What Hath *Miller* Wrought: Effective Representation of Juveniles in Capital-Equivalent Proceedings

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I. INTRODUCTION

*Miller v. Alabama*\(^1\) and *Graham v. Florida*’s\(^2\) equation in proportionality analysis under the Eighth Amendment of life without parole for juveniles and the death penalty for adults changes what is effective representation for juveniles facing capital-equivalent cases. This constitutional equivalence has two components: the unique severity and characteristics of the penalties mean that the punishments are categorically disproportionate when applied to certain crimes or certain classes of offenders, and that they require certain procedures be followed before the punishment can be constitutionally imposed. Because *Miller v. Alabama* applies this categorical approach to the procedures that must be followed whenever a defendant in the particular class (juveniles) faces the possibility of the particular penalty (life without parole), such a defendant must correspondingly be entitled to the same protections as an adult facing the possibility of the death penalty.

As adult capital defendants are entitled to effective assistance of counsel that reflects the special challenges and procedures of capital representation, so must juvenile defendants facing the possibility of life without parole. As indigent adult capital defendants are entitled, as a matter of due process and fundamental fairness, to the assistance of certain experts at state expense, so too must juvenile defendants facing the possibility of life without parole. And as adult capital defendants are entitled to these protections as early as possible because of the significant consequences of early developments in the long term direction of a capital case, so too are juvenile defendants who

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could face the possibility of life without parole. While the ultimate impact of *Graham v. Florida* and *Miller v. Alabama* on juvenile justice across the country will depend upon judicial and legislative responses in the coming years, these decisions immediately affect how very serious juvenile cases—homicides carrying the possibility of life without parole and arguably non-homicides that could carry lengthy adult prison sentences—should be handled by juvenile defenders.

Part II discusses the Court’s proportionality analysis of life without parole for juveniles and the death penalty for adults. The constitutional requirements for capital-equivalent cases are discussed in Part III, and Part IV describes the procedural protections that should be provided to juveniles facing potential life without parole sentences. Part V explains why juveniles facing such charges, even in juvenile court, are constitutionally entitled to the resources, experts, assistance, and quality of representation guaranteed adult capital defendants, and why lawyers representing these juveniles should demand them immediately. The failure to provide these constitutional protections in juvenile capital equivalent cases should invalidate resulting juvenile transfer or waiver decisions and convictions in adult criminal court.

II. Capital-Equivalent Cases

In *Graham* and *Miller*, the Supreme Court equated, for purposes of proportionality analysis under the Eighth Amendment, life without parole (LWOP) for juveniles and the death penalty for adults. In a novel approach not previously used outside the death penalty context, the Court equated not simply the sentences but the cases that produced those sentences. This means that in addition to invalidating sentences of LWOP already imposed mandatorily on persons for crimes committed as juveniles, any future cases that could possibly result in a juvenile facing LWOP will now require different procedures throughout their courses.

The Supreme Court identified a class of cases that are the juvenile equivalent of capital punishment for adults in an Eighth Amendment challenge and held that this class of cases requires a different procedure; *Miller*’s holding is more than simply a substantive limit on sentencing. Because the constitutionally required procedure is now different (and those


procedures constitutionally require lawyers\(^5\)), the Court necessarily changed what it means to provide effective assistance of counsel in these cases, and thereby what a juvenile charged with a capital equivalent case is constitutionally entitled to.

Because of the front-loaded nature of both juvenile and capital proceedings\(^6\) and the extensive delineation of standards for capital representation and litigation,\(^7\) this capital-equivalence changes the way defense counsel should handle potential LWOP cases. If the Supreme Court continues to broadly interpret the scope of the Miller requirement by interpreting cases as falling within the scope of Miller to include those which are effectively LWOP despite not explicitly including that in the judgment,\(^8\) then the impact on juvenile cases could be correspondingly much larger.

A. The Jurisprudential Background: Graham v. Florida

In Graham, the Court held that a sentence of LWOP was unconstitutionally disproportionate when applied to a juvenile for a non-homicide offense.\(^9\) The Court specifically rejected an as-applied approach to proportionality analysis in Graham, and instead chose to use the analysis used for “categorical restrictions on the death penalty.”\(^10\) In assessing the objective indicia of legislative enactments and actual imposition of sentences, the Court directly compared its analysis of LWOP for juveniles convicted of non-homicide offenses to its analysis invalidating the death penalty for developmentally disabled persons, juveniles, and those who did

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5. In re Gault, 387 U.S. 1, 36-37 (1967) (holding that Fourteenth Amendment Due Process Clause requires provision of counsel in juvenile delinquency proceedings).


8. See, e.g., People v. Caballero, 282 P.3d 291, 295 (Cal. 2012) (holding cruel and unusual juvenile's sentence for non-homicide offense that is parole-eligible but whose length exceeds juvenile's natural life-expectancy).


10. Id. at 2021.
not kill or intend to kill.\textsuperscript{11}

The \textit{Graham} Court relied directly upon its findings in \textit{Roper v. Simmons}\textsuperscript{12} that juveniles as a class had reduced culpability as compared to adults because of their lack of maturity, susceptibility to outside pressure, and incompletely formed characters to conclude that a juvenile’s “transgression ‘is not as morally reprehensible as that of an adult.”\textsuperscript{13} This conclusion came from \textit{Thompson v. Oklahoma},\textsuperscript{14} in which a plurality of the Court found the death penalty disproportionate when applied to sixteen-year olds.\textsuperscript{15}

Five members of the Court held in \textit{Graham} that LWOP is a categorically disproportionate punishment for juveniles convicted of non-homicides,\textsuperscript{16} and a different five members of the Court extended this principle in \textit{Miller} to homicide cases unless the sentencing procedures that are constitutionally required in capital cases (individualized sentencing and unlimited consideration of mitigation for offenders and offenses) were followed.\textsuperscript{17} These cases erect important limits on juvenile sentencing; but their reasoning also affords juveniles, and their lawyers, new procedural tools for serious juvenile cases.

B. The Capital-Equivalent Jurisprudential Terminology

Despite the division in the \textit{Graham} and \textit{Miller} opinions, there was little disagreement that there is some fundamental equivalence between the adult death penalty and juvenile LWOP.\textsuperscript{18} The Court first identified this equivalence between the adult death penalty and juvenile LWOP in \textit{Graham} when it considered a facial challenge to a non-capital sentence for a class of offenders. While the Court had previously evaluated proportionality challenges to sentences of LWOP for specific non-homicide

\begin{itemize}
\item \textsuperscript{\textsuperscript{11}} \textit{Id.} at 2024-25 (citing Enmund v. Florida, 102 S. Ct. 3368, 3375 (1982); Atkins v. Virginia, 122 S. Ct. 2242, 2249 (2002)).
\item \textsuperscript{\textsuperscript{12}} \textit{Roper v. Simmons}, 543 U.S. 551, 575 (2005) (holding that juvenile offenders cannot receive the death penalty).
\item \textsuperscript{\textsuperscript{13}} \textit{Graham}, 130 S. Ct. at 2026 (citing Thompson v. Oklahoma, 487 U.S. 815, 835 (1988) (plurality opinion)).
\item \textsuperscript{\textsuperscript{14}} 487 U.S. at 837 (1988).
\item \textsuperscript{\textsuperscript{15}} \textit{Id.}
\item \textsuperscript{\textsuperscript{16}} \textit{Graham}, 130 S. Ct. at 2017, 2034 (2010).
\item \textsuperscript{\textsuperscript{17}} \textit{Miller}, 132 S. Ct. at 2460, 2475 (2012).
\item \textsuperscript{\textsuperscript{18}} Compare \textit{Graham}, 130 S. Ct. at 2027-28 (stating in dicta juvenile LWOP is akin to the death penalty), \textit{with Miller}, 132 S. Ct. at 2467-68 (stating juvenile LWOP offenders will spend as much, if not more time in prison as adults that commit homicide). Both \textit{Graham} and \textit{Miller} were decided 5-4, with the majority (in both) including Justices Kennedy, Breyer, Sotomayor, and Ginsburg. Justice Stevens joined the majority in \textit{Graham}, while Justice Kagan joined the majority in \textit{Miller}.  
\end{itemize}
offenses (such as habitual criminal statutes,\textsuperscript{19} distribution of over 650 grams of cocaine,\textsuperscript{20} and three strikes recidivist laws\textsuperscript{21}), it had done so by evaluating whether the penalty was "grossly disproportionate" to the particular offense.\textsuperscript{22}

As the Court chose to analyze \textit{Graham}, however, it presented a claim that the penalty was disproportionate as applied to an entire \textit{class of offenders}.\textsuperscript{23} The Court could have simply continued the as-applied approach of prior LWOP cases and examined whether the penalty of LWOP was grossly disproportionate as-applied to the individual (as Chief Justice Roberts did in his concurrence).\textsuperscript{24} Instead, the Court quite intentionally adopted the categorical approach it had previously applied only to capital cases; it examined the imposition of a particular penalty on a class of defendants that it found "share[d] some characteristics with death sentences that are shared by no other sentences."\textsuperscript{25} These characteristics included altering the remainder of the defendant's life "by a forfeiture that is irrevocable,"\textsuperscript{26} imprisonment until death,\textsuperscript{27} and being the "second most severe penalty permitted by law."\textsuperscript{28} This choice did not go unnoticed. Justice Thomas, dissenting, noted: "[f]or the first time in its history, the Court declares an entire class of offenders immune from a noncapital sentence using the categorical approach it previously reserved for death penalty cases alone."\textsuperscript{29}

In \textit{Miller}, the Supreme Court explicitly reaffirmed this approach. It based its invalidation of mandatory LWOP sentences for juveniles on a "correspondence"\textsuperscript{30} between LWOP for juveniles and the death penalty for adults.\textsuperscript{31} Noting that \textit{Graham}'s analysis had operated "by \textit{likening life-}

\begin{itemize}
\item \textsuperscript{19} See Solem v. Helm, 463 U.S. 277, 296 (1983).
\item \textsuperscript{22} \textit{Ewing}, 532 U.S. at 20; \textit{Harmelin}, 501 U.S. at 1001 (Kennedy, J., concurring in part and concurring in judgment); \textit{Solem}, 463 U.S. at 284; \textit{Rummel}, 445 U.S. at 271-72.
\item \textsuperscript{23} \textit{Graham}, 130 S. Ct. at 2022-23 (2010).
\item \textsuperscript{24} \textit{Id.} at 2036. (Roberts, J., concurring in judgment) (applying "narrow proportionality review" and \textit{Roper}'s conclusion that juvenile offenders are less culpable than adults for similar offenses).
\item \textsuperscript{25} \textit{Id.} at 2023-24, 2027.
\item \textsuperscript{26} \textit{Id.} at 2027 (citing \textit{Solem}, 463 U.S. at 300-01).
\item \textsuperscript{27} \textit{Id.} at 2028.
\item \textsuperscript{28} \textit{Id.} (citing \textit{Harmelin}, 501, U.S. at 1001).
\item \textsuperscript{29} \textit{Id.} at 2046 (Thomas, J., dissenting).
\item \textsuperscript{30} \textit{Miller}, 132 S. Ct. at 2467.
\item \textsuperscript{31} \textit{Id.} (using the "correspondence" between LWOP for juveniles and the death penalty for adults to implicate the "second line of our precedents, demanding individualized
without-parole sentences imposed on juveniles to the death penalty itself,” the Court “viewed this ultimate penalty for juveniles as akin to the death penalty” and “treated it similarly to that most severe punishment.”32 In short, the Court acknowledged that in Graham it had adopted a bar that “mirrored a proscription first established in the death penalty context[,]” by which it “[t]reat[ed] juvenile life sentences as analogous to capital punishment.”33

C. The Capital-Equivalent Jurisprudential Consequences

There is a “correspondence” between the death penalty for adults and LWOP for juveniles. So what? Words aside, the Court also did something that it had not done in the Eighth Amendment context outside of capital cases: it held a sentencing result constitutionally invalid if it was obtained through a given procedure.34 Unlike the exclusions restricting applicability of the death penalty from categories of offenses35 or categories of offenders,36 it drew on decisions invalidating the application of the death penalty under a particular procedure (or absence thereof).37 While the scope of the procedural protections—such as whether they are retroactive,38 whether they extend to sentences for which there is a

sentencing when imposing the death penalty”)

32. Id. at 2466 (emphasis added).
33. Id. at 2467.
34. Id. at 2469 ("We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders.") (emphasis added).
theoretical but not meaningful possibility of parole, and whether they can apply to discretionary LWOP sentences—are currently being litigated, the particular procedural requirements identified in Miller, individualization of sentencing and consideration of mitigating circumstances, now demand specific practices by counsel and specific resources for counsel.

III. CONSTITUTIONAL REQUIREMENTS FOR CAPITAL-EQUIVALENT SENTENCES

Miller identifies two constitutional requirements of capital sentencing that are relevant in evaluating the validity of a “mandatory” penalty that is the equivalent of the death penalty: an individualized sentencing procedure and an opportunity for the defendant to present any mitigation concerning himself and the offense. The absence of these two sentencing features invalidates a capital sentencing scheme and, according to Miller, also invalidates a capital-equivalent sentencing structure. Both sentencing features, individualization and unlimited consideration of mitigating evidence, require specific practices and resources in order for counsel to implement them.

A. Individualized Sentencing

Because of the uniquely final qualities of capital sentencing, the Eighth Amendment requires individualization of the sentence of death, which cannot occur in a mandatory sentencing system. The Court relied on its decisions invalidating mandatory death penalty schemes for the proposition that the Eighth Amendment (at least in the capital context) "require[ed] that resentencing to correct an illegal sentence), People v. Morfin, 2012 Ill. App. 1st 103568, P67 (Ill. App. Ct. Nov. 30, 2012) (holding that Miller applies retroactively on collateral review), and People v. Luciano, 2013 Ill. App. 2d 113792, P57 (Ill. App. Ct. March 14, 2013) (holding that Miller must be applied retroactively as a substantive rule because it changes sentencing options for class of defendants). See also Hill v. Snyder, No. 10-14568, 2013 WL 364198, at *2 (E.D. Mich. Jan. 30, 2013) ("[I]f ever there was a legal rule that should—as a matter of law and morality—be given retroactive effect, it is the rule announced in Miller. To hold otherwise would allow the state to impose unconstitutional punishment on some persons but not others, an intolerable miscarriage of justice.").

sentencing authorities consider the characteristics of a defendant and the
details of his offenses before sentencing him to death." The mandatory
nature of the death penalty precluded individualization of the sentence,
both with respect to the offense and the defendant; and in Woodson v.
North Carolina a plurality of the Court held that the Eighth Amendment
required individualized sentencing when applying the death penalty.44

The Court concluded in Miller that the individualization of sentence
required by the Eighth Amendment in capital-equivalent cases, that is
LWOP cases for juveniles, cannot be accomplished through a sentencing
structure that imposes a mandatory sentence because of the distinctive
characteristics of juveniles.45 Just as a discretionary sentence of death can
be constitutional for an adult defendant even though a mandatory sentence
of death is not, because "death is different," a mandatory sentence of
LWOP for an adult can be constitutional while a mandatory sentence of
LWOP cannot be for a juvenile because "children are different."46 The
strength of this analogy is undercut by the larger holding of Miller that
death is no longer uniquely different since LWOP for juveniles is its
equivalent.47

Critically, the Court in Miller also rejected the proposition that this
individualization could be done through the discretion available in the
movement of a case from juvenile to adult court: this movement was either
non-existent for some juvenile homicide defendants; solely in the hands of
prosecutors; had to be exercised by judges too early in the process with
insufficient information; or ultimately left judges with insufficient
sentencing options to appropriately individualize the sentence.48 This

43. Id. at 2463-64 (citing Woodson v. North Carolina, 428 U.S. 280, 303 (1976);
Lockett v. Ohio, 438 U.S. 586, 605 (1978)).

44. Woodson, 428 U.S. at 304 ("[I]n capital cases the fundamental respect for
humanity underlying the Eighth Amendment . . . requires consideration of the character and
record of the individual offender and the circumstances of the particular offense as a
constitutionally indispensable part of the process of inflicting the penalty of death.")
(citation omitted).

45. Miller, 132 S. Ct. at 2470.

46. Id. Mandatory sentences, even of LWOP, for adults, however, remain unaffected
as the Court reaffirmed Harmelin v. Michigan, 501 U.S. 957, 959-60 (1991) (holding
LWOP for distribution of over 650 grams cocaine not cruel and unusual punishment
because not grossly disproportionate to offense).

47. Woodson, 428 U.S. at 305:
This conclusion rests squarely on the predicate that the penalty of death is qualitatively
different from a sentence of imprisonment, however long. Death, in its finality, differs more
from life imprisonment than a 100-year prison term differs from one of only a year or two.
Because of that qualitative difference, there is a corresponding difference in the need for
reliability in the determination that death is the appropriate punishment in a specific case.

48. Miller, 132 S. Ct. at 2474 ("Even when States give transfer-stage discretion to
reasoning establishes that a capital-equivalent case must be treated as such long before any capital-equivalent sentence (i.e., LWOP) is imminent.

B. Unlimited Consideration of Mitigating Evidence

Besides requiring individualized capital-equivalent sentences, the Court also required that capital sentencing procedures not limit a defendant’s ability to present mitigating evidence. Both factors precluded the mandatory LWOP sentence for juveniles. A capital sentencing scheme that limited in any way the defendant’s ability to present, as a basis for mercy, any aspect of herself or her crime unconstitutionally limited the individualization of the sentence. Similarly, the capital-equivalent sentencing procedure must provide for any mitigating consideration. This constitutional requirement cannot be satisfied by simply holding a hearing where a judge weighs whatever mitigating evidence has been adduced during trial or offered concerning the offense.

The sentencing procedure must take into account “youth (and all that accompanies it),” which the Court described as:

the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional [...] 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 [...] that he might have been charged and convicted of a lesser offense if not for incompetencies judges, it has limited utility. First, the decision maker typically will have only partial information at this early, pretrial stage about either the child or the circumstances of his offense....But by [trial in adult court], of course, the expert's testimony could not change the sentence; whatever she said in mitigation, the mandatory life-without-parole prison term would kick in. The key moment for the exercise of discretion is the transfer—and as Miller's case shows, the judge often does not know then what she will learn, about the offender or the offense, over the course of the proceedings.

49. Id. at 2467.
50. Lockett v. Ohio, 438 U.S. 586, 604 (1978): 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 of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.
51. See Wiggins v. Smith, 539 U.S. 510, 538 (2003) (reversing and remanding a capital sentence because the defendant's counsel's failure to present mitigating evidence to the sentencing jury prejudiced the defendant); Morgan v. Illinois, 504 U.S. 719, 738-39 (1992) (reversing and remanding a defendant's death sentence because jurors stated they would vote for the death penalty without considering mitigating factors); Lockett, 438 U.S. at 605 (stating that statutes cannot limit the types of mitigating factors a sentencer may consider in capital cases).
52. Miller, 132 S. Ct. at 2469.
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.\textsuperscript{53}

This description of the constitutionally required considerations in a
sentencing scheme that can subject a juvenile to LWOP is similar to what
may be considered in a capital sentencing phase: the defendant’s entire life
history is relevant.\textsuperscript{54}

IV. PROCEDURAL PROTECTIONS IN CAPITAL-EQUIVALENT CASES

Eligibility for a penalty that is the constitutional equivalent of the death
penalty must, as a matter of due process and equal protection, carry with it
the same entitlement to procedural protections that apply in capital cases. If
LWOP for a juvenile is the constitutional equivalent of the death penalty
for adults, for purposes of the restrictions on how a state may impose it,
then before LWOP is imposed juveniles are constitutionally entitled to the
same protections as is an adult defendant before the death penalty is
imposed.\textsuperscript{55} Most significantly for lawyers representing juveniles, this
means that a juvenile who is eligible for a charge that could carry a LWOP
penalty must receive representation of the same quality as that required for
an adult defendant facing a possible sentence of death.

The basic standards for performance in capital cases have been
exhaustively set forth by the American Bar Association (ABA) in its
Guidelines for the Appointment and Performance of Defense Counsel In
Death Penalty Cases (ABA Guidelines),\textsuperscript{56} and the Supreme Court has long
recognized that ABA performance standards, though not law, are “guides”
concerning competent representation.\textsuperscript{57} While there are obvious aspects of

\textsuperscript{53.} Id. at 2468.
\textsuperscript{54.} ABA GUIDELINES, supra note 7, at 24.
\textsuperscript{55.} Kent v. United States, 383 U.S. 541, 554 (1966).
\textsuperscript{56.} ABA GUIDELINES, supra note 7.
\textsuperscript{57.} Strickland v. Washington, 466 U.S. 668, 688 (1984) ("Prevailing norms of
practice as reflected in American Bar Association standards and the like, e.g., [AMERICAN
BAR ASSOCIATION, ABA STANDARDS FOR CRIMINAL JUSTICE 4-1.1 to 4-8.6 (2d ed. 1980)],
are guides to determining what is reasonable, but they are only guides."); Williams v.
Taylor, 529 U.S. 362, 396 (2000) (stating that counsel's omissions "clearly demonstrate that
trial counsel did not fulfill their obligation to conduct a thorough investigation of the
defendant's background. See [AMERICAN BAR ASSOCIATION, ABA STANDARDS FOR
(pointing out that the defense counsel's work fell short of ABA standards); Rompilla v.
Beard, 545 U.S. 374, 387 (2005) (applying the ABA standards as a reasonableness standard
in considering the performance of a defendant's counsel). But see Bobby v. Van Hook, 558
U.S. 4, 130 S. Ct. 13, 17 (2009) (acknowledging that Strickland emphasized that the
American Bar Associations standards are merely guides to reasonable means, the
capital proceedings that will be inapplicable in a capital-equivalent juvenile case,\(^5^\)\(^8\) mapping the ABA Guidelines onto a juvenile delinquency case in which LWOP could be a possibility provides a framework not only for what counsel should do to be effective, but what a juvenile defendant is constitutionally entitled to in order to have effective assistance of counsel. These arguments should be especially salient in jurisdictions that have explicitly adopted the ABA Guidelines.\(^5^\)\(^9\)

### A. “Capital-Equivalent” Cases: What Are They?

Constitutionally effective representation of juveniles in capital-equivalent proceedings should be different after Miller. While many diligent juvenile defenders have consistently sought the resources and assistance needed to adequately represent juveniles in serious cases, Miller provides an additional constitutional basis on which to seek these assets. What qualifies as a “capital-equivalent” case?

At a minimum, a “capital-equivalent” proceeding is any delinquency petition\(^6\)\(^\circ\) or criminal charge that could result in a penalty of LWOP.\(^6\)\(^1\) The Constitution only requires that defense counsel acts reasonably, and states may choose to imposes specific rules so long as the rules comply with Constitutional requirements).

\(^5^8\). Witt v. Wainwright, 470 U.S. 1039, 1040 (1985) (Marshall, J., dissenting) (discussing the common practice in capital cases of establishing "death qualified" juries whose members are willing to choose the death penalty but also are significantly more likely to convict defendants).


Be it resolved that the Alabama Circuit Judge's [sic] Association adopts the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. These Guidelines are adopted as a recommendation to the circuit judges of Alabama. They are not hard and fast rules. The purpose of their adoption by this organization is to that an optimum standard can be set for circuit judges to attempt to achieve in capital cases. It's [sic] adoption is not to be considered a rule or requirement but only a recommendation. However, as to Guidelines 5.1 and 8.1 which apply to the qualification and experience of defense counsel appointed in capital cases the recommendations would be adhered to as closely as is practical.

\(^6^0\) Id.

significance of transfer or waiver for the outcome of a juvenile case means that certain constitutional requirements arise well before it reaches "adult" criminal court. Even waiting for a delinquency petition to be brought can forego critical investigative opportunities. Any juvenile who could face a delinquency petition for an offense punishable by LWOP, whether specifically labeled as "life without parole" or not, is subject to a capital-equivalent proceeding. Because proceedings involving juveniles who may ultimately face trial as adults require determinations that have significant impact on their cases and far in advance of adult criminal litigation, the approach to any potentially capital-equivalent delinquency allegation must be different.

The essential feature of a crime for which a juvenile could receive a sentence of LWOP after Graham is a homicide; but given features of accomplice liability and felony murder, this could include factual scenarios where a juvenile is neither the killer nor intended that death occur. As a practical matter, this means that “capital-equivalent” reaches any juvenile, against whom a delinquency petition may be sought, involved in a transaction that includes a death, in a jurisdiction that punishes any form of homicide by a penalty of LWOP, unless the juvenile is age-ineligible for this penalty.

B. The Capital-Equivalent Case: When Does It Begin and When Does It End?

There is no little matter in capital representation and seemingly minor


62. See Miller, 132 S. Ct. at 2474-75 (noting that in many jurisdictions transfer decisions result in either a light punishment as a juvenile or a harsh punishment as an adult).


64. See id.; Miller, 132 S. Ct. at 2474-75.


proceedings can have great significance later on in the litigation; thus, the ABA Guidelines "apply from the moment the client is taken into custody and extend to all stages of every case in which the jurisdiction may be entitled to seek the death penalty, including initial and ongoing investigation, pretrial proceedings, trial, post-conviction review, clemency proceedings and any connected litigation." Commentary to the ABA Guidelines explains the importance of prompt action:

The period between an arrest or detention and the prosecutor's declaration of intent to seek the death penalty is often critically important. In addition to enabling counsel to counsel his or her client and to obtain information regarding guilt that may later become unavailable, effective advocacy by defense counsel during this period may persuade the prosecution not to seek the death penalty. Thus, it is imperative that counsel begin investigating mitigating evidence and assembling the defense team as early as possible—well before the prosecution has actually determined that the death penalty will be sought.

Prompt effective representation in a potentially capital case is essential for several reasons including the need to discover possible shortcomings in the prosecution's case, to identify and develop mitigating evidence, and to develop or discover evidence that may dissuade the prosecution from seeking the death penalty. Prompt, early, and thorough representation in a potentially capital case is crucial, as the ABA Guidelines specify:

Comprehensive pretrial investigation is a necessary prerequisite to enable counsel to negotiate a plea that will allow the defendant to serve a lesser sentence, to persuade the prosecution to forego seeking a death sentence at trial, or to uncover facts that will make the client legally ineligible for the death penalty.

In the juvenile context, an additional reason for prompt action, particularly for the youngest defendants who may face a longer period of potential custody or supervision in the juvenile correction system, is that it may dissuade a prosecutor from seeking or choosing, or prevent a judge from transferring or waiving, a child for prosecution as an adult. The importance of early investigation and advocacy for sentencing is already a recognized requirement for juvenile defender practice in delinquency

67. ABA GUIDELINES, supra note 7, at 1.1B.
69. ABA GUIDELINES, supra note 7, at 1.1; Freedman, supra note 69, at 925.
cases, so its role a fortiori in capital-equivalent cases should be clear.

The duration of counsel’s obligations in a capital case, according to ABA Guideline 10.2, extends “for so long as the jurisdiction is legally entitled to seek the death penalty.”  

Lest there be any doubt that counsel should operate fully anticipating the potential capital notice, the commentary accompanying this guideline explains that “once a client is detained under circumstances in which the death penalty is legally possible, counsel should proceed as if it will be sought.” This obligation exists “until the imposition of the death penalty is no longer a legal possibility.”

The capital-equivalent phase of a juvenile case would analogously end when there is no possibility that a juvenile could face LWOP, either because the charges that could carry LWOP are dismissed with prejudice or the prosecutor otherwise agrees not to pursue them under some enforceable provision.

V. CAPITAL-EQUIVALENT CASES: WHAT IS REQUIRED?

While a “capital-equivalent” case will obviously not be a capital case, meaning some aspects of capital jurisprudence will have no applicability, to what extent do the features of effective assistance of counsel in the capital context apply to capital-equivalent juvenile cases? Three features seem immediately and particularly relevant to juvenile cases: access to investigative resources to prepare a complete life history to use for the negotiation and/or litigation of transfer or waiver, access to resources for mental health expert assistance, and prompt appointment of counsel of capital-equivalent expertise.

A. Access to Investigative Resources to Prepare a Complete Life History

Competent assistance of counsel in capital cases includes thorough investigation of the defendant’s life history in order to assess potential mitigating evidence and failure to present such evidence cannot be justified as a strategic decision without adequate investigation to develop what the evidence is. The requirement of individualized sentencing in capital-

70. ROBIN WALKER STERLING, ROLE OF JUVENILE DEFENSE COUNSEL IN DELINQUENCY COURT 17-18 (Nat’l Juvenile Defender Ctr., 2009).
71. ABA GUIDELINES, supra note 7, at 10.2 (Applicability of Performance Standards); Freedman, supra note 69, at 993.
72. Freedman, supra note 69, at 994.
73. Id. at 995.
equivalent cases should similarly carry a requirement of access to investigative resources to develop a life history.

As the Supreme Court has recognized, "ABA Guidelines provide that investigations into mitigating evidence 'should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'"\textsuperscript{75} The analogous research necessary to rebut the arguments for transfer, to assert arguments to retain or waive a juvenile back into juvenile court, or to convince a prosecutor not to seek transfer, addresses similar issues.\textsuperscript{76} As noted in the capital context, in order to develop a basis for a non-capital disposition the investigation must begin immediately,\textsuperscript{77} and the Court recognized the same point in \textit{Miller} when it noted that the investigation could not wait until trial as the "key moment for the exercise of discretion is the transfer."\textsuperscript{78}

Planning a comprehensive case for sentencing is already an element of best-practice for juvenile practitioners and the need for resources to create a life-history for sentencing is even greater in capital-equivalent cases.

Dispositional investigation and advocacy begin at the initiation of the attorney-client relationship. Regardless of counsel's prognosis of the case outcome, counsel begins disposition planning and investigation at the earliest opportunity to maximize the chance that the appropriate investigation, evaluations and interviews are completed, and the necessary documents are located and submitted, with the end result that, should the client be found guilty, the client receives the most appropriate, least restrictive disposition with as little delay as possible.\textsuperscript{79}

Given the importance \textit{Miller} places on the juvenile's family and social

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\textsuperscript{75} \textit{Id.} at 524 (citing ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES 11.4.1(C), p. 93 (1989)) (emphasis in original).

\textsuperscript{76} \textit{Id.} (citing ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES 11.8.6(B)(1)-(8) (1989) (noting that "among the topics counsel should consider presenting are medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences.")) (emphasis in original).

\textsuperscript{77} Freedman, supra note 7, at 925 (2003) (providing commentary on Guideline 1.1).

\textsuperscript{78} \textit{Miller v. Alabama}, 132 S. Ct. 2045, 2474 (2012) ("The key moment for the exercise of discretion is the transfer—and as Miller's case shows, the judge often does not know then what she will learn, about the offender or the offense, over the course of the proceedings.").

\textsuperscript{79} \textit{Sterling}, supra note 71.
history, and the fact that some types of analogous mitigation evidence in adult capital cases will not be available simply because of the juvenile defendant's youth (e.g. employment history, military history, role as a parent or spouse), the investigative burden should be reduced and development of a comprehensive life history, with resources to prepare it, should be available in all capital-equivalent cases. Some scholars have already begun arguing that capital mitigation jurisprudence now can be wholly imported into at least capital-equivalent juvenile cases, and perhaps even those simply facing lengthy prison sentences.

B. Access to Resources for Independent Expert Mental Health Assistance

The standards of practice in capital representation, according to the ABA Guidelines and the ABA Criminal Justice Mental Health Standards, call for independent expert mental health assistance at the state's expense. This exceeds the federal constitutional standard under Ake v. Oklahoma, which provides that only "when a defendant demonstrates . . . his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." The ABA Guidelines set forth the range of relevant mental health issues in a capital case:

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80. Miller, 132 S. Ct. at 2468.
81. Beth Caldwell, Appealing to Empathy, 64 ME. L. REV. 392, 403 (2012) (analogizing that capital defense lawyer's constitutional duty to find and present mitigation evidence same duty for juvenile counsel based in professional norms).
82. Standard 7-3.3 Evaluations initiated by the Defendant, provides:

(a) Defense access to mental health or mental retardation professional assistance and evaluation. The right to defend one's self against criminal charges includes an adequate opportunity to explore, through a defense-initiated mental evaluation, the availability of any defense to the existence or grade of criminal liability relating to defendant's mental condition at the time of the alleged crime. Accordingly, each jurisdiction should make available funds in a reasonable amount to pay for a mental evaluation by a qualified mental health or mental retardation professional selected by defendant in any case involving a defendant financially unable to afford such an evaluation. In such cases an attorney who believes that an evaluation could support a substantial legal defense should move for the appointment of a professional or professionals in an ex parte hearing. The court should grant the defense motion as a matter of course unless the court determines that the motion has no foundation.

ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS (1989).
In particular, mental health experts are essential to defending capital cases. Neurological and psychiatric impairment, combined with a history of physical and sexual abuse, are common among persons convicted of violent offenses on death row. Evidence concerning the defendant’s mental status is relevant to numerous issues that arise at various junctures during the proceedings, including competency to stand trial, sanity at the time of the offense, capacity to intend or premeditate death, ability to comprehend Miranda warnings, and competency to waive constitutional rights. The Constitution forbids the execution of persons with mental retardation, making this a necessary area of inquiry in every case. Further, the defendant’s psychological and social history and his emotional and mental health are often of vital importance to the jury’s decision at the punishment phase. Creating a competent and reliable mental health evaluation consistent with prevailing standards of practice is a time-consuming and expensive process. Counsel must compile extensive historical data, as well as obtain a thorough physical and neurological examination. Diagnostic studies, neuropsychological testing, appropriate brain scans, blood tests or genetic studies, and consultation with additional mental health specialists may also be necessary.84

In 2003, Evan J. Miller’s attorney sought $6,000 from the juvenile court to retain a psychologist to conduct a forensic evaluation.85 This is the Alabama Supreme Court’s description of counsel’s efforts to secure the assistance of an expert mental health professional for the defense:

Based on his status as an indigent and his history of mental illness, E.J.M. moved the juvenile court for funds to retain a mental-health expert to testify at his transfer hearing. E.J.M. requested $6,000 in State funds to retain Karen Salekin, Ph.D., a mental-health and juvenile-delinquency expert. The juvenile court was aware that Karen Lang, E.J.M.’s juvenile probation officer, had stated that she was concerned about his mental health. However, the juvenile court denied E.J.M.’s motion for funds to retain a mental-health expert.

E.J.M. then moved the juvenile court for an outpatient mental evaluation. The juvenile court granted that motion and ordered that E.J.M. undergo a psychological evaluation by the Alabama Department of Mental Health and Mental Retardation. Dr. Brent Willis, Psy.D. (doctor of clinical psychology), a mental-health expert at the Taylor Hardin Secure Medical Facility, evaluated E.J.M. and prepared a report. Dr. Willis diagnosed E.J.M. with a depressive disorder, oppositional defiant disorder, conduct disorder, and substance abuse. Following Dr.

84. ABA GUIDELINES, supra note 7, at 4.1.
85. Ex parte E.J.M., 928 So. 2d 1081, 1083 (Ala. 2005).
Willis's examination, E.J.M. again moved the juvenile court for funds to retain the mental-health expert of his choosing, Dr. Salekin. The juvenile court once again denied E.J.M.'s motion.

At the transfer hearing held pursuant to § 12–15–34(d), Ala. Code 1975, Dr. Willis testified to E.J.M.'s mental health. Dr. Willis concluded that E.J.M. was sufficiently emotionally mature for his case to be transferred to the circuit court. The juvenile court transferred the case to the circuit court.86

The Alabama Supreme Court affirmed the denial of funds for Evan Miller's attorney to retain an independent mental health expert, concluding this was not a denial of due process because Miller had neither been barred from offering his own mental health expert (had he been able to retain one himself) nor had he been subjected to a transfer hearing without a mental health evaluation.87 Due process, the court held, required access to a mental health evaluation if there was a significant mental health issue, but not an expert of the defendant's choosing: "[T]he issue before us is whether due process requires the expenditure of State funds to pay for a mental-health expert of the juvenile's choosing when the juvenile court has provided the juvenile with a court-appointed, independent psychiatrist. There is no such requirement."88

The Alabama jurisprudence that precluded availability of a court appointed mental health expert for the transfer hearing was consistent with the few state courts that have ruled on the matter: all have held that there is no constitutional basis to an appointed mental health expert in transfer hearings, even in the most serious cases.89 In 1987, the New Jersey Supreme Court stated that "[i]t is doubtful that a juvenile has a constitutional right to a psychiatrist at a waiver hearing ... [because] in a waiver hearing, guilt or innocence is not at issue. Rather, the focus is on determining the appropriate court to hear the case."90 Similarly, Ohio courts rejected appointment of a psychological expert because "the purpose of the bindover proceeding was not to determine whether he committed the crime, but whether the juvenile court would retain jurisdiction over him."91

86. Id. at 1083-84.
87. Id. at 1087-88.
88. Id. at 1087 (citing Ake, 470 U.S. at 79).
91. See State v. Whisenant, 711 N.E.2d 1016, 1026 (Ohio Ct. App. 1998) ("[J]uvenile is not entitled to a court-appointed independent psychologist to assist him in determining whether to submit to or waive a Juv. R. 30 mental examination."); see also State ex rel.
And in Texas, while one court has opined that due process requires appointment of a mental health expert in some instances in a post-dispositional “release/transfer” hearing to determine whether a juvenile already committed to the Texas Youth Commission should be transferred to the Texas Department Criminal Justice Institutional Division,92 others have explicitly rejected the claim that a “failure of a juvenile to undergo a mental examination per § 54.02(d) of the Texas Family Code ipso facto renders invalid his certification as an adult.”93

Whether the Ake right94 extends to mental health experts addressing something apart from whether the defendant has an insanity defense, or, even more broadly, whether it applies to other types of expert assistance beyond mental health experts,95 is an open question; however, many federal circuits have held that the Ake right does apply in capital cases.96 Access by juveniles to appointment of mental health experts in capital-equivalent cases as a constitutional matter, under the Eighth Amendment, is particularly important because there is no clearly established federal constitutional right, as a matter of due process, even to competence to stand trial in a juvenile delinquency case.97 After Miller, no indigent juvenile

Juvenile v. Hoose, 539 N.E.2d 704, 707 (Ohio Ct. App. 1988), cause dismissed, 534 N.E.2d 94 (Ohio 1988) ("In the present cause, however, petitioner seeks to secure a psychiatric examiner at the state's expense for a hearing which will not determine his guilt or innocence, or which will not result in the ultimate imposition of sentence."); State v. McDonald, 11228, 1990 WL 78593, *7 (Ohio Ct. App. June 5, 1990) ("We find the reasoning in State v. R.G.D., supra, to be persuasive.").

92. Matter of J.E.H., 972 S.W.2d 928, 931-32 (Tex. Ct. App. 1998) ("Release-transfer hearing is sufficiently a part of the punishment-setting process as to afford the same due process right to J.E.H. as set forth under Ake"). But see In re N.S., 10-01-319-CV, 2004 WL 254215 (Tex. Ct. App. Feb. 11, 2004) ("[c]ourt's erroneous failure to appoint an 'appropriate expert' to evaluate [juvenile]'s competency did not affect his substantial rights.").

93. See Montgomery v. State, 07-00-0574-CR, 2003 WL 1623315 (Tex. Ct. App. 2003); see also In re Allen R., 127 N.H. 718, 721-22 (1986) (rejecting delinquency counsel's reimbursement for services of independent psychologist even if justified, remanding to determine what cost would have been at local mental health agency).

94. Access to a competent psychiatrist where the defendant demonstrates that sanity at the time of the offense will be a factor at trial. Ake v. Oklahoma, 470 U.S. 68, 83 (1985).

95. See, e.g., Terry v. Rees, 985 F.2d 283, 284 (6th Cir. 1993) (denial of independent pathologist violated Ake); see also Little v. Armontrout, 835 F.2d 1240, 1243 (8th Cir. 1987) (extending Ake to experts in areas beyond psychiatry).


97. Compare Golden v. State, 21 S.W.3d 801, 802-03 (Ark. 2000) (explaining due process standard under Dusky applies to juvenile proceedings), and Matter of W.A.F., 573
facing a capital-equivalent case should be denied access to expert mental health services for the juvenile court proceeding. A juvenile should be entitled to such services as a matter of effective assistance of counsel, due process, and equal protection. “[M]ere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and … a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense.”

If, as Miller holds, a sentencing court in a capital-equivalent case must consider the factors a mental health expert would bring forth, then expert mental health services are integral to the building of an effective defense.

While the Court in Ake rejected a defendant’s right to hire his own psychiatrist, Miller requires a court to take into account the specific features that a psychiatric expert would testify to and thus a juvenile’s lawyer needs to be able to call. It is also a matter of best practice in juvenile defense: “As part of disposition preparation, juvenile defense counsel consults with mitigation specialists, social workers, and mental health, special education, and other experts to develop a plan consistent with the client’s expressed interests.”

Access to mental health experts in capital-equivalent cases should be distinguishable from even serious delinquency cases handled exclusively in juvenile court. While some jurisdictions explicitly have held juveniles are not entitled to expert mental health assistance in delinquency cases handled exclusively in juvenile court, Miller’s focus on specific consideration of youth in sentencing should be a response to this holding.

C. Prompt Access to Counsel of Capital-Equivalent Expertise

Prompt appointment of counsel that has adequate expertise is essential in capital cases. The ABA Guidelines specify eight broad domains in which counsel must have adequate expertise: state, federal and international law governing substance and procedure of capital litigation; skills in complex negotiation and litigation; legal research and drafting; oral advocacy; use of experts; investigation and presentation of mental health issues; investigation; and presentation of mitigation evidence and trial...
advocacy.\textsuperscript{102}

In addition to these areas, capital-equivalent counsel must not only know the relevant capital jurisprudence and practice, but also the juvenile-specific jurisprudence and practice.

Competent juvenile defense counsel is also well-versed in the areas of child and adolescent development. Child and adolescent development research intersects with counsel's representation in many ways. For example, counsel might rely on recent development research in detention and disposition arguments. Counsel also might use the research to help counsel convey complex legal concepts in age-appropriate language.\textsuperscript{103}

This includes counsel that can effectively use the information developed by experts to address the points \textit{Miller} makes constitutionally required.\textsuperscript{104} A corollary to the expectation of counsel's competencies is that counsel lacking these will be constitutionally ineffective. Even before the Court's decision in \textit{Miller}, some commentators were making this argument,\textsuperscript{105} and now it is far stronger.

\textbf{VI. CONCLUSION}

\textit{Miller} opens a path for counsel in virtually any case involving a homicide and a juvenile—if LWOP is a possibility—to seek a significantly more robust defense toolkit than has previously been the case. In investigative resources, mental health experts and counsel with relevant skills, it provides a mechanism for arguing that juvenile defendants are entitled to considerably more than they had had access to in some jurisdictions as recently as last year.

\begin{itemize}
\item \textsuperscript{102} ABA GUIDELINES, \textit{supra} note 7, at 5.1(B)(2), (h); Freedman, \textit{supra} note 69, at 921.
\item \textsuperscript{103} STERLING, \textit{supra} note 71, at 13.
\item \textsuperscript{104} State v. Ferguson, 605 A.2d 765, 768 (N.J. Super. Ct. App. Div. 1992) (finding ineffective assistance of counsel where "in preparing for the waiver hearing, defense counsel simply seemed to put the case in the lap of the retained psychiatrist and stand aside").
\item \textsuperscript{105} Caldwell, \textit{supra} note 81, at 410 ("According to the same reasoning [as in capital cases], ineffective assistance of counsel claims for juvenile offenders should arguably be analyzed under the standards previously reserved for capital cases because mitigating evidence is necessary to make appropriate sentencing decisions in both realms.").
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