



## **Overview of the FY 2016-2017 Budget Request for the State Appellate Defender Office and Michigan Appellate Assigned Counsel System**

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### **Organizational background**

Together, the State Appellate Defender Office (SADO) and Michigan Appellate Assigned Counsel System (MAACS) supply appellate counsel to all indigent criminal defendants who seek to appeal their felony convictions each year. That number averages approximately 3,400 annually, about 6% of the total number of felony cases reaching final disposition in the trial courts. Defendants are constitutionally entitled to appellate counsel whether appealing from a trial, or plea-based, conviction. Cases arise from all Michigan counties.

SADO is a state-funded, statutorily-created, appellate public defender office. Full-time attorneys are trained and supervised, handling caseloads compliant with national standards. SADO's statutory mandate is to handle no less than 25% of the statewide workload; in 2015 it handled approximately 28%. MCL 780.716. MAACS administers a roster of approximately 150 private assigned attorneys who handle the remaining 72% of the statewide workload. Significantly, MAACS roster attorneys are paid by Michigan counties, pursuant to widely different fee schedules.

In 2014, the Michigan Supreme Court merged SADO and MAACS for management purposes, facilitating the coordinated assignment of cases, cost-effective practices, and improvements in the quality of defense representation.

### **Needs in 2016-2017**

Michigan's appellate defense delivery system is in great need of increased state support of the cost of constitutionally effective counsel. Modest budgetary increases in recent years have increased the SADO share of the statewide workload from a low of 17% to the current 28%. There are compelling reasons to allocate an additional \$1.1 million, as recommended by the Governor, on an ongoing basis. The increase would address both (1) the need for counsel in a discrete class of cases involving "juvenile lifers," and (2) the urgent need for competent and well-resourced appellate counsel assigned by MAACS.

### **Counsel for juvenile lifers**

On January 25, 2016, the United States Supreme Court extended retroactive effect to its landmark decision in *Miller v Alabama*, 567 US \_\_\_ (2012) that mandatory life sentences without possibility of parole for juveniles are unconstitutional. *Montgomery v Louisiana*, 577 US \_\_\_ (2016). For the approximately 364 "juvenile lifers" in Michigan whose convictions and sentences were final when *Miller* was decided, a meaningful opportunity for release within their lifetimes became available. All 364 of the Michigan defendants sentenced to life without parole for crimes committed before they turned eighteen (Michigan and Pennsylvania have the largest number of affected defendants) are now eligible for counsel at sentencing hearings.

The Michigan Legislature planned for this outcome when it designed a remedy in MCL 769.25a, enacted shortly after the *Miller* decision. Pursuant to the statute:

- The prosecutor shall submit a list of names to the chief circuit judge of all defendants who are entitled to resentencing under *Miller*, within 30 days of the date that *Montgomery* becomes final;
- The prosecutor shall file motions for resentencing in all cases in which the prosecution requests imprisonment for life without the possibility of parole, within 180 days of the date that *Montgomery* becomes final;
- The sentencing judge (or successor judge) shall conduct a hearing on the prosecution's motion;
- In all cases not involving a prosecutor's motion, the sentencing or successor judge shall impose a term of imprisonment for which the maximum term is 60 years and the minimum term is between 25 and 40 years; and
- Proceedings in cases where the defendant has served more than 20 years shall be heard first, followed by those in which the prosecutor seeks a sentence of life without parole.

At present, approximately 114 of the 364 juveniles eligible for resentencing under *Miller* are represented by SADO (pursuant to prior appointment orders), 75 are represented by private pro bono counsel, and 175 are not yet represented. Appointment of counsel is being coordinated by MAACS, while recruitment of private pro bono counsel is being coordinated by a committee of volunteer attorneys.

### **Nature of resentencing proceedings**

None of the 364 juveniles received individualized sentencing after they were convicted, or appellate review of sentencing. All legal work on their cases is now new, regardless of any work done in the past on appeal. According to the United States Supreme Court in *Miller* and *Montgomery*, the resentencing of juvenile lifers must be robust examinations of the individual and offense, rather than summary proceedings. In *People v Carp*, 496 Mich 440, 473 (2014), the Michigan Supreme Court emphasized that in cases where a life without parole sentence is sought:

- juvenile defendants must be afforded the opportunity and the financial resources to present evidence of mitigating factors relevant to the offender and the offense;
- psychological and other evaluations relevant to the youthfulness and maturity of the defendant must be allowed; and
- courts must consider aggravating and mitigating evidence.

Such individualized sentencing should occur in all 364 cases, whether the individual is subject to life without parole, or a term of years, in order to comply with *Miller/Montgomery*. Most importantly, cases cannot proceed to negotiation or resentencing hearings until significant

investigation occurs. The failure to investigate and conduct a “robust examination” of each case invites further litigation on appeal.

SADO has represented two direct appeal clients on post-*Miller* resentencings, confirming the need for considerable resources. In one arising from Berrien County (Dakotah Eliason), a staff team (two attorneys, one investigator, one social worker, and one mitigation specialist) devoted nearly 550 hours to investigation, client and witness consultation, and participation in a two-day trial court proceeding. Expert witness and consultant fees totaled over \$6,700. Most significantly, the trial court was persuaded through this advocacy to impose a term of 35 to 60 years, rather than life without parole. If Mr. Eliason is paroled at his earliest release date, satisfying the Michigan Parole Board that he doesn't present a risk to the public, the State of Michigan saves a projected \$450,000 in prison costs.

### **Need for ongoing funding**

The additional work required by *Montgomery* is more than short-term and not easily accomplished. The cases resemble death penalty cases, which generally involve years of litigation involving whether to impose the ultimate penalty – witnesses present testimony on the offender's life and facts of the crime, including experts who explore developmental and family-related issues. Like all those receiving a mandatory life sentence, juvenile lifers received what was effectively a death sentence with no meaningful opportunity to be released. The severity of that sanction – imposed on an immature child – is the basis for the *Miller* and *Montgomery* relief, which contemplates extensive proceedings.

The needs over time were also recognized in the statute, MCL 769.25a (5), which established a priority for cases involving defendants who have served 20 or more years of imprisonment, to be followed by cases in which the prosecutor will request life without parole, and then cases in which a term of years will be imposed. Prosecutors' final choices on life without parole cases are not due until approximately September, 2016.

The *Montgomery* decision adds 364 major post-conviction proceedings to the appellate workload. Resentencing decisions made by the circuit courts will be reviewable, by right, on appeal, further extending the timeline and costs for the system.

Further, many of the cases were tried over 20 years ago (about 65 of SADO's 114), and records have been warehoused or distributed to clients. Merely assembling the records, making contacts with the clients, and gathering updated MDOC and medical files will take months of time.

Finally, a number of threshold legal issues will be litigated, including the right to a jury trial at a life without parole hearing, the nature and scope of resentencing hearings involving a term of years, and the availability of disciplinary credits. These issues affect all 364 cases, and are likely to push back the timing for hearings.

### **SADO's budgetary increase to ensure *Montgomery* compliance**

The large amount of work that *Montgomery* requires cannot be absorbed by current SADO staffing without negative impact on Michigan counties, involving the passing along of a state obligation. SADO currently represents approximately 28% of the total annual appellate assigned counsel workload, the remainder handled by assigned private counsel appointed through the Michigan Appellate Assigned Counsel System (MAACS). SADO's statutory mandate is to handle "no less than" 25% of that workload, "accept[ing] only that number of assignments . . . which will insure quality criminal defense appellate services consistent with the funds appropriated by the state." MCL 780.716(c). SADO's defense services are state-funded, while Michigan counties pay for services provided by MAACS roster attorneys. If SADO provides services to the juvenile lifers without a budgetary increase, more of the "normal" cases will be assigned to MAACS roster attorneys, at considerable additional expense to the counties.

### **Cost savings from investment**

Cost savings due to resentencing of juvenile lifers to a term of years (rather than mandatory life) are both likely and sizeable. The *Montgomery* and *Miller* Courts emphasized that mandatory life after resentencing should be confined to the "rare" defendant possessing "irreparable corruption." The vast majority of SADO's juvenile lifer clients should receive resentencing to a term of years. Assuming an average sentence of 33 years (the midpoint of 25 and 40 years), with 60 years as the maximum, the average client, sentenced at the age of 17, would become parole-eligible at the age of 50 (17 years of age, plus the average minimum term of 33 years). United States Sentencing Commission data on average life expectancy for a person in the general prison population is 64 years. Computed conservatively, up to 14 years of prison costs could be saved on the average resentencing to a term of years, producing \$490,000 in savings per case. Just about three average cases per year would amply cover the \$1.1 million program investment.

### **Impact of ongoing funding: the MAACS effect**

Upon completion of the *Montgomery* compliance project, SADO's FY 2017 staff increase would be applied to the handling of a greater share of the statewide workload. Adjusting the SADO share from 28% to 40% would allow MAACS to assign more difficult, serious, and costly cases to SADO, while working with counties that face challenges of paying, or even finding, competent appellate counsel. The increased SADO share is supported by the Appellate Defender Commission, as part of its goal of system improvement.

This increased workload rationale was used in SADO's initial FY 2017 Proposal for Change, submitted by the Supreme Court, before the unprecedented *Montgomery* decision was released in January, 2016. The Governor's recommendation incorporated SADO's response to *Montgomery*.

SADO has long demonstrated cost-effectiveness of its client advocacy, represented by 20 cases involving wrongfully-convicted clients in recent years, and annual prison cost savings over \$6 million in reduced sentences.