November 12, 2018

Honorable Kim K. Ogg
District Attorney, Harris County Texas
500 Jefferson St.
Houston, Texas 77002

Dear Ms. Ogg,

We write today to urge your office to reconsider its approach to the sentencing of juveniles, even those juveniles facing the most serious of charges. In particular, we are concerned about the impending sentencing hearing of Alan Nickerson. Alan was 17 years old when he killed Carltrell Odom during a robbery. He was convicted of capital murder and automatically sentenced to life without the possibility of parole. We understand that your office is once again seeking a life without parole sentence even after the Supreme Court of the United States found his original sentence unconstitutional. The Texas Legislature eliminated life without parole for juveniles in 2013 and we are concerned about the imposition of this sentence given the Eighth Amendment concerns around this practice.

We do not presume to advise your office regarding individual cases; we are however concerned with the process that is accorded to such decisions. In 2012, the United States Supreme Court held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Miller v. Alabama*, 132 U.S. 2455 (2012). The Court held that "[b]y making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment." *Id.* at 2460. It stated that those determining the sentence of a juvenile must consider the offender's "age and the wealth of characteristics and circumstances attendant to it." *Id.* at 2467. The court required factfinders to first "consider a juvenile's chronological age and its hallmark features-among them, immaturity, impetuosity, and failure to appreciate risks and consequences;" "the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional;" "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;" whether "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;" and finally "the possibility of rehabilitation even when the circumstances most suggest it." *Id.* at 2468 (citations omitted).

In *Montgomery v. Louisiana*, the United States Supreme Court held that *Miller* was retroactive because "it rendered life without parole an unconstitutional penalty for 'a class of defendants because of their status'—that is, juvenile offenders whose crimes reflect the transient immaturity of youth." *Montgomery v. Louisiana*, 557 U.S. ___, 136 S. Ct. 718, 734 (2016). Importantly, the Supreme Court stated that life without parole should be reserved for the rare juvenile offender displaying irreparable corruption, whose crime does not reflect

the transient nature of youth. It placed the burden on the State to prove this irreparable corruption before it could seek this penalty for a juvenile.

The signatories to this letter urge your office in the strongest possible terms to take a strategic pause in your prosecution efforts to ensure that your office has a process in place for determining when, and under what circumstances, it seeks this most serious of sentences. We urge this office first to consider whether life without parole is ever an appropriate sentence for a juvenile since the Texas Legislature has since found it is not, eliminating the ability of prosecutors to seek this penalty since 2013. If you do decide that there may be instances in which such a sentence is appropriate, we would urge you to develop a deliberate process for evaluating which juveniles are irreparably corrupt and whose crimes are not reflective of the transient immaturity of youth. We have attached a summary appendix of our consensus legal view of the current landscape and offer it as additional substantive law. But our primary goal today, in this joint letter, is to seek a pause in your actions on these cases and a meeting with you and your staff regarding the best path forward.

Yours respectfully,

Doug Murphy

Doug Murphy
President
Harris County Criminal Lawyers Association

Jay Jenkins

Jay Jenkins
Harris County Policy Attorney
Texas Criminal Justice Coalition

Elizabeth Henneke

Elizabeth A. Henneke
Executive Director
Lone Star Justice Alliance

Heather Renwick

Heather Renwick
Legal Director
Campaign for Fair Sentencing of Youth

Marcy Mistrett

Marcy Mistrett
CEO
Campaign for Youth Justice

Appendix: Legal Landscape

In June 2012, the United States Supreme Court ruled in *Miller v. Alabama* that mandatory life sentences without the possibility of parole (LWOP) are unconstitutional for juvenile (under 18) defendants. 132 U.S. 2455 (2012). Importantly, the Court found that a youth could not be sentenced to LWOP without considering the individual characteristics of the youth to determine if the youth was the "rare juvenile offender" displaying "irreparable corruption." *Id.*, at 132. Absent such a finding, the Court required imposition of a sentence that provided a "meaningful opportunity" for review.

In *Montgomery v. Louisiana*, the United State Supreme Court held that *Miller* was retroactive because "it rendered life without parole an unconstitutional penalty for 'a class of defendants because of their status'—that is, juvenile offenders whose crimes reflect the transient immaturity of youth." *Montgomery v. Louisiana*, 557 U.S. ___, 136 S. Ct. 718, 734 (2016. The Supreme Court recognized that *Miller* announced a substantive constitutional rule, and as such, "a court has no authority to leave in place a conviction or sentence that violates a substantive rule, regardless of whether the conviction or sentence became final before the rule was announced." *Id.* at 731. State courts, therefore, have "a duty to grant the relief that federal law requires." *Id.* at 727 (internal quotation marks and citations omitted).

Importantly, *Montgomery* also clarified that *Miller*'s commentary regarding the rareness of this sentence was not mere dicta but was essential to the holding and imposed upon the prosecutor the burden of proving that a juvenile was within the narrow class of irreparably corrupt juveniles prior to sentencing them to life without parole. *Id.* at 733-34.

In addition to the burdens imposed upon prosecutors, the case requires courts to examine critical factors prior to imposing life without parole including the offender's "age and the wealth of characteristics and circumstances attendant to it." *Miller,* 132 U.S. at 2467. "Under a mandatory 'life without parole' sentencing scheme, the factfinder cannot consider a juvenile's 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. And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it." *Id.* at 2468 (citations omitted)

To comply with the mandates of *Miller* and *Montgomery* in each juvenile life without parole (JLWOP) case, counsel must compile comprehensive and well-documented multigenerational psychosocial histories of their clients based on exhaustive investigations that include multiple client, family and other witness interviews as well as document collection, review,

and analysis. Utilizing this type of investigation to form the basis of an individualized sentencing hearing is the constitutional safeguard that both *Miller* and *Montgomery* require.

In capital cases, the need for and involvement of a mitigation specialist at the penalty phase is well established. The American Bar Association (ABA) Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases "set forth a national standard of practice for the defense of capital cases in order to ensure high quality legal representa□tion for all persons facing the possible imposition or execution of a death sen- tence by any jurisdiction:' The need for and importance of mitigation in capital cases is also well established by the U.S. Supreme Court. In such seminal capital cases as *Lockett v. Ohio*," *Eddings v. Oklahoma*, *Skipper v. South Carolina*, and *Williams v. Taylor*, the Court has repeatedly emphasized the centrality of mitigation at the sentencing phase and the procedural protections such critical evidence requires.

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

Texas's Response and the Imposition of Life/Life Without Parole

The Texas Legislature proactively sought to bring its statue into compliance with the Eighth Amendment in 2013, and passed legislation eliminating the imposition of life without parole for juveniles. TEX. PENAL CODE ANN. § 12.31 (West Supp. 2016). By eliminating this sentencing option, the Legislature announced a clear policy preference against this sentence.

Recent research has cast doubt on the imposition of even a mandatory life sentence for juveniles. First, in Texas, "capital life" for a juvenile precludes parole eligibility or consideration of good conduct time until the juvenile serves 40 calendar years, beyond the average life expectancy of a person in custody. Tex. Gov. Code § 508.145(b) (2014). The United States Sentencing Commission recognizes that a sentence of 470 months, or 39.17 years, is effectively a "life sentence." *See* U.S. Sentencing Commission Preliminary Quarterly Data Report (through September 30, 2016), App. A7 ("In cases where the court imposes a

sentence of life imprisonment, a numeric value is necessary to include these cases in any sentence length analysis.) Thus, Texas does not permit a juvenile even the option for parole until well beyond the average life expectancy of a prisoner.

Moreover, the Houston Press recently published an article stating that "[o]f the 366 Texas juveniles sentenced to life with the possibility of parole for capital murder since 1962, only 17—less than 5 percent—have ever been released." Meagan Flynn, Sorry for Life?: Ashley Ervin Didn't Kill Anyone, But She Drove Home the Boys Who Did, HOUSTON PRESS (Jan. 12, 2016), http://www.houstonpress.com/news/sorry-for-life-ashley-ervin-didn-t-kill-anyone-but-she-drove-home-the-boys-who-did-8064300. Thus, for the vast majority of juveniles a life sentence means dying behind prison walls without consideration of whether their crimes reflect the transient immaturity of youth. The Eighth Amendment, however, demands that sentencers be given the opportunity to consider several factors prior to imposing such an extreme sentence on a juvenile. *See, e.g., Miller*, 567 U.S. at 477.

This low parole rate is unsurprising given that the Parole Board seemingly treats youth as an aggravating factor for parole decisions. Since 1985, Parole Board has been guided by parole guideline that set criteria for making parole decisions. *See* Texas Gov't Code §508.036. These parole guidelines, which have not been revised since 2012 (the year the Supreme Court decided *Miller v. Alabama*), require the Parole Board to assign each individual a risk assessment score and an offense severity score. All juveniles convicted of capital life are automatically assigned the highest offense severity score, meaning that the only opportunity they have for their youth to mitigate in favor of parole release is through the application of the risk assessment score.

While there are no published reports indicating how the Parole Board considers an inmate's age at first commitment, a widely read How-To Manual suggests that the Parole Board treats age as an *aggravator* by assigning an additional 2 points out of 16 possible points against parole for anyone who entered the system before they turned eighteen. *See* Risk Item Factors Scale.[1] Moreover, none of the *Miller* factors required to be a part of the Parole Board's decision and there is no way to account for hallmark features of youth. Without taking into account the factors that reduce a juvenile's culpability, this matrix then likely fails to recognize that youth is in fact a mitigator rather than an aggravator.

Signatories

The Lone Star Justice Alliance is helmed by Elizabeth A. Henneke, a nationally recognized expert on the sentencing of juveniles. Elizabeth graduated from Yale University and the University of Texas School of Law, where Elizabeth was an editor on the Texas Law Review. Elizabeth served as a law clerk for the South Africa Constitutional Court and for Judge Edward C. Prado on the U.S. Court of Appeals, Fifth Circuit before joining Williams & Connolly LLP in Washington, D.C, where she engaged in high-stakes litigation. Elizabeth left Williams & Connolly to join the faculty at the University of Southern California Gould School of Law, where she taught criminal law and supervised students in the Post-Conviction Justice Project, which brought state and federal habeas challenges on behalf of juvenile lifers. Elizabeth is on the Juvenile Council for the State Bar of Texas, an Advisory Member of the

[1] Available at http://www.paroletexas.com/articles/Risk_assesment_new.pdf.

Juvenile Justice Committee for the Texas Judicial Council, and on the Collaborative Council of the Judicial Commission on Mental Health. Elizabeth is also on the Board of Directors for the Campaign for Youth Justice. In May 2017, Elizabeth received the Travis County Women Lawyers' Association Attorney Award for her work in the Public Interest.