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Salua Kamerow

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REDEFINING YOUTH: THE CASE FOR APPLYING THE  
PRINCIPLES OF MILLER V. ALABAMA TO CRIMINAL CASES  
INVOLVING ADULTS IN LATE ADOLESCENCE

*Salua Kamerow*\*

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\* Salua Kamerow is a Certified Legal Intern at the Blair County District Attorney's Office. Ms. Kamerow has a law degree from Universidad Cooperativa de Colombia, a Master of Laws from Pennsylvania State University, and a Master of Science in Translation from New York University. Ms. Kamerow earned her J.D. from the University of Richmond School of Law in 2022 with a certificate of concentration in Family Law, which she obtained with honors. She is the recipient of the Orrell-Brown Award for Clinical Excellence in the Children's Law Center, presented to the graduating student who excelled in skills necessary for direct representation of clients. Ms. Kamerow would like to graciously recognize the guidance on this article and in her career to her professor and mentor, Julie E. McConnell, Esq.

## ABSTRACT

*In 2012, in Miller v. Alabama, the United States Supreme Court held it unconstitutional to impose a mandatory sentence of life without parole on children because such a sentence fails to adequately account for a child's developmental stage or ability to weigh long-term consequences. Children are fundamentally different from adults, making them more susceptible to lack of self-regulation, poor decision making, and peer pressure. In Miller, the Court found that these aspects of children's behavior made children less culpable than adults.*

*Psychological studies have demonstrated that adolescence is more protracted than previously recognized. Profound malleability of the brain characterizes the period between ages ten and twenty-five. This malleability often results in changes in behavior, unanticipated reactions, and poor decision-making in these individuals. However, scientific findings support the contention that this same malleability allows adolescents to rehabilitate, making a case for rapid positive change.*

*Individuals between eighteen and twenty-one years old can be considered to have entered a period known as "late adolescence," a time more akin to adolescence than adulthood. Late adolescence may help explain why criminality in young adults dramatically decreases around the time they reach age twenty-two and continues to decline until their mid-twenties. This article argues that courts should apply Miller when sentencing late adolescents. Therefore, courts should extend the ban on mandatory life without parole to youth who committed a crime before turning twenty-one.*

"I've been struck by the upside-down priorities of the juvenile justice system. We are willing to spend the least amount of money to keep the kid at home, more to put him in a foster home and the most to institutionalize him."

-Marian Wright Edelman

## INTRODUCTION

In *Miller v. Alabama*, the Supreme Court handed down its most controlling decision of the last quarter-century in youth law, impacting the lives of many individuals who were sentenced to life in prison when they were minors.<sup>1</sup> The Court emphasized that those individuals deserve "some meaningful opportunity to obtain release" based on their rehabilitation because their

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<sup>1</sup> *Miller*, 567 U.S. at 465.

crimes reflect an “unfortunate yet transient immaturity.”<sup>2</sup> The Court found that mandatory sentencing schemes for young people violated the Eighth Amendment. In arriving at this decision, the Court set a five-factor test for the trier of fact to consider in deciding each case.

The Court received numerous amicus briefs supporting the defendants.<sup>3</sup> These amici argued that juveniles’ age and underdeveloped brains made them susceptible to impulsivity and reckless behavior.<sup>4</sup> These briefs argued that children’s social and familial environments significantly impact their decision-making and that their unfinished brain development diminishes their capacity to understand the risks involved in their behavior.<sup>5</sup> Amici further explained that children deserve special consideration based on their failure to anticipate consequences and their tremendous capacity for rehabilitation.<sup>6</sup>

This article proposes that courts apply the Miller factors applicable to juveniles seventeen years old and younger to late adolescents: individuals between eighteen and twenty-one years of age. This article argues that late adolescents’ brain maturation, personal traits, family and peer influence, understanding of the legal environment, and potential for rehabilitation are more akin to teenagers than young adults. Because of all these commonalities between the two groups, life in prison without the possibility of parole for late adolescents arguably violates the Eighth Amendment under Miller.

## I. LIFE WITH THE POSSIBILITY OF PAROLE AS THE DEFAULT FOR LATE ADOLESCENTS

“Life without parole” is a euphemism that legitimizes the second-harsh

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<sup>2</sup> *Id.* (citing *Graham v. Florida*, 560 U.S. 48, 75 (2010)); *Id.* (citing *Roper v. Simmons*, 543 U.S. 551, 573 (2005)).

<sup>3</sup> Brief of Former Juvenile Court Judges as Amici Curiae Supporting Petitioner at 1, *Miller v. Alabama*, 567 U.S. 460 (2012) (No. 10-9646); Brief of American Psychological Association, *supra* note 3 at 1; Brief of Amici Curiae Amnesty International, et al. Supporting Petitioners at 1, *Miller v. Alabama*, No. 10-9646; Brief of Amici Curiae of Certain Family Members of Victims Killed by Youths Supporting Petitioners at 1, *Miller v. Alabama*, 567 U.S. 460 (2012) (No. 10-9646); Brief of Jeffrey Fagan et al. as Amici Curiae Supporting Petitioners at 1, *Miller v. Alabama*, 567 U.S. 460 (2012) (No. 10-9646); Brief of Amici Curiae J. Lawrence Aber et al. Supporting Petitioners at 1, *Miller v. Alabama*, 567 U.S. 460 (2012) (No. 10-9646); Brief of Professor of Law and His Students from the Moritz College of Law at Ohio State University as Amici Curiae Supporting Petitioners at 1, *Miller v. Alabama*, 567 U.S. 460 (2012) (No. 10-9646); Brief of Juvenile Law Center et al. as Amici Curiae Supporting Petitioners at 1, *Miller v. Alabama*, 567 U.S. 460 (2012) (No. 10-9646); Brief of Amici Curiae NAACP Legal Defense & Educational Fund, Inc. et al. Supporting Petitioners at 1, *Miller v. Alabama*, 567 U.S. 460 (2012) (No. 10-9646).

<sup>4</sup> Brief of Amici Curiae J. Lawrence Aber et al. Supporting Petitioners, *supra* note 16.

<sup>5</sup> Brief of American Psychological Association, *supra* note 3, at 8.

<sup>6</sup> Brief of Former Juvenile Court Judges as Amici Curiae Supporting Petitioners, *supra* note 16, at 5.

penalty imposed on children in the United States. “Death-by-incarceration”<sup>7</sup> is a more appropriate description. It is not uncommon to find individuals condemned to die in prison.<sup>8</sup> During the mid-1990s, American society largely embraced this idea by abolishing the possibility of parole.<sup>9</sup> By 2000, Alaska, Arizona, California, Delaware, Florida, Illinois, Indiana, Kansas, Louisiana, Maine, Minnesota, Mississippi, New York, North Carolina, Ohio, Oregon, Tennessee, Virginia, Washington, and Wisconsin had abolished discretionary parole.<sup>10</sup> This resulted in its indiscriminate use, rather than reserving a life without parole sentence for the most egregious crimes. This approach is premised on the false narrative that sentencing people to life without parole is an effective deterrent.<sup>11</sup> As a result, society has embraced life without parole as an appropriate sentence, even while rejecting the death penalty.<sup>12</sup>

When the U.S. government initially created parole in the nineteenth century, the hope was that the potential for release would encourage offenders to seek opportunities for rehabilitation.<sup>13</sup> There was a sincere push for shifting from the retributive, punishment-oriented goal of a lengthy prison sentence to providing opportunities for the reintegration of incarcerated offenders into the community when rehabilitated.<sup>14</sup> Parole served as a motivator for offenders to rehabilitate. Still, its abolition in some states and its denial for subjective reasons where parole is an option diminish the chance for positive transformation.<sup>15</sup> However, sentencing people for the sole purpose of punishment instead of rehabilitation is back in fashion in several states, an approach that only increased with the abolition of the death penalty at the end of the twentieth century.<sup>16</sup>

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<sup>7</sup> Richard Gross, *Death by Incarceration: Cruel and Unusual*, PEN Am. (Sept. 9, 2019), <https://pen.org/death-by-incarceration-cruel-and-unusual/>.

<sup>8</sup> Ashley Nellis, Sent’g Project, *Life Goes On: The Historic Rise of Life Sentences in America 1* (2013), <https://www.sentencingproject.org/reports/life-goes-on-the-historic-rise-in-life-sentences-in-america/> (discussing the notion of a whole-life sentence gaining popularity starting with the ban on the death penalty, which was in place from 1972 to 1976).

<sup>9</sup> Fox Butterfield, *Eliminating Parole Boards Isn’t A Cure-All, Experts Say*, N.Y. Times (Jan. 10, 1999), <https://www.nytimes.com/1999/01/10/us/eliminating-parole-boards-isn-t-a-cure-all-experts-say.html>.

<sup>10</sup> Timothy Hughes et al., U.S. Dep’t of Just., Bureau of Justice Statistics Special Report: Trends in State Parole 1999-2002, (2001), <https://bjs.ojp.gov/content/pub/pdf/tsp00.pdf>.

<sup>11</sup> Michelle Miao, *Replacing Death with Life? The Rise of LWOP in the Context of Abolitionist Campaigns in the United States*, 15 NW. J. L. & Soc. Pol’y, 173, 181, 189 (2020).

<sup>12</sup> *Id.* at 180-81.

<sup>13</sup> Butterfield, *supra* note 22.

<sup>14</sup> Val Kiebala, *The Origin Story of Life without Parole in Pennsylvania, Straight Ahead!*, <https://straight-ahead.org/2021/09/27/the-origin-story-of-life-without-parole-in-pennsylvania/> (last visited Jan. 22, 2023).

<sup>15</sup> Jorge Renaud, *Grading the Parole Release Systems of All 50 States, Prison Pol’y Initiative* (Feb. 26, 2019) [https://www.prisonpolicy.org/reports/grading\\_parole.html](https://www.prisonpolicy.org/reports/grading_parole.html).

<sup>16</sup> Kiebala, *supra* note 27.

Between 2008 and 2012, there was a 22.2% increase in people sentenced to life without parole compared to those sentenced with the possibility of parole.<sup>17</sup> By 2012, there were 159,520 people in the United States sentenced to die in prison.<sup>18</sup> Today, one out of every nine incarcerated offenders' convictions result in life without parole.<sup>19</sup> Approximately 10,000 of these offenders are there for nonviolent offenses.<sup>20</sup> More than 10,000 additional inmates are serving their lengthy imprisonments for crimes they committed as juveniles.<sup>21</sup>

#### *A. Historical Progression of the Eighth Amendment Interpretation*

As the United States embraced indiscriminately harsh sentences, the Supreme Court began to consider whether the death penalty and life without parole were consistent with the Eighth Amendment's ban on cruel and unusual punishment. The Court decided in several decisions from the early 2000s until late 2021 that sentencing people deemed incompetent to the death penalty and life without parole was violative of the Eighth Amendment.<sup>22</sup>

The analysis of the Eighth Amendment has not been stagnant, appropriately evolving with the "standards of decency" of a civilized society.<sup>23</sup> The courts have interpreted a sentence to violate the Eighth Amendment if it is excessive, meeting certain criteria. First, the sentence must be a purposeless and needless imposition of pain and suffering.<sup>24</sup> Second, the sentence must be grossly out of proportion to the severity of the crime.<sup>25</sup> From the retributive perspective, the punishment is excessive if it is harsher than the defendant deserves.<sup>26</sup> Sentencing every murderer to the death penalty, for instance, would be cruel and unusual because it should be rarely imposed and reserved for the most egregious murders.<sup>27</sup>

It was not until 2002 that the Court concluded for the first time that

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<sup>17</sup> Nellis, *supra* note 21.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 5.

<sup>20</sup> *Id.* at 1.

<sup>21</sup> *Id.*

<sup>22</sup> See, e.g., *Kennedy v. Louisiana*, 554 U.S. 407, 412 (2008) (prohibiting use of the death penalty where the crime did not result, and was not intended to result, in the death of the victim); see also *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (concluding that "death is not a suitable punishment for a[n] intellectually disabled person]" and is "excessive" under the Eighth Amendment); see also *Woodson v. North Carolina*, 428 U.S. 280, 301 (holding that mandatory imposition of capital punishment violated the Eighth Amendment).

<sup>23</sup> *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

<sup>24</sup> See *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (describing part one of the test for excessive punishment under the Gregg analysis).

<sup>25</sup> *Id.* (describing part two of the test for excessive punishment under the Gregg analysis).

<sup>26</sup> John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 Va. L. Rev. 899, 899 (2011).

<sup>27</sup> *Coley v. State*, 204 S.E.2d 612, 616 (Ga. 1973).

sentencing an intellectually disabled person to the death penalty was excessive and thus a cruel and unusual punishment violative of the Eighth Amendment.<sup>28</sup> That decision emphasized that the Eighth Amendment should be interpreted in a way that “comport[s] with “the progress of a maturing society.”<sup>29</sup> Some jurisprudence did not evolve at the same pace at which society began to reject these harsh punishments. It was not until 2005 that the Supreme Court held in *Roper v. Simmons* that sentencing children under eighteen to death constituted cruel and unusual punishment.<sup>30</sup> The core of this decision recognized for the first time that juveniles are less culpable and deserve less severe penalties than their adult counterparts.<sup>31</sup> The Court recognized the standards of decency were not only moral prerogatives, but derived from the influence of scientific advances in psychology and brain development in juveniles. The Court wrote that juveniles, compared to adults, “lack maturity and [have] an underdeveloped sense of responsibility,” that children are more vulnerable to peer pressure and negative influences, and that their character traits were not “as well-formed.”<sup>32</sup>

The Court did not hold that youth should be absolved of responsibility, but rather that courts should consider children’s actions attributable to their youth and lack of brain development in some cases. In other words, children should be considered less culpable than an adult committing the same offense.<sup>33</sup> The Court recognized the developments in psychology and brain science that evidenced the foundational differences between juveniles and adults and the vast capacity for change inherent in youth.<sup>34</sup>

Justice Scalia dissented in *Roper*, echoing an opinion he delivered sixteen years earlier holding the opposite: capital punishment for juveniles under eighteen did not constitute cruel and unusual punishment.<sup>35</sup> One possible reason for the dissent is that Justice Scalia was a textualist, which seemingly contradicts the Eighth Amendment’s evolving standards of decency approach. Although several courts had pointed out the concept of excessiveness of punishment according to the prevailing standards of 1685,<sup>36</sup> Justice Scalia urged them to reexamine the original meaning of the Amendment.<sup>37</sup> Justice Scalia was also a firm believer that the Supreme Court should judge rather

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<sup>28</sup> *Atkins*, 536 U.S. at 321.

<sup>29</sup> *Id.* at 311-312.

<sup>30</sup> *Roper*, 543 U.S. at 568.

<sup>31</sup> *Id.* at 571.

<sup>32</sup> *Id.* at 569-70.

<sup>33</sup> *Id.* at 570.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 608-9 (Scalia, J., dissenting); *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989).

<sup>36</sup> *Trop*, 356 U.S. at 100-101.

<sup>37</sup> *Roper*, 543 U.S. at 608 (Scalia, J., dissenting).

than nullify laws enacted by state legislatures, pointing out that national consensus was a mechanism the founding fathers used to prevent the Court from quashing statutes.<sup>38</sup> The dissent called the majority opinion lenient for abandoning the harsh punishments for juveniles.<sup>39</sup> The dissent also alleged that the majority's rationale had nothing to do with the decency standard but with an unnecessary sentiment of compassion towards guilty minors.<sup>40</sup>

Three years later, the Court heard *Kennedy v. Louisiana*, where the defendant was charged with the rape of a child, a non-homicidal offense, but nevertheless was sentenced to death.<sup>41</sup> The Court found the punishment in this context was cruel and unusual based on a national consensus that capital punishment is inconsistent with the evolving standards of decency that mark the progress of a maturing society, an approach with two sources of precedents.<sup>42</sup>

In 2010, the Supreme Court held under the same logic that a life without parole sentence for a juvenile who did not commit homicide violated the Eighth Amendment. This case, *Graham v. Florida*, was the first Eighth Amendment case in which the Court considered all the circumstances concerning a term-of-years sentence.<sup>43</sup> The trial court judge had decided the defendant, a sixteen-year-old child, was incorrigible. However, on appeal, the Supreme Court held that a categorical rule for all non-homicide juvenile cases would provide those children meaningful opportunities to demonstrate their rehabilitation as well as an opportunity for release.<sup>44</sup>

Promptly after the *Graham v. Florida* decision, a series of cases followed solidifying the concept that children are different than adults for the purposes of sentencing.<sup>45</sup> Two petitions for two fourteen-year-old individuals were argued before the Supreme Court in a single hearing asking for a bright-line rule that would ban life sentences for children.<sup>46</sup> The state had charged both Kuntrell Jackson and Evan Miller with murder.<sup>47</sup> These cases involved mandatory sentencing schemes that precluded judges from considering all the

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<sup>38</sup> *Id.* at 608-610.

<sup>39</sup> *Miller*, 567 U.S. at 494-95 (Roberts, J., dissenting).

<sup>40</sup> *See id.* at 501 (Roberts, J., dissenting) (stating that “[t]he principle behind today’s decision seems to be only that because are different from adults, they must be sentenced differently”).

<sup>41</sup> *Kennedy*, 554 U.S. at 412-13 (2008).

<sup>42</sup> *Id.* at 446-47.

<sup>43</sup> *Graham v. Florida*, 560 U.S. 48, 48 (2010).

<sup>44</sup> *Id.* at 79.

<sup>45</sup> *See Miller*, 567 U.S. at 461 (stating that, in considering the cases of two separate juvenile offenders, “a mandatory life-without-parole term for a fourteen-year-old violates the Eighth Amendment.”).

<sup>46</sup> *See id.*

<sup>47</sup> *Id.*; *see also* Petitioners’ Briefs on the Merits at 3-5, *Miller v. Alabama*, 567 U.S. 460 (2012) (Nos. 10-9646 and 10-9647).



circumstances surrounding a juvenile defendant's reckless behavior.<sup>48</sup>

In this landmark decision, the Court found that these schemes prevented judges from considering juveniles' "lessened culpability,"<sup>49</sup> weighing the mitigating factors, and balancing their "capacity for change"<sup>50</sup> and rehabilitation.<sup>51</sup> Writing for the majority, Justice Kagan developed a set of factors the sentencing court should consider, known as the Miller factors: immaturity, impetuosity, risk-taking, family and home, peer influence, understanding of the legal proceedings, and greater potential for rehabilitation.<sup>52</sup> The Court also made clear that life sentences for juveniles should be exceedingly rare and only imposed on youth deemed permanently incorrigible.

The conservative justices of the Miller court based their argument in the dissent on their view of the national consensus.<sup>53</sup> Accordingly, the dissent argued the people, through their state legislatures, had endorsed mandatory sentences for minors, providing "objective indicia"<sup>54</sup> of society's standards.<sup>55</sup> However, the dissent did not account for the veto a court's decision would face when each case appeared before the parole board or court for resentencing. The majority view did not grant immediate release to those serving mandatory life sentences for murders they committed while under eighteen. Instead, it provided an opportunity to have their progress during incarceration reviewed for possible parole or a lower sentence.

In responding to *Miller* and *Montgomery v. Louisiana*, which clarified that *Miller* should be applied retroactively, states could either allow those originally sentenced to life without parole when they were minors to go back to the trial court for a resentencing opportunity or go before a parole board for the chance of early release. States around the country have released many individuals in light of these opportunities. Yet, across the country, 1,716 people originally sentenced as children are still serving this type of lengthy

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<sup>48</sup> Brief for Petitioner at 2, *Kuntrell Jackson v. State*, 359 Ark. 87 (Ark. 2004) (No. 10-9647); Brief for Petitioner at 3, *Evan Miller v. State*, 148 So.3d 78 (Ala. Crim. App., 2013) (No. 10-9646).

<sup>49</sup> *Graham*, 560 U.S. at 68 (citing *Roper v. Simmons*, 543 U.S. 551, 569 (2005)).

<sup>50</sup> See *id.* at 74.

<sup>51</sup> *Miller*, 567 U.S. at 478.

<sup>52</sup> *Miller*, 567 U.S. at 472, 477.

<sup>53</sup> Mary Sigler, *The Political Morality of the Eighth Amendment*, 8 *Ohio St. J. Crim. L.* 403, 404 (2011) (the courts evaluate "objective indicia" by looking at legislative enactments, patterns of jury decision making, and international opinion as measures of contemporary values); see *Miller v. Alabama*, 567 U.S. 460, 482 (2012).

<sup>54</sup> Mary Sigler, *The Political Morality of the Eighth Amendment*, 8 *Ohio St. J. Crim. L.* 403, 411 (2011).

<sup>55</sup> *Miller*, 567 U.S. at 482.

sentences.<sup>56</sup> Although there is still a long way to go, twenty-five states and Washington, D.C. currently ban life without parole for juveniles, and seven other states have no one serving juvenile life without parole.<sup>57</sup>

*Montgomery* was decided four years after *Miller*. In 1963, a Louisiana court sentenced Henry Montgomery to death for killing a man when Montgomery was seventeen years old.<sup>58</sup> An appellate court overturned his conviction, and a new jury found him guilty again in 1970 without imposing the death penalty.<sup>59</sup> This decision immediately triggered a sentence of life without the possibility of parole under Louisiana's sentencing scheme.<sup>60</sup> By 2012, Montgomery was a sixty-three-year-old man who had spent forty-nine years imprisoned.<sup>61</sup> His legal team filed a suit in Louisiana, asking the court to apply *Miller* retroactively in that state.

*Miller* was not an immediate fix, but it was a stepping stone to Mr. Montgomery's release. The trial court denied the petition, and so did the Louisiana Supreme Court by denying a supervisory writ.<sup>62</sup> The United States Supreme Court granted certiorari over the *Montgomery* case<sup>63</sup> and decided that Mr. Montgomery—and virtually everyone convicted of life without parole when they were juveniles previous to *Miller*—faced an equally unconstitutional sentence.<sup>64</sup> This decision created hope for release for Montgomery and every other person sentenced to life without parole before they turned eighteen. Indeed, Montgomery was released in 2021 at age seventy-five, after serving almost sixty years imprisoned and surviving two denials of parole in 2018 and 2019.<sup>65</sup>

The progressive evolution of the decency standard was abruptly interrupted by the Supreme Court holding in *Jones v. Mississippi*.<sup>66</sup> The Court

<sup>56</sup> Josh Rovner, *Juvenile Life Without Parole: An Overview Sentencing Project*, SENT'G PROJECT (May 24, 2021), <https://www.sentencingproject.org/policy-brief/juvenile-life-without-parole-an-overview/>; Ashley Nellis, SENT'G PROJECT, *Life Goes On: The Historic Rise of Life Sentences in America* 11 (2013), <https://www.sentencingproject.org/reports/life-goes-on-the-historic-rise-in-life-sentences-in-america/>.

<sup>57</sup> *32 States and DC Ban or Have No One Serving Life Without Parole For Children*, CAMPAIGN FOR FAIR SENT'G YOUTH (Apr. 19, 2022), <https://cfsy.org/> (demonstrating that Idaho, New Mexico, Minnesota, Missouri, New York, and Maine have no one serving JLWP).

<sup>58</sup> *Montgomery v. Louisiana* 577 U.S. 190, 194 (2016) (citing *State v. Montgomery*, 181 So.2d 756, 762 (La. 1966)).

<sup>59</sup> *Id.* (citing *State v. Montgomery*, 242 So.2d 818, 818 (La. 1970)).

<sup>60</sup> *Id.*

<sup>61</sup> *See id.* at 195.

<sup>62</sup> *Id.* at 196 (citing *State v. Montgomery*, 2013-1163 (La. 6/20/14), 141 So. 3d 264, 264).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 213.

<sup>65</sup> Elyse Carmosino, *Convicted of Murder at 17, His Case Changed Juvenile Sentences. Louisiana Freed Him at Age 75*, ADVOCATE, (Nov. 17, 2021), [https://www.theadvocate.com/baton\\_rouge/news/article\\_8b7188a8-47b5-11ec-ac41-6befdfb0d59c.html](https://www.theadvocate.com/baton_rouge/news/article_8b7188a8-47b5-11ec-ac41-6befdfb0d59c.html).

<sup>66</sup> *Jones v. Mississippi*, 141 S. Ct. 1307, 1311 (U.S. 2021).

heard arguments in a case involving a fifteen-year-old boy, Jones, who murdered his grandfather.<sup>67</sup> The *Jones* trial judge did not make a separate finding of Jones' permanent incorrigibility, which *Miller* required. Nevertheless, the Supreme Court reasoned the Constitution did not compel an on-the-record explanation of the mitigating circumstances considered by the sentencer in life without parole cases.<sup>68</sup>

Jones did not disturb the central Court holdings in *Miller* and *Montgomery* that mandatory life sentences for children constitute cruel and unusual punishment, but did weaken the protections of the cases. The *Jones* court rejected the idea that a sentencing court must make a predicate finding that a child is permanently incorrigible before imposing a life sentence.<sup>69</sup>

### *B. Applying Miller to Late Adolescence in Eighth Amendment Analysis*

The Supreme Court's shift to protect children under eighteen from cruel and unusual punishment did not disrupt the line of cases justifying different outcomes in different matters for children of different ages.<sup>70</sup> The five *Miller* factors focused on the evidence that children are less culpable than adults and that they have a more significant chance at rehabilitation. The five factors identified in *Miller* are also relevant in late adolescence.<sup>71</sup> Thus, it follows that the same protections the Court afforded to adolescents should be extended to young people between eighteen and twenty-one, a period known as late adolescence.

Both science and past cases support extending the ban on life without parole to late adolescence. The Supreme Court relied heavily on adolescent brain science when drafting the *Miller* decision.<sup>72</sup> Brain science has explained why some children, even those who grow up in stable families and were educated by loving and dedicated parents, can act irrationally and get involved in criminal activity.<sup>73</sup> These findings have been acknowledged by the Supreme Court, reflecting that children are "less culpable" than adults.<sup>74</sup> In addition, the Court recognized that in imposing a sentence of life without parole on children,<sup>75</sup> the penalty becomes more severe because they naturally would spend more time imprisoned than an adult with the same sentence due to their

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<sup>67</sup> *Id.* at 1312.

<sup>68</sup> *Id.* at 1319.

<sup>69</sup> *Id.* at 1318-19.

<sup>70</sup> STEINBERG, *supra* note 7, at 189.

<sup>71</sup> *Miller*, 567 U.S. at 471-72.

<sup>72</sup> *Miller*, 567 U.S. at 471-72.

<sup>73</sup> See Gary B. Melton, *Developmental Psychology and the Law: The State of the Art*, 22 J. FAM. L. 445, 447-48 (1983-84) (including an introduction of brain science in court rulings).

<sup>74</sup> *Roper*, 543 U.S. at 588.

<sup>75</sup> *Miller*, 567 U.S. at 474-75.

age.<sup>76</sup> In *Roper v. Simmons*, the Supreme Court first recognized that children are more reckless, thoughtless, and susceptible to peer pressure than adults,<sup>77</sup> acknowledging that brain science has identified some neurobiological underpinnings that account for differences between children and adults.<sup>78</sup>

*i. Defining Characteristics of Adolescence*

Neuroscience demonstrates that the most important developmental changes in the brain occur between puberty and the early twenties.<sup>79</sup> There is hope for change even in those children whose circumstances are more conducive to a life in crime because of a neglectful or abusive environment. While early intervention is the ideal approach, the brain's plasticity is at its peak at the outset of adolescence, providing an excellent chance for rehabilitation.<sup>80</sup> Yet, the criminal system has not contemplated that an adolescent whose brain is in the most important developmental phase for restoration, is also increasingly impacted by the trauma of incarceration.<sup>81</sup> By placing adolescents in adult prisons, the government only reinforces antisocial behavior in an adolescent's character, which violates the advice of psychologists who advocate for educational centers for convicted children that can help reduce recidivism.<sup>82</sup>

Experts agree on one fact: brain development does not conclude until around twenty-four years old.<sup>83</sup> This fact also supports the long-standing data that radical and disruptive behavior declines during the early twenties, prompting less crime in adults.<sup>84</sup> This decrease in criminal behavior is attributable to a reduction in reward-and-sensation-seeking behavior that controls adolescents' behavior during puberty.<sup>85</sup>

*ii. Late Adolescents are Children, too, in the United States*

In the United States, the definition of a child is more nuanced than it first appears. While most states have adopted eighteen years old as the general

<sup>76</sup> Miller, 567 U.S. at 475.

<sup>77</sup> *Roper*, 543 U.S. at 569-70.

<sup>78</sup> STEINBERG, *supra* note 7, at 189.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> J.C. Gagnon, et. al., *Providing High-Quality Education in Juvenile Corrections: Next Steps*, 92 AM. J. ORTHOPSYCHIATRY Feb. 2022 at 435-436 (the largest meta-analysis of correctional educational studies found that individuals who participate in educational programs are 43% less likely to recidivate than those who do not).

<sup>83</sup> COAL. OF JUV. JUST., APPLYING RESEARCH TO PRACTICE: WHAT ARE THE IMPLICATIONS OF ADOLESCENT BRAIN DEVELOPMENT FOR JUVENILE JUSTICE? 18 (2006), [https://www.juvjustice.org/sites/default/files/resource-files/resource\\_138\\_0.pdf](https://www.juvjustice.org/sites/default/files/resource-files/resource_138_0.pdf).

<sup>84</sup> Brief of APA Amici Curiae at 4-5, *Miller v. Alabama*, 567 U.S. 460 (2012) (Nos. 10-9646 and 10-9647).

<sup>85</sup> *Id.* at 5.

age at which the Court recognizes one as an adult, historically, twenty-one years of age marked the end of childhood.<sup>86</sup> The states have adopted a bright-line approach in imposing a rule for minority ages, which understandably facilitates the anticipation of outcomes in children's cases but leaves very little room to consider a child's maturity, background, and upbringing.<sup>87</sup>

Fifty years ago, in *Wisconsin v. Yoder*, a landmark case involving childhood status, the Supreme Court questioned for the first time whether courts should consider a fifteen-year-old child's opinion on whether he should attend school.<sup>88</sup> Yoder's compulsory religious background dictated that he should not continue school attendance once he turned fifteen, even though he wanted to continue going to school.<sup>89</sup> The Court held that in compelling the parents to send the child to school, the State had violated the parents' religious freedom.<sup>90</sup> Justice Douglas dissented, writing that the practice of religion is a personal experience and that the Court should have respected a mature child's interest in overriding his parents' religious objections.<sup>91</sup> This view was not the majority view, but it influenced a new question seven years later: whether a child could bypass her parents' opinions to get an abortion. In 1979, the Court held in *Bellotti v. Baird* that a statute requiring parental consent for abortions was unconstitutional.<sup>92</sup> The Court held that most pregnant individuals under the age of eighteen were capable of validly consenting to an abortion.<sup>93</sup>

Both decisions created the foundations of what is known as the Mature Minor Doctrine.<sup>94</sup> Yet, both decisions evidenced an apparent confusion about children's rights. First, the *Yoder* court established that a fifteen-year-old child had to submit to his parents' opinions regarding his academic future. In the dissent's words, this was a case where the Court's decision imperiled the future of the child because it barred Yoder from entering "an amazing world of diversity," and violated the Bill of Rights that would prevent Yoder from being the "master of [his] own destiny."<sup>95</sup> Second, although the *Bellotti* court recognized that the Court could not equate children with adults because children are peculiarly vulnerable and unable to make critical decisions in an informed manner when lacking parental consent, a court could balance

<sup>86</sup> DOUGLAS E. ABRAMS ET AL., CHILDREN AND THE LAW: DOCTRINE, POLICY, AND PRACTICE 18 (7th ed. 2020).

<sup>87</sup> *Id.*

<sup>88</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972).

<sup>89</sup> *Id.* at 207-08.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 242-43.

<sup>92</sup> *Bellotti v. Baird*, 443 U.S. 622, 624 (1979).

<sup>93</sup> *Id.* at 628.

<sup>94</sup> ABRAMS ET AL., *supra* note 99, at 80.

<sup>95</sup> *Yoder*, 406 U.S. at 245-46.

whether the minor was mature enough to decide to get an abortion.<sup>96</sup>

However, the maturity of youth and ability to make critical decisions are not as appreciated when children are tried and convicted as adults.<sup>97</sup> For example, although the Court recognized that due process applied to children in *In Re Gault*,<sup>98</sup> it also recognized due process came with the ability to punish children similarly to adults. The exceptional practice of trying children as adults became more regular during the “get tough” era in the 1990s.<sup>99</sup> When treating children as adults, courts continue to hold children to a high standard of maturity, even when science concludes their character is not yet fully formed, and impulsivity and peer pressure tend to dominate their decisions.

For example, between 2003 and 2008, Florida transferred almost 200 children to adult courts per 100,000 cases, positioning Florida as the “clear outlier” according to the Federal Office of Juvenile Justice and Delinquency Prevention.<sup>100</sup> Between 2010 and 2014, Florida alone transferred 11,000 children to adult court due to prosecutorial discretion.<sup>101</sup> Most legislatures do not allow children younger than eighteen to enter into a contractual obligation, yet children in this state were expected to negotiate plea agreements, even when harsh penalties were involved.<sup>102</sup>

On the other hand, Virginia passed a statute known as the Serious Offender Statue in 1996,<sup>103</sup> allowing courts to sentence children to blended sentences which involve a juvenile penalty and an adult Department of Corrections sentence.<sup>104</sup> The statute allows youth to appear before the judge who sentenced them for a review. The judge can then suspend their sentences if the juvenile has successfully engaged in rehabilitative and educational programs during the juvenile portion of their incarceration.<sup>105</sup> This process serves as an incentive for children to work toward rehabilitation in the hope that they will be

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<sup>96</sup> *Bellotti v. Baird*, 443 U.S. at 622-23.

<sup>97</sup> See Jarod K. Hofacket, *Justice or Vengeance: How Young Is Too Young for A Child to Be Tried and Punished As an Adult?*, 34 TEX. TECH L. REV. 159, 161 (2002).

<sup>98</sup> *Application of Gault*, 387 U.S. 1, 13-15 (1967).

<sup>99</sup> *Moral Poverty*, CHI. TRIB., (Dec. 15, 1995) [perma.cc/8LCD-VV9X] (a deplorable period in the late 1980s and 1990s characterized by mass hysteria over a predicted rise in juvenile violent crime--were these principles temporarily abandoned); Peter Annin, 'Superpredators' Arrive: Should We Cage the New Breed of Vicious Kids?, NEWSWEEK (Jan. 22, 1996) [perma.cc/GTW9-CFBF].

<sup>100</sup> Eli Hager, *The Worst State for Kids Up Against the Law*, MARSHALL PROJECT (Mar. 24, 2015), <https://www.themarshallproject.org/2015/03/24/the-worst-state-for-kids-up-against-the-law>.

<sup>101</sup> Cynthia Soohoo, *You Have the Right to Remain A Child: The Right to Juvenile Treatment for Youth in Conflict with the Law*, 48 COLUM. HUM. RTS. L. REV. 1, 7 (2017).

<sup>102</sup> *Commonwealth v. Castro*, 262 A.3d 482 (Pa. Super. Ct. 2021).

<sup>103</sup> See VA. CODE § 16.1-285.2 (2023).

<sup>104</sup> Julie E. McConnell, *Unshackled: Stories of Redemption Among Serious Youth Offenders*, 25, Rich. Pub. Interest L. Rev., 68, 84 (2022).

<sup>105</sup> VA. CODE § 16.1-285.2 (2023).

released early.<sup>106</sup>

There was little recognition of adolescent brain development science and a relentless push to try more children as adults during the eighties and nineties.<sup>107</sup> In 2006, data registered the highest number of delinquency cases waived to adult courts.<sup>108</sup> Though these judicially-waived cases increased by a mere 9% between 2005 and 2009, the number of cases further increased to 27% by 2019.<sup>109</sup> These only confirm that science has evolved, but the culture of treating children as adults remains largely undisturbed. While society seemed to accept as reasonable punishing children by trying them as adults, there has been no successful move to lower the age at which young people could gain the privileges of adulthood, such as voting, legally purchasing alcohol, entering into contracts, or joining the military.<sup>110</sup>

## II. ADOLESCENTS HAVE MORE IN COMMON WITH LATE ADOLESCENTS THAN YOUNG ADULTS VIS-À-VIS THE *MILLER* FACTORS

The periods of adolescence and late adolescence have much in common, but society, the legislatures, and the courts are reluctant to accept it. In appreciating the similarities of both groups of individuals, this article advocates a limit on sentences of life without parole for those who were late adolescents when they committed their crimes.<sup>111</sup> This expansion of *Miller* would allow judges to determine case-by-case whether late adolescents' mitigating circumstances should allow them to be sentenced similarly to the adolescents under *Miller*.

### A. Similarities according to Miller Factor 1: Immaturity, Impetuosity, Risk-taking

Laurence Steinberg, one of the leading experts in developmental psychology, defines adolescence as lasting approximately fifteen years, concluding at twenty-five years of age.<sup>112</sup> The brain is highly malleable during this period, presenting both a risk and an opportunity for adolescents and late

<sup>106</sup> Julie E. McConnell, *Blended Sentencing in Virginia Circuit Courts*, NAT'L. ASS'N. OF CRIM. DEF. LAW., <https://www.nacdl.org/getattachment/67f0e4bc-99e3-46c1-a096-68a3919ae9a5/serious-offender-review-hearings.pdf>.

<sup>107</sup> COAL. OF JUV. JUST., *supra* note 96, at 28.

<sup>108</sup> SARAH HOCKENBERRY & CHARLES PUZZANCHERA, NAT'L CTR. FOR JUV. JUST., JUVENILE COURT STATS. 2019 38 (2019), <https://www.ojjdp.gov/ojstatbb/njcda/pdf/jcs2019.pdf>.

<sup>109</sup> *Id.*

<sup>110</sup> ABRAMS ET AL., *supra* note 99.

<sup>111</sup> COAL. OF JUV. JUST., *supra* note 96, at 28.

<sup>112</sup> STEINBERG, *supra* note 7, at 5.

adolescents.<sup>113</sup> Malleability explains why adolescents are often extreme risk-takers, conduct that disseminates at the end of late adolescence.<sup>114</sup> It also explains why this group of people has great potential for rehabilitation when their incarceration has a rehabilitative goal, unlike imprisonment in an adult prison which is more focused on punishment.<sup>115</sup>

The Court has been considering the importance of neuroscience in the legal field since *Roper*. Notably, the Supreme Court's decisions following *Roper* repeatedly consider the effects of brain development in juveniles' decision-making.<sup>116</sup> As time has passed since *Miller*, the American Psychology Association has conducted several investigations identifying the similarities between adolescents and late adolescents, supporting a higher age ban on life without parole for late adolescents.

For example, developmental research on psychosocial functioning in adolescence measured adolescents' attitudes, behaviors, and perceptions, indicating they are different from adults.<sup>117</sup> These brain changes also show that several changes in brain regions occur that shape the individual's impulses, control of their emotions, and self-regulation, suggesting these cognitive capacities do not mature until late adolescence.<sup>118</sup> For these reasons, it is appropriate to expand consideration of the *Miller* factors to those individuals between eighteen and twenty-one at the time of their offense.

#### *B. Similarities according to Miller Factor 2: Family & Home*

Similar to chronological age, the Supreme Court recognized that a child's upbringing could be a mitigating factor.<sup>119</sup> The Court recaptured the importance of the family background of the youth in *Miller* as the second factor, contending life without parole "prevents taking into account the family and home environment that surrounds" the juvenile.<sup>120</sup>

A body of research shows that many adolescents and late adolescents involved in the criminal justice system experienced traumatic events and

<sup>113</sup> *Id.* at 9.

<sup>114</sup> *Id.* at 16.

<sup>115</sup> *See id.*

<sup>116</sup> Laurence Steinberg, *Adolescent Brain Science and Juvenile Justice Policymaking*, 23 PSYCH, PUB. POL'Y & L. 410, 411 (2017).

<sup>117</sup> *See generally* Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCH. ASS'N 1009 (2003).

<sup>118</sup> Laurence Steinberg, *Adolescent: Developmental and Juvenile Injustice*, 5 ANN. REV. CLIN. PSYCH. 459, 468 (2009).

<sup>119</sup> *See generally* *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

<sup>120</sup> *Miller*, 567 U.S. at 461.



adverse childhood experiences<sup>121</sup> growing up that may have influenced their involvement in the criminal system.<sup>122</sup> These experiences are intrinsically connected to brain plasticity, making the adolescent brain more responsive to arousal, including adverse and stressful events such as abuse or neglect.<sup>123</sup> In households where parents are stable, caring, and patient, juveniles tend to develop reasonable grounds for self-control, which keeps them out of trouble.<sup>124</sup> Late adolescents who suffered caretaker maltreatment when they were children or who witnessed parental substance abuse, violence, or parental incarceration, are more likely to struggle with social dysregulation.<sup>125</sup> Young people who experience poverty and other traumas may have less cortical surface on their brains, diminishing their capacity for language acquisition and the possibility for positive social change during adolescence.<sup>126</sup> These neurologic changes in juveniles are perceivable through MRI and electrophysiological methods.<sup>127</sup>

### C. Similarities according to Miller Factor 3: Peer Influence

Adolescents and late adolescents are equally susceptible to peer pressure. The mere presence of peers increases impulsivity during adolescents' decision-making.<sup>128</sup> This pattern changes at the end of late adolescence, decreasing the necessity to satisfy others for rewards.<sup>129</sup> For adolescents, peer presence heavily influences their decision-making. Predictors are not better for late adolescents whose immaturity reflects their poor choices.<sup>130</sup> This similarity between adolescents and late adolescents marks a fundamental indicator that late adolescents' brains are more akin to adolescent brains than adult brains. As with adolescents, late adolescents are more susceptible to making reckless decisions when they are with peers than alone, explaining why many crimes by adolescents typically involve groups of peers.<sup>131</sup>

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<sup>121</sup> Abigail A. Fagan & Abigail Novak, *Adverse Childhood Experiences and Adolescent Delinquency in a High-Risk Sample: A Comparison of White and Black Youth*, 16 YOUTH VIOLENCE & JUV. JUST. 395, 395-99 (2018).

<sup>122</sup> INSEL, ET. AL., *supra* note 10, at 22.

<sup>123</sup> STEINBERG, *supra* note 7, at 122.

<sup>124</sup> *Id.*

<sup>125</sup> See INSEL, ET. AL., *supra* note 10, at 21.

<sup>126</sup> Emily C. Merz et al., *Socioeconomic Inequality and the Developing Brain: Spotlight on Language and Executive Function*, 0 CHILD DEV. PERSP. 1, 2 (2018).

<sup>127</sup> *Id.*

<sup>128</sup> Jorien Van Hoorn et al., *Hanging Out With the Right Crowd: Peer Influence on Risk-Taking Behavior in Adolescence*, 27 J. RSCH. ON ADOLESCENCE 189, 189 (2016).

<sup>129</sup> Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 DEVELOPMENTAL REV. 78, 92 (2008).

<sup>130</sup> Steinberg, *supra* note 129, at 415.

<sup>131</sup> INSEL, ET. AL., *supra* note 10, at 24.

*D. Similarities according to Miller Factor 4: Understanding the Legal Proceedings*

The United States criminal system is accusatorial and often relies on interrogations, which can sometimes elicit false confessions, more commonly in adolescents.<sup>132</sup> The malleability occurring in their brains renders adolescents more susceptible to interrogation than adults.<sup>133</sup> Decades of research suggests adolescents do not fully comprehend their *Miranda* rights or the implications of waiving *Miranda* rights.<sup>134</sup> The *Miller* court held that the “inability to deal with police officers or prosecutors” and the “incapacity to assist [juveniles] own attorneys” were limitations natural to juvenile offenders.<sup>135</sup>

Late adolescents tend to favor immediate reward over long-term consequences, much like younger adolescents, and tend to be quicker to waive their *Miranda* rights, take plea agreements without consideration, and falsely confess, hoping that those decisions will help hasten the end of encounters with police or prosecutors.<sup>136</sup> Data suggest defense attorneys are rarely present during late adolescents’ interviews, a factor shared with adolescents.<sup>137</sup> This absence of legal representation explains why adolescents and late adolescents are susceptible to falsely confessing to crimes they did not commit when faced with police techniques designed to deceive defendants.<sup>138</sup> Several scholars suggest a congressional mandate to protect adolescents and late adolescents from making unintelligent waivers.<sup>139</sup> In a study that measured youth’s perceptions of police and police methods, particularly their manners in treating children, were biased towards youth’s gender, age, and race/ethnicity.<sup>140</sup> While interrogations are stressful themselves, youth’s perception of police bias only degrades their decision-making, proving adversarial to juveniles’ self-interest.<sup>141</sup>

*E. Similarities according to Miller Factor 5: Greater Potential for Rehabilitation*

The Court in *Miller* restated prior holdings that juveniles’ character is not

<sup>132</sup> Caitlin N. August & Kelsey S. Henderson, *Juveniles in the Interrogation Room: Defense Attorneys as a Protective Factor*, 27 PSYCH. PUB. POL’Y & L. 268, 268 (2021).

<sup>133</sup> SEE STEINBERG, *supra* note 7, at 195.

<sup>134</sup> INSEL, ET. AL., *supra* note 10, at 27.

<sup>135</sup> *Miller*, 567 U.S. at 477-78.

<sup>136</sup> August & Henderson, *supra* note 145, at 270.

<sup>137</sup> *Id.*

<sup>138</sup> STEINBERG, *supra* note 7, at 194.

<sup>139</sup> August & Henderson, *supra* note 145, at 269.

<sup>140</sup> Adam D. Fine et al., *Measuring Youths’ Perceptions of Police: Evidence from the Crossroads Study*, 28 PSYCH. PUB. POL’Y & L. 92, 95, 103 (2022).

<sup>141</sup> INSEL, ET. AL., *supra* note 10, at 29.

as well-formed as that of an adult.<sup>142</sup> Children neurologically, like late adolescents, have a character that is not fully matured. Thus, mandatory sentencing schemes “disregard the possibility of [juveniles’] rehabilitation”<sup>143</sup> because harsh sentences like life without parole “forswear[] the rehabilitative ideal altogether.”<sup>144</sup>

As discussed previously, late adolescent brains learn similarly to adolescent brains.<sup>145</sup> Moreover, brain research has shown that significant maturity occurs between adolescence to adulthood and into the early twenties.<sup>146</sup> This maturation process is evident when looking at late adolescents who have been chronically involved in the criminal system and age out of antisocial behavior as they enter adulthood. This change occurs regardless of punitive intervention.<sup>147</sup> Late adolescents can achieve “remorse, renewal, and rehabilitation”<sup>148</sup> when sentenced to institutions for people their age focused more on rehabilitative progress. This fact is consistent with brain changes that corroborate a decline in seeking novel experiences from late adolescence to adulthood.<sup>149</sup>

The five factors summarized in *Miller* are thus applicable to both adolescents and late adolescents as these two groups are so akin to each other and very distinguishable from adults. Similarly to those under eighteen, late adolescents deserve “some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.”<sup>150</sup>

### III. AN EXAMPLE OF A SUCCESSFUL EXTENSION OF MILLER FACTORS TO A LATE ADOLESCENT

#### *A. United States of America v. Jermaine Jarrell Sims*

On February 17, 1998, the government indicted Jermaine Jarrell Sims on six counts of purchasing firearms later used in the 1997 NationsBank robbery in Richmond, Virginia, when he was twenty-one.<sup>151</sup> Although he did not

<sup>142</sup> Roper, 543 U.S. at 570.

<sup>143</sup> Miller, 567 U.S. at 495 (citing *J.D.B. v. North Carolina*, 564 U.S. 261, 269 (2011)).

<sup>144</sup> Graham, 560 U.S. at 74.

<sup>145</sup> See generally INSEL, ET. AL., *supra* note 10, at 29 (noting how middle and late adolescents are more likely to make risky decisions when feeling stressed).

<sup>146</sup> See generally Brief of APA Amici Curiae at 3-4, 13, *Miller v. Alabama*, 567 U.S. 460 (2012) (Nos. 10-9646, 10-9647) (noting the difference between adults and adolescents in their early twenties).

<sup>147</sup> INSEL, ET. AL., *supra* note 10, at 37.

<sup>148</sup> Graham, 560 U.S. at 79.

<sup>149</sup> STEINBERG, *supra* note 7, at 42.

<sup>150</sup> Miller, 567 U.S. at 479.

<sup>151</sup> *U.S. v. Sims*, No. 3:98-CR-45, 2021 WL 1603959, at \*1 (E.D. Va. Apr. 23, 2021).

participate in the robbery or directly assist the defendants in robbing the bank, the court convicted Sims on six counts, including conspiracy under 18 U.S.C. § 371, multiple aiding and abetting charges, use of a semiautomatic assault weapon in relation to a crime of violence under 18 U.S.C. §§ 924(c)(1)&(2), causing the death of another through use of a firearm under 18 U.S.C. §§ 924(j)(1)&(2), false statement in connection with the acquisition of a firearm under 18 U.S.C. §§ 922(a)(6) & 924(a)(2), and transfer of the firearm for use in a crime of violence under 18 U.S.C. § 924 (h).<sup>152</sup>

The presiding judge at the trial and sentencing, the late Richard L. Williams, made a statement on the record that sentencing Sims to a mandatory sentence of life without parole plus 120 months amounted to a cruel and unusual punishment under the Eighth Amendment.<sup>153</sup> Sims' attorney filed an appeal, but the Fourth Circuit did not endorse Judge Williams' finding that Sims' sentence violated the Eighth Amendment.<sup>154</sup>

Judge Williams made findings that Sims' involvement in providing a firearm to one of the individuals convicted of committing the robbery could not be the compelling fact for such an outrageous mandatory minimum sentence. Judge Williams distinguished Sims' participation from the defendants who robbed the bank and killed the bank teller, alleging he did not deserve the same punishment when Sims' involvement was comparatively limited.<sup>155</sup> The judge essentially anticipated the *Miller*<sup>156</sup> decision when he stated for the record the reasons why life without parole as a mandatory sentence should not apply to Sims' case.<sup>157</sup> He further stated in a clemency letter in 2009 that Sims should not have had "to receive the same mandatory life sentence to which the actual perpetrators were sentenced."<sup>158</sup>

Sims served twenty-three years in prison, where he displayed extraordinary model behavior. Even Judge Williams wrote a letter of support on behalf of Sims' release, but the Fourth Circuit and other authorities denied Sims' applications on two occasions in 2011 and 2017.<sup>159</sup> Sims filed a resentencing proceeding with the passage of the First Step Act,<sup>160</sup> which Congress stressed

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at \*1, \*6.

<sup>156</sup> *Miller*, 567 U.S. at 476-477 (stating "Under these schemes, every juvenile will receive the same sentence as every other—the 17-year-old and the 14-year-old, the shooter and the accomplice, the child from the stable household and the child from a chaotic and abusive one. And still worse, each juvenile (including these two 14-year-olds) will receive the same sentence as the vast majority of adults committing similar homicide offenses..." emphasis added).

<sup>157</sup> *Sims*, No. 3:98-CR-45, 2021 WL 1603959, at \*1.

<sup>158</sup> *Id.* at \*5.

<sup>159</sup> *Id.* at \*1.

<sup>160</sup> *Id.* at \*2; *see also* First Step Act of 2018, Pub. L. No. 115 - 391, 132 Stat 5194; 18 U.S.C. § 924(c).

was essential to reduce unnecessary incarceration that did not serve the ends of justice.<sup>161</sup>

During his incarceration, Sims availed himself of numerous vocational and educational opportunities.<sup>162</sup> The Court found that Sims' record during incarceration reflected that he would not put public safety in danger if he were to be released.<sup>163</sup> The Court noted Sims had not committed any infractions since 1999,<sup>164</sup> consistent with the brain development findings science had confirmed. The Court found that Sims was not technically a juvenile at his arrest.<sup>165</sup> Nonetheless, it incorporated the *Miller* factors in determining the existence of extraordinary and compelling reasons under 18 U.S.C. § 3582 (c).<sup>166</sup> The Court further reasoned that precedent supported the district court's focus on "the defendants' relative youth," meeting the scientific findings that youth included those whose ages fluctuated between nineteen and twenty-four at the time of their offense.<sup>167</sup> The Court found the *United States v. McCoy* case compelling to Sims' case because the defendant in McCoy was nineteen-years-old, and neurological development impacted his positive and prosocial behavior.<sup>168</sup> As outlined below, the Court applied some of the *Miller* factors to Sims' case.

*i. Miller Factor 1: Immaturity, Impetuosity, Risk-taking.*

The Court found Sims was twenty-one years old at his arrest. Based on well-regarded scientific research, the Court further found that Sims had acted with impulsivity, risking a three-year plea deal in exchange for proving his innocence, even when he had sold the guns used in the crime.<sup>169</sup>

*ii. Miller Factor 4: Understanding the Legal Proceedings*

At his arrest, Sims was just twenty-one years old and had not previously been involved in the federal justice system. Sims had no experience in understanding his legal proceedings. Although the government offered Sims a plea of three years, he thought his right to a trial would represent a better opportunity to be released; thus, he rejected the plea agreement and was sentenced to life in prison.<sup>170</sup>

<sup>161</sup> See *U.S. v. Simons*, 375 F. Supp. 3d 379, 389 (E.D.N.Y. 2019).

<sup>162</sup> *Sims*, No. 3:98-CR-45, 2021 WL 1603959, at \*1.

<sup>163</sup> *Id.* at \*5.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at \*6.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* (citing *U.S. v. McCoy*, 981 F.3d 271, 286 (4th Cir. 2020)).

<sup>168</sup> *U.S. v. McCoy*, 981 F.3d 271, 286 (4th Cir. 2020).

<sup>169</sup> *Sims*, No. 3:98-CR-45, 2021 WL 1603959, at \*7.

<sup>170</sup> *Id.* at \*5-6.

*iii. Miller Factor 5: Greater Potential for Rehabilitation*

The Court found Sims had spent his years of incarceration “pursuing every opportunity to improve his mind and character.”<sup>171</sup> During his imprisonment, Sims worked as a supervisor, and his performance demonstrated he was “self-driven, dependable, and a vital team member, who constantly [sought] self-improvement.”<sup>172</sup> At the time of his release, Sims was a forty-two-year-old man who had passed the years of reckless impulsivity, susceptibility to peer pressure, and had a fully developed brain. Sims took numerous academic courses, including earning a paralegal certificate from the Blackstone Career Institute.<sup>173</sup>

The Court granted Sims’s motion to reduce his sentence and released him.

## CONCLUSION

In the United States, there is no consensus on the definition of childhood or who belongs to that category. Courts arbitrarily define a party as a child depending on the particular case or reason they appear before the court. Such assignment feels haphazard, since children have varying levels of autonomy. At fifteen, they can decide on their medical treatment, including whether an abortion is appropriate. Thirteen states have no minimum age for trying children as adults: Alaska, Delaware, Florida, Hawaii, Idaho, Maine, Maryland, Michigan, Pennsylvania, Rhode Island, South Carolina, Tennessee, and West Virginia.<sup>174</sup> Some states allow children to be prosecuted as adults at ten, twelve, or thirteen years old.<sup>175</sup> However, these same children cannot vote until eighteen or consume alcohol or tobacco until twenty-one (in most states). Although extensive scientific research on brain maturation has shown that children are reckless because recklessness is an intrinsic characteristic of adolescence—which is deeply intertwined with brain development—children are expected to behave, think, and make decisions like adults would for sentencing purposes.

The Supreme Court has stated that children are persons of age seventeen and younger. The Court also held that children are significantly different from adults, which serves as mitigation for sentencing purposes. In *Miller*, the Court held that children’s qualities and circumstances, including immaturity, impulsivity, family circumstances, peer pressure, lack of

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<sup>171</sup> *Id.* at \*5.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at \*7.

<sup>174</sup> *Children in Adult Prison*, EQUAL JUST. INITIATIVE, <https://eji.org/issues/children-in-prison/> (last visited Jan. 29, 2023).

<sup>175</sup> *Id.*

understanding of the legal system, and capacity for rehabilitation, are factors to consider as mitigators when sanctioning children.

Scientific research on brain growth has shown that adolescence is a period that starts at age ten and ends at age twenty-five, and that children between eighteen to twenty-five years old are in a similar state known as late adolescence. Brain studies evidence that late adolescents share many of the same characteristics as children seventeen years old and younger because their brains are also not fully developed. This research on brain development explains adolescents' and late adolescents' reckless behavior, which typically concludes at age twenty-five. Courts should consider holding late adolescents to the same standard as seventeen-year-old children and younger by applying cases such as *Miller v. Alabama*, at a minimum, to individuals between the ages of eighteen and twenty-one.