COMMENT

"YOUTH MATTERS": WHY DEMANDING THE SAME HEIGHTENED LEVEL OF MITIGATION IN JUVENILE LIFE WITHOUT PAROLE SENTENCING PROCEEDINGS AS IS REQUIRED IN CAPITAL SENTENCING PROCEEDINGS IS THE ONLY CONSTITUTIONAL OPTION

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Donnell Wilson was only sixteen years old when he was sentenced to life in prison without the possibility of parole (JLWOP). Wilson appealed his life sentence, claiming that his defense counsel was ineffective for failing to investigate and present mitigation evidence pertaining to his youth and background when he was facing the possibility of a life sentence. While the state appellate court agreed, the state supreme court did not. The court in Wilson's

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case concluded that the standards for presentation of mitigation evidence at sentencing as laid out by the American Bar Association's Criminal Justice Standards for the Defense Function ("ABA Defense Standards") do not apply to anything other than capital proceedings, but such a conclusion is contrary to everything the Supreme Court has said in recent JLWOP decisions, from Roper v. Simmons *in 2005 to* Jones v. Mississippi *in 2021. The premise is simple: "youth matters in sentencing."*

There is no standard to assist state courts in determining exactly how much mitigation evidence defense counsel is required to present at sentencing when representing a juvenile offender who faces a potential sentence of life in prison without the possibility of parole. While the Supreme Court has pointed to the ABA Defense Standards as courts' search image for what is required of counsel in capital sentencing proceedings, and repeatedly compared the severity of capital sentences to that of life without parole sentences for juvenile offenders, the Court has not yet explicitly said that the same standards for mitigation in capital proceedings must be imported to the JLWOP context. This Comment argues that the same standards for investigation into and presentation of mitigation evidence at sentencing in capital proceedings must govern JLWOP proceedings. This is the only option that comports with the requirements of the Sixth and Eighth Amendments to the U.S. Constitution. Such an adoption would eliminate existing confusion and inconsistencies among state courts and set a standard for counsel to follow in JLWOP sentencing proceedings nationwide. Standardization would provide for a consistent framework for evaluating defense counsel's effectiveness. Adopting such a standard would also open the door to the possibility of claims of abuse of discretion in cases where defense counsel did present the level of mitigation evidence required of them and the sentencing authority then chose to constructively ignore it. Most importantly, the adoption of such a standard is the only way that courts can ensure that youth does matter in sentencing.

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INTRODUCTION

Donnell Wilson—an "intelligent" young man considered a "role model" to his family and friends[1]—was only sixteen years old when he was sentenced to prison for more than ten times as many years as he had been alive.[2]

Following his conviction, Wilson contended that his trial defense counsel was ineffective for failing to investigate and present mitigation evidence at sentencing when he was facing life in prison without the possibility of parole.[3] Wilson argued that the failure to present this evidence was the reason that he received a life sentence.[4] On appeal at the Court of Appeals for the state of Indiana, Wilson found a glimmer of hope when the court held that his counsel was, indeed, ineffective.[5] However, the Supreme Court of Indiana vacated that decision on appeal and held that his counsel was not ineffective because they had no obligation to "present[] expert testimony regarding the mitigating qualities of youth [or] conduct[] a more thorough investigation of Wilson's background."[6] The court opined that Wilson did not cite strong enough evidence that such investigation into and presentation of mitigation evidence "was required by [the] 'prevailing professional norms'" of juvenile representation since they cited solely to the American Bar Association's (ABA) Criminal Justice Standards for the Defense Function ("ABA Defense Standards")[7] which, the court maintained, only strictly applied to "the presentation of mitigation evidence in the death penalty context."[8] Since Wilson cited only to the ABA Defense Standards in his brief and not to standards specifically written for the purpose of providing guidance in juvenile proceedings in which life in prison without the possibility of parole is on the line (JLWOP), the court declined to find that such standards governed in Wilson's case.[9]

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1. Brief for Petitioner-Appellant, Wilson v. State, 128 N.E.3d 492 (Ind. Ct. App. 2019) (No. 18A-PC-03041), 2019 WL 8223525, at *58.

2. Wilson v. State, 128 N.E.3d 492, 495–96 (Ind. Ct. App. 2019), *vacated*, 157 N.E.3d 1163 (Ind. 2020).

3. Brief for Petitioner-Appellant, *supra* note 1, at *42–43.

4. *Id.*

5. *Wilson*, 128 N.E.3d at 501–02.

6. Wilson v. State, 157 N.E.3d 1163, 1177–78 (Ind. 2020).

7. AM. BAR ASS'N, CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION (4th ed. 2017) [hereinafter ABA DEFENSE STANDARDS].

8. *Wilson*, 157 N.E.3d at 1178.

9. *Id.*

As demonstrated by Donnell Wilson's case, state courts have struggled to come to a consensus about how much mitigation evidence relating to a juvenile defendant's youth and its attendant characteristics is required at sentencing. This is particularly true concerning the evidence required for a juvenile's defense counsel to escape liability under a claim of ineffective assistance of counsel (IAC) for failing to investigate and present such evidence. Should the same standards that govern adult proceedings apply in JLWOP proceedings? Further, should citing to standards that do not strictly govern JLWOP proceedings—standards that, in fact, solely govern death penalty proceedings—in JLWOP cases be enough to establish that those standards apply in JLWOP proceedings, considering the parallels between the two types of proceedings that the U.S. Supreme Court has drawn? Litigators, legal scholars, and advocates for juvenile justice are pleading for answers to these questions.[10]

There is no agreed upon standard to assist courts in determining about how much mitigation evidence is required in JLWOP sentencing proceedings.[11] Therefore, courts must require the same standards set for death penalty proceedings in JLWOP proceedings, as outlined by

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10. Jose B. Ashford, *Arizona, Other States Need Resentencing Guidelines for JLWOP Youth*, JUV. JUST. INFO. EXCH. (Nov. 8, 2017), https://jjie.org/2017/11/08/arizona-other-states-need-resentencing-guidelines-for-jlwop-youth [https://perma.cc/QCK9-76UX] (noting the need for "affirmative steps to make sure that lawyers and mitigation specialists are prepared to develop and present [mitigation] evidence . . . in making a case for leniency when youth are convicted of heinous offenses").

11. Compare the two interpretations of this standard by the state courts of Indiana in the case of Donnell Wilson. *Compare* Wilson v. State, 128 N.E.3d 492, 502 (Ind. Ct. App. 2019) (holding that failure to present mitigation evidence did constitute IAC), *with* Wilson, 157 N.E.3d at 1177 (holding the opposite, that failure to present mitigation evidence did not constitute IAC). Wilson's case demonstrates the conflicting and contradictory interpretations and the tension this creates within state court systems, but it is important to note that this issue of inconsistent interpretations is not limited to the state of Indiana. These tensions exist not only within state court systems, but *between* state court systems, as well. *Compare* Young v. State, 294 So. 3d 1238, 1244–45 (Miss. Ct. App. 2020) (holding that defense counsel's failure to present readily available mitigation evidence at defendant's *Miller* resentencing hearing when defendant was a juvenile facing life in prison without the possibility of parole constituted IAC), *with* People v. Patterson, 25 N.E.3d 526, 545–47 (Ill. 2014) (holding that defense counsel's failure to present mitigation evidence relating to the defendant's "lengthy mental health history and limited intellectual capacity," among other things, did not constitute IAC). Consistency exists neither among the states, nor within them.

the ABA Defense Standards.[12] Some courts have been in the position to adopt these standards and declined to do so, constructively ignoring the only option that comports with the requirements of the Sixth and Eighth Amendments. Such an adoption would eliminate significant confusion and inconsistent outcomes in JLWOP proceedings among state courts and set the standard by which defense counsel in juvenile life proceedings are evaluated. Moreover, adopting these standards would also open the door to the possibility of abuse of discretion claims against the sentencing authority for failing to give proper weight to the mitigating factors presented.[13]

Part I of this Comment explores the history of the constitutional right to effective assistance of counsel as set out in the Sixth Amendment and elaborated on in the Supreme Court cases interpreting that Amendment.[14] Part I also outlines the evolution of JLWOP case law over the past two decades, particularly in the context of the Eighth Amendment.[15] Part I then discusses the ways in which the constitutional right to effective counsel and the standards governing JLWOP proceedings have become increasingly intertwined, coming to a climax in the recent decision of *Jones v. Mississippi*.[16] In *Jones*, the Court explicitly acknowledged the possibility of an IAC claim for failing to investigate and present mitigation evidence in JLWOP sentencing proceedings for the first time in a JLWOP case.[17] Finally, Part I raises possibility of abuse of discretion claims in the JLWOP context.[18] Part II of this Comment argues that the Constitution and Supreme Court precedent both require that the same standards for investigation into and presentation of mitigation evidence at sentencing that is required in death penalty proceedings is also

12. ABA Standards—with a capital-S—are the weightiest rules and regulations that the ABA authors. Second to Standards in terms of weight are Guidelines. The difference between capital-G Guidelines and capital-S Standards is a difference that I will reiterate throughout the course of this Comment.

13. Gene Johnson, *Washington Justices Vacate 46-Year Sentence for Teen Killer*, AP NEWS (Sept. 23, 2021), https://apnews.com/article/courts-washington-sentencing-long view-drownings-9efc9f3dbfa7fdd680f79c7fe0346e61 (demonstrating a case in which the petitioner prevailed on an abuse of discretion claim for the court's failure to properly consider mitigation evidence at sentencing).

14. *See infra* Part I.

15. *Infra* Part I.

16. 141 S. Ct. 1307 (2021).

17. *See infra* Part I.

18. *Infra* Part I.

required at JLWOP sentencing proceedings.[19] This solution would standardize all courts' analyses of IAC claims and open the door for the possibility of abuse of discretion claims for failing to properly consider and weigh the mitigation evidence presented.[20] Finally, this Comment concludes that this adoption is the only way courts can comply with the demands of the Sixth and Eighth Amendments.

I. BACKGROUND

First, this Part will lay out the history of the Sixth Amendment right to effective assistance of counsel as originally articulated in the U.S. Constitution and further colored by Supreme Court decisions in the late twentieth century. Then, this Part will explain the evolution of the body of law surrounding JLWOP and touch on the Court's recent acknowledgment of the likelihood of IAC claims in the JLWOP context. Finally, this Part will introduce the new and exciting body of law around abuse of discretion claims in the JLWOP context when IAC claims fall short.

A. The Sixth Amendment and Ineffective Assistance of Counsel

The Sixth Amendment to the U.S. Constitution articulates some of the most important rights available to criminal defendants.[21] The Sixth Amendment states that

> [i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, *and to have the Assistance of Counsel for his defense.*[22]

This final phrase is the most important for the purposes of this Comment because it explicitly sets forth a defendant's unalienable

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19. *See infra* Part II.

20. *See infra* Part II.

21. Veronica J. Finkelstein, *Better Not Call Saul: The Impact of Criminal Attorneys on Their Clients' Sixth Amendment Right to Effective Assistance of Counsel*, 83 U. CIN. L. REV. 1215, 1219 (2015) ("Although other substantive rights are also guaranteed by the Sixth Amendment, the assistance of counsel has always been a key constitutional protection.").

22. U.S. CONST. amend. VI (emphasis added).

right to counsel.[23] The flagship case for interpreting what the Sixth Amendment means by the phrase "assistance of counsel" in terms of the threshold for attorney performance and competence at trial is *Strickland v. Washington*.[24]

In *Strickland v. Washington*, the Supreme Court laid out what would become known as the "*Strickland* standard"[25] among legal professionals and litigators.[26] The *Strickland* standard is a two-prong test for evaluating the effectiveness of counsel.[27] In that case, the defendant, Washington, "committed three groups of crimes" over the course of ten days, which included torture, assault, extortion, theft, and murder.[28] Washington pled guilty to all the charges against him, which included three capital murder charges.[29] In preparing for Washington's sentencing hearing, his defense counsel contacted his wife and mother on the phone and talked to Washington himself about his background.[30] However, defense counsel did not seek other character witnesses or seek a psychiatric expert to perform an exam on Washington since there was no indication that he suffered from any psychological problems.[31] On appeal, Washington contended that his defense counsel's decision not to conduct a more thorough investigation into mitigation evidence in preparation for his sentencing rendered them ineffective.[32]

The Supreme Court in *Strickland*, for the first time, "elaborated on the meaning of the constitutional requirement of effective assistance" of counsel in addressing Washington's contention.[33] In doing so, the

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23. Sanjay Chhablani, *Disentangling the Sixth Amendment*, 11 U. PA. J. CONST. L. 487, 492 (2009).

24. 466 U.S. 668 (1984); *see* Finkelstein, *supra* note 21, at 1234 (noting that *Strickland v. Washington* is considered the first case in which "[t]he attorney performance standard was first articulated by the Court").

25. Also referred to as the "*Strickland* two-prong test." Barbara A. Fedders, *Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Representation*, 14 LEWIS & CLARK L. REV. 771, 804 (2010).

26. Whitney Cawley, Note, *Raising the Bar: How* Rompilla v. Beard *Represents the Court's Increasing Efforts to Impose Stricter Standards for Defense Lawyering in Capital Cases*, 34 PEPP. L. REV. 1139, 1148 (2007).

27. *Strickland*, 466 U.S. at 686–87. First adopted in the context of capital sentencing proceedings, this test has since been expanded to apply to all proceedings.

28. *Id.* at 671–72.

29. *Id.* at 672.

30. *Id.* at 672–73.

31. *Id.* at 673.

32. *Id.* at 675.

33. *Id.* at 686.

Court noted that the touchstone for evaluating an IAC claim is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[34] The Court declined to "consider the role of counsel in an ordinary sentencing, which may involve informal proceedings and standardless discretion in the sentencer, and hence may require a different approach to the definition of constitutionally effective assistance" in the context of *Strickland*, a capital case.[35] However, not only has JLWOP been compared to capital punishment, but courts have also adopted the *Strickland* standard to ordinary sentencing as well as JLWOP sentencing in the years since the *Strickland* decision was rendered.[36]

Accordingly, in this historic case, the Court established the two-prong test that is now commonly known as the *Strickland* standard.[37] First, the defendant must prove that "counsel's performance was deficient."[38] In order to prove this, a defendant "must show that counsel's representation fell below an objective standard of reasonableness."[39] Second, the defendant must also prove that "the deficient performance prejudiced the defense."[40] In determining what constitutes an objective standard of reasonableness, the Court noted that such a standard should be governed by "the legal profession's . . . standards," or, in other words, the "prevailing professional norms" of the legal profession as a whole.[41]

One source for determining such "prevailing professional norms" is the ABA Defense Standards.[42] When it comes to the investigation into

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34. *Id.*

35. *Id.*

36. *See* Meredith J. Duncan, *The (So-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform*, 2002 BYU L. REV. 1, 17 n.100 ("Although *Strickland* is a capital case, the ineffective assistance of counsel inquiry fashioned by the Court is the same when applied in noncapital contexts as well." (citing Nix v. Whiteside, 475 U.S. 157, 164–65 (1986))).

37. *Strickland*, 466 U.S. at 687; *see* Finkelstein, *supra* note 21, at 1237 (noting that the *Strickland* test is now "applied to most ineffective assistance claims").

38. *Strickland*, 466 U.S. at 687.

39. *Id.* at 688.

40. *Id.* at 687.

41. *Id.* at 688.

42. *See id.* ("Prevailing norms of practice as reflected in American Bar Association standards and the like, *e.g.*, ABA STANDARDS FOR CRIMINAL JUSTICE 4-1.1 to 4-8.6 (2d ed. 1980)."). These 1980 ABA Defense Standards have since been updated. The most recent version of the ABA Defense Standards is the 4th edition, published in 2017,

and presentation of mitigation evidence, the *Strickland* Court stated that "counsel has a duty to make reasonable investigations" and that a "particular decision not to investigate must be directly assessed for reasonableness."[43] Some of the factors relevant to making this assessment include "the experience of the attorney, the inconsistency of unpursued and pursued lines of defense, and the potential for prejudice from taking an unpursued line of defense."[44]

Although Washington did not win his case, *Strickland v. Washington* is important because it was the first U.S. Supreme Court case in which the Court adequately defined what is meant by effective assistance of counsel.[45] The Supreme Court did not actually rule a death sentence unconstitutional for more than fifteen years after it issued its decision in *Strickland*.[46] The first case to do so, and one of the most important cases in understanding IAC in terms of how much mitigation evidence is required, was *Williams v. Taylor*.[47]

In 2000, Williams was convicted of robbery and capital murder.[48] On appeal, Williams claimed IAC for his defense counsel's failure to investigate and present mitigation evidence at sentencing.[49] Citing *Strickland*, the Supreme Court in *Williams* held that counsel was, in fact, ineffective, pointing out that Williams's defense counsel did not even

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which, as previously mentioned, I now refer to generally as "ABA Defense Standards." *See supra* note 7; *see also* Joseph H. Ricks, Comment, *Raising the Bar: Establishing an Effective Remedy Against Ineffective Counsel*, 2015 BYU L. REV. 1115, 1138 (2015) (highlighting the fact that since "so many courts have looked to the ABA's standards to determine the 'professional norms' relevant to ineffective assistance claims, when an attorney is found ineffective under *Strickland*, it necessarily implies" that that attorney has violated these standards in some way); Cawley, *supra* note 26, at 1176–77, 1179 (noting the Court's increasing deference to the ABA Defense Standards, "giv[ing] more weight to the American Bar Association standards and codes of conduct as to how to present a mitigation case, than counsel's decisions as to how to proceed"). These were the standards that Donnell Wilson's appellate counsel cited to in their brief. *See supra* notes 4–9 and accompanying text.

43. *Strickland*, 466 U.S. at 691.

44. *Id.* at 681.

45. *See* Ricks, *supra* note 42, at 1119–20 (describing the test that the Court introduced in *Strickland* and noting that, according to that test, the Court ruled that Washington was not denied effective assistance of counsel and was executed two months later).

46. Cawley, *supra* note 26, at 1158.

47. 529 U.S. 362 (2000).

48. *Id.* at 368.

49. *Id.* at 390.

begin preparing for sentencing until a week before trial.[50] Because of their delay, counsel failed to "conduct an investigation that would have uncovered extensive records graphically describing Williams's nightmarish childhood."[51] In this way, the first prong of the *Strickland* test was clearly satisfied.[52] The Court then wrote a detailed recollection of his "nightmarish childhood," which included abuse, neglect, a history of familial incarceration, and evidence of mental disability and noted counsel's numerous failures in declining to investigate such evidence in more depth.[53] The Court held that "the entire postconviction record, viewed as a whole and cumulative of mitigation evidence presented originally, raised 'a reasonable probability that the result of the sentencing proceeding would have been different' if competent counsel had presented and explained the significance of all the available evidence," therefore satisfying the second prong of the *Strickland* test.[54] Consequently, it was clear to the Supreme Court that Williams's trial defense counsel "did not fulfill their obligation to conduct a thorough investigation of the defendant's background," citing to the ABA Defense Standards as proof of this failure.[55] Williams's death sentence was thus overturned.[56]

Three years later, in 2003, the *Strickland* standard application arose again in *Wiggins v. Smith*.[57] Wiggins was convicted of drowning an old woman in her bathtub.[58] He was sentenced to death.[59] He contended that his defense counsel was ineffective for failing to investigate and present mitigation evidence pertaining to his troubled background at sentencing.[60] His new appellate counsel "chronicled [Wiggins's] bleak life history" for the court.[61] Appellate counsel uncovered extensive mitigation evidence that defense counsel never did.[62] In *Wiggins*, the Court again cited to the ABA Defense Standards.[63] The Court held that

50. *Id.* at 363.
51. *Id.* at 395.
52. *Id.* at 363–64.
53. *Id.* at 395–96.
54. *Id.* at 399.
55. *Id.* at 396.
56. *Id.* at 399.
57. 539 U.S. 510, 511 (2003).
58. *Id.* at 514.
59. *Id.* at 515–16.
60. *Id.* at 516.
61. *Id.*
62. *Id.* at 534–35.
63. *Id.* at 524.

defense "[c]ounsel's conduct . . . fell short of the standards for capital defense work articulated by the American Bar Association (ABA)" as well as the "professional standards that prevailed" at the time of Wiggins's trial.[64] Accordingly, "[c]ounsel's investigation into Wiggins's background did not reflect reasonable professional judgment."[65] Wiggins's death sentence was thus overturned by the Supreme Court.[66]

Finally, in 2005, the *Strickland* standard arose once more in *Rompilla v. Beard*.[67] Ronald Rompilla, was convicted for the stabbing and setting aflame of James Scanlon in 1988 and sentenced to death.[68] On appeal, Rompilla contended that his defense counsel was ineffective for "failing to present significant mitigating evidence about Rompilla's childhood, mental capacity and health, and alcoholism."[69] Like counsel in *Wiggins*, Rompilla's new appellate counsel discovered "a number of likely avenues" that Rompilla's defense counsel could have pursued and built a mitigation case on had they done their due diligence, but chose not to.[70] As in *Wiggins*, the Court found that Rompilla's counsel was ineffective for their failure to investigate these avenues for mitigation, again citing the ABA Defense Standards, which "describe[d] [defense counsel's] obligation in terms no one could misunderstand in the circumstances of a case like [Rompilla's]."[71] The *Rompilla* decision relied even more heavily on these standards than did its preceding IAC cases.[72] The Court cited to *Williams*, *Wiggins*, and *Strickland*, noting their own recognition of the ABA Defense Standards.[73] Accordingly, the Court concluded that the mitigation

64. *Id.*
65. *Id.* at 534.
66. *Id.* at 538.
67. 545 U.S. 374 (2005).
68. *Id.* at 377–78.
69. *Id.* at 378.
70. *Id.* at 382.
71. *Id.* at 387.
72. *See id.* (quoting the ABA Defense Standards at length); *see also id.* at 400 (Kennedy, J., dissenting) (noting how the majority essentially treated the ABA Defense Standards as "the constitutional baseline for effective assistance of counsel" in its decision); Cawley, *supra* note 26, at 1141 (explaining that *Rompilla* is an especially interesting case for its application of the *Strickland* standard and ABA Defense Standards because "it is not a case in which defense counsel simply failed to make attempts to provide a defense, but rather counsel was held ineffective even though their performance was neither nonexistent nor terrible").
73. Cawley, *supra* note 26, at 1141; *see also* John H. Blume & Stacey D. Neumann, *'It's like Deja Vu All over Again':* Williams v. Taylor, Wiggins v. Smith, Rompilla v. Beard *and a (Partial) Return to the Guidelines Approach to the Effective Assistance of Counsel*, 34 AM.

evidence discovered by appellate counsel but ignored by trial counsel "add[ed] up to a mitigation case that [bore] no relation to the few naked pleas for mercy actually put before the jury."[74] To the Supreme Court, this obviously fell short of the objective level of reasonableness required by *Strickland* when looking at attorney performance, and this deficient performance prejudiced Rompilla, satisfying both prongs of the *Strickland* test.[75] Rompilla's conviction was thus overturned.[76]

While *Strickland* originally laid out the standard for IAC claims, cases like *Williams*, *Wiggins*, and *Rompilla* provide a deep and detailed look into how the Supreme Court has analyzed IAC claims in the context of defense counsel's alleged failure to investigate and present mitigation evidence at sentencing.[77] Not only do all three of these cases demonstrate what renders counsel ineffective and deficient, but all three of these cases demonstrate what renders counsel ineffective *specifically* in terms of counsel's failure to follow up on readily available evidence that would have resulted in the sentencing authority imposing a lower sentence. The fact that these three cases—indeed, three of the most well-known and frequently-cited cases on IAC—revolve around mitigation is not a coincidence. These cases underscore the Court's appreciation of the importance of mitigation at sentencing.[78]

J. CRIM. L. 127, 146 (2007) ("The Court's most recent decision about ineffective assistance, *Rompilla v. Beard*, solidified the centrality of existing professional norms, especially the ABA standards, for determining whether counsel's performance fell below the reasonableness bar.").

74. *Rompilla*, 545 U.S. at 393.

75. *Id.*

76. *Id.*

77. *See* Blume & Neumann, *supra* note 73, at 135 ("Beginning with the *Williams* decision, then continuing with *Wiggins* in 2003 and *Rompilla* in 2005, the Court began to actually police defense counsel's performances; in [these] cases the Court held that counsel's performance in a capital case was objectively unreasonable."). *See generally* James S. Liebman & Lawrence C. Marshall, *Less Is Better: Justice Stevens and the Narrowed Death Penalty*, 74 FORDHAM L. REV. 1607, 1666–67 (2006) (noting how *Williams*, *Wiggins*, and *Rompilla* demonstrate "a willingness on Court's part to scrutinize death sentences more vigorously," highlighting the increasing number of instances in which the Court "overturned [] death verdicts due to ineffective assistance of counsel, concluding that there was a 'reasonable probability' that the mitigating evidence trial counsel incompetently failed to discover would have generated a sentence less than death").

78. *See* Cawley, *supra* note 26, at 1179–80 (highlighting the fact that in the sixteen years after the Court issued its decision in Strickland v. Washington it did not overturn any death sentences under the two-prong test set forth in *Strickland*, then overturned three death sentences within five years, beginning with *Williams v. Taylor*, and noting

This line of cases sheds light on what might constitute an IAC claim when it comes to counsel's failure to discover, investigate, consider, present, and expound mitigation evidence at sentencing. Indeed, state courts have taken notice, citing to *Strickland* in finding that counsel's failure to present mitigation evidence at sentencing constitutes IAC.[79]

B. The Eighth Amendment and Juvenile Life Without the Possibility of Parole (JLWOP)

The Eighth Amendment states that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[80] The line of Supreme Court cases in which the Court considers the constitutionality of juvenile sentencing, starting with the death penalty as applied to juveniles and moving on to JLWOP, revolves around the Eighth Amendment's ban on cruel and unusual punishment.[81] Therefore, this Section will highlight the importance of Eighth Amendment jurisprudence in the evolution of juvenile sentencing precedent.[82]

The Eighth Amendment was at the core of the Supreme Court's approach to juvenile sentencing precedent since the start. *Roper v. Simmons*[83] was the first noteworthy case in an increasingly long line of Supreme Court decisions on juvenile sentencing and the Eighth Amendment, holding that the imposition of the death penalty on juvenile offenders violated the Eighth Amendment.[84] When

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that this phenomenon represents a shift in the Court's approach to and appreciation of mitigation at sentencing).

79. *See, e.g.*, State v. Herring, 28 N.E.3d 1217, 1239 (Ohio 2017) (holding that defense counsel "ha[d] an obligation to fully investigate the possible mitigation evidence available" in defendant's capital case and was rendered ineffective for failing to do so (quoting Jells v. Mitchell, 538 F.3d 478, 495 (6th Cir. 2008))).

80. U.S. CONST. amend. VIII.

81. *See generally* James Donald Moorehead, *What Rough Beast Awaits?* Graham, Miller, *and the Supreme Court's Seemingly Inevitable Slouch Towards Complete Abolition of Juvenile Life Without Parole*, 46 IND. L. REV. 671, 675 (2013) (noting the Court's consistent reliance on the Eighth Amendment when presented with questions pertaining to juvenile law, sentencing, and punishment).

82. *See* William W. Berry III, *Evolved Standards, Evolving Justices? The Case for Broader Application of the Eighth Amendment*, 96 WASH. U. L. REV. 105, 124 (2018) (highlighting the significance of the Court's application of an Eighth Amendment analysis to JLWOP).

83. 543 U.S. 551 (2005).

84. *See* Sara E. Fiorillo, Note, *Mitigating After* Miller*: Legislative Considerations and Remedies for the Future of Juvenile Sentencing*, 93 B.U. L. REV. 2095, 2102 (2013) (chronicling the Supreme Court's decisions from *Roper* to *Graham v. Florida*).

Christopher Simmons was seventeen, he drowned Shirley Crook by binding her hands and feet together, covering her head with a towel, and throwing her off a bridge into the Meramec River.[85] Indeed, there was "little doubt that Simmons was the instigator of the crime."[86] He was tried as an adult nine months later, after he had turned eighteen.[87] The jury was particularly haunted by the "chilling, callous terms" Simmons used to discuss the crime with several of his friends.[88] The boy's friends later testified that he told them he knew they could "get away with it" since they were not yet eighteen and bragged about the crime in the days to follow.[89] When he was arrested, he confessed to the crime.[90] He reenacted the crime for the police and agreed to record the reenactment on video at the police station.[91] Given all the evidence that Simmons committed the crime and did so without remorse, he was sentenced to death for the murder of Ms. Crook.[92]

On appeal, Simmons's counsel argued that the Eighth and Fourteenth Amendments forbid the execution of a juvenile offender who was under the age of eighteen at the time of his offense.[93] The Supreme Court agreed and ruled in Simmons's favor, holding that the execution of a juvenile offender ran afoul of the Eighth Amendment and constituted cruel and unusual punishment.[94] In doing so, the Court noted that "[t]he prohibition against 'cruel and unusual punishments,' like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent."[95] One of the key phrases that the Court cited to as the guiding framework in such scenarios was the "evolving standards of decency that mark the progress of a maturing society."[96] Indeed, given

85. *Roper*, 543 U.S. at 556–57.
86. *Id.* at 556.
87. *Id.*
88. *Id.*
89. *Id.* at 556–57.
90. *Id.* at 557.
91. *Id.*
92. *Id.* at 556.
93. *Id.* at 559–60.
94. *Id.* at 578–79.
95. *Id.* at 560.
96. *Id.* at 561 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)); *see also* Berry, *supra* note 82, at 109–10 ("In its application of the Eighth Amendment, the Supreme Court uses the evolving standards of decency doctrine to demarcate the line between constitutional punishments and cruel and unusual punishments. What constitutes a cruel and unusual punishment is not static—the Supreme Court has

the growing "national consensus" against the imposition of the death penalty for juvenile offenders, the Court held that imposing such a sentence on juveniles was contrary to the "evolving standards of decency" and therefore violated the Eighth Amendment's ban on cruel and unusual punishment.[97]

The Court latched onto this "evolving standards of decency" doctrine, citing it in every notable juvenile sentencing case to follow. Post-*Roper*, while juveniles could no longer be sentenced to death for their crimes, no matter how heinous, the Supreme Court continued to compare the severity of a death sentence to other severe sentences that juvenile offenders could still face, including life in prison without the possibility of parole.[98] In *Graham v. Florida*,[99] the Court cited to *Roper* in holding that it was not only a violation of the Eighth Amendment to impose a death sentence on a juvenile, but also to impose a sentence of life without the possibility of parole on a juvenile offender who was convicted of a non-homicide offense.[100] The Court noted that, while a death sentence is "unique in its severity,"[101] there are undeniable and grave similarities between a death sentence and a sentence of life in prison.[102] In *Graham*, the Court not only pointed out the similarity in severity between the death penalty and life in prison for adult offenders but noted how this was especially true in cases of life in prison for juvenile offenders, given their youth and the many more years of freedom before them that they risked losing forever.[103] The

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made clear that the 'evolving standards of decency' change over time, consistent with the maturing of society.").

97. *Roper*, 543 U.S. at 561, 567–68.

98. David Siegel, *What Hath* Miller *Wrought: Effective Representation of Juveniles in Capital-Equivalent Proceedings*, 39 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 363, 367–68 (2013).

99. 560 U.S. 48 (2010).

100. *Id.* at 82; *see also* Berry, *supra* note 82, at 124 (noting the importance of the Court's choice to apply the "evolving standards of decency" doctrine in this case).

101. *Graham*, 560 U.S. at 69 (quoting Gregg v. Georgia, 428 U.S. 153, 187 (1976)) (plurality).

102. *See id.* at 69–70 (stating that "life without parole sentences share some characteristics with death sentences that are shared by no other sentences," such as the fact that "the sentence alters the offender's life by a forfeiture that is irrevocable," and "[i]t deprives the convict of the most basic liberties without giving hope of restoration").

103. *See id.* at 70 ("Life without parole is an especially harsh punishment for a juvenile.").

Court "relied upon its recent death penalty case law" in coming to this conclusion in *Graham*.[104]

For the first time in a juvenile sentencing case, the Supreme Court—albeit in Justice Thomas's dissent—also cited to the cases of *Lockett v. Ohio*[105] and *Eddings v. Oklahoma*,[106] two cases which stand for the proposition that the most severe sentences must not be imposed without a sentencing authority's opportunity to consider evidence that might serve as mitigation in favor of a lesser sentence.[107] *Lockett* and *Eddings* both dealt with the death penalty, but Justice Thomas realized their applicability to life in prison for juvenile offenders, as well.[108] While citations to these cases only appeared in the dissenting opinion in *Graham*, they became increasingly relied on by the majority in the cases to follow as the majority accepted the pertinence of that line of precedent.

Two years after *Graham*, in *Miller v. Alabama*,[109] the Court cited again both to *Roper* and *Graham* in holding that sentencing a juvenile offender to life in prison without the possibility of parole for a homicide offense under a mandatory, non-discretionary sentencing scheme was a violation of the Eighth Amendment.[110] The Court recalled the way in which "*Graham* further likened life without parole for juveniles to the death penalty,"[111] forcing the Court to conclude that "life-without-parole sentences, like capital punishment, may violate the Eighth Amendment when imposed on children."[112] Indeed,

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104. Cara H. Drinan, *The* Miller *Revolution*, 101 IOWA L. REV. 1787, 1797 (2016).
105. 438 U.S. 586 (1978).
106. 455 U.S. 104 (1982).
107. *Graham*, 560 U.S. at 102 (Thomas, J., dissenting).
108. *Id.*
109. 567 U.S. 460 (2012).
110. *Id.* at 465.
111. *Id.* at 470. The Court iterated the fact that this was one of the core holdings in *Graham* several times, noting repeatedly that *Graham* found JLWOP similar in severity to death itself for juvenile offenders. "*Graham* makes plain these mandatory schemes' defects in another way: by likening life-without-parole sentences imposed on juveniles to the death penalty itself. Life-without-parole terms, the Court wrote, 'share some characteristics with death sentences that are shared by no other sentences.' Imprisoning an offender until he dies alters the remainder of his life 'by a forfeiture that is irrevocable.' And this lengthiest possible incarceration is an 'especially harsh punishment for a juvenile' . . . . All of that suggested a distinctive set of legal rules: In part because we viewed this ultimate penalty for juveniles as akin to the death penalty, we treated it similarly to that most severe punishment." (internal quotations omitted). *Id.* at 474–75.
112. *Id.* at 473.

the Court, this time in the majority opinion, acknowledged its reliance in *Graham* on cases such as *Lockett* and *Eddings*,[113] as well as *Woodson v. North Carolina*.[114] The Court thus "treat[ed] juvenile life sentences as *analogous* to capital punishment."[115] Accordingly, there are certain elements required at capital sentencing that ensure disproportionate punishments shall not be imposed that must also apply to life without the possibility of parole sentencing for juvenile offenders.[116] An individualized sentencing scheme reflective of the sort of individualized sentencing present in capital sentencing was one of these elements.[117] In capital cases, the sentencing authority must have the opportunity to consider "any mitigating factors."[118] Likewise, in JLWOP cases, the sentencing authority must have the opportunity to consider the "mitigating qualities of youth."[119] A sentence without room for such consideration necessarily runs afoul of the Eighth Amendment.[120]

Four years later, when the Supreme Court issued its decision in *Montgomery v. Louisiana*,[121] the Court held that its previous decision in *Miller* applied retroactively.[122] After *Montgomery*, courts across the

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113. *Id.* at 474–76.

114. *Id.* at 470.

115. *Id.* at 475 (emphasis added) (quoting Graham v. Florida, 560 U.S. 48, 89 (2010) (Roberts, J., concurring)).

116. *Id.* at 475–76. "By making youth (and all that accompanies it) irrelevant to the imposition of th[e] harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment." *Id.* at 479.

117. *Id.* at 475–76.

118. *Id.*; *see also* Moorehead, *supra* note 81, at 682 ("Because mandatory imposition of capital punishment gave a sentencing authority no opportunity to consider mitigating factors, it axiomatically could not assess the defendant's culpability. Here, the majority found the practice *even more egregious*, because of 'the mitigating qualities of youth . . . .'") (emphasis added).

119. *Miller*, 567 U.S. at 476 (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).

120. *Id.* at 489 ("*Graham*, *Roper*, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles."); *see also* Berry, *supra* note 82, at 126 (chronicling the consistent application of the "evolving standards of decency" test in both *Graham* and *Miller*).

121. 577 U.S. 190 (2016).

122. *Id.* at 208–09 ("As a result, *Miller* announced a substantive rule of constitutional law. Like other substantive rules, *Miller* is retroactive because it 'necessarily carr[ies] a significant risk that a defendant'—here, the vast majority of juvenile offenders—'faces a punishment that the law cannot impose upon him.'" (quoting Schriro v. Summerlin, 542 U.S. 348, 352 (2004))). It is important to note that, for purposes of retroactivity, *Miller* established a substantive rule, however, this does not mean that it makes sense

nation had a choice to make about how best to comport with *Miller*. The states took several different approaches. Some states got rid of JLWOP altogether, deciding that such a solution was the simplest option following the *Miller* decision.[123] Other states chose to hold on to JLWOP.[124] In those states, all juveniles who were sentenced to their respective JLWOP sentences prior to *Miller* and *Montgomery* were granted what is commonly known as "*Miller* resentencing hearings," where the sentencing authority was required to consider the mitigating factors of youth.[125] Those who would be sentenced after *Miller* and *Montgomery* would be granted this consideration at sentencing.[126] To

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to determine that *Miller* established a rule that is *only* substantive. *See id.* at 225 (Scalia, J., dissenting) (claiming that the majority in *Montgomery* rewrote *Miller* to make its holding retroactive, believing instead that *Miller*'s holding was purely a procedural one). Most scholars see *Miller*'s holding as having both substantive and procedural components. *See* Siegel, *supra* note 98, at 364–65 (acknowledging that *Miller*'s holding both established a substantive rule relevant to juvenile sentencing as well as a procedural one); *see also* Freya Whiting, Miller v. Alabama*: An Empty Promise for Juveniles Facing Life Without Parole?*, 9 VA. J. CRIM. L. 91, 100 (2021) ("The Court in *Montgomery v. Louisiana* asserted that *Miller*'s holding *procedurally* requires a sentencer to consider juvenility and youthful characteristics before deciding that life without parole is an appropriate sentence, and rendered a *substantive* rule of constitutional law through disallowing a penalty for a class of defendants because of their status.") (emphasis added).

123. *A State-by-State Look at Juvenile Life Without Parole*, AP NEWS (July 31, 2017), https://apnews.com/article/9debc3bdc7034ad2a68e62911fba0d85; *see also* Drinan, *supra* note 104, at 1816 (noting that several states "comprehensively reconsidered" JWLOP and simply did away with it). In the most recent JLWOP decision rendered by the Court, Justice Sotomayor points out that twenty states plus the District of Columbia have now done away with JLWOP entirely. Jones v. Mississippi, 141 S. Ct. 1307, 1336 (2021) (Sotomayor, J., dissenting).

124. *A State-by-State Look at Juvenile Life Without Parole*, *supra* note 123.

125. *See* Alexandra Fahringer, Note, *Disturbing the Finality of a Sentence: How States with High Rates of Juvenile Life Without Parole ("JLWOP") Responded to* Montgomery v. Louisiana, 70 RUTGERS U. L. REV. 1271, 1272 (2018) ("After [the *Montgomery* decision], states which previously refused to apply *Miller* retroactively were forced to take measures to ensure that all the juveniles in their state, who had previously been sentenced to life without parole, would receive resentencing in accordance with *Miller*."). Fahringer's Note exquisitely outlines the individual responses of several states with the most juveniles serving JLWOP to *Montgomery*'s retroactivity holding. *See generally*, Emily Komp, Comment, *Resentencing Juveniles: States' Implementation of* Miller *and* Montgomery *Through Resentencing Hearings*, 53 UIC J. MARSHALL L. REV. 311, 314–15 (2020) (detailing different states' approaches to their *Miller* resentencing hearings).

126. For purposes of this Comment, the difference between "*Miller*-resentencing hearings" (pre-*Miller*) and "sentencing" (post-*Miller*) is without consequence. The only difference between cases that require a *Miller* resentencing hearing and cases that do

help sentencers navigate this process, some of those states introduced new legislation outlining what mitigating factors a sentencing authority would be required to consider when sentencing or resentencing a juvenile offender to JLWOP.[127] However, for the states that chose to hold on to JLWOP, yet chose not to introduce specific legislation that outlined the requirements for mitigation evidence, there is little to no guidance on what potential mitigating factors counsel is required to investigate and what factors a court should consider when sentencing a juvenile to JLWOP. While *Miller* repeatedly stated that a juvenile offender's youth is a mitigating factor, it offered no further guidance on how that youth should be investigated or considered.[128] This became one of the problems to be addressed by *Jones v. Mississippi*, along with the related question of whether a Court must explicitly find that a juvenile offender facing JLWOP is "permanently incorrigible" before being sentenced to JLWOP.[129]

In *Jones v. Mississippi*, the Court held that no formal finding of permanent incorrigibility—neither explicit nor implicit—is required before sentencing a juvenile offender to JLWOP.[130] To require such a

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not is whether the juvenile defendant was originally sentenced before or after the *Miller* decision came out.

127. *A State-by-State Look at Juvenile Life Without Parole*, *supra* note 123; *see, e.g.*, FLA. STAT. ANN. § 921.1402 (West 2014) (stating that "[w]hen determining if it is appropriate to modify the juvenile offender's sentence, the court shall consider any factors it deems appropriate,: including factors such as the juvenile's demonstrated levels of maturity, the results of the juvenile's mental health assessment and risk assessment, whether the court believes the juvenile still poses a threat to society, etc.); LA. CODE CRIM. PROC. ANN. art. 878.1 (2017) (stating that the "defense shall be allowed to introduce any . . . mitigating evidence . . . including but not limited to the facts and circumstances of the crime, the criminal history of the offender, the offender's level of family support, social history, and such other factors as the court may deem relevant"); N.C. GEN. STAT. § 15A-1340.19B (2012) ("The defendant or the defendant's counsel may submit mitigating circumstances to the court, including, but not limited to, the following factors: (1) Age at the time of the offense. (2) Immaturity. (3) Ability to appreciate the risks and consequences of the conduct. (4) Intellectual capacity. (5) Prior record. (6) Mental health. (7) Familial or peer pressure exerted upon the defendant. (8) Likelihood that the defendant would benefit from rehabilitation in confinement. (9) Any other mitigating factor or circumstance.").

128. Fiorillo, *supra* note 84, at 2097.

129. Jones v. Mississippi, 141 S. Ct. 1307, 1311 (2021).

130. *Id.* at 1318–19.

formal finding of fact, the Court reasoned, was not what *Miller* intended to do and not what the Eighth Amendment requires.[131]

Brett Jones was fifteen years old—a year younger than Donnell Wilson was at the time of his conviction—when he was convicted for the murder of his grandfather in 2004.[132] He was sentenced to JLWOP,[133] as Mississippi law in 2004 imposed a mandatory sentence of life in prison without parole for murder.[134] Following the *Miller* decision, Jones was granted a resentencing hearing in which the sentencing judge could properly consider the mitigating qualities of Jones's youth at the time of his offense.[135] However, the judge affirmed the appropriateness of Jones's life sentence nonetheless.[136] In doing so, the judge stated that he knew he had the discretion now to sentence Jones to a lesser sentence but declined to do so.[137] While the judge acknowledged his discretion to impose a lesser sentence, he did not base his choice not to do so on any explicit or implicit finding of permanent incorrigibility.[138] Jones contended that the judge needed to find that he was permanently incorrigible before resentencing him to JLWOP in order to comport with the Eighth Amendment, but the Mississippi Court of Appeals disagreed.[139] The Supreme Court granted certiorari to address this common and problematic disagreement.[140]

The Court in *Jones* cited to *Montgomery v. Louisiana*, which stated that "*Miller* did not impose a formal fact finding requirement" and that "a finding of fact regarding a child's incorrigibility . . . is not required."[141] In coming to this conclusion, the Court relied heavily on the language of the preceding cases in which it considered the constitutionality of JLWOP under the Eighth Amendment.[142] It emphasized the

131. *See id.* at 1313 ("[A] State's discretionary sentencing system is . . . constitutionally sufficient."). While this Comment does not dwell on the notion of "permanent incorrigibility," as was the crux of the case in *Jones*, it is important to understand that case and what it has to contribute to the "youth matters" conversation.

132. *Id.* at 1312.

133. *Id.*

134. MISS. CODE ANN. § 97-3-21 (2000), § 47-7-3(g) (2004).

135. *Jones*, 141 S. Ct. at 1312–13.

136. *Id.* at 1313.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* (quoting Montgomery v. Louisiana, 577 U.S. 190, 211 (2016)).

142. *Id.* at 1314 (asserting that both Miller and Montgomery "squarely rejected such a requirement").

importance of sentencing authorities considering a juvenile offender's youthfulness before imposing the most severe punishment available to a juvenile and how those cases drew similarities between the two most severe punishments: the death penalty and, for children, life in prison without parole.[143] More so than in any of the preceding JLWOP cases, the Court cited to the Eighth Amendment cases of *Woodson*, *Lockett*, and *Eddings* in emphasizing the importance of the consideration of mitigating factors for juvenile offenders facing JLWOP.[144] The Court stated:

> *Miller* repeatedly described youth as a sentencing factor akin to a mitigating circumstance. And *Miller* in turn required a sentencing procedure similar to the procedure that this Court has required for the individualized consideration of mitigating circumstances in capital cases such as *Woodson v. North Carolina* . . . *Lockett v. Ohio* . . . and *Eddings v. Oklahoma* . . . .[145]

The Supreme Court reiterated that those cases stood for the proposition that a sentencing authority must have the opportunity to consider mitigating factors before imposing the most severe of punishments, highlighting how those cases required the sentencing authority to consider mitigation evidence before imposing the death penalty on a defendant in order to comport with the Eighth Amendment's ban on cruel and unusual punishment.[146] The Court reiterated that, in those cases, the sentencing authority was given the discretion needed to consider such evidence.[147] Accordingly, the *Jones* Court held that all that is required of a sentencing authority before imposing JLWOP on a juvenile defendant in order to comport with the Eighth Amendment is just that: discretion.[148] A sentencing authority must have the *opportunity* to consider mitigation evidence before imposing JLWOP on the defendant.[149]

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143. *Id.* at 1314–16; *see also id.* at 1324 (Thomas, J., concurring) ("*Miller* and *Montgomery* are from the same lineage of precedent that refashions the Eighth Amendment to accommodate this Court's views of juvenile justice.").

144. The Court in *Jones* cites to *Woodson*, *Lockett*, and *Eddings* each five separate times in the majority opinion. *See id.* at 1315–16, 1320 (majority opinion).

145. *Id.* at 1315–16 (citations omitted).

146. *Id.* at 1316; Andy T. Wang, *Deserving of Life: A Mitigating Factor Approach to the Narrowing Mandate in Capital Sentencing*, 52 HARV. J. ON LEGIS. 509, 515 (2015).

147. *Jones*, 141 S. Ct. at 1316.

148. *Id.*

149. *See id.* ("Repeatedly citing *Woodson*, *Lockett*, and *Eddings*, the *Miller* Court stated that 'a judge or jury must have the opportunity to consider' the defendant's youth and

Importantly, the Court in *Jones* said that "youth matters in sentencing."[150] Moreover, "because youth matters, *Miller* held that a sentencer must have discretion to consider youth before imposing a life-without-parole sentence, *just as a capital sentencer must have discretion to consider other mitigating factors before imposing a death sentence*."[151] This also means that no on-the-record explanation of how the sentencing authority weighs that mitigation evidence is required.[152] The Court also used capital sentencing precedent as laid out in *Woodson*, *Lockett*, and *Eddings* to justify this portion of its decision.[153]

The major theme that permeates each of these Supreme Court decisions addressing juvenile sentencing and JLWOP-*Roper v. Simmons*, *Graham v. Florida*, *Miller v. Alabama*, *Montgomery v. Louisiana*, and *Jones v. Mississippi*—is a simple one: youth matters at sentencing.[154] Since youth is a mitigating factor that matters at sentencing, a sentencing authority must have the discretion to consider it before imposing JLWOP on a juvenile offender.[155]

C. The Confluence of IAC and JLWOP in the Compelling Case of Brett Jones

When the Supreme Court issued its decision in the highly anticipated case of *Jones v. Mississippi*, it also added to the complicated discord in scenarios where IAC claims and JLWOP proceedings collide.[156] The Court in *Jones* held that no formal finding of fact

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must have 'discretion to impose a different punishment' than life without parole." (citing Miller v. Alabama, 567 U.S. 460, 465 (2012))).

150. *Id.* at 1314 ("In a series of Eighth Amendment cases applying the Cruel and Unusual Punishments Clause, this Court has stated that youth matters in sentencing."). The simple phrase "youth matters" appears three separate times in the majority opinion in *Jones*. *See id.* at 1314–16.

151. *Id.* at 1316 (emphasis added).

152. *See id.* at 1320–21 (noting that it would be "incongruous" to require an on-the-record explanation in life without parole cases).

153. *See id.* at 1320 ("A sentencing explanation is not necessary to ensure that the sentencer in death penalty cases considers the relevant mitigating circumstances. It follows that a sentencing explanation is likewise not necessary to ensure that the sentencer in juvenile life-without-parole cases considers the defendant's youth.").

154. *Id.* at 1316.

155. *Id.*

156. One footnote—footnote six of the *Jones* decision—proves especially interesting, touching on the likelihood of IAC claims in JLWOP proceedings and processes. *See id.* at 1319 n.6 (2021); Kristina Kersey, *Keeping up with the Joneses*, NJDC (July 2, 2021), https://njdc.info/wp-content/uploads/Keeping-up-with-the-Joneses-7-2.pdf [https://perma.cc/UBD2-GDWQ] (drawing attention to the *Jones* Court's discussion of IAC in the JLWOP context).

concerning a juvenile offender's permanent incorrigibility was required before sentencing that child to JLWOP.[157] Instead, it held that the fact that courts have the discretion to consider mitigating factors such as a juvenile offender's youth before sentencing them to JLWOP is enough, according to *Miller*.[158] In doing so, in footnote 6, the Court noted the following:

> If defense counsel fails to make the sentencer aware of the defendant's youth, it is theoretically conceivable (albeit still exceedingly unlikely in the real world) that the sentencer might somehow not be aware of the defendant's youth. But in that highly unlikely scenario, the defendant may have a potential ineffective-assistance-of-counsel claim, not a *Miller* claim—*just as defense counsel's failure to raise relevant mitigating circumstances in a death penalty sentencing proceeding can constitute a potential ineffective-assistance-of-counsel problem*, not a *Woodson/Lockett/Eddings* violation.[159]

This is the first time that the Supreme Court, in its decisions considering juvenile sentencing and JLWOP, acknowledged the likelihood of an IAC claim in the JLWOP context.[160] Neither *Roper*, *Graham*, *Miller*, nor *Montgomery* addressed the effectiveness of counsel in their decisions. *Jones* broke new ground in doing so. *Strickland* and its progeny have been cited to and applied in death penalty proceedings[161] as well as JLWOP proceedings[162] as the standard for

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157. *Jones*, 141 S. Ct. at 1315–16.

158. *Id.* at 1316.

159. *Id.* at 1319 n.6 (emphasis added).

160. *Id.*

161. *See, e.g.*, United States v. Gray, 878 F.2d 702, 710 (3rd Cir. 1989) ("As *Strickland v. Washington* instructs, this court must inquire whether 'counsel's representation fell below an objective standard of reasonableness,' and, if so, whether there is a 'reasonable probability' that the ineffectiveness prejudiced the outcome at trial." (citations omitted) (citing Strickland v. Washington, 466 U.S. 668, 688, 694 (1984)); Laird v. Horn, 159 F. Supp. 2d 58, 112 (E.D. Pa. 2001) ("Under *Strickland v. Washington*, it is well-settled that, in order to establish a claim for ineffective assistance of counsel at trial or at a death penalty sentencing proceedings, a convicted defendant must demonstrate that his counsel's performance (1) 'fell below an objective standard of reasonableness,' and (2) that counsel's deficient performance prejudiced the defense.'" (citations omitted) (quoting *Strickland*, 466 U.S. at 688, 692)); Haliym v. Mitchell, 492 F.3d 680, 694 (6th Cir. 2007) ("In considering whether the assistance of counsel was constitutionally ineffective, we apply the familiar standard of Strickland v. Washington . . . .").

162. *See, e.g.*, People v. Speight, 227 Cal. App. 4th 1229, 1248 (Cal. Ct. App. 2014) ("A defendant claiming ineffective assistance of counsel must satisfy *Strickland*[] . . . .") (internal quotations omitted); Conley v. State, 164 N.E.3d 787, 805 (Ind. Ct. App. 2021) ("To prevail on his ineffective assistance of counsel claims, Conley must show

evaluating the effectiveness of counsel in both scenarios.[163] The footnote in *Jones* validates this application of the *Strickland* standard to juvenile sentencing.[164]

D. The Consistent Application of the Strickland *standard in Death Penalty Cases Compared to the Inconsistent Application of* Strickland *in JLWOP Cases*

Although *Strickland* is widely recognized as the standard for evaluating the effectiveness of counsel in both death penalty and JLWOP proceedings,[165] that standard is applied very differently in the two contexts. All modern JLWOP IAC cases cite to *Strickland*, yet there is no question that the difference between how it is applied and the vast differential between the level of evidence that has been found to be adequate and inadequate in each of those cases is night and day.

1. The Strickland *Standard as Applied in* Andrews v. Davis

Note how the court in *Andrews v. Davis*[166] applied the *Strickland* standard in the death penalty context.[167]

Jesse James Andrews was found guilty of first-degree murder for the vile killings of Preston Wheeler, Patrice Brandon, and Ronald Chism.[168] According to the testimony of one Charles Sanders—who was also arrested in connection with the killings but made a plea agreement with the state—he and Andrews devised a plan to rob Wheeler, who was a drug dealer.[169] He and Andrews went to Wheeler's apartment, smoked with him, then ambushed him.[170] They tied Wheeler and Patrice Brandon up in order to search the apartment for drugs and money.[171] When their search proved to be unproductive,

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that: (1) his counsel's performance fell short of prevailing professional norms; and (2) his counsel's deficient performance prejudiced his defense." (citing *Strickland*, 466 U.S. at 687), *vacated*, 169 N.E.3d 854 (2021)); Dawson v. State, 611 S.W.3d 761 (Mo. Ct. App. 2020); People v. Gunn, 161 N.E.3d 1095 (Ill. Ct. App. 2020); Wilson v. State, 128 N.E.3d 492 (Ind. Ct. App. 2019), *vacated*, 157 N.E.3d 1163 (2020).

163. *See* Fedders, *supra* note 25, at 807 (noting how the *Strickland* standard "governs adult and juvenile IAC practice").

164. *See Jones*, 141 S. Ct. at 1319 n.6 (noting that a defendant can raise an IAC claim for not mentioning youth as a mitigating factor in sentencing).

165. *Id.*; Strickland, 466 U.S. at 685–86.

166. 944 F.3d 1092 (9th Cir. 2019) (en banc).

167. *Id.*

168. *Id.* at 1100–01.

169. *Id.* at 1100.

170. *Id.*

171. *Id.*

Andrews took Brandon to the kitchen and said he would "make [her] talk."[172] He raped, sodomized, and killed her.[173] While Sanders continued to search the apartment, Andrews also killed Wheeler.[174] Sanders and Andrews then began cleaning the apartment when Chism knocked and asked if everything was okay, at which point Andrews took Chism to the bathroom and killed him, too.[175] Because the jury found four special circumstances to be present in Andrews's case, he was eligible for the death penalty.[176] Indeed, the jury determined that Andrews was deserving of the death penalty.[177]

Andrews appealed, claiming his counsel was ineffective "based on their failure to investigate avenues of mitigation and to present mitigation evidence."[178] The Ninth Circuit held in the petitioner's favor, concluding that defense counsel was ineffective for failing to discover and present mitigation evidence at sentencing.[179] In fact, the court found that Andrews's defense counsel "performed almost no investigation at the penalty phase," and also "introduced almost no mitigation evidence during the penalty phase, despite the availability of 'substantial and compelling' evidence."[180] The court explained such mitigation evidence in excruciating detail.[181]

Andrews was born in Mobile, Alabama, to alcoholics parents who separated shortly after he was born, both abandoning him to move to distant parts of the country and leaving him to be raised by his grandparents.[182] When he was young, his grandfather—a "loving, benevolent, and responsible" man[183]—died.[184] Shortly after the loss of his grandfather, Andrews was committed to the Alabama Industrial School for Negro Children, a reform school commonly known as "Mt. Meigs" near Montgomery, Alabama, for car theft when he was fourteen years old.[185] The court detailed the "appalling" conditions at Mt. Meigs,

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172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.* at 1101.
178. *Id.*
179. *Id.* at 1120.
180. *Id.* at 1108.
181. *See id.* at 1102–04 (detailing Andrews's extraordinarily grim childhood).
182. *Id.* at 1102.
183. *In re* Andrews, 52 P.3d 656, 660 (Cal. 2002).
184. *Andrews*, 944 F.3d at 1102.
185. *Id.*

where children were beaten with broomsticks, forced to work in cotton fields, and regularly sexually abused.[186] Andrews's mother said that what happened to him at Mt. Meigs "ruined [his] life."[187] Following his release from Mt. Meigs, he started associating with older boys, getting into trouble, and ultimately ended up spending the next decade of his life in and out of various prisons throughout Alabama—prisons which were hardly better than Mt. Meigs itself, as the Alabama penal system in those days was considered one of the worst penal systems in the country.[188] On top of it all, psychiatrists that evaluated Andrews testified that he suffered from several mental disorders, including post-traumatic stress disorder.[189]

The Ninth Circuit concluded that, had Andrews's counsel done their due diligence in investigating his history, this gruesome evidence would have come to light.[190] However, counsel neither investigated the institutions to which Andrews was committed as a child nor had Andrews evaluated by a psychiatrist, both of which were considered "standard."[191] In fact, it turned out that Andrews's counsel barely even consulted with his mother.[192] The court pointed out that no court has ever held that "counsel may forgo a thorough background investigation and wholly fail to present evidence in mitigation where readily available, compelling . . . mitigating evidence exists."[193] To support this holding, the court in *Andrews* explicitly cited to the ABA Defense Standards as the touchstone for determining how much investigation into and presentation of mitigation evidence is required

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186. *Id.* Several witnesses at Andrews's reference hearing who had also been committed to Mt. Meigs in their youth collectively recalled

> one particularly cruel example of abuse: When a child was disobedient in the fields or failed to pick his quota of cotton, an overseer would 'poke a hole in the ground and order him to lie down, to pull down his pants, and to stick his penis into the hole. The overseer would then beat the boy's thighs with a stick, often until the skin burst open. One witness remembered seeing [Andrews] beaten in this manner.'

Id. (quoting *In re* Andrews, 52 P.3d at 677 (Kennard, J., dissenting)).

187. *Id.* at 1103.

188. *Id.*

189. *Id.* at 1104.

190. *Id.* at 1109.

191. *See id.* ("Each of these steps should have been a standard component of counsel's penalty-phase investigation. And even the most basic of investigations would have uncovered evidence of the abuse Andrews suffered.").

192. *Id.* at 1105.

193. *Id.* at 1108–09.

at sentencing in capital proceedings.[194] The court also cited to cases such as *Wiggins v. Smith* and *Rompilla v. Beard* to further support this conclusion.[195] According to the court, Andrews's counsel obviously fell short of these Standards.[196] Applying the *Strickland* two-prong test, the court found Andrews's counsel to be ineffective.[197]

2. The Strickland *Standard as Applied in the* Wilson *cases*

Compare the straightforward application of *Strickland* in *Andrews v. Davis* with the inconsistent and conflicting application of *Strickland* in the JLWOP context in the case of Donnell Wilson.

On March 17, 2013, sixteen-year-old Donnell Wilson was walking his girlfriend, fifteen-year-old Pecolla Crawford, home with a few other friends.[198] While they were walking, the group came across brothers Shaqwone Ham and Charles Wood.[199] Wilson and another one of the boys in his group began fighting with the brothers, and Wilson shot Wood in the head.[200] Ham tried to run away, but one of Wilson's

194. *See id.* at 1109 ("'American Bar Association . . . standards and the like' are evidence of those norms and 'guides to determining what is reasonable[.]' According to the ABA standards in effect at the time of Andrews's trial, defense counsel had a duty to conduct an investigation designed to 'explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction.'") (citations omitted). It is important to note here that, in evaluating ineffective assistance of counsel claims, courts sometimes also choose to look to the ABA's capital-G Guidelines, as well as or instead of the ABA's capital S-Standards. One example of this is the case of *Haliym v. Mitchell*, 492 F.3d 680 (6th Cir. 2006), in which the court cited to the ABA's *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913 (2003). *Haliym*, 492 F.3d at 717 ("In short, the ABA Guidelines and the commentary thereto explicitly recognize that competent counsel will investigate and discover all the evidence that Petitioner's counsel failed to unearth."). The fact that the specific ABA work that the Sixth Circuit cited to in that case were capital-G Guidelines (and not the more compelling, weightier, capital-S Standards) is an insignificant difference for purposes of the point I make in this Comment. The point is that, in deciding both of these cases, counsel had instruction from the ABA on the mitigation that was required of them, and the court heeded that instruction. I simply propose the adoption of the capital-S ABA Defense Standards because of their greater weight and persuasiveness.

195. *Andrews*, 944 F.3d at 1109.

196. *Id.* at 1121.

197. *Id.* at 1112–19.

198. Wilson v. State, 128 N.E.3d 492, 495 (Ind. Ct. App. 2019), *vacated*, 157 N.E.3d 1163 (2020).

199. *Id.*

200. *Id.*

friends, Jonte Crawford, shot him.[201] Both brothers died from their injuries.[202] Wilson was charged with two counts of murder, Class B felony armed robbery, and Class D felony conspiracy to commit criminal gang activity, with a criminal gang activity sentence enhancement for both the murder and robbery charges.[203] Wilson was found guilty on all charges and sentenced to an aggregate sentence of 183 years in prison.[204]

Wilson appealed his conviction claiming ineffective assistance of counsel under *Strickland*.[205] Wilson alleged that his defense counsel was ineffective for failing to investigate and present mitigation evidence at sentencing when Wilson faced a sentence of life in prison without the possibility of parole.[206] The Indiana Court of Appeals acknowledged the lack of a standard to follow, noting only what would "likely" be considered enough evidence for the sentencing authority to be able to give sufficient weight to the consideration of a juvenile offender's youth at sentencing.[207] In one of the briefs filed by Wilson's appellate counsel, counsel cited to the ABA Defense Standards, arguing that "[a]s juvenile life without parole is akin to the death penalty, counsel should be held to similar standards as a death penalty attorney."[208] Counsel argued that "[i]n cases where a child faces life in prison, counsel must undertake significant mitigating efforts" in order to defend against the imposition of a disproportionate punishment.[209] Counsel further argued that "[t]he U.S. Supreme Court has equated life without parole for children to the death penalty for adults, and, in *Miller*, reiterated the expansive ability of the sentencer to consider any mitigating evidence."[210] Counsel then cited to the ABA Defense

201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.* at 495–96. This sentence was soon slightly lowered to 181 years. *Id.* at 496. Why the court thought such an insignificant and slight markdown in Wilson's sentence was worthwhile, I do not know.
205. *Id.*
206. Brief for Petitioner-Appellant, *supra* note 1, at *43.
207. *See Wilson*, 128 N.E.3d at 501 (noting what evidence might likely be included in a constitutionally sufficient *Miller* hearing, and how such evidence "would ideally cover both the attendant characteristics of youth in general and the particular youth and characteristics of the defendant being sentenced").
208. Brief for Petitioner-Appellant, *supra* note 1, at *45.
209. *Id.*
210. *Id.*

Standards to more concretely illustrate exactly what mitigation evidence is required.[211]

On appeal at the Indiana Court of Appeals, the court found Wilson's defense counsel ineffective and deficient at sentencing.[212] Citing to *Miller*, the Indiana Court of Appeals stated that "[i]t is not enough . . . to simply acknowledge the defendant's youth. A *Miller* hearing requires more."[213] The court stated that it could "only conclude that trial counsel's failure to present any evidence related to youth and its attendant characteristics or to Wilson's own youth, environment, mental health, good character, or prospects of rehabilitation resulted in a hearing that was deficient," and that, accordingly, it could "likewise conclude that the absence of the above-described evidence prejudiced Wilson," therefore addressing both prongs of *Strickland*.[214] The court came to a decisive conclusion, citing the extensive and overwhelming evidence that defense counsel inexcusably failed to discover, investigate, and present at Wilson's sentencing hearing that was soon discovered by Wilson's appellate counsel.[215] One of the biggest failures noted by the court was defense counsel's failure to "hir[e] any experts who specialized in child or developmental psychology, mental health experts, or life history investigators."[216] Wilson's life sentence was thus vacated.[217]

This victory, however, was short lived. At the Indiana Supreme Court, the court found the opposite.[218] The court addressed the fact that Wilson's defense counsel did not hire any experts or present expert testimony to testify to Wilson's diminished culpability as a juvenile, holding that doing so was simply not required.[219] The

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211. *Id.*

212. *Wilson*, 128 N.E.3d at 502–03.

213. *Id.* at 501.

214. *Id.* at 502.

215. *See id.* at 501–02 ("In contrast, at Wilson's post-conviction hearing, his attorney presented multiple witnesses, two of whom testified at length about youth and its attendant characteristics in general and as related to Wilson . . . . Had the sentencing hearing been more similar to the post-conviction hearing, it cannot be denied that *Miller* would have been satisfied.").

216. *Id.* at 502.

217. *Id.* at 503.

218. Wilson v. State, 157 N.E.3d 1163, 1178 (Ind. 2020).

219. *See id.* (taking issue with the fact that, in maintaining that Wilson's trial defense counsel had an obligation to present expert testimony, among other things, his appellate counsel "cites no evidence that this presentation was required by 'prevailing professional norms'" (citing Strickland v. Washington, 466 U.S. 668, 688 (1984))).

Supreme Court of Indiana held that "Wilson simply fails to establish that it was standard practice among defense counsel to present such expert testimony at a sentencing hearing for a juvenile facing a lengthy term of years sentence."[220]

In this way, evidence that the Indiana Court of Appeals found necessary and needed to be investigated by Wilson's defense counsel was not considered necessary by the Indiana Supreme Court, and the state Supreme Court reversed that part of the decision.[221] The court stated that the defense counsel met *Strickland*'s standards.[222]

E. Abuse of Discretion

A secondary contention that occasionally arises in cases where a juvenile defendant is claiming IAC are claims of abuse of discretion.[223] The logic behind this phenomenon is relatively straightforward: one could contend that, even though defense counsel did investigate and present enough mitigation evidence at sentencing to be considered effective, there remains the possibility that the sentencing authority did not give that evidence its appropriate weight when imposing a particular sentence. The case of *State v. Haag*[224] is a recent example of such an argument carrying the day. In that case, Timothy Haag was resentenced to forty-six years to life at his *Miller* resentencing hearing after serving twenty-three years of his original life sentence, despite his counsel's presentation of evidence demonstrating his rehabilitation over the last two decades.[225] Haag appealed, claiming abuse of discretion on behalf of the resentencing authority for effectively

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220. *Wilson*, 157 N.E.3d at 1178 (emphasis added).

221. *See id.* at 1184 (holding that Wilson's appellate counsel, not defense counsel, was deficient in failing to argue that Wilson's sentence was inappropriate under Indiana Appellate Rule 7(B), resulting in his sentence being bumped down from 181 years to 100 years in prison).

222. *Id.* at 1178.

223. *See, e.g.*, State v. Majors, 940 N.W.2d 372, 376, 391 (Iowa 2020); Luna v. State, 387 P.3d 956, 958 (Okla. Crim. Ct. App. 2016), *overruled by* White v. State, 499 P.3d 762 (Okla. Crim. Ct. App. 2021); People v. Foxx, 133 N.E.3d 1154, 1156 (Ill. App. Ct. 2018). Not only has this combination of claims been seen before, but it has very recently achieved success in this context. *See, e.g.*, State v. Haag, 495 P.3d 241, 249 (Wash. 2021). In that case, the Supreme Court of Washington found that the resentencing authority in Timothy Haag's case "abused its discretion because its finding lacked substantial evidence that Haag had not overcome the factors that led to the murder" for which he was convicted. *Id.*

224. 495 P.3d 241 (Wash. 2021).

225. *Id.* at 234–44.

ignoring the mitigation evidence of his rehabilitation.[226] The Supreme Court of Washington found that the resentencing authority did indeed abuse its discretion in imposing this sentence, stating that "its finding lacked substantial evidence that Haag had not overcome the factors that led to the murder" for which he was convicted.[227] Accordingly, the court held that Haag was entitled to a new resentencing hearing.[228]

Unlike IAC, which is governed by the language of the Sixth Amendment to the U.S. Constitution, as well as the Supreme Court cases interpreting that language, such as *Strickland*, there are no constitutional provisions on abuse of discretion claims. Abuse of discretion is a standard of review.[229] Also, unlike IAC, there are no Supreme Court cases addressing the standard for abuse of discretion claims. For that reason, there is no one definition that governs abuse of discretion claims.[230] There are many ways to articulate this standard.[231] Not only are there different versions of the standard, but there are different situations in which there would be an abuse of discretion. For example, the Ninth Circuit has stated that an abuse of discretion may exist where there is "no evidence on which [a court] rationally could have based that decision,"[232] or even where a court "applies the correct law to facts which are not clearly erroneous but rules in an irrational manner."[233] On the other hand, the Fourth Circuit has stated that abuse of discretion may exist when, "in attempting to exercise discretion, [the sentencing authority fails to] adequately [] take into account judicially recognized factors

226. *Id.* at 249.
227. *Id.* at 251.
228. *Id.* at 252.
229. *See* Kevin Casey et al., *Standards of Appellate Review in the Federal Circuit: Substance and Semantics*, 11 FED. CIR. B.J. 279, 286 (2002) ("The most lenient standard of review is abuse of discretion.").
230. *Id.* at 284 ("Phrases such as . . . 'abuse of discretion' have no intrinsic meaning. It might be better to think of the phrases as defining a mood, rather than a precise formula, because they cannot be precisely defined."); Amanda Peters, *The Meaning, Measure, and Misuse of Standards of Review*, 12 LEWIS & CLARK L. REV. 233, 244 (2009) (noting that despite the fact that the phrase "abuse of discretion" first entered the American legal domain in the late eighteenth and nineteenth centuries, "the term has never been consistently defined").
231. Casey et al., *supra* note 229, at 284 (noting that, despite the lack of one common definition of "abuse of discretion," that "many courts have attempted definitions").
232. Kali v. Bowen, 854 F.2d 329, 331 (9th Cir. 1988).
233. Chang v. United States, 327 F.3d 911, 925 (9th Cir. 2003).

constraining its exercise."[234] These cases demonstrate the many different circumstances and standards for abuse of discretion claims that find themselves floating around the various circuit courts.

II. ANALYSIS

As is demonstrated by Donnell Wilson's case, as well as many of the other cases discussed thus far, there is no standard for how much mitigation is required at sentencing in the context of JLWOP sentencing proceedings.[235] A set standard, however, is required in order to assure that all juvenile defendants receive effective assistance of counsel as is required by the Sixth Amendment and are not disproportionately punished in compliance with the Eighth Amendment.

In Donnell Wilson's case, the Supreme Court for the state of Indiana held that Wilson's appellate counsel "cite[d] only to the American Bar Association guidelines, in effect at the time, applicable to the presentation of mitigation evidence in the *death penalty* context," and that citing to such "simply fail[ed] to establish that it was standard practice among defense counsel to present such expert testimony at a sentencing hearing for a juvenile facing a lengthy term of years sentence."[236] However, this interpretation of the ABA Defense Standards to which Wilson's appellate counsel cited is dangerously narrow. The Supreme Court has only explicitly cited to the ABA Defense Standards in cases considering the appropriateness of the level of investigation into and presentation of mitigation in capital sentencing proceedings. However, the fact that the Supreme Court has not *yet* explicitly cited to the ABA Defense Standards in a case considering the same in JLWOP sentencing proceedings does not mean it does not hold weight in such cases. Indeed, the ABA Defense Standards do not limit themselves to only capital proceedings. What it

234. James v. Jacobson, 6 F.3d 233, 239 (4th Cir. 1993).

235. *See* Fiorillo, *supra* note 84, at 2097 ("Though it is clear that mandatory juvenile life-without-parole sentences are now unconstitutional, the [*Miller*] decision offers little guidance on other important issues."). *Compare* Wilson v. State, 128 N.E.3d 492, 503 (Ind. Ct. App. 2019) (holding that failure to present mitigation evidence did constitute IAC), *with* Wilson v. State, 157 N.E.3d 1163, 1178 (Ind. 2020) (holding that failure to present mitigation evidence did not constitute IAC).

236. Wilson v. State, 157 N.E.3d 1163, 1178 (Ind. 2020). While the court in this case refers to the ABA work it is talking about as "guidelines" with a small-G, it is important to understand that the court is actually referring to the ABA's capital-S Standards. Guidelines and Standards are, in fact, different things.

does say is that "[t]hese Standards are intended to address the performance of criminal defense counsel *in all stages of their professional work*."[237] To interpret these Standards too narrowly would mean that counsel for juvenile offenders is not being held to a high enough standard and raises the risk of disproportionate punishment in violation of the Eighth Amendment.

Following the Supreme Court's decision in *Jones v. Mississippi*, in which the Supreme Court recognized the likelihood of IAC claims in the JLWOP context for failure to investigate and present mitigation evidence, courts are now in a prime position to adopt the same requirements for mitigation evidence in JLWOP proceedings as those that apply in death penalty proceedings. Not only are they in a prime position to do so—everything that the Court has held concerning juvenile sentencing and JLWOP requires as much. The Supreme Court has reiterated the fact that consideration of mitigation is mandatory before imposing a sentence of death for adult offenders or life in prison without the possibility of parole for juvenile offenders.[238] Moreover, the Supreme Court has cited to the ABA Defense Standards time and time again as the reigning standard for how much mitigation is required at death penalty proceedings.[239] It so follows that the same standard for what is required of defense counsel in capital proceedings must apply to JLWOP sentencing proceedings.

Strickland has been applied to JLWOP cases, but unlike in death penalty cases in which the Court has consistently held that the ABA Defense Standards control how much mitigation evidence is required at sentencing, there is no set standard, case, or consensus that addresses how much evidence is required at juvenile sentencing in order to avoid liability under an IAC claim and ensure that a juvenile offender's sentence is proportional in light of any and all mitigating

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237. ABA DEFENSE STANDARDS (emphasis added).

238. *See* Woodson v. North Carolina, 428 U.S. 280, 303–04 (1976) (stating that sentencing schemes that mandate the imposition of the death penalty for certain offenses without taking into consideration potential mitigation evidence are unconstitutional); Miller v. Alabama, 567 U.S. 460, 470, 474–75 (2012) (repeatedly stating that sentencing schemes that mandate the imposition of life in prison without parole on juvenile offenders are unconstitutional because they revoke the sentencing authority's opportunity to consider mitigation evidence and impose a lesser sentence based on that evidence).

239. *See* Rompilla v. Beard, 545 U.S. 374, 387 (2005) (citing the ABA Defense Standards and noting the Court's history of citing to these Standards in other capital cases such as *Strickland v. Washington* and *Wiggins v. Smith*).

factors. Courts come out all sorts of ways on this, requiring different amounts mitigation in JLWOP proceedings. Courts must require the same standards for an investigation into and presentation of mitigation evidence in death penalty proceedings in JLWOP proceedings when considering IAC claims to comport with the requirements of the Sixth and Eighth Amendments and with Supreme Court precedent.

The Supreme Court has said in no uncertain terms that its JLWOP jurisprudence mirrors and flows from its death penalty jurisprudence.[240] Therefore, even if the ABA Defense Standards did apply solely to the death penalty context, Supreme Court precedent still requires that the standards for death penalty proceedings apply to JLWOP proceedings. This was at the core of the *Jones* decision.[241]

First and foremost, the acceptance of the ABA Defense Standards as the standard for how much mitigation evidence is required in JLWOP sentencing proceedings would standardize all courts' analyses of IAC claims in the JLWOP context and guarantee that all juvenile offenders receive the same effective assistance of counsel as is required by the Sixth Amendment. Accordingly, it would ensure that juvenile defense counsel provides enough mitigation evidence in order to defend against disproportionate punishments in violation of the Eighth Amendment. The Supreme Court has emphasized the notion that JLWOP proceedings are "analogous" to death penalty proceedings, establishing that the standards for what mitigation evidence is required at death penalty proceedings should apply to JLWOP proceedings, as well.[242] The prevailing professional norms of juvenile representation also require a heightened standard for the investigation into and presentation of mitigation evidence in JLWOP proceedings.[243] This solution also comports with the "evolving standards of decency" doctrine applicable in evaluating the constitutionality of a particular

240. Drinan, *supra* note 104, at 1812–13.

241. *See supra* notes 141–52 and accompanying text (highlighting the many ways in which the *Jones* Court analogizes death penalty proceedings to JLWOP proceedings).

242. *See* Jones v. Mississippi, 141 S. Ct. 1307, 1319 (2021) (nodding to "this Court's analogous death penalty precedents").

243. *See generally* TRIAL DEFENSE GUIDELINES: REPRESENTING A CHILD CLIENT FACING A POSSIBLE LIFE SENTENCE (CAMPAIGN FOR FAIR SENT'G OF YOUTH 2015) [hereinafter CFSY GUIDELINES] https://cfsy.org/wp-content/uploads/Trial-Defense-Guidelines-Representing-a-Child-Client-Facing-a-Possible-Life-Sentence.pdf [https://perma.cc/JUW2-XSYS] (laying out "a national standard of practice to ensure zealous, constitutionally effective representation for all juveniles facing a possible life sentence," as articulated by professionals and prominent organizations in the juvenile defense field).

punishment under the Eighth Amendment that has been reiterated by the Court in recent years when deciding JLWOP cases. Moreover, the adoption of standards akin to the ABA Defense Standards as the requirement for mitigation in JLWOP sentencing proceedings and standardization of the expectations of juvenile defense counsel would open the door to claims of abuse of discretion.

A. The Sixth Amendment and the Supreme Court's Interpretation of the Sixth Amendment's Right to Effective Assistance of Counsel in Cases Such as Strickland v. Washington *Require Extensive Mitigation Evidence be Presented at JLWOP Sentencing Proceedings*

The explicit adoption of the ABA Defense Standards as the standard for mitigation in JLWOP sentencing proceedings would standardize all courts' analyses of IAC claims. There is currently no standard for how much mitigation is required at sentencing under *Strickland* in the context of juvenile life without parole sentencing proceedings.[244] Following the Supreme Court's decision in *Jones v. Mississippi*, there is a renewed reason to adopt the same requirements for mitigation evidence as are required in death penalty proceedings in JLWOP proceedings when considering claims of IAC for failure to present mitigation evidence of youth and its attendant circumstances at sentencing. It is imperative that the Supreme Court explicitly cite to the ABA Defense Standards—as they have cited to the ABA Defense Standards in death penalty sentencing proceedings—as the standard for what is required of defense counsel in JLWOP sentencing proceedings. This citation is necessary so that courts have clearly defined instructions for the level of mitigation evidence that is required in order for juvenile defense counsel to be deemed effective under the Sixth Amendment and *Strickland v. Washington*. Providing this clear standard will help avoid cruel and unusually disproportionate punishment under the Eighth Amendment.

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244. *See* Fiorillo, *supra* note 84, at 2097 ("Though it is clear that mandatory juvenile life-without-parole sentences are now unconstitutional, the [*Miller*] decision offers little guidance on other important issues.").

1. The Supreme Court has repeatedly reiterated the notion that JLWOP proceedings are "analogous" to death penalty proceedings, establishing that the standards for what mitigation evidence is required at death penalty proceedings should apply to JLWOP proceedings

Life in prison for a juvenile offender is comparable in severity to the death penalty.[245] While *Strickland*, *Williams*, *Wiggins*, and *Rompilla* were all cases involving adult defendants facing death sentences, cases involving juvenile defendants in adult criminal court in which the juvenile faces a sentence of JLWOP have been likened to these death penalty cases time and time again in recent U.S. Supreme Court decisions.[246] Accordingly, the same standards for effective assistance of counsel in capital cases can be and have also been applied to JLWOP cases.[247]

Most recently, in the case of *Jones v. Mississippi*, the Supreme Court stated that JLWOP proceedings are "analogous" to death penalty proceedings.[248] *Jones*, of course, was not the first to make this analogy, considering the Court's robust history of comparing elements of JLWOP proceedings to death penalty proceedings. *Jones* merely adds to this history.[249]

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245. Graham v. Florida, 560 U.S. 48, 69 (2010) (noting that both death sentences and sentences of life in prison without parole "alter[] the offender's life by a forfeiture that is irrevocable").

246. *See* Miller v. Alabama, 567 U.S. 460, 474 (2012) (commenting on the Court's history of comparing JLWOP sentences to a death sentence for juvenile offenders, noting that, among other things, such sentences "share some characteristics with death sentences that are shared with no other sentences" (quoting *Graham*, 560 U.S. at 69)); *see also* Jones v. Mississippi, 141 S. Ct. 1307, 1316 (2021) (emphasizing that "*Miller* held that a sentencer must have discretion to consider youth before imposing a life-without-parole sentence, just as a capital sentencer must have discretion to consider other mitigating factors before imposing a death sentence").

247. *See, e.g.*, Wilson v. State, 128 N.E.3d 492, 497 (Ind. Ct. App. 2019) (applying the two-prong *Strickland* standard to the defendant's IAC claim when defendant was sentenced to JLWOP). *See generally* Siegel, *supra* note 98, at 363 ("As adult capital defendants are entitled to effective assistance of counsel that reflects the special challenges and procedures of capital representation, so must juvenile defendants facing the possibility of life without parole.").

248. *See Jones*, 141 S. Ct. at 1319 (pointing to the Court's "analogous death penalty precedents" as a way to support the conclusion that an on-the-record sentencing explanation is not required at JLWOP sentencing because it is not required at capital sentencing).

249. *See id.* (ruling an on-the-record sentencing explanation is not required for JLWOP sentencing); *see also id.* at 1324 (Thomas, J., concurring) (chronicling the history of the Supreme Court analogizing JLWOP proceedings with proceedings in the capital context, noting that "[a]t one point, for example, *Miller* discussed a line of

The Court in *Jones v. Mississippi* discussed which procedural steps and elements are required when sentencing a juvenile offender to JLWOP.[250] For example, the Court reasoned that "[b]ecause the Constitution does not require an on-the-record explanation of mitigating circumstances by the sentencer in death penalty cases, it would be *incongruous* to require an on-the-record explanation of the mitigating circumstance of youth by the sentencer in life-without-parole cases."[251] While the Court has required that a sentencing authority consider mitigating factors before sentencing a defendant to death, it has never required an on-the-record explanation before doing so.[252] This is exactly what the Court decided is also required in juvenile proceedings in *Miller*.[253] Accordingly, the Court held that, since no on-the-record explanation of how a sentencing authority considered and weighed the mitigating factors in a death penalty case, that such an on-the-record explanation of mitigating factors in a JLWOP case could not be required.[254] Since the sentences themselves share significant similarities, the Court has stated repeatedly that the trial and sentencing procedures do and should share important similarities, too.[255]

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precedents that condition the death penalty on an individualized sentencing process," and how the Court in *Miller* "[r]eason[ed] by analogy" to reach its conclusion).

250. *See id.* at 1316–21 (majority opinion) (holding that, while the discretion to consider mitigation evidence in JLWOP sentencing proceedings is required, an on-the-record explanation of how the sentencing authority considered that evidence is not).

251. *Id.* at 1320–21 (emphasis added).

252. *See id.* at 1320 (noting that, "[i]n a series of capital cases over the past 45 years, the Court has required the sentencer to consider mitigating circumstances when deciding whether to impose the death penalty . . . . But the Court has never required an on-the-record sentencing explanation . . . regarding those mitigating circumstances," using this as its justification in declining to require such an explanation now in the JLWOP context); *see also* Woodson v. North Carolina, 428 U.S. 280, 304–05 (1976); Lockett v. Ohio, 438 U.S. 586, 606–08 (1978); Eddings v. Oklahoma, 455 U.S. 104, 112–17 (1982). None of these capital cases require the sentencing authority to make any statement or on-the-record explanation of any finding regarding mitigation evidence, requiring only that such evidence be available for said sentencing authority to consider.

253. Miller v. Alabama, 567 U.S. 460, 475–76 (2012).

254. *Jones*, 141 S. Ct. at 1319 ("We reject Jones's alternative argument because an on-the-record sentencing explanation with an implicit finding of permanent incorrigibility . . . is not required by or consistent with this Court's analogous death penalty precedents . . . .").

255. *See* Graham v. Florida, 560 U.S. 48, 69–70 (2010) (highlighting the similarities between death sentences and JLWOP); *Miller*, 567 U.S. at 475 (noting how the *Graham*

Another parallel that the *Jones* Court draws between capital proceedings and JLWOP proceedings is between IAC claims in both capital cases and JLWOP cases.[256] While courts had been applying *Strickland* in the JLWOP context for a while, *Jones* was the first case in the Supreme Court's line of JLWOP cases to mention such a phenomenon.[257]

Other requirements of JLWOP proceedings that the Court has derived from death penalty proceedings precedent include the need for an individualized sentencing scheme in which mitigating factors can be considered before imposing a sentence to comport with the Eighth Amendment,[258] and that no formal finding of fact concerning a defendant's incorrigibility be required before imposing such a sentence.[259] While the Court has noted that it intends to "limit the scope of any attendant procedural requirements to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems,"[260] the simple fact is that some procedural

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Court analogized death sentences to life sentences for juvenile offenders and holding that this "demand[s] individualized sentencing" in JLWOP sentencing proceedings); *Jones*, 141 S. Ct. at 1315–16 (further noting that the Court has unequivocally held that an individualized sentencing scheme is required in both capital sentencing proceedings as well as JLWOP proceedings).

256. *Jones*, 141 S. Ct. at 1319, n.6 ("If defense counsel fails to make the sentencer aware of the defendant's youth, it is theoretically conceivable . . . the defendant may have a potential ineffective-assistance-of-counsel claim . . . .").

257. *See id.*

258. *Miller*, 567 U.S. at 483; *see also* Betsy Wilson & Amanda Myers, *Accepting* Miller*'s Invitation: Conducting a Capital-Style Mitigation Investigation in Juvenile-Life-Without Parole Cases*, CHAMPION (Apr. 2015), https://www.sagemitigation.com/uploads/1/1/7/0/117015214/final_wilson_myers_accepting_millers_invitation_april_2015_04012015_730_art_copy.pdf [https://perma.cc/TD3Q-4Q7P] ("As with death sentences in adult cases, a sentence of life without parole may be imposed on a juvenile only after an individualized sentencing procedure that allows the sentencer to take into account the unique characteristics of youth and the defendant's particular life circumstances."). This was the primary takeaway from the Court's citation to the cases of *Woodson v. North Carolina*, 428 U.S. 280 (1976), *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

259. *Jones*, 141 S. Ct. at 1315–16.

260. Montgomery v. Louisiana, 577 U.S. 190, 211 (2016). It is important to note that the majority in *Montgomery* emphasized the substantive nature of the Court's decision in *Miller v. Alabama*, but it would be naïve to say that *Miller* did not also mandate an important procedural element in requiring and individualized sentencing scheme when sentencing juveniles to JLWOP. *See id.* at 225 (Scalia, J., dissenting) (arguing that the "new, youth-protective procedure prescribed by *Miller*" is not a substantive one at all). In this way, the best way to understand the Court's holding in

requirements must be imposed in order to ensure compliance with the Constitution. The procedures required at sentencing in cases where JLWOP is on the table are increasingly reflecting that of capital sentencing.

The Court's interpretation of the Constitution now requires that the same standards for the investigation into and presentation of mitigation evidence at sentencing in the JLWOP context mirror that of sentencing in the capital context. The ABA Defense Standards are well-known to attorneys everywhere.[261] These standards make determining whether defense counsel's decision to do something such as abandon an investigation into possible mitigation evidence relating to his client pre-trial constitutes ineffective assistance of counsel in death penalty proceedings much more straightforward and guided. These standards do exactly what they are supposed to do: faithfully guide courts to make consistent, fair, equitable judgements about what constitutes ineffective assistance of counsel in a case. The Supreme Court of Indiana in *Wilson v. State* declined to follow the ABA Defense Standards and followed no other concrete set of standards or guidelines in concluding that counsel was not ineffective for failing to investigate and present mitigation evidence at sentencing.[262] This holding is contrary to everything that the Supreme Court has said about juvenile sentencing. The Court has compared almost every other aspect of JLWOP sentencing to sentencing in capital proceedings. It makes little sense to begin to differentiate between the two now. In order to standardize the level of investigation into and presentation of mitigation evidence in JLWOP proceedings, it is imperative the courts follow standards such as the ABA Defense Standards.

Miller in light of the interpretation of that holding in *Montgomery* is to accept that there is both a substantive element (mandating that life without the possibility of parole is unconstitutional for most juvenile offenders, and thus places a categorical bar on a class of offenders) and a procedural element (mandating that a sentencing authority follow a certain process of considering the characteristics of juvenile offenders before imposing a particular sentence). *See* Siegel, *supra* note 98, at 364 (noting that, after *Graham* and *Miller*, "any future cases that could possibly result in a juvenile facing LWOP will . . . require different procedures," making *Miller*'s holding "more than simply a substantive limit on sentencing").

261. *See* Siegel, *supra* note 98, at 372 (noting how the Supreme Court "has long recognized the ABA performance standards, though not law, are 'guides' concerning competent representation" for counsel in death penalty proceedings).

262. *See* Wilson v. State, 157 N.E.3d 1163, 1178 (Ind. 2020) (nodding to the ABA Defense Standards but holding that they did not govern in that case).

It is important to note that another option for the courts in terms of adoption of standardized guidelines for mitigation evidence in JLWOP proceedings would be to explicitly adopt guidelines such as those proffered by the Campaign for the Fair Sentencing of Youth (CFSY).[263] The CFSY Trial Defense Guidelines: Representing a Child Client Facing a Possible Life Sentence (CFSY Guidelines) are geared specifically towards the defense of juvenile offenders facing extreme sentences such as JLWOP and have emerged and were built largely on the standards set forth by the ABA.[264] In its introduction, the CFSY Guidelines nod to the ABA specifically.[265] The CFSY Guidelines go into great depth to explain the level of investigation into and presentation of mitigation evidence at sentencing.[266] They require that a mitigation specialist be sought out and retained almost immediately in order to help build a "comprehensive and cohesive mitigation case."[267] In terms of sentencing, they require:

> Defense counsel's mitigation presentation at sentencing should include, but is not limited to: the circumstances of the offense, including the extent of the child client's participation and the impact of peer and familial pressure; incompetencies associated with youth, including the child client's inability to deal with police officers, prosecutors, or defense counsel; the child client's reduced culpability due to age and capacity for change; and other relevant life history identified during the mitigation investigation.[268]

In this way, the CFSY Guidelines reflect many of the same values and requirements as capital trial and sentencing guidelines.[269] However,

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263. *See generally* CFSY GUIDELINES, *supra* note 243.

264. *See* Dana Cook et al., Miller, Montgomery, *and Mitigation: Incorporating Life History Investigations and Reentry Planning into Effective Representation for 'Juvenile Lifers'*, CHAMPION (Apr. 2017), https://ysrp.org/wp-content/uploads/2017/05/Cook_Fine_Adjoian_April_2017_The_Champion-1.pdf [https://perma.cc/8XFG-8ASE] ("Building on the ABA Guidelines, in March 2015, the Campaign for the Fair Sentencing of Youth (CFSY) released the first-ever guidelines for attorneys representing children who face sentences of life in prison without the possibility of parole."). The CFSY Guidelines are modeled after the ABA Guidelines and are amended only slightly to specifically and more appropriately apply to juvenile cases.

265. CFSY GUIDELINES, *supra* note 243, at 5 n.2.

266. *See generally id.*

267. *Id.* at 19.

268. *Id.* at 20.

269. *See id.* at 5 n.2 (stating that "[a]spects of these guidelines will be relevant to transfer hearings and for children facing other extreme sentences," noting that related guidance can be located in the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases).

the likelihood that courts would go out of their way to adopt 1) guidelines proffered by an organization other than the ABA, and 2) "guidelines" and not weightier "standards" is less likely than an adoption of ABA Defense Standards, which is why that is the recommendation of this Comment.[270]

2. The "prevailing professional norms" of juvenile representation require a heightened standard for the investigation into and presentation of mitigation evidence in JLWOP proceedings

The "prevailing professional norms" of juvenile defense hold counsel to a higher standard when representing a juvenile offender who is facing a possible sentence of JLWOP. This "prevailing professional norms" language comes from the Supreme Court case of *Strickland v. Washington*, where the Court held that "[t]he proper measure of attorney performance remains . . . reasonableness under prevailing professional norms."[271] This heightened standard for the presentation of mitigation evidence in JLWOP sentencing proceedings is widely recognized as the "prevailing professional norms" amongst the community of litigators who actually represent juveniles in JLWOP cases.[272] In fact, extensive investigation into and presentation of mitigation evidence at sentencing is becoming the norm in all criminal sentencing, not just JLWOP sentencing.[273] This is especially relevant in juvenile sentencing.[274] Litigators across the country recognize the

270. Thank you to Professor Patricia Puritz, my esteemed mentor and advisor, for illumination on this important point.

271. Strickland v. Washington, 466 U.S. 668, 688 (1984).

272. *See* Beth Caldwell, *Appealing to Empathy: Counsel's Obligation to Present Mitigating Evidence for Juveniles in Adult Court*, 64 ME. L. REV. 391, 410 (2012) ("The type of mitigating evidence counsel is required to present in the sentencing phase for capital cases is the same type of evidence courts typically consider in sentencing juvenile offenders, further reinforcing the similarities between capital sentencing and sentencing of juvenile offenders.").

273. *See* Miriam S. Gohara, *Grace Notes: A Case for Making Mitigation the Heart of Noncapital Sentencing*, 41 AM. J. OF CRIM. L. 41, 57–62 (2013) (arguing that the "robust capital mitigation practice required by today's prevailing professional capital defense norms" should apply to noncapital sentencing, citing to Supreme Court dicta as well as the ABA Defense Standards).

274. *See* Caldwell, *supra* note 272, at 410 ("Professional standards for the representation of juvenile offenders generally provide that presenting mitigating evidence is a critical aspect of effectively representing this population.").

importance of extensive investigation into and presentation of mitigation evidence at JWLOP proceedings.[275]

While the CFSY Guidelines previously mentioned in this Comment may not be adoptable as standards themselves like the ABA Defense Standards are, they are one more reason and resource that indicate the fact that extensive investigation into and presentation of mitigation evidence is the norm for juvenile defense counsel in JLWOP proceedings. Indeed, the CFSY Guidelines were "drafted in close collaboration with attorneys and advocates from across the nation" that recognize this.[276] Not only did almost forty attorneys and advocates draft the CFSY Guidelines, but more than forty national, state, and local organizations—including public defender offices, associations of criminal defense lawyers, and more—from nineteen states additionally endorsed the Guidelines.[277] Highly renowned national organizations that also endorsed the Guidelines include the NAACP Legal Defense Fund, National Juvenile Defender Center, and Juvenile Law Center.[278] As the CFSY notes on their website, these endorsements demonstrate not only that the CFSY Guidelines represent the prevailing professional norms of juvenile defense, but also the "very real need for national standards for the representation" of juvenile offenders facing JLWOP.[279]

In this way, the CFSY Guidelines, if nothing else, serve as a resource that represents the prevailing professional norms within the legal community that expect extensive mitigation evidence be presented in JLWOP proceedings. This is one fact that courts cannot ignore.

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275. *See, e.g.*, LA. ADMIN. CODE tit. 22, § 2127 (2017) ("This investigation [done in preparation for the juvenile offender's sentencing] should comprise extensive and ongoing efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence or argument that may be offered by the prosecutor."). The Louisiana Administrative Code is available for free on the Louisiana Public Defender Board's website and exquisitely exemplifies what is expected of juvenile defense counsel in JLWOP proceedings. *See id.*

276. *Defense Guidelines*, CAMPAIGN FOR FAIR SENT'G OF YOUTH, https://cfsy.org/media-resources/defense-guidelines [https://perma.cc/QLZ6-HBJE].

277. *Guidelines Endorsements*, CAMPAIGN FOR FAIR SENT'G OF YOUTH, https://cfsy.org/media-resources/defense-guidelines/guidelines-endorsements [https://perma.cc/CC2X-2JF7].

278. *Id.*

279. *Id.*

B. The "Evolving Standards of Decency" Doctrine of the Eighth Amendment Supports the Adoption of Standards that Prioritize Heightened Mitigation in JLWOP Proceedings

The Eighth Amendment states that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[280] The "evolving standards of decency" doctrine has been applied when determining whether a particular punishment violates the Eighth Amendment's prohibition on cruel and unusual punishment, both in the capital and the JLWOP context.[281] Every notable case that has addressed JLWOP has cited this doctrine.[282] By considering the cruelty of punishments through this lens, the standard for what constitutes cruel and unusual punishment is given room to evolve and reflect the moral compass of our society as a whole.[283]

The "prevailing professional norms" and "evolving standards of decency" doctrines are closely intertwined. Surely, as our society grows, so must the expectations to which we hold our attorneys grow, as well. As society reconsiders what constitutes cruel and unusual punishment, so must the legal profession metamorphose in order to guarantee that it provides representation at a level that defends against the imposition of cruel and unusual punishment.

It follows that ineffective counsel as has been outlined by the Sixth Amendment and *Strickland*—when found in a JLWOP case, especially—could result in a judgement or punishment that is considered cruel and unusual. Indeed, without an adequate investigation into and presentation of mitigation evidence at sentencing, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would . . . be[]

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280. U.S. CONST. amend. VIII.

281. *See* Graham v. Florida, 560 U.S. 48, 58 (2010) ("To determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to 'the evolving standards of decency that mark the progress of a maturity society.'" (quoting Estelle v. Gambelle, 429 U.S. 97, 102 (1976))).

282. *See id.*; *see also* Miller v. Alabama, 567 U.S. 460, 469 (2012) ("As we noted the last time we considered life-without-parole sentences imposed on juveniles, '[t]he concept of proportionality is central to the Eighth Amendment.' And we view that concept . . . according to the 'evolving standards of decency.'") (citations omitted).

283. *See Graham*, 560 U.S. at 58 (explaining how this standard must change "as the basic mores of society change" (quoting Kennedy v. Louisiana, 554 U.S. 407, 419 (2008))).

different."[284] Thus, when courts ignore mitigation evidence in a JLWOP proceeding that could have resulted in the juvenile offender receiving a lower sentence, the longer sentence that a juvenile receives may be considered cruel and unusual punishment according to the language of *Miller*.[285]

The "evolving standards of decency" also reflect important policy considerations. It is impossible to address the sentencing of juvenile offenders without touching on such policies surrounding punishments that are considered cruel and unusual when it is a child that is being punished. This notion in policy considerations that "youth matters" has been stressed over and over again by the U.S. Supreme Court.[286]

C. The Adoption of the Same Standards for Mitigation Required in Death Penalty Proceedings as the Standard for Mitigation in JLWOP Sentencing Proceedings and the Standardization of the Expectations of Juvenile Defense Counsel Would Open the Door to Claims of Abuse of Discretion

If there is a set, accepted standard for how much mitigation evidence is required at sentencing in the JLWOP context, having that standard could not only ensure more guided, consistent, and uniform IAC claims, but could also open the door to the possibility of claims of abuse of discretion at sentencing, too. For example, on appeal, one could argue that a sentencing authority abused its discretion by imposing a sentence "not justified by the evidence."[287]

There are no constitutional provisions nor any Supreme Court cases addressing the correct standard for abuse of discretion claims, so there is no single, set test for deciding such claims.[288] There are many ways courts have articulated this standard, and many different situations in which a court would find an abuse of discretion.[289] For example, abuse

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284. Rompilla v. Beard, 545 U.S. 374, 390 (2005) (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984)).

285. *See Miller*, 567 U.S. at 473 (noting that *Graham*'s core holding was that "youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole" for juveniles, and that failure to give adequate consideration to that youth could "render a life-without-parole sentence disproportionate" (citing *Graham*, 560 U.S. at 71–74)).

286. *See, e.g.*, Jones v. Mississippi, 141 S. Ct. 1307, 1316 (2021) ("*Miller* cited *Roper* and *Graham* for a simple proposition: Youth matters in sentencing.").

287. Rabkin v. Or. Health Scis. Univ., 350 F.3d 967, 977 (9th Cir. 2003).

288. Peters, *supra* note 230, at 244 (pointing out that "abuse of discretion" has "never been consistently defined").

289. *See* Casey et al., *supra* note 229, at 284 (noting that "many courts have attempted defin[ing]" the abuse of discretion standard).

of discretion may exist where there is "no evidence on which [a court] rationally could have based that decision";[290] a court "in attempting to exercise discretion, [fails to] adequately [] take into account judicially recognized factors constraining its exercise";[291] or a court even "applies the correct law to facts which are not clearly erroneous but rules in an irrational manner."[292] Notwithstanding the "definition" promulgated by any particular court, appellate counsel can take these definitions and make a colorable claim that a sentencing authority's decision to sentence a juvenile offender to JLWOP goes against any one of these definitions in a particular case.

Given the fact that there is no single, reigning Supreme Court decision specifically defining abuse of discretion, coupled with Circuit Courts' various definitions of their own—all of which can be applied either more conservatively or more liberally—there is room to gain traction in this area. This can be done by alleging that a sentencing authority abused its discretion in ignoring mitigation evidence, failing to give counsel a chance to address factors in mitigation, or simply sentencing a juvenile offender to JLWOP when there is a case to be made that that decision was unreasonable.

In *Wilson v. State*, Donnell Wilson's appellate counsel considered raising an abuse of discretion argument, but decided not to pursue that claim in Wilson's case because the trial court did mention Wilson's young age at sentencing several different times.[293] However, other state cases that have considered IAC claims for defense counsel's failure to investigate and present mitigation evidence have similarly touched on the possibility of abuse of discretion claims.[294] Moreover, while Wilson's counsel decided that an abuse of discretion claim was not likely to be successful, this argument has been successful in other cases, and in recent cases no less.[295]

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290. Kali v. Bowen, 854 F.2d 329, 331 (9th Cir. 1988).

291. James v. Jacobson, 6 F.3d 233, 239 (4th Cir. 1993).

292. Chang v. United States, 327 F.3d 911, 925 (9th Cir. 2003).

293. Katie Stancombe, *Teen Convicted of Murder Wins Resentencing Due to Ineffective Counsel*, IND. LAW. (June 27, 2019), https://www.theindianalawyer.com/articles/50712-teen-convicted-of-murder-wins-resentencing-due-to-ineffective-counsel [https://perma.cc/76YS-P7TT].

294. *See* State v. Majors, 940 N.W.2d 372, 376 (Iowa 2020) ("In this appeal, we must decide whether the district court abused its discretion . . . and whether defense counsel provided constitutionally deficient representation.").

295. *See e.g.*, State v. Haag, 495 P.3d 241 (Wash. 2021).

For example, in Timothy Haag's case, counsel succeeded on an abuse of discretion claim.[296] Timothy Haag was sentenced to life in prison in 1995 for a crime he committed when he was seventeen years old.[297] Following the U.S. Supreme Court's decision in *Miller*, Haag received a resentencing hearing in 2018, after which he was resentenced to forty-six years to life.[298] The Supreme Court of the state of Washington stated that the resentencing authority's finding of fact concerning mitigation evidence pertaining to Haag's rehabilitation at Haag's *Miller* resentencing hearing "lacked substantial evidence, amounting to an abuse of discretion."[299] Since Haag had been incarcerated, he had received his high school diploma, worked in the prison chapel, and converted to Christianity, and generally displayed good behavior.[300] The court held that the resentencing judge's ignorance of this mitigation evidence of rehabilitation and good behavior was an abuse of discretion that warranted a new resentencing hearing.[301] The court unanimously concluded that the resentencing authority "abused its discretion because its finding lacked substantial evidence that Haag had not overcome the factors that led to the murder" for which he was convicted.[302] In conclusion, the court found that the mitigating factors present in Haag's case so far outweighed the aggravating factors that the court's decision to resentence him to a de facto life sentence was indeed an abuse of discretion.[303] Therefore, Timothy Haag's case sheds light on what might have happened had Donnell Wilson's sentencing authority not acknowledged Wilson's young age as many times as it did at sentencing and Wilson's counsel decided to pursue an abuse of discretion claim.

Accordingly, if there is evidence that the sentencing authority has not adequately considered a defendant's youth and sentenced that defendant to an unreasonably long or disproportionate sentence, one can allege that the sentencing authority abused its discretion. While this is not a commonly pursued claim for appellate counsel to argue in this context, it is gaining traction and could gain more in the wake of the Supreme Court for the state of Washington's decision in the *Haag*

296. Johnson, *supra* note 13.
297. *Haag*, 495 P.3d at 243.
298. *Id.*
299. *Id.* at 249.
300. Johnson, *supra* note 13.
301. *Id.*
302. *Haag*, 495 P.3d at 251.
303. *Id.*

case. It has been successful and could be successful in more cases like Timothy Haag's.

CONCLUSION

Donnell Wilson is now twenty-five years old. He has served seven years of his life sentence.[304] The Supreme Court of Indiana has said that this new sentence means that, if Wilson demonstrates good behavior, he will be eligible for parole in his 60's,[305] turning a blind eye to the reality that Donnell Wilson's chances of seeing his 60's are slim to none.[306] The harsh truth is that, in all likelihood, Donnell Wilson will die in prison for a crime he committed before he was old enough to buy a lottery ticket.

Youth matters. By adopting the standards applicable to death penalty proceedings for the investigation into and presentation of mitigation evidence in JLWOP proceedings, as is outlined by the ABA Defense Standards and reinforced and elaborated upon by the CFSY Guidelines, courts will resolve each one of these issues previously mentioned and prove that youth does matter at sentencing. Courts will reflect the notion iterated in *Jones* that JLWOP proceedings are and should be analogous and congruent to capital proceedings. Courts will also follow the prevailing professional norms of juvenile representation and will demonstrate the "evolving standards of decency" that require more rigorous investigation into and presentation of mitigation evidence at sentencing to fight for lesser sentences for juveniles convicted in adult criminal court. Finally, the adoption of the ABA Defense Standards in JLWOP proceedings, and the subsequent standardization of juvenile representation and mitigation investigations will open the door to the possibility of abuse of discretion claims for a sentencing authority's failure to consider the

304. Only ninety-three to go.

305. Dan Carden, *Supreme Court Resentences Gary Man for Two Murders He Committed as a Teenager*, NWI TIMES (Nov. 23, 2020), https://www.nwitimes.com/news/local/crime-and-courts/supreme-court-resentences-gary-man-for-two-murders-he-committed-as-a-teenager/article_7c72d1e2-5c2f-56d3-811b-5ed4f51bbab2.html#tncms-source=login.

306. In 2016, the average life expectancy for male prisoners was 57 years old, compared to the average life expectancy for males in the United States as a whole of 76 years old. *See* Lisa Fitch, *Prison Reforms Should Recognize Inmate Deaths*, OUR WEEKLY (Oct. 18, 2019, 12:00 AM), http://ourweekly.com/news/2019/oct/18/prison-reform-should-recognize-inmate-deaths [https://perma.cc/CXC6-P95N]. According to these statistics, Wilson will likely never know life outside of prison.

mitigation evidence presented to it properly, as was demonstrated by *State v. Haag*.

In conclusion, highly renowned organizations like the ABA—a national association of attorneys and one of the world's largest and most respected legal non-profit organizations—as well as the CFSY—a national non-profit dedicated to reforming the juvenile legal system—have already done the heavy lifting when it comes to outlining what the expectations should be of juvenile defense counsel in JLWOP cases. The simplest option is for courts to now outright adopt those standards and requirements for how much mitigation is required in JLWOP proceedings. Following *Jones*, this is the only constitutional way forward.