APPEALING TO EMPATHY: COUNSEL'S OBLIGATION TO PRESENT MITIGATING EVIDENCE FOR JUVENILES IN ADULT COURT

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> The case for retribution is not as strong with a minor as with an adult. Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.
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> -*Roper v. Simmons*, 543 U.S. 551, 571 (2005)

I. INTRODUCTION

Media representations of youth as "superpredators" and "monsters" fuel public fear of juvenile offenders.[1] These depictions infiltrate public consciousness and promote widespread misconceptions about the prevalence of youth crime and the nature of juvenile delinquents.[2] In public discourse, youth who break the law are characterized as hardened criminals who will continue to prey upon innocent victims unless they are incarcerated. However, a closer examination of the life stories of young people who commit serious crimes reveals histories characterized by trauma, victimization, and abuse – almost without exception.[3] A central part of a lawyer's job is to uncover these stories and to tell them in a compelling way. The effective presentation of mitigating information can pierce the initial tendency of a judge or prosecutor to view a defendant as unequivocally deserving of retribution. Shifting the perceptions of those with the power to make key decisions can dramatically impact the outcome of a case. It may result in the chance to remain in juvenile court rather than be transferred to adult court, better plea bargain offers, or sentences focused more on rehabilitation than on long prison sentences.[4]

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1. For a more thorough discussion of the impact of media representations of youth on juvenile justice policy, see Beth Caldwell & Ellen C. Caldwell, *"Superpredators" and "Animals"– Images and California's "Get Tough on Crime" Initiatives,* 11 J. INST. JUST. & INT'L STUD. 61 (2011).

2. For example, a 1996 poll in California indicated that sixty percent of respondents believed that young people were responsible for most violent crime, whereas youth were actually only responsible for thirteen percent of violent crime at the time of the survey. LORI DORFMAN & VINCENT SCHIRALDI, BUILDING BLOCKS FOR YOUTH, OFF BALANCE: YOUTH, RACE & CRIME IN THE NEWS 4 (2001), *available at* www.cclp.org/documents/BBY/offbalance.pdf.

3. For example, psychiatrist Marty Beyer reports that 48 out of 50 youth offenders he evaluated for court had experienced severe trauma. Marty Beyer, *Fifty Delinquents in Juvenile and Adult Court*, 76 LN. 2 AM. J. OF ORTHOPSYCHIATRY 206, 207 (2006).

4. *See generally* REHABILITATING LAWYERS: PRINCIPLES OF THERAPEUTIC JURISPRUDENCE FOR CRIMINAL LAW PRACTICE (David B. Wexler ed., 2008) (discussing the importance of gathering information about mitigation and rehabilitative options in criminal defense practice).

The Supreme Court's recent decisions in *Roper v. Simmons*[5] and *Graham v. Florida*[6] demonstrate that mitigating information about a young person accused of a crime is important to courts. In both *Roper* and *Graham*, the Supreme Court considered the tragic life histories of young defendants in conjunction with adolescent development research. In *Roper*, the Court held that sentencing juvenile offenders to death violates the Eighth Amendment's prohibition against cruel and unusual punishment.[7] Similarly, the *Graham* decision found the punishment of life without the possibility of parole unconstitutional for juveniles convicted of non-homicide offenses.[8] Mitigating information helped to frame the Court's understanding of the complicated developmental issues impacting juvenile offenders in both of these landmark cases.

The *Graham* decision has been cited as groundbreaking in many regards[9] and has spawned academic debate regarding its implications.[10] The holding of *Graham* specifically prohibits sentencing juveniles not convicted of homicide offenses to life without the possibility of parole.[11] Courts are wrestling with how to apply *Graham*'s holding to cases that are similar to – yet slightly different from – the scenario the Court specifically addressed. Most of these cases relate rather specifically to extending *Graham*'s narrow holding to apply to other (similar) categories of juvenile offenders. For example, the United States Supreme Court heard oral argument in March 2012 regarding whether sentencing juvenile homicide offenders to life without the possibility of parole violates the Eighth Amendment.[12] In addition, the California Supreme Court is considering whether *Graham* prohibits sentencing juvenile offenders to lengthy prison sentences that exceed their life expectancies because such sentences amount to *de facto* life without parole.[13] Although much of the litigation regarding *Graham*'s applicability

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5. 543 U.S. 551 (2005) (holding that juveniles cannot be sentenced to death).

6. Graham v. Florida, 130 S. Ct. 2011 (2010) (holding that juveniles convicted of non-homicide crimes cannot be sentenced to life without the possibility of parole).

7. *Roper*, 543 U.S. at 578.

8. *Graham*, 130 S. Ct. at 2037.

9. *See* Tamar R. Birckhead*, Juvenile Justice Reform 2.0*, 20 BROOK. J. L. & POL'Y 15, 20 (2012) ("Each of these decisions [*Roper,* 543 U.S. 551; *Graham,* 130 S. Ct. 2011; and *J.D.B v. North Carolina*, 131 S. Ct. 2394 (2011)] has been hailed as 'landmark,' and together they have raised expectations among scholars, advocates, and practitioners that a new era of reform may be emerging for youth offenders."); Marsha Levick, *Kids Really Are Different: Looking Past* Graham v. Florida, 87 Crim. L. Rep. 664 (BNA) (July 14, 2010) (arguing that *Roper* and *Graham* "provide the framework for a developmentally driven juvenile Eighth Amendment jurisprudence that has potentially broad implications for the laws, policies, and practices that govern the treatment of offenders under the age of 18, particularly sentencing practices."); Neelum Arya, *Using* Graham v. Florida *to Challenge Juvenile Transfer Laws*, 71 LA. L. REV. 99, 100 (2010) ("The new categorical rule established by *Graham* has the potential to profoundly impact the field of juvenile justice and youth policies as a whole.")

10. *See* Craig S. Lerner, *Juvenile Criminal Responsibility: Can Malice Supply the Want of Years?*, 86 TUL. L. REV. 309 (2011).

11. *Graham*, 130 S. Ct. at 2034.

12. Miller v. State, 63 So. 3d 676 (Ala. Crim. App. 2010), *cert. granted*, 132 S. Ct. 548 (2011) (to be argued in tandem with Jackson v. Norris, 651 F.3d 923 (8th Cir. 2011), *cert. granted sub nom.* 132 S. Ct. 548 (2011)).

13. *See* People v. Nuñez, 125 Cal. Rptr. 3d 616 (Cal. Ct. App. 2011), *review granted and opinion superseded by* 255 P.3d 951 (Cal. 2011); People v. Caballero, 119 Cal. Rptr. 3d 920 (Cal. Ct. App. 2011) *review granted and opinion superseded by* 250 P.3d 179 (Cal. 2011).

focuses on whether the holding applies to relatively similar sentences or offenders, the Supreme Court seems to have indicated a willingness to apply *Graham*'s reasoning more broadly. In 2011, the Court held in *J.D.B. v. North Carolina* that given the widely recognized differences between juveniles and adults, courts must consider a young person's age when determining whether an individual was in custody for purposes of determining whether *Miranda* warnings were required.[14]

Some scholars have suggested that *Graham* has broad ramifications for the treatment of juvenile offenders.[15] Tamar Birckhead suggests that *Roper*, *Graham*, and *J.D.B*. may provide the basis for legal reforms emphasizing the need to treat juveniles and adults differently in the criminal context and minimizing the use of long-term incarceration of youth.[16] She also notes that these cases "could support litigation that results in rigorous client-centered representation for juveniles," and could require "prosecutors, judges, and probation officers [to] take into account the youth's brain development [and] mental and emotional state" at disposition or sentencing hearings.[17] Neelum Arya argues that several of the Court's collateral holdings in *Graham* prohibit prosecuting juveniles in adult criminal courts.[18] Indeed, the Court's reasoning in the *Graham* decision emphasizes the unique position of juvenile offenders in terms of their development, diminished levels of culpability, and capacity for change.[19] One California appellate court decision – *People v. Mendez* – took the Court's reasoning to heart, resting its decision on the principles and findings set forth in *Graham*.[20] The *Mendez* court incorporated the spirit of the *Graham* decision more broadly than other courts, relying on its reasoning to find that mitigating evidence about a juvenile offender facing a lengthy adult prison sentence must be presented at a sentencing hearing.[21] This Article builds on the innovate approach of the *Mendez* decision, exploring the importance of mitigating information in juvenile defense practice and discussing post-conviction strategies for challenging sentences imposed without adequate consideration of mitigating evidence.

Part Two discusses the tremendous impact mitigating information can have on the outcome of a case. It begins with a review of the mitigating information presented about the defendants in both *Roper* and *Graham* and incorporates examples of mitigating evidence included in recent California decisions

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14. *J.D.B*., 131 S. Ct. at 2399.

15. *See* Arya, *supra* note 9, at 102 ("This Article suggests that lawyers consider using *Graham* to ensure that every child under the age of eighteen, regardless of whether the child has been given a [juvenile life without parole] sentence, is entitled to a chance to 'atone for his crimes and learn from his mistakes' so that he may 'demonstrate that the bad acts he committed as a teenager are not representative of his true character.' *Graham* is not merely an extension or incremental continuation of *Roper*, but provides significant fodder for a reexamination of our juvenile justice policies more broadly, including the possibility of removing retribution as a valid goal of the criminal justice system as applied to youth, and firmly establishing a constitutional right to rehabilitation.") (quoting *Graham*, 130 S. Ct. at 2033).)

16. Birckhead, *supra* note 9, at 49-50.

17. *Id*. at 50.

18. Arya, *supra* note 9, at 152.

19. *Graham*, 130 S. Ct. at 2026-29.

20. People v. Mendez, 114 Cal. Rptr. 3d 870, 882 (Cal. Ct. App. 2010).

21. *Id.* at 882-84.

interpreting *Graham*. Part Three sets forth the framework for potential post-conviction challenges based on the argument that failure to present mitigating evidence about a juvenile client in adult court constitutes ineffective assistance of counsel. Part Four explores alternative mechanisms for providing incarcerated juvenile offenders the opportunity to present evidence of rehabilitation in an effort to facilitate the type of "meaningful opportunity for release" that the *Graham* decision guarantees. Part Five discusses specific skills and techniques attorneys should develop in order to gather and present mitigating information about juvenile clients. Drawing from therapeutic jurisprudence scholarship, as well as this author's background in the field of Social Welfare, this discussion presents multi-disciplinary techniques that enhance the legal representation of youth.

II. THE NECESSITY OF MITIGATING EVIDENCE

A. The Role of Mitigation in Roper and Graham

Presenting Christopher Simmons and Terrence Graham as children who had experienced victimization likely shaped the way in which the Supreme Court viewed their cases. It is impossible to surmise the extent to which framing their stories in the context of their traumatic childhoods influenced the Court's decisions in these landmark decisions. We do know, however, that storytelling can play a powerful role in shaping legal outcomes.[22] We also know that these narratives were underdeveloped at the trial court level in both *Roper* and *Graham*. In both cases, the trial courts imposed sentences that the Supreme Court then reversed; the different outcomes may very well have been shaped by the mitigating information presented at the Supreme Court level.

The trial court in Terrence Graham's case seemed oblivious to the dysfunctional aspects of his home life. The sentencing judge told the young man, "as far as I can tell, you have quite a family structure. You had a lot of people who wanted to try and help you get your life turned around. . . ."[23] In contrast, Graham's appellate attorneys emphasized mitigating information about their client, framing his criminal conduct within the context of his traumatic childhood.[24] In the opening brief to the Supreme Court, the discussion of the case history commences with a two-paragraph summary of Terrence's childhood, beginning with the fact that he was addicted to cocaine when he was born.[25] The brief explains how his parents' crack addictions impacted his mental health.[26] Terrence was clinically depressed and was diagnosed with ADHD, yet he did not receive the recommended treatment because his mother advised him not to take the prescribed medication.[27] His father and siblings spent time in prison and juvenile detention facilities while

22. *See* Philip N. Meyer, *Vignettes from a Narrative Primer*, 12 LEG. WRITING 229 (2006) (discussing the importance of narrative and storytelling in legal advocacy with a particular emphasis on criminal appeals).

23. *Graham*, 130 S. Ct. at 2019.

24. *Id*. at 2018.

25. Brief for Petitioner at 11, Graham v. Florida, 130 S. Ct. 2011 (2010) (No. 08-7412).

26. *Id*.

27. *Id*.

he was growing up.[28] Painting a portrait of a traumatized child with little parental support challenges the trial court's perception of Terrence as a young man who had been given plenty of opportunities to succeed yet, for some inexplicable reason, chose to commit his life to engaging in crime.[29] The effective presentation of compelling mitigation evidence at the Supreme Court level may well have contributed to the outcome of the case. Indeed, the mitigating information about Graham's life history was important to the Supreme Court, as evidenced by the Court's reference to his traumatic childhood in the first part of the decision.[30] The second paragraph of the opinion provides the petitioner's name and birth date.[31] It then immediately provides the following information: "Graham's parents were addicted to crack cocaine, and their drug use persisted in his early years. Graham was diagnosed with attention deficit hyperactivity disorder in elementary school. He began drinking alcohol and using tobacco at age nine and smoked marijuana at age thirteen."[32] The opinion's reference to Terrence Graham's childhood difficulties, particularly at the beginning of the opinion, signals that this information made an impact on the Court.

In *Roper*, Christopher Simmons—who was seventeen years old at the time of his offense - was sentenced to death after his attorney failed to present extensive mitigating information at the death penalty sentencing phase.[33] After he was sentenced, a new attorney moved to set aside Simmons's conviction and sentence on the basis that his trial counsel was ineffective because he failed to present sufficient evidence of mitigation.[34] Mitigating information, including testimony by clinical psychologists and neighbors, painted the picture of a child who was raised in a "difficult home environment," who struggled in school, and who was out of school for long periods of time.[35] The trial court denied the motion to set aside the conviction and sentence, the Missouri Supreme Court affirmed,[36] and a petition for a writ of habeas corpus on the basis of ineffective assistance of counsel was denied.[37] Ultimately, the Supreme Court addressed a different issue based upon the 2002 Supreme Court decision in *Atkins v. Virginia,* which held that executing

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28. *Id.* at 12.

29. For example, the trial court stated:

> Mr. Graham, as I look back on your case, yours is really candidly a sad situation. You had, as far as I can tell, you have quite a family structure. You had a lot of people who wanted to try and help you get your life turned around including the court system, and you had a judge who took the step to try and give you direction through his probation order to give you a chance to get back onto track. And at the time you seemed through your letters that that is exactly what you wanted to do. And I don't know why it is that you threw your life away. I don't know why. . . . The only thing that I can rationalize is that you decided that this is how you were going to lead your life and that there is nothing that we can do for you.

Graham, 130 S. Ct. at 2019-20.

30. *Id*. at 2018.

31. *Id.*

32. *Id.*

33. Roper v. Simmons, 543 U.S. 551, 558-59 (2005).

34. *Id*.

35. *Id.* at 559.

36. State v. Simmons, 944 S.W.2d 165 (Mo. 1997).

37. *Roper*, 543 U.S. at 559.

mentally retarded defendants constitutes cruel and unusual punishment in violation of the Eighth Amendment.[38] Although the Supreme Court's decision in *Roper v. Simmons* did not address the lack of mitigating evidence presented at the trial court level, the Court did consider evidence of mitigation about Christopher Simmons's childhood. Just as in *Graham*, the Court signaled that this information was important by devoting attention to it in the opinion.[39] It described expert testimony about his "difficult home environment," "poor school performance," long absences from home, and substance abuse.[40] The Court also noted that "[p]art of the submission was that Simmons was 'very immature,' 'very impulsive,' and 'very susceptible to being manipulated or influenced.'"[41] These characteristics, which the Court concluded are normative features of adolescence, ultimately factored heavily into the legal analysis in the decision.[42] The Court specifically found "[t]hree general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders."[43] Of particular relevance to this Article's discussion of mitigation, the *Graham* opinion cites adolescents' immaturity and susceptibility to peer pressure as two major differences that call for the recognition of the diminished culpability of juvenile offenders.[44] It appears that the mitigating information about Christopher's childhood and characteristics made an impact on the way the Court framed and understood the issues presented in the case.

B. Mitigation in the Lives of Juveniles in Adult Court

Social science research demonstrates the existence of high levels of abuse, victimization, trauma, and neglect in the lives of most youth offenders. This is the type of information that can be uncovered and presented as mitigation evidence. Exploring childhood trauma helps provide the context in which young people commit crimes and makes their criminal behavior more understandable. One psychiatrist who conducted developmental evaluations of fifty juvenile offenders – some who were processed in juvenile courts and others through adult courts— reported, "[r]egardless of age, offense, or classification as a juvenile or adult, these 50 delinquents had a high incidence of trauma and disabilities, as well as immature thinking and unformed identities typical of adolescents."[45] Similarly, studies with larger sample sizes consistently demonstrate widespread experiences with physical and sexual abuse among female delinquents.[46] Many young offenders also have

38. 536 U.S. 304 (2002); *Roper*, 543 U.S. at 559.

39. *Roper*, 543 U.S. at 558-59.

40. *Id.* at 559.

41. *Id*.

42. *Id*. at 569-70.

43. *Id.* at 569.

44. *Id.* at 569-71.

45. Beyer, *supra* note 3, at 206. Notably, forty-eight of the fifty youth had "experienced severe trauma, including repeated abuse and/or death of an important person and/or abandonment since early childhood." *Id*. at 207. Many had experienced physical or sexual abuse, and forty-two percent of these youth had learning disabilities. *Id*. at 208.

46. *See* MEDA CHESNEY-LIND & RANDALL G. SHELDEN, GIRLS, DELINQUENCY, AND JUVENILE JUSTICE 34-35 (2d ed.1998).

mental health needs that have gone untreated. A study including 1,829 youth in a the Chicago area's Cook County juvenile detention facility found that 65% of the boys and 71% of the girls met the criteria for being diagnosed with a psychiatric disorder.[47] A Florida study of three hundred young offenders found that 82% had a mental health issue and 51% had potential substance abuse problems.[48] Most young offenders have experienced situations in their lives that call out for sentencing mitigation. Motivated by a desire to uncover this information – and equipped with the knowledge and skills to do so effectively – attorneys can dramatically impact the outcome of these young offenders' criminal cases by presenting information about childhood trauma, abuse, disabilities, and mental health issues in court.

C. The Impact of Mitigating Evidence on Judicial Decision-Making

Presenting mitigating information about a client transforms the way people perceive the criminal act he committed. Highlighting a history of victimization humanizes the individual and contextualizes his criminal behavior. In addition, telling an individual's life story complicates the tendency to demonize and blame the individual. Rather, it exposes the range of factors that create the conditions under which young people engage in serious crime, widening the web of people and institutions that are responsible for these conditions and, by extension, for the crime committed.

Judges who learn about the tragic details of a young offender's life are likely to be more open to rehabilitative sentencing options. People tend to support less severe punishments when they are presented with a greater level of detail regarding the circumstances of a crime.[49] Research demonstrates that "'[w]hen people are told about an offender's history of childhood abuse, for example, their desire for severe punishment diminishes.'"[50] A recent study revealed that when people were asked to choose between trying a juvenile offender in juvenile or adult court, study participants were much more likely to select juvenile court if they were informed that the young person had been abused.[51]

Judges' decisions are likely impacted in a similar way. Imagine, for example, what a judge's initial response to hearing about a sixteen-year-old teenager who sexually assaulted a fourteen-year-old neighbor might be. Characterized as a sexual deviant who preyed upon his innocent cousin to satisfy his personal desires, this young man did not initially engender empathy from the court. However, when

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47. Elizabeth Cauffman & Thomas Grisso, *Mental Health Issues Among Minority Offenders in the Juvenile Justice System*, *in* OUR CHILDREN, THEIR CHILDREN: CONFRONTING RACIAL AND ETHNIC DIFFERENCES IN AMERICAN JUVENILE JUSTICE 390, 398 (Darnell F. Hawkins & Kimberly Kempf-Leonard eds., 2005).

48. *Id.* at 399.

49. *See* Andrew E. Taslitz, *The Criminal Republic: Democratic Breakdown as a Cause of Mass Incarceration*, 9 OHIO ST. J. CRIM. L. 133, 175 (2011).

50. *Id.* at 176 (quoting JULIAN V. ROBERTS & MICHAEL J. HOUGH, UNDERSTANDING PUBLIC ATTITUDES TO CRIMINAL JUSTICE 24 (2005)).

51. Narina Nunez, Minday J. Dahl, Connie M. Tang & Brittney L. Jensen, *Trial Venue Decisions in Juvenile Cases: Mitigating and Extralegal Factors Matter*, 12 LEGAL & CRIMINOLOGICAL PSYCHOL. 21, 37 (2007).

the young man's attorney uncovered Child Protective Services (CPS) records detailing that he had been the victim of extreme physical and sexual abuse throughout his childhood, the judge's perspective shifted. Further details about his childhood reinforced the profound victimization this young man experienced himself. Records indicated that he was born with opiates in his system to a mother who abused heroin and alcohol throughout her pregnancy. CPS records revealed that he was removed from his parents four times prior to the age of six. When he was three-years-old, he was left outside in the snow while his mother was on a drug binge. At least three adult relatives sexually abused and/or sodomized the child when he was three to six years old. Presented with detailed information about the trauma this young man experienced at a very early age, the court was more inclined to interpret his actions in the context of this trauma. The legal issues were thus viewed through this lens, and a greater emphasis was placed on crafting a rehabilitative sentence.

The Supreme Court has recognized that this type of mitigating information may well impact the outcome of a sentence in the death penalty context.[52] In *Rompilla v. Beard*, the Court reasoned that mitigating evidence about the defendant's experiences of childhood abuse, mental impairments, parental neglect, and developmental disability "might well have influenced the jury's appraisal of [his] culpability . . . and the likelihood of a different result if the evidence had gone in is sufficient to undermine confidence in the outcome actually reached at sentencing."[53] Similarly, in *Wiggins v. Smith* the Court stated: "Had the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance" with regards to the sentence imposed.[54] The impact of this kind of information is not limited to the death penalty context and would likely impact decisions of judges and prosecutors considering other sentencing options as well.

Over the past year, a string of California cases have considered the applicability of the Supreme Court's holding in *Graham* – which specifically prohibited sentencing juveniles to life without the possibility of parole ("LWOP") for non-homicide crimes – to cases where juveniles are sentenced to *de facto* LWOP sentences. A split of authority has emerged among appellate courts with regards to whether *Graham*'s holding restricts sentencing juveniles to prison sentences that exceed the life expectancy of the offender, and the California Supreme Court is currently considering the issue.[55] Although there are various possible explanations for the split of authority, the presence of mitigating information about the offender – or lack thereof – may very well have swayed the outcomes of these cases. More importantly, courts' consistent reference to mitigating information about the lives of these young offenders indicates that such

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52. *See* Rompilla v. Beard, 545 U.S. 374, 393 (2005); Wiggins v. Smith, 539 U.S. 510, 537 (2003).

53. *Rompilla*, 545 U.S. at 393 (citation omitted).

54. *Wiggins*, 539 U.S. at 537.

55. *See* People v. Caballero, 119 Cal. Rptr. 3d 920 (Cal. Ct. App. 2011), *review granted and opinion superseded by* 250 P.3d 179 (Cal. 2011).. Other state court decisions on this issue, including Georgia, Arizona, and Florida, have limited Graham's application to sentences specifically labeled as "life without parole" and have declined to extend the holding to limit the imposition of term-of-years sentences. *See, e.g.*, Henry v. State, 82 So. 3d 1084 (Fla. Dist. Ct. App. 2012).

information matters.

The California cases holding that non-homicide juvenile offenders may not be sentenced to prison terms exceeding their life expectancies incorporate mitigating information about the offenders into their opinions, demonstrating that courts have found this evidence to be important to their understanding of these cases. In *People v. J.I.A.*, an appellate court considered whether sentencing a juvenile to fifty years to life plus two consecutive life terms for non-homicide convictions constituted cruel and unusual punishment.[56] The court dedicated a substantial portion of its analysis to a discussion of the defendant's "extremely abusive childhood," which included sexual abuse at the age of five or six.[57] Referencing *Graham*'s consideration of the defendant's background, including parental neglect, his mental health diagnoses, and his history of substance abuse, the court concluded that J.A.'s "family life and upbringing are also highly relevant to the analysis."[58] In addition, the court emphasized the fact that J.A. was "mentally retarded" or, at the very least, of "substandard intelligence."[59] Based upon this information, the court concluded that the sentence was cruel and unusual punishment because "he is not *eligible* for parole until about the time he is expected to die."[60] The court therefore modified the sentence to run concurrently rather than consecutively, thereby allowing that he would be eligible for parole when he is fifty-six years old, after serving forty-two and a half years in prison.[61]

Similarly, an appellate court reversed the sentence of Antonio de Jesus Nuñez, concluding that a sentence of one-hundred and seventy-five years to life is a de facto sentence of life without parole and therefore violates the Eighth Amendment under *Graham*.[62] The opinion emphasized mitigating evidence about Antonio's childhood. Specifically, the opinion recounts "the post-traumatic stress disorder" that was "informed by his trauma history of having been shot, his brother being shot and killed, his life being threatened, and seeing people shot and killed in his neighborhood."[63] The court went on to explain that Antonio's brother was shot while attempting to help Antonio.[64] The opinion noted that Antonio had been diagnosed with major depression, was amenable to treatment in juvenile hall, and suffered from "'adverse developmental factors including early alcohol and drug use, neglect and abuse, and possible cognitive defects.'"[65] Mitigating evidence clearly impacted the court, as evidenced by the substantial attention devoted to these issues in its opinion.

In another California appellate case, the court declined to find an Eighth Amendment violation when a fifteen year old was sentenced to thirty-five years

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56. People v. J.I.A., 127 Cal. Rptr. 3d 141 (Cal. Ct. App. 2011), *review granted and opinion superseded by* 260 P.3d 283 (Cal. 2011).

57. *Id.* at 146, 152 (describing additional details about physical, emotional, and sexual abuse he suffered).

58. *Id.* at 152.

59. *Id.*

60. *Id.* at 149.

61. *Id.* at 154.

62. *In re* Nuñez, 93 Cal. Rptr. 3d 242 (Cal. Ct. App. 2009).

63. *Id.* at 261.

64. *Id.*

65. *Id.* at 252.

and eight months to life, noting that "the paucity of the record in this matter fails to support an as applied challenge to defendant's sentence" because essentially no mitigating information was presented.[66] Specifically, the court noted that "the record contains no information about defendant's upbringing"[67] and concluded, "[w]ithout sufficient mitigating evidence about defendant, there is nothing to counterbalance the fact that the robberies, and the use of a firearm during each of the robberies, present a clear danger to society justifying a lengthy sentence."[68] Rather than reversing the sentence and requiring the trial court to consider mitigating information in determining the appropriate sentence, as in *Mendez*, the court ruled that the evidence presented did not render his sentence cruel and unusual under the Eighth Amendment.[69] The court suggested instead that he could bring a writ of habeas corpus, which would provide a remedy "should he be able to garner evidence beyond the record provided on appeal."[70]

People v. Mendez emphasizes the importance of presenting mitigating evidence at a sentencing hearing of a juvenile offender in light of *Graham*'s reasoning.[71] In that case, the court concluded that a sentence of eighty-four years to life for a juvenile not convicted of homicide constitutes cruel and unusual punishment because it amounts to a "de facto LWOP sentence."[72] The opinion devoted substantial attention to the lack of mitigating evidence presented by counsel in this case, stating:

> We are particularly troubled here by the fact that the record is silent as to Mendez's personal and family life and upbringing. This is important because the particular characteristics of the offender are relevant to the harshness of the penalty and a defendant's culpability. The record is silent as to the reasons Mendez joined a gang in the first place, any drug use, mental health issues, educational level, etc. It may well be the case that there were mitigating factors that would diminish his culpability and expose the harshness of his sentence. But we simply have no such knowledge here. And it does not appear that the trial court had any such evidence before imposing consecutive sentences.[73]

The opinion references the Supreme Court's description of Graham's childhood, explaining that the Court considered "that his parents were drug addicts, that he had been diagnosed with attention deficit hyperactivity disorder in elementary school, and that he began drinking at age 9 and smoking marijuana at age 13."[74] Although *Mendez* does not interpret *Graham* to require counsel to present mitigating evidence, it implies that the absence of such information significantly impacts the Court's ability to analyze whether the sentence at issue constitutes cruel and unusual punishment. The decision highlights the importance of mitigation on the

66. People v. Roldan, 2011 WL 3873858, at *5 (Cal. Ct. App. Sept. 2, 2011).
67. *Id.*
68. *Id.* at *6.
69. *Id.* at *3.
70. *Id.* at *5.
71. People v. Mendez, 114 Cal. Rptr. 3d 870, 884-85 (2010).
72. *Id.* at 882.
73. *Id.* at 884-85 (citations omitted).
74. *Id.* at 885 (citing Graham v. Florida, 130 S. Ct. 2011, 2018 (2010)).

outcome of cases where juveniles are subject to sentencing in adult courts.

Presenting mitigating evidence humanizes individual defendants by presenting a counter-narrative to the common assumption that young offenders are "super-predators." Mitigation evidence is often referred to as "empathy evidence" by defense attorneys who seek to humanize their clients in the eyes of judges and juries.[75] This humanization is particularly important given that the vast majority of youth facing sentencing in adult courts are youth of color,[76] a population that is systematically dehumanized and demonized in popular discourse.[77]

III. RAISING AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM BASED ON FAILURE TO PRESENT MITIGATING EVIDENCE

The Sixth Amendment of the United States Constitution requires counsel to provide effective representation.[78] In the context of juvenile defendants, I argue that mitigating evidence must be presented in order to meet this standard. Failure to present such evidence can give rise to a claim of ineffective assistance of counsel on direct appeal or through a writ of habeas corpus. This Part draws upon a strategy employed by Stanford Law School's Criminal Defense Clinic in order to obtain post-conviction relief for people sentenced under California's Three Strikes Law.[79] In the same way that the Stanford Clinic brings ineffective assistance of counsel claims to challenge Three Strikes sentences on the basis that counsel failed to present mitigating evidence,[80] post-conviction attorneys could challenge the sentences of juveniles sentenced to lengthy adult prison sentences.

Under *Strickland v. Washington*, an attorney is deemed ineffective when his performance falls below a reasonable standard, as defined by professional norms, and when the attorney's failures resulted in prejudice.[81] Although presenting mitigating evidence is not universally required of attorneys in non-death penalty sentencing hearings,[82] the case is stronger for juvenile defendants. Professional

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75. Thomas W. Brewer, *Race and Jurors' Receptivity to Mitigation in Capital Cases: The Effect of Jurors', Defendants', and Victims' Race in Combination*, 28 L. & HUM. BEHAV. 529, 532 (2004).

76. In 2010, over fifty-five percent of juveniles sentenced for felonies in adult court were Hispanic and over twenty-nine percent were Black. KAMALA D. HARRIS, CAL. DEP'T OF JUSTICE, JUVENILE JUSTICE IN CALIFORNIA 2010, at 42 tbl.31 (2011). Only 10.5% of juveniles sentenced for felonies in adult court were White. *Id.* A national study concluded that "African American youth were overrepresented and White youth were underrepresented in cases waived to adult court" for all types of offenses. EILEEN POE-YAMAGATA & MICHAEL A. JONES, AND JUSTICE FOR SOME: DIFFERENTIAL TREATMENT OF MINORITY YOUTH IN THE JUSTICE SYSTEM 12 (2002).

77. *See* Caldwell & Caldwell, *supra* note 1.

78. *See* Strickland v. Washington, 466 U.S. 668, 686 (1984).

79. Michael Romano, *Striking Back: Using Death Penalty Cases to Fight Disproportionate Sentences Imposed Under California's Three Strikes Law*, 21 STAN. L. & POL'Y REV. 311, 316 (2010).

80. *Id.* at 318.

81. *Strickland*, 466 U.S. at 687 ("First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.").

82. Criminal defense attorneys arguably are required to introduce mitigating information at sentencing. *See* Tamar M. Meekins, *You Can Teach Old Defenders New Tricks: Sentencing Lessons from Specialty Courts*, in REHABILITATING LAWYERS, *supra* note 4, at 144, 145 (explaining that a

norms governing juvenile delinquency practice emphasize counsel's duty to obtain and present such information in juvenile courts. In death penalty cases, counsel is ineffective when she fails to adequately gather and present mitigating information about the defendant at the sentencing phase of the trial.[83] The Stanford Clinic pursues post-conviction reversals of sentences imposed under California's Three Strikes Law on the ground that failure to present mitigating evidence at sentencing hearings in Three Strikes cases similarly constitutes ineffective assistance of counsel.[84] Comparing Three Strikes sentencing hearings to death penalty sentencing, the Clinic has succeeded in bringing ineffective assistance of counsel claims due to trial counsel's failure to adequately discover and present mitigating information at sentencing.[85] Similarly, sentencing hearings for juvenile offenders facing substantial prison sentences in adult court arguably require counsel to uncover and present mitigating information.

A. Establishing an Obligation to Present Mitigating Evidence

1. Counsel's Requirement to Present Mitigating Evidence in Capital Cases

In the death penalty context, courts are constitutionally required to consider "the character and record of the individual offender and the circumstances of the particular offense."[86] Accordingly, failure to adequately find and present mitigating evidence during the penalty phase constitutes ineffective assistance of counsel.[87] A series of three major Supreme Court cases, each of which held an attorney ineffective for inadequately presenting mitigating evidence during the penalty phase of a capital case, have established relatively high standards for requiring attorneys to uncover mitigating evidence in death penalty cases.[88] Traditionally, the Court has distinguished death penalty cases from other criminal cases, thus limiting counsel's burden of presenting mitigating evidence at sentencing to death penalty cases.[89] In *Williams v. Taylor*, the Court recognized

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criminal defense attorney is "required to marshal the facts, introduce evidence of mitigating circumstances, and assist the defendant in presenting his or her sentencing requests.").

83. Williams v. Taylor, 529 U.S. 362, 393 (2000); Wiggins v. Smith, 539 U.S. 510, 522-23 (2003); Rompilla v. Beard, 545 U.S. 374, 377 (2005) ("even when a capital defendant's family members and the defendant himself have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial.").

84. Romano*, supra* note 79, at 318.

85. *Id*.

86. Woodson v. North Carolina, 428 U.S. 280, 304 (1976). "While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Id.* (citing Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion).

87. Strickland v. Washington, 466 U.S. 668, 686-87 (1984).

88. *Williams*, 529 U.S. 362; *Wiggins*, 539 U.S. 510; *Rompilla*, 545 U.S. 374.

89. *See Woodson*, 428 U.S. at 305 ("This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two.

that the defendant had "a constitutionally protected right [ ] to provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer."[90] In that case, trial counsel failed to uncover "extensive records graphically describing Williams's nightmarish childhood."[91] Specifically, trial counsel failed to present evidence

> that Williams' parents had been imprisoned for the criminal neglect of Williams and his siblings, that Williams had been severely and repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents' incarceration (including one stint in an abusive foster home), and then, after his parents were released from prison, had been returned to his parents' custody.[92]

Further, trial counsel did not present evidence that he was borderline mentally retarded, had limited schooling, and demonstrated helpful, non-violent behavior while in prison.[93] The Supreme Court concluded that "trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background,"[94] and this failure to present this mitigating evidence "raised 'a reasonable probability that the result of the sentencing proceeding would have been different' if competent counsel had presented and explained the significance of all the available evidence."[95] The Court's conclusion that the attorney failed to adequately investigate rested upon the commentary accompanying the ABA Standards for Criminal Justice regarding counsel's duty to investigate.[96] These standards govern defense counsel generally and are not limited to capital cases.

Similarly, in *Wiggins* the defendant suffered a tragic childhood characterized by repeated episodes of physical and sexual abuse perpetrated by various adults in his life.[97] Trial counsel failed to uncover or present this information, and Wiggins

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Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.").

90. *Williams*, 529 U.S. at 393.

91. *Id.* at 395.

92. *Id.*

93. *Id.* at 396 (internal quotation marks omitted).

94. *Id.*

95. *Id.* at 399 (citing Strickland v. Washington, 466 U.S. 668, 694 (1984)).

96. *Id.* at 396 (citing ABA STANDARDS FOR CRIMINAL JUSTICE 4-4.1, cmt. at 4-55 (2d ed. 1980)).

97. Wiggins v. Smith, 539 U.S. 510, 516-18 (2003). A social worker hired by post-conviction counsel reported:

> [P]etitioner's mother, a chronic alcoholic, frequently left Wiggins and his siblings homes alone for days, forcing them to beg for food and to eat paint chips and garbage. Mrs. Wiggins' abusive behavior included beating the children for breaking into the kitchen, which she often kept locked. She had sex with men while her children slept in the same bed and, on one occasion, forced petitioner's hand against a hot stove burner—an incident that led to petitioner's hospitalization. At the age of six, the State placed Wiggins in foster care. Petitioner's first and second foster mother abused him physically and, as petitioner explained to [the social worker], the father in his second foster home repeatedly molested and raped him. At age 16, petitioner ran away from his foster home and began living on the streets. He returned intermittently to additional foster homes, including one in which the foster mother's sons allegedly gang-raped him on more than one occasion. After leaving the foster care system, Wiggins entered a Job Corps program and was allegedly sexually abused by his supervisor."

was sentenced to death.[98] The Supreme Court referenced the standard practice of preparing social history reports in capital cases in Maryland at the time of the sentencing, and concluded that counsel's preparation fell short of the standard practice in Maryland as well as the standards for death penalty cases articulated by the American Bar Association.[99] While the *Williams* opinion relied on ABA guidelines regarding criminal defense practice more generally,[100] *Wiggins* drew upon more specific professional standards governing attorneys in capital cases.[101] The Court concluded that counsel's failure to obtain this information "did not reflect reasonable professional judgment,"[102] and there was a "reasonable probability" the jury "would have returned with a different sentence" if it had been presented with this mitigating evidence.[103]

In *Rompilla* – the most recent of the string of Supreme Court decisions finding ineffective assistance of counsel based upon failure to adequately present mitigating information in capital cases – the Court relied upon the American Bar Association Standard 4-4.1 (governing a criminal defense attorney's duty to investigate) to conclude that Rompilla's attorney's investigation fell short of that which would be required under professional norms.[104] The Court also referenced ABA guidelines related specifically to defense counsel's obligations in capital cases.[105] As in *Williams* and *Wiggins*, the Court concluded that counsel's inadequate investigation – failure to look in the file regarding his prior convictions, which the prosecution relied upon to show aggravation – obscured mitigating evidence that would likely have led to a different outcome in the case.[106] Specifically, the defense failed to uncover evidence that his "IQ was in the mentally retarded range" and that he showed signs of schizophrenia.[107] Further, counsel failed to uncover details of Rompilla's traumatic childhood, including exposure to alcohol as a fetus, severe beatings by his father, exposure to domestic violence in the home, and his being locked "in a small wire mesh dog pen that was filthy and excrement filled."[108]

Defendants are not constitutionally entitled to an "individualized determination that punishment is 'appropriate'" outside of the death penalty context.[109] Accordingly, courts are not required to consider mitigating factors prior to sentencing except in capital cases.[110] Even though there is no constitutional requirement that courts consider mitigating evidence, such evidence is frequently presented by defense counsel in discretionary sentencing hearings. Developing

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Id. at 516-17 (citations omitted).

98. *Id*. at 516.
99. *Id.* at 524.
100. *Williams*, 529 U.S. at 396.
101. *Wiggins*, 539 U.S. at 524.
102. *Id.* at 534.
103. *Id.* at 536.
104. Rompilla v. Beard, 545 U.S. 374, 387 (2005).
105. *Id*. at 387-88 n.7.
106. *Id.* at 393.
107. *Id.* at 391-93.
108. *Id.* at 391-92.
109. Harmelin v. Michigan, 501 U.S. 957, 995 (1991).
110. *Id.* at 994-95.

such information is important because, in addition to impacting sentencing, it may help to secure a better plea bargain. Despite the importance of mitigation and the professional standards that recognize attorneys' responsibility to develop such information, courts do not generally deem counsel ineffective for failing to develop mitigating evidence in non-capital cases. In contrast to death penalty cases where – as discussed above – attorneys must present mitigating evidence at sentencing, counsel is not clearly required to develop such evidence in non-capital cases. In *Strickland*, the Court distinguished capital sentencing from "ordinary sentencing," indicating that ordinary sentencing hearings may require a different standard for counsel because such hearings may be informal and "involve standardless discretion in the sentence."[111] The more formal nature of capital sentencing hearings renders them more similar to trials and, according to *Strickland*, requires higher standards for counsel.[112] However, under *Strickland*'s standard requiring attorneys to provide representation that is reasonable under professional norms, counsel is arguably obligated to similarly present mitigating information in non-capital sentencing hearings. The ABA Standards for Criminal Justice – which are often relied upon to establish professional norms by which to measure the reasonableness of counsel's representation – require all criminal defense counsel to investigate mitigating evidence.[113] According to the commentary accompanying these standards, "[t]he lawyer has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing. . . . Information concerning the defendant's background, education, employment record, mental and emotional stability, family relationships, and the like, will be relevant, as will mitigating circumstances surrounding the commission of the offense itself."[114] However, courts are generally reluctant to find counsel ineffective for failing to adequately prepare evidence of mitigation in non-capital cases. For example, the Ninth Circuit refuses to review habeas petitions based upon ineffective assistance of counsel at sentencing hearings.[115]

2. The Stanford Clinic Model

Claims of ineffective assistance of counsel based upon failure to present mitigating information at sentencing hearings generally fail when the defendant is not facing the death penalty.[116] However, in spite of this deeply entrenched "death is different" approach, the Stanford Clinic has successfully argued that an attorney is ineffective if she fails to present mitigating evidence in a California Three Strikes sentencing hearing.[117] By analogizing Three Strikes sentencing hearings to the death penalty context, the Stanford Clinic has convinced California courts that failure to present mitigating information at sentencing hearings for Three Strikes

111. Strickland v. Washington, 466 U.S. 668, 686 (1984).
112. *Id.* at 686-87.
113. ABA STANDARDS FOR CRIMINAL JUSTICE 4-4.1 (3d ed. 1993).
114. ABA STANDARDS FOR CRIMINAL JUSTICE 4-4.1, cmt. at 183 (3d ed. 1993).
115. Romano, *supra* note 79, at 339.
116. *See id.*
117. *Id*. at 317-18.

cases constitutes ineffective assistance of counsel.[118]

California's Three Strikes Law requires that a defendant be sentenced to twenty-five years to life for committing any felony if he has two prior convictions for "serious" or "violent" offenses.[119] The twenty-five to life sentence is mandatory, but there is one exception: judges are permitted to dismiss a prior strike conviction "in the interest of justice," thus allowing them some discretion not to impose a third strike sentence.[120] The Clinic has convinced California courts that sentencing for a third strike offense is similar to a death penalty sentencing because courts are required to consider personal information about a defendant in order to determine whether to dismiss a prior strike conviction just as courts must consider characteristics of an offender in determining whether to sentence him to death.[121] The California Supreme Court has established that courts must consider "the particulars of his background, character, and prospects" in determining whether to dismiss a prior conviction such that an enhanced sentence would not apply under California's Three Strikes Law.[122] The Clinic has successfully argued that in order to adequately consider these issues, courts must be presented with mitigating information about a client's background. For example, it has uncovered and presented information about defendants' histories of mental health issues, abuse and neglect suffered as children, exposure to parental drug addictions or alcoholism, prior suicide attempts, and evidence of developmental disabilities that was not presented at sentencing.[123] California courts have found trial counsel ineffective for failing to present this evidence and have accordingly reversed twelve Three Strikes sentences.[124] This is a unique approach given the general reluctance of courts to consider claims of ineffective assistance of counsel relating to sentencing hearings outside of the capital context.

3. Mitigation Requirement for Juveniles Sentenced in Adult Courts

Similarly, attorneys should be obligated to present mitigating evidence at sentencing hearings for juveniles, particularly those who are sentenced in adult courts. Juveniles who commit crimes are generally prosecuted in juvenile delinquency courts, where professional standards emphasize the importance of counsel's presenting mitigating information at disposition hearings—the juvenile court equivalent of sentencing hearings.[125] Juveniles who are prosecuted in adult courts are different from adults in significant ways, and those differences render the

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118. *Id.* at 318 ("[t]o date, Clinic students have won reversals of twelve life sentences imposed under the Three Strikes law for minor crimes.").

119. CAL. PENAL CODE §§ 667, 1170.12 (West 2012).

120. People v. Romero, 917 P.2d 628, 649 (Cal. 1996); People v. Williams, 948 P.2d 429, 436 (Cal. 1998).

121. Romano, *supra* note 79, at 340.

122. *Romero*, 917 P.2d at 649.

123. Romano, *supra* note 79, at 338.

124. *Id.*

125. *See* INST. OF JUDICIAL ADMIN. & ABA, JUVENILE JUSTICE STANDARDS: STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES § 9.2(b)(ii) (1980) ("[w]hether or not social and other reports are readily available, the lawyer has a duty independently to investigate the client's circumstances, including such factors as previous history, family relations, economic condition and any other information relevant to disposition.").

presentation of mitigating evidence critically important in their sentencing hearings, particularly because these young offenders may be faced with spending the rest of their lives in prison. The Supreme Court's decision in *Graham* rests heavily upon the Court's finding that juveniles are fundamentally different from adults, and normative characteristics of adolescents render them less culpable than adults.[126] *Graham*'s holding does not address claims of ineffective assistance of counsel, nor does it directly address the issue of presenting mitigating evidence about juvenile offenders. However, the Court's reasoning emphasizes mitigating information about juvenile offenders as a class, reinforcing the importance of considering evidence of mitigation in juvenile sentencing. The Court explained, "[t]he judicial exercise of independent judgment requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question."[127] Although the decision focuses on normative characteristics that apply to adolescents as a category, the reasoning illustrates that considering a juvenile's diminished culpability is material to determining the appropriate sentence.

In *Graham*, the Court held that a particular sentence – life without the possibility of parole – is unconstitutional as applied to non-homicide juvenile offenders because of their diminished culpability.[128] Similarly, courts should consider information that may diminish the culpability of an individual juvenile defendant such that a less severe sentence would be appropriate. The approach the *Graham* court takes in analyzing the behavior of juvenile offenders emphasizes the fundamental importance of considering the "lessened culpability" of juveniles based upon neurological and psychological characteristics of adolescents.[129] According to the Court, "[i]t remains true that 'from a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.'"[130] The Court emphasized the "limited moral culpability" of juvenile offenders.[131] This reasoning about fundamental characteristics of juveniles cannot be logically restricted to apply only to the analysis of life without parole sentences; the Court discusses adolescents generally. The *Graham* decision created a categorical rule prohibiting the sentence of life without parole for juveniles convicted of non-homicide offenses such that individual consideration of mitigating information this particular class of offenders would be irrelevant. However, the only way to take into account the "limited moral culpability" of juvenile offenders facing other sentences would be for courts to consider the factors that impact an individual's development and, therefore, their culpability. For example, it would be impossible to evaluate the culpability of a fourteen-year-old accused of committing sex offenses without considering information about the offender's sexual victimization as a child. Mitigating information is the key to assessing diminished culpability and, therefore, must be considered in order for sentencing decisions to remain

126. Graham v. Florida, 130 S. Ct. 2011, 2026 (2010).
127. *Id.*
128. *Id.* at 2034.
129. *Id.* at 2026-27.
130. *Id*. (quoting Roper v. Simmons, 543 U.S. 551, 570 (2005)).
131. *Id.* at 2030.

consistent with the fundamental reasoning of *Graham*.

State appellate courts have reached different conclusions as to whether mitigating information about juvenile offenders must be considered in sentencing hearings under *Graham*. As previously discussed, in *People v. Mendez*, a California appellate court interpreted *Graham*'s reliance on mitigating information and research on adolescent development to require consideration of mitigating evidence about a juvenile defendant facing a lengthy prison sentence at his sentencing.[132] The court reversed the judgment and directed the trial court to reconsider the sentence; in accord with the opinion, the reconsideration would require the consideration of any mitigating information about Mendez's background.[133] In contrast, an appellate court in Texas recently held that trial courts do not have the duty "to ensure that all mitigating evidence is fully developed during sentencing" for juvenile offenders.[134] The Texas court took the opposite approach of the California court, focusing on the specific holding of *Graham* rather than its reasoning. The court explained that "discussion of a constitutional rule regarding mitigating evidence is conspicuously absent from the decision, and we do not find merit in the argument that *Graham* implicitly established" an obligation to consider mitigating evidence.[135] While the California court focused on the reasoning in *Graham*, the Texas court emphasized the limited holding of the case. *Graham*'s emphasis on the relevance of the diminished culpability of adolescents is consistent with requiring counsel to present mitigating evidence relating to a juvenile offender's diminished culpability.

Counsel should be required to present mitigating evidence about juvenile clients because their cases are unique. Although counsel has previously only been required to present mitigating evidence in death penalty cases according to the "death is different" principle, the *Graham* decision stands for the proposition that juveniles are different too.[136] Juveniles sentenced to life in prison face longer sentences than their adult counterparts because their sentences begin at a younger age.[137] Thus, they face harsher penalties due to their youth. In addition, they are more likely to change because they are in a process of maturation.[138] Their characters are not yet established, and most will not continue to commit crimes as adults.[139] Under this reasoning, it is particularly important for courts to consider evidence of rehabilitation or alternative sentences that would promote such rehabilitation. Due to the unique situation of juvenile offenders, the Court in *Graham* applied an analytical framework previously reserved for death penalty cases to a non-death sentence—juvenile life without parole.[140] In taking this approach, the Court blurred the line that distinguished the rules for death penalty cases from other criminal cases, particularly those involving juvenile defendants.

132. People v. Mendez*,* 114 Cal. Rptr. 3d 870, 884-85 (Cal. Ct. App. 2010).
133. *Id.* at 885-86.
134. Welch v. State, 335 S.W.3d 376, 377 (Tex. Crim. App. 2011).
135. *Id.* at 381.
136. *Graham*, 130 S. Ct. at 2026.
137. *Id*. at 2028.
138. *Id.* at 2026-27.
139. *Id*. at 2026.
140. *Id.* at 2032.

According to the same reasoning, ineffective assistance of counsel claims for juvenile offenders should arguably be analyzed under the standards previously reserved for capital cases because mitigating evidence is necessary to make appropriate sentencing decisions in both realms.

The type of mitigating evidence counsel is required to present in the sentencing phase for capital cases is the same type of evidence courts typically consider in sentencing juvenile offenders, further reinforcing the similarities between capital sentencing and sentencing of juvenile offenders. In the capital context, attorneys are responsible for gathering evidence about a defendant's childhood, mental capacity, health, history of substance abuse, experiences of abuse or neglect, and developmental disabilities.[141] The juvenile cases previously discussed in this Article have incorporated similar information into their analysis. This is the same type of information that professional standards regarding criminal defense of juveniles require counsel to obtain.[142] It is incompetent for counsel to fail to present this information to a judge charged with determining a young person's fate.

B. Establishing Ineffective Assistance of Counsel

1. Deficient Representation

Under *Strickland*, an attorney is "deficient" or ineffective if his representation "fell below an objective standard of reasonableness" as dictated "under prevailing professional norms."[143] The Supreme Court has considered the American Bar Association guidelines for defense counsel in assessing reasonable standards of representation in the death penalty context.[144] Professional standards for the representation of juvenile offenders generally provide that presenting mitigating evidence is a critical aspect of effectively representing this population.[145] The American Bar Association's Center for Criminal Justice has published a set of Juvenile Justice Standards including recommendations for the obligations of counsel. Under these standards, counsel "has a duty independently to investigate the client's circumstances, including such factors as previous history, family relations, economic condition, and any other information relevant to disposition."[146] Furthermore, the Standards provide that "[t]he lawyer should seek to secure the assistance of psychiatric, psychological, medical or other expert personnel needed for purposes of evaluation, consultation, or testimony with

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141. *See* Rompilla v. Beard, 545 U.S. 374, 390-93 (2005).

142. *See* ABA STANDARDS FOR CRIMINAL JUSTICE 4-4.1 (3d ed. 1993).

143. Strickland v. Washington, 466 U.S. 668, 688 (1984).

144. *Id.* at 688-89 ("Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable . . ."). *See also Rompilla*, 545 U.S. at 387.

145. *See* ABA STANDARDS FOR CRIMINAL JUSTICE 4-4.1 (3d ed. 1993).

146. INST. JUDICIAL ADMIN. & ABA, JUVENILE JUSTICE STANDARDS: STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES § 9.2(b) (1980). Although these standards may be crafted with juvenile delinquency proceedings in mind, the same standards should apply for the representation of juveniles whose cases are processed through adult court because the same developmental issues apply to all adolescents regardless of the court.

respect to formation of a dispositional plan."[147] In addition, the ABA guidelines for representing adults require counsel to "collect information concerning the defendant's background, education, employment record, mental and emotional stability, family relationship, 'and the like.'"[148]

Similarly, the National Juvenile Defender Center interprets the duties of competence and diligence to require that juvenile defense attorneys are "well-versed in the areas of child and adolescent development" and have a "working knowledge," and contact with experts, in "collateral consequences" of conviction, special education, abuse and neglect, cultural competence, and mental health.[149] In addition, these standards indicate that competent juvenile defense counsel should consult "with mitigation specialists, social workers, and mental health, special education, and other experts to develop a plan consistent with the client's expressed interests" at the disposition hearing.[150] Counsel should also "prepare[] and present[] the court with a creative, comprehensive, strengths-based, individualized disposition alternative consistent with the client's expressed interests."[151] Although these standards relate to the representation of juveniles in delinquency court, they are germane to representing juvenile offenders in adult court.

Unfortunately, juvenile defense attorneys regularly and systematically fail to meet these standards.[152] Many court-appointed attorneys are inundated with cases, leaving little time for in-depth preparation of each client's case.[153] There are unique challenges to representing youth, including communication difficulties and challenges to earning clients' trust. In the *Graham* decision, the Supreme Court discussed "special difficulties encountered by counsel in juvenile representation."[154] Specifically, the Court noted that juveniles "are less likely than adults to work effectively with their lawyers to aid in their defense" due to a lack of trust and more "limited understandings of the criminal justice system and the roles of the institutional actors within it."[155] This is a problem among juvenile court attorneys that is likely more pronounced for attorneys in adult courts, who likely have few juvenile clients. In addition, some attorneys do not routinely appoint

147. *Id*. § 9.2(c).

148. ABA STANDARDS FOR CRIMINAL JUSTICE 4-4.1 cmt. (3d ed. 1993).

149. ROBIN WALKER STERLING, NAT'L JUVENILE DEFENDERS CTR., ROLE OF JUVENILE DEFENSE COUNSEL IN DELINQUENCY COURT 14 (2009), *available at* www.njdc.info/pdf/njdc_role_of_counsel_book.pdf.

150. *Id.* at 18.

151. *Id.*

152. *See* Barbara Fedders, *Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Representation*, 14 LEWIS & CLARK L. REV. 771, 792 (2010).

153. *See* JUSTICE POLICY INST., SYSTEM OVERLOAD: THE COSTS OF UNDER-RESOURCING PUBLIC DEFENSE 10 (2011), *available at* www.justicepolicy.org/uploads/justicepolicy/documents/system_overload_final.pdf (reporting on nationally recommended limits on caseloads of public defenders and concluding that "according to the most recent Census of Public Defense Offices (CPDO) conducted by the DOJ, 73 percent of county-based public defender offices lacked enough attorneys to meet these national caseload standards, while 23 percent of offices had less than half of the necessary attorneys to meet caseload standards.").

154. Graham v. Florida, 130 S. Ct. 2011, 2032 (2010).

155. *Id.*

experts to assist with developing the defense.[156] Studies have found that juvenile delinquency "[a]ttorneys rarely obtained educational records, mental health records, or other information from the community about their clients for the disposition hearing."[157] Requiring attorneys to develop and present mitigating evidence in cases where juveniles are tried in adult court may force the criminal justice system to resolve some of the endemic problems plaguing the representation of youth. At the very least, this standard would ensure that all youth have the opportunity to present mitigating evidence in the trial court or, if not, through post-conviction remedies.

2. Prejudice: Failure to Present Mitigating Evidence Impacted the Outcome

In order to establish ineffective assistance of counsel, there must be a reasonable probability that the failures of counsel contributed to the sentence that was imposed.[158] In its Three Strikes litigation, the Stanford Clinic argues that mitigating evidence may place a defendant outside the spirit of the Three Strikes law such that it should not apply.[159] Similarly, in the juvenile context, counsel could argue that mitigating information about a juvenile defendant is essential to assessing the diminished culpability of an offender and is therefore required under the spirit of *Graham*, which emphasizes the importance of considering the diminished culpability of youth offenders in determining an appropriate punishment.

Supreme Court precedent in the capital arena demonstrates that the presentation of mitigating information is likely to impact sentencing decisions. In the same way that this information is likely to impact the decision of whether to impose the death penalty, it is logical to assume that mitigating evidence likely would impact other sentencing decisions. Judges often have wide discretion in selecting the term of years to impose. Mitigating information could impact the length of the sentence a judge chooses. In addition, juvenile defendants in criminal court may argue that this evidence demonstrates that they should have been remanded to juvenile court. Many states provide some provision for remand to juvenile court, or for more lenient sentencing under "youthful offender" provisions in adult courts. Remand to juvenile court or sentencing as a "youthful offender" has major implications for the length of sentence that can be imposed. For example, a young person can be incarcerated up to the age of twenty-five in California's juvenile court system whereas that same youth could be imprisoned for

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156. *See, e.g.*, ABA JUVENILE JUSTICE CTR. & NEW ENG. JUVENILE DEFENDER CTR., MAINE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 35-36 (2003), *available at* www.njdc.info/pdf/mereport.pdf ("One indication of the lack of zealous advocacy discerned in this study was the universal recognition by district court judges that many juvenile defenders were not petitioning for available court funds for expert assessments. Given the extremely high rate of mental health problems exhibited in this population, the juvenile defense bar's insistence on the use of court-ordered and/or independent evaluations and expert testimony should be staples of court hearings: they are not.").

157. Wallace J. Mlyniec, In re Gault *at 40: The Right to Counsel in Juvenile Court–A Promise Unfulfilled*, 44 No.3 CRIM. L. BULL. 5 (2008).

158. Strickland v. Washington, 466 U.S. 668, 687 (1984).

159. Romano, *supra* note 79, at 336-37.

life through adult court. Further, mitigating evidence is likely to be useful during the plea bargaining process and may result in the prosecution offering to reduce the charge to a less serious offense, and to a reduced prison sentence. Mitigating information is recognized to have a major impact on death penalty decisions, as well as on dispositions in juvenile court. It would likely have a similar impact on the outcomes of juvenile cases in adult courts.

3. Vehicles for Raising Ineffective Assistance of Counsel Claim

Requiring the presentation of mitigating evidence as a component of effective representation would facilitate post-conviction review of the cases where juveniles are sentenced as adults by creating a clear rule establishing that counsel who fail to present evidence of mitigation are deemed ineffective. These claims would typically arise through a direct appeal, or by a writ of habeas corpus. Procedurally, appellate counsel could raise the issue of ineffective assistance of counsel based upon trial counsel's failure to adequately research and present mitigating evidence on direct appeal. If the timeline for appeal has already expired, the claim could be raised through a writ of habeas corpus.[160] The procedures would be similar to those employed in death penalty appeals where the right to present mitigating evidence, and counsel's obligation to effectively gather such evidence, are clearly recognized. This would ensure greater equity in the representation juvenile offenders receive because it would provide recourse in those cases where a juvenile's attorney does not adequately present crucial mitigating information. This is particularly important because juveniles may be less capable of advocating for themselves due to their relative immaturity, making them more likely to be prejudiced by attorneys who do not adequately represent their interests.[161]

IV. CREATING POST-CONVICTION OPPORTUNITIES TO REVIEW SENTENCES IN LIGHT OF REHABILITATION

Raising ineffective assistance of counsel claims on direct appeal or through habeas corpus writs is not the only way to incorporate the spirit of *Graham* into post-conviction review. It may also be possible to file motions for reconsideration of a sentence after sufficient time has passed to demonstrate rehabilitation. *Graham* requires that juveniles sentenced for non-homicide offenses have a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[162] While making it clear that the opportunity for release is required, the Supreme Court did not provide additional details regarding what type of opportunity the Constitution requires. The *Graham* decision made clear that courts may not determine "at the outset that [juveniles convicted of non-homicide offenses] never will be fit to reenter society."[163] However, the Supreme Court left it up to states "to explore the means and mechanisms for compliance" with its

160. Writs of habeas corpus can raise ineffective assistance of counsel claims. *See, e.g., In re* Avena, 909 P.2d 1017 (Cal. 1996).

161. *Graham* recognizes juveniles' capacity of change and rehabilitation. Graham v. Florida, 130 S. Ct. 2011, 2028-30 (2010).

162. *Id.* at 2030.

163. *Id.*

opinion.[164] Creative attorneys could engage in post-conviction advocacy to have sentences reviewed in light of evidence of rehabilitation. This may lead to legislative changes that create standardized procedures for sentence reconsideration.

California's Senate Bill 9, which has not been passed as of the publication of this Article, proposes a new procedure whereby all juveniles sentenced to life without the possibility of parole would have the opportunity to petition the court to reduce their sentences after they have served fifteen years in prison.[165] Essentially, it proposes a new post-conviction process whereby juvenile offenders would have an opportunity to petition the sentencing court "for recall and resentencing."[166] According to the proposed legislation, the petition must include a statement regarding the offender's "remorse and work towards rehabilitation."[167] The sentencing court would review the petition to determine whether to hold a hearing to reconsider the original sentence.[168] If a hearing is granted, the court would consider factors relating to the diminished culpability of the offender due to the circumstances surrounding the offense, a lack of criminal history, evidence or rehabilitation while in custody, and mitigating information, such as developmental disabilities, psychological or physical trauma, and participation in the crime with an adult co-defendant (who may have negatively influenced the younger co-defendant to participate in the crime).[169]

If passed, this law would only apply to those who have been sentenced to life without the possibility of parole.[170] The bill does not address those youth who have been sentenced to lengthy prison sentences but who—technically—still have a chance to be released on parole. Given *Graham*'s emphasis on the hope for redemption of juvenile offenders, such a procedure would make sense for all juveniles sentenced to lengthy prison sentences. Even if new procedures are not designed to address this issue, attorneys may be able to rely upon existing law to bring requests for sentencing review to court. The procedure will vary from state

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164. *Id.*.

165. S. B. 9, 2011-12 (Cal. 2010).

166. *Id.*

167. *Id.*

168. *Id.* As currently written, the legislation states that a hearing to reconsider the sentence would be granted if the sentencing court determines one of the following facts is established by a preponderance of the evidence in the defendant's petition:

> (i) The defendant was convicted pursuant to felony murder or aiding and abetting murder provisions of law. (ii) The defendant does not have juvenile felony adjudications for assault or other felony crimes with a significant potential for personal harm to victims prior to the offense for which the sentence is being considered for recall. (iii) The defendant committed the offense with at least one adult codefendant. (iv) The defendant has performed acts that tend to indicate rehabilitation or the potential for rehabilitation, including, but not limited to, availing himself or herself of rehabilitative, educational, or vocational programs, if those programs have been available at his or her classification level and facility, using self-study for self-improvement, or showing evidence of remorse.

Id.

169. *Id.* The sentencing court may consider, for example, whether the minor was convicted of murder on a felony murder theory, or as an accomplice. *Id.*

170. *Id.*

to state, but counsel could rely upon state provisions that allow for commutations of sentences by state governors and may offer evidence of rehabilitation in such applications.[171] However, this avenue is extremely limited given that commutations of sentence are rarely granted.

V. PRESENTING MITIGATING EVIDENCE: THE ART OF GATHERING INFORMATION

There is a growing body of work rooted in the theory of therapeutic jurisprudence that discusses the importance of criminal defense attorneys thoroughly developing mitigating information and a "rehabilitation-oriented packet" to use in plea negotiations or a sentencing hearing.[172] Mitigation has long been recognized as a fundamental concept in criminal law and as a critical aspect of effective representation of juvenile offenders. However, many attorneys do not adequately present such evidence. There are various explanations for this failure on the part of some attorneys. First, the vast majority of court-appointed attorneys and public defenders have too many cases to devote substantial time to gathering mitigating evidence.[173] Some defense attorneys would consider this role to be outside of their obligations in non-death penalty cases. Others do not believe that presenting mitigating evidence about childhood trauma or abuse would be helpful to their clients' cases, or they do not have the time or knowledge to locate this information.[174] However, there is a growing recognition that "in order to fully represent a client throughout all phases of the criminal justice system, they must take on various roles, including counsel, advisor, social worker, educator, and contract negotiator."[175] With regards to the time constraints making it virtually impossible for many attorneys to uncover this information, a standard rendering counsel ineffective for failing to adequately present this evidence may provide leverage for indigent defense systems to advocate for additional funding so that attorneys have sufficient resources to zealously represent their clients. At the same time, it is important for attorneys to consider developing skills rooted in other disciplines so that they are more equipped to gather mitigating information about young clients

Criminal defense attorneys typically focus on selecting appropriate experts in preparing mitigation evidence, and this is a critical piece of advocacy. However, attorneys must do some initial groundwork in order to determine the type of experts

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171. *See, e.g.*, CAL. PENAL CODE §§ 4800-4813 (West 2012); CAL. CONST. art. V, § 8; ME. REV. STAT. ANN. tit. 15, §§ 2161-2167 (2003).

172. *See* David B. Wexler, *Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defense Lawyer*, *in* REHABILITATING LAWYERS, *supra* note 4, at 20, 28.

173. In a critique of therapeutic jurisprudence, Mae C. Quinn points out that the suggestion that criminal defense attorneys should present mitigating evidence is not new. Failure to engage in this type of advocacy renders an attorney's performance "substandard" but more likely results from a lack of resources rather than a commitment to a "'traditional' lawyering model." Mae C. Quinn, *An RSVP to Professor Wexler's Warm Therapeutic Jurisprudence Invitation to the Criminal Defense Bar: Unable to Join You, Already (Somewhat Similarly) Engaged*, in REHABILITATING LAWYERS, *supra* note 4, at 91, 117-18.

174. *See* Phyllis L. Crocker, *Childhood Abuse and Adult Murder: Implications for the Death Penalty*, 77 N.C. L. Rev. 1143, 1193-94 (1999).

175. Tamar M. Meekins, *"Specialized Justice": The Over-Emergence of Specialty Courts and the Threat of a New Criminal Defense Paradigm*, *in* REHABILITATING LAWYERS, *supra* note 4, at 46, 55.

that should be appointed on a particular case. Further, the attorney is responsible for providing relevant documents and information for the experts to consider. Failure to gather comprehensive information about a client's background severely limits an attorney's effectiveness.[176] The most important starting point for gathering mitigating information is generally the accused and his or her family members. Although at first glance it may seem that it would be simple to obtain information from one's own client, research indicates that this process is more complicated than it seems in that "[t]here is often a conspiracy of silence between the youths and their family."[177] For example, study of fourteen juveniles who had been sentenced to the death penalty (before the *Roper* decision outlawed capital punishment for juvenile offenders) revealed that although each of the youth had experienced severe abuse during their childhoods, their attorneys had not presented this information either because they had not uncovered it or because the family urged them not to make the information public.[178] The following section discusses some skills and techniques that may facilitate attorneys' capacities to obtain mitigating information about their clients.

A. Communicating Effectively with Young Clients

In *Graham*, the Supreme Court recognized that "[youth] are less likely than adults to work effectively with their lawyers to aid in their defense."[179] The Court specifically cited juveniles' limited understanding of the roles of various actors in the justice system and a "reluctance to trust defense counsel" as "factors [that] are likely to impair the quality of a juvenile defendant's representation."[180] Attorneys are not typically trained in skills focused on improving communication with adolescent clients, but such skills are critical in terms of developing an understanding of the client's life.[181] Though not the only source of information, the client has intimate knowledge about his or her life that can help make sense of his or her behavior.[182] Developing open communication with a young client can dramatically improve an attorney's representation in court.

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176. *See* Fedders, *supra* note 152, at 796 (discussing the systematic failure of juvenile delinquency attorneys to gather necessary education or medical records, or to hire experts to evaluate their clients, in order to make effective arguments at disposition hearings in juvenile court, in contrast to model rules and standards).

177. Ellen Marrus & Irene Merker Rosenberg, Roper v. Simmons *and* Strickland v. Washington: *Dancing with Death*, 42 No.2 CRIM. L. BULL. 153, 158 (2006).

178. *Id.*

179. Graham v. Florida, 130 S. Ct. 2011, 2032 (2010).

180. *Id*.

181. *See* Ann Tobey, Thomas Grisso, & Robert Schwartz, *Youths' Trial Participation as Seen by Youths and Their Attorneys: An Exploration of Competence-Based Issues*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 225, 241 (Thomas Grisso & Robert Schwartz eds., 2002) ("Attorneys can be encouraged to think about ways to explain things to young people in simpler terms . . . Mental health professionals, given their knowledge of developmental, clinical, and applied interviewing strategies, are likely to be better prepared to teach lawyers these skills than are other lawyers.").

182. In *Rompilla*, the defendant's lack of open communication with trial counsel limited counsel's awareness of mitigating information regarding his childhood. Rompilla v. Beard, 545 U.S. 374, 381 (2005) ("Rompilla's own contributions to any mitigation case were minimal. Counsel found him uninterested in helping, as on their visit to his prison to go over a proposed mitigation strategy, when

The most effective approach to effectively communicating with young clients runs counter to the typical communication style of attorneys. It requires investing substantial amounts of time and using open-ended questions, rather than narrowly tailored questions aimed at eliciting specific responses. As attorneys, we are keenly focused on "relevant" information and tend to become impatient when clients talk about "irrelevant" facts. However, it is often by listening to our client's seemingly "irrelevant" stories that we become aware of highly significant information. Listening and trust-building techniques are emphasized in the fields of social work and psychology as foundational skills. Attorneys who develop some of these skills will be better prepared to obtain potentially helpful information about their clients' lives and traumatic experiences.

1. Building Rapport: Working Towards Trust

The first obstacle attorneys must overcome when representing youth is that many juveniles may not trust their attorneys. Young offenders encounter various professionals in the criminal justice system, and they often do not understand the specific roles of each individual.[183] The concept of attorney-client privilege is not widely understood by adolescents. Further, many youth offenders are socialized to distrust authority figures and to keep family affairs confidential. It is therefore important for an attorney to spend time explaining her role, as well as the rules governing confidentiality. Developmental psychologists suggest specific techniques such as using diagrams and examples to make the explanation of an attorney's role more concrete and, therefore, more likely to be understood by adolescent clients. Emphasizing confidentiality is essential particularly given the importance of peer groups in adolescence. Generally, youth in this developmental stage are very concerned about peer acceptance. Those who are detained facing serious charges are even more concerned about appearing "tough" among their peers because their safety often depends on this reputation. Showing vulnerability to other detained youth is seen as a sign of weakness that should be avoided at all costs. Thus, attorneys should reinforce the confidential nature of their communications with their clients. Privacy during attorney-client interviews is of utmost importance given the heightened confidentiality concerns among this population. Furthermore, attorneys should explain the reasons behind asking about personal experiences so that their young clients understand how this information will be used in the case. By explaining the rationale behind presenting mitigating

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Rompilla told them he was 'bored being here listening' and returned to his cell. To questions about childhood and schooling, his answers indicated they had been normal, save for quitting school in the ninth grade. There were times when Rompilla was even actively obstructive by sending counsel off on false leads."). The Supreme Court held that the attorneys should have continued to investigate by obtaining school records and records from Rompilla's prior incarcerations. *Id.* at 382. The decision reinforces that obtaining information from one's client is not the only way to uncover mitigating information. At the same time, developing skills that make it more likely that one's client will share such information is a valuable endeavor. Rompilla's trial counsel would have been in a better position to continue investigating his childhood if the defendant had been more open in his communications.

183. *See Graham*, 130 S. Ct. at 2032 ("Juveniles mistrust adults and have limited understandings of the criminal justice system and the roles of the institutional actors within it. They are less likely than adults to work effectively with their lawyers to aid in their defense.").

information and emphasizing that only the information that would be helpful to the client's case will be used by the attorney, clients may be more willing to share their stories.

More importantly, however, the attorney must invest time in getting to know the client. Once a trusting relationship is established, the information will flow. Although an initial meeting may occur in the holding tanks or attorney interview rooms in court buildings, frequent visits to meet with the client can go a long way towards building trust.[184] Rather than immediately asking a battery of personal questions about a young person's life history, it is more effective to spend time talking about issues that interest the young person. This stage in a therapeutic relationship is referred to as "building rapport" and is widely viewed as critical to the effectiveness of future therapy. Typically, counselors devote the first two counseling sessions to building rapport with clients. Skipping this step in the process can cause the client to feel unsafe and to guard information. This is the worst result for an attorney trying to illicit mitigating information. And yet, it is very difficult for attorneys to find the time to devote to this stage in the process due to the overwhelming caseloads of most public defenders and court appointed attorneys.[185] Most public defenders represent many more clients than recommended by national guidelines and have so many cases that it is virtually impossible to devote enough time to fully prepare each case.[186] Hopefully, one of the benefits of finding counsel ineffective for failing to adequately present mitigating information would be that policy-makers would be forced to allocate sufficient funding to indigent defense to bring caseloads down to recommended levels. This would provide attorneys with the additional time that is necessary to adequately prepare a defense.

Mitigating information often encompasses painful, traumatic experiences that a client would rather not discuss with anyone, particularly a stranger. Asking clients to discuss these issues is more akin to therapy than to traditional legal interviews that focus on gathering factual information. By investing time in building rapport, attorneys may be able to learn more about their clients' personal experiences. Consider, for example, my experiences with a female client who I visited frequently in the juvenile hall where she was detained. During some visits, we discussed how she was doing in school, issues with friends, and books she was reading. Other times, we focused more specifically on issues relating to her legal case. During informal conversations, I gathered pieces of information that ultimately became quite important in her case. I found out that she had been sexually abused in the gang she claimed membership in. She told me that she had been on a drug binge for the months leading up to her crime, and that she wanted to

184. A survey of young offenders in Colorado revealed that, from the perspective of the youth, "more time was needed with their lawyer to build trust, to enable their lawyer to know them as people, to be listened to, [and] to share important information about themselves and the case." ABA JUVENILE JUSTICE CTR., YOUTH LAW CTR. & JUVENILE LAW CTR., A CALL FOR JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 27 (2002), *available at* www.njdc.info/pdf/cfjfull.pdf.

185. *Id.* at 8 ("T[t]he [national] assessment found high caseloads to be the single most important barrier to effective representation" of juveniles).

186. *See* JUSTICE POLICY INST., *supra* note 153, at 10.

get treatment for her drug addiction. I also learned that she was homeless at the time of this incident because her mother had kicked her out of the family home. After three months of these meetings, she told me, "You know what, Miss? I'm going to tell you the reason my mom kicked me out. It's because I told her that my dad and my grandpa used to have sex with me when I was little." Our unstructured conversations provided me with mitigation evidence that could be presented in a more organized, chronological fashion in a motion to the court. This information also informed the choice of which experts would be most appropriate to appoint on the case, which ultimately included a psychologist with an expertise in sexual abuse.

2. Empathic, Non-Judgmental Listening Techniques

Listening in an open and non-judgmental way allows clients to feel understood, creating an environment where they are more likely to share personal information that is ultimately critical for attorneys to learn about. Reflective listening, or paraphrasing what a client says, is an effective way to show that the listener hears and understands the experiences of the speaker.[187] This technique puts the client in the role of the expert, thus minimizing obstacles to communication that can otherwise result from cultural or generational differences.[188] Reflective listening requires avoiding providing advice, sharing a personal opinion, or passing judgment. Rather, the listener focuses on what is being said and explains what she hears. This technique may seem simple, but it can be challenging to employ. Attorneys may have to fight the urge to offer legal advice, or to tell the client that a particular statement is irrelevant to their defense. However, it is worth investing time in this process. When people feel understood rather than judged, they tend to open up even more. Thus, using reflective listening techniques can help an attorney to learn more and, in turn, may dramatically impact the presentation of a case.

Getting below the superficial information provided in an initial interview is crucial. The following case study exemplifies the difference that interviewing techniques can make. A sixteen-year-old young man was sentenced to serve sixteen years in adult prison for an assault with a firearm. The social worker's report to the judge stated that the juvenile reported that he came from a stable, supportive family. He mentioned that his father left the family for a period of time because he was "doing his own thing." The social worker did not delve into this issue more deeply but instead reported the youth's version of events verbatim to the court. Based on a cursory interview with the young man, she concluded that he was not amenable to treatment in juvenile court because he had plenty of opportunities at home and had not taken advantage of them. The attorney had spent very little time talking with his client and was unaware that there was much

187. *See* MARSHALL B. ROSENBERG, NONVIOLENT COMMUNICATION: A LANGUAGE OF LIFE (2d ed. 2003).

188. Kristin Henning, *Defining the Lawyer-Self: Using Therapeutic Jurisprudence to Define the Lawyer's Role and Build Alliances that Aid the Child Client*, *in* REHABILITATING LAWYERS, *supra* note 4, at 327, 340.

more to the story, so the court made the sentencing decision based on this limited information.

In reality, this young man's mother became pregnant with him as the result of rape; she told him that she wished she had aborted him. She left him in the care of an abusive relative when he was one year old; he did not have adequate food or basic necessities. He became ill and almost died as a baby. Beginning at the age of three, he was sexually abused by a male family member who sodomized him on a regular basis. The child was brought to the United States around the age of five, however, his mother's husband was resentful towards the child. The husband was an alcoholic and would beat the child with a belt when he was intoxicated. He would also regularly beat the mother until she bled in the presence of the child. At the age of ten, the young man began to run away, feeling desperate to get away from the violence and rejection at home. He was able to feel accepted in the context of a gang, and he became a member at the age of twelve. His life history paints quite a different picture than the summary provided by the social worker, which illustrates the importance of cultivating trust and taking time to gather information from young clients.

A teenage client will likely not immediately understand how personal, painful experiences from the past relate to their current court case. Explaining this, and creating a relationship that is conducive to sharing this type of information, is therefore critical. Uncovering mitigating information often entails discussing traumatic experiences. It is typical for people who have gone through trauma to shut down when talking about their experiences. It may be helpful to back away from a topic that a client seems unwilling or unable to discuss because it may be more effective to come back to the topic at another time. An attorney's role is not to be the social worker, but the skills attorneys need in order to provide effective legal representation to youth overlap with skills required of social workers. Employing these techniques can improve the quality of legal advocacy that an attorney is able to provide.

B. Partnering with Experts in Other Disciplines

Although attorneys regularly rely upon experts in criminal defense practice, many attorneys do not appoint experts to generate information useful for plea bargaining and sentencing, even in cases where juveniles are tried in adult court.[189] Social workers support the work of attorneys in various legal contexts and are particularly powerful allies for attorneys developing mitigating evidence.[190] They are trained to conduct "bio-psycho-social" assessments of people in order to develop a holistic understanding of how biological, psychological, and environmental factors have impacted an individual's life. This framework is useful in gathering mitigating information about clients because of its comprehensive nature. "Mitigation specialists" are generally hired in capital cases. Their role is to help the attorney gather and present the type of evidence discussed in this Article. Similarly, attorneys representing juveniles facing adult sentences may consider

189. Marty Beyer, *supra* note 3, at 206 ("most juveniles whose cases are filed directly in adult court (without a transfer hearing) do not have expert testimony prior to or at the sentencing hearing").

190. Meekins, *supra* note 82, at 151 (referencing the role of social workers in drug courts).

partnering with a mitigation specialist who has expertise in gathering such information.

The Los Angeles County Public Defender's Office employs psychiatric social workers who partner with attorneys to prepare psycho-social history reports for clients facing transfer from juvenile to adult court. This team of social workers functions as mitigation specialists for these juvenile offenders, using therapeutic skills to interview clients, their family members, and others to obtain detailed information about the client's life experiences. The social worker ultimately writes a report highlighting the mitigating information in a young client's life. This partnership is an effective model that could be incorporated into the representation of youth in adult courts throughout the country.

Attorneys must also become familiar with the wide range of issues that may impact their young clients in order to appoint appropriate experts to present additional mitigating information to the court. Biological factors such as exposure to drugs or alcohol while *in utero* or traumatic injuries may impact an individual's development. Accordingly, these are important issues for an attorney to explore. Fetal alcohol spectrum disorder is particularly important to look for because of its prevalence and implications for young offenders. One study found that fetal alcohol spectrum disorder impacts 24% of young offenders in custody.[191] The disorder impacts cognitive functioning, can result in a wide range of developmental and mental health disorders, and can impact decision-making.[192] Neuropsychologists may be particularly helpful experts to investigate whether a particular client has a fetal alcohol spectrum diagnosis.[193] Mental health issues are similarly important to explore, and attorneys may want to appoint a psychologist and/or psychiatrist to conduct an evaluation. An attorney who is familiar with her client's unique experiences and characteristics will be better suited to select experts whose expertise relates most closely to the client's issues.

C. Obtaining Records

In the capital context, attorneys obtain school records, records from prior incarcerations, and documentations of a history of alcoholism or substance abuse.[194] These types of records can provide a wealth of information about a client's life experiences and often contain extensive mitigating evidence. School records, for example, may contain information about learning disabilities, developmental disabilities, and a child's exposure to abuse or neglect in the home. Such records can be important in developing a diagnosis and can also be used to highlight systemic failures in a child's life. If a child demonstrated signs of a learning disability that was never diagnosed, or if a disability was diagnosed but the school did not provide appropriate educational services, this information can be

191. David Boulding, *Fetal Alcohol and the Law*, *in* REHABILITATING LAWYERS, *supra* note 4, at 186, 187 (indicating that experts estimate that it may actually impact 40% of this population).

192. *Id.*

193. Boulding recommends a multi-disciplinary team comprised of a pediatrician, neuro-psychologist, speech pathologist, occupational therapist, physical therapist, general practitioner, and a psychologist to diagnose fetal alcohol spectrum disorders. *Id.* at 190.

194. Rompilla v. Beard, 545 U.S. 374, 381 (2005).

helpful in distributing blame among various social institutions rather than merely on the shoulders of the child. Medical records can also be quite telling. Birth records generally indicate whether a child is born with drugs in his system, or whether the mother consumed alcohol during pregnancy. Childhood medical records may contain information about physical injuries consistent with abuse or neglect. Referrals to Child Protective Services may also be noted in school or medical records, which can in turn lead to additional evidence. A client may not even be aware of relevant records in the custody of Child Protective Services, so it is generally a good idea to request such records. Mental health records should also be obtained if they exist. Records from any detention centers where a young person has been confined may also contain helpful information and can highlight additional professionals who should be interviewed as potential witnesses. Evidence of good behavior and participation in rehabilitative efforts, for example, can be useful to present at a sentencing hearing. Counsel has been found to be ineffective for failing to adequately investigate records in a death penalty case.[195] Given the wealth of information contained in these sources, a similar requirement makes sense in the juvenile context.

VI. CONCLUSION

Juveniles prosecuted in adult courts face serious consequences – including spending the rest of their lives in prison – despite their immaturity and often traumatic upbringings. The Supreme Court has recognized the categorical diminished culpability of adolescents. The culpability of some young offenders is particularly diminished because of the details of their lives. It is critical for attorneys to uncover and present mitigating information at sentencing hearings because such information may have an impact on the rest of their young clients' lives. Unfortunately, the deficient representation of juvenile offenders is widely recognized. Although professional standards point to the importance of attorneys gathering and presenting mitigating evidence regarding juvenile clients, many fail to do so. Recognizing ineffective assistance of counsel claims on the grounds that counsel failed to adequately present such information would encourage attorneys to comport with the professional standards and would give those juveniles who did not receive adequate assistance some recourse on appeal (or through a writ of habeas corpus). This approach would be consistent with adolescent development principles and would be in line with the Supreme Court's recognition that adolescents are fundamentally different than adults and that their behavior should be assessed in light of their lessened moral culpability.

While presenting evidence of mitigation is important, there are inherent limitations to this approach. Some sentencing schemes do not allow for judicial discretion, and courts are not able to impose shorter prison sentences even when faced with compelling reasons. In other cases, reduced sentences still bring about injustice. A juvenile whose sentence is reduced from eighty years to fifty years will likely not feel that the lower sentence is substantially different. However, uncovering the tragic information about young offenders' histories and forcing

195. *Id.*

courts to wrestle with the complexities of these young people's lives may ultimately cultivate a greater sensitivity to the needs of this population which—over time—has the potential to transform our approach to juvenile justice. Rather than demonizing these young men and women, our society may be able to recognize their humanity and to craft public policies with this in mind. Developing empathy across deeply entrenched boundaries of race and class is an important foundation for working towards justice. As Michelle Alexander notes in *The New Jim Crow*, "[i]f we had actually learned to show love, care, compassion, and concern across racial lines during the Civil Rights Movement—rather than go colorblind—mass incarceration would not exist today."[196] Viewed from this perspective, cultivating empathy by presenting mitigating evidence has an important role to play in terms of the larger movement to end our overreliance on incarceration.

196. MICHELLE ALEXANDER, THE NEW JIM CROW (2010).