CRIMINAL LAW — LIFE SENTENCES WITHOUT PAROLE — SUPREME COURT OF MISSISSIPPI AFFIRMS A SENTENCE OF LIFE WITHOUT PAROLE FOR A JUVENILE OFFENDER. — *Chandler v. State*, 242 So. 3d 65 (Miss. 2018) (en banc).

Under the Supreme Court's Eighth Amendment jurisprudence, life without parole (LWOP) is reserved for the most incorrigible offenders; only the rare juvenile homicide offender who is irretrievably corrupt may receive such a sentence.[1] In *Miller v. Alabama*,[2] the Supreme Court held that the Eighth Amendment prohibits sentencing schemes that mandate LWOP for juvenile homicide offenders.[3] Because juvenile homicide offenders are typically less culpable than adult homicide offenders,[4] sentencing courts must take youth into account.[5] While *Miller* offered substantive protection, the Court was silent on the procedural requirements, and state courts have varied in their interpretations of the mandate.[6] The Court clarified that *Miller* was retroactive in *Montgomery v. Louisiana*,[7] but it still left questions critical to the implementation of the new mandate unanswered, including whether *Miller* had created a presumption in favor of parole and whether sentencing courts must make explicit findings about "irreparable corruption" before sentencing (or resentencing) a juvenile to LWOP.[8] Recently, in *Chandler v. State*,[9] the Supreme Court of Mississippi affirmed that the trial court had satisfied *Miller* and had not abused its discretion in resentencing a juvenile homicide offender to LWOP, even though the sentencing court placed the burden on him to provide mitigating evidence of his capacity for rehabilitation and did not make a finding on the record that he was permanently incorrigible.[10] *Chandler* highlights a potential problem with *Miller* and *Montgomery*: because the Court did not mandate any particular procedure to guarantee the rights that it recognized, it gave states

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1 Montgomery v. Louisiana, 136 S. Ct. 718, 733–35 (2016).

2 567 U.S. 460 (2012).

3 *Id.* at 465.

4 *See id.* at 471 (citing Graham v. Florida, 560 U.S. 48, 68 (2010)).

5 *Id.* at 479–80.

6 *See* Alice Reichman Hoesterey, *Confusion in* Montgomery*'s Wake: State Responses, the Mandates of* Montgomery*, and Why a Complete Categorical Ban on Life Without Parole for Juveniles Is the Only Constitutional Option*, 45 FORDHAM URB. L.J. 149, 151–52 (2017); Caroline Maass, Comment, *A Meaningful Opportunity to Obtain Release: A Practical Impossibility*, 8 WAKE FOREST J.L. & POL'Y 503, 511–12 (2018).

7 136 S. Ct. 718, 732 (2016). In order to establish that *Miller* guaranteed retroactive protection, the Court defined the right as a substantive commitment that LWOP is a disproportionate punishment for the majority of juvenile offenders rather than merely a procedural right of juveniles to be free from sentencing schemes that mandate LWOP sentences. *Id.* at 736.

8 *See* Hoesterey, *supra* note 6, at 161.

9 242 So. 3d 65 (Miss. 2018) (en banc).

10 *See id.* at 68, 70.

the opportunity to procedurally undermine these substantive rights and deny juvenile homicide offenders the meaningful opportunity for future release that the Eighth Amendment requires.

In 2005, seventeen-year-old Joey Montrell Chandler was convicted of murder and sentenced to life imprisonment.[11] Chandler shot his cousin twice after learning that he had stolen marijuana and money that Chandler had planned to use to support his pregnant girlfriend.[12] The Supreme Court of Mississippi affirmed the sentence on appeal,[13] but Chandler received a new sentencing hearing in light of *Miller*.[14]

On resentencing, Judge Kitchens focused primarily on the issue of Chandler's maturity. The facts section of the opinion highlighted that Chandler was "17 years, 6 months and 13 days old" at the time of the crime, and the analysis began with an extensive list of privileges available to seventeen-year-olds in general, including driving, joining the military with parental consent, obtaining abortions without parental consent, and receiving a private pilot's certificate.[15] Judge Kitchens then noted that Chandler was "mature enough to father a child with his girlfriend and . . . [sell] drugs."[16] Furthermore, the judge declared that Chandler was "very mature" because he acted alone, planned the crime, and was not mentally impaired or abused.[17] With regard to rehabilitation, the judge stated only that the Executive has the ability to pardon.[18] "After carefully reviewing the evidence in this case and the matters presented in the re-sentencing hearing," Judge Kitchens found that Chandler should be sentenced to LWOP.[19]

Chandler appealed the second sentence on the grounds that the trial court failed to properly take the mitigating impact of his youth into account because it failed to issue findings for each of the *Miller* factors; in particular, the court had omitted any findings concerning Chandler's individual capacity for rehabilitation in the record.[20] The Mississippi Supreme Court affirmed.[21] Writing for the court, Justice Coleman[22]

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[11] *Id.* at 67.

[12] Chandler v. State, 946 So. 2d 355, 357 (Miss. 2006) (en banc).

[13] *Id.* at 366–67.

[14] *Chandler*, 242 So. 3d at 67.

[15] Chandler v. State, No. 8491, 2015 WL 13744176, at *1 (Miss. Cir. Ct. Oct. 9, 2015).

[16] *Id.* at *2.

[17] *Id.* at *3. In a footnote, Judge Kitchens relayed the tale of a seventeen-year-old war hero to dispute the claim that actions committed at that age are per se immature. *Id.* at *2 n.4.

[18] *Id.* at *3.

[19] *Id.*

[20] *Chandler*, 242 So. 3d at 67, 70. Briefly summarized, the *Miller* factors are: age and its attendant features, family and home environment, circumstances of the offense, legal competency, and possibility of rehabilitation. Miller v. Alabama, 567 U.S. 460, 477–78 (2012).

[21] *Chandler*, 242 So. 3d at 70–71.

[22] Presiding Justice Randolph also joined in this opinion, along with Justice Maxwell, Justice Beam, and Justice Chamberlin.

stated that the trial court had "exceeded" its minimum obligation under *Miller* and *Parker v. State*[23] by conducting a hearing and considering all that was presented.[24] Because "[n]othing in the record indicates that the trial court *did not* take [the evidence that Chandler proffered] into account" and the trial court acknowledged the Executive's power to pardon, the decision to resentence Chandler to LWOP was not "*automatic*[]" and therefore not in violation of *Miller* or an abuse of discretion.[25]

Chief Justice Waller[26] dissented, arguing that the sentencing court failed to address the primary focus of *Miller* by skirting the issue of Chandler's capacity for rehabilitation and not articulating that Chandler was among "the rarest of juvenile offenders,"[27] as required in other states.[28] The Chief Justice deemed the trial court's solitary statement about executive pardons insufficient evidence that the sentencing court had adequately considered the defendant's capacity for rehabilitation, particularly in light of the testimony from Chandler's family and friends and his excellent disciplinary record in prison.[29] Since "*Miller* established that a LWOP sentence is an unconstitutionally disproportionate punishment for juvenile homicide offenders whose crimes reflect transient immaturity,"[30] any decision from the trial court that did not "at a minimum . . . address[] Chandler's capacity for rehabilitation and ma[k]e an on-the-record finding that Chandler was one of the rare juvenile offenders whose crime reflected permanent incorrigibility" was insufficient as a matter of law.[31]

Justice King[32] also provided a separate dissenting opinion to challenge the majority's holding that abuse of discretion was the appropriate standard of review. Relying on the precedent of death penalty cases,[33]

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[23] 119 So. 3d 987 (Miss. 2013) (en banc). In *Parker*, the Mississippi Supreme Court held that *Miller* applied to the case of a juvenile homicide offender that was pending on direct review. *Id.* at 996.

[24] *Chandler*, 242 So. 3d at 70. As a preliminary matter, the court held that abuse of discretion (rather than "heightened scrutiny," as Chandler argued) was the proper standard of review for a trial court's sentencing decision under *Miller*. *Id.* at 68.

[25] *Id.* at 70 (first emphasis added).

[26] Presiding Justice Kitchens, Justice King, and Justice Ishee joined in this opinion.

[27] *Chandler*, 242 So. 3d at 71 (Waller, C.J., dissenting) (quoting Montgomery v. Louisiana, 136 S. Ct. 718, 734 (2016)).

[28] *Id.* at 72.

[29] *Id.* at 71–72.

[30] *Id.* at 72.

[31] *Id.* at 73.

[32] Presiding Justice Kitchens joined in this opinion.

[33] *Chandler*, 242 So. 3d at 73–74 (King, J., dissenting) (citing Graham v. Florida, 560 U.S. 48 (2010)).

Justice King concluded that imposition of LWOP on a juvenile necessitates the same heightened scrutiny as capital punishment because it is the most severe penalty available.[34]

The *Chandler* majority interpreted *Miller* and *Montgomery* narrowly, and in so doing, the court made it much less likely that juvenile homicide offenders in Mississippi will receive the "meaningful opportunity to obtain release" that the Supreme Court promised.[35] Scholars in the death penalty context have commented on the "[p]rocedural undermining of substantive rights," through which the Supreme Court's acknowledgement of a substantive right is weakened by the erection of procedural barriers in lower courts.[36] The Mississippi Supreme Court's interpretation of the *Miller-Montgomery* precedent in *Chandler* is an example of this phenomenon; the decision undermines the spirit of the Supreme Court's rulings and risks inequitable application of constitutional mandates based on jurisdiction. While the *Miller* holding was narrow,[37] the clarifying language of *Montgomery* suggests that the central promise of *Miller* was that LWOP should be reserved for a very small subset of the worst juvenile offenders.[38] The *Montgomery* dissenters' fear that the majority holding would make "imposition of [juvenile LWOP] a practical impossibility" further supports the conclusion that *Miller* was intended to broadly restrict the class of juvenile homicide offenders ineligible for parole.[39] The Mississippi Supreme Court has ignored this suggestion, however, and used three tools to procedurally undermine the grant of substantive rights: implementing the strictest possible standard for immaturity, finding no presumption in favor of parole, and not requiring sentencing judges to make a finding of permanent incorrigibility before sentencing a juvenile homicide offender to LWOP.

Rather than reserving LWOP for "the rare juvenile offender,"[40] the Supreme Court of Mississippi's LWOP decisions have led other Mississippi courts to interpret *Miller* as prohibiting LWOP only for ju-

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[34] *Id.*

[35] Miller v. Alabama, 567 U.S. 460, 479 (2012) (quoting *Graham*, 560 U.S. at 75).

[36] CAROL S. STEIKER & JORDAN M. STEIKER, COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT 229 (2016); *see also* Carol S. Steiker & Jordan M. Steiker, Atkins v. Virginia*: Lessons from Substance and Procedure in the Constitutional Regulation of Capital Punishment*, 57 DEPAUL L. REV. 721, 731 (2008).

[37] The broader alternatives proposed by the defendants were that LWOP was categorically unconstitutional for all juvenile homicide offenders or for all juvenile homicide offenders aged fourteen or under. *Miller*, 567 U.S. at 479.

[38] The *Montgomery* Court stated that *Miller* "rendered [LWOP] an unconstitutional penalty for . . . juvenile offenders whose crimes reflect the transient immaturity of youth." Montgomery v. Louisiana, 136 S. Ct. 718, 734 (2016).

[39] *Montgomery*, 136 S. Ct. at 744 (Scalia, J., dissenting).

[40] *Miller*, 567 U.S. at 479 (quoting Roper v. Simmons, 543 U.S. 551, 573 (2005)).

venile homicide offenders "whose crimes reflected *only* transient immaturity," not for those "whose crimes reflect[ed] irreparable corruption."[41] Under this standard, LWOP is constitutionally permissible if the crime reflected *any* level of corruption which the judge perceived as irreparable.[42] Though the *Montgomery* Court's assertion that *Miller* "rendered [LWOP] an unconstitutional penalty for . . . juvenile offenders whose crimes reflect the transient immaturity of youth"[43] arguably left open the question of how much transient immaturity a crime must reflect before LWOP is rendered unconstitutional, the state court's decision to limit the class of juvenile offenders eligible for relief by implementing the strictest possible standard highlights the way that Mississippi exploited the deference that the Supreme Court afforded it to limit the impact of *Miller* and *Montgomery*.[44]

The *Chandler* court undermined the substantive rights protected in *Miller* and *Montgomery* by denying the existence of a rebuttable presumption in favor of parole eligibility for juvenile homicide offenders.[45] This decision placed the burden on Chandler to present mitigating evidence of his youth and potential for rehabilitation in order to prove that he was part of the constitutionally protected class, rather than placing the burden on the prosecution to present evidence that Chandler was one of the rare offenders for whom LWOP is constitutional. The *Chandler* majority refused to implement a presumption in favor of parole because neither *Miller* nor *Montgomery* explicitly mandated one.[46] But several aspects of the *Miller* and *Montgomery* opinions suggest that acknowledgment of this presumption would be more faithful to the Court's intent than would denial. Writing for the *Miller* majority, Justice Kagan[47] predicted that juvenile LWOP would become "uncommon."[48] *Montgomery* reaffirmed this sentiment; the Court referred to *Miller* as a categorical bar on LWOP "for all but the rarest of juvenile

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41 Cook v. State, 242 So. 3d 865, 873 (Miss. Ct. App. 2017) (quoting *Montgomery*, 136 S. Ct. at 734, 736) (discussing the effect of Mississippi Supreme Court precedent on the application of both *Montgomery* and *Miller* in Mississippi).

42 *See id.*

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

44 The *Montgomery* Court used the phrase "reflected *only* transient immaturity" once in the majority opinion, while the more open-ended alternative "reflected transient immaturity" was used six times. *Id.* at 734–36, 744. This suggests that the Court intended for state courts to interpret the *Miller* mandate more broadly than Mississippi has.

45 *See Chandler*, 242 So. 3d at 69.

46 *Id.*; *see also Cook*, 242 So. 3d at 873 (rejecting the notion that *Miller* and *Montgomery* established a presumption against LWOP for juvenile homicide offenders). Other states including Nebraska, Arizona, and Virginia, also deny a presumption in favor of parole. Hoesterey, *supra* note 6, at 165–66.

47 Justices Kennedy, Ginsburg, Breyer, and Sotomayor joined this opinion.

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

offenders"[49] and reiterated six times that juvenile LWOP should be "rare."[50] Based on these observations, six state supreme courts have held that faithful implementation of *Miller* and *Montgomery* requires a presumption in favor of parole.[51] In *Commonwealth v. Batts*,[52] the Pennsylvania Supreme Court stated that, though isolated remarks in *Miller* and *Montgomery* could be interpreted to suggest that the burden of proof should be placed on the defendant,[53] the notion that the juvenile offender should bear the burden of proof "is belied by the central premise of *Roper*, *Graham*, *Miller* and *Montgomery* — that as a matter of law, juveniles are categorically less culpable than adults."[54] In recognition of this reduced culpability, there should be a presumption in favor of parole for juvenile offenders.

The *Chandler* court's refusal to implement such a presumption also belies the Supreme Court's intent to reserve juvenile LWOP for rare cases because of the difficulties inherent in the task of providing evidence of the mitigating impact of youthfulness and capacity for rehabilitation. The *Miller* Court noted that mandatory LWOP for juvenile homicide offenders was unconstitutional in part because "incompetencies associated with youth" may prevent juvenile offenders from fully assisting their attorneys.[55] It would be unfaithful to the Court's recognition of the incompetencies intrinsic to youth for a sentencing court to place the burden on the juvenile offender to prove that he is a member of the protected class.[56] Yet that is precisely what the *Chandler* majority did. Though it could be argued that the offenders, like Chandler, who received resentencing hearings in light of *Miller* and *Montgomery* could carry such a burden because they are no longer juveniles, the court's refusal to acknowledge a presumption in favor of parole still constitutes an inappropriate procedural barrier to relief because mitigating evidence such as testimony from family members, friends, or former teachers becomes more difficult to obtain when the offender has been incarcerated for a substantial period of time.[57] Because of the inherent difficulty of providing evidence on the impact of youthfulness, states

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[49] *Montgomery*, 136 S. Ct. at 734.

[50] *Id.* at 726, 733–34; *see also* Hoesterey, *supra* note 6, at 175.

[51] The six states are Connecticut, Iowa, Utah, Missouri, Indiana, and Pennsylvania. *See* Hoesterey, *supra* note 6, at 164–65. *But cf. id.* at 166 (acknowledging that some states have upheld schemes that presume LWOP for juvenile homicide offenders). This number does not include the states that have prohibited juvenile LWOP outright.

[52] 163 A.3d 410 (Pa. 2017).

[53] *See id.* at 451.

[54] *Id.* at 452; *see also* Hoesterey, *supra* note 6, at 176.

[55] Miller v. Alabama, 567 U.S. 460, 477–78 (2012).

[56] *See* Hoesterey, *supra* note 6, at 177.

[57] *See* Brianna H. Boone, Note, *Treating Adults Like Children: Re-Sentencing Adult Juvenile Lifers After* Miller v. Alabama, 99 MINN. L. REV. 1159, 1187–88 (2015) (describing how relationship losses negatively affect the parole bids of adult prisoners).

should recognize a presumption in favor of parole eligibility for juveniles to effectuate the Court's instruction that LWOP be used rarely.[58]

The *Chandler* court's procedural decision that the sentencing court was not required to issue a finding of irreparable incorrigibility also diminishes the impact of *Miller* and *Montgomery*.[59] The court based this conclusion on the statement in *Montgomery* that "*Miller* did not require trial courts to make a finding of fact regarding a child's incorrigibility,"[60] but this assertion was tempered by a clarification four sentences later: "That *Miller* did not impose a formal factfinding requirement *does not* leave States free to sentence a child whose crime reflects transient immaturity to [LWOP]."[61] One legal scholar suggests that in light of this clarification, the lack of a formal factfinding requirement in *Miller* is better understood as a refusal to tell the states exactly *how* to make the determination of incorrigibility than as a statement that the sentencing court need not make such a finding.[62] Furthermore, Justice Scalia's *Montgomery* dissent[63] and Justice Sotomayor's concurrences in *Adams v. Alabama*[64] and *Tatum v. Arizona*[65] suggest that members of the Court interpret *Montgomery* as imposing an "incorrigibility requirement."[66] Seven of the eleven state supreme courts that have directly addressed the question have held that imposition of LWOP on a juvenile homicide offender requires a finding of incorrigibility.[67] These courts often concluded that LWOP is "beyond the court's power to impose"[68] in the absence of such a finding because "the court must determine whether the juvenile is one of the rare offenders for whom the sentence

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[58] *See* Hoesterey, *supra* note 6, at 177.

[59] *See Chandler*, 242 So. 3d at 69.

[60] Montgomery v. Louisiana, 136 S. Ct. 718, 735 (2016).

[61] *Id.* (emphasis added); *see also* Hoesterey, *supra* note 6, at 173–74 (explaining how the *Montgomery* Court tempered its statement about the lack of a factfinding requirement).

[62] Hoesterey, *supra* note 6, at 174.

[63] *Montgomery*, 136 S. Ct. at 744 (Scalia, J., dissenting) ("Not so with the 'incorrigibility' requirement that the Court imposes today to make *Miller* retroactive."). This dissent was joined by Justice Thomas and Justice Alito.

[64] 136 S. Ct. 1796, 1799–1801 (2016) (Sotomayor, J., concurring in the decision to grant, vacate, and remand). This concurrence was joined by Justice Ginsburg.

[65] 137 S. Ct. 11, 12 (2016) (Sotomayor, J., concurring in the decision to grant, vacate, and remand) (stating that *Montgomery* "require[s] a sentencer to ask: whether the petitioner was among the very 'rarest of juvenile offenders'" before imposing a sentence of LWOP (quoting *Montgomery*, 136 S. Ct. at 734)).

[66] *See also* Hoesterey, *supra* note 6, at 174 (quoting *Montgomery*, 136 S. Ct. at 744 (Scalia, J., dissenting)).

[67] This number does not include the states that have banned juvenile LWOP. Arizona, Florida, Georgia, Oklahoma, Pennsylvania, Iowa, and Illinois require such a finding. *See* People v. Holman, 91 N.E.3d 849, 863 (Ill. 2017); Hoesterey, *supra* note 6, at 164, 190–91. The Virginia, Tennessee, Michigan, and now Mississippi state supreme courts have explicitly held that a finding of incorrigibility is not required. *See* People v. Skinner, 917 N.W.2d 292, 309 (Mich. 2018); *Chandler*, 242 So. 3d at 69; Hoesterey, *supra* note 6, at 164, 192.

[68] Hoesterey, *supra* note 6, at 162 (quoting Commonwealth v. Batts, 163 A.3d 410, 435 (Pa. 2017)).

is permitted."[69] In contrast to this reasoning, the Mississippi Supreme Court took advantage of the latitude that the Supreme Court afforded state courts in *Miller* and *Montgomery* by refusing to implement procedures (such as a requirement that the sentencing judge make a finding of permanent incorrigibility on the record) that would protect the right that the Supreme Court intended to guarantee.[70]

Though the procedure that the sentencing court followed in *Chandler* satisfied the base constitutional mandates of *Miller* and *Montgomery*, it failed to grasp the central promise of the Court's decisions.[71] While some states have implemented changes to their sentencing processes that may actually render juvenile LWOP "uncommon,"[72] Mississippi has interpreted the mandates so narrowly that they have become all sizzle and no steak. As a result of the directives that LWOP is unconstitutional only when the crime reflected "only transient immaturity," that sentencing courts are not to recognize any presumption against LWOP, and that a finding of "permanent incorrigibility" is not required before the implementation of such a sentence, many of the defendants, like Chandler, who have received resentencing hearings in Mississippi have had their sentences upheld despite the second chance.[73] *Chandler* illustrates the "[p]rocedural undermining of substantive rights"[74] that state courts may engage in when the Supreme Court issues a narrow substantive holding accompanied by language suggesting a broader intent without any procedural requirements. The underlying substantive grant loses significance for defendants in jurisdictions where sentencing officials are not required to follow procedures that ensure the rights will be recognized.

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[69] *Id.* (citing Veal v. State, 784 S.E.2d 403, 412 (Ga. 2016)); *see also id.* (noting that the Florida Supreme Court held that "failing to make the distinction between juveniles who are irreparably corrupt and those whose crimes reflect transient immaturity 'would mean life sentences for juveniles would not be exceedingly rare, but possibly commonplace'" (quoting Landrum v. State, 192 So. 3d 459, 466 (Fla. 2016))).

[70] *See Chandler*, 242 So. 3d at 69.

[71] *Cf.* 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, 501 (2016) (arguing that Florida's response to *Miller* similarly meets the constitutional requirement in a way that fails to achieve the broader goals of the Court).

[72] *See, e.g.*, Stephanie Singer, Note, *A Proposed Solution to the Resentencing of Juvenile Lifers in Pennsylvania Post* Montgomery, 10 DREXEL L. REV. 695, 700 (2018) (stating that the Pennsylvania Supreme Court implemented a "presumption *against* imposing LWOP for a juvenile, which the prosecution can rebut only with proof beyond a reasonable doubt the juvenile is 'permanently incorrigible'" (quoting *Batts*, 163 A.3d at 459)).

[73] *See, e.g.*, Cook v. State, 242 So. 3d 865, 868–69 (Miss. Ct. App. 2017) (affirming a second LWOP sentence for an offender, even after testimony from a psychologist that no data suggested that he was "the sort of 'rare' offender who warranted [such punishment] under *Miller*," *id.* at 871); Hudspeth v. State, 179 So. 3d 1226, 1227 (Miss. Ct. App. 2015) (affirming LWOP for a juvenile though the offender was sixteen at the time of the crime, received no formal education after sixth grade, and had a difficult family life).

[74] STEIKER & STEIKER, *supra* note 36, at 229.