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Miller, Montgomery, and Mitigation:

Incorporating Life History Investigations and Reentry Planning Into Effective Representation for 'Juvenile Lifers'

“By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence,” mandatory life without parole “poses too great a risk of disproportionate punishment.”

Miller v. Alabama
132 S. Ct. 2455, 2469 (2012)

Over the last 12 years, the U.S. Supreme Court has fundamentally shifted the understanding of, and approach to, the protections that are constitutionally required when prosecuting and sentencing children in the adult criminal legal system. Starting with *Roper v. Simmons*¹ in 2005 (categorically banning the execution of children under the age of 18), and building on *Graham v. Florida*² in 2010 (categorically banning life without parole sentences for children not convicted of homicide), through the most recent cases of *Miller v. Alabama*³ and *Montgomery v. Louisiana*⁴ in 2012 and 2016, respectively (banning

mandatory sentences of life in prison without parole for children under 18, and then applying that ban retroactively), the Court has consistently incorporated relevant social science research into its consideration of the behaviors leading children to adult criminal court and the proper responses to them. The Court has emphasized the need to consider a defendant's⁵ youth and individual circumstances in fashioning a sentence that comports with the Constitution and provides both for a full consideration of a person and the situation leading to a court case being filed, as well as a meaningful opportunity for release. In other words, as a result of decisions that have evolved from *Roper* through *Montgomery*, children can no longer be subjected to mandatory life sentences; they are now entitled to individualized sentencing considerations. For the approximately 2,000 individuals previously sentenced as children to these now unconstitutional mandatory sentences, resentencing hearings are available and happening in many states. In Pennsylvania, for example, over 500 people who were sentenced as children to die in prison pre-*Miller* (and pre-*Montgomery*) will finally get their day in court. Mitigation, which includes reentry planning, is essential to ensuring the constitutionality and fairness of that process.

Overview

Drawing from the national standard of care in death penalty cases, this article will discuss how comprehensive mitigation investigations play a critical role in this new era of sentencing young people in the adult justice system, and more specifically in resentencing adults who were mandatorily sent to prison for life when they were children. It will describe what mitigation is and explain

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how it is undertaken, including the importance of incorporating reentry into what is prepared and presented to the relevant decision makers.

To comply with the mandates of *Miller* and *Montgomery* in each juvenile life without parole (JLWOP) case, mitigators⁶ must compile comprehensive and well-documented multigenerational psychosocial histories of their clients based on exhaustive investigations that include multiple client, family and other witness interviews as well as document collection, review, and analysis. This article will discuss how this biopsychosocial information must be fashioned into a comprehensive and compelling narrative of the client's life history that should be formulated into a written document — which may or may not be submitted as an independent report. Utilizing this type of investigation to form the basis of an individualized sentencing hearing is the constitutional safeguard that both *Miller* and *Montgomery* require.

While the cases discussed here have many similarities to death penalty cases, a significant difference exists that will also be explored in this article: the need for comprehensive reentry planning to correspond with the individualized mitigation investigation required in each case. In JLWOP cases, mitigation investigations and reports must incorporate thorough, thoughtful reentry plans, which are informed by the information obtained through interviews and review of relevant records. Thus, in the concluding sections, mitigators detail factors that should be considered when compiling a reentry plan, and the ways in which such plans build on the foundation established by the preceding mitigation investigation. This discussion underscores the fact that while *Miller* and *Montgomery* provide many opportunities, they also present challenges, including those inherent in the potential release of hundreds of individuals who have grown up and lived the vast majority of their lives in prison.

The ideas articulated in this article are suggestions for how to compile this information and synthesize it into a format that is usable and workable for the defense team. Whether that information should be formulated into a separate document for submission to the decision maker is a complex jurisdictional and strategy question that is beyond the scope of this article. In Pennsylvania, resentencing hearings are proceeding for many of the approximately 500 men and women⁷ who were mandatorily sen-

tenced to die in prison for crimes they committed as children. Specifically, all of the authors work in Philadelphia, where some 300 of these cases originated. In Philadelphia, many resentencing hearings are proceeding by agreement, with offers extended by prosecutors and accepted by defendants who have already served the minimum term of years required for parole consideration. In these cases, the use of experts may not be essential in the same way that it will be for so-called contested resentencing hearings. In a contested hearing, on the other hand, counsel should consider using expert and lay witness testimony as part of the mitigation presentation at the resentencing. This article does not address presentation strategy but merely highlights that there are important differences between how defense teams should prepare for negotiated and contested hearings. Mitigation is critical for both types.

Background on Mitigation

At its core, mitigation is the process of humanizing a defendant through fact-based storytelling. Mitigation provides the legal decision makers (the judge and/or jury, the Parole Board⁸ and the prosecution) with information about who the defendant is. This information would not necessarily be made available through discovery or through trial advocacy that is more dedicated to disputing or calling into question the facts of the alleged offense. Mitigation is designed to be more than a counterattack or response to aggravating evidence. Instead, it seeks to paint a detailed and nuanced picture of the context in which the defendant was operating at the time of the offense, including but not limited to: multigenerational family history; mental health history; history of physical or sexual abuse; history of substance abuse; trauma history; educational experience; home life; religious, gender, sexual orientation, ethnic, racial, cultural, and community influences; and socioeconomic, historical, and political factors. How this information is compiled and presented is the subject of the ensuing section and, as noted above, may or may not take the form of a written report. In juvenile lifer resentencings, mitigation also encompasses the context and experience of someone in the intervening period after he or she was sentenced (throughout incarceration in a state correctional institution).

In capital cases, the need for and involvement of a mitigation specialist at the penalty phase is well established.⁹ For

capital defendants facing a penalty phase, a mitigation specialist functions as a core member of the defense team. In fact, it is not uncommon for more than one mitigation specialist to be part of a capital defense team.¹⁰ The American Bar Association (ABA) Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases “set forth a national standard of practice for the defense of capital cases in order to ensure high quality legal representation for all persons facing the possible imposition or execution of a death sentence by any jurisdiction.”¹¹ The need for and importance of mitigation in capital cases is also well established by the U.S. Supreme Court. In such seminal capital cases as *Lockett v. Ohio*,¹² *Eddings v. Oklahoma*,¹³ *Skipper v. South Carolina*,¹⁴ and *Williams v. Taylor*,¹⁵ the Court has repeatedly emphasized the centrality of mitigation at the sentencing phase, and the procedural protections such critical evidence requires.

Building on the ABA Guidelines, in March 2015, the Campaign for the Fair Sentencing of Youth (CFSY)¹⁶ released the first-ever guidelines for attorneys representing children who face sentences of life in prison without the possibility of parole.¹⁷ These Guidelines, published before the U.S. Supreme Court issued its decision in *Montgomery*, apply with equal force to the process of representing a “juvenile lifer” at resentencing. The Guidelines were “drafted in close collaboration with attorneys, mitigation experts, and advocates from across the nation, [and] seek to set forth a national standard of practice to ensure zealous, constitutionally effective representation consistent with the standards established by the Supreme Court in *Miller v. Alabama*.”¹⁸ Specifically, the Guidelines address the various roles and responsibilities of members of a defense team: defense counsel, investigator, and mitigation specialist, while also providing guidance on key issues such as the requisite training for those members, what constitutes adequate compensation, how to approach plea agreements, and each member's ethical duties. Most salient to the issues addressed here, the Guidelines provide detailed explanations of the responsibilities of a mitigation specialist, including the depth and breadth of a thorough, constitutionally effective mitigation investigation,¹⁹ and the process for establishing a mitigation strategy in partnership with the rest of the defense team.²⁰ This article will refer to several of the key tenets of the Guidelines.

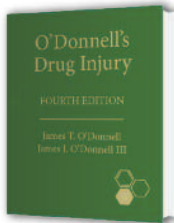
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context focuses on a person's life preincarceration, often going back multiple generations, and may also feature information about the person's adjustment to prison during incarceration.²¹ It attempts to convince the decision maker to show mercy on a person because of what he or she has experienced, and demonstrated, all with the understanding that converting a potential execution into a sentence of life in prison without parole is a victory. When mitigation is being employed in the resentencing of someone who was previously condemned as a child to life in prison without parole, victory is defined as return to the community. In addition to a significantly different definition of "success," mitigation in JLWOP cases differs from capital mitigation in terms of the information presented to decision makers. It encompasses both historical and forward-looking information about the individual: who they were, who they have been, and how they are likely to engage in the community if given an opportunity for release. This forward-looking information is directly linked to the individual's reentry plan and must be informed by the information gathered about the individual's past and present. In addition, mitigation reports

in juvenile lifer cases may not, in every instance, provide detailed information on traumatic brain injury or other neurological disorders. Defense teams should be thoughtful about how and when to introduce evidence of severe impairment, as it relates to rehabilitation and reentry.

Put simply, in juvenile lifer cases, mitigation reports should encompass three distinct time periods: (1) preincarceration; (2) during incarceration; and (3) postincarceration or reentry. With someone who was sentenced to life in prison without parole as a child and now faces resentencing, it is important to contextualize that person's preincarceration experience, but also to demonstrate the arc of the intervening years, culminating in a forward-looking presentation on what he or she plans to do if given the opportunity to return to the community.

Nuts and Bolts of a Mitigation Investigation

In the broadest sense, a mitigation investigation typically involves uncovering and delving into the biological, psychological, and social influences on a person's development as well as the person's adult functioning. This process entails simultaneous tracks of collecting and analyzing life history records (on the client, family members, and any other relevant individuals over multiple generations) as well as conducting face-to-face interviews with numerous witnesses, who are both familial and nonfamilial. The nonfamilial witnesses may include former teachers, friends, social workers, healthcare providers, counselors, clergy, coaches, neighbors, mentors, attorneys, fellow prisoners, and correctional staff. The purpose of this process is to identify and develop evidence that will aid in humanizing the client by generating information that helps the decision maker understand the factors that were at play in his life. In other words, the goal is to provide the decision maker with information that will assist in balancing the aggravating aspects of the offense against the reasons for compassion and mercy that weigh in favor of a lesser sentence and, ultimately release.

The multigenerational investigation into a client's social history and background is a process that requires both time and specialized skills. First, it involves the thorough collection of objective and reliable documentation of the life of the client and his family, which

includes medical, psychological, educational, social service, employment, military, prison, and court records. Often, these records are readily available and easy to obtain, but just as often, bureaucratic hurdles make securing them time-consuming and require patience and personal contacts. These records provide documentation of relevant events. They can corroborate the information shared by a family member or other witness, and also may provide new information or leads to other relevant documents or individuals to investigate. A record also may offer information that the client and/or family members could not share for a variety of reasons, including: being too young during the relevant period to now recall it with any specificity; being too traumatized and ashamed to reveal the information; or never having been in possession of the information in the first place. For example, a teacher's observational notes on how a child acted during school provides information that family members likely would not have been privy to, or school records contain the names of specific teachers who may be able to shed light on a child's circumstances at the time of the offense (was he coming to school with bruises, and/or ill-fitting or dirty clothes?), and medical records may reveal a traumatic incident that occurred just prior to the person's arrest in the case, or reveal a series of missed appointments.

A second and equally important task in a social history investigation is conducting multiple face-to-face interviews with a variety of people, as described above. Preferably, each conversation will be in person and one-on-one. Given the characteristically sensitive nature of mitigating evidence, such as physical and sexual abuse, domestic violence, alcohol or drug addiction, mental illness, intellectual deficits, neglect, and poverty, the process of obtaining this information from witnesses is time-consuming and involves building the foundation for a trusting relationship over time. Often, obtaining this information also requires very specific clinical skills. Many barriers to obtaining this information exist, such as race, culture, immigration status, ethnicity, language, class, education, age, religion, social values, and gender. Individuals who are new to mitigation work should be particularly sensitive to the ways in which their privilege, and any of the differences referenced above, can be a barrier to forging relationships and obtaining relevant information. Attending trainings on cultural competency and responsiveness

and approaching every interaction with humility and openness are important aspects of the training and perspective that anyone undertaking mitigation work should actively engage in. Overcoming barriers is a critical component in developing mutually respectful and trusting relationships with individuals in a client's life to ensure that the mitigation investigation and ultimately the report generated are founded on honest and reliable information.

Incorporating Institutional Histories

Another critical component of a comprehensive mitigation investigation in a juvenile lifer resentencing is that of institutional or prison adjustment. Especially for those who have been in prison for decades, a look at the unfolding of their lives over the course of their imprisonment will paint a picture of their growth and maturation process. By discovering and highlighting one's transformation in prison, mitigation investigations and reports can bring to life the Supreme Court's repeated understanding, articulated in *Roper* and its progeny, of the idea of a child's "heightened capacity for change"²² in a powerful and compelling way. Any sentencing narrative that does not include an in-depth portrayal of this change would be lacking in critical information that prosecutors, judges, and parole boards typically consider significant in making sentencing or release determinations.

Investigation into prison adjustment is not without its hurdles. It is the very rare individual that spends years in prison without any infractions or misconducts. This is especially true for children in adult prisons, particularly in the first years of their incarceration. In fact, research indicates that youth are more likely than adults to engage in prison misconduct, including violence.²³ However, often extenuating circumstances contribute to a youth engaging in violent behavior in prison. In the prison environment, youth are vulnerable and often a target for abuse and maltreatment. In fact, children who are housed in adult prisons have a higher likelihood of being the victims of violence — namely assault and rape — as well as an increased risk for committing suicide.²⁴ Negative or problematic prison adjustment, however, can be mitigated when placed in this context, as well as the context of the science of the developing adolescent brain — the same science that the Court has relied upon in its decisions involving children in the adult

criminal legal system. An individual's negative behavior in those early years, particularly before turning age 21, can be further understood when placed in the even broader context of his or her social history. An understanding of the individual's multigenerational life history goes hand in hand with understanding the individual's prison adjustment.

Despite any history of misconducts in those initial years, children grow up. They age and mature and become adults. In fact, they often grow and mature into model prisoners. The "[r]esearch suggests that the vast majority of lifers opt to avoid trouble and to make the most of the opportunities for work, education and rehabilitative programs in prison."²⁵ This has certainly proven true in Pennsylvania. In prisons around the Commonwealth, correctional officers, counselors and prison administrators have routinely described the juvenile lifer population as a stabilizing force in their respective prisons. Additionally, juvenile lifers are credited by staff for their mentoring of younger prisoners and praised for their dedication in creating and teaching innovative programs. These staff members have developed positive working relationships with the juvenile lifers and are often strong advocates for their release. And while it may seem counterintuitive to those who assume that lifers have nothing to lose and thus no motivation to follow the rules, the opposite is in fact true. Upon accepting the realization that prison is their home, lifers tend to "stay out of trouble because trouble, and especially trouble featuring violence, jeopardizes the narrow but nominally rewarding lives they have built for themselves, often with great effort."²⁶ By investigating and seeking to understand the clients' process of accepting their circumstances in prison, and their experience in working to build a positive existence for themselves, mitigation specialists have an opportunity to uncover compelling evidence of the clients' resilience, rehabilitation and, quite simply, their humanity.

Clients will be an invaluable source of information in terms of detailing, from a personal perspective, their challenges, experiences and accomplishments while in prison. Additional witnesses to this transformation include family members who can address the positive changes they have observed in their loved one over time as well as correctional officers, prison counselors and other prisoners who can provide eyewitness insights into the individual's prison

adjustment. Identifying and interviewing these individuals in the prison system is a crucial part of this process. Other avenues for obtaining this information may include letters of support or even in-court testimony.

In addition to witnesses who can attest to the individual's transformation and contributions to the prison, prison records are a key component of JLWOP mitigation investigation (as described above), and are necessary to corroborate and supplement this information. Records will need to be obtained from the individual's current prison as well as any past prisons.²⁷ Records from any prior incarcerations should be obtained as well, including juvenile justice facilities and pretrial detention centers or jails. Information from these records is important to show both prison adjustment and additional social history context. For example, it is important to understand a child's experience in a juvenile facility and the impact it might have had on his or her emotional well-being and/or likelihood of later becoming involved in the adult criminal legal system.

In many cases, a review of prison adjustment will lead to the discovery of institutional misconducts or "write ups." Regardless of the number or timing of the misconducts, any complete investigation of prison adjustment must be based on an understanding of each and every institutional write up and the circumstances surrounding it. Despite how any particular incident might appear in institutional records, misconducts must be investigated and understood in a larger context of an individual's life experiences and challenges. Oftentimes, misconducts that can be construed to paint a defendant as a danger can be mitigated when the circumstances surrounding the incident are understood. For example, a prisoner receives a misconduct for having contraband (i.e., a deadly weapon) in her cell. Further investigation might reveal that the person had a history of being targeted for abuse or assault, had requested and been denied protective custody, and thus out of fear resorted to the only form of protection available to her.

A final and critical part of the process of developing prison adjustment as mitigation in JLWOP cases is understanding how the individual has worked to improve herself over the years as well as contributed in meaningful ways to the institution, particularly as someone who has grown up behind prison walls. This could include the following: participa-

Professional Announcement

POSITION ANNOUNCEMENT 17-12

Assistant Federal Public Defender — Capital Habeas Unit Office of the Federal Public Defender District of Arizona — Salt Lake City

THE FEDERAL PUBLIC DEFENDER is accepting applications for an assistant federal public defender for the Capital Habeas Unit to be stationed in Salt Lake City, Utah. More than one position may be filled from this announcement. The federal defender organization operates under authority of the **Criminal Justice Act, 18 U.S.C. § 306A**, to provide defense services in federal criminal cases and related matters by appointment from the court. The Capital Habeas Unit has staffed offices in Phoenix, Tucson, and **Salt Lake City**.

REQUIREMENTS: An assistant federal public defender must be: (1) a graduate of an accredited law school, and admitted to practice in good standing before the highest court of a state; (2) licensed to practice in the U.S. District Court by the time of entrance on duty. It is preferred that applicants have capital litigation experience in direct appeal, state post-conviction or federal habeas corpus proceedings. Other related experience may be considered. Applicants must be team-oriented, exhibit strong writing skills and a commitment to criminal defense for those facing the death penalty. Heavy and extended travel is required.

SELECTION CRITERIA: The successful applicant will have an established capacity or clearly demonstrated aptitude for excellence in criminal defense practice, a commitment to the representation of indigent accused persons, and a reputation for personal integrity. Applicants must submit to a background security investigation requiring an FBI name check, IRS tax check, and to be fingerprinted and photographed. Appointment will be subject to the applicant's successful completion of a background security investigation and favorable adjudication.

SALARY AND BENEFITS: The salary of an assistant federal public defender is commensurate with that of an assistant U.S. attorney with similar qualifications and experience. The position is in the excepted service and does not carry the tenure rights of the competitive Civil Service. The position does include regular Government employment benefits including health and life insurance, retirement, and the Thrift Savings Plan. Salary is payable only by Electronic Funds Transfer (direct deposit). All positions are at will and are subject to the availability of funds.

HOW TO APPLY: Qualified persons may apply by sending via e-mail a letter of interest, resume, and representative writing sample. References will be required from candidates selected for an interview. Applicable experience should be described in detail. Send completed application to the **Personnel Administrator, Federal Public Defender, District of Arizona**, at HR@fpdaz.org. Announced March 20, 2017; **open until filled**.

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Professional Announcement

POSITION ANNOUNCEMENT 17-14

Assistant Federal Public Defender Office of the Federal Public Defender District of Arizona — Tucson

THE FEDERAL PUBLIC DEFENDER is accepting applications for an assistant federal public defender to be stationed in Tucson. More than one position may be filled from this announcement. The federal defender organization operates under authority of the **Criminal Justice Act, 18 U.S.C. § 306A**, to provide defense services in federal criminal cases and related matters by appointment from the court. The organization has staffed offices in Phoenix, **Tucson**, Yuma, and Flagstaff.

REQUIREMENTS: An assistant federal public defender must be: (1) a graduate of an accredited law school; (2) admitted to practice in good standing before the highest court of a state; and (3) licensed to practice in the U.S. District Court by the time of entrance on duty. Applicants must have at least one to two years' experience in trial work or other related work, and a commitment to criminal defense. Spanish language proficiency is **required** for this position. Applicants selected for interview will be tested for Spanish-speaking ability. Appointment is subject to a satisfactory background investigation including an FBI name and fingerprint check and an IRS tax check.

DUTIES: The assistant federal public defender will represent clients charged with federal criminal offenses and clients involved in other matters covered under the Criminal Justice Act. The position requires travel for investigation, litigation, and training. Federal public defender attorneys may not engage in the private practice of law.

SELECTION CRITERIA: The successful applicant will have a clearly demonstrated aptitude for excellence in criminal defense practice, a commitment to the representation of indigent accused persons, and a reputation for personal integrity. Applicants must also possess the ability to communicate effectively with clients, witnesses, colleagues, staff, and court and agency personnel as part of their employment. Experience in handling federal criminal cases is preferred.

SALARY AND BENEFITS: The salary of an assistant federal public defender is commensurate with that of an assistant U.S. attorney with similar qualifications and experience. The position is in the excepted service and does not carry the tenure rights of the competitive Civil Service. The position does include regular Government employment benefits including health and life insurance, retirement, and the Thrift Savings Plan. Salary is payable only by Electronic Funds Transfer (direct deposit). All positions are at will and are subject to the availability of funds.

HOW TO APPLY: Qualified persons may apply by sending via e-mail a letter of interest, resume, and representative writing sample. References will be required from candidates selected for an interview. Applicable experience should be described in detail. Send completed application to the **Personnel Administrator, Federal Public Defender, District of Arizona**, at HR@fpdaz.org. Announced March 20, 2017; **open until filled**.

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tion in programs;²⁸ certification trainings (for which mitigators need to obtain copies of the certificates and descriptions of the programs); work history (which should include interviews with supervisors and co-workers); the ability to develop and/or maintain family relationships; contributions to staff or other prisoners through service or mentoring; and any other unique way in which the individual has demonstrated growth and transformation. All of this information folds into the narrative to demonstrate how the individual has truly grown and changed over the years, and how she will contribute to the broader community going forward.

Developing a Narrative

Once the investigation has yielded a rich and detailed multigenerational social history of an individual's childhood as well as the individual's institutional adjustment, the team can begin the process of synthesizing the information into a narrative and drafting the report that will be used to present what has been gathered. Again, this report may be prepared for submission to a prosecutor, and/or a judge, and/or the parole board, or it may merely form the basis of other submissions by defense counsel. In any form, presenting this mitigating evidence involves much more than a laundry list of facts or accomplishments. Rather, mitigation provides critical context for an individual's actions, and ultimately for her contribution to a tragedy. In other words, mitigation provides an avenue for additional information to become part of the story. In many cases, and in all cases involving mandatory sentences of life in prison without parole, that information has never been considered about the individual deemed responsible.

Importantly, a compelling and tragic narrative already exists in the case — the crime and its impact on the family and

Professional Announcement

POSITION ANNOUNCEMENT 17-15

Assistant Federal Public Defender — Capital Habeas Unit Office of the Federal Public Defender District of Arizona — Phoenix

THE FEDERAL PUBLIC DEFENDER is accepting applications for an assistant federal public defender for the Capital Habeas Unit (CHU) to be stationed in Phoenix, Arizona. Attorneys in the CHU represent persons under a sentence of death in habeas corpus proceedings in the federal court. More than one position may be filled from this announcement. The federal defender organization operates under authority of the **Criminal Justice Act, 18 U.S.C. § 306A**, to provide defense services in federal criminal cases and related matters by appointment from the court. The Capital Habeas Unit has staffed offices in **Phoenix**, Tucson, and Salt Lake City.

REQUIREMENTS: An assistant federal public defender must be: (1) a graduate of an accredited law school, and admitted to practice in good standing before the highest court of a state; (2) licensed to practice in the U.S. District Court by the time of entrance on duty. It is preferred that applicants have capital litigation experience in direct appeal, state post-conviction or federal habeas corpus proceedings. Other related experience may be considered. Applicants must be team-oriented, exhibit strong writing skills and a commitment to criminal defense for those facing the death penalty. Heavy and extended travel is required.

SELECTION CRITERIA: The successful applicant will have an established capacity or clearly demonstrated aptitude for excellence in criminal defense practice, a commitment to the representation of indigent accused persons, and a reputation for personal integrity. Applicants must submit to a background security investigation requiring an FBI name check, IRS tax check, and to be fingerprinted and photographed. Appointment will be subject to the applicant's successful completion of a background security investigation and favorable adjudication.

SALARY AND BENEFITS: The salary of an assistant federal public defender is commensurate with that of an assistant U.S. attorney with similar qualifications and experience. The position is in the excepted service and does not carry the tenure rights of the competitive Civil Service. The position does include regular Government employment benefits including health and life insurance, retirement, and the Thrift Savings Plan. Salary is payable only by Electronic Funds Transfer (direct deposit). All positions are at will and are subject to the availability of funds.

HOW TO APPLY: Qualified persons may apply by sending via e-mail a letter of interest, resume, and representative writing sample. References will be required from candidates selected for an interview. Applicable experience should be described in detail. Send completed application to the **Personnel Administrator, Federal Public Defender, District of Arizona**, at HR@fpdaz.org. Announced April 3, 2017; **open until filled**.

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larger community. Mitigation in juvenile life without parole cases does not intend to diminish the tragedy of the life or lives that were lost, or the impact such loss has had on the person's network or the broader community. In fact, mitigation should include, when possible, recognition of the devastating effect the crime has had on the victim's family, the immediate community, and the larger society. Through mitigation the story that began with death and loss now can include a much more nuanced understanding of the individual held responsible as well as the ways in which that person has learned from his or her mistakes, has taken advantage of available opportunities, and is prepared to become a contributing member of the community. Take, for example, the story of Eddie that follows.

An Example: Eddie's Story

At 17 years old, Eddie was homeless and owed money to a drug dealer. Eddie was told he could work off his debt by driving the getaway car for a robbery, which ultimately, and unknowingly to Eddie upon his agreement to participate, led to a man tragically losing his life. At the advice of his attorney, Eddie took a negotiated plea and expected to be released within the next 18 years, but upon beginning his state prison sentence, soon learned that his charge carried a mandatory sentence of life in prison without the possibility of parole.

Eddie has lived behind bars for the past 36 years with no actionable hope for release until the *Montgomery* decision in January 2016. Despite this, he completed his GED, an Associate's Degree in Religious Education, and became a minister and facilitator to the men serving alongside him. The authors and their colleagues have been working with Eddie and his defense attorney to prepare a report for, first the prosecutor, and now the judge and parole panel responsible for determining his release. The report includes details about his life prior to and during his incarceration, and a comprehensive plan of programs and services that he is connected with to help facilitate his successful reintegration into the community.

Role of the Mitigation Specialist

Building upon an understanding of how mitigation information is developed and crafted into a narrative, it is essential to discuss in further detail the precise nature of the role of the mitigation specialist on a defense team. Some institutions — such as

public defender offices, law school clinics, or nonprofit advocacy organizations — may have mitigation specialists, investigators, or sentencing advocates on staff. However, many defense teams or solo practitioners do not have similar access, and thus will need to locate and identify an independent mitigation specialist to be appointed to the case by the courts. A mitigation specialist is, under no circumstances, separate from the defense team. Only by and through assigned counsel should a mitigation specialist conduct the investigation and thus be protected under the umbrella of confidentiality and privilege.

As a member of the defense team, mitigation specialists are not experts and are not testifying witnesses.²⁹ Their role is to conduct the investigation through records collections and witness interviews, compile the gathered information into the team's desired format, identify potential testifying witnesses, and provide guidance on the need for any defense experts that the case may require. The mitigation specialist works hand in hand with other members of the defense team every step of the way to ensure that the client receives the full representation that he or she is entitled to in these cases. Given the detailed discussions above of the various aspects of a mitigation investigation, attorneys must ensure that appointed mitigation specialists are afforded the necessary time and resources, usually through the court, to effectively do their job.

There is no particular degree or set of credentials required to become a mitigation specialist. Training in interviewing techniques, trauma, research and writing, however, are all essential components of the preparation required to become proficient in this field. Most important to becoming a successful mitigation specialist is an ability and commitment to developing strong, trusting relationships with clients and their supporters that will enable understanding and overcoming the potential barriers described above. Only then will a mitigation specialist be able to successfully delve into uncovering the most intimate and often guarded details of an individual's life, and to provide that individual and the process with the respect, intentionality, and dignity they deserve.

Reentry

As discussed throughout, it is imperative for lawyers and mitigation specialists to include reentry in their advocacy for juvenile lifers. Mitigation

must inform reentry: The information collected through the mitigation investigation — about someone's challenges, relationships, strengths and aspirations — must inform the plan for where the person will live, and with whom, and how that person will be connected to resources in the community. Both judges, in resentencing hearings, and the parole board in their process, will need to feel secure that a thoughtful plan is in place before deciding to release someone from decades of incarceration.

As with mitigation, a standard for reentry planning in JLWOP cases is provided by the Campaign for the Fair Sentencing of Youth Guidelines:

7.5 Reentry Planning: The defense team should be cognizant of the child client's possibility for release and any reentry planning that should take place in anticipation of release. Reentry planning should include, but is not limited to, identifying programming needs both during and postincarceration that address issues identified during the investigative and mitigation phase of representation (e.g., the child client's behavioral health, special education, substance abuse disorder, and skills training) to ensure successful reintegration to the community and lower the risk of recidivism.³⁰

As the CFSY guidelines indicate, the mitigation investigation directly informs the development of the reentry plan, and no two reentry plans should be identical. As with mitigation generally, there is no "one-size-fits-all" approach.

In addition to the dearth of trained mitigation specialists to handle the need in juvenile lifer resentencings, advocates must also contend with the fact that traditional legal representation, particularly that related to capital and other homicide cases, does not focus on clients' reentry needs, leaving reentry under-resourced. To be responsive to this need, individuals seeking training in mitigation must also consider learning how to develop a comprehensive and individualized reentry plan for their future clients, and they should be guided by the CFSY guidelines, the best practices detailed here, and the resources available in their jurisdictions.

In order to develop the type of reentry plan contemplated here, mitigation specialists must be familiar with the pro-

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grams their clients have had access to throughout their incarceration, and also the programs and resources available to them in the community upon release. This may be a complicated task for mitigation specialists operating in states where juvenile lifer clients have largely been excluded from such programming.

For instance, because of their designation as lifers, for the majority of their time behind bars, juvenile lifers in Pennsylvania³¹ were categorically excluded from participating in programs that, while imperfect, provide other prisoners with training on technology and other life skills. Therefore, in addition to resources needed to recruit, train, and support attorneys and mitigation specialists in handling resentencing presentations, significant resources are needed to provide comprehensive reentry planning and support for the men and women who will be returning to the community after decades of incarceration. The majority of these individuals will have limited access to stable housing and employment. In many cases, their support networks no longer exist. Attorneys and advocates must work collaboratively with their juvenile lifer clients to develop detailed, individualized reentry

plans to be used in the resentencing process to demonstrate their readiness and capacity for successful reentry — which requires the involvement of mitigation specialists and, ideally, a dedicated reentry coordinator.

Understanding the reentry needs and potential challenges this population will face upon release requires consistent communication, preferably in person, and a dedicated commitment to identifying their questions and concerns. For example, over a series of 11 workshops facilitated by the authors, with juvenile lifers across Pennsylvania, participants were asked to identify their most pressing concerns and questions as they pertain to their potential parole and return to the community. Responses ranged from “what do things cost?” to “how do I continue my cancer treatment?”³² It is not until information is collected and shared in a collaborative and responsive way that advocates and mitigation specialists can truly begin to anticipate the needs and potential barriers to successfully reintegrating to the community. For mitigation specialists and other advocates interested in best supporting their clients or juvenile lifers more generally through the reentry process, the authors have compiled suggested action steps and guidance below.

Resource Gathering and Partnership Development:

Liaise with organizations that provide reentry support to men and women returning to the community after decades of incarceration, including housing agencies, employment training and placement programs, employers, and mental and physical health providers. Connect clients, or juvenile lifers more broadly, to these organizations.

Documentation of Available Resources:

Once resource partnerships have been established, it becomes essential that such relationships be memorialized. Mitigation specialists and other advocates should gather letters of support from community-based programs that provide housing, job placement and training, behavioral health services, medical care, religious programming/support, and general life skills.

Applications for Benefits:

The letters of support described above ought to detail the nature of the services and resources provided by the partner organization. Among the most important partnerships to identify will be organizations that provide guidance, and in some

cases, offer facilitation of the application process for public benefits such as: Social Security Disability (SSD) or Supplemental Security Income (SSI); Medicaid or Medicare; and other forms of public assistance, including Food Stamps. In some instances, applications for these types of benefits can be submitted in advance of an individual’s release from incarceration, and in other instances, the prisons may be able to provide support.

Emotional Support: The challenges inherent in returning to the community after decades of incarceration cannot be overstated. In JLWOP resentencings, individuals will be returning to a world that is fundamentally different from the one they were removed from in their adolescence. To acknowledge the magnitude of this transition, mitigation specialists and advocates should consider introducing their clients to behavioral health supports, which may include, but are not limited to, peer-to-peer support groups and mentoring (facilitated by other individuals with lived experience) and professional counseling and trauma-informed therapy. Moreover, such supportive services should be offered not only to the individual juvenile lifer going through the process of reentry, but also to the individual’s loved ones or family members who are supporting him through his transition home.

Housing: Some jurisdictions may offer immediate postrelease housing plans by way of halfway houses/community corrections or “transitional housing.” The availability of such resources should not form the basis of a juvenile lifer’s reentry plan, and housing plans in particular should contemplate both short-term and long-term possibilities. In Pennsylvania, for example, community corrections is available for re-entering juvenile lifers upon their release, even if they also have an approved home plan. Mitigation specialists and defense attorneys should know where their clients plan to sleep as soon as the institutional intermediary option is no longer available. Presenting both a “Plan A” and a “Plan B” for long-term housing options is optimal. A client’s plan of last resort should not include a homeless shelter.

Technology: Understanding how to properly use technology may be among the most confounding, and also most exciting, experiences for juvenile lifers returning home. It is unlikely that juvenile lifer clients will have had much, if any, access to technology during their incarceration, and it is further unlikely that signif-

icant training in accessing and managing technology will be provided prior to their release. In addition to simply understanding how to navigate a website and answer a cellphone, juvenile lifers will also need to be educated on how to avoid getting into trouble once they have technology at their fingertips. Candid conversations about the pitfalls and potential dangers in browsing the Web, entering personal information, and posting on social media should occur early and often.

Financial Management and Literacy:

As noted above, juvenile lifers surveyed by the authors expressed significant concern over their ability to manage financially upon release. Having only navigated a prison economy for the large majority of their lives, it will be important to understand how to open a bank account, balance a checkbook, access an ATM, and generally how to budget based on the costs of living in a new millennium. As with technology generally, juvenile lifers should also be provided with guidance and tools on how to safely and securely manage their finances so that they can avoid identity theft and other predatory schemes often directed at individuals who are elderly or lack financial or technological literacy.

Free Time: One aspect of supporting the reentry of juvenile lifers that may be less intuitive is the process of helping them determine how to structure their free time (or time that is not spent working or participating in programming). Transitioning from an incarcerated life, which has been rigidly timed and structured by design, to a free-form schedule with limited parameters can pose a significant challenge for many individuals returning to the community after lengthy periods of imprisonment. Identifying programs to support clients in structuring their free time, such as exercising at the YMCA or participating in appropriate volunteer activities, can provide a substantial benefit and source of support upon release.

Finally, just as much as reentry plans should incorporate and relate to the information gathered during the mitigation investigation, there is also an important nuance at play: what makes for good mitigation may not make for a good reentry plan. For example, a defense team should not simultaneously present the traumatic home life of its client as mitigation and suggest the same home as the basis for the reentry plan without explaining any significant differences in the current environment. Although there

is no question that families evolve and mature over time, just as youth clients do, advocates should be cautious not to present reentry plans that are contradictory to what they presented in mitigation. It is a delicate balance to strike, and one that the defense team should be carefully evaluating at all stages of the process.

Writing a Mitigation Report and Reentry Plan

Although local practice may vary depending on the rules for admission of information and whether it is likely that the submission of a written report might require the mitigation specialist to testify, it is important that mitigation specialists compile the information collected through the methods described above into a narrative that has a particular advocacy perspective. In JLWOP resentencing cases, the ultimate “ask” should be for a particular term of years sentence if the audience is the prosecutor or judge in a contested hearing, or in support of the judge’s acceptance of a negotiated sentence, or for release if the reader is the parole board. The same report can be edited and repurposed with each of these audiences in mind, as the case moves through the resentencing process. For example, the first version of the report should be written with the prosecutor as the audience, in advance of an offer, then it should be updated for the court, and finally for the parole board, if a parole hearing is required for release. All information shared should fit into the overarching request being made to the court, and tailored with the specific audience in mind. While the substance of each of these versions would largely remain the same, minor adjustments should be made to reflect the nature of the request as it corresponds to the authority of the decision maker or audience (e.g., a resentencing memorandum presented to a judge determining length of sentence and potential release, as compared to a parole report presented to a parole board determining ultimate release and appropriateness of the reentry plan). This is where it is particularly important to be working together as a defense team so that the report and advocacy contained therein fits into the attorney’s overall strategy for the case, and so nothing that might compromise that strategy is shared, or shared in a manner that is not in furtherance of the overall advocacy.

The written report should be well organized, and should follow a detailed outline. Suggested topics/sections to include are: Introduction; Process; Recommendation; Life History (including,

for example, Family Structure, Developmental Years and Education); Prison Adjustment and Growth; Programming while Incarcerated; Employment; Reentry Plan; and Conclusion. Each mitigation report should also include an appendix with certificates earned through the prison system and letters of support from family and other community members. More specifically, this includes documents attesting to where the client will live upon returning home and any programs that have been identified as part of the Reentry Plan, to substantiate the descriptions contained within the report. Teams may also consider including photographs, if they are accessible, that show any representations of the person’s major life events, such as photos from childhood, graduation, completion of programs while incarcerated, and family member visits.

Conclusion

The recent rulings in *Miller* and *Montgomery* offer defense teams handling juvenile life without parole resentencings a unique opportunity to develop and present compelling information about individuals who, under automatic sentencings schemes, were defined solely by their convictions. Decision makers must now take into account social history information that was previously excluded, and in many ways forms the basis for determining the most appropriate outcome for the juvenile lifer being resentenced, the justice system, and the community. This opportunity is one that must be approached with the utmost seriousness and sufficient resources in order to provide children who were automatically sentenced to die in prison with the individualized sentencing hearing that they are now constitutionally entitled to. Defense counsel must utilize a team approach that involves mitigation and reentry specialists to develop and present the multigenerational life story of their juvenile lifer client. This investigation and its translation into a comprehensive picture of the juvenile lifer and the circumstances of his or her life, involvement in the crime, adjustment to prison, and a robust reentry plan are fundamental to effective representation at resentencing.

Notes

1. 534 U.S. 551 (2005).
2. 560 U.S. 48 (2010).
3. 132 S.Ct. 2455 (2012).
4. 136 S.Ct. 718 (2016).
5. In this article, the terms “defendant” and “juvenile lifer” are used interchangeably.

ably, although neither accurately represents the stage at which the individual being resentenced finds him/herself in the court process. A “juvenile lifer” is an individual who, as a child (under age 18 at the time of the offense), was sentenced to serve a life term of imprisonment, without the possibility of parole. In the context of the *Montgomery* decision and the discussion here, the term “juvenile lifer” is used to refer only to those individuals who were sentenced under a mandatory scheme.

6. This article uses the terms “mitigators” and “mitigation specialists” interchangeably to describe the individuals who compile the life history information described throughout.

7. While the overwhelming majority of juvenile lifers are male, it should not be overlooked that women too serve this sentence and that their needs and circumstances are often very different from those of men. Those differences must play a critical role in the development of their mitigation and corresponding reentry plans.

8. In Pennsylvania, virtually all juvenile lifers who have been resentenced thus far have been resentenced to a term of years to life imprisonment, requiring the Parole Board to act to release them.

9. See, e.g., American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (2003), available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_representation/2003guidelines.authcckdam.pdf.

10. See, e.g., *id.*

11. *Id.*

12. 438 U.S. 586, 604 (1978) (The sentencer must “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.”).

13. 455 U.S. 104, 113-114 (1982) (“Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence.”).

14. 476 U.S. 1, 4 (1986) (“[T]he only question before us is whether the exclusion from the sentencing hearing of the testimony petitioner proffered regarding his good behavior during the over seven months he spent in jail awaiting trial deprived petitioner of his right to place before the sentencer relevant evidence in mitigation of punishment.”).

15. 529 U.S. 396 (2000) (Trial counsel’s “failure to introduce the comparatively voluminous” mitigation information later discovered about their client “clearly demonstrate[s] that [they] did not fulfill their obligation to conduct a thorough investigation of the defendant’s background.”).

16. CFSY is “a national coalition and clearinghouse that coordinates, develops and supports efforts to implement fair and age-appropriate sentences for youth, with a focus on abolishing life without parole sentences for youth.” See <http://fairsentencingofyouth.org/our-vision/>.

17. Campaign for the Fair Sentencing of Youth, *Trial Defense Guidelines: Representing a Child Client Facing a Possible*

Life Sentence (2015), available at <http://fairsentencingofyouth.org/wp-content/uploads/2015/03/Trial-Defense-Guidelines-Representing-a-Child-Client-Facing-a-Possible-Life-Sentence.pdf>. All three authors of this article were Contributors to the Guidelines and participated in their drafting. *Id.*

18. *Id.* See also Press Release, Campaign for the Fair Sentencing of Youth, CFSY Releases First-Ever Defense Guidelines for Representing Youth Facing Life Sentences (2015), available at <http://fairsentencingofyouth.org> (in the April 2015 newsletter).

19. See Guideline 4.2.

20. See Guideline 4.3.

21. See *Skipper v. South Carolina*, 476 U.S. 1, 8 (1986) (Exclusion of evidence regarding a defendant’s good behavior in prison awaiting trial “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.”).

22. See, e.g., *Miller*, 132 S.Ct. 2455, at 17.

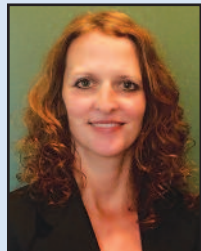
23. Attapol Kuanliang, Jon R. Sorenson & Mark D. Cunningham, *Juvenile Inmates in an Adult Prison System: Rates of Disciplinary Misconduct and Violence*, 35 CRIM. JUST. & BEHAV. 9 (2008), available at <http://journals.sagepub.com/doi/pdf/10.1177/0093854808322744>.

24. Vincent Schiraldi & Jason Zeidenberg, *The Risks Juveniles Face When They Are Incarcerated With Adults* (1997). See also Liz Ryan, Campaign for Youth Justice, *Youth in the Adult Criminal Justice System* (2012), available at <http://www.campaignforyouthjustice.org/images/policybriefs/po>

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forensic analysis depends far less on cross-examination at trial, and far more on sound lab techniques, full disclosure of strengths and limitations of forensic evidence to prosecutors and the defense, and careful litigation. The changing judicial understanding of the constitutional significance of forensic evidence in criminal cases may follow from a new appreciation that forensic evidence is not only increasingly important in criminal cases, but that many traditional techniques lack adequate reliability and validity. The Sixth Amendment and the Due Process Clauses are emerging as promising constitutional sources for improved regulation of forensics, including through ineffective assistance of counsel and *Brady v. Maryland* rulings focusing on investigations and plea bargains, as well as theories focusing on the general due process entitlement to a fair trial, access to expert evidence, and protection against the fabrication of evidence. How meaningful courts will make those dual constitutional protections in the years to come will be a crucial test of the nation's commitment to accuracy in criminal justice. ■

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Miller, Montgomery, and Mitigation

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licyreform/FR_YACJS_2012.pdf (citing the Bureau of Justice Statistics' finding that youth under the age of 18 represented 21 percent of all substantiated victims of inmate-on-inmate sexual violence in jails in 2005, and 13 percent in 2006, notwithstanding only making up 1 percent of the jail population and further explaining that "The National Prison Rape Elimination Commission found that 'more than any other group of incarcerated persons, youth incarcerated with adults are probably at the highest risk for sexual abuse.'").

25. Robert Johnson & Ania Dobrzanska, *Mature Coping Among Life-Sentenced Inmates: An Exploratory Study of Adjustment Dynamics*, 11/1/05 Corrections Compendium 2005 WLNR 264084858, available at <http://www.deathpenaltyinfo.org/documents/coping.pdf>.

26. *Id.* at 9.

27. Efforts should be made by defense teams to ensure that all institutional records are obtained, which requires an in-depth understanding of how different prisons maintain their records. For example, mental health records are often maintained separate from the main institutional file and must be specifically requested. This can also be the case for medical records, which often require separate request protocols and procedures.

28. Defense teams will need to develop an understanding, specific to the prison system in their jurisdiction, of what programs were historically made available to lifers prior to *Miller* as well as whether or not additional programs were made available to

them after *Miller*. In Pennsylvania, for example, this information can even vary from institution to institution, and thus care must be taken to investigate the specific opportunities that were/are available to an individual over the course of the incarceration.

29. While there may be the rare occasion that the mitigation specialist is called to testify for some specific and limited purpose, the authors maintain that they are not experts nor should they be called to testify in general to the information they have gathered. That role is best left to the actual witnesses themselves.

30. See Trial Defense Guidelines, *supra* note 17.

31. While the authors have the most anecdotal experience regarding the experience of juvenile lifers in Pennsylvania, where they work, the same may be true for juvenile lifers across the country.

32. Other questions gathered through this process included the following: How is medication paid for and by whom? What would a budgeted income for a senior man be? Will there be somebody to help show a person the ropes? Will there be somebody to talk with if frightened of being on one's own? How much help is really going to be given if one cannot succeed on one's own? How much does food cost? Are people open to giving jobs to people who have been in prison for 30 years? For a person who has no family, what can be done to help? What kinds of workshops are available? Will there be people who really understand my situation and care? How much for clothing? How will my relationship with my son turn out after my release from prison? Are there resources for Juvenile Lifers to speak to troubled teens? How soon can we start helping people after getting out? How can we start looking for jobs now? How can I properly prepare myself for an adult life of responsibility when I have been taken care of for decades? ■