2014 Criminal Law Seminar
Friday, May 2

Representing the Juvenile in Adult Court
1:15 p.m. - 2:45 p.m.

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APPEALING TO EMPATHY: COUNSEL’S OBLIGATION TO PRESENT MITIGATING EVIDENCE FOR JUVENILES IN ADULT COURT

Beth Caldwell

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APPEALING TO EMPATHY: COUNSEL’S OBLIGATION TO PRESENT MITIGATING EVIDENCE FOR JUVENILES IN ADULT COURT

Beth Caldwell*

The case for retribution is not as strong with a minor as with an adult. Retribution is not proportional if the law’s most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.

-Roper v. Simmons, 543 U.S. 551, 571 (2005)

I. INTRODUCTION

Media representations of youth as “superpredators” and “monsters” fuel public fear of juvenile offenders.¹ These depictions infiltrate public consciousness and promote widespread misconceptions about the prevalence of youth crime and the nature of juvenile delinquents.² In public discourse, youth who break the law are characterized as hardened criminals who will continue to prey upon innocent victims unless they are incarcerated. However, a closer examination of the life stories of young people who commit serious crimes reveals histories characterized by trauma, victimization, and abuse – almost without exception.³ A central part of a lawyer’s job is to uncover these stories and to tell them in a compelling way. The effective presentation of mitigating information can pierce the initial tendency of a judge or prosecutor to view a defendant as unequivocally deserving of retribution. Shifting the perceptions of those with the power to make key decisions can dramatically impact the outcome of a case. It may result in the chance to remain in juvenile court rather than be transferred to adult court, better plea bargain offers, or sentences focused more on rehabilitation than on long prison sentences.⁴

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¹ J.D., UCLA; Master’s in Social Welfare, UCLA. Faculty Fellow, Thomas Jefferson School of Law. The case studies referenced in this Article are derived from my experiences as a public defender in Los Angeles County and as the Director of Youth Development at Venice Community Housing Corporation.

² For a more thorough discussion of the impact of media representations of youth on juvenile justice policy, see Beth Caldwell & Ellen C. Caldwell, “Superpredators” and “Animals”—Images and California’s “Get Tough on Crime” Initiatives, 11 J. INST. JUST. & INT’L STUD. 61 (2011).

³ For example, a 1996 poll in California indicated that sixty percent of respondents believed that young people were responsible for most violent crime, whereas youth were actually only responsible for thirteen percent of violent crime at the time of the survey. Lori Dorfman & Vincent Schiraldi, BUILDING BLOCKS FOR YOUTH, OFF BALANCE: YOUTH, RACE & CRIME IN THE NEWS 4 (2001), available at www.cclp.org/documents/BBY/offbalance.pdf.

⁴ See generally REHABILITATING LAWYERS: PRINCIPLES OF THERAPEUTIC JURISPRUDENCE FOR CRIMINAL LAW PRACTICE (David B. Wexler ed., 2008) (discussing the importance of gathering information about mitigation and rehabilitative options in criminal defense practice).
The Supreme Court’s recent decisions in *Roper v. Simmons*\(^5\) and *Graham v. Florida*\(^6\) demonstrate that mitigating information about a young person accused of a crime is important to courts. In both *Roper* and *Graham*, the Supreme Court considered the tragic life histories of young defendants in conjunction with adolescent development research. In *Roper*, the Court held that sentencing juvenile offenders to death violates the Eighth Amendment’s prohibition against cruel and unusual punishment.\(^7\) Similarly, the *Graham* decision found the punishment of life without the possibility of parole unconstitutional for juveniles convicted of non-homicide offenses.\(^8\) Mitigating information helped to frame the Court’s understanding of the complicated developmental issues impacting juvenile offenders in both of these landmark cases.

The *Graham* decision has been cited as groundbreaking in many regards\(^9\) and has spawned academic debate regarding its implications.\(^10\) The holding of *Graham* specifically prohibits sentencing juveniles not convicted of homicide offenses to life without the possibility of parole.\(^11\) Courts are wrestling with how to apply *Graham’s* holding to cases that are similar to – yet slightly different from – the scenario the Court specifically addressed. Most of these cases relate rather specifically to extending *Graham’s* narrow holding to apply to other (similar) categories of juvenile offenders. For example, the United States Supreme Court heard oral argument in March 2012 regarding whether sentencing juvenile homicide offenders to life without the possibility of parole violates the Eighth Amendment.\(^12\) In addition, the California Supreme Court is considering whether *Graham* prohibits sentencing juvenile offenders to lengthy prison sentences that exceed their life expectancies because such sentences amount to *de facto* life without parole.\(^13\) Although much of the litigation regarding *Graham’s* applicability

5. 543 U.S. 551 (2005) (holding that juveniles cannot be sentenced to death).
9. See Tamar R. Birckhead, *Juvenile Justice Reform 2.0*, 20 BROOK. J. L. & POL’Y 15, 20 (2012) (“Each of these decisions [Roper, 543 U.S. 551; Graham, 130 S. Ct. 2011; and J.D.B v. North Carolina, 131 S. Ct. 2394 (2011)] has been hailed as ‘landmark,’ and together they have raised expectations among scholars, advocates, and practitioners that a new era of reform may be emerging for youth offenders.”); Marsha Levick, *Kids Really Are Different: Looking Past Graham v. Florida*, 87 Crim. L. Rep. 664 (BNA) (July 14, 2010) (arguing that *Roper* and *Graham* “provide the framework for a developmentally driven juvenile Eighth Amendment jurisprudence that has potentially broad implications for the laws, policies, and practices that govern the treatment of offenders under the age of 18, particularly sentencing practices.”); Neelum Arya, *Using Graham v. Florida to Challenge Juvenile Transfer Laws*, 71 LA. L. REV. 99, 100 (2010) (“The new categorical rule established by *Graham* has the potential to profoundly impact the field of juvenile justice and youth policies as a whole.”)
focuses on whether the holding applies to relatively similar sentences or offenders, the Supreme Court seems to have indicated a willingness to apply Graham’s reasoning more broadly. In 2011, the Court held in J.D.B. v. North Carolina that given the widely recognized differences between juveniles and adults, courts must consider a young person’s age when determining whether an individual was in custody for purposes of determining whether Miranda warnings were required.14

Some scholars have suggested that Graham has broad ramifications for the treatment of juvenile offenders.15 Tamar Birckhead suggests that Roper, Graham, and J.D.B. may provide the basis for legal reforms emphasizing the need to treat juveniles and adults differently in the criminal context and minimizing the use of long-term incarceration of youth.16 She also notes that these cases “could support litigation that results in rigorous client-centered representation for juveniles,” and could require “prosecutors, judges, and probation officers [to] take into account the youth’s brain development [and] mental and emotional state” at disposition or sentencing hearings.17 Neelum Arya argues that several of the Court’s collateral holdings in Graham prohibit prosecuting juveniles in adult criminal courts.18 Indeed, the Court’s reasoning in the Graham decision emphasizes the unique position of juvenile offenders in terms of their development, diminished levels of culpability, and capacity for change.19 One California appellate court decision – People v. Mendez – took the Court’s reasoning to heart, resting its decision on the principles and findings set forth in Graham.20 The Mendez court incorporated the spirit of the Graham decision more broadly than other courts, relying on its reasoning to find that mitigating evidence about a juvenile offender facing a lengthy adult prison sentence must be presented at a sentencing hearing.21 This Article builds on the innovate approach of the Mendez decision, exploring the importance of mitigating information in juvenile defense practice and discussing post-conviction strategies for challenging sentences imposed without adequate consideration of mitigating evidence.

Part Two discusses the tremendous impact mitigating information can have on the outcome of a case. It begins with a review of the mitigating information presented about the defendants in both Roper and Graham and incorporates examples of mitigating evidence included in recent California decisions

14. J.D.B., 131 S. Ct. at 2399.
15. See Arya, supra note 9, at 102 (“This Article suggests that lawyers consider using Graham to ensure that every child under the age of eighteen, regardless of whether the child has been given a [juvenile life without parole] sentence, is entitled to a chance to ‘atone for his crimes and learn from his mistakes’ so that he may ‘demonstrate that the bad acts he committed as a teenager are not representative of his true character.’ Graham is not merely an extension or incremental continuation of Roper, but provides significant fodder for a reexamination of our juvenile justice policies more broadly, including the possibility of removing retribution as a valid goal of the criminal justice system as applied to youth, and firmly establishing a constitutional right to rehabilitation.”) (quoting Graham, 130 S. Ct. at 2033.)
16. Birckhead, supra note 9, at 49-50.
17. Id. at 50.
18. Arya, supra note 9, at 152.
21. Id. at 882-84.
interpreting *Graham*. Part Three sets forth the framework for potential post-conviction challenges based on the argument that failure to present mitigating evidence about a juvenile client in adult court constitutes ineffective assistance of counsel. Part Four explores alternative mechanisms for providing incarcerated juvenile offenders the opportunity to present evidence of rehabilitation in an effort to facilitate the type of “meaningful opportunity for release” that the *Graham* decision guarantees. Part Five discusses specific skills and techniques attorneys should develop in order to gather and present mitigating information about juvenile clients. Drawing from therapeutic jurisprudence scholarship, as well as this author’s background in the field of Social Welfare, this discussion presents multi-disciplinary techniques that enhance the legal representation of youth.

II. THE NECESSITY OF MITIGATING EVIDENCE

A. The Role of Mitigation in *Roper* and *Graham*

Presenting Christopher Simmons and Terrence Graham as children who had experienced victimization likely shaped the way in which the Supreme Court viewed their cases. It is impossible to surmise the extent to which framing their stories in the context of their traumatic childhoods influenced the Court’s decisions in these landmark decisions. We do know, however, that storytelling can play a powerful role in shaping legal outcomes.\(^{22}\) We also know that these narratives were underdeveloped at the trial court level in both *Roper* and *Graham*. In both cases, the trial courts imposed sentences that the Supreme Court then reversed; the different outcomes may very well have been shaped by the mitigating information presented at the Supreme Court level.

The trial court in Terrence Graham’s case seemed oblivious to the dysfunctional aspects of his home life. The sentencing judge told the young man, “as far as I can tell, you have quite a family structure. You had a lot of people who wanted to try and help you get your life turned around. . . .”\(^{23}\) In contrast, Graham’s appellate attorneys emphasized mitigating information about their client, framing his criminal conduct within the context of his traumatic childhood.\(^{24}\) In the opening brief to the Supreme Court, the discussion of the case history commences with a two-paragraph summary of Terrence’s childhood, beginning with the fact that he was addicted to cocaine when he was born.\(^{25}\) The brief explains how his parents’ crack addictions impacted his mental health.\(^{26}\) Terrence was clinically depressed and was diagnosed with ADHD, yet he did not receive the recommended treatment because his mother advised him not to take the prescribed medication.\(^{27}\) His father and siblings spent time in prison and juvenile detention facilities while

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24. *Id.* at 2018.


26. *Id.*

27. *Id.*
he was growing up. 28 Painting a portrait of a traumatized child with little parental support challenges the trial court’s perception of Terrence as a young man who had been given plenty of opportunities to succeed yet, for some inexplicable reason, chose to commit his life to engaging in crime. 29 The effective presentation of compelling mitigation evidence at the Supreme Court level may well have contributed to the outcome of the case. Indeed, the mitigating information about Graham’s life history was important to the Supreme Court, as evidenced by the Court’s reference to his traumatic childhood in the first part of the decision. 30 The second paragraph of the opinion provides the petitioner’s name and birth date. 31 It then immediately provides the following information: “Graham’s parents were addicted to crack cocaine, and their drug use persisted in his early years. Graham was diagnosed with attention deficit hyperactivity disorder in elementary school. He began drinking alcohol and using tobacco at age nine and smoked marijuana at age thirteen.” 32 The opinion’s reference to Terrence Graham’s childhood difficulties, particularly at the beginning of the opinion, signals that this information made an impact on the Court.

In Roper, Christopher Simmons—who was seventeen years old at the time of his offense—was sentenced to death after his attorney failed to present extensive mitigating information at the death penalty sentencing phase. 33 After he was sentenced, a new attorney moved to set aside Simmons’s conviction and sentence on the basis that his trial counsel was ineffective because he failed to present sufficient evidence of mitigation. 34 Mitigating information, including testimony by clinical psychologists and neighbors, painted the picture of a child who was raised in a “difficult home environment,” who struggled in school, and who was out of school for long periods of time. 35 The trial court denied the motion to set aside the conviction and sentence, the Missouri Supreme Court affirmed, 36 and a petition for a writ of habeas corpus on the basis of ineffective assistance of counsel was denied. 37 Ultimately, the Supreme Court addressed a different issue based upon the 2002 Supreme Court decision in Atkins v. Virginia, which held that executing

28. Id. at 12.
29. For example, the trial court stated:
   Mr. Graham, as I look back on your case, yours is really candidly a sad situation. You had, as far as I can tell, you have quite a family structure. You had a lot of people who wanted to try and help you get your life turned around including the court system, and you had a judge who took the step to try and give you direction through his probation order to give you a chance to get back onto track. And at the time you seemed through your letters that that is exactly what you wanted to do. And I don’t know why it is that you threw your life away. I don’t know why. . . . The only thing that I can rationalize is that you decided that this is how you were going to lead your life and that there is nothing that we can do for you.
30. Id. at 2018.
31. Id.
32. Id.
34. Id.
35. Id. at 559.
36. State v. Simmons, 944 S.W.2d 165 (Mo. 1997).
37. Roper, 543 U.S. at 559.
mentally retarded defendants constitutes cruel and unusual punishment in violation of the Eighth Amendment.\(^{38}\) Although the Supreme Court’s decision in \textit{Roper v. Simmons} did not address the lack of mitigating evidence presented at the trial court level, the Court did consider evidence of mitigation about Christopher Simmons’s childhood. Just as in \textit{Graham}, the Court signaled that this information was important by devoting attention to it in the opinion.\(^{39}\) It described expert testimony about his “difficult home environment,” “poor school performance,” long absences from home, and substance abuse.\(^{40}\) The Court also noted that “[p]art of the submission was that Simmons was ‘very immature,’ ‘very impulsive,’ and ‘very susceptible to being manipulated or influenced.’[41] These characteristics, which the Court concluded are normative features of adolescence, ultimately factored heavily into the legal analysis in the decision.\(^{42}\) The Court specifically found “[t]hree general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders.”\(^{43}\) Of particular relevance to this Article’s discussion of mitigation, the \textit{Graham} opinion cites adolescents’ immaturity and susceptibility to peer pressure as two major differences that call for the recognition of the diminished culpability of juvenile offenders.\(^{44}\) It appears that the mitigating information about Christopher’s childhood and characteristics made an impact on the way the Court framed and understood the issues presented in the case.

\subsection*{B. Mitigation in the Lives of Juveniles in Adult Court}

Social science research demonstrates the existence of high levels of abuse, victimization, trauma, and neglect in the lives of most youth offenders. This is the type of information that can be uncovered and presented as mitigation evidence. Exploring childhood trauma helps provide the context in which young people commit crimes and makes their criminal behavior more understandable. One psychiatrist who conducted developmental evaluations of fifty juvenile offenders—some who were processed in juvenile courts and others through adult courts—reported, “[r]egardless of age, offense, or classification as a juvenile or adult, these 50 delinquents had a high incidence of trauma and disabilities, as well as immature thinking and unformed identities typical of adolescents.”\(^{45}\) Similarly, studies with larger sample sizes consistently demonstrate widespread experiences with physical and sexual abuse among female delinquents.\(^{46}\) Many young offenders also have

\begin{itemize}
  \item 38. 536 U.S. 304 (2002); \textit{Roper}, 543 U.S. at 559.
  \item 39. \textit{Roper}, 543 U.S. at 558-59.
  \item 40. \textit{Id.} at 559.
  \item 41. \textit{Id.}
  \item 42. \textit{Id.} at 569-70.
  \item 43. \textit{Id.} at 569.
  \item 44. \textit{Id.} at 569-71.
  \item 45. Beyer, supra note 3, at 206. Notably, forty-eight of the fifty youth had “experienced severe trauma, including repeated abuse and/or death of an important person and/or abandonment since early childhood.” \textit{Id.} at 207. Many had experienced physical or sexual abuse, and forty-two percent of these youth had learning disabilities. \textit{Id.} at 208.
  \item 46. See \textsc{Meda Chesney-Lind & Randall G. Shelden, Girls, Delinquency, and Juvenile Justice} 34-35 (2d ed.1998).
\end{itemize}
mental health needs that have gone untreated. A study including 1,829 youth in the Chicago area’s Cook County juvenile detention facility found that 65% of the boys and 71% of the girls met the criteria for being diagnosed with a psychiatric disorder.47 A Florida study of three hundred young offenders found that 82% had a mental health issue and 51% had potential substance abuse problems.48 Most young offenders have experienced situations in their lives that call out for sentencing mitigation. Motivated by a desire to uncover this information – and equipped with the knowledge and skills to do so effectively – attorneys can dramatically impact the outcome of these young offenders’ criminal cases by presenting information about childhood trauma, abuse, disabilities, and mental health issues in court.

C. The Impact of Mitigating Evidence on Judicial Decision-Making

Presenting mitigating information about a client transforms the way people perceive the criminal act he committed. Highlighting a history of victimization humanizes the individual and contextualizes his criminal behavior. In addition, telling an individual’s life story complicates the tendency to demonize and blame the individual. Rather, it exposes the range of factors that create the conditions under which young people engage in serious crime, widening the web of people and institutions that are responsible for these conditions and, by extension, for the crime committed.

Judges who learn about the tragic details of a young offender’s life are likely to be more open to rehabilitative sentencing options. People tend to support less severe punishments when they are presented with a greater level of detail regarding the circumstances of a crime.49 Research demonstrates that “‘[w]hen people are told about an offender’s history of childhood abuse, for example, their desire for severe punishment diminishes.’”50 A recent study revealed that when people were asked to choose between trying a juvenile offender in juvenile or adult court, study participants were much more likely to select juvenile court if they were informed that the young person had been abused.51

Judges’ decisions are likely impacted in a similar way. Imagine, for example, what a judge’s initial response to hearing about a sixteen-year-old teenager who sexually assaulted a fourteen-year-old neighbor might be. Characterized as a sexual deviant who preyed upon his innocent cousin to satisfy his personal desires, this young man did not initially engender empathy from the court. However, when

48. Id. at 399.
50. Id. at 176 (quoting Julian V. Roberts & Michael J. Hough, Understanding Public Attitudes to Criminal Justice 24 (2005)).
the young man’s attorney uncovered Child Protective Services (CPS) records detailing that he had been the victim of extreme physical and sexual abuse throughout his childhood, the judge’s perspective shifted. Further details about his childhood reinforced the profound victimization this young man experienced himself. Records indicated that he was born with opiates in his system to a mother who abused heroin and alcohol throughout her pregnancy. CPS records revealed that he was removed from his parents four times prior to the age of six. When he was three-years-old, he was left outside in the snow while his mother was on a drug binge. At least three adult relatives sexually abused and/or sodomized the child when he was three to six years old. Presented with detailed information about the trauma this young man experienced at a very early age, the court was more inclined to interpret his actions in the context of this trauma. The legal issues were thus viewed through this lens, and a greater emphasis was placed on crafting a rehabilitative sentence.

The Supreme Court has recognized that this type of mitigating information may well impact the outcome of a sentence in the death penalty context.52 In Rompilla v. Beard, the Court reasoned that mitigating evidence about the defendant’s experiences of childhood abuse, mental impairments, parental neglect, and developmental disability “might well have influenced the jury’s appraisal of [his] culpability . . . and the likelihood of a different result if the evidence had gone in is sufficient to undermine confidence in the outcome actually reached at sentencing.”53 Similarly, in Wiggins v. Smith the Court stated: “Had the jury been able to place petitioner’s excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance” with regards to the sentence imposed.54 The impact of this kind of information is not limited to the death penalty context and would likely impact decisions of judges and prosecutors considering other sentencing options as well.

Over the past year, a string of California cases have considered the applicability of the Supreme Court’s holding in Graham – which specifically prohibited sentencing juveniles to life without the possibility of parole (“LWOP”) for non-homicide crimes – to cases where juveniles are sentenced to de facto LWOP sentences. A split of authority has emerged among appellate courts with regards to whether Graham’s holding restricts sentencing juveniles to prison sentences that exceed the life expectancy of the offender, and the California Supreme Court is currently considering the issue.55 Although there are various possible explanations for the split of authority, the presence of mitigating information about the offender – or lack thereof – may very well have swayed the outcomes of these cases. More importantly, courts’ consistent reference to mitigating information about the lives of these young offenders indicates that such

53. Rompilla, 545 U.S. at 393 (citation omitted).
54. Wiggins, 539 U.S. at 537.
55. See People v. Caballero, 119 Cal. Rptr. 3d 920 (Cal. Ct. App. 2011), review granted and opinion superseded by 250 P.3d 179 (Cal. 2011). Other state court decisions on this issue, including Georgia, Arizona, and Florida, have limited Graham’s application to sentences specifically labeled as “life without parole” and have declined to extend the holding to limit the imposition of term-of-years sentences. See, e.g., Henry v. State, 82 So. 3d 1084 (Fla. Dist. Ct. App. 2012).
information matters.

The California cases holding that non-homicide juvenile offenders may not be sentenced to prison terms exceeding their life expectancies incorporate mitigating information about the offenders into their opinions, demonstrating that courts have found this evidence to be important to their understanding of these cases. In People v. J.I.A., an appellate court considered whether sentencing a juvenile to fifty years to life plus two consecutive life terms for non-homicide convictions constituted cruel and unusual punishment. The court dedicated a substantial portion of its analysis to a discussion of the defendant’s “extremely abusive childhood,” which included sexual abuse at the age of five or six. Referencing Graham’s consideration of the defendant’s background, including parental neglect, his mental health diagnoses, and his history of substance abuse, the court concluded that J.A.’s “family life and upbringing are also highly relevant to the analysis.” In addition, the court emphasized the fact that J.A. was “mentally retarded” or, at the very least, of “substandard intelligence.” Based upon this information, the court concluded that the sentence was cruel and unusual punishment because “he is not eligible for parole until about the time he is expected to die.” The court therefore modified the sentence to run concurrently rather than consecutively, thereby allowing that he would be eligible for parole when he is fifty-six years old, after serving forty-two and a half years in prison.

Similarly, an appellate court reversed the sentence of Antonio de Jesus Nuñez, concluding that a sentence of one-hundred and seventy-five years to life is a de facto sentence of life without parole and therefore violates the Eighth Amendment under Graham. The opinion emphasized mitigating evidence about Antonio’s childhood. Specifically, the opinion recounts “the post-traumatic stress disorder” that was “informed by his trauma history of having been shot, his brother being shot and killed, his life being threatened, and seeing people shot and killed in his neighborhood.” The court went on to explain that Antonio’s brother was shot while attempting to help Antonio. The opinion noted that Antonio had been diagnosed with major depression, was amenable to treatment in juvenile hall, and suffered from “adverse developmental factors including early alcohol and drug use, neglect and abuse, and possible cognitive defects.” Mitigating evidence clearly impacted the court, as evidenced by the substantial attention devoted to these issues in its opinion.

In another California appellate case, the court declined to find an Eighth Amendment violation when a fifteen year old was sentenced to thirty-five years

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57. Id. at 146, 152 (describing additional details about physical, emotional, and sexual abuse he suffered).
58. Id. at 152.
59. Id.
60. Id. at 149.
61. Id. at 154.
63. Id. at 261.
64. Id.
65. Id. at 252.
and eight months to life, noting that “the paucity of the record in this matter fails to support an as applied challenge to defendant’s sentence” because essentially no mitigating information was presented. Specifically, the court noted that “the record contains no information about defendant’s upbringing” and concluded, “[w]ithout sufficient mitigating evidence about defendant, there is nothing to counterbalance the fact that the robberies, and the use of a firearm during each of the robberies, present a clear danger to society justifying a lengthy sentence.”

Rather than reversing the sentence and requiring the trial court to consider mitigating information in determining the appropriate sentence, as in Mendez, the court ruled that the evidence presented did not render his sentence cruel and unusual under the Eighth Amendment. The court suggested instead that he could bring a writ of habeas corpus, which would provide a remedy “should he be able to garner evidence beyond the record provided on appeal.”

People v. Mendez emphasizes the importance of presenting mitigating evidence at a sentencing hearing of a juvenile offender in light of Graham’s reasoning. In that case, the court concluded that a sentence of eighty-four years to life for a juvenile not convicted of homicide constitutes cruel and unusual punishment because it amounts to a “de facto LWOP sentence.” The opinion devoted substantial attention to the lack of mitigating evidence presented by counsel in this case, stating:

We are particularly troubled here by the fact that the record is silent as to Mendez’s personal and family life and upbringing. This is important because the particular characteristics of the offender are relevant to the harshness of the penalty and a defendant’s culpability. The record is silent as to the reasons Mendez joined a gang in the first place, any drug use, mental health issues, educational level, etc. It may well be the case that there were mitigating factors that would diminish his culpability and expose the harshness of his sentence. But we simply have no such knowledge here. And it does not appear that the trial court had any such evidence before imposing consecutive sentences.

The opinion references the Supreme Court’s description of Graham’s childhood, explaining that the Court considered “that his parents were drug addicts, that he had been diagnosed with attention deficit hyperactivity disorder in elementary school, and that he began drinking at age 9 and smoking marijuana at age 13.” Although Mendez does not interpret Graham to require counsel to present mitigating evidence, it implies that the absence of such information significantly impacts the Court’s ability to analyze whether the sentence at issue constitutes cruel and unusual punishment. The decision highlights the importance of mitigation on the

67. Id.
68. Id. at *6.
69. Id. at *3.
70. Id. at *5.
72. Id. at 882.
73. Id. at 884-85 (citations omitted).
74. Id. at 885 (citing Graham v. Florida, 130 S. Ct. 2011, 2018 (2010)).
outcome of cases where juveniles are subject to sentencing in adult courts.

Presenting mitigating evidence humanizes individual defendants by presenting a counter-narrative to the common assumption that young offenders are “super-predators.” Mitigation evidence is often referred to as “empathy evidence” by defense attorneys who seek to humanize their clients in the eyes of judges and juries.\(^75\) This humanization is particularly important given that the vast majority of youth facing sentencing in adult courts are youth of color,\(^76\) a population that is systematically dehumanized and demonized in popular discourse.\(^77\)

III. RAISING AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM BASED ON FAILURE TO PRESENT MITIGATING EVIDENCE

The Sixth Amendment of the United States Constitution requires counsel to provide effective representation.\(^78\) In the context of juvenile defendants, I argue that mitigating evidence must be presented in order to meet this standard. Failure to present such evidence can give rise to a claim of ineffective assistance of counsel on direct appeal or through a writ of habeas corpus. This Part draws upon a strategy employed by Stanford Law School’s Criminal Defense Clinic in order to obtain post-conviction relief for people sentenced under California’s Three Strikes Law.\(^79\) In the same way that the Stanford Clinic brings ineffective assistance of counsel claims to challenge Three Strikes sentences on the basis that counsel failed to present mitigating evidence,\(^80\) post-conviction attorneys could challenge the sentences of juveniles sentenced to lengthy adult prison sentences.

Under *Strickland v. Washington*, an attorney is deemed ineffective when his performance falls below a reasonable standard, as defined by professional norms, and when the attorney’s failures resulted in prejudice.\(^81\) Although presenting mitigating evidence is not universally required of attorneys in non-death penalty sentencing hearings,\(^82\) the case is stronger for juvenile defendants. Professional

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76. In 2010, over fifty-five percent of juveniles sentenced for felonies in adult court were Hispanic and over twenty-nine percent were Black. Kamala D. Harris, Cal. Dep’t of Justice, *Juvenile Justice in California* 2010, at 42 tbl.31 (2011). Only 10.5% of juveniles sentenced for felonies in adult court were White. Id. A national study concluded that “African American youth were overrepresented and White youth were underrepresented in cases waived to adult court” for all types of offenses. Eileen Poe-Yamagata & Michael A. Jones, *And Justice for Some: Differential Treatment of Minority Youth in the Justice System* 12 (2002).
80. Id. at 318.
81. Strickland, 466 U.S. at 687 (“First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.”).
82. Criminal defense attorneys arguably are required to introduce mitigating information at sentencing. See Tamar M. Meekins, *You Can Teach Old Defenders New Tricks: Sentencing Lessons from Specialty Courts*, in REHABILITATING LAWYERS, *supra* note 4, at 144, 145 (explaining that a
norms governing juvenile delinquency practice emphasize counsel’s duty to obtain and present such information in juvenile courts. In death penalty cases, counsel is ineffective when she fails to adequately gather and present mitigating information about the defendant at the sentencing phase of the trial. The Stanford Clinic pursues post-conviction reversals of sentences imposed under California’s Three Strikes Law on the ground that failure to present mitigating evidence at sentencing hearings in Three Strikes cases similarly constitutes ineffective assistance of counsel. Comparing Three Strikes sentencing hearings to death penalty sentencing, the Clinic has succeeded in bringing ineffective assistance of counsel claims due to trial counsel’s failure to adequately discover and present mitigating information at sentencing. Similarly, sentencing hearings for juvenile offenders facing substantial prison sentences in adult court arguably require counsel to uncover and present mitigating information.

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83. Williams v. Taylor, 529 U.S. 362, 393 (2000); Wiggins v. Smith, 539 U.S. 510, 522-23 (2003); Rompilla v. Beard, 545 U.S. 374, 377 (2005) (“even when a capital defendant’s family members and the defendant himself have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial.”).

84. Romano, supra note 79, at 318.

85. Id.

86. Woodson v. North Carolina, 428 U.S. 280, 304 (1976). “While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.” Id. (citing Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion)).


88. Williams, 529 U.S. 362; Wiggins, 539 U.S. 510; Rompilla, 545 U.S. 374.

89. See Woodson, 428 U.S. at 305 (“This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two.
3. Mitigation Requirement for Juveniles Sentenced in Adult Courts

Similarly, attorneys should be obligated to present mitigating evidence at sentencing hearings for juveniles, particularly those who are sentenced in adult courts. Juveniles who commit crimes are generally prosecuted in juvenile delinquency courts, where professional standards emphasize the importance of counsel’s presenting mitigating information at disposition hearings—the juvenile court equivalent of sentencing hearings.\footnote{125} Juveniles who are prosecuted in adult courts are different from adults in significant ways, and those differences render the

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118. Id. at 318 ("[t]o date, Clinic students have won reversals of twelve life sentences imposed under the Three Strikes law for minor crimes.").
120. People v. Romero, 917 P.2d 628, 649 (Cal. 1996); People v. Williams, 948 P.2d 429, 436 (Cal. 1998).
121. Romano, supra note 79, at 340.
122. Romero, 917 P.2d at 649.
123. Romano, supra note 79, at 338.
124. Id.
125. See INST. OF JUDICIAL ADMIN. & ABA, JUVENILE JUSTICE STANDARDS: STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES § 9.2(b)(ii) (1980) ("[w]hether or not social and other reports are readily available, the lawyer has a duty independently to investigate the client’s circumstances, including such factors as previous history, family relations, economic condition and any other information relevant to disposition.").
presentation of mitigating evidence critically important in their sentencing hearings, particularly because these young offenders may be faced with spending the rest of their lives in prison. The Supreme Court’s decision in *Graham* rests heavily upon the Court’s finding that juveniles are fundamentally different from adults, and normative characteristics of adolescents render them less culpable than adults. \(^{126}\) *Graham*’s holding does not address claims of ineffective assistance of counsel, nor does it directly address the issue of presenting mitigating evidence about juvenile offenders. However, the Court’s reasoning emphasizes mitigating information about juvenile offenders as a class, reinforcing the importance of considering evidence of mitigation in juvenile sentencing. The Court explained, “[t]he judicial exercise of independent judgment requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question.” \(^{127}\) Although the decision focuses on normative characteristics that apply to adolescents as a category, the reasoning illustrates that considering a juvenile’s diminished culpability is material to determining the appropriate sentence.

In *Graham*, the Court held that a particular sentence – life without the possibility of parole – is unconstitutional as applied to non-homicide juvenile offenders because of their diminished culpability. \(^{128}\) Similarly, courts should consider information that may diminish the culpability of an individual juvenile defendant such that a less severe sentence would be appropriate. The approach the *Graham* court takes in analyzing the behavior of juvenile offenders emphasizes the fundamental importance of considering the “lessened culpability” of juveniles based upon neurological and psychological characteristics of adolescents. \(^{129}\) According to the Court, “[i]t remains true that ‘from a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.’” \(^{130}\) The Court emphasized the “limited moral culpability” of juvenile offenders. \(^{131}\) This reasoning about fundamental characteristics of juveniles cannot be logically restricted to apply only to the analysis of life without parole sentences; the Court discusses adolescents generally. The *Graham* decision created a categorical rule prohibiting the sentence of life without parole for juveniles convicted of non-homicide offenses such that individual consideration of mitigating information this particular class of offenders would be irrelevant. However, the only way to take into account the “limited moral culpability” of juvenile offenders facing other sentences would be for courts to consider the factors that impact an individual’s development and, therefore, their culpability. For example, it would be impossible to evaluate the culpability of a fourteen-year-old accused of committing sex offenses without considering information about the offender’s sexual victimization as a child. Mitigating information is the key to assessing diminished culpability and, therefore, must be considered in order for sentencing decisions to remain

\(^{127}\) Id.
\(^{128}\) Id. at 2034.
\(^{129}\) Id. at 2026-27.
\(^{130}\) Id. (quoting Roper v. Simmons, 543 U.S. 551, 570 (2005)).
\(^{131}\) Id. at 2030.
consistent with the fundamental reasoning of *Graham*.

State appellate courts have reached different conclusions as to whether mitigating information about juvenile offenders must be considered in sentencing hearings under *Graham*. As previously discussed, in *People v. Mendez*, a California appellate court interpreted *Graham’s* reliance on mitigating information and research on adolescent development to require consideration of mitigating evidence about a juvenile defendant facing a lengthy prison sentence at his sentencing. The court reversed the judgment and directed the trial court to reconsider the sentence; in accord with the opinion, the reconsideration would require the consideration of any mitigating information about Mendez’s background. In contrast, an appellate court in Texas recently held that trial courts do not have the duty “to ensure that all mitigating evidence is fully developed during sentencing” for juvenile offenders. The Texas court took the opposite approach of the California court, focusing on the specific holding of *Graham* rather than its reasoning. The court explained that “discussion of a constitutional rule regarding mitigating evidence is conspicuously absent from the decision, and we do not find merit in the argument that *Graham* implicitly established” an obligation to consider mitigating evidence. While the California court focused on the reasoning in *Graham*, the Texas court emphasized the limited holding of the case. *Graham’s* emphasis on the relevance of the diminished culpability of adolescents is consistent with requiring counsel to present mitigating evidence relating to a juvenile offender’s diminished culpability.

Counsel should be required to present mitigating evidence about juvenile clients because their cases are unique. Although counsel has previously only been required to present mitigating evidence in death penalty cases according to the “death is different” principle, the *Graham* decision stands for the proposition that juveniles are different too. Juveniles sentenced to life in prison face longer sentences than their adult counterparts because their sentences begin at a younger age. Thus, they face harsher penalties due to their youth. In addition, they are more likely to change because they are in a process of maturation. Their characters are not yet established, and most will not continue to commit crimes as adults. Under this reasoning, it is particularly important for courts to consider evidence of rehabilitation or alternative sentences that would promote such rehabilitation. Due to the unique situation of juvenile offenders, the Court in *Graham* applied an analytical framework previously reserved for death penalty cases to a non-death sentence—juvenile life without parole. In taking this approach, the Court blurred the line that distinguished the rules for death penalty cases from other criminal cases, particularly those involving juvenile defendants.

133. *Id.* at 885-86.
135. *Id.* at 381.
137. *Id.* at 2028.
138. *Id.* at 2026-27.
139. *Id.* at 2026.
140. *Id.* at 2032.
According to the same reasoning, ineffective assistance of counsel claims for juvenile offenders should arguably be analyzed under the standards previously reserved for capital cases because mitigating evidence is necessary to make appropriate sentencing decisions in both realms.

The type of mitigating evidence counsel is required to present in the sentencing phase for capital cases is the same type of evidence courts typically consider in sentencing juvenile offenders, further reinforcing the similarities between capital sentencing and sentencing of juvenile offenders. In the capital context, attorneys are responsible for gathering evidence about a defendant’s childhood, mental capacity, health, history of substance abuse, experiences of abuse or neglect, and developmental disabilities.\textsuperscript{141} The juvenile cases previously discussed in this Article have incorporated similar information into their analysis. This is the same type of information that professional standards regarding criminal defense of juveniles require counsel to obtain.\textsuperscript{142} It is incompetent for counsel to fail to present this information to a judge charged with determining a young person’s fate.

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\textsuperscript{141} See Rompilla v. Beard, 545 U.S. 374, 390-93 (2005).
\textsuperscript{142} See ABA STANDARDS FOR CRIMINAL JUSTICE 4-4.1 (3d ed. 1993).
\textsuperscript{144} Id. at 688-89 (“Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable . . .”). See also Rompilla, 545 U.S. at 387.
\textsuperscript{145} See ABA STANDARDS FOR CRIMINAL JUSTICE 4-4.1 (3d ed. 1993).
\textsuperscript{146} INST. JUDICIAL ADMIN. & ABA, JUVENILE JUSTICE STANDARDS: STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES § 9.2(b) (1980). Although these standards may be crafted with juvenile delinquency proceedings in mind, the same standards should apply for the representation of juveniles whose cases are processed through adult court because the same developmental issues apply to all adolescents regardless of the court.
V. PRESENTING MITIGATING EVIDENCE: THE ART OF GATHERING INFORMATION

There is a growing body of work rooted in the theory of therapeutic jurisprudence that discusses the importance of criminal defense attorneys thoroughly developing mitigating information and a “rehabilitation-oriented packet” to use in plea negotiations or a sentencing hearing. Mitigation has long been recognized as a fundamental concept in criminal law and as a critical aspect of effective representation of juvenile offenders. However, many attorneys do not adequately present such evidence. There are various explanations for this failure on the part of some attorneys. First, the vast majority of court-appointed attorneys and public defenders have too many cases to devote substantial time to gathering mitigating evidence. Some defense attorneys would consider this role to be outside of their obligations in non-death penalty cases. Others do not believe that presenting mitigating evidence about childhood trauma or abuse would be helpful to their clients’ cases, or they do not have the time or knowledge to locate this information. However, there is a growing recognition that “in order to fully represent a client throughout all phases of the criminal justice system, they must take on various roles, including counsel, advisor, social worker, educator, and contract negotiator.” With regards to the time constraints making it virtually impossible for many attorneys to uncover this information, a standard rendering counsel ineffective for failing to adequately present this evidence may provide leverage for indigent defense systems to advocate for additional funding so that attorneys have sufficient resources to zealously represent their clients. At the same time, it is important for attorneys to consider developing skills rooted in other disciplines so that they are more equipped to gather mitigating information about young clients.

Criminal defense attorneys typically focus on selecting appropriate experts in preparing mitigation evidence, and this is a critical piece of advocacy. However, attorneys must do some initial groundwork in order to determine the type of experts


173. In a critique of therapeutic jurisprudence, Mae C. Quinn points out that the suggestion that criminal defense attorneys should present mitigating evidence is not new. Failure to engage in this type of advocacy renders an attorney’s performance “substandard” but more likely results from a lack of resources rather than a commitment to a “‘traditional’ lawyering model.” Mae C. Quinn, An RSVP to Professor Wexler’s Warm Therapeutic Jurisprudence Invitation to the Criminal Defense Bar: Unable to Join You, Already (Somewhat Similarly) Engaged, in REHABILITATING LAWYERS, supra note 4, at 91, 117-18.


that should be appointed on a particular case. Further, the attorney is responsible for providing relevant documents and information for the experts to consider. Failure to gather comprehensive information about a client’s background severely limits an attorney’s effectiveness. The most important starting point for gathering mitigating information is generally the accused and his or her family members. Although at first glance it may seem that it would be simple to obtain information from one’s own client, research indicates that this process is more complicated than it seems in that “[t]here is often a conspiracy of silence between the youths and their family.” For example, study of fourteen juveniles who had been sentenced to the death penalty (before the Roper decision outlawed capital punishment for juvenile offenders) revealed that although each of the youth had experienced severe abuse during their childhoods, their attorneys had not presented this information either because they had not uncovered it or because the family urged them not to make the information public. The following section discusses some skills and techniques that may facilitate attorneys’ capacities to obtain mitigating information about their clients.

A. Communicating Effectively with Young Clients

In Graham, the Supreme Court recognized that “[youth] are less likely than adults to work effectively with their lawyers to aid in their defense.” The Court specifically cited juveniles’ limited understanding of the roles of various actors in the justice system and a “reluctance to trust defense counsel” as “factors [that] are likely to impair the quality of a juvenile defendant’s representation.” Attorneys are not typically trained in skills focused on improving communication with adolescent clients, but such skills are critical in terms of developing an understanding of the client’s life. Though not the only source of information, the client has intimate knowledge about his or her life that can help make sense of his or her behavior. Developing open communication with a young client can dramatically improve an attorney’s representation in court.

176. See Fedders, supra note 152, at 796 (discussing the systematic failure of juvenile delinquency attorneys to gather necessary education or medical records, or to hire experts to evaluate their clients, in order to make effective arguments at disposition hearings in juvenile court, in contrast to model rules and standards).


178. Id.


180. Id.

181. See Ann Tobey, Thomas Grisso, & Robert Schwartz, Youths’ Trial Participation as Seen by Youths and Their Attorneys: An Exploration of Competence-Based Issues, in YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 225, 241 (Thomas Grisso & Robert Schwartz eds., 2002) (“Attorneys can be encouraged to think about ways to explain things to young people in simpler terms . . . Mental health professionals, given their knowledge of developmental, clinical, and applied interviewing strategies, are likely to be better prepared to teach lawyers these skills than are other lawyers.”).

182. In Rompilla, the defendant’s lack of open communication with trial counsel limited counsel’s awareness of mitigating information regarding his childhood. Rompilla v. Beard, 545 U.S. 374, 381 (2005) (“Rompilla’s own contributions to any mitigation case were minimal. Counsel found him uninterested in helping, as on their visit to his prison to go over a proposed mitigation strategy, when
The most effective approach to effectively communicating with young clients runs counter to the typical communication style of attorneys. It requires investing substantial amounts of time and using open-ended questions, rather than narrowly tailored questions aimed at eliciting specific responses. As attorneys, we are keenly focused on “relevant” information and tend to become impatient when clients talk about “irrelevant” facts. However, it is often by listening to our client’s seemingly “irrelevant” stories that we become aware of highly significant information. Listening and trust-building techniques are emphasized in the fields of social work and psychology as foundational skills. Attorneys who develop some of these skills will be better prepared to obtain potentially helpful information about their clients’ lives and traumatic experiences.


The first obstacle attorneys must overcome when representing youth is that many juveniles may not trust their attorneys. Young offenders encounter various professionals in the criminal justice system, and they often do not understand the specific roles of each individual. The concept of attorney-client privilege is not widely understood by adolescents. Further, many youth offenders are socialized to distrust authority figures and to keep family affairs confidential. It is therefore important for an attorney to spend time explaining her role, as well as the rules governing confidentiality. Developmental psychologists suggest specific techniques such as using diagrams and examples to make the explanation of an attorney’s role more concrete and, therefore, more likely to be understood by adolescent clients. Emphasizing confidentiality is essential particularly given the importance of peer groups in adolescence. Generally, youth in this developmental stage are very concerned about peer acceptance. Those who are detained facing serious charges are even more concerned about appearing “tough” among their peers because their safety often depends on this reputation. Showing vulnerability to other detained youth is seen as a sign of weakness that should be avoided at all costs. Thus, attorneys should reinforce the confidential nature of their communications with their clients. Privacy during attorney-client interviews is of utmost importance given the heightened confidentiality concerns among this population. Furthermore, attorneys should explain the reasons behind asking about personal experiences so that their young clients understand how this information will be used in the case. By explaining the rationale behind presenting mitigating

Rompilla told them he was ‘bored being here listening’ and returned to his cell. To questions about childhood and schooling, his answers indicated they had been normal, save for quitting school in the ninth grade. There were times when Rompilla was even actively obstructive by sending counsel off on false leads.”). The Supreme Court held that the attorneys should have continued to investigate by obtaining school records and records from Rompilla’s prior incarcerations. . The decision reinforces that obtaining information from one’s client is not the only way to uncover mitigating information. At the same time, developing skills that make it more likely that one’s client will share such information is a valuable endeavor. Rompilla’s trial counsel would have been in a better position to continue investigating his childhood if the defendant had been more open in his communications.

183. See Graham, 130 S. Ct. at 2032 (“Juveniles mistrust adults and have limited understandings of the criminal justice system and the roles of the institutional actors within it. They are less likely than adults to work effectively with their lawyers to aid in their defense.”).
information and emphasizing that only the information that would be helpful to the client’s case will be used by the attorney, clients may be more willing to share their stories.

More importantly, however, the attorney must invest time in getting to know the client. Once a trusting relationship is established, the information will flow. Although an initial meeting may occur in the holding tanks or attorney interview rooms in court buildings, frequent visits to meet with the client can go a long way towards building trust. Rather than immediately asking a battery of personal questions about a young person’s life history, it is more effective to spend time talking about issues that interest the young person. This stage in a therapeutic relationship is referred to as “building rapport” and is widely viewed as critical to the effectiveness of future therapy. Typically, counselors devote the first two counseling sessions to building rapport with clients. Skipping this step in the process can cause the client to feel unsafe and to guard information. This is the worst result for an attorney trying to illicit mitigating information. And yet, it is very difficult for attorneys to find the time to devote to this stage in the process due to the overwhelming caseloads of most public defenders and court appointed attorneys. Most public defenders represent many more clients than recommended by national guidelines and have so many cases that it is virtually impossible to devote enough time to fully prepare each case. Hopefully, one of the benefits of finding counsel ineffective for failing to adequately present mitigating information would be that policy-makers would be forced to allocate sufficient funding to indigent defense to bring caseloads down to recommended levels. This would provide attorneys with the additional time that is necessary to adequately prepare a defense.

Mitigating information often encompasses painful, traumatic experiences that a client would rather not discuss with anyone, particularly a stranger. Asking clients to discuss these issues is more akin to therapy than to traditional legal interviews that focus on gathering factual information. By investing time in building rapport, attorneys may be able to learn more about their clients’ personal experiences. Consider, for example, my experiences with a female client who I visited frequently in the juvenile hall where she was detained. During some visits, we discussed how she was doing in school, issues with friends, and books she was reading. Other times, we focused more specifically on issues relating to her legal case. During informal conversations, I gathered pieces of information that ultimately became quite important in her case. I found out that she had been sexually abused in the gang she claimed membership in. She told me that she had been on a drug binge for the months leading up to her crime, and that she wanted to

184. A survey of young offenders in Colorado revealed that, from the perspective of the youth, “more time was needed with their lawyer to build trust, to enable their lawyer to know them as people, to be listened to, [and] to share important information about themselves and the case.” ABA JUVENILE JUSTICE CTR., YOUTH LAW CTR. & JUVENILE LAW CTR., A CALL FOR JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 27 (2002), available at www.njdc.info/pdf/cjffull.pdf.
185. Id. at 8 (“T[he [national] assessment found high caseloads to be the single most important barrier to effective representation” of juveniles).
186. See JUSTICE POLICY INST., supra note 153, at 10.
get treatment for her drug addiction. I also learned that she was homeless at the
time of this incident because her mother had kicked her out of the family home.
After three months of these meetings, she told me, “You know what, Miss? I’m
going to tell you the reason my mom kicked me out. It’s because I told her that my
dad and my grandpa used to have sex with me when I was little.” Our unstructured
conversations provided me with mitigation evidence that could be presented in a
more organized, chronological fashion in a motion to the court. This information
also informed the choice of which experts would be most appropriate to appoint on
the case, which ultimately included a psychologist with an expertise in sexual
abuse.

2. Empathic, Non-Judgmental Listening Techniques

Listening in an open and non-judgmental way allows clients to feel
understood, creating an environment where they are more likely to share personal
information that is ultimately critical for attorneys to learn about. Reflective
listening, or paraphrasing what a client says, is an effective way to show that the
listener hears and understands the experiences of the speaker. This technique
puts the client in the role of the expert, thus minimizing obstacles to
communication that can otherwise result from cultural or generational
differences. Reflective listening requires avoiding providing advice, sharing a
personal opinion, or passing judgment. Rather, the listener focuses on what is
being said and explains what she hears. This technique may seem simple, but it
can be challenging to employ. Attorneys may have to fight the urge to offer legal
advice, or to tell the client that a particular statement is irrelevant to their defense.
However, it is worth investing time in this process. When people feel understood
rather than judged, they tend to open up even more. Thus, using reflective listening
techniques can help an attorney to learn more and, in turn, may dramatically impact
the presentation of a case.

Getting below the superficial information provided in an initial interview is
crucial. The following case study exemplifies the difference that interviewing
techniques can make. A sixteen-year-old young man was sentenced to serve
sixteen years in adult prison for an assault with a firearm. The social worker’s
report to the judge stated that the juvenile reported that he came from a stable,
supportive family. He mentioned that his father left the family for a period of time
because he was “doing his own thing.” The social worker did not delve into this
issue more deeply but instead reported the youth’s version of events verbatim to the
court. Based on a cursory interview with the young man, she concluded that he
was not amenable to treatment in juvenile court because he had plenty of
opportunities at home and had not taken advantage of them. The attorney had
spent very little time talking with his client and was unaware that there was much

187. See MARSHALL B. ROSENBERG, NONVIOLENT COMMUNICATION: A LANGUAGE OF LIFE (2d ed.
2003).

188. Kristin Henning, Defining the Lawyer-Self: Using Therapeutic Jurisprudence to Define the
Lawyer’s Role and Build Alliances that Aid the Child Client, in REHABILITATING LAWYERS, supra note
4, at 327, 340.
more to the story, so the court made the sentencing decision based on this limited information.

In reality, this young man’s mother became pregnant with him as the result of rape; she told him that she wished she had aborted him. She left him in the care of an abusive relative when he was one year old; he did not have adequate food or basic necessities. He became ill and almost died as a baby. Beginning at the age of three, he was sexually abused by a male family member who sodomized him on a regular basis. The child was brought to the United States around the age of five, however, his mother’s husband was resentful towards the child. The husband was an alcoholic and would beat the child with a belt when he was intoxicated. He would also regularly beat the mother until she bled in the presence of the child. At the age of ten, the young man began to run away, feeling desperate to get away from the violence and rejection at home. He was able to feel accepted in the context of a gang, and he became a member at the age of twelve. His life history paints quite a different picture than the summary provided by the social worker, which illustrates the importance of cultivating trust and taking time to gather information from young clients.

A teenage client will likely not immediately understand how personal, painful experiences from the past relate to their current court case. Explaining this, and creating a relationship that is conducive to sharing this type of information, is therefore critical. Uncovering mitigating information often entails discussing traumatic experiences. It is typical for people who have gone through trauma to shut down when talking about their experiences. It may be helpful to back away from a topic that a client seems unwilling or unable to discuss because it may be more effective to come back to the topic at another time. An attorney’s role is not to be the social worker, but the skills attorneys need in order to provide effective legal representation to youth overlap with skills required of social workers. Employing these techniques can improve the quality of legal advocacy that an attorney is able to provide.

B. Partnering with Experts in Other Disciplines

Although attorneys regularly rely upon experts in criminal defense practice, many attorneys do not appoint experts to generate information useful for plea bargaining and sentencing, even in cases where juveniles are tried in adult court.189 Social workers support the work of attorneys in various legal contexts and are particularly powerful allies for attorneys developing mitigating evidence.190 They are trained to conduct “bio-psycho-social” assessments of people in order to develop a holistic understanding of how biological, psychological, and environmental factors have impacted an individual’s life. This framework is useful in gathering mitigating information about clients because of its comprehensive nature. “Mitigation specialists” are generally hired in capital cases. Their role is to help the attorney gather and present the type of evidence discussed in this Article. Similarly, attorneys representing juveniles facing adult sentences may consider

189. Marty Beyer, supra note 3, at 206 (“most juveniles whose cases are filed directly in adult court (without a transfer hearing) do not have expert testimony prior to or at the sentencing hearing”).

190. Meekins, supra note 82, at 151 (referencing the role of social workers in drug courts).
partnering with a mitigation specialist who has expertise in gathering such information.

The Los Angeles County Public Defender’s Office employs psychiatric social workers who partner with attorneys to prepare psycho-social history reports for clients facing transfer from juvenile to adult court. This team of social workers functions as mitigation specialists for these juvenile offenders, using therapeutic skills to interview clients, their family members, and others to obtain detailed information about the client’s life experiences. The social worker ultimately writes a report highlighting the mitigating information in a young client’s life. This partnership is an effective model that could be incorporated into the representation of youth in adult courts throughout the country.

Attorneys must also become familiar with the wide range of issues that may impact their young clients in order to appoint appropriate experts to present additional mitigating information to the court. Biological factors such as exposure to drugs or alcohol while in utero or traumatic injuries may impact an individual’s development. Accordingly, these are important issues for an attorney to explore. Fetal alcohol spectrum disorder is particularly important to look for because of its prevalence and implications for young offenders. One study found that fetal alcohol spectrum disorder impacts 24% of young offenders in custody.\textsuperscript{191} The disorder impacts cognitive functioning, can result in a wide range of developmental and mental health disorders, and can impact decision-making.\textsuperscript{192} Neuropsychologists may be particularly helpful experts to investigate whether a particular client has a fetal alcohol spectrum diagnosis.\textsuperscript{193} Mental health issues are similarly important to explore, and attorneys may want to appoint a psychologist and/or psychiatrist to conduct an evaluation. An attorney who is familiar with her client’s unique experiences and characteristics will be better suited to select experts whose expertise relates most closely to the client’s issues.

C. Obtaining Records

In the capital context, attorneys obtain school records, records from prior incarcerations, and documentations of a history of alcoholism or substance abuse.\textsuperscript{194} These types of records can provide a wealth of information about a client’s life experiences and often contain extensive mitigating evidence. School records, for example, may contain information about learning disabilities, developmental disabilities, and a child’s exposure to abuse or neglect in the home. Such records can be important in developing a diagnosis and can also be used to highlight systemic failures in a child’s life. If a child demonstrated signs of a learning disability that was never diagnosed, or if a disability was diagnosed but the school did not provide appropriate educational services, this information can be

\textsuperscript{191}. David Boulding, \textit{Fetal Alcohol and the Law}, in \textit{REHABILITATING LAWYERS}, supra note 4, at 186, 187 (indicating that experts estimate that it may actually impact 40% of this population).

\textsuperscript{192}. \textit{Id}.

\textsuperscript{193}. Boulding recommends a multi-disciplinary team comprised of a pediatrician, neuropsychologist, speech pathologist, occupational therapist, physical therapist, general practitioner, and a psychologist to diagnose fetal alcohol spectrum disorders. \textit{Id} at 190.

\textsuperscript{194}. Rompilla v. Beard, 545 U.S. 374, 381 (2005).
helpful in distributing blame among various social institutions rather than merely on the shoulders of the child. Medical records can also be quite telling. Birth records generally indicate whether a child is born with drugs in his system, or whether the mother consumed alcohol during pregnancy. Childhood medical records may contain information about physical injuries consistent with abuse or neglect. Referrals to Child Protective Services may also be noted in school or medical records, which can in turn lead to additional evidence. A client may not even be aware of relevant records in the custody of Child Protective Services, so it is generally a good idea to request such records. Mental health records should also be obtained if they exist. Records from any detention centers where a young person has been confined may also contain helpful information and can highlight additional professionals who should be interviewed as potential witnesses. Evidence of good behavior and participation in rehabilitative efforts, for example, can be useful to present at a sentencing hearing. Counsel has been found to be ineffective for failing to adequately investigate records in a death penalty case.\footnote{Id.}

Given the wealth of information contained in these sources, a similar requirement makes sense in the juvenile context.

VI. CONCLUSION

Juveniles prosecuted in adult courts face serious consequences – including spending the rest of their lives in prison – despite their immaturity and often traumatic upbringings. The Supreme Court has recognized the categorical diminished culpability of adolescents. The culpability of some young offenders is particularly diminished because of the details of their lives. It is critical for attorneys to uncover and present mitigating information at sentencing hearings because such information may have an impact on the rest of their young clients’ lives. Unfortunately, the deficient representation of juvenile offenders is widely recognized. Although professional standards point to the importance of attorneys gathering and presenting mitigating evidence regarding juvenile clients, many fail to do so. Recognizing ineffective assistance of counsel claims on the grounds that counsel failed to adequately present such information would encourage attorneys to comport with the professional standards and would give those juveniles who did not receive adequate assistance some recourse on appeal (or through a writ of habeas corpus). This approach would be consistent with adolescent development principles and would be in line with the Supreme Court’s recognition that adolescents are fundamentally different than adults and that their behavior should be assessed in light of their lessened moral culpability.

While presenting evidence of mitigation is important, there are inherent limitations to this approach. Some sentencing schemes do not allow for judicial discretion, and courts are not able to impose shorter prison sentences even when faced with compelling reasons. In other cases, reduced sentences still bring about injustice. A juvenile whose sentence is reduced from eighty years to fifty years will likely not feel that the lower sentence is substantially different. However, uncovering the tragic information about young offenders’ histories and forcing
courts to wrestle with the complexities of these young people’s lives may ultimately cultivate a greater sensitivity to the needs of this population which—over time—has the potential to transform our approach to juvenile justice. Rather than demonizing these young men and women, our society may be able to recognize their humanity and to craft public policies with this in mind. Developing empathy across deeply entrenched boundaries of race and class is an important foundation for working towards justice. As Michelle Alexander notes in The New Jim Crow, “[i]f we had actually learned to show love, care, compassion, and concern across racial lines during the Civil Rights Movement—rather than go colorblind—mass incarceration would not exist today.” Viewed from this perspective, cultivating empathy by presenting mitigating evidence has an important role to play in terms of the larger movement to end our overreliance on incarceration.

New Partners and New Opportunities in The Defense of Children Facing Life Without Parole

“So Graham and Roper and our individualized sentencing cases alike teach that in imposing a State’s harshest penalties, a sentencer misses too much if he treats every child as an adult. … 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.” — Miller v. Alabama

“Your loved one has been arrested. … The mitigating factor here will be how well informed you chose to be about what is possible inside the law. Ask questions. Get creative. Be unafraid.” — Mother of a person convicted as a teenager who was sentenced to life without parole on working with a defense team

In June 2012, the U.S. Supreme Court held in Miller v. Alabama that the practice of sentencing children to mandatory life without parole violates the constitutional prohibition against cruel and unusual punishments. In doing so, it also provided attorneys representing people facing life without parole for crimes that occurred when they were under 18 with new opportunities and obligations to present a universe of mitigating evidence that would counsel in favor of imposing some other lesser sentence. In collecting and presenting this evidence, the person’s family and other loved ones can be crucial partners and will often be the legal team’s primary source of information about the defendant’s life, family history, and social context. While creating these collaborative relationships can be challenging, partnering in new ways with clients’ families and loved ones, as well as integrating mitigation specialists and forensic social workers into the defense team, will give these defendants a much better chance of avoiding the most extreme available sentences.

This opportunity and obligation to present a mitigating narrative is rooted in the Court’s recognition, in both Miller and its predecessor Graham v. Florida, that the sentence of life without parole and the death penalty share certain similarities. In Graham, the Court noted that while “the State does not execute the offender sentenced to life without parole … the sentence alters the offender’s life by a forfeiture that is irrevocable.” The Miller Court similarly viewed the sentence of life without parole for youthful offenders as an “ultimate penalty” that requires safeguards similar to those provided to people facing execution. And although there are obvious distinctions between the two sentences, it should be noted that both sentences end with the death of the incarcerated individual.

In mitigation investigations, a client’s family and
other loved ones often can provide a wealth of relevant evidence that attorneys should find useful in preparing a mitigation narrative. Family members often have the best access to the people who can testify to the defendant’s character, gather the relevant files and documents, share knowledge of the defendant’s formative experiences, and provide multigenerational family histories. And if the person is incarcerated, family members may be the most reliable and available point of contact. It is essential that the relationship between the family and the defense team be as collaborative as possible.

Unfortunately, certain characteristics of the criminal justice system, including the ethical requirement of zealous advocacy on behalf of one’s client and ever-increasing case loads, work against the creation of such a collaborative partnership. In response to this challenge, attorneys defending youth facing life without parole would be wise to borrow a page from the experience of the capital defense community by partnering with mitigation specialists and forensic social workers. These professionals, by inclination and training, have a set of skills that can strengthen the relationship between the legal team and the client’s loved ones, which in turn fosters the collaboration necessary to win these cases.

Necessity of Presenting A Mitigation Narrative

Beyond the parallels between the death penalty and life-without-parole sentences already discussed, both Graham and Miller rely on legal approaches that had previously been reserved for death penalty cases. In coming to its holding, the Court drew on two lines of cases, both of which developed out of the capital punishment context. The first are those cases declaring the most serious punishments unconstitutional to certain discrete categories of criminal defendants. This line includes cases such as Coker v. Georgia (prohibiting the death penalty for people convicted of rape of an adult), Atkins v. Virginia (prohibiting the death penalty for mentally disabled individuals), and Roper v. Simmons (abolishing the juvenile death penalty). Graham (prohibiting life without parole for children convicted of non-homicide crimes) was the first case to export this categorical approach from the capital punishment context and apply it to other sentences.

However, Miller also imported another line of cases from the capital context that requires individualized sentencing or consideration of the whole person in his or her social context before the most severe punishments can be imposed. This line had its origins in Woodson v. North Carolina, which prohibited mandatory death sentences because they prohibited consideration of “the character and record of the individual offender or the circumstances” of the offense, and “exclud[ed] from consideration … the possibility of compassionate or mitigating factors.” In particular, the Miller Court took note of cases that highlighted youth and its characteristics as important factors that needed to be considered. Those cases included Johnson v. Texas and Eddings v. Oklahoma, which characterized youth as a “condition of life when a person may be most susceptible to influence and to psychological damage.”

This second line of cases did not stop with the early decisions requiring courts to allow the introduction of certain categories of mitigating evidence in capital defense. In the early 2000s, the Court began emphasizing the ethical imperative of thorough mitigation investigations in capital cases. Beginning with Williams v. Taylor, and continuing with Wiggins v. Smith and Rompilla v. Beard, the Court began to vacate death penalty sentences because attorneys failed to provide effective assistance of counsel when they did not sufficiently investigate mitigating evidence about the defendant’s life and social background. Given the Miller Court’s reliance on Woodson and its progeny, as well as the Court’s repeated comparisons of the death penalty and juvenile life without parole, it is reasonable to expect that it will insist on similar ethical responsibilities in both contexts.

Working With Family Members in Mitigation Investigations

Engagement with a client’s family members and loved ones is essential in order to adequately represent an individual, particularly a youth, charged with a serious crime, and it is vital that these people not become alienated from the effort to collect and present mitigating evidence. However, several obstacles stand in the way of creating meaningful and effective partnerships with a client’s family members. Many lay people find experiences with the criminal justice system in general to be bewildering, frustrating, and alienating. Often, family members of people accused or convicted of crimes are frustrated by the failure of their loved one’s attorney or the judge to keep them informed, to explain the law or strategy, or to consult with them as much as they would like. Visiting one’s loved one in prison or jail or seeing an individual shackled in court can be a frightening and demoralizing experience. And the tendency of lawyers and judges to speak about their loved one using technical jargon can leave family members feeling as if they have no one to help them navigate this unfamiliar system.

Unique features of the investigation and construction of a mitigating life history also can be particularly alienating and upsetting in ways that make effective collaboration with the legal team difficult. In the context of mitigation hearings, the family histories of people charged with crimes can be dark and damaging, full of neglect, physical and emotional abuse, and substance use. In the words of the Miller decision, they can be “brutal” and “dysfunctional.” And there is truth to this perspective. The connection between childhood abuse and later violent behavior is well-established. Certainly, an investigation of a client’s exposure to violence and abusive environments is essential for the preparation of a mitigating life history and, at least in the capital context, it can be considered ineffective assistance of counsel to fail to conduct such an investigation.

However, this black and white view of criminal defendants’ families does not necessarily reflect how their families’ dynamics are understood or experienced by the people involved. Even the most abusive or otherwise dysfunctional relationships are almost never characterized by a complete absence of love or affection, and family members may feel that overly negative portrayals of their family fail to fairly depict the nuances of their interpersonal relationships. Furthermore, family members of people accused or convicted of homicide report that they are often made to feel guilty for the crime committed by their loved one. This externally imposed guilt may be compounded by a family member’s actual feelings of shame and inadequacy even though such feelings are often unjustified. In fact, the mitigation process itself can be inherently alienating in that it implies a degree of culpability on the part of family members. It also can require talking publicly about aspects of his or her life experience that he or she may not be proud of, rehashing a family member’s own traumatic experiences, and reopening old wounds.
Additionally, legal ethical standards themselves unavoidably constrain lawyers’ practices in ways that can alienate family members from the project of constructing a mitigating narrative. Primarily, the universal requirement that attorneys place the interests of their clients above all others can leave family members feeling excluded from the defense effort. This is also not unique to the context of developing mitigation narratives. Parents, in particular, may have trouble understanding that the attorney’s client is their son or daughter and not themselves. 11 Particularly, if they are paying the legal fees or if the defendant is still a child, family members may feel more entitled to a greater role in setting legal strategy or access to confidential information than is permitted by ethical rules.

There are also aspects of defense practice that are unique to mitigation hearings in ways that lead attorneys to view family members in a manner that can be particularly alienating. The investigation of mitigating factors by lawyers representing people charged with capital offenses can be viewed by family members as reducing them to “object status” — as a thing to be investigated rather than as a dynamic system of individual subjects with their own agency. And the construction of this mitigating narrative will necessarily take precedence over the well-being of the family members. Ultimately, an essential purpose of mitigation defense is to present a story of a family that is beneficial to the client, even if it is not the story that the family would tell itself.

Attorneys in this position who want to successfully represent their clients should consider looking to the standards of representation developed for capital representation, in particular the ongoing regularization of the use of mitigation experts and forensic social workers. These experts’ ethics and world view counterbalance the attorneys’ instincts to view families as objects of investigation and are trained to spend hundreds of hours to “develop the puzzle of the person’s life.” 12 And because of Miller’s roots in case law dealing with the death penalty, these lawyers may, in fact, find themselves ethically required to enlist the services of such experts. In any event, the introduction of the mitigation specialist’s perspective is likely to be helpful in post-Miller representation of children facing life-without-parole sentences.

Using Methods of Forensic Social Work to Win Cases

While not all jurisdictions have embraced the idea that attorneys representing clients in mitigation hearings are ethically required to employ specialists to aid in the development of narratives that compel less severe sentences, it is still advisable that attorneys do so to the extent possible. This is true whether it is in the context of the death penalty or juvenile life without parole. The training of forensic social workers and mitigation specialists brings a focus on the “person in his environment” and permits the examination of the defendant’s entire social context as a system of actors and interests. 13 This world view does not necessarily conflict with and can be complementary to the attorney’s focus on identifying and making sense of mitigating and aggravating factors.

The forensic social worker or mitigation specialist can also bring this perspective to the task of building the necessary collaborative relationships with the client’s family and loved ones. With the understanding that families are complex systems, they are more likely to be attuned to the nuances of family dynamics. And a social worker’s ethical obligation to act in the best interest of each individual has the potential to counterbalance the attorney’s ethical requirement to put the client’s interests above all others, which can lead to improved communication and collaboration between the family and the defense team. 14 Finally, because of their training, forensic social workers expect to spend hundreds of hours interviewing people in each case. In addition to being necessary to the construction of a mitigating narrative, this expectation can empower family members who might otherwise feel slighted by a defense attorney’s required commitment to the client to the exclusion of all others.

While courts have yet to universally recognize that defense teams engaged in mitigation are ethically required to hire forensic social workers, it is certainly a possibility that an ethical norm will arise that recognizes that such experts bring perspectives and training that are necessary for constructing mitigation narratives. Similarly, the question of whether states are obligated to fund mitigation specialists has yet to be conclusively decided. However, given the advantages that a forensic social worker can bring to a defense team, both in terms of obtaining relevant evidence and creating collaborative relationships with family members, every effort should be made to obtain these services.

If, however, resources cannot be obtained to retain a forensic social worker, defense attorneys may mimic the strategies of those professionals by coupling their primary loyalty to the client with a rooted understanding of the emotional and intellectual needs of new collaborators — the families. At a minimum, Miller requires that defense attorneys be afforded new opportunities to argue that a lesser sentence is warranted in a particular case and to present evidence in support of that argument. To take advantage of this opportunity, defense attorneys should do whatever is possible, including employing mitigation specialists and forensic social workers when possible, to create a collaborative environment in which family members and attorneys recognize their shared interest in preventing the court from imposing a sentence of life without parole.

Notes

10. Supra note 4.
15. Williams v. Taylor, 529 U.S. 362, 395 (2000). “(Counsel) failed to conduct an investigation that would have uncovered extensive records graphically describing Williams’ nightmarish childhood.”
17. Id.
21. Supra note 8, at 358.
22. Id. at 359.

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JUVENILE COURT

Judge Witt and JCO Chad Jensen

(capable outline preparation assistance law
clerk Eddie Fishman, Fifth Judicial District)
Juvenile Sentences and Cruel and Unusual Punishment
• Eighth Amendment of the United States Constitution
  • “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.”
  • Requires an individual sentencing hearing before giving a juvenile life without parole for a homicide offense. Miller v. Alabama, 567 U.S. 2455 (2012)
• The United States Supreme Court’s policy for treating juveniles differently than adults was explained by Justice Appel in State v. Null, 836 N.W. 2d 41 (Iowa 2013)
  • Combination of lack of maturity and underdeveloped sense of responsibility often results in impulsive decision making and reckless behavior
  • Youths are more vulnerable to negative influences and peer pressure
  • Juvenile’s character is not as well formed as an adult’s character
  • Only a small portion of all youths that partake in risky or illegal activities will develop entrenched patterns of problem behavior that persists into adulthood
• Supreme Court of Iowa’s application of the Eighth Amendment
  • Prisoner was convicted of kidnapping in the first degree and his sentence was changed from life in prison to life in prison with immediate parole. With this change, the Supreme Court of Iowa found that the sentence did not violate the Eighth Amendment. State v. Hoeck, 2014 WL 584014 (Iowa 2014).
Article I, Section 17 of the Iowa Constitution

“Excessive bail shall not be required; excessive fines shall not be imposed, and cruel and unusual punishment shall not be inflicted.”

“Defendants generally have not suggested any distinction between the analysis applicable to the state clause and the federal clause...As a result, the potential development of an independent path in the area of cruel and unusual punishment has been limited by the nature of the advocacy.” State v. Null, 836 N.W.2d 41, 69-70 (Iowa 2013)(citation omitted).

Miller’s effect on Article 17 as set out by State v. Null, 836 N.W. 2d 41 (Iowa 2013).

When sentencing a juvenile defendant to fifty years in jail, Article 1, Section 17 requires that a district court

- Recognize that children ordinarily cannot be held to the same standard of culpability as adults in criminal sentencing.
  - If a district court believes a case presents an exception to this rule, the district court should make findings discussing why the general rule does not apply
- Recognize that juveniles are more capable of change than adults
- Recognize that a lengthy prison sentence without the possibility of parole is appropriate, if at all, only in rare or uncommon cases.

However,

- Youth is not an excuse
• To what crimes does Miller’s rationale apply?
  • “It can be argued that the diminished culpability of juveniles must always be a factor considered in criminal sentencing.” State v. Null, 836 N.W.2d 41, 67 (Iowa 2013).
  • Miller’s rationale was applied to a nonhomocide offense in State v. Pearson, 836 N.W.2d 88, 96 (Iowa 2013).
  • In State v. Pearson, 836 N.W.2d 88, 96 (Iowa 2013), the court said that they were not deciding “whether Miller’s principles must be applied to all juvenile sentences.” State v. Pearson, 836 N.W.2d 88, 96 (Iowa 2013).
  • In State v. Hoeck, 2014 WL 584014 (Iowa 2014), a prisoner was convicted for kidnapping. He claimed that his sentence, a life in prison with immediate parole eligibility, violated the Eighth Amendment. The Supreme Court of Iowa said “Hoeck did not receive the death penalty; therefore, Roper is inapplicable. Hoeck did not receive life without parole for a homicide offense; therefore, Miller is inapplicable.”
• Factual situations which trigger *Miller*
  • Thirty-five-year imprisonment minimum without the possibility of parole for first degree robbery and first-degree burglary. The crimes were committed when the defendant was a juvenile. *State v. Pearson*, 836 N.W.2d 88 (Iowa 2013).
    • Individual sentencing hearing required
  • Life sentence for murder was commuted to a life sentence with the possibility of parole after 60 years. Defendant was a juvenile offender. *State v. Ragland*, 836 N.W.2d 107 (Iowa 2013).
    • Individual sentencing hearing required
  • Fifty-two-and-a-half-year minimum prison term for a juvenile based on the aggregation of mandatory minimum sentences for second degree murder and first-degree robbery. *State v. Null*, 836 N.W.2d 41 (Iowa 2013).
    • Individual sentencing hearing required

• Factual situation which trigger *Graham*
  • A sentence of life in prison without parole for a nonhomicide offense is changed to make the prisoner immediately eligible for parole. *State v. Hoeck*, 2014 WL 584014 (Iowa 2014).
    • Constitutional under *Graham*

  • Inmate was found to have violated an institutional rule and claimed that the discipline he received was wrongly imposed on him. The inmate filed an application for post conviction relief with the district court and the state filed a motion to dismiss saying that the discipline imposed, was only a fifteen day disciplinary detention, and consequently, there was no substantial deprivation of a liberty interest. In response, the inmate claimed that he had not yet received his *Miller* hearing to which he was entitled and that this finding of a disciplinary violation could affect the hearing; therefore, the post conviction relief did concern a liberty interest. The court rejected the inmate’s argument saying any assertion that the discipline would affect the hearing is based on nothing but speculation and conjecture and too attenuated to give rise to a due-process-protected liberty interest.
Consent Decrees
• Iowa Code Section 232.46(1)
  • At any time after the filing of a petition and prior to entry of an order of adjudication pursuant to section 232.47, the court may suspend the proceedings on motion of the county attorney or the child's counsel, enter a consent decree, and continue the case under terms and conditions established by the court.
  • These terms and conditions may include
    • prohibiting a child from driving a motor vehicle for a specified period of time or under specific circumstances
    • the supervision of the child by a juvenile court officer or other agency or person designated by the court, or
    • the requirement that the child
      • perform a work assignment of value to the state or to the public
      • make restitution consisting of a monetary payment to the victim or
      • work assignment directly of value to the victim
• Custody
  • *State v. Iowa Dist. Court for Warren County*, 828 N.W.2d 607, 617 (Iowa 2013)
    • Section 232.46 does not authorize a juvenile court to change temporary custody, send a child to a residential facility, and require state payment. Some of the reasoning included
      • None of the terms and conditions set forth in section 232.46 involved a change of placement or custody
      • There was no legal mechanism to fund a residential placement entered pursuant to a consent decree,
      • Under this logic, a child could potentially be taken away from his parents without due process
  • Placement
      • The court said that a consent decree could be authorized in a placement hearing for a juvenile that was in the custody of the Department of Human Services, was going to remain in the custody of Human Services and only the placement would change.
        • Because T.H. was already in the department's custody at the time of the dispositional hearing and a payment mechanism through the department was already in place, the rationale supporting the holding of *Iowa Dist. Court* is inapplicable
• Refusal to Grant Decree
  • No abuse of discretion
    • In re R.V., 838 N.W.2d 681, 4 (2013)
      • Juvenile missed a court date
      • Before the court on misdemeanor charges
      • Juvenile completed all pretrial conditions
      • Juvenile improved her grades
  • Abuse of discretion
    • In re T.H., 839 N.W.2d 675 (IA Ct. App. 2013)
      • Failure to exercise any discretion
Waiver and Reverse Waiver
Juvenile Commits Delinquent Act
Jurisdiction Determination: Iowa Code Section 232.8

District Court Jurisdiction

Juvenile Court Jurisdiction

Waiver
1. Iowa Code Section 232.45

Reverse Waiver
1. Iowa Code Section 803.5
Jurisdiction

• I.C.A. § 232.8
  • The Juvenile Court has original jurisdiction in general
    • When child is accused of committing a delinquent act
    • When an adult is accused to have committed a delinquent act before he or she became an adult
      • Subject to matter being transferred to juvenile court
Iowa Code Annotated § 232.8

Jurisdiction

- I.C.A. § 232.8
  - Some violations of law will not be heard in juvenile court
    - Some specific simple misdemeanors or municipal curfew or traffic violations are excluded from juvenile court jurisdiction.
Iowa Code Annotated § 232.8

Jurisdiction

• I.C.A. § 232.8
  • Some violations of law will not be heard in juvenile court (Cont.)
    • When child is 16 or older and is accused of committing some felonies (forcibles, drug distribution involving guns)
      • Unless case is transferred to juvenile court on motion

• Note
  • Juvenile Court has exclusive original jurisdiction when child under the age of 17 is accused of animal torture
Iowa Code Annotated § 232.8

Jurisdiction

• I.C.A. § 232.8
  • If found guilty of a lesser included offense . . . . Still adult
  • Juvenile Court has jurisdiction over child when District Court waives its jurisdiction
    • Juvenile court will have an adjudicatory hearing
    • Juvenile court will have dispositional hearing
Iowa Code Annotated § 232.8

Jurisdiction

• I.C.A. § 232.8
  • If person is accidentally charged in other court when juvenile court has jurisdiction, then case will be immediately transferred
  • Juvenile Court has right to waive its jurisdiction over a child offender
Iowa Code Annotated § 232.45
Waiver Hearing and waiver of jurisdiction

• I.C.A. § 232.45
  • At what time can the Juvenile Court waive it’s jurisdiction?
    • After filing a petition of a delinquent act
    • Before an adjudicatory hearing on the merits
Iowa Code Annotated § 232.45
Waiver Hearing and waiver of jurisdiction

- I.C.A. § 232.45
  - Who can file a waiver of jurisdiction?
    - County attorney
    - Child in question

- If waiver filed
  - Court will hold Waiver hearing
    - Notice of time, place, and purpose of waiver hearing provided to parties
Iowa Code Annotated § 232.45
Waiver Hearing and waiver of jurisdiction

• I.C.A. § 232.45
  • Before the Waiver Hearing
    • Investigation conducted to collect information that will be relevant to the court’s decision to waive jurisdiction.
    • A report will be filed with the court which includes recommendations
    • Report will be accessible to child’s attorney and county attorney
Iowa Code Annotated § 232.45
Waiver Hearing and waiver of jurisdiction

• I.C.A. § 232.45
  • At the Waiver Hearing
    • All relevant and material evidence will be admitted
  • Court will then decide to waive jurisdiction or not
Iowa Code Annotated § 232.45
Waiver Hearing and waiver of jurisdiction

- I.C.A. § 232.45
  - When will the Juvenile Court waive its jurisdiction? (all must be met)
    - Child is over 14 years old
    - Probable Cause that child committed the public offense
    - State established that there is no reasonable prospect of rehabilitating child under juvenile jurisdiction
    - Waiver is found to be in best interest of child and community
Iowa Code Annotated § 232.45
Waiver Hearing and waiver of jurisdiction

• I.C.A. § 232.45
  • Things the court considers
    • Nature of the alleged act
    • Child’s prior history with juvenile authorities
    • Available programs, facilities, personnel available to the juvenile court
    • The age of the child
Iowa Code Annotated § 232.45
Waiver Hearing and waiver of jurisdiction

- I.C.A. § 232.45
  - If the court waives its jurisdiction:
    - Statements made by child can be used against him
      - After custody and before intake
        - If made with advice of child’s counsel
        - If made after waiving right to counsel
        - If court determines child waived right to remaining silent
  - Other times
    - If statement made voluntarily
      - Court considers age, education level, intelligence, nature of questioning
Iowa Code Annotated § 232.45A
Waiver to and conviction by district court – processing

• I.C.A. § 232.45A
  • Once waived on a case, then
    • All proceedings of aggravated misdemeanors or felonies after conviction will begin in district court even if person is under 18 years old
    • “Can’t re-ring the bell”
    • If started in juvenile court by mistake,
      • Case will be transferred to district court once prior waiver is made known

• Does not apply to a child who was waived to district court for the purpose of being prosecuted as a youthful offender.
Iowa Code Annotated § 803.5 Reverse Waiver

- I.C.A. § 803.5(1)
  - Adult can be transferred to juvenile court if
    - Committed a criminal offense prior to having reached the age of eighteen and
    - Taking of that person into custody for the alleged act or the filing of a complaint, information, or indictment alleging the act, occurs within the times periods and under the conditions specified in chapter 802
    - Juvenile court has not already waived its jurisdiction over the person and the alleged offense
Juvenile Commits
Delinquent Act
Jurisdiction Determination: Iowa
Code Section 232.8

District Court Jurisdiction

Juvenile Court Jurisdiction-

Waiver

1. Iowa Code Section 232.45
2. Case in which the court’s refusal to waive was upheld
   1. In re E.L.C., 776 N.W. 661 (Iowa 2009)
3. Cases in which the court’s waiver was upheld
   2. State v. Tesch, 704 N.W.2d 440 (Iowa 2005)

Reverse Waiver

1. Iowa Code Section 803.5
2. Statutory Interpretation
   State v. Ducan, 841 N.W.2d 604 (IA Ct. App. 2013)
3. Court’s discretion upheld
   State v. Neitzel, 801 N.W.2d 612 (Iowa 2011)
   State v. Sims, 829 N.W.2d 191 (Iowa 2013)
Waiver

- Refusal to Waive Upheld
  - Juvenile was charged with failure to give information and aid and with one count of vehicular homicide. Juvenile court determined that the juvenile needed no rehabilitation and her poor decisions were errors of maturity. During the eighteen months the juvenile court would have supervision of juvenile there could be a lot of maturing. Further, if she violated her probation, she could be held in contempt and jailed for up to six months. *In re E.L.C.*, 776 N.W. 661 (Iowa 2009)

- Waiver upheld
  - Juvenile was convicted of murder in the first degree, sexual abuse in the first degree, sexual abuse in the second degree, and child endangerment. He claimed that waiver was improperly denied as the state failed to prove he could not be rehabilitated through the juvenile system. The Court upheld the juvenile court’s decision that the juvenile could not be rehabilitated. Part of the juvenile court’s reasoning that the appeals court cited was that the juvenile did not need rehabilitation for conduct concerns or substance abuse concerns, but rather for much more serious behavior. *State v. Concepcion*, 2014 WL 69730 (2014).
  - Juvenile disputed the waiver to adult court. He said, in part, that the services available to him in juvenile court and adult court were identical, he showed remorse for his actions, and he is not a danger to the public. The court upheld the waiver as it found that it was reasonable to be skeptical about juvenile’s remorse, he should have understood that people would be hurt by his actions, and that it was reasonable to believe that the juvenile would not learn from this incident if he was given minimal consequences. *State v. Tesch*, 704 N.W.2d 440 (Iowa 2005).
Reverse Waiver

• Statutory Interpretation
  • *State v. Duncan*, 841 N.W.2d 604 (Iowa 2013)
    • Defendant was twenty-years-old. He committed forty-one counts of sexual abuse when he was between the ages of twelve and fifteen.
    • The Court said no discretion existed for offenses committed when the defendant was younger than fourteen as those offenses cannot be tried in criminal court, no matter the current age of the alleged offender.
    • For the other crimes the defendant committed when he was over the age of fourteen but still a juvenile, the court said reverse waiver was available for the defendant under Iowa Code Section 803.5. The court said transfer of the crimes defendant committed at this age was appropriate if the criteria set forth in Iowa Code Section 232.45 signaled the inappropriateness of trying the offenses in criminal court.

• No Abuse of Discretion in Refusing a Reverse Waiver
  • *State v. Neitzel*, 801 N.W.2d 612 (Iowa 2011)
    • Defendant was convicted in a district court. In this trial, the district court refused to issue a reverse waiver. The defendant argued that the court considered inappropriate factors in making this decision such as a deputy sheriff’s testimony: a deputy sheriff testified at trial that he was aware of another investigation regarding the juvenile’s family. The investigation involved the juvenile’s sister who was having a baby fathered by the juvenile’s brother. The parents denied knowledge of the identity of the father of the baby during the investigation. The court of appeals noted that the district court did not even mention the testimony on the record and therefore did not give it inappropriate weight. The court of appeals further said that the district court considered the appropriate factors.
  • *State v. Sims*, 829 N.W.2d 191
    • Juvenile was sixteen-years-and-eight months old and convicted of robbery in the second degree in the district court. The court refused to issue a reverse waiver as it determined that he could not be rehabilitated in the juvenile system as his crimes were increasing in severity and frequency and he would age-out of juvenile court jurisdiction before rehabilitative services were likely to be effective. *State v. Sims*, 829 N.W.2d 191 (Iowa 2013).
Juveniles/ Young Adults in District Court

- **State v. Swanson**, 841 N.W.2d 356 (IA App. Ct. 2013)
  - During sentencing, the court did not abuse its discretion by determining that the defendant’s age at the time of the sentencing, twenty-three years, is too old to be considered for leniency.

- **State v. Gilliland**, 604 N.W.2d 666 (Iowa 2000)
  - A 17-year-old defendant challenged the imposition of a ten-year sentence with the possibility of parole only after the defendant completed 85 percent of the sentence for a forcible felony. The district court said that this sentence was mandatory. On appeal, the defendant contended that the court abused its discretion with respect to its failure to consider granting a deferred judgment pursuant to Iowa Code Section 232.8(3). The appeals court disagreed as the only exception which allowed judges to grant a deferred judgment for a forcible felony was applicable only when the juvenile court waived jurisdiction over the defendant. It did not apply in the defendant’s situation as the district court had original jurisdiction over the juvenile.

- **State v. Emery**, 636 N.W.2d 116 (Iowa 2011)
  - A seventeen year old who plead guilty to possession of methamphetamine with intent to deliver and two weapons charges appealed on the grounds that the district court lacked subject matter jurisdiction over the weapons charges. The court ruled that the district court is empowered by the Iowa Constitution to hear all criminal matters and Iowa Code Section 232.8(1)(a), which gives the juvenile court exclusive original jurisdiction over the proceedings involving delinquent acts, did not deprive the district court of this subject matter jurisdiction. Although, the state failed to obtain a waiver or transfer of juvenile court jurisdiction for the weapon charges, as required by Iowa Code sections 232.45, the court held that this only affected the court’s authority to hear the case which could be waived and did not affect the court’s subject matter jurisdiction. The defendant waived this objection when he failed to object to the district court’s adjudication of his case.
• Iowa Rule of Evidence 5.404(b)
  • Makes evidence of other crimes, wrongs, or acts admissible to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
  • In re J.A.L., 694 N.W.2d 748 (Iowa 2005)
    • A juvenile was found to have authored three notes which concerned the placement of an explosive device at a school. Juvenile’s personal journals and notes found by his foster mother in his foster home were used as evidence that he authored these notes as the journal entries included phrases like “the Justice of Bombers” and indicated the juvenile’s interest in suicide, death, and murder. On appeal, the court decided that the notes were not admissible under Iowa Rule of Evidence 5.404(b) as the court found that it was not relevant to show the identity of the author of the bomb threats. The court’s reasoning was that even a reader of the journal would have to use his or her imagination to fill in any planning or operational aspects of a plan to place a bomb threat at the school or a plot to kill his fellow students.
  • State v. Sims, 829 N.W.2d 191 (IA Ct. App. 2013)
    • The defendant argued that the district court erred in allowing evidence of prior assaults and robberies in his jury trial where he was convicted of robbery in the second degree and willful injury causing bodily injury. The defendant said the evidence was not relevant to show his intent under Iowa Rule of Evidence 5.404(b). The court upheld the admissibility of the evidence as the evidence showed his involvement in similar robberies in which random victims were assaulted and money/property was taken. The evidence was relevant to rebut the defendant’s testimony that he was simply in the wrong place at the wrong time.
• Sentencing hearing
    • A juvenile who had been charged with a felony and not allowed to have a gun was found with a gun. The state offered a psychological evaluation of the juvenile which was completed in connection with an unrelated CINA action. The juvenile objected to the admission of the evaluation into evidence at the sentencing hearing because the preparer was not present for cross-examination. The district court decided to receive the exhibits. On review, the court found this evidence impermissible. The court said that although sentencing hearings need not conform to all requirements of a criminal trial, fundamental fairness is required. The court vacated the sentence because of this impermissible evidence.
Criminal Cases

• Criminal Law
  • Assault
    • *In the Interest of A.K.,* 825 N.W.2d 46 (Iowa 2013)
      • A juvenile was convicted of sexual assault when he and a female juvenile went to an abandoned house where the defendant dared the female juvenile to pull down her pants, which she did before getting scared and running away. The sexual assault was overturned as it was found that the delinquent was a significant distance away from the child when he dared her to pull down her pants, and did not touch her, move toward her, or threaten her before she ran away. The incident, therefore, did not meet the basic definition of assault.

• Separate Offenses
  • *State v. Ross,* No. 11-1133 (Iowa 2014)
    • A defendant fired multiple shots into a group of people, killing one. The defendant was convicted of voluntary manslaughter and five counts of intimidation with a dangerous weapon with intent. The defendant appealed stating that his trial counsel was ineffective as he failed to make the specific objection that defendant only committed one act of intimidation with a dangerous weapon with intent because the shots he fired that day constituted only one crime of intimidation with a dangerous weapon with intent. The factors the court considered in determining whether the defendant’s assaultive conduct was one continuous act or a series of separate acts were (1) the time interval occurring between the successive actions of the defendant, (2) the place of the actions, (3) the identity of the victims, (4) the existence of an intervening act, (5) the similarity of defendant’s actions, and (6) defendant’s intent at the time of his actions. The Supreme Court of Iowa found that there were only two instances of intimidation as there was an intervening act between the defendant firing his first and second series of shots: the defendant fired a first series of shots and then crossed the street before firing his gun again.
• **State v. Gines**, No. 11-1272 (Iowa 2014)
  - A defendant plead guilty to three separate charges of intimidation with a dangerous weapon with intent for firing multiple gunshots in the air in the presence of other people. The defendant appealed, claiming his counsel was ineffective for allowing him to plead guilty to three counts of intimidation with a dangerous weapon with intent when there was no factual basis to support three separate and distinct acts. The court considered the same factors that they considered in *Ross*. The Supreme Court of Iowa held that the factual basis was insufficient to show the three shots fired constituted separate and distinct acts supporting three counts of intimidation with a dangerous weapon with intent as the defendant did not concede each shot was a separate or distinct act. Further, when asked about his intent at the time, the defendant stated that in making these shots he had the intent to injure or provoke fear or anger in other people.

• **State v. Copenhaver**, No. 11-1616 (Iowa 2014)
  - A defendant was found guilty of two separate robberies. He appealed claiming his sentence was illegal because the district court did not combine the two convictions for robbery in the second degree into a single count. The Supreme Court of Iowa first found that the prosecution for robbery requires the defendant to have the intent to commit a theft, coupled with any of the following—commits an assault upon another, threatens another with or purposely puts another in fear of immediate serious injury, or threatens to commit immediately and forcible felony. The court then decided that there was substantial evidence for the jury to find that the defendant had the intent to commit two separate and distinct theft. Using the *Ross* factors the court decided that there was substantial evidence. More specifically, they found that the defendant approached each teller individually at their window with an interval of time between each act. The court also refuted the defendant’s argument that there was only one victim, the bank, so there could only be one robbery. The court said that each teller had possession of the property of the bank, and the defendant intended to take possession or control of the bank’s property in the possession of each teller. The court also found substantial evidence to find that the defendant committed assaults against each bank teller. The court acknowledged that assault requires an overt act and found two separate overt acts and specific intents to commit both assaults.
• Criminal Procedure
  • Miranda Warning
      • The Supreme Court held that a child’s age properly informs the Miranda custody analysis, so long as the child’s age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer.
    • State v. Pearson, 804 N.W.2d 260 (Iowa 2011)
      • A seventeen-year-old juvenile confessed to a crime to a social worker at a residential treatment facility while the social worker was performing a status assessment for the juvenile’s pending CINA and juvenile proceedings. The court held that the juvenile’s proximity to the age of majority made his age minimally important to the Miranda analysis. The social worker status as a state employee did not make Miranda apply as she was not a law enforcement officer, parole officer, or probation officer and she was not working for law enforcement by asking the questions. Further, it is not likely the juvenile was in custody as he was at the residential facility when he confessed, a place he had lived for eight years. Last, they found that although the social worker asked him questions about his crime she did not interrogate him as the juvenile freely answered the questions and there was no atmosphere of compulsion. The court held that a social worker’s interview of juvenile at youth home, during which he confessed to crimes, was not custodial interrogation, for Miranda purposes.
• Pleading the Fifth Amendment
  • *State v. Washington*, 823 N.W.2d 650 (Iowa 2013)
    • The state and defendant reached a plea agreement which in part required the defendant to perform 50 hours of community service. The judge initially accepted the guilty plea. The judge then asked the defendant if he could pass a drug test and the defendant refused to answer the sentencing judge’s question. Instead, the defendant raised his Fifth Amendment right against self-incrimination. When the defendant refused to answer, the judge said he “didn’t have to defer judgment” and that the defendant could “take the conviction.” Ultimately, the defendant was given 250 hours of community service, which was five times the amount in the plea agreement. The court articulated no rehabilitative or penological purpose for the 200 additional hours that was connected to defendant’s possible drug use. The Supreme Court of Iowa found that the additional 200 hours was imposed in retaliation for the defendant’s invocation of his constitutional right against self-incrimination.

• Criminal Adjudication
  • Civil commitment
    • *In re Detention of Geitz*, 840 N.W. 273 (Iowa 2013)
      • A juvenile was adjudicated delinquent for sexual abuse when he was fourteen-years-old. When the juvenile turned eighteen, the state petitioned to have him declared a sexually violent predator and committed civilly. The state argued that he should be committed under Iowa Code Section 229A.2(11) as this section said, amongst other things, that an individual that was convicted of a sexually violent offense could be committed; therefore, the defendant should be committed as the defendant’s adjudication was a conviction of a sexually violent offense. The district court found for the state. However, the Supreme Court of Iowa found that the adjudication of juvenile delinquency for a sex offense was not a conviction that subjected juvenile to civil commitment as a sexually violent predator.

• Double jeopardy
  • *In the Interest of Z.S.*, 776 N.W.2d 290 (Iowa 2009)
    • The state filed a delinquency petition against a juvenile, alleging that he had committed two counts of assault with intent to commit sexual abuse. The juvenile court found that the juvenile did not commit either act and dismissed the petition. The state filed a motion asking the juvenile court to make a finding on whether the juvenile had committed the lesser include offense. The trial court refused saying it did not have the authority to do so. The Supreme Court of Iowa said that the dismissal was an acquittal and double jeopardy barred review of the trial court’s failure to rule on a lesser included offense prior to the dismissal.
Legislation In The Works- Some Highlights

• Criminal gang participation
  • House Study Bill 522
    • The Bill Removes the criminal culpability requirement of “willfully” aiding or abetting a criminal act
    • Changes what act an individual must commit, or aid and abet, to be charged under this section from “criminal act” as defined in Code chapter 723A to any public offense (see Code section 701.2) that is punished by a term of incarceration of one year or more

• Bullying prevention, suicide prevention, and professional conduct and ethics for school personnel
  • House Study Bill 525
    • The bill requires individuals applying for or renewing a license, certificate, authorization, or statement of recognition issued by the board of educational examiners to complete training approved by the board relating to bullying prevention, suicide prevention, and the board’s code of professional conduct and ethics
    • The bill modifies the definition of “electronic” by adding any other electronic communication site, device, or means to the definition and by including social networking sites as part of the term “internet-based communication”
    • Requires school antiharassment and antibullying policies to include a procedure for the prompt notification of the parents or guardians of all students directly involved in the reported incident of harassment or bullying.
    • Allows school officials to take action of alleged incidents of harassment or bullying that occur outside of the school, off of school property, or away from school functions or school-sponsored activities if certain conditions are met.
• Sex Offender Registration Requirements
  • House Study Bill 570
    • Bill eliminates the requirement that the court make an initial determination, after adjudication, that the juvenile register as a sex offender and requires all juveniles required to register as a sex offender to register
      • Unless upon motion by the juvenile, the court permanently waives, modifies, or temporarily suspends the sex offender registration requirement
    • If good cause is shown, the court may permanently waive, modify the duration of registration, or temporarily suspend the registration requirements
  
• Procedures for Child Abuse Investigations
  • House File 2020
    • New Notice requirements
      • Before a DHS worker has initial contact telephonically with a person responsible for the care of the child, the DHS worker must give oral notice
      • Before a DHS worker has initial face-to-face contact with a person responsible for the care of the child, the DHS worker must give written notice
        • Even if preceded by telephone contact
    • Some of the information the notice must include
      • That the person responsible for the care of the child is not required
        • To allow the DHS child protection worker into the residence
          • However, if permission is refused, the juvenile court or district court may authorize the child protection worker to enter the home to interview or observe the child upon a showing of probable cause
        • To speak to the DHS child protection worker
        • Sign any document presented by the DHS child protection worker
      • That the person responsible for the care of the child is entitled to
        • To seek representation of an attorney
      • That any statement made by the person responsible for the care of the child may be used against the person
        • Contrast: Any statement made by the person responsible for the care of the child before appropriate notice is given is inadmissible in any administrative or court proceeding.
• Termination of Parental Rights
  • Senate File 344
    • This bill provides an additional ground for termination of parental rights
      • If the court finds the parent to be palpably unfit as determined by a consistent
        pattern of specific conduct or specific conditions directly relating to the parent-child
        relationship which are determined by the court to be of a duration or nature that
        renders the parent unable, for the reasonably foreseeable future, to provide the
        appropriate care and support for the ongoing physical, mental, or emotional needs
        of the child
      • The court may consider any specific conduct or specific conditions directly relating
        to the parent-child relationship
  • Services Provided Through the Department of Human Services
    • House File 2164; Senate File 2084
      • Code section 233A.6 is amended to require the guardian ad litem for a child placed
        at the school to meet in person with the child at least quarterly and to report to the
        court regarding the child as required by the court
      • Code Chapter 233B, relating to the Iowa juvenile home is substantially rewritten
        • 233B.1(2)- Purpose of the home is revised
        • 233B.1(7)- The Department of Human Services is required to cause the home to be
          accredited as a juvenile correctional facility by the American Correctional Association, to meet
          Department of Human Services standards for approval as a juvenile detention home, and to
          meet the applicable standards for residential services for children paid for by managed care
          or prepaid services contract for the Medicaid program
        • 233B.7- Requirements that the child comply with the rules of the home is revised
Juvenile Sentences and Cruel and Unusual Punishment

- Eighth Amendment of the United States Constitution
  - "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."
- The United States Supreme Court’s policy for treating juveniles differently than adults was explained by Justice Appel in State v. Null, 836 N.W.2d 41 (Iowa 2013).
  - Combination of lack of maturity and underdeveloped sense of responsibility often results in impulsive decision making and reckless behavior.
  - Youths are more vulnerable to negative influences and peer pressure.
  - Juvenile’s character is not as well formed as an adult’s character.
  - Only a small portion of all youths that partake in risky or illegal activities will develop entrenched patterns of problem behavior that persists into adulthood.
- Supreme Court of Iowa’s application of the Eighth Amendment
  - Prisoner was convicted of kidnapping in the first degree and his sentence was changed from life in prison to life in prison with immediate parole. With this change, the Supreme Court of Iowa found that the sentence did not violate the Eighth Amendment. State v. Hoeck, 2014 WL 584014 (Iowa 2014).
• Article I, Section 17 of the Iowa Constitution
  • "Excessive bail shall not be required; excessive fines shall not be imposed, and cruel and unusual punishment shall not be inflicted."
  • "Defendants generally have not suggested any distinction between the analysis applicable to the state clause and the federal clause...As a result, the potential development of an independent path in the area of cruel and unusual punishment has been limited by the nature of the advocacy." State v. Null, 836 N.W.2d 41, 69-70 (Iowa 2013)(citation omitted).
  • Miller's effect on Article 17 as set out by State v. Null, 836 N.W.2d 41 (Iowa 2013).
  • When sentencing a juvenile defendant to fifty years in jail, Article 1, Section17 requires that a district court
    • Recognize that children ordinarily cannot be held to the same standard of culpability as adults in criminal sentencing.
    • If a district court believes a case presents an exception to this rule, the district court should make findings discussing why the general rule does not apply
  • Recognize that juveniles are more capable of change than adults
  • Recognize that a lengthy prison sentence without the possibility of parole is appropriate, if at all, only in rare or uncommon cases.
  • However,
    • Youth is not an excuse

• To what crimes does Miller's rationale apply?
  • "It can be argued that the diminished culpability of juveniles must always be a factor considered in criminal sentencing." State v. Null, 836 N.W.2d 41, 87 (Iowa 2013).
  • Miller’s rationale was applied to a nonhomicide offense in State v. Pearson, 836 N.W.2d 88, 96 (Iowa 2013).
  • In State v. Pearson, 836 N.W.2d 88, 96 (Iowa 2013), the court said that they were not deciding "whether Miller’s principles must be applied to all juvenile sentences." State v. Pearson, 836 N.W.2d 88, 96 (Iowa 2013).
  • In State v. Hooeck, 2014 WL 584014 (Iowa 2014), a prisoner was convicted for kidnapping. He claimed that his sentence, a life in prison with immediate parole eligibility, violated the Eighth Amendment. The Supreme Court of Iowa said "Hoeck did not receive the death penalty; therefore, Roper is inapplicable. Hoeck did not receive life without parole for a homicide offense; therefore, Miller is inapplicable."

• Factual situations which trigger Miller
  • Thirty-five-year imprisonment minimum without the possibility of parole for first-degree robbery and first-degree burglary committed when the defendant was a juvenile. State v. Pearson, 836 N.W.2d 88 (Iowa 2013).
  • Individual sentencing hearing required
  • Life sentence for murder was commuted to a life sentence with the possibility of parole after 60 years. Defendant was a juvenile offender. State v. Ragland, 836 N.W.2d 107 (Iowa 2013).
  • Individual sentencing hearing required
  • Fifty-two-and-a-half-year minimum prison term for a juvenile based on the aggregation of mandatory minimum sentences for second degree murder and first-degree robbery. State v. Null, 836 N.W.2d 41 (Iowa 2013).
  • Individual sentencing hearing required
  • Factual situation which trigger Graham
  • A sentence of life in prison without parole for a nonhomicide offense is changed to make the prisoner immediately eligible for parole. State v. Hooeck, 2014 WL 584014 (Iowa 2014).
  • Constitutional under Graham
  • Inmate was found to have violated an institutional rule and claimed that the discipline he received was wrongfully imposed on him. The inmate filed an application for post conviction relief with the district court and the state filed a motion to dismiss saying that the discipline imposed, was only a fifteen day disciplinary detention, and consequently, there was no significant deprivation of a liberty interest. In response, the inmate claimed that the finding of a disciplinary violation could affect his Miller hearing to which he was entitled and that this finding of a disciplinary violation could affect the hearing. Therefore, the post conviction relief did constitute a liberty interest. The court rejected the inmate's argument saying any assertion that the discipline would affect the hearing is based on reclassification, and conjecture and too attenuated to give rise to a due-process-protected liberty interest.
Consent Decrees

- Iowa Code Section 232.46(1)
  - At any time after the filing of a petition and prior to entry of an order of adjudication pursuant to section 232.47, the court may suspend the proceedings on motion of the county attorney or the child's counsel, enter a consent decree, and continue the case under terms and conditions established by the court.
  - These terms and conditions may include
    - prohibiting a child from driving a motor vehicle for a specified period of time or under specific circumstances
    - the supervision of the child by a juvenile court officer or other agency or person designated by the court, or
    - the requirement that the child
      - perform a work assignment of value to the state or to the public
      - make restitution consisting of a monetary payment to the victim or
      - work assignment directly of value to the victim

- Custody
  - State v. Iowa Dist. Court for Warren County, 828 N.W.2d 607, 617 (Iowa 2013)
    - Section 232.46 does not authorize a juvenile court to change temporary custody, send a child to a residential facility, and require state payment.
    - Some of the reasoning included
      - None of the terms and conditions set forth in section 232.46 involved a change of placement or custody
      - None of the terms and conditions set forth in section 232.46 involved a change of placement or custody
    - Under this logic, a child could potentially be taken away from his parents without due process

- Placement
  - In re T.H., 839 N.W.2d 675 (IA Ct. App. 2013)
    - The court said that a consent decree could be authorized in a placement hearing for a juvenile that was in the custody of the Department of Human Services, was going to remain in the custody of Human Services and only the placement would change.
    - Because T.H. was already in the department's custody at the time of the dispositional hearing and a payment mechanism through the department was already in place, the rationale supporting the holding of Iowa Dist. Court is inapplicable.
• Refusal to Grant Decree
  • No abuse of discretion
    • In re R.V., 838 N.W.2d 681, 4 (2013)
      • Juvenile missed a court date
      • Before the court on misdemeanor charges
      • Juvenile completed all pretrial conditions
      • Juvenile improved her grades
  • Abuse of discretion
    • In re T.H., 839 N.W.2d 675 (IA Ct. App. 2013)
      • Failure to exercise any discretion

Waiver and Reverse Waiver

District Court Jurisdiction

Juvenile Commits Delinquent Act
Jurisdiction Determination

Waiver
1. Iowa Code Section 232.45

Reverse Waiver
1. Iowa Code Section 803.5
Iowa Code Annotated § 232.8

**Jurisdiction**

- **I.C.A. § 232.8**
  - The Juvenile Court has original jurisdiction in general
    - When child is accused of committing a delinquent act
    - When an adult is accused to have committed a delinquent act before he or she became an adult
      - Subject to matter being transferred to juvenile court

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Some violations of law will not be heard in juvenile court

- Some specific simple misdemeanors or municipal curfew or traffic violations are excluded from juvenile court jurisdiction.

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When child is 16 or older and is accused of committing some felonies (forcibles, drug distribution involving guns)

- Unless case is transferred to juvenile court on motion

**Note**

- Juvenile Court has exclusive original jurisdiction when child under the age of 17 is accused of animal torture
Iowa Code Annotated § 232.8

Jurisdiction

• I.C.A. § 232.8
  • If found guilty of a lesser included offense . . . . Still adult
  • Juvenile Court has jurisdiction over child when District Court waives its jurisdiction
    • Juvenile court will have an adjudicatory hearing
    • Juvenile court will have dispositional hearing

Iowa Code Annotated § 232.8

Jurisdiction

• I.C.A. § 232.8
  • If person is accidentally charged in other court when juvenile court has jurisdiction, then case will be immediately transferred
  • Juvenile Court has right to waive its jurisdiction over a child offender

Iowa Code Annotated § 232.45

Waiver Hearing and waiver of jurisdiction

• I.C.A. § 232.45
  • At what time can the Juvenile Court waive its jurisdiction?
    • After filing a petition of a delinquent act
    • Before an adjudicatory hearing on the merits
Iowa Code Annotated § 232.45
Waiver Hearing and waiver of jurisdiction

• I.C.A. § 232.45
  • Who can file a waiver of jurisdiction?
    • County attorney
    • Child in question
  • If waiver filed
    • Court will hold Waiver hearing
      • Notice of time, place, and purpose of waiver hearing provided to parties

• I.C.A. § 232.45
Before the Waiver Hearing
  • Investigation conducted to collect information that will be relevant to the
court's decision to waive jurisdiction.
  • A report will be filed with the court which includes recommendations
  • Report will be accessible to child’s attorney and county attorney

• I.C.A. § 232.45
At the Waiver Hearing
  • All relevant and material evidence will be admitted
  • Court will then decide to waive jurisdiction or not
Iowa Code Annotated § 232.45
Waiver Hearing and waiver of jurisdiction

- I.C.A. § 232.45
  - When will the Juvenile Court waive its jurisdiction? (all must be met)
    - Child is over 14 years old
    - Probable Cause that child committed the public offense
    - State established that there is no reasonable prospect of rehabilitating child under juvenile jurisdiction
    - Waiver is found to be in best interest of child and community

- Things the court considers
  - Nature of the alleged act
  - Child’s prior history with juvenile authorities
  - Available programs, facilities, personnel available to the juvenile court
  - The age of the child

- If the court waives its jurisdiction:
  - Statements made by child can be used against him
    - After custody and before intake
    - If made with advice of child’s counsel
    - If made after waiving right to counsel
    - If court determines child waived right to remaining silent
    - Other times
      - If statement made voluntarily
      - Court considers age, education level, intelligence, nature of questioning
### Iowa Code Annotated § 232.45A
Waiver to and conviction by district court – processing

- I.C.A. § 232.45A
  - Once waived on a case, then
    - All proceedings of aggravated misdemeanors or felonies after conviction will begin in district court even if person is under 18 years old
    - “Can’t re-ring the bell”
    - If started in juvenile court by mistake, case will be transferred to district court once prior waiver is made known
  - Does not apply to a child who was waived to district court for the purpose of being prosecuted as a youthful offender.

### Iowa Code Annotated § 803.5
Reverse Waiver

- I.C.A. § 803.5(1)
  - Adult can be transferred to juvenile court if
    - Committed a criminal offense prior to having reached the age of eighteen and
    - Taking of that person into custody for the alleged act or the filing of a complaint, information, or indictment alleging the act, occurs within the times periods and under the conditions specified in chapter 802
  - Juvenile court has not already waived its jurisdiction over the person and the alleged offense

### Appendix

**Juvenile Commits Delinquent Act**

**Jurisdiction Determination:** Iowa Code Section 232.8

**District Court Jurisdiction**

**Juvenile Court Jurisdiction**

**Waiver**

1. Iowa Code Section 232.45
2. In re H.L.C., 783 N.W.2d 351 (Iowa 2010)
4. State v. Tesch, 704 N.W.2d 420 (Iowa 2005)
5. In re E.L.C., 776 N.W. 661 (Iowa 2009)

**Reverse Waiver**

1. Iowa Code Section 803.5
4. State v. Sims, 829 N.W.2d 191 (Iowa 2013)
Waiver

- Refusal to Waive Upheld
  - Juvenile was charged with failure to give information and aid and with one count of vehicular homicide. Juvenile court determined that the juvenile needed no rehabilitation and her poor decisions were errors of maturity. During the eighteen months the juvenile court would have supervision of juvenile there could be a loss of in loco parental control, it’s too much to ask the court to remove the juvenile from the home. So, the court was right in saying it was justified for contempt and jailed for up to six months. In re E.L.C., 776 N.W. 661 (Iowa 2009)

- Waiver upheld
  - Juvenile was convicted of murder in the first degree, sexual abuse in the first degree, sexual abuse in the second degree, and child enticement. The court declined to waive, it’s inherently improper to waive adults for offenses committed after they reached the age of consent. The court upheld the juvenile court’s decision that the juvenile could not be rehabilitated. Part of the juvenile court’s reasoning is that the appeals court cited was that the juvenile did not need rehabilitation for conduct concerns or substance abuse concerns, but rather for the nature of his crime. State v. Neitzel, 636 N.W.2d 116 (Iowa 2000)

- Juvenile was sixteen-years-and-eight months old and convicted of robbery in the second degree in the district court. In this trial, the district court refused to issue a reverse waiver. The appellate court considered the appropriate factors. State v. Gilillard, 604 N.W.2d 966 (Iowa 2000)

- Juvenile was convicted of murder in the first degree, sexual abuse in the first degree, sexual abuse in the second degree, and child enticement. The court refused to issue a reverse waiver as it determined that he could not be rehabilitated in the juvenile system. Prior to this decision, the court ruled that it was reasonable to be skeptical about juvenile’s remorse, he should have been rehabilitated through the juvenile system. Juvenile court determined that the juvenile could not be rehabilitated. Part of the juvenile court’s reasoning is that the appeals court cited was that the juvenile did not need rehabilitation for conduct concerns or substance abuse concerns, but rather for the nature of his crime. State v. Gilillard, 604 N.W.2d 966 (Iowa 2000)

- Juvenile was twenty-years-old. He committed forty-one counts of sexual abuse when he was between the ages of twelve and fifteen. The court refused to issue a reverse waiver as it determined that he could not be rehabilitated in the juvenile system. Prior to this decision, the court ruled that it was reasonable to be skeptical about juvenile’s remorse, he should have been rehabilitated through the juvenile system. Juvenile court determined that the juvenile could not be rehabilitated. Part of the juvenile court’s reasoning is that the appeals court cited was that the juvenile did not need rehabilitation for conduct concerns or substance abuse concerns, but rather for the nature of his crime. State v. Gilillard, 604 N.W.2d 966 (Iowa 2000)

Reverse Waiver

- Statutory Interpretation
  - State v. Duncan, 841 N.W.2d 356 (Iowa 2013)
    - Juvenile was sentenced to a sentence only after the defendant completed 50 percent of the sentence for a forcible felony. The district court said that the sentence was mandatory. On appeal, the defendant контended that the court abused discretion in sentencing. The court upheld the district court’s decision. The court found that the defendant committed the offense when he was not yet 16 years old. The court rejected the defendant’s argument that the sentence was excessive.
  - State v. Teich, 801 N.W.2d 612 (Iowa 2011)
    - Juvenile could not be rehabilitated in the juvenile system. Part of the juvenile court’s reasoning is that the appeals court cited was that the juvenile did not need rehabilitation for conduct concerns or substance abuse concerns, but rather for the nature of his crime. State v. Gilillard, 604 N.W.2d 966 (Iowa 2000)
  - State v. Concepcion, 829 N.W.2d 191 (2012)
    - Juvenile was convicted of murder in the first degree and sexual abuse. The court refused to issue a reverse waiver as it determined that he could not be rehabilitated in the juvenile system. Part of the juvenile court’s reasoning is that the appeals court cited was that the juvenile did not need rehabilitation for conduct concerns or substance abuse concerns, but rather for the nature of his crime. State v. Gilillard, 604 N.W.2d 966 (Iowa 2000)
  - State v. Tesch, 841 N.W.2d 604 (Iowa 2013)
    - Juvenile was convicted of murder in the first degree, sexual abuse in the first degree, sexual abuse in the second degree, and child enticement. The court refused to issue a reverse waiver as it determined that he could not be rehabilitated in the juvenile system. Part of the juvenile court’s reasoning is that the appeals court cited was that the juvenile did not need rehabilitation for conduct concerns or substance abuse concerns, but rather for the nature of his crime. State v. Gilillard, 604 N.W.2d 966 (Iowa 2000)

Juveniles/ Young Adults in District Court

- State v. Swanson, 841 N.W.2d 356 (Iowa 2013)
  - During sentencing, the court was justified in determining that the defendant’s age at the time of the sentencing, twenty-three years, is a factor to be considered for leniency. State v. Swanson, 683 N.W.2d 88 (Iowa 2004)
  - The court refused to issue a reverse waiver as it determined that he could not be rehabilitated in the juvenile system. Part of the juvenile court’s reasoning is that the appeals court cited was that the juvenile did not need rehabilitation for conduct concerns or substance abuse concerns, but rather for the nature of his crime. State v. Gilillard, 604 N.W.2d 966 (Iowa 2000)

- State v. Emery, 636 N.W.2d 116 (Iowa 2001)
  - Juvenile was sentenced to a sentence only after the defendant completed 50 percent of the sentence for a forcible felony. The district court said that the sentence was mandatory. On appeal, the defendant контended that the court abused discretion in sentencing. The court upheld the district court’s decision. The court found that the defendant committed the offense when he was not yet 16 years old. The court rejected the defendant’s argument that the sentence was excessive.
Evidence

- Iowa Rule of Evidence 5.404(b)
- Makes evidence of other crimes, wrongs, or acts admissible to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
- State v. Copenhaver, 829 N.W.2d 191 (IA Ct. App. 2013)
  - A defendant was convicted of two separate robberies where the defendant had disposed of the property of each victim in an attempt to destroy evidence of the crimes. The defense argued that the evidence of the two robberies should have been excluded under Iowa Rule of Evidence 5.404(b) because there was no factual basis to support three separate and distinct acts. The court held that the evidence was admissible to rebut the defendant’s testimony that he was not present for the second robbery.

Criminal Cases

- Criminal Law
  - Assault
    - State v. Ross, No. 11-1193 (Iowa 2014)
      - A defendant was convicted of assault with a dangerous weapon with intent. The defendant appealed, claiming his counsel was ineffective for allowing his to plead guilty to two counts of assault with a dangerous weapon with intent. The court held that the defense was effective as the defendant had a factual basis to support three separate and distinct acts, and the evidence was admissible to rebut the defendant’s testimony that he was not present for the second robbery.

- Separate Offenses
  - State v. Gines, No. 11-1272 (Iowa 2014)
    - A defendant was convicted of two separate robberies where the defendant had disposed of the property of each victim in an attempt to destroy evidence of the crimes. The defense argued that the evidence of the two robberies should have been excluded under Iowa Rule of Evidence 5.404(b) because there was no factual basis to support three separate and distinct acts. The court held that the evidence was admissible to rebut the defendant’s testimony that he was not present for the second robbery.

- Sentencing Hearing
    - A juvenile was found guilty of three separate offenses and sentenced to a residential treatment facility. The defendant appealed, claiming his counsel was ineffective for allowing him to plead guilty to three separate offenses. The court held that the defense was effective as the defendant had a factual basis to support three separate and distinct acts, and the evidence was admissible to rebut the defendant’s testimony that he was not present for the second robbery.

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Criminal Procedure

Miranda Warning
  - The Supreme Court held that a child's age properly informs the Miranda custody analysis, so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer.
- State v. Pearson, 804 N.W.2d 260 (Iowa 2011)
  - A seventeen-year-old juvenile confessed to a crime to a social worker at a residential treatment facility while the social worker was performing a status assessment for the juvenile's pending CHNA and juvenile proceedings. The court held that the juvenile's proximity to the age of majority made his age minimally important to the Miranda analysis. The social worker status as a state employee did not make Miranda apply as she was not a law enforcement officer, parole officer, or probation officer and she was not working for law enforcement by asking the questions. Further, it is not likely the juvenile was in custody as he was at the residential facility when he confessed, a place he had lived for eight years. Last, they found that although the social worker asked him questions about his crime she did not interrogate him as the juvenile freely answered the questions and there was no atmosphere of compulsion. The court held that a social worker's interview of juvenile at youth home, during which he confessed to crimes, was not custodial interrogation, for Miranda purposes.

Pleading the Fifth Amendment
- State v. Washington, 823 N.W.2d 892 (Iowa 2013)
  - The state was required to prove a specific criminal act and the defendant was required to prove the state's case. The social worker status as an agent of family preservation and the Miranda warning in a Delaware, Delaware situation is irrelevant. The social worker was not acting for the state. The state was the state as family preservation officer was acting for the state. The Miranda warning was given after the interview. Further, a statement given by the social worker was not the state's statement. The social worker was not acting for the state.

Criminal Adjudication
- In re Detention of Geitz, 840 N.W.2d 273 (Iowa 2013)
  - A juvenile was adjudicated delinquent for sexual abuse when he was fourteen-years-old. When the juvenile was interviewed by a social worker, the interview was not for the purposes of a custodial interrogation. The juvenile was not a suspect or a suspect acting under compulsion. The social worker was not an enforcement officer. The juvenile was in a residential facility and was not in custodial interrogation. The juvenile was not subject to a custodial interrogation.

Double jeopadry
- In re Detention of S., 797 N.W.2d 309, 310 (Iowa 2010)
  - The state filed a delinquency petition against a juvenile, alleging that he had committed two counts of sexual abuse of a child. The state court found for the state. However, the Supreme Court of Iowa found that the adjudication of juvenile delinquency was not a conviction of a sexually violent offense. The district court found for the state. However, the Supreme Court of Iowa found that the adjudication of juvenile delinquency was not a conviction of a sexually violent offense. The district court found for the state. However, the Supreme Court of Iowa found that the adjudication of juvenile delinquency was not a conviction of a sexually violent offense.

Legislation In The Works - Some Highlights

Criminal gang participation
- House Study Bill 522
  - The bill requires individuals applying for or renewing a license, certificate, authorization, or statement of recognition issued by the board of educational examiners to complete training approved by the board relating to bullying prevention, suicide prevention, and the board's code of professional conduct and ethics.

Bullying prevention, suicide prevention, and professional conduct and ethics for school personnel
- House Study Bill 525
  - The bill requires individuals applying for or renewing a license, certificate, authorization, or statement of recognition issued by the board of educational examiners to complete training approved by the board relating to bullying prevention, suicide prevention, and the board's code of professional conduct and ethics.
  - The bill modifies the definition of "electronic" by adding any other electronic communication site, device, or means to the definition and by including social networking sites as part of the term "Internet-based communication.
  - Requires school anti-bullying and anti-harassment policies to include a procedure for the prompt notification of the parents or guardians of all students directly involved in the reported incident of harassment or bullying.
  - Allows school officials to take action on alleged incidents of harassment or bullying that occur outside of the school, off of school property, or away from school functions or school-sanctioned activities if certain conditions are met.
• Sex Offender Registration Requirements
  • House Study Bill 570
    • Bill eliminates the requirement that the court make an initial determination, after adjudication, that a juvenile register as a sex offender and requires all juveniles required to register as a sex offender to register
    • Unless upon motion by the juvenile, the court permanently waives, modifies, or temporarily suspends the sex offender registration requirement
    • If good cause is shown, the court may permanently waive, modify, or temporarily suspend the registration requirements

• Procedures for Child Abuse Investigations
  • House File 2020
    • New notice requirements
    • Before a DHS worker has initial contact telephonically with a person responsible for the care of the child, the DHS worker must give oral notice
    • Before a DHS worker has initial face-to-face contact with a person responsible for the care of the child, the DHS worker must give written notice
  • Some of the information the notice must include
    • That the person responsible for the care of the child is not required to allow the DHS child protection worker into the residence
    • However, if permission is refused, the juvenile court or district court may authorize the child protection worker to enter the home to interview or observe the child upon a showing of probable cause
    • To speak to the DHS child protection worker
    • To sign any document presented by the DHS child protection worker
    • That the person responsible for the care of the child is entitled to seek representation of an attorney
    • That any statement made by the person responsible for the care of the child may be used against the person
      • Contrast: Any statement made by the person responsible for the care of the child before appropriate notice is given is inadmissible in any administrative or court proceeding

• Termination of Parental Rights
  • Senate File 344
    • This bill provides an additional ground for termination of parental rights
      • If the court finds the parent to be palpably unfit as determined by a consistent pattern of specific conduct or specific conditions directly relating to the parent-child relationship which are determined by the court to be of a duration or nature that renders the parent unable, for the reasonably foreseeable future, to provide the appropriate care and support for the ongoing physical, mental, or emotional needs of the child
      • The court may consider any specific conduct or specific conditions directly relating to the parent-child relationship
  • Services Provided Through the Department of Human Services
    • House File 2164; Senate File 2084
      • Code section 233A.6 is amended to require the guardian ad litem for a child placed at the school to meet in person with the child at least quarterly and to report to the court regarding the child as required by the court
      • Code Chapter 233B, relating to the Iowa juvenile home is substantially rewritten
        • 233B.1(2)- Purpose of the home is revised
        • 233B.1(7)- The Department of Human Services is required to cause the home to be accredited as a juvenile correctional facility by the American Correctional Association, to meet Department of Human Services standards for approval as a juvenile detention home, and to meet the applicable standards for residential services for children paid for by managed care or prepaid services contract for the Medicaid program
        • 233B.7- Requirements that the child comply with the rules of the home is revised
Implications of the “Iowa Trilogy” for Juvenile Court

Brent Pattison
Director, Middleton Center for Children’s Rights
Drake Law School

Resources


Clinical Evaluations for Juveniles’ Competence to Stand Trial: A Guide for Legal Professionals, Thomas Grisso, Ph.D.

MacArthur Juvenile Adjudicative Competence Study

Toward Developmentally Appropriate Practice: A Juvenile Court Training Curriculum, MacArthur Foundation.

Trial Manual for Defense Attorneys in Juvenile Delinquency Cases, Anthony Amsterdam, Randy Hertz, and Martin Guggenheim.

The MacArthur Juvenile Adjudicative Competence Study

Summary

Why The Study Was Conducted

U.S. law has long required that defendants in criminal cases must be capable of understanding the trial process and contributing to their defense, indicating that they are “competent to stand trial.” For example, defendants must understand the charges against them, have some rudimentary understanding of the court proceeding, be able to understand and answer questions posed to them by their attorney, and be able to make basic decisions about their trial, such as weighing the consequences of accepting or turning down a plea agreement. The U.S. Supreme Court has held that it is fundamentally unfair and in violation of the U.S. Constitution to try defendants who do not have these basic capacities.

Historically, virtually all defendants found incompetent to stand trial have been persons with mental illnesses or mental retardation. In recent years, however, an increase in the number of adolescents tried as adults and the number of younger children tried in juvenile court has raised questions about children’s and adolescents’ capacities to participate in their trials—not necessarily due to mental illness or mental retardation, but simply because of intellectual and emotional immaturity.

In order to address these questions, the MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice conducted the first-ever large-scale study of age differences in competence to stand trial. The study was funded by grants from the John D. and Catherine T. MacArthur Foundation and the Open Society Institute, a nonprofit organization that is part of the Soros Foundations Network. The study was designed and carried out by some of the country’s leading scientific and legal researchers in the area of children and the law.

How The Study Was Conducted

Over 1,400 males and females between the ages of 11 and 24 participated in the study, which was conducted in four sites—Philadelphia, Los Angeles, Northern and Eastern Virginia, and Northern Florida—in order to obtain a sample with cultural, ethnic, and socioeconomic diversity. Half of the study participants were in jail or detained in juvenile detention centers at the time of the study, and half were individuals of similar age, gender, ethnicity, and social class but residing in the community.

These individuals were administered a standardized battery of tests designed to assess their knowledge and abilities relevant for competence to stand trial, their legal decision-making in several hypothetical situations (such as whether to confess a crime to the police, share information with one’s attorney, or accept a proffered plea agreement), and measures of a number of other characteristics that could potentially influence these capacities, such as intelligence, symptoms of mental health problems, and prior experience in the justice system.

The primary measure of abilities relevant to competence to stand trial was an evaluation tool that has been used extensively in prior studies of competence among adults with mental illnesses. The evaluation does not label individuals as “competent” or “incompetent,” but it does identify individuals whose knowledge, understanding, and reasoning are sufficiently impaired that they
are at grave risk of being incompetent to stand trial in a criminal proceeding. Prior studies of adults with mental illness who have been found incompetent to stand trial were used to establish a threshold in the present study that served as the basis for identifying individuals’ levels of ability as “impaired” or “seriously impaired.” In the present study, individuals who were identified as “seriously impaired” performed at a level comparable to adult defendants with mental illness who would likely be considered incompetent to stand trial by clinicians who perform evaluations for courts.

It is important to note that our study examined only youths’ competence to stand trial, not their criminal blameworthiness (i.e., whether someone should be held fully responsible for an offense). These are two separate issues. For example, a young inexperienced driver who accidentally skidded off the road and killed another person might be competent to stand trial for the wrongful death of another, but could be judged less than fully responsible for the death because it was accidental. Whether youths of a certain age have abilities suggesting competence or incompetence to stand trial does not tell us whether youths of that age should or should not be held as responsible as adults for their offenses.

What The Study Found

The study found that juveniles aged 11 to 13 were more than three times as likely as young adults (individuals aged 18 to 24) to be “seriously impaired” on the evaluation of competence-relevant abilities, and that juveniles aged 14 to 15 were twice as likely as young adults to be “seriously impaired”. Individuals aged 15 and younger also differed from young adults in their legal decision-making. For example, younger individuals were less likely to recognize the risks inherent in different choices and less likely to think about the long-term consequences of their choices (e.g., choosing between confessing versus remaining silent when being questioned by the police).

In the present study, juveniles of below-average intelligence (i.e., with an IQ less than 85) were more likely to be “significantly impaired” in abilities relevant for competence to stand trial than juveniles of average intelligence (IQ scores of 85 and higher). Because greater proportion of
Youths in the juvenile justice system than in the community were of below-average intelligence, and because lower intelligence was related to poorer performance on abilities associated with competence to stand trial, the risk for incompetence to stand trial is even greater among adolescents who are in the justice system than it is among adolescents in the community. In fact, more than half of all below-average 11- to 13-year-olds, and more than 40% of all below-average 14- and 15-year-olds, were in the "significantly impaired" range on abilities related to competence.

Age and intelligence were the only significant predictors of performance on the evaluation of abilities relevant to competence to stand trial. Performance on the evaluation did not vary as a function of individuals' gender, ethnicity, socioeconomic background, prior experience in the legal system, or symptoms of mental health problems. Because mental illness and its impact on competence to stand trial was not the focus of this study, very few individuals with serious mental disorders were included in the sample, and the study's results do not answer questions about the competence of juveniles with serious mental illnesses.

The study did not find differences between juveniles aged 16 and 17 and young adults in abilities relevant to their competence to stand trial. As noted above, however, this does not mean that juveniles of this age are equivalent to adults with respect to other capacities that are relevant to their adjudication, such as their criminal blameworthiness or likelihood of rehabilitation. The MacArthur Network is currently conducting further research to examine age differences in other capacities and abilities that are important in making decisions about the appropriate treatment of young offenders in the legal system.

**What The Results of This Study Mean**

The results of this study indicate that, compared to adults, a significantly greater proportion of juveniles in the community who are 15 and younger, and an even larger proportion of juvenile offenders this age, are probably not competent to stand trial in a criminal proceeding. Juveniles of below-average intelligence are especially at risk of being incompetent to stand trial. States that transfer large numbers of juveniles who are 15 and under to the criminal justice system may be subjecting significant numbers of individuals to trial proceedings for which they lack the basic capacities recognized as essential for competent participation as a defendant.

Based on these findings, states should consider implementing policies and practices designed to ensure that young defendants' rights to a fair trial are protected. In some jurisdictions, this may mean requiring competence evaluations for juveniles below a certain age before they can be transferred to criminal court. States that permit juveniles 13 and under to be tried as adults may wish to re-examine this policy in light of the substantial proportion of individuals of this age who are at great risk for incompetence to stand trial.
For more information about the study, contact:

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John F. Stinneford

In *Miller v. Alabama*, the Supreme Court held that statutes authorizing mandatory sentences of life in prison with no possibility of parole (LWOP) are unconstitutional as applied to offenders who were under eighteen when they committed their crimes.¹ *Miller* is the latest in a series of cases restricting the punishments that may be inflicted for crimes committed by minors. In *Roper v. Simmons*, the Court held that it was cruel and unusual to execute anyone for a crime committed under the age of eighteen.² In *Graham v. Florida*, the Court held that it was unconstitutional to impose an LWOP sentence on anyone who committed a nonhomicide offense under that age.³ Finally, *Miller* created a presumption against LWOP sentences even for those minors who commit homicide. The Court held that such offenders have a right to an individualized sentencing determination before being given an LWOP sentence, and that “appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.”⁴

*Miller* arose from two cases involving defendants who received mandatory life sentences for homicides committed when they were fourteen-years-old.⁵ In the first case, Kuntrell Jackson participated in the robbery of a video store, during which one of Jackson’s associates shot and killed the store clerk.⁶ Jackson was charged as an adult and convicted of capital felony murder and aggravated robbery.⁷ In the second case, Evan Miller and a friend beat a man in the head with a baseball bat after stealing his wallet.⁸ At one point, Miller proclaimed “I am God, I’ve come to take your life,” just before striking the victim on the head.⁹ Miller and his friend later set fire to the victim’s trailer in an attempt to cover up the crime.¹⁰ The victim died of a combination of head injuries and smoke

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¹ 132 S. Ct. 2455, 2460 (2012).
⁴ 132 S. Ct. at 2469.
⁵ Id. at 2460.
⁶ Id. at 2461.
⁷ Id.
⁸ Id. at 2462.
⁹ Id.
¹⁰ Id.
inhalation. Prior to the crime, Miller had been in and out of foster care because of his parents’ substance addictions and abusive behavior. Miller himself regularly used illegal drugs and alcohol and had attempted suicide on four prior occasions. Miller was charged as an adult and convicted of murder in the course of an arson. Both convictions gave rise to a mandatory LWOP sentence.

Several of the themes presented in Miller may have future significance both inside and outside the Eighth Amendment context. The most obviously important of these themes is youth. The Miller Court based its holding on the assertion that “children are constitutionally different from adults for purposes of sentencing.” The Court held that minors are generally less morally responsible, more impulsive, less deterrable, and possess a greater capacity for rehabilitation than adults. Bad behavior in minors is not necessarily evidence of a depraved character because their character is not yet “well formed” or “fixed.” Minors are also generally more susceptible to negative outside pressures than adults, and less capable of protecting their own interests in dealing with the criminal justice system. In making this final point, the Court cited J.D.B. v. North Carolina, a Fifth Amendment case in which the Court held that the age of a suspect is relevant to the question of whether she is in custody for Miranda purposes. Taken together, J.D.B. and the Roper/Graham/Miller line of cases indicate that the Supreme Court may be developing a constitutional distinction between minors and adults that applies across a range of contexts. Children may be “constitutionally different” from adults for many purposes beyond criminal sentencing.

A second significant theme is science. In Miller (as well as Roper and Graham) the Supreme Court relied on behavioral studies that tended to confirm the “common sense” belief that minors are generally less responsible, more impulsive, and more amenable to rehabilitation than adults. It also relied on neuroscientific studies showing that “parts of the brain involved in behavior control” are not yet

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11 Id.
12 Id.
13 Id.
14 Id.
15 Id.
16 Id. at 2464
17 Id.
18 Id.
19 Id.
20 Id. at 2468
21 131 S. Ct. 2394, 2403 (2011) (“[A] reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go.”)
22 132 S. Ct. at 2464.
23 Id.
fully developed during adolescence. The Supreme Court’s willingness to give scientific findings constitutional significance could impact any number of constitutional doctrines, both inside and outside the Eighth Amendment context. The use of science to inform doctrine holds out the promise of allowing the Court to update constitutional law in accordance with our best understanding of the human person and of the world in which we live. But as a basis for constitutional doctrine, science may undermine tomorrow what it builds up today. The Supreme Court’s use of scientific studies in Roper, Graham, and Miller has been criticized on the ground that at least some of the studies are unsound and that the Court has drawn inferences about moral responsibility and deterrentability that go well beyond what the studies show. To the extent such studies are merely used to confirm longstanding “common sense” judgments about the nature of adolescents (for example), such criticisms may not pose a serious problem for the Court. But the more the Court tries to use science to move constitutional doctrine beyond settled societal understandings about the human person and the world in which we live, the more vulnerable such doctrine will be to these sorts of critique.

A third important theme of Miller is mandatory sentences. Whereas Roper and Graham imposed a categorical ban on certain types of punishment in certain circumstances, Miller simply required that juvenile homicide offenders be given an individualized sentencing determination before being given an LWOP sentence. This decision may mark the beginning of a broader change in the Supreme Court’s attitude toward mandatory sentencing schemes. Several decades ago, as part of its “death is different” jurisprudence, the Supreme Court held that mandatory sentencing schemes are impermissible in the death penalty context, but pose no constitutional problem in relation to sentences of imprisonment—even LWOP sentences. The Miller Court’s decision to break down the barrier between capital and non-capital cases (at least in the LWOP context) may herald either a willingness to reexamine the constitutionality of harsh mandatory sentencing schemes.

24 Id. (quoting Graham v. Florida, 130 S. Ct. 2011, 2026 (2010)).
25 See, e.g., Deborah W. Denno, The Scientific Shortcomings of Roper v. Simmons, 3 OHIO ST. J. CRIM. L. 379, 379 (2006) (criticizing the Supreme Court for relying on scientific sources that were “insufficient and outdated”).
26 See, e.g., Stephen J. Morse, Brain Overclaim Syndrome, 3 OHIO ST. J. CRIM. L. 397, 409 (2006) (“The neuroscience evidence [discussed in Roper] in no way independently confirms that adolescents are less responsible. If the behavioral differences between adolescents and adults were slight, it would not matter if their brains are quite different. Similarly, if the behavioral differences were sufficient for moral and constitutional differential treatment, then it would not matter if the brains were essentially indistinguishable.”); William J. Katt, Roper and the Scientific Amicus, 49 JURIMETRICS J. 253, 268 (2009) (“Although common sense might tell us that adolescents clearly behave differently than adults, the sources cited by the Science Brief do not seem to prove that point.”).
28 See Harmelin v. Michigan, 501 U.S. 957, 995 (1991) (“[A] sentence which is not otherwise cruel and unusual” does not “becom[e] so simply because it is mandatory.”).
schemes generally or to impose on the LWOP sentencing process the entire machinery of constitutional procedure currently required in capital cases. Either change could have profound significance for non-capital sentencing.

A fourth potentially important theme of Miller is juvenile transfer statutes. One could plausibly claim that the entire Roper/Graham/Miller line of cases is the result of the movement in the 1990s—in reaction to the “juvenile superpredator” panic—to amend the statutes allowing juvenile offenders to be transferred to adult court for trial. In a single five-year period, some forty-five states amended their transfer statutes to make it easier to move juveniles into adult court, thus making them potentially subject to execution or LWOP sentences. 29 Roper, Graham, and Miller may be a judicial reaction to the resulting increase in underage offenders being given very harsh criminal sentences in adult criminal court. The Supreme Court has not yet entertained a direct constitutional challenge to these new transfer statutes, but their harsh effects could be an underlying motivation for the Court’s decision to limit the punishments that may be imposed on underage offenders.

A fifth theme of Miller is the conflict between “evolving standards of decency” and the Supreme Court’s “independent judgment.” Since the late 1950s, the Supreme Court has taken the position that it is not bound by the original meaning of the Cruel and Unusual Punishments Clause, but is free to interpret the Clause in accordance with current moral standards.30 From the beginning, there has been ambiguity and conflict concerning the source of such “current” standards. Should the Court focus on “societal consensus,” or should it rely on its own “independent judgment” (perhaps informed by the Court’s own reading of scientific and philosophical literature)?31 For decades, the Supreme Court has pretended that current “societal consensus” and its own “independent judgment” are in perfect accord with each other, but such pretense has become increasingly implausible.32 In Miller, the Supreme Court signals a willingness to move away from consulting “societal consensus” and toward sole reliance on its own independent judgment. The Miller Court makes no effort to show that there is a

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30 See Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion) (holding that the Cruel and Unusual Punishments Clause should be interpreted in light of “evolving standards of decency that mark the progress of a maturing society”).


32 See, e.g., John F. Stinneford, Rethinking Proportionality under the Cruel and Unusual Punishments Clause, 97 VA. L. REV. 899, 922–23 (2011) (arguing that recent cases “show that the evolving standards of decency test is often deeply at odds with the Supreme Court’s own judgment” and that the Supreme Court increasingly resolves this problem by creating a “fictionalized [societal] consensus against the punishment to support its own judgment”).
current societal consensus against mandatory LWOP sentences for juvenile homicide offenders. Instead, it argues that its holding is justified because it flows logically and “straightforwardly”33 from the Court’s own prior Eighth Amendment precedents,34 and because it accords with the Court’s own beliefs concerning the proper justifications for punishment.35 This movement away from “evolving standards of decency” and toward the exercise of judgment unconstrained by binding constitutional standards leaves the future development of Eighth Amendment doctrine radically uncertain.

The articles in this Symposium shed important light on the significance of Miller for the Supreme Court’s Eighth Amendment jurisprudence, and for juvenile justice more generally.

The first two articles concern the effect Miller may have on the “death is different” approach that has dominated the Supreme Court’s Cruel and Unusual Punishments jurisprudence over the past thirty years. Until recently, the Supreme Court followed a two-track approach to claimed Eighth Amendment violations: giving robust proportionality review to claims involving the death penalty and virtually no review to claims relating to terms of incarceration.36 Starting with Graham v. Florida, the Court has moved away from the death/imprisonment distinction, and focused instead on whether a case raises a categorical challenge to a given punishment.37 Categorical challenges now appear to get the searching proportionality review that was previously reserved for death penalty cases,38 but the Court has done little to specify what sorts of case are appropriate for a categorical challenge, and what sorts are not.

Richard Frase39 sees Miller and other recent applications of categorical analysis as a potential expansion of the “death is different” approach, not a repudiation of it. Frase identifies a number of factors present in these cases that might make a future Eighth Amendment challenge sufficiently “different” from a

34 The Miller Court does attempt to answer the argument that there is a societal consensus in favor of mandatory LWOP sentences, as demonstrated by the fact that such sentences are authorized by the federal government and twenty eight states. See id. The Court makes no effort, however, to demonstrate a societal consensus against such punishments.
35 Id. at 2464–66.
37 See Graham v. Florida 130 S. Ct. 2011, 2021–22 (2010) (distinguishing the Supreme Court’s two lines of Eighth Amendment proportionality cases on the ground that some focused on “all of the circumstances of the case” while others “used categorical rules to define Eighth Amendment standards”).
38 See id. (declaring that it is cruel and unusual to impose LWOP sentences on the entire category of juvenile nonhomicide offenders).
typical term-of-imprisonment challenge to warrant categorical treatment, even for an adult offender. These factors include: 1) whether the offender has constitutionally relevant personal characteristics, such as juvenile status or mental retardation; 2) whether the offender has been given a death sentence or an LWOP sentence, which the Supreme Court considers comparable to death; 3) whether the offender has been given a mandatory sentence; 4) whether the offender has been convicted of a nonhomicide offense; and 5) whether the offender is a low-culpability accomplice. Frase argues that the focus on these factors in Miller and Graham may signal a burgeoning preference for categorical Eighth Amendment challenges that extends well beyond the old “death is different” approach. Frase analyzes how categorical challenges might work post-Miller, and shows how the “different” factors he identifies might even lead to more robust constitutional review in non-categorical “as applied” challenges to terms of imprisonment.

Carol Steiker and Jordan Steiker explore the implications of the Miller Court’s decision to “breach[] the capital versus non-capital divide” by requiring individualized sentencing in juvenile LWOP cases as well as death penalty cases. They ask, for example, whether the Court will ultimately require states to use the same elaborate and expensive sentencing procedures in LWOP hearings that currently obtain in the death penalty context. If so, they argue, this may force states to abandon or severely limit juvenile LWOP. If the Court were to expand the individualized sentencing requirement to cover adult as well as juvenile LWOPs, however, this move might have the perverse effect of increasing the number of death penalty cases. Prosecutors faced with the choice between a costly death penalty proceeding and a costly LWOP proceeding may well choose the former over the latter. Ultimately, Steiker & Steiker are skeptical as to whether the Supreme Court will move much further toward breaching the capital/non-capital divide, at least with respect to the procedural requirements for sentencing. They are also skeptical as to whether the importation of such procedures into the non-capital context would provide much real protection to defendants. Steiker & Steiker do express modest optimism, however, that the Supreme Court’s focus on the inappropriateness of imposing very harsh sentences on juvenile offenders may create an impetus for political reform.

The next three articles focus on the relationship between Miller and juvenile justice policy.

Franklin Zimring and Stephen Rushin present an empirical study of the relationship between juvenile homicide rates and the punitive changes made to the juvenile justice system in response to the superpredator panic of the 1990s. Juveniles crime rates rose dramatically from the mid-1980s through the early-

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41 Id. at 38.
1990s, then declined dramatically from the mid-1990s through 2010. Some have argued that this decline was caused by widespread statutory changes in the 1990s that made it easier to transfer juvenile offenders into adult court and subject them to harsher punishment. Zimring & Rushin’s study calls this hypothesis into question by showing that the rate of homicides committed by young adults declined during this period to almost precisely the same degree as the juvenile homicide rate. Since young adults were not directly affected by changes to the juvenile transfer statutes, Zimring & Rushin’s study implies that some other cause affecting both juveniles and young adults must have pushed down the homicide rates for both groups. If this is so, the harsher transfer statutes would appear to have had virtually no effect on juvenile homicide rates, and would thus appear to be seriously misguided.

Elizabeth Scott argues that Miller is important, despite its seemingly modest holding, because it clarifies the unique status of juveniles under Eighth Amendment doctrine. Miller also demonstrates that the Supreme Court has embraced the wisdom of a developmental model of youth crime regulation and given it constitutional status. Scott identifies four lessons that policymakers should take from this decision. First, because juveniles are generally less culpable than adults, they should generally be subject to more lenient criminal sanctions. Second, the transfer of juveniles to adult court should be rare, and should be based on the individualized decision of a judge. Third, juvenile sanctions should focus on rehabilitation and reform, not punishment. Fourth, juvenile crime regulation can usefully be guided by developmental science.

Barry Feld argues that the reasoning of Miller supports a specific juvenile justice sentencing policy: a youth discount. Although the Roper/Graham/Miller line of cases recognizes the categorically diminished responsibility of youthful offenders, it provides them limited relief. The death penalty has been forbidden for juvenile offenders, and the use of LWOP sentences has been greatly limited. But beyond these bounds, there are no restrictions on the length of incarceration juvenile offenders may be given. For example, under Roper/Graham/Miller, life sentences are still permissible so long as the juvenile offender gets some “meaningful opportunity” to argue for parole at some point during his incarceration. Feld argues that sentencing laws would better reflect the diminished responsibility of youthful offenders if they were changed to provide a “youth discount”—that is, “a proportional reduction of adult sentence lengths based on the youth of the offender.” Such a reduction would, Feld argues, formally recognize the mitigating quality of youthfulness, take into account the fact that juvenile offenders have a much greater chance to mature and develop into law abiding

43 Elizabeth S. Scott, “Children are Different:” Constitutional Values and Justice Policy, 11 OHIO ST. J. CRIM. L. 71 (2013).
45 Id. at 108.
citizens, and give them a chance at a future life despite the serious mistakes represented by their criminal conduct.

Finally, Jeremiah Bourgeois\textsuperscript{46} provides the perspective of a man who was given a mandatory LWOP sentence some twenty years ago for a crime committed when he was fourteen. Bourgeois argues that the criminal justice system provides a mere pretense of rehabilitation to criminal offenders. He argues that the system is based on a distorted view of retribution that fails to recognize the distinction between wrongdoing committed by children and wrongdoing committed by adults. Bourgeois’s article demonstrates, by its very existence, that even the most troubled adolescents who commit the most serious crimes have the capacity to grow in knowledge, maturity, and perspective on the world around them—a capacity that is implicitly denied by the imposition of mandatory LWOP sentences on juvenile offenders.

\textsuperscript{46} Jeremiah Bourgeois, The Irrelevance of Reform: Maturation in the Department of Corrections, 11 OHIO ST. J. CRIM. L. 149 (2013).
AFTERNOON PANEL: Representing the Juvenile in Adult Court.
Moderator: Judge Mary Tabor, Iowa Court of Appeals

PRESENTATION MATERIALS OF PANELIST GEORGE B. JONES,
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1 A copy of the presentation materials will be posted on the author’s LinkedIn site after this seminar and can be accessed at: http://www.linkedin.com/pub/george-b-jones/14/269/8b8/
The Impact of *State v. Duncan*, 841 N.W.2d 604 (Iowa App. 2013) on Juvenile Court Jurisdiction and Charging of Juvenile Offenders

By trial counsel: George B. Jones, Lamoni, Iowa

The Charges: Duncan, after becoming an adult, was charged with 41 counts of Sexual Abuse 2nd degree (Class B forcible felony) for acts allegedly committed by him from age 12 through age 15. All acts were alleged to have occurred before age 16. Duncan was accused of forcing a younger sibling to engage in oral sex one time per month over a 41-month time period. All charges were filed in adult court because Duncan was an adult at the time the charges were filed.

Reverse Waiver Hearing in District Court: An adult convicted of this offense would face mandatory sentence of 25 years, with 70% to serve as a forcible felony. A reverse waiver hearing was held in an effort by counsel to get the case back to juvenile court where the consequences of adult sentencing, including potential mandatory lengthy prison term, could be avoided. The District Court Judge, interpreting juvenile code Section 232.8(1)(c), held that the court was without authority to grant the reverse waiver because the offenses were forcible felonies and the defendant was now older than age 16.

Appeal: The Iowa Supreme Court granted application for discretionary review and transferred the case to Iowa Court of Appeals. See *State v. Duncan*, 841 N.W.2d 604 (Iowa App. 2013). A three judge panel (Vogel, Danilson, Tabor) ruled:

1. The Section 232.8(1)(c) forcible felony Juvenile Court exclusion does not apply to offenses committed prior to age 16, regardless of the defendant's age when charged. (p. 9)

2. Citing the common law traditional presumption that persons between the ages of 7 and 14 were incapable of committing any crime (p. 15), the Court of Appeals ordered that all charges occurring prior to age 14 be transferred to Juvenile court. "Those offenses cannot be tried in criminal court, no matter the current age of the alleged offender." (pp. 18-19)

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1 Counsel takes the position that Section 232.8 allows the District Court, when sentencing an adult for an offense committed as a child (i.e. under age 18, see Section 232.2(5)), to suspend the sentence or defer judgment. This issue was not addressed in the Duncan decision, but see my case law summary included elsewhere in this CLE presentation.

2 Section 232.8(1)(c) excludes from the jurisdiction of the Juvenile Court violations "by a child, aged sixteen or older...which constitute a forcible felony."

3 The Iowa Court of Appeals also held, "Consistent with our reading of section 232.8(1)(c) in the first issue, we believe the phrase 'fourteen years of age or older'
3. The Court of Appeals remanded the age 14-15 charges to District Court for a new decision on the reverse waiver application, and invited the parties to seek to reopen the record. (p. 19)

4. The Court of Appeals clarified that the Juvenile court will have the ability to impose supervision on Jason for 18 months after the last date upon which jurisdiction could attach. 232.53(2). (p. 10) This seems to mean that the court can impose supervision on an adult defendant who is reverse waivered back to Juvenile Court for 18 months from the date of the dispositional order.

5. The Court also noted in a footnote, that for pre 14 year old offenses, there is no sexual offender registration requirements. 692A.103. (p. 15, n. 8)⁴

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in section 232.45(6)(a) refers to the child’s age at the time of the commission of the offense and not the time of the hearing.” (p. 17) Thus, pre age 14 offenses are not subject to the reverse waiver provisions of Section 232.45—which supports the Court’s conclusion that such offenses are never properly filed in adult court.

⁴ At note 8, page 15, the Court stated, “Fourteen marks a coming-of-age milestone in many legislative pronouncements. See, e.g., ...Section 692A.103 (registration as sex offender required if fourteen years of age or older at the time offense was committed)...”
IN THE COURT OF APPEALS OF IOWA

No. 3-708 / 12-1157
Filed October 23, 2013

STATE OF IOWA,
    Plaintiff-Appellee,

vs.

JASON TYLER DUNCAN,
    Defendant-Appellant.

Appeal from the Iowa District Court for Wayne County, Sherman W. Phipps, Judge.

This discretionary review challenges the district court's denial of a defendant's request for waiver to juvenile court. REVERSED AND REMANDED WITH DIRECTIONS.

Mark C. Smith, State Appellate Defender, and Theresa R. Wilson, Assistant Appellate Defender, for appellee.

Thomas J. Miller, Attorney General, Martha Trout, Assistant Attorney General, and Alan M. Wilson, County Attorney, for appellee.

Heard by Vogel, P.J., and Danilson and Tabor, JJ.
TABOR, J.

Jason Tyler Duncan faces forty-one counts of sexual abuse in the second degree for acts he allegedly committed when he was between the ages of twelve and fifteen. The district court determined Duncan, who is now in his twenties, was ineligible for waiver to juvenile court under Iowa Code sections 232.8(1)(c) and 702.5 (2011). The Iowa Supreme Court granted Duncan’s request for discretionary review and transferred the case to us. Because we conclude the district court misinterpreted the juvenile code provisions governing transfer of jurisdiction, we reverse its ruling and remand with directions. We also hold Duncan may not be tried as an adult for acts he allegedly committed when he was younger than fourteen.

I. Background Facts and Proceedings

The Wayne County Attorney originally charged Duncan with one count of sexual abuse in the second degree, in violation of Iowa Code section 709.1(3) and 709.3(2), by trial information filed August 31, 2010. The information alleged Duncan engaged in sex acts with a child under the age of twelve from approximately 2003 through 2008. Duncan’s attorney filed an application for waiver to juvenile court on October 5, 2010. Before the court ruled on the transfer, Duncan entered a guilty plea to an amended charge of sexual abuse in the third degree on April 26, 2011. The court allowed Duncan to withdraw his guilty plea on August 23, 2011, because the plea-taking court did not advise him of the special sentence for sex offenders under Iowa Code chapter 903B. The court reinstate[d] the original charge.
On September 13, 2011, Duncan renewed his request to be transferred to juvenile court. Less than one month later, the State moved to amend the trial information to add forty additional counts of sexual abuse in the second degree. The amended trial information alleged Duncan committed one sex act per month between January 1, 2004, and May 18, 2007, when Duncan was age twelve through fifteen.¹ The alleged victim was four years younger than Duncan. The State alleged Duncan threatened to beat up the younger boy if he refused to perform oral sex on Duncan. The district court granted the motion to amend the trial information at a hearing on November 22, 2011.

The court held a hearing on February 20, 2012, to consider Duncan’s renewed application to transfer jurisdiction to juvenile court. The defense presented the testimony of Dr. Craig Rypma, who offered his opinion that Duncan posed a low risk of reoffending. The State called juvenile court officer Daron Henson, who testified no-inpatient treatment programs would be available for Duncan in the juvenile court system.

Rather than making closing arguments, the parties filed written briefs for the district court. In his post-hearing argument, Duncan asserted both parties stipulated he could rescind his withdrawal of his original application for transfer to juvenile court and the district court accepted the stipulation. Duncan also argued counts one through nineteen of the amended trial information (spanning the time from January 1, 2004, (when Duncan was twelve years old) until August 1, 2005,

¹ The State also filed a separate trial information, FECR002359, alleging Duncan committed one sex act during the calendar year 2005 with a female child who was four or five years old at the time.
(when Duncan turned fourteen)) must be transferred to juvenile court under Iowa Code section 232.45(6)(a).

On May 1, 2012, the district court denied Duncan's renewed application to transfer his case to juvenile court. The court determined once Duncan reached the age of eighteen, he was "not eligible for a reverse waiver to juvenile court." Duncan filed a motion to enlarge findings under Iowa Rule of Civil Procedure 1.904(2), asking the court to decide whether he could be tried as an adult for offenses he allegedly committed when he was under fourteen years of age. On June 18, 2012, the court denied the motion to reconsider, stating:

The arguments therein were previously made by the defendant and rejected by the court. To grant Defendant's reverse waiver application upon any of the arguments raised by defendant would be to deny justice in this case. The court declines to do so.

Duncan filed a timely application for discretionary review with the Iowa Supreme Court. The Iowa Supreme Court granted the application on July 25, 2012. After the parties filed their briefs, the Supreme Court transferred the case to our court on July 2, 2013.

II. Scope and Standards of Review.

We review issues of statutory interpretation for correction of legal error. *State v. Terry*, 569 N.W.2d 364, 366 (Iowa 1997). We review a court's decision whether to transfer a case to or from juvenile court for an abuse of discretion. *State v. Neitzel*, 801 N.W.2d 612, 618 (Iowa Ct. App. 2011). If we were to reach Duncan's claims of ineffective assistance of counsel, review would be de novo. *State v. Brooks*, 760 N.W.2d 197, 204 (Iowa 2009).
III. Analysis.

A. Did the District Court Err in Determining Duncan Was Ineligible For Reverse Waiver Under Iowa Code Section 232.8(1)(c)?

Before reaching the merits of Duncan’s argument, we address the State’s assertion the defense did not preserve error on the arguments raised on appeal because Duncan raised them only in his original application for transfer to juvenile court, which he withdrew. The State contends Duncan did not incorporate the earlier application in his renewed application and did not receive a ruling from the district court.

We find Duncan preserved error. He requested and received a hearing on his renewed application for transfer to juvenile court. The parties stipulated Duncan could rescind his motion to withdraw the original application for transfer. The district court essentially treated the two motions as one request to be transferred to juvenile court. See Cooksey v. Cargill Meat Solutions Corp., 831 N.W.2d 94, 97-98 (Iowa 2013) (discussing court’s incorporation of issues raised in motion to dismiss). The court denied Duncan’s request to be adjudicated in juvenile court, interpreting section 232.8(1)(c) as not allowing reverse waiver for a defendant in Duncan’s position—older than sixteen and accused of committing forcible felonies. Duncan challenges that ruling on appeal.

At issue is the district court’s interpretation of the juvenile transfer statutes. Initially, the district court cited Iowa Code section 702.5, which defines a child as “any person under the age of fourteen years”—unless another age is specified. The trouble with the juvenile court’s citation is the juvenile code does specify
another age; a child is defined as a person under eighteen years of age. Iowa Code § 232.2(5). In chapter 232, the word juvenile is synonymous with child. Iowa Code § 232.2(29).

The district court then turned to section 232.8(1)(c), which "exempts certain classes of alleged juvenile offenders from the initial jurisdiction of the juvenile court." See Terry, 569 N.W.2d at 366. In the 1990s, the Iowa General Assembly, along with lawmakers from many other states, responded to juvenile crime rates by adopting the mandate that older juveniles charged with serious offenses would automatically start in adult criminal court. See Elizabeth Scott, The Legal Construction of Adolescence, 29 Hofstra L. Rev. 547, 585 (2000) (describing "mantra of punitive reformers" as "adult time for adult crime").

Iowa's provision reads, in pertinent part:

Violations by a child, aged sixteen or older, . . . which constitute a forcible felony are excluded from the jurisdiction of the juvenile court and shall be prosecuted as otherwise provided by law unless the district court transfers jurisdiction of the child to the juvenile court upon motion and for good cause pursuant to section 803.6.

I.C.A. § 232.8(1)(c).

The district court considered the wording of the provision to be "a clear reflection of the legislature's intent to waive juvenile court jurisdiction over those sixteen and older who are charged with forcible felonies." The court determined section 232.8(1)(c) addressed "the age of the defendant only at the time of the filing of the charge." The court reasoned the statute "makes no exception for those who are alleged to have committed forcible felonies prior to reaching the
age of sixteen.” Following that reasoning, the court concluded Duncan was “not eligible for a reverse waiver” after reaching age eighteen.

Duncan contests the district court’s interpretation, asserting because he is alleged to have committed the sex offenses while he was under the age of sixteen, he is not excluded from the jurisdiction of the juvenile court, even if the offenses are forcible felonies and he is now older than sixteen. Duncan argues the district court’s interpretation is inconsistent with Stuart v. State ex rel. Jannings, 253 N.W.2d 910, 913 (1977), where the Iowa Supreme Court decided the phrase “under 18 years of age” in a previous version of the juvenile code referred to “the age of the accused person at the time of the alleged offense.”

We find Duncan’s reading of the section 232.8(1)(c) more accurately reflects its plain language. “We do not search for meaning beyond the express terms of a statute when the statute is plain and its meaning is clear.” State v. Albrecht, 657 N.W.2d 474, 479 (Iowa 2003).

Section 232.8(1)(a) sets out the ordinary jurisdiction of the juvenile court:

The juvenile court has exclusive original jurisdiction in proceedings concerning a child who is alleged to have committed a delinquent act unless otherwise provided by law, and has exclusive original jurisdiction in proceedings concerning an adult who is alleged to have committed a delinquent act prior to having become an adult, and who has been transferred to the jurisdiction of the juvenile court pursuant to an order under section 803.5.

Section 803.5(1) provides for the transfer of the jurisdiction of an adult who is alleged to have committed a criminal offense before reaching the age of eighteen, provided the juvenile court has not already waived its jurisdiction.
Sections 232.8(1)(b) and 232.8(1)(c) both address "violations by a child" which fall outside the "exclusive original jurisdiction" of the juvenile court. Subsection (1)(b) exempts relatively minor violations—including traffic, tobacco, hunting, and curfews—from the jurisdiction of the juvenile court, handling them instead as simple misdemeanors. Subsection (1)(c) excludes from juvenile court jurisdiction more serious violations "by a child, aged sixteen or older" unless the district court transfers jurisdiction back to juvenile court for good cause.

The district court misinterpreted the wording of section 232.8(1)(c). When read in context, the phrase "a child, aged sixteen or older" refers to the child's age at the time of the violation, not at the time of charging—otherwise the word "child" would have no meaning. See Iowa Code § 232.2(5) (defining child as a person under eighteen years of age); see also Miller v. Westfield Ins. Co., 606 N.W.2d 301 (Iowa 2000) (presuming legislature included every part of statute for a purpose and intended each part be given effect). Duncan was older than sixteen when he was charged, but he was no longer a child. Section 232.8(1)(c) does not apply to his situation because he allegedly committed acts charged as forcible felonies when he was younger than sixteen.

Our conclusion finds support in supreme court cases interpreting section 232.8(1)(c). The Terry court summarized the purpose of that provision: "Having placed certain designated crimes committed by juveniles who have reached the age of sixteen within the criminal court jurisdiction, the legislature presumably thought the need for adult discipline and legal restraint was necessary in these cases." Terry, 569 N.W.2d at 367; see also State v. Mann, 602 N.W.2d 785, 793
(Iowa 1999) (finding it "reasonable for the legislature to consider that while some juveniles, because of their age, should have sufficient maturity to be held responsible for their acts, younger juveniles would ordinarily not have the same level of maturity and thus should not suffer the same consequences for their acts"). Because Duncan had not reached the age of sixteen when he allegedly committed the sexual assaults, he is not subject to the reverse waiver procedure under section 232.8(1)(c).

Duncan's case begins in criminal court by virtue of the fact he was an adult when the allegations arose. See Iowa Code §§ 232.8(1)(a), 803.5(1). He may be transferred to juvenile court for adjudication and disposition as a juvenile if—after a transfer hearing—the district court determines probable cause exists to believe Duncan committed an offense while still a juvenile and trying his case in criminal court would be inappropriate under the criteria set forth in sections 232.45(6)(c)² and (8)³, "if the adult were still a child." See Iowa Code § 803.5(5).

² This subsection provides the court may have jurisdiction if:
   The court determines that the state has established that there are not reasonable prospects for rehabilitating the child if the juvenile court retains jurisdiction over the child and the child is adjudicated to have committed the delinquent act, and that waiver of the court's jurisdiction over the child for the alleged commission of the public offense would be in the best interests of the child and the community.

³ This subsection states:
   In making the determination required by subsection 6, paragraph "c", the factors which the court shall consider include but are not limited to the following: a. The nature of the alleged delinquent act and the circumstances under which it was committed. b. The nature and extent of the child's prior contacts with juvenile authorities, including past efforts of such authorities to treat and rehabilitate the child and the response to such efforts. c. The programs, facilities and personnel available to the juvenile court for rehabilitation and treatment of the child, and the programs, facilities and personnel which would be available to the court
The State argues even assuming the district court erred in its interpretation of section 232.8(1)(c), "the result would not change" because the district court had discretion to deny Duncan's transfer request. Both the State and Duncan highlight the testimony from the transfer hearing to support their arguments on appeal. Duncan relies on Dr. Rypma's opinion he is a low risk to reoffend and a long prison sentence is not appropriate given emerging research on juvenile development. The State emphasizes the view of Juvenile Court Officer Henson that there exist no viable options for Duncan's rehabilitation in the juvenile system given his current age.\(^4\)

While the parties did make a record concerning the appropriateness of a transfer to juvenile court, the district court did not exercise its discretion to determine how the evidence fit with the factors outlined in section 232.45.\(^5\) We find it necessary to remand the question of transfer so the district court may consider those factors weighing for and against proceeding in juvenile court. See State v. Rubino, 602 N.W.2d 558, 562 (Iowa 1999). We do not suggest how the district court should rule after considering the evidence before it. We also do not foreclose the possibility the parties may ask the district court to reopen the record.

\(^4\) We note Henson erroneously believed Duncan did not qualify for juvenile court services because he was "18 months past his 18" birthday." The juvenile code provides: "In the case of an adult within jurisdiction of the court under the provisions of 232.8, subsection (1), the dispositional order shall automatically terminate one year and six months after the last date upon which jurisdiction could attach." Iowa Code § 232.53(2).

\(^5\) In the order denying Duncan's rule 1.904(2) motion, the district court stated: "To grant Defendant's reverse waiver application upon any of the arguments raised by defendant would be to deny justice in this case." We find this sentence too cryptic to qualify as "written findings as to its reasons" as required by sections 232.45(10) and 803.5(5).
for the presentation of any additional evidence on the appropriateness of a transfer, given the passage of time since the February 2012 hearing.

B. Did The District Court Err By Allowing Duncan To Face Adult Criminal Charges For Offenses He Allegedly Committed While He Was Under The Age Of Fourteen?

In his second issue, Duncan contends the district court has no choice but to transfer nineteen of the forty-one counts in the trial information to the juvenile court because Duncan cannot be tried in adult court for offenses he allegedly committed while he was twelve and thirteen years old. His argument rests on Iowa Code section 232.45(6)(a), as well as common law and "recent research into the behavior and culpability of young offenders."

We again start with the State's error preservation claim. The State asserts Duncan did not receive a ruling from the district court on this issue and also contends Duncan has modified his argument since filing the application for discretionary review—shifting from a common law approach to a statutory challenge. Duncan points to his legal arguments offered before the district court's ruling denying transfer and revisited in his motion to enlarge findings. He argues in the alternative that any failure to preserve error may be attributed to ineffective assistance of trial counsel.⁶

We find Duncan preserved error by urging the district court to recognize the existence of "a legal presumption that persons between the ages of seven and fourteen are incapable of committing any crime." The district court found the

⁶ Because we find Duncan preserved error, we do not need to address his ineffective assistance argument.
arguments in Duncan's motion to enlarge had been previously made and rejected by the court. Duncan did not need to secure a more specific ruling. See Lamasters v. State, 821 N.W.2d 856, 865 (Iowa 2012) (rejecting error preservation claim where district court summarized applicant's arguments before denying application in its entirety). We also believe Duncan's application for discretionary review adequately raised a statutory argument by quoting the portion of State v. Bruegger, 773 N.W.2d 862, 885 (Iowa 2009), which discussed Iowa Code section 232.45(6)(a).

Turning to the merits of Duncan's argument, we begin with his reliance on that passage from Bruegger. In analyzing a question of cruel-and-unusual punishment, the majority of our supreme court offered the following dicta:

We also note that the legislative policy regarding juvenile offenders is not entirely clear or consistent. In Iowa, a person who is under fourteen years of age cannot be tried as an adult in criminal court. Iowa Code § 232.45(6)(a). This limitation appears to be a recognition that persons under fourteen should not be criminally culpable for their acts.

Bruegger, 773 N.W.2d at 885.

Duncan also points to dicta from Shearer v. Perry Community School Dist., 236 N.W.2d 688, 697 (Iowa 1975) overruled by Miller v. Boone County Hosp., 394 N.W.2d 776 (Iowa 1986), where a dissenting Justice Reynoldson discussed the capacity of children in the context of tort law, noting: "The common law presumption that children under age 14 were incapable of committing any crime, State v. Fowler, 52 Iowa 103, 106, 2 N.W. 983, 986 (1879), has resolved into those protections codified in chapter 232, The Code."
After discussing Fowler, Shearer, and Bruegger, Duncan asserts “the Iowa Code appears to prohibit the criminal prosecution of a child under the age of 14 years” and cites section 232.45(6)(a).

That provision appears in a section of the juvenile code entitled “Waiver hearing and waiver of jurisdiction.” Iowa Code § 232.45. The waiver section opens as follows:

After the filing of a petition which alleges that a child has committed a delinquent act on the basis of an alleged commission of a public offense and before an adjudicatory hearing on the merits of the petition is held, the county attorney or the child may file a motion requesting the court to waive its jurisdiction over the child for the alleged commission of the public offense or for the purpose of prosecution of the child as an adult or a youthful offender.

Id. § 232.45(1).

Subsections (2) through (5) discuss the procedure for holding a waiver hearing. Subsection (6) states:

At the conclusion of the waiver hearing the court may waive its jurisdiction over the child for the alleged commission of the public offense for the purpose of prosecution of the child as an adult if all of the following apply:

a. The child is fourteen years of age or older.
b. The court determines . . . that there is probable cause to believe the child has committed a delinquent act which would constitute the public offense.
c. The court determines . . . there are not reasonable prospects for rehabilitating the child if the juvenile court retains jurisdiction . . . .

The State argues this statute requires only that the child be fourteen years of age or older at the time of the waiver hearing, and does not prohibit transfer to adult criminal court for acts allegedly committed before the child reached the age
of fourteen. Under this theory, a child who committed delinquent acts when he was twelve could not be transferred to adult court if the waiver hearing occurred when he was thirteen years, 364 days old, but could be transferred to adult court if the waiver hearing were held one day later. We are skeptical the legislature would hinge the waiver requirement on the vagaries of court scheduling.

Faced with the parties' dueling interpretations of section 232.45(6)(a), we must determine if that provision is ambiguous. When the wording of a statute is ambiguous, we apply the rules of statutory construction. *In re G.J.A.*, 547 N.W.2d 3, 6 (Iowa 1996). An ambiguity exists "if reasonable minds may differ or be uncertain as to the meaning of the statute." *Id.* Ambiguities may arise in different ways, either from the specific language used in a statute or from the context of the provision when read with related statutes. *See State v. Iowa Dist. Ct.*, 828 N.W.2d 607, 612 (Iowa 2013). We conclude the meaning of section 232.45(6)(a) is ambiguous and requires court construction. *See id.*

In construing ambiguous statutes, we look to the object to be accomplished, the evils to be remedied, and the purpose for which the legislature enacted the statute. *G.J.A.*, 547 N.W.2d at 6. Chapter 232 opens with its own

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7 The State claims its interpretation is bolstered by the youthful offender provision at section 232.45(7). At the time of the transfer hearing, subsection (7)(a) stated:

At the conclusion of the waiver hearing and after considering the best interests of the child and the best interests of the community the court may, in order that the child may be prosecuted as a youthful offender, waive its jurisdiction over the child if all of the following apply: (1) the child is fifteen years of age or younger.

Iowa Code section 223.45(7) (2011). In 2013, the legislature amended the first criteria to say "(1) The child is twelve through fifteen years of age or the child is ten or eleven years of age and has been charged with a public offense that would be classified as a class 'A' felony if committed by an adult." Iowa Code section 223.45(7) (2013). We do not find that the ages specified in the youthful offender statute support the State's position.
rule of construction, announcing the juvenile justice chapter "shall be liberally construed" to best serve the welfare of the children under its jurisdiction, as well as the good of the public. Iowa Code § 232.1.

We also take into account legislative history. See Iowa Code § 4.6(3); Iowa Dental Ass'n v. Iowa Ins. Div., 831 N.W.2d 138, 146 (Iowa 2013). Before Iowa adopted its juvenile code, courts and prosecutors followed a common law tradition of presuming persons between the ages of seven and fourteen years were incapable of committing any crime. Fowler, 2 N.W. at 986; see also State v. Null, 836 N.W.2d 41, 53 (Iowa 2013) (listing examples of areas of law which reflect differences between youth and adults including buying alcohol, buying cigarettes, forming contracts, consent to health decisions, voting, marriage, jury duty, and driving privileges).

Iowa first adopted a juvenile court system in 1904. See 30 G.A. ch. 11; State v. Halverson, 192 N.W.2d 765, 766 (Iowa 1971). Iowa’s juvenile code underwent a complete revision in 1965, and more minor revisions in 1967. See Halverson, 192 N.W.2d at 766–67. The 1967 amendments were discussed in Halverson:

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8 Fourteen years marks a coming-of-age milestone in many legislative pronouncements. See, e.g., Iowa Code § 92.3 (limiting employment of persons under fourteen); § 142C.3(1)(a)(3) (decision about organ donation); § 232.22(3)(c)(1)(a) (detention placement in adult facility); § 321.177 (driving instruction permits); § 600.7(1)(d) (consent to adoption); § 692A.103 (registration as sex offender required if fourteen years of age or older at the time offense was committed); § 702.5 (defining child for purposes of criminal law as person under the age of fourteen years) §§ 709.1(3), 709.4(1)(b)(3) (age of consent for sex acts).
Another section, evidently enacted specifically to comply with \textit{[Kent v. United States, 383 U.S. 541 (1966)\textsuperscript{[9]}]}, dealt with transfer of children by the juvenile court to criminal court. That section provided (and still provides in \textit{[section] 232.72, Code, 1971}):

> When a petition alleging delinquency is based on an alleged act committed after the minor's fourteenth (14th) birthday, and the court, after a hearing, deems it contrary to the best interest of the minor or the public to retain jurisdiction, the court may enter an order making such findings and referring the alleged violation to the appropriate prosecuting authority for proper action under the criminal law.

Id. at 767 (Emphasis added). This iteration of the statute makes clear the legislature was concerned about the child's age at the time of alleged commission of the act, not at the time of the waiver decision.

The legislature reorganized the juvenile code again in 1978. 1978 Iowa Acts ch. 1088; \textit{see Iowa Dist. Ct., 828 N.W.2d at 622}. Section 232.45(6)(a) was part of a new section addressing waiver from juvenile court for adult criminal proceedings. 1978 Iowa Acts ch. 1088, sec. 25(6). Although the new section explaining the waiver process is entirely reworded starting in the 1979 code, we do not find any indication in the revised formulation that the legislature suddenly intended the age-fourteen-or-older requirement refer to the child's age at the time of the waiver hearing rather than when the alleged act was committed. "Mere differences in words between old and new versions of the statute do not create an inference of intent to change the rule." \textit{See Beier Glass Co. v. Brundige, 329 N.W.2d 280, 285 (Iowa 1983)} (presuming the legislature knew the existing state

\textsuperscript{9} \textit{Kent} involved an ex parte order by a juvenile court authorizing criminal charges to be filed against a child. The United States Supreme Court emphasized the critical nature of transfer proceedings and held, among other things, that a hearing on the question of transfer is essential. 383 U.S. at 560.
of the law, including judicial decisions, and intended to use those meanings absent a contrary indication in the context).

Consistent with our reading of section 232.8(1)(c) in the first issue, we believe the phrase "fourteen years of age or older" in section 232.45(6)(a) refers to the child's age at the time of the commission of the offense and not the time of the hearing. See generally Stuart, 253 N.W.2d at 914–15 (interpreting prior version of chapter 232 and holding person's age at time of an alleged act is decisive, not his age when correlative proceedings are commenced).

But our adoption of Duncan's construction of section 232.45(6)(a) does not end the analysis. Because Duncan is no longer a child, he is not subject to a waiver proceeding under section 232.45(6). Accordingly, the State commenced its prosecution of Duncan in criminal court. Because Duncan is an adult who is alleged to have committed a criminal offense before having reached the age of eighteen, he sought transfer of jurisdiction to juvenile court under section 803.5(1). Under section 803.5(5), the district court may waive Duncan to juvenile court, if the court determines "there is probable cause to believe [he] committed an offense while still a juvenile" and "waiver to the criminal court would be inappropriate" under the criteria set forth in section 232.45(6)(c) and 232.45(8), "if [Duncan] were still a child." Thus, the reverse waiver provision of section 803.5(5)—like the traditional waiver provision of section 232.45(6)—contains a probable-cause requirement, as well as prospects-for-rehabilitation and best-interests requirements. But section 803.5(5) doesn't cross reference section
232.45(6)(a)—which requires a child be fourteen years of age or older for purposes of waiver.

In the State's view, no mention of the fourteen-year-old cutoff means the legislature did not intend to place any lower limit on the age of children alleged to have committed an offense who could then be prosecuted in criminal court once they reach adulthood. For instance, conceivably a ten-year-old child who commits a sex act with another ten-year-old child\(^\text{10}\) could be charged with sexual abuse as an adult, ten or more years later,\(^\text{11}\) and have that delinquent act tried as a criminal offense in adult court.

We decline to give section 803.5(5) that construction. See State v. McGuire, 200 N.W.2d 832, 833 (Iowa 1972) (avoiding statutory construction that leads to absurd results). It is likely the legislature did not expressly cross reference section 232.45(6)(a) when drafting section 803.5(5) because it presupposed the floor for criminal culpability was set at age fourteen. The waiver provisions in chapter 232 and chapter 803 must be read in pari materia to produce a coherent whole. Cf. State v. Nail, 743 N.W.2d 535, 541 (Iowa 2007) (interpreting a civil penalty statute). Under section 803.5(5), the district court may transfer an adult back to juvenile court if the criteria set forth in section 232.45 signals the inappropriateness of trying the offenses in criminal court. But

\(^{10}\) One definition of sexual abuse under our criminal code is a sex act performed with a child. Iowa Code § 709.1(3). The criminal code defines a child as a person under the age of fourteen. Id. § 702.5.

\(^{11}\) The limitation on bringing sexual abuse charges at Iowa Code section 802.2(1) allows the State to file an indictment or information for sexual abuse committed on or with a person who is under the age of eighteen years within ten years after the person upon whom the offense is committed attains eighteen years of age—or in our scenario above, as long as eighteen years after the commission of the sex act.
no such discretion exists for offenses committed when the adult was younger than fourteen. See Iowa Code § 232.45(6)(a). Those offenses cannot be tried in criminal court, no matter the current age of the alleged offender.

To recap, we find the May 1, 2012 ruling misinterprets the juvenile code provisions governing transfer of jurisdiction. We remand this case with two directions for the district court. First, because we hold Duncan cannot be tried in criminal court for offenses allegedly committed when he was younger than fourteen, we direct the court to transfer counts one through nineteen of the trial information to the juvenile court for adjudication. Second, because we conclude Duncan is eligible for waiver to the juvenile court on counts twenty through forty-one of the trial information, we direct the court to exercise its discretion under section 803.5(5) to transfer jurisdiction of those counts if “the court determines that there is probable cause to believe that [Duncan] committed an offense while still a juvenile, and waiver to the criminal court would be inappropriate under the criteria set forth in section 232.45(6), paragraph ‘c’, and section 232.45, subsection 8, if [Duncan] were still a child.” We leave open the possibility one or both parties may ask the district court to reopen the hearing record for the presentation of additional evidence. We do not retain jurisdiction.

REVERSED AND REMANDED WITH DIRECTIONS.
IN THE IOWA DISTRICT COURT FOR COUNTY

STATE OF IOWA )
   Plaintiff ) No. FECR

vs. )

J T D ) MOTION FOR RULING ON POINT OF

Defendant ) LAW CONCERNING APPLICABILITY

) OF SECTION 232.8(3)(a) TO THIS

CASE

Comes now the Defendant, J T D, by and through the undersigned attorney, and files this motion, requesting the court to answer the following question: "If the Defendant is convicted of one or more counts of Sexual Abuse 2nd, as charged in the amended trial information, would he be eligible for a suspended sentence and/or deferred judgment under Iowa Code Section 232.8(3)(a), and the appellate opinions interpreting said statute?"

In support of said motion, Defendant states as follows:

1. This motion is filed under Rule 2.11(2) of the Iowa Rules of Criminal Procedure, which provides that "Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion."

2. The question raised is fundamental to the strategic decisions facing the defendant as he prepares for trial. If he is ineligible for a suspended sentence or deferred judgment, the consequences of conviction of even one forcible felony would be 25 years in prison with a mandatory 70% to serve prior to parole eligibility. If Section 232.8(3)(a) gives the District Court authority to suspend such sentence, and/or to grant Defendant a deferred judgment, then the consequences of a conviction are much different. Defendant is entitled to know the range of sentence prior to entry of a guilty plea. He cannot intelligently exercise this right without knowing whether he faces a mandatory minimum 17+ years in prison if he is convicted. Likewise, Defendant is entitled to effective assistance of counsel. Given the unclear nature of this important statute, counsel is unable to provide the advice necessary to allow Defendant to intelligently exercise his options, including the decision of whether to accept any plea offer that might be made in the case, or to go to trial.
3. The Iowa Court of Appeals recently summarized the importance of advising a defendant of the maximum possible punishment for his offense, as a prerequisite to a knowing and voluntary plea. In *Smith v. State*, 791 N.W.2d 712, 2010 Iowa App. LEXIS 1689 (Iowa Ct. App. 2010), the court held:

"Before accepting a guilty plea, the court must inform the defendant of the maximum possible punishment for the offense. Iowa R. Crim. P. 2.8(2)(b)(2)."

4. Early in the procedural history of this case, Defendant entered a guilty plea to an amended charge (Class C Felony, Sexual Abuse 3rd), which plea was later set aside on Defendant’s motion in arrest of judgment. The plea colloquy demonstrates that neither of the attorneys was clear about whether defendant’s sentence could be suspended, or whether he was eligible for a deferred judgment. It appears from the record made at the plea colloquy, that prior to the plea proceeding, defendant had the belief that he would be eligible for a suspended sentence, and that it was represented to him for the first time at the plea proceeding that he was ineligible for this remedy. Ultimately, this uncertainty led the Defendant to file a motion in arrest of judgment.

5. The following portions of the record support this conclusion. First, at page 3, Mr. Wilson stated that his recommendation would be a term of incarceration of ten years, "and Ms. Chambers is free to argue whatever sentence she believes is appropriate, Your Honor." This suggests that there was discussion prior to the plea that Defendant might be eligible for a lesser sentence than that recommended by Mr. Wilson. Second, it is apparent that Mr. D’s attorney came into the plea proceeding under the impression that the Defendant was going to be eligible for a suspended sentence, and even possibly a deferred sentence. When the Court announced that, because the offense to which the Defendant was entering his guilty plea is a forcible felony, the Defendant would *not* be eligible for a suspended sentence, Mr. D’s attorney stated, "Your Honor, I believe under this code section don’t we have the possibility of a suspended and a—the possibility of a suspended and deferred sentence?" See transcript page 10. Subsequently, an off the record meeting, at the suggestion of the Court, was apparently held between counsel and the state at which time a discussion about whether a factual basis for a
plea under Section 709.4(2)(c) appears to have been held [this section is not a forcible felony when charged under subsection (2)(c)(4) according to the definitions in Section 702.11]. (See page 11 of transcript) After a discussion between the attorneys and the court, the court came back on the record and advised the Defendant, "Where we are then, Mr. D., is I was indicating to you that the amended charge is a class C forcible felony which carries a mandatory prison sentence of a term not to exceed ten years. Is there a fine on these? MR. WILSON: Yes. THE COURT: $1,000. MS. CHAMBERS: $10,000 maximum, $1,000 minimum. THE COURT: The fine would be suspensible, but the prison sentence would not be. [emphasis added] Do you understand that that is what the penalty is for this offense if you plead guilty?" (See page 12 of transcript)

6. J faces 41 Class B felony charges in this case. The charges are all brought under Iowa Code Section 709.1(3) and 709.3(2), alleging sexual abuse in the second degree, a class B felony. The essential elements for this offense are: (1) commission of a sex act—here, J is alleged to have forced his younger step-brother to suck on his penis; (2) committed against a child; and (3) the other person is under the age of 12.

7. The allegations that, between January 1, 2004, when J was 12 and his alleged victim RB (his step-brother) was age 8 (DOB 5/19/1995) and May 18, 2007, when J was 15 and his step-brother was 11, J committed 41 sex acts against RB, one time per month, where he allegedly forced RB to suck on his penis.

8. J's age at the time of the alleged offenses was as follows:

<table>
<thead>
<tr>
<th>COUNT</th>
<th>ALLEGED DATES</th>
<th>J'S AGE</th>
<th>AGE OF ALLEGED VICTIM</th>
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<td>I</td>
<td>1/1/2004 to 2/1/2004</td>
<td>12</td>
<td>8</td>
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<tr>
<td>II</td>
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<td>3/1/2004 to 4/1/2004</td>
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<tr>
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<td>5/1/2004 to 6/1/2004</td>
<td>12</td>
<td>8 to 9</td>
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<td>VI</td>
<td>6/1/2004 to 7/1/2004</td>
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<td>7/1/2004 to 8/1/2004</td>
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<td>XXVI</td>
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<td>XXXII</td>
<td>8/1/2006 to 9/1/2006</td>
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9. Based on these charges, under Iowa law, without the potential protection of Iowa Code Section 232.8(3)(a), if J is prosecuted as an adult, and if he is found guilty of all charges, he would face a maximum sentence of 25 years for each offense times 42 offenses, for a total of 1025 years in prison.

10. Iowa Code Section 702.11 defines this particular offense as a forcible felony. The consequence of that classification, under the sentencing provisions of Iowa Code Section 907.3, is that, if convicted, J would be ineligible for a deferred judgment, suspended sentence, or probation. The court would have no choice but to sentence him to a 25-year term of incarceration in adult prison. Again, this assumes that Section 232.8(3)(a) does not apply to J.

11. Finally, under Chapter 903B of the Iowa Code, the Sex Offender Special Sentencing provisions, if J were to be paroled at the age of 37 or later, he would be supervised by the State for the rest of his life under the special
sentencing provisions of Section 903B.1. J' would also risk the requirement for hormonal intervention therapy as a precondition to his release on parole, as set forth in Iowa Code Section 903B.10. He could avoid all of this, potentially, if the deferred judgment option of Section 232.8 is available to him at sentencing.

12. Section 232.8(3) states in relevant part:

"3. a. The juvenile court, after a hearing and in accordance with the provisions of section 232.45, may waive jurisdiction of a child alleged to have committed a public offense so that the child may be prosecuted as an adult or youthful offender for such offense in another court. If the child, except a child being prosecuted as a youthful offender, pleads guilty or is found guilty of a public offense other than a class "A" felony in another court of this state, that court may suspend the sentence or, with the consent of the child, defer judgment and without regard to restrictions placed upon deferred judgments for adults, place the child on probation for a period of not less than one year upon such conditions as it may require. Upon fulfillment of the conditions of probation, a child who receives a deferred judgment shall be discharged without entry of judgment."

Thus, a very clear exception exists to the mandatory sentencing provisions of Section 907.3 for child offenders. The question in this case is whether J qualifies as a "child" for the purpose of this statute.

13. In *State v. Greiman*, 344 N.W.2d 249 (1984), the defendant was convicted of first degree kidnapping and attempted murder. Greiman was 16 at the time of the offenses. The trial court refused to give Greiman the benefit of Section 232.8(3), choosing instead to sentence him as an adult to the mandatory prison sentence required for this conviction. The case was affirmed because the Supreme Court agreed with the State's argument, that "while the court may defer judgment, it is not required to do so." Greiman, 344 N.W.2d at 253.

14. In *State v. Edgington*, 601 N.W.2d 31, 32 (Iowa 1999), the Iowa Supreme Court again addressed this issue. It held: "With respect to juveniles fourteen years of age or older, the juvenile court has the authority to waive jurisdiction so that a child may be prosecuted as an adult. Iowa Code Sections 232.8(3), 232.45. When jurisdiction has been waived and the child has been
prosecuted as an adult, the district court may grant a deferred judgment even if the offense otherwise carries a mandatory prison sentence." The question then is whether the same rule applies to an adult who is facing forcible felony charges, where he was under age 16 at the time of the alleged offenses.

15. That question appears to be answered in *State v. Wahlert*, 379 N.W.2d 10 (Iowa 1985). The defendant, Wahlert, was convicted of first-degree robbery and terrorism on his guilty plea, and was sentenced to a term not to exceed twenty-five years. After defendant appealed, the State moved for a remand and resentencing "because defendant's counsel had not advised the court that defendant was a minor when the crimes were committed, hence imprisonment was not mandatory. Iowa Code Section 232.8(3)" *State v. Wahlert*, 379 N.W.2d at 11. The Supreme Court granted the motion to remand and dismissed the appeal. "Upon remand the district court, in light of Iowa Code subsection 232.8(3) and recommendations of prison counselors, deferred judgment... and placed defendant on probation for five years." *State v. Wahlert*, 379 N.W.2d at 11. It appears that in *Wahlert*, the Defendant was prosecuted as an adult, and there was no effort to transfer his case back to juvenile court. Yet, notwithstanding the first paragraph of Section 232.8(3), which refers to cases transferred from juvenile court to district court, the Supreme Court gave Wahlert the benefit of this sentencing exception. The law was applied to him solely because he was a minor when the crimes were committed.

16. Defendant contends that, to apply Section 232.8(3) to child offenders who are charged while they are still under age 18, but to refuse to apply the same protections to child offenders prosecuted after they turn 18, would violate fundamental constitutional principles. The arguments that follow summarize these constitutional principles:

a. **Juveniles are different.** The U.S. Supreme Court has held that the "fundamental differences between juvenile and adult minds" and the concomitant diminished culpability require additional constitutional protections for juvenile offenders. *Roper v. Simmons*, 543 U.S. 551, 572-73
Thus, the right to different treatment for young offenders is a constitutionally protected right.

b. Cruel and unusual punishment. Prosecution of J as an adult for crimes allegedly committed as a juvenile is unconstitutional generally, and unconstitutional as applied to J in these cases in particular. To impose incarceration of more than 17 years and as much as 1050 years for offenses committed by a child that did not result in any physical injury to any person, constitutes "cruel and unusual punishment" under both the U.S. Constitution's 8th Amendment, and Article 1, Section 17 of the Iowa Constitution.

c. Due process. Given the fact that a prosecution begun at the time of the first alleged offense would have clearly entitled J to the protections of Code Section 232.8(3), it is a violation of J's due process rights under the 5th and 14th Amendments to the U.S. Constitution and Article 1, Section 9 of the Iowa Constitution to wait until he becomes an adult and then deprive him of this important sentencing provision designed to recognize the difference in juvenile offenders.

d. Equal Protection. The 14th Amendment's Equal Protection clause states that no State shall deny to any person within its jurisdiction the equal protection of the laws. Here, if Section 232.8 sentencing options are not available to J, J would be subjected to disparate treatment from others similarly situated with no rational basis for the government policy creating such disparate treatment. The two groups of persons relevant to this analysis are juvenile offenders who are prosecuted while they are still juveniles, who have the protection of this sentencing statute, and juvenile offenders who are not prosecuted until they become adults, who (theoretically) lose out on all of the benefits of juvenile court prosecution. There is simply no rational basis to support such disparate outcomes as those presented by this case when the only difference in the two groups is the timing of the prosecution.
Wherefore, Defendant moves this court for an order clarifying whether the sentencing options provided by Iowa Code Section 232.8(3) are available to the Defendant in this case.

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DES MOINES OFFICE: 1300 DES MOINES STREET, SUITE 204
[FOR APPOINTMENTS ONLY]
TEL: 515.423.9244

COPY TO:

County Attorney

Certificate of Service

The undersigned certifies that a true copy of the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings by _____ U.S. Mail; or _ Fax; or _____ Hand delivery on this the __________ day of __________________ 2012.
The following legal argument is submitted by the Defendant in support of the pending Motion for Ruling on Point of Law Concerning Applicability of Section 232.8(3)(a). Said motion was filed on or about June 18, 2012, and due to the stay that was ordered in July 2012, said motion is still pending.

I. ISSUE: If J. D. is convicted of one or more counts of Sexual Abuse 2nd, Class B Forcible Felony, as charged in the amended trial information, would he be eligible for a suspended sentence and/or deferred judgment under Iowa Code Section 232.8(3)(a)?

A. Counts 1-19. These charges are alleged to have occurred between January 1, 2004 (when J. was age 12) and the date of his 14th birthday. The Court of Appeals held that these charges cannot be prosecuted in district court, and the district court has now, pursuant to the order of the Court of Appeals, transferred Counts 1 through 19 to the juvenile court. Because these counts are now in juvenile court, Defendant's motion in district court is moot with respect to these counts.
B. Counts 20-41. These charges are alleged to have occurred between August 1, 2005, when D was age 14 years, and May 18, 2007, when D was age 15 years, ten months.

1. Background.
   a. Relevance of issue to reverse waiver decision.

   Pursuant to the D Appellate Decision, "D is eligible for waiver to the juvenile court on counts twenty through forty-one of the trial information," and the district court has been directed "to exercise its discretion under section 803.5(5) to transfer jurisdiction of those counts if the court determines that there is probable cause to believe that D committed an offense while still a juvenile, and waiver to the criminal court would be inappropriate under the criteria set forth in section 232.45(6), paragraph 'c', and Section 232.45, subsection 8, if D were still a child."

   The question raised by this motion is directly relevant to the court's determination at the reverse waiver hearing. If the court denies the application for reverse waiver to juvenile court, what range of punishment will D face if convicted? This question must be answered before the court can make an informed decision as to whether prosecution of the charges in adult court would be inappropriate. "Under section 803.5(5), the district court may transfer an adult back to juvenile court if the criteria set forth in section 232.45 signals the inappropriateness of trying the offenses in criminal court." D Appellate Decision, p. 18.

   The range of sentence available to the court is an important factor in determining whether prosecuting D as an adult would be appropriate. If the charges are prosecuted in district court and the
suspended sentence and deferred judgment options under section 232.8(3) are not available to the court, then D will face a mandatory 25-year prison sentence on each count, and will be required to serve 70 percent of that sentence prior to parole eligibility. Such a result would strongly support transfer of the charges to juvenile court, to avoid mandatory imposition of a harsh and unjust sentence on D for crimes committed by him as a child under age 16.

b. Relevance of issue to counsel’s ability to provide effective representation.

In any criminal case, before counsel can advise the client of the risks and benefits of proceeding to trial, counsel must have a clear understanding of the range of punishment that the defendant will face if convicted. If, on the one hand, a convicted defendant faces a mandatory 25-year term with a 70 percent minimum to serve before parole eligibility, then the defendant would be well advised to seriously consider any plea offer (such as a charge reduction) that would eliminate the mandatory prison term. On the other hand, if counsel knows that, even if convicted, the defendant will be eligible for a deferred judgment and/or a suspended sentence and probation, then the advice to the client would be very different.

Without a ruling on this critical issue, counsel will be unable to effectively represent the defendant in the critical phase of the consideration of potential plea options. The Sixth Amendment right to effective assistance of counsel extends to the consideration of plea offers. Missouri v. Frye, 566 U.S. ___ (2012). That right applies to "all 'critical' stages of the criminal proceedings." Montejo v. Louisiana, 556 U.S. 778, 786. Hill v. Lockhart, 474 U. S. 52, established that Strickland's two-part test governs ineffective-assistance claims in the
plea bargain context. In *Padilla v. Kentucky*, 559 U. S. __, where a plea offer was set aside because counsel had misinformed the defendant of its immigration consequences, the U.S. Supreme Court made clear that "the negotiation of a plea bargain is a critical" stage for ineffective-assistance purposes. See *Padilla v. Kentucky*, 559 U. S. __.

2. Review of Legal Authority
   a. Adults convicted of Second Degree Sexual Assault.

      D is charged with Second Degree Sexual Assault under Iowa Code Section 709.1(3) and 709.3(2). This offense is a Class B, forcible felony. Punishment for a Class B felony is prison for up to 25 years, 902.9(2). Section 907.3, which gives the sentencing court discretion to suspend the sentence and/or defer judgment, does not apply to forcible felonies. Therefore, an adult conviction of this forcible felony offense would carry a mandatory prison term of up to 25 years, with no possibility of a suspended sentence or deferred judgment. The "70% rule" under Section 902.12 provides that persons convicted of certain offenses, including sexual abuse in the second degree in violation of section 709.3, shall be denied parole or work release unless the person has served at least seven-tenths of the maximum term of the person's sentence. Thus, for an adult convicted of one count of sexual abuse in the second degree, Iowa law carries a mandatory, non-suspendible, sentencing requirement of 25 years in prison with a mandatory minimum to serve of 70% of that time.

   b. Juveniles age 16 to 18 convicted of Second Degree Sexual Assault.

      Two Iowa cases interpreting the applicable provisions of the Iowa Juvenile Code provide a clear answer to the question posed by this motion with respect to persons who commit sexual abuse second degree while they are between the ages of 16 and 18 years old.
Defendants in this category fall under the provisions of Iowa Code Section 232.8(1)(c), which provides that "violations by a child, aged sixteen or older...which constitute a forcible felony are excluded from the jurisdiction of the juvenile court and shall be prosecuted as otherwise provided by law unless the court transfers jurisdiction of the child to the juvenile court upon motion and for good cause. A child over whom jurisdiction has not been transferred to the juvenile court, and who is convicted of a violation excluded from the jurisdiction of the juvenile court under this paragraph, shall be sentenced pursuant to section 124.401B, 902.9, or 903.1."

In Iowa v. Iowa District Court, 616 N.W.2d 575 (2000), the Iowa Supreme Court made clear that unless the district court exercises its discretion to transfer such defendants to juvenile court, such juveniles are subject to the same sentencing provisions as convicted adults. The Court initially stated: "The question to be answered in this case is whether Iowa Code section 232.8(1)(c) (1999) precludes imposition of the mandatory minimum sentence required by Iowa Code sections 902.12 and 903A.2(1)(b)...We hold...that it does not." Iowa v. Iowa District Court, 616 N.W.2d at 5797. The Court later explained: "[S]ection 232.8(1)(c) places jurisdiction in the district court of juveniles age sixteen or older who commit certain specified crimes, including forcible felonies. Unless the court transfers jurisdiction to the juvenile court as allowed by that statute, a juvenile convicted of a violation encompassed in section 232.9(1)(c) 'shall be sentenced pursuant to section 124.401B, 902.9, or 903.1.'" Iowa v. Iowa District Court, 616 N.W.2d at 579.

In State v. Edgington, 601 N.W.2d 31 (Iowa 1999), the court reached the same conclusion in the case of a defendant who committed a class B forcible felony as a 16 year old. In that case, the district court declined to exercise the option under Iowa Code Section
232.8(1)(c) to transfer the case to juvenile court, and therefore, it was required to apply the general sentencing law applicable to adults, including the prohibition on deferred judgment and suspended sentences under Iowa Code Section 907.3. The court held that where jurisdiction of the juvenile court was excluded (age 16-18 year old offenders committing forcible felonies), the district court's refusal to transfer to juvenile court required adult sentencing (as opposed to the case with younger offenders who were not excluded from the jurisdiction of the juvenile court). See Edgington, 601 N.W.2d at 32, where the court concluded: "With respect to juveniles fourteen years of age or older...[w]hen jurisdiction has been waived and the child has been prosecuted as an adult, the district court may grant a deferred judgment even if the offense otherwise carries a mandatory prison sentence. See Iowa Code Section 232.8(3); State v. Greiman, 344 N.W.2d 249, 253 (Iowa 1984)."

c. Minors age 14 to 16 convicted of Second Degree Sexual Assault.

Section 232.8(3) states in relevant part:

"3. a. The juvenile court, after a hearing and in accordance with the provisions of section 232.45, may waive jurisdiction of a child alleged to have committed a public offense so that the child may be prosecuted as an adult or youthful offender for such offense in another court. If the child, except a child being prosecuted as a youthful offender, pleads guilty or is found guilty of a public offense other than a class "A" felony in another court of this state, that court may suspend the sentence or, with the consent of the child, defer judgment and without regard to restrictions placed upon deferred judgments for adults, place the child on probation for a period of not less than one year upon such conditions as it may require. Upon fulfillment of the conditions of probation, a child who receives a deferred judgment shall be discharged without entry of judgment."
On its face, this statute applies to the situation where a child commits a crime and the juvenile court waives jurisdiction of the child to adult court. This might happen with respect to a child age 16 to 18 charged with an offense not excluded from the jurisdiction of the juvenile court (for example, a class D non forcible felony). It might also apply to a child, age 14 to 16 who commits any non Class A felony offense. Juvenile offenders in these categories are prosecuted in one of two ways. Either they are prosecuted in juvenile court or they are waived to adult court. When they are waived to adult court, they are entitle to the special sentencing provision of Section 232.8(3)(c), meaning that they are eligible for suspended sentences and deferred judgment, even where those sentencing options would be unavailable to adult offenders.

The situation presented by D is only slightly different from the above scenario, and, Defendant contends, the difference is not material to the outcome. Had J D’s prosecution begun when he was still under age 18, then the “reverse waiver” provisions of section 232.8(1)(a), would not have been triggered. His case would have begun in juvenile court and any transfer to district court for prosecution as an adult, would have been done in connection with a Section 232.45 waiver hearing, as contemplated by section 232.8(3)(a). The options in that case would have been (a) leave the case in the juvenile court for prosecution; or (b) waive D to adult court. In accordance with section 232.8(3)(a), had this occurred, upon conviction the district court would have had the option to suspend the sentence or defer the judgment, without regard to the limitations on those sentencing options for adult offenders.

But in this case, D’s case started in district court. This was not because he was excluded from the jurisdiction of the juvenile court (as with forcible felony offenders age 16 to 18). To the contrary,
section 232.8(1)(a) gives the juvenile court exclusive original jurisdiction in proceedings concerning a child who is alleged to have committed a delinquent act unless otherwise provided by law, and the juvenile court "has exclusive original jurisdiction in proceedings concerning an adult who is alleged to have committed a delinquent act prior to having become an adult, and who has been transferred to the jurisdiction of the juvenile court pursuant to an order under section 803.5." Section 232.8(1)(a).

In this case, D's charges started in district court only because he was an adult when the state filed the charges. The procedure for determining whether to try D in juvenile court or in district court is the mirror image of the procedure that the court would have utilized had the prosecution begun while D was still a child. At the waiver hearing, the juvenile court is presented with an offending juvenile and is required to determine whether it should waive its jurisdiction, thereby transferring the prosecution to district court for prosecution. The factors the court is to consider in making such a determination are set forth in section 232.45(6) and (8). At the reverse waiver hearing, the offender's charges are already in the district court, and the court is required to determine whether it should transfer jurisdiction to the juvenile court for prosecution there. The reverse waiver proceeding is governed by section 803.5(5), which provides, "the court may transfer jurisdiction to the juvenile court if the court determines that there is probable cause to believe that the adult committed an offense while still a juvenile, and waiver to the criminal court would be inappropriate under the criteria set forth in section 232.45(6)(c), and section 232.45(8), if the adult were still a child."

When the juvenile offender is prosecuted while a juvenile, the juvenile court is "the decider." When the juvenile offender is
prosecuted after reaching adulthood, the district court is "the
decider." However, in both cases, the juvenile court has "original
jurisdiction," and the factors used to determine the appropriate forum
for prosecution of the charge, are identical.

In *Iowa v. Iowa District Court*, 616 N.W.2d 575 (Iowa 2000), the
Iowa Supreme Court determined, in interpreting the applicability of
Section 232.8, that is was the intent of the legislature "to progressively
increase the punishment of juvenile offenders as they become older."
*Id., at 581, citing State v. Mann*, 602 N.W.2d 785, 793 (Iowa 1999), for
the proposition that the legislature desires "to punish older juveniles
more severely than younger juveniles."

Section 232.8(3)(a) provides that when the juvenile court
waives its jurisdiction over a child, thereby transferring the case to
the district court for prosecution, if the child is convicted the district
court may suspend the sentence or defer judgment. It would make no
sense to have a different rule where the decision to prosecute in the
district court, rather than in juvenile court, was made by the district
court judge rather than the juvenile court judge. Essentially, the only
difference in the two cases is the age of the child at the time of the
prosecution. As the Iowa Court of Appeals stated in the D
Appellate Decision, "we are skeptical the legislature would hinge the
waiver requirement on the vagaries of court scheduling." D

Had D been prosecuted for the alleged Class B felony
charges occurring between his 14th and 16th birthdays while he was
still under age 18, his case would have fallen under the jurisdiction of
the juvenile court under the first clause in Section 232.8(1)(a), and he
would have been subject to potential waiver to adult court under the
provisions of Section 232.45. Had the juvenile court, in such instance,
determined that waiver to adult court was appropriate, D would have fallen directly under the more lenient sentencing provisions of Section 232.8(3)(a), permitting the court to suspend the sentence or defer judgment, "without regard to restrictions placed upon deferred judgments or sentences for adults." In the Appellate Decision, the court pointed out that "the vagaries of court scheduling" cannot be permitted to alter the procedural rights of a defendant. (See Appellate Decision, at p. 13-14, where the court held that a twelve year old who commits a crime is too young to be transferred to adult court, and this does not change if the prosecution occurs after the child reaches the age of 14.) Thus, since D would have been eligible for the more lenient sentencing provision of 232.8(3) had his case been prosecuted prior to his 18th birthday, he cannot lose that right simply because the prosecution began after he became an adult.

The case law summarized in D's original motion for ruling on point of law presents additional persuasive authority for the provision that D should be eligible for the sentencing options afforded under Section 232.8(3)(a), if the district court declines to transfer his case back to juvenile court. See State v. Greiman, 344 N.W.2d 249 (1984); State v. Edgington, 601 N.W.2d 31 (Iowa 1999); and State v. Wahlert, 379 N.W.2d 10 (Iowa 1985).

Finally, the failure to apply section 232.8(3)(a) to permit suspended sentences and deferred judgments for all 14 and 15 year old offenders without regard to the date their prosecutions are begun, would violate the Defendant's constitutional due process and equal protection rights, under both State and Federal constitutional principles.

C.
D. CONCLUSION

Wherefore, Defendant moves this court for an order clarifying whether the sentencing options provided by Iowa Code Section 232.8(3) are available to the Defendant in the event the district court declines to transfer counts 20 through 41 to the juvenile court for prosecution there.

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COPY TO

County Attorney

Certificate of Service

The undersigned certifies that a true copy of the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings by _____ U.S. Mail; or _____ Fax; or ______ Hand delivery on this the ______ day of __________________ 2014.

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