

BEST PRACTICES IN FORENSIC MENTAL HEALTH ASSESSMENT

EVALUATIONS FOR
SENTENCING OF JUVENILES
IN CRIMINAL COURT

ANTOINETTE KAVANAUGH |

THOMAS GRISSO |

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IN CRIMINAL COURT**

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About Best Practices in Forensic Mental Health Assessment

The recent growth of the fields of forensic psychology and forensic psychiatry has created a need for this book series describing best practices in forensic mental health assessment (FMHA). Currently, forensic evaluations are conducted by mental health professionals for a variety of criminal, civil, and juvenile legal questions. The research foundation supporting these assessments has become broader and deeper in recent decades. Consensus has become clearer on the recognition of requirements for ethical and professional conduct. In the larger context of the current emphasis on “empirically supported” assessment and intervention in psychiatry and psychology, the specialization of FMHA has advanced sufficiently to justify a series devoted to best practices. Although this series focuses mainly on evaluations conducted by psychologists and psychiatrists, the fundamentals and principles offered also apply to evaluations conducted by clinical social workers, psychiatric nurses, and other mental health professionals.

This series describes “best practice” as empirically supported (when the relevant research is available), legally relevant, and consistent with applicable ethical and professional standards. Authors of the books in this series identify the approaches that seem best, while incorporating what is practical and acknowledging that best practice represents a goal to which the forensic clinician should aspire, rather than a standard that can always be met. The American Academy of Forensic Psychology assisted the editors in enlisting the consultation of board-certified forensic psychologists specialized in each topic area. Board-certified forensic psychiatrists were also consultants on many of the volumes. Their comments on the manuscripts helped to ensure that the methods described in these volumes represent a generally accepted view of best practice.

The series’ authors were selected for their specific expertise in a particular area. At the broadest level, however, certain general principles apply to all types of forensic evaluations. Rather than repeat those fundamental principles in every volume, the series offers them in the first volume, *Foundations of Forensic Mental Health Assessment*. Reading the first book, followed by a specific topical book, will provide the reader both the general principles that the specific topic shares with all forensic evaluations and those that are particular to the specific assessment question.

The specific topics of the 21 books were selected by the series editors as the most important and oft-considered areas of forensic assessment conducted by mental health professionals and behavioral scientists. Each of the 21 topical books is organized according to a common template. The authors address the applicable legal context, forensic mental health concepts, and empirical foundations and limits in the "Foundation" part of the book. They then describe preparation for the evaluation, data collection, data interpretation, and report writing and testimony in the "Application" part of the book. This creates a fairly uniform approach to considering these areas across different topics. All authors in this series have attempted to be as concise as possible in addressing best practice in their area. In addition, topical volumes feature elements to make them user friendly in actual practice. These elements include boxes that highlight especially important information, relevant case law, best-practice guidelines, and cautions against common pitfalls.

We hope the series will be useful for different groups of individuals. Practicing forensic clinicians will find succinct, current information relevant to their practice. Those who are in training to specialize in FMHA (whether in formal training or in the process of respecialization) should find helpful the combination of broadly applicable considerations presented in the first volume together with the more specific aspects of other volumes in the series. Those who teach and supervise trainees can offer these volumes as a guide for practices to which the trainee can aspire. Researchers and scholars interested in FMHA best practice may find researchable ideas, particularly on topics that have received insufficient research attention to date. Judges and attorneys with questions about FMHA best practice will find these books relevant and concise. Clinical and forensic administrators who run agencies, court clinics, and hospitals in which litigants are assessed may also use some of the books in this series to establish expectancies for evaluations performed by professionals in their agencies.

We also anticipate that the 21 specific books in this series will serve as reference works that help courts and attorneys evaluate the quality of forensic mental health professionals' evaluations. A word of caution is in order, however. These volumes focus on best practice, not what is minimally acceptable legally or ethically. Courts involved in malpractice litigation, or ethics committees or licensure boards considering complaints, should not expect that materials describing best practice easily or necessarily translate into the minimally acceptable professional conduct that is typically at issue in such proceedings.

The idea for the present book was developed following decisions by the U.S. Supreme Court in *Miller v. Alabama* and *Montgomery v. Louisiana*. In those decisions, the Court made it clear that

individuals convicted of offenses occurring prior to age 18 could not receive a sentence of mandatory life without parole. This raised important questions. Would these decisions apply retroactively to those convicted before they were decided? (The short answer is yes. See *Montgomery*.) How would sentencing courts determine the sentence for future individuals convicted? How would courts decide on a new sentence for those originally given mandatory life without parole? These complex questions can be informed by developmentally sensitive FMHA. In the second of two books published in this series following a several-year hiatus, Kavanaugh and Grisso use a developmental lens to describe a new approach to FMHA that is critically important in light of *Miller* and *Montgomery*. This is the first book to offer guidance to forensic mental health examiners when performing evaluations to assist attorneys and judges in *Miller* sentencing and resentencing cases. We expect that it will be extraordinarily helpful to those involved in evaluations and decisions regarding the sentencing or resentencing of individuals convicted of serious crimes committed before the age of 18.

Kirk Heilbrun
Alan Goldstein
Thomas Grisso

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From Dr. Grisso:

I wish to acknowledge and thank my colleagues in the MacArthur Research Network on Adolescent Development and Juvenile Justice for their collaborative work across the years. That work provided much of the science related to adolescents' capacities, competencies, and culpability in legal contexts.

From Dr. Kavanaugh:

I am forever grateful for the support, time, and mental space Lisa and Cooper gave me to accomplish this task. This work is in memory of my grandmother Mildred and my great-aunt Doris, two women who encouraged me to make a space for myself in this world. Finally, I want to recognize that at the time of publication, we are living in a world that vibrates to the words of Dr. Martin Luther King: "A riot is the language of the unheard."

This book is a guide for forensic evaluations in cases in which clinicians are asked to provide information for the sentencing of a juvenile found guilty in criminal court for a crime. The purpose of these assessments is to assist the court in weighing developmental and clinical factors related to mitigation in sentencing for juvenile crimes under criminal law. All states provide for juvenile offenders to be tried in criminal court as adults for certain offenses allegedly committed while they were of juvenile age—in most states, less than age 18. States' laws often allow this for certain serious offenses, either by discretionary transfer by a juvenile court judge or as a statutory mandate (Heilbrun et al., 2017).

A juvenile transferred to criminal court and found guilty is subject to sentencing according to the state's allowable sentences for the crime committed, just as adult defendants are. For some crimes, criminal court sentences for adults are mandatory (e.g., the death penalty or life without parole [LWOP] for certain kinds of homicide convictions). In other circumstances, judges must determine a sentence at their discretion, often within a minimum and maximum time set by law.

When sentences are discretionary, defense attorneys may provide evidence to establish mitigating circumstances for the judge to consider at the time of sentencing. As discussed later in this chapter, for juvenile offenders, courts are constitutionally required to consider potentially mitigating evidence regarding a youth's mental and developmental characteristics that could reduce culpability. When immaturity/maturity is at issue in this context, forensic

clinical examiners may be asked to evaluate the defendant to offer expert opinion on these characteristics of the defendant.

Legal and Forensic Scope of the Book

Until recent years, there was no constitutional requirement that courts consider immaturity as mitigation of culpability in sentencing for juvenile crimes in criminal court. This changed dramatically with a series of U.S. Supreme Court decisions between 2005 and 2016. In these cases, the Court ruled that judges *must* give special consideration to juveniles when sentenced in criminal court in homicide cases. The court prohibited the death penalty for homicide (*Roper v. Simmons*, 2005), prohibited LWOP for non-homicide offenses (*Graham v. Florida*, 2010), prohibited *mandatory* LWOP in juvenile homicide cases (*Miller v. Alabama*, 2012), and applied *Miller* retroactively, requiring resentencing for many persons currently serving LWOP sentences (*Montgomery v. Louisiana*, 2016). The Court ruled that sentencing in homicide cases must consider certain characteristics of youth for potential mitigation when deciding on LWOP and alternative sentences.

This book applies the requirements that the U.S. Supreme Court established in *Miller* and *Montgomery* for considering immaturity as mitigation in criminal court LWOP sentencing for juvenile homicide cases. However, the developmental framework that the Court established, and the general concepts and methods described in this book, are not necessarily limited to *Miller* or *Montgomery* homicide cases. Legal scholars (e.g., Scott et al., 2016) have argued that *Miller* created a constitutional requirement that applies to all juvenile sentencing in criminal court, not only *Miller* cases.

As a consequence, the evaluation concepts and methods described here can be used with youth being sentenced in criminal court for a charge other than homicide. Moreover, some states do not allow LWOP under any circumstances for juveniles charged in criminal court, yet they may still receive very long sentences, some exceeding life expectancy (see “Alternative Sentences” later in this chapter). Therefore, although structured for *Miller* and *Montgomery* evaluations, the concepts, research, and methods in

this book offer a guide for evaluating *any* juvenile charged in criminal court, when information related to developmental mitigation in sentencing is requested.

Evaluations Under *Miller* and *Montgomery*

The U.S. Supreme Court decisions noted earlier have given rise to what are commonly referred to as “*Miller* evaluations.” Broadly construed, a *Miller* evaluation is any forensic evaluation designed to provide legal decision makers with relevant information about the individual sentenced (or to be sentenced) in criminal court for an offense committed as a juvenile, with or without LWOP as an optional sentence. *Miller* evaluations occur in two basic contexts: (a) *Miller sentencing* immediately after adjudication (although sentencing evaluations may occur prior to the adjudication) and (b) *Miller resentencing* as required by *Montgomery*, involving those who have been serving LWOP sentences for past homicides as juveniles. The *Miller* decision and its criteria apply to both types of cases, so this book refers to them collectively as “*Miller* cases,” but with the modifiers “sentencing” or “resentencing” to distinguish them. Much of what courts must consider is similar for both *Miller* sentencing and resentencing cases, but methods and procedures of evaluations for the two will be different in various respects, as will be described throughout this book.

Socio-Legal History

It is helpful to know the socio-legal context of the Court’s recent decisions on sentencing of juveniles in criminal court. Of relevance are the historical relation of the juvenile court to criminal court, as well as events leading to the U.S. Supreme Court’s decisions.

Relation of Juvenile Court to Criminal Court

The juvenile court in the United States began 120 years ago with recognition that youth (then identified as younger than 16 or 17 years of age) were different from adults in their motivations,

capacities, and potential for rehabilitation when they committed illegal acts (Tanenhaus, 2004). Instead of subjecting young offenders to adult penalties, the juvenile court promised to provide rehabilitative opportunities. For very serious felonies, however, exceptions were made when it appeared that the youth had developed criminal attitudes and behavior not likely to change given the juvenile justice system's resources. In such cases, juvenile courts could waive their jurisdiction and transfer the youth to criminal court for trial and potential sentencing as an adult.

In the 1960s, the U.S. Supreme Court (*Kent v. U.S.*, 1966) required that the procedures used in juvenile courts for deciding on transfer to criminal court must satisfy basic requirements of due process and fairness associated with the serious consequences of transfer for juveniles. A year later, in *In re Gault* (1967), the Court affirmed that youth who were arrested and interrogated by law enforcement officers were protected by the right to avoid self-incrimination. Together these two cases ushered in a new era of due process rights for youth in juvenile court. Youth were now to be provided access to legal counsel and hearings that more formally adhered to rules of procedural fairness. As applied to transfer hearings, the state was required to provide evidence related to specific criteria showing that the youth could not be rehabilitated within the juvenile justice system (e.g., dangerousness, sophistication-maturity, and prospects for rehabilitation) (Grisso, 2013; Heilbrun et al., 2017).

During the 1980s and 1990s, the United States experienced a significant increase in serious youthful offending, which contributed to a dramatic increase in the punitiveness of juvenile laws in almost all states in response to youth crime (Grisso, 1996). Most states changed their laws to make transfer to criminal court easier and more frequent. During that time, the number of youths transferred to criminal court increased 64% nationally (Butts & Travis, 2002), exposing many thousands of youth to adult sentences, including the possibility of the death penalty or LWOP.

Recent Juvenile Justice Reform

Early in the 21st century, several factors contributed to a change in public perceptions and attitudes regarding the recent punitive

reform and widespread transfer of youth to criminal court for sentencing. The reasons included (a) a steadily falling rate of violent crimes by youth, (b) concerns about racial disproportionality in the use of transfer, and (c) rising costs of the punitive reform's high incarceration rates. In addition, the period 1995 to 2010 witnessed a wave of new neuroscientific and behavioral evidence demonstrating specifically how youths' brain-and-behavior development was immature in relation to adults in ways that suggested their lesser culpability for offenses (for reviews, see Steinberg, 2013; Scott & Steinberg, 2008).

The impact of this research on 21st-century U.S. juvenile justice policy was substantial, as seen in federal policy recommendations (e.g., National Academies of Science, 2013) and in four U.S. Supreme Court decisions from 2005 to 2016. As discussed in the next section, these cases all recognized youths' developmental immaturity relative to that of adults; they required that developmental characteristics of adolescence be considered as potentially mitigating factors when determining criminal court sentences for serious crimes committed by juveniles.

U.S. Supreme Court Cases on Sentencing of Juveniles in Criminal Court

The four U.S. Supreme Court cases relevant for understanding the Court's logic related to *Miller* sentencing and resentencing cases are *Roper v. Simmons* (2005), *Graham v. Florida* (2010), *Miller v. Alabama* (2012), and *Montgomery v. Louisiana* (2016). A fifth case during this era, *J.D.B. v. North Carolina* (2011), did not involve sentencing but followed much of the same developmental logic as the other four cases. The following brief review of the cases and their use of developmental science is discussed in greater detail elsewhere (see, e.g., Levick & Feierman, 2016).

From *Roper* to *Montgomery*

The Court's four juvenile sentencing cases limited criminal court sentencing for serious crimes by juveniles in the following ways: (a) *Roper* prohibited the death penalty; (b) *Graham* prohibited

LWOP in non-homicide cases; (c) *Miller* prohibited mandatory LWOP sentences in homicide cases; and (d) *Montgomery* required resentencing for cases of persons currently serving mandatory LWOP sentences for homicides as juveniles. All four cases were decided based on the Court's interpretation of the Eighth Amendment's prohibition of cruel and unusual punishment. All four cases based their interpretation of "cruel and unusual" in part on the Court's consideration of adolescents' developmental immaturity, relative to adults, in terms of their lesser capacities for decision making and judgment, as well as their vulnerability associated with their dependency. These considerations, the Court said, offered potential mitigation for juveniles' culpability as a class.

The four cases differed, however, in some important respects. *Roper*, *Miller*, and *Montgomery* applied to homicide cases, *Graham* to non-homicide cases. *Roper* (death) and *Graham* (LWOP) prohibited specific sentences, while *Miller* and *Montgomery* did not prohibit LWOP for homicide. They allowed it so long as sentencing proceedings (for LWOP or alternative sentences) offered adequate consideration of potentially mitigating factors related to adolescents' immaturity.

The Logic of *Miller* and *Montgomery*

In its decision in *Miller*, the Court articulated its reasons for considering adolescents' immaturity as a potentially mitigating factor in homicide cases. Its reasoning followed and cited *Roper* and *Graham*, and the following language from *Miller* captures the Court's logic:

As to the first set of cases: *Roper* and *Graham* establish that children are constitutionally different from adults for sentencing purposes. Their lack of maturity and underdeveloped sense of responsibility lead to recklessness, impulsivity, and heedless risk-taking. They are more vulnerable to negative influences and outside pressures, including from their family and peers; they have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings.

And because a child's character is not as well formed as an adult's, his traits are less fixed and his actions are less likely to be evidence of irretrievable depravity. *Roper* and *Graham* emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes. (*Miller v. Alabama*, 2012, p. 2458)

Given these general characteristics of adolescence, the Court in *Miller* noted that LWOP could be assigned only to the "rare juvenile offender whose crime reflects irreparable corruption" (*Miller v. Alabama*, 2012, p. 2469). The Court underscored this in *Montgomery*, reserving LWOP in juvenile homicide cases for only "the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility," which would exclude "the vast majority of juveniles" (*Montgomery v. Louisiana*, 2016, p. 734). Moreover, the Court required that in juvenile homicide cases where LWOP might be considered, any alternative sentences must consider the developmental characteristics of a youth.

Implications of *Miller* and *Montgomery*

To date there are no data on the frequency of *Miller* sentencing cases or forensic evaluations to assist them. In addition, the Court made no specific mention of the need for expert developmental, clinical, or forensic evaluations in such cases. Yet the nature of the developmental characteristics in question clearly points to the high likelihood that parties in most *Miller* sentencing cases will seek expert evaluations to assist the court in weighing mitigating developmental factors of adolescence in an individualized, case-by-case manner. It is also likely that attorneys will request evaluations in non-homicide cases that allow judicial discretion in length of sentences. In addition, evaluations may be requested for use in parole board hearings as well in some *Montgomery* cases.

The *Montgomery* decision, requiring some of the same types of information, creates a particular challenge in that resentencing may include consideration of the person's developmental

characteristics at the time of the original sentencing. The subject of the evaluation usually will be an adult who has been serving an LWOP sentence for some years. *Miller* resentencing cases will also require different types of data than *Miller* sentencing cases, especially related to rehabilitation progress during the person's incarceration.

According to a nationwide survey, between 2,000 and 2,500 individuals were serving mandatory LWOP terms for juvenile homicide around the time of the *Miller* and *Montgomery* decisions (Mills et al., 2016). In addition, several states have decided that *Miller* resentencing cases must be provided for those who received not only mandatory LWOP but also discretionary LWOP sentences. Thus, the demand for forensic evaluations in *Miller* resentencing cases might continue for some years.

Since *Miller*, many states' legislatures or state supreme courts have decided to abolish LWOP for juvenile offenses altogether. By 2018, 25 states and the District of Columbia had done so (Campaign for Fair Sentencing of Youth, 2018; for an example, see the State of Washington Supreme Court decision in *State v. Bassett*, 2018). Other states are expected to follow this trend in the future. In those states, formal *Miller* hearings will disregard LWOP as a sentencing alternative. Nevertheless, *Miller*-type evaluations will continue to be relevant because the alternative sentences for juvenile homicide are lengthy and will still require judicial consideration of potentially mitigating developmental factors (Scott et al., 2016).

Factors to Be Considered for Juvenile Sentencing in Criminal Court

Miller provided a set of five developmental factors that must be reviewed when considering LWOP or alternative sentences in juvenile homicide cases. In addition, *Miller* and *Montgomery* said that a condition of "irreparable corruption" was required to justify providing an LWOP sentence for juvenile homicide. Here we review these factors and concepts that form the basis for *Miller* sentencing and resentencing cases.

Mitigating Characteristics of Adolescence (“Miller Factors”)

Using the logic of *Roper* and *Graham*, *Miller* and *Montgomery* identified several characteristics of adolescence to describe how youth are immature relative to adults, supporting the Court’s conclusion that children are different from, and less culpable than, adults for sentencing purposes. These same characteristics of adolescent immaturity, the Court said, must be applied to each individual case, examining them for their potential mitigation of culpability. Therefore, characteristics of immaturity described by the Court offer a potential structure for *Miller* evaluations, including non-homicide cases and cases in which sentences other than LWOP are being considered. Four types of evidence are relevant, as described in this section, and a fifth factor is ambiguous as to whether it must be weighed individually in *Miller* sentencing cases.

Miller and *Montgomery* described each of these characteristics only briefly and did not provide the labels for the *Miller* factors offered in the present analysis. The labels used in this section parallel those offered in other commentaries that have translated legally relevant adolescent immaturity as described in the *Miller* decision (Grisso & Kavanaugh, 2016; Scott et al., 2015). These concepts are elaborated in Chapter 2, employing scientific evidence that the Court itself used to identify the factors.

Examiners should be aware that some state courts have begun to fashion their own lists and categories of developmental factors much like *Miller*’s (e.g., *People v. Gutierrez*, 2014). Typically, they will be variations on *Miller*’s factors that are quite similar. Absent local variations, the factors described in *Miller* and reviewed here are likely to apply.

DECISIONAL IMMATURITY (DECISIONAL FACTOR)

Youth are immature compared to adults in capacities associated with decision making, delay of impulse, and consideration of consequences of one’s decision. The Court described their decisional immaturity as an “underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking” (*Miller v. Alabama*, 2012, p. 2458, citing *Roper*). Other phrases

used in *Miller* regarding decisional immaturity include “transient rashness, proclivity for risk, and inability to assess consequences” (p. 2465) and “immaturity, impetuosity, and failure to appreciate risks and consequences” (p. 2468).

DEPENDENCE ON FAMILY AND ENVIRONMENT (DEPENDENCY FACTOR)

Youth are more vulnerable and less autonomous than adults, limiting their capacity to avoid harmful circumstances. Describing this factor, *Miller* noted, “Children are more vulnerable to negative influences and outside pressures, including from their family and peers; they have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings” (*Miller v. Alabama*, 2012, p. 2458, in part citing *Roper*). In addition, *Miller* indicated that courts must “take into account the family and home environment that surrounds him—and from which he cannot extricate himself—no matter how brutal or dysfunctional” (*Miller v. Alabama*, 2012, p. 2458). The Court’s description of the appellant Evan Miller clarifies the Court’s meaning regarding this factor: “Miller’s stepfather physically abused him; his alcoholic and drug-addicted mother neglected him; he had been in and out of foster care as a result; and he had tried to kill himself four times, the first when he should have been in kindergarten” (*Miller v. Alabama*, 2012, p. 2469).

CONSIDERATION OF OFFENSE CONTEXT (OFFENSE CONTEXT FACTOR)

The Court called for consideration of “the circumstances of the homicide offense, including the extent of [the youth’s] participation in the conduct and the way familial and peer pressures may have affected him” (*Miller v. Alabama*, 2012, p. 2468). The Court seemed to anticipate using information about the youth’s status on the decisional and dependency factors to analyze the offense circumstances, examining the nature of the youth’s involvement as this might affect mitigation. How planned or impulsive was the youth’s participation? To what extent was the youth’s decision making prior to and during the offense related to past abuses or

present peer influences? For example, in *Miller* the Court reflected on Miller’s co-appellant Jackson, noting that he “learned on the way to the video store that his friend Shields was carrying a gun, but his age could well have affected his calculation of the risk that posed, as well as his willingness to walk away at that point” (*Miller v. Alabama*, 2012, p. 2468).

DEFENDANT’S PROSPECTS FOR REHABILITATION (PROSPECTS FOR REHABILITATION FACTOR)

The Court required that sentencing take into consideration a youth’s characteristics related to the potential or capacity for change through rehabilitation, treatment, and/or maturation. “A child’s character is not as well formed as an adult’s; his traits are less fixed” (*Miller v. Alabama*, 2012, p. 2458). Thus, *Montgomery* explained, “*Miller* required that sentencing courts consider a child’s . . . heightened capacity for change” (*Montgomery v. Louisiana*, 2016, p. 726) on an individualized, case-by-case basis.

RISK OF INCOMPETENCY DURING LEGAL PROCESS (LEGAL COMPETENCY FACTOR)

Addressing why juveniles as a class should not receive mandatory LWOP sentences, *Miller* explained that juveniles “might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including a plea agreement) or his incapacity to assist his own attorneys” (*Miller v. Alabama*, 2012, p. 2468, citing *Graham*). The Court’s concern was with immature characteristics of adolescence that create a disadvantage during the investigative and adjudicative processes, potentially placing adolescents in the position of eligibility for a lengthy sentence they might not otherwise have faced.

However, *Miller* and *Montgomery* do not address whether this matter should be weighed individually (that is, on a case-by-case basis) when considering sentences. It appears to have been included primarily to support the argument against *mandatory* sentencing for juveniles as a class. For this reason, it is not offered here as a factor routinely applied to evaluations of sentencing in individual cases.