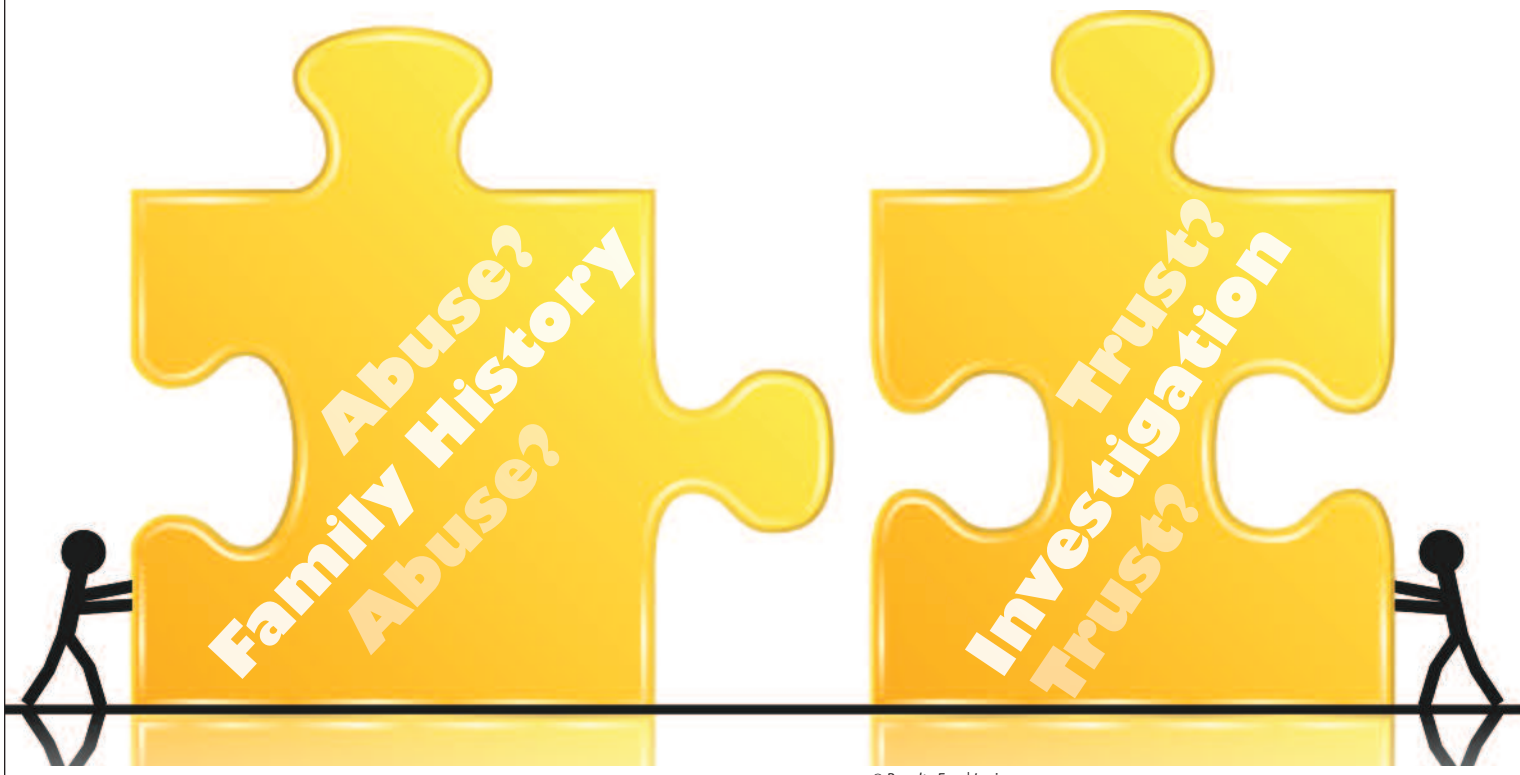

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Accepting *Miller's* Invitation: Conducting a Capital-Style Mitigation Investigation in Juvenile-Life-Without-Parole Cases

The Supreme Court, in its 2012 decision *Miller v. Alabama*,[1] issued an invitation for the defense bar to create a fairer and more individualized sentencing landscape in juvenile cases with a potential sentence of life without parole. By accepting this invitation in this novel setting, the defense bar has the opportunity to positively influence the lives of the thousands of people serving or facing juvenile-life-without-parole (JLWOP) sentences, as well as the broader culture of the legal system and its attitude toward sentencing advocacy. Defense advocates should not let this opportunity pass them by.

Editor's Note: In March 2015, the Campaign for the Fair Sentencing of Youth (CFSY) released the first-ever guidelines for representing youth facing life sentences. CFSY developed these guidelines in consultation with defense attorneys, mitigation experts, and investigators. Betsy Wilson and Amanda Myers reference the guidelines in their article. The guidelines will be published in an upcoming issue of *The Champion*.

The U.S. Supreme Court's decisions in *Miller v. Alabama*[2] and *Graham v. Florida*[3] have analyzed JLWOP cases as if they are the constitutional equivalent of death penalty cases.[4] As New England Law Professor David Siegel explained:

> In *Miller*, the Supreme Court … [n]ot[ed] that *Graham*'s analysis had operated "by likening life-without-parole sentences imposed on juveniles to the death penalty itself." The Court "viewed this ultimate penalty for juveniles as akin to the death penalty" and "treated it similarly to that most severe punishment." In short, the Court acknowledged that in *Graham* it had adopted a bar that "mirrored a proscription first established in the death penalty context[,]" by which it "[t]reat[ed] juvenile life sentences as analogous to capital punishment."[5]

As with death sentences in adult cases, a sentence of life without parole may be imposed on a juvenile only after an individualized sentencing procedure that allows the sentencer to take into account the unique characteristics of youth and the defendant's particular life circumstances. The sentencer must be able to consider all information that might mitigate the defendant's culpability.[6]

BY BETSY WILSON AND AMANDA MYERS

What these new rules mean in the trenches is less than clear. As the legal and legislative wrangling about retroactivity[7] and new sentencing schemes[8] progresses, the defense community is preparing for sentencing hearings in new cases and resentencing hearings in existing cases. Practitioners must now determine what is required of them to prepare for sentencing in juvenile cases that could carry a sentence of life without parole.

Many principles of capital mitigation investigations apply to JLWOP cases.

Since JLWOP cases can be considered constitutionally equivalent to capital cases, the principles that govern capital sentencing investigation should apply. These principles are set forth in great detail by the American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases,[9] and the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases.[10]

The Campaign for the Fair Sentencing of Youth recently translated these and juvenile practice guidelines to the context of juvenile cases with potential life sentences. Endorsed by 36 national, state, and local organizations, the CFSY's *Trial Defense Guidelines: Representing a Child Client Facing a Possible Life Sentence*[11] represent the best of the current thinking on representation in JLWOP cases.

As the guidelines make clear, to be constitutionally adequate, the defense team's investigation must include an exhaustive examination of the defendant, his life, medical and mental health, social connections, and environment. Members of the defense team must conduct a mitigation investigation that allows the team members to know their clients' life histories better than the team members know their own histories.

Defense teams working on JLWOP cases must be intimately familiar with the entirety of the ABA Guidelines and the Supplementary Guidelines. This article is not comprehensive in its discussion of the guidelines: each practitioner should conduct her own detailed examination of the ABA Guidelines and the Supplementary Guidelines. This article highlights some key principles that should guide the sentencing advocacy process in JLWOP cases: (1) a mitigation investigation must start immediately; (2) the investigation must include multiple in-person, one-on-one, face-to-face interviews and exhaustive record collection; (3) the investigation must include a multigenerational investigation of the defendant's family; and (4) the defense team must include a mitigation specialist and other experts.

Time is of the essence.

The investigation must begin immediately,[12] ideally as soon as a juvenile is arrested on a charge that might carry a sentence of life without parole. A thorough mitigation investigation is extremely time-consuming: it can require years. As time passes, witnesses move and records are destroyed, making the investigation ultimately even more time-consuming. There is no time to waste.

Moreover, the period immediately after arrest offers a fleeting opportunity to gather information and build relationships. The defendant and his family are in shock and terrified about the potential consequences of the charges, and their vulnerability can reduce their reluctance to reveal personal and sensitive information, such as a history of child abuse, mental illness, or addiction. At this early stage, the defendant and those close to him have not yet developed the fatigue and distraction that grow over the long pretrial period: this case is still the most pressing and important thing in their lives. Although it may seem cold blooded, if the defense team is to best serve its client, it must recognize and use this vulnerable period.

The defense team can help ease the trauma of this period. Support and comfort from the defense team in this traumatic period can quickly build the strong bonds with the defendant and his family that are so crucial to a successful investigation. If the members of the defense team delay the beginning of their mitigation investigation, they miss this opportunity.

These aren't the usual interviews.

Mitigation interviews are quite different from the usual conversations a lawyer has with her client about a case. In contrast to a conversation directed by the lawyer and generally limited to the elements of a case and the state of the evidence, the interviewer conducting a mitigation interview will ask the client and other witnesses to reveal information that is often excruciatingly personal, traumatic, and humiliating. Mitigation specialists often conduct interviews in which the witness tells them stories of rape, violence, or humiliation that the witness had never told anyone before. Eliciting that kind of information requires careful attention and compassion.

The interviewer must gain the witness's trust.

For a witness to reveal such information, she must trust the interviewer. This is especially difficult for defendants in serious criminal cases, who have usually had their trust abused at some point and who often fear that their team will abandon them if the team learns the true horrors of the defendant's life and acts. The interviewer must consciously and carefully facilitate trust.[13]

The setting of the interview should make the witnesses as comfortable as possible. Ideally, the interviewer will meet with the witness at the witness's home. Not only will the witnesses feel safer, but it also gives the interviewer the opportunity to gather information: Are there photographs of the defendant or her family on the wall that the interviewer can copy? Is the house clean or dirty? Is there food in the kitchen?

A mitigation specialist once spent an afternoon interviewing her client's mother in the mother's apartment. As the day went on, the apartment grew dimmer and dimmer. Finally, the mitigation specialist realized that the mother had no electricity. When asked, the mother explained that the power had been cut off because she had not paid the bill. The mother waved away concern, however, saying that this happened all the time and throughout her son's childhood. The mitigation specialist would not have learned this compelling evidence of poverty from an interview in her office.

An interview in the witness's home may not be practical. For example, if too many people live there to allow for a private conversation, the interviewer may offer to take the witness elsewhere (after stopping in the home, meeting the other residents, and arranging to interview them later). The alternative location should be a place where the witness is relatively comfortable. If the witness has a low income, McDonald's or another inexpensive restaurant or a public library might be a good choice, while Starbucks (with its $4 coffees) or a sit-

down restaurant (with waiters and busboys) might be poor choices. The interviewer should avoid conducting an interview in his office, since that shifts power from the witness to the interviewer and makes the witness less comfortable.

Even when interviewing a witness at a correctional facility, the interviewer should consider the setting. Privacy is important in mitigation interviews: the interviewer should make efforts to ensure that neither correctional staff nor other inmates can overhear the conversation. The interviewer might try to position the witness so that his face cannot be seen by other people so that he will not be embarrassed should he cry.

The manner of interviewing is also different from the usual attorney-client conversation. Lawyers often have an agenda when meeting with their clients. They have certain information they want to share with their clients and certain information that they want to obtain from the clients. The lawyer is usually in charge of the conversation.

A mitigation interview aims to put the witness in a position of power. The interviewer may try to guide the conversation, but must also be prepared to discuss whatever issue is of immediate concern to the witness. Only after his own concerns have been heard and respectfully addressed will a witness feel comfortable discussing the sensitive questions that are often at issue in a mitigation interview. When meeting an incarcerated client for the first time, most mitigation specialists spend a lot of time finding out how he is, asking what he does with his time, who his friends are in jail, whether anyone is "messing with" him, and generally how he is feeling.

These interviews are often long. The interviewer may have to meet with the witness multiple times to develop sufficient trust.[14] In many cases, witnesses only reveal crucial information after repeated interviews. One client revealed that he had been raped as a child only after the mitigation specialist had been meeting with him for a year. It was a horribly embarrassing fact that threatened his masculine self-image, especially when speaking to a female mitigation specialist. It took many, many hours before he trusted the mitigation specialist to hear his most painful secret. Patience is required.

When a client is not ready to talk and refuses to answer certain questions, the interviewer should not push and insist that the client share details. Such pressure can damage a relationship to a degree that it may take months for the relationship to recover. The interviewer should wait until her client is ready to talk rather than insisting on her own schedule.

Patience pays off. By investing the time to build a trusting relationship early in the case, the team can avoid much larger expenditures of time if the defendant begins acting out in court or disregards the attorney's advice about whether to testify or accept a plea. Such common, time-consuming conflicts with the client can often be avoided if the client knows that his team has his best interests at heart and is willing to fight for him.

The interviewer's questions should elicit the witness's experience and demonstrate deep listening.

The interviewer should ask open-ended, not close-ended, questions. Close-ended questions call for a yes-or-no answer and often suggest the answer that the interviewer expects. Open-ended questions put the witness in control of the answer and allow for meaningful, detailed answers that express the witness's experience.

The interviewer should also avoid labels, especially emotionally charged labels, such as "abuse," "rape," "mental illness," and "addict." Instead, ask for factual narratives and descriptions.

A mitigation specialist worked on a case in which documents showed that a social services worker had previously asked the client whether he had been abused as a child, and the client answered no. When the mitigation specialist asked, "How were you disciplined when you were little?" he said that his grandmother hit him on his naked back, buttocks, and legs with a switch until he was screaming and crying. The mitigation specialist asked him to explain why he had previously said that he had not been abused. The client responded that what he experienced was not abuse; it was just how children were disciplined in his community. It was only abuse if the beatings caused bleeding or scars. The client and the mitigation specialist defined abuse differently, but they both understood the underlying facts.

The interviewer needs to actively listen to the witness. The first step in active listening is simply to stop talking, which is often a challenge for lawyers

Close-ended, labeling question	Open-ended question
Were you physically abused as a child?	How were you disciplined as a child? Tell me about a time when you misbehaved as a child. How did your mother react?
Were you sexually abused as a child?	Tell me about your first sexual experience. How did you learn about sex?
Did you get good grades in school?	What was school like for you?
Are you depressed?	How do you feel?
Was anyone in your family an alcoholic?	Who drank alcohol in your family? How often and how much? What was it like when they drank?

who are taught to speak rather than keep silent. An interviewer must practice self-monitoring to ensure that the witness, not the interviewer, is talking at least 95 percent of the time,[15] and that the interviewer is focusing on the witness and not planning her next question.

The witness must know that the interviewer is listening. The interviewer should reflect the witness's statements back to the witness. The interviewer may paraphrase or summarize what the witness said. The interviewer may also try to understand and state the emotional content of the witness's statement.

For example, the witness explains that her father hit her whenever he drank and her father drank every day. The interviewer might summarize: "So your father hit you every day?" The interviewer might also interpret the witness's emotions: "You must have been terrified whenever you saw your father open a beer."

Of course, the interviewer might misinterpret the emotion, in which case the witness will usually correct the interviewer. "No, I wasn't terrified. I was angry!" the witness might respond. In either case, the witness will feel that the interviewer is listening, and the interviewer will have more information than before.[16]

The defense team must interview everyone.

When the authors begin a mitigation investigation, they tell their client, "I'm going to talk to everyone who's ever been important in your life." As the commentary to ABA Guideline 10.7 states, "[i]t is necessary to locate and interview the client's family members … and virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case workers, doctors, correctional, probation, or parole officers, and others."[17]

The investigation must include as many generations of the client's family as possible. The more witnesses the defense team interviews, the more reliable and persuasive the resulting evidence will be.[18] Multigenerational family investigation may also reveal patterns or conditions that run in the family. Children of alcoholics are more likely to become alcoholics themselves.[19] Many illnesses and mental illnesses have a genetic component; evidence of a family history of mental illness can support an assertion that the defendant is mentally ill.[20]

Record collection must leave no stone unturned.

Record collection is a crucial component of a mitigation investigation. Not only are records valuable sources of information, they have the advantage of appearing to the sentencer as less biased and susceptible to error than a witness's testimony. To the extent that the records were created before the defendant's arrest, they are not susceptible to suspicions of recent fabrication.

The record collection must be exhaustive. Mitigation specialists can accurately tell their clients that they will collect every piece of paper they can find that has the client's name on it, as well as any records that might relate to the client or his family.

The Commentary to Guideline 10.7 explains that the defense team should obtain all potentially relevant information pertaining to the client, his or her siblings and parents, and other family members, including but not limited to the following:

a. school records
b. social service and welfare records
c. juvenile dependency or family court records
d. medical records
e. military records
f. employment records
g. criminal and correctional records
h. family birth, marriage, and death records
i. alcohol and drug abuse assessment or treatment records
j. INS records.[21]

The investigator should first attempt to collect the records using a release from the witness and a record request rather than a subpoena, so that the records need not be disclosed to the prosecution unless it would benefit the defendant.

Investigators must often follow up on written record requests with in-person visits to the custodian of records.[22] An in-person inquiry will frequently reveal that records purportedly destroyed or missing in fact exist but are simply difficult to retrieve, or that the records originally provided were only part of the entire record. The team member responsible for collecting records should never take "no" for an answer.

After a mitigation specialist's initial written request for records for one client's school records elicited a statement that no records existed, she visited each school the client attended. Eventually an administrator at one school let the mitigation specialist go through 70 boxes in a storage closet, where she found a file that contained most of his client's education records — records that supported a claim that the client was intellectually disabled. She would not have had that evidence if she had taken the first "no" as the final answer.

This process can be very time-consuming. One hospital record can reveal that a client was in another hospital that he had forgotten to mention to the defense team. Some organizations require special releases, and some insist on court orders or freedom-of-information requests. Medical records are often incomplete. In one case, it took three requests and the transmission of two incomplete medical files before a hospital finally gave a mitigation specialist a file with the nursing notes that included the client's suicidal statements. Federal agencies such as the Social Security Administration and the military are often glacial bureaucracies that are very slow to respond to records requests. It is not unusual for it to take a year of follow-up to finally get a particular file.

It takes a team.

If a capital-style mitigation investigation sounds like a tremendous amount of work, that's because it is. It requires an investment of time that is beyond any one person. The mitigation investigation alone frequently demands hundreds and hundreds of hours. It requires a range of skills beyond any one area of expertise. In addition to legal expertise, the team must include people who can, among many other things, decipher complicated forensic evidence and law enforcement records, interview witnesses and testify about those interviews, elicit very sensitive information from reluctant witnesses, explore the effects of toxic environments, identify signs of mental illness, research and explain sociological issues, and discuss how all of these issues contributed to the defendant's current circumstances. Hence, the ABA Guidelines state that a capital defense team should consist of two attorneys, an investigator, a mitigation specialist, and appropriate experts.[23]

These guidelines apply to a capital-style mitigation investigation in juvenile-life-without-parole cases,[24] though in that context, one of the two attorneys should be experienced in juvenile defense and the other in death penalty defense. In that way, the defense team will have expertise in the procedure and culture of juvenile court and in working with juvenile defendants and capital-style sentencing advocacy.[25]

As the commentary to the ABA Guidelines explains, a mitigation special-

ist is essential to a defense team conducting a capital-style mitigation investigation.[26] The mitigation specialist should be experienced in building trust with defendants and witnesses, interviewing about sensitive subjects, observing and recognizing signs of mental illness, identifying and working with appropriate experts, particularly mental health experts, and helping to ensure that the client receives the support and services necessary to maintain a stable mental state during protracted litigation.[27] These skills are essential to conducting a capital-style mitigation investigation, but law school and legal experience provide little or no training to develop these skills.

The defense team will also need to find and hire specialized experts.[28] Mental health experts are essential. Mental illness, intellectual disabilities and brain injuries, combined with a history of physical, psychological, and sexual abuse, are so common in defendants accused of serious, violent crimes that it is very surprising when they are *not* present.

The Supreme Court has also emphasized the importance of the particular characteristics of youth.[29] Their age can lead to recklessness, impulsivity, and heedless risk-taking. Young people are more vulnerable to negative influences and outside pressures. Their character is not well formed; their actions are less likely to be evidence of irretrievable depravity. To fully explain the implications of these characteristics of youth, a defense team will probably need to include an expert in adolescent psychology and brain development.

The need for other experts will depend on the case. Defense teams may also need to hire a neuropsychologist, toxicologist, addiction expert, trauma expert, epileptologist, gang expert, sociologist, or any number of other types of experts.

The expense for a capital-style defense team and a capital-style mitigation investigation is substantial.[30] Based on anecdotal observations, some public defenders' offices are budgeting for mitigation investigations in JLWOP cases, and some jurisdictions are relying primarily on pro bono counsel to shoulder the cost. Some jurisdictions are familiar with the cost of capital-style mitigation investigations and provide reasonable funding in death penalty cases, but most courts hearing JLWOP cases will not be familiar with the cost of a capital-style mitigation investigation and may resist funding it. Defense attorneys must be prepared to educate the courts and fight for adequate resources.

The lawyer who attempts to conduct a capital-style mitigation investigation in the post-*Miller* world without a fully staffed and adequately funded team is setting herself up for failure, setting her client up for condemnation, and creating a culture that allows juvenile defendants in these most serious cases to get a defense that is less than the representation they need and to which they are entitled.

JLWOP cases are, in some ways, different from capital cases.

Although they generally should be approached as constitutionally equivalent, JLWOP cases are different from death penalty cases in two important ways. First, in death penalty cases the sentence is usually — although not always — determined by a jury, while in juvenile cases a judge will decide whether to impose life without parole or a lesser sentence. Second, in death penalty cases the defense is generally asking that the defendant be sentenced to life in prison rather than the death penalty. In JLWOP cases, the defense is asking that the defendant one day be released or have a chance to be released. This changes things.

Judges impose harsher sentences than juries and are consistently influenced by politics.

Comparing the sentencing decisions of judges and juries in death penalty cases shows that judges are more likely to impose death than juries.[31] Defense teams facing judges in JLWOP cases have an uphill battle.

Judges' sentencing decisions are demonstrably influenced by politics.[32] Judges become more punitive the closer they are to standing for re-election,[33] and some judges even acknowledge allowing the risk of electoral defeat to influence their actions in death penalty cases.[34] The defense team should not only focus on developing a compelling mitigation story, but it should also work with community opinion makers, such as churches and community activists and the media, to counter the tough-on-crime narrative that usually pervades public discussion of criminal defense cases.

Judges have more experience with sentencing than juries. Sometimes this appears to render judges less patient with protracted sentencing presentations and more jaded to mitigation themes that they have encountered again and again. Defense teams must explain to the judge the necessity of presenting multiple witnesses or voluminous documents.

The defense team members must take care to differentiate their client's story from the stories of the many other defendants who have appeared before the judge. Such differentiation demands extreme attention to the illustrative details of a defendant's life. The team must seek to tell the unique stories that illuminate the particular client's experience. Asserting that the defendant was horribly beaten as a child may influence the judge. Describing the switch that the client's mother used to beat the young boy bloody while he was chained naked to the front porch next to a busy street will have a greater influence.

Because a juvenile defendant may one day be released, the sentencing presentation should focus on a defendant's strengths.

Facts that are mitigating in capital cases can be aggravating in a case in which the defendant may someday be released. Mental illness may decrease a defendant's culpability, but it may also increase the sentencer's perception of the risk of allowing the defendant back into society. Addiction may be mitigating for a defendant who will die in prison, but aggravating for a defendant who may be released.

JLWOP cases should strive to focus on a defendant's strengths more than her weakness. They should emphasize her potential for redemption more than her brokenness. These strengths are, of course, unique to each client. Defense teams commonly identify the strengths of their younger clients as their willingness to work hard (even if their work is at an illegal occupation), their academic ability, their love and care for their family (especially their children or younger siblings), and their eagerness to learn and grow.

The persuasive force of these strength-focused mitigating factors can be seen by examining the factors upon which judges rely when downwardly departing from the federal sentencing guidelines. In sentencing decisions in the District of Massachusetts, judges rely on the strength of a defendant's relationship with his family twice as often as any other characteristics of the defendant, except the defendant's own efforts at rehabilitation.[35] For instance, a judge explained a reduced sentence by noting the defendant was needed to help raise his nieces and nephews after their caregiver suffered a stroke. Another judge sentenced a defendant to a below-guidelines sentence because the defendant was the only caregiver for his severely dis-

abled 19-year-old daughter.[36]

Judges are swayed by a defendant's own efforts at rehabilitation almost as much as a defendant's family ties. One judge gave a defendant a lower sentence due to the defendant's attempts to learn a trade, earn his GED, and get a job. A judge reduced another offender's sentence in part because the offender had shown uncommon rehabilitation by doing ministry work in prison while awaiting trial and sentencing and by planning to enroll in college so he could continue his religious studies.[37]

The defense team can help to support these strengths. The team can ensure that the defendant is able to take GED classes, get mental health treatment, or get a job while in jail. The team can bring children and family to visit the defendant and send the defendant books. The team can encourage the defendant to participate in parenting and religious classes, avoid disciplinary tickets, read, or play chess.

The team can help to show that the defendant has the potential that the Supreme Court recognized when it explained that the personality traits of juveniles are more transitory than adults.[38] The person before the court now is not the person society will see in 10 or 20 years. Courts should give that future person a chance.

The defense team must plan for the future.

To convince the sentencer that the defendant can be safely released at some point, the defense team must paint a picture of the defendant after release. The team needs to explain how the defendant will earn an education,

Figure 1 — Interviewing the Client's Family

Examining only the defendant's immediate family may reveal no evidence of a family history of mental illness. Members of the defendant's family who are mentally ill are shown in red.

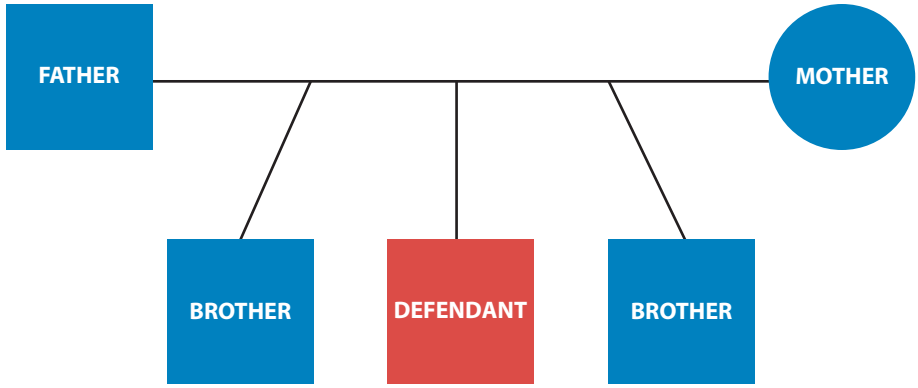
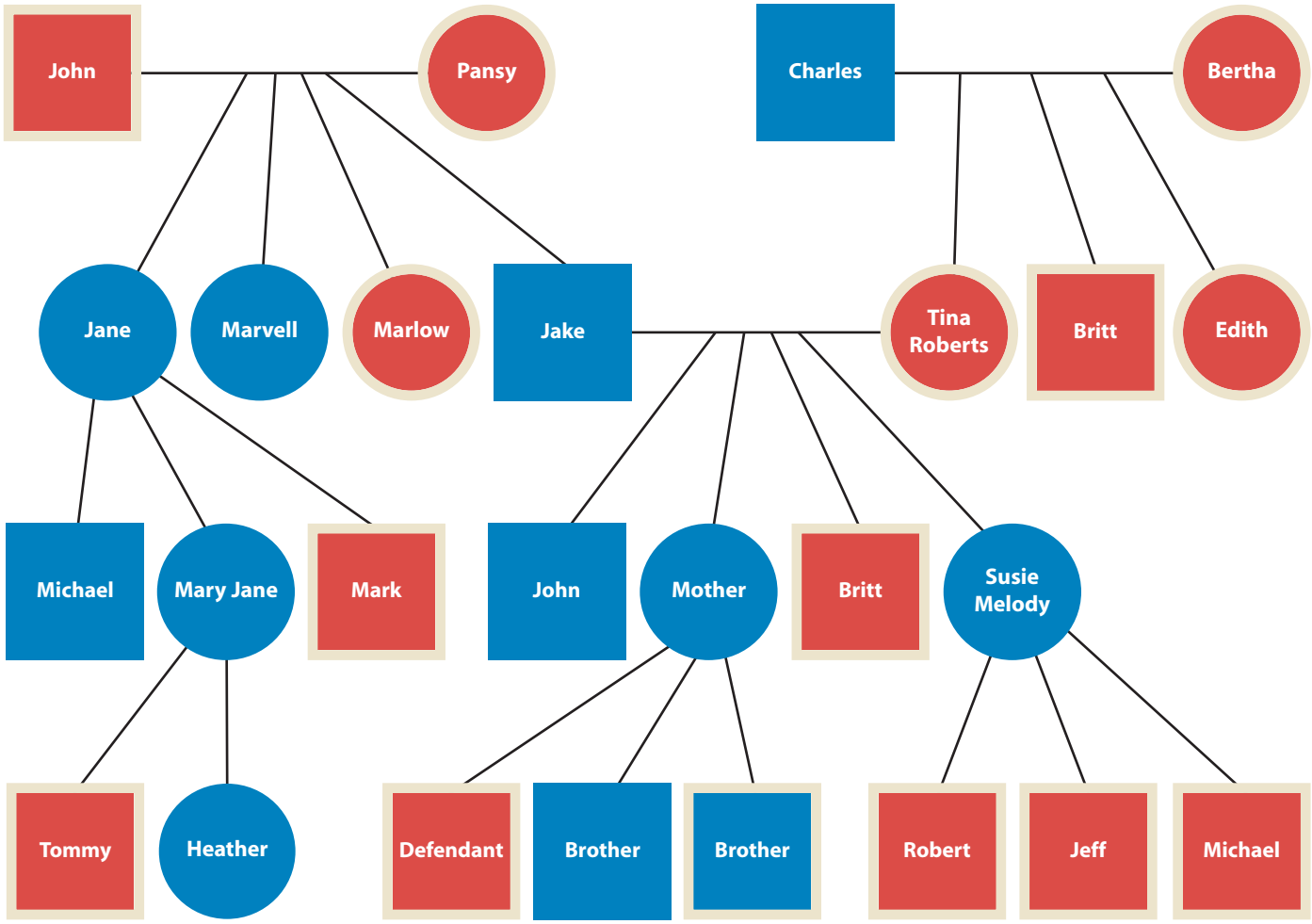


Figure 2 — Multigenerational Investigation

A multigenerational investigation of the defendant's extended family might expose a family history that is full of mental illness, reveal the defendant's genetic vulnerability to mental illness, and support the evidence of the defendant's own mental illness. Members of the defendant's family who are mentally ill are shown in red.



where the defendant might live, who will provide practical and emotional support for the defendant, and how the defendant will financially support himself.

These plans, of course, will be hypothetical, since they will describe a time years or decades in the future. But the defense team can support the plans by showing that support services the defendant will need after release exist now. The team can show that the friends and family who will help the defendant after his release are visiting and corresponding with the defendant now.

The door is open.

The Supreme Court has issued a groundbreaking invitation. By preparing for JLWOP sentencing with the same zeal that they prepare for capital sentencing, defense teams have the opportunity to educate the court about their clients, the value of sentencing advocacy, and the need for individualized sentencing. This has the potential to change the court's response in other cases when faced with requests to fund sentencing advocacy. By accepting, and sometimes insisting on, the new and heightened requirements of the Supreme Court's invitation, defense teams have the opportunity to prevent their clients from dying in jail and to change the culture of the criminal courts for the better. Defense advocates must accept this invitation in its entirety.

The authors thank attorney Justin Schwartz for his invaluable help with this article.

Notes

1. 132 S. Ct. 2455 (2012).
2. *Id.*
3. 130 S. Ct. 2011 (2010).
4. David Siegel, *What Hath Miller Wrought: Effective Representation of Juveniles in Capital-Equivalent Proceedings,* 39 New Eng. J. on Crim. & Civ. Confinement 363 (2013).
5. *Id.* at 367-68 (citations omitted).
6. *Miller,* 132 S. Ct. at 2469.
7. Eight states have ruled *Miller* retroactive: *Wyoming v. Mares*, 2014 WY 126 (Wyo. Oct. 9, 2014); *In re Rainey*, — P.3d — (Cal. App. 4th 2014); *People v. Davis*, 6 N.E.3d 709 (Ill. 2014); *State v. Ragland*, 836 N.W.2d 107 (Iowa 2013); *Diatchenko v. Dist. Att'y*, 1 N.E.3d 270 (Mass. 2013); *Jones v. State*, 122 So. 3d 698 (Miss. 2013); *State v. Mantich*, 842 N.W. 2d 716 (Neb. 2014); and *Ex parte Maxwell*, 424 S.W.3d 66 (Tex. Crim. App. 2014). Five have ruled it is not: *People v. Carp*, — N.W.2d — ; 2014 WL 3174626 (Mich. July 8, 2014); *Williams v. State*, So. 3d (Ala. Crim. App. 2014); *State v. Tate*, 2012-2736 (La. 2013); 130 So. 3d 829; *Chambers v. State*, 831 N.W.2d 311 (Minn. 2013); *Commonwealth v. Cunningham*, 81 A.3d 1 (Pa. 2013); and *Falcon v. Florida*, — So. 3d — (Fla. Sup. Ct. Mar. 18, 2015). The Supreme Court recently denied certiorari review in three cases that squarely presented the issue. *People v. Cunningham*, 134 S. Ct. 2724 (2014); *Tate v. Louisiana*, 134 S. Ct. 2663 (2014); and *Illinois v. Davis*, — S. Ct. —, 2014 WL 4094821 (2014).
8. For example, under new legislation in Michigan, juveniles convicted of first-degree murder now receive a sentencing range between a minimum term of 25 to 40 years, and a maximum term of not less than 60 years. A juvenile defendant may only be sentenced to life without parole after the prosecutor moves to seek the sentence and the court holds an individualized sentencing. MCL §769.25(6). Arkansas, Delaware, Florida, Louisiana, Michigan, Nebraska, North Carolina, Pennsylvania, South Dakota, Texas, Washington, and Wyoming have passed new legislation responding to *Miller*, while Alabama, Connecticut, Idaho, Illinois, Iowa, Massachusetts, Minnesota, Mississippi, Missouri, New Hampshire, New Jersey, Ohio, Vermont, and Virginia have not. The Sentencing Project, Slow to Act: State Responses to 2012 Supreme Court Mandate on Life Without Parole (June 2014). Arizona has also passed new legislation. A.R.S. § 13-716 (2014).
9. 31 Hofstra L. Rev. 913 (2003); *See also* Am. Bar Assoc., *List of Cases Citing to the 2003 ABA Guidelines* (Mar. 26, 2014), *available at* http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_representation/2003list.authcheckdam.pdf.
10. 36 Hofstra L. Rev. 677 (2008).
11. Read the guidelines at http://fairsentencingofyouth.org/wp-content/uploads/2015/03/Trial-Defense-Guidelines-Representing-a-Child-Client-Facing-a-Possible-Life-Sentence.pdf.
12. ABA Guidelines, Commentary to Guideline 10.7, 31 Hofstra L. Rev. 913, 1023.
13. Supplementary Guidelines, Guideline 10.11, 36 Hofstra L. Rev. 677, 689 ("Team members must conduct in-person, face-to-face, one-on-one interviews. … Multiple interviews will be necessary to establish trust [and] elicit sensitive information. …"
14. CFSY Guideline 4.2, at 17-18 ("In many instances, multiple, one-on-one interviews will be necessary to build the rapport needed to obtain sensitive information.").
15. A. Rubin & E. Babbie, Essential Research Methods for Social Work 123 (3d ed. 2013).
16. For additional discussion of interviewing techniques, *see, e.g.*, William R. Miller & Stephen Rollnick, Motivational Interviewing: Helping People Change (3d ed. 1991).
17. ABA Guidelines, Commentary to Guideline 10.7, 31 Hofstra L. Rev. 913, 1024. *See also* CFSY Guideline 4.2, at 17 ("the mitigation specialist must conduct in-person interviews of all relevant persons, including the child client and other relatives and community members who may be able to provide pertinent information about the child's life …").
18. *Id.* at 1025. ("A multigenerational investigation extending as far as possible vertically and horizontally frequently discloses significant patterns of family dys-

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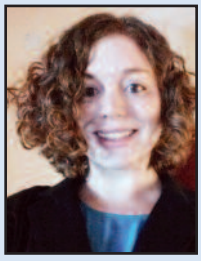

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function and may help establish or strengthen a diagnosis or underscore the hereditary nature of a particular impairment. The collection of corroborating information from multiple sources — a time-consuming task — is important wherever possible to ensure the reliability and thus the persuasiveness of the evidence." (citations omitted)).

19. Nat'l Inst. on Alcohol Abuse and Alcoholism, *Genetics of Alcohol Use Disorders, available at* http://niaaa.nih.gov/alcohol-health/overview-alcohol-consumption/alcohol-use-alcohol-use-disorders ("genes are responsible for about half of the risk for alcoholism.") (last visited Oct. 16, 2014).

20. *See, e.g.*, E.S. Gershon, J. Hamovit, J.J. Guroff, E. Dibble, J.F. Leckman, W. Sceery, S.D. Targum, J.L. Nurnberger Jr., L.R. Goldin & W.E. Bunney Jr., *A Family Study of Schizoaffective, Bipolar I, Bipolar Ii, Unipolar, and Normal Control Probands,* 39 Arch. Gen. Psychiatry (10):1157-67; PMID: 7125846 (1982) (a person with a close relative with bipolar disorder has about a 10 percent chance of getting a mood disorder, such as bipolar disorder or depression).

21. ABA Guidelines, at 1025.

22. CFSY Guideline 4.2, at 18 ("In many instances, in-person inquiries of record custodians will be necessary to collect all relevant documents and records.").

23. Guideline 4.1, *Id.* at 952.

24. CFSY Guideline 1.1, http://fairsentencingofyouth.org/wp-content/uploads/2015/03/Trial-Defense-Guidelines-Representing-a-Child-Client-Facing-a-Possible-Life-Sentence.pdf, at 9 ("The defense team must include a minimum of two qualified attorneys …, an investigator, a mitigation specialist, and, when appropriate, an interpreter.").

25. CFSY Guideline 2.1, at 11.

26. *Id.* at 959-60.

27. CFSY Guideline 4.1, at 17; Supplementary Guideline 5.1(C), 36 Hofstra L. Rev. 677, 682.

28. CFSY Guideline 2.5, at 13; ABA Guidelines, Commentary to Guideline 10.7, 31 Hofstra L. Rev. at 1026. ("The circumstances of a particular case will often require specialized research and expert consultation.").

29. *Miller,* 132 S. Ct. at 2464-65.

30. *See, e.g.*, Jon B. Gould & Lisa Greenman, *Report to the Committee on Defender Services Judicial Conference of the United States Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases* (2010) (stating that the mean cost of defending a federal case in which the prosecution is authorized to seek the death penalty is $491,905).

31. Valerie P. Hans, John H. Blume, Theodore Eisenberg, Amelia Courtney Hritz, Sheri Lynn Johnson, Caisa Elizabeth Royer & Martin T. Wells, *The Death Penalty: Should the Judge or the Jury Decide Who Dies?*, 1, 15. & 20-21, *available at* http://ssrn.com/abstract=2513371.

32. William J. Bowers, Wanda D. Foglia, Jean E. Giles & Michael E. Antonio, *The Decision-Maker Matters: An Empirical Examination of the Way the Role of the Judge and the Jury Influence Death Penalty Decision-Making,* Wash. and Lee L. Rev. 981-89 (2006).

33. Lynn Adelman & Jon Deitrich, *Why Habeas Review of State Court Convictions Is More Important Than Ever,* 24 Fed. Sent. Rep. 292, 293 (2012).

34. *Id.* at 294.

35. Brenda L. Tofte, *Booker at Seven: Looking Behind Sentencing Decisions: What Is Motivating Judges?*, 65 Ark. L. Rev. 539, 564-65 (2012).

36. *Id.* at 566-72.

37. *Id.* at 572-77. Because capital-style sentencing hearings in juvenile-life-without-parole cases are such a new phenomenon, there exists, to the authors' knowledge, no empirical studies of the impact of various arguments in those cases. Research in that area would be beneficial.

38. *Miller*, 132 S. Ct. at 2464.