BORDEN, J., dissenting. On May 17, 2010, the United States Supreme Court decided the case of *Graham* v. *Florida*, U.S. , 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010), holding that it is cruel and unusual punishment[1] to sentence a person who committed a nonhomicide offense, when he was younger than age eighteen[2] at the time of the crime, to a life sentence without the possibility of parole. Id., 2030. The court also held that, in such circumstances, the state must afford the person so sentenced a meaningful opportunity to be heard in the future[3] to establish that his sentence be modified or that he be released because he had matured and had overcome the mental, psychological and environmental deficits that the court identified as attendant to juveniles. Id. I refer herein to these future proceedings as the *Graham* "second look" requirement. These holdings were based on a body of science regarding the juvenile brain[4] that the court considered as reliable and authoritative. Id., 2026–27.

On June 25, 2012, the Supreme Court decided the case of *Miller* v. *Alabama*, U.S. , 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). As I read *Miller*, in contrast to the cramped reading by the majority, the Supreme Court, based on the science and reasoning of *Graham*, expanded the reach of *Graham* to life sentences without the possibility of parole for homicide cases as well, and also concluded that a life sentence without the possibility of parole for a juvenile convicted of a homicide offense was cruel and unusual punishment. Id., 2469. In contrast, however, to the "second look" remedy in *Graham*, namely, a hearing at some time in the future, the remedy imposed by the court in *Miller* was an actual resentencing now, at which the sentencing court is required to take into account the differences, identified by that body of science, between the juvenile and adult brains. *Miller* v. *Alabama*, supra, 2475.

In the present case, the defendant, Ackeem Riley, was born on June 18, 1989. On November 17, 2006, when he was a seventeen year old juvenile, he committed the crimes of murder, attempted murder, assault in the first degree and conspiracy to commit murder. On May 5, 2009, when he was not quite twenty years old, he received for those crimes an effective sentence of 100 years of incarceration without the possibility of parole, guaranteeing that he will die in prison. Moreover, he will die in prison without the sentencing court having taken into account the available science regarding the juvenile brain, and without any future review, based on that science, of the possibility of his having matured and rehabilitated himself. As I will explain, that sentence constitutes cruel and unusual punishment, as explicated in *Miller*.

The majority concludes to the contrary, holding that the sentence is valid under *Miller* and, accordingly, must stand. In my view, the majority's reading of *Miller* is a misreading. It ignores the reasoning of *Miller* related to the science regarding the juvenile brain on which it, and its progenitor, *Graham*, are based. It ignores the instruction of *Miller* that, in imposing such a sentence on a juvenile, the court must take into account the qualitative differences between the juvenile and adult brains that the science tells us exist. Id., 2469. Finally, the majority ignores the reasoning of *Miller* that mandates, based on *Graham*, that every juvenile given a life sentence without the possibility of parole must at some time in the future be afforded a "second look," namely, a meaningful opportunity to be heard to establish that his sentence be modified or that he be released because he had matured and had overcome the mental, psychological and environmental deficits that the court identified as attendant to the juvenile brain. *Graham* v. *Florida*, supra, 130 S. Ct. 2030. I therefore dissent.

I conclude, instead, that the defendant's sentence constitutes cruel and unusual punishment under the eighth and fourteenth amendments. I conclude further that he must now be resentenced in accord with *Miller*, and that the sentence must include a provision that, at some time in the future, he be given the "second look" opportunity that *Miller* and *Graham* require.

I

THE SENTENCING IN THE PRESENT CASE

As the majority accurately represents, the sentencing proceeding in this case followed a pattern that, prior to *Miller*, would have been relatively unremarkable for a case of this seriousness. And that is precisely because it took place prior to both *Miller* and *Graham*. In sum, the trial court read the presentence investigation report, heard argument from the state, heard from the mother of the victim who had died and the mother of one of the other victims, heard from the defendant's counsel, but not from the defendant, who chose not to address the court, and put its reasons for its sentence on the record.

The state asked for a sentence of 120 years so that the defendant would never again be free because, in its view, he was beyond the pale of possible rehabilitation. The state based this request on the facts of the case—namely, that the defendant had participated in a drive-by shooting that resulted in the death of one innocent victim and grievous injuries to two other innocent victims—and on the fact that, some weeks after this incident, the defendant was involved in the shooting of two victims, paralyzing one of them. The presentence investigation report includes information about the defendant's family, upbringing, physical and mental health and education. The defendant's counsel referred

to some of the material in the presentence investigation report, characterizing it as "[f]airly unremarkable."[5] Regarding the case itself, counsel told the court that, because the defendant maintained his innocence and intended to appeal, "it's rather difficult for an individual who maintains his innocence to . . . express any remorse or sympathy or empathy for something that he claims he did not do." Counsel asked the court to consider the defendant's age and the fact that he had "little or no prior involvement in the criminal justice system . . . in meting out punishment that you feel is appropriate."

The court then placed its reasons for its sentence on the record. It first noted that, as the state had argued, the victims were "innocent, blameless young guys minding their own business, hadn't hurt anyone, weren't involved in any gang activity, didn't use drugs, didn't bother anybody, just teenagers." The court then noted the effect on the victims and their families, and that the defendant, "for whatever reason, which I cannot figure out, other than he lived in a different neighborhood than other people, decided that it would be okay to drive by . . . and shoot many times with a semiautomatic weapon into a large group of teenagers just relaxing in front of a house not bothering anybody. The senselessness of that is mind-boggling."

Next, the court adverted to the strength of the state's case, namely, eyewitness identifications and corroborating evidence. In addition, the court noted "the terror experienced by people who live in Hartford," likened it to living with the worry "about a roadside bomb," and stated that the defendant "should be treated like a terrorist." Turning to the presentence investigation report, the court agreed that it was "pretty unremarkable. There's no reason or excuse for him being here." The court noted the defendant's relatively stable family, that he "had all the opportunities . . . to do whatever he wanted to do and become whatever he wanted to become. And he chose to become a murderer."

Finally, the court addressed the defendant. The court stated: "I have very little sense of [the defendant] except what was described during the trial. He was well behaved during the trial; never said a word. Did not testify; I don't know what his voice sounds like. So, I have very little sense of the type of person he is except for what he did on this day and [for] that, that's what I have to sentence him for." The court then, exercising its sentencing discretion, imposed the effective sentence of 100 years, which, as the majority accurately states, amounts to a sentence of 100 years without the possibility of parole that ensures that the defendant will die in prison.

II

THE MAJORITY OPINION

I briefly turn, next, to the majority opinion. Its gist is as follows: "To summarize our view of the holding in *Miller*, it is clear that the majority in *Miller* was principally concerned with 'sentencing *scheme*[*s*] that [mandate] life in prison without possibility of parole for juvenile offenders'—these statutory schemes were deemed contrary to the eighth amendment. [(Emphasis in original.) *Miller* v. *Alabama*, supra, 132 S. Ct. 2469]. It is equally apparent that life without parole sentences still can be imposed pursuant to an individualized sentencing process, where the sentencing 'judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.' Id., 2475; see also id., 2469. There may be some ambiguity as to whether such sentencing procedures must simply afford juvenile defendants the opportunity to present mitigating evidence, or whether sentencing authorities are 'require[d] . . . to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.' Id., 2469. We believe that *Miller*, which invalidated two sentencing schemes in which the sentencing courts had no discretion, and in which the defendants were unable to present any evidence in mitigation, requires only the opportunity to present such evidence to a court permitted to consider it, and to impose a lesser sentence in its discretion."

Thus, the majority reads *Miller* as doing no more than invalidating a *mandatory* sentence of life without parole on a juvenile. The majority finds an "ambiguity" regarding whether, under *Miller*, "such sentencing procedures must simply afford juvenile defendants the opportunity to present mitigating evidence, or whether sentencing authorities are 'require[d] to . . . take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.' " And the majority resolves this—in my view, self-created—ambiguity in favor of simply affording the juvenile defendant the opportunity to present mitigating evidence that the court must consider.

Thus, in the majority's view, so long as the defendant has the opportunity to present and the court is required to consider mitigating evidence, and the court has the discretion to impose a lesser sentence than life without parole—as both the defendant and the court unquestionably did in the present case—the sentence that will doom a juvenile to die in prison is perfectly valid under *Miller* and the eighth amendment. This is a gross misreading of *Miller*. To show why, I begin with *Graham*.

III

GRAHAM

In *Graham*, the United States Supreme Court considered whether the eighth amendment permits the sentencing of juveniles convicted of nonhomicide offenses

to life without parole. *Graham* v. *Florida*, supra, 130 S. Ct. 2024. Terrance Jamar Graham, who was sixteen at the time, along with three other youths attempted to rob a restaurant but fled after Graham's accomplice assaulted the restaurant manager. Id., 2018. Initially, under a plea agreement, Graham received probation for the crimes of armed burglary and attempted armed robbery. Id. One month short of his eighteenth birthday, however, Graham violated the terms of his probation by committing additional crimes. Id. Thereafter, Graham was sentenced to life without the possibility of parole for the armed burglary and fifteen years for the attempted armed robbery. Id., 2020.

On appeal to the United States Supreme Court, the court held: "The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term." Id., 2034. In other words, the state must "give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Id., 2030.

In *Graham*, the court relied heavily on its earlier findings in *Roper* v. *Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005),[6] regarding the lessened culpability of juveniles. Those findings, drawn from significant scientific and sociological studies, showed that juveniles lack maturity, have an underdeveloped sense of responsibility, are particularly vulnerable to outside influences such as peer pressure, and possess an underdeveloped mental character. Id., 569–70. The court in *Graham* reasoned that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds." *Graham* v. *Florida*, supra, 130 S. Ct. 2026. Thus, the court concluded that due to their reduced culpability, juveniles are categorically "less deserving of the most severe punishments." Id.

The court in *Graham* took the same categorical approach to its evaluation of the severity of life without parole as it had done in *Roper* regarding the death penalty. But rather than focusing on the nature of the offense—as it had previously done in eighth amendment challenges where the death penalty was not at issue—the court's analysis centered on the characteristics of the juvenile offender, the same approach that it used in both *Roper* and *Atkins* v. *Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002),[7] to invalidate the death penalty for an entire class of offenders. In evaluating the severity of the sentence, the court recognized that life without parole shares certain characteristics with the death penalty that no other sentences share. Specifically, life without parole "alters the

offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration . . . ." *Graham* v. *Florida*, supra, 130 S. Ct. 2027. The court also pointed out that this sentence is "especially harsh" for juveniles because, inevitably, a juvenile sentenced to life without parole will spend more time behind bars than his or her adult counterpart will spend. Id., 2028.

In examining the penological justifications for a sentence of life without parole, the court concluded that the diminished culpability of juveniles undermines the legitimacy of deterrence, retribution, incapacitation and rehabilitation as justifiable goals for these sentences. Id., 2030. Deterrence is premised on the belief that one evaluates the consequences of one's actions, but the court said that because juveniles lack the maturity to consider such consequences, the deterrence effect is rendered impotent. Id., 2028–29. Similarly, in the court's view, retribution is not justified because invoking the "second most severe penalty on the less culpable juvenile nonhomicide offender" is not proportionate. Id., 2028. With regard to incapacitation, the court reasoned that "[t]o justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible. The characteristics of juveniles make that judgment questionable." Id., 2029. Thus, the court forbade trial courts from making this sort of determination at the outset of a juvenile's sentence. Id. Finally, the concept of rehabilitation could not be used to justify the sentence because, by its very nature, the sentence repudiates the key principle of rehabilitation. Id. Accordingly, "[b]ecause [t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood," the court held that "those who were below that age when the offense was committed may not be sentenced to life without parole for a nonhomicide crime." Id., 2030.

The present case was argued on January 12, 2012. At that time, *Graham* was the only governing United States Supreme Court precedent, and our own Supreme Court squarely had held that it was constitutional to impose a sentence of life without the possibility of release on a juvenile for the commission of a capital felony. *State* v. *Allen*, 289 Conn. 550, 581–86, 958 A.2d 1214 (2008). In *Allen*, although the court recognized that "persons under the age of eighteen differ from adults in terms of their culpability and moral responsibility"; id., 581; it read *Roper* as implicitly sanctioning a sentence of life without parole as "an acceptable alternative to death as a punishment for juveniles who committed intentional [m]urder in the [f]irst [d]egree . . . ." (Internal quotation marks omitted.) Id., 584. Thus, the legal landscape seemed strongly to suggest the following: *Graham* was limited to nonhomicide offenses—which the present case is not—and *Allen* seemed to sanction the sentence

imposed in the present case for murder and attempted murder.

Nonetheless, we were informed that the United States Supreme Court had granted certiorari in *Miller* and a companion case; *Jackson* v. *Norris*, 378 S.W.3d 103 (Ark. 2011), cert. granted sub nom. *Jackson* v. *Hobbs*, U.S. , 132 S. Ct. 548, 181 L. Ed. 2d 395 (2011); and among the questions presented was whether the eighth amendment barred the imposition of a sentence of life, without the possibility of release, on a juvenile for a homicide offense. *Miller* v. *State*, 63 So. 3d 676 (Ala. Crim. App.), cert. denied, No. 1091663 (Ala. October 22, 2010), cert. granted, *Miller* v. *Alabama*, U.S. , 132 S. Ct. 548, 181 L. Ed. 2d 395 (2011). Moreover, we learned that *Miller* was scheduled for oral argument on March 20, 2012. We therefore stayed the decision in the present case pending the decision in *Miller*, ordering the parties to file supplemental briefs once *Miller* was decided on the question of the effect, if any, of *Miller* on the present case. I now turn to that effect.

IV

MILLER

In *Miller* v. *Alabama*, supra, 132 S. Ct. 2475, the court held that it is cruel and unusual punishment to impose a *mandatory* sentence of life without the possibility of parole on a juvenile who has committed murder. The two fourteen year old offenders in the consolidated cases of *Miller* v. *Alabama*, supra, 132 S. Ct. 2455, and *Jackson* v. *Hobbs*, U.S. , 132 S. Ct. 548, 181 L. Ed. 2d 395 (2011), were convicted of murder and sentenced to life imprisonment without the possibility of parole. *Miller* v. *Alabama*, supra, 2460. In neither case did the sentencing authority have any discretion to impose a different punishment because the relevant state law mandated that each juvenile die in prison. Id. In *Miller*, Evan Miller, along with a friend, beat a neighbor and set fire to his trailer after an evening of drinking and drug use, causing the neighbor's death. Id., 2462. Miller initially was charged as a juvenile, but his case was removed to adult court, where he was charged with murder in the course of arson. Id., 2462–63. A jury found Miller guilty, and the trial court imposed the statutorily mandated punishment of life without parole. Id. In *Jackson*, Kuntrell Jackson accompanied two other boys to a video store to commit a robbery; on the way to the store, Jackson learned that one of the other boys was carrying a shotgun. Id., 2461. Jackson stayed outside the store for most of the robbery, but after he entered, one of his coconspirators shot and killed the store clerk. Id. The state charged Jackson as an adult with capital felony murder and aggravated robbery, and a jury found him guilty of both crimes. Id. The trial court imposed the statutorily mandated sentence of life imprisonment without the possibility of parole. Id. On appeal, the United States Supreme Court invalidated the sentences

of both juveniles, holding that the eighth amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders, even for those convicted of homicide offenses. Id., 2475. Having reached this conclusion, the court found it unnecessary to consider the defendants' broader claim, which this case does present, which is that the eighth amendment forbids a sentence of life without the possibility of parole on a juvenile under a nonmandatory sentencing scheme.

In my view, *Miller* significantly has altered the legal landscape, in ways that the majority fails to recognize. Although *Miller*'s narrow holding involves only a mandatory sentence of life without the possibility of parole imposed on a juvenile for a homicide offense, its reasoning supports the defendant's claim in the present case. In arriving at its conclusion, the court in *Miller* made four significant points—none of which the majority recognizes—that require its application to this case.

First, the court reiterated the scientific findings about the juvenile brain that served as the underpinning of *Graham*. Specifically, the court stated that "*Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform, we explained, they are less deserving of the most severe punishments. . . . Those cases relied on three significant gaps between juveniles and adults. First, children have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking. . . . Second, children are more vulnerable . . . to negative influences and outside pressures, including from their family and peers; they have limited contro[l] over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings. . . . And third, a child's character is not as well formed as an adult's; his traits are less fixed and his actions less likely to be evidence of irretrievabl[e] deprav[ity]. . . .

"Our decisions rested not only on common sense—on what any parent knows—but on science and social science as well. . . . In *Roper*, we cited studies showing that [o]nly a relatively small proportion of adolescents who engage in illegal activity develop entrenched patterns of problem behavior. . . . (quoting Steinberg & Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist 1009, 1014 [2003]). And in *Graham*, we noted that developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds—for example, in parts of the brain involved in behavior control. . . . We reasoned that those findings—of transient rashness, proclivity for risk, and inability to assess conse-

quences—both lessened a child's moral culpability and enhanced the prospect that, as the years go by and neurological development occurs, his deficiencies will be reformed. . . .

"*Roper* and *Graham* emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes. Because [t]he heart of the retribution rationale relates to an offender's blameworthiness, the case for retribution is not as strong with a minor as with an adult. . . . Nor can deterrence do the work in this context, because the same characteristics that render juveniles less culpable than adults—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment. . . . Similarly, incapacitation could not support the life-without-parole sentence in *Graham*: Deciding that a juvenile offender forever will be a danger to society would require mak[ing] a judgment that [he] is incorrigible—but incorrigibility is inconsistent with youth. . . . And for the same reason, rehabilitation could not justify that sentence. Life without parole forswears altogether the rehabilitative ideal. . . . It reflects an irrevocable judgment about [an offender's] value and place in society, at odds with a child's capacity for change." (Citations omitted; internal quotation marks omitted.) *Miller* v. *Alabama*, supra, 132 S. Ct. 2464–65.

Indeed, the court noted that "[t]he evidence presented to us in these cases indicates that the science and social science supporting *Roper*'s and *Graham*'s conclusions have become even stronger. See, e.g., Brief for American Psychological Association et al. as Amici Curiae 3 ('[A]n ever-growing body of research in developmental psychology and neuroscience continues to confirm and strengthen the Court's conclusions'); id., at 4 ('It is increasingly clear that adolescent brains are not yet fully mature in regions and systems related to higher-order executive functions such as impulse control, planning ahead, and risk avoidance'); Brief for J. Lawrence Aber et al. as Amici Curiae 12–28 (discussing post-*Graham* studies); id., 26–27 ('Numerous studies post-*Graham* indicate that exposure to deviant peers leads to increased deviant behavior and is a consistent predictor of adolescent delinquency' . . .)." (Citation omitted.) *Miller* v. *Alabama*, supra, 132 S. Ct. 2464 n.5.

Second, the court stated that, although *Graham*'s categorical ban related only to nonhomicide offenses, its reasoning based on the science of the juvenile brain applies to homicide offenses as well. "*Graham* concluded from this analysis that life-without-parole sentences, like capital punishment, may violate the Eighth Amendment when imposed on children. To be sure, *Graham*'s flat ban on life without parole applied only

to nonhomicide crimes, and the Court took care to distinguish those offenses from murder, based on both moral culpability and consequential harm. . . . *But none of what it said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific. Those features are evident in the same way, and to the same degree, when (as in both cases here) a botched robbery turns into a killing. So Graham's reasoning implicates any life-without-parole sentence imposed on a juvenile, even as its categorical bar relates only to nonhomicide offenses*." (Citation omitted; emphasis added.) Id., 2465.

Furthermore, the court stated that a juvenile's youth implicates the proportionality principle inherent in the eighth amendment beyond the context of a mandatory sentence. "Most fundamentally, *Graham* insists that youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole. In the circumstances there, juvenile status precluded a life-without-parole sentence, even though an adult could receive it for a similar crime. And in other contexts as well, the characteristics of youth, and the way they weaken rationales for punishment, can render a life-without-parole sentence disproportionate. . . . *An offender's age, we made clear in Graham, is relevant to the Eighth Amendment, and so criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed.*" (Citation omitted; emphasis added; internal quotation marks omitted.) Id., 2465–66.

Third, the court emphasized the similarity between a sentence of life without the possibility of parole on a juvenile offender to the death penalty. "Life-without-parole terms, the Court wrote [in *Graham*], 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, because he will almost inevitably serve more years and a greater percentage of his life in prison than an adult offender. [*Graham* v. *Florida*, supra, 130 S. Ct. 2028]." (Citations omitted; internal quotation marks omitted.) *Miller* v. *Alabama*, supra, 132 S. Ct. 2466.

Fourth, although the court did not categorically ban a sentence of life without the possibility of parole for a juvenile convicted of murder, it ruled that such a sentence would be permissible only so long as the sentencing court *took into account all the scientifically proven factors regarding the juvenile brain*. Id., 2469. In doing so, the court emphasized that such a sentence necessarily would be an uncommon occurrence, and that the sentencing court would be required to take into account all the factors that make juveniles different

from adults and explain how, nonetheless, such a sentence is required. Id. And contrary to the majority's view in the present case, there is no ambiguity about whether the sentencing court must specifically take into account the scientifically proven differences between the juvenile and adult brains, or whether, when it does this, such a sentence would necessarily be uncommon. The United States Supreme Court stated: "But given all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, *we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty we noted in Roper and Graham of distinguishing at this early age between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption. . . . Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.*"[8] (Citations omitted; emphasis added; internal quotation marks omitted.) Id. Consequently, the court mandated that, where a trial court does impose a sentence of life without parole for a homicide case—which corresponds to the present case—it must, in imposing such a sentence, take "into account how children are different [from adults], and how those differences counsel against irrevocably sentencing" the juvenile before it to "a lifetime in prison." Id.

Thus, it is clear that *Miller* mandates that the present case must be remanded for resentencing. That is because, contrary to the majority's view that all *Miller* does is to require that the defendant have the opportunity to present and the court to consider mitigating evidence, it does much more.

Miller requires that, before a sentencing court imposes a sentence under which the juvenile defendant will die in prison, it must take "into account how children are different [from adults], and how those differences counsel against irrevocably sentencing" the juvenile before it to "a lifetime in prison." Id. This is not just taking into account "mitigating evidence . . . ." It requires the court to do two things: (1) take into account—by presentation from the state or the defendant, or both—the factors that distinguish the juvenile brain from the adult brain regarding the juvenile's diminished culpability and heightened capacity for change, and (2) take into account how those factors counsel *against* sentencing the juvenile irrevocably to die in prison.[9] Finally, because *Miller* makes clear that *Graham*'s reasoning applies to nonhomicide offenses as well as homicide offenses, the present case qualifies for a *Graham* type remedy, namely, a "second look."

The California Supreme Court already has so held. See *People* v. *Caballero*, 55 Cal. 4th 262, 267–68, 282 P.3d 291, 145 Cal. Rptr. 3d 286 (2012) (juvenile sentenced to 110 years for attempted murder entitled to *Graham* type remedy).

I recognize that this imposes a heavy burden on all of the participants, including the trial court, engaged in such a sentencing. But that is how it should be. *Miller* teaches that sentencing a juvenile to die in prison should be a rare occurrence precisely because it will be so difficult for any of the participants—state, defendant or court—to say with a reasonable degree of confidence that this particular juvenile, unlike the vast majority of his age cohort, is so incorrigibly corrupt that he is beyond the possibility of change, no matter when.

It is understandable that, given the state of the law at the time of sentencing, the trial court in the present case did not take into account the now constitutionally relevant factors in imposing its sentence. Nonetheless, those factors do apply, by virtue of *Miller*'s reasoning, to the present case, in which the defendant was sentenced, albeit not mandatorily, to an effective term of life without the possibility of release. As *Miller* makes clear, those factors apply to the defendant's mental, psychological and environmental incapacities irrespective of his crimes, and the science behind those factors has only become stronger with time. Moreover, those factors implicate the proportionality principle inherent in eighth amendment jurisprudence beyond the context of a mandatory sentence. In addition, although a trial court is not categorically barred from imposing a sentence of life without parole on a juvenile, if it does so it must, according to *Miller*, take those factors into account.

Therefore, in my view, the judgment should be reversed only as to the sentence imposed and the case remanded for a resentencing. In that resentencing, the trial court may only impose a sentence that would be the functional equivalent of life without parole after explicitly taking into account all the factors that make juveniles different from adults and why those factors counsel against imposing such a sentence. In addition, if it does impose such a sentence, the court must include in its sentence a *Graham* type remedy, namely, that at some time in the future the state must afford the defendant "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham* v. *Florida*, supra, 130 S. Ct. 2030.

[1] The eighth amendment prohibition on cruel and unusual punishment is applicable to the states through the due process clause of the fourteenth amendment. See *Tuilaepa* v. *California*, 512 U.S. 967, 970, 114 S. Ct. 2630, 129 L. Ed. 2d 750 (1994).

[2] In accord with the Supreme Court's decision in *Graham* v. *Florida*, supra, 130 S. Ct. 2011, throughout this opinion I refer to persons younger than age eighteen when they committed their crimes as juveniles.

[3] The court did not specify either the forum in which or the time period when this opportunity must be afforded.

[4] I use the term "juvenile brain" as shorthand for the various mental, psychological and environmental deficits of juveniles that the Supreme Court identified, first in *Roper* v. *Simmons*, 543 U.S. 551, 569–70, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (unconstitutional to impose death penalty on juvenile), and later reiterated in *Graham* v. *Florida*, supra, 130 S. Ct. 2011, and *Miller* v. *Alabama*, U.S. , 132 S. Ct. 2455, 2464–65, 183 L. Ed. 2d 407 (2012).

[5] My examination of the report, contained in the file, supports that description.

[6] In *Roper* v. *Simmons*, supra, 543 U.S. 555–56, the Supreme Court considered "whether it is permissible under the Eighth and Fourteenth Amendments to the Constitution of the United States to execute a juvenile offender who was older than 15 but younger than 18 when he committed a capital crime." The court held that "[t]he Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed." Id., 578. The court addressed in its analysis the existence of significant scientific and sociological studies that demonstrate juveniles' "lack of maturity and an underdeveloped sense of responsibility"; id., 569; juveniles' vulnerability to outside influences such as peer pressure and juveniles' underdeveloped mental character. Id., 569–70.

[7] In *Atkins* v. *Virginia*, supra, 536 U.S. 321, the United States Supreme Court held that it is a violation of the eighth amendment ban on cruel and unusual punishment to execute death row inmates with "mental retardation . . . ."

[8] I find particularly unavailing the majority's reliance on the *dissent* in *Miller* for its criticism of the statement of the *court* in *Miller* that "appropriate occasions for sentencing juveniles [to life without parole] will be uncommon." *Miller* v. *Alabama*, supra, 132 S. Ct. 2469. We are bound by decisions of the United States Supreme Court, that is, the majority decisions, and not by the dissents therein.

Further, simple common sense informs us that the majority's statement in *Miller* is accurate. If the science tells us, as it does, that juveniles, despite the seriousness of their crimes, have "diminished culpability and heightened capacity for change" as compared to adults, and that it is particularly difficult to identify at that young age that the juvenile will *never* change, then it follows that it will be the uncommon case in which a judge sentencing a juvenile for a homicide will be able with some reasonable degree of confidence to say, nonetheless, that the particular juvenile in front of her lacks both that diminished culpability and heightened capacity for change, that is, that this particular juvenile constitutes the rare case of "irreparable corruption." (Internal quotation marks omitted.) Id.

[9] *Miller* does not address the question of whether, if the trial court does decide to impose a life sentence without parole after taking all constitutionally relevant factors into account, it also must explicitly state on the record why it has decided to reject those factors and, nonetheless, sentence the juvenile to die in prison.