MILLER IN FEDERAL DISTRICT COURT: WHAT THE STORIES OF SIX JUVENILE LIFERS REVEAL ABOUT THE NEED FOR NEW FEDERAL JUVENILE SENTENCING POLICY

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ABSTRACT

After Montgomery v. Louisiana *made* Miller v. Alabama *retroactive, a small group of juvenile homicide offenders in the federal system became eligible to be resentenced by federal district courts around the country. A review of six of these resentencing proceedings reveals that district courts lack appropriate guidance and are ultimately ill-suited to make these difficult resentencing decisions. Further, the lack of predictability in federal sentencing outcomes for juvenile offenders convicted of homicide presents challenges for present-day juveniles accused of homicide in the federal system. Accordingly, a wholesale revision of federal sentencing law and policy is necessary to effectuate* Miller*'s substantive guarantees.*

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I.
INTRODUCTION

After a series of landmark Eighth Amendment Supreme Court decisions, it is clear that young people, even those who kill, are constitutionally different from adults for the purposes of sentencing. The developmental deficits and capacity for transformative change which are characteristic of youth require that the criminal legal system treat young people differently than adults at sentencing.[1] But while this broad pronouncement is easily made, its implementation on a case-by-case basis is less straightforward. *Miller v. Alabama* enunciated five specific factors to be considered during the sentencing of juvenile homicide offenders.[2] Accordingly,

1. *See generally*, Nick Straley, Miller*'s Promise: Re-Evaluating Extreme Criminal Sentences for Children*, 89 WASH. L. REV. 963, 970–77 (2014).

2. Miller v. Alabama, 567 U.S. 460, 477–78 (2012).

in the post-*Miller* era, lawyers must present, and courts must analyze and weigh, evidence relating to these factors when sentencing juveniles. Additionally, following *Montgomery v. Louisiana*'s ruling on *Miller*'s retroactivity,[3] many previously-sentenced prisoners have become eligible for *re*sentencing. This presents a different context in which lawyers and courts are tasked with operationalizing the "*Miller* factors." In this article, I examine the post-*Miller* resentencing proceedings of six federal prisoners previously convicted of life without parole for homicides committed when they were under 18 years old.

These resentencings are stories that ought to be examined and told for a number of reasons. First, they provide snapshots of the lives and experiences of individuals who have been convicted of brutal crimes and incarcerated their entire adult lives, and thereby challenge us to reckon with the realities of violent crime. These stories also demonstrate the truth of the *Miller* Court's statement that even juveniles who do terrible things are likely not "irretrievably depraved," but can and do "rehabilitate." They force us to confront hard questions about how and why we punish.

Second, they are stories that *can* be told. Federal resentencing hearings, unlike state parole hearings (which will be the likely forum for many similarly-situated *Miller*-eligible defendants in state systems), take place in front of a judge, usually in open court, and the records are generally publicly available. Defendants have the benefit of counsel who are able to submit memoranda in support of their arguments, recruit mental health professionals and social workers to meet with and evaluate their clients, call witnesses such as family members and mental health professionals, and respond to the government's arguments. Thus, federal resentencing proceedings will typically contain a rich and accessible body of information that advocates and policy-makers can draw upon.

Finally, they are stories that demonstrate the need for a federal policy change with regard to juvenile sentencing. There is a lack of appropriate post-*Miller* statutory guidance for the sentencing and resentencing of juveniles in the federal criminal system.[4] The existing general sentencing guidance provided by the United States Sentencing Guidelines (USSG) cannot be reworked to fill the void. Though no longer mandatory,[5] the USSG act as a powerful benchmark for federal district courts.[6] For reasons discussed infra, the use of the USSG in sentencing decisions for juvenile offenders is constitutionally untenable[7] and ought to be abandoned entirely. At the same time, the lack of workable guidelines for district court judges faced with *Miller* defendants has already resulted in a group of resentencing decisions that wildly diverge for no legitimate reason. More fundamentally, these

3. Montgomery v. Louisiana, 136 S. Ct. 718 (2016).

4. *Mending the Federal Sentencing Guidelines Approach to Consideration of Juvenile Status*, 130 HARV. L. REV. 994, 1003–04 (2017).

5. United States v. Booker, 543 U.S. 220, 245–46 (2005).

6. Peugh v. United States, 569 U.S. 530, 541 (2013).

7. *See infra* Section IV.C.

stories demonstrate that federal district courts are ill-equipped to operationalize the principle that "children are constitutionally different" for the purposes of sentencing.[8] Instead, a wholesale transformation of federal sentencing law and policy with respect to juvenile offenders is in order.

After providing background material regarding *Miller* and its aftermath, and juvenile offenders in the criminal system, this article introduces the stories of six individuals[9] who were resentenced in federal district courts following *Miller* in Part II. I provide an account of their background, the circumstances of their offenses, and their experiences in prison. I then discuss the content of the resentencing hearings in Part III. Part IV examines how the relevant constitutional and statutory law—particularly the so-called "*Miller* factors" and the USSG's 3553(a) factors—shaped these hearings and their outcomes. Part V argues that this analysis reveals the need for wholesale policy change.

A. Miller *and Its Aftermath*

In 2012, the Supreme Court ruled in *Miller v. Alabama* that a sentence of life without parole ("LWOP") could not be mandatorily imposed on a juvenile convicted of murder.[10] This decision built on the Court's prior decisions in *Roper v. Simmons*, prohibiting the death penalty for juveniles,[11] and *Graham v. Florida*, prohibiting LWOP for juvenile non-homicide offenders.[12] In *Miller*, the Court moved from setting categorical limits on the types of punishments applicable to juvenile offenders to imposing procedural requirements on the sentencing of such offenders. Drawing on the reasoning of the line of cases imposing procedural requirements on the imposition of the death penalty,[13] the Court declared that LWOP could not be imposed on a juvenile convicted of homicide unless the sentencing court engaged in a particularized analysis, in which the mitigating features of youth were taken into account. *Miller* names five factors that should guide this analysis:

8. *Montgomery*, 136 S. Ct. at 733; *see also infra* notes 14–22 and accompanying text.

9. Though no comprehensive database identifying the number of *Miller*-eligible prisoners in the federal system seems to exist, in one *Miller* resentencing, the government submitted a chart of the 28 individuals that the government was able to identify in advance of the sentencing of Bryan Sheppard. *See infra* note 35. In addition, as part of the second resentencing of Philip Bernard Friend, defense submitted a report summarizing the relevant information regarding 24 *Miller*-eligible individuals, as well as providing comparative graphs regarding certain features of the offenses. Defendant's Position on Resentencing, Exhibit 1, United States v. Friend, No. 99-CR-201 (E.D. Va. Jan. 10, 2020), ECF No. 817-1.

Not all of these individuals have been resentenced yet. The six in this article have been selected based on the availability of records, geographic diversity, and because they represent different points on the spectrum of outcomes in these cases.

10. Miller v. Alabama, 567 U.S. 460, 479 (2012).

11. Roper v. Simmons, 543 U.S. 551, 568 (2005).

12. Graham v. Florida, 560 U.S. 48, 75 (2010).

13. *Miller*, 567 U.S. at 475–76.

i. "chronological age and its hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences";
ii. "the family and home environment which surrounds" the juvenile, "and from which he cannot usually extricate himself – no matter how brutal or dysfunctional";
iii. "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him";
iv. the way in which the "incompetencies associated with youth" disadvantage a juvenile in the criminal process – such as the "inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys"; and
v. the possibility of rehabilitation.[14]

After a court applies these factors, juvenile homicide offenders *can* be sentenced to LWOP if a sentencing court determines that the offender is among the group of juvenile offenders whose crime reflects "irreparable corruption"[15] and for whom, therefore, LWOP is appropriate. The Court stated that such occasions would be "uncommon."[16] The *Miller* Court's analysis was informed by a growing body of scientific knowledge identifying distinctive neurological and psychological features of the adolescent brain.[17] Studies show that "[r]elative to individuals at other ages, . . . adolescents . . . exhibit a disproportionate amount of reckless behavior, sensation seeking, and risk taking,"[18] while also failing to weigh the consequences of their actions.[19] Neurobiologically, this is explained according to a "dual systems model:"[20] while the brain is still developing well into adulthood, adolescents' brains produce an imbalance of the neurotransmitters associated with pleasure and reward-seeking. The result is that adolescents experience periods of extreme emotional reactivity while unable to exercise mature levels of executive

14. *Id.* at 477–78 (citations omitted).

15. *Id.* at 479–80 (quoting *Roper*, 543 U.S. at 573); *see also Graham*, 560 U.S. at 68 (quoting *Roper*, 543 U.S. at 570). Whether it is reasonable to expect sentencing judges to be equipped to determine whether or not a juvenile offender is irreparably corrupt is up for debate.

16. *Id.* at 479.

17. Lawrence Steinberg, *The Influence of Neuroscience on U.S. Supreme Court Decisions Involving Adolescent Criminal Culpability*, 14 NATURE REVS. NEUROSCIENCE 513, 514 (2013).

18. L.P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCIENCE & BIOBEHAVIORAL REVS. 417, 421 (2000); *see also* B.J. Casey, Rebecca Jones & Todd Hare, *The Adolescent Brain*, 28 DEVELOPMENTAL REV. 62, 62–63 (2008).

19. Straley, *supra* note 1 at 971–72.

20. Lawrence Steinberg, Dustin Albert, Elizabeth Cauffman, Marie Banich, Sandra Graham & Jennifer Woolard, *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 DEVELOPMENTAL PSYCHOL. 1764, 1764 (2008).

functioning.[21]The line of cases culminating in the *Miller* decision gave constitutional effect to this neurobiological conception of the juvenile brain.[22]

Following *Miller*, various questions have arisen regarding which defendants the decision applies to and what the decision requires when it does apply;[23] Must a juvenile homicide offender who is *not* exposed to the possibility of LWOP receive a so-called "*Miller* hearing"? Does *Miller* apply in the case of a juvenile homicide offender facing a lengthy term-of-years sentence? What is required of parole boards faced with juvenile offenders? State courts have arrived at varying answers to these questions. For instance, both the Iowa[24] and Washington[25] Supreme Courts have issued decisions expanding the *Miller* rationale to what may be its logical conclusion—requiring every juvenile sentenced as an adult (regardless of whether or not they are eligible for juvenile life without parole ["JLWOP"]) to receive a *Miller* hearing prior to being sentenced. Other state supreme courts have attempted to define a "de facto" life sentence—i.e., a term-of-years sentence that is so long that it is functionally equivalent to LWOP and therefore requires a *Miller* hearing.[26] Other courts have examined what, if anything, *Miller* and *Graham* should require of parole boards.[27]

State legislatures have also responded to these questions in various ways. Some states have changed the statutory mandatory minimum sentences for juvenile offenders,[28] some have changed the procedures according to which juveniles must be sentenced in the first instance, and some provide for specific "second-

21. *Id.*

22. Steinberg, *supra* note 17.

23. Sarah French Russell & Tracy L. Denholtz, *Procedures for Proportionate Sentences: The Next Wave of Eighth Amendment Noncapital Litigation*, 48 CONN. L. REV. 1121, 1123–24 (2016).

24. State v. Lyle, 854 N.W.2d 378, 402–403 (Iowa 2014).

25. State v. Houston-Sconiers, 391 P.3d 409, 420 (Wash. 2017).

26. *E.g.* State v. Null, 836 N.W.2d 41, 71 (Iowa 2013) (individualized consideration of the *Miller* factors required before 52 ½ year sentence can be imposed on juvenile); State v. Zuber, 152 A.3d 197, 213 (N.J. 2017), *petition for cert. filed* (June 12, 2017) (55 years of parole ineligibility requires an individualized assessment of the juvenile applying *Miller* before being imposed.); Bear Cloud v. State, 334 P.3d 132, 141 (Wyo. 2014) (45 years of imprisonment has the "practical effect that the juvenile offender will spend his lifetime in prison [and] triggers the Eighth Amendment protections set forth" in *Miller*, requiring an individualized hearing).

27. Diatchenko v. Dist. Att'y for Suffolk Dist., 27 N.E. 349, 357 (Mass. 2015) (parole process for a juvenile homicide offender serving mandatory life sentence takes on a "constitutional dimension that does not exist for other offenders"). *See also* Greiman v. Hodges, 79 F. Supp. 3d 933, 945 (S.D. Iowa 2015) (*Graham* creates a categorical entitlement to "demonstrate maturity and reform" that goes substantially beyond a "mere hope" of parole); Hayden v. Keller, 134 F. Supp. 3d 1000, 1009 (E.D.N.C. 2015) (North Carolina parole system fails to create a meaningful opportunity for juvenile offenders by failing to distinguish between juvenile and adult offenders, inter alia); Hawkins v. New York State Dep't of Corrections, 140 A.D.3d 34, 39 (N.Y. 2016) (holding that "analogous procedural requirements" to those mandated by *Miller* are required for juvenile offender parole hearings).

28. *See generally* Perry Moriarty, *Implementing Proportionality*, 50 U.C. DAVIS L. REV. 961 (2017) (surveying post-*Miller* state legislative developments).

look" procedures during which a juvenile offender's sentence is reviewed following conviction.[29]

Additionally, lower courts have varied in their responses to the question of whether offenders previously sentenced to JLWOP were eligible for resentencing after *Miller*. Because *Miller*'s holding appeared procedural rather than substantive, many courts denied applications for resentencing submitted by prisoners who had been sentenced to LWOP prior to *Miller* for homicides committed as juveniles, on the grounds that new procedural rules are generally not retroactively applicable.[30] In 2016, the Supreme Court resolved that question by announcing in *Montgomery v. Louisiana* that *Miller* applied retroactively because it announced a new substantive rule of constitutional law, namely that JLWOP violates the Eighth Amendment when applied to "non-incorrigible" juvenile offenders.[31] At the same time, the *Montgomery* Court acknowledged that this new substantive rule was accompanied by a procedural component necessary to implement its substantive guarantee.[32] As a result of *Montgomery*'s ruling on retroactivity, many prisoners serving JLWOP became potentially eligible to have their sentences reconsidered.

29. *See generally* Russell & Denholtz, *supra* note 23, at 1131 (surveying post-*Graham* legislative developments). In California, youthful offenders are now entitled to "youthful offender" parole hearings in which great weight is given to diminished culpability, the hallmark features of youth and subsequent growth and maturity. S.B. 260, 2013 Leg., Reg. Sess. (Cal. 2013) (amending CAL. PENAL CODE §§ 3041, 3046, 4081 and enacting § 3051). Similarly, new Connecticut guidelines provide for the appointment of indigent counsel for parole hearings for juvenile offenders, and specify procedures and factors required to be considered by the parole board at the hearing. S.B. 796, 2015 Leg., Jan. Sess. (Conn. 2015) (repealing CONN. GEN. STAT. §§ 54-125a, 46b-127, 46b-133c, 46-133d, 53-46a, 53a-54b, 531-54d, 53a-54a and replacing with new sections). In language plucked directly from *Miller*, the relevant statute in West Virginia states that, "the parole board shall ensure that the procedures governing its consideration of the person's application for parole ensure that he or she is provided a meaningful opportunity to obtain release and shall adopt rules and guidelines to do so that are consistent with existing case law," and further states that the board shall consider several specific factors relating to youthful offender status. H.B. 4210, 81st Leg., 2d Sess. (W.Va. 2014) (enacting W.VA. CODE §§61-11-23, 62-12-13b) emphasis added). Similar legislation has been enacted in Nebraska, Legis. B. 44, 103d Leg., 1st Sess. (Neb. 2013) (amending NEB. REV. SAT. §§ 28-101; 83-1, 135 and enacting NEB. REV. STAT. §§ 28-105.02, 83-1,110.04), and Louisiana, H.B. 152, 2013 Leg., Reg. Sess. (La. 2013) (amending LA. REV. STAT. ANN. § 15:547.4 and enacting LA. CODE CRIM. PROC. ANN. art. 878.1). Other state legislatures have instituted mechanisms for juvenile offenders to petition for resentencing. For example, Florida (which also requires explicit consideration of the *Miller* factors at initial sentencing) provides that a juvenile offender's sentence can be reviewed periodically by the original sentencing court, which must consider specific *Miller*-esque factors. Indigent counsel is appointed for these hearings. H.B. 7035, 2014 Reg. Sess. (Fla. 2014) (amending FLA. STAT. §§ 775.082, 316.3026, 373.430, 403.161, 648.571 and enacting §§ 921.1401, 921.1402). Delaware now has a sentence modification process in place, S.B. 9, 147th Gen. Assemb., Reg. Sess. (Del. 2013) (amending DEL. CODE ANN. tit. 11 §§ 636(b), 4209, 4209A, 4204A), and California similarly provides juveniles the right to petition for resentencing provided that one out of four conditions are met. CAL. PENAL CODE § 1170.

30. *See, e.g.*, United States v. Friend, 667 Fed. App'x 826 (4th Cir. 2016).

31. Montgomery v. Louisiana, 136 S. Ct. 718, 732 (2016).

32. *Id.* at 735.

In particular, prisoners serving life sentences in the federal system for homicides committed as juveniles were immediately impacted by *Montgomery*. Because parole was abolished in the federal system in 1984,[33] every life sentence in the federal system is, by definition, LWOP. Accordingly, there could be no doubt that these prisoners were eligible to be resentenced following *Montgomery*.[34] At the time of *Montgomery*, there were roughly 30 federal prisoners serving life sentences for crimes they committed as juveniles.[35] In the years since *Montgomery*, many of these federal prisoners have been resentenced in federal district courts around the country. Some received more lenient sentences that present a meaningful chance for life outside of prison. Others received lengthy sentences, barely distinguishable from a nominal life sentence. A few received life sentences yet again.

B. Juvenile Offenders in the Federal Criminal System

Federal enforcement agencies began playing a direct role in combating "street crime" during the Reagan administration,[36] when federal law enforcement agencies began exercising broad jurisdiction under existing federal narcotics laws to target street dealers.[37] Statutes enacted in the 1970s such as the Controlled Substances Act and Racketeer Influenced and Corrupt Organization (RICO) Act were expanded and more vigorously enforced, and a series of broad-sweeping crime bills in the 1980s and 1990s vastly expanded the role of federal agencies in enforcing laws related to drugs, firearms, and violent crimes.[38]

At the same time, this era saw a drastically altered landscape for juveniles prosecuted federally. Previously, the federal government had adopted a rehabilitation-focused approach to juvenile prosecutions.[39] The Federal Juvenile

33. *See* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473. 98 Stat. 1987 (1984) (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.).

34. This is contrasted with the situation of many similarly-situated State prisoners. While many State prisoners have gotten tied up in litigation over whether they are eligible for reconsideration under *Miller* when they are serving sentences of life *with* parole eligibility after, for example, 60 years, their federal counterparts faced no such problem because parole was never on the table—there could be no debating the fact that they were serving LWOP and were therefore eligible for reconsideration under *Miller*.

35. Though no centralized database appears to exist, in advance of the resentencing of Bryan Sheppard, the Government filed a chart of all the *Miller*-eligible prisoners in the federal system that they had identified, totaling 28. *See* Federal Prisoners Eligible for Relief Under *Miller*, United States v. Sheppard, No. 4:96-0085-04-CR-FJG (E.D. Mo. 2017), ECF No. 542-1. This chart was in turn referenced by the Government in the case of Philip Bernard Friend, discussed *infra*. In a second resentencing hearing for Mr. Friend, not discussed in this article, defense provided their own summaries of *Miller*-eligible federal prisoners, and comparative chards. *See* note 9, *supra*.

36. Daniel Richman, *The Past, Present, and Future of Violent Crime Federalism*, 34 CRIME & JUST. 377, 393–94 (2006).

37. *Id.*

38. *Id.* at 394–95.

39. *Mending the Federal Sentencing Guidelines Approach to Consideration of Juvenile Status*, *supra* note 4, at 1001.

Delinquency Act of 1938 implemented a policy choice that the federal government would generally withdraw from prosecuting juveniles.[40] The Federal Youth Corrections Act (FYCA) of 1950 implemented an alternative rehabilitation-focused sentencing scheme for young offenders up to the age of 26.[41] The Juvenile Justice and Delinquency Prevention Act of 1974 barred the federal government from prosecuting juvenile delinquency absent certification from the Attorney General that a state lacked either jurisdiction or the services to address the needs of the juvenile.[42]

This rehabilitation-focused approach changed in 1984, when the Comprehensive Crime Control Act repealed the FYCA. In 1994, following the false prophecies of the advent of teenage "super-predators,"[43] the Violent Crime Control and Law Enforcement Act permitted the prosecution of juvenile offenders 13 years old and older as adults for certain crimes of violence.[44] As a result of these changes, a new generation of juvenile offenders was prosecuted federally and subjected to the harsh realities of the federal criminal system.[45]

The individuals considered in this article, as well as the other federal prisoners who are eligible for resentencing post-*Montgomery*, are members of a generation targeted by these crime bills. Some were prosecuted under the RICO Act,[46] or the related violent crimes in aid of racketeering statute,[47] for their involvement in

40. *Id.*

41. *Id*. at 1001–02.

42. *Id.* at 1001.

43. John J. Dilulio, Jr., *The Coming of the Super-Predators*, THE WEEKLY STANDARD, November 27, 1995, at 23. http://www.weeklystandard.com/the-coming-of-the-super-predators/article/8160 ("On the horizon, therefore, are tens of thousands of severely morally impoverished juvenile super-predators."); Peter Annin, *Superpredators Arrive: Should we Jail This New Breed of Vicious Kids?*, NEWSWEEK, Jan. 22, 1996, at 57 (quoting Cook County State's Attorney Jack O'Malley: "It's 'Lord of the Flies' on a Massive Scale."). Dilulio, Jr. later repudiated his influential theory, joining in an amicus brief along with several other scholars in support of the defendants in *Miller*. Brief of Jeffrey Fagan et al. as Amici Curiae in Support of Petitioners at *19, *Miller*, 567 U.S. 460 (Nos. 10-9647, 10-9646) ("Although the myth of a juvenile superpredator influenced legislation and policy, it was not substantiated by scientific evidence about how children develop . . . . Moreover, empirical data analyzing crime and arrest rates also show that the juvenile superpredator was a myth.").

44. *Mending the Federal Sentencing Guidelines Approach to Consideration of Juvenile Status*, *supra* note 4, at 1002.

45. *Id.* at 1002–03.

46. 18 U.S.C. §§ 1961 et. seq.

47. 18 U.S.C. § 1959; United States v. Crenshaw, 359 F.3d 977, 984 (8th Cir. 2004) ("Congress enacted § 1959 to complement the Racketeer Influenced and Corrupt Organizations Act ('RICO'), 18 U.S.C. § 1961, by making it a federal crime to commit violent acts for the purpose of maintaining or increasing one's position within a RICO enterprise.").

supposed gangs.[48] Others were convicted under federal carjacking[49] or robbery[50] statutes.[51] One was prosecuted pursuant to federal jurisdiction over Indian lands.[52]

II.
THE STORIES

This section presents the stories of six *Miller* resentencings from four different federal districts. Alex Wong and Amaury Rosario were resentenced in the Eastern District of New York in 2016[53] and 2018,[54] respectively; Philip Bernard Friend was resentenced in the Eastern District of Virginia in 2017,[55] and once again in 2020;[56] Kamil Hakeem Johnson[57] and Robert James Jefferson[58] were resentenced in the District of Minnesota in 2015; Riley Briones was resentenced in the District of Arizona in 2016.[59]

A note on methodology: My accounts are derived from various publicly-available sources—written submissions filed by defense attorneys and prosecutors in anticipation of the hearings, the transcripts of the hearings themselves, the resulting decisions, and any pertinent appellate history. As with all legal records, these documents construct a version of the truth in a manner that grossly simplifies incredibly complex human experiences. In distilling these stories from this already simplified truth, I have undoubtedly left out many details and perspectives that those directly involved in each case may consider central. Additionally, the facts about the underlying offenses remain contested in certain cases. Because my goal is to evaluate what these stories reveal about *Miller*'s implementation in federal

48. United States v. Wong, 40 F.3d 1347, 1355 (1994) (RICO prosecution); *Crenshaw*, 359 F.3d at 981 (8th Cir. 2004) (murder in aid of racketeering prosecution).

49. 18 U.S.C. § 2119.

50. 18 U.S.C. § 1951.

51. United States v. Friend, 667 Fed. Appx. 826, 827 (4th Cir. 2016) (carjacking resulting in death); United States v. Rosario, 48 Fed. Appx. 12 at *5 (2d Cir. 2002) ("Hobbes Act" robbery).

52. 18 U.S.C. § 1153. Government's Sentencing Memorandum at 2, *Briones*, No. 96-CR-00464 (D. Ariz. March 8, 2016), ECF No. 347. *See generally* Amy J. Standefer, *The Federal Juvenile Delinquency Act: A Disparate Impact on Native American Juveniles*, 84 MINN. L. REV. 473 (1999) (discussing the disparate treatment of Native American youth due to federal jurisdiction over Indian lands).

53. Transcript of Resentencing Hearing, United States v. Wong, No. 90-CR-1019 (E.D.N.Y. Apr. 8, 2016), ECF No. 450.

54. United States v. Rosario, 2018 U.S. Dist. LEXIS 134657 (E.D.N.Y. 2018).

55. Transcript of Resentencing Hearing, United States v. Friend, No. 99-CR-201 (E.D. Va. June 12, 2017), ECF No. 795.

56. Judgment, *Friend*, No. 99-CR-201 (E.D. Va. Feb. 3, 2020), ECF No. 830.

57. Transcript of Resentencing Hearing, United States v. Johnson, No. 02-CR-12 (D. Minn. March 27, 2015), ECF No. 307.

58. United States v. Jefferson, 2015 U.S. Dist. LEXIS 13635 (D. Minn. Feb 4, 2015).

59. Transcript of Resentencing Hearing, United States v. Briones, No. 96-CR-00464 (D. Ariz. Mar. 29, 2016), ECF No. 362.

district courts, I think it is appropriate to limit my sources to the material presented to the courts in each case.

I have selected the six individuals based on various factors. At the time of this writing, roughly 30 individuals have been identified as *Miller*-eligible in the federal system.[60] Within that group, only a portion have actually been resentenced, and an even smaller group has publicly-available, unsealed documents (i.e. transcripts and sentencing memoranda) available for review. From within this smaller group, I have selected these six stories based on geographic differences, and because they represent a wide range of outcomes.

A. Alex Wong – Eastern District of New York

At 13, Alex Wong was among the many Asian-American children in New York City who were recruited to join the Green Dragons.[61] The child of Chinese immigrants who divorced soon after their arrival in the United States, Mr. Wong became the subject of a "reverse custody battle," neither parent wishing to take him.[62] His mother was so ashamed of being a single mother that she forced her son to refer to her as his aunt.[63] Mr. Wong ended up living with his father, who was rarely home because of the long hours he worked in a Chinese restaurant.[64]

Mr. Wong moved into a Green Dragons "safe house" at 14.[65] He would later describe this as the first time that he felt a sense of belonging and security.[66] According to a forensic psychiatric evaluation prepared in advance of his initial sentencing, he had become "addicted" to the gang, and his need for this "fix" prevented him from exercising independent judgment.[67] He smoked copious amounts of marijuana to relieve his anxiety, which the psychiatrist interpreted as a symptom of "unexpressed inner conflict about the gang's activity, and an indication that he was not irredeemably part of its culture."[68]

When the adult leader of the Green Dragons ordered the murder of a Chinese restaurant manager who had refused to pay extortion money, Mr. Wong, then 16 years old, volunteered as an attempt to prove himself.[69] He and another teenager

60. *See* Federal Prisoners Eligible for Relief Under *Miller*, *supra* note 35.

61. Defendant's Sentencing Letter at 3, United States v. Wong, No. 90-CR-1019 (E.D.N.Y June 3, 2015), ECF No. 396; *see also* Seth Feranti, *The Rise of The Green Dragons, Kidnapping, Murder and Gang Warfare*, OZY (March 10, 2017), https://www.ozy.com/flashback/the-rise-of-the-green-dragons-kidnappings-murder-and-gang-warfare/76033/ [https://perma.cc/B6YY-ZX3T].

62. Defendant's Sentencing Letter, *Wong*, *supra* note 61, at 4.

63. *Id.* at 3.

64. *Id.*

65. *Id.*

66. *Id*. at 5.

67. *Id.* at 3 (citing Psychiatric Legal Report by Stuart B. Kleinman, M.D., *Wong*, No. 90-CR-1019, ECF No. 396-1 (filed under seal)).

68. *Id.* at 4.

69. Government's Sentencing Letter at 2, *Wong*, No. 90-CR-1019 (E.D.N.Y Sept. 28, 2015), ECF No. 408.

shot and killed the manager and a patron, and wounded two others.[70] When he was initially arrested by state police, he unsuccessfully conspired to have the only eyewitness against him murdered.[71]

He was sentenced to life in prison in 1992.[72] At the time, the federal sentencing guidelines were understood to be mandatory, although Mr. Wong's counsel did request that he be sentenced outside of the guidelines, or in the alternative, receive a "downward departure," a mechanism within the guidelines that allows a sentencing court to depart from the prescribed guidelines range under certain circumstances.[73] The court in 1992 noted that while Mr. Wong was not incapable of rehabilitation, to allow him to be released in the future would be too great a gamble with public safety.[74]

During his first few years in prison, Mr. Wong was extremely angry; in his own words, he was "causing chaos," and got into a number of serious infractions resulting in his transfer to a maximum-security facility where he would be locked in his cell for 23 hours a day.[75] While locked in, he reflected on his own family history, and began to evaluate the motivations behind his choices to join the Green Dragons and carry out the murders.[76] He resumed contact with his father as well as his mother, who had moved to Hong Kong, though she died of cancer shortly after he resumed contact with her.[77]

Mr. Wong enrolled in E-CODE, a Bureau of Prisons ("BOP") program, "designed to teach self-discipline and the importance of conforming to a pro-social lifestyle. The program sought to instill a sense of victim empathy in the participants. It targeted and sought to alter negative thoughts and behaviors that would lead to incarceration-related problems."[78] He successfully completed multiple phases of the program and received positive reports and feedback.[79] When his father died, he described this loss as triggering feelings of empathy and remorse for the families of the people he killed.[80]

After many years, Mr. Wong began to re-establish relationships with his extended family, which was difficult because of the Chinese cultural norm of

70. *Id.*

71. *Id.* at 3.

72. *Id.* at 5.

73. Government's Sentencing Letter, Exhibit C, at 69–71, *Wong*, No. 90-CR-1019 (E.D.N.Y Sept. 28, 2015), ECF 408-3.

74. *Id*.

75. Defendant's Sentencing Letter, *Wong*, *supra* note 61, at 4.

76. *Id*. at 4–5.

77. *Id.* at 5.

78. *Id*.

79. *Id*. at 7.

80. *Id*. at 8.

abandoning family members who have brought shame to the family.[81] He has agreed to live with and help take care of his aunt and uncle upon release.[82]

Mr. Wong was resentenced to 35 years, [83]. At the time of his resentencing in 2016, he had served approximately 25 years.[84] Likely due to his accumulated "good time" credit,[85] he was released in July of 2020 at the age of 48.[86]

B. Philip Bernard Friend – Eastern District of Virginia

When Philip Bernard Friend was 15 years old, he became involved in a series of truck-jackings orchestrated by his older brother that eventually also involved his mother, another older brother, and various girlfriends and cousins.[87] The older brother's plan was apparently to hijack a commercial truck in Virginia and drive it to pick up a load of marijuana in Laredo, Texas, which they would bring back to Virginia to re-sell.[88] However, a series of failed attempts to steal trucks left two truck drivers dead and one permanently maimed at the hands of the Friend brothers.[89]

As disclosed by the sentencing memorandum submitted by defense counsel,[90] the testimony of Mr. Friend's aunt,[91] and the evaluation[92] and testimony[93] of a clinical psychologist, Mr. Friend's childhood was deeply traumatic. His father struggled with alcoholism and was physically abusive to his family—resulting in the police frequently being called to the home.[94] The violence seemed to have a trickle-down effect, resulting in Mr. Friend also being abused by his two older brothers.[95] When Mr. Friend's father died, his family was economically destabilized.[96] His mother suffered from bipolar disorder which was exacerbated by misdiagnosis and inappropriate treatment, and she was evidently unable to care for

81. *Id*. at 9–10.

82. *Id*. at 10.

83. Transcript of Resentencing Hearing, *Wong, supra* note 53, at 22.

84. *Id*. at 4.

85. "Good time" credit reduces a defendant's sentence by up to 54 days per year of incarceration. 18 U.S.C. § 3624(b)(1).

86. BUREAU OF PRISONS INMATE LOCATOR TOOL, https://www.bop.gov/mobile/find_inmate/byname.jsp (last visited Jan. 26, 2021). *See infra* Section VI for a chart listing the relevant ages of each defendant at the time of offense and upon release.

87. Defendant's Position on Resentencing at 1–2, United States v. Friend, No. 99-CR-201 (E.D. Va. May 16, 2017), ECF No. 777.

88. Government's Position with Respect to Resentencing at 2, *Friend*, No. 99-CR-201 (E.D. Va. May 16, 2017), ECF No. 776.

89. *Id*. at 2.

90. Defendant's Position on Resentencing, *Friend*, *supra* note 87.

91. Transcript of Resentencing Hearing, *Friend*, *supra* note 55, at 12..

92. Defendant's Position on Resentencing, *Friend*, *supra* note 87, at 10–14.

93. Transcript of Resentencing Hearing, *Friend*, *supra* note 55, at 26.

94. *Id.* at 40; Defendant's Position on Resentencing, *Friend*, *supra* note 87, at 11–12.

95. Defendant's Position on Resentencing, *Friend*, *supra* note 87, at 13.

96. *Id.* at 12.

her children.[97] Mr. Friend witnessed his mother's attempted suicide at the age of five,[98] and he began skipping school and using drugs and alcohol in his early teens.[99] His eldest brother, who assumed a paternal role in the family following the death of their father, failed in his attempt to continue his father's trucking business,[100] and decided instead to resort to the hijacking plan, recruiting the entire family to participate.[101]

The series of crimes began with an attempt to steal a truck that led to the shooting of the truck driver by Mr. Friend's brother.[102] The plan evolved to include Mr. Friend's mother and other women who were to pose as prostitutes in order to lure truckers.[103] The first attempt at this failed, as the target declined the women's advances, and Mr. Friend ended up brutally beating the truck driver, though not killing him.[104] In their final attempt, the women managed to seduce a third truck driver, whom the group killed.[105] Their ultimate plan to find a truckload of marijuana in Texas failed, however.[106] Instead, the group managed to steal a truck full of carrots in Texas and were apprehended as they attempted to return to Virginia.[107]

In 2000, at age 16, Mr. Friend pled guilty to one count of carjacking and one count of carjacking resulting in death;[108] he was sentenced to LWOP pursuant to the then-mandatory guidelines. Mr. Friend was initially placed in a so-called juvenile "camp" run by the BOP.[109] He described this as a positive experience, where he learned "team work, integrity, [and] loyalty."[110] However, when he was transferred to the adult facility, he encountered a brutal environment.[111] Nonetheless, he did not succumb to the "negative influences and the gang subculture" in the adult facility.[112] Instead, he spoke to counselors and chaplains who helped him develop a plan to "rise above [] if not physically, then mentally and spiritually."[113] He participated in a BOP program called BRAVE.[114] According to Jack Donson, a consultant and former BOP administrator who testified at Mr. Friend's

97. *Id.* at 14; Transcript of Resentencing Hearing, *Friend*, *supra* note 55, at 45.
98. Defendant's Position on Resentencing, *Friend, supra* note 87, at 11.
99. *Id*. at 13.
100. Transcript of Resentencing Hearing, *Friend*, *supra* note 55, at 47.
101. Government's Position with Respect to Resentencing, *Friend*, *supra* note 88, at 3.
102. *Id*. at 4.
103. *Id*.
104. *Id*.
105. *Id*. at 5–6.
106. *Id*. at 7.
107. *Id*.
108. 18 USC §§ 2119(1); 2119(3) (2018).
109. Defendant's Position on Resentencing, *Friend*, *supra* note 87, at 15.
110. Transcript of Resentencing Hearing, *Friend*, *supra* note 55, at 160.
111. *Id*.; Defendant's Position on Resentencing, *Friend*, *supra* note 87, at 15.
112. Defendant's Position on Resentencing, *Friend*, *supra* note 87, at 18.
113. Transcript of Resentencing Hearing, *Friend*, *supra* note 55, at 160.
114. Defendant's Position on Resentencing, *Friend*, *supra* note 87, at 16.

resentencing hearing, BRAVE is touted as being a highly successful voluntary six-month residential program during which the participants all live in the same unit and split each day between work assignments and therapy groups.[115] It is designed for younger inmates to develop social and coping skills and to learn to "approach their incarceration in a positive way."[116] Mr. Friend later secured a highly-coveted, high-responsibility job,[117] did not join a gang or get prison tattoos,[118] and had a disciplinary record consisting of mostly minor infractions.[119]

After the *Miller* hearing, Mr. Friend was resentenced to 65 years.[120] Following an appellate remand,[121] and a second resentencing hearing, he was resentenced to 52 years.[122] He will be approximately 59 years old when he is released.[123]

C. Kamil Hakeem Johnson – District of Minnesota

Kamil Hakeem Johnson was born to a young single mother.[124] Because his mother worked nights, and also struggled with substance abuse, Mr. Johnson was largely raised by his older sister, starting when she was 12 and he was five.[125] When he was young, he started getting into fights at school; around the same time his family moved to a gang-saturated neighborhood.[126] Mr. Johnson joined the "Rolling 60's" gang at the age of 11, and was taken under the wing of the gang's leader.[127] Mr. Johnson was arrested for possession of a pistol at 14, and was involved with various different court-ordered programs throughout his adolescence.[128] He left home at 16, and was arrested with six grams of cocaine soon after.[129]

In 1996, when Mr. Johnson was 17, he and two confederates were ordered by a gang leader to "shoot and kill" members of an enemy gang.[130] When they found members of the enemy gang at a local gas station, Mr. Johnson and his companions shot in their direction.[131] Tragically, they shot and killed a four-year-

115. Transcript of Resentencing Hearing, *Friend*, *supra* note 55, at 104.
116. *Id*. at 104.
117. *Id.* at 101.
118. *Id.* at 156–57.
119. *Id*. at 104; Defendant's Position on Resentencing, *Friend*, *supra* note 87, at 17.
120. *See* United States v. Friend, 755 F. App'x 234, 235 (4th Cir. 2018).
121. *Id.* at 238.
122. Judgment, *Friend*, *supra* note 56..
123. *See infra* Section VI.
124. Defendant's Amended Sentencing Position at 31, United States v. Johnson, No. 02-CR-13, (D. Minn. Jan. 21, 2015), ECF No. 291.
125. *Id*.
126. *Id*. at 32.
127. *Id*.
128. *Id*. at 34.
129. *Id*.
130. *Id*. at 29.
131. *Id*. at 30.

old child—the daughter of an enemy gang member's girlfriend—as she sat in the backseat of her mother's car at the gas station.[132]

Unable to induce cooperation from other gang members, local law enforcement "could not develop a provable case" against Mr. Johnson during the years following the murder.[133] Eventually the FBI took over the investigation into the gang's drug activity and secured a conviction of Mr. Johnson in 2002, after obtaining the cooperation of the gang's leader, who had ordered the killing and was facing a number of other drug-trafficking charges.[134] Mr. Johnson was convicted of murder in aid of racketeering and sentenced to LWOP.[135] During those six years prior to the prosecution, he had some contact with law enforcement—for drug possession, domestic offenses, giving a false name—but had left violent gang life,[136] concentrating on parenting his children: a daughter born in 1996, and a son born in 2001.[137] Along with his own children, he became a father figure to his two nephews, as well as the children of his girlfriends through their previous relationships.[138]

In prison, Mr. Johnson took several classes but did not earn a GED.[139] He received positive work evaluations and did not have any disciplinary infractions during either the first or last four years of his incarceration; none of the infractions he had were violent.[140] Mr. Johnson's whole family—his mother, sister, children, and girlfriend—are all supportive of him.[141] He is in regular contact with family and has been trying to persuade his nephews to stay out of the gang life.[142]

Mr. Johnson was resentenced to 42 years.[143] He will be approximately 51 when released.[144]

D. Riley Briones – District of Arizona

Riley Briones was raised on the Salt River Indian Reservation in Arizona.[145] He attended school on the reservation through sixth grade, and then began attending school outside the reservation.[146] This was the first time he had encountered a

132. *Id*.

133. Position of the United States with Respect to Resentencing at 4–5, *Johnson*, No. 02-CR-13, (D. Minn. Aug. 22, 2014), ECF No. 281.

134. *Id*. at 5.

135. *Id*. at 6.

136. Defendant's Amended Sentencing Position, *Johnson*, *supra* note 124, at 35–36.

137. *Id*. at 33.

138. *Id*. at 33–34.

139. *Id*. at 37.

140. *Id*.

141. *Id*. at 38.

142. *Id*. at 39.

143. United States v. Johnson, 2016 U.S. Dist. LEXIS 93777, at *1 (D. Minn. July 18, 2016).

144. *See infra* Section VI.

145. Transcript of Resentencing Hearing, *Briones*, *supra* note 59, at 24.

146. *Id*. at 25–26.

significant number of non-Native people and, as can be surmised by Mr. Briones' testimony, this spawned conflict and alienation.[147] For instance, Mr. Briones was large for his age in middle school and caught the eye of the football coach who began to groom him for a position on the high school football team.[148] However, when he refused to cut his hair, which was a matter of cultural identity for Mr. Briones, he was not allowed to join the team and was ridiculed by his peers.[149] Mr. Briones consulted his father about refusing to cut his hair, and his father was supportive.[150] Mr. Briones speculated that joining the football team might have resulted in a feeling of inclusion in the school community that could have led him down a different path.[151]

Mr. Briones' father was a strict and abusive disciplinarian.[152] At one point, a teacher in his school saw blood coming through Mr. Briones' shirt and attempted to report the abuse to the authorities—though this seems to have gone nowhere.[153] Both of Mr. Briones' parents struggled with alcoholism, and Mr. Briones had to learn how to drive before he was eligible for a license in order to prevent his parents from driving drunk.[154] Mr. Briones himself began drinking excessively and experimenting with hard drugs at the age of 12;[155] from the age of 12 to 18 he was almost continually under the influence of at least one substance.[156] When his then-girlfriend (now wife) became pregnant with their daughter, Mr. Briones' father forced him to quit school and support his new family.[157] He began an apprenticeship as a heavy equipment operator,[158] but was eventually fired because he was using cocaine.[159]

Mr. Briones, his father, and his brother were members of a gang on the reservation.[160] When Mr. Briones was 17, he and several other gang members decided to rob a Subway restaurant.[161] Mr. Briones sat in the car while his confederates carried out the armed robbery, during which the cashier was killed.[162] Per the claims of various cooperating witnesses, Mr. Briones was subsequently involved

147. *Id*. at 26–30.
148. *Id*. at 31–32.
149. *Id*. at 32–34.
150. *Id*. at 33–34.
151. *Id*. at 34.
152. *Id.* at 45.
153. *Id*. at 45–46.
154. *Id*. at 8–10.
155. *Id*. at 41, 44.
156. *Id*. at 44.
157. *Id*. at 5, 40.
158. *Id*. at 41.
159. *Id*. at 44.
160. Government's Sentencing Memorandum at 3, *Briones*, No. 96-CR-00464 (D. Ariz. March 8, 2016), ECF No. 347.
161. United States v. Briones, 890 F.3d 811, 813 (9th Cir. 2018), *rev'd en banc*, 929 F. 3d 1057 (9th Cir. 2019).
162. *Id.*

in various acts of violence, including a fire-bombing against rival gang members on the reservation.[163] Mr. Briones was convicted of murder after a trial in 1997 and sentenced to LWOP.[164]

After his conviction and sentence, Mr. Briones married the mother of his child.[165] The two are still married and in regular contact.[166] Mr. Briones has had no prison infractions whatsoever.[167] He has consistently worked in food service while in prison,[168] and has become a mentor for younger inmates.[169] Although such arrangements are typically not allowed, Mr. Briones has been allowed to share a cell with his brother and father, as a reward for good behavior.[170]

Mr. Briones was resentenced to LWOP.[171] His sentence was affirmed by a panel of the Ninth Circuit,[172] but that decision has subsequently been vacated by the Ninth Circuit sitting en banc, which remanded the case to the trial court for a rehearing.[173] The United States subsequently filed a petition for certiorari to the United States Supreme Court,[174] which remains pending at the time of this writing.

E. Robert James Jefferson – District of Minnesota

Robert James Jefferson left home at the age of 16[175] and joined the "6-0-Tre" gang in Saint Paul, Minnesota.[176] Mr. Jefferson has stated that he left home due to sexual abuse by an older brother.[177] Another older brother of Mr. Jefferson's was a founder and leader of "6-0-Tre," and appears to have given the order to carry out the crimes of which Mr. Jefferson was convicted.[178] Mr. Jefferson was

163. *Id.* at 814.

164. *Briones*, 890 F.3d at 813–14.

165. Transcript of Resentencing Hearing, *Briones*, *supra* note 59, at 5–6.

166. *Id*. at 14–15.

167. *Id*. at 37.

168. *Id*. at 35.

169. *Id*. at 56.

170. *Id*. at 65–66.

171. *Id.* at 106.

172. United States v. Briones, 890 F.3d 811, 814 (9th Cir. 2018), *rev'd en banc*, 929 F. 3d 1057 (9th Cir. 2019).

173. United States v. Briones, 929 F. 3d 1057, 1067 (9th Cir. 2019) (finding that "[t]he district court's heavy emphasis on the nature of Briones's crime, coupled with Briones's evidence that his is not one of those rare and uncommon cases for which LWOP is a constitutionally acceptable sentence, requires remand").

174. Petition for a Writ of Certiorari, United States v. Briones, No. 16-10150 (Dec. 6, 2019).

175. Declaration of Robert James Jefferson Regarding Resentencing at 1, United States v. Jefferson, No. 97-CR-276 (D. Minn. Nov. 5, 2015), ECF No. 1618.

176. Transcript of Resentencing Hearing at 53, *Jefferson*, No. 97-CR-276 (D. Minn. Jan. 29, 2015), ECF 1648 (note that Mr. Jefferson's hearing took place over two days, and this transcript refers to the second date).

177. Declaration of Robert James Jefferson Regarding Resentencing, *Jefferson*, *supra* note 167, at 1.

178. Transcript of Resentencing Hearing (Jan. 2015), *Jefferson*, *supra* note 176, at 53–54.

convicted of perpetrating a 1994 firebombing that resulted in the tragic death of five children between the ages of five and 12 years old.[179] The alleged motive was to silence a member of the gang who was thought to be cooperating with police; while the target escaped the fire, his five younger siblings were left to die.[180] Notably, Mr. Jefferson has consistently maintained his innocence of these crimes.[181]

Mr. Jefferson was not tried for the firebombing until December 1998, when he was convicted and sentenced to LWOP[182] at the age of 21.[183] In the four years preceding the indictment, he was involved in other violent acts,[184] and was incarcerated and involved in a court-ordered juvenile treatment program in Iowa.[185] Prior to his transfer for adult prosecution in federal court in 1998, Mr. Jefferson was evaluated by a clinical psychologist, who determined that he had anti-social personality disorder.[186]

Mr. Jefferson has had no disciplinary infractions whatsoever in the BOP.[187] He has completed 24 courses and is considered a positive role model by BOP staff.[188] He has continuously worked as a food service cook, sanitation orderly, and medical orderly. He convenes weekly bible groups and serves as a mentor/instructor in a class called "Life Style Intervention."[189]

Mr. Jefferson was resentenced to 50 years.[190] He will be approximately 62 years old upon release.[191]

F. Amaury Rosario – Eastern District of New York

As a child, Amaury Rosario experienced multiple forms of abuse at the hands of various family members.[192] By his teenage years, he was engaging in "unruly and risk taking behavior," and was recruited by a cousin into the "La Familia" gang.[193] He and a peer later fell in with older men in their twenties who had serious

179. *Id.* at 51, 54–55; Position of the United States with Respect to Resentencing at 3, *Jefferson*, No. 97-CR-276 (D. Minn. Oct. 30, 2014), ECF No. 1616.

180. Position of the United States with Respect to Resentencing, *Jefferson*, *supra* note 179, at 5–6.

181. Transcript of Resentencing Hearing (Jan. 2015), *Jefferson*, *supra* note 176, at 7.

182. Defendant's Position Regarding Sentencing Factors at 2, *Jefferson*, No. 97-CR-276 (D. Minn. Nov. 5, 2014), ECF No. 1617.

183. Transcript of Resentencing Hearing at 22, *Jefferson*, No. 97-CR-276 (D. Minn. Dec. 8, 2014), ECF 1647 (indicating that Mr. Jefferson's birthday is in October of 1977, making him 21 in December of 1998).

184. Transcript of Resentencing Hearing (Jan. 2015), *Jefferson*, *supra* note 176, at 58.

185. *Id.* at 38.

186. Transcript of Resentencing Hearing (Dec. 2014), *Jefferson*, *supra* note 183, at 19, 24.

187. Defendant's Position Regarding Sentencing Factors, *Jefferson*, *supra* note 182, at 3.

188. *Id.*

189. *Id.* at 4–5.

190. Transcript of Resentencing Hearing (Jan. 2015), *Jefferson*, *supra* note 176, at 65.

191. *See infra* Section VI.

192. United States v. Rosario, 2018 U.S. Dist. LEXIS 134657, at *11–12 (E.D.N.Y. 2018).

193. *Id.*

criminal records.[194] These men planned the robbery of a bodega that ultimately resulted in Mr. Rosario's crimes of conviction.[195]

Mr. Rosario's role was supposed to be limited to hiding in the basement of the bodega until closing, subduing anyone who remained, and then letting in his confederates who would rob the store.[196] The older men brought weapons (including an Uzi) to the scene and waited in a van outside.[197] Mr. Rosario hid in the basement, but had a change of heart about the plan.[198] He hid the gun he had been given in the basement and went outside to tell his colleagues to call off the plan.[199] The older men rejected this idea, took the remaining weapons, rushed Mr. Rosario into the store and announced a holdup.[200] Though the other men were wearing face-masks, Mr. Rosario was not.[201] When Mr. Rosario expressed apprehension about the victims being able to identify him, the older leader handed him the Uzi and told him to "do what he had to do."[202] Mr. Rosario killed four people and wounded a fifth with one pull of the trigger of the Uzi, a submachine gun capable of spraying up to 20 rounds in one second.[203]

Mr. Rosario was initially prosecuted by the state and was acquitted.[204] He subsequently moved to Atlanta with his girlfriend and daughter and completely desisted from criminal life, working as a baggage handler at the airport.[205] The federal government then decided to prosecute him.[206] After a federal trial he was convicted and sentenced to LWOP.[207]

His early prison record was checkered, but since 2004 he began to improve his behavior.[208] Multiple sources suggest that Mr. Rosario underwent a substantial transformation: one correctional officer noted that Mr. Rosario "was a gentleman. Respectful to guards, inmates, everyone," and a prison psychologist found him to be an "unusually brave inmate in that he was willing to challenge the negative norms of his peers and himself."[209] He enrolled in the "Challenge" program—an

194. *Id.* at *6

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* at *6–7.

200. *Id.* at *7.

201. *Id.*

202. *Id.*

203. Sentencing Memorandum by Amaury Rosario at 28, United States v. Rosario, 99-CR-533 (E.D.N.Y. June 9, 2017), ECF 76-1; *Rosario*, 2018 U.S. Dist. LEXIS 134657, at *7.

204. *Rosario*, 2018 U.S. Dist. LEXIS 134657, at *12.

205. *Id.*

206. Under the doctrine of separate sovereigns, consecutive prosecution by the federal government following an acquittal in state court, and vice versa, does not violate double jeopardy. *See* Gamble v. United States, 587 U.S. __, 1 (2019).

207. Rosario v. Holt, 2010 U.S. Dist. LEXIS 30739, at *2 (M.D. Pa. 2010).

208. *Rosario*, 2018 U.S. Dist. LEXIS 134657, at *12.

209. *Id*. at *13.

intensive residential treatment program—and "far exceeded his peers" according to BOP reports.[210] One inmate attested that Mr. Rosario had convinced him to leave the gang with which he had been affiliated and then "interceded on that inmate's behalf with gang leaders and persuaded them to permit his disaffiliation."[211]

Mr. Rosario was resentenced to 28 years.[212] According to BOP records, he was released in November of 2020 at the age of 43.[213]

III.
THE RESENTENCING PROCESS

This section examines the substance of the resentencing processes in each of these cases, looking at the approaches taken by counsel to present a compelling and sympathetic narrative of their clients' lives both before and after prison, as well as the approaches taken by the government to rebut these accounts.

Given obvious similarities, it is not surprising that defense counsel often adopted strategies similar to those deployed in the capital sentencing context, particularly in the use of mitigation experts.[214] However, several differences between the capital and juvenile sentencing/resentencing contexts are worth noting, as these differences may implicate different strategic choices. First, the audience in a *Miller* hearing (either a sentencing or resentencing) is a judge, whereas in the capital context, it is a jury.[215] Second, in resentencing proceedings, the original crime will have taken place several years prior, and there is almost always evidence of rehabilitation in prison for the court to take into account. Additionally, unlike the capital context, where the choice is typically between LWOP and death, in the juvenile context, a judge who rejects LWOP has to then decide what length of sentence to impose.

A. Written Submissions

210. *Id.* Notably, at the time he enrolled, he was ineligible as a "lifer" to receive time off of his sentence due to his participation in Challenge. *Id.* at *8.

211. *Id.*

212. *Id*. at *22.

213. BUREAU OF PRISONS INMATE LOCATOR TOOL, https://www.bop.gov/mobile/find_ inmate/byname.jsp (last visited Jan. 26, 2021). *See infra* Section VI.

214. *See generally* David Siegel, *What Hath* Miller *Wrought: Effective Representation of Juveniles in Capital-Equivalent Proceedings*, 39 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 363 (2013); Sara E. Fiorillo, *Mitigating After* Miller*: Legislative Considerations and Remedies for the Future of Juvenile Sentencing*, 93 B.U. L. REV. 2095, 2125 (2013). *See also* Marsha L. Levick & Robert G. Schwartz, *Practical Implications of* Miller v. Jackson*: Obtaining Relief in Court and Before the Parole Board*, 31 LAW & INEQ. 369, 393 (2013) (arguing that "an exact parallel to capital cases is not apt").

215. Some have argued that this is a constitutional infirmity. Because the Sixth Amendment requires juries to find sentence-determinative facts beyond a reasonable doubt, the LWOP decision should be left to the jury. *See* Sarah French Russell, *Jury Sentencing and Juveniles: Eighth Amendment Limits and Sixth Amendment Rights*, 56 B.C. L. REV. 553 (2015).

In anticipation of the resentencing hearings, defense counsel in each case filed memoranda laying out the mitigating evidence supporting a reduced sentence. This mitigating evidence was typically framed around the five-factor *Miller* analysis,[216] often detailing challenging family circumstances and the role of peer pressure in the crimes of conviction. Some memoranda also discussed the neuroscience and biology relevant to youthful offending. In addition to these topics, the memorandum submitted by the defense in Mr. Johnson's case also included an international law argument, noting that the "United Nations Convention on the Rights of the Child (CRC), ratified by every country except the United States and Somalia, forbids sentencing children under eighteen to life in prison without possibility of release," and that the CRC "further calls for imprisonment of juvenile offenders only as a measure of last resort and for the shortest appropriate period of time."[217]

Frequently attached to defendants' memoranda were various reports and letters. For instance, attached to the defense memorandum in Mr. Wong's case were: a forensic psychiatric evaluation (which was filed under seal),[218] a forensic social history report,[219] a report by juvenile brain expert Laurence Steinberg,[220] letters of support from family and friends,[221] and numerous certificates of achievement and reports from BOP programs.[222] Similarly, in Mr. Rosario's case, a social history report and a forensic psychiatric evaluation were prepared in advance of the *Miller* hearing and appended to the sentencing memoranda, along with letters of support and a letter from Mr. Rosario himself to the court.[223] In Mr. Rosario's case, defense counsel allowed Mr. Rosario to be evaluated by a forensic psychologist working for the government,[224] along with their own expert.[225]

216. *See supra* note 14 and accompanying text.

217. Defendant's Amended Sentencing Position at 13–14, United States v. Johnson, No. 02-CR-13, (D. Minn. Jan. 21, 2015), ECF No. 291.

218. Defendant's Sentencing Letter, Exhibit B, United States v. Wong, No. 90-CR-1019 (E.D.N.Y June 3, 2015), ECF No. 396-2.

219. Defendant's Sentencing Letter, Exhibit C, *Wong*, No. 90-CR-1019 (E.D.N.Y June 3, 2015), ECF No. 396-3

220. Defendant's Sentencing Letter, Affidavit of Dr. Laurence Steinberg, *Wong*, No. 90-CR-1019 (E.D.N.Y June 3, 2015), ECF No. 396-9.

221. Defendant's Sentencing Letter, Exhibit F, *Wong*, No. 90-CR-1019 (E.D.N.Y June 3, 2015), ECF No. 396-6.

222. Defendant's Sentencing Letter, Exhibit G & H, *Wong*, No. 90-CR-1019 (E.D.N.Y June 3, 2015), ECF No. 396-7, 396-8.

223. *See* Sentencing Memorandum by Amaury Rosario at 3, United States v. Rosario, 99-CR-533 (E.D.N.Y. June 9, 2017), ECF 76-1 (listing attachments to defense submissions, many of which were filed under seal).

224. *See Rosario*, 2018 U.S. Dist. LEXIS 134657, at *14.

225. *See Rosario*, 2018 U.S. Dist. LEXIS 134657, at *9.

The government's sentencing memoranda typically advocated for the re-imposition of LWOP[226] or other lengthy sentences.[227] They focused on the circumstances of the crimes,[228] and underscored any infractions the defendant may have had in prison.[229] The rationale for re-imposition of LWOP was typically based on the notion that the particular defendant was an example of the "uncommon" case that the Court in *Miller* stated would be suitable for LWOP.[230] Where the defendant was close to his eighteenth birthday at the time of the crime, the government made sure to point this out.[231] Similarly, where there was less evidence of difficult circumstances during the defendant's childhood[232] or some evidence that the defendant played a leading role in the crime,[233] these facts were highlighted. For instance, in Mr. Johnson's case, the government's memorandum discussed the tragic nature of the crime in detail,[234] noted Mr. Johnson's various prison infractions,[235] and pointed out that he had not achieved his GED, suggesting that Mr. Johnson had not taken advantage of opportunities for rehabilitation in prison.[236] Anticipating that the defense would likely bring up Mr. Johnson's childhood, the government argued that his childhood was not bad enough to count as mitigating: his mother, despite her addictions, evidently cared about him and worked hard to support her children.[237] In support of the claim that Mr. Johnson was "incorrigible" the government pointed to his juvenile record:

> [Mr. Johnson] was only six months short of his eighteenth birthday [when he committed the offense]. By then he had committed a total of 13 juvenile and adult criminal offenses. All efforts at changing his behavior through programming, intensive probation,

226. *E.g.*, Position of the United States with Respect to Resentencing, *Johnson*, *supra* note 133, at 1.

227. *E.g.*, Government's Position with Respect to Resentencing, *Friend*, *supra* note 88, at 2.

228. *E.g.*, *id.* at 2–7.

229. *E.g.*, Government's Sentencing Letter, *Wong*, *supra* note 69, at 13–15.

230. *E.g.*, *id*. at 11–12; Position of the United States with Respect to Resentencing, *Jefferson*, *supra* note 179, at 4–9.

231. For instance, in their sentencing memorandum in anticipation of Mr. Briones' resentencing, the government wrote "Here, the defendant was 17 years, 11 months and 8 days old at the time of the murder." He was therefore not of a "tender age rendering him incapable of understanding and appreciating" what he was doing. Government's Sentencing Memorandum, *Briones*, *supra* note 160, at 26. In Mr. Rosario's case, the government emphasized that he was "less than a month shy of his 18th birthday at the time of the crime." Government's Sentencing Reply Letter at 1, United States v. Rosario, 99-CR-533 (E.D.N.Y. June 9, 2017), ECF 95. Similarly, at Kamil Johnson's resentencing the government commented that "we wouldn't even have to be here," had the offense happened a few months later. Transcript of Resentencing Hearing, *Johnson*, *supra* note 57, at 20.

232. Position of the United States with Respect to Resentencing, *Jefferson*, *supra* note 179, at 6–7.

233. *E.g.*, Government's Sentencing Memorandum, *Briones*, *supra* note 160, at 26.

234. Position of the United States with Respect to Resentencing, *Johnson*, *supra* note 133, at 1–6.

235. *Id.* at 7–8.

236. *Id.* at 8.

237. *Id.*

> and sanctions less than incarceration had failed, primarily due to the defendant's refusal to participate. Unfortunately, Johnson's behavior then and now places him in that "uncommon" category of juvenile offenders for whom a sentence less than life imprisonment would not be appropriate.[238]

Following the submission of memoranda from each side, the next phase of the process in each case entailed a resentencing hearing before a federal district court.

B. The Hearings

The resentencing hearings varied in form. On the defense side, some presentations consisted solely of oral argument, with no defense witnesses presented. In other instances, defense called family members[239] and/or expert witnesses[240] to testify. In one case, the defendant was called as a witness,[241] while in the remaining cases, the defendant simply presented a prepared statement to the court at the end of the hearing. The prosecution either called no witnesses, or called members of the victims' family to present testimony[242] or victim impact statements.[243]

In the case of Mr. Friend,[244] the defense called Mr. Friend's aunt as well as two experts: a consultant and former BOP prison administrator named Jack Donson, who had met with Mr. Friend and formed a positive opinion of him and his potential for success if released,[245] and a juvenile psychiatric expert, Dr. Gillian Blair, who testified at length in addition to submitting a report under seal.[246] Dr. Blair began by discussing the brain science that has animated the Court's Eighth Amendment juvenile sentencing jurisprudence.[247] She went on to discuss her view of Mr. Friend's family history from a clinical perspective, gathered from a meeting with Mr. Friend, conversations with his mother on the telephone, and stacks of "collateral" documents— such as school records[248]— from Mr. Friend's youth.[249] When asked how his home environment would have impacted Mr. Friend, she stated:

238. *Id.*

239. *See, e.g.,* Transcript of Resentencing Hearing (Dec. 2014), *Jefferson*, *supra* note 183, at 7.

240. *See, e.g.*, Transcript of Resentencing Hearing, *Friend*, *supra* note 55, at 27.

241. *See, e.g.*, Transcript of Resentencing Hearing, *Briones*, *supra* note 59, at 23.

242. *See, e.g.*, Transcript of Resentencing Hearing (Dec. 2014), *Jefferson*, *supra* note 183, at 57.

243. *See, e.g.*, Transcript of Resentencing Hearing, *Friend*, *supra* note 55, at 135.

244. This discussion relates to Mr. Friend's first resentencing hearing. *See* note 122, *supra*, and accompanying text. Timing and space constraints regrettably do not allow for discussion of the second hearing.

245. Transcript of Resentencing Hearing, *Friend*, *supra* note 55, at 88, 100–101, 106.

246. *Id.* at 27–58.

247. *Id.* at 33–38.

248. *Id.* at 46.

249. *Id.* at 38–43.

> [I]t would impact every aspect of his being. . . . [H]e absolutely idealized his older brother. He had a much more difficult relationship with Travis [Philip's brother]. But the thing that happens in families where you have this level of abuse and neglect is that it becomes normalized. That that's all that these children know. They don't know that this is abhorrent or abnormal . . . . This is the way they think families operate.[250]

She also discussed the battery of tests she performed on Mr. Friend.[251] As a result of these tests, she concluded that Mr. Friend did not suffer from any emotional disturbances or psychotic disorders and that he had matured in a way that a typical juvenile entering adulthood would mature.[252] In cross-examining the defense expert, the government questioned her choice not to administer any risk-assessment instruments in her evaluation of Mr. Friend,[253] and suggested that she had not provided the court with adequate information to assess the safety of the community if Mr. Friend were released.[254] In closing, the government returned to this theme and argued that "the one thing that we can conclude" is that the history of family dysfunction "and its lasting impact on the defendant and his neurological development bodes ill for his ability to function productively in society down the road if he's released at an age before he's very old."[255]

In the case of Robert James Jefferson, the defense called Dr. James Alsdurf, a clinical psychologist who also provided a report.[256] Dr. Alsdurf had evaluated Mr. Jefferson in 1998 in order to determine whether Mr. Jefferson should be transferred to adult court.[257] At that time, Dr. Alsdurf determined that Mr. Jefferson had antisocial personality disorder, but that otherwise he had no mental health issues and also presented as adult-like (Mr. Jefferson was then 19).[258] In both the 1998 and 2014 interviews, Dr. Alsdurf found that Mr. Jefferson was easy-going and cooperative.[259] Omitting this in the 1998 interview, Mr. Jefferson admitted in the 2014 interview that he had been sexually abused by an older brother as a juvenile,[260] and that this led him to leave home and go live with a different older brother, where he joined the gang.[261] Dr. Alsdurf found this relevant to the

250. *Id.* at 48–49.
251. *Id.* at 51–55.
252. *Id.* at 55–57.
253. *Id.* at 60–62, 64–74.
254. *Id.* at 74–84.
255. *Id.* at 152–53.
256. Transcript of Resentencing Hearing (Dec. 2014), *Jefferson*, *supra* note 183, at 19–20, 67.
257. *Id.* at 20.
258. *Id.* at 20–24.
259. *Id.* at 21–22.
260. *Id.* at 22–23.
261. Defendant's Position Regarding Sentencing Factors, *Jefferson*, *supra* note 182, at 12–13.

"context in which he grew up" and "his own response to that[,] that I think contributed to his antisociality as an adolescent."[262]

After administering various clinical instruments (most notably the Minnesota Multiphasic Personality Inventory II) Dr. Alsdurf opined that Mr. Jefferson still had some form of personality disorder; that he was "very compartmentalized" and had not dealt with a lot of his issues (such as sexual abuse), but had been successful in prison because of his natural social adaptability and ability to determine what is expected of him.[263] He further noted that Mr. Jefferson "perceives himself as alienated from the world" in a psychological sense.[264] Dr. Alsdurf did not give any substantive predictions about how Mr. Jefferson would fare outside of prison. During cross-examination and closing, the prosecutor suggested Mr. Jefferson's recent disclosure of sexual abuse was a lie (apparently "too convenient to be credible"),[265] and that Mr. Jefferson's program participation, which increased after *Miller*'s ruling, made him an opportunist.[266]

The Court also questioned Dr. Alsdurf about the applicability of some of the *Miller* factors to Mr. Jefferson.[267] With respect to the first factor, Dr. Alsdurf said that in 1998, he definitely saw underdevelopment in Mr. Jefferson; Mr. Jefferson got sucked into a "merry-go-round" of excitement that "fed a part of him" and he did not understand the risks and consequences of his choices.[268] When asked whether Mr. Jefferson was vulnerable to peer pressure and unable to extricate himself from horrific crime-producing settings, Dr. Alsdurf stated simply "yes" with respect to his 1998 interview.[269] With respect to the notion that juvenile traits are less fixed, their characters not well-formed and therefore their actions less likely to be the result of irretrievable depravity, Dr. Alsdurf wavered. He stated that there was no evidence of "irretrievable depravity" and that he did not believe Mr. Jefferson to be a psychopath.[270] Nonetheless, Mr. Jefferson tested positive for antisocial personality in 2014, but also received behavioral reports from the BOP demonstrating prosocial behavior.[271] He continued: "I would simply say this is who he is, he's both, and none of that has really been resolved yet. . . . [W]e don't know which is in control at this point, but I think both [antisocial and prosocial tendencies] are present."[272]

262. Transcript of Resentencing Hearing (Dec. 2014), *Jefferson*, *supra* note 183, at 23.

263. *Id.* at 24, 25–27, 32–33.

264. *Id.* at 26. It is worth noting the irony of this diagnosis: Mr. Jefferson has been incarcerated his entire adult life, and therefore is quite literally "alienated" from the world.

265. *Id.* at 44–45, 82.

266. *Id.* at 48–50, 87.

267. *Id.* at 53–56.

268. *Id.* at 53.

269. *Id.* at 55.

270. *Id.*

271. *Id.*

272. *Id.* at 55–56.

The prosecution often presented their case in the form of victim impact statements—either through letters to the court or live statements by victims who attended the proceedings.[273] A selection of these victim impact statements reflects the wide range of attitudes taken by victims toward the resentencing process. At Mr. Friend's resentencing hearing, the bulk of the statements came from the family of one of the truck drivers[274] who was killed by the Friend family. All described how much they loved and missed him, and how this tragedy ripped a hole in their lives.[275] The children described how difficult it had been to have their father absent for his grandchildren's life milestones.[276] His widow also described receiving the phone call from the prosecutor's office in regard to Mr. Friend's resentencing, which she described as a triggering, re-traumatizing experience.[277] Both the wife and son stated that they wanted Mr. Friend to be resentenced to life.[278] In particular, the son said that the whole thing was "tough to stomach":

> [I]t's amazing to me that we can sit here and talk about a young man's—how well a young man is doing when we have got . . . families that are obviously still not doing well from this . . . . And it's—boy, it's tough. It's tough to stomach today, Your Honor. It really is tough for me to stomach today that—having to share the life about my kids and my family, and what we've missed out on, to hear about how wonderful somebody else is doing and how concerned we are about what he's going to do with the rest of his life, you know. Your Honor, I don't care.[279]

In contrast, the victim's siblings described their experiences of remorse and grief but went on to express forgiveness. One of the siblings directly addressed the contrast between his own family and Mr. Friend's:

> And we, as a family, were very happy . . . . And to be honest with you, it was easier for me to forgive you and your family than it was to bear the burden of bitterness and anger and hatred. And I'll be honest with you, I hated you guys for quite a while and—but I've forgiven you.
>
> I'm really sad that you grew up in a home that you did because our home—I'll tell you, we laughed and we played and we

273. 18 U.S.C. § 3771 (a)(4), known as the "Crime Victim's Rights Act" provides that victims have the right to be heard at any public proceeding regarding sentencing. Pursuant to 18 U.S.C. § 3771(c)(1) the government is required to inform victims of these rights and facilitate the exercise thereof.

274. The names of victims and their families have been omitted.

275. Transcript of Resentencing Hearing, *Friend*, *supra* note 55, at 110–51.

276. *Id.* at 125–26, 128.

277. *Id.* at 114–16.

278. *Id.* at 122, 128.

279. *Id.* at 127–28.

> worked hard. We had a great time. We still had our fights. [ ] But, man, we had a lot . . . of clean fun.
>
> And I'm very sorry for you and your family because you don't have clean good memories like we have. Memories can never be taken away from me and from us. And I have a lot, a lot of good memories. You know, I wish you did. I really wish that you did. And I'm sorry that you don't.[280]

The victim's sister described a religious experience in which God spoke to her, saying: "*'Your brother's murderer is deeply wounded. I love your brother's murderer as much as I love you, and as much as I love your brother.*'"[281] She continued: "I've learned that you and your brothers were deeply wounded, Philip. Just as God told me. I have deep compassion for you because of the wounds that you have experienced."[282] Stating that "there is no magical length of sentence that will ever bring my brother back," she explicitly forgave Mr. Friend, offering "god's love and forgiveness" and stating that "when I forgave your brother [ ] in the courtroom, I came away a free woman."[283] In the aftermath of her brother's death and her religious experience, the victim's sister has written and spoken about restorative justice and conducts seminars with federal prisoners and victims of violent crime.[284]

In Mr. Wong's case, though no victims spoke, victim letters were evidently submitted under seal and seem to have also expressed compassion and forgiveness. All of the participants at the hearing commented on how they were affected by these letters. First, defense counsel stated that although he had a twenty-minute speech prepared several days prior, he had decided to keep his remarks brief after reading the letters:

> Then I realized when I read the [victim impact] letters that I've actually said everything that I can possibly say about Mr. Wong, that no one really wants to hear what I have to say anymore, just like nobody really wants to hear what [experts in the case have to say]. . . . I think everybody really wants to hear from Mr. Wong,

280. *Id.* at 132–33.

281. *Id.* at 140.

282. *Id.*

283. *Id.* at 140–41.

284. *Id.* at 141–42. According to her statement:

> To date we've worked with nearly 200 helping them heal their wounded hearts and life. Helping them understand and accept the deep consequences and far-reaching impact of their crime, but then also encouraging them to accept God's love and forgiveness for them. Through our work, we've learned through the stories they share that they too are deeply wounded. And it is so gratifying to hear them express their deep regret, remorse, their shame and they're sorry for what they've done. That can only be a dream of mine that one day my family and I would hear the word of sorry.

Id.

> and I'm hoping that the Court will take today's hearing as an opportunity not only to listen to Mr. Wong, but actually to engage him so the Court understands exactly who the Court is about to re-sentence.[285]

When Mr. Wong addressed the Court, he was evidently in tears. After a long expression of remorse, he said:

> MR. WONG: […] I feel so bad reading Ms. [ ]'s letter.
>
> THE COURT: Takes your breath away, doesn't it?
>
> MR. WONG: Yes.
>
> THE COURT: How someone can be so decent under those circumstances and so forgiving.
>
> MR. WONG: Yes.
>
> THE COURT: Tells you something about them. Also tells you something, I suggest, about the people you killed and the quality of their lives.
>
> MR. WONG: I understand I ruined their lives, their family's lives, and I'll never forgive myself for that and I know whatever I say can't bring them back, but I can only change the future and try to do better.[286]

In pronouncing sentence, the Court also discussed the victim impact letters:

> [I]t does warrant noting at the same time these letters that I received from others, a woman whose life you conspired to end in murder tells me, in no uncertain terms, that Alex Wong should have a chance to live a normal life and return to the society. I read it over and over again. Were it not otherwise consistent with what she said in the bulk of her letter, I would have assumed it was a typo. Imagine such a woman who brings that level of understanding to this case.
>
> And of course, the letter of [ ] we will all remember for a long, long time to come . . . ."I find no joy in another human's suffering. I bear no anger or hate toward Alex Wong and his group. My desire is not about seeking revenge or restitution. It's about doing and getting the right result. I will leave Alex Wong to his god and me to mine."[287]

In each case, the defendant addressed the court. Mr. Briones also testified in addition to delivering a prepared statement.[288]All but one of these statements

285. Transcript of Resentencing Hearing, *Wong*, *supra* note 53, at 5–6.

286. *Id.* at 16.

287. *Id.* at 17–18.

288. Transcript of Resentencing Hearing, *Briones*, *supra* note 59, at 23–68.

expressed remorse. The exception was Mr. Johnson, who delivered an incoherent statement[289]which the prosecutor and the court later described as "tax protester nonsense;"[290] it is likely that Mr. Johnson is an adherent to one of a variety of conspiracy theories that proliferate in the informational vacuum of prisons.[291]

Often, it appeared that the defendants struggled to articulate their remorse in a manner that was cognizable to the court as such. This was most striking in the case of Mr. Briones. Throughout his testimony and during his statement to the court, it was clear that Mr. Briones was remorseful, but struggled with expressing this remorse. For instance, at one point he said that he did not feel worthy of asking for forgiveness, and indicated that he did not feel that words could ever suffice as an apology to the family of the person he helped kill.[292]

The issue of Mr. Briones' remorsefulness became a point of contention during his subsequent appeal to the Ninth Circuit. In a since-vacated decision affirming the district court's re-imposition of LWOP, a panel of the Ninth Circuit stated that Mr. Briones was insufficiently remorseful: "Although Briones told the court that he 'wanted to express remorse' and 'wanted to express grief,' he never actually took responsibility for any of the crimes of which he was convicted."[293] In his partial dissent, Circuit Judge Diarmuid O'Scannlain noted that "it is true that Briones's testimony was not crisp and eloquent," but rejected the majority's finding a lack of remorse:

> Although the government and the majority offer one plausible interpretation of Briones's testimony, it is hardly the only one. In fact, when I read the transcript, I see much that could support a contrary finding that Briones expressed remorse repeatedly and at length.
>
> Briones expressed regret for his actions. He admitted the key facts of the murder and subsequent crimes and admitted that "it's probably my fault when I thought about it." He explained that he regularly asks himself, "why didn't I do something at that time, why

289. Transcript of Resentencing Hearing, *Johnson*, *supra* note 57, at 17.

290. *Id.* at 23, 32. The court in Mr. Johnson's case did note that Mr. Johnson had written to the court expressing remorse prior to the sentencing, though that letter appears to have been filed under seal. *Id.* at 32.

291. *See generally* Mary Rayme, *The Conspiracy Theories You Hear in Prison,* The Marshall Project (March 15, 2018), https://www.themarshallproject.org/2018/03/15/the-conspiracy-theories-you-hear-in-prison [https://perma.cc/BEJ4-AC9H].

292. *See* Transcript of Resentencing Hearing, *Briones*, *supra* note 59, at 54. As it turns out, the day before the hearing, the government prosecutor visited Mr. Briones in prison. The prosecutor described this as being very helpful, and noted that in his 29 years as a prosecutor, he has never visited with a defendant in prison. However, the prosecutor ultimately used what Mr. Briones shared in that meeting against him. He claimed that Mr. Briones had minimized his role in the offense and his role in the gang generally. This was presented as a failure to accept responsibility. *See* Transcript of Resentencing Hearing, *Briones*, *supra* note 59, at 94–95.

293. United States v. Briones, 890 F.3d 811, 815 (9th Cir. 2018), *vacated and reh'g granted en banc*, 915 F.3d 591 (9th Cir. 2019).

> . . . didn't I stop myself way before that, why didn't I do something at the court?" He explained that, "the thing that haunted me so much about just living in prison was that" the murder victim was, "a young Christian man," and that it "haunts me to have that on my hands." And he said, "I want to express remorse, I want to express grief."
>
> Briones also expressed sympathy for those he had harmed. For instance, he explained that he did not believe the victim's family could ever forgive him because he was responsible for "a great offense that . . . is unrepaired." He explained that "now that I'm older . . . I witness not just in my own life people murdered and their killers get to go home," and he can "see [] people in pain when they've gone through their loss, [and] all of this had made me not only sympathize but to empathize with all of it." He said, "I know I have to apologize for everything and I apologize all the time to my family . . . and my apology goes out . . . to the [victim's] family."[294]

Despite these multiple quotations from Mr. Briones' testimony, the majority responded in a footnote that the dissent's claim that Mr. Briones expressed remorse "repeatedly and at length" was "simply not supported by the record."[295]

This debate over Mr. Briones' remorsefulness is telling and troubling. Mr. Briones left high school at 15 and has been incarcerated his entire adult life. Though his statement may not have been a model of eloquence, it is arguable that this was the product of doubt about his own worthiness of redemption—thus his statement that he "wanted to express remorse" but does not know how.[296] The profoundly uncharitable interpretation of Mr. Briones' statement by the district court and circuit court majority exemplifies the insensitivity of the criminal legal system to cultural and class differences in modes of expression.

The hearings concluded with oral argument that generally reprised the arguments in the memoranda. Defense counsel all essentially argued that the *Miller* factors militate in favor of leniency and typically recommended (either voluntarily or upon being asked by the court) a sentence of 25–30 years. Additional features of these arguments relating to 18 U.S.C. § 3553(a) and the USSG are discussed below. In response, the government typically advocated for the re-imposition of LWOP or a lengthy sentence, suggesting that the defendant was the uncommon "incorrigible" defendant, claiming, for example, that the *Miller* factors "are not present,"[297] or that the *Miller* factors "don't line up" in the defendant's favor.[298] Notably none of the district courts made an explicit finding of incorrigibility. In

294. *Id*. at 825–826 (O'Scannlain, J., dissenting in part).
295. *Id.* at 815 n. 1.
296. *Id.* at 814.
297. Transcript of Resentencing Hearing (Dec. 2014), *Jefferson*, *supra* note 183, at 87.
298. Transcript of Resentencing Hearing, *Johnson*, *supra* note 57, at 25.

the case of the one defendant who received LWOP, Mr. Briones, the court noted Mr. Briones' rehabilitation but said that "some decisions have lifelong consequences."[299]

IV.
THE DECISIONS

This section examines the district court decisions in these cases, as well as relevant appellate history. My analysis is structured around the sources of statutory and judicially-created guidance available to courts in this position. Section IV.A looks at how the courts analyzed the five "*Miller* factors." Section IV.B considers the use of prior *Miller* resentencings as another source of precedential guidance that courts have used to varying degrees. Section IV.C looks at the use of the 18 U.S.C. § 3553(a) factors, statutorily-available sentences, and the United States Sentencing Guidelines (USSG).

A. The Miller *Factors*

Miller enumerated five factors that courts should consider before sentencing a juvenile homicide offender to LWOP.[300] When it announced this analytical framework, the Court had in mind the initial sentencing of juvenile homicide offenders. However, the factors are used in other contexts, such as parole and resentencing hearings for juvenile offenders. In the resentencings considered above, defense counsel generally structured their memoranda and oral arguments around these factors. The district courts varied in terms of the depth with which they evaluated the *Miller* factors on the record. For instance, in pronouncing Mr. Friend's sentence of 65 years, the district court only obliquely referenced *Miller*-type considerations when commenting that it was aware of Mr. Friend's "tough upbringing."[301] Mr. Friend appealed to the Fourth Circuit, which held in an unpublished opinion that the district court had failed to place enough of its rationale on the record. The Circuit Court remanded on this narrow basis, not reaching the issue of the "substantive reasonableness" of the sentence:

> The appellant is correct that the trial court's statement explaining its sentence did not adequately address the fact that Philip was 15 years old when he committed the offenses, that he would have had trouble getting away from the influence of his family, and that, consequently, he was less blameworthy than his older brothers who came up with this criminal scheme and committed the killings. This is not to say that the court erred when it took into account the terribly brutal nature of the crimes that were committed with appellant's undeniable participation. But it should have

299. Transcript of Resentencing Hearing, *Briones*, *supra* note 59, at 105.

300. *See supra* text accompanying note 14.

301. Transcript of Resentencing Hearing, *Friend*, *supra* note 55, at 163.

> been clearer about how it weighed this latter factor against the former. We do not need to address the substantive reasonableness of the sentence imposed. We instead leave the imposition of a sentence to the able offices of the district court upon remand.[302]

This suggests that district courts must do more than merely gesture towards the *Miller* factors. Rather, a specific analysis of each factor is required, and the district court must be clear about how each factor is weighed in its ultimate decision.

1. Chronological age and its hallmark features

The first *Miller* factor is "chronological age and its hallmark features."[303] In presenting favorable evidence regarding this factor, defense attorneys often employ psychiatric experts to testify or prepare reports about the neurobiological development of adolescents. After the direct testimony of one such expert in Mr. Friend's case, the prosecutor commented:

> And before we get into the real meat of my cross-examination, I will just say up front that as the parent of two teenage children, I've experienced multiple rolled eyes in my direction when I complained about their underdeveloped prefrontal cortex. So that area of psychology is not in dispute.[304]

Notwithstanding its distasteful tone, this comment gets to something worth considering with respect to the first *Miller* factor. The scientific information about the neurobiological bases for juvenile "immaturity, impetuosity, and failure to appreciate risks and consequences"[305] is generalized to all juveniles.[306] Therefore, if we accept the scientific information for what it says, there should be no question as to the applicability of the science to a given case; if the defendant is a particular age, the science should (and does) apply by definition.[307] At the same time, the Court in *Miller* seems to call for an individualized analysis of these universal facts by presenting "chronological age and its hallmarks" as a factor to be considered at sentencing. As the prosecutor's comment suggests, such an individualized analysis should not be necessary because this "area of psychology is not in dispute" as a general matter with respect to all juveniles.

302. United States v. Friend, No. 17-4435, 2018 U.S. App. LEXIS 33618 (4th Cir. Nov. 30, 2018) at *4.

303. Miller v. Alabama, 567 U.S. 460, 477 (2012).

304. Transcript of Resentencing Hearing, *Friend*, *supra* note 55, at 58.

305. *Miller*, 567 U.S. at 477.

306. Richard J. Bonnie & Elizabeth S. Scott, *The Teenage Brain: Adolescent Brain Research and the Law*, 22(2) CURRENT DIRECTIONS IN PSYCHOL. SCI., 161, 158–161 (2013). ("Currently, the only legitimate use of adolescent brain research in individual cases is to provide decision makers with general descriptions of brain maturation."). This is not to say that there are not differences among individual juveniles in terms of their rates of development, but the science has not advanced to the point that such individual differences can be accurately measured. *See* Octavio S. Choi, *What Neuroscience Can and Cannot Answer*, 45 J. AM. ACAD. PSYCHIATRY LAW 278, 281 (2017).

307. *Cf.* Stephen J. Morse, *Brain Overclaim Redux*, 31 LAW & INEQ. 509, 509–534 (2013).

The paradox posed by the "chronological age" factor results from the Court's timidity in *Miller.* In refusing to take LWOP completely off the table, the Court in *Miller* failed to give substantive categorical effect to its pronouncements about juveniles, as it had in its prior juvenile sentencing cases.[308] Opting to preserve the ability of a sentencing court to impose JLWOP, the Court effectively created a procedural shield for sentencing courts wishing to do so. This is comparable to the state of affairs in the capital context, where increasingly complex procedural regimes create an appearance of rationality that shields the decision to put someone to death from critical scrutiny.[309]

Miller instructs sentencing courts to "consider" the fact that the person before them is (or was) young at the time of the crime, and therefore by definition subject to all the developmental deficits that come with being young. But one might reasonably wonder what there is to "consider" on an individual basis with respect to chronological age, given that the empirical facts about youth are applicable to every single *Miller*-eligible defendant. While there are certainly individual considerations to be made with respect to the remaining *Miller* factors, the first *Miller* factor is not individualizable in the same way.

This puts *Miller*-eligible defendants in a difficult position. Since the developmental deficits associated with youthfulness have not been given the categorical effect that should logically follow from their universality, these deficits are instead inevitably treated as factual questions that have to be affirmatively proved by the defendant, and which are thereby subject to disproof by prosecutors and rejection by courts. Presenting scientific testimony about the neurobiology of the juvenile brain, as applied to a particular defendant, may risk opening this door too far.

Some of the rhetorical strategies used by prosecutors in these cases illustrate the problem. Prosecutors frequently hijack the language of juvenile impulsiveness and "impetuosity" from the first *Miller* factor to argue that the particular offense committed was *not* impetuous and therefore *un*characteristic of juvenile behavior: premeditation is presented as evidence of the absence of impetuosity, which therefore negates the diminished culpability attendant to youth. The prosecutor in Mr. Jefferson's case, for example, in arguing that "the *Miller* factors are not present here," noted that the crime was not impulsive but premeditated.[310] The court agreed,[311] despite the fact that the psychiatric expert who had evaluated Mr. Jefferson in 1998 testified in response to the court's own questions about the first

308. *See* Roper v. Simmons, 543 U.S. 551, 573–75 (2005) (noting that drawing a hard line at 18 for the imposition of the death penalty is subject to the usual criticisms of categorical rules but that the risk of disproportionate punishment was too great to adopt a non-categorical rule); Graham v. Florida, 560 U.S. 48, 75 (2010) ("Categorical rules tend to be imperfect, but one is necessary here.").

309. Wayne A. Logan, *Casting a New Light on an Old Subject: Death Penalty Abolitionism for a New Millennium*, 100 MICH. L. REV. 1336, 1342–43 (2002) (describing how the increasingly complex procedural regimes surrounding the imposition of the death penalty have served to shore up confidence in the capital process, to the detriment of abolitionist movement).

310. Transcript of Resentencing Hearing (Dec. 2014), *Jefferson*, *supra* note 183, at 87.

311. Transcript of Resentencing Hearing (Jan. 2015), *Jefferson*, *supra* note 176, at 59.

Miller factor that he had definitely seen the presence of the first *Miller* factor in Mr. Jefferson.

The subtext of such prosecutorial arguments is that where a juvenile offense is premeditated, it is the product of innate moral failing—i.e. "incorrigibility"—rather than the developmental deficits associated with juvenility. This is a woefully myopic argument. Even when a juvenile offender engages in some form of premeditation, their decision-making process will be infected by the inability to accurately assess risks and consequences that were identified by the Court in *Miller* as one of the hallmarks of youth. Nevertheless, prosecutors get traction out of such arguments—particularly where the "chronological age" factor is placed as the central issue in the sentencing proceeding.

With these concerns in mind, it is worth questioning the wisdom of making complex scientific testimony the norm in support of the first *Miller* factor, rather than simply referring sentencing courts to a plethora of written scientific sources. The choice to fully take on the first *Miller* factor as something that a defendant has to affirmatively *prove*, rather than something that is simply a given based on his or her chronological age, risks shifting the analysis away from the notion that juvenile offenders are categorically less culpable simply by virtue of their chronological age. Though the problem ultimately lies with the Court's failure in *Miller* to give categorical effect to the hallmark features of chronological age, defense attorneys might be able to shift the narrative and framing of these issues by emphasizing that the empirical facts about chronological age are beyond dispute and *by definition* applicable to juvenile offenders.

This is admittedly a speculative suggestion. Given the complexity of the issues presented in these resentencing proceedings, it is impossible to disentangle the effect of a given strategic choice—such as the decision to call an expert psychiatric witness to testify as opposed to providing reports or not engaging with mental health experts at all. In the two cases in which experts were called to testify—Mr. Friend's and Mr. Jefferson's—both defendants received lengthy sentences (65 and 50 years). On the other hand, in the case of Mr. Briones, no psychiatric evidence was offered at all, and Mr. Briones received LWOP—which might suggest that the absence of scientific evidence could have a negative effect. In the two cases where reports were submitted, but no testimony presented—Mr. Rosario's and Mr. Wong's—the resulting sentences were relatively lenient compared to the others—though the similarity between the outcomes in *Rosario* and *Wong* might also be explained by other factors, such as the fact that they took place in the same federal district. At least one court in the cases considered herein appeared to approach chronological age as a categorically mitigating factor, and this approach produced one of the more lenient sentences of the group. In pronouncing sentence at the conclusion of Mr. Wong's *Miller* hearing, the court stated:

> As Judge Raggi noted [at Mr. Wong's initial 1992 sentencing], the potential [for rehabilitation] was there and now we've seen

> the manifestation to some extent of that potential, but in a way, it doesn't matter. I don't care, at some length, because that's how you spent your time. Good for you, you made good use of your time.
>
> What I want to focus on is culpability. Not what you've done [in prison]. Good for you, you made good use of your time. How do we measure your culpability? Because the science has progressed, as everyone acknowledges, even to their credit, the science has progressed . . . . So, the question is how do we justly assess your level of culpability at that time, given the science as we now know it now?[312]

The court's emphasis on the question of culpability at the time of the offense as inflected through juvenile status suggests that it viewed the deficits associated with juvenile status as categorically lessening the culpability normally associated with Mr. Wong's crimes of conviction. This might be contrasted with the treatment of age-related deficits as a debatable factual question.

2. Peer pressure, family and home environment

Miller's mandate of individualized sentencing comes to the fore when considering the remaining *Miller* factors, which demand inquiry into the life and circumstances of the offender and the crime. The second Miller factor is "family and home environment;" the third is the presence of peer pressure.[313] Peer pressure was a significant factor in every single *Miller* resentencing considered above. Mr. Wong,[314] Jefferson,[315] Johnson,[316] and Briones[317] were all members of groups labeled as gangs and had been influenced by older gang members, some of whom were also family members. Mr. Rosario had fallen in with an older and more experienced robbery crew.[318] Mr. Friend participated in his crimes alongside his entire nuclear family,[319] including two older brothers who exerted a coercive influence on him.[320]

Similarly, all of the defendants grew up in a degree of poverty, and many suffered from serious emotional and physical abuse. The consistent narrative across all of these cases features a young man who is unable to access guidance

312. Transcript of Resentencing Hearing, *Wong*, *supra* note 53, at 19–21.

313. *Miller*, 567 U.S. at 477.

314. *Supra* note 65 and accompanying text.

315. *Supra* note 178 and accompanying text.

316. *Supra* note 127 and accompanying text.

317. *Supra* note 160 and accompanying text.

318. Sentencing Memorandum by Amaury Rosario, *supra* note 203, at 8–9 & n. 12.

319. *Supra* note 86 and accompanying text.

320. *Supra* note 250 and accompanying text.

and care at home and who ends up finding a sense of belonging and protection in the company of gang-involved peers or slightly older criminally-experienced men.

Though I have suggested that individualized presentations via expert testimony or reports might be unnecessary with respect to the "chronological age" factor because the science is equally applicable to any given juvenile defendant, psychiatrists and other mental health professionals can, and often do, point out ways that chronological youth interacts with the other *Miller* factors. For instance, where a juvenile also lacks a stable family structure and/or is subject to negative peer pressure, this interaction can magnify and exacerbate the deficits attendant to juvenility.[321]

3. Inability to deal with the legal system

The fourth *Miller* factor instructs the sentencing court to consider the ways in which the "incompetencies associated with youth" might affect the way a juvenile offender interacts with the criminal legal system.[322] This factor is the least discussed of the five, and is often never mentioned at all. This may be a missed opportunity, because these incompetencies can play a huge role in the outcome of a juvenile offender's criminal case, and evidence in support of this factor might be readily available to defense counsel. This *Miller* factor is worth considering and emphasizing in conjunction with the susceptibility of juveniles to peer and family pressure, and the inability to assess risks and consequences, such as the likelihood of a conviction at trial; for instance, juvenile offenders may be more likely to listen to family members who insist that they reject a guilty plea.[323] The idea that juveniles are often less equipped to navigate the criminal legal system was constitutionalized in *J.D.B. v. North Carolina*,[324] where the court held that age was a factor that must be considered in determining whether a juvenile offender was in custody for *Miranda* purposes; accordingly, at least in theory, courts should be receptive to the argument that juvenile offenders typically operate at a disadvantage in the criminal legal system.

Particularly in the federal system, where the investigation and prosecution of violent crime will more often focus on larger criminal enterprises,[325] juveniles are likely to be charged based on their connection to criminal enterprises that are directed by older people who may deliberately recruit and use juveniles to commit

321. Straley, *supra* note 1 at 973–74.

322. *Miller*, 567 U.S. at 477.

323. This seems to have been the case for Mr. Briones, whose testimony suggested that he was pressured by his father to reject a guilty plea, and also that he was confused about the plea being offered. Transcript of Resentencing Hearing, *Briones*, *supra* note 59, at 37–39.

324. J.D.B. v. North Carolina, 564 U.S. 261, 265 (2011).

325. *See* Federal Bureau of Investigation, VIOLENT GANG TASK FORCES, available at https://www.fbi.gov/investigate/violent-crime/gangs/violent-gang-task-forces (describing the "Enterprise Theory of Investigation" as a key facet of FBI's response to violent crime); *see generally*, Richard M. McFeely, *Enterprise Theory of Investigation*, FBI LAW ENFORCEMENT BULLETIN, May 2001 (describing the Enterprise Theory of Investigation).

violent crimes on behalf of the organization.[326] Defense counsel alluded to this practice during the resentencings of both Mr. Johnson[327] and Mr. Wong.[328] Adults with more experience in the criminal legal system are likely to be better equipped to effectively navigate the twists and turns of the criminal process and recognize a good plea deal.[329]

Mr. Johnson's case is illustrative in this regard. There, one of the main witnesses against him was the older gang leader who ordered him to carry out attacks on enemy gang members. According to the government's own memorandum, on the same day that the leader of the gang was arrested on a multi-count drug indictment, he agreed to cooperate with law enforcement and ultimately testified against Mr. Johnson.[330] Despite the fact that he had—per the prosecution's memorandum—"repeatedly ordered all his gang members to shoot" any enemy gang members on sight,[331] and thus directly contributed to the resulting death, this individual was convicted of distributing crack cocaine and sentenced to 14 years, which was later reduced to 11 years.[332]

Similarly, in Mr. Briones' case, the government secured the cooperation of a participant in the Subway shooting after the first week of trial, who ultimately received seven years in exchange for this testimony.[333] This testimony formed the narrative presented by the Government at the resentencing, and the prosecutor argued that Mr. Briones' claims contradicting aspects of this narrative were evidence of his failure to take responsibility.[334] It is hardly implausible to imagine that had Mr. Briones been the one who cooperated, the government's narrative might have looked different. Similarly underscoring the significance of the "incompetencies of youth" factor, a significant amount of evidence was put forth suggesting that Mr. Briones did not understand the details of the plea deals being offered to him, had not been adequately counseled, and had been heavily influenced by the

326. *See generally* Elizabeth Mastropolo, *Child Soldiers in America: Criminal Manipulation of Minors*, 27 J. CIV. RTS. & ECON. DEV. 323, 331–332 (2014) (discussing the deliberate recruitment of juvenile gang members).

327. Defendant's Amended Sentencing Position, *Johnson*, *supra* note 124, at 32–33.

328. Defendant's Sentencing Letter, *Wong*, *supra* note 61, at 3.

329. *Miller*, 567 U.S. at 477–78 ("[LWOP] ignores that [the defendant] might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys."); *see* Tamar R. Birckhead, Graham v. Florida*: Justice Kennedy's Vision of Childhood and the Role of Judges*, 6 DUKE J. CONST. L. & PUB. POL'Y 66, 69 (2010) (describing Justice Kennedy's recognition that youths are inherently disadvantaged in the attorney-client relationship and the criminal process generally).

330. Position of United States with Respect to Resentencing, *Johnson*, *supra* note 133, at 5.

331. *Id.* at 3.

332. *See* Order and Memorandum, United States v. Williams, No. 0:01-cr-00224-DWF-AJB (D. Minn. Nov. 18, 2011), ECF No. 108.

333. Government's Sentencing Memorandum, *Briones*, *supra* note 160 at 21; Transcript of Resentencing Hearing, *Briones*, *supra* note 59, at 79.

334. Transcript of Resentencing Hearing, *Briones*, *supra* note 59, at 94–96.

presence of his father and brother as co-defendants.[335] His direct testimony established that he had in fact been offered a twenty-year plea deal either during or before trial, but his father had been adamant that he not accept it.[336]

4. Rehabilitation

The fifth *Miller* factor is the "possibility of rehabilitation."[337] This factor is different from the other four, in that it refers to the future: a court initially sentencing a *Miller* defendant is asked to predict, to a certain extent, the likelihood of a juvenile offender's eventual reform; in contrast, in the resentencing context, a court will have to consider information tending to show rehabilitation. Rehabilitation was evident to varying degrees with all of the defendants considered herein. Mr. Wong, Friend, and Rosario cited certain intensive BOP programs as being instrumental to their changed outlook,[338] while Mr. Jefferson attempted to show rehabilitation by his participation in a plethora of college courses, his employment history with in the BOP, and his having served as a mentor for other inmates in the BOP.[339] Most of the defendants also had very positive records working within the BOP.

However, *Miller*-eligible defendants face inevitable challenges in presenting evidence of rehabilitation. Programming is not universally available,[340] and the admissions criteria may bar certain inmates from participation in the more intensive programs.[341] Furthermore, prior to *Miller*, defendants believed that they were going to die in prison; many may have felt no particular motivation to engage in programming, perhaps feeling that "it [is] easier to do [their] time by letting go of any false hope."[342] Now that *Miller* introduces a new opportunity for life after prison, this coping mechanism is coming back to haunt them. Adding insult to injury, when defendants begin participating in programs post-*Miller*, they may then be accused by prosecutors as being opportunistic, and their reform efforts are

335. *Id.* at 37–40, 81–82.

336. *See supra* note 323.

337. Miller v. Alabama, 567 U.S. 460, 478 (2012).

338. Mr. Wong participated in "E-CODE." Defendant's Sentencing Letter, *Wong*, *supra* note 61, at 4. Mr. Friend participated in "BRAVE." Transcript of Resentencing Hearing, *Friend*, *supra* note 55, at 100–01. Mr. Rosario participated in "Challenge." United States v. Rosario, 2018 U.S. Dist. LEXIS 134657 at *8 (E.D.N.Y. Aug. 9, 2018).

339. Defendant's Position Regarding Sentencing Factors, *Jefferson*, *supra* note 182, at 3–6.

340. For example, the most up-to-date information from the Federal Bureau of Prisons states that the "Challenge" program is only available at 13 of 122 federal prisons and "BRAVE" is only available at two. Federal Bureau of Prisons, DIRECTORY OF NATIONAL PROGRAMS at 10 (2017) available at https://www.bop.gov/inmates/custody_and_care/docs/20170914_Directory_of_National_Programs1.pdf.

341. To participate in "Challenge" an inmate must have a history of substance abuse/dependence or a major mental health disorder. *Id.* at 10. To participate in "BRAVE" the inmate must be classified as "medium-security," and be under the age of 32. *Id.* at 9.

342. Levick &. Schwartz, *supra* note 214, at 395 (quoting letter from Pennsylvania juvenile lifer Sharif I. to the Juvenile Law Center).

discounted as disingenuous, as in the case with Mr. Jefferson, where the prosecutor scrutinized his prison record to suggest that Mr. Jefferson's participation in various activities were the result of a desire to make himself look good at an eventual *Miller* hearing.[343]

Expert reports are frequently used to provide evidence regarding rehabilitation. For instance, the defense memorandum in Mr. Wong's case stated:

> Based on the results of HCR-20 and PCL-R tests, along with Counselor Macintosh's observations, Mr. Wong's educational achievements, and his family's support system, [the expert witness] concluded that Mr. Wong projects a "[l]ow risk of violence directed toward others if released to the community in a series of structured stages with appropriate conditions of parole attached."[344]

In Mr. Friend's case, a retired BOP administrator who works in prison reform advocacy testified that he did not think Mr. Johnson would recidivate, that he was "forward-thinking" and "goal-directed."[345] He also suggested that he would be happy to serve in a mentorship capacity for Mr. Friend going forward.[346] In Mr. Rosario's case, the defense expert stated that Mr. Rosario had achieved "complete rehabilitation,"[347] and the government expert (who defense had agreed to allow to evaluate Mr. Rosario), stated that "there is no indication that he demonstrates a pronounced penchant for aggression, sadism, or violence" and that "few clinical concerns emerge regarding the likelihood that Mr. Rosario would become involved in the type of crime that resulted in his incarceration."[348]

In each case, courts recognized that the defendant had rehabilitated to some degree and none of the courts' decisions appeared to rest significantly on a concern for public safety. In each case where the court imposed LWOP or a de facto LWOP, the court instead invoked retributive or general deterrent rationales. This represents a fundamental disregard for the spirit of *Miller*. Not only did *Miller* disavow LWOP for all but the rarest juvenile offenders,[349] the Court also repeatedly emphasized juveniles' unique capacities for rehabilitation.[350] In limiting the availability of JLWOP, the Court expressed a normative judgment that rehabilitated juveniles should have a chance at living a meaningful life outside of prison. Release from prison as an elderly person, after having spent ones' entire adult life in prison, does not count as "meaningful." Where courts find that a juvenile offender is rehabilitated *now* after having spent over a decade in prison, the only

343. *See supra* note 266 and accompanying text.
344. Defendant's Sentencing Letter, *Wong*, *supra* note 61, at 17.
345. Transcript of Resentencing Hearing, *Friend*, *supra* note 55, at 106.
346. *Id.* at 108.
347. *Rosario*, 2018 U.S. Dist. LEXIS 134657, at *9.
348. *Id.*
349. *Miller*, 567 U.S. at 479–80.
350. *Id.* at 472, 477 & n.7, 478.

plausible justification for continued incarceration seems to be retribution; incapacitation and rehabilitation are no longer relevant, and over a decade in prison must surely serve as adequate general or specific deterrence. But, even assuming retribution is a viable penological objective, additional *decades* of incarceration after rehabilitation has been achieved is unconscionably excessive.

B. Prior Miller *Resentencings Used as "Precedent"*

Perhaps demonstrating their discomfort with the task, the district courts considered herein received, either on their own request or on the initiative of counsel, summaries of other federal *Miller* resentencings that have gone on around the country. As a result of this practice, a handful of early *Miller* resentencings have been treated as a baseline that subsequent *Miller* resentencings must reckon with.

For example, in Mr. Jefferson's case, after the first day of the hearing, the court asked for briefing about other resentencings that have gone on around the country.[351] In response, the government submitted a supplemental memorandum with brief summaries of six other cases[352] and made the following comparisons: none of these other cases involved multiple murders, but Mr. Jefferson's did; two of the other defendants came from very disadvantaged backgrounds, but Mr. Jefferson did not; one had a very poor record while incarcerated, unlike Mr. Jefferson; two had accepted responsibility and expressed remorse, while Mr. Jefferson did not.[353] After a brief and inconclusive contrast-and-compare exercise, the prosecution stated: "In summary, Jefferson's crimes appear to be the most serious of any defendant who has been resentenced to date pursuant to *Miller*, involving the murder of five innocent children as part of a calculated gang vendetta. The government continues to recommend a life sentence."[354] In response, the defense memorandum argued that the government's analysis of these six cases and their comparison to Mr. Jefferson's case lacked substance, because the government failed to seriously engage with the tremendous reform efforts undertaken by Mr. Jefferson.[355] The defense memorandum also noted two state cases and a federal case.[356] In both state cases, the defendant made substantial improvements and reform efforts in prison and was resentenced to 25 years; one was immediately

351. Transcript of Resentencing Hearing (Jan. 2015), *Jefferson*, *supra* note 176, at 89.

352. These were the cases of Branden Pete; Donnie Bryant; Masontae Hickman; Angel Alejandro; David Perez-Montanez; and Robert Lawrence. *See* Supplemental Position of the United States with Respect to Resentencing, United States v. Jefferson, No. 97-CR-276 (D. Minn. Jan. 6, 2015), ECF No. 1631.

353. *Id.* at 5.

354. *Id.*

355. Defendant's Supplemental Memorandum Regarding Resentencing at 2, *Jefferson*, No. 97-CR-276 (D. Minn. Jan. 7, 2015), ECF No. 1632.

356. *Id.* at 2–4.

released.[357] In the federal case, the defendant did well in prison and was resentenced to 31years.[358]

In sentencing Mr. Jefferson, the court took the comparisons offered by the prosecution and defense into account, as the court explicitly contrasted Mr. Jefferson's case with that of Donnie Bryant—one of the cases cited by the prosecution.[359] Finding more mitigation in favor of Mr. Jefferson, the court resentenced him to 50 years as compared with Mr. Bryant's 80 years.[360] Given this explicit comparison, it is quite plausible that, had a more lenient sentence for Mr. Bryant been imposed, the court may have been pressured into giving Mr. Jefferson a more lenient sentence as well.

In Mr. Johnson's case, the government also supplemented their filing with a discussion of the same six cases[361] and drew similar contrasts, noting for example that Mr. Johnson did not come from a "very disadvantaged background,"[362] and had never demonstrated remorse or accepted responsibility.[363] Mr. Johnson's offense was again purported to be among the most heinous of the six, because it was premeditated, resulted in the death of a child, and involved gang violence.[364]

In Mr. Friend's case, it was the defense in Mr. Friend's first resentencing[365] that selected the five "most analogous" federal *Miller* resentencings, including Mr. Jefferson's.[366] Angel Alejandro's case was chosen because he was the closest in age to Mr. Friend.[367] Mr. Alejandro served as a lookout during a murder, and was re-sentenced to 25 years by the Southern District of New York.[368] Robert James Jefferson's case was thought to be similar to Mr. Friend's because he had also been influenced by his older brother; unlike Mr. Jefferson, however, Mr. Friend was an "instigator" of some of the charged conduct.[369] The defense compared three additional carjacking cases: those of David Perez-Montañez, Harold Evans-Garcia, and Johnny Orsinger.[370] Of these, defense argued that Mr. Friend's case was most similar to that of David Perez-Montañez (who received 30 years),

357. *Id.* at 2–3.

358. *Id.* at 3.

359. Transcript of Resentencing Hearing (Jan. 2015), *Jefferson*, *supra* note 176, at 73.

360. *Id.*

361. Supplemental Position of the United States with Respect to Resentencing, United States v. Johnson, No. 02-CR-13 (D. Minn. Jan. 15, 2015), ECF No. 288.

362. *Id.* at 5.

363. *Id.* at 6.

364. *Id.* at 5.

365. Counsel for Mr. Friend during his second resentencing, not discussed herein, provided a longer analysis of the relevant circumstances relating to all existing *Miller*-eligible federal prisoners, as well as comparative graphs. *See* note 9, *supra.*

366. These five were the cases of Angel Alejandro, Robert James Jefferson, David Perez-Montanez, Johnny Orsinger and Harold Evans-Garcia. Defendant's Position on Resentencing, *Friend*, *supra* note 87, at 22–27.

367. *Id.* at 22.

368. *Id.* at 22–23.

369. *Id.* at 25.

370. *Id.* at 26.

because, unlike Harold Evans-Garcia (who received 37 years) and Johnny Orsinger (who received life), neither David Perez-Montañez nor Mr. Friend directly caused the death of their victims; moreover, both exhibited "positive post-sentencing conduct."[371] All of these comparisons were evidently intended to add credibility to defense's recommendation that Mr. Friend be resentenced to 35 years. In contrast, the government declined to compare other cases, noting:

> A survey of similar defendants re-sentenced across the country in the wake of *Miller* provides only limited guidance. Sentences in such cases have ranged widely from 20 years to life, with many in between, once again reaffirming the concept that every defendant's case is unique.[372]

The danger of these contrast-and-compare exercises is that relevant points of comparison are cherry-picked to serve the desired comparative function, even though those factors may not have been crucial to the prior courts' decisions. Further, there is little reason to assume that the earlier decisions got the analysis right, given that these were the first decisions post-*Miller*/*Montgomery*, and, as discussed below,[373] there continues to be inadequate guidance to sentencing courts in these cases. While some might say that this is simply how precedent functions in our legal system, there is a profound risk of arbitrariness and excessiveness given the very small number of resentencings that have occurred and the absence of any legislative guidance as to the form and content of these proceedings; one very harsh decision can heavily skew the average. The contrast-and-compare approach will inevitably entrench and reify the punitiveness of prior decisions by giving them undeserved precedential force. Furthermore, federal sentencing is, by design, decidedly *not* a precedent-based, judge-made body of law, but is instead typically guided by the U.S. Sentencing Guidelines (USSG).[374]

C. 18 U.S.C. § 3553(a) Factors and the United States Sentencing Guidelines

This section discusses conflicts between the *Miller* analysis and the traditional sentencing analysis undertaken by federal courts, which is typically guided by the so-called "3553(a) factors" and U.S. Sentencing Guidelines (USSG). Since *Miller* is an enunciation of constitutional principles, it must supersede both § 3553(a) and the USSG where these conflict with *Miller's* dictates. Moreover, the conflicts between these traditional sources of guidance and the analysis demanded by *Miller* in the juvenile context underscore the need for comprehensive changes in federal juvenile sentencing law and policy.

371. *Id.*

372. Government's Position with Respect to Resentencing, *Friend*, *supra* note 88, at 17.

373. *See infra* Section IV.C.

374. As I argue in Section IV.C, the USSG are also inadequate guides for district courts faced with *Miller*-eligible defendants. However, the absence of workable guidelines does not mean district courts should resort to a precedent-based model. Rather, a legislative solution is required, as discussed in Section V.

In the typical federal sentencing or resentencing, the court must apply the 18 U.S.C. § 3553(a) factors to determine the defendant's sentence. § 3553(a) requires consideration of:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed— [to achieve retribution, deterrence, incapacitation, and rehabilitation]…;
>
> (3) the kinds of sentences available;
>
> (4) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines. […];
>
> (5) any pertinent policy statement issued by the Sentencing Commission […];
>
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
>
> (7) the need to provide restitution to any victims of the offense.

Miller complicates the normal analysis in the juvenile context. The first enumerated § 3553(a) factor provides that a sentencing court should consider the nature and circumstances of the offense and the history and characteristics of the offender.[375] The *Miller* analysis might be seen as particularizing this first § 3553(a) factor in the juvenile context by guiding the sentencing court through specific considerations relevant to the history and characteristics of juveniles. But relegating *Miller* to this ancillary status fails to situate the *Miller* analysis in a sufficiently central position; *Miller* actually has implications for the entire § 3553(a) analysis, not just § 3553(a)(1). This is clear when one considers § 3553(a)(2). This subsection instructs the sentencing court to consider the penological objectives of deterrence, retribution, incapacitation, and rehabilitation[376]—topics explicitly addressed by the *Miller* Court with respect to juvenile offenders. There, the Court found that these traditional rationales for punishment are "less compelling" in the juvenile context because of juveniles' lessened culpability, unique susceptibility to rehabilitation, and difficulty internalizing deterrent disincentives.[377] By this logic, where a sentencing court finds that a given sentence is purportedly needed for retributive or deterrent purposes under § 3553(a)(2), this finding must be tempered by the *Miller* Court's statement that such rationales are less compelling in the juvenile offending context. In some of the cases considered herein, it is not at all evident that findings based on deterrence or retribution were tempered in this way. For instance, in Mr. Friend's first resentencing, the court

375. 18 U.S.C. § 3553(a)(1) (2012).

376. § 3353(a)(2)(A)–(D) (2012).

377. Miller v. Alabama, 567 U.S. 460, 472–73 (2012).

considered the § 3553(a) factors and stated that its determined sentence would "not only promote respect for the law and provide for deterrence, but reflect the nature and circumstances of this offense."[378] The court made no mention of whether its desired promotion of the penological objectives of retribution and deterrence was at all modulated by Mr. Friend's juvenility.

Section 3353(a)(3) goes on to instruct the sentencing court to consider the available sentences.[379] This is an essentially useless instruction to trial courts faced with many juvenile homicide offenders because most *statutorily* available sentences are not *constitutionally* available for juvenile homicide offenders after *Roper* and *Miller*. For instance, the only statutory enumerated penalties available for murder in aid of racketeering—the crime of conviction for Mr. Wong, Johnson, Briones, and Jefferson—are life imprisonment or the death penalty.[380] The death penalty is never available for any juvenile offender under *Roper*.[381] Life imprisonment is not available mandatorily under *Miller*,[382] and can only be imposed in the rare case.[383] Thus, the applicable federal sentencing laws do not provide constitutionally appropriate options to a sentencing court faced with a *Miller* defendant: such a court could never impose the death penalty and could only rarely impose life; but then, if it does not impose life, it must instead impose some term of years, which the applicable sentencing statute does not provide for at all.

Section 3553(a)(4), which instructs courts to consider the USSG, is also inapplicable in the juvenile sentencing context. The USSG are a labyrinthine set of rules which are designed to produce a recommended sentencing range for federal district judges, based on a variety of factors relating to the crimes of conviction and the defendant's criminal history. The USSG (promulgated by the unelected United States Sentencing Commission) operate within the confines of the statutorily available penalties for a given offense, providing guidance for a sentencing

378. Transcript of Resentencing Hearing, *Friend*, *supra* note 55, at 163.

379. § 3553(a)(3).

380. 18 U.S.C. § 1959(a)(1) (2012) provides:

> (a) Whoever, as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders, kidnaps, maims, assaults with a dangerous weapon, commits assault resulting in serious bodily injury upon, or threatens to commit a crime of violence against any individual in violation of the laws of any State or the United States, or attempts or conspires so to do, shall be punished—for murder, by death or life imprisonment, or a fine under this title, or both; and for kidnapping, by imprisonment for any term of years or for life, or a fine under this title, or both"

Though this appears to allow a sentencing Court to impose a fine only, this construction has been rejected by various Circuits. United States v. James, 239 F.3d 120, 126–27 (2d Cir. 2000); United States v. Mahdi, 598 F.3d 883, 897 n.14 (D.C. Cir. 2010); United States v. Under Seal, 819 F.3d 715, 720 (4th Cir. 2016). The prevailing understanding is that life imprisonment or the death penalty are the only two statutorily authorized penalties.

381. *Roper*, 543 U.S. at 568.

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

383. *Id.* at 479–80.

court's exercise of discretion where a sentencing statute provides wider latitude. But where the statutorily-available sentence is simply life or the death penalty, as in the example of murder in aid of racketeering, the guidelines must necessarily produce a recommendation of either of these sentences, since the guidelines cannot supersede the statutory law.

While the guidelines do provide specific mechanisms for "downwardly departing" from the prescribed guidelines range, the instructions on the applicability of the downward departure mechanism directly conflicts with *Miller*: the guidelines explicitly *discourage* the categorical use of age as a typical basis for downward departure.[384] USSG § 5H1.1 provides that "age (including youth) *may* be relevant in determining whether a departure is warranted, if considerations based on age . . . are present to an *unusual* degree and distinguish the case from the typical cases covered by the guidelines." This is contrary to the logic of *Miller*, which is properly read to support the proposition that youthfulness is presumptively mitigating. Similarly, USSG § 5H1.12 instructs that "lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing are not relevant grounds in determining whether a departure is warranted." This is explicitly contrary to the second *Miller* factor, which requires courts to consider home and family circumstances. With these pronouncements, the USSG directly contradict the *Miller* court by strongly discouraging the consideration of at least two of the *Miller* factors: chronological age and family history.[385] Despite these obvious conflicts, some of the courts in the above cases explicitly considered the USSG recommendation. For example, the court in Mr. Johnson's case treated the USSG as its "starting point and initial benchmark."[386] However, as Mr. Wong's attorney and others argued, treating the USSG in this way violates *Miller* because it turns LWOP into a "benchmark" rather than the "uncommon" case.[387]

Section 3553(a) has limited applicability in the juvenile sentencing context. The statutorily available sentences, the recommendation of the USSG, and the policy statements of the USSC should be disregarded; the penological objectives enumerated by § 3553(a)(2) must be analyzed through the lens of juveniles' lessened culpability and heightened capacity for change. Ultimately, federal sentencing law and policy must be revised to fully reflect the dictates of *Miller*. This will be taken up in section IV.

V.
MOVING FORWARD

384. *Mending the Federal Sentencing Guidelines Approach to Consideration of Juvenile Status*, *supra* note 4, at 994.

385. *Miller*, 567 U.S. at 477–78; *see also Mending the Federal Sentencing Guidelines Approach to Consideration of Juvenile Status*, *supra* note 4, at 994.

386. Transcript of Resentencing Hearing, *Johnson*, *supra* note 57, at 29.

387. Defendant's Sentencing Memorandum of Law at 18, Wong, No. 90-CR-1019, ECF No. 397 (citing People v. Moffett, 209 Cal. App. 4th 1465, 1476 (2012) ("A presumption in favor of LWOP . . . is contrary to the spirit, if not the letter of *Miller*")).

A. The Problem

The cases considered in this article resulted in resentencing decisions ranging from 28 years (*Rosario*) to LWOP (*Briones*). What accounts for this massive difference?

With respect to the *Miller* factors, in each case there was evidence of varying degrees of peer pressure, family dysfunction, and rehabilitation; but the differences between the cases with respect to each factor do not correlate to the differences in outcomes that one would expect. For example, when the *Miller* court instructed sentencing courts to consider, "the family and home environment which surrounds" the juvenile, "and from which he cannot usually extricate himself—no matter how brutal or dysfunctional,"[388] the obvious implication would seem to be that a juvenile who is raised in a brutal and dysfunctional home environment should be afforded some leniency as a result. But the outcomes here point in the opposite direction: the records show that Mr. Friend was arguably subject to the greatest amount of family dysfunction and external pressure.[389] He nonetheless received what is arguably a functional life sentence of 52 years.[390] Mr. Briones also had a markedly dysfunctional upbringing[391] and received LWOP.[392] These factors were not as pronounced in Mr. Johnson and Mr. Jefferson's cases, yet they each received shorter sentences.[393]

The differences in outcomes also cannot be explained by the circumstances of the offenses. Each case involved the death of innocent people. Some involved the deaths of multiple people including very young children. But in the two cases in which it is undisputed that the victims were *not* killed at the hands of the defendants,[394] the resentencings resulted in the two most severe outcomes—Mr. Friend initially received 65 years, then 52, and Mr. Briones received LWOP.

The seemingly arbitrary disparity in sentence lengths among the cases considered herein might be explained by the fact that the courts in each case had to come up with a sentence length out of whole cloth. In contrast to the usual position in which federal district judges find themselves at sentencing, the courts in the cases considered herein did not have the benefit of a constitutionally legitimate guidelines range, and were tasked with arriving at a term of years without the benefit of the recommendation with which federal district courts are used to. In such

388. *Miller*, 567 U.S. at 477.

389. *See supra*, notes 90–101 and accompanying text.

390. Judgment, *Friend*, *supra* note 56.

391. *See supra*, notes 152–154 and accompanying text.

392. *Briones*, 890 F.3d at 814.

393. By no means do I intend to suggest that Mr. Johnson and Mr. Jefferson should have gotten higher sentences—their sentences of 42 and 50 years were also very harsh.

394. *See Friend*, 755 F.App'x at 236 (describing that it was Mr. Friend's older brothers who killed the two victims); *Briones*, 890 F.3d at 813 (describing that Mr. Briones waited in a car while another person shot the victim).

circumstances, one would expect precisely the level of arbitrary disparity among outcomes that can be found in the cases considered above.

The recently-denied certiorari petition, *J.B.R. v. United States*,[395] demonstrates another aspect of the problem. J.B.R. was accused of committing first-degree murder at 17 years old. The United States moved to transfer the proceeding for criminal prosecution—as opposed to a juvenile delinquency proceeding—pursuant to 18 U.S.C. § 5032, the first step in any "adult" prosecution of a juvenile offender in the federal system. The district court granted the transfer over defense objection; the Fifth Circuit affirmed. In his certiorari petition, J.B.R. argued that, because the only statutory penalties available to adults upon conviction are death or mandatory LWOP, and because he cannot constitutionally be sentenced to either by virtue of his age, due process prohibited his adult prosecution entirely.[396] Due process requires advance notice of potential penalties, thus J.B.R. argued that he could not effectively decide whether to accept a plea without advance knowledge of the range of outcomes he would face at sentencing.[397] Since the only statutorily-authorized punishments directly conflicted with the Eighth Amendment as enunciated in *Roper* and *Miller,* and therefore could not be imposed, J.B.R. argued he had no advance knowledge of what to expect at sentencing should he be convicted.[398] In a procedurally analogous case, the Fourth Circuit instead affirmed a district court's decision rejecting the government's transfer motion because there was no statutorily authorized penalty that would be constitutional following *Roper* and *Miller*.[399] Reaching the opposite result in *J.B.R.*, the Fifth Circuit suggested that district courts can essentially do their best to fashion a constitutional sentence where neither of the statutorily authorized sentences are constitutional as applied to the defendant.[400] This circuit split demonstrates that after *Miller*, a new federal sentencing scheme must be created for juvenile offenders: not only do sentencing courts lack statutory guidance when sentencing juvenile offenders after a conviction, but juveniles accused of homicide cannot

395. Petition for a Writ of Certiorari, J.B.R. v. United States, No. 18-192 (June 23, 2018), *cert. denied*, No. 18-192, 2019 U.S. LEXIS 1512 (Feb. 25, 2019).

396. *Id.* at 11–12.

397. *Id.* at 22.

398. *Id.* at 2.

399. United States v. Under Seal, 819 F.3d 715 (4th Cir. 2016).

400. The Fifth Circuit's suggestion—that district courts can just do their best to make up sentences for juvenile homicide offenders—is undermined by my forgoing discussion of *Miller* resentencings from federal district courts around the country, which suggest that these courts are ill-suited to perform this task, coming up with very divergent results in cases with many similarities. Moreover, a federal judge presented with a *Miller* resentencing has more information than a judge sentencing a juvenile offender in the first instance. In the former scenario, the judge will have the defendant's entire prison record and evidence of rehabilitation, while in the latter scenario, the judge will have none of this information. Given that the more-informed resentencing decisions still appear arbitrary when contrasted with each-other, it stands to reason that judges left to unfettered discretion in their less-informed initial sentencing decisions would come up with even more arbitrary and inconsistent sentencing decisions.

effectively decide whether to risk going to trial when it is anyone's guess how they will be sentenced if convicted.

B. A Solution: Barry Feld's "Youth Discount"

The wide range of resentencing outcomes in the *Miller* resentencing context and the danger of further reliance on prior resentencings as precedent points to the need for a wholesale revision of the federal approach to sentencing juveniles. Juvenile justice scholar Barry Feld has long advocated for a "Youth Discount" at sentencing.[401] Feld proposes a "sliding scale" according to which a young offender would receive a proportionate reduction relative to the adult punishment based on their age at the time of the offense.[402] Feld contrasts this categorical approach with a case-by-case approach.

Feld suggests that a Youth Discount is preferable to individualized sentencing decisions for two principal reasons: first, "the inability to define or identify what constitutes adult-like culpability among offending youths."[403] Because culpability is a "normative construct" and not an objective, scientifically measurable fact, it makes sense to encapsulate this normative construct in sentencing policy rather than leave the task to judges and clinicians to implement on a case-by-case basis.[404] Feld's approach mirrors other activities like voting, drinking, and driving, which are restricted by bright-line age limits because chronological age is believed to sufficiently approximate adult levels of maturity and capacity.[405] Second, Feld suggests that a categorical rule taking into account youth as a mitigating factor is preferable because, as the Court pointed out in *Roper* when it rejected a case-by-case approach in the juvenile death penalty context, "the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course."[406] As between the abstraction of juvenile's lessened culpability, and the reality of a heinous crime, the latter will inevitably trump the former.

The cases considered in this article exemplify both of these problems. First, as discussed *supra*, it is difficult for individual defendants to deploy the available science regarding the juvenile brain to establish their reduced culpability because the science is generalized to juveniles as a class. As Feld points out, reduced juvenile culpability is virtually impossible to prove at an individual level, because, "clinicians lack the tools with which to assess impulsivity, foresight, and preference for risk, or a metric by which to relate maturity of judgment with criminal

401. *See* Barry C. Feld, *Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences,* 10 J.L. & FAMILY STUDIES 11, 70 (2007); Barry C. Feld, *Adolescent Criminal Responsibility, Proportionality, and Sentencing Policy:* Roper*,* Graham*,* Miller/Jackson*, and the Youth Discount*, 31 LAW & INEQ. 263 (2013) [hereinafter Feld, *Adolescent Criminal Responsibility*].

402. Feld, *Adolescent Criminal Responsibility*, *supra* note 401, at 322–23.

403. *Id.* at 319.

404. *Id*. at 320.

405. *Id*. at 321.

406. *Id*. at 276 (quoting *Roper*, 543 U.S. at 572–73).

responsibility."[407] Thus, arguments regarding chronological age may not be persuasive when pitched at an individualized level; what's worse, these arguments may open the door to specious prosecutorial responses that the individual defendant did not suffer from the deficits attendant upon juvenility at the time of the offense. Prosecutors support these arguments by identifying facts about the offense suggesting adult-like qualities. Such arguments (particularly in the temporally distant resentencing context) are necessarily imprecise and likely inaccurate. Human behavior is far too complex to accurately infer adult levels of maturity from the isolated fact that, for example, the sixteen-year-old defendant was involved in planning the crime; and where the facts of the offense are largely derived from the testimony of cooperating witnesses, it is difficult to corroborate testimony as to participation or its extent.

The cases considered also support Feld's second point: that judges will struggle to weigh the abstraction of youth against the heinous realities of brutal crimes.[408] The cases considered in this article all involved the tragic and brutal killing of innocent people, including very young children. The facts are heart-wrenching to read and the experiences of the victim's family members are unimaginable. In many of the cases, family members of those killed were evidently present in the courtroom as the judge pronounced sentence. In the cases where the lengthiest sentences were imposed—*Friend* and *Briones*—the courts, in their initial resentencing decisions, focused on the heinous nature of the crimes above all else. The court began its pronouncement in Mr. Friend's case, likely in the presence of multiple family members of victims, by stating "Well, Mr. Friend, as I hear your comments to the court, and your desire for mercy, it does remind me that each of the victims you so brutally tortured in this case begged for their life and begged for mercy from you, and you gave them none."[409] In initially re-sentencing Mr. Friend to sixty-five years, the court cited the nature and circumstances of the offense as the primary factor.[410] Similarly, in re-sentencing Mr. Briones to LWOP, the court took note of a number of mitigating factors including the fact that Mr. Briones had been a model inmate, but stated that "some decisions have life-long consequences"[411] and went on to describe Mr. Briones' involvement in the Subway murder.

A statutory Youth Discount would eliminate these problems. Treating youth as a categorically mitigating factor would obviate the need for defendants to "prove" to sentencing courts what their youth should mean in a normative sense. It would also not require judges to balance the competing interests of vindicating crime victims' desire for retribution and acknowledging the capacity for redemption in individual cases.

407. *Id*. at 320.
408. *Id.* at 276.
409. Transcript of Resentencing Hearing, *Friend*, *supra* note 55, at 161.
410. *Id.* at 163.
411. Transcript of Resentencing Hearing, *Briones*, *supra* note 59, at 105.

C. Further Recommendations for the Federal System

To be consistent with *Miller*, a Youth Discount should operate as a starting point, implementing the first *Miller* factor without the need for a sentencing court to give effect to the "chronological facts" of youth on a case-by-case basis. A court must then engage in the requisite individualized examination of the remaining *Miller* factors. In other words, simply by virtue of chronological age, the starting point should be lower for juvenile offenders than for their adult counterparts. Then, the sentencing court should consider whether to further reduce the sentence based on peer pressure, family history, and inability to navigate the criminal system.

Further, *Graham* and *Miller* contemplate that juvenile offenders sentenced to lengthy terms of imprisonment should be offered a "meaningful opportunity to obtain release" based on demonstrated maturity and rehabilitation.[412] In the absence of parole eligibility in the federal system, a mechanism for a court-based periodic review of the progress of juvenile offenders must be implemented in order to offer juveniles this opportunity to obtain release. Further, given the *Miller* Court's pronouncements about juveniles' unique capacity for rehabilitation, such capacity should be presumed at the initial sentencing hearing, and programming should be made available to facilitate the rehabilitative process for young offenders.[413]

In the federal system, these changes to the sentencing process should be accomplished first by new sentencing provisions for young offenders, which would implement the youth discount and thereby make chronological youth an automatically mitigating factor. This should be accompanied by amendments to the USSG that operationalize the second, third, and fourth *Miller* factors. Concomitantly, the existing USSG provisions discouraging using youth and other *Miller*-esque factors must be excised. Finally, Congress should provide a specific mechanism by which juvenile offenders can be periodically evaluated for potential release based on demonstrated rehabilitation, with a presumption in favor of release if rehabilitation is demonstrated after a designated period of time.

412. Graham v. Florida, 560 U.S. 48, 74–75 (2010); Miller v. Alabama, 567 U.S. 460, 478 (2012).

413. It has also been suggested that by reenacting the FYCA, congress could give judges "substantial authority to tailor a sentence to the needs of a particular juvenile offender." *Mending the Federal Sentencing Guidelines Approach to Consideration of Juvenile Status*, *supra* note 4, at 1114.

VI.
APPENDIX

Table 1: Outcomes and Relevant Ages of Individuals Discussed Above.

Name	New Sentence	Age at Crime	Estimated Age at Resentencing[414]	Estimated Age at Release[415]	Federal District
Riley Briones	LWOP	17	37	N/A	Arizona
Philip Bernard Friend	52[416]	15	36	59	Virginia
Robert James Jefferson	50	16	38	62	Minnesota
Kamil Hakeem Johnson	42	17	36	51	Minnesota
Amaury Rosario	28	17	40	40	Eastern District of NY
Alexander Wong	35	16	42	48	Eastern District of NY

414. Where not made explicit at the resentencing hearing, the defendants' age at resentencing has been estimated based on information about their age at the time of the offense or original sentencing.

415. These ages are approximated based on the defendant's current age and release date as provided by the BUREAU OF PRISONS INMATE LOCATOR TOOL, https://www.bop.gov/mobile/find_inmate/byname.jsp (last visited Jan. 26, 2021). Discrepancies between the sentence lengths and the release ages are likely due to the application of "good time credit." *See supra* note 85.

416. Mr. Friend was initially resentenced to 65 years, but resentenced to 52 after an appellate remand. *See supra*, note 122 and accompanying text.