JUVENILE LIFER RESENTENTING PROCEEDINGS: WHAT A MILLER HEARING MAY LOOK LIKE

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Mitigation and Litigation in Juvenile Lifer Resentencing Hearings

1. Resentencing Hearings Under *Miller* and MCL 769.25-.25a

Sentencing hearings under *Miller* and MCL 769.25-25a will be unlike other usual Michigan court sentencing hearings. The United States Supreme Court has compared the sentence of life without parole for juveniles to the death penalty for adults. *See, e.g., Miller*, 132 S.Ct. 2455, 2467 (2012); *Graham v Florida*, 130 S Ct 2011, 2027 (2010). The Court has stressed the need for the sentencer to consider a wide range of evidence relevant to the "mitigating qualities of youth." See *Miller*, 132 S Ct at 2467.

The Michigan Supreme Court has also highlighted the unique nature of the hearings and recognized the need for adequate resources to conduct them:

> "juvenile defendants **mus**t be afforded the opportunity and the **financial resources to present evidence of mitigating factors** relevant to the offender and the offense, psychological and other evaluations relevant to the youthfulness and maturity of the defendants must be allowed, and courts must now embark upon the consideration of aggravating and mitigating evidence offered regarding juvenile defendants as a condition to imposing sentences that previously required no such consideration."

(emphasis added) *People v Carp*, 496 Mich 440, 473, (2014), *certiorari granted and reversed sub. nom on other grounds by, Carp v Michigan*, Supreme Court No. 14-824 (March 7, 2016).

Thus, the defense will need to undertake significant mitigation efforts, similar to the requirements for counsel in death penalty cases. See Campaign for Fair Sentencing of Youth, "Trial Defense Guidelines: Representing Child Client Facing Possible Life Sentence," found at http://fairsentencingofyouth.org/wp-content/uploads/2015/03/Trial-Defense-Guidelines-Representing-a-Child-Client-Facing-a-Possible-Life-Sentence.pdf. It also means that, similar to death penalty cases, litigation teams are the norm. The Trial Defense Guidelines for representing youth facing life sentences provide that "[t]he defense team must include a minimum of two qualified attorneys ("defense counsel"), an investigator, a mitigation specialist, and, when appropriate, an interpreter." *Id.* at Standard 1.1.

More specifically, this means:

- Defense counsel must retain or ask the court for funds for a mitigation specialist, or at a bare minimum, an investigator experienced in mitigation work, who can conduct a mitigation investigation.

- The defense must interview people who know the defendant, both presently and at the time leading up to the offense, in order to develop a full understanding of his/her life. These interviews can include family members, teachers, coaches, detention, jail, and prison employees, probation officers, counselors, doctors or psychologists, foster care workers, neighbors, friends and others.

- The defense must collect records and documents about the defendant and his/her life. Documents that may be relevant include: school, work, foster care, juvenile file, neglect and abuse file, drug rehabilitation/abuse of the defendant or family members, mental health records, hospitalization records, prison records and more. **See Attachment 1** – List of Records and Documents to Obtain in Mitigation.

- The defense must hire or ask the court for funds for an expert psychological evaluation of the defendant. This may be done via ex parte motion.

Age and Acquisition of Records: The age of some of the cases may pose logistical issues. For example, it may be difficult to locate and produce records relevant to the *Miller* factors concerning the defendant as of the date of the offense. Additionally, MCL 769.25(7) states that at a *Miller* hearing, the court [or jury if that right is applied] "may consider evidence presented at the trial together with any evidence presented at the sentencing hearing." The older the conviction, the more difficult it will be to locate witnesses, evidence, or exhibits to demonstrate those circumstances to a fact-finder. Lastly, in many of the older cases, the trial judge may no longer be on the bench, so a successor judge will be in a similar situation to a new jury – unaware of the trial evidence absent a hearing that may become, in certain cases, essentially a retrial.

Experts: The use of experts will be essential. The science of adolescent neurological development, psychology, child trauma, forensic psychology, and dynamics at the Department of Corrections are all relevant areas for expert evaluations. The defendant may have been exposed to or victimized by sexual or physical abuse, domestic and community violence or trauma, may have significant mental illness, may have an intellectual disability, or another feature of his or her medical or social history that can best be understood and explained to the jury or judge by an expert. As a result, a psychologist, psychiatrist, M.D., or other expert may also be necessary. Depending on the defendant's background and situation, a variety of health and mental health assessments or testimony may be persuasive to the courts. A motion requesting funding for this expert may need to be filed ex parte. **See Attachment 2** – Sample Motion for Court-Appointed Expert (this motion was not filed ex parte).

Mitigation Specialists: A term more familiar in the death penalty context, mitigation specialists will also be key players in this process. A mitigation specialist is a trained professional – often someone with a social work or other advanced degree – who helps develop personal and social histories of clients and their families through extensive interviewing and record collection; they have traditionally been used most frequently for the sentencing phase of death penalty cases. In fact, the American Bar Association standards, which set the minimum standards for death penalty cases, require that the defense team has a mitigation specialist. ABA Guideline 4.1 A, 1. For more information on mitigation specialists, visit the website for the National Alliance of Sentencing Advocates & Mitigation Specialists (NASAMS), found at: http://www.nasams.org/NASAMS/NASAMS_home.

See also:

Attachment 3 – Sample Declaration regarding the need for mitigation investigation and for a mitigation specialist in a JLWOP case (which lays out factual and legal reasons a mitigation specialist is necessary);

Attachment 4 - Mitigation Specialist Affidavit in a JLWOP case (describing what mitigation specialists do and how they are relevant).

SADO'S Experience: Several *Miller* hearings have been held in Michigan for clients on direct appeal. SADO conducted two hearings and averaged approximately 650 team hours devoted to preparation and presentation of evidence, with expert witness and consultant expenses of approximately $7,000 per case. The list after each case name includes the witnesses called by SADO, as relevant to the *Miller* factors:

a. *People v Masalmani* (Macomb County):
   i. Dr. Daniel Keating: Professor of Psychology, Psychiatry and Pediatrics at University of Michigan (expert in brain development)
   ii. Jennifer Keller: Mr. Masalmani's foster care worker
   iii. William Ladd: Mr. Masalmani's appointed guardian ad litem in a child abuse/neglect case
   iv. Dr. Frank Vandervort: clinical professor at Child Advocacy Clinic and Juvenile Justice Clinic at University of Michigan Law School (expert in child welfare and juvenile delinquency proceedings)
   v. Dr. Lyle Danuloff: clinical psychologist (also provided information about Mr. Masalmani's prison record)

b. *People v Eliason* (Berrien County):
   i. Dr. Daniel Keating: Professor of Psychology, Psychiatry and Pediatrics at University of Michigan (expert in brain development)
   ii. Dr. Carol Holden: Director of the Center for Forensic Psychiatry (expert in clinical, developmental, and forensic psychology)

iii. Lay witnesses: Mr. Eliason, his father, sister, grandmother, and stepmother

2. Case Law

a. ***Woodson v North Carolina*, 428 US 280 (1976):** capital defendants must have an opportunity to advance mitigating factors for a judge/jury to assess to appropriateness of imposing the death penalty.

b. ***Roper v Simmons*, 543 US 551 (2005):** the Court prohibited capital punishment for children.

c. ***Graham v Florida*, 560 US 48 (2010):** the Court prohibited life without parole sentences for a juvenile convicted of a nonhomicide offense.

d. ***Atkins v Virginia*, 536 US 304 (2002):** Death penalty for mentally retarded defendants violates the Eighth Amendment ban on cruel and unusual punishment.

e. ***Miller v Alabama*, 132 S Ct 2455 (2012):** The Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile homicide offenders. The Court stressed that life without parole sentences must be "rare" and uncommon, and analogized life without parole for youth offenders to the death penalty for adults.

f. ***Montgomery v Louisiana*, __ US __; _ (Docket No. 14-280, issued 1/25/16):** Held that the decision in *Miller v Alabama* was fully retroactive to all juvenile mandatory life without parole homicide sentences and emphasized that life without parole sentences for youth must be rare.

g. ***People v Woolfolk*, 497 Mich 23 (Docket No. 149127, issued 12/2/14):** The birthday rule, rather than the common-law rule of age calculation, applies when determining whether a defendant was a juvenile at the time of the offense. Mr. Woolfolk, who was convicted of a homicide the day before his 18th birthday and sentenced to life without parole, is entitled to resentencing under *Miller*.

h. ***People v Skinner*, 312 Mich App 15 (2015):** *Miller* defendants have a Sixth Amendment right to have a jury make findings under the proof beyond a reasonable doubt standard in determining whether a life without parole sentence will be imposed. A leave application was filed by the prosecution and the *Skinner* application is currently pending in the Michigan Supreme Court.

i. ***People v Hyatt* (COA docket #325741, 7/21/16):** Conflict panel of Court of Appeals overruled *Skinner* and held there is no right to jury finding on facts essential to the imposition of life in prison without parole. The Court repeatedly stressed that life without parole sentences must be rare and reversed the imposition of life without

parole sentence, finding that the sentencing judge did not adequately apply the strong presumption against life sentences or evaluate the defendant's potential for recidivism. The concurring judge urged a categorical bar on all life without parole sentences for youth.

j. ***Hill v Snyder*, U.S. District Court, E.D. MI; Nos. 13-2661 and 13-2705:** Class action lawsuit under 28 U.S.C. §1983 challenging the statute barring the Department of Corrections' from considering for parole those prisoners serving life sentences for offenses committed as juveniles. Following remand from the Sixth Circuit, plaintiffs are now challenging the constitutionality of MCL 769.25a and presenting other claims. A TRO was entered preventing prosecutors from filing for life without parole. The Sixth Circuit dissolved the TRO pending a hearing in the district court. A motion for injunctive relief was argued before Judge Corbett O'Meara on July 28, 2016, and a decision is pending.

It appears highly likely that the Michigan Supreme Court will grant leave to resolve the conflict between *Skinner* and *Hyatt* as to whether the Sixth Amendment demands a jury determination on the *Miller* factors. The issue could ultimately be resolved in the Federal courts, either through habeas corpus proceedings or through a direct grant of certiorari in the United States Supreme Court.

Given that no one knows what will happen with *Skinner* and *Hyatt*, or in *Hill*, many if not most resentencings under *Miller* in direct appeal cases are on hold. In light of the many uncertainties, many jurisdictions may opt for a go-slow approach to these hearings, unless the parties and court agree otherwise.

3. MCL 769.25a

Following *Miller*, the Michigan Legislature enacted MCL 769.25a, which set forth statutory and procedural requirements if *Miller* were found to be retroactive. The statute currently states that if the Court ever ruled *Miller* to be retroactive, which it did in *Montgomery*, then all persons serving life sentences for an offense that occurred before the individual was 18 years of age are eligible for resentencing using the statutory and *Miller* factors. ("At the hearing, the trial court shall consider the factors listed in *Miller* . . . and may consider any other criteria relevant to its decision, including the individual's record while incarcerated.") MCL 769.25(6).

The statute states the prosecutor in each county has 30 days from the date the decision is final[1] to notify their Circuit Court of all defendants sentenced in that county who are now entitled to resentencing. The prosecution has 180 days from the date the decision is final to file a motion seeking imposition of life without parole. **If the prosecutor does not file for life without parole**

[1] A decision of the United States Supreme Court is final when the Court issues its mandate in the case, not the date the opinion is released, which occurs 25 days after entry of the judgment. U.S. Supreme Court Rule 45.2.

within that time, the defendant must be resentenced to a term of years. The minimum term must be between 25 years and 40 years and the maximum term is set at 60 years. MCL 769.25(9). A hearing on the prosecution's motion must be held as provided in MCL 769.25(6). The statute also gives priority in scheduling resentencings to prisoners who have already served over 20 years. MCL 769.25a(5)(a).

4. *Miller* Factors

The Court required individualized sentences to enable lower courts to consider the following factors when determining whether a juvenile should be sentenced to life without parole (*Miller*, *supra* at 2468):

a. Chronological age and its hallmark features: immaturity, impetuosity, failure to appreciate risks/consequences

b. Family/home environment

c. Circumstances of the homicide offense, including the extent of participation and how familial or peer pressure may have affected him/her
    i. Possibility of lesser conviction, if not for "incompetencies associated with youth" (i.e. working with prosecutors, police, trial counsel)

d. Possibility of Rehabilitation

The Court noted that sentencing a juvenile to life without parole "will be uncommon" and it will be the "rare juvenile offender whose crime reflects irreparable corruption." *Miller*, *supra* at 2469.

Attachment

1

RECORDS AND DOCUMENTS TO OBTAIN IN MITIGATION

Records and documents that may be necessary to your investigation include:

a. All school records, including transcripts, health reports, standardized testing, attendance, special education, disciplinary action, adult education and vocational schools, GED, Job Corps, continuing education;

b. Employment records including records related to job applications, attendance, assignments and performance evaluations, medical and psychological evaluations, relocations, pay records, Social Security tax records;

c. Family and individual social service records, including records of food stamps, AFDC, WIC, Medicare, Medicaid, welfare, counseling, referrals, medical and mental health treatment, records associated with adoption agencies and foster homes, including placement and discharge reports, progress reports, and medical, educational, mental health and intelligence evaluations;

d. Medical records, including private physicians, clinics and hospitals;

e. Juvenile criminal justice records, including defense counsel's files, pre-trial intervention, community service records, juvenile detention records, and all related medical, educational and intelligence evaluations, treatment plans, field and progress notes, referrals and court files;

f. Adult criminal records including police, sheriff and FBI records, jail and prison records, psychological, educational and medical evaluations and notes, daily progress notes, disciplinary reports, work assignment records, classification reports, records of participation in all vocational, educational, religious and honor programs, religious reports and visitation logs, all court records, all public defender and prosecution files;

g. Probation and parole records, including pre-sentence investigation and sentencing reports, field notes, family and social history information, conditions of supervision and violations, and conditions of release from supervision;

h. Psychological and psychiatric records, including records from community mental health clinics, private doctors and counselors, hospitals and substance abuse facilities, to include intake evaluations, treatment interventions, medication logs, physician and nurse progress notes, referrals and discharge reports;

i. All applicable birth, death and marriage certificates, records.

-*Source*: Juliet Yackel, attorney and mitigation specialist.

GATHERING THE NECESSARY RECORDS FOR JUVENILE LIFER MITIGATION

When doing sentence mitigation it is important to understand your client's history in detail, both prior to and during incarceration. Collecting records from your client's facility, the MDOC and prior contacts is essential in getting a whole picture of the client. This worksheet has been created in collaboration with the MDOC FOIA coordinator to assist in understanding the best, most cost-effective and efficient way of requesting relevant records.

The goal of this process is to acquire Your Client's:

- Pre-Sentence Investigation Report (PSI)
- MDOC Record Office File from the Facility
- Psych/Medical Records from the Facility
- Parole Board Records from MDOC FOIA Coordinator
- Any other Relevant Documents from Prior Community Contacts

Steps Covered:

- Acquiring the PSI

- Getting Release Forms Signed
  - 3 different releases:
    - General MDOC Client Release – *(template attached)*
    - MDOC Health Care Release Form- *(template attached)*
    - Firm Release – Or General Release Form
  - Get three copies of each. Get signed and give one to the client; keep two for your records.

- Send Forms with Cover Letters- (*templates attached*)
  - Cover Letter + MDOC General Release = Record Office File and Substance Abuse Related Records
  - Cover Letter + Medical Release = MDOC Psych and Med records
    - Send Both to Facility
  - Cover Letter + MDOC General Release = Central Office File (Parole Records) and Static 99
    - Send to MDOC FOIA Coordinator
  - You will want to seriously consider the need for records from additional community contacts such as school records, prior care records etc. For these... Cover Letter + Your Release = Case Specific Records
    - Send to School, Group Home, Prior Treatment Provider etc.

The first thing two things you will want to do is make sure you have a PSI and get all necessary release forms signed.

PSI: The policy on how to get this has changed. If you can get this from the original trial attorney or client, than do it. If not, there are two other ways you can get it.

1.) **Ask your client to request the PSI through a kite from the institution's records office.** If your client does not have the funds to copy it, ask them to send it to you. Make a copy of their PSI and send it back to your client. If it is safe for them to have it with them make sure they have a copy or they can give one to you for safe keeping. It is important that the client is familiar with all information in the PSI and that they have access to their PSI throughout their incarceration.

2.) **You can request a copy from the sentencing court.** For the most part this has been working for attorneys; however there have been glitches in a county or two. At present these are being worked out. If Court does not have a copy of the PSI, you can request the Court obtain it through the probation office servicing the Court. That office will then provide the copy, if available, to the sentencing court or, if directed to do so by the Court, directly to you.

Release forms: You will need two primary release forms. A general release form for the MDOC from the client (example attached) and a MDOC health care release form (also attached). I suggest you have three copies of this form. One copy for the client and two signed originals for your files. Most of the forms can be faxed or emailed, but each time you request medical records you must mail an original signed version to the institution. I suggest you have the client sign your copies of the form at your first visit or send them to be signed immediately with a prepaid pre-addressed envelope. **Forms must be signed within a month of the request or your file requests for confidential records may not be fulfilled*.

You may also have your own release form you use for additional records from non-MDOC sources, such as schools, hospitals clinics etc. that your client frequented prior to incarceration. Remember to get this form signed at the same time, even if you are unsure if you will need it.

WHAT DO YOU DO ONCE YOU HAVE THE SIGNED FORMS?

In addition to the PSI, there are three different MDOC records files that need to be requested from two different locations.

From the MDOC Correctional Facility:

- Record Office File plus SASSI
- Physical Medical Records and Psychological/Psychiatric Records

Send Cover Letter + General MDOC Client Release = Record Office File and Substance Abuse Related Records

1. Requests for a prisoner's active Record Office/Institutional file should be directed to the FOIA Coordinator at the institution at which the prisoner is housed.
    a. This file has the most complete record on a prisoner; it will include all needed documents from the Counselor File. This file contains all records that are maintained at the institution – including the mundane day-to-day activities.
    b. This file contains Misconduct Class I and II documents.

i. Misconduct Class III documents are only kept in the counselor file for 60 days and then are thrown out. These documents are not legally relevant because of there short life.

c. This file should contain almost all necessary assessments. See wording below.

d. WORDING FOR REQUEST: " Pursuant to the Michigan Freedom of Information Act I am writing to purchase a copy of any and all documents contained in the above prisoner's Record Office File (*which may include, but is not limited to COMPAS Narrative Summary, TAP, VASOR, Parole Guideline Score, Transcase Notes, Work and Program Reports and Certificates*) as well as the prisoner's substance abuse related records.

Send Cover Letter + MDOC Medical Release Form = Psych and Med Records

1. Requests for a prisoner's active Psych and Medical should be directed to the Health Care Unit FOIA Coordinator at the institution at which the prisoner is housed.
   a. This file should contain all necessary information regarding mental health and physical medical records. Be specific on the form (exclude dental etc.) to lower costs. See wording below.
   b. WORDING FOR REQUEST: Pursuant to the Michigan Freedom of Information Act (if for mental health records) or the Medical Records Access Act (if for physical medical records), I am writing to purchase a copy of any and all documents contained in the above prisoner's Mental Health and Medical Records including psychological services records, progress reports, case notes and termination reports and any records regarding substance abuse treatment. See appropriate MDOC Health Care release form attached.

From The MDOC

- Central Office File and Static 99

Send Cover Letter + General MDOC Client Release = Central Office File Parole Board Documents and Static 99

1. Requests for a prisoner's active Central Office file should be directed to: Michigan Department of Corrections, ATTN: FOIA, P. O. Box 30003, Lansing MI 48909. (This file has most of the same documents that the Record Office/Institutional file has plus Parole Board activity.)
   a. In Juvenile Lifer cases the only thing you will really need are Parole Board Records and Static 99, everything else will be duplicative from the facility. Some clients may have nothing, but some clients may have extensive records from lifer hearings, commutations etc. If they do have Parole Board records this can be very helpful.
   b. WORDING FOR REQUEST: " Pursuant to the Michigan Freedom of Information Act I am writing to purchase a copy of any and all documents by or to the Parole Board contained in the prisoner's Central Office, complete case notes and Static 99.
      i. The current FOIA Coordinator and I discussed exactly what this means and she understands what documents are being requested including any letters written to the Parole Board.

If you send a request to the "wrong" location, it may be redirected but does result in additional time and expense on behalf of DOC staff. Also, an extension of time to respond will always be taken when the request must be redirected which means that your response will be delayed. Therefore, your assistance in sending the request to the correct location when possible would is greatly appreciated.

Attachment

2

Material prepared by the State Appellate Defender's Office

STATE OF MICHIGAN

IN THE _____COUNTY CIRCUIT COURT

PEOPLE OF THE STATE OF MICHIGAN,
Appellee

vs.

_____,
HON. _____
Appellant

Trial Court No. _____
Court of Appeals No. _____

MOTION REQUESTING FUNDS FOR PSYCHOLOGICAL EVALUATION AND TESTIMONY OF EXPERT WITNESS

_____, through his attorneys, _____, moves for funding for psychological evaluation and expert witness testimony under MCL 775.13a, MCL 769.25, *People v Carp*, 298 Mich.App. 472 (2012), *Miller v Alabama*, 132 S.Ct. 2455 (2012), and for the following reasons:

1. _____was convicted of first degree murder, attempted murder, and conspiracy to commit murder _____. He received a mandatory sentence of life without parole on the murder conviction on _____.
2. On March 4, 2014, the Governor signed into law a new sentencing provision for juveniles convicted of first-degree murder, codified at MCL 769.25 and 769.25a.
3. In an order dated _____, the Court of Appeals remanded this action to this Court for sentencing under MCL 769.25.
4. By statute, at the sentencing hearing held pursuant to MCL 769.25, the "trial court shall consider the factors listed in *Miller v Alabama* … and may consider any other criteria relevant to its decision, including the individual's record while incarcerated." *Id.*
5. This Court held _____sentencing hearing under *Miller v. Alabama* and MCL 769.25 on _____.
6. The prosecutor in this matter sought a sentence of life without parole and provided evidence in support of that sentence. _____, through counsel, presented evidence in compliance with *Miller v. Alabama* and MCL 769.25 for this Court's consideration.
7. Among other witnesses, _____obtained an expert, Dr. _____, to evaluate _____and provide testimony to this Court.

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8. Based on the information at the sentencing hearing, this Court imposed a sentence of life without parole.

Compensation for Expert Witness

9. MCL 769.25 is a relatively new, untested provision, dealing with serious and complex matters of law and fact. The Michigan Supreme Court in *People v. Carp*, *supra*, anticipated the complexity of proceedings under MCL 769.25:

> "*juvenile defendants must be afforded the* opportunity and the *financial resources* to present evidence of mitigating factors relevant to the offender and the offense, psychological and other evaluations relevant to the youthfulness and maturity of the defendants must be allowed, and courts must now embark upon the consideration of aggravating and mitigating evidence offered regarding juvenile defendants as a condition to imposing sentences that previously required no such consideration." Slip op. 24-25 (emphasis added).

10. In other words, the *Carp* Court anticipated that defendants facing sentencing hearings under MCL 769.25 would obtain "psychological and other evaluations" and that these defendants would be given the "financial resources" by the trial courts to do this.

11. The *Miller* Court, likewise, anticipated that sentencing hearings would include significant research, preparation, and evidence. The *Miller* Court compared the imposition of life without parole on a juvenile to the death penalty. *Miller*, *supra*, at 2467. The American Bar Association Guidelines for death penalty defense counsel requires the appointment of a defense team include "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." *ABA Guideline for the Appointment and Performance*

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of Defense Counsel in Death Penalty Cases (Revised ed 2003), Guideline 4.1B, 31 HOFSTRA L. REV. 913, 952 [Heretoafter "ABA Guidelines"].

12. To adequately prepare for the sentencing hearing, _____employed a psychological expert witness, _____who has a private practice and is also director of the Center for Forensic Psychology. _____'s CV is attachment B.

13. _____requests the assistance and court-funding of _____. The provision of, and payment for, assistance in mitigation under MCL 769.25 was explicitly required by our Supreme Court in *People v. Carp*, supra, at slip op. 25-26; see also ABA Guidelines, *supra* (requiring court to provide resources for experts in death penalty cases).

14. _____testified at the resentencing hearing.

15. _____bills $150/hour for her services. Costs are as follows:

    a. Record review/preparation: 2.5 hours

    b. Clinical Interviews: 1.25 hours

    c. Court Testimony (including time attending and waiting for testimony): 6.0 hours

    d. Total: 9.75 hours

16. In total, _____spent 9.75 hours preparing for and giving testimony, and is thus owed $1462.50.

17. The invoice is attached. Attachment C.

18. _____requests court-funding to pay the fees.

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WHEREFORE, Defendant-Appellant respectfully requests that this Honorable Court:

1) Provide $1462.50 in compensation to _____in her role as an expert witness in the resentencing hearing pursuant to MCL 769.25, *People v Carp*, 298 Mich.App. 472 (2012), and *Miller v Alabama*, 132 S.Ct. 2455 (2012).

Respectfully submitted,

Material prepared by the State Appellate Defender's Office

Attachment

3

Material prepared by the State Appellate Defender's Office

DECLARATION OF CAROL A. KOLINCHAK, ESQ.

I, Carol A. Kolinchak, declare under penalty of perjury as follows:

Background and Qualifications

I am an attorney licensed to practice law in the state of Louisiana and I have been a member in good standing of the Louisiana Bar since 1993. I am currently the Legal Director at the Juvenile Justice Project of Louisiana. Since 2010, in partnership with the Equal Justice Initiative, I have been coordinating Louisiana's implementation of the United States Supreme Court's decision in *Graham v. Florida*. More recently, I have been acting as statewide coordinator for Louisiana's implementation of the Court's decision in *Miller v, Alabama*.

Prior to joining JJPL, I was the Deputy Director of the Capital Post-Conviction Project of Louisiana (CPCPL). CPCPL represents individuals who have been sentenced to death in Louisiana in post conviction proceedings. For more than a decade, before joining CPCPL, I represented indigent defendants at the trial level in both state and federal court, primarily in capital cases, including a number of juveniles facing either the death penalty or life without parole.

I have over twenty years experience in the preparation and presentation of mitigation evidence. Over the years, I have represented numerous adolescent defendants in homicide cases in which I was responsible for investigating and presenting mitigation on their behalf. I am familiar with the scope of investigation required to develop and present mitigation evidence. I have trained attorneys at both the national and local level on mitigation investigation and presentation. Most recently, I coordinated a statewide training program for attorneys, investigators and mitigation specialists on *Miller v. Alabama* Sentencing and Resentencing in Louisiana.

Miller v. Alabama and Individualized Sentencing

On June 25, 2012, the United States Supreme Court held that mandatory life without parole sentences were unconstitutional for juveniles convicted of homicide offenses. In reaching this decision, the Court relied on two strands of precedent dealing with proportionate punishment. The first strand

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establishes "that children are constitutionally different from adults for purposes of sentencing." The second strand, drawn from its capital jurisprudence, struck down mandatory death sentences and required individualized sentencing and consideration of mitigation evidence. Drawing on these two strands, the Court equated juvenile life without parole sentences to death sentences for adults. "Life-without-parole terms ... 'share some characteristics with death sentences that are shared by no other sentences.' *Miller v. Alabama*, No. 10-9646, slip op. at 12 (U.S. June 25, 2012) (quoting *Graham v. Florida*, 130 S. Ct. 2011, 2027 (2010)). In particular, the Court drew upon capital precedent requiring individualized sentencing determinations, which take into account "'the character and record of the individual offender,' "'the circumstances' of the offense," and "compassionate or mitigating factors." *Id.* at 13 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion)). Because life-without-parole sentences are, in the realm of juvenile sentences, "the ultimate penalty for juveniles," *id.* at 12, imposition of this ultimate penalty is rendered unconstitutional if the sentencer does not engage in meaningful individualized sentencing consideration. "[T]he Eighth Amendment requires consideration of the character and record of the individual and the circumstances of the particular offense as a constitutionally indispensible part of the process" of inflicting the ultimate penalty. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976); *cited with approval*, *Miller* at 13.

Thus, the *Miller* decision firmly established that before a juvenile could be sentenced to life without parole for a homicide offense, there must be individualized sentencing and consideration of mitigation evidence. "Given all we have said in *Roper*, *Graham* and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Miller* at __.

In the capital context, there is more than 35 years of case law implementing individualized sentencing. When states tried to limit the amount and kind of mitigation that sentencers could consider, the Supreme Court struck down those limitations, holding that "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any circumstances of the offense

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that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586. 605 (1978); *see also Eddings v. Oklahoma*, 455 U.S. 104 (1982) (sentencing court's failure to consider at mitigation the circumstances of Eddings' "unhappy upbringing and emotional disturbance" rendered sentence unconstitutional); *Smith v. Texas*, 543 U.S. 37 (2004) (jury instruction limiting consideration of mitigation rendered sentence unconstitutional).

Louisiana has likewise repeatedly stressed the importance of consideration of all mitigating circumstances when determining the sentence to be imposed:

> It is well established that the defendant in a capital case must be allowed to place before the sentencing jury all relevant evidence in mitigation of punishment. "Exclusion by the state trial court of relevant mitigating evidence 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."

State v. Weiland, 505 So.2d 702, 707 (La.1987) (citations omitted) (quoting *Skipper v. South Carolina*, 476 U.S. 1, 8 (defendant "must be allowed to place before the sentencing jury all relevant evidence in mitigation of punishment"); *State v. Hamilton*, 478 So. 2d 123, 129 (La. 1985): (character of the defendant is the critical issue "on which the determination of sentence is focused"); *State v. Sonnier* 380 So.2d 1, 7 (La. 1979) (capital sentence cannot be "imposed in disregard of numerous and persuasive mitigating circumstances"). Without a thorough consideration of mitigating factors, any sentence imposed will be found unconstitutional.

Counsel's Corresponding Duty to Investigate

Post *Miller*, investigation of a client's background, character, life experiences, and mental health is axiomatic in the defense of an adolescent charged with homicide.

> "[J]ust as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered" in assessing his culpability. *Id.*, at 116.

Miller v. Albama, No. 10–9646, slip op. at 14 (U.S. June 25, 2012).

> Such mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it. Under these schemes, every juvenile will receive the same sentence as every other—the 17-year-old and the 14-year-old, the shooter and the accomplice, the child from a stable household and the child from

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> a chaotic and abusive one. And still worse, each juvenile (including these two 14year-olds) will receive the same sentence as the vast majority of adults committing similar homicide offenses—but really, as *Graham* noted, a *greater* sentence than those adults will serve. In meting out the death penalty, the elision of all these differences would be strictly forbidden. And once again, *Graham* indicates that a similar rule should apply when a juvenile confronts a sentence of life (and death) in prison.

Miller v. Albama, No. 10–9646, slip op. at 14 (U.S. June 25, 2012).

> Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors(including on a plea agreement) or his incapacity to assist his own attorneys. See, *e.g.*, *Graham*, 560 U. S., at ___ (slip op., at 27) ("[T]he features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings"); *J. D. B. v. North Carolina*, 564 U. S. ___, ___ (2011) (slip op., at 5–6) (discussing children's responses to interrogation). And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.

Miller v. Albama, No. 10–9646, slip op. at 15 (U.S. June 25, 2012). Thus, *Miller* makes clear that counsel has a duty to investigate and develop this type of mitigation evidence in preparation for sentencing and develop a unified strategy for the guilt-innocence and sentencing phases.

As early as 1983, Professor Gary Goodpaster discussed trial counsel's "duty to investigate the client's life history, and emotional and psychological make-up" in capital cases. He wrote, "There must be inquiry into the client's childhood, upbringing, education, relationships, friendships, formative and traumatic experiences, personal psychology and present feelings. The affirmative case for sparing the defendant's life will be composed in part of information uncovered in the course of this investigation. The importance of this investigation, and the care with which it is conducted, cannot be overemphasized." (Gary Goodpaster, "The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases," 58 New York University Law Review 299 (1983) at 323-324.)

In juvenile homicide cases, competent defense counsel now have a duty to conduct life-history investigations and develop social histories, but generally lack the skill to conduct the investigations

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themselves. Moreover, even if lawyers had the skills, it is more cost-effective to employ those with recognized expertise in developing mitigation evidence. Thus, competent counsel retain a mitigation or sentencing specialist to complete a detailed, multigenerational social history to highlight the complexity of the client's life and identify multiple risk factors and mitigation themes.

It is important to note that Louisiana's legislative response to the *Miller* decision now requires development of this type of social history.

> At the hearing, the prosecution and defense shall be allowed to introduce any aggravating and mitigating evidence that is relevant to the charged offense or the character of the offender, including but not limited to the facts and circumstances of the crime, the criminal history of the offender, the offender's level of family support, *social history*, and such other factors as the court may deem relevant. Sentences imposed without parole eligibility should normally be reserved for the worst offenders and the worst cases.

Act 239/HB 152, Louisiana Legislature Regular Session 2013 (emphasis added).

In addition, the Subcommittee on Federal Death Penalty Cases, Committee on Defender Services for the Judicial Conference of the United States, for example, noted that mitigation specialists "are generally hired to coordinate an investigation of the defendant's life history, identify issues requiring evaluation by psychologists, psychiatrists or other medical professionals, and assist attorneys in locating experts and providing documentary material for them to review." (*Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation*, Federal Judicial Conference, May 1998, available at http://www.uscourts/gov/dpenalty/1COVER.htm.)

Without a thorough social history investigation, it is impossible to ascertain the existence of previous head injuries, childhood trauma, and a host of other life experiences. Moreover, without a social history, counsel cannot determine which experts to retain, in order to gauge the nature and extent of a client's possible mental disorders and impairments. Mental health experts, in turn, require reliable social history data to conduct a thorough and reliable evaluation.

The social history investigation should include a thorough collection of objective, reliable documentation about the client and his family, typically including medical, educational, employment, social service, corrections, and civil and criminal court records. Such contemporaneous records may

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document events which the client and other family members were too young to remember, too impaired to understand and record in memory, or too traumatized, ashamed, or biased to articulate. The collection and analysis of this documentation is a slow and time- intensive process. Many government record repositories routinely take months to comply with appropriately authorized requests. Great diligence is required to ensure compliance. Careful review of records often discloses the existence of collateral documentation which, in turn, needs to be pursued.

A social history cannot be completed in a matter of hours or days. In addition to the bureaucratic obstacles to the acquisition of essential documentation, it takes time to establish rapport with the client, his family, and others who may have important information to share about the client's history. It is quite typical, in the first interview with clients or their family members, to obtain superficial and defensive responses to questions about family dynamics, socio- economic status, religious and cultural practices, the existence of intra-familial and community violence, and mentally ill family members. These inquiries invade the darkest, and most shameful secrets of the client's family, expose raw nerves, and often re-traumatize those being interviewed. Barriers to disclosure of sensitive information may include race, nationality, ethnicity, culture, language, accent, class, education, age, religion, politics, social values, gender, and sexual orientation. These barriers can be overcome, but only with repeated interviews and genuine efforts to build trusting relationships.

Only with time can an experienced mitigation specialist or investigator break down these barriers, and obtain accurate and meaningful responses to these sorts of questions. In my professional opinion, an experienced mitigation specialist requires, at minimum, hundreds of hours to complete an adequate social history – even working under intense time pressure. Several nationally recognized authorities in mitigation investigation who have worked extensively in Louisiana have stressed the cyclical nature of the work and estimated that hundreds of hours will typically be required.

Conclusion

Based on my training and experience and my review of case related material, it is my conclusion that effective representation in this case requires a substantial continuance to allow counsel and her

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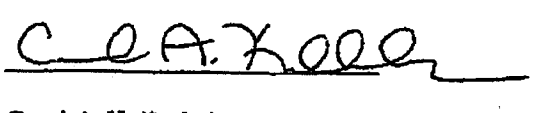
mitigation investigator to investigate and develop mitigation evidence in preparation for the sentencing hearing. Critical education, SSI and DCSF records that have been subpoenaed by counsel have not yet been provided. As noted above, without an opportunity to carefully review and digest these records, counsel cannot develop the comprehensive and reliable social history *Miller* now requires. Without a reliable social history, counsel cannot consult with appropriate experts and obtain a competent and reliable mental health assessment of their client. There are indications of a family history of abuse, neglect, mental illness and chronic exposure to trauma. Chronic exposure to severe trauma causes enduring personality and brain function changes that range from hyper-vigilance to psychosis. All of these indicators point to the critical need for a comprehensive and reliable social history in this case. Without it, counsel will be unable to effectively develop the mitigation evidence they are now duty bound to present in light of *Miller* and Act 239.

In my opinion, which I base on my training and experience, it would have been impossible for the investigation and assessment to be completed by the July 9 sentencing date and will require at a minimum several months to complete.

I declare under penalty of perjury under the laws of the State of Louisiana the foregoing is true and correct.

Executed this 8th day of July 2013.



Carol A. Kolinchak

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Attachment

4

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STATE OF LOUISIANA	**:**	**NUMBER: 243,727 Section 4**
VERSUS	**:**	**FIRST JUDICIAL DISTRICT COURT**
DWIGHT KEITH BACON	**:**	**CADDO PARISH, LOUISIANA**

AFFIDAVIT OF JULIET M. YACKEL

1. I am a capital mitigation specialist and attorney with 17 years of experience in capital cases in state, federal, and military jurisdictions throughout the United States.

2. In late February, 2009 the Louisiana Public Defender Board approved the request that I conduct the mitigation investigation on behalf of Dwight Bacon whose trial is scheduled for July 6, 2009.

I. Background & Qualifications

3. My practice has been devoted entirely to the defense of capital murder cases since graduating from Tulane Law School in 1992. Over the years, I have served as the mitigation specialist or counsel in over 50 capital murder cases. My experience includes work at all phases of the proceedings including pre-authorization, trial, state post-conviction, federal habeas, and executive clemency.

4. I have instructed mitigation specialists, lawyers, and investigators in capital mitigation, serving as faculty for numerous national, state, and local seminars relating to the mitigation function in capital murder cases.

5. I presently direct the Death Penalty Mitigation Institute, the annual training for capital mitigation specialists sponsored by the National Alliance of Sentencing Advocates and Mitigation Specialists [NASASMS], and have done so since 2006. I also serve on NASASMS's Executive Committee, a position I have held since 2005.

6. A more detailed recitation of my education, training, and experience can be found in my curriculum vitae which is appended hereto as Exhibit A.

I. Standard of Care

7. The role and responsibilities of the capital mitigation specialist are set forth in the *ABA Guidelines for the Appointment & Performance of Defense Counsel in Death Penalty Case* and the new *Supplementary Guidelines for the Mitigation Function.*[1]

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[1] The *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases* were first published in Hofstra Law Review on June 15, 2008, and have been

8. In broad terms, the Guidelines contemplate that the capital mitigation specialist performs the following functions:

- investigate whether the defendant is mentally retarded and therefore ineligible for the death penalty pursuant to *Atkins v. Virginia*;
- screen for mental disorders and recommend appropriate mental health experts;
- work closely with experts, and assemble & summarize voluminous life history information for their review;
- conduct a bio-psycho-social history investigation;
- set the stage for a plea through working with the client, members of his family, and others persons who are influential in the client's life;
- prepare for a capital sentencing hearing.

9. In June, 2008 the *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases* were published in to reflect prevailing professional norms. These guidelines specify the mitigation function as follows:

> Guideline 10.11 (a): conduct an ongoing, exhaustive and independent investigation of every aspect ofhte client's character, history, record and any circumstance of the offense, or other factors, which may provide a basis for a sentence less than death;
>
> Guidelines 10.11(b): investigate the client's life history in a manner which surveys a broad set of sources and includes:
>
> - medical history: complete prenatal, pediatric and adult health information;
> - exposure to harmful substances in utero and in the environment;
> - substance abuse history;
> - mental health history;
> - history of maltreatment and neglect;
> - trauma history;
> - educational history;
> - employment & training history;
> - military experience;
> - multi-generational family history;
> - genetic disorders and vulnerabilities as well as multi-generational patterns of behavior;
> - prior adult and juvenile correctional experience;
> - religious, gender, sexual orientation, ethnic, racial, cultural, and community influences;
> - socio-economic, historical, and political factors.
>
> Guideline 10.11(c): Team members must conduct in-person, face-to-face, one-on-one interviews with the client, the clients; family, and other witnesses who are familiar wit the client's life, history, or family history or who would support a sentence less than death.

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endorsed by the American Bar Association and the National Alliance of Sentencing Advocates and Mitigation Specialists.

> Multiple interviews will be necessary to establish trust, elicit sensitive information and conduct a thorough and reliable life-history investigation.
>
> Team members must endeavor to establish the rapport with the client and witnesses that will be necessary to provide the client with a defense in accordance with constitutional guarantees relevant to a capital sentencing proceedings.
>
> Guideline 10.11(d): Team members must provide counsel with documentary evidence for the investigation through the use of such methods as genealogies, social history reports, chronologies and presorts on relevant subjects including, but not limited to, cultural, socioeconomic, environmental, racial, and religious issues in the clients; life.

10. The first step in any capital case is to investigate whether the defendant is mentally retarded and therefore ineligible for the death penalty pursuant to *Atkins v. Virginia*.

12. The second phase of the investigation involves conducting the bio-psycho-social history investigation. As this aspect of the investigation unfolds, the mitigation specialist begins to identify areas which require expert evaluation.

13. The bio-psycho-social history investigation includes examining the following areas of the defendant's life:

- Pre and perinatal development;
- Early childhood and adolescent development including physical, mental, emotional, and social;
- Medical history;
- Incidents of neglect and abuse;
- Symptoms of social impairment (self medication);
- Quality of caretakers, homes, and schools;
- Consistency and quality of social support;
- Presence and effect of corrupting influences;
- Defendants' strengths and efforts to overcome impairments; and
- Defendants' response to care, structure, medication, and incarceration.

14. The bio-psycho-social history, in conjunction with close observation and in depth interviews of the client, will reveal the range and extent of any developmental disabilities, brain dysfunction, mental disorder or other condition that would preclude the execution of the client.

15. Once the bio-psycho-social history investigation is complete, and appropriate experts have been selected, the mitigation specialist provides the information they have gathered to the evaluating mental health professionals. This information – usually provided in the form of a detailed bio-psycho-social chronology, smaller sub-chronologies, indexed notebooks of records, genograms and other summaries – give the experts a solid foundation for their assessments and assists them in determining the presence, severity and effect of mental disorders and developmental disabilities that affected the client's behavior during the course of his life and in connection with the charges he faces.

16. A soon as a criminal defendant is charged with a crime in which death is a possible

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punishment, counsel is required to assemble a core defense team – consisting of two attorneys, one mitigation specialist and one fact investigator. The mitigation investigation should begin immediately.

17. Plea negotiations should commence at the beginning of the case and continue even after the prosecution has elected to seek the death penalty. As new mitigation information is developed, it may be presented to the prosecution as grounds not to seek the death penalty or to reconsider the decision to seek death. Mental retardation, severe mental illness, successful adjustment to the structure of prison, and brain damage are powerful arguments that negotiated settlement is a better course than the expense and time of a trial that could likely result in a jury unwilling to impose a death sentence.

18. A mitigation inquiry will also uncover multi-generational patterns of behavior which define family dynamics. Family patterns are influenced by culture, community services and attitudes, economic status, race, religion and education. Family patterns of behavior find expression in family values, child rearing practices and beliefs about the role of family. These patterns contribute to abandonment, neglect, physical abuse, sexual abuse, and emotional abuse.

19. The mitigation assessment must be conducted in a manner which is accepted in both the legal and medical communities. The data must be competent, reliable and vital. Collateral evidence obtained from health care providers, law enforcement, governmental agencies, family, neighbors, friends, schools and employers supports valid claims such as physical neglect and abuse, drug and alcohol addiction and debilitating mental diseases. As part of a competent examination and assessment, this evidence must be collected and analyzed.

20. It is important to determine the criminal backgrounds of adults and others who were significant figures in the client's life and to gather appropriate records about other family members who have mental disabilities or histories that affected the client's behavior or functioning.

21. Records play a vital role in developing mitigation and the biopsychosocial history, and form the basis for accurate and reliable expert opinions. To maintain a standard of care, social historians and mental health experts must rely on collateral evidence which corroborate and expands upon the information provided by the client and by witnesses.

22. Records also reveal patterns of family dynamics provide information on additional witnesses and document any mental and medical illnesses and mental impairments. Guideline 10.7 of the ABA Guidelines recognizes:

> "Records… can contain a wealth of mitigating evidence, documenting or providing clues to childhood abuse, retardation, brain damage, and/or mental illness, and corroborating witnesses' recollections. Records should be requested concerning not only the client, but also his parents, grandparents, siblings, and

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children. A multi-generational investigation frequently discloses significant patterns of family dysfunction and may help establish or strengthen a diagnosis or underscore the hereditary nature of a particular impairment. Corroborating information from multiple sources - a time consuming task - is important wherever possible to ensure the reliability and thus the persuasiveness of the evidence."

23. The following records on the client and his/her family must be collected:

a. All school records, including transcripts, health reports, standardized testing, attendance, special education, disciplinary action, adult education and vocational schools, GED, Job Corps, continuing education;

b. Employment records including records related to job applications, attendance, assignments and performance evaluations, medical and psychological evaluations, relocations, pay records, Social Security tax records;

c. Family and individual social service records, including records of food stamps, AFDC, WIC, Medicare, Medicaid, welfare, counseling, referrals, medical and mental health treatment, records associated with adoption agencies and foster homes, including placement and discharge reports, progress reports, and medical, educational, mental health and intelligence evaluations;

d. Medical records, including private physicians, clinics and hospitals;

e. Juvenile criminal justice records, including defense counsel's files, pre-trial intervention, community service records, juvenile detention records, and all related medical, educational and intelligence evaluations, treatment plans, field and progress notes, referrals and court files;

f. Adult criminal records including police, sheriff and FBI records, jail and prison records, psychological, educational and medical evaluations and notes, daily progress notes, disciplinary reports, work assignment records, classification reports, records of participation in all vocational, educational, religious and honor programs, religious reports and visitation logs, all court records, all public defender and prosecution files;

g. Probation and parole records, including pre-sentence investigation and sentencing reports, field notes, family and social history information, conditions of supervision and violations, and conditions of release from supervision;

h. Psychological and psychiatric records, including records from community mental health clinics, private doctors and counselors, hospitals and substance abuse facilities, to include intake evaluations, treatment interventions, medication logs, physician and nurse progress notes, referrals and discharge reports;

i. All applicable birth, death and marriage certificates, records and related investigations.

a.

24. Regular meeting with the client are crucial to conducting the mitigation investigation, setting the stage for a plea, and preparing for trial. A regular visitation/interview schedule should be established to integrate the information being developed and learned from witnesses and from documentation with information being developed and learned from the client. As an ongoing, evolutionary process, this best takes place by repeated visits over time on a continuing basis.

25. Continuing consultation with counsel and routine team meetings must be

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conducted. In addition, status reports will be prepared on a regular basis in order to keep all members of the defense team informed of new information as it is gathered, developed and analyzed. Recommendations for expert evaluations will be made when warranted.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

_____

Juliet Yackel
Capital Mitigation Specialist

Sworn to and subscribed before me this 26th day of May, 2009 in Shreveport, Louisiana

_____
Notary Public

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