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FALCON V. STATE: SHOULD THE FLORIDA SUPREME COURT HAVE OPENED THE DOOR FOR SENTENCING REVIEW OF JUVENILES SENTENCED TO LIFE IN PRISON FOR MURDER?

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I. INTRODUCTION

Imagine you are the father of a fourteen-year-old boy, and after twelve years, you are sitting in a courtroom again.[2] You are confronted again with the painful memories regarding the brutal murder of your son at the hands of his fourteen-year-old "best friend."[3] However, this time you are not uneasily listening to all the testimony at trial, painfully waiting for a verdict from the jury, or desperately anticipating a just sentence for the murder of your son.[4] Instead, you are sitting in the courtroom for a resentencing hearing, anxiously waiting for the judge to decide whether

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2. *See Teen gets life in best friend's murder*, NBC NEWS (Nov. 7, 2008, 4:43 PM), http://www.nbcnews.com/id/27597174/ns/us_news-crime_and_courts/t/teen-gets-life-sentence-best-friends-murder/#.WbMON8aZP-Y (explaining teenager Michael Hernandez was given a mandatory sentence of life in prison without parole after being convicted of first-degree murder for stabbing his best friend Jamie Gough 42 times in a middle-school bathroom); *see also* David Ovalle, *Life in prison again for Southwood Middle killer Michael Hernandez*, MIAMI HERALD (Feb. 22, 2016, 11:43 AM), http://www.miamiherald.com/news/local/crime/article61743422.html (noting that the parents of Jaime Gough were present at the resentencing hearing of their son's killer in February 2016).

3. *See* Gary Nelson, *Judge To Decide in 'Southwood Middle Killer' Re-Sentencing*, CBS MIAMI (Feb. 5, 2016, 3:18 PM), http://miami.cbslocal.com/2016/02/05/mother-of-southwood-middle-killer-takes-the-stand/ (noting that at the end of the resentencing hearing, Jaime Gough's father said, "It has been a stressful three days. It's been really tough to go through the same thing again"); *see also* Ovalle, *supra* note 2 ("A dozen years after slitting his classmate's throat inside a Palmetto Bay middle-school bathroom, Hernandez got another life sentence for a crime that sickened South Florida.").

4. *See* Ovalle, *supra* note 2 (stating that Hernandez's life sentence was a relief to Jaime Gough's parents); *see also Teen gets life in best friend's murder*, *supra* note 2 (explaining that fourteen-year-old Michael Hernandez was automatically sentenced to life in prison without parole after being convicted of first-degree).

your son's murderer will be released early or continue his life behind bars.[5] This is exactly what one father experienced on February 22, 2016, and what so many more victims' families will experience due to decisions by the United States Supreme Court and subsequent decisions by state supreme courts.[6]

Previously, when a juvenile[7] was convicted[8] of an offense involving homicide[9] in Florida, judges were required to impose mandatory sentences,[10] leaving no room for any discretion.[11] Life in prison with no

5. *See* David Ovalle, *Ruling gives hundreds of juvenile murderers shot at new Sentences*, MIAMI HERALD (May 26, 2016, 12:26 PM), http://www.miamiherald.com/news/local/community/broward/article80040602.html (noting that Hernandez is part of the handful of juveniles who have been re-sentenced); *see also* Peter Burke, *Judge upholds life in prison sentence for Michael Hernandez*, LOCAL 10 (Feb. 22, 2016, 8:28 AM), https://www.local10.com/news/judge-decides-new-prison-sentence-for-michael-hernandez (explaining that after Hernandez received a mandatory life sentence for the stabbing death of Jaime Gough, a resentencing hearing was mandated because of a 2012 U.S. Supreme Court decision).

6. *See* Ovalle, *supra* note 5; *see also* Burke, *supra* note 5 ("[T]he U.S. Supreme Court ruled in 2012 that juveniles could not automatically be sentenced to life without the chance of parole.").

7. *See* FLA. STAT. § 985.03(7) (2017) (defining "juvenile" as "any person under the age of 18 or any person who is alleged to have committed a violation of law occurring prior to the time that person reached the age of 18 years"); *see also Juvenile*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("Someone who has not reached the age (usually 18) at which one should be treated as an adult by the criminal-justice system.").

8. *See* FLA. STAT. § 775.13(1) (2017) ("[T]he term 'convicted' means, with respect to a person's felony offense, a determination of guilt which is the result of a trial or the entry of a plea of guilty or nolo contendere, regardless of whether adjudication is withheld."); *see also Conviction*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("1. The act or process of judicially finding someone guilty of a crime; the state of having been proved guilty; 2. The judgment (as by a jury verdict) that a person is guilty of a crime.").

9. *See* FLA. STAT. § 782.04 (2017) (defining "murder" as "[t]he unlawful killing of a human being" and explaining the range of degrees of murder); *see also Homicide*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("1. The killing of one person by another; 2. Someone who kills another.").

10. *See Sentence*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("The judgment that a court formally pronounces after finding a criminal defendant guilty; the punishment imposed on a criminal wrongdoer."); *see also Mandatory Sentence*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A sentence set by law with no discretion for the judge to individualize punishment.").

11. *See* Gary Fineout, *Few Florida Juvenile Lifers Resentenced Despite U.S. Mandate*, CLICK ORLANDO (July 31, 2017, 3:04 AM), https://www.clickorlando.com/news/few-florida-juvenile-lifers-resentenced-despite-us-mandate (noting that courts previously imposed life sentences without a chance of parole on juveniles who were convicted of homicide); *see also* Anna M. Phillips, *Florida Supreme Court opens the door for new hearings for juvenile offenders*, TAMPA BAY TIMES (May 26, 2016, 12:06 PM), http://www.tampabay.com/news/politics/stateroundup/florida-supreme-court-opens-the-door-for-new-hearings-for-juvenile-killers/2279094 (explaining judicial decisions that changed the sentencing requirements for juveniles who were automatically sentenced to life in prison under laws that did not allow judges to use their discretion).

possibility of parole[12] was a sentence included in this mandatory sentencing scheme.[13] However, mandatory sentences changed in 2012 when the United States Supreme Court in *Miller v. Alabama*[14] declared mandatory life sentences without the possibility of parole for juveniles unconstitutional.[15] Florida's mandatory sentencing scheme changed as a result of the *Miller* holding, but Florida took this one step further.[16] In 2015, the Florida Supreme Court in *Falcon v. State*[17] ruled that the holding in *Miller* applied retroactively,[18] meaning juveniles who were already sentenced and serving mandatory life sentences without parole are now entitled to a resentencing hearing.[19] Many support this change to juvenile's rights, believing this is the best approach when considering such harsh sentences for juveniles.[20] However, what about the victims and their families?[21] These judicial mandates are so concerned with the juvenile defendant's rights that they overlook the effect it will have on the victims' families and the victims' rights.[22]

This Comment addresses the implications on victim's families and society regarding the resentencing and future sentencing of juveniles who

12. *See Parole*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("The conditional release of a prisoner from imprisonment before the full sentence has been served."); *see also Parole*, FLORIDA COMMISSION ON OFFENDER REVIEW, https://www.fcor.state.fl.us/release-types.shtml (last visited Mar. 26, 2018) ("Parole is the release of an inmate, prior to the expiration of the inmate's court-imposed sentence, with a period of supervision to be successfully completed by compliance with the conditions and terms of the release agreement ordered by the Commission.").

13. *See* Megan McCabe Jarrett, *Stifling the Shot at a Second Chance: Florida's Response to Graham and Miller and the Missed Opportunity for Change in Juvenile Sentencing*, 45 STETSON L. REV. 499, 510 (2016) (noting that Florida was one of 28 states "that required a mandatory life without parole sentence for anyone convicted of first-degree homicide, including a juvenile offender"); *see also* Josh Rovner, *Juvenile Life Without Parole: An Overview*, SENTENCING PROJECT (Oct. 13, 2017), http://www.sentencingproject.org/publications/juvenile-life-without-parole/ (explaining that in 2012, 2,500 juvenile offenders convicted of homicide-related crimes were serving life without parole sentences, some of which were mandatory).

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

15. *See id.* at 489; *see also infra* Part II, Section A.

16. *See infra* Part II, Section C; *see also* Jarrett, *supra* note 13, at 512 (explaining that the Florida Legislature modified juvenile sentencing to comply with *Miller* during the 2014 legislative session).

17. Falcon v. State, 162 So. 3d 954 (Fla. 2015).

18. *See Retroactive*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("(Of a statute, ruling, etc.) extending in scope or effect to matters that have occurred in the past."); *see also infra* Part II, Section B.

19. *See infra* Part II, Section B; *see also Falcon*, 162 So. 3d at 956.

20. *See infra* Part III, Section A; David L. Hudson, *Adult Time for Adult Crimes*, A.B.A. J. (Nov. 2009), http://www.abajournal.com/magazine/article/adult_time_for_adult_crimes/ (explaining that because juveniles are "less culpable, less mature and less responsible than adults," it would be "misguided to equate the failings of a minor with those of an adult").

21. *See infra* Part III.

22. *See infra* Part III.

have been convicted of murder.[23] Specifically, this Comment will focus on the factors judges are required to consider before a life sentence is imposed, while proposing a solution to balance the factors in order to ensure victim's rights are not overlooked.[24] Part II explores the required juvenile sentencing factors mandated by the United States Supreme Court in *Miller*,[25] and further explores Florida's response as evidenced in *Falcon*,[26] *Atwell v. State*,[27] and *Landrum v. State*.[28] Part II further discusses Florida's previous statutory scheme and the shift from mandatory life sentences to the application of the *Miller*-required factors prior to life sentences being imposed on juveniles.[29] Part III discusses the issues stemming from federal and Florida judicial decisions, particularly the effect of resentencing hearings and the newly required factors on our society, the court system, but most importantly, the victims' families.[30] Part IV proposes an inclusive solution by suggesting a more equal balance between defendant's and victim's rights to the *Miller*-required factors, which judges will take into consideration during sentencing.[31] Part V concludes by explaining that although Florida is bound by its federal precedent, the factors considered are not exhaustive, and courts should adopt a more victim-oriented approach when sentencing juveniles who have been convicted of murder.[32]

II. BACKGROUND

A. FEDERAL PRECEDENT: THE *MILLER* MONOPOLY ON JUVENILE SENTENCING

In 2012, Justice Kagan delivered the opinion in *Miller*, which declared mandatory life prison terms for juveniles who are convicted of homicide unconstitutional.[33] The Court's key rationale behind this decision

23. *See infra* Part III.
24. *See infra* Part II, Section C; *see also infra* Part IV.
25. *See infra* Part II, Section A.
26. *See infra* Part II, Section B.
27. *See infra* Part II, Section B.
28. *See infra* Part II, Section B.
29. *See infra* Part II, Section C.
30. *See infra* Part III.
31. *See infra* Part IV.
32. *See infra* Part V.
33. *See* Miller v. Alabama, 567 U.S. 460, 489 (2012) (holding that mandatory life prison terms for juveniles convicted of homicide violate the Eighth Amendment's ban on cruel and unusual punishment); *see also* Thomas Grisso & Antoinette Kavanaugh, *Prospects for Developmental Evidence in Juvenile Sentencing Based on* Miller v. Alabama, 22 PSYCHOL. PUB. POL'Y, & L. 235, 236 (2016) (highlighting that *Miller* interpreted the Eighth Amendment to mean life without parole sentences in juvenile homicide cases cannot be mandatory).

was focused on the idea that life without parole for a juvenile is the moral equivalent of the death penalty.[34] This reasoning was based on the fact that mandatory death penalty sentences for adults are prohibited, and as a result, mandatory life without parole sentences are prohibited for juveniles.[35] The Court's main focus was that just as "death is different" for constitutional purposes, "children are different too."[36] Consequently, because the death penalty cannot be imposed without extensive consideration of mitigation evidence,[37] life sentences without parole cannot be imposed on juveniles without extensive consideration of the "mitigating qualities of youth."[38]

34. *See Miller*, 567 U.S. at 474–75 (explaining that mandatory sentencing schemes for juveniles are defected by comparing mandatory life-without-parole sentences to the death penalty); *see also* Shobha L. Mahadev, *Youth Matters: Roper, Graham, J.D.B., Miller, and the New Juvenile Jurisprudence*, CHAMPION MAGAZINE (Mar. 2014) https://www.nacdl.org/Champion.aspx?id=32599 (comparing life without parole and other extreme sentences to the death penalty when it is applied to juveniles because "children cannot view the future in the same way as adults do" and "will serve more time in prison for the same offense than an adult offender").

35. *See Miller*, 567 U.S. at 474–75 (highlighting that a statute imposing mandatory death sentences for first-degree murder violates the Eighth Amendment because no significance is given to "'the character and record of the individual offender or the circumstances' of the offense"); *see also* Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (holding that a statute mandating the death penalty for first-degree murder violated the Eighth Amendment).

36. *See Miller*, 567 U.S. at 481 (quoting Harmelin v. Michigan, 501 U.S. 957 (1991)); *see also* Jarrett, *supra* note 13, at 508 ("Just as death penalty cannot be imposed mandatorily on adults . . . this most severe sentence for juveniles cannot be without first considering certain factors.").

37. *See, e.g.*, Sumner v. Shuman, 483 U.S. 66, 85 (1987) (holding as unconstitutional a mandatory death penalty statute for murder because the defendant was not allowed to present mitigation evidence); *see also Mitgation in Capital Cases*, CAPITAL PUNISHMENT IN CONTEXT, http://www.capitalpunishmentincontext.org/issues/mitigation (last visited Mar. 26, 2018) ("'[M]itigating evidence' is evidence the defense can present in the sentencing phase of a capital trial to provide reasons why the defendant should not receive the death sentence. This evidence, which can include mental problems, remorse, youth, childhood abuse or neglect, a minor role in the homicide, or the absence of a prior criminal record, may reduce the culpability of the defendant in the killing or may provide other reasons for preferring a life sentence to death.").

38. *See Miller*, 567 U.S. at 475–76, 489 (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)); *see also* Mahadev, *supra* note 34 ("[B]ecause juveniles are less culpable than adults, judges must consider youth and its concomitant features—including age, development maturity, home environment, and peer pressure—before sentencing young people under the age of [eighteen] to die in prison without any possibility of parole.").

These mitigating qualities involve a number of factors that judges are required to consider prior to sentencing a juvenile to life in prison.[39]

B. STATE PRECEDENT: FLORIDA FEELS THE EFFECTS OF THE MILLER DECISION

In 2015, the Florida Supreme Court in *Falcon*[40] considered whether the holding in *Miller* applies retroactively to juveniles already serving mandatory life prison terms.[41] The majority answered this question in the affirmative and held that individuals currently serving mandatory life prison terms for homicide offenses committed as a juvenile are entitled to resentencing under Chapter 2014-220, Laws of Florida.[42]

Just a year later, in *Atwell*,[43] the Florida Supreme Court determined that the holding in *Miller* further applies to juvenile individuals who are

39. *See Miller*, 567 U.S. at 477 (explaining that mandatory life without parole sentences exclude consideration of the juvenile's age and its attributes, such as "immaturity, impetuosity, and failure to appreciate risks and consequences"); *see also* Sarah French Russell & Tracy L. Denholtz, *Procedures for Proportionate Sentences: The Next Wave of Eighth Amendment Noncapital Litigation*, 48 CONN. L. REV. 1121, 1127–28, 1151 (2016) (highlighting that *Miller* "requires sentencers to give mitigating effect to the circumstances and characteristics of youth when a child faces life without parole," listing the *Miller*-mandated characteristics and the state statutes applying to them).

40. Falcon v. State, 162 So. 3d 954 (Fla. 2015) (noting that in 1997, Rebecca Lee Falcon, at the age of fifteen, was involved in an attempted robbery that resulted in the death of a cab driver and was ultimately convicted of first-degree murder and attempted armed robbery with a firearm; she was mandatorily sentenced to life in prison without the possibility of parole for the first-degree murder charge).

41. See *id.* at 955 (questioning whether *Miller* applies to juveniles who were already convicted and sentenced when *Miller* was decided); *see also* Jarrett, *supra* note 13, at 514 (noting that federal and state courts were divided on the issue of applying *Miller* retroactively and that the First District Court of Appeal certified the question of retroactivity to the Florida Supreme Court under *Falcon*).

42. *See Falcon*, 162 So. 3d at 963–64 ("[T]he United States Supreme Court's decision in *Miller* applies retroactively to any juvenile offender seeking to challenge the constitutionality of his or her sentence pursuant to *Miller* through collateral review."); *see also* Tessa Duvall, *Significant past cases influencing juvenile sentencing*, THE FLORIDA TIMES UNION (Oct. 22, 2016), http://jacksonville.com/news/2016-10-22/significant-past-cases-influencing-juvenile-sentencing (noting that in *Falcon*, the Florida Supreme Court held that the *Miller* ruling applied "retroactive[ly] in Florida, meaning juveniles sentenced to mandatory life without parole became eligible for resentencing").

43. *See* Atwell v. State, 197 So. 3d 1040, 1041 (Fla. 2016) (noting that in 1990, at the age of sixteen, Angelo Atwell committed an armed robbery and a first-degree murder, later receiving sentences of a mandatory life prison term with the possibility of parole after twenty-five years); *see also* Ovalle, *supra* note 5 (detailing that in 1992, a jury convicted Atwell of the robbery and fatal shooting of high school teacher Margaret Holuczak outside her home when she refused to surrender her purse to an accomplice and Atwell who grabbed it and then shot her in the back of the head).

serving a life sentence even with parole eligibility.[44] This decision was predicated on the conclusion that sentences imposed on juveniles which amount to life are still unconstitutional if juveniles are not afforded a "meaningful opportunity for release" during their natural life.[45] Thus, even if a juvenile is technically eligible for parole during his or her life sentence, the sentence is unconstitutional if the individual is likely to remain in prison for the remainder of his or her natural life because the juvenile no longer has a "meaningful opportunity for release."[46] The Court further concluded that Florida's parole system did not provide for "individualized consideration" of Atwell's juvenile status.[47] As a result of the *Atwell* decision, the number of cases eligible for resentencing in Florida more than doubled.[48]

44. *See Atwell*, 197 So. 3d at 1050 (holding that even though Atwell's sentence included the possibility of parole after twenty-five years, his sentence "effectively resemble[d] a mandatorily imposed life without parole sentence," and required individualized sentencing under *Miller*); *see also* Court E. Keeley, Atwell v. Florida: *Long Sentences of Youth Deserve Review, State High Court Rules*, US CRIMINAL LAW BLOG (May 27, 2016), https://www.uscriminallawblog.com/2016/05/27/atwell-v-florida-long-sentences-of-youth-deserve-review-state-high-court-rules/ ("In *Atwell v. Florida*, the court ruled that reviews are in order even when the offender technically has a shot at parole.").

45. *See Atwell*, 197 So. 3d at 1050 (determining that because Atwell's potential parole release date was 140 years after he committed the crime, Atwell had no "hope for some years of life outside prison walls" and therefore his sentence was unconstitutional (quoting Montgomery v. Louisiana, 136 S. Ct. 718, 737 (2016)); *see also* Keeley, *supra* note 44 (explaining that Atwell's sentence was "virtually indistinguishable from life without parole, which means it is unconstitutional").

46. *See Atwell*, 197 So. 3d at 1050 (deeming Atwell's sentence unconstitutional because his potential parole release date provided no prospect for significant time outside the prison cell and therefore no "meaningful opportunity for release"); *see also* Duvall, *supra* note 42 ("[S]entences that amount to life, even if they are parole-eligible, must be reconsidered by a judge.").

47. *See Atwell*, 197 So. 3d at 1048, 1050 ("Atwell's sentence . . . did not receive the type of individualized sentencing consideration *Miller* requires."); *see also* Douglas A. Berman, *Split Florida Supreme Court finds technical eligibility for parole insufficient to comply with* Miller *Eighth Amendment requirements*, SENTENCING LAW AND POLICY (May 26, 2016, 3:18 PM) (explaining Florida's parole system under *Atwell* "does not provide for individualized consideration of Atwell's juvenile status at the time of the murder, as required by *Miller*").

48. *See* Phillips, *supra* note 11 (noting that the decision in *Atwell* could reopen cases of approximately 300 juvenile offenders who were sentenced decades ago); *see also* Duvall, *supra* note 42.

The Florida Supreme Court took *Miller* and *Atwell* one step further in its 2016 decision in *Landrum*.[49] Here, the Court held that even where a non-mandatory life sentence is imposed on a juvenile convicted of an offense involving homicide and a judge has discretionary power over the sentence, the sentence is unconstitutional.[50] As a result, individuals who were sentenced as juveniles could still be eligible for resentencing opportunities even though the judge had full discretion during the juvenile's sentencing.[51]

C. FLORIDA'S FORCED STATUTE REFORMATION: INCORPORATION OF THE *MILLER*-MANDATED FACTORS

Prior to these United States Supreme Court and Florida Supreme Court decisions, the sentencing laws in Florida were a result of the high-crime era of the 1980s.[52] During that time period, "a line was drawn in the sand" by politicians who passed "tough on crime" legislation, which even

49. Landrum v. State, 192 So. 3d 459, 460–61 (Fla. 2016) (noting that in 2004, at the age of sixteen, Laisha Landrum assisted her then-boyfriend in murdering Emily Clemons in a fit of jealousy and was convicted of second-degree murder and sentenced to life in prison without the possibility of parole); *see also* Alexandra Zayas, *Teen gets life for killing boyfriend's ex*, TAMPA BAY TIMES (Feb. 21, 2006), http://www.sptimes.com/2006/02/21/Tampabay/Teen_gets_life_for_ki.shtml (explaining that Landrum beat her boyfriend's ex-girlfriend, Emily Clemons, to death with kitchen pots, a hammer, and a boom box, hitting Clemons approximately 34 times and using the hammer's claw on her face).

50. *See Landrum*, 192 So. 3d at 460 ("[T]he Supreme Court's decision in *Miller* applies to juvenile offenders whose sentences of life imprisonment without parole were imposed pursuant to a discretionary sentencing scheme when the sentencing court, in exercising that discretion, was not required to, and did not take 'into account how children are different and how those differences counsel against irrevocably sentencing them to a lifetime in prison.'" (quoting Miller v. Alabama, 567 U.S. 460, 480 (2012))); *see also* Duvall, *supra* note 42 (highlighting that in *Landrum*, the Florida Supreme Court ruled that "cases where discretion was used to decide on a life-without-parole sentence for a juvenile should still be eligible for resentencing opportunities").

51. *See Landrum*, 192 So. 3d at 460–61 (determining Landrum's sentence was a violation of the Eighth Amendment because the Court did not take into consideration the *Miller* factors and therefore Landrum's case was remanded for resentencing in accordance with Florida's modified statutory sentencing scheme); *see also* Duvall, *supra* note 42.

52. *See* Keeley, *supra* note 44 ("As the country was emerging from the high-crime era of the 1980s, politicians everywhere had passed 'tough on crime' legislation that drew a hard line in the sand when it came to sentencing."); *see also* Mahadev, *supra* note 34 (explaining that prior to the Court's recent focus on individualized consideration of youth in criminal matters, the states passed legislation supporting the "adultification" of youth which was "[f]ueled by 'get tough' approaches to crime and fears of juvenile 'superpredators'").

applied to juveniles.[53] For example, an individual convicted of murder had one of two options in Florida: the death penalty or life in prison with parole after twenty-five years.[54] As a result of these federal and state decisions, Florida modified its statutory sentencing scheme for juvenile offenders, which took effect on July 1, 2014.[55]

The major change to the Florida Statutes was the abolishment of automatic sentences and the inclusion of the *Miller*-approved factors, such as the defendant's age and maturity; background; home life; and whether the crime committed was a result of any familial or peer pressure, which judges must take into account prior to sentencing a juvenile to life in prison without the possibility of parole.[56] These factors, which relate to the defendant's youth and attendant circumstances, are now also required by law to be considered by judges prior to resentencing any juveniles or

53. Keeley, *supra* note 44; *see also* Hudson, *supra* note 20 ("On the heels of fear about rising juvenile crime and reports of juvenile 'super predators,' legislatures across the country enacted 'adult crime, adult time' statutes, including automatic waiver laws that provide for the transfer of more youths from juvenile court into adult criminal court. The statutes also meant increased time and even life without parole for juvenile defendants who commit violent felonies.").

54. *See* Jarrett, *supra* note 13, at 513 ("Florida Statute Section 775.082(1) only allowed for a sentence of death or life without parole."); *see also* Keeley, *supra* note 44 (noting the only options available to a defendant convicted of murder in Florida).

55. *See* H.R. 7035, 2014 Leg., Reg. Sess. (Fla. 2014) (amending FLA. STAT. § 775.082 and enacting FLA. STAT. §§ 921.1401–.1402); *see also* Jarrett, *supra* note 13, at 516–18 (explaining Florida Governor Rick Scott signed House Bill 7035 into law amending FLA. STAT. § 775.082 which provides penalties for criminal offenses and applies to juvenile offenders who commit crimes after July 1, 2014).

56. *See* FLA. STAT. § 921.1401(2)(a)-(j) (2017) (listing factors the court must consider relevant to the offense and defendant's youth and attendant circumstances). These factors include, but are not limited to:

> (a) [t]he nature and circumstances of the offense[;] (b) [t]he effect of the crime on the victim's family and community[;] (c) [t]he defendant's age, maturity, intellectual capacity, and mental and emotional health at the time of the offense[;] (d) [t]he defendant's background, including his/her family, home, and community environment[;] (e) [t]he effect of immaturity, impetuosity, or failure to appreciate risks and consequences on the defendant's participation in the offense[;] (f) [t]he extent of the defendant's participation in the offense[;] (g) [t]he effect of familial pressure or peer pressure on the defendant's actions[;] (h) [t]he nature and extent of the defendant's prior criminal history[;] (i) [t]he effect of characteristics attributable to the defendant's youth on the defendant's judgment[; and] (j) [t]he possibility of rehabilitating the defendant.

Id.; *see also* Jarrett, *supra* note 13, at 516–17 (highlighting that under amended FLA. STAT. § 775.082, juveniles can only be sentenced to life without parole for a capital felony after a sentencing hearing is held in accordance with newly added FLA. STAT. § 921.1401); Russell, *supra* note 39, at 1138–39 ("[T]he Florida legislature passed a bill eliminating mandatory life-without-parole sentences for juveniles and establishing a sentence review process.").

individuals who were juveniles at the time they committed the offense.[57] Requiring these factors to be considered before sentencing a juvenile to life in prison gives judges a more individualized approach to each case.[58] However, even though this legislation and the application of these new factors may be giving juvenile defendants an opportunity for a more fair and balanced sentence, is it also burying victims' rights by disrespecting their integrity and giving criminal defendants more respect than the victims' families who lost their loved ones at the hands of a juvenile murderer?[59]

57. *See* FLA. STAT. § 921.1402(6)(a)-(i) (2017) (listing factors the court must consider when determining whether it is appropriate to modify a juvenile's sentence). These factors include:

> (a) [w]hether the juvenile offender demonstrates maturity and rehabilitation[;] (b) [w]hether the juvenile offender remains at the same level of risk to society as he or she did at the time of the initial sentencing[;] (c) the opinion of the victim's next of kin . . . ; (d) [w]hether the juvenile offender was relatively minor participant in the criminal offense or acted under extreme duress or the domination of another person[;] (e) [w]hether the juvenile offender has shown sincere and sustained remorse for the criminal offense[;] (f) [w]hether the juvenile offender's age, maturity, and psychological development at the time of the offense affected his or her behavior[;] (g) [w]hether the juvenile offender has successfully obtained a high school equivalency diploma or completed another educational, technical, work, vocational, or self-rehabilitation program, if such program is available[;] (h) [w]hether the juvenile offender was a victim of sexual, physical, or emotional abuse before he or she committed the offense[; and] (i) [t]he results of any mental health assessment, risk assessment, or evaluation of the juvenile offender as to rehabilitation.

Id.; *see also* Jarrett, *supra* note 13, at 518 (explaining that FLA. STAT. § 921.1402 sets the requirements for proceedings involving sentence review hearings and that "[i]f the court finds that the juvenile offender has been rehabilitated, the court may modify the sentence").

58. *See* Rovner, *supra* note 13 (noting that the reformed legislation of the elimination of juvenile life without parole provides judges the ability to consider unique circumstances of each juvenile defendant and opportunity for review after a reasonable time of incarceration); *see also* Ben Piven, *To Free or not to free: Giving juvenile murderers a second chance*, ALJAZEERA AMERICA (June 20, 2014, 5:00 AM), http://america.aljazeera.com/watch/shows/ajam-presents-thesystem/articles/2014/6/18/juvenile-life-withoutparole.html ("[J]udges in every state are obliged to exercise their discretion in looking at mitigating circumstances" when considering juvenile life without parole sentences).

59. *See infra* Part III.

III. DISCUSSION

"No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved."[60]

A. CURRENT RETROACTIVE APPLICATION OF *MILLER* IS NOT A VICTORY FOR VICTIMS OR THE CRIMINAL JUSTICE SYSTEM.

i. Effects on Victims' Families

Justice Harlan's words echo the belief of many family members and loved ones of victims murdered by juvenile offenders—"there needs to be a viable end to a criminal process, there shouldn't be a going back period."[61] Retroactive application of *Miller* is viewed as a win for juvenile defendants; however, victim's families tend to disagree.[62] In response to

60. Mackey v. United States, 401 U.S. 667, 691 (1971) (Harlan, J., concurring in part and dissenting in part); Brief Amicus Curiae of Becky Wilson et al. in Support of Respondent at 2, Montgomery v. Louisiana, 136 S. Ct. 718 (2016) (No. 14-280).

61. Eric Lenhart, *Brief Amicus Curiae of Becky Wilson and the National Association of Victims of Juvenile Murderers*, PENN STATE BLOG (Dec. 9, 2015), http://sites.psu.edu/montgomeryvlouisiana/amicus-briefs (highlighting the view that retroactive application of *Miller* removes the actual end of the criminal process that victim's families need); *see Mackey*, 401 U.S. at 691.

62. *See The Retroactivity Question*, NAT'L ORG. OF VICTIMS OF JUVENILE MURDERERS (Jan. 2016), http://www.teenkillers.org/index.php/courts-2/miller-alabama-jackson-hobbs/retroactivity-question/; *see also* Jennifer S. Mann, *Victims' families worry about reconsideration of juvenile killers' life sentences*, ST. LOUIS POST-DISPATCH (Oct. 17, 2015), http://www.stltoday.com/news/local/crime-and-courts/victims-families-worry-about-reconsideration-of-juvenile-killers-life-sentences/article_f7100562-fe73-5637-b99b-5ce1a20ad5d1.html; Jordan Steffen, *JUVENILE MURDERERS AND THEIR VICTIMS' FAMILIES STRUGGLE IN LIMBO WHILE COLORADO WAITS TO ACT ON LIFE SENTENCES*, THE DENVER POST (July 1, 2016), http://extras.denverpost.com/juvenile-justice/index. Because *Miller* is applied retroactively, and sentences will be re-opened, victims' families are devastated and horrified because although many years have passed since the murders of their loved ones, they are heading back into lengthy, agonizing new legal proceedings. *See The Retroactivity Question*, *supra*. Many surviving family members have expressed their angst regarding *Miller*'s retroactive application because it does not take a lot for them to be re-traumatized as memories of their loved one's murders never fade. *See* Mann, *supra*. This retroactive application and the mandatory resentencing hearings have a particularly negative impact on some surviving families because these families are being forced to face all the painful memories of losing their loved ones again when their loved one's murders were sentenced decades ago. *See* Steffen, *supra*.

Montgomery v. Louisiana,[63] one particular family member, partnered with the National Association of Victims of Juvenile Murderers ("NOVJM"),[64] spoke out against *Miller*'s retroactive application in a Brief Amicus Curiae supporting the State of Louisiana, the respondent in *Montgomery*.[65] The proponents of this Brief argue that retroactive application attacks the integrity and rights of victims, disrespects the surviving victims of the murder, and fails to give equal respect to the rights of victims of juvenile murderers compared to the actual juvenile murderer themselves.[66]

Surviving family members suffer significant traumatic effects of the murder immediately after it happens.[67] Applying *Miller* retroactively to cases that were tried and sentenced decades ago causes yet another re-victimization by forcing victims' families to relive these painful memories

63. *See* Montgomery v. Louisiana, 136 S. Ct. 718, 725–26 (2016) (noting that in 1963, at the age of seventeen, Henry Montgomery killed deputy sheriff Charles Hurt and was automatically sentenced to life without parole); *see also* R.J. RICO, *Inmate Who Killed Deputy When a Teen Now Eligible for Parole*, U.S. NEWS (June 21, 2017, 5:27 PM), https://www.usnews.com/news/best-states/louisiana/articles/2017-06-21/inmate-who-killed-as-a-juvenile-gets-parole-eligibility (explaining that seventeen-year-old Henry Montgomery shot and killed East Baton Rouge Parish Deputy Charles Hurt in a park and ultimately was convicted and sentenced to life in prison without parole in 1969).

64. *See* NAT'L ORG. OF VICTIMS OF JUVENILE MURDERERS, http://www.teenkillers.org (last visited Mar 27, 2018) (explaining that the NOVJM is an all-volunteer organization and although it takes no specific stance on what criminal sentences for juvenile offenders should be, it stands for the "importance of giving devastated victims' families LEGAL FINALITY in their cases so that they do not have to spend much of the rest of their lives constantly having to re-engage with the person who destroyed their lies by murdering their loved ones").

65. *See* Brief for the Respondent, *supra* note 60, at 1; *see also* Lenhart, *supra* note 61 (noting Becky Wilson and the NOVJM filed a Brief Amicus Curiae in support of the respondent, the State of Louisiana, in the case *Montgomery v. Louisiana*); NAT'L ORG. OF VICTIMS OF JUVENILE MURDERERS, *supra* note 64 (noting that the NOVJM submitted an amicus brief to the United States Supreme Court in the *Montgomery* case in support of the respondent).

66. *See* Brief for the Respondent, *supra* note 60, at 3 (explaining how retroactive application deprives the victims' families the finality they have had for years and that these family members deserve as much respect as the juvenile murderers); *see also* Lenhart, *supra* note 61 (highlighting the key points victims and the NOVJM argued in the Brief Amicus Curiae in opposition to the retroactive application of *Miller*).

67. *See* Brief for the Respondent, *supra* note 60, at 16 (highlighting traumatic effects survivors deal with after a murder, which "include effects on health, finances, mental stability, employment, and relationships" and noting that survivors even struggle with sleeping and concentrating at work and thus end up going to therapy).

and confront what they thought was a closed chapter in their lives.[68] After hearing that their loved one's murderer received a life without parole sentence, family members of victims walked away from the sentencing hearing believing it was permanent.[69]

This re-victimization spread to Florida after the Florida Supreme Court's decision in *Falcon*, which held that *Miller* applies retroactively to juveniles sentenced in Florida decades ago.[70] Now, surviving family members in Florida join the countless others across the nation who lose the legal finality of their cases because they will be subject to this new legal nightmare of re-opened legal proceedings.[71] Families will once again be

68. *See* Lenhart, *supra* note 61 ("[A]llowing collateral review can cause adverse effects on survivors, traumatizing the victims again with the pains of memory and remorse."); *see also* NAT'L ORG. OF VICTIMS OF JUVENILE MURDERERS, *supra* note 64 (noting that victims' loved ones endure "literal torture" every time something regarding the murder case is re-opened in their lives); Meg Garvin, *Victims and the Supreme Court's Eighth Amendment Jurisprudence in* Miller v. Alabama: *A Tale of Constitutive Paradox for Victims*, 39 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 303, 309–10 (2013) (highlighting that crime victims who participate in the criminal justice system can be subjected to secondary victimization resulting in physical and mental distress, including posttraumatic stress, and lead to victims feeling frustrated or alienated from the criminal justice system); *see also* Brief for the Respondent, *supra* note 60, at 15 (discussing how Jody Robinson, whose brother was brutally stabbed and murdered by a juvenile in 1990, attended a commutation hearing in 2010 and found it to be a re-victimization as she heard numerous things about her brother's murder that had never come out in trial, such as how he begged for his life, offered his money and car keys, and fought for his life).

69. *See* Mann, *supra* note 62 ("People who, as recently as three years ago or as long as decades ago, "walked away from the life-without-parole sentencing, believing it was permanent."); *see also* NAT'L ORG. OF VICTIMS OF JUVENILE MURDERERS, *supra* note 64 ("[M]any [family members of victims] will not be able to even be notified [of the resentencing hearings] because they walked away from the life sentences given [to] their loved ones' murderers believing they were permanent, and have not stayed in contact with local officials[.]").

70. *See* Falcon v. State, 162 So. 3d 954, 963–64 (Fla. 2015) ("[T]he United States Supreme Court's decision in *Miller* applies retroactively to any juvenile offender seeking to challenge the constitutionality of his or her sentenced pursuant to *Miller* through collateral review."); *see also* Duvall, *supra* note 42 (noting that in *Falcon*, the Florida Supreme Court held that the *Miller* ruling applies retroactively in Florida, "meaning juveniles sentenced to mandatory life without parole became eligible for resentencing").

71. *See The Retroactivity Question*, *supra* note 62 (explaining that victims' families have expressed devastation and horror about heading back into new, lengthy legal proceedings and dealing with the agony and pain associated with the murder of their loved ones); *see also* NAT'L ORG. OF VICTIMS OF JUVENILE MURDERERS, *supra* note 64 (highlighting that the holding in *Miller* will likely negatively affect "tens of thousands of murder victims family members all over the nation").

traumatized because they will be forced to re-engage with the person who destroyed their lives by murdering their loved ones so many years ago.[72]

Consider the *Hernandez v. State*[73] and *Salazar v. State*[74] cases in Florida.[75] In 2008, Michael Hernandez, then fourteen years old, was convicted of first-degree murder and automatically sentenced to life in prison after stabbing his best friend, Jaime Gough, forty-two times in a middle school bathroom back in 2004.[76] The judge imposed this sentence after the evidence showed how Hernandez was obsessed with becoming a serial killer and carefully planned the entire murder.[77] The sentence was a relief to Gough's family; however, they were forced to endure the stress and pain of re-encountering their son's murderer in 2016, when Hernandez was entitled to a resentencing hearing under the retroactive application of

72. *See The Retroactivity Question*, *supra* note 62 ("For victim's families, the 'retroactive' application of the *Miller* Supreme Court ruling means only one thing—more torture and endless agony for [the] brutalized families."); *see also* NAT'L ORG. OF VICTIMS OF JUVENILE MURDERERS, *supra* note 64 (highlighting that victims' families are forced to live with the ramifications of the *Miller* holding and have already expressed personal shock and re-traumatization on social media).

73. *See* Hernandez v. State, 117 So. 3d 778, 779, 785 (Fla. 3d DCA 2013) (explaining that the mandatory life in prison without parole sentence for Michael Hernandez, who brutally murdered his friend in a South Florida middle school bathroom at the age of fourteen, was vacated and remanded for resentencing after the U.S. Supreme Court decision in *Miller*).

74. *See* Salazar v. State, 180 So. 3d 242, 242 (Fla. 3d DCA 2015) (noting that Florida resident, Ronald Salazar, was convicted of first degree murder for the rape and murder of his own sister).

75. *See* Ovalle, *supra* note 2 (noting that Michael Hernandez is one of the handful of juveniles in South Florida to be resentenced under *Miller*); *see also* Liane Morejon, *During re-sentencing hearing killer teen explains why he ended the life 11-year-old sister*, ABC LOCAL 10 (Jan. 26, 2015, 11:55 PM), https://www.local10.com/news/florida/miami-dade/during-re-sentencing-hearing-killer-teen-explains-why-he-ended-the-life-of-11-year-old-sister (noting that both Michael Hernandez and Ronald Salazar were entitled to a sentence review because of the 2012 United States Supreme Court ruling in *Miller*).

76. *See Teen gets life in best friend's murder*, NBC NEWS (Nov. 7, 2008, 4:43 PM), http://www.nbcnews.com/id/27597174/ns/us_news-crime_and_courts/t/teen-gets-life-sentence-best-friends-murder/#.Wfi7A0yZPq0 (explaining that as a teenager, Michael Hernandez was sentenced to life in prison without parole after brutally stabbing and killing his best friend in a middle school bathroom in 2004); *see also* Nelson, *supra* note 3 (noting that Michael Hernandez received a mandatory life sentence for the 2004 murder of his friend Jamie Gough in a Southwood Middle School bathroom when he was fourteen years old).

77. *See* Ovalle, *supra* note 2 (highlighting Hernandez's obsession with becoming a serial killer and how he lured his friend into the bathroom after he had already carefully planned and obtained the knife, rubber gloves, and tape and then stabbed his friend over forty times and cut his throat); *see also* Amanda Batchelor, *Michael Hernandez to be resentenced in October*, LOCAL 10 (Aug. 3, 2015, 6:23 PM), https://www.local10.com/news/florida/miami-dade/michael-hernandez-to-be-resentenced-in-october (noting that the trial evidence in the *Hernandez* case showed that Hernandez had a planned hit list of victims, including Jaime Gough and another thirteen-year-old boy).

Miller.[78] Nevertheless, to the Gough family's relief, Hernandez was sentenced to life again after his resentencing hearing in 2016.[79]

Although the judge resentenced Hernandez to life a second time, the judge in *Salazar* came to a different decision.[80] In 2009, Ronald Salazar was given two life sentences after being convicted of the rape and first-degree murder of his eleven-year-old sister at the age of fourteen.[81] However, Salazar was entitled to resentencing under the Supreme Court mandate, and in 2015, the circuit judge lessened his sentence to forty years with a possibility for a shortened term after twenty-five years.[82] Salazar's

78. *See* Batchelor, *supra* note 77 (explaining that the Third District Court of Appeal threw out Hernandez's sentence because the U.S. Supreme Court ruled in 2012 that juveniles cannot face mandatory life sentences, even for murder, but that after taking into consideration how "children are different," a judge could still impose another life sentence on Hernandez); *see also* Ovalle, *supra* note 2 (noting that the decision in *Miller* deemed automatic sentences as "cruel and unusual punishment" for juveniles and thus, judges must hold full sentencing hearings so they can consider defendant's youth; however, "the opinion also left the door open to life prison terms for 'uncommon' cases").

79. *See* Burke, *supra* note 5 (explaining that Hernandez's life sentence was upheld after his resentencing hearing because after Judge Schlesinger listened to nineteen weeks of jail calls where Hernandez talked about serial killers and other murderers he admired, it was apparent Hernandez still posed a threat to society); *see also* Ovalle, *supra* note 2 (noting Michael Hernandez received a life sentence again after the prosecutor played jail telephone recordings where Hernandez joked about making "skin suits," the movie *Hannibal*, and other mutilations detailed in *American Horror Story*, coupled with the death metal songs played over the phone for Hernandez which talked about "trachea's torn" and "life leaving him").

80. *See* David Ovalle, *From life to 40 years: Miami man gets new sentence for rape, murder of 11-year-old sister*, MIAMI HERALD (Feb. 2, 2015, 10:00 AM), http://www.miamiherald.com/news/local/crime/article8934323.html (noting that Ronald Salazar will not be serving a life sentence anymore after his sentence review hearing, even though he was convicted for raping and murdering his eleven-year-old sister); *see also* Joan Murray, *Child Rapist, Killer Re-Sentenced To 40 Years*, CBS MIAMI (Feb. 6, 2015, 5:19 PM), http://miami.cbslocal.com/2015/02/06/child-rapist-killer-re-sentenced-to-40-years/ (explaining that the judge reduced Ronald Salazar's sentence from life in prison to forty years, with a review hearing scheduled in twenty-five years).

81. *See* Laura Rodriguez, *Man Who Killed His Sister Could Get Second Chance at Life*, NBC MIAMI (May 8, 2015, 11:36 PM), http://www.nbcmiami.com/news/local/Man-Who-Killed-His-Sister-Could-Get-Second-Chance-at-Life-303146831.html (noting the judge gave Salazar two life sentences in 2009 after being convicted of the brutal rape and murder of his eleven-year-old sister); *see also* Gary Nelson, *Convicted Child Killer Takes Stand In Re-Sentencing Hearing*, CBS MIAMI (Jan. 26 2015, 6:15 PM), http://miami.cbslocal.com/2015/01/26/convicted-child-killer-takes-stand-in-re-sentencing-hearing/ (explaining Ronald Salazar was originally sentenced to life in prison after he was convicted of the murder of his younger sister).

82. *See* Ovalle, *supra* note 80 (noting that Ronald Salazar will no longer be serving a life sentence for raping and murdering his eleven-year-old sister because he was resentenced according to the U.S. Supreme Court decision in *Miller* and will now serve a forty year term with a possibility of a shortened sentence after twenty-five years); *see also* Rodriguez, *supra* note 81 (highlighting that based on the 2012 U.S. Supreme Court ruling, Salazar was given a resentencing hearing in February of 2015, where the judge lessened his sentence to forty years with a possibility of a shorter prison term after twenty-five years).

parents never attended the resentencing hearings, and when the media tried to get comments from them, they never responded.[83]

Additionally, retroactive application of *Miller* fails to give victims the same respect that is given to juvenile defendants convicted of murder.[84] Based on its decisions, the United States Supreme Court and subsequent state courts have given juvenile offenders the ability to seek a second chance through judicial sentence review, which is something that Jaime Gough and countless other victims will never be able to do.[85] At the very least, surviving victims of juvenile murders and juvenile offenders deserve equal respect.[86]

However, this is not accomplished by forcing surviving family members to attend hearing after hearing, and now a resentencing hearing that could change the original outcome of their case.[87] These family members attend appellate and supreme court challenge hearings, parole hearings, and now are forced to attend resentencing hearings in order for their voices to be heard (again), and they must continue to fight for justice

83. *See* David Ovalle, *Man who killed sister makes plea,* MIAMI HERALD (Jan. 26, 2015, 7:11 AM), http://www.miamiherald.com/news/local/crime/article8150049.html (explaining that Salazar's mother has voiced that Salazar "ruined" their family after brutally killing his own sister and noting Salazar's parents never attended any of the legal proceedings regarding the resentencing); *see also* Rodriguez, *supra* note 81 (noting that after the media attempted to contact Salazar's family after the resentencing hearing, the family did not respond to requests).

84. *See* Brief for the Respondent, *supra* note 60, at 16 (arguing that the rights of victims of juvenile murderers deserve just as much respect as the rights of juvenile murderers); *see also* Lenhart, *supra* note 61 (noting that the Amicus Curiae Brief of Becky Wilson and the NOVJM "argue that the rights of victims . . . deserve equal respect as . . . the juvenile" who murdered their loved ones).

85. *See, e.g.*, Brief for the Respondent, *supra* note 60, at 16 (noting that Jimmy Cotaling, a victim who was stabbed to death by a juvenile, will never get the second chance that his killer seeks through the retroactive application of *Miller*); *Victims*, FAIR SENTENCING FOR YOUTH, http://fairsentencingforyouth.org/changed-lives/victims-perspectives/ (last visited Mar. 27, 2018) (highlighting different victims' perspectives on the retroactive application of *Miller*, including Maggie Elvey, who views the retroactive application as society's way of saying, "it is [now] OK to kill someone and the killer should expect to get out of prison and walk the face of the earth again," yet the victim's family can never have that same expectation).

86. *See* Brief for the Respondent, *supra* note 60, at 17 (arguing that since "the interests of victims are a [major] factor that counsels against the retroactive application of *Miller*[,]" then "the interests of the victims of juvenile murderers deserve at least the same respect that the juvenile killers receive").

87. *See id.* at 18 (noting victims' surviving family members are already "compelled to do something that hurts them" by attending parole or commutation hearings in order for their voice to be heard); *see also* Steffen, *supra* note 62 (explaining that victims' families deserve legal finality in their cases and should not have to go back to court over and over again and be forced to interact with the convicted juvenile murderers who ruined their lives).

for their lost loved ones.[88] Nevertheless, this issue does not stop here; forcing surviving family members into facing these traumatic experiences again has even been shown to have adverse effects on their brains and lives.[89] Consequently, reopening cases that have been long-finalized does not do any good for anyone, specifically the victim's family who has an "interest in [the] finality" of this heart-wrenching situation that deserves the utmost respect.[90]

ii. Effects on the Criminal Justice System

Furthermore, the retroactive application of *Miller* affects the criminal justice system as a whole because not only does the loss of legal finality have a negative effect on victims' lives, it also shifts a burden onto the

88. *See* Brief for the Respondent, *supra* note 60, at 18 (highlighting that victims' family members "are forced to relive the traumatic events" by having no choice but to attend post-conviction hearings if they want their voices heard); Beth Schwartzapfel, *Sentenced Young: The story of life parole for juvenile offenders*, ALJAZEERA AMERICA (Feb. 1, 2014), http://america.aljazeera.com/features/2014/1/sentenced-young-thestoryoflifewithoutparoleforjuvenileoffenders.html (noting that in response to critics' arguments supporting that life-sentenced juvenile offenders "deserve . . . a chance at parole," Scott Burns, the executive director of the National District Attorneys Association, explains that post-conviction hearings, such as "[p]arole hearings . . . take a deep financial and emotional toll on . . . surviving family members" because they typically have to "travel hundreds of miles . . . every two . . . [to] five years" and have to "face their loved ones' killer again and again").

89. Brief for the Respondent, *supra* note 60, at 17–18 (noting that "people respond to trauma differently[;]" however, memories of their loved ones' murder involuntarily intrudes the minds of surviving family members because, unlike ordinary stress, losing a loved one who was killed is "sudden[] and the lack of warning force[s] . . . [victims' famil[ies] . . . to endure the unendurable" and live with the resulting trauma); *see also* Garvin, *supra* note 68, at 309–10 (highlighting that repeated legal proceedings are a "secondary victimization" and can result in many types of "physical and mental distress" for the juvenile murder victims' surviving family members).

90. Brief for the Respondent, *supra* note 60, at 19–20; *see also* Garvin, *supra* note 68, at 305 n.13. In *Mackey*, "Justice Harlan observed [that] reopening . . . cases" that have long been finalized "does nobody any good" because the courts will be re-litigating old facts that have long been buried in the past through the dimmed memories of witnesses. Brief for the Respondent, *supra* note 60, at 19–20. Although the decision in *Miller* "did not facially address victims or their rights[,]" it still had a "profound" impact. Garvin, *supra* note 68, at 305 n.13. The author explains:

> There is no doubt, however, that the Court's decision [in *Miller*] had a profound effect on the families of the victims murdered by the acts of the offenders before the Court, as well as the families of the victims of the at least 2,000 other prisoners who at the time of the Court's decision were serving mandatory life without parole sentences for murders. These families had legitimate expectations in the finality of the sentences imposed, to a system that operates on notions of fundamental fairness, and, correspondingly, to whatever small peace may come with finality and fairness in the aftermath of tragedy. The fundamental disruption and turmoil caused by the Court's determination should not be underestimated.

Id.

criminal justice system and everyone involved.[91] Judges, prosecutors, and defense counsel will now be forced to spend a substantial amount of energy and time on these once-final convictions that were free from error in order to deal with the resentencing mandates for these juvenile cases.[92] However, not every state is on board with applying *Miller* retroactively because of the controversial nature of the ruling and the effects it will have on juvenile sentencing.[93] Although Florida was one of the first states to rule against applying *Miller* retroactively, the legal challenges following that decision were ultimately reversed.[94]

As of July 2017, there are roughly six hundred inmates in Florida whose life sentences are eligible for judicial review.[95] However, only about eighty-five of these inmates have been resentenced.[96] This slow pace is

91. *See* Brief for the Respondent, *supra* note 60, at 6 (quoting Justice Harlan's dissenting opinion in *Mackey*, where he stated that "the failure to give finality its due 'would do more than subvert the criminal process itself[,] [i]t would also seriously distort the very limited resources society has allocated to the criminal justice process'").

92. *See id.*; *see also* Williams v. United States, 401 U.S 667, 691 (1971) (Harlan, J., dissenting). Justice Harlan sustained:

> This drain on society's resources is compounded by the fact that issuance of the habeas writ compels a State that wishes to continue enforcing its laws against the successful petitioner to relitigate fats buried in the remote past though presentation of witnesses whose memories of the relevant events have often dimmed. This very act of trying stale facts may well, ironically, produce a second trial no more reliable as a matter of getting at the truth than the first.

Williams, 401 U.S. at 691 (Harlan J., dissenting).

93. *See The Retroactivity Question*, *supra* note 62 (highlighting different states, such as Pennsylvania, Louisiana, Michigan, Texas, Minnesota, and South Dakota, that oppose the retroactive application of *Miller*); *see also* Joshua Rovner, *Slow to Act: State Responses to 2012 Supreme Court Mandate on Life Without Parole*, THE SENTENCING PROJECT (June 25, 2014), http://sentencingproject.org/wp-content/uploads/2015/11/Slow-to-Act-State-Responses-to-Miller.pdf (noting state legislative responses to the decision in *Miller* and the different states that have adopted or rejected retroactive application of the *Miller* decision).

94. *See The Retroactivity Question*, *supra* note 62 ("[The] Florida's Supreme Court was one of the first [courts] to [hold that] *Miller* [was] not to be retroactive,"); *see also* Duvall, *supra* note 42 (highlighting that in *Falcon*, the Florida Supreme Court held that *Miller* applies retroactively in Florida, making Florida the tenth state to adopt it).

95. Fineout, *supra* note 11 (discussing that the vast majority of inmates that are serving life sentences and are eligible for resentencing are still waiting for their chance for review); The Associated Press, *A state-by-state look at juvenile life without parole*, WTOP (July 31, 2017) https://wtop.com/national/2017/07/a-state-by-state-look-at-juvenile-life-without-parole/ ("Florida is complicated because the [Florida] Supreme Court has expanded the number of juvenile[s] . . . who are . . . eligible for a new sentence" and how there are about 600 prisoners in Florida who are eligible).

96. Fineout, *supra* note 11 (noting that as of July 2017, out of almost 600 inmates eligible for resentencing, only about 85 have actually been resentenced); The Associated Press, *supra* note 95 (reiterating the complicated process associated with resentencing in Florida).

attributed to various factors, such as: lack of funding, which prevents prosecutors and public defenders from quickly reopening these old cases; trouble adjusting to the United States Supreme Court's new mandates; and difficulty in the state court systems trying to determine which sentences conform with these recent rulings.[97]

B. THE *MILLER*-MANDATED FACTORS FAIL TO ADEQUATELY FACTOR IN VICTIMS AND THEIR RIGHTS.

In writing for the United States Supreme Court in *Miller*, Justice Kagan explains that because punishment should be proportional and judged with a more evolving-society approach, the Eighth Amendment[98] prohibits statutorily mandated life in prison without the possibility of parole sentences for juveniles.[99] The Court ultimately relied on the questions and rationales articulated in *Trop v. Dulles*,[100] which analyzed the Eighth Amendment's key words "cruel and unusual punishment."[101] In its analysis, the Court decisively notes that the Eighth Amendment's fundamental concept is centered around a person's dignity.[102]

Expanding on this concept, the *Miller* decision created guidelines for what the courts should look at if and when juveniles are to be sentenced to life in prison.[103] Those guidelines were then statutorily implemented in many states, including Florida, as factors judges must consider prior to

97. Fineout, *supra* note 11 (explaining the factors attributed to the slow pace of sentence review in Florida).

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

99. Miller v. Alabama, 567 U.S. 460, 469, 489 (2012) (sustaining that punishment should be "graduated and proportioned"); Garvin, *supra* note 68, at 306 (explaining that Justice Kagan determined, "punishment should be proportional," where "proportionality should be judged through the lens of 'the evolving standards of decency that mark the progress of a maturing society'" and held that since sentencing juveniles to life without the possibility of parole was not proportional, it violated the Eighth Amendment).

100. Trop v. Dulles, 356 U.S. 86, 99–101, 103 (1958) (questioning whether denaturalization as punishment for military desertion constituted cruel and unusual punishment under the Eighth Amendment).

101. *Id.* at 99–101; Garvin, *supra* note 68, at 306–07 (highlighting that the Court in *Trop* explained that the phrase of the Eighth Amendment "'cruel and unusual [punishment]' . . . are 'not precise' nor is the scope of the phrase 'static'").

102. *See Trop*, 356 U.S. at 99–100; *see also* Garvin, *supra* note 68, at 307 ("[T]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man.").

103. *Miller*, 567 U.S. at 477, 480, 489; *see also* Grisso & Kavanaugh, *supra* note 33, at 236 (noting that judges should not be prevented from considering "mitigating factors of adolescent immaturity" when considering a life in prison sentence for a juvenile).

sentencing a juvenile to life in prison.[104] Furthermore, because *Falcon* mandates retroactive application of the *Miller* decision in Florida, there are also similar statutorily required factors judges must consider during resentencing hearings for juvenile offenders.[105]

However, the factors judges must consider before sentencing a juvenile are significantly more favorable to the juvenile defendant compared to the victim involved.[106] Currently, before a judge can sentence a juvenile to life in prison, he or she must consider a non-exhaustive list of ten "factors relevant to the offense and the defendant's youth and attendant circumstances."[107] Consequently, out of those ten factors, eight are relevant to the juvenile defendant's circumstances and only two relate to "[t]he nature and circumstances of the offense" and "[t]he effect of the crime on the victim's family and on the community."[108]

Additionally, the factors that judges must consider in resentencing are also defendant-favorable.[109] During a sentence review hearing, judges must also consider a non-exhaustive list of nine factors.[110] However, only two out of nine factors relate to "[t]he opinion of the victim's [family]" and "[w]hether the juvenile offender remains at the same level of risk to society as he or she did at the time of the initial sentencing."[111]

Victim's rights have already been put to the way-side simply because of the required retroactive application of *Miller* to old, finalized cases.[112] However, the Florida's statutory factors take this one step further by barely

104. *See, e.g.*, FLA. STAT. § 921.1401(2)(a)-(j) (2014) (listing the *Miller*-approved factors judges must consider prior to sentencing a juvenile to life in prison); Jarrett, *supra* note 13, at 510 (highlighting that Florida was one of the states that modified its statutes on juvenile sentencing to comply with the decision in *Miller*).

105. *See* § 921.1402(6)(a)-(i) (identifying the factors judges take into consideration during a sentence review hearing of a juvenile offender convicted of murder); *see also* Jarrett, *supra* note 13, at 517–18 (noting that judges have discretion to modify the sentence after considering a list of factors during a "sentence review hearing").

106. *See* § 921.1401(2)(a)-(j) (identifying the factors the court considers and the majority relates to the defendant's circumstances).

107. *Id.*

108. *Id.*

109. *See id.* (identifying the factors judges must consider in a juvenile resentencing hearing, where seven out of nine factors relate specifically to the defendant).

110. *See id.* (listing the nine factors "the court shall consider" during a "sentence review hearing" for juveniles convicted of murder).

111. *Id.* (identifying the factors considered during juvenile resentencing where only two relate to "[t]he opinion of the victim or victim's [family]" and if the juvenile offender is still a "risk to society").

112. *See* Brief for the Respondent, *supra* note 60, at 3; *see also* Lenhart, *supra* note 61 (highlighting the argument that victims' rights and integrity have been disrespected and are not equal to the rights afforded to these juvenile defendants).

even considering victims during the sentencing or resentencing phase of a juvenile murder case.[113] Because the factors are unbalanced against the victim and mainly take into consideration the juvenile defendant's youth and individual circumstances, it gives judges more discretion to modify sentences in favor of the defendant, unraveling the finality of the case and justice for the victim.[114] As stated in *Trop*, the Eighth Amendment is centered around keeping a *person's* "dignity" intact; this concept should not only be reflected on the juvenile defendants, but on the victims too.[115] The surviving family members are the ones that have had someone unexpectedly taken from them and they should not be overlooked, dismissed, or disrespected at the expense of the very person who took their loved one's life.[116]

IV. SOLUTION

While the *Miller* decision controls across the nation and many states adopt new sentencing legislation to implement factors that contemplate the juvenile defendant's youth and circumstances surrounding the crime, courts should reconsider the proportionality of these factors.[117] Focusing on Florida's adopted legislation on this issue, the court should weigh the statutorily listed factors in proportion to the actual weight they carry on a case-by-case basis.[118] This proportional analysis should be done whether a judge is looking at the nine factors in a juvenile sentence review hearing or

113. *See* § 921.1401(2)(a)-(j) (listing the *Miller*-approved factors judges must consider prior to sentencing a juvenile to life in prison where only two factors consider the victim or "[t]he nature . . . of the offense"); § 921.1402(6)(a)-(i) (listing the factors judges take into consideration during a "sentence review hearing . . . [of a] juvenile offender" convicted of murder where only two factors consider the victim or the community).

114. *See* Jarrett, *supra* note 13, at 518 (highlighting that judges have discretionary power to modify the sentence of a juvenile who was convicted of murder after considering the statutory list of factors during a sentence review hearing); *see also* Ovalle, *supra* note 80 (noting that after being resentenced under *Miller* and *Falcon*, Ronald Salazar is an example of a convicted juvenile who received a modified sentence of forty years instead of life in prison after raping and murdering his eleven-year-old sister).

115. *See* Trop v. Dulles, 356 U.S. 86, 100 (1958); *see also* Garvin, *supra* note 68, at 306–07, 316 (explaining that the Court in holding the principle behind the Eighth Amendment is essentially a person's dignity "ignores crime victims and their rights in one breath").

116. *See* Brief for the Respondent, *supra* note 60, at 3 (arguing that victims deserve the same respect as defendants and their rights should not be trampled nor their integrity overlooked); *see also* Lenhart, *supra* note 61 (noting how painful the memories of loss are and the remorse that comes with yet another hearing that the victims' families must attend because of the court decisions).

117. *See supra* Part III, Section B.

118. *See supra* Part II, Section C; *see also supra* Part III, Section B.

the ten factors in determining whether a life imprisonment term is appropriate for a juvenile offender.[119]

Although allowing a judge to have more discretion when it comes to sentencing juveniles is an important change to our criminal justice system, the factors need to be weighed in a way to equally include victims' rights.[120] Giving equal weight to the present factors when they are not on equal standing will not lead to justice for anyone, especially victims and their families.[121] Instead, judges should exercise their discretion by weighing factors by the specific facts of each individual case, keeping in mind that the victim's rights should not be overlooked or disrespected.[122]

Alternatively, the legislature could modify the statute to include additional factors that relate more to the victims, their family, the overall effect of the murder on the community as a whole, and the nature and circumstances surrounding the offense.[123] This could be accomplished by simply amending the statute to add language or include additional factors that relate to these particular issues.[124] Florida's current statutes already include language that makes the list non-exhaustive.[125] Specifically, the statute relating to resentencing juveniles includes language that the court must consider all of the nine factors listed, but indicates that the court must also consider "any factor it deems appropriate."[126] While applying more victim-related factors will not change the retroactive application of *Miller* or preserve the finality of victims' cases, it will help alleviate the facially unbalanced statutory scheme in place and better protect victims' rights.[127]

V. CONCLUSION

From the United States Supreme Court decision in *Miller* to the Florida Supreme Court decision in *Falcon*, courts have continuously modified juvenile sentencing in order to fit within the confines of the Constitution.[128] However, these decisions have continuously chipped away at victims' rights, ultimately causing more victimization and hardly factoring in the effect on victims when sentencing a juvenile who murdered

119. *See supra* Part II, Section C; *see also supra* Part III, Section B.
120. *See supra* Part III, Section B.
121. *See supra* Part III, Section B.
122. *See supra* Part III, Section B.
123. *See supra* Part II, Section C; *see also supra* Part III, Section B.
124. *See supra* Part II, Section C; *see also supra* Part III, Section B.
125. *See supra* Part III, Section B; *see also supra* Part II, Section C.
126. FLA. STAT. § 921.1402(6)(a)-(i); *see also supra* Part III, Section B.
127. *See supra* Part III, Sections A–B.
128. *See supra* Part II.

their loved ones.[129] In an attempt to keep victims' rights a priority during this sentencing shift, courts should be considering an equal balance of victims' and juvenile defendant's rights.[130] As the current Florida statutes stand, they fail to adequately consider victims, their rights, and the effect a sentence or modified sentence will have on those rights.[131]

129. *See supra* Part III, Sections A–B.
130. *See supra* Part IV.
131. *See supra* Part III, Sections A–B.