Short sentencing guide for representing juveniles facing first-degree murder after *Miller v. Alabama* – Top Ten Questions and Responses Including sample motions, pleadings, and mitigation information

Prepared July 25, 2014

This memo highlights some areas related to sentencing after *Miller v. Alabama* that may be unique or unfamiliar to criminal defense attorneys when they are representing juveniles facing first-degree murder charges.

More importantly, included with this short memo are a number of helpful resources, including sample pleadings and motions for adaption to your juvenile first-degree murder case.[1]

1. What does *Miller v. Alabama* entitle juveniles facing first-degree murder to? What is the current state of the law in Michigan?

Miller requires a sentencing hearing where the court considers the unique characteristics of youth. Specifically, the court should evaluate: (1) chronological age and immaturity, impetuosity, and the failure to appreciate risks and consequences; (2) the offender's family and home environment; (3) circumstances of the offense, including extent of participation in the criminal conduct; (4) impact of familial and peer pressures; (5) effect of offender's youth on the criminal justice process, such as inability to comprehend a plea bargain; and (6) the possibility of rehabilitation. *Miller*, 132 SCt at 2468.

Miller was clear that these are *mitigating* factors. We know that some judges, in practice, view your client's youth or family circumstances as aggravating factors. Be prepared to educate the court, and make a good record for appeal, about how youth is required to be mitigating under *Miller* and how characteristics of youth (impulsiveness, peer pressure, etc) are also mitigating and that your client will age-out of these traits that are characteristic of his/her chronological immaturity.

MCL 769.25 controls the sentencing hearing. Per the statute:

- A prosecutor must file notice to pursue a life without parole sentence. This notice is required 21 days after the conviction for new cases and by June 2, 2014 (90 days from the effective date of the statute) for cases on direct appeal at the time of the *Miller* decision. MCL 769.25(3). **If this notice is not timely filed, a prosecutor may not seek and a court may not impose life without parole. MCL 769.25(4).**
- The defense has fourteen days to respond to this notice. MCL 769.25(5).
- The court must then consider the *Miller* factors at a hearing. The court may also include other factors including an individual's performance while incarcerated. MCL 769.25(6).
- If the court does not impose a life without parole sentence, the court should impose a minimum sentence between 25 to 40 years and a maximum sentence of at least 60 years. MCL 769.25(9).

[1] This document was a collaborative project of the Juvenile Justice Clinic at the University of Michigan Law School, the ACLU of Michigan's Juvenile Life Without Parole Initiative, and the State Appellate Defender Office. Special thanks to attorney Mark Bookman, Director of the Atlantic Center for Capital Representation of Philadelphia, Pa., mitigation specialist Juliet Yackel of Baton Rouge, La., attorney Carol Kolinchak, Legal Director of the Juvenile Justice Project of Louisiana, and mitigation specialist, Julianne Cuneo, Sunshine Investigations, Warren, MI, and, for their willingness to share their expertise and materials.

Both *Miller* and *People v Carp* (MSC#146478), decided July 8, 2014 lay out the standard for the rare event that the court should impose a life without parole sentence:

- *Miller* makes it clear that an LWOP sentence is reserved for the "rare juvenile offender whose crime reflects irreparable corruption." *Miller v Alabama*, 132 S Ct 2455, 2469 (2012).
- *Carp* acknowledges that "It **thus seems certain** as a result of *Miller* that a **considerable number** of juvenile defendants who would previously have been sentenced to life without parole for the commission of homicide offenses **will have a lesser sentence meted out**. Slip op, 25.
- *Carp* also makes clear that the default sentence is a term of years. Slip op, 79.
- Please note, there is some bad language in *Carp*, making it clear that the majority feels LWOP sentences are often appropriate.

Please note: Any direct appeal attorneys with post-*Miller* LWOP sentences, either based on the judge's discretion or the life with parole vs. LWOP remedy of the initial Court of Appeals *Carp* decision have a strong argument for automatic resentencing per MCL 769.25.

Attorneys should make it clear that an LWOP sentence would be a rare and unusual exception and *not* the expected result of the hearing.

2. Who is a juvenile?

Miller v. Alabama applies to any person under 18 at the time of the offense. MCL 769.25 also explicitly applies to anybody under 18. MCL 769.25(1). Therefore, even though 17 year olds are considered adults for purposes of Michigan law, *Miller* applies to them and they are entitled to have a sentencing hearing at which mitigating factors are considered.

3. How should these sentencing hearings be different from a usual sentencing hearing?

Sentencing hearings under *Miller* should be unlike other usual Michigan court sentencing hearings. Instead, counsel should think of these hearings like death penalty sentencings. The U.S. Supreme Court has equated life without parole for juveniles to the death penalty for adults, and, in *Miller*, reiterated the wide-ranging ability of the fact-finder in such serious cases to consider any mitigating evidence. *See Miller*, 132 S.Ct. 2455, 2467 (2012) (restating the likeness of life without parole to the death penalty and the importance of individualized, and stating that "[o]f special pertinence here, we insisted in these rulings that a sentencer have the ability to consider the 'mitigating qualities of youth.'"); *Graham*, 130 S.Ct. 2011, 2027 (2010) (life without parole sentences "share some characteristics with death sentences that are shared by no other sentences.").

Carp also highlights the unique nature of the hearings:

> "juvenile defendants **must** be afforded the opportunity and the **financial resources** to present evidence of mitigating factors relevant to the offender and the offense, **psychological and other evaluations** relevant to the youthfulness and maturity of the defendants **must be allowed**, and courts must now embark upon the consideration of

aggravating and mitigating evidence offered regarding juvenile defendants as a condition to imposing sentences that previously required no such consideration." Slip op. 24-25, emphasis added.

This means that counsel will need to undertake significant mitigation efforts, similar to the requirements for counsel in death penalty cases. (See Attachment 1 - Guidelines for Mitigation in Death Penalty cases).

This means:

a) Preparation for sentencing should *begin as soon as the client is charged*. **Adequate sentencing mitigation preparation cannot be started after conviction!**

b) Consider hiring and asking the court for funds for a mitigation specialist, or at a bare minimum, an investigator experienced in mitigation work, who can conduct a mitigation investigation. See Question #4 below about the role of mitigation specialists.

c) Interview those who know your client to develop a full understanding of his/her life. These interviews can include family members, teachers, coaches, detention and jail employees, probation officers, counselors, doctors or psychologists, foster care workers, neighbors, friends and others.

d) Collect records and documents about your client and his or her life. Documents that may be relevant are: school, work, foster care, juvenile file, neglect and abuse file, drug rehabilitation of client or family members, mental health records, hospitalization records; jail records and more. See Attachment 2 – List of Records and Documents

e) Consider hiring or asking the court for funds for an expert evaluation of your client. You may want to file this motion *ex parte*. See Question #5.

4. What investigation should be done? What do mitigation specialists do? What are the standards? How can I get the court to pay for this?

A mitigation specialist is a trained professional – often someone with a social work or other advanced degree – who helps develop personal and social histories of clients and their families through extensive interviewing and record collection; they have traditionally been used most frequently for the sentencing phase of death penalty cases. In fact, the American Bar Assocation standards, which set the ***minimum*** standards for death penalty cases, ***require*** that the defense team has a mitigation specialist. Guideline 4.1 A, 1.

The U.S. Supreme Court has compared the sentence of life without parole for juveniles to the death penalty for adults. See, e.g., *Miller*, 132 S.Ct. 2455, 2467 (2012); *Graham*, 130 S.Ct. 2011, 2027 (2010). However, as your court may be unfamiliar with this comparison and will almost certainly be unfamiliar with the additional requirements of counsel at a death penalty sentencing and the important role of a mitigation specialist in death penalty cases, counsel will need to educate the court (and the prosecutor) about this important defense team member.

The organization for mitigation specialists is the National Alliance Sentencing Advocates & Mitigation Specialists (NASAMS)- http://www.nasams.org/NASAMS/NASAMS_home. A

mitigation specialist may be willing to, at a minimum, consult on the case and help you or an inexperienced sentencing investigator develop a solid mitigation plan.

There are three relevant attachments.

1) Attachment 3 – Sample Motion for Mitigation Expert and Order (in a Death Penalty case);

2) Attachment 4 – Attorney Affidavit regarding a mitigation specialist in a JLWOP case (which lays out factual and legal reasons a mitigation specialist is necessary);

3) Attached 5- Mitigation Specialist Affidavit in a JLWOP case (describing what mitigation specialists do and how they are relevant).

5. Should I get an expert to evaluate my client and submit a report to the court or testify at sentencing? What should that person do/say? How can I get the court to pay for this?

Your clients may have been exposed to or victimized by sexual or physical abuse, domestic and community violence or trauma, may have significant mental illness, may have intellectual disability, or another feature of his medical or social history that can best be understood and explained to the court by an expert. As a result, a psychologist, psychiatrist, M.D., or other expert may also be useful as part of your mitigation strategy. Depending on the background and situation of your client, a variety of health and mental health assessments or testimony may be persuasive to the courts. A motion requesting funding for this expert may need to be filed *ex parte*.

The science of adolescent neurological development, psychology, child trauma, forensic psychology, and dynamics at the Department of Corrections are all relevant areas for expert evaluations.

See Attachment 6 – Sample Motion for Court-Appointed Expert (this motion was not filed ex parte). See also *Carp*, slip op. 24-25: "juvenile defendants **must** be afforded the opportunity and the **financial resources** to present evidence of mitigating factors relevant to the offender and the offense, **psychological and other evaluations** relevant to the youthfulness and maturity of the defendants **must be allowed**."

6. Should I file any motions prior to the sentencing hearing?

- If the forum is not favorable, there is a live argument based on *Alleyne v United States*, 570 US __ (2013) for a jury to determine whether a term of years or LWOP is appropriate. *See Carp*, slip op. at 43. We "leave it to another day to determine whether the individualized sentencing procedures required by *Miller* must be performed by a jury in light of *Alleyne*."

- Although *Carp* rejected a categorical rule against sentencing either juvenile offenders of juvenile offenders convicted of aiding and abetting felony murder to life without parole, there is still an argument for a categorical rule against sentencing certain classes of youthful offenders to life without parole per the Eighth Amendment of the United States Constitution or Article 1 section 16 of the

Michigan Constitution. The *Carp* court noted for example that a categorical ban against sentencing a 14 year-old to LWOP was not yet ripe for review.

- Attorneys will need to file the appropriate motions for expert witnesses, mitigation specialists, and adjournments for proper time to prepare the hearings.

7. What should I submit, if anything, prior to the sentencing hearing?

Sentencing memorandum are needed in cases in which juveniles are facing possible life without parole. This memorandum should contain an explanation of why, under *Miller v. Alabama*, your client should receive a sentence less than life without parole.

Also, this memorandum should contain mitigating information about the client, including a social history of the client, as well as any relevant documentary evidence or reports. The length and content of these memoranda can vary.

We assume you are familiar with a legal sentencing memorandum, but are including two attachments that give social histories of clients prepared in anticipation of sentencing.

See Attachment 7 – Social history, prepared on a short timeline, presented in a *Miller* JLWOP case (redacted)

See Attachment 8 – Social history submitted to the court in a non-JLWOP case (redacted)

8. The prosecutor is talking about presenting expert evidence related to future dangerousness. What should I do?

This is exactly contrary to what *Miller* (and the court's other cases) say, and should be vigorously challenged – the whole point is that because young people's brains have not completed their development, there is no way to predict who will recidivate and who will reform.[2]

While the rules of evidence do not apply at the sentencing stage, MRE 1101(b)(3), due process requires reliability in the evidence considered at sentencing. Due process requires that "the information the sentencing judge considers has sufficient indicia of reliability." *People v Eason*, 435 Mich 228, 234 (1990). *See also United States v Silverman*, 976 F2d 1502 (CA 6, 1992) (due process requires sufficient or minimally adequate indicia of reliability).

In addition to challenging the admissibility of this "evidence," if the prosecution is presenting expert evidence, you absolutely must obtain an expert to help you counter the state's "evidence."

9. What sentence should I ask for?

Per MCL 769.25, counsel should advocate for a sentence at the low end of the 25 to 40 year minimum sentence range. Although the statute does not specify guidelines, murder 2 guidelines can be used by analogy, and for clients without a prior, counsel should highlight that the appropriate PRV score for sentencing range purposes would be zero.

[2] If the judge seems as if he/she might hear this testimony, the witnesses and the testimony should be challenged as inadmissible. As one court succinct summarized: "The scientific community virtually unanimously agrees that psychiatric testimony on future dangerousness is, to put it bluntly, unreliable and unscientific." *Flores v. Johnson*, 210 F.3d 456, 464 (5th Cir. 2000) (concluding that future dangerous evidence failed every one of the *Daubert* factors).

10. If the judge sentences my client to life without parole, should I make any additional objections?

- MCL 769.25 arguably violates separation of powers by permitting resentencing *See People v Preleigh* 304 Mich 306 (1952).

- MCL 769.25 arguably is an improper mandatory minimum sentence for a juvenile offender of at least 25 years, in violation of *Miller*.

- Preserve your Sixth Amendment objection to the judge, instead of the jury, finding the facts that subjected your client to LWOP. *See Alleyne v United States,* 570 US __ (2013).

- Throughout the hearing and in post-sentencing motions, attorneys should make a clear record regarding denial of resources for expert witnesses and mitigation specialists, and denial of time to properly prepare.

GUIDELINES FOR MITIGATION IN DEATH PENALTY CASES

The ABA guidelines for mitigation in death penalty cases, the *Supplemental Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, (2008) are helpful to guide your mitigation investigation. These guidelines may give you ideas of areas of your client's life to explore, possible witnesses to talk to, documents to obtain, experts to contact or other useful information.

Guideline 10.11(B) The defense team must conduct an ongoing, exhaustive and independent investigation of every aspect of the client's character, history, record and any circumstances of the offense, or other factors, which may provide a basis for a sentence less than death. The investigation into a client's life history must survey a broad set of sources and includes, but is not limited to: medical history; complete prenatal, pediatric and adult health information; exposure to harmful substances in utero and in the environment; substance abuse history; mental health history; history of maltreatment and neglect; trauma history; educational history; employment and training history; military experience; multi-generational family history, genetic disorders and vulnerabilities, as well as multi-generational patterns of behavior; prior adult and juvenile correctional experience; religious, gender, sexual orientation, ethnic, racial, cultural and community influences; socio-economic, historical, and political factors.

Guideline 10.11(C) Team members must conduct in-person, face-to-face, one-on-one interviews with the client, the client's family, and other witnesses who are familiar with the client's life, history, or family history or who would support a sentence less than death. Multiple interviews will be necessary to establish trust, elicit sensitive information and conduct a thorough and reliable life-history investigation. Team members must endeavor to establish the rapport with the client and witnesses that will be necessary to provide the client with a defense in accordance with constitutional guarantees relevant to a capital sentencing proceeding.

Guideline 10.11(D). Team members must provide counsel with documentary evidence of the investigation through the use of such methods as genealogies, social history reports, chronologies and reports on relevant subjects including, but not limited to, cultural, socioeconomic, environmental, racial, and religious issues in the client's life. The manner in which information is provided to counsel is determined on a case by case basis, in consultation with counsel, considering jurisdictional practices, discovery rules and policies.

Guideline 10.11(E). It is the duty of the defense team members to aid counsel in the selection and preparation of witnesses who will testify, including but not limited to:

1. Expert witnesses, or witnesses with specialized training or experience in a particular subject matter. Such experts include, but are not limited to:

a. Medical doctors, psychologists, toxicologists, pharmacologists, social workers and persons with specialized knowledge of medical conditions, mental illnesses and impairments; substance abuse, physical, emotional and sexual maltreatment, trauma and the effects of such factors on the client's development and functioning.

b. Anthropologists, sociologists and persons with expertise in a particular race, culture, ethnicity, religion.

RECORDS AND DOCUMENTS TO OBTAIN IN MITIGATION

Records and documents that may be necessary to your investigation include:
a. All school records, including transcripts, health reports, standardized testing, attendance, special education, disciplinary action, adult education and vocational schools, GED, Job Corps, continuing education;

b. Employment records including records related to job applications, attendance, assignments and performance evaluations, medical and psychological evaluations, relocations, pay records, Social Security tax records;

c. Family and individual social service records, including records of food stamps, AFDC, WIC, Medicare, Medicaid, welfare, counseling, referrals, medical and mental health treatment, records associated with adoption agencies and foster homes, including placement and discharge reports, progress reports, and medical, educational, mental health and intelligence evaluations;

d. Medical records, including private physicians, clinics and hospitals;

e. Juvenile criminal justice records, including defense counsel's files, pre-trial intervention, community service records, juvenile detention records, and all related medical, educational and intelligence evaluations, treatment plans, field and progress notes, referrals and court files;

f. Adult criminal records including police, sheriff and FBI records, jail and prison records, psychological, educational and medical evaluations and notes, daily progress notes, disciplinary reports, work assignment records, classification reports, records of participation in all vocational, educational, religious and honor programs, religious reports and visitation logs, all court records, all public defender and prosecution files;

g. Probation and parole records, including pre-sentence investigation and sentencing reports, field notes, family and social history information, conditions of supervision and violations, and conditions of release from supervision;

h. Psychological and psychiatric records, including records from community mental health clinics, private doctors and counselors, hospitals and substance abuse facilities, to include intake evaluations, treatment interventions, medication logs, physician and nurse progress notes, referrals and discharge reports;

i. All applicable birth, death and marriage certificates, records.

-*Source*: Juliet Yackel, attorney and mitigation specialist.

IN THE COURT OF

	HONORABLE
v.	CAPITAL CASE
DEFENDANT.	

DEFENDANT'S EX PARTE AND SEALED MOTION FOR THE APPOINTMENT OF A MITIGATION SPECIALIST

Defendant, XX, through undersigned counsel, moves for an order authorizing counsel to engage YY to perform services in this case as a Mitigation Specialist, and in support states the following.

Because this *Motion* relates to the provision of resources for the preparation of a defense, it is filed *ex parte* and with a request that it be maintained under seal until the conclusion of this litigation.

1. As the Court is aware, XX is before it for a capital resentencing phase. This will be the..... Counsel requires the services of a highly competent person to perform mitigation services on behalf of XX and by this *Motion* XX seeks the Court's authorization to employ YY

2. In support of this application, counsel has attached a *Declaration* from Russell Stetler (hereafter, *Declaration*) (Exhibit A), who serves as the National Mitigation Coordinator for two federal court death penalty projects. This *Declaration* was provided *pro bono* by Mr. Stetler. Mr. Stetler is among the foremost national experts with regard to the norms in the area of capital sentencing and mitigation services. *See Declaration*, ¶¶ 4-12. In his *Declaration*, he explains in detail the need for a mitigation specialist in capital sentencing generally (*Declaration*, ¶¶ 13-31), and why in his expert view, YY has the requisite skills, training, education and experience to perform these services (*Declaration*, ¶¶ 32-34). Counsel will not repeat the content of Mr. Stetler's declaration in the body of this *Motion*, but, instead will summarize the highlights.

3. There is no question that the use of mitigation specialists in capital sentencing is now routine and constitutionally required. Capital counsel has a duty to investigate and present to the jury those aspects of a capital defendant's background and life-history that mitigate, and this duty has existed for at least the last four decades. *See and compare*, *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982) ("Evidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation." *citing McGautha v. California*, 402 U.S.

183, 187-188 (1971)), *with Porter v. McCollum*, 130 S. Ct. 447, 452 (2009) ("It is unquestioned that under the prevailing professional norms . . . counsel had an obligation to conduct a thorough investigation of the defendant's background."). Indeed, the Supreme Court has found capital counsel ineffective in five cases over the last dozen years for failing to conduct the required background investigation.[1]

4. The use of a mitigation specialist to assist counsel in the investigation and presentation of this constitutionally required life history, is a long-standing and routine feature of capital defense. *Declaration*, ¶ 21 ("Competent capital counsel have long retained a 'mitigation specialist' to complete a detailed, multigenerational social history to highlight the complexity oft he client's life and identify multiple risk factors and mitigation themes."). It is therefore unsurprising that The AMERICAN BAR ASSOCIATION'S GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, 31 Hofstra Law Review 913 (2003) (hereafter, GUIDELINES) – which the United States Supreme Court has referred to as "guides to determining what is reasonable" in capital litigation[2] – Guideline 10.4, requires

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[1] *Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v. Beard*, 545 U.S. 374 (2005); *Porter v. McCollum*, 130 S. Ct. 447 (2009); and *Sears v. Upton*, 130 S. Ct. 3259 (2010).

[2] *Wiggins*, 529 U.S. at 524, *citing*, *Williams v. Taylor*, 529 U.S. at 396 and *Strickland v. Washington*, 466 U.S. 668, 688 (1984); *see also Rompilla*, 545 U.S. at 387, n.7 (discussing the relevance of the GUIDELINES in the assessment of the

capital counsel to immediately upon appointment secure the services of "at least one mitigation specialist" (counsel seeks only one such specialist).

5. Counsel proposes the use of YY. YY's *curriculum vitae* is attached as Exhibit B. As YY's *CV* demonstrates, and as Stetler opines (*Declaration*, ¶ 33), YY possess a wealth of experience in providing services as a mitigation specialist. YY is highly educated, properly trained and has worked in this area for years. YY has experience in cases, like XX, which .....

a client who..... Such cases present

unique issues and problems. Given YY's general experience and YY's particular experience in .....cases, she is likely to be highly cost effective.

6. YY's normal rate is $100 per hour. YY is willing to reduce that rate to $75 per hour in view of this being an assigned case and given the Court's request to counsel to be mindful of budgetary concerns. Counsel proposes that the Court authorize counsel to retain YY at that rate and to bill the Court in increments of $5,000. There is no doubt in counsel's mind that YY or any other qualified and conscientious mitigation specialist will exceed $5,000 in services. However, in order to allow the Court to monitor YY's progress and the funds committed, counsel thinks it is reasonable to allot funds in such increments. Because

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performance of capital counsel).

YY lives in the ..... area, she has also agreed to reduce

the rate for travel to $40 per hour.

7. Counsel and YY are available to respond to any questions that the Court may have. If required, counsel can also arrange to have Stetler available by phone to respond to any questions. A proposed order is attached.

Respectfully Submitted,

Assigned Counsel

Dated:

IN THE COURT OF

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	:	HONORABLE
	:	
v.	:	CAPITAL CASE
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DEFENDANT.	:	
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ORDER

And Now, this _____ day of upon consideration of *Defendant's Ex Parte and Sealed Motion for the Appointment of a Mitigation Specialist*, the Court **FINDS:**

1. That this *Motion* was properly presented *ex parte* and sealed, and it shall remain sealed for the duration of this litigation;

2. That counsel has demonstrated that pursuant to the Sixth and Eighth Amendment, Defendant XX is entitled to the services of a mitigation specialist for ....;

3. That YY is highly qualified to serve as a mitigation specialist for XX; and

4. That YY's skill, experience, education and training will render retaining YY as a cost-effective means of providing these constitutionally-required services to XX.

WHEREFORE, IT IS ORDERED:

Counsel's *Motion* is **Granted.**

Counsel may utilize the services of YY at the rate of$75 per hour and $40 per hour for travel, plus costs and expenses;

That YY shall submit an invoice when YY has reached$5,000 in fees and expenses and must seek reauthorization before exceeding $5,000;

That counsel and YY will comply with the rules of the .... in all respects.

SO ORDERED,

_____

Judge

DECLARATION OF CAROL A. KOLINCHAK, ESQ.

I, Carol A. Kolinchak, declare under penalty of perjury as follows:

Background and Qualifications

I am an attorney licensed to practice law in the state of Louisiana and I have been a member in good standing of the Louisiana Bar since 1993. I am currently the Legal Director at the Juvenile Justice Project of Louisiana. Since 2010, in partnership with the Equal Justice Initiative, I have been coordinating Louisiana's implementation of the United States Supreme Court's decision in *Graham v. Florida*. More recently, I have been acting as statewide coordinator for Louisiana's implementation of the Court's decision in *Miller v. Alabama*.

Prior to joining JJPL, I was the Deputy Director of the Capital Post-Conviction Project of Louisiana (CPCPL). CPCPL represents individuals who have been sentenced to death in Louisiana in post conviction proceedings. For more than a decade, before joining CPCPL, I represented indigent defendants at the trial level in both state and federal court, primarily in capital cases, including a number of juveniles facing either the death penalty or life without parole.

I have over twenty years experience in the preparation and presentation of mitigation evidence. Over the years, I have represented numerous adolescent defendants in homicide cases in which I was responsible for investigating and presenting mitigation on their behalf. I am familiar with the scope of investigation required to develop and present mitigation evidence. I have trained attorneys at both the national and local level on mitigation investigation and presentation. Most recently, I coordinated a statewide training program for attorneys, investigators and mitigation specialists on *Miller v. Alabama* Sentencing and Resentencing in Louisiana.

Miller v. Alabama and Individualized Sentencing

On June 25, 2012, the United States Supreme Court held that mandatory life without parole sentences were unconstitutional for juveniles convicted of homicide offenses. In reaching this decision, the Court relied on two strands of precedent dealing with proportionate punishment. The first strand

establishes "that children are constitutionally different from adults for purposes of sentencing." The second strand, drawn from its capital jurisprudence, struck down mandatory death sentences and required individualized sentencing and consideration of mitigation evidence. Drawing on these two strands, the Court equated juvenile life without parole sentences to death sentences for adults. "Life-without-parole terms ... 'share some characteristics with death sentences that are shared by no other sentences.' *Miller v. Alabama*, No. 10-9646, slip op. at 12 (U.S. June 25, 2012) (quoting *Graham v. Florida*, 130 S. Ct. 2011, 2027 (2010)). In particular, the Court drew upon capital precedent requiring individualized sentencing determinations, which take into account "'the character and record of the individual offender,' "'the circumstances' of the offense," and "compassionate or mitigating factors." *Id.* at 13 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion)). Because life-without-parole sentences are, in the realm of juvenile sentences, "the ultimate penalty for juveniles," *id.* at 12, imposition of this ultimate penalty is rendered unconstitutional if the sentencer does not engage in meaningful individualized sentencing consideration. "[T]he Eighth Amendment requires consideration of the character and record of the individual and the circumstances of the particular offense as a constitutionally indispensible part of the process" of inflicting the ultimate penalty. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976); *cited with approval*, *Miller* at 13.

Thus, the *Miller* decision firmly established that before a juvenile could be sentenced to life without parole for a homicide offense, there must be individualized sentencing and consideration of mitigation evidence. "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." *Miller* at __.

In the capital context, there is more than 35 years of case law implementing individualized sentencing. When states tried to limit the amount and kind of mitigation that sentencers could consider, the Supreme Court struck down those limitations, holding that "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any circumstances of the offense

that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 605 (1978); *see also Eddings v. Oklahoma*, 455 U.S. 104 (1982) (sentencing court's failure to consider at mitigation the circumstances of Eddings' "unhappy upbringing and emotional disturbance" rendered sentence unconstitutional); *Smith v. Texas*, 543 U.S. 37 (2004) (jury instruction limiting consideration of mitigation rendered sentence unconstitutional).

Louisiana has likewise repeatedly stressed the importance of consideration of all mitigating circumstances when determining the sentence to be imposed:

> It is well established that the defendant in a capital case must be allowed to place before the sentencing jury all relevant evidence in mitigation of punishment. "Exclusion by the state trial court of relevant mitigating evidence impeded the sentencing jury's ability to carry out its task of considering all relevant facets of the character and record of the individual offender."

State v. Weiland, 505 So.2d 702, 707 (La.1987) (citations omitted) (quoting *Skipper v. South Carolina*, 476 U.S. 1, 8 (defendant "must be allowed to place before the sentencing jury all relevant evidence in mitigation of punishment"); *State v. Hamilton*, 478 So. 2d 123, 129 (La. 1985): (character of the defendant is the critical issue "on which the determination of sentence is focused"); *State v. Sonnier* 380 So.2d 1, 7 (La. 1979) (capital sentence cannot be "imposed in disregard of numerous and persuasive mitigating circumstances"). Without a thorough consideration of mitigating factors, any sentence imposed will be found unconstitutional.

Counsel's Corresponding Duty to Investigate

Post *Miller*, investigation of a client's background, character, life experiences, and mental health is axiomatic in the defense of an adolescent charged with homicide.

> "[J]ust as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered" in assessing his culpability. *Id.*, at 116.

Miller v. Alabama, No. 10–9646, slip op. at 14 (U.S. June 25, 2012).

> Such mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it. Under these schemes, every juvenile will receive the same sentence as every other—the 17-year-old and the 14-year-old, the shooter and the accomplice, the child from a stable household and the child from

> a chaotic and abusive one. And still worse, each juvenile (including these two 14year-olds) will receive the same sentence as the vast majority of adults committing similar homicide offenses—but really, as *Graham* noted, a *greater* sentence than those adults will serve. In meting out the death penalty, the elision of all these differences would be strictly forbidden. And once again, *Graham* indicates that a similar rule should apply when a juvenile confronts a sentence of life (and death) in prison.

Miller v. Albama, No. 10–9646, slip op. at 14 (U.S. June 25, 2012).

> Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors(including on a plea agreement) or his incapacity to assist his own attorneys. See, *e.g.*, *Graham*, 560 U. S., at ___ (slip op., at 27) ("[T]he features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings"); *J. D. B. v. North Carolina*, 564 U. S. ___, ___ (2011) (slip op., at 5–6) (discussing children's responses to interrogation). And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.

Miller v. Albama, No. 10–9646, slip op. at 15 (U.S. June 25, 2012). Thus, *Miller* makes clear that counsel has a duty to investigate and develop this type of mitigation evidence in preparation for sentencing and develop a unified strategy for the guilt-innocence and sentencing phases.

As early as 1983, Professor Gary Goodpaster discussed trial counsel's "duty to investigate the client's life history, and emotional and psychological make-up" in capital cases. He wrote, "There must be inquiry into the client's childhood, upbringing, education, relationships, friendships, formative and traumatic experiences, personal psychology and present feelings. The affirmative case for sparing the defendant's life will be composed in part of information uncovered in the course of this investigation. The importance of this investigation, and the care with which it is conducted, cannot be overemphasized." (Gary Goodpaster, "The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases," 58 New York University Law Review 299 (1983) at 323-324.)

In juvenile homicide cases, competent defense counsel now have a duty to conduct life-history investigations and develop social histories, but generally lack the skill to conduct the investigations

themselves. Moreover, even if lawyers had the skills, it is more cost-effective to employ those with recognized expertise in developing mitigation evidence. Thus, competent counsel retain a mitigation or sentencing specialist to complete a detailed, multigenerational social history to highlight the complexity of the client's life and identify multiple risk factors and mitigation themes.

It is important to note that Louisiana's legislative response to the *Miller* decision now requires development of this type of social history.

> At the hearing, the prosecution and defense shall be allowed to introduce any aggravating and mitigating evidence that is relevant to the charged offense or the character of the offender, 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. Sentences imposed without parole eligibility should normally be reserved for the worst offenders and the worst cases.

Act 239/HB 152, Louisiana Legislature Regular Session 2013 (emphasis added).

In addition, the Subcommittee on Federal Death Penalty Cases, Committee on Defender Services for the Judicial Conference of the United States, for example, noted that mitigation specialists "are generally hired to coordinate an investigation of the defendant's life history, identify issues requiring evaluation by psychologists, psychiatrists or other medical professionals, and assist attorneys in locating experts and providing documentary material for them to review." (*Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation,* Federal Judicial Conference, May 1998, available at http://www.uscourts/gov/dpenalty/1COVER.hun.)

Without a thorough social history investigation, it is impossible to ascertain the existence of previous head injuries, childhood trauma, and a host of other life experiences. Moreover, without a social history, counsel cannot determine which experts to retain, in order to gauge the nature and extent of a client's possible mental disorders and impairments. Mental health experts, in turn, require reliable social history data to conduct a thorough and reliable evaluation.

The social history investigation should include a thorough collection of objective, reliable documentation about the client and his family, typically including medical, educational, employment, social service, corrections, and civil and criminal court records. Such contemporaneous records may

document events which the client and other family members were too young to remember, too impaired to understand and record in memory, or too traumatized, ashamed, or biased to articulate. The collection and analysis of this documentation is a slow and time- intensive process. Many government record repositories routinely take months to comply with appropriately authorized requests. Great diligence is required to ensure compliance. Careful review of records often discloses the existence of collateral documentation which, in turn, needs to be pursued.

A social history cannot be completed in a matter of hours or days. In addition to the bureaucratic obstacles to the acquisition of essential documentation, it takes time to establish rapport with the client, his family, and others who may have important information to share about the client's history. It is quite typical, in the first interview with clients or their family members, to obtain superficial and defensive responses to questions about family dynamics, socio- economic status, religious and cultural practices, the existence of intra-familial and community violence, and mentally ill family members. These inquiries invade the darkest, and most shameful secrets of the client's family, expose raw nerves, and often re-traumatize those being interviewed. Barriers to disclosure of sensitive information may include race, nationality, ethnicity, culture, language, accent, class, education, age, religion, politics, social values, gender, and sexual orientation. These barriers can be overcome, but only with repeated interviews and genuine efforts to build trusting relationships.

Only with time can an experienced mitigation specialist or investigator break down these barriers, and obtain accurate and meaningful responses to these sorts of questions. In my professional opinion, an experienced mitigation specialist requires, at minimum, hundreds of hours to complete an adequate social history – even working under intense time pressure. Several nationally recognized authorities in mitigation investigation who have worked extensively in Louisiana have stressed the cyclical nature of the work and estimated that hundreds of hours will typically be required.

Conclusion

Based on my training and experience and my review of case related material, it is my conclusion that effective representation in this case requires a substantial continuance to allow counsel and her

mitigation investigator to investigate and develop mitigation evidence in preparation for the sentencing hearing. Critical education, SSI and DCSF records that have been subpoenaed by counsel have not yet been provided. As noted above, without an opportunity to carefully review and digest these records, counsel cannot develop the comprehensive and reliable social history *Miller* now requires. Without a reliable social history, counsel cannot consult with appropriate experts and obtain a competent and reliable mental health assessment of their client. There are indications of a family history of abuse, neglect, mental illness and chronic exposure to trauma. Chronic exposure to severe trauma causes enduring personality and brain function changes that range from hyper-vigilance to psychosis. All of these indicators point to the critical need for a comprehensive and reliable social history in this case. Without it, counsel will be unable to effectively develop the mitigation evidence they are now duty bound to present in light of *Miller* and Act 239.

In my opinion, which I base on my training and experience, it would have been impossible for the investigation and assessment to be completed by the July 9 sentencing date and will require at a minimum several months to complete.

I declare under penalty of perjury under the laws of the State of Louisiana the foregoing is true and correct.

Executed this 8th day of July 2013.

C A. Kolinchak

Carol A. Kolinchak

AFFIDAVIT OF JULIET YACKEL, J.D.

The affiant, being duly sworn, states as follows:

1. I am an attorney and mitigation specialist with twenty-one years of experience in state, federal, and military jurisdictions throughout the United States.

2. I graduated from Tulane Law School in 1992 and operate a private practice based in Baton Rouge, Louisiana.

3. In June, 2013 I was contacted by attorneys Margaret Lagattuta and Lindsey Jarrell and asked to provide my professional opinion regarding the following two items: (a) articulate the scope of the mitigation investigation as required by the United States Supreme Court in *Miller v. Alabama, 132 U.S. 2455 (2012);* and (b) opine about the number of hours required to conduct the mitigation investigation in juvenile life without parole cases.

4. I was asked to address a similar issue last summer by the criminal defense bar in the State of Michigan. In that circumstance, I was asked to develop curriculum and serve as faculty at the first national training event designed to prepare practitioners to handle juvenile life without parole cases remanded for new sentencing hearings pursuant to *Miller v. Alabama*, 132 U.S. 2455 (2012)[1].

5. One question posed at the above-described training event was the amount of time required to conduct a constitutionally effective mitigation investigation in a life without parole case. Since every case is different, there is no "one size fits all" answer to this question.

6. It is helpful, however, to have an understanding of the key components of a mitigation investigation to assess what is reasonable in any given case. This affidavit is an attempt to do just that.

[1] I also assisted in curriculum development and served as faculty at the May 23-24, *2013 Miller v. Alabama Sentencing and Resentencing in Louisiana* training which took place at Tulane Law School.

1. BACKGROUND & QUALIFICATIONS

7. My practice has been devoted entirely to the defense of criminal cases since graduating from Tulane Law School in 1992.

8. Over the years, I have served as the mitigation specialist in over seventy capital murder & life without parole cases in state, federal and military jurisdictions nationwide.

9. I have instructed mitigation specialists, lawyers, and investigators in mitigation as a faculty member for numerous national, state, and local seminars relating to the mitigation function in criminal cases.

10. I am the immediate past president of the National Alliance of Sentencing Advocates and Mitigation Specialists ("NASASMS"), the only national organization devoted to the training, Executive Committee, from 2005 to 2011, and was Chair of the Training Committee.

11. A more detailed recitation of my education, training and experience can be found in my curriculum vitae which is appended hereto as Exhibit A.

II. STANDARD OF CARE

12. For all opinions set out below, I rely upon *Strickland v. Washington*, the Supreme Court's definitive teaching on the Sixth Amendment right to the effective assistance of counsel. My opinion is also informed by the Court's opinion in *Miller v. Alabama*, 132 U.S. 2455 (2012).

13. For purposes of this analysis, mitigation is defined as compassionate factors stemming from the diverse frailties of humankind, the ability to make a positive adjustment to incarceration, the realities of incarceration and the actual meaning of a life sentence, capacity for redemption, remorse, vulnerabilities related to mental health, explanations of patterns of

behavior, negation of aggravating evidence regardless of its designation as an aggravating factor, positive acts or qualities, responsible conduct in other areas of life (e.g. employment, education, military service, as a family member), any evidence bearing on the degree of moral culpability, and any other reason for a sentence less than life.

The Miller Opinion

14. In *Miller v. Alabama*, the United States Supreme Court invites the investigation and presentation of evidence relating to three separate and distinct areas of mitigation:

(a) mental health issues including adolescent brain development;

(b) family & environmental factors;

(c) potential for rehabilitation.

15. At its core, the *Miller* opinion relies upon research showing "children are different than adults." Advances in science prove that the human brain is not fully developed until the early twenties, thus teenage offenders are not equipped with a fully developed brain.

16. The *Miller* opinion also takes into account the individual mental health history of each defendant. In reaching its decision, the court noted Evan Miller's long history of suicide attempts with the fist occurring when he was just 6 years old.

17. In many cases, defendants suffer mental impairments that may not meet the legal definition of insanity or incompetency, but are nevertheless powerfully mitigating disabilities which are given great weight when assessing individualized culpability.

18. For clients who are psychiatrically disordered or brain damaged, mitigation evidence may explain the succession of facts and circumstances that led to the crime, and how that client's disabilities distorted his judgment and reactions. Of all the diverse frailties of humankind, brain damage is singularly powerful in its ability to explain why individuals from the same family

growing up in the same setting turn out differently. It is an objective scientific fact. It does not reflect a bad choice made by the client.

19. Additional areas to be covered in the life history are virtually unlimited, but the minimal areas of inquiry have been frequently described by courts as follows: medical history; complete prenatal, pediatric and adult health information; exposure to harmful substances *in utero* and in the environment; substance abuse history; mental health history; history of maltreatment and neglect; trauma history; educational history; employment and training history; military experience; multi-generational family history, genetic disorders and vulnerabilities, as well as multi-generational patterns of behavior; prior adult and juvenile correctional experience; religious, gender, sexual orientation, ethnic, racial, cultural and community influences; socio-economic, historical, and political factors.

20. Development and presentation of evidence covering a broad range of possibilities requires a thorough and comprehensive multi-disciplinary, multi-generational, culturally competent, bio-psycho-social investigation, which must be conducted by specialists trained to identify and collect such evidence.

III. TIME & RESOURCES REQUIRED TO CONDUCT MITIGATION INVESTIGATIONS

21. Based upon my review of the sources described above, and considering them in light of the prevailing professional standard of care, and relying upon my professional training and twenty-one years of criminal defense experience, it is my expert opinion that a *minimum of 300 hours* is required to conduct a mitigation investigation in a case involving life without the possibility of parole.

22. This figure is based on the fact that mitigation investigations of this magnitude requires:

- investigating the client's mental health to determine whether he suffers from organic brain injury, psychiatric disorders, or trauma outside the realm of ordinary human experience;
- establishing trust with the client and key witnesses through multiple in-person, one-on-one, face to face interviews;
- creating a climate conducive to the disclosure of sensitive information which enables the client to reveal sensitive information needed to make an effective presentation;
- obtaining the client's records including, at a minimum, medical, psychological, school, employment, social service, and corrections records;
- obtaining records relating to first degree relatives to demonstrate a multi-generational pattern of mental illness, addiction, and certain behaviors;
- working with experts including preparing summaries chronologies, and genograms to assist evaluating experts properly assess voluminous information;
- setting the stage for a plea, when appropriate;
- preparing for a sentencing hearing including designing exhibits and testimony outlines.

23. The collection of records and analysis of this documentation is one of the most labor intensive and time consuming processes of the above-stated tasks. Many government, medical and school record repositories routinely take months to comply with appropriately authorized requests. Great diligence is required to ensure compliance. Careful review of records often discloses the existence of collateral documentation which, in turn, needs to be pursued.

20. After records have been obtained, they must be reviewed for new leads, with an eye towards identifying new witnesses to interview, facts and events to investigate, and additional records to request. Follow-up interviews with certain mitigation witnesses will be required to explore new information contained in the records.

21. Also, it is the general practice to summarize and index all mitigation records, and incorporate new data from the records into a set of master documents. This master timeline and the indexed version of the records are typically provided to consulting and evaluating experts, in order to provide them with the background needed to render an accurate and reliable opinion.

22. The life history investigation also requires multiple interviews of the client. The defense team must immediately begin to build a relationship of trust and establish an effective rapport with the client.

23. It is critically important to interview available family members, as well as former teachers, neighbors, co-workers, classmates and others who had an opportunity to observe the client's development and may provide information critical to expert evaluations, as well as offer lay testimony and historical documentation to corroborate the testimony of experts.

24. There is no substitute for in-person, on the ground investigation. When life without the possibility of parole is at stake, phone interviews are simply not an option because the subject matter involved in establishing a client's life history is so sensitive. As noted in the ABA Guidelines' Commentary addressing client interviews, "much of the information that must be elicited for the sentencing phase investigation is very personal and may be extremely difficult for the client to discuss. [Sensitive topics] should therefore not be broached in an initial interview." Such information may often be equally painful for family members to discuss and likewise will require repeated interviews. Such information is unlikely to be elicited over the phone.

25. Additional factors rendering the mitigation investigation time-intensive and complex include:

a) Locating lay witnesses can be difficult. Oftentimes, lay witnesses are dispersed and are hard to trace. Travel is frequently necessary to locate witnesses.

b) Mitigation specialists often encounter practical difficulties in obtaining relevant documents; for example, there may be bureaucratic obstacles to the acquisition of records. In addition, the records collected can be voluminous. Extracting relevant data from records and digesting the information is a time-consuming process.

c) Throughout the course of the investigation, the mitigation specialist must devote significant time to analyze and organize the collected data in such a way that defense counsel can effectively utilize it in court proceedings.

d) The work of a mitigation specialist is cyclical in that new interviews and documents often lead not only to new sources, but often lead back to original sources who must then be re-interviewed in the context of new information.

26. For all of the reasons stated above, a minimally adequate mitigation investigation requires at least 300 hours, and often much longer.

I declare under penalty of perjury that the forgoing is true and correct to the best of my knowledge and recollection.

_____

Juliet Yackel

STATE OF MICHIGAN

IN THE [redacted]

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

[redacted]

Defendant-Appellant.

/

Court of Appeals No. [redacted]

Circuit Court No. [redacted]

Honorable [redacted]

[redacted]
Attorney for Plaintiff-Appellee

[redacted]
Attorney for Defendant-Appellant /

MOTION FOR REIMBURSEMENT OF EXPERT WITNESS

Defendant-Appellant [redacted] by and through his attorney, the STATE APPELLATE DEFENDER OFFICE, by [redacted], respectfully moves this Honorable Court to order reimbursement for the costs of obtaining expert testimony in support of his Motion for New Trial and states:

1. On [redacted], a jury found [redacted] guilty of felony-murder and first-degree child abuse following a trial held in the [redacted] Circuit Court, the Honorable [redacted] presiding.

2. On [redacted], this Court sentenced [redacted] to lifetime imprisonment for felony-murder and 10 to 50 years for first-degree child abuse. [redacted] is currently serving that sentence at the [redacted] Correctional Facility.

3. After the defendant's timely request for appellate counsel, this Court appointed the State Appellate Defender Office to perfect an appeal and/or pursue post-conviction remedies on August 14, 2009. A claim of appeal was issued on the same date.

4. [redacted] was constitutionally entitled to the effective assistance of appellate counsel. US Const, Am VI, XIV; Const 1963 art 1, § 20.

5. On appeal, competent representation requires adequate investigation into any and all matters which may entitle the defendant to relief. *See, e.g., People v Davis*, 199 Mich App 502 (1993) ("Defendant, as an indigent, was entitled to a waiver of costs for court fees, transcripts, and expert witness services reasonably necessary for his defense").

6. In fact, Michigan's Minimum Standards for Indigent Criminal Appellate Defense Services require appellate counsel to raise all issues "which offer reasonable prospects of meaningful postconviction or appellate relief[.]" Administrative Order No. 2004-6, Standard 3. "If a potentially meritorious issue involves a matter not reflected in the trial court record, counsel should move for and conduct such evidentiary hearings as may be required." *Id.*

7. To that end, appellate counsel challenged the decision of [redacted] trial attorney not to obtain the opinion of an independent forensic pathologist and present it to the jury. On [redacted] the Court of Appeals remanded the case to this Court for an evidentiary hearing on this issue. Thereafter, appellate counsel filed a Motion for New Trial.

8. A two-day evidentiary hearing on this motion commenced on [redacted] and concluded on [redacted]

9. To establish a good faith basis for his motion, and thereby fulfill his professional obligation, appellate counsel sought the opinion of [redacted] an expert in the

forensic pathology. [redacted] made extensive findings supporting appellate counsel's argument that [redacted] did not receive the effective assistance of counsel at trial.

10. Although this Court ultimately denied this motion, this Court did credit [redacted] testimony and found that the testimony given at trial by the prosecution's expert was "incredible" and "significantly misleading."

11. [redacted] the [redacted] did not bill for the time he spent analyzing the case and preparing for the evidentiary hearing. But his office did bill for the [redacted] hours [redacted] spent testifying in court. That bill, which is appended to this motion, amounted to [redacted]

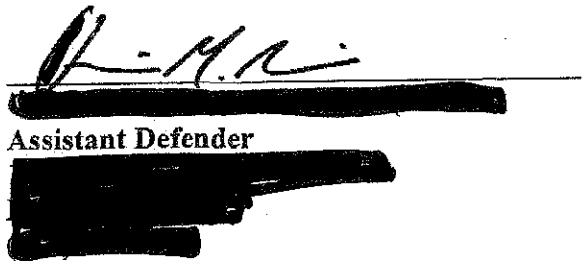
12. [redacted] is entitled to the appointment of an expert at public expense under *People v Kosciecha*, 185 Mich App 672 (1990) and *People v Jacobsen*, 205 Mich App 302 (1994). *See also* MCL 775.13a, 775.15.

13. By court rule, the costs of appellate representation must be borne by the political subdivision responsible for maintaining, financing, and operating the appointing court. MCR. 8.202(B). *See also* MCL 768.20a(3) (providing that indigent defendants who seek to present an insanity defense are entitled to the appointment of an expert witness at county expense).

14. In this case, [redacted] County is the political entity responsible for [redacted] prosecution and, consequently, his defense.

WHEREFORE, Defendant respectfully requests that this Honorable Court grant the Motion For Reimbursement Of Expert Witness.

STATE APPELLATE DEFENDER OFFICE

BY: 

Assistant Defender

[redacted]

Date: January 11, 2011

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December 13, 2012

Honorable Judge CET

RE: ***Commonwealth v. KB***

Sentencing Memorandum

This sentencing memo is being prepared on behalf of KB, who is scheduled for a sentencing hearing in front of the Honorable Judge CET. On July 16, 2012, Mr. B was convicted by a jury of First Degree Murder and related charges. Pursuant to Miller v. Alabama, 132 S.Ct. 2455 (2012), Your Honor has scheduled a separate hearing to determine the appropriate sentence for Mr. B.

The following information was obtained through interviews with KB, TC, LC, YC, JC and DG. Additionally, the following materials were reviewed: Presentence Report dated 9/25/2012 prepared by JM; JCMS records on KB, CPCMS on KB, TC and DG; and the Philadelphia Police Department Arrest Report.

KB was born on March 23, 1993, to TC in Gainesville, Florida. TC was 19 years old at the time of his birth. KB has one older half sister, JC, who is two years older than him. DG is KB's biological father but this information was unknown to both father and son until many years later. TC had moved to Florida with her paramour, WB, while she was pregnant with KB. According to TC, she never told DG about KB because he was always "in and out of jail." Despite his not being the biological son, KB was given WB's last name. They had moved to Florida because WB was trying to get out of the drug business, and as a result had been shot six times and almost died. Coupled with threats to his family and TC, this was enough to cause him to move out of state.

TC reports that there were no problems with her pregnancy, labor or delivery, and KB was born a healthy 7 pounds and 4 ounces. TC was receiving prenatal care in Florida. When KB was around 8 or 9 months old, the family moved back to Philadelphia. TC and WB remained together for several more years until he "went off the deep end." TC reports that WB, who was reportedly high on PCP, came to her mother, YC's house in a rage and shot her in the hip. At

this time, KB was around 2 years old and he and JC were in the house when this happened. Then he came after TC and was trying to kill her. She left the kids in the house with their bleeding grandmother and ran out of the house hoping that he would follow her. She got halfway down the block when she heard another gunshot. She ran back into the house to find that WB had shot and killed himself.

In 1996, when KB was 3, his mother TC was indicted and pled guilty to marijuana distribution. She served 2 years in the Federal Correctional Institute. Upon being released from prison, TC was on probation for a few years, which ended in 1999. During his mother's incarceration, KB was cared for by his maternal aunt Te. C.

Sometime in 2000, when KB was 7 years old, TC met WM; he soon became a very stable father figure for the family. Both KB and JC report that he was the only real father any of the kids had ever known. For four years, he was a constant and positive figure in their lives. WM took TC's children as is own, treated them kindly and sought to enrich their lives in many ways. He would regularly take them to Sesame Place, the park, to ride bikes and he and KB often played basketball. KB recalls that WM would talk to him about the importance of staying in school. TC had stabilized herself as well and was working as a home health aide. In 2004, however, things took a tragic turn when TC received a phone call from WM's mother telling her that he had been found shot to death. In the weeks that followed, TC learned that she was pregnant with their child.

This was a devastating loss to the family. KB was inconsolable and seemed to be affected the most. TC said it was the first time she had ever seen KB cry. TC was also in a state of depression. She would hardly come out of her room and cried all the time. It was KB and his siblings who kept the family together and ultimately pulled her out of her depression. She eventually sought out grief counseling at CM.

To this day, KB recalls the anger he carried as a child at not having his father around, and that WM had filled that void for a time. Because of the lack of a regular father figure, KB felt it was his responsibility to take care of his mother and siblings. His younger brothers and sisters still look up to him for guidance and advice; all of the siblings are very close to one another. (In addition to his older sister JC, KB has several other half-siblings: AC, age 17; WM, age 8, UH, age 7; and KH, age 4.) TC recognizes that since KB was the only consistent man of the house he took on more responsibility that he should have had to. TC has struggled in many ways, and her own difficulties have always hit KB the hardest; according to his mother, he was often the one left trying to hold the family together.

The family had a lot of financial hardships and received public assistance. TC struggled to keep a job as a single parent raising her children alone. None of the fathers ever provided a significant amount of financial or emotional support. KB's childhood is rife with chaos, instability and loss. Additionally, KB was exposed to a significant amount of neighborhood violence. He witnessed people being shot and stabbed to death, and was himself the victim of violence on multiple occasions.

According to his mother, KB was a smart kid who performed well academically in school. Khidhr attended WE School, TH Elementary School, JH and in 7th grade was transferred to Alternative School. He attended school while he was in placement and was in the 10th grade at

WP High School when he was arrested on the current offense. Both TC and KB report that he had some disciplinary problems in school, which resulted in his placement at Alternative School. These problems, however, were at their height in the wake of the sudden loss of WM. A request is still pending for records from the School District. While incarcerated, KB attended school through the PennyPack program and received his diploma (attached as an exhibit to this report). He also received a Certificate of Recognition for outstanding achievement in science (also attached). KB has expressed a desire to take college courses while incarcerated, and reports that his favorite subject is math.

TC confirms that there has been DHS involvement with the family over the years. A records request to DHS, initiated by the presentence investigator, is still pending. In 2005, when UH was born, DHS intervened substantially. Umar was born at 6 months and weighed only 1 pound and 3 ounces. He was born with marijuana in his system and was taken out of the home by DHS. TC indicates that she was under a lot of stress at the time because the baby's father was locked up and she had resorted to smoking. It took two years for her to finally regain custody of UH.

KB was first arrested as a juvenile at age 13 on three separate drug charges. He was adjudicated delinquent in March of 2007 and ultimately placed. While at placement, KB was diagnosed with ADHD and prescribed a number of different medications including Seroquel, a very powerful antipsychotic that is typically used to treat schizophrenia and bipolar disorder in adults. In fact, it is not approved by the FDA for the treatment of ADHD. Seroquel can have very serious side effects and is known to increase the risk of suicidal thoughts and behaviors in children. Given the availability of a variety of other drugs used to treat the symptoms of ADHD, this seems an extraordinarily inappropriate medication for the treatment of ADHD in an adolescent. Other medications prescribed for KB included Clonidine and Strattera – both commonly used to treat ADHD. After successfully completing the program, KB was discharged on March 4th, 2008. He is not presently on any medication.

KB had some adjustment problems in aftercare. According to his mother, one of those problems was that he was constantly sleeping. At one point she had to go to the RediWrap program and explain that his medications were the cause. She described how he would take one of the pills prescribed and within 20 minutes be passed out.

It wasn't until a few years ago that DG learned from Y, KB's maternal grandmother, that he was KB's father. In 2006, DG and KB met for the first time and started to establish a relationship. DG has been supportive of KB since he has been incarcerated and attended the trial. Despite not having known about KB for many years, he is making an effort to be a part of his life. DG has had his own trouble with the law and served several different prison terms for offenses including possession with intent to deliver and aggravated assault. He was released from state prison in 2003 after serving the minimum on an 8 ½ to 20-year sentence for the aggravated assault.

Even a short and hardly microscopic examination of KB's life indicates a chaos and dysfunctionality that routinely leads to violence. Nonetheless, there is nothing in his background that might indicate a negative long-term prognosis – there is no organic impairment or learning disabilities, and every reason to think that the 15 year old who has been convicted of this crime cannot mature into a 40 year old man fully prepared to be a

responsible adult. We urge this Court to sentence him to the lowest possible number of years in prison, understanding full well that a very serious crime has been committed and that severe punishment for that crime is necessary. We believe that KB will be an excellent candidate for parole in the future, and we hope this Court, in fashioning its sentence, allows him this possibility.

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ELLEN T. GREENLEE
Defender

DATE

PRE-SENTENCE SOCIAL HISTORY

Prepared by: Erin L. Fennell, M.A.
Mitigation Specialist
Defender Association of Philadelphia

Commonwealth v. DS

SOURCE MATERIAL

In preparing this social history, numerous face-to-face interviews were held with the defendant, DS as well as with his mother AS, his maternal aunts MS & LS, and his cousin JS. In addition, the following records were reviewed: discovery made available by the Office of the District Attorney, Philadelphia Department of Human Service records, student records from the School District of Philadelphia, medical records from HU Hospital, and substance abuse treatment records from the JI Substance Abuse Treatment Program.

INTRODUCTION

DS is a 26 year old African American male who is awaiting sentencing, having been found guilty of Robbery and Criminal Conspiracy. DS has been incarcerated since his arrest in April 2003.

DS has lived a life marked with instability and abandonment. He was born to alcoholic parents and became known to the Department of Human Services by the age of 2. Despite his mother's attempts at providing stability for DS and his younger sister, the family moved from shelter to shelter and was subsequently shuffled among maternal family members. Dallas took on the parental role with his younger sister, JS, and according to DHS records, the two of them were left to beg for food from neighbors. DS attended 10 different schools, forcing him to adjust to new neighborhoods and peers with each move.

Family members noted that at age 11 DS became severely depressed when his father died. "Everything just stopped, he lost all of his self-esteem". By the age of 13, DS had learned to self medicate his troubles with marijuana. In addition to an apparent genetic predisposition to

addiction, his drug abuse was reinforced by unstable living conditions in shelters and the drug infested projects of North Philadelphia.

DEVELOPMENTAL HISTORY

DS was born to 22 year old AS and 42 year old DP in University Hospital on February 22. DS's mother reported that she abused alcohol and cocaine during her pregnancy.

AS lived in North Philadelphia with her maternal aunt when DS was born. Within the year she moved to West Philadelphia with her mother and grandmother. Prior to turning 2 years old, on two separate occasions, DS ingested medication prescribed to his maternal grandmother. He was thereafter evaluated at the Children's Hospital, which led to the first of several DHS referrals.

In November of 1981, the family was again referred to DHS; this time by a family doctor who reported concerns with AS's "ability to cope, DS's ingestion of the medication and JS's skull fracture at 11 months old." Problems indicated were "inadequate care, mother needs guidance on providing proper supervision and a safe environment for her children, family dysfunction, mother appears depressed, expressed concern about her own experiences where she was physically abused as a child, afraid she may become abusive to her children."

AS moved her family into the Projects with DS's father, DP. By the third grade, DS was routinely absent from school. His teacher attributed 53 of his 63 absences to "parental neglect". His mother's drug use began to escalate and in July of 1987 and DHS was again contacted, this time by an anonymous female caller. She stated "The mother abuses drugs, spends DPA money and food stamps on drugs, children go to neighbor's houses and beg for food, they run the streets late at night and are dirty and unkempt." It was not until November of 1987 that a DHS worker visited the home. No contact was made with April; however, the worker wrote "This is a high risk neighborhood where drug activity is an open and common practice." Contact was not made with April until March of 1988; the DHS social worker was led to the DS's apartment by the manager of the Housing Projects. The manager commented "the apartment is deplorable and she is in the course of the eviction process for nonpayment of rent". The DHS social worker wrote "getting to the third floor was a frightening experience. There were men and women all over the steps, openly trafficking drugs. AS's apartment and herself was unkempt and her refrigerator, empty and dirty. She admits using drugs and something suspicious was going on in the back room."

The family was soon evicted from the projects and AS's crack cocaine addiction spiraled out of control. DS and JS were left to live with their maternal grandmother, maternal aunt and 4 cousins in a 3 bedroom row home in the L. section of the city. According to AS, "I was on the street using, moving from place to place using crack, I did what I had to do to get my drugs."

Eventually, AS sought help for her addiction and underlying childhood abuse issues. She entered the shelter and the children were returned to her care. They continued to live in shelters

for approximately 2 years. It is during this time that DS's father died of cancer. DS was 11 years old.

AS recalled a change in DS's personality following his father's death. She described him as becoming withdrawn and seeming more vulnerable. She reported that he trusted other children who did not deserve his trust, and they in turn often took advantage of him.

In 1996, his beloved maternal aunt died of AIDS. DS relationship with L was a close one and her death likely contributed to his growing Depression.

EDUCATIONAL HISTORY

DS's education was continuously disrupted, due to his family's unstable living arrangements. With each move, DS and his sister had to change schools and readjust to their new peer group only to be transferred to a new school the following year.

Throughout his elementary education DS was often absent. Teacher's notes indicate absences were attributed to "parental neglect" and "other urgent reasons." In DHS records, his third grade teacher noted "There is never a week that children are not absent once or twice, and they are late quite frequently. The children however, are not failing and DS is a pretty good, bright boy."

Despite DS's mother describing him as a "slow learner" and DS having failed and repeated several grades, it does not appear that the school system ever had him evaluated for special education services. In addition, the large discrepancy between his mathematical and verbal test scores in the records should have indicated the need for a learning support evaluation.

DS dropped out of BF High School after having failed 9th grade four times. He attempted to obtain his GED while in drug treatment at Substance Abuse Treatment Program in June of 2000, however, he failed by two points.

While incarcerated, DS completed the Rational Emotive Spiritual Therapy (REST) Program, and actively participated in Bible studies. He began taking GED courses, however was fearful of failure so he did not take the test.

TREATMENT HISTORY

DS had learned to self medicate with marijuana at an early age. By the age of 16, his use became daily. In June of 1999, DS was court ordered to FS half way house and out patient treatment at Substance Abuse Treatment Program. While in treatment DS was diagnosed with cannabis dependency and often described as "sad and confused". His counselor referred to him as a "lost puppy", and says "he just does what he is told and wanders from place to place, person to person." Throughout DS's treatment he was described as depressed, with flat affect and unable to express emotions. DS was administered the Beck Inventory for Depression, his score

of "39" categorized him as "severely depressed", however, despite treatment recommendations, no Axis I diagnosis was given nor were any medications prescribed to alleviate his depressive symptoms.

While in treatment, DS's strengths were listed as being "honest about problems, follows directions, motivated for treatment, and receptive to help and therapy." His weaknesses were listed as "limited ability to grasp concepts, co-dependent personality, gullible and a limited ability to interact socially." His obstacles to treatment were identified as "learned helplessness, poor education, and a lack of positive environment."

DS remained in the half-way house for 11 months and prior to his discharge he was promoted to a supervisory position.

SUMMARY

In one of many discussions with DS's mother AS, she recalled the following: "When DS was 6 years-old, he used to dress himself and his little sister and walk her down the block to church. I would be strung out on my drugs and when they came home, he would lean over me and say 'Mommy, I prayed for you'". Despite being abandoned throughout his childhood, DS has continually demonstrated his ability to love and show the nurturance to his family that he never received.

With proper guidance, treatment and support DS has the potential to be a productive and healthy member of society. In the past he has demonstrated a willingness and ability to achieve in educational and treatment settings. He should be encouraged to stay on task, and not allow his emotional vulnerability cause him to let his guard down around those who do not have his best interests at heart.