STRATEGIES FOR LITIGATING *MILLER* CASES

The purpose of this handout is to provide guidance to attorneys appointed to represent defendants charged with or convicted of first-degree murder committed when they were juveniles. The advice in this handout applies both to new murder charges and murder cases at the post-conviction stage. As these cases involve a fast-developing area of the law, counsel should use this guide as a starting point for handling *Miller* cases, and contact the Office of the Appellate Defender at (919) 354-7210 with questions.

I. Background

Over the past decade, the Supreme Court of the United States has issued a series of decisions that curtailed punishments available for juveniles convicted of serious crimes. In 2005, the Court held that it was unconstitutional to impose capital punishment for crimes that the defendant committed while under the age of 18. *Roper v. Simmons*, 543 U.S. 551, 573 (2005). The Court based its decision on three general differences between juveniles and adults:

1. Juveniles are less mature and have an underdeveloped sense of responsibility.
2. Juveniles are more vulnerable to negative influences and outside pressures.
3. The character of juveniles is not as well formed as the character of adults.

Five years later, the Court relied on these differences to prohibit LWOP sentences for juveniles who commit non-homicide offenses. *Graham v. Florida*, 560 U.S. 48, 74 (2010). In 2012, the Court again cited the differences between juveniles and adults as grounds to hold that mandatory LWOP sentences for juvenile homicide offenders violated the Eighth Amendment ban on cruel and unusual punishments. *Miller v. Alabama*, 183 L. Ed. 2d 407, 424 (2012).

After the decision in *Miller* was issued, the North Carolina General Assembly enacted new sentencing statutes for juvenile defendants (under 18 at the time of the offense) convicted of first-degree murder. If the defendant was convicted based solely on felony murder, the trial court must impose a sentence of life in prison with the possibility of parole after 25 years. N.C. Gen. Stat. § 15A-1340.19B(a). If the defendant was convicted based on a theory other than felony murder, the court must hold a sentencing hearing. *Id.* At the hearing, the court must consider mitigating factors that might support a sentence of life in prison with parole. N.C. Gen. Stat. § 15A-1340.19C(a). Statutory mitigating factors include the defendant's age at the time of the offense, immaturity, and intellectual capacity, among others. N.C. Gen. Stat. § 15A-1340.19B(c). The Court of Appeals held in *State v. James*, 786 S.E.2d 73, 81 (2016), that it is not improper for the trial court to begin the hearing with a presumption in favor of an LWOP sentence. However, at the conclusion of the hearing, the court must make findings justifying the sentence that it imposes. N.C. Gen. Stat. § 15A-1340.19C(a).

Many defendants will be affected by *Miller* and the new sentencing statutes created by the General Assembly. Any new first-degree murder charges filed against juveniles are subject to *Miller* and the new statutes. Additionally, *Miller* is retroactive. *Montgomery v. Louisiana*, 193 L. Ed. 2d 599, 622 (2016). Thus, defendants who had LWOP sentences before *Miller* for murders

committed when they were juveniles are also entitled to relief under *Miller*. Most of the advice in this handout applies to both new cases and post-conviction cases. If counsel is appointed to a new first-degree murder charge or a post-conviction case, counsel should use this handout to prepare for the case. The Campaign for the Fair Sentencing of Youth also has a resource kit with valuable information on issues that arise in *Miller* cases. Counsel should contact them and request permission to access the resource kit. The office can be reached by phone at (202) 289-4677.

II. Cases involving 13, 14, or 15 years olds

A juvenile who is 16 or 17 years old is automatically subject to the jurisdiction of criminal superior court. N.C. Gen. Stat. § 7B-1501(7). However, a juvenile who is 13, 14, or 15 years old is initially subject to the jurisdiction of district court, but may be transferred to superior court. N.C. Gen. Stat. § 7B-2200. If counsel is appointed to a case involving a 13, 14, or 15 year old charged by petition with first-degree murder, counsel should immediately contact the Office of the Juvenile Defender for advice on handling the case. The Office of the Juvenile Defender can be reached by phone at (919) 890-1650. Counsel should also consider the following strategies:

1. Use the probable cause hearing to get the charge reduced to a lesser offense:
    a. If a district court judge finds probable cause to believe that a juvenile who is 13, 14, or 15 years old committed first-degree murder, the court must transfer the case to superior court. N.C. Gen. Stat. § 7B-2200. If counsel demonstrates that there is only probable cause to believe that the juvenile committed second-degree murder or a lesser offense, the case is not subject to automatic transfer to superior court. Counsel can then argue, based on N.C. Gen. Stat. § 7B-2203, that the case should remain in district court. However, even if the court transfers the case to superior court, the case will proceed on a reduced charge. *See* N.C. Gen. Stat. § 7B-2203(c) (when a case is transferred to superior court, the superior court has jurisdiction over "that felony").
2. Challenge the constitutionality of the automatic transfer statute:
    a. If the district court judge finds probable cause to believe that the juvenile committed first-degree murder, counsel should argue in district court that N.C. Gen. Stat. § 7B-2200, which mandates the transfer of Class A felonies to superior court, violates the juvenile's right to due process under N.C. Const. art. I, § 19 and U.S. Const. amend. V and XIV.
    b. As part of the argument, counsel should argue that N.C. Gen. Stat. § 7B-2200 deprives the juvenile of the right to be heard and an individualized consideration of the mitigating circumstances of youth described in *Miller* before subjecting him to proceedings in superior court. For an example of an argument against an automatic transfer statute, counsel should review the amicus brief filed by the Juvenile Law Center in *Washington v. Zyion Dontice Houston-Sconiers and Treson Roberts*.
    c. Counsel should be aware that the North Carolina Court of Appeals rejected an 8th Amendment challenge to automatic transfer in *State v. Stinnett*, 129 N.C. App. 192 (1998). If the State relies on *Stinett* in its response to the motion, counsel should argue that *Stinett* involved a separate constitutional claim and is no longer good law in light of *Miller*.

d. If the district court denies the motion to declare automatic transfer unconstitutional, raise the issue again in superior court and obtain a ruling from the superior court judge.

3. Treat a hearing on discretionary transfer as a *Miller* hearing:
   a. If the district court judge finds probable cause to believe that the juvenile committed second-degree murder or a lesser offense, counsel should treat the transfer hearing as if it were a sentencing hearing under *Miller v. Alabama*, 183 L. Ed. 2d 407 (2012). That is, counsel should follow the advice in sections III, IV, and VI below in presenting a comprehensive view of the juvenile to the court and arguing that the juvenile should remain in juvenile court in order to receive treatment and rehabilitation that is unavailable to adults in superior court.

III. Preparing for trial proceedings in the case

Counsel should review the mitigating factors under N.C. Gen. Stat. § 15A-1340.19B(c) and gather information and evidence that might support each factor with the goal of demonstrating that the defendant is not one of the "rarest" juvenile offenders whose conduct reflects "permanent incorrigibility." *Montgomery v. Louisiana*, 193 L. Ed. 2d 599, 620 (2016). Counsel should also consider non-statutory mitigating factors, such as remorse, lack of a stable home environment, or a history of abuse.

During the information-gathering process, counsel should seek as much information as possible about the juvenile and his family. For example, information about the juvenile's parents could shed light on the stability of the defendant's home life. Medical records of the juvenile's birth and early childhood could also provide information about any mental illnesses or intellectual disabilities the juvenile faced when he was older. Counsel should also interview the juvenile and the juvenile's family about the juvenile's background.

Counsel should file a motion for funds to hire a mitigation investigator who can gather and organize information about the juvenile. A sample motion for funds to hire a mitigation investigator is available in the Experts and Other Assistance section of the IDS Motions Bank. Counsel should contact Vicky McGee, a mitigation specialist who works in conjunction with IDS, to request assistance in finding a mitigation investigator. Ms. McGee can be reached by phone at (919) 673-3122 or by email at vickylmcgee@gmail.com. Ms. McGee can save counsel valuable time by identifying the best mitigation investigator based on the investigator's specialty, caseload, and location.

Counsel should also identify experts to provide advice about the case and testify at the sentencing hearing. When searching for an expert, counsel should use the database of experts compiled by the Forensic Resource Counsel. Counsel can use the database to identify psychiatric or psychological experts who have experience working with juveniles and who can explain adolescent brain development. Counsel should also search for an expert in the area of criminology to evaluate and explain the defendant's prospects in prison. Sample motions for funds to hire experts are available in the Experts and Other Assistance section of the IDS Motions Bank.

There are many sources of information about the juvenile. Any expert witnesses hired by counsel will need to review information about the juvenile before advising counsel or testifying at the sentencing hearing. Additionally, information about the juvenile will likely provide mitigating evidence that would support a sentence of life in prison with parole. With the assistance of a mitigating investigator, counsel should seek information from the following sources:

Discovery: Counsel should file discovery motions under the United States and North Carolina constitutions and N.C. Gen. Stat. § 15A-901, *et. seq*. Discovery motions are discussed in 1 NORTH CAROLINA DEFENDER MANUAL Ch. 4, Discovery (2d ed. 2013). Sample discovery motions are also available in the Discovery section of the IDS Motions Bank.

Juvenile court proceedings: If the juvenile was subject to abuse, neglect, or dependency proceedings or was a respondent in a juvenile delinquency case, counsel should seek records of those cases. The following three provisions give attorneys for the juvenile access to this information:

1. N.C. Gen. Stat. § 7B-2901(a): Under this provision, the attorney for a juvenile is entitled to examine and obtain copies of written parts of the clerk's records for cases involving abuse, neglect, or dependency proceedings involving the juvenile. Counsel does not need to file a motion or get a court order to obtain records under the provision.
2. N.C. Gen. Stat. § 7B-2901(b): This provision gives the juvenile the right to examine DSS records of cases in which the juvenile was under placement by a court or was placed under protective custody by DSS. These records include "family background information; reports of social, medical, psychiatric, or psychological information concerning a juvenile or the juvenile's family; interviews with the juvenile's family; or other information which the court finds should be protected from public inspection in the best interests of the juvenile." There is no requirement that the juvenile file a motion or obtain a court order before examining the records. The Court of Appeals also held in *In re J.L.*, 199 N.C. App. 605, 609 (2009), that juveniles have a "right" under N.C. Gen. Stat. § 7B-2901(b) to access such records.
3. N.C. Gen. Stat. § 7B-3001: According to this provision, the juvenile and the juvenile's attorney are entitled to examine and obtain copies of records concerning the juvenile that are maintained by law enforcement and the Division of Adult Correction and Juvenile Justice. No motion or court order are required to obtain the records. A sample request form is available on the Juvenile Defender website.

School records: Under the Family Educational Rights and Privacy Act ("FERPA"), a school can release educational records with the written consent of the juvenile's parent or guardian. 20 U.S.C. § 1232g. A sample release form is available on the Juvenile Defender website. The school can also release the records in response to a subpoena or court order. *See* 1 NORTH CAROLINA DEFENDER MANUAL § 4.7F, Specific Types of Confidential Records (2d ed. 2013). For additional information on obtaining school records, see Jason B. Langberg & Barbara A. Fedders, *How Juvenile Defenders Can Help Dismantle the School-to-Prison Pipeline: A Primer on Educational Advocacy and Incorporating Clients' Education Histories and Records into Delinquency Representation*, 42 J. L. & EDUC. 653 (2013).

Medical records: Counsel should obtain the juvenile's medical history, including any history of mental health treatment, and ask that the juvenile and the parent, guardian, or custodian to authorize the release of medical and other records for the juvenile. If the hospital or facility has its own release form, counsel should have the juvenile and the parent, guardian, or custodian sign that form. A sample release form is available on the Juvenile Defender website. Parents and other caretakers may also be able to provide more specific information about past diagnoses and treatment of the juvenile.

Commitment records: The juvenile may have been voluntarily admitted or involuntarily committed in the past. To obtain court records from prior proceedings, counsel should file a motion in the district court that heard the case. *See* G.S. 122C-54(d). A facility may also disclose confidential information if the defendant consents in writing to the release of the information. G.S. 122C-53(a).

Jail records: Counsel should also seek any jail records for the juvenile. The records might provide additional information about the juvenile's physical or mental health, as well information about the juvenile's conduct while incarcerated. A sample motion for jail records is available in the Discovery section of the IDS Motions Bank.

IV. The science supporting mitigated sentences

There is a significant body of research supporting the conclusion that juveniles as a class are less culpable than adults and have greater capacity for reform. The research was influential in *Roper*, *Graham*, and *Miller*. Much of the research is described in the amicus briefs *for Graham v. Florida* submitted by the American Medical Association and the American Psychological Association. Counsel should consider submitting the amicus briefs or some of the research to the trial court at sentencing to emphasize that there is a biological basis for finding the defendant less culpable and concluding that a lower sentence is warranted. Alternatively, if counsel presents the testimony of an expert in adolescent psychology or adolescent brain development, counsel could ask the expert to explain the research to the trial court.

If counsel submits the amicus briefs to the court, counsel should first explain the significance of the amicus briefs to the court. As noted in the amicus briefs, research into adolescent brain development was limited until the 1990s when brain imaging technology established that the regions of the brain that govern behavior are still maturing through adolescence and young adulthood. During adolescence and young adulthood, neural pathways become insulated and synapses are pruned, which is believed to improve the executive function of the prefrontal cortex that governs impulse control and risk evaluation. Research has also shown that juveniles have a greater amount of dopamine, which increases reward-seeking behavior, and lower levels of serotonin, which inhibits risky behavior.

The research into adolescent brain development is also supported by psychological studies, some of which provide the following insights:

1. Juveniles are vulnerable to the negative influence of peers:
    a. Margo Gardner & Lawrence Steinberg, *Peer Influence on Risk Taking, Risk*

Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study, 41 DEVELOPMENTAL PSYCHOL. 625 (2005). In this study, the researchers used a sample of 306 individuals from the community and an undergraduate university. Participants consisted of three groups: (1) adolescents ages 13 to 16 years old, (2) youth ages 18 to 22 years old, and (3) adults ages 24 and older. Researchers also used self-report questionnaires and a behavioral task to assess risky decision-making and risk-taking. The results indicated that individuals in middle and late adolescence were much more likely than adults to take more risks and engage in riskier decision-making when tested in groups than when tested alone.

2. Juveniles are more likely to engage in risky behavior:
    a. Laurence Steinberg et al., *Age Differences in Sensation-Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 DEVELOPMENTAL PSYCHOL. 1764 (2008). This was an experimental study involving 935 individuals from ages 10 to 30. The researchers used self-report questionnaires and behavioral tasks to assess sensation-seeking and impulsivity in the participants. The results of the study indicated that sensation-seeking behaviors increased between the ages of 12 to 15 and then steadily declined. In addition, adolescents younger than 16 demonstrated significantly less impulse control than 16 to 17 year-olds, and 16 to 17 year-olds demonstrated significantly less impulse control than 22 to 25 year-olds.
3. Juveniles are less able to anticipate the consequences of their conduct:
    a. Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 CHILD DEV. 28 (2009). In this study, researchers used self-report questionnaires and behavioral tasks to assess future orientation and a preference for delayed versus immediate rewards. The study involved a sample of 935 individuals from 10 to 30 years-old. The results of the study indicated that juveniles under 16 preferred small immediate rewards over larger delayed rewards. The juveniles under 16 also self-reported that they were less concerned about the future and less likely to anticipate the consequences of their decisions than older youth.

Counsel should also consider an emerging area of research involving trauma. The prevalence of trauma and its effect on juveniles is described in two recent articles. *See* Eduard Ferrer, *Transformation through Accommodation: Reforming Juvenile Justice by Recognizing and Responding to Trauma*, 53 AM. CRIM. L. REV. 549 (2016); Samantha Buckingham, *Trauma Informed Juvenile Justice*, 53 AM. CRIM. L. REV. 641 (2016). According to research, trauma can result from adverse childhood experiences ("ACEs"), such as neglect, abuse, parental divorce, or the incarceration of a parent or guardian. Multiple or sustained adverse childhood experiences have the potential to impede brain development and amplify deficiencies in self-regulation and impulse control in juveniles. Ferrer, *supra* at 572. If counsel represents a juvenile who experienced one or more ACEs, counsel should consider seeking funds to hire an expert in childhood trauma to evaluate the defendant and, if necessary, testify at the sentencing hearing about the effects of trauma on the juvenile.

V. Preserving constitutional arguments against an LWOP sentence

If the juvenile is convicted of first-degree murder based on a theory other than felony murder, counsel should file a motion raising constitutional challenges against an LWOP sentence before the sentencing hearing. Simply filing the motion is not enough to preserve the issues for appellate review. Counsel must argue the issues in court and obtain a ruling on each issue. A sample motion is available on the Appellate Defender website. The motion should raise the following four issues:

1. A sentence of LWOP violates the ban against cruel and unusual sentences under N.C. Const. art. I, § 27 and U.S. Const. amend. VIII:
    a. This issue has not yet been litigated in North Carolina, but a defendant recently prevailed based on this argument in *State v. Sweet*, 879 N.W.2d 811 (Iowa 2016). In *Sweet*, the Iowa Supreme Court considered an argument that a consensus had emerged among the states that LWOP sentences for juveniles should be abolished. Although the Court did not agree that there was a consensus, the Court barred LWOP sentences for juveniles on a separate ground. Specifically, the Court held that LWOP sentences for juveniles violate the Eighth Amendment because the question of parole eligibility under *Miller* is based on whether a juvenile can be rehabilitated and experts cannot predict which juveniles will have the ability to be rehabilitated.
    b. Counsel should raise both arguments in a written motion and present supporting expert testimony about the inability to predict the defendant's prospects for rehabilitation at the sentencing hearing.
2. The new sentencing statutes violate the ban against cruel and unusual sentences in N.C. Const. art. I, § 27 and U.S. Const. amend. VIII because they contain a presumption in favor of LWOP sentences:
    a. This argument was recently rejected by the North Carolina Court of Appeals in *State v. James*, 786 S.E.2d 73 (2016). However, the case is currently pending in the North Carolina Supreme Court under the docket number 514PA11-2. Counsel should raise this argument to preserve the issue should the Court of Appeals' opinion be reversed, or for review in federal court in post-conviction habeas proceedings.
3. The new sentencing statutes violate due process under N.C. Const. art. I, § 19 and U.S. Const. amend. XIV because they are vague and do not give judges sufficient guidance on how to decide between life in prison with parole and life in prison without parole.
    a. This argument was recently rejected by the North Carolina Court of Appeals in *State v. James*, 786 S.E.2d 73 (2016). However, the case is currently pending in the North Carolina Supreme Court under the docket number 514PA11-2. Counsel should raise this argument to preserve the issue should the Court of Appeals' opinion be reversed.
4. The new sentencing statutes violate the prohibitions against *ex post facto* laws under N.C. Const. art. I, § 16 and U.S. Const. amend. I, § 10.
    a. This argument is only appropriate for cases in which the offense date arose before the July 12, 2012 enactment date of the new sentencing statutes. The argument was also rejected by the North Carolina Court of Appeals in *State v. James*, 786 S.E.2d 73 (2016). However, the case is currently pending in the North Carolina Supreme Court under the docket number 514PA11-2. Counsel should raise this argument to preserve the issue should the Court of Appeals' opinion be reversed.

VI. The sentencing hearing

Counsel should begin the sentencing hearing by explaining that *Miller* did not merely hold that mandatory LWOP sentences are unconstitutional. Instead, *Miller* established that a discretionary LWOP sentence "still violates the Eighth Amendment for a child whose crime reflects 'unfortunate yet transient immaturity.'" *Montgomery v. Louisiana*, 193 L. Ed. 2d 599, 622 (2016). Thus, counsel should advise the trial court that an LWOP sentence is, "more often than not, not just inappropriate, but a violation of the juvenile's constitutional rights," *People v. Hyatt*, No. 325741, slip op. at 24 (Mich. Ct. App. Jul. 21, 2016), and reserved only the "very 'rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.'" *Adams v. Alabama*, 195 L. Ed. 2d 251, 256 (2016) (Sotomayor, J., concurring) (*quoting Montgomery*, 193 L. Ed. 2d at 620).

In order to demonstrate that the juvenile is not one of the rare juveniles whose crime reflects permanent incorrigibility, counsel should present testimony and documentary evidence that explain the juvenile's life from birth until the sentencing hearing. Counsel should support the evidence with testimony from one or more experts in adolescent brain development, trauma, or criminology. The Rules of Evidence do not apply at sentencing proceedings, Evidence Rule 1101(b)(3), and any competent evidence that has probative value may be submitted to the court. *State v. Augustine*, 359 N.C. 709, 731 (2005). Thus, counsel may submit a "wide array of evidence" to describe the juvenile's life to the court. *Id*.

Counsel should provide as much specificity and context for the evidence as possible, including dates of important events and the order in which the events occurred. Counsel should also present evidence that supports the statutory mitigating factors under N.C. Gen. Stat. § 15A-1340.19B(c), as well as non-statutory factors. For example, school records might demonstrate that the juvenile had limited intellectual capacity. Additionally, evidence that the juvenile was a passive participant in the murder or was guilty under a theory of acting in concert might indicate that the juvenile's conduct was the result of peer pressure.

In arguing for the lesser sentence of life in prison with parole, counsel should present a chronological narrative of the juvenile's life and explain which specific mitigating factors demonstrate that the juvenile is not one of the rare juveniles whose conduct warrants an LWOP sentence. Counsel should also be aware that under N.C. Gen. Stat. § 15A-1340.19B(d), the juvenile has the right to the last argument.

VII. Common arguments for imposing an LWOP sentence

The State might present the following reasons why a sentence of life without parole is justified. Counsel should respond and argue that the reasons do not justify a sentence of life without parole.

1. The murder was particularly heinous or cruel:
    a. The heinousness of the crime cannot by itself support an LWOP sentence. The Supreme Court has made clear that there is an "unacceptable likelihood" that the

brutality of a crime will overpower the mitigating factors of youth where those factors support a lesser sentence. *Roper v. Simmons*, 543 U.S. 551, 573 (2005). The Court later recognized that the "distinctive attributes of youth" diminish the justifications for the harshest sentence "even when they commit terrible crimes," *Miller v. Alabama*, 183 L. Ed. 2d 407, 419 (2012), and that "children who commit even heinous crimes are capable of change." *Montgomery v. Louisiana*, 193 L. Ed. 2d 599, 622 (2016).

2. The juvenile was 17 and almost an adult at the time of the murder.
    a. Even if the juvenile was 17 at the time of the murder, that does not mean that he should be viewed as an adult. The defendant in *Montgomery v. Louisiana* was 17 at the time of the murder in his case. Further, "the fact that a defendant is nearing the age of eighteen does not undermine the teachings of *Miller*. . . ." *State v. Seats*, 865 N.W.2d 545, 555 (Iowa 2015). The features of youth "do not magically disappear at age seventeen -- or eighteen for that matter." *State v. Sweet*, 879 N.W.2d 811, 838 (Iowa 2016).
3. The juvenile was only 17 and did not have enough time to accumulate a significant record in adult court.
    a. The prior record mitigating factor is not limited to the juvenile's record in superior court. Instead, the mitigating factor extends to juvenile court, as well. *See State v. Lovette*, 233 N.C. App. 706, 722 (2014) (upholding LWOP sentence because of the defendant's "extensive juvenile record"). Thus, the court must look at the juvenile's entire record to determine whether a sentence of LWOP is warranted. Further, the lack of a significant record in adult court should support a lesser sentence of life in prison with parole.
4. Even if the juvenile is not "irretrievably corrupt" or has the potential for rehabilitation, the court can still sentence him to life in prison without parole:
    a. The authority for this argument is *State v. Lovette*, 233 N.C. App. 706, 719 (2014), which held that a trial court could still impose an LWOP sentence even after finding that the defendant was not "irretrievably corrupt" and that it was possible he could be rehabilitated. However, this part of *Lovette* directly contradicts *Montgomery v. Louisiana*, 193 L. Ed. 2d 599, 619 (2016), which held that an LWOP sentence "still violates the Eighth Amendment for a child whose crime reflects 'unfortunate yet transient immaturity.'"
5. The best place for the juvenile is prison because that is the only place where he has improved.
    a. This argument appears to cut directly against *Miller*. One of the reasons the Supreme Court found a mandatory sentence of life without parole unconstitutional was because it "forswears altogether the rehabilitative ideal" and "reflects 'an irrevocable judgment about [an offender's] value and place in society,' at odds with a child's capacity for change." *Miller v. Alabama*, 183 L. Ed. 2d 407, 419-20 (2012). The Court later stated that those defendants who demonstrate a capacity for change should be afforded the "opportunity for release." *Montgomery v. Louisiana*, 193 L. Ed. 2d 599, 609 (2016).

VIII. Challenging de facto LWOP sentences

If the court imposes consecutive sentences or a single sentence for second-degree murder or a lesser offense and the total amount of imprisonment exceeds 40 years in prison, counsel should argue that the total sentence constitutes a de facto life sentence and violates the ban against cruel and unusual punishment under N.C. Const. art. I, § 27 and U.S. Const. amend. VIII. Counsel should argue that lengthy sentences fall under *Graham*, *Miller*, and *Montgomery* when the juvenile faces the prospect of release at an old age. In support of the argument that a lengthy sentence is equivalent to an LWOP sentence, counsel should argue the following:

1. The juvenile will not be released before serving the minimum sentence.
2. Courts in other jurisdictions have found lengthy sentences to be the functional equivalent of an LWOP sentence. *See Moore v. Biter*, 725 F.3d 1184, 1192 (9th Cir. 2013) (254-year sentence); *Casiano v. Comm'r of Correction*, 317 Conn. 52, 79 (2015) (50-year sentence); *Bear Cloud v. State*, 334 P.3d 132, 144 (Wyoming 2014) (45-year sentence); *Brown v. State*, 10 N.E.3d 1, 7–8 (Ind. 2014) (150-year sentence); *State v. Null*, 836 N.W.2d 41, 72 (Iowa 2013) (52.5-year sentence); *People v. Caballero*, 282 P.3d 291, 296 (California 2012) (sentence of 100 years to life).
3. Courts have also held that a trial judge may not impose a de facto life sentence without holding an individualized sentencing hearing and considering the mitigating factors of youth. *See, e.g., Bear Cloud*, 334 P.3d at 141-42 ("We hold that the teachings of the *Roper*/*Graham*/*Miller* trilogy require sentencing courts to provide an individualized sentencing hearing . . . when, as here, the aggregate sentences result in the functional equivalent of life without parole.")
4. The United States Sentencing Commission quantifies a life sentence as 470 months (39 years and two months). United States Sentencing Commission, *Life Sentences in the Federal System* 10 (2015).
5. There is some data indicating that juveniles serving long sentences have a very short life expectancy. The ACLU of Michigan found that the average life expectancy of a juvenile sentenced to life in prison is 50.6 years. ACLU of Michigan, *Michigan Life Expectancy Data for Youth Serving Natural Life Sentences* 2 (2013).
6. Research demonstrates that while some juveniles engage in criminal activity, juveniles "are likely to desist as they mature into adulthood." Elizabeth S. Scott and Laurence Steinberg, *Social Welfare and Fairness in Juvenile Crime Regulation*, 71 LA. L. REV. 35, 64 (2010).

X. The appeal

If the defendant is convicted of first-degree murder or a lesser offense, counsel should give notice of appeal orally or in writing from the judgment and in the same manner as in other criminal cases. *See* N.C. R. App. P. 4 (describing requirements for notice of appeal in criminal cases). Counsel should ask the court to appoint the Appellate Defender to represent the juvenile on appeal. Counsel should ensure that the trial judge signs an appellate entries form (AOC-CR-350), indicating the appointment of the Office of the Appellate Defender to perfect the appeal, and send a copy of the appellate entries to the Office of the Appellate Defender. The Appellate Defender will assign the case to an attorney who will review the case for error, including errors

under *Miller*. Counsel should be sure to give notice of appeal even if the court sentences the defendant to life in prison *with* parole.

If the defendant was denied a new sentencing hearing or sentenced to life in prison without parole after filing a motion for appropriate relief, counsel should give notice of appeal from the order or judgment of the court. Counsel should ask the court to appoint the Appellate Defender to represent the juvenile on appeal. Counsel should ensure that the trial judge signs an appellate entries form (AOC-CR-350), indicating the appointment of the Office of the Appellate Defender to perfect the appeal, and send a copy of the appellate entries to the Office of the Appellate Defender. The defendant arguably has the right to appeal under N.C. Gen. Stat. § 7A-27(b). If the defendant does not have the right to appeal under these circumstances, the appellate attorney can seek relief through a petition for writ of certiorari.

If the juvenile declines to appeal, counsel should nevertheless contact David Andrews or Kathy VandenBerg at the Office of the Appellate Defender. Their contact information can be found at the end of this handout. Counsel should share a copy of the sentencing order with them as the order will provide data on the types of sentences that are being imposed around the state.

X. An eye toward the future

The opinion in *Miller* has significantly altered the law regarding sentencing for juveniles convicted of first-degree murder. However, there are other issues on the horizon that could emerge in the wake of *Miller*. The following is a description of three of those issues.

1. Mandatory LWOP sentences should be barred for adults with mental or intellectual disabilities convicted of first-degree murder:
    a. In *Miller*, the Supreme Court barred mandatory LWOP sentences for juvenile defendants because many of the justifications for LWOP sentences were insufficient in light of the "distinctive attributes of youth." One commentator has observed that a similar approach could serve to bar mandatory LWOP sentences for adult defendants who are intellectually-disabled. *See* Nick Bonham, *Mandatory Life Without Parole Sentences for the Intellectually Disabled: A Violation of the Eighth Amendment*, 12 CARDOZO PUB. L. POL'Y & ETHICS J. 737 (2014).
2. Trial judges in cases involving juvenile defendants should give guilt phase instructions that take youth into account:
    a. One of the main reasons the Supreme Court barred mandatory LWOP sentences for juvenile defendants in *Miller* was because the Court determined that juveniles were less culpable than adults. The Court relied on psychological studies and research into adolescent brain development to conclude that juveniles do not engage in the same decision-making processes as adults. Based on the logic of *Miller*, one commentator has argued that a juvenile's lessened culpability should support guilt phase instructions on criminal intent that are specific to juveniles. *See* Jenny E. Carroll, *Brain Science and the Theory of Juvenile Mens Rea*, 94 N.C. L. REV. 539 (2016).
3. Juveniles should be held to a different standard of competency than adults:
    a. Under current law, the competency of juveniles is evaluated under the same standard

as the competency of adults. *See* N.C. Gen. Stat. § 7B-2401, 15A-1001. However, a single standard for both adults and juveniles fails to take into account reasons for incompetence that are unique to juveniles. The Supreme Court described many of those reasons in *Miller* and *J.D.B. v. North Carolina*, 564 U.S. 261 (2011). If counsel represents a juvenile and there is a question of whether the juvenile is competent, counsel should file a motion for an evaluation and then ask the court to consider any intellectual disability or developmental maturity on the part of the juvenile when determining whether the juvenile is competent. For additional ideas on competency standards for juveniles, see National Juvenile Justice Network, *Competency to Stand Trial in Juvenile Court: Recommendations for Policymakers* (2012).

Contributors

The following individuals contributed to the preparation of this handout. If counsel has questions about representing a juvenile defendant who currently faces a charge of first-degree murder or is entitled to a new sentencing hearing for a first-degree murder conviction that pre-dated *Miller*, counsel should contact the individuals below.

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