

Practitioner Brief

Applying a Developmental Framework to Juvenile Sentencing

What Forensic Experts and Attorneys Should Know

Recent decisions by the United States Supreme Court have severely restricted the use of life without parole for juvenile offenders (JLWOP). Affirming the principle that children are developmentally different from adults, and that those differences must be considered in sentencing, the Court made it clear that sentencing hearings must consider five mitigating factors:

1. Decision-making capacity
2. Capacity to resist negative influences
3. Context of the offense
4. Legal competency
5. Potential for rehabilitation

Child forensic mental health experts have a variety of tools and procedures to assess these factors in juveniles and help guide decisions in sentencing hearings and, to a more limited extent, in resentencing and parole hearings. Although the Supreme Court ruling only dealt with JLWOP, these factors are important in guiding juvenile sentencing decisions more generally.

The Supreme Court and the science of adolescent development

Three Supreme Court cases over the past decade have had a major impact on the sentencing of juvenile offenders. In *Roper v. Simmons* (2005) the Court prohibited the death penalty for juveniles; in *Graham v. Florida* (2010) the Justices barred the sentence of life without parole (LWOP) for juveniles convicted of a non-homicide offense; and in *Miller v. Alabama* (2012) they banned the use of mandatory LWOP sentences even for juveniles convicted of homicide.

In the *Miller* opinion, the Court delineated a powerful constitutional principle: children are different from adults, and these differences have implications for criminal punishment.¹ While that principle had previously been acknowledged by the Court, the recent opinions were the first to point to science for confirmation of what “any parent knows.”² The Court noted three characteristics of adolescence that distinguish youths from adults:

- Their decision-making is impulsive and immature, with little regard for consequences.

- They are more vulnerable to external influences such as peer pressure and immediate incentives.
- Their character is still being formed, making it difficult to judge their actions as “irretrievably depraved.”

These observations have been validated not only by behavioral science, but also by neuroscience documenting age-related changes in brain structure, neural connections, and brain functioning. Neuroscientists have found that in adolescence, the brain systems involved in self-regulation are relatively immature, while the systems that respond to emotional and social stimuli and to incentives exhibit heightened activity, partly as a consequence of changes in the brain at puberty.³ Brain studies also find that adolescence is a period of high neuroplasticity—the capacity of the brain to change in response to experience—making adolescents good candidates for rehabilitation.⁴

With these findings, experts on adolescent development can provide sentencing courts with general information about aspects of both neurological and psychological functioning during adolescence that bear on issues of culpability, competence, and the potential for rehabilitation. However, it’s important to note that it is not currently possible to use brain imaging, either alone or in combination with psychological evaluation, to assess immaturity or risk in an *individual* adolescent. Experts who offer such opinions exceed the limits of current scientific knowledge.

Assessing mitigating factors in sentencing hearings

The *Miller* decision did not entirely bar LWOP for juveniles convicted of homicide, though some states have done so. But the Court made clear that this sentence is seldom acceptable, creating a presumption of immaturity for youths facing the sentence.

This means states that retain JLWOP must do more than make it discretionary. Prosecutors must prove that LWOP is an appropriate sentence for a particular juvenile, in a sentencing hearing that

considers the five mitigating factors described in *Miller*:

1. Decision-making capacity
2. Capacity to resist negative influences
3. Context of the offense
4. Legal competency
5. Potential for rehabilitation

Of course, not all factors will be relevant in every case. But in all cases, because the factors are based on developmental constructs, they require expert assessment by forensic *child* clinical psychologists or psychiatrists.

Decision-making capacity. This requires an assessment of the youth’s capacity for abstract thinking, ability to delay impulsive reactions, and capacity to consider future consequences (including the ability to weigh risks). Forensic mental health (FMH) experts have a variety of validated tools for comparing a youth’s performance to others of the same age. They also need to assess these capacities under real-life conditions, which can be done through a comprehensive review of records of the youth’s past behavior in school and other settings, and through skilled interviewing of the youth, family members, teachers, and peers. Finally, FMH experts should consider mental and behavioral disorders, such as ADHD and PTSD, that could affect the youth’s decision-making capacity. FMH experts will use their developmental and clinical knowledge and experience to integrate this information and often can offer potential explanations for the youth’s decision-making before and after the offense.

Capacity to resist negative influences. *Miller* expressed concern that negative family circumstances and other conditions from which the juvenile might not have the capacity to extricate himself could contribute to the youth’s involvement in crime. Depending on family circumstances as well as individual capacities, adolescents differ in their autonomy in making choices and in their ability to meet their needs independent of external guidance and support. FMH experts can identify an individual’s level of autonomy or dependency using measures such as “social maturity scales,” which assess the youth’s degree of independence and self-direction in everyday

functioning according to age norms. Interviews with the youth and family members, along with inspection of school and clinical records, can provide additional evidence of autonomy or dependency in everyday life.

Context of the offense. Heightened susceptibility to peer influence is a major hallmark of adolescence. This means that attorneys and FMH experts should pay special attention to the youth’s role in the offense—and in particular, to the role of peer pressure. This is especially important in offenses that involve several youths acting in a group, where some may be initiators and others followers. But in adolescence, even “leaders” may be responding to peer pressure. In some cases the role of peer influence will be clear; in other cases it may be difficult or impossible to discern. Experienced forensic experts can often glean the necessary information from a close examination of reports of the youth’s involvement in the crime.

Legal competency. Our legal system requires that defendants be able to make decisions about whether to submit to police interrogation and accept a plea agreement, and they must be able to understand the trial process and assist in their defense. Compelling research shows that adolescents, especially those age 15 and under, are poorly prepared to do these things; older teens, however, may be as competent as most young adults. Forensic psychology and psychiatry offer standardized assessment tools for evaluating these capacities and can provide guidance for applying the results to a retrospective analysis of the youth’s competence in police interrogations and legal proceedings.

Potential for rehabilitation. Research has shown that the majority of youth involved in the justice system stop offending as they approach adulthood, and only a small number will become long-term offenders.⁵ There currently are no reliable and valid psychological instruments that alone can identify which individuals fall into the latter group, and the seriousness of the crime itself has no predictive value. However, there are systematic procedures for evaluating a youth’s rehabilitation potential. FMH experts can assess specific characteristics of the individual—for example, early onset of aggression and frequent offending—that are associated with persistence of criminal behavior into

Five Mitigating Factors for Sentencing Hearings

- 1. Decision-making capacity:** immaturity, impetuosity, and related characteristics that impair the ability to make decisions.
- 2. Capacity to resist negative influences:** family circumstances and individual capacities that limit the youth’s ability to meet his or her own needs.
- 3. Context of the offense:** the circumstances of the offense, including peer pressure and the role the youth played.
- 4. Legal competency:** impaired competency that puts the youth at a disadvantage in dealing with police or legal proceedings.
- 5. Potential for rehabilitation:** the potential for the youth to desist from offending, on his or her own or with interventions.

adulthood. They can also describe past rehabilitation programs that a youth has been provided, their outcomes, and reasons if those efforts have failed. However, they may not be able to state with confidence whether a given youth is or is not likely to reform. An additional note on applying the mitigating factors: As Justice Roberts pointed out in his *Miller* dissent, the Court’s “children are different” framework posits a general principle of reduced culpability that applies not only to homicide, the crime at issue in the case, but generally to the criminal conduct of young offenders.⁶ The same developmental factors that mitigate culpability for murder or armed robbery also influence adolescents committing less serious crimes. Expert testimony on the mitigating factors can help guide courts in a broad spectrum of sentencing decisions.

The *Miller* factors in resentencing and parole hearings

Many states have begun to require resentencing of offenders serving JLWOP. The resentencing hearings often examine factors that were not considered at the time of mandatory LWOP sentencing. This requires a retrospective analysis, since the original sentencing may have occurred years or decades earlier.

The issue of retrospective analysis is complex. Assessment of an adult prisoner’s intellectual,

cognitive, emotional, personality, or mental health functioning cannot provide an accurate picture of the individual as an adolescent at the time of the offense. The greater the time since the offense, the less valuable the current assessment. Nevertheless, in some cases new assessments by an FMH expert can provide useful information. For example, they might reveal disabilities such as intellectual impairment, brain damage, or ADHD; these conditions typically develop before adulthood and are likely to have existed when the individual was an adolescent.

Evaluations that were performed around the time of the offense—for example, mental health evaluations in the community, school-based evaluations, competence to stand trial evaluations prior to adjudication, and evaluations for discretionary transfer hearings—can sometimes be helpful, though their quality may be inferior to those using current assessment tools.⁷ FMH experts may also be able to obtain data from collateral sources such as school records, health and mental health records, offense

data, and parents' or peers' recollections of the youth's behavior and attitudes during adolescence. In some cases, these data might lead to relatively reliable evidence related to mitigating factors.

Apart from resentencing, some states provide special parole hearings for offenders serving life or other lengthy sentences for crimes committed as juveniles. Where these regulations require consideration of *Miller* factors, the same issues will arise around retrospective analyses. Parole hearings, however, are more concerned with evidence of the adult inmate's current state of rehabilitation than with his or her potential for rehabilitation as a juvenile. Similarly, whether the individual as a youth would or would not have desisted from offending will be less relevant for parole boards than his or her current likelihood of offending if released on parole. FMH experts can use validated risk assessment instruments to assist in these evaluations; but parolees who are adults require a different approach from one based on developmental mitigation factors.

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1. *Miller v. Alabama*, 132 S.Ct 2455, 2470 (2012).
 2. *Miller*, 132 S.Ct. 2455, 2464 (2012)(quoting *Roper v. Simmons*, 543 U.S. 551, 569 (2005)).
 3. BJ Casey, Sarah Getz, and Adriana Galvan (2008). The adolescent brain. *Developmental Review*, 28, 62–77.
 4. Laurence Steinberg, *Age of Opportunity: Lessons From the New Science of Adolescence*, New York: Houghton Mifflin Harcourt (2014), note 19.
 5. Terrie Moffitt (1993). Adolescent-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy, *Psychol. Rev.*, 100, 674; Edward Mulvey, Laurence Steinberg, Alex Piquero, Michelle Besana, Jeffrey Fagan, Carol Schubert, and Elizabeth Cauffman (2010). Longitudinal Offending Trajectories among Serious Adolescent Offenders, *Dev. and Psychopathology*, 22, 453.
 6. *Miller*, 132 S.Ct. 2455, 2482 (Roberts, C.J., dissenting).
 7. For example, specialized tools for performing developmentally-relevant competence to stand trial evaluations of adolescents did not exist until about 2005. Thomas Grisso, *Evaluating Juveniles' Adjudicative Competence* (2005).

This brief is based on the report “The Supreme Court and the Transformation of Juvenile Sentencing,” prepared by Elizabeth Scott, Thomas Grisso, Marsha Levick, and Laurence Steinberg, and available at modelsforchange.net/transformation. For more information, contact Elizabeth Scott, Harold R. Medina Professor of Law, Columbia Law School, es2054@columbia.edu.

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