

***Juveniles are Different*: Using Adolescent Brain Science When**

**Representing Youth in Adult Court- 2018 Update**

In recent years, both the US Supreme Court and the Washington Supreme Court have handed down decisions profoundly altering the treatment of youth and young adults in the criminal justice system. Beginning in 2005 with *Roper v. Simmons* [[1]](#footnote-1) these courts have recognized that juveniles are different and must be treated differently from adults. In *Roper*, the Supreme Court relied on the 8th Amendment when it abolished the death penalty for all juveniles.[[2]](#footnote-2) Five years later in 2010, the Supreme Court again relied on the 8th Amendment when it struck down mandatory life sentences for youth who commit non-homicide crimes in *Graham v. Florida*.[[3]](#footnote-3) Then, in June 2011, the Supreme Court decided *JDB v. North Carolina*,[[4]](#footnote-4) holding that the *Miranda* custody test can readily include consideration of the age and maturity of a juvenile. Finally, in June of 2012, the Supreme Court decided *Miller v. Alabama*,[[5]](#footnote-5) holding that a mandatory life without parole sentence for juveniles convicted of homicide crimes is unconstitutional, again relying on the 8th Amendment. The Washington Supreme Court has followed these decisions with *St v. O’Dell*[[6]](#footnote-6) in August of 2015, holding that youth and developmental immaturity is relevant in some cases to culpability and can be a basis to depart from a standard range sentence, even if the individual had reached his 18th birthday prior to the crime. In 2017, the Washington Supreme Court decided *St v. Houston Sconiers[[7]](#footnote-7),* holding that trial courts have discretion to depart from not only the standard range but also from any mandatory sentencing when factoring in the role youth and developmental maturity.

In each of these cases the courts recognize the principle that youth are significantly different from adults and must be treated differently in the criminal court setting. Youth are different because they are young and their brains are still developing. Youth are different because, as a class they are characterized by certain inherent traits and characteristics that distinguish them from adults. Youth are different because they will outgrow these characteristics in time and, therefore, they are more likely to be transformed and rehabilitated than an adult. Youth are less culpable than adults due to the innate qualities of their age - this was the holding of *Roper*, *Graham* and *Miller*. In each of these cases the courts recognized that youth have diminished decision making capacity compared to adults, based on the emerging research into adolescent brain development.

**Adolescent Brain Development- Understanding the Science[[8]](#footnote-8)**

The adolescent brain is like a highway under construction. Scientific research has demonstrated that the human brain continues to change and mature throughout childhood and adolescence. The teen years, in particular, are an active time of growth and development at the physical level in the brain. The primitive and instinctual part of the brain develops first, and then comes the part of the brain that helps control reasoning and helps us think before we act. The early, ancestral part of the brain is called the amygdala. It is responsible for gut reactions, the “fight or flight” response, and fear and aggressive behaviors. The more advanced area of the brain is the frontal cortex which helps us control our emotions and modify our actions and response. Adolescents actually use their brains differently than adults when reasoning or solving problems. Adolescents rely more on their instinctual structures, like the amygdala, and less on their more advanced areas such as the frontal lobe.

In addition to physical development, adolescents are developing rapidly in the social and emotional realms. There are significant, dramatic changes occurring in youth and rapidly developing between ages 10-13 years. In this age range youth begin seeking out thrills and have increased levels of emotional arousal - higher highs, lower lows, and it’s easier to reach the highs and lows. In this time period, they develop an increased attentiveness to social awareness with respect to peer influence, especially negative peer influence. Adolescents also misread social cues, such as the emotions associated with facial expression.

Cognitive control develops more slowly, beginning in adolescence and continuing through into the early 20’s. The deliberative system is still coming on-line in adolescence, and this remains true into the early 20’s. As youth mature, there is better impulse control, better emotional regulation, and more foresight and planning ahead. More mature youth are better able to think through the next steps and consequences, and consider alternatives when problem solving. More mature youth and adults exhibit better reasoning.

Youth clients, in general:

* Are more impulsive- especially in a heated emotional context;
* Are sensation seekers;
* Are more susceptible to peer pressure, especially negative peer pressure, and may acquiesce to the “authority” of older peer or go along with a group;
* See things in “black and white” – they may not realize exiting a group situation is an option when trouble erupts
* Lack foresight/planning, lack understanding of consequences;
* Are poor risk assessors, they perceive threats and interpret emotions of others differently than adults, they may misinterpret a level of threat and/or overreact to a perceived threat; and
* Are more impaired by their developmental status when under stress (i.e. they have hot and cold cognition – while they may function well under ideal circumstances, they may not fare so well under stress or pressure.)

**Ethical Communication and Effective Advocacy: Issues to Consider**

Because of the innate characteristics of youth a number of issues come up when representing these clients that require careful consideration, investigation and evaluation.

*Effective communication with the client; setting the goals of representation:[[9]](#footnote-9)* Defense attorneys must effectively communicate with the client, allow the client to set the goals of representation and consult with the client about how those goals will be achieved. RPC 1.2, 1.4. Youth clients process information differently than adults, so factor this in when having discussions about the case. Because of their developmental level, youth clients may have a hard time making important decisions in the course of representation. Adolescents think about time much differently than adults – they are more likely to consider short term gratification rather than long term consequences. These clients may also have a skewed sense of the chance of success at trial as well as the outcome if they lose. Youth are often used to deferring to the opinions of adults on such difficult decisions.

Some helpful communication strategies include:

* Allow for plenty of face time with the client. Young clients need more time with their attorney than adult clients.
* Make charts or decision trees with the client to explain the court process or procedure and let the client keep these to refer back to later.
* With respect to assessing the risk of going to trial, make a chart of the evidence the state will produce at trial followed by defense counsel’s response to all of that evidence and any defense evidence.
* Make a pros/cons chart when considering risks/outcomes of going to trial. Let the client hold on to these charts and diagrams so they can reference them whenever necessary.
* When the client makes a decision, have the client explain the rationale and potential consequences so that the lawyer can tell if the client is making an informed decision.
* Make sure your client has plenty of time to process information and consider choices, such a decision to plead guilty or go to trial.[[10]](#footnote-10)

*Competency [[11]](#footnote-11) –* Youth who are15 or under are at greater risk for incompetence, even more so if there is a history of a learning disability or mental illness requiring treatment or history of IQ below 75. Youth clients may not have a good understanding of court processes and procedures. Even if they do understand the various roles of the parties, they may lack competency to make thoughtful reasoned decisions with respect to their case (*e.g.,* what to tell their lawyer).

***Mitigation - Plea Bargain:[[12]](#footnote-12)*** Brain development research supports the principle that youth are less culpable due to their age and more likely to be transformed and rehabilitated than adults. The traits of adolescence will fade with age. Gather and present evidence to show your client was not fully developed in plea negotiations, including efforts to remand an auto-declined case to juvenile court.

*Remand to Juvenile Court -* Auto-decline cases can go back to juvenilecourt two ways*:*

* Auto-decline cases can return to juvenile court upon the agreement of the prosecutor without having to amend the charges. [[13]](#footnote-13)
* Amendment to or conviction of non-auto-decline charge*:* If the State initially charges an offense that triggers auto decline, but later amends the information to charge an offense that does not automatically grant jurisdiction to the superior court, the juvenile court obtains jurisdiction over the case. State v. Mora, 138 Wn.2d 43, 47, 977 P.2d 564 (1999). If the juvenile is convicted of crimes that do not provide superior court jurisdiction, they should be remanded to juvenile court. RCW 13.04.030.

***Challenge to the Evidence at Trial***: Adolescent brain development may be relevant to issues of mens rea, foreseeability, and possible defenses. If in *JDB v. North Carolina*, the age of the youth was a relevant factor in determining whether a “reasonable person” would think they were in custody. Other evidentiary issues may also include consideration of the age of a youth:

* Negligence, recklessness, or other places where a “reasonable person” standard is applied;
* Intentional acts (i.e., murder, assault)
* Felony murder
* Provocation by peers
* Self-defense
* Duress
* Accomplice liability- did they know what their actions would accomplish
* Voluntariness in waiver of any rights- carefully consider with confessions, searches and seizures.

*Jury Instructions*: Consider asking for an instruction for a “reasonable juvenile” where there is any language involving foreseeability or a reasonable person.

***Use of Experts****.* The adolescent brain development and behavioral research is very general and applies to most adolescents, but not all. To apply this research to your case consider using a forensic mental health expert to assesses your client’s developmental status and tie the case facts and circumstances to the science surrounding adolescent development. *Be sure your expert specializes in adolescent development*. You can’t assume that an expert that works in the adult realm is qualified to do this work. Be sure to ask if they do developmental adolescent evaluations. A good defense expert will need to know how to interview children – it is different than adults – they must be familiar with the brain development research and they will need to be able to place the responses and circumstances of your client into the information gleaned from the general research.

***Age as Mitigation at Sentencing****: St v. O’Dell* [[14]](#footnote-14) held that trial courts can consider a defendant’s age/youth and the impact immature development has on criminal culpability. Depending on the type of case and facts present, numerous possible bases exist to argue that an adolescent client is less culpable and that age and development are relevant and merit leniency. An expert’s evaluation and opinion about your individual client is the most compelling evidence to support this conclusion, but an expert is not required in every case[[15]](#footnote-15).[[16]](#footnote-16)

In Washington, RCW 9.94A.535(1) lists reasons the court can depart downward when sentencing in a felony matter. The list is illustrative only. Adolescent brain development can be argued as a solid basis on its own to justify a departure.[[17]](#footnote-17) Possible arguments include:

* Youth did not contemplate that his conduct would cause harm to another. Youth are impulsive, so perhaps your client did not have time or the capacity to stop and think about his actions. The teenage brain is like a highway under construction. The frontal lobe (the “CEO”) is still developing. This area of the brain is responsible for throwing the brakes on bad ideas. Youth are sensation seekers, and they are more driven by the prospect of a positive reward than deterred by negative consequences.
* Youth acted under strong provocation. Youth are much less capable of assessing threats or risk and may overreact to a perceived threat.
* Criminal conduct was induced or facilitated by another. Adolescent youth are highly attentive to their peers, and more susceptible to negative peer influence than positive peer influence. Was the crime committed in a group (most youth offense are)? Was the youth being pressured by others to act? Youth acquiesce to authority, was your client the youngest in a crowd following the lead of older kids?
* Criminal conduct was the result of circumstances unlikely to occur again. Youth are more likely to be transformed and rehabilitated and will grow up and out of the developmental deficits.
* Youth is likely to comply with the terms of probation. Discuss the maturation process, how the youth has done in custody or while released, show by behavior that the youth has matured while case pending.
* Sentence is not necessary to deter others. Studies support that lengthy sentences are not deterrent for youth. At best harsh a sentence does nothing, at worst it will cause harm.

**Raising a Constitutional Challenge to Auto Decline:**

The Washington Supreme Court decided *In re Boot*,[[18]](#footnote-18) which upheld the auto-decline statute in Washington, in 1996. *In re Boot* relied upon cases now overruled by *Graham* *v. Florida*[[19]](#footnote-19) and *Miller v. Alabama*. [[20]](#footnote-20) This issue is now pending before the Washington Supreme Court in *St v. Tyler Watkins* (argued March 2018).

***Challenge to any mandatory sentencing*.[[21]](#footnote-21)**Challenge mandatory sentencing that does not provide an individualized sentencing for adolescent defendants because it fails to follow the dictate of Miller requiring youth, home environment and potential for rehabilitation as factors that are required to be considered at sentencing.[[22]](#footnote-22)

* RCW 9.94A.540(3) provides that youth charged as adults are not subject to the same mandatory minimum terms as adults. Legislative findings and intent following the statute specifically indicate the legislature relied upon the differences in adolescent brains when enacting this statute (effective in 2005).
* The legislature also took youth development into account when it passed legislation amending sentencing of youth for serious crimes in adult court. The new sentencing schemes allow for youth, lack of maturity/development and account for rehabilitation. Youths sentenced to lengthy prison terms are eligible for early release after 20 years.[[23]](#footnote-23) Youths sentenced for aggravated murder are no longer subject to mandatory life without parole.[[24]](#footnote-24)

***Challenge to a “life equivalent” sentencing or lengthy term of years sentence***: Challenge mandatory minimum and/or consecutive sentences or enhancements that violate *Graham* as life equivalent sentences or *Miller* as a lengthy term of years sentence (ie geriatric release) that requires an individualized sentencing hearing.[[25]](#footnote-25) Under the new sentencing schemes, some individuals may still face a life equivalent sentence without a meaningful opportunity for release, as required in Graham.[[26]](#footnote-26)

**Further Reading/Additional Resources:**

*Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty.* Larry Steinberg and Elizabeth Scott, 58 Am. Psychol. 1009 (2003),

Washington Supreme Court’s Juvenile Justice Symposium on May 20, 2014(first hour presentation by Dr. BJ Casey, an adolescent development research scientist)- great resource to recommend to prosecutors or judges: <http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2014050006>.

*JDB v. North Carolina: The US Supreme Court Heralds the Emergence of the ‘Reasonable Juvenile’ in American Criminal Law*, Marsha Levick, 89 CrL 753 (8/24/2011)

The Champion-In Defense of Children: The Juvenile Justice IssueMarch 2014 (available at <http://www.nacdl.org/champion.aspx>), including:

* *Juveniles Convicted of Homicide post-Miller.* Stephen Harper.
* *Youth Matters: Roper, Graham, J.D.B., Miller and the New Juvenile Jurisprudence*, Shobha Mahadev
* *Defending Juvenile Confessions After J.D.B. v North Carolina,* Joshua Tepfer
* *Interviewing a Child Client*, Randee Waldman

[*Graham v. Florida and a Juvenile’s Right to Age Appropriate Sentencing*](http://harvardcrcl.org/archive/), Martin Guggenheim, Harvard Civil Rights Civil Liberties Law Journal, Vol. 47 No. 2 (2012)

*The Eighth Amendment Evolves, Defining Cruel and Unusual Punishment Through the Lens of Childhood and Adolescence*. Marsha Levick, et al.,15 U. Pa. J & Soc. Change 285 (2012).

1. 543 US 551, 125 S.Ct. 1183, 161 L.Ed.2d 1( 2005) [↑](#footnote-ref-1)
2. The Court had previously abolished the death penalty for juveniles under 16 at the time of the crime. *Thompson v. Oklahoma*, 487 US 815, 108 S.Ct. 2687 (1998) [↑](#footnote-ref-2)
3. 560 US 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) [↑](#footnote-ref-3)
4. 564 U.S. 261, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011) [↑](#footnote-ref-4)
5. 567 U.S. 460, 132 S.Ct. 2455 183 L.Ed.2d 407 (2012) [↑](#footnote-ref-5)
6. *St v. O’Dell* 183 Wn.2d 680, 358 P.3d 359 (2015) held that trial courts can consider a defendant’s age/youth and the impact immature development has on criminal culpability when deciding whether to impose an exceptional sentence below the standard range [↑](#footnote-ref-6)
7. 188 Wn.2d 1, 291, 391 P.3d 409 (2017) [↑](#footnote-ref-7)
8. NACDL and the Juvenile Law Center offered this free webcast as a primer for defense attorneys-[Adolescent Development 101](http://www.ustream.tv/recorded/20924981) –March 6, 2012 (last accessed June 24, 2014). See also Larry Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty.*  58 Am. Psychol. 1009 (2003) [↑](#footnote-ref-8)
9. *“*Interviewing a Child Client” Randee Waldman, The Champion-In Defense of Children: The Juvenile Justice IssueMarch 2014 (available at <http://www.nacdl.org/champion.aspx>).. [↑](#footnote-ref-9)
10. See the WDA Practice Advisory [Plea Offer with Short Deadline](http://www.defensenet.org/resources/practice-advisories/procedural-issues/PLEA%20OFFER_Short%20Deadline.doc/view) to get support to push back on a prosecutor or court’s desire to move things along quickly. [↑](#footnote-ref-10)
11. [Questioning Juvenile Competencies](http://www.defensenet.org/education-and-training/2011-cle-recordings-materials/wdas-2011-defender-conference-tools-of-defense-4.29.11), Dr. Jennifer Woolard, WDA Defender Conference, April 2011 (Juvenile Track) [↑](#footnote-ref-11)
12. See WDA training. [Challenging Auto Decline from Juvenile to Superior Cour](http://www.defensenet.org/education-and-training/2010-cle-recordings-materials/challenging-auto-declines-from-juvenile-to-adult-superior-court)t, Ali Pearson, WDA Webinar 8-20-10 [↑](#footnote-ref-12)
13. RCW 13.04.030(1)(e)(v)(E)(III) *The prosecutor and respondent may agree to juvenile court jurisdiction and waive application of exclusive adult criminal jurisdiction in (e)(v)(A) through (E) of this subsection and remove the proceeding back to juvenile court with the court's approval.*  
     [↑](#footnote-ref-13)
14. *St v. O’Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015). [↑](#footnote-ref-14)
15. Id., in *O’Dell* the court specifically states that an expert is not required in every case. [↑](#footnote-ref-15)
16. RCW 9.94A.730 provides that youth convicted and sentenced as adults are eligible for early release in long sentences after serving 20 years. [↑](#footnote-ref-16)
17. RCW 9.94A.535(1)(a) (c),(d),(e) and (g) could easily apply with a youthful client. [↑](#footnote-ref-17)
18. *In re Boot*, 130 Wn.2d 553, 925 P.2d 964 (1996) [↑](#footnote-ref-18)
19. *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010), [↑](#footnote-ref-19)
20. *Miller v. Alabama*, 567 U.S. 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012) [↑](#footnote-ref-20)
21. See the WDA Practice Advisories found in the subfolder [Youth in Adult Court](http://www.defensenet.org/resources/practice-advisories/youth-in-adult-courts/JLWOP_Miller%20and%205064%20for%20attorneys.docx/view). [↑](#footnote-ref-21)
22. See *St. v. Ronquillo*, \_\_\_ Wn.App \_\_\_, 2015 WL 6447740, (Div I Oct. 2015) *St. v Joel Ramos* (189 Wn.App 431, Div III, Aug 2015). The WDA Brief Bank includes a copy of the Ramos [Appellant’s Opening Brief](http://www.defensenet.org/resources/brief-bank-1/juveniles_adult-court/Ramos%20AOB.doc/view). In Iowa on July 18, 2014, the Iowa State Supreme Court struck down any mandatory sentencing for youth pursuant to Miller v. Alabama, [State v. Lyle,\_\_ Iowa \_ (No. 11-1339, 7/18/14).](http://www.iowacourts.gov/About_the_Courts/Supreme_Court/Supreme_Court_Opinions/Recent_Opinions/20140718/11-1339.pdf) Even though 2014 legislation (2ESSB 5064) gives youth sentenced to more than 20 years a review hearing before the ISRB and possible early release, not everyone is eligible for a hearing. RCW 9.94A.730. [↑](#footnote-ref-22)
23. RCW 9.94A.730 [↑](#footnote-ref-23)
24. RCW 10.95.030(3), 10.95.035 [↑](#footnote-ref-24)
25. *See* St v Ronquillo, \_\_\_ Wn.App \_\_\_, (Div I, Oct 2015)(2015 WL 6447440)St .v. Null, 836 NW.2d 41 (Iowa, 2013)(52.5 year minimum sentence of a 75 year aggregate sentence for murder and robbery violates Miller for defendant who was 16 at the time of the offense) [↑](#footnote-ref-25)
26. RCW 9.94A.730 provides for early release of individuals convicted of crimes before their 18th birthday after serving 20 years, but individuals are not eligible if they have a conviction subsequent to their 18th birthday. [↑](#footnote-ref-26)