CENTER FOR APPELLATE LITIGATION

120 WALL STREET – 28TH FLOOR, NEW YORK, NY 10005 TEL. (212) 577-2523 FAX 577-2535
http://appellate-litigation.org/

ISSUES TO DEVELOP AT TRIAL

September 2023

We hope you enjoyed your summers! This issue proposes linking jury charges with the concepts of mens rea and adolescent and young adult brain development. You are probably familiar by now with the Supreme Court's pronouncements barring imposition of the death penalty and mandatory life-without-parole sentences for those under 18. These decisions categorically recognize the now-universally accepted neuroscience establishing that the brains of juveniles and adolescents function differently than adult brains. Because of their underdeveloped prefrontal cortex -- the part of the brain that controls higher executive function -- juveniles and adolescents (and, we would add based on the neuroscience, anyone under the age of 25), are more impulsive and fail to appreciate the risks and consequences of their actions. They are also more susceptible to peer pressure. As a result, the Supreme Court declared youth a factor that mitigates culpability in sentencing. The Supreme Court also imported this understanding into the Miranda context, holding in J.D.B. v. North Carolina, 564 U.S. 261 (2011), that a child's age properly informs the Miranda custody analysis.

Professor Steven Zeidman of CUNY Law School made the point to us that impulsivity and risk appreciation are also relevant to mens rea. We agree and have developed some applications in this area in the hope of pushing courts to see this connection. We also suggest a due process challenge to the charge of felony murder insofar as it fails to take into account a young person's inability to foresee the consequences of their actions.

Some background

In the sentencing context, in a series of decisions starting in the death penalty context, *Roper v. Simmons*, 543 U.S. 551 (2005), but extending to the imposition of life sentences, *see Miller v. Alabama*, 567 U.S. 460 (2012), the Supreme Court concluded that the Eighth Amendment prohibits infliction of the most serious punishments against juveniles, whose lack of maturity and potential for rehabilitation make them less culpable than other offenders. In reaching these decisions, the Court has recognized 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*, 567 U.S. at 472. *Roper* identified three areas of difference between juveniles under 18 and adults: (1) a lack of maturity and underdeveloped sense of responsibility that often result in impetuous and ill-considered actions and decisions; (2) juveniles are more vulnerable or susceptible to negative influences and outside pressures, "including peer pressure;" and (3) the character of a juvenile is not as well formed as that of an adult and their personality traits "more transitory," making it "misguided to equate the failings of a minor with those of an adult," 543 U.S. at 569-70.

The neuroscience also shows that brain maturation continues through the 20's. *See, e.g., People v. H.M.*, 63 Misc.3d 1213(A), at *4 (referencing National Institute Mental Health study showing frontal lobe still maturing in 21-year-olds); Juvenile Law Center, *Rethinking Justice For Emerging Adults*, at 3 ("Developmental science now characterizes the mid-twenties as a period when the degree of brain development is comparable to the markable changes that occur during early childhood."). For example, a longitudinal study of 5,000 children "demonstrated that their brains were not fully mature until at least 25 years of age." Rethinking Justice, at 4-5 (citing Nico U. F. Dosenbach et. al., *Prediction of Individual Brain Maturity Using fMRI*, 329 SCI.1358, 1358-59 (2010)). Yet another study indicates that, because emerging adults—defined as young people from late teens to early twenties—are most likely to engage in risky behaviors, there is an "age-crime curve" that shows declining criminal activity as one leaves the early twenties. *Id.* at 5.

Jury charge requests

Our proposal is to extend the application of the neuroscience from sentence-mitigation to the substantive law. Because, as is now universally understood, the thought processes and cognitive abilities of adults versus juveniles and emergent adults are profoundly different, it is appropriate that the standards for determining criminal culpability account for these differences in assessing mens rea. *See, e.g.*, Carroll, *Brain Science and Juvenile Mens Rea*, 94 N.C. L. Rev. (2016). The assumptions underlying the doctrinal law around *mens rea* are inapposite for the typical adolescent and young adult. Accordingly, courts should provide juries with general charges allowing them to consider the defendant's brain development when determining whether the prosecution has proven beyond a reasonable doubt that your adolescent or young adult client had the relevant *mens rea* for the crime charged.

We can imagine many scenarios where a jury charge linking brain development to aspects of the crime may be relevant. We flag a few below and encourage you to consider adapting the suggested charges more widely. For this issue, though, we've identified the following situations: where your client has been charged with a reckless crime; an intent crime; with acting in concert, or where the reasonableness of the defendant's behavior is at issue, such as where your client is asserting justification as a defense. Note that the charge should be tailored depending on whether your client was a juvenile under 18 (the clearest case for the charge) or between 18 and 25.

Below, we propose some charge requests, with some variations depending on the age of your client and the charge the court chooses to give. Note that we have framed the charges at the highest level of generality on the theory that these principles enjoy universal consensus and thus should apply categorically to all young people in all cases. You should also consider asking the DA to give these charges to the grand jury.

You can use the information in the ITD to develop a written request to charge, and we suggest prefacing your request with a brief overview of the accepted neuroscience in this area, as discussed above.

Request to charge for reckless crime

The brain science we've discussed finds ready application where your young client is charged with a reckless offense (e.g., second-degree manslaughter or reckless assault). Here, you will want to focus on your client's underdeveloped prefrontal cortex as limiting their ability to be aware of and to consciously disregard the risk, as well as that the developmental attributes of one's age should be part of the "situation" that a reasonable person in the actor's situation needs to observe. This is the charge request we propose:

> *You heard me charge that a person acts recklessly with respect to [a particular result, e.g., a death; serous physical injury] when that person engages in conduct which creates or contributes to a substantial and unjustifiable risk that [the result] will occur, and when he or she is aware of and consciously disregards that risk, and when that risk is of such nature and degree that disregard of it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.*
>
> *In determining whether the prosecution has proven beyond a reasonable doubt that the defendant in this case acted recklessly, you may consider the relationship between age and brain development.*
>
> *In that regard, consider that the parts of a human being's brain that control impulsivity and the ability to appreciate or foresee the risks and consequences of one's actions are not fully developed in [juveniles and adolescents/ until the age of 25]*
>
> *You may consider brain development in deciding whether the defendant in this case was aware of and consciously disregarded the risk of [particular result, i.e., death, serious physical injury] and in considering the situation in which the defendant acted and whether a reasonable [juvenile or adolescent/individual under the age of 25] would have acted differently in that situation.*

Another potential use of neuroscience is in charge-down requests. If you believe there is a factual basis for requesting the lesser *mens rea* crime (e.g., criminally negligent homicide as a lesser of reckless manslaughter), bolster your request by arguing that your client's age vis a vis brain development supports that your client failed to perceive the risk as opposed to consciously disregarded it.

Request to charge for intent crimes

Linking brain development to the *mens rea* of intent is challenging because young people can obviously intend to do things and then go on to do them. Their conduct may provide strong evidence of that intent (i.e., pointing a gun directly at someone and shooting).

Nonetheless, some of the circumstances the jury might ordinarily consider to determine intent should be viewed with brain science in mind.

The basic charge on intent is found in the CJI charges relating to the specific substantive offense, and instructs the jury that intent means "conscious objective or purpose." ***See, e.g.,*** **CJI2d, Murder in the Second Degree (Intentional Homicide). However, the expanded charge on intent instructs the jury that it can consider such things as "what, if anything, did the person do or say;" "what result, if any, followed the person's conduct;" and "was that result the natural, necessary and probable consequence of that conduct." CJI2d, Expanded Charge on Intent.**

We believe that brain development should impact some of these inferences, and propose a charge that addresses the power of those circumstances. Here is our proposed charge request:

> *You heard me charge that intent means conscious objective or purpose.*
>
> *In determining whether a person had the conscious objective or purpose to commit the crime, that is, had the intent do so, you can ordinarily consider the person's conduct and all of the circumstances surrounding that conduct.*
>
> *In that regard, however, you may also consider that the parts of a human being's brain that control impulsivity and the ability to appreciate or foresee the risks and consequences of one's actions are not fully developed [in juveniles and adolescents/ until the age of 25].*
>
> *For example, while you may consider the result that followed the defendant's conduct as a circumstance bearing on intent, you may also keep in mind that the parts of the brain that control the ability to foresee consequences is not fully developed [in juveniles and adolescents/until the age of 25]. In other words, you may conclude that, in light of what I have told you about brain development, the result of the defendant's conduct here does not have bearing, or has limited bearing, on the defendant's intent.*

In addition, consider whether you want the following charge, which attempts to blunt the unfavorable inference that a person generally intends the natural and probable consequence of their conduct. The charge may be more appropriate if the court has decided to give the expanded charge on intent.

> *Similarly, while you may consider whether the result was the natural, necessary and probable consequence of that conduct, you may also decide, in light of what I have told you about the development of the parts of the brain that control impulsivity and the ability to foresee consequences, that you do not want to draw the inference that the defendant in this case intended the natural and probable consequences of his/her alleged actions.*

Request to charge in Justification cases

In pertinent part, justification requires the jury to find that the defendant "reasonably believes" the use of force is "necessary to defend themselves (or someone else) from what he or she reasonably believes to be the use or imminent use of physical force by such individual." *See* CJI2d, Justification: Use of Physical Force in Defense of a Person. If the defendant has used deadly physical force, then he or she must "reasonably believe" that deadly physical force was necessary to defend themselves against the imminent use of deadly physical force by another person. *See* CJI2d, Justification: Use of Deadly Phyaiscal Force in Defense of a Person. The charge then continues to instruct:

The determination of whether a person REASONABLY BELIEVES [deadly] physical force to be necessary to defend himself/herself [or someone else] from what he/she reasonably believes to be the use or imminent use of [deadly] physical force by another individual requires the application of a two-part test. That test applies to this case in the following way:

First, the defendant must have actually believed that [specify] was using or was about to use [deadly] physical force against him/her/or someone else] and that the defendant's own use of [deadly] physical force was necessary to defend himself/herself [or someone else] from it; and

Second, a "reasonable person" in the defendant's position, knowing what the defendant knew and being in the same circumstances, would have had those same beliefs.

The requested charge in this case would connect brain development to the jury's assessment of a "'reasonable person' in the defendant's position":

In determining whether a reasonable person in the defendant's position would have had those same beliefs, you may consider that the parts of a human being's brain that control impulsivity and the ability to appreciate or foresee the risks and consequences of one's actions are not fully developed in [juveniles and adolescents/ until the age of 25]

You may consider brain development in assessing whether a reasonable person in the defendant's position would have believed that physical force was necessary to defend himself/herself.

Request to charge in Acting in Concert cases

One of the key features *Roper* identified in juveniles (and equally applicable to emergent adults) is susceptibility to peer pressure. We think this has relevance to acting in concert. The "intent" of young people who join others in committing a crime might just as well be to go along with the crowd, not to achieve a particular result.

The CJI's Accessorial Liability (or Acting in Concert) Charge requires the jury to find beyond a reasonable doubt that the defendant (1) "solicited, requested, commanded, importuned, or intentionally aided" someone else to engage in the charged conduct, and (2) that he or she did so "with the state of mind required for the commission of the offense [that is, that he/she acted (e.g., intentionally, recklessly, with criminal negligence)].

We think an argument can be made that the jury should consider a young person's susceptibility to peer pressure in deciding whether your client acted with the "state of mind required for commission of the offense." We propose the following charge:

I have charged you that, in order for the defendant to be held criminally liable for the conduct of another/others which constitutes an offense, you must find beyond a reasonable doubt:

(1) That he/she solicited, requested, commanded, importuned, or intentionally aided that person [or persons] to engage in that conduct, and

(2) That he/she did so with the state of mind required for the commission of the offense (that is, that he/she acted e.g. intentionally, recklessly, with criminal negligence)].

In determining whether the People have proven beyond a reasonable doubt that the defendant acted with the state of mind required for the commission of the offense, you may consider that [juveniles and adolescents/individuals up to the age of 25] are, due to the ongoing development of certain areas of their brain, more susceptible to peer pressure and other outside and negative influences.

If the prosecution or court assert that you needed to put on an expert to establish the foundation for your charge, you can respond that the foundational science is well-established in the Supreme Court cases and in scholarship on the subject (citing the sources above). You do not need to put on an expert to get the charge, just as it is not necessary to put on an expert to get a cross-racial identification charge. *See People v. Boone*, 30 N.Y.3d 521 (2017).

Constitutional challenge to Penal Law § 125.25(3) [felony murder]

Felony murder is a strict liability homicide crime in the sense that it punishes the defendant for murder even if he or she had no intent to kill, so long as they had or shared the intent to commit the underlying felony. A young client's involvement in a robbery-gone-wrong is a common scenario.

We propose that, if your young client has been charged with felony murder, you can use the neuroscience to craft a motion to dismiss the felony murder jury charge itself, on the ground that the offense violates due process as applied to your young client: The failure to foresee consequences is the hallmark of the undeveloped prefrontal cortex, and thus, adolescents and young adults cannot be assumed to foresee a risk of death when committing the underlying felonies.

As Penal Law § 125.25(3) does not distinguish between adults and adolescents/emergent adults whose brains are not fully developed, the statute violates due process. U.S. Const., amend. XIV; N.Y. Const., art. 1, § 6.

Remember, a motion to dismiss must be made in writing. CPL § 210.45 (1).

* * *