No. 14-280

IN THE

Supreme Court of the United States

HENRY MONTGOMERY,

Petitioner,

—v.—

STATE OF LOUISIANA,

Respondent.

ON WRIT OF CERTIORARI TO
THE LOUISIANA SUPREME COURT

BRIEF OF *AMICUS CURIAE* AMERICAN BAR ASSOCIATION IN SUPPORT OF PETITIONER

WILLIAM C. HUBBARD
Counsel of Record
PRESIDENT
AMERICAN BAR ASSOCIATION
321 North Clark Street
Chicago, Illinois 60654
(312) 988-5000
abapresident@americanbar.org

Of Counsel:

LAWRENCE A. WOJCIK
KENNETH L. SCHMETTERER
KATHERINE E. CHAMBERS
AMANDA E. REAGAN

Counsel for Amicus Curiae American Bar Association

QUESTION PRESENTED

In this brief, *amicus curiae* American Bar Association addresses the first Question Presented:

Whether *Miller v. Alabama*, 132 S. Ct. 2455 (2012), adopts a new substantive rule that applies retroactively on collateral review to people condemned as juveniles to die in prison.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

Page(s)

Page(s)

Page(s)

STATUTES

Page(s)

OTHER AUTHORITIES

Page(s)

U.S. CONSTITUTION

STATEMENT OF INTEREST[1]

Pursuant to Supreme Court Rule 37.3, the American Bar Association ("ABA") as *amicus curiae*, respectfully submits this brief in support of Petitioner. The ABA urges this Court to hold that *Miller* applies retroactively. *Miller* recognized that sentencing a juvenile to life in prison without parole will only rarely comport with the Eighth Amendment. Juveniles sentenced to die in prison under mandatory sentencing schemes before *Miller* must thus be resentenced to ensure that "this harshest possible penalty" has not been unconstitutionally imposed.

With nearly 400,000 members, the ABA is the leading association of legal professionals and one of the largest voluntary professional membership organizations in the United States. Its members practice in all fifty states, the District of Columbia, the U.S. Territories, and other jurisdictions, and include prosecutors, public defenders, private defense counsel, and appellate lawyers. They also include attorneys in law firms, corporations, non-profit organizations, and governmental agencies, as well as judges, legislators, law professors, law

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* certifies that no counsel for a party authored this brief in whole or in part, and no person other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

students, and non-lawyer "associates" in related fields.[2]

For over forty years, the ABA has worked to ensure appropriate protections for juvenile defendants when transferred to the adult criminal justice system and has taken positions against imposing capital punishment and life without the possibility of parole on juvenile offenders. In 1980, after ten years of work, the ABA promulgated a comprehensive body of Juvenile Justice Standards, addressing the entire juvenile justice continuum, from police handling and intake to adjudication, disposition, and juvenile corrections.[3]

During the 1980s, the perceived increase in juvenile crime and the advent of the label "super-

---

[2] Neither this brief nor the decision to file it reflects the views of any judicial member of the ABA. No inference should be drawn that any member of the Judicial Division Council participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to its filing.

[3] Merril Sobe & John D. Elliott, *The IJA-ABA Juvenile Justice Standards*, Crim. Justice, 24 (Fall 2004). Only recommendations that are presented to and adopted by the ABA's House of Delegates ("HOD") become ABA policy. The HOD is comprised of 560 delegates representing states and territories, state and local bar associations, affiliated organizations, sections and divisions, ABA members, and the Attorney General of the United States, among others. *See House of Delegates – General Information*, A.B.A., http://www.abanet.org/leadership/delgates.html (last visited July 24, 2015). The ABA policies dating from 1988 onward that are discussed in this brief are available online at http://www.americanbar.org/directories/policy.html. Policies dated prior to 1988 are available from the ABA.

predator" for certain juveniles led to the passage of laws that facilitated the transfer of juveniles to adult court and increased their exposure to adult sentences.[4] Concerned with the growing imposition of capital punishment on juvenile offenders, the ABA adopted policy in 1983 that opposed "the imposition of capital punishment upon any person for an offense committed while under the age of eighteen."[5] The ABA did so, despite its long-standing policy of taking no position on the death penalty as a general matter, after concluding that the arguments used to support capital punishment for adults, including retribution and deterrence, did not apply in the same manner to juveniles.

The ABA has repeatedly reaffirmed its position that "children are different." In 1991, the ABA adopted policy that opposed life without the possibility of parole for juvenile offenders,[6] and in 1997, the ABA supported a moratorium on the death

---

[4] Haley Van Erem, *State Responses to* Graham *and* Miller*: A Policy Proposal that Recognizes Children Are Different*, 50 No. 4 Crim. L. Bull. 891 (Summer 2014) (citing Michelle Marquis, Note, Graham v. Florida*: A Game-Changing Victory for Both Juveniles and Juvenile-Rights Advocates*, 45 Loy. L.A. L. Rev. 255, 262-64 (2011)).

[5] ABA Policy # 117A (adopted Aug. 1983) and its accompanying report are available from the ABA. The policy was cited in *Stanford v. Kentucky,* 492 U.S. 361, 388 (1989) (Brennan, J., dissenting), and in *Thompson v. Oklahoma,* 487 U.S. 815, 830 (1988).

[6] ABA Policy # 119 (adopted Feb. 1991) (endorsing the United Nations Convention on the Rights of the Child), *available at* http:www.americanbar.org/content/dam/aba/directories/policy/1991_my_119.authcheckdam.pdf.

penalty until jurisdictions implemented procedures that, *inter alia,* "prevent[ed] execution of . . . persons who were under the age of 18 at the time of their offenses."[7] Also in 1997, the ABA created a task force that, in 2001, published its report, *Youth in the Criminal Justice System: Guidelines for Policymakers and Practitioners* (2001) ("Guidelines").[8] This report, noting that at least 200,000 juveniles were being tried as adults each year, presented seven general principles, including that "[y]outh are developmentally different from adults, and these developmental differences need to be taken into account at all stages and in all aspects of the adult criminal justice system." *Id.* at 7.

The ABA drew upon its expertise and efforts to protect children in the juvenile justice system when it filed its *amicus curiae* brief in *Roper v. Simmons,* 543 U.S. 551 (2005), in which this Court ruled that the death penalty was unconstitutional when imposed on juvenile offenders.[9] Thereafter, the ABA adopted ABA Policy #105C (adopted Feb. 2008),[10] in which the ABA urged that all jurisdictions

---

[7] ABA Policy # 107 (adopted Feb. 1997), *available at* http://www.americanbar.org/groups/committees/death_penalty_representation/resources/dp-policy/moratorium-1997.html.

[8] *Available at* http://www.campaignforyouthjustice.org/documents/natlres/ABA%20%20Youth%20in%20the%20Criminal%20Justice%20System%20Guidelines%20for%20Policymakers.pdf.

[9] The ABA's *amicus curiae* brief is available at http://www.americanbar.org/content/dam/aba/migrated/amicus/briefs/was154586715.authcheckdam.pdf.

[10] *Available at* http://www.americanbar.org/content/dam/aba/directories/policy/2008_my_105c.authcheckdam.pdf.

implement sentencing laws and procedures that both protect public safety and appropriately recognize the mitigating considerations of age and maturity of offenders under the age of 18 at the time of their offenses.

The ABA's juvenile justice work also provided the basis for the ABA's *amicus curiae* brief in *Graham v. Florida*, 560 U.S. 48 (2010),[11] in which this Court held that a sentence of life without the possibility of parole is unconstitutional for juvenile offenders convicted of non-homicide crimes. 560 U.S. at 75-76. It likewise provided the basis for the ABA's *amicus curiae* brief in *Miller*,[12] in which this Court held unconstitutional a sentence of mandatory life in prison without the possibility of parole for juvenile offenders convicted of homicide, and in which the Court concluded that, because of juveniles' diminished culpability and greater prospects for reform, it was the Court's expectation that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Id.* at 2469.

Finally, when disagreement developed among the states about whether *Miller* should be applied retroactively, the ABA adopted policy urging that all

---

[11] The ABA's *amicus curiae* brief is available at http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_07_08_08_7412_PetitionerAmCuABA.authcheckdam.pdf.

[12] The ABA's *amicus curiae* brief is available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/109646_petitioneramcuaba.authcheckdam.pdf.

jurisdictions "[e]liminate life without the possibility of release or parole for youthful offenders both prospectively and retroactively," and provide them "with meaningful periodic opportunities for release based on demonstrated maturity and rehabilitation beginning at a reasonable point into their incarceration, considering the needs of the victims."[13]

SUMMARY OF ARGUMENT

As explained in the Statement of Interest, the ABA for many years has devoted considerable time and resources to the study and improvement of the juvenile justice system, including the formulation of policy which directly bears on the issue here. It is precisely because of these extensive efforts that the ABA submits this *amicus* brief in support of the Petitioner's position.

The ABA respectfully submits that *Miller* fundamentally altered Eighth Amendment jurisprudence as to when a sentence of life without parole is permissible for a juvenile. *Miller* not only barred states from imposing mandatory life without parole sentences on juveniles, but also made clear that this harshest of juvenile sentences is constitutionally permissible only for "the rare juvenile offender whose crime reflects irreparable corruption." 132 S. Ct. at 2469. Under the retroactivity analysis of *Teague v. Lane*, *Miller* announced a substantive rule severely restricting the

---

[13] ABA Policy #107C (adopted Feb. 2015), *available at* http://www.americanbar.org/content/dam/aba/images/abanews/2015mm_hodres/107c.pdf.

circumstances under which a juvenile can be sentenced to life without parole. Under the rule in *Miller,* the great majority of juveniles serving life without parole are serving a sentence that the law cannot constitutionally impose on them. That is the epitome of a substantive rule that should be applied retroactively.

As demonstrated below, retroactive treatment of *Miller* is necessary to avoid unjust and unconstitutional treatment of juvenile offenders, will not unduly burden the states, and does not implicate the same concerns of finality and deterrence that this Court has considered in other cases addressing the possible retroactive application of a new constitutional rule. Indeed, several states have recognized this fact and either through court decision or legislative action have applied *Miller* retroactively and commenced resentencing hearings. *Miller* and the Court's decisions in *Roper* and *Graham* are all premised on juveniles' lesser culpability and greater capacity to change. Because nearly all juvenile offenders sentenced to mandatory life without parole before *Miller* are serving a sentence that the law cannot impose on them, it is only just that they be given the opportunity to demonstrate, at some point before dying in prison, that they too are capable of change.

ARGUMENT

I. *Miller v. Alabama* Announced a Substantive Rule That Applies Retroactively.

In *Miller*, this Court held that the Eighth Amendment's bar on cruel and unusual punishments precludes sentencing schemes under which juveniles receive a mandatory sentence of life without the possibility of parole. The question in this case is whether that rule should apply retroactively to juveniles whose convictions became final before *Miller* was announced.

Miller articulated a "new" constitutional rule—that is, a rule that was not dictated by previous precedent. Accordingly, under *Teague v. Lane*, 489 U.S. 288 (1989) and its progeny, the rule in *Miller* does not apply retroactively to cases on collateral review unless it is either a "substantive" rule or a "watershed" rule of criminal procedure. The question the ABA addresses here is whether *Miller* set forth a "substantive" rule within the meaning of this Court's retroactivity doctrine.[14]

A careful examination of *Miller* itself, including the decisions on which *Miller* relied, and the principles underlying the distinction between "substantive" and "procedural" rules, demonstrates that the holding in *Miller* is a substantive rule that should apply retroactively to all juveniles who were mandatorily sentenced to life without parole. *Miller*

---

[14] This brief does not address whether *Miller* set out a "watershed" rule of criminal procedure.

changed the Eighth Amendment rule as to when life without parole is a constitutionally permissible sentence for a juvenile, severely constricting the states' ability to impose such a punishment. In short, *Miller* did not merely set out a procedural mechanism designed to make decisions more accurate, it changed the *substance* of Eighth Amendment doctrine regarding what punishments are cruel and unusual for juveniles.

A. *Miller* Was Based on the Eighth Amendment's Substantive Guarantee of Proportionality.

Miller is a case about proportionality under the Eighth Amendment. *See* 132 S. Ct. at 2463 (explaining that the Eighth Amendment embodies "the basic precept of justice that punishment for crime should be graduated and proportioned to both the offender and the offense") (internal quotation marks omitted). It addressed whether, and under what circumstances, life without the possibility of parole could be a proportional—and hence constitutional—sentence for offenders who committed their crimes as juveniles.

The Court explained that this question "implicate[s] two strands of precedent reflecting our concern with proportionate punishment." *Id. First*, the Court relied on decisions that "adopted categorical bans on sentencing practices based on a mismatch between the culpability of a class of offenders and the severity of a penalty." *Id. Second,* it relied on decisions that "prohibited mandatory imposition of capital punishment, requiring that

sentencing authorities consider the characteristics of a defendant and the details of his offense before sentencing him to death." *Id.* at 2463–64. "[T]he confluence of these two lines of precedent leads to the conclusion that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment." *Id.* at 2464.

1. The first strand of precedent included decisions like *Roper v. Simmons*, 543 U.S. 551 (2005) (death penalty may not be imposed on juveniles), and *Graham v. Florida*, 560 U.S. 48 (2010) (life without parole may not be imposed on juveniles who did not commit homicide), which "establish that children are constitutionally different from adults for purposes of sentencing." *Miller*, 132 S. Ct. at 2464. "Because juveniles have diminished culpability and greater prospects for reform," *Roper* and *Graham* hold that "they are less deserving of the most severe punishments." *Id.* at 2464 (internal quotation marks omitted). Specifically, "children have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking." *Id.* (internal quotation marks omitted). They "are more vulnerable . . . to negative influences and outside pressures." *Id.* And, perhaps most significantly here, "a child's character is not as well formed as an adult's; his traits are less fixed and his actions less likely to be evidence of irretrievable depravity." *Id.* (internal quotation marks and brackets omitted).

Those "distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when

they commit terrible crimes." *Miller*, 132 S. Ct. at 2465. Because minors are less blameworthy, "the case for retribution is not as strong with a minor as with an adult." *Id.* (internal quotation marks omitted). Moreover, juveniles' "immaturity, recklessness, and impetuosity" mean that they are unlikely to be deterred by "potential punishment." *Id.* Finally, a sentence of life without parole requires "making a judgment that he is incorrigible—but incorrigibility is inconsistent with youth." *Id.* (internal quotation marks and brackets omitted). For all these reasons, "life-without-parole sentences . . . may violate the Eighth Amendment"—that is, the Eighth Amendment's substantive guarantee that punishment will be proportional to the crime—"when imposed on children." *Id.*

Miller reasoned that mandatory imposition of life without parole on juveniles "prohibit[s] a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender" and thus "contravenes *Graham's* (and also *Roper's*) foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." 132 S. Ct. at 2466.

2. Because the Court viewed a life without parole sentence for a juvenile as analogous to a death sentence—the harshest possible available sentence, which mandates that the juvenile offender will die in prison—*Miller* also relied on a second strand of precedent. Those decisions require "that capital defendants have an opportunity to advance, and the judge or jury a chance to assess, any mitigating

factors, so that the death penalty is reserved only for the most culpable defendants committing the most serious offenses." 132 S. Ct. at 2467 (citing *Sumner v. Shuman*, 483 U.S. 66, 74-76 (1987); *Eddings v. Oklahoma*, 455 U.S. 104, 110-12 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978)); *see id.* at 2464 (citing *Woodson v. North Carolina*, 428 U.S. 280 (1976)). "In light of *Graham*'s reasoning," the Court explained, "these decisions too show the flaws of imposing mandatory life-without-parole sentences on juvenile homicide offenders. . . . Such mandatory penalties . . . preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it," by applying the same sentence to all juvenile and adult offenders alike regardless of culpability or the likelihood of change in the future. *Id.* at 2467–68.

3. Synthesizing these two lines of precedent, the Court held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders." *Miller*, 132 S. Ct. at 2469. "By making youth . . . irrelevant to the imposition of that harshest prison sentence, *such a scheme poses too great a risk of disproportionate punishment.*" *Id.* (emphasis added). Indeed, the Court noted, "given all we have said . . . about children's diminished culpability and heightened capacity for change, *we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.* That is especially so because of the great difficulty . . . of distinguishing at this early age between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile

offender whose crime reflects irreparable corruption." *Id.* (emphasis added) (internal quotation marks omitted).

In short, *Miller* held that the inherent characteristics of juvenile offenders—even those who have committed homicide—will typically render a sentence of life without parole unconstitutionally disproportionate. It required states to give meaningful consideration to the characteristics of youth before imposing life without parole on a juvenile precisely because of the "great . . . risk of disproportionate punishment" that would otherwise exist. *Id.*

B. *Miller*'s Holding Is Substantive Under This Court's Retroactivity Doctrine.

Whether *Miller*'s holding is retroactive under this Court's doctrine turns on whether the holding is viewed as "substantive" or "procedural." The principles underlying this Court's retroactivity doctrine demonstrate that *Miller*'s holding is "substantive" for retroactivity purposes. In a nutshell, *Miller* held that most of those serving mandatory life in prison without parole sentences for crimes committed as juveniles are serving sentences the state cannot constitutionally impose. That is the very essence of a substantive rule.

1. In *Teague v. Lane*, 489 U.S. 288 (1989), this Court set out its retroactivity doctrine, in which new constitutional rules typically are applied to cases pending on direct review but are not retroactive to cases on collateral review. *Teague* identified two

exceptions to that rule: A new rule should be applied retroactively if (1) "it places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe"; or (2) "it requires the observance of those procedures that . . . are implicit in the concept of ordered liberty"—that is, it is a "watershed" rule of criminal procedure. *Id.* at 307, 311 (plurality).

In *Penry v. Lynaugh*, 492 U.S. 302 (1989), the Court clarified that the first *Teague* exception applies to "substantive categorical guarantees accorded by the Constitution." *Id.* at 329. For instance, where "the Eighth Amendment, as a substantive matter, prohibits imposing the death penalty on a certain class of defendants because of their status, or because of the nature of their offense," the rule should be retroactive. *Id.* at 329–30. That is so because "the Constitution itself deprives the State of the power to impose a certain penalty, and the finality and comity concerns underlying [the general rule of nonretroactivity] have little force." *Id.* at 330.

More recently, in *Schriro v. Summerlin*, 542 U.S. 348 (2004), the Court gave additional content to the distinction between substantive constitutional guarantees, which apply retroactively, and merely procedural rules, which do not. "New *substantive* rules generally apply retroactively," "because they necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him." *Id.* at 351–52 (internal quotation marks omitted). By contrast, "[n]ew rules of

procedure . . . generally do not apply retroactively," because "[t]hey do not produce a class of persons convicted of conduct the law does not make criminal" or facing an unconstitutional punishment, "but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Id.* at 352. Put differently, "[a] rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." *Schriro*, 542 U.S. at 353. "In contrast, rules that regulate *only the manner of determining* the defendant's culpability are procedural." *Id.*

Schriro determined that the rule of *Ring v. Arizona*, 536 U.S. 584 (2002)—which held that, under the Sixth Amendment, an aggravating factor necessary to imposition of the death penalty must be found by the jury, not the judge—was "procedural" and thus not retroactive under those principles. 542 U.S. at 358–59. The Court explained that *Ring* "did not alter the range of conduct Arizona subjected to the death penalty"; "[i]nstead, *Ring* altered the range of permissible methods for determining whether a defendant's conduct is punishable by death, requiring that a jury rather than a judge find the essential facts bearing on punishment." *Id.* at 353. "[T]he range of conduct punished by death in Arizona was the same before *Ring* as after. . . . This Court's holding that, *because Arizona* has made a certain fact essential to the death penalty, that fact must be found by a jury, is not the same as *this Court's* making a certain fact essential to the death penalty. The former was a procedural holding; the latter would be substantive." *Id.* at 354.

2. Under these principles, *Miller*'s holding is a substantive rule. Although *Miller* did not categorically bar life without parole sentences for juveniles, it nonetheless recognizes a "substantive . . . guarantee accorded by the Constitution," *Penry*, 492 U.S. at 329—the guarantee that, under the Eighth Amendment, life without parole may be imposed only on "the rare juvenile offender whose crime reflects irreparable corruption." *Miller*, 132 S. Ct. at 2469.

In *Schriro*'s terms, *Miller*'s holding is substantive because there is "a significant risk that [a juvenile] defendant" sentenced before *Miller* "faces a punishment that the law cannot impose upon him." 542 U.S. at 352. Indeed, *Miller* made precisely that point: Mandatory life without parole is unconstitutional as applied to juveniles because "such a scheme poses too great a risk of disproportionate punishment"—punishment that the Constitution forbids. 132 S. Ct. at 2469.

In other words, unlike *Ring*, which merely required states to change the *decisionmaker*—from the judge to the jury—*Miller* sets new requirements that must be satisfied for the *decision* itself to be constitutional. As *Schriro* explained, "this Court's making a certain fact essential to the death penalty . . . would be substantive," and such a holding would be retroactive. 542 U.S. at 354. Here, *Miller* has effectively made certain facts essential to the constitutional imposition of life without parole on juveniles—facts that, before *Miller*, decisionmakers

in states with mandatory sentencing schemes could not consider at all.

Before *Miller,* every juvenile convicted of a homicide offense could constitutionally be sentenced to life in prison without the possibility of parole. After *Miller*, such a sentence is permitted only in the "rare" and "uncommon" case in which the juvenile's crime and character reflect irreparable corruption. Outside of that exceptional case, each person serving a sentence of mandatory life in prison without parole for crimes committed as a juvenile is now serving a sentence that the State may not lawfully impose.

3. Because *Miller* addressed the scope of the constitutional guarantee against cruel and unusual punishment, *Miller* established a substantive rule. Most constitutional provisions governing criminal proceedings—like the Sixth Amendment jury-trial right at issue in *Ring*—mandate *procedural* protections for defendants. *See Schriro*, 542 U.S. at 353 (noting that "the Sixth Amendment's jury-trial guarantee . . . has nothing to do with the range of conduct a State may criminalize"). By contrast, the Eighth Amendment has everything to do with the range of conduct a State may criminalize—and with the range of punishment a State may impose on a specific offender. It imposes *substantive* restrictions on a State's authority to punish, and new rules regarding those substantive restrictions should thus be applied retroactively.

The Eighth Amendment cases on which *Miller* relied bolster this point. *Roper, Graham,* and *Atkins v. Virginia*, 536 U.S. 304 (2002) (barring the death

penalty for the intellectually disabled), have all been applied retroactively.[15] Those are cases in which the Court held that "the Eighth Amendment, as a substantive matter, prohibits imposing the death penalty [or life without parole] on a certain class of defendants because of their status"—*Penry*'s archetype of a substantive rule. 492 U.S. at 329–30. *Miller*'s rule likewise reflects a new understanding of the Eighth Amendment's substantive guarantee; the only difference between *Miller* and *Roper, Graham,* and *Atkins* is that *Miller* held that the Eighth Amendment prohibits imposing life without parole on juveniles, not categorically, but in all but the very rare cases.

---

[15] *See Penry*, 492 U.S. at 329-30 (making clear that rule eventually adopted in *Atkins* would be applied retroactively); *see also*, *e.g.*, *Arroyo v. Dretke*, 362 F. Supp. 2d 859, 883 (W.D. Tex. 2005), *aff'd on other grounds sub nom.*, *Arroyo v. Quarterman*, 222 Fed. App'x 425 (5th Cir. 2007) (unpublished) (per curiam) (applying *Roper* retroactively to case on collateral review); *In re Sparks*, 657 F.3d 258, 262 (5th Cir. 2011) (acknowledging that *Roper* has been given retroactive effect); *Moore v. Biter*, 725 F.3d 1184, 1190-91 (9th Cir. 2013) ("Thus, we hold that *Graham* is retroactive under *Teague*."); *In re Moss*, 703 F.3d 1301, 1303 (11th Cir. 2013) (holding that offender made a prima facie showing that "*Graham* has been made retroactively applicable by the Supreme Court to cases on collateral review"); *Bell v. Cockrell*, 310 F.3d 330, 332 (5th Cir. 2002) (holding that *Atkins* applies retroactively to collateral attacks, including habeas relief); *Hill v. Anderson*, 300 F.3d 679, 681 (6th Cir. 2002) (acknowledging *Atkins* applies retroactively); *see also In re Henry*, 757 F.3d 1151, 1160 (11th Cir. 2014) (same); *In re Holladay*, 331 F.3d, 1169, 1173 (11th Cir. 2003) (same); *Martin v. Symmes*, 782 F.3d 939, 942 (8th Cir. 2015) (same); *Ochoa v. Sirmons*, 485 F.3d 538, 540 (10th Cir. 2007) (same); *Woods v. Buss*, 234 F. App'x 409, 411 (7th Cir. 2007) (same).

To be sure, not all decisions grounded in the Eighth Amendment articulate new substantive rules. Some Eighth Amendment decisions do not alter the basic understanding of what the Amendment forbids, but instead impose procedural protections designed to increase the accuracy of sentencing determinations. When an Eighth Amendment decision is *solely* concerned with defining the procedure necessary to protect the pre-existing understanding of the Eighth Amendment guarantee, it may not be applicable retroactively as a substantive rule.[16] *Miller*, however, both articulated a new substantive understanding of the Eighth Amendment and imposed a procedural requirement to vindicate that understanding.

4. Lower courts finding the rule in *Miller* nonretroactive have relied heavily on language in *Miller* stating that "[o]ur decision does not categorically bar a penalty for a class of offenders or type of crime—as, for example, we did in *Roper* or *Graham*. Instead, it mandates only that a sentencer

---

[16] For that reason, the Court has held that certain new rules grounded in the Eighth Amendment do not apply retroactively. *See, e.g.*, *Beard v. Banks*, 542 U.S. 406, 408 (2004) (rule of *Mills v. Maryland*, 486 U.S. 367 (1988), that juries may not disregard mitigating factors not found unanimously); *Sawyer v. Smith*, 497 U.S. 227 (1990) (rule of *Caldwell v. Mississippi*, 474 U.S. 320 (1985), that jury may not be led to believe that ultimate responsibility for sentencing defendant to death lies elsewhere). Unlike *Miller*, *Mills* and *Caldwell* merely addressed the appropriate jury instructions to maximize the accuracy of the sentencing process; they did not change the understanding of the scope of the underlying bar on cruel and unusual punishment.

follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." 132 S. Ct. at 2471. Those courts have concluded that because *Miller* requires a new process—an individualized sentencing hearing—it is "procedural," not substantive, and therefore not to be applied retroactively.[17]

That analysis is fundamentally wrong. *Miller*'s newly required procedure is only designed to implement its new substantive rule. The existence of a procedure necessary to enforce a substantive rule does not mean that the rule itself is merely procedural. *Atkins*, for example, required states to adopt new procedures to determine whether capital defendants had intellectual disabilities, but the underlying rule in *Atkins* was undoubtedly substantive: The Eighth Amendment forbade executing those with intellectual disabilities. So too here.

Nor does *Miller*'s statement that it did not "categorically bar a penalty for a class of offenders" render the rule in *Miller* purely procedural. *Miller* itself makes clear that a new rule need not be *categorical* to be *substantive.* A new rule under which life without parole is only *rarely* a proportionate sentence for juvenile offenders is just

---

[17] *See, e.g.*, *Johnson v. Ponton*, 780 F.3d 219, 222 (4th Cir. 2015); *People v. Tate*, --- P. 3d ---, 2015 WL 3452609, at *11, 2015 Colo. 42, ¶ 60 (Colo. June 1, 2015); *State v. Tate*, 130 So. 3d 829, 834, 837 (La. 2013), 130 So. 3d 829, 834, reh'g denied (Jan. 27, 2014), cert. denied, 134 S. Ct. 2663, 189 L. Ed. 2d 214 (2014).

as substantive as a new rule under which it is *never* a proportionate sentence. In both cases, failure to apply the rule retroactively creates "a significant risk that a defendant . . . faces a punishment that the law cannot impose upon him." *Schriro*, 542 U.S. at 352. Indeed, in cases like this one, which fundamentally altered the scope of the prohibition on cruel and unusual punishment, the Court has never refused to give retroactive effect to its decisions.[18] As explained further below, the Court should not reach a contrary result here. It is not consistent with basic principles of fairness to continue to force a prisoner to serve a sentence that the Court has held youth makes disproportionate.

II. Retroactive Application of *Miller* Is Necessary To Avoid Unjust Treatment of Juvenile Offenders and Will Not Unduly Burden the States.

This Court's retroactivity doctrine weighs the potential injustice of refusing to apply a new constitutional rule to all affected defendants against the states' interest in finality. In many cases, that balance counsels in favor of respecting finality. Here, however, the balance tips sharply in the other direction. The injustice of refusing to apply *Miller* retroactively is far greater, and the burden on the states from doing so far less, than in the typical case. The very point of *Miller* is that juveniles change; and

---

[18] *E.g.*, *Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida*, 560 U.S. 48 (2010); *Atkins v. Virginia*, 536 U.S. 304 (2002); *Lockett v. Ohio*, 438 U.S. 586, 608 (1978); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

unless *Miller* is retroactive, most juveniles condemned to die in prison under a mandatory sentencing scheme will never have the opportunity to demonstrate either their capacity for change or that they have in fact changed. Moreover, the rule in *Miller* will have little effect on finality. It undoes no convictions and requires no one to be released from prison. It merely requires that a small group of prisoners receive a hearing to determine whether they should someday have the opportunity to seek release. For these reasons, a majority of states have interpreted *Miller* to apply retroactively or have enacted reforms consistent with *Miller*'s new rule.

A. Applying *Miller* Retroactively Is the Only Just Result.

Miller's premise is that because juvenile offenders are less culpable and have greater capacity for change, they must be treated differently from adults in sentencing. Fair treatment requires that *Miller*'s new rule be applied retroactively, so that no juvenile offenders are denied the opportunity to establish their capacity for change before they die in prison.

Indeed, the longer juvenile offenders have already served in prison, the greater is the likelihood that they can demonstrate the kind of changed character that might entitle them to the possibility of parole. Likewise, the longer juvenile offenders have already served in prison, the more disproportionate is the continued incarceration for those who may be able to demonstrate that their crimes reflect the "unfortunate yet transient immaturity" of youth

rather than bad character. *Miller,* 132 S. Ct. at 2469.

As *Miller* noted, "[i]mprisoning an offender until he dies alters the remainder of his life by a forfeiture that is irrevocable. . . . And this lengthiest possible incarceration is an especially harsh punishment for a juvenile, because he will almost inevitably serve more years and a greater percentage of his life in prison than an adult offender." 132 S. Ct. at 2466. At the same time, "[l]ife without parole forswears altogether the rehabilitative ideal"; "[i]t reflects an irrevocable judgment about an offender's value and place in society, at odds with a child's capacity for change." *Id.* at 2465 (internal quotation marks and brackets omitted).

Miller recognized that life without parole may be imposed only on "the rare juvenile offender whose crime reflects irreparable corruption." *Miller*, 132 S. Ct. at 2469. Refusing juvenile offenders the chance to demonstrate that they did not fall within that category when they were sentenced under mandatory sentencing schemes, or do not fall within that category now, unnecessarily subjects them to a significant risk of serving out an irrevocable sentence that is disproportionate and therefore unconstitutional under the Eighth Amendment.

B. Applying *Miller* Retroactively Would Not Meaningfully Affect States' Interest in Finality.

The states' interest in finality, which underpins the general rule of non-retroactivity, is particularly weak here. One justification for finality is deterrence. *See Teague*, 489 U.S. at 309 ("Without finality, the criminal law is deprived of much of its deterrent effect."). However, whatever the relationship may be between finality and deterrence of *adult* conduct, children are different. "[T]he same characteristics that render juveniles less culpable than adults—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment" and thus much less likely than adults to be deterred by the prospect of punishment. *Miller*, 132 S. Ct. at 2465. Especially given that applying *Miller* retroactively would not vacate juvenile offenders' convictions or necessarily even modify their sentences, retroactivity would not undermine deterrence.

The states' interest in finality also encompasses an interest in avoiding the expense and difficulty of repeated trials long after the offense. That interest is also not meaningfully implicated here. Applying *Miller* retroactively would not mean repeated re-litigation of convictions that were the result of trials that conformed to contemporary constitutional standards; it would not automatically undo any juvenile offender's life sentence. What is at issue here is merely whether those juvenile offenders should be given the opportunity at some point during their lives to demonstrate that they

have changed. As Justice Harlan's influential separate opinion in *Mackey v. United States*, 401 U.S. 667, 691 (1971), put it, finality in the criminal law ensures that "attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community." *Id.* at 690. Because *Miller* merely requires that juvenile offenders be given an opportunity to demonstrate their capacity for rehabilitation and their ability to rejoin society, preserving their constitutionally infirm sentences cannot reasonably be justified by an interest in finality.

Moreover, as demonstrated by the states that have already determined that *Miller* should be applied retroactively, any burden on the courts from resentencing those affected by *Miller* would be minimal. Only a limited number of juvenile offenders would be affected.[19] When *Miller* was decided in 2012, approximately 2,500 juvenile offenders of the approximately 1,600,000 people imprisoned in the United States[20] were serving

---

[19] *See, e.g., People v. Williams*, 982 N.E.2d 181, 198 (Ill. App. Ct. 2012) ("At oral argument the State informed the court that approximately 105 convicted defendants in Illinois have life without parole sentences and would be affected if the *Miller* holding is applied retroactively. This is not such a great number of cases for us to conclude that it is an unreasonable burden for the State and the courts to reopen their cases for resentencing.").

[20] U.S. Dep't of Justice, Bureau of Justice Statistics, *Correctional Populations in the United States, 2011*, at 2–3 (Nov. 2012) (reporting that the number of prisoners under the jurisdiction or legal authority of state and federal adult correctional officials at the end of 2011 was1,598,780).

sentences of life without parole.[21] Approximately 90% of those individuals were serving sentences imposed pursuant to mandatory sentencing regimes.[22] At that time, 38 states permitted imposition of life without parole upon juvenile offenders 14 years of age or older, and 28 states mandated a life without parole sentence for certain types of offenses and under certain circumstances.[23]

In the states that either have held that *Miller* does not apply retroactively[24] or have not decided the issue of retroactivity, only a limited number of

---

[21] *See* Erik Eckholm, *A Murderer at 14, Then a Lifer, Now a Man Pondering a Future*, N.Y. Times, at A1 (Apr. 11, 2015) (noting that most of the 2,500 juvenile offenders serving life without parole sentences when *Miller* was decided were sentenced under mandatory sentencing schemes); *see also* Connie de la Vega & Michelle Leighton, *Sentencing Our Children to Die in Prison: Global Law and Practice*, 42 U.S.F. L. Rev. 983, 985 & n.11 (2007-2008) ("[Human Rights Watch']s most recent count of state cases suggests that there are at least 444 child offenders serving LWOP sentences now in Pennsylvania and a total of 2484 child offenders serving LWOP sentences nationwide.") (citing Human Rights Watch, *Executive Summary: The Rest of Their Lives: Life Without Parole for Youth Offenders in the United States in 2008*, at 3 (2008)).

[22] Brief of Petitioner, at 24–25, *Miller v. Alabama,* 567 U.S. __, 132 S. Ct. 2455 (2012) (Nos. 10-9646).

[23] Brief of *Amici Curiae* State of Michigan, Eighteen (18) Other States, and One (1) Territory for Respondents, at 1, *Miller v. Alabama,* 567 U.S. __, 132 S. Ct. 2455 (2012) (Nos. 10-9646, 10-9647); *Miller*, 132 S. Ct. at 2471.

[24] The highest courts of 19 states have addressed the issue, and of those, 7 have refused to apply *Miller* retroactively: Alabama, Colorado, Louisiana, Minnesota, Michigan, Pennsylvania, and Montana.

juvenile offenders would be entitled to resentencing.[25] For example, in Michigan there are approximately 370 juvenile offenders who would be entitled to a resentencing.[26] In Pennsylvania, there are approximately 470 juvenile offenders who would be affected.[27] Alabama has around 80 juvenile offenders presently serving mandatory life without parole sentences,[28] and Louisiana has an estimated 230.[29]

In short, just treatment of juvenile offenders serving unconstitutional sentences outweighs any

---

[25] *See* Eckholm, *A Murderer at 14, Then a Lifer, Now a Man Pondering a Future*, N.Y. Times, at A1 (Apr. 11, 2015) (estimating that 1,130 prisoners in Louisiana, Michigan, Minnesota, and Pennsylvania could be affected by *Miller*'s retroactive application).

[26] *See* Dan O'Connor, *Juvenile Lifers: Miller v. Alabama and Michigan*, Senate Fiscal Agency (Aug. 16, 2012) ("Speaking on behalf of the MDOC, Executive Bureau Administrator Russell Marlan and Legislative Liaison Jessica Peterson stated that the Department had looked through its population and determined that there are 370 individuals for whom the [*Miller*] decision may be applicable.").

[27] *See* Moriah Balingit, *Other states watch how Pennsylvania handles life terms for juveniles*, Pittsburgh Post-Gazette (Sept. 23, 2012) ("The Philadelphia-based Juvenile Law Center estimates there are about 470 inmates . . . who are serving life sentences for crimes they committed before their 18th birthday . . . .").

[28] Kent Faulk, *Alabama Supreme Court says SCOTUS ruling on juvenile killers not retroactive* (Mar. 27, 2015).

[29] Erik Eckholm, *Juveniles Facing Lifelong Terms, Despite Rulings*, N.Y. Times, at A1 (Jan. 20, 2015).

state's interest in finality, or the minimal burden to its courts in conducting resentencings.

C. The Federal Government and Many States Have Recognized that Fairness Dictates *Miller*'s Retroactive Application.

The federal government has repeatedly conceded that *Miller* applies retroactively to habeas cases.[30] As the First Circuit recognized, "[t]he government plays a central role in criminal law enforcement . . . [and] it is fair to say that the government is generally resistant to collateral review of criminal convictions and sentences." *Evans-Garcia v. United States*, 744 F.3d 235, 238-39 (1st Cir. 2014) (certifying that *Miller* qualified as a basis for habeas relief on a second or successive petition where government made the "exceedingly rare" concession that *Miller* applied retroactively). State attorneys general have made similar concessions.[31] The federal and state governments' "exceedingly rare" decisions to concede the retroactivity of a rule favoring prisoners, in addition to the number of states expressly holding that *Miller* applies retroactively,

---

[30] *See, e.g.*, *Johnson v. United States*, 720 F.3d 720, 720 (8th Cir. 2013) ("The government here has conceded that *Miller* is retroactive . . . ."); *Wang v. United States*, No. 13–2426 (2d Cir. July 16, 2013) (unpublished) (relying in part on the government's concession to certify a second or successive habeas petition based on *Miller*).

[31] *See, e.g.*, *People v. Tate*, --- P. 3d ---, 2015 WL 3452609, at *22, 2015 Colo. 42, ¶ 104 (Colo. June 1, 2015) (Hood., J. dissenting) (recognizing that "[w]hile such a concession is not binding on this court, it is certainly telling").

supports the conclusion that government interests are not unduly harmed by giving juvenile offenders the benefit of the rule in *Miller* no matter when their sentences were imposed.

Most state courts that have addressed the issue agree that *Miller* applies retroactively.[32] To date, the highest courts of twelve states have ruled that *Miller* applies retroactively,[33] and the resentencing process under *Miller* has commenced in those states.

Moreover, states have demonstrated that they are equipped to handle the changes required by *Miller* without undue disruption to the criminal justice system. For example, as one of Florida's appellate courts noted, the burden of resentencing its 266 defendants "will not be onerous in terms of determining what sentence to impose as the appellate courts [in Florida] are already addressing the issue for defendants whose sentences were

---

[32] *See People v. Tate*, 2015 Colo. 42, at ¶ 103 (Hood., J. dissenting).

[33] *Kelley v. Gordon*, 2015 Ark. 277, 6 (Ark. June 18, 2015); *Casiano v. Comm'r of Correction*, 317 Conn. 52 (May 26, 2015); *Falcon v. State*, 162 So. 3d 954, 962 (Fla. 2015); *People v. Davis*, 6 N.E.3d 709 (Ill. 2014); *In re State*, 103 A.3d 227, 234 (N.H. 2014); *Ex parte Maxwell*, 424 S.W.3d 66, 75 (Tex. Crim. App. 2014); *State v. Mantich*, 842 N.W.2d 716, 730-31 (Neb. 2014); *Aiken v. Byars*, 765 S.E.2d 572, 575 (S.C. 2014); *Jones v. State*, 122 So. 3d 698, 703 (Miss. 2013); *State v. Mares*, 335 P.3d 487, 508 (Wyo. 2014); *Diatchenko v. Dist. Attorney*, 466 Mass. 655, 666, 1 N.E.3d 270, 281 (Mass. 2013); *State v. Ragland*, 836 N.W.2d 107, 117 (Iowa 2013).

pending when *Miller* was issued."[34] In fact, Florida is now using a discretionary sentencing scheme.[35] In interpreting Florida's post-*Miller* legislation to apply retroactively, the Florida Supreme Court made clear that a life without parole sentence will rarely be warranted for a juvenile offender and that such sentences must be reviewed critically to be faithful to *Miller*.[36]

Illinois, too, has already begun holding resentencing hearings in accordance with *Miller*. In fact, one petitioner, Addolfo Davis, was given a resentencing hearing, and then re-sentenced to a term of life in prison without the possibility of parole.[37] As evidenced by the court's sentencing order, individuals who were mandatorily sentenced to life without parole can conceivably receive that same sentence upon resentencing, but only after the judge has considered the mitigating factors of youth and the juvenile offender's proven capacity to change in accordance with *Miller*.

In addition, states have legislative options available to provide opportunities for subsequent judicial review of sentences or parole hearings after a

---

[34] *Toye v. Florida*, No. 2D12–5605 (Fla. Dist. Ct. App. Jan. 22, 2014).

[35] Laws of Florida, Chapter 2014-220(b)(1).

[36] *Horsley v. Florida*, 160 So. 3d 393, 405, (Fla. 2015).

[37] Resentencing Order, *People v. Davis*, No. 91CR-03548 (Ill. Cir. Ct. Cook Cnty. May 4, 2015).

set number of years[38] for most juvenile offenders convicted of homicide.[39] Those new laws are already being applied retroactively to juvenile offenders currently serving life without parole sentences.[40]

As the experiences of these states illustrate, there are many ways in which a State can ensure that individuals who are serving sentences of mandatory life without parole receive a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 2469 (quoting *Graham,* 130 S. Ct. at 2030). The minimal burden associated with a court's provision of the resentencing determinations is outweighed by the interests of the discrete population of juvenile offenders who are currently serving a sentence that the State may not constitutionally impose after *Miller*. This Court should hold that *Miller* set out a substantive rule that applies retroactively, and that

---

[38] The ABA takes no position in this brief on what is a reasonable length of time before judicial sentence reviews or parole hearings are given to juvenile offenders, or whether any of the laws cited in this section adequately respond to *Miller*'s directives.

[39] *See* 11 Del. Code § 4204A(d); Cal. Pen. Code § 1170(d)(2)(A); Fla. Stat. § 921.1402(2)(a); W.V. Code § 61-11-23(b); Wyo. Stat. § 6-10-301(c).

[40] 79 Laws of Del. 2013 § 7; *see also Wyant v. State*, 113 A.3d 1081 (Del. 2015) (remanding case for correction of sentence's effective date after petitioner sentenced on October 19, 1982 obtained modified sentencing order pursuant to 11 Del. Code § 4204A(d)); *Horsley*, 160 So. 3d at 408-09; W.V. Code) § 62-12-13b(a); Cal Pen. Code § 1170(d)(2)(A)(i); *Mares*, 335 P.3d at 497 ("[T]he amended [Wyoming] statutes govern parole eligibility for juveniles already serving life sentences when the amendments became effective . . . .").

these juvenile offenders, who will otherwise die in prison, must be given the opportunity to show that they are worthy of release.

CONCLUSION

Amicus curiae American Bar Association respectfully urges that the judgment of the Louisiana Supreme Court be reversed.

Respectfully submitted,

WILLIAM C. HUBBARD
Counsel of Record
PRESIDENT
AMERICAN BAR ASSOCIATION
321 North Clark Street
Chicago, IL 60654
(312) 988-5000
abapresident@americanbar.org

Of Counsel:
Lawrence A. Wojcik
Kenneth L. Schmetterer
Katherine E. Chambers
Amanda E. Reagan

Counsel for Amicus Curiae American Bar Association

July 29, 2015