sixty-four years. For example, if a seventeen-year-old is to be sentenced, a de facto life sentence for him or her should be forty-seven years.[242] There is a high probability that this specific juvenile will only live to sixty-four years,[243] and if a seventeen-year-old is sentenced to any term of years higher than forty-seven, there is a high probability that he will be spending his entire life in prison. Therefore, states must adopt a specific calculation based on the average life expectancy of prisoners to specifically define de facto life sentences. This sixty-four-year number is only a base starting point for this calculation. States should use the most accurate statistics available about life expectancies of those imprisoned as children, especially if statistics are available pertaining to their specific state prison system.

V. CONCLUSION

States have sought to implement the holdings of *Miller* and *Montgomery* in varied ways. While all of these different laws and holdings fall in line with the constitutionality of the cases, they have led to disparate outcomes for individuals in the states[244] and to

240. *Sanders*, 56 N.E.3d at 571.

241. *Buffer*, 137 N.E.3d at 778 (Burke, A., concurring) (explaining that a calculation should be used to determine what term of years constitutes a de facto life sentence).

242. 64 years – 17 years = 47 years.

243. Cummings & Colling, *supra* note 237, at 270-71 (pointing out that some argue that life expectancy tables and the like should not be used to determine the constitutionality of life with parole sentences, as they can be interpreted incorrectly, are an estimate for the general population, and tables do not take into account other factors like socio-economic status). Yet using the estimated life expectancy for federal prisoners would limit the problems posed by using general life expectancy tables, even if they are delineated by race or gender. Using a prisoner life expectancy as the base takes into account the conditions of prison that would lessen an individual's life that are not taken into account in general tables.

244. Robert S. Chang, David A. Perez, Luke M. Rona, & Christopher M. Schafbuch, *Evading Miller*, 39 SEATTLE U. L. REV. 85, 105 (2015) (outlining statistics that show beyond disparate outcomes for resentences, there is already a disparity by race of juveniles that are sentenced to life without parole - 56.1 percent of juveniles sentenced to life without parole are black).

confusion for judges, lawyers, and juvenile lifers, regarding who is eligible and what their new sentences could be. States should be aiming with their laws and holdings to achieve efficiency, justice, and clarity in resentencing for these individuals. Accordingly, states should adopt automatic resentencing based on an order of priority, first those that have been held the longest, second those who could receive life without parole sentences again, and lastly the rest of the individuals sentenced to life without parole. States should mandate that an individual must be found incorrigible before they are resentenced to life without parole. States should adopt laws that define de facto life, and it should be defined as sixty-four minus the age the individual was when they committed the crime. Additionally, courts should look at the prison record of the individuals they are resentencing in order to give out the most just sentences. These laws will create a system of implementing *Miller* that is the most efficient and the most just and clear for juvenile lifers.