**JUSTICE DELAYED? WHAT’S NEXT FOR MICHIGAN’S JUVENILE LIFERS. By Sofia Nelson Michigan Bar Journal**

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.1

Relying on the mitigating qualities of youth, the Court first banned the death penalty for

juvenile offenders.2 Then in 2010, the Court prohibited life-without-parole sentences for juveniles convicted of non-homicide offenses.3 In 2012, in *Miller v Alabama*, the Court barred mandatory life-without-parole sentences for all offenders under the age of 18.4 And in 2016, in *Montgomery v Louisiana*, the Court held that *Miller* applied retroactively,5 rendering unconstitutional the sentences of 363 juvenile lifers in Michigan, the largest population of juvenile lifers nationwide.6 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.

7 MCL 769.25a(4)(b) and (c) gave county prosecutors the option to re-seek lifewithout-

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.8 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.9 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.10

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*.11 By contrast, the neighboring states of Wisconsin, Indiana, and Ohio have just 16 juvenile lifers

combined.12 More than half of all states and the District of Columbia no longer impose life-without-parole sentences on children in any circumstance.13 And the United States is alone on the global stage in imposing life-without-parole sentences on children.14

Six years after *Miller*, only one-third of Michigan’s juvenile lifers have been relieved of their unconstitutional sentences and 47 have been paroled.15 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.16 Now that *Skinner* has been decided, *Miller* hearings are beginning in 28 counties.17 The United States Supreme Court and the Michigan legislature have instructed that, at *Miller* hearings, the sentence 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.”18 The *Miller* factors must be considered for their mitigating nature and are not to be deemed aggravators.19 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.”20 • Evidence regarding “**the family and home environment** that surround[ed] [the juvenile]—and from which he cannot usually extricate himself.”21 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.22 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.23 • 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.24 • Any evidence bearing on “**the possibility of rehabilitation**[,]” including “the individual’s record while incarcerated.”25 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[.]26

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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.34 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.35

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.