The Champion

March 2014 , Page 34

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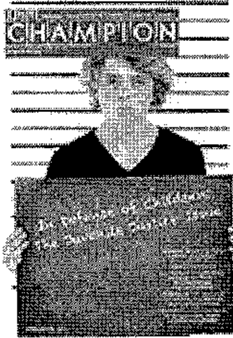

Resentencing Juveniles Convicted of Homicide Post-Miller

By Stephen K. Harper

The social and behavioral sciences — and now the U.S. Supreme Court — have recognized that "kids are different." Traditional scientific research demonstrates that adolescence is a transitional period of life in which cognitive abilities, emotions, judgment, impulse control, and identity are all still developing. Teenagers by their very nature are less mature and less able to assess risk, make good decisions, and control anger.[1]

Moreover, recent advances in scientific research reveal that even the normal adolescent's brain (the frontal lobes in particular) is still developing in those areas that regulate self-control, emotions, judgment, and identity.[2] Teens simply do not handle social pressure, instinctual urges, and stressors the same way adults do. This makes adolescents more prone to immature, reckless, and even dangerous behaviors.

These findings confirm that not only are kids different from adults, but they can change and can mature into someone very different from the delinquent youth who commits a violent or deadly crime.

Supreme Court Jurisprudence

In *Roper v. Simmons*, the Court found that the death penalty was unconstitutional when applied to individuals under the age of 18. The Court determined that three critical differences exist between children and adults. As the majority opinion stated, children have "a lack of maturity and an underdeveloped sense of responsibility. ... These qualities often result in impetuous and ill-considered actions and decisions."[3] Second, juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressures. "This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment."[4] Third, the Court said that "the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed."[5]

Thus, the Court went on to say that "it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. ... [C]ulpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity."[6]

Continuing to follow this compelling rationale, the Court in *Graham v Florida*[7] held that juveniles could not be sentenced to life without the possibility of parole for a nonhomicide offense. "A state is not required to guarantee eventual freedom to a juvenile offender

convicted of a nonhomicide crime. What the state must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[8]

The third case in which the court held that kids are different was *Miller v. Alabama*,[9] which involved juveniles charged with the most serious charge of homicide. Acknowledging that a homicide is indeed more serious than any other crime, the Court held that "*mandatory* life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'"[10] While a judge can still sentence a juvenile who commits first degree murder to life without the possibility of parole, there must first be a full-blown sentencing hearing in which the juvenile can present and the court can consider the many reasons why this child is different and should not be sentenced to life without any chance of release.

The Court in *Miller* also said, "In light of Graham's reasoning, these decisions too show the flaws of imposing mandatory life-without-parole sentences on juvenile homicide offenders. Such mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it. Under these schemes, every juvenile will receive the same sentence as every other — the 17-year-old and the 14-year-old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one."[11]

There are many permutations of the *Graham*/*Miller* decisions, and these cases have resulted in legislation in some states and a tremendous amount of litigation. For example, under *Graham*, what is a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation? Would consideration of parole after a mandatory minimum of 50 years meet the requirements of *Graham*? What does one do with a client who was sentenced to 25 years with the possibility of parole on a murder count but was sentenced to life without parole on a nonhomicide count? What about a case in which the judge had the option of sentencing a juvenile to less than life but held no sentencing hearing? Is *Miller* retroactive? These are just a few of the questions raised by *Graham* and *Miller*.

This is the backdrop to the current landscape. There are many unknowns. Trial lawyers will be on the cutting edge of giving adolescents a second chance as well as preserving the records for future action in the state and federal courts, including the U.S. Supreme Court. The next step is to prepare and push forward the *Miller* cases.

Litigating a *Miller* Case

When litigating a *Miller* case, lawyers should start by educating themselves about the *Roper*, *Graham*, and *Miller* cases. The next step is to educate the judges and the prosecutors. Defense lawyers must use the language — not just the holdings — of those cases. The language in these three cases is sweeping and powerful. There will be resistance and even some resentment in many jurisdictions when lawyers tell the court that life without parole (LWOP) can no longer be mandatory in first degree murder cases and that there must first be a sentencing hearing. The mindset is still on LWOP for serious crimes — the paradigm must be shifted to the fact that the client is or was a kid and kids are different. Reliance on all three of these cases will start and complete the paradigm shift.

In preparation for a *Miller* resentencing, a lawyer must consider and answer a number of questions. The lawyer must obtain the actual sentencing order and transcript. The lawyer should then arrive at a carefully considered legal strategy that deals with the questions below.

- On how many cases was the juvenile sentenced?
- Were the sentences consecutive or concurrent?
- What is the law in the jurisdiction?
- What was the law at the time of the offense?
- How much gain time would he be entitled to if not sentenced to LWOP?
- How long has he been incarcerated?
- How old was he at the time of the crime?
- Who is the judge?
- Who is the prosecutor?
- What does the victim's family think now?
- What are the facts of the crime? What was the defendant's role?
- What is the plan if he is discharged from prison?
- What is the defendant's attitude now? Has he reflected on what he did?
- Can/will the defendant testify? How prepared is he to do so?
- How fair was the plea?
- How good or bad was his attorney?

- Was he originally offered a plea (which he rejected because of his youth)?
- What are all of the mitigating factors that need to be presented to show (1) why he did this, (2) what life was like for him at the time, (3) how kids are very different from adults, and (4) how much has he changed?

Taking Account of an Offender's Age and Circumstances

> "Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features — among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him — and from which he cannot usually extricate himself — no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it 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 on a plea agreement) or his incapacity to assist his own attorneys. ... And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it."
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> *Miller v. Alabama*
> 132 S. Ct. 2455, 2468 (2012)

Ideally, there should be a team involved in the preparation and presentation of a *Miller* resentencing. The team should include a lawyer who knows about mitigation and how to investigate and present it. This is normally a capital lawyer. One would also need a lawyer or person who knows the many ways in which youngsters are different from adults and the many ways in which this manifests itself. The "what" and the "why" of a murder committed by a 14-year-old are very different from a murder committed by a 40-year-old. A mitigation specialist who also has a special understanding of kids is critical. Mitigation specialists can gather information and elicit often delicate information (e.g., child and sexual abuse). They also understand the clinical impact and meaning of information gained. This person can also help understand and integrate the mitigating themes that will be critical to a sentence of less than life.[12]

In preparing for the *Miller* sentencing hearing, it is critical to speak to the client many times. Most clients (particularly clients who are to be resentenced pursuant to the holding in *Miller*) are not inclined to trust lawyers, follow their advice, or understand who they are. Spending time with the client and helping him to understand who the lawyer is (and vice versa) are basic requirements for any ultimate success.

The defense team must obtain releases signed by client. The team must gather all the different kinds of records pertaining to the client including school records, mental health records, hospital records, juvenile records, and any other kind of records. It is also critical to gather all of the records from the jail or prison.

Another essential task is to speak to people in the jail or prison system (classification officers, teachers, corrections officers) who know and have worked with the defendant and have seen him change. It may take considerable work, but counsel should have people sympathetic to the defendant to appear as witnesses at the sentencing hearing.

Retaining and calling an expert on life in prison or jail who can explain the records and circumstances and how they show a lack of future dangerousness is critical. This kind of expert can give a judge the realities of prison/jail life and testify about how the defendant has changed in the prison system. This person can testify as to what the jail or prison records mean and do not mean and can put them in the proper perspective. Counsel must obtain records of everything the juvenile has accomplished in prison (e.g., GED, honors, recognition) and be prepared to enter them into evidence.

It is important to speak to family members, friends, ministers, and employers who knew the client then and who know him now. Counsel must prepare them to testify about the many ways in which the client has matured and how he has changed (even if there is a short time between the crime and the sentencing). These people should be asked to give concrete examples of who he was then (and why) and who he is now.

The lawyer must have the client evaluated by a child and adolescent psychiatrist/psychologist who will be able to explain how adolescents think and react in ways that are very different from adults. If the client is being sentenced, the expert should discuss how this juvenile thinks and reacts and how much room there is for change. If the client is being resentenced, the expert can also testify that the client no longer thinks or behaves like an adolescent. This is the expert to whom the majority of courts will pay the most attention.

One should gather the information listed below and have the mitigation specialist prepare a psycho-social report for the psychiatrist/psychologist.

- Prenatal history
- Developmental history
- Family history
- Medical history
- Past psychiatric history
- Social history
- Educational history
- Drug and alcohol abuse (and the "whys" involved)
- Reports of behavior while incarcerated

The most important (and often absent) component of any sentencing is the re-entry plan. Counsel must make sure the plan is well thought out, well structured, and concrete. Providing the actual details as well as identifying people who will "surround" and help the defendant will be critical to reassure the judge that the defendant will not reoffend in the future.

Finally, if possible, counsel should prepare the defendant to testify. This is critical to any resentencing and may, depending on the appellate situation, be possible at sentencing. If the defendant can testify about who he was then and who he is now, about the full impact of what he did and the remorse he now feels, and apologize to the victim's family, this could have a substantial impact on the outcome of the sentencing hearing. If the defendant is going to testify, a considerable amount of time should be taken to prepare him for the direct and the cross-examination.

At the sentencing hearing, one must try to explain to the court that (1) the kid who committed this crime (___ years ago) is not the same person who stands before the court now or (2) he is still a kid and that kids are very different from adults. Oftentimes juveniles refuse to take pleas offered because of a false sense of loyalty, because they simply cannot register the amount of time that is being offered, or because the whole situation is just too surreal for a child.

For a resentencing, the defense must show that the client is now a mature person and quote the language in *Graham:* "Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation."[13] This is a person who, because he was a kid at the time, did not understand the full consequences of what he did. He now fully understands what he did and all of the consequences, and now he is in full control of his behavior. He is safe to be released. He has been punished for what he did. Obvious and considerable changes in a person can have a significant impact on a judge, prosecutor, and victim's family.

Finally, counsel should prepare a sentencing memorandum that lays out the facts and the many reasons why the defendant should not be sentenced to life without the possibility of parole. A sentencing memorandum will solidify the lawyer's thinking while further challenging the judge to impose less than a life sentence.

Conclusion

Roper, Graham, and *Miller* have fundamentally changed the landscape regarding the way courts treat juveniles. It is now up to individual lawyers to take these cases and change the outcome for individual clients found guilty of murder. The struggle will often require defense lawyers to climb a very steep hill, but these cases have carved out a path of possibility that heretofore was nonexistent.

Notes

1. *See, e.g.,* Larry Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility and the Juvenile Death Penalty,* 58 Am. Psychol. 1009 (2003).
2. *See* Beatrize Luna, *The Relevance of Immaturities in the Juvenile Brain to Culpability and Rehabilitation,* 63 Hastings L.J. 1469 (2012).
3. *Roper v. Simmons,* 543 U.S. 551, 569 (2005).
4. *Id.*
5. *Id.* at 570.

6. *Id.*
7. *Graham v. Florida*, 130 S. Ct. 2011, 2030 (2012).
8. *Id.* at 2030.
9. *Miller v. Alabama*, 132 S. Ct. 2455 (2012).
10. *Id.* at 2460 (emphasis added).
11. *Id.* at 2466-67.
12. Be aware that there are a number of mitigators in the capital context that could actually hurt the defense lawyer's chances of getting a client released. Presenting evidence of mental retardation, mental illness, child abuse causing permanent damage, or permanent neurological impairment could be detrimental to a call for release.
13. *Graham*, 130 S. Ct. at 2032.

About the Author

Stephen K. Harper is a Visiting Clinical Professor at Florida International University College of Law. He teaches a course on the death penalty and is the supervising attorney in the death penalty clinic. In his prior position as Co-Coordinator of the Capital Litigation Unit at the Miami-Dade Public Defender Office, he gathered and presented mitigation evidence in capital cases.

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