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CRIMINAL LAW—A Denial of Hope: Bear Cloud III and the Aggregate Sentencing of Juveniles; *Bear Cloud v. State*, 2014 WY 113, 334 P.3d 132 (Wyo. 2014)

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CASE NOTE

CRIMINAL LAW—A Denial of Hope: Bear Cloud III and the Aggregate Sentencing of Juveniles; *Bear Cloud v. State*, 2014 WY 113, 334 P.3d 132 (Wyo. 2014)

*Alexander J. Wolfe**

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I. INTRODUCTION

There are four primary justifications for penological decisions: retribution, incarceration, deterrence, and rehabilitation.¹ Any sentence lacking legitimate penological justification is disproportionate to the offense,² and violates the Eighth Amendment.³ The United States Supreme Court has held that lack of maturity, vulnerability to negative influences, and less defined character diminish the justification for imposing the harshest penalties on juveniles.⁴

* Candidate for J.D., 2018, University of Wyoming College of Law. I would like to thank my wife Amy, for her support and encouragement during the writing of this case note: once again, I ruined Christmas. I cannot thank Professor Darrell Jackson enough, for his enthusiasm about this project, his guidance, and for exciting me about the practice of criminal law. I must also offer my deepest thanks to the Editorial Board of the *Wyoming Law Review* for the opportunity to write this case note, and all their hard work in helping bring it to life, particularly Mikole Bede Soto, Emily Elliot, and Paige Hammer. I would also like to thank my friends Christyne Martens and Dave Delicath, for introducing me to this story, and encouraging me to play my own part in it.

¹ *Graham v. Florida*, 560 U.S. 48, 71–76 (2010).

² *Id.* at 71.

³ *See* U.S. CONST. amend. VIII.

⁴ *Miller v. Alabama*, 132 S. Ct. 2455, 2464–65 (2012); *see infra* notes 74–88 and accompanying text. The Court has used the adjective “diminished” to describe the culpability of

Rehabilitation was the primary focus of the juvenile justice system at the turn of the twentieth century, not punishment.⁵ Consequently, judges predominantly decided cases based on what they believed to be the best interest of the child.⁶ Popular thought believed that committing criminal activities was a symptom of a child's "real needs," and the offense usually had little to do with the child's disposition.⁷ The shift away from these earlier beliefs of rehabilitation to criminalizing juveniles in the adult system has had particularly devastating effects on juveniles.⁸

Over the last decade, the United States Supreme Court's jurisprudence on juvenile sentencing has rejected punitive goals in favor of the possibility of rehabilitation.⁹ First, the Supreme Court categorically prohibited the death penalty for juveniles.¹⁰ Next, the Supreme Court categorically prohibited life without parole sentences for juveniles who commit non-homicide offenses.¹¹ Finally, in *Miller v. Alabama* the Supreme Court prohibited mandatory life without parole sentences for juveniles regardless of the crime.¹² In 2016, *Montgomery v. Louisiana* allowed the retroactive application of the *Miller* decision,¹³ which grants inmates sentenced to life without parole as juveniles a "meaningful opportunity" to demonstrate they are ready to return to society.¹⁴

Wyoming finds itself at the forefront of the next great question in juvenile sentencing reform: determining the role of *Miller* in aggregate sentencing.¹⁵ Wyatt Bear Cloud was sixteen years old when he and another juvenile, Dharminder Vir Sen, broke into the home of an elderly couple in Sheridan, Wyoming.¹⁶ During the course of the robbery, Sen shot and killed one of the homeowners.¹⁷ Bear

juveniles, acknowledging some culpability for the crimes committed while justifying the juvenile offender's unique position under the Eighth Amendment. *See also Graham v. Florida*, 560 U.S. 48, 69 (2010).

⁵ Barry C. Feld, *Juvenile and Criminal Justice Systems' Response to Youth Violence*, 24 CRIME & JUST. 189, 192 (1998).

⁶ *See Id.* at 193.

⁷ *Id.*

⁸ *See Graham*, 560 U.S. at 74.

⁹ *See infra* notes 44–106 and accompanying text.

¹⁰ *Roper v. Simmons*, 543 U.S. 551, 578 (2005); *see infra* notes 44–56 and accompanying text.

¹¹ *Graham*, 560 U.S. at 74; *see infra* notes 57–73 and accompanying text.

¹² *Miller v. Alabama*, 132 S. Ct. 2455, 2460 (2012); *see infra* notes 74–88 and accompanying text.

¹³ *Montgomery v. Louisiana*, 136 S. Ct. 718, 732 (2016).

¹⁴ *Id.* at 736–37 (2016); *see infra* notes 90–106 and accompanying text.

¹⁵ *Bear Cloud v. State*, 2014 WY 113, ¶ 32, 334 P.3d 132, 141 (Wyo. 2014); *see infra* notes 147–172 and accompanying text.

¹⁶ *Bear Cloud v. State*, 2012 WY 16, ¶ 4, 275 P.3d 377, 383 (Wyo. 2012).

¹⁷ *Id.*, 275 P.3d at 383.

Cloud appealed his life in prison sentence to the United States Supreme Court.¹⁸ The Supreme Court remanded for resentencing in accordance with *Miller*.¹⁹ Two appeals later, Bear Cloud confronted the Wyoming Supreme Court with the question of whether aggregate sentences added up to *de facto* life without parole.²⁰ In *Bear Cloud III* the Wyoming Supreme Court held consecutive sentences could aggregate into a *de facto* life without parole sentence that violated *Miller v. Alabama*.²¹ The Wyoming Supreme Court correctly applied United States Supreme Court precedent in extending *Miller* to aggregate sentences which create *de facto* life sentences for juveniles in violation of the Eighth Amendment.²²

In the Background section, this Note discusses the evolution of Eighth Amendment jurisprudence.²³ Next it considers the shifting penological justifications for juvenile sentencing in *Roper v. Simmons*, *Graham v. Florida*, and *Miller v. Alabama*.²⁴ Third, it examines *Montgomery v. Louisiana*'s retroactive application of *Miller*.²⁵ The Principal Case, *Bear Cloud v. State (Bear Cloud III)*, examines the Wyoming Supreme Court's decision that lengthy aggregate sentences are *de facto* life without parole sentences for juveniles that violated *Miller*.²⁶ This Note argues that the Wyoming Supreme Court correctly applied *Miller*'s prohibition of mandatory life without parole sentences to juveniles given aggregate sentences that were *de facto* life without parole.²⁷ This argument is supported by the United States Supreme Court's explanation of *Miller* in their 2016 decision, *Montgomery v. Louisiana*.²⁸ Now that *de facto* life without parole sentences are unconstitutional, a clear definition of *de facto* must be put in place.²⁹ Finally, the focus of juvenile justice must shift toward rehabilitation and eventual release, and the continued assurance of *Miller*'s substantive guarantee.³⁰

¹⁸ *Bear Cloud v. State*, 2013 WY 18, ¶ 12, 294 P.3d 36, 40 (Wyo. 2013).

¹⁹ *Id.*, 294 P.3d at 40.

²⁰ *Bear Cloud v. State*, 2014 WY 113, ¶ 12, 334 P.3d 132, 137 (Wyo 2014); *See infra* notes 113–172 and accompanying text. *De facto* is defined by Black's as "[a]ctual; existing in fact; having effect even though not formally or legally recognized. *De facto*, BLACK'S LAW DICTIONARY (10th ed. 2014), Westlaw 2017.

²¹ *Bear Cloud*, ¶ 33, 334 P.3d at 141–42.

²² *See infra* notes 175–254 and accompanying text.

²³ *See infra* notes 31–40 and accompanying text.

²⁴ *See infra* notes 41–89 and accompanying text.

²⁵ *See infra* notes 90–112 and accompanying text.

²⁶ *See infra* notes 113–174 and accompanying text.

²⁷ *See infra* notes 175–185 and accompanying text.

²⁸ *See infra* notes 186–216 and accompanying text.

²⁹ *See infra* notes 217–254 and accompanying text.

³⁰ *See infra* notes 255–282 and accompanying text.

II. BACKGROUND

A. *The Eighth Amendment: Proportionality*

The Eighth Amendment states, “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”³¹ The Amendment’s protections are shaped around the idea that punishment should be proportional to the crime.³² Proportionality analysis considers evidence of changes in society, gathered by surveying federal and state law, and the justices own judgment to determine whether a punishment is so disproportionate to the crime that it becomes cruel and unusual.³³

Proportionality analysis found a modern voice in *Thompson v. Oklahoma*.³⁴ In *Thompson*, the United States Supreme Court held that evolving standards of decency did not allow a juvenile under sixteen-years-old to be sentenced to death.³⁵ In the next year, *Stanford v. Kentucky* cited the evolving standards and the Court upheld the death penalty for juveniles over fifteen but under eighteen.³⁶ On the same day, the Court also held the Eighth Amendment did not categorically exempt mentally disabled convicts from being sentenced to death.³⁷

However, over a decade later, the *Atkins v. Virginia* Court noted that standards of decency had evolved, and held the Eighth Amendment prohibited the execution of mentally disabled offenders.³⁸ The decision relied on the understanding that diminished culpability made deterrence less effective, and made it less defensible to punish in pursuit of retribution.³⁹ As the concept of diminished culpability took shape, it fundamentally changed juvenile sentencing.⁴⁰

³¹ U.S. CONST. amend. VIII.

³² *Atkins v. Virginia*, 536 U.S. 304, 311 (2002); *see also* *Weems v. United States*, 217 U.S. 349, 367 (1910).

³³ *See Roper v. Simmons*, 543 U.S. 551, 560–61 (2005). The Court has continually used “the evolving standards of decency that mark the progress of a maturing society” to describe its analysis of what constitutes “cruel and unusual.” *Trop v. Dulles*, 356 U.S. 86, 100–101 (1958) (plurality opinion).

³⁴ *See Roper*, 543 U.S. at 561 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 818–838 (1988)).

³⁵ *Id.*

³⁶ *Stanford v. Kentucky*, 492 U.S. 361, 370–1 (1989).

³⁷ *Roper*, 543 U.S. at 563 (citing *Penry v. Lynaugh*, 492 U.S. 302 (1989)).

³⁸ *See Atkins v. Virginia*, 536 U.S. 304, 316 (2002).

³⁹ *Roper*, 543 U.S. at 563–64 (citing *Atkins*, 536 U.S. at 318–20).

⁴⁰ *See infra* notes 44–56 and accompanying text.

B. *Shifting Penological Justifications*

Roper v. Simmons, *Graham v. Florida*, and *Miller v. Alabama* represent a shift in the United States Supreme Court's conception of juvenile justice.⁴¹ In these cases, the Court held that because of their diminished culpability, the most severe punishments, death and life without parole, were unconstitutional for juveniles.⁴² After years of treating juveniles in the criminal justice system as if they were adults, the Court acknowledged that immaturity not only caused juveniles to make bad decisions, it also changed the way they should be punished.⁴³

Diminished culpability was the rationale for the Court's 2005 decision in *Roper v. Simmons*, where the Court held the Eighth Amendment forbids imposition of the death penalty on offenders who were under the age of eighteen at the time the offender committed the crime.⁴⁴ Surveying state statutes and sentencing practices, the Court found that death sentences were rarely imposed on juveniles, and states were trending toward abolishing the sentence for juveniles.⁴⁵ The Court held that juveniles were less culpable for three reasons.⁴⁶ First, juveniles have an underdeveloped sense of responsibility and lack of maturity.⁴⁷ Second, juveniles are more vulnerable and susceptible to negative influences.⁴⁸ Lastly, a juvenile's character is not as well-formed as an adult's.⁴⁹

The social purposes of the death penalty—retribution and deterrence—are less effective because of these differences in how juveniles conceptualize punishment.⁵⁰ While the Court never exculpates the juveniles of all responsibility, it is inherently diminished by immaturity; juveniles are less blameworthy, and

⁴¹ See *infra* notes 44–88 and accompanying text.

⁴² See *infra* notes 44–88 and accompanying text.

⁴³ *Roper*, 543 U.S. at 571; see *infra* notes 44–88 and accompanying text.

⁴⁴ *Id.* at 578. Justice Kennedy wrote for the Court, joined by Justices Stevens, Souter, Ginsburg, and Breyer. Justice Scalia dissented, joined by Chief Justice Rehnquist, and Justice Thomas. Justice O'Connor dissented separately. *Id.* at 551.

⁴⁵ *Id.* at 564, 567. The Court noted that while trends in sentencing had generally been trending toward harsher sentences for juveniles, no state since the Court's decision in *Stanford v. Kentucky*, 492 U.S. 361 (1989) had reinstated a death penalty for juveniles, while several had prohibited it, and a majority of the states and the federal government prohibited death sentences for juveniles. *Id.* at 564–68.

⁴⁶ *Id.* at 569–70; see *infra* notes 47–52 and accompanying text.

⁴⁷ *Roper*, 543 U.S. at 569.

⁴⁸ *Id.*

⁴⁹ *Id.* at 570.

⁵⁰ *Id.* at 571. For a discussion of the social purposes of the death penalty, see *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (joint opinion of Stewart, Powell, Stevens, JJ).

less deserving of society's retribution.⁵¹ Likewise, the threat of punishment only deters someone who weighs the consequences of his or her actions.⁵²

In implementing a categorical ban on sentencing juveniles to death, the *Roper* Court explicitly rejected a case-by-case analysis.⁵³ The Court's decision hinged on the inherent difficulty in determining whether or not a juvenile is irreparably corrupt.⁵⁴ Psychologists, for example, cannot diagnose an individual under eighteen with antisocial personality disorder.⁵⁵ The Court concluded that jurors should not be asked to make determinations of irreparable corruption when highly trained doctors are prohibited from making those judgments until patients have reached maturity.⁵⁶

In 2010, the Supreme Court again considered the diminished culpability of juveniles in *Graham v. Florida*.⁵⁷ Seventeen-year-old Graham was found guilty of armed burglary and attempted robbery while on probation, as such he was sentenced to life imprisonment.⁵⁸ The *Graham* Court held that the Eighth Amendment also prohibited sentencing a juvenile to life in prison without parole for a non-homicide crime, requiring that states provide an opportunity—not a guarantee—to obtain release before the end of the term.⁵⁹

After determining that Graham's categorical challenge to his sentence was appropriate, the Court analyzed it under the *Roper* framework: survey legislative

⁵¹ *Roper*, 543 U.S. at 571.

⁵² *Id.* at 571–72.

⁵³ *Id.* at 573. The Court concluded that “an unacceptable likelihood exist[ed] that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth . . . even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death.” *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* (citing AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STAT. MANUAL OF MENTAL DISORDERS, 701–706 (4th ed. 2000)). (“This pattern has also been referred to as psychopathy, sociopathy, or dissocial personality disorder.” *Id.* at 702.).

⁵⁶ *Roper*, 543 U.S. at 573 (citing AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STAT. MANUAL OF MENTAL DISORDERS, 701–706 (4th ed. 2000)) (“By definition, Antisocial Personality Disorder cannot be diagnosed before age 18 years.” *Id.* at 704.).

⁵⁷ *Graham v. Florida*, 560 U.S. 48, 68 (2010).

⁵⁸ *Id.* at 57. Florida abolished parole in 1983, for any crime committed after October 1 of that year. Absent executive clemency, Graham's life imprisonment sentence meant he would have spent his life in prison. *Release Types*, FLORIDA COMMISSION ON OFFENDER REV., <https://www.fc.or.state.fl.us/release-types.shtml>. (Last visited Feb. 5, 2017).

⁵⁹ *Graham*, 560 U.S. at 82. Justice Kennedy wrote for the Court, joined by Justices Stevens, Ginsburg, Breyer, and Sotomayor. Chief Justice Roberts concurred in the judgment. Justices Scalia, Thomas and Alito dissented. *Id.* at 48.

enactments, and apply their independent judgment.⁶⁰ First, the Court noted that standards of decency had evolved.⁶¹ In 2010, the year of Graham's arguments, thirty-seven states and the federal government allowed judges to sentence juvenile non-homicide offenders to life without parole.⁶² However, a survey of actual sentencing practices in the country showed courts rarely used the sentence.⁶³ The Court viewed this as persuasive evidence that the practice was disfavored by society.⁶⁴

The Court applied its independent judgment through the lens of the *Roper* factors of lessened juvenile culpability: immaturity and undeveloped sense of responsibility; vulnerability to negative outside influences and peer pressure; and undeveloped character.⁶⁵ These three factors influenced Graham as much as they influenced the juvenile in *Roper*.⁶⁶ If Graham had diminished culpability because of his age, the Court determined he should be even less culpable than an adult non-homicide offender, and less deserving of the harshest punishments.⁶⁷

To a juvenile, a sentence of life without parole "means a denial of hope . . ."⁶⁸ Such punishment is especially harsh on a juvenile, who will likely serve more years and a greater percentage of their life in prison than a similarly sentenced adult.⁶⁹ This disproportionate effect could violate the Eighth Amendment on its own.⁷⁰ Severe punishment is less likely to deter a juvenile because a juvenile is less likely to consider possible punishment prior to acting.⁷¹ Retribution must directly

⁶⁰ *Id.* at 59–65. Graham's appeal challenged the constitutionality of his sentence, not for its length, but for its categorical effect, a type of challenge previously considered only in death penalty cases. The Court began the opinion evaluating whether *Roper* or the analysis set forth in *Harmelin v. Michigan* was appropriate. Under *Harmelin*, a term-of-years sentence is challenged by comparing the gravity of the offense to the sentence imposed. If this analysis suggests disproportionality, the sentence is then compared to similar sentences for the same crime in that jurisdiction. *Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991) (opinion of Kennedy, J.).

⁶¹ *Graham*, 560 U.S. at 62–5.

⁶² *Id.* at 62.

⁶³ *Id.* at 62–5.

⁶⁴ *Id.* at 67.

⁶⁵ *Id.* at 67–8; see *supra* notes 46–49 and accompanying text.

⁶⁶ See *Id.* at 68.

⁶⁷ *Id.* at 68–9. See *Kennedy v. Louisiana* 554 U.S. 407 (2008) (discussing distinction between homicide and non-homicide offenders.).

⁶⁸ *Id.* at 70. (quoting *Naovarath v. State*, 105 Nev. 525, 526, 779 P.2d 944 (1989) ("it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict] he will remain in prison for the rest of his days.")).

⁶⁹ *Graham*, 560 U.S. at 71.

⁷⁰ See *Id.*

⁷¹ *Id.* at 72.

relate to the offender's personal culpability, and that culpability is diminished by youth enough to preclude the harshest punishment unless a juvenile is irreparably corrupt.⁷² The Court held that determinations of irreparable corruption could not be made at the outset, but without that determination, there was no adequate penological justification for life without parole sentences for juvenile non-homicide offenders, and the Eighth Amendment forbids such sentences.⁷³

Following the decisions in *Roper* and *Graham*, the Supreme Court granted certiorari to two cases that argued mandatory life without parole sentences for juveniles were unconstitutional.⁷⁴ In the first case consolidated in *Miller v. Alabama*, Kuntrell Jackson, fourteen, was convicted of felony murder after the fatal shooting of a clerk during an attempted robbery of a video store.⁷⁵ In the second case, Evan Miller, also fourteen, was convicted of murder in the course of arson after beating a drug dealer with a bat, and setting fire to his trailer to disguise the beating, which resulted in the dealer's death.⁷⁶ Both Arkansas and Alabama law required sentences of life without parole.⁷⁷

In *Miller*, the United States Supreme Court held that mandatory life without parole sentences constitute cruel and unusual punishment for juveniles.⁷⁸ *Miller* reiterated *Graham* and *Roper*'s rationale that "children are constitutionally different from adults for the purposes of sentencing."⁷⁹ There is "too great a risk of disproportionate punishment" if youth cannot be considered during sentencing.⁸⁰

Much of the *Miller* Court's analysis focused on *Graham*, where a juvenile's immaturity and vulnerability to peer pressure diminished their culpability and made them less deserving of the harshest sentences.⁸¹ The *Miller* Court acknowledged the distinction *Graham* made between homicide and non-homicide crimes, but drilled further, to the root of the reasoning: juveniles are

⁷² *Id.* at 71–3.

⁷³ *Id.* at 72–4. Considering Graham's "escalating pattern of criminal conduct," the trial judge determined Graham was incorrigible, but the Court disagreed: "even if Graham had shown during his time in prison that he was in fact, incorrigible, 'the sentence was still disproportionate because the judgment was made at the outset.'" *Id.* at 73.

⁷⁴ *Miller v. Alabama*, 132 S. Ct. 2455, 2461–63 (2012).

⁷⁵ *Id.* at 2461.

⁷⁶ *Id.* at 2462–63.

⁷⁷ *Id.* at 2461–63.

⁷⁸ *Id.* at 2460.

⁷⁹ *Id.* at 2464.

⁸⁰ *Id.* at 2469.

⁸¹ *Id.* at 2463–69.

different.⁸² *Miller* requires sentencing schemes to consider age and a juvenile's diminished culpability.⁸³

The inflexibility of a mandatory sentencing structure does not allow consideration of age.⁸⁴ Mandatory sentences also fail to take into account family and home situations, and the circumstances of the crime itself.⁸⁵ Juveniles will also likely serve more years in prison for a life sentence than an adult with a comparable sentence.⁸⁶ The Court left open the possibility that a juvenile *could* be sentenced to life without parole, but warned that appropriate occasions would be uncommon.⁸⁷ To make the determination that a juvenile should be sentenced to life without parole, a judge is required to account for the differences between juveniles and adults outlined in *Roper*, *Graham*, and *Miller* itself.⁸⁸ For four years, the meaning and reach of *Miller* would be argued across the country until the Supreme Court issued their first substantive explanation of the case in *Montgomery v. Louisiana*.⁸⁹

C. Diminished Culpability Applied: *Montgomery v. Louisiana*

In 1963, Henry Montgomery killed a deputy sheriff in Louisiana, at the age of seventeen.⁹⁰ He was serving a life without parole sentence when the Supreme Court handed down the *Miller* decision.⁹¹ Montgomery sought collateral review of his sentence under *Miller*, and after Louisiana rejected his claim, he appealed to the United States Supreme Court.⁹² In *Montgomery v. Louisiana*, the United States Supreme Court considered whether *Miller* had set forth a rule that required retroactive application.⁹³ The *Montgomery* Court applied the analysis of *Teague v. Lane* and held that *Miller* was a substantive rule of constitutional law, which therefore required the retroactive application of the rule.⁹⁴

⁸² *Id.* at 2465. “Most fundamentally, *Graham* insists that youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole.” *Id.*

⁸³ *Id.* at 2466.

⁸⁴ *Id.* at 2468–69.

⁸⁵ *Id.* at 2468.

⁸⁶ *Id.* at 2466.

⁸⁷ *Id.* at 2469.

⁸⁸ *Id.*

⁸⁹ See *Montgomery v. Louisiana*, 136 S. Ct. 718, 727 (2016).

⁹⁰ *Id.* at 725.

⁹¹ *Id.* at 726.

⁹² *Id.* at 726–27.

⁹³ *Id.* at 727.

⁹⁴ *Id.* at 732.

Under *Teague*, substantive rules of constitutional law and “watershed rules of criminal procedure,” which implicate the fundamental fairness and accuracy of criminal proceedings, are retroactively applicable.⁹⁵ The *Montgomery* Court concluded that *Miller* was a new substantive rule of constitutional law, and the Constitution requires state courts to give retroactive effect on collateral review.⁹⁶ In examining the substantive nature of *Miller*, the Court did not waste the opportunity to offer guidance on what the decision meant, and how to apply the decision.⁹⁷

The State of Louisiana argued *Miller* was a procedural holding, not implicating *Teague*, because it did not place punishment beyond the State’s power to impose.⁹⁸ Rather, Louisiana argued *Miller* only required consideration of youth in the sentencing.⁹⁹ The Court explained the line drawn in *Miller* was between crimes of transient immaturity and irreparable corruption, where a life without parole sentence was appropriate only in the latter instance.¹⁰⁰ Louisiana also contested the distinction because the holding in *Miller* did not require a finding of fact, only a hearing during which the juvenile’s age must be considered as part of the sentencing determination.¹⁰¹ The *Montgomery* Court found these arguments unpersuasive.¹⁰² According to the *Montgomery* Court, the substantive holding in *Miller* is that “life without parole is an excessive sentence for children whose crimes reflect transient immaturity.”¹⁰³

The Court also addressed permissible ways to implement *Miller*’s retroactivity.¹⁰⁴ States could avoid re-litigating sentences by extending parole eligibility to juvenile offenders sentenced to life without parole.¹⁰⁵ Parole boards

⁹⁵ *Id.* at 729–30. (quoting *Teague v. Lane*, 489 U.S. 288, 311 (1989)).

⁹⁶ *Id.* at 729.

⁹⁷ *Id.* at 732–37; *See infra* notes 98–112 and accompanying text.

⁹⁸ *Id.* at 734.

⁹⁹ *Id.*

¹⁰⁰ *Id.* “The only difference between *Roper* and *Graham* on the one hand, and *Miller* on the other hand, is that *Miller* drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption. The fact that life without parole could be a proportionate sentence for the latter kind of juvenile offender does not mean that all other children imprisoned under a disproportionate sentence have not suffered the deprivation of a substantive right.” *Id.*

¹⁰¹ *Id.* at 734.

¹⁰² *Id.* at 734–36.

¹⁰³ *Id.* at 735.

¹⁰⁴ *Id.* at 736.

¹⁰⁵ *Id.* (discussing WYO. STAT. ANN. § 6-10-301(c) (2016) (“a person sentenced to life imprisonment for an offense committed before the person reached the age of eighteen (18) years shall be eligible for parole after commutation of his sentence to a term of years or after having served twenty-five (25) years of incarceration . . .”).

would then have the task of determining which offenders had matured (whose crimes reflected transient immaturity) from those who were irreparably corrupt, and deserving of life in prison.¹⁰⁶

The United States Supreme Court has stressed how difficult it is to determine irreparable corruption.¹⁰⁷ The only way immaturity can be taken out of the analysis is by allowing the juvenile to mature.¹⁰⁸ The time it takes for juveniles to mature means *Miller* should be read as a categorical bar on *initially* sentencing a juvenile to life without parole.¹⁰⁹ *Roper, Graham, Miller, and Montgomery* fundamentally establish the proposition that youth matters during sentencing, and only juveniles whose crimes are representative of irreparable corruption can be subjected to the most severe penalties.¹¹⁰ The Court has yet to address the specific requirements for the timing and nature of a *Miller* hearing.¹¹¹ It will be the rare juvenile who will spend their life in prison, but the question of how rare juvenile life without parole sentences will be now lies with the states.¹¹²

III. PRINCIPAL CASE

On August 26, 2009, Wyatt Bear Cloud, along with Dharminder Vir Sen and Dennis Poitra Jr., broke into the home of Robert and Linda Ernst in Sheridan, Wyoming.¹¹³ During the burglary, Sen shot and killed Mr. Ernst.¹¹⁴ Bear Cloud was sixteen at the time and Sen was just fifteen.¹¹⁵

Bear Cloud was charged with Murder in the First Degree (Felony Murder) (Count I), Conspiracy to Commit Aggravated Burglary (Count II), and Aggravated Burglary (Count III), to which he pled not guilty.¹¹⁶ After denying Bear Cloud's motion to transfer the case to a juvenile court, and a change of plea, Bear Cloud was sentenced to twenty to twenty-five years on Count III, life in

¹⁰⁶ *Id.*

¹⁰⁷ *See id.* at 734; *see supra* notes 44–49, 53–56, 65–73, 81–83, and accompanying text.

¹⁰⁸ *Id.*

¹⁰⁹ *See supra* notes 90–106 and accompanying text.

¹¹⁰ *See supra* notes 44–106 and accompanying text.

¹¹¹ *See supra* notes 74–88 and accompanying text.

¹¹² *Montgomery*, 136 S. Ct. at 733–34. “*Miller* made clear that “appropriate occasions” for sentencing juveniles to this harshest possible penalty will be uncommon.” *Id.*

¹¹³ *Bear Cloud v. State*, 2012 WY 16, ¶ 4, 275 P.3d 377, 383 (Wyo. 2012).

¹¹⁴ *Id.* ¶ 8, 275 P.3d at 384.

¹¹⁵ *Id.* ¶ 4, 275 P.3d at 383. Dennis Poitra, the third member of the trio, was eighteen years old at the time of the crime. *Id.* ¶ 4, 275 P.3d at 383. As such, Dennis Poitra is beyond the scope of this comment.

¹¹⁶ *Id.* ¶ 9, 275 P.3d at 384.

prison with the possibility of parole¹¹⁷ for Count I to be served consecutively to the sentence for Count III, and twenty to twenty-five years for Count II, served concurrent to Count I.¹¹⁸

In *Bear Cloud v. State (Bear Cloud I)*, the Wyoming Supreme Court held that a juvenile's life sentence for felony murder was constitutional under both the United States Constitution and Wyoming Constitution.¹¹⁹ Bear Cloud argued for an extension of *Graham* to felony murder, and alternatively, all life sentences for juveniles.¹²⁰ However, the Wyoming Supreme Court refused to extend *Graham* because Bear Cloud was sentenced to life *with* the possibility of parole.¹²¹ The court viewed *Graham's* holding as limited to a sentence of life *without* parole.¹²² The Wyoming Supreme Court also refused to hold Wyoming's mandatory sentencing scheme, which required the imposition of a life sentence for juveniles charged as adults with felony murder, as unconstitutional.¹²³ Although Wyoming's sentencing scheme did not provide the opportunity to consider the offender's age, culpability, life history or potential to reform, as relied upon in *Roper* and *Graham*, the mandatory sentence was not per se unconstitutional.¹²⁴ Further, Bear Cloud's age was considered as part of the motion to transfer to juvenile court.¹²⁵

Bear Cloud filed an application for writ of certiorari to the United States Supreme Court in 2012.¹²⁶ In June 2012, *Miller v. Alabama* was decided, which prohibited mandatory life without parole sentences for juveniles.¹²⁷ Following *Miller v. Alabama*, the United States Supreme Court vacated the judgment and remanded *Bear Cloud I* to the Wyoming Supreme Court.¹²⁸

On remand in *Bear Cloud II*, the Wyoming Supreme Court held that Wyoming's sentence of life imprisonment according to the law as applied to juveniles violated the Eighth Amendment and remanded the case to the district

¹¹⁷ *Id.* ¶ 15 n. 1, 275 P.3d at 384 n.1. (explaining the sentence is known in Wyoming as "life imprisonment according to law." The *Bear Cloud I* court used this phrase interchangeably with "life with the possibility of parole.").

¹¹⁸ *Id.* ¶ 15, 275 P.3d at 384 n. 1.

¹¹⁹ *Id.* ¶ 87, 275 P.3d at 413.

¹²⁰ *Id.* ¶ 48, 275 P.3d at 397.

¹²¹ *Id.* ¶ 51, 275 P.3d at 399.

¹²² *Id.* ¶¶ 48–52, 275 P.3d at 397–99.

¹²³ *Id.* ¶ 81, 275 P.3d at 411.

¹²⁴ *Id.* ¶ 83, 275 P.3d at 411.

¹²⁵ *Id.*, 275 P.3d at 411.

¹²⁶ *Bear Cloud v. State*, 2013 WY 18, ¶ 12, 294 P.3d 36, 40 (Wyo. 2013).

¹²⁷ *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012).

¹²⁸ *Bear Cloud v. Wyoming*, 133 S. Ct. 183, 183 (2012).

court for resentencing on the first degree murder conviction.¹²⁹ First, the court concluded that reliance on executive clemency to provide a meaningful opportunity for release was inconsistent with *Graham v. Florida*.¹³⁰ The Wyoming Statute provides for “two possible sentences for a juvenile convicted of first-degree murder: life imprisonment without the possibility of parole or life imprisonment ‘according to the law.’”¹³¹ Parole was statutorily unavailable to anyone sentenced to “life imprisonment without parole or a life sentence.”¹³² Only the possibility of executive clemency differentiated the two sentences.¹³³ Due to the limitations of the statute, the court concluded Wyoming’s sentencing and parole scheme had the “practical effect” of mandating life without parole under both sentences and, when applied to juveniles, violated the Eighth Amendment under *Miller*.¹³⁴

The court also offered guidance to district courts sentencing juveniles under *Miller*.¹³⁵ Wyoming district courts “must consider the factors of youth and the nature of the homicide at an individualized sentencing hearing when determining whether to sentence the juvenile offender to life without the possibility of parole or life according to law.”¹³⁶ The court also listed the factors *Miller* recommended to trial courts, and stressed that considering these factors at a hearing on a motion to transfer to juvenile court was insufficient protection under *Miller*.¹³⁷ The sentence of life imprisonment according to the law would be the appropriate sentence for juveniles whom the court determined should have the possibility of parole, and every juvenile so sentenced must be afforded the opportunity for “true parole” at some point.¹³⁸ The parole board must also “provide a meaningful determination and review when parole eligibility arises.”¹³⁹

Following the guidance set forth in *Bear Cloud II*, the district court resentenced Bear Cloud to life imprisonment with the possibility of parole after twenty-five years.¹⁴⁰ The life sentence with possibility of parole was to be served consecutively with Bear Cloud’s sentence of twenty to twenty-five years for

¹²⁹ *Bear Cloud*, ¶ 49, 294 P.3d 36, 48.

¹³⁰ *Id.* ¶ 19–20, 294 P.3d at 41–2.

¹³¹ *Id.* ¶ 31, 294 P.3d at 44 (quoting WYO. STAT. ANN. § 6-2-101(b) (2009)).

¹³² *Id.* ¶ 32, 294 P.3d at 44–45 (quoting WYO. STAT. ANN. § 7-13-402(a) (2009)).

¹³³ *Id.* ¶ 32–33, 294 P.3d at 45 (quoting WYO. STAT. ANN. § 6-10-301(c) (2009)).

¹³⁴ *Id.* ¶ 34, 294 P.3d at 45.

¹³⁵ *Id.* ¶ 35, 294 P.3d at 45.

¹³⁶ *Id.* ¶ 45, 294 P.3d at 47.

¹³⁷ *Id.* ¶¶ 42–43, 294 P.3d at 47 (discussing *Miller v. Alabama*, 132 S. Ct. 2455, 2467–68 (2012)).

¹³⁸ *Id.* ¶ 46, 294 P.3d at 47.

¹³⁹ *Id.* ¶ 47, 294 P.3d at 48.

¹⁴⁰ *Bear Cloud v. State*, 2014 WY 113, ¶ 11, 334 P.3d 132, 136 (Wyo. 2014).

aggravated burglary.¹⁴¹ Thus, Bear Cloud would serve a total of forty-five years before he was eligible for parole, at the age of sixty-one.¹⁴²

Not long after *Bear Cloud II* was decided, Dharminder Vir Sen's appeal went before the Wyoming Supreme Court.¹⁴³ Like his co-conspirator, Sen was convicted of First Degree felony murder, conspiracy to commit aggravated burglary, and aggravated burglary.¹⁴⁴ The court upheld Sen's conviction, but in light of *Miller* and *Bear Cloud II*, the court vacated the entire sentence.¹⁴⁵ The court was concerned that Sen's life without parole sentence might have influenced the term-of-years sentences for the other counts.¹⁴⁶

Bear Cloud appealed again and argued that the court should have reconsidered all three of his sentences as was the case in *Sen*.¹⁴⁷ In *Bear Cloud III*, the Wyoming Supreme Court considered whether all of Bear Cloud's sentences should have been vacated upon remand in *Bear Cloud II*, and whether Bear Cloud's sentence created a *de facto* life without parole sentence which did not comply with *Miller v. Alabama*.¹⁴⁸ The court analyzed these claims under the Eighth Amendment of the United States Constitution.¹⁴⁹

Writing for the Wyoming Supreme Court, Justice Kate Fox began by acknowledging that under *Miller* juveniles were constitutionally different than adults for sentencing purposes.¹⁵⁰ She recognized that following *Graham's* reasoning, any life without parole sentence for juveniles implicated the differences between juveniles and adults.¹⁵¹ Following the holding in *Sen*, the court first held that it erred in remanding *Bear Cloud II* for resentencing only on Bear Cloud's first-degree murder conviction.¹⁵² When the United States Supreme Court vacated the judgment in *Bear Cloud I* "it wiped the slate clean."¹⁵³

¹⁴¹ *Id.*, 334 P.3d at 136.

¹⁴² *Id.*, 334 P.3d at 136.

¹⁴³ *Sen v. State*, 2013 WY 47, 301 P.3d 106 (Wyo. 2013).

¹⁴⁴ *Id.* ¶ 8, 301 P.3d at 112.

¹⁴⁵ *Id.* ¶ 1, 301 P.3d at 110.

¹⁴⁶ *Id.* ¶ 1, 301 P.3d at 110.

¹⁴⁷ *Bear Cloud*, ¶¶ 30–31, 334 P.3d at 141.

¹⁴⁸ *Id.* ¶ 12, 334 P.3d at 137.

¹⁴⁹ *Id.* ¶ 14, 334 P.3d at 137. An argument was raised under the Wyoming Constitution but was quickly dismissed by the court as "no more than a passing reference to the protections that might be afforded by our state constitution." *See*, ¶ 14 n. 4, 334 P.3d at 137 n 4.

¹⁵⁰ *Id.* ¶ 15, 334 P.3d at 137.

¹⁵¹ *Id.* ¶ 22, 334 P.3d at 139.

¹⁵² *Id.* ¶ 31, 334 P.3d at 141.

¹⁵³ *Id.* ¶ 31, 334 P.3d at 141.

The Wyoming Supreme Court then considered whether the practical effect of lengthy aggregate sentences violated the Eighth Amendment for juveniles, as set forth in *Roper*, *Graham*, and *Miller*.¹⁵⁴ The court interpreted the underlying principle of these cases to require the protection of *Miller* when aggregate sentences result in the functional equivalent of life without parole.¹⁵⁵ Justice Fox explained that allowing lengthy aggregate sentences, which effectively put a juvenile in prison for life, was exactly what *Miller* held to be unconstitutional.¹⁵⁶

In the wake of *Miller*, courts across the United States confronted aggregate sentencing of juveniles.¹⁵⁷ The Wyoming Supreme Court found several courts' decisions to be persuasive, in their logic, if not their results.¹⁵⁸ Courts in Indiana and Iowa agreed with Wyoming that aggregate sentences could result in *de facto* life sentences.¹⁵⁹ The Indiana Supreme Court chose to “focus on the forest—the aggregate sentence—rather than the trees—consecutive or concurrent, number of counts, or length of sentence on any individual count.”¹⁶⁰ *State v. Null*, decided by the Iowa Supreme Court in 2013, was particularly persuasive to the Wyoming Supreme Court.¹⁶¹ In *Null*, Iowa considered whether a juvenile sentenced to a 52.5-year minimum prison term triggered the protections of *Miller*.¹⁶² The court held that “geriatric release” did not provide a “meaningful opportunity” to reenter society as required in *Graham* and *Miller*, but held under the Iowa Constitution such a sentence was cruel and unusual.¹⁶³ A juvenile “should not be worse off” receiving a lengthy aggregate sentence than one sentenced to life without parole after receiving a *Miller* hearing.¹⁶⁴ The court noted that while *Miller* did not bar life sentences for juveniles, a process must be followed when imposing a sentence of life without parole.¹⁶⁵

What that process entailed, and what evidence might be considered remained nebulous.¹⁶⁶ The Wyoming Supreme Court rejected the use of life expectancy and

¹⁵⁴ *Id.* ¶ 33, 334 P.3d at 141–42.

¹⁵⁵ *Id.* ¶ 33, 334 P.3d at 141–142.

¹⁵⁶ *Id.* ¶ 33, 334 P.3d at 142.

¹⁵⁷ See *infra* notes 159–164; 234–239 and accompanying text.

¹⁵⁸ *Bear Cloud*, ¶¶ 33–35, 334 P.3d at 142–43.

¹⁵⁹ *Id.* ¶ 33, 334 P.3d at 142.

¹⁶⁰ *Id.* ¶ 33, 334 P.3d at 142 (quoting *Brown v. State*, 10 N.E.3d 1, 8 (Ind. 2014) (holding a 150-year sentence under this framework unconstitutional, but an 80-year sentence to be constitutional)).

¹⁶¹ *Bear Cloud*, ¶ X, 334 P.3d at 142 (discussing *State v. Null*, 836 N.W.2d 41 (Iowa 2013)).

¹⁶² *Id.* ¶ 34, 334 P.3d at 142 (quoting *State v. Null*, 836 N.W.2d 41, 71 (Iowa 2013)).

¹⁶³ *Id.* ¶ 34, 334 P.3d at 142 (quoting *State v. Null*, 836 N.W.2d 41, 70–75 (Iowa 2013)).

¹⁶⁴ *Id.* ¶ 34, 334 P.3d at 142 (quoting *State v. Null*, 836 N.W.2d 41, 72 (Iowa 2013)).

¹⁶⁵ *Id.* ¶ 43, 334 P.3d at 145.

¹⁶⁶ See *id.* ¶ 36–37, 334 P.3d at 143–44 (holding that *Miller* must be applied “to the entire sentencing package, when the sentence is life without parole, or when aggregate sentences result in the functional equivalent of life without parole.”).

actuarial data to make projections as to what Bear Cloud's life expectancy might be in relation to his sentence, though it did note that the United States Sentencing Commission equated a sentence of 470 months to a life sentence.¹⁶⁷ The court did not signal approval for this term-of-years to be used as a standard.¹⁶⁸ A survey of other jurisdictions revealed no clear consensus in federal and state courts whether *Miller* and *Graham* applied to lengthy or aggregate sentences, or how courts should make that determination.¹⁶⁹ Wyoming established the concept of *de facto* life without parole, but the court did not set out a clear standard to determine whether a sentence was a *de facto* life without parole sentence.¹⁷⁰ Rather than implement a concrete standard to identify a *de facto* sentence, or list factors to be weighed or balanced, the court simply stated that “[d]istrict court[s] should weigh the entire sentencing package” and “must consider the practical result of lengthy consecutive sentences” in light of *Miller*.¹⁷¹

On remand, the district court resentenced Bear Cloud to life with the possibility of parole after twenty-five years, five to ten years for aggravated burglary and twenty to twenty-five years for conspiracy to commit aggravated burglary running concurrently with his life sentence.¹⁷² Wyatt Bear Cloud will be eligible for parole after serving twenty-five years.¹⁷³ In March of 2017, in Sen's third appeal to the Wyoming Supreme Court, the court declined to overrule *Bear Cloud III*'s conclusion that *Miller* applies to aggregate sentences.¹⁷⁴

IV. ANALYSIS

A. *Bear Cloud III*: De Facto Life Without Parole Violates the Eighth Amendment

In *Bear Cloud III*, the Wyoming Supreme Court correctly applied *Miller v. Alabama*'s prohibition of mandatory life without parole sentences to juveniles

¹⁶⁷ *Id.* ¶ 34, 334 P.3d at 142; see U.S. SENTENCING COMMISSION PRELIMINARY QUARTERLY DATA REPORT, 8 (through March 31, 2014) <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC-2014-Quarter-Report-2nd.pdf>. (470 months is 39.17 years.).

¹⁶⁸ *Bear Cloud*, ¶ 34, 334 P.3d at 142.

¹⁶⁹ *Id.* ¶¶ 33–35, 334 P.3d at 142–43; see *infra* notes 234–239 and accompanying text.

¹⁷⁰ *Id.* ¶¶ 36–37, 334 P.3d at 143–44.

¹⁷¹ *Id.* ¶ 36, 334 P.3d at 143–44.

¹⁷² Offender Locator, WYOMING DEPARTMENT OF CORRECTIONS, <http://wdoc-loc.wyo.gov/Home/Detail/?id=29819&dbType=WCIS>. (last visited April 28, 2017, 1:05 PM)

¹⁷³ *Id.* The decision to run the sentences concurrently, rather than consecutively, eliminated twenty to twenty-five years from Bear Cloud's aggregate sentence. He will be approximately forty-one when he is eligible for parole, excluding application of good time.

¹⁷⁴ *Sen v. State*, 2017 WY 30, ¶ 18 n. 3, 390 P.3d 769, 775 n. 3. (Wyo. 2017); see *infra* notes 245–249 and accompanying text.

sentenced to aggregate sentences that were *de facto* life without parole.¹⁷⁵ The *Miller* Court argued that “[m]ost fundamentally, *Graham* insists that youth matters in determining the appropriateness of a lifetime of incarceration”¹⁷⁶ To the Wyoming Supreme Court, the differences between juveniles and adults “implicate[d] any life-without-parole sentence imposed on a juvenile,” whether it was one count or multiple counts.¹⁷⁷ The court refused “to ignore the reality” of the consequences lengthy aggregate sentences would have on juveniles.¹⁷⁸ *Miller* prohibited mandatory situations where a juvenile would spend their life in prison.¹⁷⁹ Aggregate sentences could violate the Eighth Amendment as surely as a single sentence.¹⁸⁰

The Wyoming Supreme Court saw *Miller* as a procedural protection, noting that it was not a categorical bar, but a requirement for consideration of the unique differences between juveniles and adults.¹⁸¹ The result of the court’s application of *Miller*, however, was substantive.¹⁸² In holding that *Miller*’s process must be applied to the entirety of a juvenile’s sentencing package, district courts were instructed as to when *Miller* must be considered, not how.¹⁸³ *Bear Cloud III*’s precedent, that a forty-five year sentence implicated a *de facto* life without parole sentence placed the Wyoming Supreme Court at the forefront of protecting the Eighth Amendment rights of juveniles.¹⁸⁴ Two years later, the United States Supreme Court’s decision in *Montgomery v. Louisiana* would read *Miller* in much the same way as the Wyoming Supreme Court did in *Bear Cloud III*, making much of the earlier decision’s reasoning appear prophetic.¹⁸⁵

¹⁷⁵ See *Bear Cloud*, ¶ 33, 334 P.3d 132, 141–42.

¹⁷⁶ *Miller v. Alabama*, 132 S. Ct. 2455, 2465 (2012).

¹⁷⁷ *Bear Cloud*, ¶¶ 22–34, 334 P.3d at 139–42.

¹⁷⁸ *Id.* ¶ 33, 334 P.3d at 142.

¹⁷⁹ *Id.* ¶ 33, 334 P.3d at 142.

¹⁸⁰ *Id.* ¶ 33, 334 P.3d at 142.

¹⁸¹ *Id.* ¶ 27, 334 P.3d at 141.

¹⁸² See *supra* notes 95–103 and accompanying text.

¹⁸³ *Bear Cloud*, ¶ 36, 334 P.3d at 143.

¹⁸⁴ See *supra* notes 147–172 and accompanying text.

¹⁸⁵ Compare *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016) (“The only difference between *Roper* and *Graham* on one hand, and *Miller*, on the other hand, is that *Miller* drew a line between children whose crimes reflect irreparable corruption. The fact that life without parole could be a proportionate sentence for the latter kind of juvenile offender does not mean that all other children imprisoned under a disproportionate sentence have not suffered the deprivation of a substantive right.”), and *Montgomery*, 136 S. Ct. at 733–34 (“*Miller* made clear that ‘appropriate occasions for sentencing juveniles to the harshest possible penalty will be uncommon.’”), with *Bear Cloud v. State*, 2014 WY 113, ¶ 22, 334 P.3d 132, 139 (“the reasoning in *Graham* ‘implicates any life without parole sentence imposed on a juvenile. . . .’”), and *Bear Cloud*, ¶ 37, 334 P.3d at 144 (“appropriate occasions for sentencing juveniles to the harshest possible penalty will be uncommon.”).

B. Miller Reconsidered: Montgomery v. Louisiana's Implied Categorical Bar

The *Montgomery* Court concluded *Miller* was a substantive holding, requiring retroactive application.¹⁸⁶ The *Montgomery* Court favored an expansive reading of the *Miller* decision, similar to the Wyoming Supreme Court's interpretation in *Bear Cloud III*.¹⁸⁷ *Miller*'s true holding was that "sentencing a child to life without parole is excessive for all but the 'rare juvenile offender whose crime reflects irreparable corruption.'"¹⁸⁸ *Bear Cloud III* relied on this premise two years earlier when it extended the Eighth Amendment protections to aggregate sentences.¹⁸⁹ The *Montgomery* Court's interpretation of *Miller* suggests *Bear Cloud III* was in accord with *Miller v. Alabama* and the Eighth Amendment's protection of juveniles from cruel and unusual punishments.¹⁹⁰

For courts seeking to apply *Miller/Montgomery*, there is ample substantive guidance.¹⁹¹ The proportionality analysis employed in the *Miller* line of cases determined that severe punishments were excessive for all but the rare, irreparably corrupt, juvenile.¹⁹² It is the procedural component that state and lower federal courts must now implement.¹⁹³ The procedures require consideration of fairness and timeliness.¹⁹⁴ Fairness under *Miller* revolves around the determination of irreparable corruption: who makes it, and when.¹⁹⁵ The Supreme Court has made it clear, the "when" of this decision is vital to securing a juvenile's Eighth Amendment rights.¹⁹⁶ If a decision about whether a juvenile is irreparably corrupt

¹⁸⁶ *Montgomery v. Louisiana*, 136 S. Ct. 718, 732 (2016). The practical effect of *Bear Cloud III* also determined *Miller* to be a substantive holding. *Bear Cloud v. State*, 2014 WY 113, ¶¶ 32–33, 334 P.3d 132, 141–42 (Wyo. 2014); see *supra* notes 154–171, 175–180 and accompanying text.

¹⁸⁷ *Montgomery*, 136 S. Ct. at 732–33. The holding in the *Miller* opinion is as follows: "We therefore hold that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" *Miller v. Alabama*, 132 S. Ct. 2455, 2460 (2012).

¹⁸⁸ *Montgomery*, 136 S. Ct. at 734 (quoting *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012)).

¹⁸⁹ *Bear Cloud v. State*, 2014 WY 113, ¶ 37, 334 P.3d 132, 144 (Wyo. 2014) "The United States Supreme Court's Eighth Amendment jurisprudence requires that a process be followed before we make a judgment that juvenile 'offenders will never be fit to reenter society.'" (quoting *Graham v. Florida*, 560 U.S. 48, 75 (2010)).

¹⁹⁰ See *supra* notes 90–112 and accompanying text; see *infra* notes 191–216 and accompanying text.

¹⁹¹ *Montgomery*, 136 S. Ct. at 732–37.

¹⁹² *Id.* at 734.

¹⁹³ *Id.* at 735–37; see also *Bear Cloud*, ¶¶ 33–35, 334 P.3d at 142–43.

¹⁹⁴ See *infra* notes 195–210 and accompanying text.

¹⁹⁵ See *supra* notes 44–56 and accompanying text.

¹⁹⁶ See *supra* notes 68–73; 98–111 and accompanying text.

is made too soon immaturity may taint the reliability of that determination.¹⁹⁷ The *Miller* Court thought that the harshest sentence, life without parole, would be uncommon because of the “great difficulty” of separating the juvenile whose crime reflected transient immaturity and the juvenile whose crime reflected irreparable corruption.¹⁹⁸ The difficulty in differentiating between transient immaturity and irreparable corruption guided the *Roper* Court toward a categorical ban on juvenile death sentences, rather than using a case-by-case analysis.¹⁹⁹ *Graham* used the categorical framework as well.²⁰⁰ *Miller*’s prohibition on mandatory sentencing is categorical for the same reason, though its implementation requires two parts.²⁰¹ To fairly sentence under *Miller* the initial determination that a juvenile has committed a crime evidencing either transient immaturity or irreparable corruption, must be followed by a later determination that irreparable corruption was the cause of the juvenile’s crime.²⁰²

Logically, a juvenile offender can only demonstrate their crime was a product of immaturity by showing a court that they have matured.²⁰³ Procedures that do not allow for a proper determination of corruption—those procedures that make a determination before a juvenile has the opportunity to mature or rehabilitate—would violate the Eighth Amendment under *Miller*.²⁰⁴ For the transiently immature, life imprisonment is improper.²⁰⁵ The *Montgomery* Court suggested parole hearings could serve as the forum for both retroactive consideration, and future evaluations of irreparable corruption.²⁰⁶ Parole boards already have a place in the justice system and gather information on inmates that would be useful in helping to make determinations under *Miller*.²⁰⁷ At a parole hearing, a determination that an offender sentenced as a juvenile has matured and made efforts to rehabilitate themselves could serve as a basis for concluding their crime

¹⁹⁷ *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016) (“Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment.”).

¹⁹⁸ *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012).

¹⁹⁹ *Roper v. Simmons*, 543 U.S. 551, 573 (2005).

²⁰⁰ *Graham v. Florida*, 560 U.S. 48, 58–62 (2010).

²⁰¹ *Montgomery* 136 S. Ct. at 734 “To be sure, *Miller*’s holding has a procedural component. *Miller* requires a sentencer to consider a juvenile offender’s youth and attendant characteristics before determining that life without parole is a proportionate sentence.”

²⁰² *Id.*; See also notes 68–73; 78–83; 100–103 and accompanying text.

²⁰³ Maturity is an antonym of immaturity. *Maturity*, MERRIAM-WEBSTER THESAURUS, <https://www.merriam-webster.com/thesaurus/maturity>.

²⁰⁴ *Montgomery*, 136 S. Ct. at 735. “[L]ife without parole is an excessive sentence for children whose crimes reflect transient immaturity.” *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 736.

²⁰⁷ *Id.*

was a product of transient immaturity.²⁰⁸ Conversely, findings that an offender sentenced as a juvenile has not rehabilitated themselves, and has given further evidence during their incarceration that they are not deserving of release will show an irreparable corruption that time has not diluted.²⁰⁹ As noted approvingly in *Montgomery*, Wyoming statutorily implemented parole eligibility to provide retroactivity under *Miller*.²¹⁰

The United States Supreme Court has yet to consider whether aggregate sentences implicate the protections of *Miller v. Alabama*.²¹¹ However, the *Montgomery* Court's substantive interpretation of *Miller* suggests a majority of the Court would agree with the Wyoming Supreme Court that aggregate sentences resulting in *de facto* life without parole sentences are unconstitutional under *Miller*.²¹² If multiple sentences create the same effect as the single sentence in *Miller*, the juvenile should not lose their meaningful opportunity to demonstrate that they are not irreparably corrupt.²¹³ With *Montgomery*, *Miller*, and *Graham* all standing for the proposition that it will be the uncommon juvenile offender who merits a life behind bars, a lengthy term-of-years sentence could be construed by the Court as violating the principles of these cases.²¹⁴ Going forward, challenges to juvenile sentences should be made under the *Miller* framework, as explained in *Montgomery*.²¹⁵ Any aggregate sentence given to a juvenile in Wyoming exceeding Bear Cloud's invites an appeal for a violation of *Miller*.²¹⁶

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ See *Bear Cloud v. State*, 2014 WY 113, ¶ 29, 334 P.3d 132, 141 (Wyo. 2014).

²¹² See *Montgomery*, 136 S. Ct. at 734; *Bear Cloud*, ¶ 33, 334 P.3d at 141–42. See also notes 44–106 147–173, 175–185 and accompanying text.

²¹³ See *Montgomery*, 136 S. Ct. 718, 734 (2016) (“*Miller* drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption.”).

²¹⁴ See *supra* notes 57–106 and accompanying text.

²¹⁵ *Montgomery*, 136 S. Ct. 718, 718 (2016). Six of the current justices of the United States Supreme Court joined this opinion. *Id.* The *Miller* majority, Justice Kagan, with Justice Kennedy, Ginsburg, Breyer, and Sotomayor, was joined in *Montgomery* by Chief Justice Roberts. *Id.* In *Graham*, Chief Justice Roberts concurred separately: “*Graham’s* age places him in a significantly different category from the defendan[t] in . . . *Harmelin*.” *Graham v. Florida*, 560 U.S. 48, 91 (2010) (Roberts, C.J., concurring in judgment). Justice John Paul Stevens voted in the majority in *Graham* before Justice Kagan replaced him later that year. *Graham v. Florida*, 560 U.S. 48, 48 (2010). Justice Kagan took her seat August 7, 2010. *Biographies of Current Justices of the Supreme Court*, SUPREME COURT OF THE UNITED STATES, <https://www.supremecourt.gov/about/biographies.aspx> (last visited February 3, 2017).

²¹⁶ See *supra* notes 170–173 and accompanying text.

C. *Why the De Facto Life Without Parole Standard Must be Clear*

The Wyoming Supreme Court warned that when an aggregate sentence became a *de facto* life without parole sentence, an offender is required to receive a *Miller* hearing.²¹⁷ The court did not set a threshold for district courts to assess when an aggregate sentence begins to implicate *Miller*, only that the sentence should not be “functionally equivalent” to life without parole.²¹⁸ This situation is unworkable for several reasons. First, without an objective standard that triggers *Miller*, the analysis devolves into a case-by-case analysis, a process distinctly rejected by the United States Supreme Court.²¹⁹ Second, it could inadvertently produce the same results the Wyoming Supreme Court sought to avoid, where a juvenile with a lengthy aggregate sentence is left worse off than an offender sentenced to life without parole after receiving a *Miller* sentencing hearing.²²⁰

Case-by-case analysis of juvenile sentencing has been rejected by the United States Supreme Court since *Roper v. Simmons*.²²¹ The categorical determination under *Miller/Graham/Roper* that juveniles are different for the purposes of sentencing is due to their characteristics.²²² In *Graham*, the Court found that the categorical challenge to a term-of-years sentence was unique, but warranted.²²³ While *Miller* may not have explicitly created a categorical bar to life without parole, it can be inferred from *Montgomery* that determinations of irreparable corruption cannot be made when an offender is a juvenile, and initial life without parole sentences will be exceedingly uncommon.²²⁴ For Wyoming to implement a case-by-case consideration of what a *de facto* life without parole sentence entails contravenes the United States Supreme Court’s current Eighth Amendment jurisprudence.²²⁵ Juveniles are a category unto themselves for sentencing and state court decisions applying the Eighth Amendment in opposition to that precept invite reversal.²²⁶

²¹⁷ *Bear Cloud*, 2014 WY 113, ¶ 33, 334 P.3d at 141–2.

²¹⁸ *Id.* ¶ 33, 334 P.3d at 142.

²¹⁹ *Roper v. Simmons*, 543 U.S. 551, 572–74 (2005); *Graham v. Florida*, 560 U.S. 48, 59–62, 74–9 (2010); *see also* notes 53–56; 60 and accompanying text.

²²⁰ *See infra* notes 154–165 and accompanying text; *see also* *State v. Null*, 836 N.W.2d 41, 72 (Iowa 2013).

²²¹ *Roper*, 543 U.S. at 572–74; *see infra* notes 53–56 and accompanying text.

²²² *Graham v. Florida*, 560 U.S. 48, 61 (2010).

²²³ *Id.* Analysis under *Harmelin v. Michigan*—a comparison between the severity of the penalty and the gravity of the crime—is inapplicable when a class of offenders is challenging the sentencing for a multitude of crimes. *Id.* at 61–2; *see also* *Harmelin v. Michigan*, 501 U.S. 957, 998–1001 (1991) (Kennedy, J., concurring in part and concurring in judgment).

²²⁴ *Montgomery v. Louisiana*, 136 S. Ct. 718, 734–36 (2016).

²²⁵ *See supra* notes 221–224 and accompanying text.

²²⁶ *See Roper v. Simmons*, 543 U.S. 551, 572–73 (2005); *Graham*, 560 U.S. at 77–80.

Wyoming's current understanding of *de facto* life without parole is nebulous.²²⁷ Without defining *de facto* life without parole, Wyoming runs the risk that lengthy aggregate sentences will put a juvenile with multiple lesser offenses in prison longer than the juvenile sentenced to life, who is statutorily-guaranteed parole eligibility after twenty-five years.²²⁸ For example, in *Bear Cloud*, before burglarizing the Ernst home, the three attempted to enter another home in the area.²²⁹ Aggravated burglary can carry a sentence up to twenty-five years.²³⁰ Hypothetically, if Bear Cloud had been charged with a count of aggravated burglary for each home, he could have faced a fifty-year sentence.²³¹ If Bear Cloud had only been charged with murdering Mr. Ernst, under the current statutory scheme he could be eligible for parole in twenty-five years.²³² Such results violate the fundamental "precept of justice that punishment for crime should be graduated and proportioned to [the] offense" under *Miller*.²³³

The case law cited in *Bear Cloud III* agreed that *de facto* life without parole existed, but varied widely in determining what sentences might qualify.²³⁴ In *Moore v. Biter*, the Ninth Circuit considered a 254-year aggregate sentence, under which the offender would not have been eligible for parole before he was 144 years old and held that his sentence violated *Graham* because "the trial judge determined at the outset that Moore could not rehabilitate."²³⁵ In *State v. Null*, the Iowa Supreme Court held that fifty-two and one half years implicated a *de facto* life without parole sentence, while rejecting objective standards of lifespan to inform that decision.²³⁶ In *Floyd v. State*, the First District Court of Appeal of Florida held that an eighty-year sentence was *de facto* life without parole, based on life expectancy data suggesting Floyd would die in prison.²³⁷ In *Thomas v. State*, the same court rejected the argument that a fifty-year sentence was *de facto* life without parole.²³⁸ While the Wyoming Supreme Court found the arguments of

²²⁷ See *infra* notes 228–242 and accompanying text.

²²⁸ See *supra* notes 154–165 and accompanying text; see also, *State v. Null*, 836 N.W.2d 41, 72 (Iowa 2013).

²²⁹ *Bear Cloud v. State*, 2012 WY 16, ¶ 5, 275 P.3d 377, 383 (Wyo. 2012).

²³⁰ WYO. STAT. ANN. § 6-3-301 (c) (2016).

²³¹ *Id.*

²³² WYO. STAT. ANN. § 6–3–301(c) (2016); WYO. STAT. ANN. 6–10–301(c) (2016).

²³³ *Weems v. United States*, 217 U.S. 349, 367 (1910).

²³⁴ *Bear Cloud v. State*, 2014 WY 113, ¶ 33–35, 334 P.3d 132, 143–43; see *infra* notes 235–240 and accompanying text.

²³⁵ *Moore v. Biter*, 725 F.3d 1184, 1186, 1194 (9th Cir. 2013).

²³⁶ *State v. Null*, 836 N.W.2d 41, 71 (Iowa 2013).

²³⁷ *Floyd v. State*, 87 So.3d 45, 47 (Fla. 1st DCA 2012).

²³⁸ *Thomas v. State*, 78 So.3d 644, 646 (Fla. 1st DCA 2011).

these courts persuasive, the court was much more faithful to the idea of giving juveniles a *meaningful* opportunity for release.²³⁹

Wyoming's *de facto* life without parole sentence is implicated by a shorter term-of-years than any jurisdiction surveyed in *Bear Cloud III*.²⁴⁰ The *Bear Cloud III* court rejected a forty-five-year year term before parole eligibility as a *de facto* life sentence.²⁴¹ Wyoming Statute § 6-10-301(c) now extends parole to juveniles sentenced to life in prison after twenty-five years.²⁴² The Wyoming Supreme Court narrowed the window of guidance for *de facto* sentencing under *Bear Cloud III*, when they decided the third appeal of Bear Cloud's co-conspirator, Dharminder Vir Sen.²⁴³

In *Sen v State (Sen III)*, the Wyoming Supreme Court held that Sen's thirty-five-year sentence was not a *de facto* life sentence, and did not violate the Eighth Amendment.²⁴⁴ The court explained their decision in *Bear Cloud III* did not hold every aggregate sentence over twenty-five years to be in violation of *Miller*.²⁴⁵ The court also determined that eligibility for parole at age fifty did not indicate that Sen lacked a meaningful opportunity for release.²⁴⁶ Thus, in Wyoming, a *de facto* life sentence implicates *Miller* at some point between thirty-five years and forty-five years, including aggregate sentences.²⁴⁷ The court noted that the statutory requirement for parole eligibility after twenty-five years used the singular, "an offense," and was not controlling in aggregate sentences.²⁴⁸

Through case law, the Wyoming Supreme Court has begun to determine a categorical benchmark of where a *de facto* life without parole sentence begins under *Bear Cloud III*.²⁴⁹ The holding in *Sen III* narrows the range of sentences

²³⁹ *Bear Cloud*, ¶ 37, 334 P.3d at 144; see *supra* notes 171–173 and accompanying text. When the standard in *Miller* requires a "meaningful opportunity," it is hard to see eighty years, or even fifty-two years as meaningful, compared to the parole eligibility Bear Cloud will have after twenty-five years in prison. *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012).

²⁴⁰ *Bear Cloud v. State*, 2014 WY 113, ¶¶ 33–35, 334 P.3d 132, 142–43; see *supra* notes 171–173 and accompanying text.

²⁴¹ *Id.* ¶¶ 11, 33, 334 P.3d 132, 136, 141–42.

²⁴² WYO. STAT. ANN. § 6-10-301(c) (2016).

²⁴³ *Sen v. State*, 2017 WY 30, ¶ 2, 390 P.3d 769, 771.

²⁴⁴ *Id.* ¶ 2, ¶ 25, 390 P.3d at 771, 777.

²⁴⁵ *Id.* ¶ 21, 390 P.3d at 775–76.

²⁴⁶ *Id.* ¶ 25, 390 P.3d at 777.

²⁴⁷ Compare *Bear Cloud*, ¶¶ 1, 11, 33, 334 P.3d at 135, 136, 141–42 (holding forty-five year sentence *de facto* life without parole) with *Sen*, ¶¶ 22, 25 (holding thirty-five years was not the functional equivalent of life without parole sentence); see *supra* notes 147–172 and accompanying text.

²⁴⁸ *Sen*, ¶ 21, 390 P.3d at 775.

²⁴⁹ See *supra* notes 241–249 and accompanying text.

that will implicate *Bear Cloud III* challenges to aggregate sentences between thirty-five and forty-five years.²⁵⁰ This guidance will hopefully make it easier for district courts across Wyoming to effectively sentence under *Bear Cloud III*.²⁵¹ Given the Wyoming Supreme Court's aversion to legislating from the bench, it seems likely that challenges will be raised until the window is narrowed to an exact point, or the sentences draw the attention, and intervention of the legislature.²⁵²

To leave Justice Fox's prescient reading of *Miller* wallowing in case-by-case appeals, offering little finality to juvenile sentences in Wyoming, or persuasive guidance to other courts, would waste an opportunity to transform juvenile justice in the Equality State and beyond.²⁵³ In granting a meaningful opportunity for release to many juveniles, the promise of *Miller* and *Bear Cloud III* can only be kept by doing everything possible to make prison a meaningful rehabilitative experience.²⁵⁴

D. Rehabilitation, and Demonstrating Transient Immaturity

In demanding that juvenile offenders who demonstrate their capacity to change be provided with a meaningful opportunity to be released, the *Miller* line of cases removed a major impediment to juvenile rehabilitation.²⁵⁵ Those serving life without parole sentences suffer limited access to rehabilitative programs in many prison systems and are sometimes completely ineligible.²⁵⁶ Post-secondary education is effectively unavailable following the elimination of Pell Grant eligibility for inmates.²⁵⁷ Grants for life skills training are only available to inmates under thirty-five years of age, who are within seven years of release.²⁵⁸ Inmates serving life without parole sentences usually have the lowest priority for accessing vocational programs, GED classes, or even support groups.²⁵⁹

²⁵⁰ *Sen.*, ¶ 2, ¶ 25, 390 P.3d at 771, 777.

²⁵¹ *See* Brief for Appellee at 12–13, *Sen. v. State*, 2017 WY 30, 390 P.3d 769 (Wyo. 2017).

²⁵² *See generally* *Bear Cloud v. State*, 2012 WY 16, ¶ 85, 275 P.3d 377, 412 (Wyo. 2012) (declining to serve “as a ‘super legislature’ to rewrite the laws of [Wyoming] under the guise of constitutional mandate.”).

²⁵³ *See supra* notes 221–226 and accompanying text.

²⁵⁴ *See infra* notes 277–283 and accompanying text.

²⁵⁵ *Miller v. Alabama*, 132 S. Ct. 2455, 2465 (2012) (quoting *Graham v. Florida*, 560 U.S. 48, 74 (2010) (“Life without parole forswears altogether the rehabilitative ideal.”)).

²⁵⁶ Brief for The Sentencing Project as Amicus Curiae, at 10–13, *Graham v. Florida*, 560 U.S. 48 (2010) (Nos. 08-7412, 08-7621).

²⁵⁷ Brief for The Sentencing Project as Amicus Curiae, at 11, *Graham v. Florida*, 560 U.S. 48 (2010) (Nos. 08-7412, 08-7621); *see* 20 U.S.C. § 1070a(b)(7) (2012).

²⁵⁸ Brief for The Sentencing Project as Amicus Curiae, at 11, *Graham v. Florida*, 560 U.S. 48 (2010) (Nos. 08-7412, 08-7621).

²⁵⁹ Brief for The Sentencing Project as Amicus Curiae, at 12, *Graham v. Florida*, 560 U.S. 48 (2010) (Nos. 08-7412, 08-7621).

Now, even juveniles sentenced for the most severe crimes will have better access to programs when those programs are based on severity of the sentence.²⁶⁰ Under *Miller*, juveniles will not enter prison sentenced to life without parole, and will therefore be eligible for rehabilitative programs, even under current prison regulations.²⁶¹ Educational opportunities during incarceration reduce recidivism and improve job prospects upon release.²⁶² Without improvements to the rehabilitative aspects of juvenile incarceration, the opportunity for release guaranteed by *Miller* will be less meaningful and less successful for both the offenders and society.²⁶³

In addition to assuring that juvenile offenders have meaningful opportunities to rehabilitate while incarcerated, a juvenile offender's opportunities for release equally depend on establishing procedures that will accurately implement *Miller*.²⁶⁴ To assure these opportunities are meaningful, the necessary delay between sentencing and the determination of irreparable corruption suggest two possible paths to implementation.²⁶⁵ The United States Supreme Court has already approved of allowing parole boards to serve this function.²⁶⁶ Parole eligibility easily remedies the retroactive application of *Miller*, but prospectively, jurisdictions face choices in establishing procedures to properly sentence under *Miller*.²⁶⁷ States might allow all *Miller* determinations of transient immaturity to be administered by the parole board.²⁶⁸ States could also require that all *Miller*-eligible juvenile offenders receive a sentencing hearing before a judge to re-evaluate their maturity

²⁶⁰ See *supra* notes 256–259 and accompanying text.

²⁶¹ See Brief for The Sentencing Project as Amicus Curiae, at 11–13, *Graham v. Florida*, 560 U.S. 48 (2010) (Nos. 08-7412, 08-7621); see *supra* notes 186–216 and accompanying text (arguing that *Miller* categorically bans initially sentencing a juvenile to life without parole).

²⁶² *Reducing Recidivism and Improving Other Outcomes for Young Adults in the Juvenile and Adult Criminal Justice Systems*, JUSTICE CENTER, THE COUNCIL OF STATE GOVERNMENTS, 1, 4 (2015), <https://csgjusticecenter.org/wp-content/uploads/2015/11/Transitional-Age-Brief.pdf>.

²⁶³ *Reducing Recidivism and Improving Other Outcomes for Young Adults in the Juvenile and Adult Criminal Justice Systems*, JUSTICE CENTER, THE COUNCIL OF STATE GOVERNMENTS, 1, 4 (2015), <https://csgjusticecenter.org/wp-content/uploads/2015/11/Transitional-Age-Brief.pdf>. (quoting Matthew R. Durose et al., *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010*, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics (2014). “Recidivism rates for young adults released from prison are significantly higher than for other age groups. One study found that approximately 76 percent of people who were under the age of 25 when released from prison were rearrested within three years, and 84 percent were rearrested within five years.”).

²⁶⁴ See *infra* notes 266–280 and accompanying text.

²⁶⁵ See *Montgomery v. Louisiana*, 136 S. Ct. 718, 734–36 (2016).

²⁶⁶ *Id.* at 736.

²⁶⁷ *Id.*

²⁶⁸ See *id.*

after a set period of time.²⁶⁹ What must not vary between jurisdictions is the fairness of any procedure by which the transiently immature may distinguish themselves from the irreparably corrupt.²⁷⁰

The United States Supreme Court showed a preference for retroactive implementation of *Miller* via parole eligibility.²⁷¹ This eliminates the burden of re-litigating thousands of sentences that might be implicated under *Miller*.²⁷² Since the Court has shown support for the parole process, parole eligibility criteria would be a starting point for jurisdictions establishing their own procedural framework for prospective application of *Miller*.²⁷³

In Wyoming, parole eligibility rests on several factors, most notably having served the appropriate portion of the sentence and not having engaged in specific violent acts while incarcerated.²⁷⁴ Commutation reports in Wyoming present information to the parole board regarding an inmate's offense and sentence, criminal history, personal history, psychological and psychiatric evaluations, and institutional history.²⁷⁵ The effectiveness of these indicia to determine whether a juvenile offender deserves an opportunity for release under *Miller* will have to be evaluated over time.²⁷⁶ The *Montgomery* Court briefly discussed submissions it received from Montgomery in his petition, detailing his efforts to create a prison boxing team, and his employment in the prison silk-screening shop.²⁷⁷ To what extent information like Montgomery's submissions to the Court, testimony, and other evidence is allowed, and what procedures are to be followed must be debated and studied.²⁷⁸ Courts must evaluate the effectiveness of such criteria in

²⁶⁹ *Id.* at 736. (Re-litigation of sentences was neither required, nor proscribed. The Court's preference for parole eligibility as a retroactive solution may stem from its connection to the penal system, and its function as the typical avenue of release following incarceration.)

²⁷⁰ *Id.* at 735 (explaining "The hearing does not replace but rather gives effect to *Miller's* substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity."). *Miller's* procedural component only requires that some type of hearing consider that question. *Id.*

²⁷¹ *Id.* at 736.

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Wyoming Board of Parole, Policy and Procedure Manual*, WYOMING BOARD OF PAROLE, 35–37 (2017), <https://sites.google.com/a/wyo.gov/bop/about-us/board-policies>.

²⁷⁵ *Id.* at 33.

²⁷⁶ *Montgomery v. Louisiana*, 136 S. Ct. 718, 718 (2016).

²⁷⁷ *Id.* at 736.

²⁷⁸ See generally *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.")

successfully identifying juveniles whose crimes reflected transient immaturity over time to assure meaningful compliance with the Court's decision.²⁷⁹

Second, it will be decades before the justice system can evaluate whether juveniles sentenced after *Miller* received the benefit of its substantive guarantee.²⁸⁰ Life without parole sentences for juvenile offenders will become truly uncommon, or the necessity for greater procedural safeguards will become apparent.²⁸¹ Monitoring the parole decisions of inmates eligible under *Miller* will offer necessary additional data that legislatures need to consider if these decisions are going to actually change juvenile sentencing in the United States, or simply shift the location, from courtroom to parole hearing, where we give up on rehabilitating juvenile offenders.²⁸²

V. CONCLUSION

The Eighth Amendment is violated when a juvenile whose crime is rooted in transient immaturity is sentenced to life without parole.²⁸³ *Bear Cloud III* correctly held that aggregate sentences can create *de facto* life without parole sentences that are cruel and unusual punishment for juveniles.²⁸⁴ *Miller v. Alabama* procedurally requires the court to consider the diminished culpability of juveniles for sentencing purposes, and substantively holds that only those whose crimes reflect irreparable corruption receive a sentence of life without parole.²⁸⁵ The *Miller* line of cases further stands for the proposition that irreparable corruption cannot be determined until a juvenile has the opportunity to mature.²⁸⁶ The initial sentencing of a juvenile to life without parole is unconstitutional.²⁸⁷ The nebulous standard in *Bear Cloud III* does not provide

²⁷⁹ See generally *Montgomery*, 136 S. Ct. at 734. If the established criteria do not effectively make this determination, the consequences are severe for society and the juvenile offender. Those who were transiently immature who are not released have been denied their constitutional rights, those who were irreparably corrupt who are released are a danger to society.

²⁸⁰ See *supra* note 157–172 and accompanying text. For example, absent good time, it will be approximately twenty years before Wyatt Bear Cloud is eligible for parole.

²⁸¹ *Montgomery*, 136 S. Ct. at 733–34 (“*Miller* made clear that ‘appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.’”).

²⁸² *Id.* at 736.

²⁸³ *Id.* at 734.

²⁸⁴ *Bear Cloud v. State*, 2014 WY 113, ¶ 33, 334 P.3d 132, 141–42 (Wyo. 2014); see *supra* notes 147–175, and accompanying text.

²⁸⁵ *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012); see *supra* notes 41–89 and accompanying text.

²⁸⁶ *Montgomery*, 136 S. Ct. at 726, 734; see *supra* notes 90–112 and accompanying text.

²⁸⁷ See *supra* notes 186–216 and accompanying text.

the guidance district courts need to effectively sentence, though the recent decision in *Sen III* is a first step toward the necessary clarity.²⁸⁸ Case-by-case consideration of juvenile sentencing has been expressly rejected by the United States Supreme Court; to assure the accurate and timely protection of a juvenile's rights under *Miller* a clear standard must be provided.²⁸⁹ Finally, the focus of prison for juveniles must shift from retribution to rehabilitation, or juvenile offenders will return to society unprepared and destined to be separate, almost as if they had remained incarcerated.²⁹⁰ The promises of *Miller* and *Bear Cloud III* must be kept; should justice fail the transiently immature, society's culpability cannot be diminished.²⁹¹

²⁸⁸ *Sen v. State*, 2017 WY 30, ¶¶ 21–25, 390 P.3d 769, 775–77; *see supra* notes 217–254 and accompanying text.

²⁸⁹ *See supra* notes 217–254 and accompanying text.

²⁹⁰ *See supra* notes 255–282 and accompanying text.

²⁹¹ *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016). “The opportunity for release will be afforded to those who demonstrate the truth of *Miller*’s central intuition—that children who commit even the most heinous crimes are capable of change.” *Id.* The question we must ask ourselves, is are we capable of that change as well?