

# Sentencing

## Taking youthfulness into account.

BY LAURA SHAVER



Courts are beginning to recognize what common sense and parenting experience have told us for years: young people undervalue the conse-

quences of their actions and they are more impulsive and more likely to be rehabilitated when they engage in criminal conduct. This common sense knowledge and emerging scientific studies — which conclude that the human brain does not settle into its mature, adult form until after the adolescent years — have challenged the criminal justice system’s treatment of young people. While this issue has been argued and ruled on by courts throughout the country for over a decade, the current state of the law in Washington remains a moving target.

This article will discuss key cases shaping laws surrounding sentencing youth in adult court and the steps attorneys should take when representing a young adult or juvenile.

### Evolution of Sentencing Juveniles in the Adult System

In 2005, in *Roper v. Simmons*, the United States Supreme Court recognized the principle that youth are significantly different from adults and must be treated differently within the criminal justice system.<sup>1</sup> In *Roper*, the Court held the Eighth and Fourteenth amendments forbid the imposition of the death penalty on individu-

als who are under 18 years old when their crimes were committed.<sup>2</sup> Five years later, in *Graham v. Florida*, the Supreme Court deemed mandatory life sentences for youth who committed non-homicide offenses unconstitutional.<sup>3</sup> Justice Kennedy explained the prohibition would give “all juvenile non-homicide offenders a chance to demonstrate maturity and reform” and noted that juveniles “should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential.”<sup>4</sup>

The Supreme Court took another step in recognizing the fundamental unfairness of sentencing children to die in prison in 2012 when, in *Miller v. Alabama*,<sup>5</sup> it held that mandatory life sentences for juveniles convicted

When *Miller* was decided it effectively struck down laws in 28 states — and it took years for most states to pass statutory reform. In fact, many states refused to apply *Miller* retroactively because the opinion was silent on the issue.<sup>7</sup> In 2014, the Washington Legislature sought to provide a remedy for those affected by *Miller*,<sup>8</sup> two years before the Supreme Court ruled in 2016 that *Miller* did apply retroactively. Washington’s “*Miller* fix” statutes (1) allow new sentencing hearings for juveniles sentenced to life without parole for aggravated murder and (2) set minimum terms to be served before parole suitability hearings can occur for crimes other than aggravated murder.<sup>9</sup>

In 2015, the Washington State Supreme Court decided *State v. O’Dell*,

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“[C]hildren are different.” *Miller v. Alabama*, 567 U.S. 460, 481, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012); *State v. Houston-Sconiers*, 188 Wn.2d 1, 8, 391 P.3d 409 (2017).

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of homicide offenses are unconstitutional. *Roper*, *Graham*, and *Miller* demonstrate an evolving recognition that juveniles are not little adults and they should not be treated as such. The Supreme Court based its decisions, in part, on the fact that a teenager’s immature brain leads to an underdeveloped sense of responsibility, recklessness, impulsivity, and heedless risk-taking.<sup>6</sup>

which held that youthfulness, while not a per se mitigating factor, can support an exceptional sentence below the standard range.<sup>10</sup> Justice Sheryl Gordon McCloud, writing for the majority, pointed to studies showing human brain development occurring well into people’s twenties and acknowledged the scientific and technical nature of the studies, but concluded that the defense does not need to

put on expert testimony about youth or immaturity and could instead, rely on lay opinion testimony.<sup>11</sup>

Since *Miller*, our supreme court, in addition to *O'Dell*, has held that de facto life sentences — such as the 85-year sentence handed down in *State v.*

*Ramos* — are permissible so long as an individualized *Miller* hearing takes place and the court considers youth and its attributes before determining the sentence.<sup>12</sup> In 2017, the court, in *State v. Houston-Sconiers*, reversed a Division Two holding that sentencing

courts must have absolute discretion to impose any sentence below the applicable range and enhancements.<sup>13</sup> Prior to *Houston-Sconiers*, it was well-settled that judges did not have discretion when it came to weapon enhancements.

Two important cases are pending before the Washington Supreme Court that will greatly impact juvenile justice moving forward. Oral arguments were held on September 12, 2017, in *State v. Scott*. The key issue in *Scott* is whether the “*Miller*-fix” statute remedies *Scott*’s unconstitutional sentence because it gives him

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the possibility of release (also known as parole).<sup>14</sup> The defense argued the “Miller-fix” statute applying to youth convicted of crimes other than aggravated first degree murder does not provide a constitutional remedy because these youth do not get the benefit of re-sentencing hearings during which there is an individualized consideration of youth.

On October 3, 2017, arguments were heard in *In re PRP Light-Roth* after the state petitioned for accelerated review following Division One’s holding that *O’Dell* applies retroactively and was material to Light-Roth’s sentence.<sup>15</sup> In its decision, Division One announced that prior to *O’Dell* defendants could not meaningfully argue youthfulness as a mitigating factor for sentencing purposes. Since Light-Roth was 19 years old at the time of his offense, they said, he could have asked for an exceptional

limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings.

- Third, a child’s character is not as well formed as an adult’s; traits are less fixed and actions less likely to be evidence of irretrievable depravity.<sup>17</sup>

The Court cited, as part of its authority, “Less Guilty by Reasons of Adolescence,” a 2003 article published in the *American Psychologist* by Laurence Steinberg and Elizabeth Scott. This article discusses the mounting evidence of the neuropsychological and neurobiological differences between adults and adolescents with the following consequences:

1. As they begin the process of individuating from parental control, adolescents are more susceptible to peer influence.

have more rapid mood swings than adults — causing them to act more impulsively.<sup>18</sup>

Each of the factors identified in *Miller* constitute reasons to justify leniency for young offenders. Ultimately it is the defense attorney’s job to ensure the court has all the information it needs so the court will be able to consider youthfulness and so give a sentence that reflects developmental reality, and not just the offense.

### “Developmental Maturity” as a Reason to Depart

RCW 9.94A.535(1) lists numerous reasons the court can depart downward when sentencing in a felony matter. The list is illustrative only. An assessment of your client’s developmental maturity can be argued as a solid basis on its own to justify a departure.<sup>19</sup> Be creative and argue the facts of the case and evidence that fits into the research findings related to adolescent brain development.<sup>20</sup> Possible arguments include:

- **Youth did not contemplate that his or her conduct would cause harm to another.** Youth are impulsive. Perhaps your client did not have time or the capacity to stop and think about his or her actions? The teenage brain is like a highway under construction. The frontal lobe (the “CEO” of the brain) 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

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sentenced based on his youth pursuant to *O’Dell* — something courts had characterized as “absurd” in earlier cases.<sup>16</sup>

### Understanding the Science

In *Miller*, the Court identified three specific gaps between teenagers and adults:

- First, children have a lack of maturity and an underdeveloped sense of responsibility.
- Second, children are more vulnerable to negative influences and outside pressures, including from their family and peers; they have

2. As a result of limited cognitive abilities making them less able than adults to think about events that have not occurred and fewer life experiences, adolescents are less future-oriented and more concerned with the short-term consequences.
3. Because of their limited time perspective and the different values and goals they have from adults, adolescents’ use of risk-reward calculus places less weight on the risks of their actions.
4. As a result of their lesser capacity for self-management, adolescents

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, as many youth offenses are? Was the youth being pressured by others to act? Did the 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; they will grow up and out of their developmental deficits.
- **Youth is likely to comply with the terms of probation.** Discuss how the youth has done in custody or while released; show by behavior that the youth has matured while the case has been pending.
- **The sentence is not necessary to deter others.** Because youth do not do so well thinking about consequences before acting, a lengthy sentence is not a deterrent.

Remind the court of the ways our society recognizes that youth should be treated differently outside the criminal justice arena: military, contracts, marriage and more. We treat them differently in these contexts because we don't think they have the maturity necessary for certain actions or decisions. The same reasoning applies when considering culpability for criminal actions.<sup>21</sup>

### It Doesn't End at Age 18

Because age 18 is the cutoff for many activities, the Supreme Court has been comfortable using 18 as the cutoff when considering appropriate sentences for the most serious offenses. But that doesn't mean we

should stop there. The Supreme Court recognized this in *Roper v. Simmons*: "The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach."<sup>22</sup>

### Conclusion

The evolution of cases involving juvenile sentencing are significant to anyone representing young adults or juveniles because each case has altered the way a sentencing court must treat youth in the criminal justice system. 

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### Notes

1. 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005).
2. Id.
3. 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010).
4. Id. at 79.
5. *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012).
6. Id.
7. Id., and Joshua Rovner, *Slow to Act: State Responses to 2012 Supreme Court Mandate on Life Without Parole*, (Washington, D.C.: The Sentencing Project, June 25, 2014), <http://www.sentencingproject.org/publications/slow-to-act-state-responses-to-2012-supreme-court-mandate-on-life-without-parole>.
8. *Montgomery v. Louisiana* \_\_\_ U.S. \_\_\_, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016), RCW 9.94A.730 & RCW 10.95.030.
9. RCW 9.94A.730 & RCW 10.95.030.
10. 183 Wn.2d 680, 358 P.3d 359 (2015).
11. Id. at 697.
12. 187 Wn.2d 420, 387 P.3d 650 (2017).
13. 188 Wn.2d 1, 391 P.3d 409 (2017).
14. RCW 9.94A.730.
15. \_\_\_ Wn.App. \_\_\_, 401 P.3d 459 (No. 75129-8) (Div. I) (August 14, 2017).
16. Id.
17. *Miller*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012).
18. Laurence Steinberg and Elizabeth S. Scott, "Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty," *American Psychologist* 58, no. 12: 1012-13, <https://www.ncbi.nlm.nih.gov/pubmed/14664689>.
19. An expert's evaluation and opinion about your individual client is the most compelling evidence to support this conclusion. RCW 9.94A.540(3) provides that youth charged as adults are not subject.
20. For example, RCW 9.94A.535(1) (a) (c), (d) and (e) could easily apply with a youthful client.
21. Military - will not accept anyone under 18; Contracts - cannot legally enter until age 18; Marriage- RCW 26.04.010 (must be 18, void if under 17, unless condition waived by superior court); Voting - Wash Constitution, Art VI, section 1 (must be 18 to vote); Driving laws restrict driving by age; DOC's Risk Assessment tool - DOC's static tool recently introduced accounts for age of probationer when assessing risk; Alcohol - must be 21 years old; Jury Service - RCW 2.36.070(1) (must be 18 to serve); Firearms - RCW 9.41.040(2) (a) (ii) must be 18 (except in limited circumstances set out in RCW 9.41.042)
22. *Roper*, 125 U.S. at 1197.

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