Partial (Not Exhaustive!) Checklist for *Miller* Sentencing

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I. Investigation

A. Obtain experts

B. Conduct discovery

C. Develop sentencing strategy

Read *Trial Defense Guidelines: Representing a Child Client Facing a Possible Life Sentence*, available at http://fairsentencingofyouth.org.

II. Memorandum on Sentencing

A. Eligibility for LWOP as a juvenile is constitutionally equivalent to eligibility for the death penalty as an adult (life without parole "for juveniles as akin to the death penalty." (*Miller v. Alabama* (2012) 567 U.S. ___ [132 S.Ct 2455, 2466]).) This means:

1. Quality of representation must be equivalent. (See Siegel, *What Hath Miller Wrought: Effective Representation of Juveniles in Capital-equivalent Proceedings* (Spring, 2013) 39 New Eng. J. on Crim. & Civ. Confinement 363.) Read ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, available at http://www.americanbar.org/groups/committees/death_penalty_representation/resources/aba_guidelines.html

2. Must have equivalent access to experts and investigators: psychologists and other mental health experts; social workers and life history investigators; prison experts; other relevant experts and investigators. (*Wiggins v. Smith* (2003) 539 U.S. 510, 538 (finding prejudicial trial counsel's failure to present mitigating evidence at sentencing)

3. Time to investigate and prepare for hearing must be equivalent to death penalty.

4. Hearing must be orderly, conducted with equivalent formality and

seriousness as penalty phase.

III. Motions

A. Motion for ancillary services (investigators, social workers, prison experts, psychologists).

Where "reasonable and available defense strategy requires consultation with experts or introduction of expert evidence," failure to request funding is *Strickland* error. (*Hinton v. Alabama* (2014) 134 S. Ct. 1081, 1088.)

B. Right to a Jury Trial

Under the Sixth Amendment, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.) A jury—and not a judge—must find beyond a reasonable doubt the "aggravating circumstance necessary for imposition of the death penalty." (*Ring v. Arizona* (2002) 536 U.S. 584, 609.) "When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury." (*Alleyne v. United States* (2013) 133 S.Ct. 2151, 2162.)

Based on the forgoing, a youthful offender may not be exposed to life without parole without jury findings beyond a reasonable doubt that he is irreparably corrupt under *Miller*. (See Russell, *Jury Sentencing and Juveniles: Eighth Amendment Limits and Sixth Amendment Rights* (2015) 56 B.C. L. Rev. 553.)

"We find that the Sixth Amendment mandates that juveniles convicted of homicide who face the possibility of a sentence of life without the possibility of parole have a right to have their sentence determined by a jury." (*People v. Skinner* (Mich. Ct.App. Aug. 20, 2015) 2015 WL 4945986.)

IV. Motions in limine

A. Admissibility of evidence with authority;

B. Obtain rulings on each point;

V. Bench instructions with authority

A. Eighth Amendment presumption against JLWOP term

In stopping short of a categorical ban on LWOP for juveniles, *Miller* cautioned "... 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.' [Citations.]" (*Miller*, 132 S.Ct. at p. 2469.) This can only reasonably be understood that the default rule is that the offender must have a meaningful opportunity for release (i.e., 25-to-life).

Further, *People v. Gutierrez* (2014) 58 Cal.4th 1354 observed that, "'Treating [life without parole] as the default sentence takes the premise in *Miller* that such sentences should be rarities and *turns that premise on its head*, instead placing the burden on a youthful defendant to affirmatively demonstrate that he or she deserves an opportunity for parole.'" (*Gutierrez*, 58 Cal.4th at p. 1379, emphasis added.) It stands to reason that, if a presumption in favor of LWOP turns *Miller* "on its head" by requiring on the defendant to justify lenient treatment, then *Miller*'s premise must be that there is a presumption against LWOP and that it is the state's burden to show the defendant does not deserve an opportunity for parole.

The Connecticut Supreme Court stated that *Miller* "suggests that the mitigating factors of youth establish, in effect, a presumption against imposing a life sentence without parole on a juvenile offender that must be overcome by evidence of unusual circumstances." (*State v. Riley* (Conn. Mar. 10, 2015) 2015 WL 854827 at *8.) The Missouri Supreme Court has held that "a juvenile offender cannot be sentenced to life without parole for first-degree murder unless the state persuades the sentencer beyond a reasonable doubt that this sentence is just and appropriate under all the circumstances." (*State v. Hart* (Mo. 2013) 404 S.W.3d 232, 241("[A] juvenile offender cannot be sentenced to life without parole for first-degree murder unless the state persuades the sentencer beyond a reasonable doubt that this sentence is just and appropriate under all the circumstances.")

B. How sentencing factors are to be evaluated:

1. As in death penalty cases, imposition of the harshest available penalty for juveniles (death in prison) must be based on "reason rather than caprice or emotion." (See *Godfrey v. Georgia* (1980) 446 U.S. 420, 433.)

2. The fact of the homicide must **not** predominate over mitigation evidence based on youth

   a. *Miller* 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*." (132 S. Ct. at 2465 (emphasis added).)

   b. All murders are horrible. There must be an objective basis for

finding either that the youth's offense was more severe or egregious than any other first degree murder or demonstrate his irreparable corruption. Without objective criteria the defendant and the community cannot be confident that the imposition of the harshest available penalty was based on "reason rather than caprice or emotion." (*Godfrey*, *supra*, 446 U.S. at p. 433.)

c. U.S. Supreme Court jurisprudence requires sentencers to separate the crime from the culpability of the offender. In the context of the juvenile death penalty, the Court found that "[a]n unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death." (*Roper*, 543 U.S. at p. 573.) This same "unacceptable likelihood" attends juvenile life without parole cases; if the violent nature of the crime is permitted to overpower evidence of mitigation based on the juvenile's youth, juvenile life without parole will not be "uncommon" (see *Miller*, 132 S. Ct. at p. 2469), since every homicide is a violent offense.