



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[l] 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,

**FIGHT WITH COURAGE AND COMPASSION
FOR NON-CITIZEN DEFENDANTS**



**CONTACT CRIMMIGRATION ATTORNEY
WANA SAADZOI, ESQ.**

17 Veterans Sq.
Media, PA 19063

Office: 610-566-5956
wana@saadzoilaw.com

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

Jason S. Dunkle, Esquire JD Law, P.C.



204 East Calder Way , Suite 306
State College, PA 16801

Phone: (814) 954-7622

E-mail: jd@mystatecollegelawyer.com

Web: www.mystatecollegelawyer.com

Webster Law P.C.

CRIMINAL DEFENSE



CRIMINAL DEFENSE

Serving Pennsylvania and Federal Courts

*"The darkest places in hell are reserved for those who
maintain their neutrality in times of moral crisis."*

Dante Alighieri



87 NORTH BROAD STREET, DOYLESTOWN, PENNSYLVANIA 18901
215.348.7700 + 215.348.0171 + SWEBSTER@WEBSTERLAWPA.COM
WWW.WEBSTERLAWPA.COM

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).

▶ [Click here to view and/or print the full notes section for this article.](#)

About the Authors



Antoinette Kavanaugh, PhD, ABPP, Board Certified in Forensic Psychology, is the former Clinical Director of the Juvenile Justice Division — Cook County Juvenile Court Clinic, served as a clinical professor at Northwestern University's School of Law for ten years and is a Lecturer at the Feinberg School of Medicine, Northwestern University, Chicago, IL. She has authored several peer-reviewed articles and routinely trains lawyers and psychologists on issues related to adolescent development and obtaining and conducting forensic evaluations. In private practice since 1999, she evaluates juveniles and adults for criminal state and federal court cases as well as for civil cases. Correspondence may be addressed to: Antoinette Kavanaugh, PhD, ABPP at antoinette@drkavanaugh.com.



Thomas Grisso, PhD, ABPP Thomas Grisso, PhD, a clinical and forensic psychologist, is Emeritus Professor in Psychiatry at the University of Massachusetts Medical School. He has forty years of experience in research and consultation aiming to improve juvenile justice law and policy, juvenile courts' decision making, and mental health professionals' evaluations in juvenile cases. He is Executive Director of the American Board of Forensic Psychology.

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.