FIRST DISTRICT APPELLATE PROJECT
TRAINING SEMINAR
January 22, 2016

SHAPING THE LAW WITH THE REVOLUTIONARY "KIDS ARE DIFFERENT" JURISPRUDENCE IN ADULT CRIMINAL CASES

RICHARD BRAUCHER
Staff Attorney
First District Appellate Project
January 2016

TABLE OF CONTENTS

SHAPING THE LAW WITH THE REVOLUTIONARY "KIDS ARE DIFFERENT" JURISPRUDENCE IN ADULT CRIMINAL CASES

A. Introduction

Not since *In re Gault* (1967) 387 U.S. 1, which held that a child in a delinquency matter is entitled to the same constitutional guarantees of due process as those accorded an adult criminal defendant, has there been such a profound development in criminal jurisprudence governing children. While *Gault,* nearly 50 years ago, ushered in an era of due process in which "the condition of being a boy does not justify a kangaroo court" in juvenile delinquency cases (*Id*., at 28), *Roper v. Simmons*[1], *Graham v. Florida*[2], *J.D.B. v. North Carolina*[3], and *Miller v. Alabama*[4] have brought to our generation the revolutionary concept that children are neurologically and developmentally different from adults in myriad ways that mandate different treatment.

In 2005 in *Roper*, the U.S. Supreme Court held that imposition of the death penalty for children who were 16 or 17 years old at the time of the offense violated the Eighth Amendment. Taking into account that there was a national consensus against executing children, the Court espoused three elementary differences between youth and adults that required different treatment at sentencing: less of an ability for good decision-making, increased susceptibility to peer pressure, and greater chance for reform. (*Roper*, 543 U.S. at 568-575.) *Roper* concluded that "[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite

---

[1] *Roper v. Simmons* (2005) 543 U.S. 551.

[2] *Graham v. Florida* (2010) 560 U.S. 48.

[3] *J.D.B. v. North Carolina* (2011) 564 U.S. 261 , 131 S.Ct. 2394.

[4] *Miller v. Alabama* (2012) __ U.S. __, 132 S.Ct. 2455.

insufficient culpability." (*Id*. at 572-573.)

In 2010, *Graham* held that the Eighth Amendment also renders unlawful a sentence of life in prison without parole (LWOP) for children convicted of nonhomicide offenses. (*Graham*, 560 U.S. at 82.) Building on the rationale of *Roper*, the Supreme Court in *Graham* further focused on the ways children are different from adults, particularly their "lessened culpability." (*Ibid*.) *Graham* observed that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds," which, the Court stated, must impact the ways courts assess the "penological justifications for the sentencing practice." Finding those "fundamental differences" between children and adults rendered unlawful the sentencing practice in the case, *Graham* emphasized: "An offender's age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed."

A year later in 2011, in *J.D.B.*, the Supreme Court held that "a child's age properly informs the *Miranda* custody analysis." (*J.D.B.*, 131 S. Ct. at 2399.) The Court ruled that the test for determining whether or not a juvenile suspect would have felt free to terminate a police interrogation—that is, the test for determining whether or not the juvenile was "in custody" such that he should have received *Miranda* warnings at the outset of the interrogation—must be evaluated through the prism of a reasonable juvenile, rather than a reasonable adult. Writing for the majority, Justice Sotomayor stated: "[S]o 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, its inclusion in the custody analysis is consistent with the objective nature of that test." (*Id.,* at 2406.)

The justice characterized youth as an unambiguous fact that "generates commonsense conclusions about behavior and perception" and she noted that such conclusions are "self-evident to anyone who was a child once himself, including any police officer or

judge."[5] (*J.D.B.,*. at p. 2403.) Among these commonsense conclusions are: "that children 'generally are less mature and responsible than adults,' (citation); that they 'often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them,' (citation); that they 'are more vulnerable or susceptible to ... outside pressures' than adults, [*Roper v. Simmons* (2005) 543 U.S. 551, 5693]; and so on. See [*Graham v. Florida* (2010) 560 U.S. 825, 130 S.Ct. 2011, 2026] (finding no reason to 'reconsider' these observations about the common 'nature of juveniles').)" (*Id.,* at 2403.)

Coming on the heels of *J.D.B.*, a year later in 2012, *Miller* held that imposition of a mandatory life without parole sentences upon a child in a homicide case violated the Eighth Amendment. *Miller* thus reaffirmed the Court's prior holdings in *Roper*, *Graham*, and *J.D.B.*, emphasizing once again the unique characteristics of children and recognizing that "youth is more than a chronological fact. [citation] It is a time of immaturity, irresponsibility, 'impetuousness[,] and recklessness.' [citation] It is a moment and 'condition of life when a person may be most susceptible to influence and to psychological damage.' [citation] And its 'signature qualities' are all 'transient.'" [citation]. (*Miller v. Alabama*, 132 S.Ct. at p. 2467.) This leads to a recognition that children are less morally culpable for the crimes they commit and are uniquely able to be rehabilitated and become productive members of society.

This new jurisprudence from the U.S. Supreme Court, firmly

---

[5] "Describing no one child in particular," *J.D.B.* stressed, "these observations restate what 'any parent knows'—indeed, what any person knows—about children generally." (*J.D.B.*, at 2403, citing *Roper*, 543 U.S., at 569.) *J.D.B.* noted that, "Although citation to social science and cognitive science authorities is unnecessary to establish these commonsense propositions, the literature confirms what experience bears out." (*J.D.B.*, at 2403, fn. 5.) "'[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds.'" (*Ibid.*, quoting *Graham v. Florida*, 560 U.S. at 68.)

rooted in science, has thus far been confined to specific issues arising under the Eighth and Fifth Amendment. However, the rationale for these cases—that children are profoundly different—clearly has powerful implications for other areas of the law, discussed below. With few exceptions, however, the defense bar has been slow to take advantage of this new jurisprudence.

The point of this paper is to encourage appellate defenders to examine this new "Children Are Different" (CAD) jurisprudence and to apply it to new areas of the law to better serve our youthful clients and shape the law in ways that reflect reality.

1. What about youth over 18?

A word about youth over the age of 18. While the matters discussed here apply to youth under 18, we must advance arguments asserting that CAD jurisprudence should also apply to young adults over 18, in particular cases. Even when a young person has reached the legal age of majority, he may exhibit all the characteristics of a juvenile. (See *Roper*, 543 U.S. at 574 (noting that the "qualities that distinguish juveniles from adults do not disappear when an individual turns 18"); see also Amicus Br., Am. Psych. Assoc. 6 n.3, *Graham v. Florida*, Case No. 08-7412 (filed July 2009) (noting the same).) Scientific research supporting CAD jurisprudence continue to demonstrate that a bright line at 18 is untenable. (Kelsey B. Shust, *Extending Sentencing Mitigation for Deserving Young Adults*, 104 J. Crim. L. & Criminology 667, 685-689.) Therefore, there are arguments to be made that it should apply to young people up to age 25.[6]

---

[6] The "Youth Offender Parole Law" (discussed, at B.5., *post*), which requires the Board of Parole Hearings to "give great weight to the diminished culpability of juveniles as compared to adults, [and] the hallmark features of youth ... in accordance with relevant case law" (Pen. Code, § 4801, subd. (c)), now applies to youth who were 18, 19, 20, 21, and 22, at the time of their crimes. This may be rightly understood as the California legislature's own affirmation that the qualities that distinguish youth from adults do

B. Applications

J.D.B., in particular, arguably established the presumption of a "reasonable child" standard in every area of law, criminal and civil:

> Indeed, even where a "reasonable person" standard otherwise applies, the common law has reflected the reality that children are not adults. In negligence suits, for instance, where liability turns on what an objectively reasonable person would do in the circumstances, "[a]ll American jurisdictions accept the idea that a person's childhood is a relevant circumstance" to be considered. Restatement (Third) of Torts §10, Comment b, p. 117 (2005); [cite omitted]. [¶] As this discussion establishes, "[o]ur history is replete with laws and judicial recognition" that children cannot be viewed simply as miniature adults. *Eddings*, 455 U. S., at 115-116, 102 S.Ct. 869. We see no justification for taking a different course here. . . . The same "wide basis of community experience" that makes it possible, as an objective matter, "to determine what is to be expected" of children in other contexts, Restatement (Second) of Torts §283A, at 15; see *supra*, at 2403, and n. 6, likewise makes it possible to know what to expect of children subjected to police questioning.
>
> (*J.D.B.*, 131 S.Ct. at 2404.)

The establishment of this presumption of a "reasonable child" standard in every area of law creates myriad opportunities to advocate that the criminal law must be applied differently to young persons in adult court.

/

/

---

matter and do not disappear when an individual turns 18.

1. Confessions

a. *Miranda*: Invocation of right to counsel

J.D.B. held that a child suspect's age is relevant to determining when he has been taken into custody and thus entitled to a *Miranda* warning. (*J.D.B.* at 2406.) Drawing on this analysis, *In re Art T.* (2015) 234 Cal.App.4th 335, 354, held that whether a child makes an unequivocal request for attorney requires consideration of juvenile's age:

> We find that, as in the custody context addressed in *J.D.B.*, a court should consider a juvenile's age for purposes of analyzing whether the juvenile has unambiguously invoked his or her right to counsel. As the court in *J.D.B.* held: "Even for an adult, the physical and psychological isolation of custodial interrogation can 'undermine the individual's will to resist and ... compel him to speak where he would not otherwise do so freely.' [Citation.] Indeed, the pressure of custodial interrogation is so immense that it 'can induce a frighteningly high percentage of people to confess to crimes they never committed.' [Citations.] That risk is all the more troubling—and recent studies suggest, all the more acute—when the subject of custodial interrogation is a juvenile. [Citation.]"
>
> (*J.D.B., supra,* 131 S.Ct. at p. 2401.)

b. *Miranda*: *Rhode Island v. Innis* Interrogation Analysis

The standard for whether an "interrogation" occurred requiring *Miranda* warnings, under *Rhode Island v. Innis* (1980) 446 U.S. 291, 302, requires an objective determination of whether the police used "words or actions . . . that they should have known were reasonably likely to elicit an incriminating response." *Innis* noted that this objective determination should factor in, among other things, the "unusual susceptibility of a defendant to a particular

form of persuasion." (*Innis* at 302, fn. 8.) As Guggenheim and Hertz have argued:

> [T]he 'interrogation' inquiry in a juvenile case should take into account the specific age of the accused, assessing whether the words or actions of the police were 'reasonably likely to elicit an incriminating response' from a reasonable juvenile of the accused's age. In doing so, the trial court should keep in mind the commonsense conclusions,' ratified by the Court in *J.D.B.*, that 'children "generally are less mature and responsible than adults,"' that 'they "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them,"' and that 'they "are more vulnerable or susceptible to . . . outside pressures" than adults.'"
>
> Martin Guggenheim & Randy Hertz, *J.D.B. and the Maturing of Juvenile Confession Suppression Law* (2012) 38 Wash. U. J.L. & Pol'y 109, 165, quoting *J.D.B.*, 131 S. Ct. at 2403.

c. *Miranda* waiver

While *Miranda* warnings need not be given "in the exact form described in that decision," they must "reasonably 'convey to a suspect his rights as required by *Miranda*.'" (*Duckworth v. Eagan* (1989) 492 U.S. 195, 202–203.) As in *J.D.B.*, this objective test must consider the suspect's age which encompasses the fact that children "possess only an incomplete ability to understand the world around them" (*J.D.B.*, at 2403) and that they "have limited understandings of the criminal justice system and the roles of the institutional actors within it." (*Graham*, 560 U.S. at 78.)

Where the State asserts a waiver of *Miranda* rights, it must prove both "'a course of conduct indicating waiver"' and that "the accused understood these rights." (*Berghuis v. Thompkins* (2010) 560 U.S. 370, 384.) Research overwhelmingly demonstrates that most children–especially those under 15–do not understand *Miranda*

rights.[7] (Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis* (1980) 68 CAL. L. REV. 1134; Naomi Goldstein et al., *Juvenile Offenders' Miranda Rights Comprehension and Self-Reported Likelihood of Offering False Confessions*, Assessment 10(4) (2005) 359-369; Eric Y. Drogin, & Richard Rogers, *Juveniles and Miranda: Current Research and the Need to Reform How Children Are Advised of Their Rights, Criminal Justice*, ABA, Vol. 29, No. 4, Winter 2015.)

The State must also prove that the waiver, whether explicit or implicit, was "'voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception,' and 'made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.'" (*Berghuis*, 560 U.S. at 382-383, quoting *Moran v. Burbine* (1986) 475 U.S. 412, 421.) As Guggenheim and Hertz observe: "*J.D.B.* warns that children must be assumed to 'lack the capacity to exercise mature judgment' and too 'often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.'" (*J.D.B. and the Maturing of Juvenile Confession Suppression Law* at 166, quoting quoting *J.D.B.*, 131 S. Ct. at 2403.) "[G]iven *J.D.B.*'s recognition that juveniles '"are more vulnerable or susceptible to . . . outside pressures" than adults,' it seems difficult to credit a juvenile's waiver as voluntary when it is made (as it usually is) in a police interrogation room by a child, confronted by one or more police officers and denied the support of a parent or other concerned adult." (*Id.* at 166-167, quoting *J.D.B.*, at

---

[7] Even the Reid Interrogation Manual acknowledges this fact, instructing police officers: "When a juvenile younger than 15, who has not had any prior experience with the police, is advised of his *Miranda* rights, the investigator should carefully discuss and talk about those rights with the subject (not just recite them) to make sure that he understands them. If attempts to explain the rights are unsuccessful, no interrogation should be conducted at that time." (Fred E. Inbau, John E. Reid, Joseph P. Buckley & Brian C. Jayne, *Criminal Interrogations and Confessions* (5th ed. 2013) 255.)

2403.)

Whether a *Miranda* waiver can be voluntary, knowing, and intelligent in the case of young children is particularly ripe for litigation in California. Recently, the California Supreme Court narrowly denied review in the Fourth District case of *In re Joseph H.* (2015) 237 Cal.App.4th 517, 533-534, which held a 10-year-old validly waived his *Miranda* rights. In a lengthy[8] dissenting statement joined by justices Cuéllar and Kruger, Justice Liu wrote: "This case raises an important legal issue that likely affects hundreds of children each year: whether and, if so, how the concept of a voluntary, knowing, and intelligent *Miranda* waiver can be meaningfully applied to a child as young as 10 years old." The statement quotes *J.D.B.* at length, concluding, "The 'very real differences between children and adults' must be factored into any assessment of whether a child validly waived his *Miranda* rights." (*In re Joseph H.*, S227929, diss. statement of Liu, J., quoting *J.D.B.*, 131 S.Ct. at 2408.)

d. Voluntariness

The court in *In re Elias V.* (2015) 237 Cal.App.4th 568 held that police use of Reid techniques of maximization and minimization – condemned 50 years ago in the *Miranda* decision –overbore the will of a 13-year-old, requiring reversal of the case. The 27-page opinion draws heavily on "[a]n extensive body of literature [that] demonstrates that juveniles are 'more suggestible than adults, may easily be influenced by questioning from authority figures, and may provide inaccurate reports when questioned in a leading, repeated and suggestive fashion.'" (*Id.* at 578.) This scholarly opinion is fertile soil for cultivating arguments attacking youthful confessions on voluntariness grounds.

---

[8] The dissenting statement, which is over 3,000 words long, can be found at http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=2114967&doc_no=S227929

2. Suppression of Evidence on Fourth Amendment Grounds

a. Detention

In re J.G. (2014) 228 Cal.App.4th 402, 412, examined *J.D.B.* in the context of a Fourth Amendment detention and stated:

> *J.D.B.*'s holding—that a juvenile's age is a factor in the reasonable-person analysis of Fifth Amendment custody—may implicate 'other areas of criminal procedure—including voluntariness of waivers of rights and seizure inquiries' as well as areas of substantive criminal law, such as 'blameworthiness of [the subject's] conduct and/or state of mind.' [Citation.] The holding seems particularly fitting for search-and-seizure analyses since the tests for custody under the Fifth Amendment and detentions under the Fourth Amendment both focus on how reasonable persons would perceive their interaction with the police.

The First District "recognize[d] the strength of the argument that *J.D.B.*'s holding should be extended to Fourth Amendment custody determinations," but did not resolve the issue because it concluded the juvenile defendant had been illegally detained regardless of his age. (*Id.* at 411.)

In re J.G. can be understood to be an express invitation to lawyers to employ *J.D.B.* in arguments focusing on the reasonableness of whether a youth would feel free to terminate an encounter during a *Terry* stop.

b. Consent

An inquiry determining voluntariness of consent to allow a warrantless search (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218) must consider the importance of age. *State v. Butler* (Ariz. 2013) (en banc) 302 P.3d 609, 612-613, held that age is an important factor in a consent analysis and found involuntary a 16-year-old boy's consent to a blood draw. *Butler* recognized the applicability of *J.D.B.*'s

Miranda youthful custody inquiry to Fourth Amendment consent analysis, and observed *Roper*'s recognition of the "diminished culpability" of juveniles under 18[; its holding] that '[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty'[; and that] '[j]uveniles tend to possess less maturity and are "more vulnerable or susceptible to negative influences and outside pressures."'" (*Id.*, at 613, quoting *Roper* at 569–570.) *Butler* cautioned: "Courts should not blind themselves to this reality when assessing the voluntariness of consent to a blood draw." (*Ibid.*)

For a trenchant discussion of this topic see Megan Annitto, *Consent Searches of Minors* (2014) 38 N.Y.U. Rev. L. & Soc. Change 1.

3. Plea Proceedings and Other Waivers of Constitutional Rights

Anytime a child waives any constitutional rights (e.g. right to a trial via plea bargain, right to counsel, etc.) reviewing counsel should consider whether the age of the child, as understood in the *J.D.B.* decision, affected his ability to voluntarily, knowingly, and intelligently make the waiver. (See, discussion at part B.2.c, *ante*, "Miranda Waiver"; Allison D. Redlich, *The Susceptibility of Juveniles to False Confessions and False Guilty Pleas* (2010), 62 Rutgers L.Rev. 943.) Reasonable children are subject to coercion and pressure, particularly from authority figures, in ways that adults are not. (*Roper*, 543 U.S. at 598 (Youth are "more vulnerable or susceptible to negative influences and outside pressures.")

4. Offenses/Defenses

The U.S. Supreme Court's "children are different" jurisprudence cries out for challenges to substantive law which unfairly holds children accountable to an adult standard they are developmentally and neurologically incapable of meeting:

- The law recognizes the reality that juveniles are not adults and a juvenile cannot be compared to an adult in this regard.

- An adult is presumed to be in full possession of his senses and knowledgeable of the consequences of his actions. Juveniles are not.

- Anybody who is familiar with adolescent behavior knows intuitively that adolescents do not necessarily think or behave like adults. Their brains are not fully developed in the areas that control impulses, foresee consequences, and temper emotions.

- The juvenile brain processes information and manages emotion differently than the adult brain.[9]

- "[The chronological age of a juvenile includes] hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences."

- "[C]hildren demonstrate a 'lack of maturity and an underdeveloped sense of responsibility,' leading to recklessness, impulsivity, and heedless risk-taking."

- "[J]uveniles lack maturity and a sense of responsibility; juveniles are more susceptible to negative influences and outside pressures; and the character of a juvenile is more transitory than that of an adult."[10]

With the above in mind, consider:

a. Lack of Mens Rea

A child's capacity to form the requisite mens rea to commit a crime (her capacity to have formed specific intent defined by the

---

[9] *J.D.B.*, 131 S.Ct. at 2403; *Gallegos v. Colorado* (1962) 370 U.S. 49, 54; *Roper*, 543 U.S. at 569; *Miller,* 132 S.Ct. at 2465-2466.

[10] *Miller*, passim.

legal charge, e.g., intentional, knowing, or reckless harm, at the time of the alleged offense) is ripe for challenge. This is especially true of any specific intent crimes or crimes where the mens rea required is negligence or recklessness.

b. Self-Defense

A "reasonable child" will have a different understanding of the objective test of when she may be facing an imminent threat of bodily harm. The same is true not for just defense of self, but also defense of others, defense of property, necessity, resisting arrest, and duress, which is especially important in the realm of gang related activity.

c. Defense of Accomplice Liability

The new "children are different" jurisprudence must affect an assessment of a youth's capacity to form the necessary intent to be considered an accomplice for two reasons: (1) youth are more easily coerced (e.g. fourteen year old girl "aids" her seventeen year old paramour); and (2) because a youth with inherently limited capacity could not "reasonably foresee" a series of events in the same way an adult could.

d. Defense of Conspiracy

Just as contract law limits a child's ability to agree to a contract, *J.D.B.*'s recognition of the "reasonable child" may affect a child's capacity to agree to commit a crime.

e. Defense of Felony Murder

In light of *J.D.B.*, counsel should challenge any claims by the State that attempt to establish the intent (including the foreseeability of death or dangerousness of actions) necessary to find a child guilty of felony murder, considering the limited ability to foresee consequences based on their immaturity. The concurring opinion of Justice Breyer, joined by Justice Sotomayor, in *Miller* would appear to support this argument.

While *Miller* and its companion case, *Jackson*, did not ultimately consider whether a constitutional LWOP sentence for youth could be predicated upon felony murder or accomplice liability, Justices Breyer argued that the logic of *Graham* would forbid an LWOP sentence for Kuntrell Jackson, unless it was specifically determined that he "kill[ed] or intend[ed] to kill" the robbery victim in that case. (*Miller*, at 2475, Breyer, J., and Sotomayor, J., concurring).

Justice Breyer observed that felony murder involves transferred intent principles in which a defendant's intent to commit the underlying felony "transfers" to or "satisfies" the intent to commit murder. With this in mind, the justice emphasized that "the theory of transferring a defendant's intent is premised on the idea that one engaged in a dangerous felony should understand that the victim of the felony could be killed, even by a confederate.... Yet the ability to consider the full consequences of a course of action and to adjust ones conduct accordingly is precisely what we know juveniles lack capacity to do effectively." (*Id.* at 2476.)

f. Adequate Provocation for Manslaughter

Just as a child's age is a relevant component of an objective custody analysis (*J.D.B.*, at 2403), so too should a child's age be relevant to an objective analysis of whether the facts and circumstances were sufficient to arouse the passions of an ordinarily reasonable person (Pen. Code, § 192). Adolescents in general are more impulsive than adults. (Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty* (2003 58 Am. Psychologist 1009, 1014.) Just as omitting youth from the custody analysis under *Miranda* violated the Fifth Amendment rights of J.D.B., omitting age from consideration by a jury trying a child, and imposing the standard of an average person or reasonable adult—a standard no child could meet because of the inherent neurological differences between children and adults—would violate a right to due process and trial by jury (U.S. Const., 6th & 14th Amends.).

g. Premeditation and Deliberation

The incompetencies of youth may inform an analysis as to whether there was a motive to kill based on "'unconsidered or rash impulse hastily executed,'" as opposed to "'pre-existing reflection'" and "'careful thought and weighing of considerations'" required to find premeditation and deliberation. (*People v. Anderson* (1968) 70 Cal.2d 15 .)

5. Sentencing

Counsel should consider the above outlined arguments, regarding reduced culpability (see B.4., *ante*), as mitigating factors in advocating for a just and sensible sentence. (Cal. Rules of Court, rule 4.423(a).)

Counsel may also enhance arguments for a mitigated sentence by leveraging components of the Youth Offender Parole Law. Also known as SB 260, the law, which went into effect in 2015, added section 3051 to the Penal Code, requiring the Board of Parole Hearings (BPH) to conduct early youth offender parole hearings for people who were under the age of 18 at the time of their offenses.

In accordance with the law, in conducting youth offender parole hearings, the BPH is required to "give **great weight** to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law." (Pen. Code, § 4801, subd. (c) [emphasis added].)

More recently, SB 261 (effective January 1, 2016) expanded on SB 260 and amended Penal Code section 3051, applying the law to people who were older than 18, but younger than 23 at the time of their crimes.

"[R]elevant case law" means the Eighth Amendment as dictated by *Graham* and *Miller*, which require a sentencer to consider the offender's youth and the hallmark features of youth (among

them immaturity, impetuosity, and failure to appreciate risks and consequences), and consider, in an individualized way, the nature of the offender and the offense (for example, as relevant, the offender's background and upbringing, mental and emotional development, and possibility of rehabilitation). (*Miller,* 132 S.Ct. at 2471, 2467–2468, 2466–2467.) There appears to be no principled argument not to give "great weight" to these matters at any sentencing involving a young person.

C. Best Litigation Practices

Do not brief alone! Broad litigation efforts have the greatest impact. Use the Pacific Juvenile Defender listservs to discuss issues considered in this paper and share your briefing with other defenders. Contact appropriate amici early to collaborate.[11]

[11] Contact Richard Braucher at FDAP for suggestions.