

Advocating for Youth Charged with First Degree Murder

March 9, 2018 / Chapel Hill, NC

*Cosponsored by the UNC-Chapel Hill School of Government
& Office of Indigent Defense Services*

AGENDA

Friday March 9, 2018

- | | |
|----------------|--|
| 8:00 to 8:45am | Check-in |
| 8:45 to 9:00 | Welcome
<i>Austine Long, Program Attorney</i>
UNC School of Government, Chapel Hill, NC |
| 9:00 to 10:15 | Adolescent Development and Behavior [75 min.]
<i>Dr. Cindy Cottle, Ph.D, Psychological Services, Raleigh, NC</i> |
| 10:15 to 10:30 | Break |
| 10:30 to 11:45 | Representing 13, 14 and 15 Year Olds [75 min]
<i>Aleta Ballard, Attorney, Smithfield, NC</i> |
| 11:45 to 12:30 | Lunch (<i>provided in building</i>) * |
| 12:30 to 2:15 | Preparing for Sentencing [105 min.]
<i>Tessa Hale, Assistant Director, Carolina Justice Policy Center, Durham, NC</i>
<i>Carl Ivarsson, Attorney at Law, Fayetteville, NC</i> |
| 2:15 to 2:45 | Break |
| 2:45 to 3:30 | Parole Hearings [45 min]
<i>Ben Finholt, Staff Attorney,</i>
North Carolina Prisoner Legal Services, Raleigh, NC |
| 3:30 to 4:15 | Miller Cases: The Future [45 min.]
<i>David Andrews, Assistant Appellate Defender,</i>
Office of the Appellate Defender, Durham, NC |

CLE HOURS: 5.75

* IDS employees may not claim reimbursement for lunch

Adolescent Development and Behavior

**Moving Forward:
Advanced Concepts in Adolescent
Brain Development**

Cindy C. Cottle, Ph.D.
Clinical & Forensic Psychologist

Agenda

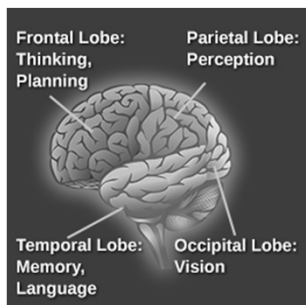
- Review of Adolescent Brain Development
- Mental Illness, Disability, Substance Use, and Exposure to Maltreatment/Trauma
- The Use of Neuroscience in Legal Proceedings
- Cautions, Limitations, and Advice

**Adolescent
Brain Development**

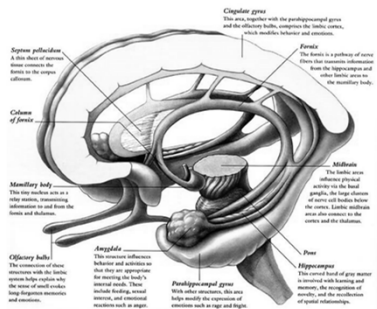
As a result of the chemical and structural changes in the brain, we know that:

- Adolescents do not process information as efficiently as adults
- Adolescents' capacities to weigh risks and long-term consequences are still developing
- Older adolescents may be as capable as adults of making decisions in some contexts
- Adolescents are more sensitive to emotion and social evaluation

Frontal Lobe



Limbic System



The Neuron: Transmitter of Information

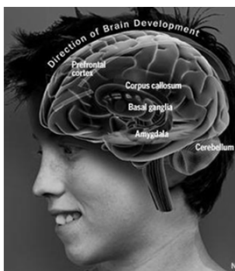
Structure of a Typical Neuron

Neurotransmitters

Neurotransmitters

Neurotransmitters and Their Effects			
Name	Primary Function	Locations	Receptors
Acetylcholine	Muscle control, memory formation, sensory response, excitatory	Neuromuscular junctions, CNS	Neostigmic, muscarinic
Acetate	Excitatory movement control, mood regulation, appetite, sleep, muscle control	GU, CNS	5-HT
Dopamine	Reward pathways, cognition, voluntary motion, high or light reduces, increased heart rate, increased glucose in bloodstream, increased oxygen to brain and muscles	Hypothalamus	D1, D2, D3, D4, D5
Norepinephrine	High or light reduces, increased heart rate, increased glucose in bloodstream, increased oxygen to brain and muscles	Adrenal medulla	Adrenergic
L-DOPA	Precursor to dopamine	Hypothalamus	N/A
Tryptophan	Precursor to Serotonin	Blood	N/A
GABA	Inhibits CNS	Brain	GABAA, GABAB
Glycine	Inhibits signals	Spinal Cord, Brainstem	NMDA
Glutamate	Blood Pressure regulation	CNS, Kidney	TAT
Choline	Long-term potentiation, memory	CNS, PNS	NMDA, others

Changes in the Brain

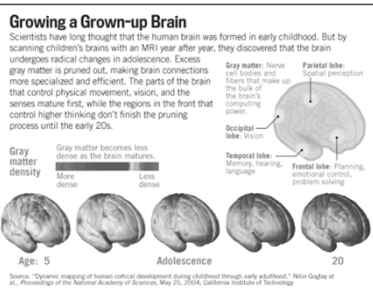


Beginning from the back and moving To the front of the brain, there is:

1. Overproduction of grey matter
2. Pruning of grey matter
3. Myelination (increase in white matter)

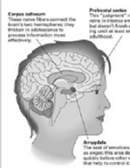
At the same time, there are changes in hormones and neurotransmitter levels, as well as the sensitivity of receptor sites.

Changes in the Brain



Brain Development

BRAIN DEVELOPMENT ADOLESCENCE (12 – 19 YEARS)



Brain undergoes structural changes

Age 12 - Parietal Lobe mature

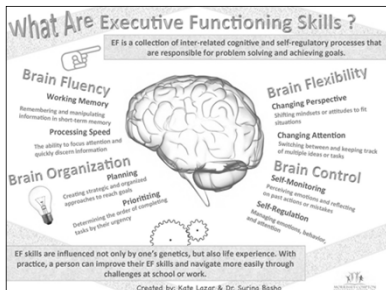
- Corpus callosum - nerve fibers connect the brain's left and right hemispheres - thickens, improves adolescents' ability to process information
- Amygdala - matures earlier than the prefrontal cortex
- Synapses - at adult density

18 - 25 years: Frontal Lobe/ Prefrontal cortex matures

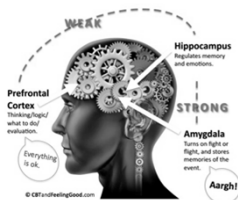
These structural and chemical changes in the brain are affected by the environment.

Learning occurs when the connections between essential areas of the brain become stronger.

The Goal: Develop Executive Functioning Skills



Emotionally Driven

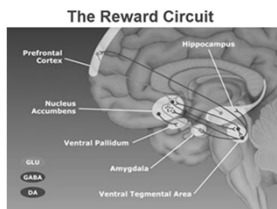


The connections between the Amygdala and the prefrontal cortex are not strong.

Also, neurotransmitters are more active in the amygdala and limbic system regions during adolescence. Therefore, it is a period of emotion and drama!

How well do adolescents reason during emotionally charged situations?

The Reward Circuit



- * The part of the brain that causes a person to remember and repeat an action
- * Affected by substances in that drugs trigger craving for euphoria or pain relief.
- * "Mesolimbic dopaminergic reward pathway"

During adolescence there is an increase in the activity of the neural circuits using dopamine, a neurotransmitter central in creating our drive for reward.



Risk Taking and Self Control

Adolescents perceive rewards and risks of a situation or behavior differently

- They place more emphasis on reward (limbic system), including peer acceptance
- They are less reasoned in their decision making (prefrontal cortex)
- They are not as efficient or quick to make these decisions
- The consequences of their behavior affect teens differently: they are less sensitive to negative consequences (chemically) and more sensitive to rewards (reward center of brain)
- They do not have as many experiential memories to guide them

Summary of Adolescent Brain Development Research

Effect of Adolescent Brain Development on Behavior

- | | | |
|---|---|--|
| Ineffective levels of neurotransmitters | ➡ | Moody, less attentive, ineffective problem solving, & more risky behaviors |
| Less reliance on frontal lobes in decision making | ➡ | Impulsivity, "gut" reactions; problems ignoring distractions |
| Less efficient connections, such as those to and from memory centers of the brain | ➡ | Less reliance on experience and memory in decision making |

Implications

Adolescents have different needs than children and adults in terms of sleep, physical activity, exposure to activities and risks

Adolescents learn differently: better with rewards rather than punishments or removal of rewards

Adolescents benefit from skill development, both behaviorally and through structural changes in the brain

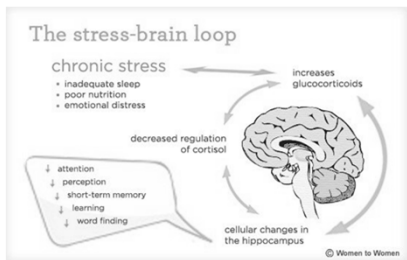
Adolescents need active teaching of "thinking" and resiliency skills

The effect of stressful environments on adolescent brain development is significant but can be reversed with early intervention

Mental Illness, Disability, Substance Use and Trauma

Normal Brain Development

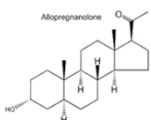
The Effect of Stress on the Brain



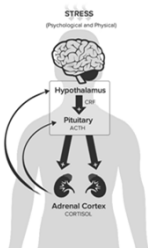
Adolescent Stress Response

Adolescents do not respond to stress in the same way as adults.

The changes that occur in the hypothalamic-pituitary-adrenal (HPA) axis reactivity result in heightened stress-induced hormonal responses. The limbic and cortical areas of the brain are particularly vulnerable to these shifts in responsiveness.



The stress hormone (THP) has a calming effect for adults but creates additional anxiety for adolescents.



The Effects of Stress

- * Attention
- * Memory Consolidation
- * Increases in cortisol causes the hippocampus (memory and learning) to stop functioning normally. The growth of the hippocampus and frontal lobes slow, and the amygdala seems to increase in size.

The Effects of Stress

- * What stressors do your juvenile clients face?
- * What stressors do your juvenile clients face within the context of their legal cases?
- * How does knowledge about adolescents' stress response and the effect of stress influence your thoughts about legal competencies and possible dispositions?

Post Traumatic Stress Disorder (PTSD)

Criterion A: Stressor

The person was exposed to: death, threatened death, actual/threatened serious injury, or violence, as follows: (one required):

- (1) Direct exposure;
- (2) Witnessing in person;
- (3) Indirectly, by learning that a close relative or close friend was exposed to trauma. If the event involved actual or threatened death, it must have been violent or accidental; and/or
- (4) Repeated or extreme indirect exposure to aversive details of the event(s), usually in the course of professional duties (e.g., first responders, collecting body parts; professionals repeatedly exposed to details of child abuse). This does not include indirect non-professional exposure through electronic media, television, movies, or pictures.

Criterion B: Intrusion symptoms

The traumatic event is persistently re-experienced in the following way(s): (one required)
 Recurrent, involuntary, and intrusive memories. Note: Children older than six may express this symptom in repetitive play.
 Traumatic nightmares. Note: Children may have frightening dreams without content related to the trauma(s).
 Dissociative reactions (e.g., flashbacks) which may occur on a continuum from brief episodes to complete loss of consciousness. Note: Children may reenact the event in play.
 Intense or prolonged distress after exposure to traumatic reminders.
 Marked physiologic reactivity after exposure to trauma-related stimuli.

Criterion C: Avoidance

Persistent effortful avoidance of distressing trauma-related stimuli after the event: (one required)
 Trauma-related thoughts or feelings.
 Trauma-related external reminders (e.g., people, places, conversations, activities, objects, or situations)

Criterion D: negative alterations in cognitions and mood

Negative alterations in cognitions and mood that began or worsened after the traumatic event: (two required)
 Inability to recall key features of the traumatic event (usually dissociative amnesia; not due to head injury, alcohol, or drugs).
 Persistent (and often distorted) negative beliefs and expectations about oneself or the world (e.g., "I am bad," "The world is completely dangerous").
 Persistent distorted blame of self or others for causing the traumatic event or for resulting consequences.
 Persistent negative trauma-related emotions (e.g., fear, horror, anger, guilt, or shame).
 Markedly diminished interest in (pre-traumatic) significant activities.
 Feeling alienated from others (e.g., detachment or estrangement).
 Constricted affect: persistent inability to experience positive emotions.

Criterion E: alterations in arousal and reactivity

Trauma-related alterations in arousal and reactivity that began or worsened after the traumatic event: (two required)
 Irritable or aggressive behavior
 Self-destructive or reckless behavior
 Hypervigilance
 Exaggerated startle response
 Problems in concentration
 Sleep disturbance

Criterion F: duration

Persistence of symptoms (in Criteria B, C, D, and E) for more than one month.

Criterion G: functional significance

Significant symptom-related distress or functional impairment.

Criterion H: exclusion

Disturbance is not due to medication, substance use, or other illness.

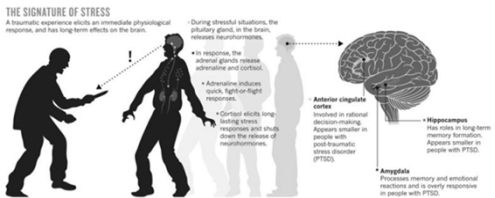
Specify if: With dissociative symptoms. An individual experiences high levels of either of the following in reaction to trauma-related stimuli:

Depersonalization: experience of being an outside observer or detached from oneself (e.g., feeling as if "this is not happening to me" or one were in a dream).
 Derealization: experience of unreality, distance, or distortion ("things are not real").

Specify if: With delayed expression.

Full diagnosis is not met until at least six months after the trauma(s), although onset of symptoms may occur immediately.

The Brain and PTSD



Adolescents and PTSD

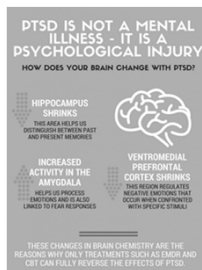
Adolescents are more prone than adults to develop PTSD

Exposure to neglect and trauma affects brain development, emotional functioning and learning capacity

Adolescents with histories of neglect/abuse tend to have more activity in the amygdala and insula (threat/pain).

Adolescents with histories of neglect/abuse tend to have less gray matter in prefrontal cortex.

➤Creates a filter through which the world is interpreted



Adolescents and PTSD: Considerations

- The Traumatized Client
- Capacity to Proceed
- Capacity to Waive Miranda Rights
- Risk of Self-Incrimination in other contexts
- Re-traumatization during evaluations or with legal authorities
- "Maturity" of the adolescent
- Treatment needs and amenability

Mental Disorders During Adolescence

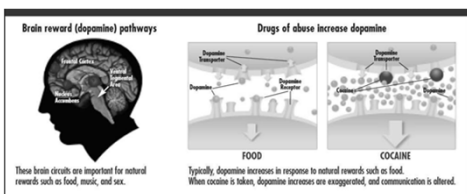
Age of onset of many mental health conditions oftentimes occurs during adolescence and early adulthood.

The assessment and diagnosis of adolescent mental health conditions requires specialized knowledge of adolescent development and psychopathology

It is crucial to rule-out other conditions, including medical diagnosis and alcohol/substance abuse.

Adolescents respond differently to treatment, including medication, than adults.

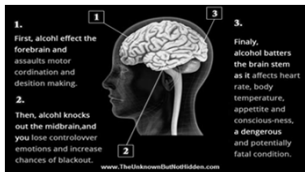
Alcohol and Substance Use



Adolescents are more prone to addiction than adults.

The brain rewards positive actions with feelings of pleasure so we want to repeat them. Alcohol and drugs take over these areas of the brain by producing those "feel-good" brain chemicals, or neurotransmitters, from a harmful chemical, instead of experience.

Alcohol and The Brain



Alcohol binds to GABA receptors in the brain. It replicates the effect of GABA, resulting in relaxation. It also increases the amount of serotonin and dopamine in the brain – which stimulates the reward centers. So, people usually feel relaxed and pleasure. Drinking too much leads to overstimulation of GABA pathways, leading to extreme sedation.

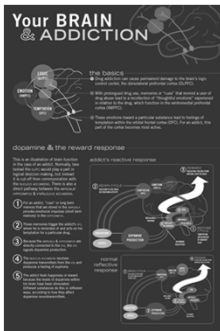
Adolescents have fewer GABA receptors, so they experience fewer inhibitory effects. Therefore, there is less sedation and less impairment in motor functions. It also means greater tolerance and a greater incentive to keep drinking.

Adolescents respond differently to alcohol

Alcohol and Substance Use

- * Alcohol use can cause long-term and permanent changes in the prefrontal areas of the brain
- * The hippocampus, involved in learning and memory, suffers the most in teens.
 - * Long-term, heavy drinking causes teens to have a 10% smaller hippocampi.
- * Short-term or moderate drinking impairs learning and memory far more in youths than adults.
- * Adolescents are more prone to addiction than adults.

Other Substances



Marijuana:
Affects receptor sites in the nucleus accumbens (pleasure, reward, laughter, addiction, fear); the hippocampus (learning, memory), cerebellum (coordination, balance), and amygdala (fear, emotions, novelty).

Opiates
Change the limbic system that control emotions, pleasure, as well as the brain stem and areas that control automatic bodily functions. Opiates also block pain messages to the brain.

Other Substances

Cocaine:

Initially, the brain treats cocaine as a foreign object and tries to defend itself. It does so by changing the shape of the neurons and synapses. The brain therefore tries to reduce the effect of the drug, as a defensive reaction. Adolescents are more sensitive to the effects of cocaine. That is, when defensive efforts fail, the full intensity of the drug's effects increase substantially (300%)

Cocaine increases stress hormones (cortisol) and can damage the cardiovascular system, leading to blood clots/stroke.

Causes loss of gray matter (twice as much!)

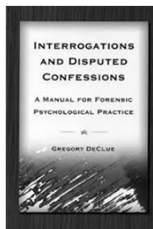
Limbic System: Repeated use changes the ways the brain experiences pleasure. It also affects the user's ability to learn from fear-based experiences and to modify future behaviors accordingly. In combination, these brain changes increase the chances for involvement in impulsive, risky behaviors during adulthood.

Use of Neuroscience in Court

- Capacity to Waive Miranda Rights
- Transfer to Adult Court
- Capacity to Proceed to Trial
- Mental State at the Time of the Offense
- Disposition/Sentencing/Miller

Miranda Waiver and False Confessions

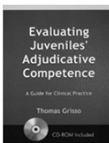
- * Basic understanding of warning and risk (Grisso)
- * Weighing reward (stopping the questioning) with the risk (short-term and long-term)
- * Susceptibility to manipulation and police tactics (the goal is to obtain facts, not necessarily to obtain accurate confessions)
- * Tainting of memory over time and due to emotion/stress
- * Traumatized youth during questioning



Capacity to Proceed

- MacArthur Study: Adjudicative Competence
- Adolescents aged 16-17 scored similarly to adults on measures of understanding and reasoning
 - Adolescents below the age of 15 performed more poorly than young adults
 - Significant impairments were noted among adolescents aged 11-13 years old, even when there was no mental illness or defect.

Capacity to Proceed



- * Competence deficits in adolescence are less pronounced in relation to adults
- * The mental disorders associated with findings of incompetence are more varied than among adults (e.g., ADHD, anxiety, adjustment)
- * Adolescents' decision making tends to be more concrete and focused on more immediate consequences rather than long term consequences

Mental State at the Time of the Offense

Age, maturity: Ability to plan, foresee consequences, control impulses

Mental health conditions and intellectual functioning

Peer affiliation and influence

Effects of trauma and maltreatment on behavior

Effects of alcohol or substances on behavior/thinking

Medication changes or other medical causes

Use the timeline approach

Disposition/Sentencing and "Miller" Cases

Potentially, an analysis of any or all of the preceding types of evaluations

Evaluate: maturity, mental disability, intellectual functioning, familial or peer pressure

Likelihood that the person would benefit from rehabilitation in confinement

The Problem with Predicting Violence

Risk assessment versus Risk management

Cautions and Limitations

Timing of the Evaluation

- * When should you call an evaluator?
- * Retrospective evaluations
- * The time between the evaluation and trial
- * How is your client behaving?

Cautions and Limitations

Limitations of Neuropsychological Research and Assessment Techniques

- Animal versus human research
- Applying research about groups to an individual case
- Overreliance on neuroscience
- Explanation, not excuse

Cautions and Limitations

Common Challenges for Experts and with the Use of Forensic Evaluations

- * Disclosure of unwanted or harmful information
- * Challenge assessment techniques
- * Challenge due to time (retrospective)
- * "Everyone goes through this; why is this case special?"
- * Use multiple methods to assess multiple factors across time and document

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Moving Forward:

Advanced Concepts in Adolescent Brain Development

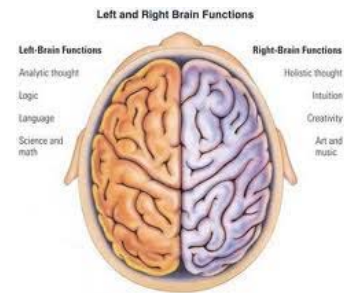
March 9, 2018

Cindy C. Cottle, Ph.D.

I. Overview of Adolescent Brain Structures and Function

A. Areas of the Brain

Division by Hemispheres: In general, the left hemisphere is dominant for language, logic, math functions while the right hemisphere is dominant for spatial abilities, face recognition, and music. The left side of the brain controls the right side of the body (sensory and muscles) while the right side of the brain controls the left side of the body.



Division by Lobes

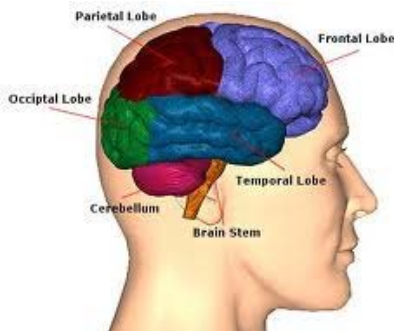


Figure 2: www.neuroskills.com

Occipital Lobe: Located at the back of the brain and is associated with interpreting visual stimuli and information. Damage may result in visual problems, including difficulties recognizing objects, inability to identify colors or words.

Temporal Lobe: Related to senses of olfaction and audition and also serves to integrate visual perception with information from other senses. It is important in terms of memory functioning. Damage may result in aphasia (speech), memory, and language skills.

Parietal Lobe: Located in the middle of the brain, the parietal lobe is associated with processing tactile information. Damage may result in problems with language, spatial orientation, and memory functioning.

Frontal Lobe: Makes up about a third of the cerebral hemispheres. It is associated with reasoning, motor skills (includes the motor cortex), higher level cognition, expressive language.

B. Important Structures of the Brain

Brain Stem: Where information is channeled between the brain and the body. Critical for regulating alertness, arousal, breathing, temperature regulation.

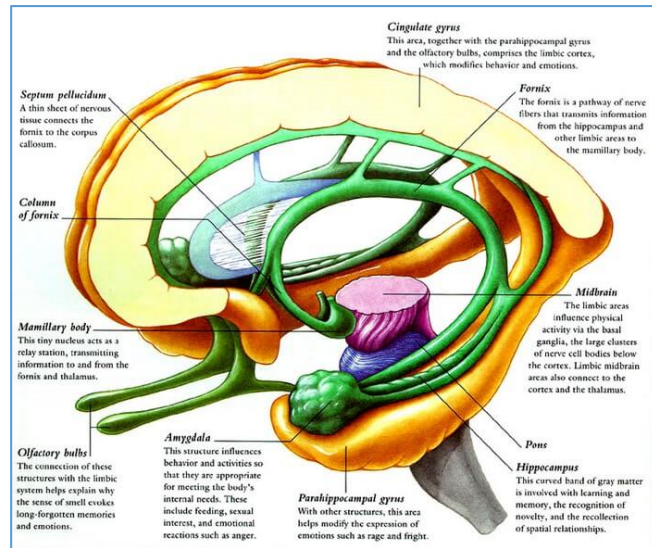
Cerebellum: Large structure at back of brain; skilled motor movements and balance.

Limbic System: Involved in processing emotions and emotion-based behavior and in facilitating learning and memory. Includes the amygdala, which is influence emotional responses (e.g., fear).

Note:

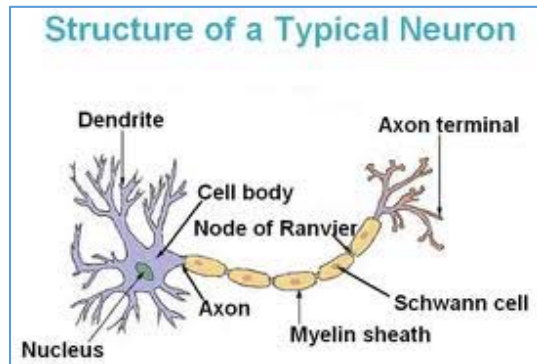
Amygdala: food, sex, and emotion (anger)

Hippocampus: learning and memory; recognition of novelty



C. The Neuron

The human brain contains about 10 billion neurons (nerve cells that transmit information throughout the body). Neurons communicate electrically and chemically through neurotransmitters.



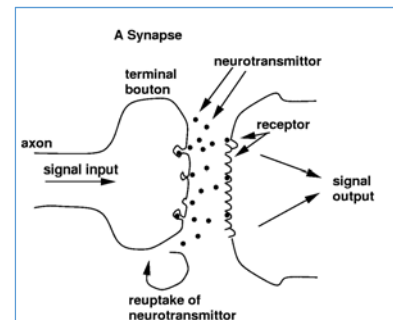
Dendrites: collect information from other neurons

Axon – Elongated fiber that extends from the cell body to the terminal endings; transmits the neural signal.

Axon terminal or terminal buttons – At the end of the neuron and are responsible for sending a signal to other neurons.

Some axons are covered with myelin sheath, a white fatty substance that insulates the neuron and allows information to be transmitted faster.

The space between two neurons is called a synapse. When the neuron fires, neurotransmitters are released from the first neuron to the next. Neurotransmitters are chemicals which bind to the receptors of the second neuron. Neurotransmitters influence the extent to which a signal from one neuron is passed on the next. For example, the amount of neurotransmitter that is available, the number/arrangement of the receptors, the amount of the neurotransmitter that is reabsorbed.



Neurotransmitters and Their Functions

Neurotransmitters are chemicals that transmit signals between neurons.

Norepinephrine: Brings the nervous system in “high alert,” by increasing heart rate and blood pressure. NE is also important in the formation of memories. Amphetamines (speed) works by causing the release of NE, as well as dopamine and serotonin.

Dopamine (DA): An inhibitory neurotransmitter, meaning when it binds on a receptor site, it blocks the tendency of that neuron to fire. DA is strongly associated with the reward mechanism of the brain (“feels good”). Drugs (cocaine, heroin, alcohol, nicotine) increase dopamine levels in the brain. Mental illnesses, like Schizophrenia, have been shown to involve excessive amounts of DA in the frontal lobes. Parkinson’s Disease is associated with too little DA.

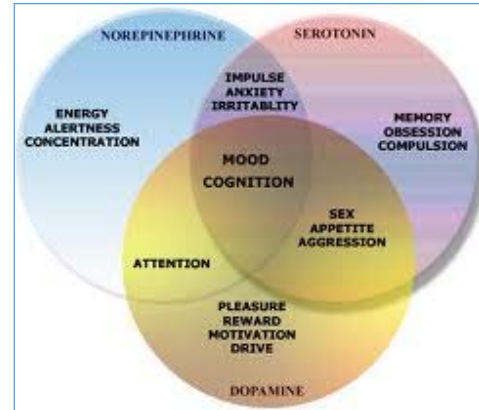
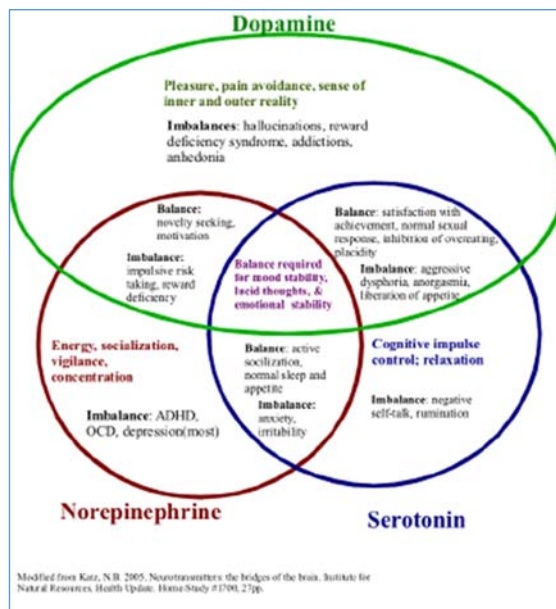


Image from www.nursingcrib.com

Serotonin (5-HT): An inhibitory neurotransmitter that is involved in emotion and mood. When low, there is insomnia, anxiety, depression, anger problems, suicide, panic attacks, obesity (increased appetite for starchy foods), chronic pain, and alcohol abuse. When high, there may be hypomania and hallucinations. Medications (prozac) prevent the uptake of 5-HT so there is more of it floating around. Hallucinogens (LSD) work by attaching to 5-HT receptor sites, thereby blocking transmission.

Acetylcholine (ACH): found in sensory and sleep. There is a ACH in the brains of Alzheimer’s.

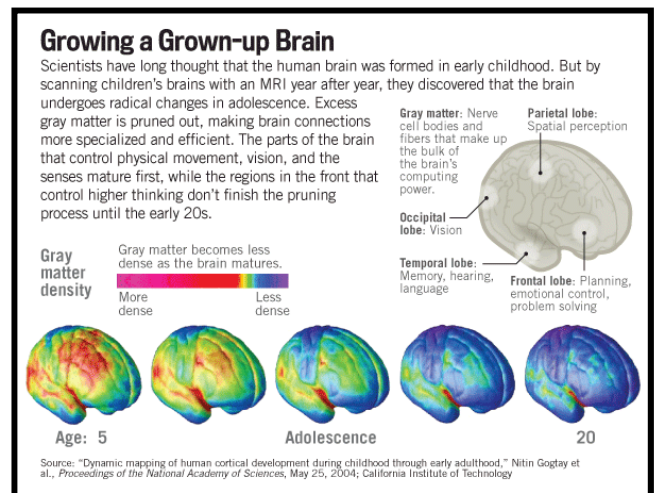


Stimulates muscles and is neurons link between a loss of individuals with

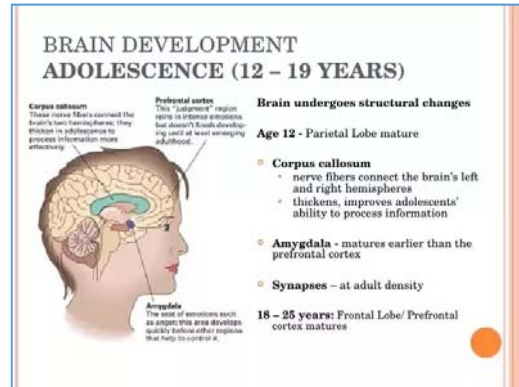
II. Adolescent Brain Development

A. Changes in the Brain During Adolescence

1. Younger children/adolescents are not efficient thinkers – they rely on more parts of the brain in making decisions and performing a task than adults. Those regions relied upon by youth tend to be more subcortical and deeper regions of the brain – those that are more “primitive” and that are developed earlier – rather than the frontal parts of the brain. This can result in less efficient thinking strategies and in relying more on emotions than on reason in making decisions.
2. Gray matter (nerve cells) becomes less dense as the brain matures. Therefore, during early adolescent years (when there is more gray matter), there is more “hit or miss” or trial-and-error type of thinking. As gray matter is “pruned away,” there is more efficient thinking and behaving.
3. White matter (myelin) increases in the brain during development. White matter/myelin is material that allows for speed and more efficient thinking.
4. It is not that certain parts of the brain become functional or activated. Rather, an emergence of functional networks is developed that support more efficient strategies for performing particular tasks. The direction of change is from back to front of the brain.



5. As connections to the frontal lobe develop, thinking becomes more “mature” – that is, based on the reasoning and higher-level thinking skills of the frontal lobe, rather on the less mature and more emotional parts of the brain (those that produce “gut reactions” or impulses).

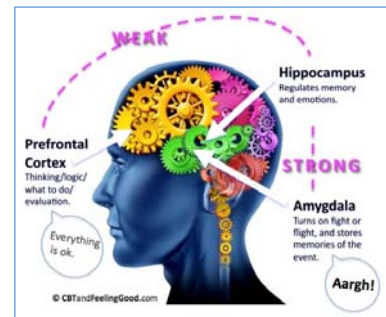


6. Neurotransmitters, or chemicals in the brain that allow for communication among nerve cells, do not reach the most effective levels until adulthood. Varying levels of neurotransmitters can lead to problems with mood, motivation, and sensitivity to rewards or aversive consequences.

B. Practical Implications of Adolescent Brain Development

1. Cognitive Skills: During adolescence and young adulthood, there are progressive improvements in processing speed, memory, planning ability, the ability to think in hypothetical terms, and introspective thought.

2. Emotion: Adolescents rely more on the amygdala, the region of the brain associated with emotion. Therefore, they do not perform well on tasks requiring them to process emotional, stressful, or anxiety provoking stimuli. This may be why some adolescents who seem to exhibit “mature” thinking in some contexts (e.g., those with little stress) do not do so in other contexts (e.g., with peers).



3. Risk taking, Decision Making, and Self Control:

Some degree of involvement in risky behaviors (drinking, use of illegal drugs) has become normative, even across cultures (and species). For some adolescents, risk taking is limited while for other, it persists (see T. Moffitt’s, *Life Course Limited and Life Course Persistent Antisocial Behavior*, 1993). Risk taking allows humans to explore behaviors, privileges, face and conquer challenges, and increase status and peer affiliation.

Why Do Adolescents Engage in Risky Behaviors?

Adolescents do not place the same weight on the rewards and risks of behaviors as adults. Although they are more aware of the costs of risky behavior, they overestimate the reward and underestimate the risk. Also, the consequences of the behavior affect teens differently than do adults: they are less sensitive to negative consequences of drinking (hangovers), for example.

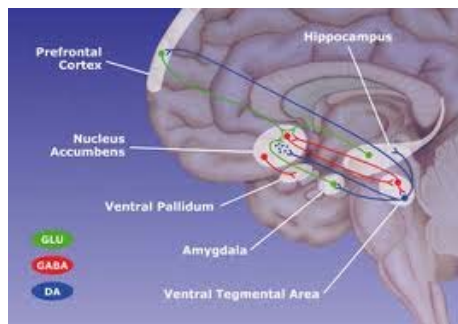
These factors all play a role in *decision making*, which involves the prefrontal cortex and more specifically: working memory, response selection, and inhibition of risky choices.

When making decisions about risk, adolescents rely less on the prefrontal cortex, the insula, and the anterior cingulate cortex (ACC). The prefrontal cortex of the brain is associated with inhibition of risky behaviors, as well as the processing of emotions. Since adolescents rely less on this area of the brain, they are more likely to engage in risky behaviors and to fail to consider consequences.

In addition, there is evidence that levels of certain neurotransmitters associated with risk appraisal are not most effective during adolescence. In other words – because of the levels of neurotransmitters in the brain - adolescents have higher sensation-seeking levels (a more activated “reward center” of the brain) than adults and they engage in more risky behaviors than adults.

The Reward Center

Adolescents’ “reward center” of the brain is more active than are adults. There is also evidence that their “avoidance” region (also the amygdala) is less activated so that they are not motivated to avoid negative consequences. In other words, there is a heightened sensitivity to reward and less sensitivity to punishment for adolescents. It is therefore more difficult to motivate teens with threats than with rewards.



When excited, the cerebral cortex signals the ventral tegmental area to release dopamine into the amygdala, the prefrontal cortex and the nucleus accumbens. This is the “reward center” of the brain and serves to increase the individual’s attention so that s/he learns to repeat the behavior once more.

Situational Factors Affect Reasoning Ability: Hot Cognitions

Adolescents may think and reason about risky situations similarly to adults under ideal circumstances. However, this may bear little resemblance to the decisions they make in real-world settings, particularly when in stressful or high-arousing situations.

Hot cognitions refer to the idea that a state of emotional excitement may drive behavior more than reasoned thought and logic. In those situations, adolescents may not take into account the costs-benefits of risks when making decisions.

Individuals who are less able to regulate their emotional states or who are more excitable may be particularly prone to exhibit risk-taking behavior in these settings.

4. Social, Emotional, and Other Needs:

During adolescence, there is an increase in time spent with peers (4 times more with peers than with adults), emotional distance from parents and adults, and sexual Interest and behavior.

There are also differences among adolescents in their susceptibility to peer influence. These differences have been found to be associated with *different patterns of neural activation in adolescents when exposed to emotional stimuli*. Youth with higher resistance to peer pressure have greater coordinated activity in brain regions associated with perception and decision-making (Grosbras et al, 2007).

The amygdala is involved in the basic processing of emotional stimuli and social signals of emotions, as well as the planning defense responses (flight/ fight). During adolescence and early adulthood, the amygdala increases in volume and the connections between the amygdala and the frontal lobe become more elaborate. Until the brain is mature, the increase in size of the amygdala may be associated with emotionality and aggressive behavior. In addition, adolescents are more prone to read emotions and miss content - because they rely on the amygdala instead of allowing the frontal lobe of the brain to impart reason on the emotional situation.

Finally, adolescents have different levels of certain neurotransmitters, resulting in gender differences in emotion/mood (low serotonin in girls) and risk-taking/aggression (higher dopamine in boys). This also explains different needs of adolescents in terms of sleep (melatonin levels and timing of release of melatonin).

5. The Role of the Environment: Not only does myelin speed axonal conduction, but axonal activity can stimulate the formation of myelin. Since neuronal activity is largely driven by input from the environment, myelination is sensitive to environmental experiences. Enriched environments lead to more myelinated axons and larger corpus collosums among animals. For humans: The corpus collosum is smaller in neglected children. Note: Sleep is a period of memory consolidation and learning.

- While the brain is most malleable to experience early in life, brain plasticity is retained during adolescence. Thus, adolescence is a period of particular vulnerability and opportunity.
- The adolescent brain is “built to learn.” Like muscles, neurons operate on a “use it or lose it” principle.
- The adolescent brain is primed to pay attention to things that are new and different.
- The adolescent brain may provide an enhanced opportunity for the nervous system to recover from drug exposure, brain damage, or other challenges.

Keep in mind, however, some of this research is based on animal studies. And, there is great variability among adolescents and their environments, and these differences (e.g., in temperament, intelligence, activity level) influence the extent to which changes occur.

C. Guiding Concepts in Development (Steinberg & Schwartz, 2000)

- Change does not occur in a linear manner. There are periods of regression and inconsistencies, both between individuals and within a person.
- Keep in mind the influence of poverty, mental illness, instability, abuse, and neglect.
- An individual may be able to apply more mature thinking in one context (e.g., in less stressful situations) but may not be able to apply that same level of thinking in another context (e.g., with peers or when in an emotionally charged situation).

III. Mental Illness, Disability, Substance Use, and Exposure to Trauma

A. General Stress

Adolescents respond to stress differently than do adults. They may be less protected against stress because of the way they respond to the stress hormone THP: instead of a calming effect, the hormone creates additional anxiety.

When faced with a stressor, the amygdala is the first to respond. It releases stress hormones that signal the release of adrenaline (epinephrine), which results in a “fight or flight” stance. Adolescents, whose amygdalas are less under control of their frontal lobes, are prone to respond to situations of stress with more extreme emotion than adults, who can rely on their prefrontal cortex to control their fear and anger.

During adolescence, increases in hormones (including oxytocin, vasopressin, and cortisol – esp for girls) could be related to an increase in the average number of stressors to which adolescents are exposed, the greater reactivity to stressors, and/or to changes in the systems contributing to the release of stress hormones.

Oxytocin is also released (produced by hypothalamus), both in the blood and in a variety of brain regions. Social stressors seem to cause increases in levels of oxytocin, and these increases result in an increased motivation for social contact (DeAngelis, 2008). Oxytocin levels have been found to be lower in individuals with clinical disorders involving deficits in processing of social cues (Autism; Green et al., 2001) and children neglected early in life when interacting with their adoptive mothers than non-neglected children interacting with adoptive mothers

(Fries et al, 2005). Some research suggests oxytocin produces a “relaxation response.”

Effect of Stress on Brain Development

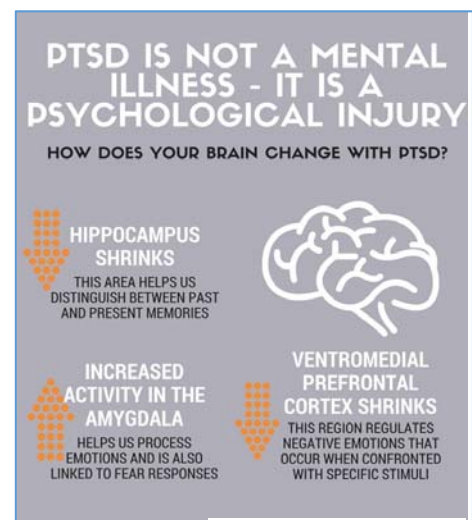
Stress causes problems with attention and memory consolidation. The surge of cortisol during a stress response causes the hippocampus to stop functioning normally. In animal studies, there was a decrease in synapses and growth in the frontal lobes and hippocampus, and the amygdala seemed to increase in size. Stress altered the maturation of the brain. In humans, the hippocampus likewise gets smaller, which is not good for memory and learning. The increase in the amygdala may explain the exaggerated responses seen in PTSD.

B. Exposure to Maltreatment/Trauma/PTSD

Adolescents appear more prone than adults to develop PTSD, in part because of the amygdala functioning. Severe and chronic stress, including neglect and abuse, affects brain development (physically), as well as emotional functioning and learning capacity. These early experiences affect the production of stress hormones and often, the development of neural pathways in the brain.

Children and youth who have been exposed to significant trauma, particularly those who have suffered ongoing trauma, may have trouble assessing and interpreting another individual’s emotions. They may, for example, misread cues and incorrectly believe that another person is angry or threatening. This, in turn, leads to behavior problems as they attempt to protect themselves from perceived threats.

Adolescents with histories of neglect or abuse tend to have more activity in the amygdala and insula (threat detection and anticipation of pain) areas of the brain. They have also been found to have less gray matter in the prefrontal cortex. This could interfere with motivation, impulse control, emotional regulation, attention, concentration, and learning.



From: www.ptsduk.org

The importance of intervening with adolescents who have histories of trauma is paramount. The brain’s plasticity during adolescence means that the effects of trauma on the brain do not have to be permanent. There is also an important need to protect teens from external stressors as much as possible and to actively teach resilience and coping skills.

Trauma/PTSD:

- Creates a filter through which the world is interpreted
- Changes emotional and physical reactivity

- Interactions with law enforcement may lead to misinterpretations
- Discussing history with attorney or others may lead to re-traumatization

Things to Consider:

- The Traumatized Client
- Capacity to Proceed: make sure the symptoms and potential effects are assessed.
- Capacity to Invoke/Waive Miranda Rights: “Totality of the circumstances” and withstanding the pressure of the interrogation, excessive guilt, ...
- Other risk of self-incrimination during evaluations or with legal authorities, including in court
- Transfer Cases: Increased vulnerability to trauma and need for specialized treatment.
- Disposition/Miller: Mitigation, treatment needs and amenability
- Re-traumatization during evaluations, meetings and court proceedings
- Caution: relying on symptoms of trauma can highlight other problems, leading to undesired consequences (e.g., transfer to adult system)

C. Mental Illness and Disability

The onset on mental illness oftentimes occurs during adolescence and early adulthood. Many conditions, including depression, anxiety disorders, eating disorders, behavioral disorders (conduct disorder, oppositional disorder) surge in adolescence. Some research suggests that stressful environments and situations may lead to the onset of a mental disorder (stress diathesis model).

Is it mental illness or normal adolescence? Or Drugs?

- Severity of mood/behavior change
- Change in functioning

Keep in mind that some conditions look different in adolescents than in adults. The symptoms of depression, for example, are often quite different for adolescents and may include agitation, irritability and aggression rather than isolation and sadness.

Adolescents respond differently to treatment, including medication, than adults. Some medications seem to increase the risk of suicidal thoughts and behaviors in adolescents.

Manic/bipolar disorders are not as common in teens as simple depression. Schizophrenia is even less common than other conditions; however, it is quite possible to see signs/symptoms of an emerging condition (“prodromal phase”).

The Adolescent Brain and Mental Illness

Depression: The stress response centers of the brain (hypothalamic-pituitary-adrenal axis) are taxed, and there is a greater than normal release of cortisol in the brain. Also, the left areas of the amygdala are overactive.

Anxiety: Increased activity in the amygdala (esp right), which is associated with detecting emotional stimuli. When the amygdala is overactive, there is even more of a need for the prefrontal cortex reasoning. However, during adolescence there is less myelin and connections allowing the two areas to communicate with one another.

understanding Depression

What Is Depression?
Depression is a serious medical condition that affects thoughts, moods, feelings, behavior, and physical health. There are different types of depression, the most common is Major Depressive Disorder. Major Depressive Disorder and other types of serious depression are “long-lasting” and get in the way of a person’s ability to work, study, sleep, and eat.

Signs and Symptoms of Major Depression
A person may have depression if five or more of the following symptoms are present for more than two weeks at any one time; this should be reported to a healthcare provider.

- Persistent sad, anxious, or hopeless mood
- Irritability or nervousness
- Feelings of guilt, fear, or worthlessness
- Significant weight loss or gain due to appetite change
- Overtiredness and/or decreased energy
- Unable to sleep or too much sleep
- Unexplained crying spells
- Difficulty concentrating, remembering, and/or making decisions
- Little or no interest in companionship or sex
- Thoughts of death or suicide

If thoughts of suicide exist, or if symptoms get in the way of daily activities, one should seek treatment right away.

Who is at Risk for Depression?
Although depression can be triggered by physical conditions, most often it is caused by a combination of the factors below.

- **Family History:** Depression often runs in families. Family history of depression itself does not mean a person will get it.
- **Gender:** There is a higher incidence of depression in women.
- **Seasonal Changes:** Changing seasons, especially winter, can trigger depression in some people.
- **Alcohol and Drug Abuse:** Alcohol and drug abuse can lead to depression.
- **Medications:** Certain drugs, such as birth control pills, can lead to depression.
- **Physical Disease:** Physical conditions, such as chronic pain, can lead to depression.
- **Stress:** Stress is a common trigger for depression.

Other Types of Depression
Dysthymic Disorder (Dysthymia)
People who are depressed are at higher risk for suicide. If a person has the symptoms being described, it is important to seek help immediately. Contact a mental health professional if you are having any of the following symptoms:

- Being sad for most of the time
- Being sad for most of the time
- Being sad for most of the time

Bipolar Disorder (Manic Depressive Illness)
Bipolar disorder is a mental illness characterized by alternating periods of depression and mania. It is a complex condition that affects the brain's chemistry. People with bipolar disorder often experience extreme mood swings, ranging from deep sadness to intense happiness. Treatment typically involves a combination of medication and therapy. It is important to seek professional help if you suspect you or someone you know has bipolar disorder.

Suicide
Suicide is the act of taking one's own life. It is a complex phenomenon that can be influenced by many factors, including mental health conditions, stress, and social support. If you or someone you know is thinking about suicide, it is crucial to seek help immediately. Contact a mental health professional or a crisis hotline for support.

Treatment
Depression can often be treated with medication, therapy, or a combination of both. It is important to work closely with a healthcare provider to find the right treatment plan. Some common treatments include:

- **Antidepressants:** These medications help regulate brain chemistry.
- **Mood Stabilizers:** These medications help stabilize mood.
- **Alternative Therapies:** These include yoga, meditation, and acupuncture.
- **Psychotherapy:** This involves talking to a therapist to explore thoughts and feelings.
- **Counseling (Psychotherapy):** This involves talking to a therapist to explore thoughts and feelings.

Areas of the Brain Affected by Depression

- Thalamus:** Controls sensory input of visual and auditory, including sleep and temperature. It connects the amygdala. The thalamus is highly active in people with depression.
- Hypothalamus:** Controls various types of neural and autonomic, including sleep and temperature. Lesions in the hypothalamus help regulate mood and appetite while hypothalamic pathways help regulate emotions and energy level.
- Amygdala:** Helps control the response to negative feelings; it is highly active in people with depression.
- Anterior cingulate cortex:** Helps regulate emotion and helps with attention. It also has a role in emotional experience and the regulation of anger. This area is highly active in people with depression.
- Prefrontal cortex:** Involved in complex thinking, personality, and social behavior. Dysfunction in this area is linked to depression. Hypothalamic pathways affect attention, concentration, memory, and motivation processes. There is decreased activity in the prefrontal cortex in depression.

The Limbic System
Regulates emotions, moods, motivation, and social drive. It is highly active in people with depression. Any dysfunction in the limbic system can affect mood and behavior.

The Role of Neurotransmitters
Neurotransmitters are chemicals that carry messages between the brain cells. In depression, there are imbalances in neurotransmitters, which can lead to the symptoms of depression. Some common neurotransmitters involved in depression include serotonin, dopamine, and norepinephrine. Medications that affect these neurotransmitters can help improve symptoms.

Abused
Closed membrane channels seen on a neuron affected by depression.

Normal
Closed membrane channels seen on a neuron not affected by depression.

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D. Alcohol/Substance Use

Researchers are now beginning to look at substance use as a form of learning, in terms of the way the brain changes in response to substance use. Repeated substance use reshapes learning pathways in the brain. Factors contributing to increased propensity of adolescents to use alcohol and other drugs:

- These are risk-taking activities. Thus, they may reflect the same immature capacities for self-control as other risky behaviors.
- Oftentimes, the use of alcohol/substances occurs socially, with adolescents being particularly susceptible to peer influence (either directly or indirectly).
- In the brain, alcohol and drugs interact with the same reward circuitry as other rewards (the dopamine system). Thus, adolescents are more rewarded by (and motivated for) the use of alcohol and drugs (animal studies).

- Adolescents have a reduced sensitivity to aversive consequences that normally serve to moderate use of alcohol/drugs.

Alcohol and the Adolescent Brain:

Adolescents, compared to adults, are better at handling the sedative aspects of drinking (drowsiness, hangovers, lack of coordination). The neurotransmitter GABA is enhanced by alcohol. Adolescents have fewer GABA receptors – so they experience fewer inhibitory effects that GABA allows. Less inhibitions means less sedation, less impairment of motor skills and fewer coordination problems. It also means greater tolerance – and therefore – a greater incentive to keep drinking.

In terms of development, alcohol has been shown to affect the size and efficiency of the prefrontal cortex and the hippocampus, which is important for learning and memory. Alcohol also affects white matter. Among teens with alcohol-use disorders, white matter of the corpus callosum becomes damaged, especially in an area called the splenium, which is the part of the brain associated with hearing, vision, motor control and sleep-wake cycles. Alcohol use may also inhibit adolescents' abilities to consider multiple sources of information when making a decision – forcing them to use fewer strategies when learning new information.

Substance Use: Adolescents process other drugs (cocaine) differently from adults. Cocaine stimulates dopamine, and teens appear sensitive to the effects of cocaine, especially in the reward centers and the habit forming areas of the brain. OxyContin likewise affects the reward system and can result in permanent changes to that system. OxyContin tricks the brain into keeping more dopamine receptors than needed.

IV. Use of Adolescent Brain Development Concepts in Court

Capacity to Waive/Invoke Miranda Rights (NCGS 7B-2101: Interrogation Procedures)

Developmental factors to consider in capacity to waive Miranda Rights:

- Mental status of juvenile (IQ, age, time of day, level of stress in environment, number of adults present, emotional arousal and decision making)
- Beliefs the juvenile may have about peers – do they worry about “ratting them out” or are they taking the blame for another peer
- Was their thinking characteristic of only considering “short-term” consequences (i.e., stopping the questioning?)

Transfer to Adult Court: NCGS 7B-2203 considers factors relevant at a transfer hearing, including the following: age, maturity, intellectual functioning, prior record, and prior attempts to rehabilitate the juvenile. Consider:

- Decision making during alleged offense
- Susceptibility to peers, emotional arousal and interpretation

- Level of planning versus impulsivity
- Treatment needs and amenability: some argue that adolescents are more amenable to treatment due to the malleability and continued development of the brain.

Capacity to Proceed to Trial: Consider the ability of the juvenile to weigh risks/ benefits in making decisions (e.g., how to plead), to think in hypothetical situations (e.g., deciding if to accept a plea agreement); and to delay gratification (e.g., plead guilty versus wait in detention for trial).

Diminished Capacity/Mental State at Time of Offense: In addition to factors considered in preceding sections (see, e.g., Transfer), consider the juvenile's emerging mental health functioning and increased susceptibility to alcohol/substance abuse and mental illness. Consider the possibility of misdiagnosis; effectiveness of treatment; and consistency of treatment.

Disposition/Sentencing/"Miller": Relevant to psychological evaluations is 15A-1477c: Penalty Determination: "The defendant or the defendant's counsel may submit mitigating circumstances to the court, including, but not limited to, the following factors: Age at the time of the offense; Immaturity; Ability to appreciate the risks and consequences of the conduct; Intellectual capacity; Prior record; Mental health; Familial or peer pressure exerted upon the defendant; Likelihood that the defendant would benefit from rehabilitation in confinement; and Any other mitigating factor or circumstance.

Many of these factors relate to the maturity of the adolescent – decision making capacities, impulsivity, emotional functioning, social functioning – all factors that are in flux during adolescence due, in part, to brain development.

Forensic Evaluations in Delinquency Matters

Legal Issue	Indicators for an Evaluation	Referral Questions	Special Issues/Potential Dilemmas
<p>Capacity to Proceed NCGS §15A1001-1008</p>	<p>History of Intellectual Disability, learning problems, failure in school</p> <p>Acquiescing to others/ “parroting back” information</p> <p>Neurological impairment</p>	<p>“Evaluate juvenile to determine if s/he has a mental health diagnosis or intellectual disability that impairs his/her capacity to proceed to trial or to enter into a plea agreement”</p>	<p>Confidentiality regarding statements about alleged offense (recommend the evaluator not question about the juvenile’s version of events)</p>
<p>Capacity to Waive Miranda Rights</p> <p>NCGS §7B-2101</p> <p><i>In re JDB v NC 131 S. Ct. 2394 (2011)</i></p> <p><i>In re KDL, 207 NC App. 453, 459 (2010)</i></p>	<p>Age/experience with legal system</p> <p>Intellectual/learning problems</p> <p>Evidence of impairment at the time (intoxication, extreme fear)</p> <p>Multiple or conflicting statements</p>	<p>“Evaluate the juvenile to determine his/her capacities to waive Miranda rights in the context of a police interrogation.”</p> <p>“Evaluate the juvenile to determine the juvenile’s capacities to waive Miranda rights and the risk of being coerced into making a statement”</p> <p>“To determine if there were any coercive factors associated with the conditions of the interrogation that – when combined with the juvenile’s risk of being coerced – would have made the waiver involuntary”</p>	<p>Involves assessing a past mental state and requires much collateral data</p> <p>Timing: how much time has occurred since the statement is highly relevant since the capacities of adolescents will change over time more than for adults</p> <p>Adolescents’ decision making is not as sophisticated as adults (e.g., short-term thinking, impulsivity, failure to weigh risks).</p> <p>Adolescents may be more influenced by circumstances of questioning and feel more pressure than an adult</p> <p>JDB v NC (2011) Evaluators need to determine when the client was <i>in custody</i> vs when perceived s/he was in custody</p>

Legal Issue	Indicators for Evaluation	Referral Question	Special Issues/Potential Dilemmas
Juvenile Transfer (Waiver) NCGS §7B-2203	Age/experience with legal system Mental health and/or trauma history Immaturity (“follower”) Behavior marked by impulsivity, poor decision making	“Evaluate the juvenile with respect to those factors of 7B-2203 that may be addressed by mental health assessment...” Eval. juvenile’s intellectual functioning, mental health status, ...maturity, treatment needs and amenability	Assessment of “risk of harm” and the problem of the alleged offense Right to avoid self-incrimination Opinions about “risk” should be <i>estimates</i> & be specific to type and timeframe What is maturity? Sophistication?
“Mental State at the time of Offense “ or Culpability	Age/exper/IQ, mental health, IEP/BIP Autism Spectrum Disorder Behavior of alleged offense deviates from prior behavior Trauma history/exposure	““What was the juvenile’s level of functioning /mental capacities at the time of the alleged offenses?” “What situational factors may have been present at the time of the alleged offense? What effect would they have on decision making and behavior, given his/her level of functioning at the time?”	Involves assessment of prior mental state. Therefore, the time between alleged offense and evaluation is relevant to memory functioning, cognitive development and maturity over time
Disposition NCGS § 15A-1477c “Miller” Resentencing	As above, as well as history of treatment successes/failures in past Changes in support system or other environmental factors Consideration of how to manage risk	To obtain clarification as to what has and hasn’t worked. To determine who should be involved in treatment and how To establish a plan for treatment that includes transitioning to community	Risk Estimates, not predictions; Consider “risk management” versus “risk of harm” Aggression is multifaceted: people may be at higher risk in some situations than in others Adolescence is change: limits the degree to which we can predict behaviors. Confidentiality: Revealing undetected behavior.

V. Cautions and Limitations

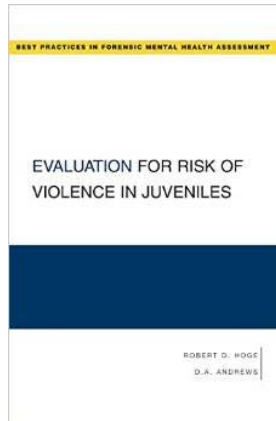
- A. Timing: Retrospective evaluations, when to call the evaluator
- B. Limitations of Neuropsychological Research and Assessment Techniques
 - Animal vs human research
 - Applying research about groups to an individual case
 - Overreliance on neuropsychological research
 - Explanation, not an excuse
- C. Common Challenges Associated with the Use of Forensic Evaluations

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Recommended Books



Best Practices in Mental Health Assessment Series; Editors: Thomas Grisso, Alan Goldstein, and Kirk Heilbrun; Oxford University Press

Relatively concise (150-200 pp) but thorough books on specific topics related to mental health law. Each title covers a given area (e.g., Evaluation of Risk of Violence in Juveniles) and is written by the professionals who are considered to have substantial clinical and research expertise in that area. Each book in the series follows a basic format of providing a foundation of relevant forensic mental health concepts, a summary of research in the area, how/what comprises a forensic evaluation of the issues, a review of specialized tests/instruments, and an overview of case law and statutes.

On the Web:

The MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice
<http://www.adjj.org/content/index.php>

Ethical Standards, Principles, and Guidelines

Ethical Principles of Psychologists and Code of Conduct with 2010 Amendments
<http://www.apa.org/ethics/code/index.aspx>

Specialty Guidelines for Forensic Psychologists, APA (2013)
<http://www.apa.org/practice/guidelines/forensic-psychology.pdf>

Ethical Guidelines for the Practice of Forensic Psychiatry
<http://www.aapl.org/ethics.htm>

National Organization of Forensic Social Work
<http://nofsw.org/?s=ethics>



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DEVELOPMENTAL REFORM IN JUVENILE JUSTICE:

Translating the Science of Adolescent Development to Sustainable Best Practice

By John A. Tuell, with Jessica Heldman and Kari Harp

INTRODUCTION

The goals, practices, policies, outcomes, and operations of the juvenile justice system and its affiliated youth-serving partners should be informed by the growing body of research and knowledge about adolescent development. The research that was effectively synthesized in the 2013 National Research Council report recognized that adolescents differ from adults in three important ways:

- **Adolescents are less able to regulate their own behavior in emotionally charged contexts.**
- **Adolescents are more sensitive to external influences such as the presence of peers and the immediacy of rewards.**
- **Adolescents are less able to make informed decisions that require consideration of the long term.¹**

These adolescent characteristics provide the foundation for the adoption and implementation of developmentally informed practices, policies and procedures that have proven effective in achieving the primary responsibilities of the juvenile justice system, which include accountability, prevention of re-offending, and fairness and equitable treatment. Unfortunately, and all too frequently still in current practice, the goals, design, and operation of the juvenile justice system are not informed by this growing body of knowledge.

As a result, the outcomes are more likely to be negative interactions between youth and justice system officials, increased disrespect for the law and legal authority, and the reinforcement of a deviant identity and social disaffection.² The challenge going forward includes increasing the numbers and array of system practitioners who understand and embrace the research findings and implications; adopting systemic youth and family intervention practices across the spectrum of key decision points directly impacting the primary goals of the juvenile justice system; and creating and maintaining quality assurance methodologies that ensure fidelity to these principles and practices.

Upon closer examination of the origins of the research over the past decade, there is evidence of significant changes in brain structure and function during the period of adolescence³ that has resulted in a strong consensus among neuroscientists about the nature of these changes. Much of this work has resulted from advances in magnetic resonance imaging (MRI) techniques that provide the opportunity to safely track the development of brain structure, brain function, and brain connectivity in humans.⁴ The evidence suggests that the three previously highlighted cognitive tendencies are linked to the biological immaturity of the brain and an imbalance among

² Ibid.

³ Scientifically, adolescence has no precise chronological onset or endpoint. It refers to a phase in development between childhood and adulthood beginning at puberty, typically about 12 or 13, and ending in the late teens or early twenties. Generally speaking, when referring to an adolescent the focus is on those persons under age 18.

⁴ Steinberg, L. (2009). Adolescent Development and Juvenile Justice. *Annual Review Clinical Psychology*, Vol. 5, 459-485.

¹ National Research Council. (2013). *Reforming Juvenile Justice: A Developmental Approach*. Washington, DC: The National Academies Press.
<https://doi.org/10.17226/14685>

developing brain systems. Simply stated, the brain system that influences pleasure-seeking and emotional reactivity develops more rapidly than the brain system that supports self-control. This fact leaves adolescents less capable of self-regulation than adults.⁵ Additionally, both the seriousness and likelihood of offending are also strongly affected by influences in youths' environment — peers, parents, schools, and communities.

Another key aspect of the research findings from *Reforming Juvenile Justice: A Developmental Approach* has significant implications for initial juvenile justice system responses and the consideration of alternatives to formal processing and diversion opportunities. Specifically, the research shows that for most youths the period of risky experimentation does not extend beyond adolescence, ceasing as identity settles with maturity.⁶ The vast majority of youths who are arrested or referred to juvenile court have not committed serious offenses, and more than half of them appear in the system only once.

SUPREME COURT CASE LAW

Three landmark United States Supreme Court decisions in the past dozen years that involved the criminal culpability of juveniles have been informed by this research. In each of the cases, the Court drew on the adolescent brain development research to conclude that “adolescents, by virtue of their inherent psychological and neurobiological immaturity are not as responsible for their behavior as adults.”⁷ In *Roper v. Simmons* (2005), the Court opined that adolescents' diminished blameworthiness makes it inappropriate to sentence them in ways that are reserved for those who are deemed fully responsible for their criminal acts. Thus, the Court abolished the death penalty for juveniles. In *Graham v. Florida* (2010), the Court remarked in its majority opinion about the maturation in late adolescence of brain regions important for behavior control, and thus banned the use of life without parole for juveniles who are convicted of crimes other than homicide. Finally, in *Miller v. Alabama* (2012), the US Supreme Court found it unconstitutional for a state to mandate life without parole for juveniles and noted in the majority opinion once again that the adolescent neuroscience reflected immaturity in high order executive functions such as impulse control, planning ahead and risk avoidance.

In all three of these transformative decisions, the Court cited *amicus curiae* briefs filed by the American Psychological Association, the American Psychiatric Association, and Adolescent Psychiatry, among others, which summarized the current research on adolescent brain development and connected it to the legal issues confronting the United States

Supreme Court. It is this recent history of litigation before the highest court that serves to cement the impact of the research in our everyday approach and successful practice toward the goals of the juvenile justice system. The Court's rulings and reliance on this research tend to undermine any notion that the research merely suggests a pendulum swing in a direction of change that will eventually swing back. In fact, it can be argued that the Court's rulings provide a constitutional framework grounded in developmental neuroscience which must guide policy and practice development and implementation of reforms in the juvenile justice system. In combination with other research that applies the foundation of this understanding to treatment and where interventions and practices with juvenile offenders achieve successful reductions of re-offending and improve positive youth development, it is apparent that the future of successful juvenile justice systems must be fundamentally driven by this research.

HISTORY OF REFORM

As our juvenile justice system policy makers, leaders, practitioners and key partners address the critical enhancement and reformation of the juvenile justice system it is instructive to briefly retrace the history of the approaches to juvenile justice reform. The John D. and Catherine T. MacArthur Foundation, through its *Models for Change: Systems Reform in Juvenile Justice Initiative*, published *Sustaining Momentum: Assessing and Mitigating Threats to the Fourth Wave of Juvenile Justice Reform*⁸ in 2015. This publication, used as a framework to facilitate a Town Hall meeting at the 9th Annual *Models for Change* National Conference in December 2015, briefly articulated the characteristics of the historical “waves of reform.”

The first reform was the creation of a system of justice for juveniles that was separate from the criminal justice system — a late 19th century recognition that youth were dependent, still growing, and therefore could be guided. The court would be the kindly parent, or serve as *parens patriae*, and direct youth away from crime by meeting the youth's needs. However, by the 1960s our nation's courts concluded that this model failed to provide what it promised. This approach was therefore replaced by a second-wave of reform which is usually highlighted by the 1960's United States Supreme Court *In re: Gault* due process decision, which recently (May 2017) reached its 50 year milestone in law. The *Gault* case law afforded all juveniles the same rights as adults when faced with prosecution, defense attorneys, pleadings, and procedural rules. It is important to note that the system retained its core commitment to rehabilitation through this period of change.

⁵ National Research Council. (2012). Report Brief, *Reforming Juvenile Justice: A Developmental Approach*. Washington, DC: The National Academies Press. <https://doi.org/10.17226/14685>

⁶ Ibid.

⁷ Steinberg, L. (2009). Adolescent Development and Juvenile Justice. *Annual Review Clinical Psychology*, Vol. 5, 459-485.

⁸ Models for Change. (2015). *Sustaining Momentum Assessing and Mitigating Threats to the Fourth Wave of Juvenile Justice Reform*, Town Hall Forum. Chicago: John D. and Catherine T. MacArthur Foundation. <http://modelsforchange.net/publications/793>

The third wave of reform came in the period covering the latter part of the 1980s and continued throughout the 1990s. This period of change was in response to a national rise in youth violence that created a strong desire for punitive responses and led to public outcry and multiple legislative reforms.⁹ In nearly all 50 states, laws were changed to respond to youth with penalties that were harsher, often involving high volumes of cases transferred or waived to the adult criminal court. While leaving intact due process requirements, it significantly undermined the rehabilitative objectives of the juvenile justice system. In the past decade, with the research confirming that many of those laws, policies and accompanying practices had not produced greater public safety or improved outcomes for youth, many have been reformed again. These more recent changes have been informed by the developmental research about adolescents which has brought us to the so-called fourth wave of juvenile justice in today's policies and practices.

As indicated above, the primary responsibilities or aims of the juvenile justice system are to hold youths accountable for wrongdoing, prevent further offending, and treat all youth with fairness and equity. Within that framework, the research strongly supports that focusing on the positive social development of youth can enhance and assure the protection of public safety. An examination of these responsibilities reflects their compatibility with the developmental approach to juvenile justice.

Accountability – It is imperative that our juvenile justice systems provide an opportunity for youths to accept responsibility for their actions and make amends to individual victims and the community. This focus ensures that offenders are answerable for wrongdoing, particularly in cases in which there is harm to person and/or property. Among the research-supported best practices in this area are restorative justice, peer/youth courts, community service, and cognitive skill building. The effective methods for accountability do not include those that mimic the adult criminal justice system (e.g., “lengthy confinement, control and condemnation”¹⁰). While monitoring and supervision may be included in the juvenile justice and court system response, to be effective in protecting public safety it must be accompanied by opportunities for youth to address their accountability through the research-supported best practices.

In fact, additional research reviews reveal very important findings that should further inform future practice reform in accordance with the accountability responsibility. First, deterrence-oriented programs that focus on discipline, surveillance, or threat of punitive consequences (e.g., Scared

Straight-type programs, boot camps, and intensive probation supervision) on average have no effect on recidivism and may actually increase it.¹¹ Second, many “therapeutic” programs and services oriented toward facilitating constructive behavior change have shown very positive effects - even for serious offenders.¹² Therefore, juvenile offenders with moderate or high risk for reoffending should be “subject to the minimal level of supervision and control consistent with public safety and be provided with appropriate, effective therapeutic services;” and furthermore, “subjecting juvenile offenders to punishment beyond that which is inherent in the level of control necessary for public safety is likely to be counter-productive to reducing recidivism.”¹³ When combined with the current research on adolescent development, these best practice approaches actually have a much higher likelihood of achieving the goal of youth accountability within our juvenile justice system.

Preventing Reoffending - The best practice approach to reduce reoffending includes the commitment to the use of structured decision-making instruments that inform professional judgement at key decision points (e.g., risks-needs-responsivity [RNR] tools). In the case process this includes referral/intake, diversion or alternative responses, adjudication, disposition and case planning.¹⁴ These scientifically validated tools and instruments can identify whether a youth is at low, moderate or high risk to reoffend. At the referral and intake processing decision point, this may provide a critical opportunity to divert the youth from formal involvement in the juvenile justice system. Given the fact that most low risk offenders are not likely to reoffend and formal involvement in the system may actually increase the likelihood to reoffend, the systematic use of these risk screening tools provides a positive opportunity to prevent reoffending through diversion or alternative responses to formal involvement in the juvenile justice system. Further, RNR assessment tools (e.g., SAVRY, YASI, YLS-CMI, etc.) may be used to assess for the specific needs of the youth in identified domains (family, peers, behavioral health, education, etc.) and permit a more effective matching of treatment and programmatic interventions that will ameliorate the risk to reoffend. If implemented well, the use of RNR tools effectively target specific evidence-based interventions (e.g., specific therapeutic interventions such as aggression replacement therapy and cognitive-behavioral therapy) that reduce

⁹ Ibid.

¹⁰ National Research Council. (2012). Report Brief, Reforming Juvenile Justice: A Developmental Approach. Washington, DC: The National Academies Press. <https://doi.org/10.17226/14685>

¹¹ Lipsey, M. (2009). The primary Factors That Characterize Effective Interventions with Juvenile Offenders: A Meta- Analytic Overview. *Victims and Offenders*, Vol. 4, 124-47.

¹² Lipsey, M.W. & Cullen, F.T. (2007). The Effectiveness of Correctional Rehabilitation: A Review of Systematic Reviews. *Annual Review of Law and Social Science*, Vol. 3, 297-320.

¹³ Lipsey, M.W., Howell, J., Kelley, M. & Chapman, G. (2010). Improving the Effectiveness of Juvenile Justice Programs: A New Perspective on Evidence-Based Practice. Washington, DC: Georgetown Public Policy Institute.

¹⁴ Tuell, J.A. & Harp, K.L. (2016). Probation System Review Guidebook, 2nd Edition. Boston: Robert F. Kennedy Children's Action Corps. <http://rfknrcjj.org/resources/probation-system-reform/>

reoffending and produce fiscal returns relative to their costs/youth.

Fairness and Equitable Treatment – The third aim requires that youth are treated fairly through the assurance that due process laws and procedures are protected for every youth and family involved in the juvenile court process. Fundamentally, this includes equal certainty that all youth have access to and are represented by properly trained defense counsel and that all youth have an opportunity to participate in the juvenile justice system proceedings. The fairness standard also applies to the practice of swift justice. An adherence to standards and timelines for case processing is critical in that the juvenile justice process is designed to teach offenders that illegal behavior has consequences and that anyone who violates the law will be held accountable. Youth who must wait a significant period of time between offense and consequence, often for the convenience of the system process and actors, may not be able to sufficiently connect the two events so as to serve as an effective deterrent. Practically speaking, if the juvenile justice process is not timely, many youth will experience prolonged uncertainty which can negatively impact trust and a sense of fairness. If a youth does not perceive the juvenile justice system to be predictable and fair, then the system's goal of changing behavior is less likely to be achieved.¹⁵ Ensuring that youth perceive they have been treated fairly and with dignity contributes to several important features of prosocial development, including moral development, belief in the legitimacy of the law, and the legal socialization process generally.

It is also important to highlight the research and data that reflect the disproportionate numbers of minorities involved in the juvenile justice system, particularly in the deeper end of system involvement (e.g., detention, correctional placements) and that perceptions of unfairness have been corrosive to minorities, their families, and communities. Each juvenile justice system must be dedicated to examining this circumstance and where relevant must create policies and practices that seek to reduce racial and ethnic disparities. These diligent efforts can ameliorate the effects of disadvantage and discrimination by reducing unnecessary involvement and confinement within the justice system.

HALLMARKS FOR TRANSFORMATION

In response to the 2012 National Research Council Brief, the Executive Director of the Robert F. Kennedy National Resource Center for Juvenile Justice (RFK National Resource Center) was privileged to serve as a member of the Subcommittee to create a Prioritized Plan to Implement a Developmental Approach in Juvenile Justice Reform (within the Committee on Law and Justice, Division of Behavioral and Social Sciences and Education of the National Academy of Sciences). The subcommittee members were contributing authors for the *Implementing Juvenile Justice Reform: The Federal Role* report, published in 2014, which identified seven hallmarks of a developmental approach to juvenile justice. These seven hallmarks (described in greater detail in Sidebar #1) include:

- **Accountability without criminalization**
- **Alternatives to justice system involvement**
- **Individualized response based on assessment of needs and risks**
- **Confinement only when necessary for public safety**
- **A genuine commitment to fairness**
- **Sensitivity to disparate treatment**
- **Family engagement¹⁶**

The identification of these hallmarks helps to organize the opportunities to achieve the key aims and responsibilities of the juvenile justice system around research-supported methods of practice at each key decision point in a youth's case. They form the foundation of a necessary training curriculum for all juvenile justice system professionals and affiliated stakeholders. Upon recommended completion of adolescent development training, there should be a standard evaluation by which every youth-serving practitioner, manager and leader demonstrate their knowledge, aptitude, and proficiency. The RFK National Resource Center's experiences in delivering training and technical assistance related to probation and dual status youth to jurisdictions across the country for more than a decade have helped to further clarify the set of policies and practices that comport with the adolescent development hallmarks. When successfully interwoven throughout the key decision points and among all of the relevant practitioners in policy and practice, a state and/or local jurisdiction may have in place a successful, replicable and sustainable framework for positive juvenile justice system performance and youth outcomes.

¹⁵ National Center for State Courts. (2011). Model Time Standards for State Trial Courts. <http://ncsc.contentdm.oclc.org/cdm/ref/collection/ctadmin/id/1836>

¹⁶ National Research Council. (2012). Report Brief, Reforming Juvenile Justice: A Developmental Approach. Washington, DC: The National Academies Press. <https://doi.org/10.17226/14685>

SIDEBAR #1

HALLMARKS OF A DEVELOPMENTAL APPROACH TO JUVENILE JUSTICE

- **Accountability without criminalization:** Adolescents need opportunities to accept responsibility for their actions and, where appropriate, to make amends to affected individuals and communities. However, given that adolescence is a transient period, when youth are involved in the justice system, measures should be taken to fully preserve the youth's opportunities for successful integration into adult life.
- **Alternatives to justice system involvement:** Interventions that aim to prevent re-offending often are more effective if services needed by adolescents are provided within the community and not through the justice system, as long as accountability is also achieved when appropriate. Well-designed community-based programs are more likely than institutional confinement to facilitate healthy development and reduce recidivism for the majority of youth who come to the attention of the juvenile justice system.
- **Individualized response based on assessment of needs and risks:** Individualized assessment of the treatment and intervention needs of the adolescent, as well as the risk of subsequent reoffending, helps to match needs appropriately to levels of supervision and services.
- **Confinement only when necessary for public safety:** Even when youth are adjudicated as delinquent, alternatives to confinement often serve the goals of the system. This does not mean that all services need to be provided outside of residential placement, which is necessary for some adolescents from a public safety perspective. Studies have shown, however, that confinement of juveniles beyond the minimum amount needed to deliver intensive services effectively is not only wasteful economically but also potentially harmful, and it may impede prosocial development.
- **A genuine commitment to fairness:** Treating youth fairly and ensuring that they perceive they have been treated fairly and with dignity contribute to several important features of prosocial development, including moral development, belief in the legitimacy of the law, and the legal socialization process generally.
- **Sensitivity to disparate treatment:** As perceptions of unfairness have been corrosive to minorities, their families, and communities, jurisdictions' efforts to reduce racial/ethnic disparities are extremely important and can ameliorate the effects of disadvantage and discrimination by reducing unnecessary involvement with and confinement in the justice system.
- **Family engagement:** A positive family experience is a central feature of positive youth development, even for system-involved youth. The juvenile justice system has the opportunity and responsibility to encourage family involvement whenever possible, including interactions with law enforcement, court proceedings, service delivery, intervention, and reintegration, in order to produce successful outcomes and to reduce reoffending.

TRANSLATING THE SCIENCE INTO PRACTICE

The RFK National Resource Center for Juvenile Justice has developed the Advancing Best Practice in Youth Justice Seminar (see sidebar #2, next page). The curriculum focuses on a set of practices connected to effective system reform that embrace the tenets and principles fundamental to implementation of a developmental approach to youth justice. Additionally, the National Council of Juvenile and Family Court Judges (NCJFCJ) adopted a resolution in July, 2017 which endorsed a set of juvenile probation practices that conform to the current knowledge of adolescent development and adolescent brain development.¹⁷ The following segments of the curriculum, consistent with the NCJFCJ resolution, can serve as an organizing and guiding mechanism for a state or local jurisdiction to translate the science of the developmental approach to practice within their juvenile justice system and maximize the likelihood for improved system performance and youth outcomes:

Collaborative Leadership

As youth-serving agencies often face the steady stream of immediate crises, it is frequently a challenge to incorporate time and attention to the nurturance of important professional partnerships. This can lead to a fragmentation of effort among the very well-meaning service professionals that undermines accomplishment of goals, objectives and outcomes that benefit the youth and families we serve. With varying missions and mandates, it is also frequently easy to argue for this separatist practice to continue even as we fail as a community of service practitioners to realize positive outcomes. The underlying premise for a developmental approach to juvenile justice system reform (e.g., less capacity for self-regulation, heightened sensitivity to peer pressure, and less ability to make judgements that require future orientation) provides the strongest case yet for system partners to find common ground around which a strong collaborative foundation can be built. With this strong scientific basis, our professional practitioners can collectively recognize that during this period of adolescence, our youth actively engage in risky decision-making in relation to authority at home, in school and in the community. This development impacts susceptibility to the use of drugs and alcohol when offered by peers. It impacts how youth interpret and process trauma, stress and violent situations. It often also impacts youth's ability to learn. Therefore, if we are going to successfully ameliorate the risk to reoffend and provide opportunities for positive behavior

¹⁷ National Council of Juvenile and Family Court Judges. (2017). Resolution Regarding Juvenile Probation and Adolescent Development. http://www.ncjfcj.org/sites/default/files/Fnl_AdoptedProbationPolicyResolution_7-2017_1.pdf

SIDEBAR #2

RFK NATIONAL RESOURCE CENTER TRAINING INSTITUTE

The RFK National Resource Center offers a variety of on-site training opportunities addressing critical topics in juvenile justice. We bring experts and experienced facilitators to you, ensuring that all vital leaders, staff, and stakeholders have the opportunity to attend. Each curriculum is based on well-established frameworks for reform that have been applied in numerous jurisdictions throughout the nation, while also incorporating current research and emerging best practices. We work with you to identify your jurisdiction's unique goals for the training and we then adapt the curriculum to meet those goals. Our approach to training strikes a balance between the traditional presentation of essential information with interactive discussions and facilitated activities aimed at applying the information to each individual jurisdiction. As a result, participants conclude the training well-informed and poised to begin taking action immediately. Below are several examples of training we offer that directly apply the research on adolescent development.

Advancing Best Practices in Youth Justice Seminar

This interactive seminar provides a comprehensive yet succinct overview of the key best practices in the field of juvenile justice in order to promote awareness and change at all levels of the policy, practice and service continuum. The curriculum is based on more than a decade of field experience in Probation System Review and Dual Status Youth reform and is informed by the seminal research from the National Research Council synthesized in the 2013 publication entitled *Juvenile Justice Reform: A Developmental Approach*. Additionally,

the curriculum benefitted from the input and expertise of the RFK National Resource Center's Probation System Reform Practice Network, a select group of experienced leaders and practitioners from across the country who have championed reform within their local jurisdictions. This 1 ½ day seminar provides an opportunity for the leaders of your state or local system to collectively learn about research-based best practices that incorporate the best understanding of adolescent development. The seminar initiates or builds upon the valuable process of identifying policy and practice opportunities within systems to align with national best practices that can improve both youth outcomes and system performance.

Dual Status Youth: Improving Outcomes for Youth Involved in Child Welfare and Juvenile Justice Training Initiative

The Dual Status Youth Training Initiative aims to increase knowledge among child welfare, juvenile justice and other youth-serving system leaders, practitioners and stakeholders about best practices to improve dual status youth outcomes and to expedite the development and implementation of new or enhanced dual status youth policies and procedures. The two-day curriculum includes principles and practices that have proven to promote coordinated and integrated multi-system practices and shared accountability. The training is based on the Framework for Dual Status Youth Reform, which is detailed in two influential RFK National Resource Center publications released in 2013, the *Dual Status Youth - Technical Assistance Workbook* and the *Guidebook for Juvenile Justice and Child Welfare System Coordination and Integration: A Framework for Improved Outcomes, 3rd Edition*. Additionally, the curriculum benefitted from the input and expertise of the RFK National Resource Center's Dual Status Youth Practice Network, a select group of experienced leaders and practitioners from across the country who have championed dual status reform within their local jurisdictions. As a

result, the training has a strong focus on meeting the training, education, and planning needs of those doing the work on the ground in order to foster collaborative achievement of best practices and system approaches.

Probation System Review Training

The RFK National Resource Center for Juvenile Justice has pioneered an analytic approach that can be used in partnership with state and local jurisdictions to enhance probation department and juvenile justice system performance. This approach is detailed in the *RFK National Resource Center's Probation System Review Guidebook, 2nd Edition (2016)* and forms the basis for the Probation System Reform Training. This 1 ½ day training provides an opportunity for the leaders of your state or local system to learn about the key areas of probation system practice and policy that must be examined and aligned with national best practices in order to achieve optimal youth and system outcomes. The training curriculum engages the participants in understanding the four key elements of examination which include 1) Administration, 2) Probation Supervision, 3) Intra- and Interagency Work Processes and 4) Quality Assurance. Participants will not only learn about the methods, tools and resources available to examine their probation system within these four elements but they will engage in facilitated conversations that allow them the chance to identify which areas of their practice are best aligned with research-based principles and which areas have room for improvement. The curriculum was informed by the expertise of the RFK National Resource Center's Probation System Reform Practice Network, a select group of experienced leaders and practitioners from across the country who have championed reform within their local jurisdictions.

For more information on the RFK National Resource Center Training Institute, please visit www.rfknrcj.org.

change, cognitive skills development, and stability within a home environment, we simply will not be able to do that alone or in a professional vacuum. Further, what is recognized nearly universally by seasoned and novice practitioners alike is supported by the following two examples of the characteristics of the youth that touch our juvenile justice system:

- **As many as 80% of youth with child welfare and juvenile justice involvement have active trauma symptoms that require targeted mental health treatment to ameliorate the risk of reoffending and to increase the likelihood of a stable response to interventions (e.g., system monitoring and placement stability).¹⁸**
- **In a meta-analysis of 161 studies addressing juvenile offending and primary risk factors, parenting behaviors**

emerged as the strongest predictor of juvenile delinquency; followed by educational issues, negative peer influence, and substance abuse.¹⁹

These are but a couple of examples of the research and data that help solidify our understanding that the vast majority of the youth and families we serve are experiencing challenges in multiple domains.

Collaboration is not merely a concept; rather it is a dynamic and detailed set of connected actions. It is not accomplished episodically, but routinely through the development and adoption of policies, procedures and protocols that are effectively overseen by the persons who comprise the collaborative partnership. According to research on

¹⁸ Grisso, T. & Vincent, G. (2014). Trauma in Dual Status Youth: Putting Things in Perspective. Boston: Robert F. Kennedy Children's Action Corps. <http://rfknrcj.org/resources/trauma/>

¹⁹ Ryan, J., Williams, A., & Courtney, M. (2013). Adolescent Neglect, Juvenile Delinquency and the Risk of Recidivism. *Journal of Youth and Adolescence*, Vol. 42(3), 454-465.

collaborative practices, if the appropriate people are “brought together in constructive ways and with good information, they will create authentic visions and strategies for addressing the shared concerns of the organization and the community.”²⁰ Among the documented sustainable benefits are:

- **Buy-in**
- **Trust building**
- **Elimination of turf issues**
- **Access to more & better information**
- **Better opportunity for substantive results**
- **Generation of new leadership**
- **Community and/or organization empowerment**
- **System operations improved systemically**

The principle findings of the research on adolescent brain development and the accompanying neuroscience on adolescence can be used to compel our youth-serving partners to understand that without such systematic collaborative practices, our juvenile justice system will fail to achieve our mandates and vision far more often than is acceptable for the youth and families we serve.

Risks-Needs-Responsivity (RNR) Tools

After more than two decades of research that confirmed the efficacy of scientifically validated structured decision making tools to screen and assess for risk to reoffending, there is still a significant gap between the research and practice. In view of the neuroscience of adolescents, instead of basing sanctions solely on the offense, a more effective approach is to assess each youth’s risk for reoffending and reserve the most intensive monitoring and interventions (including both therapeutic services and sanctions) for those at highest risk. In addition, evidence suggests that the best results come from matching services to youths’ specific “dynamic risk factors”—that is, risk factors that can be changed, such as substance abuse, poor school achievement, or lack of parental monitoring. Further, with a strong commitment to the RNR tools, juvenile justice system practitioners can more effectively target positive youth development opportunities that focus on increasing competency and cognitive skills development.

There is considerable literature that provides guidance, instruction and examples to the field regarding the selection and implementation of a RNR tool and approach. This guidance delineates a number of pre-implementation steps that are critical to success within a jurisdiction. These include:

- **Development of a policy related to the implementation of the selected validated tool**

²⁰ KU Center for Community Health and Development. Community Toolbox: Section 11. Collaborative Leadership. <http://ctb.ku.edu/en/table-of-contents/leadership/leadership-ideas/collaborative-leadership/main>

- **Development of protections regarding the collection and sharing of information**
- **Development of youth and caretaker interview scripts**
- **Development of a disposition template which includes recommendations to the court**
- **Development of a case plan format for documenting the youth’s case plan while on probation.**²¹

A growing number of jurisdictions that have effectively implemented and sustained fidelity of RNR practices have evidence that the approach has significant positive impact on juvenile justice system performance and protection of public safety. The improved system performance is demonstrated by the increased diversion of low-risk offenders from formal involvement in the juvenile justice system and the exchange of relevant information among prosecutors, public defenders and judges that permit more timely case processing and informed dispositions. The positive impact on public safety is reflected in the reduction of recidivism and corresponding improvements in cognitive skills and positive youth development.

Trauma Screening & Treatment

The growing awareness of the effect of trauma has led to the need for interventions that take into account the relevance of trauma in the lives of youth with behavior problems and potential involvement in the juvenile justice and related youth-serving systems.²² The first step to identify appropriate interventions is the identification of youth for whom trauma-based treatment is necessary. Consistent with the field’s concerns, a recent Attorney General’s Report has urged all child-serving organizations to “train their staff to identify, screen, and assess children for exposure to violence”.²³ Together with trauma-based interventions, methods to specifically screen and assess youth for trauma-based concerns are critical to improving the likelihood for successful behavior change and amelioration of risk to reoffend.

The point of emphasis is not merely to acknowledge that youth have high likelihood of trauma events in their life, made higher by those in the child welfare and juvenile justice system, but also the routine need to identify active trauma symptoms. This practice requires a systematic approach to screening through the use of a validated instrument; expedited availability of clinical assessment where the risk indicates need; targeted,

²¹ Vincent, G., & Guy, L. (2012). Using Risk Assessment to Meet Needs and Reduce Recidivism. Models for Change Innovation Brief. Chicago: John D. and Catherine T. MacArthur Foundation.

<http://www.modelsforchange.net/publications/356>

²² Grisso, T. & Vincent, G. (2014). Trauma in Dual Status Youth: Putting Things in Perspective. Boston: Robert F. Kennedy Children’s Action Corps.

<http://rfknrcjj.org/resources/trauma/>

²³ Report of the Attorney General’s National Task Force on Children Exposed to Violence. (2012). Washington DC: Office of Juvenile Justice and Delinquency Prevention. <https://www.justice.gov/defendingchildhood/cev-rpt-full.pdf>

evidence-based treatment interventions with appropriately licensed clinicians; and training of youth-serving staff to appropriate methods of interaction and recognition of trauma responses.

There are indeed many agencies that are becoming trauma-informed and implementing the best practice of trauma screening. This should be done with an understanding of the entire trajectory a youth may travel into and within the systems as a result of identified trauma symptoms. The RFK National Resource Center's Dual Status Youth Practice Network²⁴ has developed a comprehensive three-system graphic²⁵ depicting the potential role trauma plays in accelerating the path of youth deeper into system involvement. With elevated attention to the principles of practice articulated in the Attorney General's report, the education, child welfare and juvenile justice systems each have a unique opportunity to interrupt this negative trajectory and create the best opportunities for successful outcomes.

Alternative Responses / Diversion

An abundance of credible research supports the need for early screening and appropriate diversion for low risk youth and reveals that low risk youth are unlikely to reoffend if there is no intervention.²⁶ However, when low risk youth are mixed with high risk youth, this can create a contagion effect and can actually increase the risk that youth will reoffend. Further studies identified that unnecessary involvement in the juvenile justice system can also increase recidivism as demonstrated by the fact that youth who were put on probation were 12 times more likely to be arrested as an adult as those youth who aren't put on probation.²⁷

Research confirms that aggression and delinquent behavior is near normative behavior as evidenced by the fact that 8 in 10 males will have police contact in their life while only 1 in 10 will have an arrest for a violent offense. Self-reports by juvenile males in the general population reflect that 1 in 4 boys between the ages of 15-16 report they have committed a serious violent act in the previous year. Although committing delinquent acts is a fairly normal behavior for adolescent males, it becomes important to separate the low risk of

reoffending youth from those who will become chronic/life offenders. These chronic offenders follow a trajectory where they begin to act out at a very young age (emotional volatility, behavior issues, etc.) and continue until it peaks at age 10-12 and never comes back down.²⁸ In addition, the severity of a youth's offense is not significantly related to the future pattern of offending.²⁹

These research findings create a solid foundation for effectively holding youth accountable while addressing their underlying criminogenic needs, ensuring that scarce resources within the formal juvenile justice system are used efficiently, and reducing the development of future delinquent behavior by diverting low risk youth from the consequences of negative system involvement.

Graduated Response / Sanctions

A strong system of "graduated responses" – combining sanctions for violations and incentives for continued progress – can significantly reduce unnecessary incarceration, reduce racial and ethnic disparities, and improve successful probation completion rates and other outcomes for youth under supervision. The Center for Children's Law and Policy (CCLP) produced the Graduated Responses Toolkit, originally published in 2016, that provides expert guidance, tools, and resources for state and local jurisdictions seeking to implement a system of graduated responses that includes a balanced focus on sanctions and incentives.³⁰

There is compelling evidence that the juvenile justice system and its partners should incorporate this practice at key decision points affecting the trajectory of the youth into and out of system involvement. In the most recent federal census of youth in residential placement, which took place in 2013, one in four youth in detention were incarcerated for technical violations of probation or court orders.³¹ In many jurisdictions, technical violations represent one of the leading reasons for admission to detention or out-of-home placement. Youth of color are often overrepresented among youth incarcerated for this reason. Juvenile courts, probation officers, victims, and other juvenile justice stakeholders want youth to comply with terms of probation and other court orders, and youth should comply. However, officials often resort to incarceration

²⁴ The RFK National Resource Center for Juvenile Justice has brought together experienced leaders and practitioners from across the country that has championed reform within their local jurisdictions and provides the opportunity to develop leadership, enhance models, and develop additional resources, tools and guidance to accelerate systems improvement nationwide. More information may be retrieved about the work of the Practice Networks at: <http://rfkncrj.org/about-us/practice-networks/>.

²⁵ Robert F. Kennedy National Resource Center for Juvenile Justice. (2016). The Trajectory of a Traumatized Youth: A Three System Perspective. <http://rfkncrj.org/resources/trauma/>

²⁶ Lipsey, M. (2009). The primary Factors That Characterize Effective Interventions with Juvenile Offenders: A Meta- Analytic Overview. *Victims and Offenders*, Vol. 4, 124-147.

²⁷ Gatti, U., Tremblay, R.E. & Vitaro, F. (2009). Iatrogenic Effect of Juvenile Justice. *Journal of Child Psychology & Psychiatry*, Vol. 50, 991-998.

²⁸ Farrington, D.P. (1995). The Development of Offending and Antisocial Behaviour from Childhood: Key findings from the Cambridge Study in Delinquent Development. *Journal of Child Psychology and Psychiatry*, Vol. 6(36), 929-964.

²⁹ Mulvey, E.P., Steinberg, L., Piquero, A.R., Besana, M., Fagan, J., Schubert, C.A., & Cauffman, E. (2010). Longitudinal Offending Trajectories Among Serious Adolescent Offenders. *Development & Psychopathology*, Vol. 22, 453-475.

³⁰ Center for Children's Law and Policy. (2016). Graduated Responses Toolkit: New Resources and Insights to Help Youth Succeed on Probation. Washington, DC. <http://www.cclp.org/graduated-responses-toolkit/>

³¹ Sickmund, M., Sladky, T.J., Kang, W., & Puzanchara, C. (2017). Easy Access to the Census of Juveniles in Residential Placement. <http://www.ojjdp.gov/ojstatbb/ezacjr/>

to respond to violations when other interventions could have held youth accountable without exposing them to the negative effects of confinement.³²

For example, probation officers can develop a partnership with school officials to implement a Positive Behavioral Intervention in Schools (PBIS) initiative to address nearly inevitable instances of disciplinary events for court-involved youth that would be available as an alternative to the filing of a formal probation violation; or court/probation officials could adopt a graduated responses/sanctions grid that more systematically guides reactions to behavioral transgressions and provides opportunities to improve the youth's judgement skills when confronted with the circumstances that led to the current behavioral concern. Additionally, the institutionalization of incentives to reward or encourage positive behavior has a significant research foundation confirming improved responsiveness. It is a "cardinal tenet of our justice system that punishment should be proportional to the offending behavior and evidence is now available from many criminal justice and youth-serving contexts that using incentives more frequently than sanctions is most likely to achieve behavior change."³³

Positive Youth Development

Yet another practice that can be directly informed by the research about adolescent development involves commitment to the concepts related to positive youth development (PYD). This approach erodes the deficit based approach that dominates many of our juvenile justice and probation system paradigms for case management and acknowledges that youth are capable of stabilizing maladaptive behaviors if they can be attached to a variety of social resources that facilitate healthy development. In the past decade, concentrating on positive youth development goals has provided the juvenile justice system with a compelling framework for service delivery, especially in cases involving younger juveniles and those charged with less serious crimes. The PYD essentially asserts that reducing offending means not simply restricting opportunities to offend but expanding opportunities to grow. The practices associated with an effective PYD approach support development of more mature patterns of thinking, reasoning, and decision-making.³⁴ During this period of adolescence, youth are highly susceptible to the acquisition of the kinds of skills and relationships they will draw on to meet the demands of adult life.

There are a variety of implementation frameworks that have emerged during the last decade and while there are some differences in the approaches, PYD shares three basic assumptions:

1. Focus on strengths and assets rather than deficits and problems. Keeping youth away from drugs, criminal activity, premature sexual behavior, and other risks does not, by itself, prepare youth for a productive future. PYD frameworks emphasize the building of youth assets, or the skills and competencies that will allow youth to take on new roles as they transition from childhood to adulthood.
2. Strengths and assets are usually acquired through positive relationships, especially with pro-social and caring adults. Relationships and interactions between youth and trusted adults are one of the key mechanisms through which healthy development occurs. Relationships with pro-social peers can also facilitate development, but positive relationships with adults are the primary focus of PYD.
3. The acquisition and development of youth assets occurs in multiple contexts and environments. Schools, workplaces, community organizations, social programs, and neighborhoods are all part of a youth's natural environment and all offer opportunities for the acquisition of developmental resources³⁵ (e.g., mentoring, cross-age tutoring, community development projects, career opportunities, etc.).

In combination with the appropriate use of RNR approaches, case management plans can incorporate PYD opportunities into the strategies that strengthen cognitive skills and positive assets which help to ameliorate risk in the priority domains for treatment and intervention.

Case Processing Timeline Standards

In a brief entitled *Delays in Youth Justice*, the Office of Juvenile Justice and Delinquency Prevention stated, "Delays in the processing of youth through the justice system can have negative results not only for the youth themselves but also for their families and communities. Improving the timeliness of the justice process is far more than a technical matter for managers and judges; it is a critical part of policy and practice in ensuring the juvenile justice system fulfills its basic mission."³⁶

Recently in Idaho, leadership recognized the importance of effective and efficient case processing. As a result, all of the state's judicial districts came together to develop revised

³² The Annie E. Casey Foundation. (2011). No Place for Kids: The Case for Reducing Juvenile Incarceration.

<http://www.aecf.org/resources/no-place-for-kids-full-report>

³³ Center for Children's Law and Policy. (2016). Graduated Responses Toolkit: New Resources and Insights to Help Youth Succeed on Probation. Washington, DC. <http://www.cclp.org/graduated-responses-toolkit/>

³⁴ Schubert, C.A., & Mulvey, E.P. (2014). Issue Brief: Programs that Promote Positive Development Can Help Young Offenders Grow Up and Out of Crime. Chicago: John D. and Catherine T. MacArthur Foundation. <http://www.modelsforchange.net/publications/695>

³⁵ Butts, J., Mayer, S., & Ruth, G. (2005). Focusing Juvenile Justice on Positive Youth Development. Chapin Hall Center for Children, Issue Brief 105. <http://www.chapinhall.org/research/brief/focusing-juvenile-justice-positive-youth-development>

³⁶ National Institute of Justice & Office of Juvenile Justice and Delinquency Prevention. (2014). Delays in Youth Justice. Justice Research. <https://www.ncjrs.gov/pdffiles1/nij/237149.pdf>

standards and practices for timeliness of their juvenile court processes and procedures. The qualitative research findings on successful adoption of adherence to these improved practices highlighted two common themes:

- **Success in addressing court delay requires leadership in the form of a court culture that is committed to case management, and**
- **Routine and shared communication is vital for any successful case management system, no matter how automated that system may be.**

These revised practices require collaboration from the key system actors and include judges, prosecutors, defense counsel, court administrators, and court/probation department staff at a minimum.

Family Involvement and Engagement

The active engagement and involvement of families, which by definition must include the nuclear, single parent and extended family units, must 1) be based on their strengths and assets, and 2) must provide for an active role and partnership in the development, implementation and management of comprehensive treatment plans for their children. Adolescent youth rely on the family, the primary natural support, to provide guidance, instruction and nurturance no matter the level of dysfunction and our efforts must seek to enhance and not supplant that support system in both the short- and long-term. Principles for success in this endeavor are informed by the *Family Involvement in Pennsylvania's Juvenile Justice System* monograph³⁷ and reflect that all services are child-centered, family focused, community-based, multi-system and collaborative, culturally competent and offered in the least restrictive/intrusive setting as possible (See Sidebar #3). Given that family members are involved with professional staff as a result of an instant moment of crisis or with histories of challenges and/or dysfunction, the establishment of a partnership or effective working relationship can be daunting.

However, the research is clear that absent the meaningful engagement and involvement of families in our planning and interventions there is a decreased likelihood of achieving the positive outcomes we seek for our youth. In fact, the research reflects that when working together with families and reaching agreement on action plans, the court time and costs are reduced and families more rapidly avail services.³⁸ Additionally, when families are partners in case conferences there is a greater degree of familial involvement in the

SIDEBAR #3

PRINCIPLES OF FAMILY INVOLVEMENT IN JUVENILE JUSTICE:

- Effective and authentic family involvement supports the principles and practice of balanced and restorative justice and engages the family and juvenile justice system together with the youth in repairing the harm and moving the youth to become a competent and responsible community member.
- Family involvement is predicated on the recognition that the family is a child's primary emotional, social, cultural, and spiritual resource.
- Families are involved by the inherent nature of their role, and the quality of their involvement hinges on a dynamic interaction of personal and environmental factors.
- All families will act in the best interest of their child, and fulfill their role, when they have the knowledge, skills, and supports necessary to provide ongoing and developmentally appropriate guidance and interaction.
- Where families are unable to act in the best interest of their child, this should be seen as a complex phenomenon that the family would choose to counteract, if an avenue to do so presented itself.
- Positive family engagement involves a discrete set of approaches and services that systems can provide to families to assist them in meeting their family's needs, including in helping them make the best use of system and community resources.
- A juvenile justice system committed to family involvement ensures that there are flexible and authentic opportunities for families to partner in the design, implementation, and monitoring of their child's plan, as well as juvenile justice system policy, program, and practices which support responsive, effective outcomes for youth.

³⁷ Models for Change. (2009). *Family Involvement in Pennsylvania's Juvenile Justice System*. Chicago: John D. and Catherine T. MacArthur Foundation. <http://www.modelsforchange.net/publications/238>

³⁸ Walker, J. M. T., Wilkins, A. S., Dallaire, J. R., Sandler, H. M., & Hoover-Dempsey, K. V. (2005). Parental Involvement: Model Revision through Scale Development. *Elementary School Journal*, vol. 106(2), 85-104

management of the case and it serves to detach youth from problematic peers.³⁹ Further, when youth participated in family group conferencing there was an increased desistance in their delinquent behavior over a 24 month period.⁴⁰ In its oversimplified form, leaders can be guided by the following self-analysis inquiries of our system practices:

- **At each decision-making point, is there is an opportunity for the family to have meaningful, informed and authentic input?**
- **Do families have access to resources (workforce personnel and service interventions) supportive of their involvement, including family peer advocates?**
- **Does juvenile justice staff receive family involvement and engagement training and resources?**
- **Is there a process in place for all families with youth involved in the juvenile justice system to provide input regarding their experiences and to evaluate the capacity of the system to support their involvement?**

In 2016, the Annie E. Casey Foundation published a guiding publication entitled *Engaging Parents, Developing Leaders: A Self-Assessment and Planning Tool for Nonprofits and Schools*⁴¹ which details a process for a rigorous self-assessment of family engagement practices. As public agencies and their community-based and non-profit partners collaborate to develop routine family involvement and engagement practices, this resource could be valuable in developing a strategic plan to achieve the positive outcomes we seek in this area of focus.

Quality Assurance / Improvement

When implemented with a full understanding of adolescent development in each individual area and interwoven effectively among our collaborating systems, the practices referenced above will result in achieving the aim of the juvenile justice system: 1) holding youth accountable for wrongdoing, 2) preventing further offending and thereby protecting public safety, and 3) treating all youth with fairness and equity. However, during this transformational journey of our juvenile justice system and its partners, reliance on anecdotal evidence to claim victory is completely insufficient. The oft ignored practice of developing an effective quality assurance or quality improvement capacity is essential to create or bolster the tangible and substantial outcomes, measures and benchmarks for each key system practice area. The quality assurance system must be developed and informed by a routine set of data collection, management and reporting policies and procedures. These practices must be woven into job expectations and individual system performance evaluations and cemented by cross-system agreements where necessary.

While challenging, there are certainly examples in state and local jurisdictions where this capacity has been developed successfully. One such example was documented in the report on the Calcasieu Parish, Louisiana experience in which their local data environment evolved from one that had very limited internal automated data resources and expertise, to one that became a dynamic data driven and quality assurance model.⁴² In another example from Louisiana, detailed in *Sustaining the Momentum of Probation System Reform in Jefferson Parish*,⁴³ the author highlights the most recent results of ongoing tracking of the impact of system performance and youth outcome reforms undertaken in Jefferson Parish. The practice brief identifies the key principles of sustainability that have contributed to the continued success of their reforms. The technical assistance guidance that supported this achievement is captured in two articles⁴⁴ authored by Gene Siegel, a noted data analyst and researcher. These quality assurance mechanisms and gains in capacities for measurement of our system performance and achievement of outcomes do not always rely on significant fiscal investments.

³⁹ Weigensberg, E.C., Barth, R.P., & Guo, S. (2009). Family Group Decision-making: A Propensity Score Analysis to Evaluate Child and Family Services at Baseline and after 36 Months. *Children and Youth Services Review*, Vol. 31, 383-390.

⁴⁰ McGarrell, E., & Hipple, N. K. (2007). Family Group Conferencing and Re-Offending Among First-Time Juvenile Offenders: The Indianapolis Experiment. *Justice Quarterly*, 24(2), 221-246.

⁴¹ Annie E. Casey Foundation. (2016). *Engaging Parents, Developing Leaders: A Self-Assessment and Planning Tool for Nonprofits and Schools*. <http://www.aecf.org/resources/engaging-parents-developing-leaders/>

⁴² Siegel, G. (2014). *Becoming a Data-Driven Juvenile Justice Organization: The Calcasieu Parish Experience*. National Center for Juvenile Justice. <http://www.ncjj.org/Publication/Becoming-a-Data-Driven-Juvenile-Justice-Organization-The-Calcasieu-Parish-Experience.aspx>

⁴³ Ryals, J., Jr. (2015). *Sustaining the Momentum of Probation System Reform in Jefferson Parish*. Boston: Robert F. Kennedy Children's Action Corps. <http://rfknrcjj.org/resources/probation-system-reform/>

⁴⁴ Data Planning in the DSY Initiatives Initial Suggestions; and, How to Improve Data Capabilities in Dual Status Youth Initiative Sites: Key Principles and Examples. Both available at: <http://rfknrcjj.org/resources/data/>

Summary / Conclusion

The goals, practices, policies, outcomes, and operations of the juvenile justice system and its affiliated youth-serving partners should be informed by the growing body of research and knowledge about adolescent development. As noted in the Introduction, our challenge moving forward requires an intentional focus on increasing the number of system practitioners who understand and embrace the research findings and implications, who translate this research to systematic and sustainable practices across the spectrum of key decision points connected to the primary goals of the juvenile justice system, and who create and maintain quality assurance methodologies that ensure fidelity to these principles and practices. Fortunately, the experiences of field-based technical assistance and training initiatives – informed by juvenile justice leaders and stakeholders – have resulted in a synthesizing of the hallmark principles of adolescent development upon which we may structure a set of identifiable and interwoven practices that provide a pathway to excellence on behalf of our nation's youth and families involved in the juvenile justice system.

The start of that journey for each juvenile justice system and its leadership is the required completion of adolescent development training for each practitioner, manager, and affiliated stakeholder leader with an accompanying evaluation of their demonstrated knowledge, aptitude, and proficiency upon completion of this core competency. The transformation can then continue by focusing on an identified set of field-tested practices connected to effective system reform. The identified practice areas can serve as an organizing and guiding mechanism for a state or local jurisdiction to translate the science of the developmental approach within their juvenile justice system and maximize the likelihood for improved system performance and youth outcomes. As detailed in this brief, these practice areas include:

- **Collaborative Leadership**
- **Alternative Responses / Diversion**
- **Risks-Needs-Responsivity**
- **Positive Youth Development**
- **Case Processing Timeline Standards**
- **Graduated Response/Sanctions and Incentives**
- **Trauma Screening & Treatment**
- **Family Engagement**
- **Quality Assurance**

Within each of these practices, there exists a wealth of research, training and technical assistance opportunities that supports a variety of methods, approaches, programs, services and clinical interventions that increase the likelihood for positive achievement. With so much to guide juvenile justice systems toward the kind of transformation or improvement in these targeted areas, it seems incumbent upon us to evaluate our performance against these hallmarks and evidence-based practices. Each day we do not scratch and scramble to improve, our efforts may unwittingly increase the harm caused to one youth's future or most certainly fall short of what we should expect of ourselves and our systems.

Through our extensive Probation System Reform and Dual Status Youth technical assistance work in the field over the past fifteen years, staff at the RFK National Resource Center has witnessed an encouraging willingness among state and local jurisdictions to examine their operations and performance and take on challenging reforms. A growing number of juvenile justice systems, probation departments, and critical stakeholders (e.g., judges, prosecutors, defense counsel, etc.) are becoming more engaged in the development of refined policies and practices connected to adolescent development that demonstrate improved rates of recidivism across all risk classifications and improve other critically important measures of positive youth development. We fervently hope that this brief, supported by a variety of our training and technical assistance methods, provides additional impetus and guidance for even more juvenile justice system leaders to translate the adolescent development research into an effective set of sustainable practices. We believe there is a responsibility to accelerate our progress toward achieving the vision articulated by the man for whom our National Resource Center is named when he said "We envision a world where strong families and communities nurture and cherish their children to be contributing members of society, so that every child in this country live as we would want our own children to live."⁴⁵

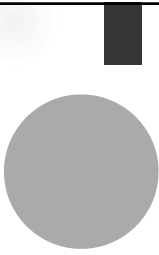
⁴⁵ Address by Robert F. Kennedy delivered at the Seattle World's Fair on August 7, 1962. <https://www.justice.gov/sites/default/files/ag/legacy/2011/01/20/08-07-1962.pdf>

Representing 13, 14 and 15 Year Olds

Preparing for Sentencing

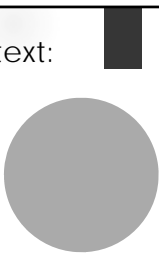
**Sentencing for
Juvenile Clients**

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**Mitigation in the Juvenile Context:
Special Considerations and
Challenges**

- ▶ Time limitations
- ▶ Risk of retraumatization
- ▶ Recency of trauma
- ▶ Maturity level of client



When to Get a Mitigation Specialist

- ▶ If you can, you should do it!
 - ▶ It is possible to get a mitigation specialist even in a juvenile case
 - ▶ Even when mitigation is not going to be at the center of your defense, understanding your client can be helpful in various other ways
 - ▶ An expert is no substitute for a mitigation specialist

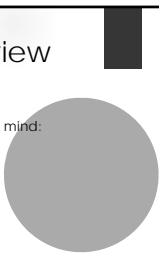


INTERVIEWS



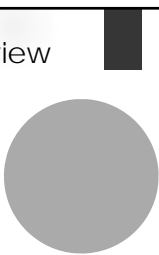
I. Conducting First Client Interview

- ▶ Don't come with a rigid agenda, but have these goals in mind:
 - ▶ Basic Housekeeping
 - ▶ Get a good supply of all kinds of releases signed.
 - ▶ Explain confidentiality.
 - ▶ Emphasize concerns about contact with state actors.
 - ▶ Get a sense of who they are calling and writing from the jail.
 - ▶ Ask about his/her well-being and health
 - ▶ Observe client's physical appearance, demeanor, ability to track conversation, speech, etc.,
- ▶ But, most of all: **LISTEN!!!!**




I. Conducting First Client Interview

- ▶ Start institutional outline
 - ▶ Birth hospital
 - ▶ Schools
 - ▶ Medical
 - ▶ Workplaces
 - ▶ Rehab/psych history
 - ▶ Churches/Temples/Mosques
- ▶ Don't push for depth and breadth too soon. Just focus on getting a bare outline so you can start record work after your first visit




II. Conducting Field Interviews

- ▶ A. Before the Interview: Do Your Homework
 - ▶ Learn what you can about the person you are interviewing before you go (area of town, relationship to crime, are they grieving, afraid to be seen talking to you)
 - ▶ Think about the best or most appropriate place or time



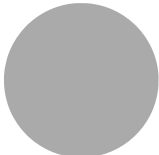
II. Conducting Field Interviews

- ▶ B. Introduction
 - ▶ Hi, my name is Tessa and I came by to visit with you because I'm helping a young lady who was your neighbor. I work for the _____ and I'm her attorney.
 - ▶ Do Not ask for permission to be there
 - ▶ Don't ask if this is a good time to talk



II. Conducting Field Interviews

- ▶ First Impression
 - ▶ What should I wear?
 - ▶ What should I carry?



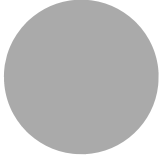
III. Conducting Field Interviews

- ▶ Getting an interview with someone who dislikes your client
 - ▶ Make them feel that their opinion is valued
 - ▶ Raise questions




III. Getting to Know Your Client and Witnesses

- ▶ A. Keep in Mind:
 - ▶ A Mitigation Interview is NOT
 - ▶ An interrogation
 - ▶ A list of questions
 - ▶ A cross-examination



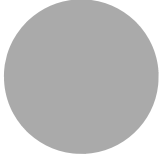
III. Getting to Know Your Client and Witnesses

- ▶ B. Build Rapport
 - ▶ Put the interviewee at ease
 - ▶ Relax, smile, and look at the interviewee
 - ▶ Respond to concerns
 - ▶ This shows the interviewee that you want to hear their story above all else, rather than to satisfy your own needs



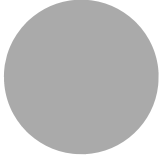
III. Getting to Know Your Client and Witnesses

- ▶ C. Limit your own talking
 - ▶ Don't offer advice
 - ▶ Become comfortable with silence
 - ▶ In an especially long pause, ask "what are you thinking?"



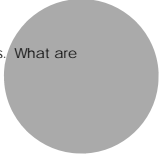
III. Getting to Know Your Client and Witnesses

- ▶ D. Use open-ended questions
 - ▶ Avoid questions with a yes-no answer
 - ▶ Ask questions from general to specific
- ▶ Examples of open ended questions include:
 - ▶ Tell me about ...
 - ▶ How would you describe ...
 - ▶ What were some of the things you did ...
 - ▶ What do you remember about ...
 - ▶ What exactly happened when ... ?
 - ▶ What kind of person was he?
 - ▶ When that happened, what did you do? How did you feel?
 - ▶ Is there anything else?



III. Getting to Know Your Client and Witnesses

- D. Use open-ended questions
 - ▶ Practice some examples of asking open ended questions. What are some alternatives to:
 - ▶ Did you live in a bad neighborhood?
 - ▶ Did you like school?
 - ▶ Did your dad hit you?
 - ▶ Do you feel like your mom loved you?
 - ▶ Were you sexually abused?
 - ▶ Why did you skip school?

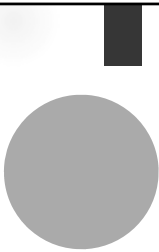


RECORDS




When to Start

- ▶ Right away!
- ▶ Get release signed at first encounter
 - ▶ Bring specialized hospital releases



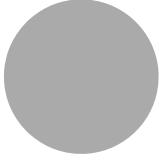
I. Educational Records

- ▶ A. Accumulative School Records
 - ▶ Ask for - "I need to obtain all school records for _____, including but not limited to, cumulative school records and all special education records and IEP (Individualized Education Program) records maintained while (s)he has been enrolled at _____. These records should include but not be limited to discipline records, teacher progress notes, guidance counselor notes, teacher-parent conferences, assessment reports, physiological evaluations, testing, and IQ and achievement testing. This request includes a request from any other schools previously attended."
 - ▶ Don't always expect to receive discipline records and special education records as they are often kept separately from general record
 - ▶ Separate special education request should use the following language "We need to obtain all special education records for _____, including but not limited to, cumulative IEP (Individualized Education Program) records maintained while _____ was enrolled at _____ School or gathered from previous schools, IEP reports, assessment reports, physiological evaluations, IQ testing, and any other records maintained by the Exceptional Children's department."



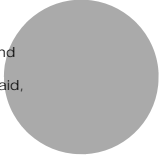
I. Educational Records

- ▶ B. Headstart Records



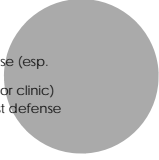
II. Medical Records

- ▶ A. Special Guidelines:
 - Releases must comply with Health Insurance Portability and Accountability Act (HIPAA)
 - This includes psychotherapy notes, Medicare and Medicaid, pharmacies, and substance abuse facilities
 - <http://www.hhs.gov/ocr/hipaa/>
 - <http://privacyruleandresearch.nih.gov/>
 - Often they require original signatures.
 - Use a HIPAA-compliant release all the time—you never know when there might be medical records



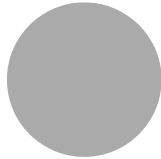
II. Medical Records

- ▶ What Release Must Include, 45 Code of Federal Regulations § 164.508(c)(1):
 - List of all types of records meant to be covered by the release (esp. HIV/AIDS information, mental health)
 - Name of person authorized to make disclosure (i.e. hospital or clinic)
 - Name of person/entity to whom disclosure can be made (list defense team members)
 - Purpose of the disclosure ("in representation of Joe Client")
 - Expiration Date (i.e. ten years from the date signed)
 - Signature and Date
 - the date range of the records, even if that means birth to present
 - Statement of individual's right to revoke the authorization in writing with a description of how they may do this



II. Medical Records

- ▶ B. Sources for Medical Records
 - ▶ Hospital records
 - ▶ Health clinic records
 - ▶ Drug/alcohol rehab clinics from family members
 - ▶ Prison and Jail medical records from family members
 - ▶ Pharmacy records



II. Medical Records

- ▶ C. Language for Request:
 - ▶ "We request that you provide us with a complete and legible copy of ALL records. This request includes, but is not limited to, inpatient and outpatient records, diagnoses, diagnostic and treatment records, test results, lab results, X rays, raw data, progress notes, medication logs and lists, case notes, emergency, admission, and discharge summaries and assessments, and billing information. This request includes a specific release for information including, but not limited to, diagnosis, prognosis, and treatment for physical illness and where applicable emotional/mental illness including treatment of alcohol or drug abuse, HIV tests and results, or AIDS related diagnosis. Please include ALL records including those stored on microfiche."



Hospital Record

Review of systems: As above.

Social history: The patient lives with mother, father, and sib in home of paternal grandmother in Pratt City. Approx. 22-23 people live at this home which is a 9 room dwelling with city water and outside dogs. The mother of the child is a housewife and keeps the child at home. The father is a city truck driver.

Family history: Mother 21, father 24, sib 2 years, female, A&W. The patient had a sib who died at 1 month of age, allegedly SIDS. There is no family history of TB, diabetes mellitus, leukemia, sickle cell disease, cancer, renal, or lung disease.

Failure to Thrive/Neglect

Impression on admission was (1) failure to thrive, rule out organic etiology versus neglect. After admission the patient was fed Similac with iron p.o. ad lib as well as cereals, fruits, and vegetables. During the first 2 days of hospitalization the patient gained a total of 18 oz. and did not develop any problems with vomiting or diarrhea during that time. LP was performed which revealed no WBCs, 2 RBCs, protein 22, glucose 51/76 serum value. Urinalysis also WNL. The CSF cultures were negative at 72 hours. It was felt that there was no organic basis for the child's failure to thrive and that he manifested good weight gain without any evidence of diarrhea or vomiting during his hospitalization. Social Service consult was obtained and referral made through this agency and subsequent investigation by DPS revealed a considerable home situation and further investigation through anonymous sources revealed a history that was compatible with neglect. Subsequent court hearing was held at which time the patient was placed in custody of the DPS and subsequently the patient was placed in a foster home pending further investigation and modification of the home situation. The patient is to be discharged into the custody of DPS on 2-28-78 in satisfactory condition. The only discharge

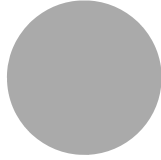
DATE: 6/2/91
 PROGRESS NOTES
 J.C. born 6-13-91 reads presumptive positive
 Attempted phone contact on 6/2/91. Located on 6/2/91
 2 days long BTD 17 days
 6/24/91 Attempted phone contact, left message to family
 member father to call NMC.
 8/27/91 Intended to be checked given per... to give
 positive info to DPS client to use... if
 available... information about...
 Neg. HIV... - ...

IV. Other Records to Obtain with Releases

- ▶ Public Housing/Homeless and Domestic Violence Shelters
- ▶ Social Security Records
- ▶ Church or Youth Group Records
- ▶ Birth Certificate
- ▶ Financial Records from family-bank information, property
- ▶ Dental records

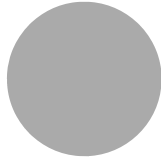
V. Records Requiring Court Orders

- ▶ DSS records
- ▶ Juvenile records



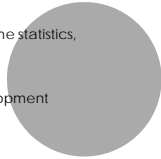
VI. Courthouse Records

- ▶ For searches of various people on your witness list
 - ▶ Be sure to re-do searches to catch new ones periodically



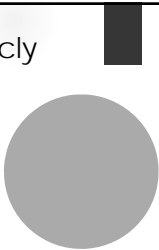
VII. Records Regarding Places

- ▶ Records regarding places your client lived- 911 calls, crime statistics, etc.
- ▶ Records regarding neighborhood and neighbors
- ▶ Records regarding environmental issues affecting development



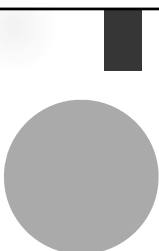
IX. Media Records/Other Publicly Available Sources

- ▶ Lexis-Nexis
- ▶ Local Papers
- ▶ Obituaries and funeral home books
- ▶ Yearbooks



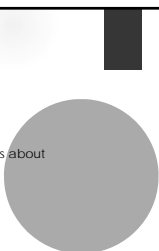
X. Family Member Records

- ▶ Don't forget about these!
 - ▶ They can be just as critical as client records in some cases



ORGANIZING INFORMATION

- ▶ Final product should be a chronology
 - ▶ Draft a chart with year, age of client, date of incident, notes about incident, location, client address, and source of information



Preparing Client for Hearing

- ▶ Give your client some advance notice that it will be difficult to listen to the hard parts of their life
- ▶ Explain to the client why it is important to share these things with the court
- ▶ Talk to your client about the worst parts of the sentencing evidence

Questions?

CLE

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How Did We Get Here?

Roper v. Simmons

- 543 US 51 (2005)
- *unconstitutional to execute individuals who are convicted of a crime committed as a juvenile*

Roper v. Simmons

Juveniles

- Susceptible to outside influences
- Character of juvenile not developed
- Transitory personality traits
- Lack maturity
- Under developed sense of responsibility

Graham v. Florida

- 560 US 48 (2005)
- *-it is unconstitutional to sentence a person to LWOP for non-homicide crime committed as a juvenile*

Miller v. Alabama

- 567 US 460 (2012)
- *- prohibits mandatory LWOP sentences in the case of a homicide committed by juvenile*

Miller v. Alabama

Mandatory LWOP's precludes the sentencer from considering offender's age

There are characteristics and circumstances related to age

LWOP only imposed after conducting an individualized sentencing hearing

Miller v. Alabama

given what we have said in Roper and Graham and this (Miller's) decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty (LWOP) will be uncommon. This is so because of the *great difficulty in distinguishing between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption*

Miller v. Alabama

➤ mandatory penalties schemes prevent the sentencer from considering youth and from assessing whether the law's harshest term of imprisonment proportionally punishes a juvenile offender

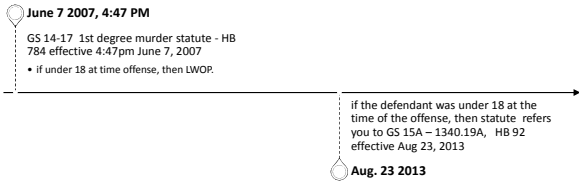
Montgomery v. Louisiana

577 US _____ 136 S. Ct. 718 (2016)

1963 offense date

Ruled that Miller is retroactive

GS 14-17 1st degree murder statute



GS15A – 1340.19 A

GS15 A – 1340.19 A - LWP requires the defendant to serve minimum of 25 years' imprisonment prior to becoming eligible for parole SB 635 eff. July 3, 2012.

GS15A – 1340.19B (a) (1)- if the sole basis of the conviction was felony murder, then the court "shall sentence the defendant to LWP.

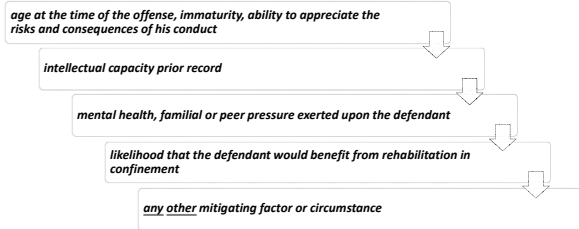
GS15A – 1340.19B (a) (2)- if the court does not sentence a defendant pursuant to (1), the court shall conduct the sentencing hearing to determine LWP or LWOP

GS15A – 1340.1 9B (b)

parties not required to resubmit evidence presented during phase I

evidence presented, including rebuttal evidence, may be presented as to any matter that the court deems relevant to sentencing AND any evidence which the court deems to have probative value may be received

GS 15 A – 1340.19B(c)



GS15 A – 1340.19 B (d)

➤ defendant gets last sentencing argument

GS 15 A – 1340.19C (a)

The court shall consider any mitigating factors in determining which punishment to impose, and the particular circumstances of the Δ.



The judge ordering the sentence shall include findings on the absence or presence of any mitigating circumstances and such other findings as the court deems appropriate to include in the order

GS 15A – 1340.19C (b)(c)(d)

All MARs filed seeking resentencing will be referred to the senior resident superior court judge who will assign it for review and administrative action etc.



The trial judge who presided at the trial is empowered to act on the motion even if he/she is another district or his/her commission has expired.



If the trial judge is unavailable to act, the senior resident judge will assign another judge per subsection (b) of this statute

15A-1340.19D
– Incidents of
Parole (Article
85)

➤ if sentenced to LWP, defendant will be subject to the conditions and procedures in Article 85

Miller in Practice
Four Miller Factors

I.
Chronological
Age And Its
Important
Features

immaturity, impetuosity

failure to appreciate the risk and consequences

propensity for decisions to reflect immature recklessness impulsivity and heedless risk-taking

II.
Δ'S Greater
Social
Dependency

likely to be more vulnerable to negative influences and outside pressures from family and peers

have limited ability compared to an adult to control their own environment

lack the ability to extricate themselves from horrific, crime producing settings

**III.
The
Circumstances
Surrounding
The Offense**

- role in the offense
- extent of participation in the crime,
Commonwealth of Pennsylvania v. Batts 66A, 3d 286 (2013)
- how familial and peer pressure may have affected Δ

**IV.
Potential For
Rehabilitation
Must Be
Considered**

- child's character is not as well-formed as an adult
- traits are less fixed
- LWOP ignores the rehabilitative ideal and is at odds with the child's capacity for change i.e. rehabilitation

Types of Experts

- Psychiatrist
- Psychologist
- Social Workers
- Substance Abuse Counselors
- Educational Experts
- Evaluator Expert**

Expert's Roles
Educator and Evaluator

<p>→ Educates the attorney and the court about the science of adolescent brain behavior, medical problems, psychological problems or social science problems with information related to the factors that the court must consider per Miller</p> <p>→ Provides testimony about the science of adolescent brain development and its effect on thinking and behavior</p> <p>→ Orient your expert - Make sure you educate your expert on the Miller factors</p>	<p>Educator Expert</p>
--	----------------------------

<p>Educator Expert's Framework</p>	<ul style="list-style-type: none">➤ adolescent brain is not as developed and as an adult brain<ul style="list-style-type: none">➤ this increases the defendant's impulsivity without considering the consequences➤ part of the brain that controls impulsive behavior is still developing➤ adolescents are more subject to peer pressure which further increases risk-taking behavior
--	---

<ul style="list-style-type: none"> ⇒ Provides the attorney and court with individualized information about the Δ with the goal being LWP ⇒ Circumstances surrounding the crime which may be mitigating ⇒ Orient your expert about the four Miller factors 	<h2>Evaluator Expert</h2>
--	---------------------------

<p>1st Miller Factor: Immaturity at the Time Of the Offense</p> <ul style="list-style-type: none"> ➤ How do the things that the defendant experienced during his life before the crime impact the normal trajectory of adolescent development? ➤ Explain the effects of alcohol and drug abuse at such an early age ➤ Biological age at the time the offense ➤ Interaction with social services and other government agencies and early age
--

<p>2nd Miller Factor Family Home and Other Social Background Information</p> <ul style="list-style-type: none"> ➤ How did Δ's family life impact developmental processes and cause Δ to engage in risky decision-making ➤ How did Δ's social life impact his development process and cause him to engage in risky decision-making ➤ Did Δ have any behavioral, emotional, or mental illness issues such as schizophrenia, bipolar, delusional, PTSD ➤ Is there a family history of behavioral, emotional or mental illness describe effects on Δ's development? ➤ Was Δ taking prescription medication per instructions? If so, why and what was it? ➤ Bad, adverse childhood experiences and the impact of those experiences on Δ's development and behavior ➤ Traumatic experiences in Δ's past ➤ Head injuries – Auto accidents, assaults, beatings and effect on Δ ➤ Educational background ➤ Psychological testing- use caution

3rd Miller Factor- The Crime and Δ's Individualized Culpability

- Was Δ vulnerable to the influence of peers. Δ afraid that if he didn't go through with the crime that his codefendants/peers would call him names or exclude him from their circle.
 - Explain to the court how Δ's role in the offense was consistent with adolescent development including risk-taking and peer pressure
- Circumstances leading up to the offense.
 - Was Δ there for another criminal purpose such as a drug deal or robbery but not a homicide?
- Δ's role in the offense? Follower? Leader? Planner? Wheel man?
- Would the homicide have happened if the Δ wasn't there?
- Who chose the victim? What is the relationship between the victim and Δ?
- Did the victim put himself in a position to become a victim? Was he engaged in criminal or other inherently dangerous activity? Did the victim have a reputation for violence? Did Δ know that?
- Did Δ fully appreciate the risk involved?
 - Was Δ under the influence of alcohol or illegal drugs?
 - Did Δ have a mental health need that was not met?
 - Was Δ taking his prescription drugs as directed?
 - Did immaturity, behavioral, emotional, mental illness, intellectual problems contribute risky behavior

4th Miller Factor Rehabilitation Potential

- Expert needs information which allows him to educate the court on Δ's prospects for rehabilitation.
 - Educational background
 - Work background
 - Interview his prior supervisors
 - Incarceration programs he participated in while incarcerated

Expert's Report

- Report is discoverable
- Do you want your expert to prepare a report? If the expert learns something unfavorable about Δ, it cannot be unlearned.
- A scenario may develop where the expert becomes more of a consultant for the attorney rather than a testifying expert

Expert's Report Goals

Build	Build a case history of the defendant as a youth, including weaknesses and strengths
Develop	Develop a psychological picture of the defendant's recent and current psychological status
Translate	Translate all this information to the 4 Miller factors

More About Expert's Report Goals 1 & 2

1	2	3	4
Information from 2-time periods: date of offense and A's present status with an eye toward building a rehabilitation argument.	Records • Records • Records <ul style="list-style-type: none"> • Educational records • Employment records • Medical health records • Criminal records • Civil and prison records • Juvenile records • School records • Arrest reports • Traffic records • Records from any prior court proceedings 	Keep a paper trail of your sources that you contacted about records and if there were no records document that fact.	Critical • Critical • Critical - Interviews with people who know the A: family, teachers, school counselors, coaches, youth leaders, friends, teammates, religious leaders

Don't forget to pull from GS 15A – 1340.16 (e)

weave into your presentation statutory mitigating circumstances

- E1 was A under duress or coercion etc.
- E2 was A a passive participant
- E3 A suffers from mental or physical condition
- E4 A's age or immaturity or limited mental capacity
- E7 A aided in the apprehension of another felon, or testify truthfully or cooperated
- E8 A acted under strong provocation OR relationship between the defendant and victim was otherwise extenuating
- E9 A's reasonable foreseeability of harm
- E11 at an early stage the A acknowledged wrongdoing to law enforcement
- E12 A has been a person of good character or good reputation in the community
- E13 A is a minor and has a reliable supervision
- E15A accepted responsibility for his conduct
- E16 drug or alcohol treatment programs completed or participating in now
- E17 A supports his family
- E18 A has a support system in the community
- E19 A has positive employment history or is gainfully employed
- E20 good treatment prognosis and workable treatment plan is available
- E21 any other mitigating factor recently related to the purposes of sentencing

GS 15A – 1340.12 Purposes of Sentencing

1. Impose a punishment commensurate with the injury the offense has caused taking into account factors that may diminish or increase culpability
2. Protect the public by restraining offenders
3. Rehabilitation of the offender
4. Deter others

Strange Things – Despite All Your Preparation

- Δ's mother came her son's capital sentencing hearing drunk
- Δ's siblings testified that when they were young, mom's boyfriend held dogfights in the house and they had to clean up blood and dog feces from the floor and walls
- Same boyfriend beat up mom and another man who looked at mom inappropriately and did this in front of the children in public
- Δ witnessed an uncle hit Δ's dog with a brick
- Δ previously went to mental health facility for help and was turned away
- Δ's relatives previously tried to have Δ involuntarily committed and were denied
- MRI of Δ's brain showed a hole or defect in his brain
- Δ's elementary school teacher heard of trial in media and came to the courthouse to offer testimony

Resources

Resources

- St v. Harry James, 786 SE2d 2d 73 (NC App 2016) now pending in NC Supreme Ct.
*Issue: Did the trial judge's finding of fact sufficiently demonstrate the absence of mitigating factors?
- Prospects for Developing Expert Evidence Juvenile Sentencing
- Trial Defense Guidelines: Representing a Child Client Facing a Possible Life Sentence
- Don't forget to pull from GS 15A – 1340.16 (e) statutory mitigating factors
- Purposes of Sentencing GS 15A – 1340.12
- NC Capital Case Law Handbook

Sentencing Enhancements

Firearm Enhancement

The person actually possessed a firearm or deadly weapon about his or her person. If so, increase as follows:

- 72 months class A, B1, B2, C, D, E, then increased by 72 months. *The maximum term of imprisonment shall be the maximum term that corresponds to the minimum term after it is increased by 72 months per GS15A – 1340.17e (the maximum sentence per the sentencing grid)
- 36 months Class F, or G, increase by 36 months. The maximum term of imprisonment shall be the maximum term that corresponds to the minimum term after it is increased by 36 months per GS15A – 1340.17 (d)
- 12 months Class H or I, increased by 12 months. The maximum term of imprisonment shall be the maximum term that corresponds to the minimum term after it is increased by 12 months per GS15A – 1340.

**15A – 1340.6A(d)
Indictment Must
Allege the
Enhancement**

- (e) must be proved BARD. If defendant pleads guilty, then the jury will be impaneled to determine the enhancement
- (f) enhancement does not apply if the evidence of the use, display, or threatened use or display the firearm or deadly weapon is needed to prove an element of the felony or if the person is not sentenced to an active term of imprisonment.
- Question** - Is this Δ specific? What if co Δ possessed weapon but Δ did not?

**15A – 1340.16C Bullet
Proof Vest Enhancement-
1 Offense Level Higher**

- Magic Words - convicted of a felony and the defendant "wore or had in his possession or his immediate possession a bullet proof vest at the time of the felony, then the defendant is guilty of a felony that is one class higher than the underlying felony for which the person was convicted.
 - (c) must be alleged in the indictment
 - (d) must be proven BARD if the defendant pleads guilty, then impanel a jury for this issue.
- Enhancement does not apply if the evidence that the person wore or had in his possession a bullet proof vest which is needed to prove an element of the felony
- **Question?** What if your Δ wore bullet proof vest, was convicted of second-degree murder, does the enhancement apply to boost his offense level from B1 to A?
- **Question?** Is this enhancement defendant specific?

Trial Defense Guidelines: Representing a Child Client Facing a Possible Life Sentence

Issued by the Campaign for the Fair Sentencing of Youth

March 2015

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A special thank you to everyone who participated in the drafting of these trial defense guidelines.

ENDORSEMENTS

NATIONAL ORGANIZATIONS

GIDEON'S PROMISE

JUVENILE LAW CENTER

NAACP LEGAL DEFENSE AND EDUCATION FUND

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

NATIONAL ASSOCIATION FOR PUBLIC DEFENSE

NATIONAL JUVENILE DEFENDER CENTER

SOUTHERN CENTER FOR HUMAN RIGHTS

SOUTHERN POVERTY LAW CENTER

STATE & LOCAL ORGANIZATIONS

ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE

COLORADO JUVENILE DEFENDER CENTER

CONNECTICUT CRIMINAL DEFENSE LAWYERS ASSOCIATION

CONNECTICUT DIVISION OF PUBLIC DEFENDER SERVICES

COOK COUNTY (IL) PUBLIC DEFENDER

DEFENDER ASSOCIATION OF PHILADELPHIA

DELAWARE OFFICE OF THE PUBLIC DEFENDER

FLORIDA PUBLIC DEFENDER FOURTH JUDICIAL CIRCUIT

ILLINOIS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

JUVENILE DEFENDERS ASSOCIATION OF PENNSYLVANIA

JUVENILE JUSTICE PROJECT OF LOUISIANA

MARICOPA COUNTY (AZ) OFFICE OF THE PUBLIC ADVOCATE

MARYLAND OFFICE OF THE PUBLIC DEFENDER

MASSACHUSETTS YOUTH ADVOCACY DIVISION OF THE COMMITTEE FOR PUBLIC COUNSEL SERVICES

MINNESOTA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

MINNESOTA BOARD OF PUBLIC DEFENSE

NEW HAMPSHIRE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

OHIO CHILDREN'S LAW CENTER

OHIO JUVENILE JUSTICE COALITION

WYOMING OFFICE OF THE STATE PUBLIC DEFENDER

YOUTH SENTENCING AND REENTRY PROJECT

UNIVERSITY & LAW SCHOOL PROGRAMS

CASE WESTERN RESERVE UNIVERSITY SCHUBERT CENTER FOR CHILD STUDIES

GEORGETOWN LAW JUVENILE JUSTICE CLINIC

LOYOLA LAW SCHOOL CENTER FOR JUVENILE LAW & POLICY

NORTHWESTERN UNIVERSITY SCHOOL OF LAW CHILDREN AND FAMILY JUSTICE CENTER

QUINNIPIAC UNIVERSITY SCHOOL OF LAW JUVENILE SENTENCING PROJECT

UNIVERSITY OF CHICAGO LAW SCHOOL CRIMINAL AND JUVENILE JUSTICE PROJECT

UNIVERSITY OF NORTH CAROLINA SCHOOL OF LAW YOUTH JUSTICE CLINIC

The list above reflects endorsements on the date of issuance. For an updated list of endorsements, please visit www.fairsentencingofyouth.org.

If your organization is interested in endorsing the guidelines, please contact info@fairsentencingofyouth.org.

INTRODUCTION

The objective of these guidelines is to set forth a national standard of practice to ensure zealous, constitutionally effective representation for all juveniles facing a possible life sentence (“juvenile life”) consistent with the United States Supreme Court’s holding in *Miller v. Alabama*, 132 S.Ct. 2455, 2469 (2012) that trial proceedings “take into account how children are different, and how those differences counsel against irrevocably sentencing [children] to a lifetime in prison.”

The representation of children¹ in adult court facing a possible life sentence is a highly specialized area of legal practice, therefore these guidelines address the unique considerations specific to the provision of a zealous trial defense. These guidelines set forth the roles and responsibilities of the defense team for the duration of a trial proceeding and outline child-specific considerations relevant to pre-trial, trial, and sentencing representation. Direct appeal and collateral review are not explicitly addressed in these guidelines.²

These guidelines are premised on the following foundational principles:

- children are constitutionally and developmentally different from adults;
- children, by reason of their physical and mental immaturity, need special safeguards and care;³
- children must not be defined by a single act;
- juvenile life defense is a highly specialized legal practice, encompassing the representation of children in adult court as well as the investigation and presentation of mitigation;
- juvenile life defense requires a qualified team trained in adolescent development;
- juvenile life defense requires communicating with clients in a trauma-informed, culturally competent, developmentally and age-appropriate manner;
- juvenile life defense is based on the client’s expressed interests, informed by meaningful and competent child client participation;

¹ The terms “children,” “child,” “child client,” “youth,” and “juvenile” used in these guidelines include anyone charged in adult court for an offense committed when the individual was a minor, regardless of whether the client reaches the age of majority prior to or during the legal proceeding.

² Aspects of these guidelines will be relevant to transfer hearings and for children facing other extreme sentences. For additional related guidance, see NJDC National Juvenile Defense Standards, ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, NJDC Juvenile Defense Attorneys and Family Engagement, and NLADA Standards for the Appointment of Counsel in Death Penalty Cases. Many of the concepts contained in the other guidelines are adopted here.

³ UN Convention on the Rights of the Child.

- juvenile life defense counsel must ensure that child clients and their families are treated with dignity and respect;
- juvenile life defense counsel must ensure that victims' families are treated with dignity and respect;
- juvenile life defense counsel must litigate for a presumption against life sentences for children; and
- juvenile life defense counsel must litigate to ensure a meaningful individualized sentencing determination, in which defense counsel is able to fully and effectively present mitigation to the court.

TABLE OF CONTENTS

PART 1	DEFENSE TEAM COMPOSITION AND ETHICAL DUTIES
1.1	DEFENSE TEAM COMPOSITION
1.2	PROFESSIONAL RESPONSIBILITY
1.3	DUTY OF LOYALTY TO CHILD CLIENT
1.4	FAMILY ENGAGEMENT
1.5	WORKLOAD
PART 2	DEFENSE COUNSEL QUALIFICATIONS AND RESPONSIBILITIES
2.1	QUALIFICATIONS
2.2	RELATIONSHIP WITH CHILD CLIENT
2.3	DEFENSE TEAM MANAGEMENT
2.4	CHILD CLIENT’S COMPETENCE TO STAND TRIAL
2.5	RETAIN EXPERT WITNESSES
2.6	DUTY TO ASSERT LEGAL CLAIMS
2.7	CHILD CLIENT TESTIMONY
2.8	CHILD-APPROPRIATE CONDITIONS
2.9	TRIAL PREPARATION
PART 3	INVESTIGATOR QUALIFICATIONS AND RESPONSIBILITIES
3.1	QUALIFICATIONS
3.2	INVESTIGATION
3.3	GUILT/INNOCENCE CASE STRATEGY DEVELOPMENT
PART 4	MITIGATION SPECIALIST QUALIFICATIONS AND RESPONSIBILITIES
4.1	QUALIFICATIONS
4.2	MITIGATION INVESTIGATION
4.3	MITIGATION STRATEGY DEVELOPMENT
PART 5	SENTENCING
5.1	PRESENTATION OF MITIGATING EVIDENCE
5.2	WITNESS TESTIMONY FOR MITIGATION
5.3	AGGRAVATING EVIDENCE
5.4	PRESENTENCE REPORT
PART 6	PLEA AGREEMENTS
6.1	PLEA NEGOTIATIONS
6.2	GUILTY PLEAS

PART 7	POST-SENTENCING RESPONSIBILITIES
7.1	POST-SENTENCING LEGAL ACTION
7.2	POST-SENTENCING RELATIONSHIP WITH CHILD CLIENT AND FAMILY
7.3	SUCCESSOR COUNSEL
7.4	FACILITY PROGRAMMING
7.5	REENTRY PLANNING
PART 8	DEFENSE TEAM COMPENSATION
8.1	PAY RATE
8.2	LITIGATE FOR FUNDING
PART 9	TRAINING
9.1	JURISDICTION-ALLOCATED FUNDS
9.2	CONTINUING EDUCATION

PART 1: DEFENSE TEAM COMPOSITION AND ETHICAL DUTIES

1.1 DEFENSE TEAM COMPOSITION

The defense team must include a minimum of two qualified attorneys (“defense counsel”), an investigator, a mitigation specialist,⁴ and, when appropriate, an interpreter. The defense team must be comprised of individuals who, through their experience, training, and function, will advocate zealously for a sentence other than life. The entire defense team should be involved at all stages of the litigation: pre-trial, trial, and sentencing.

At least one member of the team must have specialized training in identifying symptoms of mental and behavioral impairment, including cognitive deficits, mental illness, developmental disability, post-traumatic stress disorder, and neurological deficits; long-term consequences of deprivation, neglect, and maltreatment during developmental years; social, cultural, historical, political, religious, racial, environmental, and ethnic influences on behavior; effects of substance abuse; and the presence, severity, and consequences of exposure to trauma.

1.2 PROFESSIONAL RESPONSIBILITY

All members of the defense team are agents of defense counsel. The entire defense team is bound by the rules of professional responsibility that govern the conduct of defense counsel, including attorney-client privilege, diligence, and loyalty to the child client. The privileges and protections applicable to the work of all defense team members derive from their role as agents of defense counsel.

The defense team should be familiar with rules and statutes governing disclosure of information in the event that a member of the defense team or retained expert is called as a fact or mitigation witness.

The defense team, as well as retained experts, also should be familiar with rules and statutes governing the mandatory reporting of child abuse and other matters that may be disclosed by the child client, the child client’s family, or others with whom the defense team or expert(s) may come into contact.

⁴ The term mitigation specialist includes sentencing advocates, forensic social workers, and other similarly trained professionals.

1.3 DUTY OF LOYALTY TO CHILD CLIENT

A duty of loyalty is owed to the child client. The defense team must act on behalf of the child client and not the client's caretaker(s). The defense team may not disclose case information to the child client's caretakers, including, but not limited to, parents, current or former guardians, extended family, social workers, counselors, teachers, or coaches, without the consent of the child client, unless required by rule or statute. If the opinion of the child client and caretaker diverge, the defense team is ethically and professionally obligated to act at the direction of the child client, assuming the child client's competency.

1.4 FAMILY ENGAGEMENT

The defense team should be sensitive to the ongoing concerns and involvement of caretakers and loved ones while the child client is incarcerated. Although the duty of loyalty remains to the child client, assuming his or her consent, the defense team should provide members of the family and support network with regular updates and the opportunity to ask questions and receive clarification on the legal process.

Building a relationship with the child client's caretakers and loved ones is essential to the defense team's ability to conduct a comprehensive mitigation investigation.

1.5 WORKLOAD

All members of the defense team have an ethical obligation to limit their caseloads in recognition of the tremendous time and diligence required to investigate, prepare, and present a case for both guilt/innocence and mitigation. The time and resources required in a juvenile life case are comparable to those of a capital case. In jurisdictions with capital punishment, the workload restrictions placed on capital defenders also should apply to juvenile life defense counsel.

When a juvenile life case is assigned by a public defender office or other government mechanism, the assigning agency must limit the workload of the defense team to the level needed to permit the extraordinary time and effort necessary to ensure zealous and constitutionally effective representation.

PART 2: DEFENSE COUNSEL QUALIFICATIONS AND RESPONSIBILITIES

2.1 QUALIFICATIONS

Defense counsel must provide competent, diligent, zealous, and constitutionally effective advocacy on behalf of the child client, and understand the relevant state, federal, and international law—procedural and substantive—governing juvenile cases prosecuted in adult court.

At least one attorney must have specialized training⁵ and relevant substantive experience representing child clients. In particular, at least one attorney must have experience interviewing and communicating with child clients in a trauma-informed and developmentally and age-appropriate manner.

At least one attorney must have specialized training and relevant substantive experience representing individuals charged with homicide offenses in adult court, including, but not limited to, the investigation and presentation of sentencing mitigation. When possible, one attorney should have experience investigating and presenting death penalty mitigation at a capital sentencing hearing.

2.2 RELATIONSHIP WITH CHILD CLIENT

Defense counsel must develop a relationship and maintain consistent communication with the child client, including consistent in-person meetings between court appearances. Defense counsel must provide a trauma-informed and a developmentally and age-appropriate explanation to the child client of all aspects of the case, including, but not limited to: the attorney-client relationship and confidentiality; the fact and mitigation investigations undertaken on behalf of the child client; pre-trial motions; hearings; the trial sequence; direct consequences of an adult criminal conviction; and possible plea offers. Defense counsel should explain in a developmentally and age-appropriate manner the expectation of the child client at each appearance in court. The child client must have consistent, meaningful opportunities to ask defense counsel questions and to discuss the case status and strategy. Defense counsel and the child client must discuss what information the child client is comfortable sharing and with whom.

⁵ See Part 9 for additional guidance on training and continuing education.

2.3 DEFENSE TEAM MANAGEMENT

One attorney will act as lead defense counsel. At arrest or the earliest opportunity, lead defense counsel must assemble a competent defense team. Lead defense counsel is fully responsible for the performance and conduct of the defense team. Defense counsel must lead the defense team in a zealous, exhaustive, independent investigation relating to issues of guilt/innocence and sentencing in order to develop a coordinated case theory, mitigation strategy, and presentation at trial. The child client or the child client's caretaker(s) initial opposition to investigation should not prevent the defense team from fulfilling its ethical duty to independently investigate.

When a case is assigned by a public defender office or other government mechanism, the assigning authority should appoint or provide adequate funding for an investigator and mitigation specialist in addition to defense counsel.

2.4 CHILD CLIENT'S COMPETENCE TO STAND TRIAL

As a preliminary matter, defense counsel must determine if the child client's ability to participate in his or her own defense is compromised due to developmental immaturity, mental health disorders, trauma, language impairments, or developmental/intellectual disabilities. With assistance from the defense team and qualified professional(s)/expert(s), defense counsel must assess whether the child client's level of functioning limits his or her ability to communicate effectively with defense counsel, as well as his or her ability to have a factual and rational understanding of the proceedings. Defense counsel should not rely on the prosecution's witnesses for any determination of the child client's competency or diagnosis regarding mental health or cognitive issues.

After assessing the child client, if defense counsel determines that he or she may not be competent to stand trial, defense counsel must take all appropriate action, including, but not limited to, retaining a qualified expert in adolescent development and filing a pre-trial motion requesting a competence determination hearing.

If the child client is competent to stand trial but would benefit from certain accommodations during court proceedings, defense counsel should petition the court for such accommodations, including, but not limited to: scheduling proceedings to allow defense counsel the opportunity to meet with the child client before and after each hearing or witness, and avoiding scheduling conflicts with the administration of psychotropic or other medication.

If a bona fide concern about the child client's competency arises at a subsequent phase in the case, defense counsel has a duty to raise the client's competency at that time.

2.5 RETAIN EXPERT WITNESSES

In a timely manner, defense counsel must retain all relevant expert witness(es), including, but not limited to, expert witness(es) with specialized knowledge, skill, experience, training, and/or education in adolescent development. Expert witnesses may serve as consulting or testifying witnesses, and may include, but are not limited to, medical doctors, psychiatrists, psychologists, academics, social workers, correctional experts, and forensic experts. The entire defense team should aid defense counsel in identifying, selecting, and preparing expert and lay witnesses relevant to the guilt/innocence and mitigation strategies, and to rebut any aggravating facts presented by the prosecution.

Defense counsel must research and assess jurisdictional disclosure requirements prior to sharing privileged information with retained experts; carefully study the relevant subject matter to give experts adequate direction and focus; thoroughly discuss with experts all conclusions and the form and manner in which those conclusions are to be memorialized; and when relevant, fully prepare experts to testify.

When necessary, defense counsel must zealously litigate for funds to retain defense expert witnesses by submitting necessary declarations and evidence regarding indigency and the need for the expert(s). In the event expert funds are denied, defense counsel must create a sufficient record to litigate the issue on appeal and collateral review.

2.6 DUTY TO ASSERT LEGAL CLAIMS

At every stage of the case, defense counsel must consider all legal claims potentially available, investigate the basis for each potential claim before concluding whether to assert it, and evaluate each potential claim in light of the unique characteristics of juvenile life litigation. For each legal claim asserted, defense counsel should present the claim as forcefully as possible, tailoring the presentation to the facts and circumstances in the child client's case and the applicable law in the relevant jurisdiction. Defense counsel must ensure that a full record is made in connection with all claims asserted.

In particular, defense counsel should litigate for a presumption against life sentences for children,⁶ and should identify, investigate, and, where appropriate, assert potential legal claims that may reduce the likelihood of a life sentence. This includes motions that would preclude consideration of life sentences for children

⁶ “[G]iven all [the Court has] said in *Roper*, *Graham*, and [*Miller*] about children’s diminished culpability and heightened capacity for change, [the Court] think[s] appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.” *Miller*, 132 S.Ct. at 2469.

generally, and as applied to specific statutory schemes, including, but not limited to, felony murder, accomplice liability, mandatory enhancements, mandatory consecutive/aggregate sentences, mandatory transfers, and any sentencing scheme that does not allow for an individualized sentencing determination. Defense counsel also should raise child-specific claims where appropriate, including, but not limited to, child-centric jury instructions (*e.g.*, a “reasonable child” standard) and the susceptibility of children to false confessions.⁷

2.7 CHILD CLIENT TESTIMONY

The child client retains the right to decide whether to testify in his or her case, however, the defense counsel must explain in a developmentally and age-appropriate manner the benefits and risks of testifying, including, but not limited to, the risk of self-incrimination and impeachment. If the child client decides to testify, defense counsel must thoroughly prepare the client to testify, including, but not limited to, explaining expectations for the child client and courtroom procedures.

Some jurisdictions afford defendants an opportunity for allocution prior to sentencing. In such instances, defense counsel must explain to the child client in a developmentally and age-appropriate manner the benefits and risks of testifying for purposes of allocution. If the child client will testify, defense counsel must thoroughly prepare the child client. If the child client maintains his or her innocence, defense counsel must prepare the child client accordingly.

2.8 CHILD-APPROPRIATE CONDITIONS

Defense counsel should advocate that the child client be placed in a juvenile facility until age 21 or the maximum allowable age. Defense counsel must investigate the extent to which the facility provides the child client legally mandated safety protections, medical and mental health care, rehabilitative treatment, and education services to which the child client is entitled.

2.9 TRIAL PREPARATION

As the investigation produces information, defense counsel should formulate a defense theory. Defense counsel should seek a theory that will be effective in connection with both guilt/innocence and sentencing and should seek to minimize any inconsistencies between the guilt/innocence and sentencing theories.

Defense counsel cannot effectively proceed to trial until the defense team has exhausted pretrial litigation, the guilt/innocence investigation, and the mitigation investigation.

⁷ See *J.D.B. v. North Carolina*, 131 S.Ct. 2394 (2011).

PART 3: INVESTIGATOR QUALIFICATIONS AND RESPONSIBILITIES

3.1 QUALIFICATIONS

The investigator must be able to identify, locate, and interview persons for the case fact development in a culturally competent manner that produces relevant information to build the guilt/innocence defense theory.

The investigator must have experience obtaining all relevant records pertaining to the child client and case, including, but not limited to, the various methods and mechanisms for requesting records—*e.g.*, subpoenas, FOIA requests, criminal background checks, interviews, and on-site investigation—and obtaining the necessary waivers and releases.

At defense counsel's direction, the investigator may assist with the mitigation investigation and/or dispositional advocacy generally.

3.2 INVESTIGATION

The investigation must begin as soon as defense counsel is appointed or retained. The investigation should be conducted regardless of any admission or statement by the child client concerning the facts of the alleged crime, overwhelming evidence of guilt, or facts presented by the prosecution.

As soon as possible, the investigator and defense counsel must go to the crime scene to photograph, diagram, measure, and canvass. Particular attention must be paid to lighting conditions, obstructions, surveillance cameras, witness vantage points, and the time of day and year.

As soon as possible, the investigator must compile an investigation file, which includes a copy of all discovery materials and charging documents. After reviewing the initial discovery and at the direction of or in collaboration with defense counsel, the investigator must create an investigation plan and preliminary witness list.

At the direction of defense counsel, the investigator must conduct in-person interviews of all individuals relevant to the case fact development and issues of guilt/innocence, including, but not limited to: eyewitnesses, alibi witnesses, the prosecution's witnesses, and witnesses familiar with the client's life history that may affect the likelihood of culpability. The investigator must assess the credibility of key trial witnesses as well as canvass for additional witnesses.

The investigator also must collect all relevant physical evidence relating to the facts of the case, including physical and documentary evidence. The fact investigation should include, but is not limited to:

- charging documents;
- police reports;
- autopsy reports;
- records on all police officers involved in the case, including police misconduct reports;
- comprehensive criminal background checks on all witnesses, including the child client, complaining witnesses, and co-defendants;
- photographs;
- video and/or audiotape recordings;
- crime scene and crime lab reports;
- surveillance videos;
- cell phone records;
- social media check on all potential prosecution and defense witnesses, including police officers;
- incarceration records;
- jailhouse recordings; and
- other physical evidence.

3.3 GUILT/INNOCENCE CASE STRATEGY DEVELOPMENT

The investigator must assist defense counsel in coordinating and integrating the fact investigation into the case strategy, as well as synthesizing investigative information for the defense team.

PART 4: MITIGATION SPECIALIST QUALIFICATIONS AND RESPONSIBILITIES

4.1 QUALIFICATIONS

The mitigation specialist must be able to identify, locate, and interview persons relevant to mitigation in a culturally competent manner that produces confidential and relevant information. The mitigation specialist also must be competent to obtain all relevant records pertaining to the child client and case and understand the various methods and mechanisms for requesting records and obtaining necessary waivers and releases.

The mitigation specialist should have specialized knowledge of adolescent development, including, but not limited to, developmental science and other research that informs specific legal questions regarding capacities, responsiveness to treatment, and culpability. The mitigation specialist also should have experience interviewing and communicating with children in a trauma-informed and developmentally and age-appropriate manner.

The mitigation specialist should have specialized training and relevant substantive experience identifying symptoms of physical, mental, and behavioral impairment.

4.2 MITIGATION INVESTIGATION

The mitigation specialist must investigate and develop a social, psychological, and genealogical history of the child client for purposes of presenting mitigating evidence at sentencing. The mitigation specialist also should work with the child client and his or her caretaker(s) to develop a reentry plan to present at sentencing.

Mitigation evidence includes, but is not limited to: the ability to make a positive adjustment to incarceration; the realities of incarceration; capacity for redemption; remorse; vulnerabilities related to mental or physical health; explanations of patterns of behavior; negation of aggravating evidence regardless of its designation as an aggravating factor; positive acts or qualities; responsible conduct in other areas of life (*e.g.*, employment, education, as a family member, etc.); any evidence bearing on the degree of moral culpability; mercy; and any other reason for a sentence other than life.

As soon as possible and at the direction of defense counsel, the mitigation specialist must conduct in-person interviews of all relevant persons, including the child client and other relatives and community members who may be able to provide pertinent information about the child's life, including, but not limited to, parents, siblings, grandparents, social workers, teachers, coaches, doctors, therapists, and other medical providers relevant to the child client's life, and multi-generational family history that enable defense counsel to develop and implement an effective mitigation strategy for sentencing. In many instances,

multiple one-on-one interviews will be necessary to build the rapport needed to obtain sensitive information.

As soon as possible and at the direction of defense counsel, the mitigation specialist must obtain all relevant records and documents relevant to the child client's life and multi-generational family history that enable defense counsel to develop and implement an effective mitigation strategy for sentencing. In many instances, in-person inquiries of record custodians will be necessary to collect all relevant documents and records.

The investigation into the child client's life and history should include, but is not limited to:

- age;
- immaturity;
- impetuosity;
- ability to appreciate risks and consequences;
- intellectual capacity;
- intellectual development;
- language impairments;
- existence of and susceptibility to peer and/or familial pressure;
- circumstances of the offense;
- level of participation in the offense;
- ability to meaningfully participate in his/her defense;
- capacity for rehabilitation and remorse;
- education records;
- special education evaluations and services;
- juvenile and/or criminal records, including probation and parole;
- current and prior incarceration/detention records, including availability and completion of correctional programming and relationships with correctional staff and other detainees/inmates;
- trauma history, including traumatic brain damage;
- possible organic brain damage;
- faith and community involvement;

- history of maltreatment or neglect, and/or involvement in the child welfare system;
- multi-generational family history;
- employment and training history;
- pediatric/medical history, including history of genetic disorders and vulnerabilities;
- mental health history;
- physical health history;
- exposure to harmful substances in utero and in the environment;
- history of physical or sexual abuse;
- history of substance abuse;
- gang involvement;
- religious, gender, sexual orientation, ethnic, racial, cultural, and community influences; and
- socio-economic, historical, and political factors.

The mitigation specialist also must collect existing relevant demonstrative evidence that humanizes and positively portrays the child client, including, but not limited to, photographs, videotapes, letters of reference, schoolwork, and awards.

Defense counsel and the mitigation specialist must inform all parties—including the child client, the child client’s caretaker(s), the prosecution, and the court—that the mitigation investigation is an extremely time-consuming, labor-intensive, and lengthy process.

4.3 MITIGATION STRATEGY DEVELOPMENT

The mitigation specialist must assist defense counsel in developing a comprehensive and cohesive mitigation case. The mitigation specialist must be able to synthesize investigative information for the defense team, including, but not limited to, the creation of genealogies, chronologies, social histories, and studies of the cultural, socioeconomic, environmental, political, historical, and racial influences on the child client. The mitigation specialist also should aid defense counsel in the selection and preparation of witnesses who will testify for purposes of presenting mitigating evidence. As necessary to the mitigation investigation and strategy development, the mitigation specialist should identify and recommend other relevant specialists and experts and provide social history information to experts to enable competent and reliable evaluations.

PART 5: SENTENCING

5.1 PRESENTATION OF MITIGATING EVIDENCE

Defense counsel should consider litigating for a bifurcated sentencing hearing, including a jury determination at sentencing. Defense counsel's mitigation presentation at sentencing should include, but is not limited to: the circumstances of the offense, including the extent of the child client's participation and the impact of peer and familial pressure; incompetencies associated with youth, including the child client's inability to deal with police officers, prosecutors, or defense counsel; the child client's reduced culpability due to age and capacity for change; and other relevant life history identified during the mitigation investigation.⁸

Defense counsel must determine the manner in which mitigating evidence will be presented, including, but not limited to, lay witness testimony, expert witness testimony, demonstrative evidence, affidavits, records, and reports.

5.2 WITNESS TESTIMONY FOR MITIGATION

Defense counsel's mitigation presentation should include expert witness testimony on adolescent development, including, but not limited to: youth brain development, youth impetuosity, youth immaturity, youth inability to assess risks and consequences, youth intellectual capacity, youth susceptibility to familial and peer pressure, and youth capacity for reform. Expert witnesses may include, but are not limited to, medical doctors, psychiatrists, psychologists, academics, social workers, forensic experts, correctional or prison experts, gang experts, and others with a particularized knowledge of adolescent development.

Mitigation should include lay witness testimony on the child client's particular development and functioning, family and home environment, community environment, peer and social network, behavior patterns, and any other relevant life history that may explain or diminish the child client's culpability. Lay witnesses may include, but are not limited to, the child client's family, friends, teachers, coaches, classmates, employers, co-workers, social workers, social service providers, treatment providers, neighbors, religious leaders, and community members.

⁸ See *Miller*, 132 S.Ct. at 2468.

5.3 AGGRAVATING EVIDENCE

Defense counsel should legally and factually challenge the use and admissibility of aggravating evidence. As soon as possible, defense counsel should identify the aggravating evidence the government will use in support of a life sentence. Defense counsel carefully should consider whether all or part of the aggravating evidence may be challenged as improper, inaccurate, misleading, or inadmissible. Defense counsel should become familiar with the rules regarding notification of aggravating evidence, object to any non-compliance, and if such rules are inadequate or do not exist, defense counsel should challenge the adequacy of the rules and/or litigate to establish rules regarding notification.

Defense counsel must anticipate and be prepared to rebut the prosecution's aggravating evidence including, but not limited to, the facts of the instant case, criminal history, prior incarceration conduct, and gang involvement. If the prosecution and/or trial judge improperly mischaracterizes mitigating evidence such as the child client's age or family circumstances as aggravating evidence, or considers such evidence as aggravating, not mitigating, then defense counsel must preserve the issue for appeal.

5.4 PRESENTENCE REPORT

Some jurisdictions require a presentence investigative report prior to sentencing. In such instances, defense counsel must explain to the child client in a developmentally and age-appropriate manner the potential impact of the presentence report at sentencing and on appeal. Defense counsel should provide the report preparer any information favorable to the child client.

In some jurisdictions, defense counsel must determine whether it is in the child client's best interest to be interviewed by the report preparer, considering, among other factors, the child client's age and maturity. If defense counsel determines that the child client will be interviewed by the report preparer, defense counsel must prepare the child client for the interview in a developmentally and age-appropriate manner and attend the interview with the child client.

If a presentence report is prepared, defense counsel must review the completed report and take all actions to ensure that improper, incorrect, or misleading information is not considered at sentencing.

PART 6: PLEA AGREEMENTS

6.1 PLEA NEGOTIATIONS

At every stage of the case, defense counsel should explore with the child client the possibility and desirability of reaching an agreed-upon outcome. In so doing, defense counsel should explain in a developmentally and age-appropriate manner the rights that would be waived or forfeited, the possible consequences, and the legal, factual, and contextual considerations that bear upon the decision, including, but not limited to, immigration consequences.⁹ Specifically, defense counsel must explain to the child client in developmentally and age-appropriate language: the strengths and weaknesses of the prosecution's case; the impact of any applicable sentencing guidelines or mandatory sentencing requirements; the types of pleas that may be agreed to; whether any negotiated agreement can be made binding on the court; the practices, policies, and concerns of persons or entities, including the judge, the prosecutor, and the victim's family, that may affect the content and likely results of plea negotiations; concessions the child client may offer; and benefits the child client may obtain from a negotiated settlement.

If a negotiated settlement would be in the best interest of the child client, initial refusals by the prosecutor to negotiate should not prevent defense counsel from making further efforts to negotiate. Similarly, a child client's initial opposition should not prevent defense counsel from engaging in ongoing settlement negotiations. Ultimately, the decision to plead guilty lies with the child client.

Ongoing negotiations with the prosecution do not diminish the obligations of defense counsel respecting investigation and litigation.

6.2 GUILTY PLEAS

Defense counsel should not advise a child client to accept a guilty plea that could result in a life-without-parole sentence. Defense should not advise a child client to accept a guilty plea allowing for a life sentence or a de facto life sentence without serious strategic consideration.

⁹ If the child client is a foreign national, defense counsel immediately should contact the relevant consulate for possible funding and assistance. Defense counsel also should file a motion to suppress any statement given to authorities if the child client was not first informed of his or her right to contact the consulate. See UN Vienna Convention on Consular Relations (1963) Art. 36.

PART 7: POST-SENTENCING RESPONSIBILITIES

7.1 POST-SENTENCING LEGAL ACTION

In the event of a conviction, defense counsel should act to maximize the child client's ability to obtain relief, including, but not limited to, filing a motion for a new trial, a motion for resentencing, and/or a notice of appeal.

7.2 POST-SENTENCING RELATIONSHIP WITH CHILD CLIENT AND FAMILY

Defense counsel must explain the terms of the conviction and the right to and grounds for appeal to the child client in a developmentally and age-appropriate manner. Defense counsel must maintain consistent in-person contact with the child client following conviction and prior to the appointment of successor counsel.

If consented to by the child client, defense counsel should explain the terms of the conviction and the right to and grounds for appeal to the child client's family and support network.

7.3 SUCCESSOR COUNSEL

If defense counsel does not continue to represent the child client on direct appeal, defense counsel should take all appropriate action to ensure the timely appointment of successor counsel to represent the child client. Defense counsel should continue to act on the child client's behalf until successor counsel has been appointed or defense counsel's representation has been formally terminated. Defense counsel also should explain to the child client in a developmentally and age-appropriate manner the transition between attorneys.

As soon as possible after successor counsel has been appointed or retained, defense counsel must turn over the complete case file to successor counsel and should cooperate in a professionally appropriate post-conviction strategy.

7.4 FACILITY PROGRAMMING

Defense counsel should identify and advocate for child client-specific programming, education, and physical, mental, and behavioral health needs during incarceration.

7.5 REENTRY PLANNING

The defense team should be cognizant of the child client's possibility for release and any reentry planning that should take place in anticipation of release. Reentry planning should include, but is not limited to, identifying programming needs both during and post-incarceration that address issues identified during the investigative and mitigation phase of representation (*e.g.*, the child client's behavioral health, special education, substance abuse disorder, and skills training) to ensure successful reintegration to the community and lower the risk of recidivism.

PART 8: DEFENSE TEAM COMPENSATION

8.1 PAY RATE

The defense team should be compensated at a rate commensurate with the provision of zealous legal representation and that reflects the extraordinary responsibilities inherent in juvenile life representation. Flat fees, caps on compensation, caps on hours worked, and lump-sum contracts are improper for defense team members in juvenile life cases.

Attorneys should be compensated for actual time and service performed. In states that have capital punishment, the pay rate for juvenile life defense attorneys should be commensurate with the pay rate for capital defense attorneys.

Investigators should be compensated in a manner commensurate with the provision of effective investigatory services. Mitigation specialists and retained experts should be compensated in a manner commensurate with the salary scale for comparable services in the private sector.

8.2 LITIGATE FOR FUNDING

Defense counsel must litigate for funding to ensure the provision of zealous legal representation, including funding for an investigator, a mitigation specialist, experts, and other necessary resources. In the event funds are denied, defense counsel must create a sufficient record to litigate the issue on appeal and collateral review.

PART 9: TRAINING

9.1 JURISDICTION-ALLOCATED FUNDS

Jurisdictions that prosecute juvenile life cases should allocate funds for defense team training to ensure zealous representation and appropriate presentation and consideration to the court of the unique factors of adolescence generally, and as applied specifically to individual children.

9.2 CONTINUING EDUCATION

At least once every two years, all defense team members should attend and successfully complete a multi-day comprehensive training program that focuses on the defense of juvenile life cases or topics relevant to juvenile life litigation, including youth behavior and brain development and how it informs specific legal questions regarding capacities, responsiveness to treatment, and culpability.

Defense counsel training should include, but is not limited to: an overview of the relevant state, federal, and international law; pleading and motion practice; pretrial investigation, preparation, and theory development; jury selection; trial preparation and presentation, including the use of experts; ethical considerations particular to juvenile life defense representation; preservation of the record; investigation and presentation of mitigating evidence; rebutting aggravating evidence; defense counsel's relationship with the child client and his/her family and support system; appellate and collateral litigation in state and federal court; and developments in youth behavior and brain development.



PROSPECTS FOR DEVELOPING EXPERT EVIDENCE

in Juvenile “*Montgomery*” Resentencing Cases

Antoinette Kavanaugh¹ and Thomas Grisso

During the past twelve years, the United States Supreme Court (SCOTUS) entered several decisions reflecting the premise that adolescents are different than adults for the purpose of sentencing for major crimes. One of these decisions, *Miller v. Alabama*,² held that a mandatory life without parole sentence for a crime committed by a juvenile is unconstitutional. The Court held that before a juvenile is automatically sentenced to life without parole, there must be a judicial consideration of various potentially mitigating factors related to the juvenile’s developmental immaturity. *Montgomery v. Louisiana*³ requires that juvenile lifers are entitled to retroactive application of *Miller*. Currently, Pennsylvania has approximately five hundred inmates awaiting a new sentence hearing consistent with *Miller* and *Montgomery*.⁴

To optimize the juvenile lifer’s opportunity to obtain a favorable resentencing, the defense may retain an expert trained in developmental, psychological, or clinical sciences.⁵ At the discretion of the attorney, the expert could assist the defense team by presenting developmentally-relevant evidence to the court. After a brief history of the relevant decisional law, this article (a) examines the developmental and psychological factors that are likely to be raised in retroactive resentencing cases pursuant to *Miller* and *Montgomery*, and (b) explains the potential benefits and limitations of an expert’s assistance in offering relevant

information on those factors in individual cases. What can expert witnesses be expected to provide?

Relevant Federal and Pennsylvania Cases

Since 2005, a number of SCOTUS cases have recognized that adolescents and adults are developmentally different for the purposes of being sentenced for major crimes. In 2005, SCOTUS held in *Roper v. Simmons*⁶ that it is unconstitutional to execute individuals who were convicted of a crime committed as a juvenile. The Court noted that juveniles “are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure⁷... [and] the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory.”⁸ Five years later, citing developmental differences between juveniles and adults, SCOTUS decided *Graham v. Florida*⁹ and held that it is unconstitutional to sentence a person to life without parole (LWOP) for a non-homicide crime committed as a juvenile. Two years later, in 2012, the Court in *Miller* interpreted the Eighth Amendment to prohibit mandatory LWOP sentences in the case of a homicide committed by a juvenile.

In all of these cases, the Court cited developmental differences between adolescents and adults as part of its sentencing rationale. In *Miller*, for example, the Court ruled that a mandatory sentence of LWOP for a youth who

committed homicide “preclude[s] a sentencer from taking account of an offender’s age and the wealth of characteristics and circumstances attendant to it.”¹⁰ The Court held that LWOP in juvenile homicide cases could only be imposed after conducting an individualized sentencing hearing. Further, even after such a hearing, LWOP should only be imposed in the rarest of circumstances.¹¹

Miller did not address the question of retroactivity of the decision. Within a few years after *Miller*, many states’ supreme courts concluded that the holding in *Miller* did not apply retroactively.¹² This is the position that Pennsylvania’s Supreme Court held in *Commonwealth v. Cunningham*.¹³ Courts that held that *Miller* was not retroactive reasoned that *Miller* had simply provided a new rule of criminal procedure for future cases.¹⁴ Other states, however, decided that *Miller* established a new substantive rule of sentencing that would require resentencing of pre-*Miller* juvenile cases where the defendants received mandatory LWOP.¹⁵ Indeed, in 2014, the United States District Court of the Eastern District of Pennsylvania decided, in *Songster v. Beard*¹⁶ that, contrary to the Pennsylvania Supreme Court’s ruling in *Cunningham*, a retroactive application of *Miller* was required. The Commonwealth appealed to the Third Circuit Court of Appeals.¹⁷ While the appeal was pending, SCOTUS made its decision in *Montgomery*.¹⁸ The Third Circuit then remanded *Songster*’s case “for proceedings not inconsistent with *Montgomery*,”¹⁹ and in August 2016, the Eastern District of Pennsylvania granted *Songster*’s habeas petition and ordered that *Songster* be resentenced.²⁰

Pennsylvania now faces the task of addressing requests for resentencing from nearly five hundred JLWOP inmates. Currently, Pennsylvania law is unclear about the reach of *Montgomery*, especially regarding second-degree murder cases and concerning applicable maximum and minimum alternative sentences.²¹ Whatever the resolution of those matters, Pennsylvania courts will be compelled to consider the issues at the heart of the *Miller* and *Montgomery* requirements: individualized resentencing that takes into account developmental and psychological factors with the potential for mitigation.

Relevant Factors in Montgomery Resentencing

Miller and at least two Pennsylvania cases offer trial court judges and attorneys guidance on the nature of the evidence to be considered at a resentencing hearing. Soon after the *Miller* decision, the Pennsylvania Supreme Court in *Commonwealth v. Batts* (hereinafter “*Batts*”)²² defined a minimum standard for developmental factors in mitigation that should be considered at a *Miller* resentencing hearing. Most recently, the U.S. District Court for the Eastern District of Pennsylvania in *Songster v. Beard*²³ offered instructions consistent with *Miller* and significant clarification related to resentencing. Here we briefly describe those *Miller* factors before offering suggestions about the role of experts when providing evidence regarding these factors.²⁴ Rooting these suggestions in the language of the law, we hope that defense attorneys will share this article with retained experts.

Factor 1: *Miller* identified adolescents’ “chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences”²⁵ and the propensity for juveniles’ decisions and actions to reflect immature “recklessness, impulsivity and heedless risk-taking.”²⁶ *Batts* clarified that the trial court should also consider “his emotional maturity and development ... his drug and alcohol history ... his mental health history.”²⁷

Factor 2: *Miller* referred to youths’ greater social dependency as a central factor to consider. Adolescents “are more vulnerable . . . to negative influences and outside pressures,” including from their family and peers; they have limited “contro[ll] over their own environment” and lack the ability to extricate themselves from horrific, crime-producing settings.”²⁸ *Batts* elaborated that trial courts should consider the individual’s “family, home and neighborhood environment [and] his past exposure to violence.”

Factor 3: *Miller* required courts to consider “the circumstances of the homicide offense, including the extent of [the individual’s] participation in the conduct and the way familial and peer pressures may have affected him.”²⁹ Related to this factor, *Batts* also said the trial court should consider the individual’s “extent of participation in the crime.”

Factor 4: The *Miller* court noted that an adolescent’s potential for rehabilitation must be



considered. “A child’s character,” the Court said, “is not as well formed as an adult’s; his traits are less fixed.”³⁰ Also, the *Miller* court found that “Life without parole forswears altogether the rehabilitative ideal [and is] at odds with a child’s capacity for change.”³¹ When applied as a variable to describe a specific youth, this factor suggests the need for evidence to compare a youth to other youths on a continuum of rehabilitation potential.

Discussing *Miller*, the court in *Songster* noted that among the factors to consider, “the potential for reform is most critical.”³² This was emphasized for two reasons. First, *Miller* emphasizes that a LWOP sentence in cases involving homicide by a juvenile requires a finding that the individual is “irreparably corrupt,”³³ meaning there is no reasonable likelihood the individual can be rehabilitated. Second, *Songster* noted that *Montgomery* resentencing cases typically will involve inmates who have undergone rehabilitation efforts since the time of their offense. The results of rehabilitation efforts are likely to play a role in resentencing.

“ Pennsylvania now faces the task of addressing requests for resentencing from nearly five hundred JLWOP inmates. Currently, Pennsylvania law is unclear about the reach of *Montgomery*, especially regarding second-degree murder cases and concerning applicable maximum and minimum alternative sentences.”²¹ ”

“The rehabilitation factor,” *Songster* explained, “tells us how he has acted more recently and helps predict how he will act in the future. It addresses the question of whether the defendant is beyond reform and is incorrigible.”³⁴

The court in *Songster 2016* noted the retrospective nature of the inquiry would be difficult in

light of the time that elapsed between the original conviction and sentencing, but that the effort must be made to meet *Miller's* requirements.³⁵ *Songster 2016* also acknowledged "the parties and the sentencing court can call upon appropriate experts to opine on the defendant's mental and physical condition, and his level of maturity at the time of the offense. Indeed, expert testimony may be necessary."³⁶

Roles for Retained Experts in Montgomery Resentencing Cases³⁷

Experts retained by the defense can play two roles in *Montgomery* resentencing cases. The legal team determines which role is appropriate on a case-by-case basis. This article assumes the legal team has decided to present the expert to the court at the resentencing hearing, or to the prosecutor prior to the resentencing hearing to obtain a negotiated plea. In either case, the expert can play the role of "educator" or "evaluator." Typically, in the educator role, the expert does not evaluate the defendant. Rather, the expert educates the court about how "kids are different" than adults from a developmental perspective. As an educator, the expert provides relevant medical, psychological or social science background related to the developmental, clinical or rehabilitation factors the court must consider.

Experts also can play the role of "evaluator," providing individualized information about the defendant and educating the court on the science and clinical background for the *Miller* factors. Defense attorneys frequently retain experts to serve as evaluators in these resentencing cases. At times, based on what the expert learns or upon hearing the expert's clinical opinion, defense counsel will not want the expert to write a report or testify.

The Expert in the Educator Role: There is much research relevant for explaining the four factors that *Miller* identified (described above). SCOTUS cases were influenced by (and cited in) that research. Central to *Miller* was evidence from developmental neuroscience and behavioral research on adolescent brain development and its effects on thinking and behavior.³⁸ This research showed that two areas of the brain are still in development during adolescence. The first area of the brain still in development during adolescence, increases the

adolescent's impulse for risks and rewards. The other area of the brain still in development has a role in delaying impulses. The risk/reward structure becomes stronger, while the structure responsible for more careful responses is not yet sufficiently matured to control impulses. Much research indicates that youths' responsiveness to peers further increases their risk-taking behavior.³⁹ Research relevant to youths' general rehabilitation potential includes empirical evidence that most adolescent offenders desist from offending as they age out of adolescence.⁴⁰ Further, research finds there are specific types of treatment programs with known effectiveness relevant for rehabilitation.

Sometimes, the defense may retain more than one type of expert to educate the court. For example, imagine a scenario where the defendant was raised by a single mother addicted to crack cocaine and methamphetamines. The legal team obtained the mother's treatment records and the family's social services records. Based on those records the legal defense may decide to retain a psychopharmacologist or an addiction specialist to serve as an educating expert. In this capacity, the expert would educate the court about the nature of addiction in general and of the mother's addiction (as documented in the records). In the same case, a mental health expert could educate the court about how someone who uses those substances at the rate she did (as documented in the records) would have difficulty parenting effectively. The expert could also educate the court about the how being raised in such an environment impacts the "hallmark" features of adolescence. This type of informative testimony would be relevant for the *Miller* factor related to the defendant's home life and the science underlying *Miller*.

In offering this type of testimony to the court, the expert may want to work with the attorney to develop demonstrative exhibits to assist the court in understanding the science and how it relates to the *Miller* factors. Regardless of which role the expert serves, the expert and attorney should spend a significant amount of time together preparing for testimony.

The Expert in the Evaluator Role: The process for a resentencing evaluation consists of reviewing records, interviewing the defendant, possibly administering psychological tests to the defendant, and interviewing collateral sources.⁴¹ The evaluator

seeks data that will be used to develop a clinical opinion regarding all or some of the *Miller* factors.

Not all experts retained by the defense will write a report for the defense. Consistent with the ethics of the expert's profession, the expert conducts the evaluation knowing that data relied upon in forming the clinical opinion are subject to rules of discovery and could be shared with the court and prosecutor. Often this is why the defense counsel chooses not to have the retained evaluator write a report. Imagine the following scenario, consistent with the ethics of the profession. The expert takes detailed and accurate notes. While interviewing the defendant, the expert discovers something not favorable to the attorney's client. The expert cannot forget or delete this information. In this case, the defense counsel might not want the evaluator to write a report and the evaluating expert becomes a consultant for the defense. Neither the court nor prosecutor has access to a consultant's work.

At the defense's discretion, the expert may write a report. The expert's report and testimony can be tendered to the court as evidence. The report documents the process used to develop the clinical opinion and memorializes that opinion. In general, the expert evaluator in these cases will have three main objectives: (a) build a case history of the defendant as a youth, including personality, weaknesses and strengths; (b) develop a psychological picture of the defendant's recent and current psychological status; and (c) translate both types of information regarding their relevance to the four *Miller* factors.

As the first two objectives indicate, evidence in *Miller* cases is likely to require information from two distinct time periods: evidence about the individual at the time of the offense (during adolescence), and the individual's present status as it relates to progress toward rehabilitation or prospects in the future. One implication of this is that the ideal expert must be specialized in child development to build a picture of the defendant as an adolescent, yet must also be qualified to perform evaluations of the adult defendant. Not all experts are qualified for both child and adult evaluations.

A second implication is that such cases will demand a great breadth of records for review. The expert will want to review records related to

(a) the defendant's mental health, educational, vocational and criminal records that predate and concur historically with the offense, (b) records pertaining to the other people in the defendant's household(s) over the course of the defendant's life prior to the offense, (c) records related to the offense including police records and trial transcripts, and (d) the defendant's prison record.⁴² In our experience, obtaining these records is taxing for the legal team. The attorney should anticipate that many of the records may no longer exist. *If that is the case, the defense should provide the clinician with documentation from the source that the records no longer exist.* The defense should do this in anticipation of the claim that the clinician was selective in which records were reviewed and relied upon in forming their opinion.

The expert will want to spend a significant period of time interviewing the defendant and potentially administering psychological tests. Interviews typically will focus on the defendant's childhood and adolescence, and the defendant's current psychological status. The first two *Miller* factors direct the expert specifically to inquire as to the defendant's recollections of childhood and adolescence, including such things as education,

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mental health and trauma, placements outside of the home, criminal and social service history, drug and alcohol history, and the defendant's memories of salient relationships with peers and parents. The third *Miller* factor focuses the expert to inquire about the offense, as the defendant remembers it.⁴³ The fourth *Miller* factor focuses the clinician on the defendant's account of his or her life while in prison, with special focus on services, personal rehabilitation efforts, and infraction incidents.

The clinician will also want to interview people who had contact with the defendant while the defendant has been in prison. The clinician can use the data from these interviews to assess if the defendant has matured while in prison and gather data related to the question of the possibility of rehabilitation. Finally, related to the fourth *Miller* factor (rehabilitation potential), the clinician may want to administer some psychological tests, typically chosen by the expert, to focus on current personality, mental health, risk of recidivism, and level of supervision needs.

Additionally, the clinician will want to interview the defendant's family members and people who may have gotten to know the defendant since the conviction. In many cases, family members may have died or will not make themselves available. It is important for the legal team to prepare the interviewees prior to their meeting with the expert as it can be difficult for a person to describe events in their life, especially those events which they would like to forget or have not talked about in many years. In our experience, the ease with which the defendant and other collateral sources are able to answer the clinician's questions is directly related to how much time the legal team has spent discussing these matters with them in advance of the interview with the expert. Finally, in determining how much weight to give any particular aspect of the interview data, the expert will consider how consistent the information is across the interview sources and the records reviewed.

The clinician may also want to interview people who are not relatives of the defendant, but either knew the defendant prior to the crime or came to know the defendant during incarceration. Often these sources are very valuable to the clinician, but the legal team should not underestimate the

effort it will take to identify this type of potential collateral source.

Imagine the following scenario: while interviewing the defendant's sister, the clinician learned that the defendant, Mark, had played basketball at the local Boys and Girls Club. There Mark had become close to the basketball coach, Sam. Although the Boys and Girls Club was demolished due to gentrification of the neighborhood, Mark's legal team was able to locate Coach Sam. During the interview with Coach Sam, the clinician learned Mark often smelled as if he had not showered or bathed for days, his clothes were often dirty and the coach often gave Mark something to eat because he knew Mark's mother was an alcoholic and that he often went hungry. The information the coach provided was consistent with what the clinician also learned from the defendant and his sister – that Mark's mother often failed to meet his basic needs. Clearly, this information relates to the second *Miller* factor.

Evaluator Testimony in Montgomery Resentencing

Here we provide specific examples of how the expert can translate the information obtained from records, interviews and testing in relation to the four *Miller* factors.

Factor 1: Immaturity at Time of Offense.

The fundamental question for the expert in the evaluator capacity is this: how, if at all, did the things the defendant experienced before the crime impact the normal trajectory of adolescent development? For example, imagine a scenario where the defendant and his sister told the clinician that the defendant had an extensive drug and alcohol history dating back to when he was nine years old. He committed the crime just after his sixteenth birthday. He became involved with social services at age thirteen and those records indicated he was using since he was eleven years old. Relying on those records, the evaluator would want to explain to the effects of using drugs and alcohol between the ages of eleven and sixteen. We know from reliable research that frequent use of drugs and alcohol prior to or during adolescence has a negative effect on the brain.

Factor 2: Family, Home and Dependency.

Using research, the expert will attempt to overlay information relevant to the defendant with

data related to normal adolescent development. This is done to provide the court with some idea as to how the defendant's family life may have impacted his developmental process. As already indicated, risky decision-making is a normative part of adolescence. However, research has also shown that adolescents' risky decision-making is related to an adolescent's perception of their relationship with their parents. For example, research has demonstrated that those adolescents who perceived their relationship with their parents as being problematic over the course of the year prior to the offense made riskier decisions than those who did not identify such problems in their relationship with their parents.⁴⁴

By collecting information related to the defendant's family, the clinician can provide the court with information that might help explain the defendant's conduct that ultimately led to his homicide conviction. As an example, a clinician may learn through interview data and through the review of records that the defendant's mother had been diagnosed with schizophrenia. When she did not take her medication, the client's

mother would become paranoid and delusional. During these episodes, and to protect the defendant from the devil, she covered the window with tin foil and made him pray while kneeling on rice for hours at a time. In this case, the expert could educate the court on the impact of being raised in such a household.

Finally, in gathering data related to this factor, the clinician may also try to assess the defendant's adverse childhood experiences and understand the impact of those experiences. To do this, the clinician could administer an instrument that identifies potentially traumatic experiences, allowing the clinician to compare the number of traumatic experiences the defendant experienced to others of the same gender. As is the case with any type of data, if the clinician uses a trauma or adverse experience scale that relies on the youth's self-report, it is important for the clinician to obtain information from other sources verifying those experiences. Conversely, through records and interviews with others, the evaluator could learn about trauma that the defendant did not acknowledge. When this occurs, the evaluator will want to ask the defendant about these incidents

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of trauma. If the defendant still does not acknowledge the trauma, the expert may have to educate the court about how this is may not be unexpected for victims of trauma.

Factor 3: Circumstances of the Offense. When gathering data related to this factor, the clinician will rely heavily on information from interviews with the defendant and records reviewed. In interviewing the defendant, the clinician will want to obtain a detailed account of the offense, including the circumstances leading up to and following the offense.

The clinician will also want to assess whether the degree of the defendant's participation was related to normal adolescent characteristics such as failure to fully appreciate the risks involved, vulnerability to the influence of peers, heightened desire for sensation-seeking, the influence of drugs or alcohol or an unmet mental health need. For example, in reflecting on a crime that occurred fifteen years earlier, a defendant described how he and his co-defendant, a "friend" six years his senior, broke into an apartment because they "heard" the victim had thousands of dollars hidden there. The victim came home while they were in his house and began to attack the co-defendant. While they were fighting, the defendant searched another room looking for something to use to help his friend. After a brief search, he found a knife that he used to stab the victim. When asked why he did not leave the apartment instead of looking for something to use to help his friend, he explained leaving his friend was not an option because their friends would call him "a punk." The defendant's description of the offense was consistent with what he and his co-defendant told the police hours after they were arrested. The clinician could explain to the court how the defendant's account of the offense was consistent with many aspects of normal adolescent development including risk-taking and the influence of peers.

Factor 4: Rehabilitation Potential. The clinician will want to review the defendant's prison records, to understand what services and programs the defendant participated in and the nature of the defendant's disciplinary records. Some defendants may have worked in prison and for many this may be the only service or program in which they participated. Obviously, work and skills are an aspect of rehabilitation. Reviewing the work record with

“*The clinician will want to review the defendant's prison records, to understand what services and programs the defendant participated in and the nature of the defendant's disciplinary records.*”

the defendant can provide data regarding what prompted the defendant to get the job and what duties were required. Prison records may also lead to collateral interviews. Imagine a scenario where the records indicated the defendant worked as an electrician for four years and during a brief phone call with the defendant's supervisor, the clinician learned the defendant was given more responsibilities than other inmates working in the shop. The supervisor also explained that the inmate took it upon himself to learn techniques that made the shop run more efficiently and taught these techniques to other inmates. By interviewing the supervisor, the clinician gained information beyond what was in the records that could be useful to the court in its consideration of the final *Miller* factor.

On the other hand, the absence of being involved in programming or work while in prison may not necessarily be indicative of poor rehabilitation potential. It is important the clinician discern if lack of involvement reflects the defendant's desire or the facility's policy. For example, when allotting resources, some facilities do not provide LWOP inmates an opportunity to participate in rehabilitative programming such as work or drug treatment or cognitive behavior therapy to address criminal thinking.

Finally, the clinician will want to place the defendant's disciplinary records into a developmental perspective. Research has shown that those who go into prison before their eighteenth birthday incur disciplinary write-ups at a faster rate than their older counterparts.⁴⁵ Moreover, reviewing some disciplinary records with the defendant allows the defendant an opportunity to place the incidents into context which then aids the clinician in assessing if the behavior represented some combination of normal developmental oppositionality, unmet mental health needs or an

underlying personality trait. Some defendants may have lengthy disciplinary records and this does not necessarily mean they do not have the potential for rehabilitation. Instead, it could reflect unmet mental health needs or be indicative of something else that was going on in the defendant's life. However, without discussing the disciplinary records with the defendant and considering other services that the defendant did or did not receive while in prison, it is unlikely that the clinician will be able to shed light on this issue for the court.

In summary, experts can play an important role in the approximately five hundred *Miller/Montgomery* cases pending in Pennsylvania's courts. Experts retained by the defense can serve as educators or evaluators. In the latter role, the expert will review records related to the defendant, the defendant's home life before the offense, and to the offense itself, as well as prison records. Additionally, the expert may want to administer psychological tests to the defendant. The expert will want to spend a significant period of time interviewing the defendant and others who knew the defendant before, and since, the conviction. At times, because of what the evaluating expert has learned, the defense counsel will not want

the expert to write a report. At that point, the evaluating expert becomes a consultant for the defense. A consultant's work does not have to be shared with the prosecution or the court. On the other hand, in many cases, the defense will request that the evaluating expert write a report. Defense counsel may want to share the report with the prosecutor to negotiate a plea or tender the report to the court as evidence at the resentencing hearing. When the report is tendered to the court, the defense may also want the expert to testify at the resentencing hearing. In doing so, the expert could provide the court with information to consider when imposing an individualized sentence consistent with *Miller* and *Montgomery*. 🏠

Notes

1. Author's note: The authors acknowledge Marsha Levick, Esq. Deputy Director and Chief Counsel of the Juvenile Law Center for her consultation pertaining to the analysis of Pennsylvania's cases related to *Miller* and *Montgomery*.
2. *Miller v. Alabama*, 567 U.S. 460 (2012).
3. *Montgomery v. Louisiana*, 577 U.S. ___; 136 S. Ct. 718 (2016).

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Prospects for Developing Expert Evidence in Juvenile “Montgomery” Resentencing Cases



Notes

1. Author's note: The authors acknowledge Marsha Levick, Esq. Deputy Director and Chief Counsel of the Juvenile Law Center for her consultation pertaining to the analysis of Pennsylvania's cases related to *Miller* and *Montgomery*.
2. *Miller v. Alabama*, 567 U.S. 460 (2012).
3. *Montgomery v. Louisiana*, 577 U.S. ___; 136 S. Ct. 718 (2016).
4. Pennsylvania's Office of Victim Advocate, Department of Corrections and the Board of Probation and Parole. May 2016: <http://www.pbpp.pa.gov/About%20PBPP/Documents/Juvenile%20Lifers%20Fact%20Sheet%20FINAL.pdf>.
5. In this article, we use the term “expert” narrowly to refer to a developmental, mental health, or health professional who is qualified by training and experience to testify about the subject matter relevant for the case at hand, including sufficient forensic training or experience to understand the legal relevance of their opinions.
6. *Roper v. Simmons*, 543 U.S. 551 (2005).
7. *Id.* at p. 15.
8. *Id.* at p. 16.
9. *Graham v. Florida*, 560 U.S. 48 (2010).
10. *Miller v. Alabama*, 567 U.S. 460 (p. 14) (2012).
11. *Miller* noted that LWOP should be applied only to “rare juvenile offender whose crime reflects irreparable corruption” (p. 17; elsewhere, “irretrievably depraved,” at p. 2).
12. Scott, E., et al. (2016). *The Supreme Court and the Transformation of Juvenile Sentencing*. Chicago, IL; John D. and Catherine T. MacArthur Foundation. <http://modelsforchange.net/transformation>.
13. *Commonwealth v. Cunningham*, 81 A.3d 1 (Pa. 2013).
14. *Id.*
15. *Id.*
16. *Songster v. Beard*, 35 F. Supp. 3d 657, 661 (E.D. Pa. 2014).
17. *Songster v. Beard*, C.A. No. 12-3941.
18. *Montgomery v. Louisiana*, 577 U.S. ___ 136 S. Ct. 718 (2016).
19. *Songster v. Secretary*, Pa. Dep't of Corr., F. App'x, No. 12-3941, 2016 WL 1019244 (3d Cir. Mar. 15, 2016).
20. *Songster v. Beard*, C.A. No. 04-5916 (August 17, 2016).
21. See, e.g., Brief *In Re Richard Lee Olds*, Supreme Court of Pennsylvania, Western District, No. 127, W.D. Misc. Docket 2016 (December 20, 2016); *Commonwealth of Pennsylvania v. Qu'eed Batts*, No. 45, MAP 2016, Supreme Court of Pennsylvania, Middle District (August 29, 2016).
22. *Commonwealth v. Batts*, 66 A.3d 286 (Pa. 2013).
23. Note 17.
24. More detailed descriptions are provided in: Grisso, T., & Kavanaugh, A. (2016). *Prospects for Developmental Evidence in Juvenile Sentencing Based on Miller v. Alabama*. *Psychol., Pub. Policy, and Law*, 22, 235-249.
25. *Miller* at 15.
26. *Miller* at 8.
27. Here, and in the remainder of this section, all references to *Batts* refer to *Commonwealth v. Batts*, 66 A.3d 286, 297 (Pa. 2013).
28. *Miller* at 8.
29. *Miller* at 15.
30. *Miller* at 8.
31. *Miller* at 10.
32. *Songster* at 4.
33. *Miller* at 17; elsewhere in *Miller*, “irretrievably depraved,” at 2.
34. *Songster v. Beard*, C.A. No. 04-5916, p. 4 (August 17, 2016).
35. *Id.* at 3.
36. *Id.* at 4.
37. In this article, we use the term “expert” to refer to any developmental, mental health, or health professional who is qualified by training and experience to testify about the subject matter relevant for the case at hand and sufficient forensic training or experience to understand the legal relevance of their opinions.
38. For reviews, see: Arain et al. (2013). *Maturation of the Adolescent Brain*. *Neuropsychiatr. Dis. Treat.* 9, 449-461. Scott, E., & Steinberg, L. (2008). *Rethinking Juvenile Justice*. Cambridge, MA: Harvard University Press. Steinberg, L. (2008). *A Social Neuroscience Perspective on Adolescent Risk-taking*. *Dev. Rev.*, 28, 78-106.
39. *Id.*, Scott and Steinberg.
40. Moffitt, T. (1993). *Adolescence-limited and Life-course-persistent Antisocial Behavior: A Developmental Taxonomy*. *Psychol. Rev.* 100, 674-701. Monahan, K.C., Steinberg, L., Cauffman, E., and Mulvey, E. 2009. *Trajectories of Antisocial Behavior and Psychosocial Maturity from Adolescence to Young Adulthood*. *Dev. Psych.* 45, 1654-1668. Mulvey, E., Steinberg, L., Piquero, A., Besana, M., Fagan, J., Schubert, C., and Cauffman, E. (2010). *Trajectories of Desistance and Continuity in Antisocial Behavior following Court Adjudication among Serious Adolescent Offenders*. *Dev. and Psychopath.*, 22, 453-475.
41. Kavanaugh, A. (2014). *Retaining a Forensic Mental Health Expert in Miller Cases*, *The Champion*, Nov/Dec., 22-27.
42. Subpoenas for the prison records should be as specific as possible. Counsel should expect to serve more than one subpoena before they successfully obtain all of the client's records. Additionally, in some jurisdictions, not all investigation records are kept in an inmate's master file and must be specifically requested.
43. With the approval of the legal team, the clinician may speak with the defendant about the crime, as this is clearly one of the factors the court will consider in the resentencing hearing.
44. McCormick, E. M., Qu, Y., & Telzer, E. H. (2016). *Adolescent neurodevelopment of cognitive control and risk-taking in negative family contexts*. *NeuroImage*, 124, 989-996.
45. Kolivoski, K., & Shook, J. (2016). *Incarcerating Juveniles in Adult Prisons: Examining the Relationship Between Age and Prison Behavior in Transferred Juveniles*. *Crim. Just. And Beh.* 43, 1242-1259. Kuanliang, A., Sorensen, J., & Cunningham, M. (2008). *Juvenile Inmates in an Adult Prison System: Rates of Disciplinary Misconduct and Violence*. *Crim. Just and Beh.*, 35, 1186-1201.

Parole Hearings

Parole Hearings

Advocating for Youth Charged with First Degree Murder

March 9, 2018 / Chapel Hill, NC

Overview

- The law on parole gives offenders no right to release and almost zero due process rights
- But Judge Terrence Boyle of the EDNC ruled in Hayden v. Butler that SCOTUS has created greater procedural protection for juvenile offenders in the parole process
- He also held that NC's parole procedures are so minimal and the Parole Commission's workload so great that said procedures for juvenile offenders violate the 8th Amendment

Overview, cont.

- So new procedures are required and will be implemented
- In making the case for parole, advocates should focus on putting the factors important to the Parole Commission in context and demonstrating maturity and rehabilitation

The law on parole

- “There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence.” Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 7 (1979)
- In the Fourth Circuit, a State is not constitutionally obligated to provide a parole regime. Vann v. Angelone, 73 F.3d 519, 521 (4th Cir. 1996).

The law on parole, cont.

- Therefore, offenders' limited right to consideration for parole is based on State law. See Burnette v. Fahey, 687 F.3d 171, 181 (4th Cir. 2012).
- Parole is an “act of grace . . . extended by the State as a reward for good behavior, conferring no vested rights upon the convicted person.” Goble v. Bounds, 13 N.C. App. 579, 583, 186 S.E.2d 638, 640.

The law on parole, cont.

- “By providing for parole, however, North Carolina, in common with other states, has made consideration for parole as integral a part of punishment by imprisonment as the length of the sentence itself. Moreover, to a man sentenced for life, the date he becomes eligible for parole consideration is paramount.” Wilson v. State of N.C., 438 F.2d 284, 286 (4th Cir. 1971).

Due Process Requirements

- The Fourth Circuit has determined that due process requires only that authorities “furnish to the prisoner a statement of [their] reasons for denial of parole.” Vann, 73 F.3d at 522.
- This may conflict with Greenholtz, which upheld Nebraska’s parole regime because it afforded notice and an opportunity to be heard.

Due Process Requirements, cont.

- For adult offenders, there are no current due process rights beyond notice and opportunity to be heard
- However, “[i]t is axiomatic that due process is flexible and calls for such procedural protections as the particular situation demands.” Greenholtz, 442 U.S. at 12.

Hayden v. Butler, 5:10-ct-03123-BO

- As a 15-year-old, Shaun Hayden committed burglary and sex offenses
- He pled guilty and was sentenced to a term of natural life.
- He has been in the custody of the NCDPS since March of 1983, and he is now 51 years old.

Hayden v. Butler, cont.

- Shaun became parole eligible in 2002, after serving twenty years.
- The Parole Commission has considered him for parole every year since 2002 (except in 2017) under the normal adult offender parole procedures.
- Each year parole has been denied at the first level of review.

Hayden v. Butler, cont.

- In 2010, Shaun sued the Parole Commission under 42 U.S.C. § 1983
- North Carolina Prisoner Legal Services was appointed and filed an amended complaint in September 2013
- In September 2015, Judge Boyle granted summary judgment in Shaun’s favor
- Shaun’s amended complaint and Judge Boyle’s ruling were based on Graham v. Florida, 560 U.S. 48 (2010) and the 8th Amendment

Why does Graham apply?

- In Graham, the U.S. Supreme Court held that under the 8th Am. juvenile offenders could not be sentenced to LWOP (JLWOP) for non-homicides
- None of the people with parole hearings are serving JLWOP
- But as Judge Boyle noted, recent US Supreme Court decisions have changed JLWOP law, and those changes implicate parole processes
- Graham, Miller v. Alabama, 567 U.S. 460 (2012), Montgomery v. Louisiana, 136 S. Ct. 718 (2016), Tatum v. Arizona, 137 S. Ct. 11 (2016), Adams v. Alabama, 136 S. Ct. 1796 (2016)

Development of JLWOP Law

- Graham: 8th prohibits JLWOP for non-homicides
- Miller and Montgomery: 8th prohibits JLWOP for homicides for defendants whose crimes reflect only transient immaturity
- Tatum and Adams: judgments vacated and cases remanded because courts in Arizona and Alabama did not determine whether the defendants were “irreparably corrupt”
- Be careful with Tatum and Adams, as the “irreparable corrupt” language is dicta in concurrence

JLWOP law, cont.

- So only juvenile offenders convicted of first degree murder who are “irreparably corrupt” can serve JLWOP
- What should states do with juvenile offenders who are not in this class?
- What if “a juvenile offender's life sentence, while ostensibly labeled as one **with** parole, is the functional equivalent of a life sentence **without** parole . . .”? (emphasis added)

In Judge Boyle’s opinion...

- “. . . then the State has denied that offender the meaningful opportunity to obtain release . . . that the Eighth Amendment demands.”
- If juvenile offenders have no real chance to obtain release, they are serving de facto JLWOP
- If those offenders didn’t commit murder [or aren’t irreparably corrupt], JLWOP is unconstitutional

What process is required?

- “What the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation . . . Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives.” 560 U.S. at 75.
- “Those prisoners who have shown an inability to reform will continue to serve life sentences. The opportunity for release will be afforded to those who demonstrate the truth of *Miller’s* central intuition—that children who commit even heinous crimes are capable of change.” *Montgomery*, 136 S. Ct. at 736.

Due Process Requirements, cont.

- Judge Boyle: “The Supreme Court has now clarified that juvenile offenders’ parole reviews demand more procedural protections.”
- “What Hayden seeks is what he is constitutionally entitled to, a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.”
- Does NC offer this opportunity?

History of Parole in NC

- Prior to 1981, North Carolina had indeterminate sentencing laws. Under these laws, judges had wide discretion to set sentences and the Parole Commission could release an inmate at almost any point during the prison term.
- Fair Sentencing eliminated discretionary parole for most felons.
- The Structured Sentencing Act totally eliminated parole for crimes committed after October 1, 1994
- However, it ushered in post-release supervision

Who is eligible for parole?

- Prior to Miller v. Alabama, there were 1,800-1,900 pre-FSA and FSA offenders serving life sentences
- Of those, 166 were juvenile offenders
- There have been an additional 28 juvenile offenders sentenced to life with parole after Miller hearings

When are offenders eligible?

- When offenders are eligible depends on when they committed crimes
 - Before July 1, 1981 (pre-Fair): most have been eligible for years
 - July 1, 1981 – October 1, 1994 (FSA): depends on the crime(s)
 - October 1, 1994 – present (SSA): Miller defendants, 25 years and up (§§15A-1340.19A-D)
- Hard to determine exact eligibility dates without “inside” information, but easy to get approximation

Calculating parole eligibility dates

- The basic rule is aggregation: add up the minimums and the maximums to arrive at a total range
- The total minimum is the parole eligibility date
- Have to call the Commission to get info on good/gain/earned time

Parole eligibility dates

§ 15A-1371. Parole eligibility, consideration, and refusal.
 (a) Eligibility. - . . . A prisoner whose sentence includes a minimum term of imprisonment imposed under authority of this Subchapter is eligible for release on parole only upon completion of the service of that minimum term or one fifth of the maximum penalty allowed by law for the offense for which the prisoner is sentenced, whichever is less, less any credit allowed under G.S. 15A-1355(c) and Article 19A of Chapter 15 of the General Statutes. A prisoner sentenced under the Fair Sentencing Act for a Class D through Class J felony, who meets the criteria established pursuant to this section, is eligible for parole consideration after completion of the service of at least 20 years imprisonment less any credit allowed under applicable State law.

Parole eligibility, cont.

- § 1371 was passed in 1977, before FSA
- Most sentences had a maximum and a minimum
- FSA eliminated minimum sentences

FSA parole eligibility

- Only a few FSA sentences had actual minimums:
 - First and second degree burglary
 - Armed robbery (now RWDW)
 - Habitual felon
 - Drug trafficking (2-20 years)
- For these crimes, you had to serve the minimum, even if it was more than 1/5 of the max
- Otherwise, minimum time to parole eligibility is 1/5 of the maximum

FSA parole dates, cont.

- Statutorily, 1/5 of a life sentence = 20 years (subsection has been repealed, but still applies)
- Class A and B felons don't get good time (day-for-day)
- Class C life gets good time, so 10 year minimum
- Thomas Adams

FSA parole dates, cont.

- "A prisoner sentenced under the Fair Sentencing Act for a Class D through Class J felony, who meets the criteria established pursuant to this section, is eligible for parole consideration after completion of the service of at least 20 years imprisonment less any credit allowed under applicable State law"
- How does this work?
- 20 years flat? Each crime? Mandatory minimums?

SSA parole eligibility dates

- Only applicable to Miller defendants
- Each life sentence is 25 year minimum
- Each other sentence has a min and max
- Parole eligibility date shifts as offender works down to the minimum of any non-class A felony
- Donte Santiago

The Parole and Post-Release Supervision Commission

- In North Carolina, the Commission has the exclusive discretionary authority to grant or deny parole. N.C. Gen. Stat. § 143B-720.
- Consists of four members who are appointed by the governor. One of the members is designated by the governor to serve as chair.
- Also consists of one psychologist, one DWI coordinator, two senior parole case analysts, and 16 parole case analysts

The Commission Staff

- The psychologist conducts psychological evaluations on any offender referred by the Commission in addition to conducting case consultations with mental health professionals on matters such as medical releases, mental health disorders, and offender needs.
- The DWI coordinator identifies and refers appropriate DWI offenders with substance abuse problems to the Commission for placement in the DART/Cherry Residential Program.

The Commission Staff

- The 16 parole case analysts determine and calculate parole/post release eligibility, schedule and conduct parole/post release reviews, analyze and assess each case eligible for supervision, and correspond and meet with interested parties.
- The 2 senior parole case analysts supervise the analytical and support staffs and handle special types of programs such as MAPP (Mutual Agreement Parole Program), the jail release program, and parole/post release revocation reviews.

The Commissioners

- Willis J. Fowler

Commissioner Bill Fowler, who has been chairman since Feb. 13, 2017, served as a Raleigh police officer and detective from 1964-1972 before joining the Department of Correction as a parole officer. After the state's parole and probation supervision systems were merged, he supervised both probationers and parolees for many years. In 1983, Fowler was promoted to a parole hearing officer. He was a chief parole hearing officer when Gov. Mike Easley appointed him to the Parole Commission in July 2005.



The Commissioners

- Eric Montgomery

Commissioner Eric Montgomery of Charlotte was appointed by Gov. Roy Cooper on Dec. 8, 2017. Montgomery is the president of the Montgomery Law Firm. He previously served as assistant general counsel for Bank of America and Flagstar Corporation. Montgomery is also a member of the board of directors for the African American Community Foundation.



The Commissioners

- Danny Moody

Commissioner Danny Moody served as the chief of protocol, historian and special collections librarian for the Supreme Court of North Carolina from 2004 through 2013. He established and led the NC Supreme Court's Historical Society, serving as its executive director. Prior to this, Moody was the chief hearing officer for License and Theft in the Enforcement Section of the Division of Motor Vehicles within the North Carolina Department of Transportation.



The Commissioners

- Graham Atkinson

Commissioner Graham Atkinson was appointed by Gov. Roy Cooper on March 24, 2017. He has more than 30 years of service as a law enforcement officer with the Surry County Sheriff's Office, including sheriff from 2006 until his retirement in April 2017. He served as a patrol deputy, detective, narcotics investigator, chief of detectives and county's first DARE officer in 1990. He served on the executive board of the NC Sheriffs' Association for several years, and was president in 2016-17. Atkinson also served two terms on the Surry County Board of Education, including three years as chairman. He is a graduate of Surry Community College and Gardner-Webb University.



Duties of the Commissioners

- Making all discretionary release decisions
- Establishing the conditions of supervision
- All parole/post release supervision revocation matters
- The modification of parole/post release supervision agreements and terms
- Conducting meetings with crime victims, family members, and interested parties who wish to provide information to the Commission for parole/post release supervision purposes.

The Commission Workload

- "Caseloads are high: each parole case analyst is responsible for approximately 4,338 offenders."
- This includes parole and post-release
- "Commissioners vote on in excess of 2,000 cases every month, not including other work."
- "As of September 2014, the Parole Commission had reviewed about 15,200 parole [and post-release] cases for that year."
- "On a fairly typical day, a commissioner casts approximately 91 [parole and post-release] votes."

When we think of parole hearings...

- We think of in-person chats
- The reality is different

The Commissioners see 8 pages of:

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PC05 0 0174678          PAROLE ACTION COMMENTS          CR60210 03/18/1 10:22:48
PCAS005                                     NC/DCC PAGE 003
DOC#:                                     NAME:                                     CURLOC:          PROJ.REL: LIFE
TELECN B/M PAR.ANAL:                                     ACTIV: CE A/C HEATING, BED: FIRM-018
CUST: MED CNTRL: RPOP SP.CHAR: LIF ACUITY:1 ACT.GRD:1 REV: 03/21/1
EVENT: 200 PAROLE REVIEW COMPLETE/ANALYST DATE: 03/25/1 SEQ: 2
-----
CMT LINS
ACT TYP NUM          COMMENTS
T01
T01 01 ANALYST REVIEW RECOMMEND
T01 02 REGULAR PAROLE / MAPF REVIEW
T01 03
T01 04
T01 05
T01 06
T01 07
T01 08
T01 09
T01 10
T01 11
T01 12
F1=MAIN MENU F3=SCREENS F4=REPORTS
F6=1ST PAGE F8=PGDN

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Myths?

- **Myth:** *The Parole Commission meets as a group in a formal hearing to decide whether an offender should be paroled.*
- **Truth:** The commissioners conduct an individual review of the offender's file and vote independently.

Myths?

- **Myth:** *The Parole Commission meets face to face with the offender during the parole review process.*
- **Truth:** The Commission does not meet with the offender.

Myths?

- **Myth:** *Commissioners place incarcerated offenders in community based programs (work release, home leaves, etc.)*
- **Truth:** The Commission has no jurisdiction over the placement of offenders in community-based programs while they are incarcerated. The Commission gives final approval for work release placement in Life sentence cases, but takes action only after receiving a recommendation from the Division of Prisons.

Frequency of review

- Originally all offenders were reviewed every year
- Now, those convicted of 1st and 2nd degree murders are reviewed every 3 years
- Those convicted of “sexually violent offenses” as defined in G.S. 14-208.6(5) are reviewed every 2 years
- Juvenile offenders will be reviewed every 2 years under Hayden

The 4 Statutory Reasons to Deny Parole

- There is a substantial risk that the offender would fail to conform to reasonable conditions of parole
- Release would unduly depreciate the seriousness of the crime or promote disrespect for law
- Continued correctional treatment, medical care, or vocational or other training in the institution will substantially enhance law-abiding conduct
- There is a substantial risk of further criminal conduct.

Parole Process

- A parole case analyst is assigned to each offender when the offender enters prison. The analyst is responsible for maintaining a file on the offender and calculating the parole eligibility date.
- There are two parts of the Commission’s process: review and investigation.

The Review Stage

- “At the review stage, the parole case analyst relies on any psychological evaluations contained within the offender's prison file. After writing the summary of the prison file, and making a written recommendation for or against granting parole, the parole case analyst provides the information to a commissioner.” (emphasis added)

Review Stage, cont.

- “There is no information about one's status as a juvenile offender. There is no specific information about maturity or rehabilitative efforts. There is no special process for one convicted as an adult before the age of 18, and the commissioner are unaware of that status.” (emphasis added)

First Decision

- “Testimony states that a commissioner's usual vote is no on felony parole at the review stage.”
- “If the vote is not no, the commissioner will most likely vote incomplete, and recommend an investigation.”

Notification of Investigation

- “At the investigation stage, the parole case analyst notifies the offender, the offender's prison facility, the victim, the prosecuting district attorney, and law enforcement.”
- Any victim or survivor who would like to be notified must submit a written request for notification of pending investigations or decisions in a case.

The Role of Victims

- The Commission contacts those victims listed for notification. The victims are given a specified time (usually 30 days) to respond.
- Victims can express their opinions in writing at any time. The letters are included in the inmate's file and the commissioners take the letters into consideration during the process.
- Victims of violent or assaultive crimes whose offenders are in medium or minimum custody can schedule a face-to-face meeting with a Commissioner. The meetings are scheduled on a first-come-first-serve basis in Raleigh and are held twice a month. These meetings last 30 minutes and are limited to five people per scheduled appointment.
- Victims may also request that certain conditions be imposed on the offender upon release.

The Investigation Stage

- "It is normal practice for the commission to order a psychological report to be conducted on the offender at this second level of review. All such reports must be completed by the Parole Commission's staff psychologist, Dr. Denis Lewandowski."
- "The probation department is requested to investigate the feasibility of the offender's proposed home plan."

Review v. Investigation

- The offender does not have independent input in the investigation stage
- The only "input" from the offender comes in the form of the psych eval and the home plan
- All other input comes from the victim/survivors or law enforcement
- The only additional "neutral" information the Commissioners receive from the investigation appears to be the psych eval and the evaluation of the home plan

MAPP Contracts

- Mutual Agreement Parole Program
- “If the investigation shows that the candidate for parole is promising, the Parole Commission will normally offer a MAPP contract, which is a contract between the offender, the prison, and the Parole Commission. The contract lets an offender work through different custody levels and get on work release for one to five years before they are released.”
- “The MAPP contract is ordinarily a mandatory step toward felony parole.”

MAPP Criteria

- Within three years of parole;
- In medium or minimum custody;
- Not subject to a detainer or pending court action which could result in further confinement;
- Infraction-free for a period of 90 days prior to being recommended;
- If sentenced under FSA, be otherwise eligible for community service parole under 15A-1380.2(h) or 270 Day Parole under 148-4.1
- The last part confuses me

MAPP Confusion

- Community service parole is for first-time offenders
- 270 Day Parole under 148-4.1 was passed to combat prison overcrowding, but excludes most serious crimes
- Excludes first or second degree murder, voluntary manslaughter, first or second degree rape, first or second degree sexual offense, any sexual offense involving a minor, robbery, kidnapping, or assault, or attempting, soliciting, or conspiring to commit any of those offenses

MAPP Confusion, cont.

- In its annual report to the legislature on the MAPP program, DPS says that all FSA offenders are eligible MAPP if they meet the other criteria
- As of 12/31/16, DPS reported 1,425 inmates eligible for MAPP
- Seems as though either all FSA offenders are eligible or these are all first-time offenders

Factors in the parole decision

- “According to Paul Butler, the Chairman of the Parole Commission, the most important information in the summary includes the following:
 - the official crime version (narrative of events of crime of conviction);
 - prison infraction history;
 - gang membership;
 - psychological evaluations;
 - custody level history;
 - visitation history; and
 - a home plan.
- Special weight is given to the brutality of the crime.”

Factors, cont.

- “It is important to note that in the risk assessment it was further noted that the young age that Hayden did the crimes and the fact that he has spent much of his developmental life in prison suggests he will always require at least moderate level of supervision since it is unlikely that he has significant coping skills and decision making ability to function well without good guidance.”
- So Shaun’s young age at the time of the crime was working against his release

How many offenders get parole?

- Short answer, not a lot
- The State argued at summary judgment that “the Commission’s decision to not release any juvenile offender [in 2014] demonstrates no perceptible disadvantage for Plaintiff or other similarly situated offenders. Similar results can be seen from 2011 through 2013.”
- Math behind this argument: 1.9% of adult offenders were paroled in 2014, and 35 juvenile offenders were eligible. 1.9% of 35 is 0.665 people, so it’s statistically fine to release zero people

How many offenders get parole?

Year	# of eligible inmates	# of MAPP contracts or treatment	# of parole hearings	# paroled	# of juvenile offenders	# of juvenile offenders paroled
2010	421	50	371	22 (5.9%)	32	6 (18.8%)
2011	446	35	411	11 (2.7%)	28	0
2012	490	53	437	10 (2.3%)	29	0
2013	508	63	445	6 (1.4%)	32	0
2014	529	43	486	9 (1.9%)	35	0
2015	531	24	507	6 (1.2%)	34	1 (2.9%)

Who does get parole?

- As part of summary judgment, we submitted an expert statistical report
- Data is based on offenders sentenced to life prior to 1995

Who gets parole, cont.

- “The report found that the statistical data shows that older offenders, offenders who have reached 58 to 59 years of age, are more likely to be paroled than younger offenders.”
- “However, the length of an offender’s incarceration seems to have no impact on whether or not the offender will be paroled. Merely being in prison longer is not enough to increase parole likelihood.”
- Shaun goes in at 15 = 43-44 years until parole
- I go in now at 40 = 18-19 years until parole

Who gets paroled, cont.

- “The report found that compared against the base case of violent crime, sex offenders are significantly less likely to be paroled. On the other hand, perpetrators of property crimes (which include burglary and arson in this model) are only slightly more likely to be paroled than violent offenders.”

Who gets paroled, cont.

- “The report found that a vast majority of the paroled offenders to have a low infraction history in prison.”
- “The report also found that those that attempt escape are significantly less likely to be granted parole.”

All things considered...

- The workload of the Commission
- The procedures in place, which don't alert the Commission to juvenile status or allow juvenile offenders to participate
- The rate of parole release

Does NC offer juvenile offenders sentenced to life a meaningful opportunity for release?

- No (according to Judge Boyle . . . and me)
- Therefore, they are serving de facto JLWOP
- "In the case before this court, it is evident that North Carolina has implemented a parole system which wholly fails to provide Hayden with any meaningful opportunity to make his case for parole."
- "The court finds that the North Carolina parole process violates the Eighth Amendment as outlined in Graham."

New procedures

- Judge Boyle left it up to the parties to devise a remedy ("It is for the State, in the first instance to explore the means and mechanisms for compliance." Graham, 560 U.S. at 75.)
- Both sides submitted plans
- The State's plan was adopted

New procedures highlights

- Review every two years
- A designated parole case analyst for all juvenile offenders
- Written notice at least 180 days in advance of any parole review hearing
- Ability for offender to submit materials in advance

Highlights, cont.

- A 30 minute "hearing" with one Commissioner and parole case analyst via videoconference
- Can have attorney, advocate, and witnesses at hearing
- Specific reasons for denial and suggestions for improvement

New procedural details

Pre-Hearing Procedures

- Advocates for the offender will be guaranteed a thirty-minute meeting slot to address, in person, one or more members of the Parole Commission (is this the same as the "hearing"?)
- The offender may request a reasonable continuance of a scheduled parole review hearing up to thirty (30) days in advance of the designated hearing date;
- Those who oppose parole will be guaranteed, if requested, an equal thirty-minute meeting slot to address the same Commissioner(s) who will preside over any parole review hearing

New procedural details, cont.

Hearing Procedures

- Audio recordings of the hearing and, if requested, any hearing afforded to those opposing release
- No use of STATIC-99

New procedural details, cont.

Post-Hearing Procedures

- The Commissioner and parole case analyst will prepare a report to be circulated to the remaining members of the Commission;
- Audio recordings kept for 3 years
- The Parole Commission will collect and maintain data, including a statistical breakdown on the basis of age, race, gender, and type of criminal offense
- Encourage Division of Prisons to accept MAPP contract recommendations

Making Your Case

- Focus on important factors plus maturity and rehabilitation
- Important factors
 - Official crime version
 - Prison infraction history
 - Gang membership
 - Custody level history
 - Visitation history and home plan

Dealing with factors

- Official crime version
 - Was your client the principal?
 - Accept responsibility
 - Provide context
- Prison infraction history
 - Any change?
 - How does client account for change?

Dealing with factors, cont.

- Context is so important
- “For example, Hayden has been found guilty of 41 disciplinary infractions throughout his 32 years of incarceration; however, of those infractions he was only convicted of seven infractions since 2000, and one in the last five years. This information has significantly different meaning depending on the context in which it is viewed. It gives meaningful insight into gaining, or failing to gain, maturity and rehabilitation if the commissioner views it knowing Hayden was sentenced as a juvenile offender. Viewed in the absence of that knowledge, it simply illustrates a high number of disciplinary infractions which are statistically damaging to one’s chance for parole.”

Dealing with factors, cont.

- Gang membership
 - Tattoos (prison officials often cite these)
 - Is he or she really in a gang?
 - Have they tried to be re-evaluated?
 - Custody level history
 - If not in minimum, why not?
 - Visitation history and home plan
 - Where will they live?
 - Who will be around?
 - Will your client have a job?
- } Stability and security

Maturity and Rehabilitation

- Get your own psych eval if possible
- Prisoner record
 - Classes/certificates
 - Education
- Three types of people to speak with
 - Those who knew your client at the time of the crime
 - Those who know your client in prison
 - Those who will provide support when your client gets out

Presenting Evidence

- Goal is to show change and future stability
- Two options for presenting evidence: live witnesses or in letters
- Witnesses: remember that you have 30 minutes TOTAL
- Letters: organize them and bring 4 copies, one for each commissioner

Keep in mind

“The Commissioners are easy to talk to, but them being nice is not an indicator that they will rule in your favor.”

Miller Cases: The Future

Miller v. Alabama:
The Road Ahead

MARCH 9, 2018

DAVID ANDREWS
ASSISTANT APPELLATE DEFENDER
OFFICE OF THE APPELLATE DEFENDER

The Central Premise

- Children are “constitutionally different from adults.” *Miller v. Alabama*, 567 U.S. 460, 471 (2012).

- Children have diminished culpability and greater capacity for reform.

The Central Premise

- “Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity.” *Haley v. Ohio*, 332 U.S. 596 (1948).

- “This is the period of great instability which the crisis of adolescence produces.” *Id.*

A Case Built on Hope

- The mandatory imposition of LWOP “disregards the possibility of rehabilitation even when the circumstances most suggest it.” *Miller v. Alabama*, 567 U.S. 460, 478 (2012).
- Even if a child commits a brutal crime, the law must give that child the opportunity to show that he or she can be redeemed.

Staying Power

- *Miller* “drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption.” *Montgomery v. Louisiana*, 193 L. Ed. 2d 599 (2016).
- Even if a judge considers a child’s age before imposing LWOP, “that sentence still violates the Eighth Amendment for a child whose crime reflects ‘unfortunate yet transient immaturity.’” *Id.*

Staying Power

- The Supreme Court of Georgia initially believed that “*Miller* established a procedural rule” *Veal v. State*, 784 S.E.2d 403, 409 (Ga. 2016).
- “But then came *Montgomery*.” *Id.* at 410.
- “[T]he explication of *Miller* by the majority in *Montgomery* demonstrates that our previous understanding of *Miller* . . . was wrong” *Id.*

Keep Fighting

- Before *Miller*, the N.C. Supreme Court upheld a mandatory LWP sentence for a 13-year-old in *State v. Green*, 348 N.C. 588 (1998).
- Based on *Green*, the Court of Appeals upheld mandatory LWOP sentences in *State v. Lee*, 148 N.C. App. 518 (2002) and *State v. Medina*, 174 N.C. App. 723 (2005).
- And, yet, *Miller* is now the law.

Reform Current Sentencing Procedures

- N.C. Gen. Stat. § 15A-1340.19A, *et seq.* was upheld in *State v. James*, 786 S.E.2d 73 (2016).
- The case is pending in the Supreme Court of North Carolina in *State v. James*, No. 514PA11-2.

Reform Current Sentencing Procedures

- Presumption in favor of LWP
- Burden of proof on the State to establish that LWOP is warranted
- Determination by the court – supported by findings and evidence – of whether the child can be redeemed

Reform Parole Hearings

- Right to a hearing
- Right to an attorney
- Right to a psychological expert
- Right to consideration of mitigating factors of youth
- Right to a written explanation of the denial
- Right to appeal

Reform Parole Hearings

- Parole should be denied only if the defendant:
 - Has not demonstrated maturity and rehabilitation such that there is a substantial risk that he/she will not conform to reasonable conditions of parole or would engage in further criminal conduct.

Abolish LWOP for Juveniles

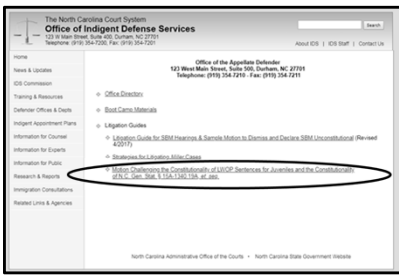
- The goal is to avoid entrenchment of LWOP as a possible sentence.
- Since *Miller*, at least 12 state legislatures have abolished LWOP for juveniles (including Arkansas, Texas, North Dakota, South Dakota, Utah, West Va.).
- 3 state appellate courts have banned LWOP for juveniles under state constitutions (Massachusetts, Iowa, Washington).

Abolish LWOP for Juveniles

- Abolishing LWOP for juveniles in the legislature is a possible solution.
- Court litigation is another solution.
- If you have a case with an upcoming *Miller* sentencing hearing, file a motion asserting that LWOP is unconstitutional for juveniles. There is a sample motion on the Appellate Defender website.

Abolish LWOP for Juveniles

- <http://www.ncids.org/AppDefender/OAD-Home.htm>



The screenshot shows the website for the Office of the Appellate Defender. A red oval highlights a link in the 'Information for Courts' section: 'Motion Concerning the Constitutionality of LWOP Sentences for Juveniles and the Constitutionality of N.C. Gen. Stat. § 15A-1301.2(a) et seq.'.

A word about constitutional arguments

- If you anticipate making constitutional arguments, put the argument in a motion and litigate it.
- “Constitutional issues not raised . . . at trial will not be considered for the first time on appeal.” *State v. Gainey*, 355 N.C. 73 (2002).
- Get a ruling on the argument. Without a ruling, the argument is waived. *Walden v. Morgan*, 179 N.C. App. 673 (2006).

A word about constitutional arguments

- Be sure to raise arguments under the North Carolina constitution.
- Protections in state constitutions often extend “beyond those required by the Supreme Court’s interpretation of federal law.” William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977).

A word about constitutional arguments

- The 8th Amendment bars cruel **and** unusual punishments.
- N.C. Const. art. I, § 27 bars cruel **or** unusual punishments.
- “The disjunctive term ‘or’ in the State Constitution expresses a prohibition on punishments more inclusive than the Eighth Amendment.” Harry C. Martin, *The State as a “Font of Individual Liberties”*: North Carolina Accepts the Challenge, 70 N.C. L. REV. 1749 (1992).

What If . . .

- Your 17-year-old client is not sentenced to LWOP, but receives the following consecutive sentences:
 - Second-Degree Murder: 22 years
 - Attempted Murder: 15 years
 - Two Counts of First-Degree Kidnapping: 16 years
 - First-Degree Burglary: 6 years
 - Armed Robbery: 6 years

You should . . .

- Object to the sentence under the 8th Amendment and N.C. const. art. I, § 27.
- Explain that a 65-year sentence is the functional equivalent of a mandatory LWOP sentence.
- Ask for a continuance to file written arguments on the issue and a hearing on the arguments.

Abolish De Facto LWOP Sentences

- “The prospect of geriatric release . . . does not provide a ‘meaningful opportunity’ to demonstrate the ‘maturity and rehabilitation’ required to obtain release and reenter society as required by *Graham*.” *State v. Null*, 836 N.W.2d 41 (Iowa 2013).
- “[T]he teachings of the *Roper / Graham / Miller* trilogy require sentencing courts to provide an individualized sentencing hearing . . . when . . . the aggregate sentences result in the functional equivalent of life without parole.” *Bear Cloud v. State*, 334 P.3d 132 (Wy. 2014).

Abolish De Facto LWOP Sentences

- “[A] fifty year term and its grim prospects for any future outside of prison effectively provide a juvenile offender with ‘chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope.’” *Casiano v. Comm’r of Corr.*, 115 A.3d 1031 (Conn. 2015).
- “Defendants’ potential release after five or six decades of incarceration, when they would be in their seventies and eighties, implicates the principles of *Graham* and *Miller*.” *State v. Zuber*, 152 A.3d 197 (N.J. 2017).

Abolish De Facto LWOP Sentences



- *Wyoming v. Sam*, No. 17-952: Does the 8th Amendment limit a judge to an aggregate term of years for a juvenile sentenced for murder and other crimes?
- *Bostic v. Pash*, No. 17-912: Can a court sentence a juvenile who did not commit murder to a term of years sentence under which he will not be eligible for parole until he is 112-years-old?

What If . . .



- There is a chance that your 17-year-old client will be sentenced to a mandatory sentence of life in prison with parole?

You should . . .



- File a motion objecting to the sentence under the 8th Amendment and N.C. const. art. I, § 27.
- Argue that, under *Miller*, the trial judge must have discretion to choose an appropriate sentence.

Abolish Mandatory LWP Sentences

- In *State v. Jefferson*, 798 S.E.2d 121 (2017), the Court of Appeals rejected a facial challenge to a mandatory LWP sentence.
- However, the Court also held that there “may indeed be a case” in which a mandatory LWP sentence is disproportionate in light of a particular defendant’s age and immaturity.
- Footnote 3: “We would like to note Defendant declined to address whether his sentence violated the North Carolina Constitution.”

Abolish Mandatory LWP Sentences

- Be aware of *State v. Bowlin*, 783 S.E.2d 230 (2016).
- In *Bowlin*, the Court rejected an 8th Amendment challenge to a mandatory minimum sentence for a juvenile defendant convicted of first-degree sex offense.
- The Court did so because a trial judge “retains significant discretion to consider the factual circumstances of the case, including the defendant’s age” *Id.* at 234-35.

Abolish Mandatory LWP Sentences

- Sentencing courts “must have complete discretion to consider mitigating circumstances associated with the youth of any juvenile defendant” *State v. Houston-Sconiers*, 391 P.3d 409 (Wash. 2017).
- “[T]he heart of the constitutional infirmity with the punishment imposed in *Miller* was its mandatory imposition, not the length of the sentence.” *State v. Lyle*, 854 N.W.2d 378 (Iowa 2014).

What If . . .

- You represent a 13-year-old charged with first-degree murder, who must automatically be transferred to superior court under N.C. Gen. Stat. § 7B-2200?

You should . . .

- File a motion objecting to automatic transfer under the 8th Amendment; the 14th Amendment Due Process Clause; and N.C. const. art. I, §§ 19 and 27.
- Argue that a district court judge must have discretion over the question of transfer.

End Automatic Transfer to Superior Court

- In a *pre-Miller* decision, the Court of Appeals upheld automatic transfer in *State v. Stinnett*, 129 N.C. App. 192 (1998).
- “It is within the province of the General Assembly to enact a process for dealing with serious offenses committed by juveniles.”

End Automatic Transfer to Superior Court

- In *State v. Aalim*, 83 N.E.3d 862 (Ohio 2016), the Supreme Court of Ohio held that automatic transfer violated Due Process.
- Two justices were subject to age-mandated retirement. The State then filed a motion for reconsideration.
- In *State v. Aalim*, 83 N.E.3d 883 (2017), the re-constituted Supreme Court of Ohio held that automatic transfer did not violate Due Process.

End Automatic Transfer to Superior Court

- “[T]here is no place in our system of law for reaching a result of such tremendous consequences without ceremony – without hearing, without effective assistance of counsel, without a statement of reasons.” *Kent v. United States*, 383 U.S. 541 (1966).
- “The key moment for the exercise of discretion is the transfer – and as Miller’s case shows, the judge often does not know then what she will learn, about the offender or the offense, over the course of the proceedings.” *Miller v. Alabama*, 567 U.S. 460 (2012).

End Automatic Transfer to Superior Court

- Under new N.C. Gen. Stat. § 7B-2200.5, transfer is mandatory for 16- and 17-year-olds charged with Class A – G felonies.
- Under N.C. Gen. Stat. § 7B-2203(c), the superior court has jurisdiction over any felonies that are transferred in the district court’s discretion, as well as any other related offenses.

What If . . .



- There is a chance that a jury will convict your 17-year-old client based on felony murder?

You should . . .



- File a motion objecting to felony murder under the 8th Amendment; the 14th Amendment Due Process Clause; and N.C. const. art. I, §§ 19 and 27.
- Argue that the theory of felony murder is not appropriate for children and teenagers.

Abolish Felony Murder for Juveniles



- The felony murder rule was promulgated “to deter even accidental killings from occurring during the commission of or attempted commission of a dangerous felony.” *State v. Richardson*, 341 N.C. 658 (1995).
- Deterrence is ineffective with children because the characteristics that render juveniles less culpable than adults – immaturity, recklessness, and impetuosity – “make them less likely to consider potential punishment.” *Miller v. Alabama*, 567 U.S. 460 (2012).

Abolish Felony Murder for Juveniles

- “The likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent.” *Thompson v. Oklahoma*, 487 U.S. 815 (1988).
- “Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult.” *Id.*

Abolish Felony Murder for Juveniles

- The State would likely argue that SCOTUS could have abolished felony murder in *Miller*. Breyer, after all, wrote a concurrence about felony murder.
- However, SCOTUS does not “decide issues outside the questions presented by the petition for certiorari.” *Glover v. United States*, 531 U.S. 198 (2001).

What If . . .

- There is a chance that a jury will convict your 17-year-old client based on first-degree murder based on premeditation and deliberation?

You should . . .

- File a motion under the 8th Amendment; the 14th Amendment Due Process Clause; and N.C. const. art. I, §§ 19 and 27 requesting age-specific instructions for premeditation and deliberation.
- Argue that the jury needs to be able to consider how children are different than adults before deciding whether your client engaged in premeditation and deliberation.

Apply *Miller* to Guilt-Phase Instructions

- Children are “constitutionally different from adults.” *Miller v. Alabama*, 567 U.S. 460 (2012).
- Children cannot be viewed as “miniature adults.” *J.D.B. v. North Carolina*, 564 U.S. 261 (2011).
- A juvenile defendant “should be judged by the standard of a reasonable person of [the defendant’s] like age, intelligence, and experience under similar circumstances.” *J.R. v. State*, 62 P.3d 114 (Alaska Ct. App. 2003).

Apply *Miller* to Guilt-Phase Instructions

- “Crimes committed by youths . . . deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults.” *Thompson v. Oklahoma*, 487 U.S. 815 (1988).
- “Changes in behavior and limbic circuitry during adolescence coincide with a heightened sensitivity to emotional cues that may cause them to impulsively react rather than retreat from cues of potential threat.” Michael Dreyfuss et al., *Teens Impulsively React Rather than Retreat from Threat*, 36 *Developmental Neuroscience* 220 (2014).

What If . . .



- Your 19-year-old client is sentenced to mandatory LWOP for first-degree murder?

You should . . .



- File a motion objecting to the sentence under the 8th Amendment and N.C. const. art. I, § 27.
- Argue that the reasoning of *Miller* should extend beyond the age of 17.

Extend *Miller* Beyond the Age of 17



- Until SCOTUS raises the age of adulthood, “we must respect its decision to reject advancing the line any further.” *Zebroski v. State*, 2018 Del. LEXIS 42 (Del. 2018).
- “[W]e decline defendant’s invitation to extend *Miller* to 18-year-old offenders.” *People v. Jordan*, 2017 Mich. App. LEXIS 367 (Mich. Ct. App. 2017).

Extend *Miller* Beyond the Age of 17



- “[D]efendant committed a capital crime after he turned eighteen years old, and that simple fact carries defendant’s case over the bright line drawn by *Roper*.” *State v. Garcell*, 363 N.C. 10 (2009).
- “Defendant’s age falls past the bright line drawn by *Miller*, which applies only to those who commit crimes prior to the age of 18.” *State v. Sterling*, 233 N.C. App. 730 (2014).

Extend *Miller* Beyond the Age of 17



- “Today, we . . . have the benefit of . . . advances in the scientific literature. Thus, we now know that age may well mitigate a defendant’s culpability, even if that defendant is over the age of 18.” *State v. O’Dell*, 358 P.3d 359 (Wash. 2015).
- “Although the Court in *Roper* delineated the division between juvenile and adult at 18, we do not believe that this demarcation has created a bright line rule.” *People v. House*, 72 N.E.3d 357 (Ill. App. Ct. 2015).

Extend *Miller* Beyond the Age of 17



- “The features of youth identified in *Roper* and *Graham* simply do not magically disappear at age seventeen – or eighteen for that matter.” *State v. Sweet*, 879 N.W.2d 811 (Iowa 2016).

Extend *Miller* Beyond the Age of 17

- American Bar Association Resolution 111:
 - “RESOLVED, That the American Bar Association, without taking a position supporting or opposing the death penalty, urges each jurisdiction that imposes capital punishment to prohibit the imposition of a death sentence on or execution of any individual who was 21 years old or younger at the time of the offense.”

Extend *Miller* Beyond the Age of 17

- It is unfair to lump a person in his early 20s in with adults as old as 50 for purposes of sentencing.
- Eighth Amendment precedent counsels that the consensus of the scientific community should not be ignored when a court sentences a defendant.
- There is an emerging consensus that brain development continues into the 20s.

Extend *Miller* Beyond the Age of 17

- In *Moore v. Texas*, 197 L. Ed. 2d 416 (2017), SCOTUS criticized the lower court for rejecting medical guidance and “clinging” to its own standard to determine intellectual disability.
- Because scientific consensus was central to *Roper*, *Graham*, *Miller*, and *Moore*, the current scientific consensus on when the brain matures should apply to defendants who are over 18, as well.

Bring Trauma to the Court's Attention

- Mandatory LWOP prevents the court from taking into account the client's family and home environment "no matter how brutal or dysfunctional." *Miller v. Alabama*, 567 U.S. 460 (2012).
- "[I]f ever a pathological background might have contributed to a 14-year-old's commission of a crime, it is here." *Id.* at 478-79.

Bring Trauma to the Court's Attention

- Think of trauma as a distinct issue that could factor into:
 - Transfer
 - Interrogation
 - Capacity to proceed
 - Determination of guilt
 - Sentencing


Bring Trauma to the Court's Attention

- If your client has experienced significant or sustained trauma, file a motion to hire a psychologist or psychiatrist with a background in trauma.
- A psychologist or psychiatrist might be able to explain how trauma affected the client during the crime, interrogation, or court proceedings.

Bring Trauma to the Court's Attention

○

- <http://www.ncids.com/forensic/index.shtml>



Bring Trauma to the Court's Attention

○

- Youth who have experienced trauma might:
 - Have a less developed prefrontal cortex, which regulates emotional responses and impulse control.
 - Have greater activity in the amygdala, which is involved in processing emotional stimuli and planning defense responses.
- The effects of trauma might lead a teenager to react impulsively to a stressful situation rather than thinking through the consequences of potential responses.

Bring Trauma to the Court's Attention

○

- In *State v. Janes*, 850 P.2d 495 (1993), the Supreme Court of Washington recognized the defense of "battered child syndrome."
- In *In re Tristan C.*, 595 N.Y.S.2d 635 (1993), a family court judge dismissed a manslaughter case because the juvenile would have been "damaged by having to participate in a fact-finding and then a dispositional hearing."
- In *United States v. Juvenile*, 347 F.3d 778 (9th Cir. 2003), the Court granted re-sentencing because the trial court failed to consider the juvenile's "history of victimization."

Bring Trauma to the Court's Attention

- Be aware that some courts might view evidence of trauma as "double-edged." *Ladd v. Cockrell*, 311 F.3d 349 (5th Cir. 2002).
- Although evidence of trauma might show lesser culpability, some courts might believe it shows that the juvenile "is likely to continue to be dangerous in the future." *Id.*

Bring Trauma to the Court's Attention

- Jessica Feierman and Lauren Fine, *Trauma and Resilience: A New Look at Legal Advocacy for Youth in the Juvenile Justice and Child Welfare Systems*, Juv. L. Ctr. (2014).
- Megan Glynn Crane, *Childhood Trauma's Lurking Presence in the Juvenile Interrogation Room and the Need for a Trauma-informed Voluntariness Test for Juvenile Confessions*, 62 S.D. L. REV. 626 (2017).
- Eduardo R. Ferrer, *Transformation through Accommodation: Reforming Juvenile Justice by Recognizing and Responding to Trauma*, 53 Am. Crim. L. Rev. 549 (2016).

Join the Community

- Join the Miller Counsel NC Google Group.
- Contact the Campaign for the Fair Sentencing of Youth to join the JLWOPLitigation listserv.
- Call the Appellate Defender, Juvenile Defender, or Prisoner Legal Services to brainstorm arguments.
