

**The Developmental Factors in *Miller v. Alabama*:
What Experts Can Provide**

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I declare no conflicts of interest relevant for this presentation.

PURPOSE OF PRESENTATION:

To provide guidance on the use of clinical experts (clinical psychology, psychiatry, social work) in *Miller* sentencing and retrospective re-sentencing cases

To outline the types of psychological information, especially developmental factors, that experts should obtain for formulating expert opinions in *Miller* cases

OUTLINE:

- I. The Need for Experts, and Selecting Them for *Miller* Cases
- II. Helping the Expert Frame the Questions Relevant for *Miller* Cases
- III. The Developmental Factors of Immaturity in *Miller v. Alabama*, and How Experts Can Evaluate Them
- IV. The Challenge of Retrospective Re-Sentencing Cases for Experts

*All citations to Miller v. Alabama are 132 S.Ct. 2455 (2012).
Footnotes refer to supporting information referenced at end of outline.*

I. Recognizing the Need for Experts, and Selecting Them

A. Need for experts

1. *Roper*,¹ *Graham*,² and *Miller's* acknowledgement of developmental differences in adolescence as relevant for mitigation
2. Court's need for developmental/clinical expertise to consider relevant clinical information about client's developmental status as noted in *Miller*

3. Expert's two roles:
 - a. Evaluation of client to form opinion and testimony about client characteristics relevant for mitigation
 - b. Ability to inform the court regarding adolescent development generally and the developmental research that supported U.S. Supreme Court's presumptions about developmental immaturity of adolescence in *Roper*, *Graham* and *Miller*

B. Qualifications of experts ³

1. Need for forensic experience (but not necessarily *Miller* experience)
2. Child/adolescent training and/or experience is essential. Do not hire without it.

C. Consulting with the expert on objectives

1. Little specific guidance for *Miller* evaluations in expert literature. ⁴ Therefore, special need to review the objectives and evaluation plan with the expert.
2. In the absence of much guidance in literature, this presenter's opinion about the proper structure of *Miller* evaluations has no consensual authority among forensic experts. It follows a general forensic evaluation principle: The expert's evaluation should be structured and designed to obtain legally relevant information (not merely general psychological information) for the specific type of case (here, *Miller* cases). ⁵
3. A note on differences between *Miller* sentencing and retroactive re-sentencing cases, the latter to be examined later.

II. Framing the Question with the Expert

A. Discuss with the expert the types of developmental maturity/immaturity characteristics that are relevant for Miller cases.

1. Aiming to provide an overall "mature/immature" classification of the youth is not an appropriate objective for the expert. There are various ways in which people can be mature or immature (biological, neurological, cognitive, behavioral, social); sometimes they are mature in some ways and not others.
2. A better objective for the expert is to describe where the youth stands by way of maturity or immaturity on various areas of development.

3. Determine whether the expert is familiar with the developmental factors specifically raised by the U.S. Supreme Court in *Miller v. Alabama* (as described later in this presentation.)

B. Discuss with the expert the role that maturity/immaturity will play in your advocacy. For example:

1. *Miller* has already declared that the class in which the youth belongs (adolescents) is less mature on average than adults, but recognizes that some adolescents might be more mature than the average for the class.
2. *Miller v. Alabama*, at 2469: “We think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.”
3. This frames the question, “Is there any reason to believe that this youth is remarkably more mature than others in his/her class, with reference to the developmental factors in *Miller*?” (And, of course, “Is the youth remarkably less mature than others in his/her class on any of the factors?”)

C. Discuss with the expert to whom the youth should be compared in describing “maturity” or “immaturity” on the relevant developmental factors.

1. Compare to average of the “class” of 12-17 year olds overall? Then most 16-17 year olds will appear “more mature.”
2. Compare to peers of client’s own age? Then some 12-14 year olds who are mature for their age will be labeled “mature” when they are only like the average for adolescents as a whole.
3. Compare them all to adults? But which adults is not clear. And the measures of development used with adolescents typically have not been used with adults.
4. Possible approach: Compare all adolescents to the oldest age group in the class.

III. *Miller’s* Developmental Factors

Miller described several ways in which the Court believed that immaturity was relevant for weighing mitigation in LWOP sentencing. The factors are not labeled in *Miller*; the presenter labels them:

**Decisional
Dependency
Offense Context
Rehabilitation Potential
Legal Competency**

A. Decisional Factor

1. *Miller*: “lack of maturity and an underdeveloped sense of responsibility leading to recklessness, impulsivity and heedless risk-taking” (*Miller* at 2458). Elsewhere in *Miller*: “immaturity, recklessness and impetuosity;” “failure to appreciate risks and consequences.”
2. Focus is on capacities for self-regulation. Also adolescents’ greater susceptibility to influence by peers that can impair self-control and decision making.
3. Basis in developmental science: ⁶
 - a. Behavioral research on development from adolescence to adulthood of self-regulation and impulsiveness
 - b. MRI neuroscience developmental evidence: Compared to adults, adolescents show stronger neural responsiveness to reward potential, and less effective neural activation of brain areas that are important for inhibiting impulse to consider consequences and plan before acting
4. Expert’s evaluation methods
 - a. Various subtests of standardized intelligence tests; also behavioral methods used in lab to study the above characteristics (Go/No-Go, Tower of London, Stroop Color Test).
 - b. Specialized psychological measures of susceptibility to peer influence
 - c. Records (mental health, school) and parent/peer/teacher interviews
 - d. Assessment of mental disorders (e.g., ADHD and impulsiveness)
5. Why not obtain MRI for client? ⁷ All developmental neuroscientists agree that the error rate is too high to use MRI to identify brain maturity in single individuals.

B. Dependency Factor

1. *Miller*: “Children are more vulnerable to negative influences and outside pressures, including their family.” “They have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings.” Must “take into account the family and home environment that surrounds him—and from which he cannot extricate himself—no matter how brutal or dysfunctional.” *Miller* at 2458.

E.g., “Miller’s stepfather physically abused him; his alcoholic and drug-addicted mother neglected him; he had been in and out of foster care as a result; and he had tried to kill himself four times, the first when he should have been in kindergarten.” *Miller* at 2469.

2. Focus is on description of the history of negative conditions of childhood and adolescence the youth could not avoid—especially abuse, neglect, trauma, family chaos, and negative environmental influences—and their effect on the juvenile’s life.
3. Expert’s evaluation methods
 - a. Thorough review of child welfare system records
 - b. Interviews with youth, parents, teachers, and mental health professionals
 - c. Measures of traumatization (e.g., PTSD) ⁸
4. Be aware that mere “exposure to potentially traumatizing things” is not enough. Most delinquent youth are exposed to some degree of neglect and neighborhood experiences that could be traumatizing. Must demonstrate that the traumatizing experiences were extraordinary, and that they had long-lasting effect on youth.

C. Offense Context

1. *Miller*: Should consider “the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures have affected him.” *Miller* at 2468.
2. Focus is on whether and how the developmental factors in Decisional and Dependency domains might have had some impact on the offense itself. Special emphasis on peer influence and “leader/follower” role.
3. Expert’s evaluation methods
 - a. Analysis of the offense, using Decisional and Dependency data
 - b. Using interview of youth and in-depth exploration of feelings/motives
 - c. Review of police records and all other descriptions of the event
4. Be aware that expert’s logic must be solid and compelling, not merely a convenient explanation. It must take into account alternative interpretations of the youth’s involvement in the offense, and must be more compelling than those.

D. Rehabilitation Potential

1. *Miller*: “A child’s character is not as well formed as an adult’s; his traits are less fixed and his actions less likely to be evidence of irretrievable depravity.” *Miller* at 2458 (elsewhere, “irreparable corruption”) “Life without parole forswears altogether the rehabilitative ideal [and is] at odds with a child’s capacity for change.”

The Court also referred to the evidence that most juveniles with delinquency records do not continue their offending into adulthood, but rather desist as they mature beyond adolescence. ⁹

2. Focus is on youth's capacity to change; any evidence that the crime is not indicative of an unalterable criminal character
3. Expert's evaluation methods: Two approaches
 - a. Measures of "psychopathic traits," because psychopathic personality is resistant to change through intervention. Why this is of questionable value with adolescents.
 - b. Evaluating characteristics known to improve response to rehabilitation³
 - c. Evaluation that identifies mental disorder, which may be treatable and might reduce future risk
4. Be aware that "failure to have responded to past juvenile justice rehabilitation efforts" may be used to suggest poor rehabilitation potential. Consider the quality (often poor) of juvenile justice rehab programs that the youth was in.

E. Legal Competency

1. *Miller*: "[Mandatory sentencing] ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including a plea agreement) or his incapacity to assist his own attorney." *Miller* at 2468.
2. The reference here is to substantial research on adolescents' lesser capacities to make "knowing, intelligent and voluntary" waiver of *Miranda* rights,³ and their lesser capacities than adults to assist counsel and make decisions at trial—that is, competence to stand trial.¹⁰
3. Expert's evaluation methods
 - a. Many evaluation tools available to measure capacities in both of these contexts.¹¹
 - b. Need for them in *Miller* cases may be variable, depending on circumstances of the case.
4. Suggestion: Reserve the additional effort of competency assessment for those cases in which there is specific concern about it, in light of history of the case.

IV. Retrospective Re-Sentencing Cases

A. Requires expert to examine what the client was like, on Miller developmental factors, at time of original sentencing, which may have been five to forty years ago

B. Difficulties for the expert

1. Lack of empirical guidance in the literature regarding relation of present adult status to past adolescent status
2. Current psychological testing, developmental status, or personality will often be irrelevant because of potential changes in client's status during the time period. Trying to make direct inferences that present adult behavior represents past adolescent behavior often will be unreliable and may damage the credibility of the expert's opinion.
3. Records of the client's distant past often may be difficult to obtain.

C. What the expert can offer

1. May be able to infer from current status if the time has not been too long.
2. Can sometimes build a detailed developmental history based on records and parent and client interviews, if the school, mental health, child welfare, and juvenile records can be obtained. Attorney should offer every possible assistance in discovering past records.
3. Some past records may include psychological testing done while the client was an adolescent (school, mental health services, juvenile justice contacts)
4. Some current adult disabilities (e.g., Developmental Disability [mental retardation], ADHD, Autistic Spectrum Disorder, Schizophrenia) have a developmental trajectory such that certain adolescent characteristics can be inferred from present status.
5. Parents' recollections may be helpful, but typically will have to be used cautiously because of informant's interest in the client.

References Cited in Outline

1. *Roper v. Simmons*, 125 S.Ct. 1183 (2005).
2. *Graham v. Florida*, 130 S.Ct. 2011 (2010).
3. Grisso, T. (2013). *Forensic evaluation of juveniles* (second edition). Sarasota, FL: Professional Resource Press.
4. Scott, E., Grisso, T., Levick, M., & Steinberg, L. (forthcoming, 2016). "Children are Different:" The Supreme Court and the transformation of juvenile sentencing. *Temple Law Review*.
5. Heilbrun, K. (2001). *Principles of forensic mental health assessment*. New York: Kluwer Academic/Plenum Publishers.
6. Scott, E., & Steinberg, L. (2008). *Rethinking juvenile justice*. Cambridge, MA: Harvard University Press; also, Steinberg, L., & Scott, E. (2003). Less guilty by reason of adolescence: Developmental immaturity, diminished responsibility, and the juvenile death penalty. *American Psychologist*, 58, 1009–1018.
7. Steinberg, L. (2013). The influence of neuroscience on U.S. Supreme Court decisions involving adolescents' criminal culpability. *Nature Reviews Neuroscience*, 14, 513-518.
8. Wevodau, A., Cruise, K., & Grisso, T. (2015). *Identifying dual status youth with trauma-related problems*. Issue Brief, Robert F. Kennedy Children's Action Corps. Available at www.modelsforchange.net/publications/833
9. Moffitt, T. (1993). Adolescence-limited and life-course-persistent antisocial behavior: A developmental taxonomy. *Psychological Review*, 100, 674-701; also, 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. *Development and Psychopathology*, 22, 453–475.
10. Grisso, T., Steinberg, L., Woolard, J., Cauffman, E., Scott, E., Graham, S., Lexcen, F., Reppucci, N., & Schwartz, R. (2003). Juveniles' competence to stand trial: A comparison of adolescents' and adults' capacities as trial defendants. *Law and Human Behavior*, 27, 333-363.
11. Goldstein, H., Zelle, H., & Grisso, T. (2012). *Miranda Rights Comprehension Instruments*. Sarasota, FL: Professional Resource Press. Also, Kruh, I., & Grisso, T. (2009). *Evaluation of juveniles' competence to stand trial*. New York: Oxford.