

# Justice Delayed

## What's Next for Michigan's Juvenile Lifers?



By Sofia Nelson

In 2005, the United States Supreme Court began recognizing that children are fundamentally different from adults in ways that mitigate culpability. Because children are less culpable for their actions and more capable of change, the Court reasoned, it is cruel and unusual to impose the harshest penalties on children, even when they commit heinous crimes.<sup>1</sup>

Relying on the mitigating qualities of youth, the Court first banned the death penalty for juvenile offenders.<sup>2</sup> Then in 2010, the Court prohibited life-without-parole sentences for juveniles convicted of non-homicide offenses.<sup>3</sup> In 2012, in *Miller v Alabama*, the Court barred mandatory life-without-parole sentences for all offenders under the age of 18.<sup>4</sup> And in 2016, in *Montgomery v Louisiana*, the Court held that *Miller* applied retroactively,<sup>5</sup> rendering unconstitutional the sentences of 363 juvenile lifers in Michigan, the largest population of juvenile lifers nationwide.<sup>6</sup>

In response, Michigan's legislature passed MCL 769.25 and MCL 769.25a in an attempt to bring the state's juvenile sentencing laws into compliance with the Eighth Amendment's prohibition against cruel and unusual punishment.<sup>7</sup> MCL 769.25a(4)(b) and (c) gave county prosecutors the option to re-seek life-without-parole sentences for juvenile offenders convicted pre-*Miller* by filing a motion. If a motion requesting imposition of a life sentence was not filed, the juvenile offender must be sentenced to a term of between 25 and 40 years at the minimum and 60 years at the maximum.<sup>8</sup>

The United States Supreme Court cautioned that death in prison for children is cruel and unusual punishment in all but the "very rarest" of cases where the offender is permanently incapable of rehabilitation.<sup>9</sup> The Court explained that such a sentence is cruel because it deprives a child of any "chance for fulfillment outside prison walls," amounting to one of the cruelest deprivations—the deprivation of hope.<sup>10</sup>

Yet Michigan prosecutors are re-seeking such sentences in over 200 cases—making the state an extreme outlier in its response

to *Miller* and *Montgomery*.<sup>11</sup> By contrast, the neighboring states of Wisconsin, Indiana, and Ohio have just 16 juvenile lifers combined.<sup>12</sup> More than half of all states and the District of Columbia no longer impose life-without-parole sentences on children in any circumstance.<sup>13</sup> And the United States is alone on the global stage in imposing life-without-parole sentences on children.<sup>14</sup>

Six years after *Miller*, only one-third of Michigan's juvenile lifers have been relieved of their unconstitutional sentences and 47 have been paroled.<sup>15</sup> The majority of juvenile lifers—more than 200—remain in prison awaiting *Miller* hearings to determine if a life-without-parole sentence is proportionate in their case.

Since the United States Supreme Court's ruling in *Montgomery*, *Miller* hearings in Michigan had largely been stayed pending a Michigan Supreme Court decision concerning the standard of appellate review following such a hearing and whether the hearings should take place before a judge or a jury. In June 2018, the Michigan Supreme Court issued an opinion in *People v Skinner* holding that *Miller* hearings should take place before a judge, not a jury, and that appellate courts should review trial courts' decisions in these cases for abuse of discretion.<sup>16</sup> Now that *Skinner* has been decided, *Miller* hearings are beginning in 28 counties.<sup>17</sup>

The United States Supreme Court and the Michigan legislature have instructed that, at *Miller* hearings, the sentencer must consider the mitigating factors of youth as outlined in *Miller* and how these attributes “counsel against irrevocably sentencing [a juvenile offender] to a lifetime in prison.”<sup>18</sup> The *Miller* factors must be considered for their mitigating nature and are not to be deemed aggravators.<sup>19</sup> Those factors are (emphasis added):

- **A juvenile offender's chronological age and its hallmark features** such as immaturity, impetuosity, and failure to appreciate risks and consequences. The *Miller* Court noted that these biological differences from adults, which are established by both developmental psychology and neuroscience, lessen a youth's moral culpability and enhance the prospects that, as the years go by, his or her “deficiencies will be reformed.”<sup>20</sup>
- Evidence regarding “**the family and home environment** that surround[ed] [the juvenile]—and from which he cannot usually extricate himself.”<sup>21</sup> Relevant “environmental vulnerabilities” include evidence of childhood abuse or neglect; familial drug or alcohol abuse; lack of adequate parenting, supervision, or education; exposure to violence; and susceptibility to psychological damage or emotional disturbance.<sup>22</sup>
- Evidence regarding **the circumstances of the homicide**, including the extent of the youth's participation and the way familial and peer pressures may have affected him or her.<sup>23</sup>
- Evidence concerning whether the juvenile **might have been charged and convicted of a lesser offense** if not for incompetencies associated with youth—for example, the inability to deal with police officers or prosecutors or the incapacity to assist his or her attorneys or appropriately evaluate plea offers.<sup>24</sup>
- Any evidence bearing on “**the possibility of rehabilitation**[,]” including “the individual's record while incarcerated.”<sup>25</sup>

Because many of these cases are decades old, developing mitigating evidence is both challenging and labor intensive.

The Michigan Supreme Court has highlighted the unique nature of *Miller* hearings and has recognized the need for adequate resources:

[J]uvenile defendants must be afforded the opportunity and the financial resources to present evidence of mitigating factors relevant to the offender and the offense, [and] psychological and other evaluations relevant to the youthfulness and maturity of the defendants must be allowed[.]<sup>26</sup>

The Court has repeatedly compared the imposition of life without parole on a juvenile to the death penalty, and has

## At a Glance

Following the United States Supreme Court's ruling in *Montgomery v Louisiana*, Michigan prosecutors are currently re-seeking life-without-parole sentences in more than 200 juvenile lifer cases—the largest number of any state. To provide a constitutionally adequate defense to these 200 juvenile lifers, defense teams must conduct extensive mitigation investigations, focused on the factors identified in *Miller v Alabama*, and consult with necessary expert witnesses. For the defense, preparing for a *Miller* hearing is most analogous to preparing for the penalty phase of a death-penalty case.

anticipated that these hearings would include significant research, preparation, and evidence.<sup>27</sup> The American Bar Association guidelines for death penalty cases require the appointment of a defense team of two attorneys, a mitigation specialist, an investigator, and “the assistance of all expert, investigative, and other ancillary professional services reasonably necessary or appropriate to provide high quality legal representation at every stage of the proceedings.”<sup>28</sup>

To prepare for a *Miller* hearing, the defense team—which should include a mitigation specialist—should become familiar with best practices for mitigation in death penalty cases.<sup>29</sup> The defense team has a duty to conduct extensive mitigation interviews with its client, exploring family history, childhood, the crime, the client’s experience with the legal system, rehabilitation, remorse, re-entry plans, and any other relevant areas of the client’s life. The defense team must also interview the client’s family and others that knew him or her. This can mean tracking down estranged relatives, co-defendants, former teachers or coaches, probation officers, counselors, foster-care workers, friends, and neighbors. The team must also collect relevant records including, but not limited to, school, work, foster care, juvenile court, abuse and neglect, medical, and prison and jail records. Depending on the case, it may be necessary to locate similar records for the client’s parents and siblings.<sup>30</sup>

The defense team is responsible for conducting a constitutionally adequate mitigation investigation, but the assistance of experts is also required to effectively address the *Miller* factors. The United States Supreme Court recognized that “[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.”<sup>31</sup> Clinical forensic psychologists experienced in working with violent juvenile offenders possess critical expertise. And because juvenile Eighth Amendment jurisprudence is rooted in part in brain science,<sup>32</sup> an expert in adolescent brain development is likely necessary. A corrections expert is also vital to help the defense team and the court make sense of hundreds to thousands of pages of corrections records. Depending on the client’s history, a neuropsychologist, child abuse or trauma expert, gang expert, foster-care expert, and others may be needed.

The State Appellate Defender Office conservatively estimates that the defense team, excluding experts, should expect to put in an average of 800 hours per case. The defense bar, prosecutors, and courts must be prepared for the time and resources required to undertake the “very meaningful task” of distinguishing between “a child whose crimes reflect transient immaturity” and “those rare children whose crimes reflect irreparable corruption for whom a life without parole sentence may be appropriate.”<sup>33</sup>



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In addition to time, these cases will cost money. As the Michigan Supreme Court made clear in *People v Kennedy*, due process requires the appointment of experts at the government’s expense for indigent criminal defendants when it is demonstrated that it is reasonably probable that the expert will be of assistance, and the denial of that assistance will render the proceedings fundamentally unfair.<sup>34</sup> The Michigan Court of Appeals is currently considering a juvenile lifer case in which the defense asked for \$42,650 for a mitigation specialist and the court approved only \$2,500. Concurring in the grant of leave to appeal, Judge Gleicher wrote:

The hearings for juvenile offenders seeking parole sentences involve complicated legal and factual issues, and potentially, volumes of legal, psychological, educational, vocational, and disciplinary information. The defendant and his counsel likely lack the skills and training to adequately evaluate and analyze this evidence. A meaningful hearing depends on meaningful input from experts. While \$42,650 represents a considerable sum, it may be closer to being realistic than the \$2,500 approved.<sup>35</sup>

Necessary budgets will be case specific. For example, I have found Michigan trial court orders approving funding requests for more than \$52,000 in one case, more than \$15,000 for a mitigation investigation alone, and in excess of \$15,000 for a single necessary expert.

Defense attorneys handling these cases must also litigate various issues in advance of a hearing. Because this is an evolving area of the law, many legal questions remain unresolved. Does the prosecution or defense bear the burden of proof? What constitutes relevant evidence at a *Miller* hearing? Is a sentence at the top of the range, 40–60 years, functionally equivalent to a life sentence? And is a life-without-parole sentence categorically unconstitutional for some classes of juveniles, such as those convicted of felony murder or as aiders and abettors, those who were mentally ill or had learning disabilities, or particularly young offenders?

What I have learned in the last two years of representing juvenile lifers is that even in the direst circumstances, people are capable of inspiring growth. Who we were as kids is not who we are destined to be as adults. And if you define someone solely by his or her worst deed, you are likely overlooking the majority of who that person truly is. There is always the hope of change, of something better. This ability to change, this hope, is why the United States Supreme Court held we cannot simply condemn children responsible for murder to die in prison. To deny their capacity to change is just too cruel. ■



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## ENDNOTES

- Graham v Florida*, 560 US 48, 68–69, 71; 130 S Ct 2011; 176 L Ed 2d 825 (2010).
- Roper v Simmons*, 543 US 551, 575; 125 S Ct 1183; 161 L Ed 2d 1 (2005).
- Graham*, 560 US at 82.
- Miller v Alabama*, 567 US 460, 470; 132 S Ct 2455; 183 L Ed 2d 407 (2012).
- Montgomery v Louisiana*, 136 S Ct 718, 736; 193 L Ed 2d 599 (2016).
- Winowiecki & Lafond, *UPDATE: How many of Michigan's "juvenile lifers" have been re-sentenced?*, Michigan Radio (August 25, 2017) <<http://www.michiganradio.org/post/update-how-many-michigans-juvenile-lifers-have-been-re-sentenced>> [<https://perma.cc/25E5-7WC6>] [more individuals have been resentenced since publishing of this article]. Pennsylvania previously had the largest population of juvenile lifers—519—but the state has resentenced 388 of its juvenile lifers, leaving Michigan with the largest population of juvenile lifers. *Juvenile Lifer Information*, Pennsylvania Dep't of Corrections (November 15, 2018) <<https://www.cor.pa.gov/About%20Us/Initiatives/Pages/Juvenile-Lifers-Information.aspx>> [<https://perma.cc/G55T-TN9L>]. There are multiple reasons why Michigan has such a disproportionate number of the nation's juvenile lifers: (1) Michigan's age of criminal responsibility is 17, not 18; (2) mandatory life-without-parole sentences applied even in felony murder cases or cases in which defendants were convicted on an aiding and abetting theory; and (3) the limited sentencing options before *Miller* for juveniles convicted of first-degree murder led to many 14-, 15-, and 16-year-olds being waived into adult court. Barnes, *Why Michigan has more juvenile life sentences than almost any other state*, Grand Rapids Press (November 6, 2011) <[https://www.mlive.com/news/index.ssf/2011/11/why\\_michigan\\_has\\_more\\_juvenile.html](https://www.mlive.com/news/index.ssf/2011/11/why_michigan_has_more_juvenile.html)> [<https://perma.cc/VHM3-DHG2>]. All websites cited in this article were accessed November 23, 2018.
- The constitutionality of these statutes is the subject of ongoing federal litigation in *Hill v Snyder*, 308 F Supp 3d 893 (ED Mich, 2018) and *Hill v Snyder*, 900 F3d 260 (CA 6, 2018).
- MCL 769.25a(4)(c).
- Tatum v Arizona*, 137 S Ct 11, 12–13; 196 L Ed 2d 284 (2016) (citations omitted) and *Montgomery*, 136 S Ct at 734.
- Graham*, 560 US at 79.
- Justice at Last for the Youngest Inmates?*, New York Times (November 20, 2017) <<https://www.nytimes.com/2017/11/20/opinion/life-sentence-youth-parole.html>> [<https://perma.cc/CMF5-46SB>].
- Juvenile Sentencing Project, *Juvenile Life Without Parole Sentences in the United States*, Quinnipiac University Law School (June 2017), pp 6, 12, 16 <[https://www.juvenilewop.org/wp-content/uploads/June%202017%20Snapshot%20of%20JLWOP%20Sentences\\_01.pdf](https://www.juvenilewop.org/wp-content/uploads/June%202017%20Snapshot%20of%20JLWOP%20Sentences_01.pdf)> [<https://perma.cc/XVP4-UMZS>].
- The Campaign for the Fair Sentencing of Youth, *States that Ban Life Without Parole for Children* <<https://www.fairsentencingofyouth.org/media-resources/states-that-ban-life/>> [<https://perma.cc/G4LS-CLRQ>].
- De La Vega et al, *Cruel and Unusual: U.S. Sentencing Practices in a Global Context*, University of San Francisco School of Law (May 2012), p 58 <<https://www.usfca.edu/sites/default/files/law/cruel-and-unusual.pdf>> [<https://perma.cc/89VT-YLME>].
- Montgomery*, 136 S Ct at 734 and Terry, *Freed juvenile lifer gets a second chance at motherhood*, The Detroit News (July 30, 2018) <<https://www.detroitnews.com/story/news/local/michigan/2018/07/31/freed-juvenile-lifer-gets-second-chance-motherhood/850352002/>> [<https://perma.cc/3P4C-PKVV>].
- People v Skinner*, 502 Mich 89, 137; 917 NW 2d 292 (2018).
- The author found that some counties did not have any juvenile lifers and others chose not to re-seek life sentences in any of their cases, such as in Ingham and Gratiot counties. Additionally, Arenac, Bay, Berrien, Calhoun, Cass, Clinton, Eaton, Genesee, Ionia, Jackson, Kalamazoo, Kent, Lake, Lapeer, Macomb, Midland, Montcalm, Muskegon, Oakland, Ottawa, Saginaw, Shiawassee, St. Clair, St. Joseph, Van Buren, and Wayne counties all have pending juvenile lifer cases that will go to *Miller* hearings unless prosecutors withdraw their motions re-seeking life sentences.
- Miller*, 567 US at 480.
- Skinner*, 502 Mich at 114.
- Miller*, 567 US at 472 (citations omitted).
- Id.* at 477. The United States Supreme Court uses male pronouns to refer to juvenile lifers; however, the author recognizes that there are several female juvenile lifers in Michigan.
- Id.* at 472, 475–478.
- Id.* at 477.
- Id.* at 477–478.
- Id.* at 478 and MCL 769.25(6)
- People v Carp*, 496 Mich 440, 473, (2014), certiorari granted and judgment vacated by *Carp v Michigan*, 136 S Ct 1355; 194 L Ed 2d 339 (2016).
- Id.* at 474.
- ABA, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L Rev 913, 952 (February 2003) <[https://www.americanbar.org/content/dam/aba/migrated/2011\\_build/death\\_penalty\\_representation/hofstralawreview.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_representation/hofstralawreview.authcheckdam.pdf)> [<https://perma.cc/7PDE-53YJ>].
- Mitigation specialists conduct a thorough and reliable life-history investigation by collecting records, conducting multiple in-person face-to-face interviews with the client's family and other witnesses familiar with the client's life, and researching the cultural, socioeconomic, environmental, racial, and religious issues that may have impacted the client. Maher, *The ABA Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 Hofstra L Rev 763 (2008) <<https://scholarlycommons.law.hofstra.edu/cgj/viewcontent/cgj?referer=https://www.google.com/&httpsredir=1&article=2616&context=hlr>> [<https://perma.cc/3LK3-2Z2U>].
- Id.* at 767–768, 771, 773; *Guidelines for the Appointment and Performance of Defense Counsel*, p 1024.
- Roper*, 543 US at 573.
- Miller*, 567 US at 471.
- Tatum*, 137 S Ct at 13.
- People v Kennedy*, 502 Mich 206; 917 NW2d 355 (2018).
- People v Williams*, unpublished order of the Court of Appeals, entered June 4, 2018 (Docket No. 341703) <[https://publicdocs.courts.mi.gov:81/coa/public/orders/2018/341703\(9\)\\_order.PDF](https://publicdocs.courts.mi.gov:81/coa/public/orders/2018/341703(9)_order.PDF)> [<https://perma.cc/H37G-HREJ>].