

No. 11-56771

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATALIE DeMOLA,)	DC# CV 10-00014-JLS-SS
)	
Petitioner-Appellee,)	
)	
v.)	
)	
JAVIER CAVAZOS, Acting Warden,)	
)	
Respondent-Appellant.)	
_____)	

**BRIEF OF *AMICUS CURIAE* JUVENILE LAW CENTER
IN SUPPORT OF APPELLEE’S PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING EN BANC**

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

HONORABLE JOSEPHINE L. STATON
United States District Judge

MARSHA L. LEVICK
Deputy Director and Chief Counsel
JUVENILE LAW CENTER
1315 Walnut Street, 4th Floor
Philadelphia, PA 19107

Telephone: 215-625-0551
Fax: 215-625-2808

Attorney for Amicus Curiae

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I. STATEMENT OF IDENTITY AND INTEREST

Founded in 1975, Juvenile Law Center is the oldest multi-issue public interest law firm for children in the United States. Juvenile Law Center advocates on behalf of youth in the child welfare and criminal and juvenile justice systems to promote fairness, prevent harm, and ensure access to appropriate services. Among other things, Juvenile Law Center works to ensure that children's rights to due process are protected at all stages of juvenile court proceedings, from arrest through disposition, from post-disposition through appeal, and; that the juvenile and adult criminal justice systems consider the unique developmental differences between youth and adults in enforcing these rights.

Juvenile Law Center has worked extensively on the issue of juvenile life without parole, filing *amicus* briefs in the U.S. Supreme Court in both *Graham v. Florida*, 130 S. Ct. 2011 (2010) and *Miller v. Alabama*, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). Since the U.S. Supreme Court issued its decision in *Miller v. Alabama*, Juvenile Law Center has filed briefs in state and federal courts throughout the country addressing the impact and scope of the *Miller* decision, including briefs in the U.S. Court of Appeals for the Second Circuit (*Wang v. U.S.*, Case No. 13-2426); the U.S. Court of Appeals for the Third Circuit (*Baines v. Commonwealth*, Case No. 12-cv-3996); the California Supreme Court

(*State v. Gutierrez*, Case No. S206365; *State v. Moffett*, Case No. S206771); the Colorado Supreme Court (*Banks v. State*, Case No. 12SC1022); the Florida Supreme Court (*Falcon v. State*, Case No. SC 13-865); the Massachusetts Supreme Court (*Commonwealth v. Brown*, Case No. SJC-11454); the Nebraska Supreme Court (*State v. Castaneda*, Case No. S-11-0023); the Ohio Supreme Court (*State v. Long*, Case No. 2012-1410); and the Pennsylvania Supreme Court (*Commonwealth v. Batts*, 79 MAP 2009; *Commonwealth v. Cunningham*, 38 EAP 2012).

II. STATEMENT REQUIRED BY FED. R. APP. P. 29(c)(5)

All parties have consented to the filing of this amicus brief. No party's counsel authored the brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person – other than the *amicus curiae*, its members, or its counsel – contributed money that was intended to fund preparing or submitting the brief.

III. ARGUMENT

Amicus Juvenile Law Center writes in support of Appellant's motion for panel rehearing or, in the alternative, rehearing *en banc* on the question as to whether Appellant's life without parole sentence violates the Supreme Court's holdings in *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

A. *Miller* Reaffirms The U.S. Supreme Court’s Recognition That Children Are Fundamentally Different From Adults And Categorically Less Deserving Of The Harshest Forms Of Punishments

Miller held that, prior to imposing a life without parole sentence on a juvenile offender, the sentencer must take into account the juvenile’s decreased culpability. *Miller*, 132 S. Ct. at 2460. Justice Kagan, writing for the majority in *Miller*, was explicit in articulating the Court’s rationale for its holding: the mandatory imposition of sentences of life without parole “prevents those meting out punishment from considering a juvenile’s ‘lessened culpability’ and greater ‘capacity for change,’ and runs afoul of our cases’ requirement of individualized sentencing for defendants facing the most serious penalties.” *Id.* (quoting *Graham*, 130 S. Ct. at 2026-27, 2029-30). The Court grounded its holding “not only on common sense . . . but on science and social science as well,” *id.* at 2464, which demonstrate fundamental differences between juveniles and adults. The Court noted “that those [scientific] findings – of transient rashness, proclivity for risk, and inability to assess consequences – both lessened a child’s ‘moral culpability’ and enhanced the prospect that, as the years go by and neurological development occurs, his ‘deficiencies will be reformed.’” *Id.* at 2464-65 (quoting *Graham*, 130 S. Ct. at 2027; *Roper v. Simmons*, 543 U.S. 551, 570, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005)).

In *Graham*, which held that life without parole sentences for juveniles convicted of non-homicide offenses violate the Eighth Amendment, the Court found that because the personalities of adolescents are still developing and capable of change, an irrevocable penalty that afforded no opportunity for review was developmentally inappropriate and constitutionally disproportionate. The Court’s holding rested largely on the incongruity of imposing a final and irrevocable penalty on an adolescent, who had capacity to change and grow.

The *Graham* Court relied upon an emerging body of research confirming the distinct emotional, psychological and neurological status of youth. The Court clarified that, since *Roper*, “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence.” *Id.* at 2026. Thus, the Court underscored that because juveniles are more likely to be reformed than adults, the “status of the offender” is central to the question of whether a punishment is constitutional. *Id.* at 2027.

Importantly, in *Miller*, the Court found that none of what *Graham* “said about children – about their distinctive (and transitory) mental traits and environmental vulnerabilities – is crime-specific.” *Id.* at 2465. Accordingly, the Court 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.” *Id.*

B. *Miller* Requires The Sentencer To Make An Individualized Sentencing Determination Based On A Juvenile's Overall Culpability

Miller held “that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders,” *id.* at 2469, because “[s]uch mandatory penalties, by their nature, preclude a sentencer from taking account of an offender’s age and the wealth of characteristics and circumstances attendant to it.” *Id.* at 2467. *Miller* set forth specific factors that the sentencer, at a minimum, should consider: (1) the juvenile's “chronological age” and related “immaturity, impetuosity, and failure to appreciate risks and consequences;” (2) the juvenile’s “family and home environment that surrounds him;” (3) “the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him;” (4) the “incompetencies associated with youth” in dealing with law enforcement and a criminal justice system designed for adults; and (5) “the possibility of rehabilitation.” *Id.* at 2468. Prior to imposing a juvenile life without parole sentence, the sentencer must consider how these factors impact the juvenile’s overall culpability. *Id.* at 2469.

C. The Scope And Extent Of The Holding In *Miller* Is A Critical National Issue And Requires Thorough Briefing And Consideration

The scope and extent of the U.S. Supreme Court's holding in *Miller* is of critical national importance and requires extensive briefing and careful consideration by this Court or the District Court on remand. *Miller* does not simply forbid mandatory life without parole sentences for juvenile offenders; the Court also *requires* the sentencer "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Miller*, 132 S. Ct. at 2469. Therefore, even *discretionary* life without parole sentencing schemes run afoul of *Miller* if the sentencer fails to consider the offender's young age and corresponding attributes as evidence of mitigation.

Since the U.S. Supreme Court issued its decision in *Miller*, state and federal courts across the county have been grappling with the full meaning of the ruling, including examining its impact on sentencing schemes in which the sentencer has discretion. Post-*Miller*, the U.S. Supreme Court vacated a juvenile life without parole sentenced imposed pursuant to California's sentencing statute and remanded the case for further consideration in light of *Miller*. See *Mauricio v. California*, 133 S. Ct. 524 (2012). In two pending cases, the California Supreme Court is also considering the impact of *Miller* on California's sentencing statute. See *State v. Gutierrez*, Case No. S206365 (Cal.); *State v. Moffett*, Case No. S206771 (Cal.).

Courts around the country are undertaking similar examinations of sentencing statutes in light of *Miller*. The U.S. Courts of Appeals for the Second, Third and Eighth Circuits, for example, have granted authorization to file successive § 2255 motions under *Miller* even though the U.S. Attorneys argued that the life without parole sentences were discretionary, not mandatory, under the federal sentencing schemes in place at the time the petitioners were sentenced. *See Johnson v. U.S.*, 720 F.3d 720 (8th Cir. 2013); *Wang v. U.S.*, No. 13-2426 (2d Cir. July 16, 2013); *In re Pendleton*, No. 12-3617, 2013 WL 5486170 (3d Cir. Oct. 3, 2013). Several state courts are also considering how *Miller* impacts discretionary juvenile life without parole sentences and other lengthy juvenile sentences when the trial court did not take the defendant's young age into account. *See, e.g., State v. Null*, 836 N.W.2d 41 (Iowa 2013) ("In this case, it is important to point out that the district court did not have the benefit of *Miller* or this opinion during sentencing. . . . [W]e have concluded that the analysis of *Miller* . . . applies to the very lengthy mandatory minimum sentence without the possibility of parole at issue in this case. Now that we and the Supreme Court have provided clearer guidance on the considerations to be given in sentencing, the appropriate course is to vacate the sentence imposed on Null and remand the case to the district court.); *State v. Long*, No. 2012-1410 (Ohio) (a pending case in which the Ohio Supreme

Court is considering a challenge to a pre-*Miller* discretionary life without parole sentence imposed on a juvenile); *Daugherty v. State*, 96 So. 3d 1076, 1079 (Fla. Dist. Ct. App. 2012) (“Unlike the juvenile defendant in *Miller* . . . appellant was not sentenced to a statutorily mandated sentence of life imprisonment without the possibility of parole. Rather, the trial judge in his case had discretion to impose a different punishment. Nevertheless, *Miller* contains language suggesting that sentencing juveniles to life-without-parole prison terms should be ‘uncommon’ in light of the ‘great difficulty’ of distinguishing at this early age between ‘the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.’ Thus, under *Miller*, judges must take an individualized approach to sentencing juveniles in homicide cases and consider factors which predict whether a juvenile is amenable to reform or beyond salvation.”) (internal citations omitted).

IV. CONCLUSION

Determining *Miller*’s implications on sentencing statutes and individual sentencings requires thorough briefing and analysis, including a review of sentencing transcripts to determine whether – and how – the sentencing court took the defendant’s young age into consideration. Since such an analysis and review was not conducted in this case, *Amicus* Juvenile Law Center respectfully requests

this Court grant Petitioner's motion for panel rehearing or, in the alternative, rehearing en banc on the question.

Respectfully submitted,

/s/ Marsha L. Levick
MARSHA L. LEVICK
Deputy Director and Chief Counsel

Attorney for Amicus Curiae
Juvenile Law Center

DATED: October 21, 2013

CERTIFICATE OF COMPLIANCE

Pursuant to Circuit Rules 29-2 and 32, I certify that this brief is proportionally spaced, has a typeface of 14 points or more, and contains 1,793 words.

s/ Marsha L. Levick
MARSHA L. LEVICK

DATED: October 21, 2013

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 21, 2013.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Marsha L. Levick
MARSHA L. LEVICK

DATED: October 21, 2013