S-11-0023

IN THE SUPREME COURT OF THE STATE OF NEBRASKA

THE STATE OF NEBRASKA,

Appellee,

vs.

JUAN E. CASTANEDA

Appellant.

APPEAL FROM THE DISTRICT COURT
OF DOUGLAS COUNTY, NEBRASKA

Honorable John Hartigan, District Court Judge

BRIEF OF JUVENILE LAW CENTER
AS *AMICUS CURIAE*
ON BEHALF OF APPELLANT

MARSHA LEVICK
PA Attorney I.D. 22535
Deputy Director and Chief Counsel
EMILY KELLER
PA Attorney I.D. 22535
LAUREN FINE
PA Attorney I.D. 311636
JUVENILE LAW CENTER
The Philadelphia Building
1315 Walnut Street, 4th Floor
Philadelphia, PA 19107
Telephone (215) 625-0551
Facsimile (215) 625-2808

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I. STATEMENT OF 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.

II. SUMMARY OF ARGUMENT

In *Miller v. Alabama,* 567 U.S.___, 132 S. Ct. 2455, 183 L.Ed.2d 407 (2012) the United States Supreme Court held that the mandatory imposition of life without parole sentences on juvenile offenders is unconstitutional. Under current Nebraska law, any juvenile convicted of first degree murder must be sentenced to life imprisonment without the possibility of parole. NEB. REV. STAT. § 29-2520. The statute governing first degree murder fails to account for consideration of the different levels of culpability associated with participation as an aider/abetter, versus as the actual shooter. Additionally, the sentencing judge has no discretion to take the offender's youth or other circumstances into account, and the only available sentence does not provide the constitutionally mandated possibility of parole for a juvenile who did not commit homicide. *See Graham v. Florida*, 130 S. Ct. 2011 (2010) (holding that a life without parole sentence can never be imposed upon a juvenile when there is no finding that the juvenile either killed or intended to kill). The possibility of commutation of the life imprisonment sentence does not alter the unconstitutionality of the punishment as it neither allows the court to

impose an individualized sentence (as required by *Miller*), nor does it provide a meaningful opportunity for release (as required by *Graham*, 130 S. Ct. at 2030). Accordingly, Appellant Juan Castañeda's sentence must be vacated and a new constitutional sentence imposed.

III. ARGUMENT

A. Nebraska's Mandatory Life Imprisonment Without the Possibility of Parole Sentencing Scheme For Juveniles Convicted Of Murder Is Unconstitutional Under the United States Constitution

In *Miller v. Alabama*, 567 U.S.___, 132 S. Ct. 2455, 2469 (2012), the United States Supreme Court held "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders." Acknowledging the unique status of juveniles and reaffirming its recent holdings in *Roper v. Simmons*, 543 U.S. 551 (2005), *Graham v. Florida*, 130 S. Ct. 2011 (2010), and *J.D.B. v. North Carolina*, 564 U.S. ___, 131 S. Ct. 2394 (2011), the Court in *Miller* held that "children are constitutionally different from adults for purposes of sentencing," *id.* at 2464, and therefore the "imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." *Id.* at 2466.

1. *Miller* Reaffirms The Court's Recognition That Children Are Fundamentally Different Than Adults And Categorically Less Deserving Of The Harshest Forms Of Punishments

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,' *Graham v. Florida*, 130 S. Ct. 2011, 2026–27, 2029–30 (2010), and runs afoul of our cases' requirement of individualized sentencing for defendants facing the most serious penalties." *Miller* at 2460. 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,* 543 U.S., at 570)). Importantly, the Court specifically 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.*

Miller held "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *See id.,* at 2469 The Court found that "[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. The Court further explained that:

> Under these schemes, every juvenile will get the same sentence as every other – the 17-year-old and the 14-year-old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one. And still worse, each juvenile (including these two 14-year-olds) will receive the same sentence as the vast majority of adults committing similar homicide offenses – but really, as *Graham* noted, a *greater* sentence than those adults will serve.

Id. at 2467-68. Relying on *Graham*, *Roper*, and other previous decisions on individualized sentencing, the Court found "that in imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult." *Id.* at 2468. Mandatory life without parole sentences are unconstitutional as applied to juveniles because "[b]y making youth (and all that accompanies it) irrelevant to imposition of the harshest prison sentence, such a scheme poses too

great a risk of disproportionate punishment." *Id.* at 2469. The combination of the *Graham* and *Miller* decisions require that Juan Castañeda be offered an opportunity for release during his lifetime that is meaningful and realistic.

2. Nebraska's Mandatory Life Without Parole Sentencing Scheme For Juvenile Offenders Convicted Of Murder Is Unconstitutional

Nebraska's sentencing scheme, which currently mandates that any juvenile offender convicted of first degree murder must be sentenced to life without the possibility of parole, is unconstitutional pursuant to *Miller*. Nebraska statutes define two types of first degree murder: a Class I felony punishable by death, and a Class IA felony punishable by life imprisonment without parole, but the elements required to prove either type are the same. *See* NEB. REV. STAT. § 28-303 (murder in the first degree "shall be punished as a Class I or Class IA felony"); Neb. Rev. Stat. § 28-105 (sentence for a Class I felony is death; penalty for a Class IA felony is life imprisonment). Both the Nebraska statute and U.S. Supreme Court jurisprudence exclude Class I felonies as an option for juveniles, leaving a Class IA felony as the only available charge. *See Roper*, 543 U.S. at 578-79 (2005), NEB. REV. STAT. § 28-105.01. Thus, in Nebraska, a juvenile convicted of first degree murder in the adult criminal justice system must receive a sentence of life imprisonment.

In Nebraska, life imprisonment does not provide an opportunity for parole. Life imprisonment for a Class IA is both a minimum and maximum. *See* NEB. REV. STAT. § 28-105 (penalty for a Class IA felony is "life imprisonment" whereas sentence for a Class IB felony states that "life imprisonment" is a "maximum" and twenty years imprisonment is a minimum"); *see also Poindexter v. Houston*, 275 Neb. 863, 868; 750 N.W.2d 688 (2008) (defendant's "sentence of life is the 'minimum term' of his flat sentence. . . .[Defendant] is not eligible for

parole until the Board of Pardons commutes his life sentence to a term of years."). *See also, infra*, Subsection B. (statutory scheme also violates *Graham*.)

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

Miller requires that a sentencer, not a parole board, make an individualized determination of the juvenile's level of culpability and then impose the appropriate sentence. *Miller* faulted "mandatory penalty schemes [that] prevent the sentencer from considering youth and from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender." *Miller*, 132 S. Ct. at 2458. *Miller* found that "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, and declared such schemes unconstitutional. Nebraska's sentencing schemes is unconstitutional because the sentencer is denied any opportunity to consider factors related to the juvenile's overall level of culpability.

Miller sets 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. This process did not occur in Appellant's case. For example, Mr. Castañeda had no opportunity to argue that he deserved a less severe sentence in light of his relatively young age, his level of involvement in the offense, peer pressures exerted upon him, or any other factor that would demonstrate a reduced level of culpability and capacity for rehabilitation.

Because Nebraska's mandatory sentencing scheme for first degree murder deprives the sentencer of the opportunity to consider the juvenile's age and related characteristics, the sentencing scheme, as applied to juvenile offenders, is unconstitutional and sentences imposed pursuant to this scheme must be vacated. In determining an appropriate and individualized sentence, the trial court should consider any mitigating evidence, based on the *Miller* factors..

4. Nebraska Law Deprives Appellant of A Meaningful Opportunity For Release As Required By *Miller* and *Graham*

Under Nebraska law, the only means by which an offender convicted of first degree murder can be released from prison is by first having his or her life sentence commuted to a term of years by the Nebraska Board of Pardons, and then being granted parole by the Nebraska Board of Parole. *See, e.g.*, *Poindexter v. Houston*, 275 Neb. 863, 868; 750 N.W.2d 688 (2008). This multiple step process does not constitute the "meaningful opportunity for release" required by the Supreme Court for juvenile offenders, which requires, *inter alia*, that juveniles be given the opportunity to demonstrate growth and maturity. *See Graham v. Florida*, 130 S.Ct. 2011, 2030 (2010).

The Nebraska Board of Pardons ("Board") consists of the Governor, Attorney General, and Secretary of State. NEB. REV. STAT. § 83-1,126. *See also* NEB. CONST. Art. IV, § 13. Neither the Nebraska legislature nor the state's judiciary has any power to influence the exercise of the pardon power; it is vested exclusively in the Board, which requires a majority vote to grant a pardon or commute a sentence. *Id. See also* Neb. Op. Atty. Gen. No. 1011, 2001 WL 285269 (Neb.A.G.), *Otey v. Nebraska*, 485 N.W.2d 153, 163 (Neb. 1992) (describing that "[i]n Nebraska, as a matter of law, the judicial branch of government has no jurisdiction to review the granting or denial of clemency…by the Board of Pardons."). The Nebraska courts "have long held that *the exercise of clemency authority 'is not a right given for a consideration to the*

individual by the legislature, but a free gift from the supreme authority, confided to [the Board of Pardons], and to be bestowed according to [its] own discretion.'" *Id.* (quoting *Pleuler v. The State*, 10 N.W. 481, 489 (1881)) (emphasis in original). The courts have further underscored that "'[t]he exercise or nonexercise of a discretionary power to grant clemency is not subject to ordinary due process requirements.'" *Id.* (quoting *Whited v. Bolin*, 312 N.W.2d 691, 693 (1981)). Although the Board may hold a public hearing, at which it receives evidence and may hear from counsel, *id.* at 161,

> There are no 'substantive predicates' which limit the Board of Pardons' discretion in granting commutations, i.e., no specific criteria which an applicant must meet to earn a commutation from the Board of Pardons, no conditions which must first be met, no specific conduct which the applicant must have avoided, no guidelines of any kind which must be followed by the Board.

Id. at 166. Ultimately, the Nebraska Board of Pardons has "unfettered discretion to grant or deny a commutation...for any reason or no reason at all." *See id.* at 161, 166. Commutation therefore does not provide a *meaningful* opportunity for release, which is one of the fundamental tenets of the Supreme Court's *Graham* decision.

Nor does commutation even guarantee release in Nebraska; if a life sentence is commuted, the Board of Parole (or "parole board") must then review the inmate's record "annually when he or she is within five years of his or her earliest parole eligibility date" to determine whether he or she merits release based on a variety of factors. NEB. REV. STAT. § 83-192. This comports with the Nebraska practice of reviewing term of year sentences at various predetermined intervals during the term of incarceration, depending on the inmate's parole eligibility date. *See id.* In rendering a decision, the parole board interviews an applicant, "considers any letters or statements presented in support of a claim for release", and informs

him or her of the shortcomings in her application if it is denied. *See Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 1 (1979).

The distinctions between the parole and pardon processes in Nebraska underscore the capriciousness of the latter. In contrast to the subjective process for obtaining clemency described above, the pathway for parole is predictable and methodical. It further provides an opportunity for a hearing for an applicant who is "a likely candidate for release…at which the inmate may present evidence, call witnesses, and be represented by counsel." *Id.* Nebraska law also requires that review of a parole application

> include the circumstances of the offense, the presentence investigation report, the committed offender's previous social history and criminal record, his or her conduct, employment, and attitude during commitment, and the reports of such physical and mental examinations as have been made. The board shall meet with such committed offender and counsel him or her concerning his or her progress and prospects for future parole.

Neb. Rev. St. § 83-192. Most importantly, the Nebraska parole statute dictates that the parole board "'*shall*' order an inmate's release unless it concludes that his release should be deferred for at least one of four specified reasons." *Id. Greenholtz*, 442 U.S. at 1 (emphasis added). In other words, parole is possible to predict; commutation, on the other hand, "is an ad hoc exercise of executive clemency that may occur at any time for any reason without reference to any standards." *Solem v Helm*, 463 US 277, 300-01 (1983). In order to be released in Nebraska, an inmate convicted of first degree murder must first succeed at the exceedingly subjective pardon stage, in order to even be considered for parole. This is an unlikely outcome, which cannot be deemed a "meaningful" opportunity for release.

Longstanding U.S. Supreme Court jurisprudence confirms this view. Nearly three decades ago, the Court held that the possibility of executive clemency could not convert an

unconstitutionally "cruel" sentence into a constitutional one – the chance of clemency being granted was too remote. *See Solem v Helm*, 463 US 277, 300-01 (1983). In explaining why the sentences are "fundamentally different", the Court stated:

> As a matter of law, parole and commutation are different concepts, despite some surface similarities. Parole is a regular part of the rehabilitative process. Assuming good behavior, it is the normal expectation in the vast majority of cases. The law generally specifies when a prisoner will be eligible to be considered for parole, and details the standards and procedures applicable at that time. Thus it is possible to predict, at least to some extent, when parole might be granted. Commutation, on the other hand, is an *ad hoc* exercise of executive clemency. A Governor [or Board of Pardons] may commute a sentence at any time for any reason without reference to any standards.

Id. at 300 (internal citations omitted). More specifically, with respect to the South Dakota statute at issue in that case, the Court observed that

> The possibility of commutation of a life sentence under South Dakota law is not sufficient to save respondent's otherwise unconstitutional sentence on the asserted theory that this possibility matches the possibility of parole...[P]arole...is governed by specified legal standards. Commutation is an ad hoc exercise of executive clemency that may occur at any time for any reason without reference to any standards.

Id. at 278-279 (internal citations omitted). The Court further detailed its long history of "recognize[ing] the distinction between parole and commutation in...prior cases." *Id.* at 301 (citing *Rummel v. Estelle*, 445 U.S. 263 (1980)), and noted that in South Dakota, much like in Nebraska, "even if [the appellant]'s sentence were commuted, he merely would be eligible to be considered for parole." *Id.* at 302. The lack of a guarantee to be paroled, even after commutation, was critical for the Court, as was the stringent nature of the state's parole system. *Id.*

Much more recently, the Supreme Court has expressed the same view with respect to the imposition of this type of punishment on a child, invalidating a juvenile "life sentence [that] gives a defendant no possibility of release unless he is granted executive clemency." *Graham v. Florida*, 130 S.Ct. 2011, 2010 (2010). In *Graham*, the Court observed that such a sentence "deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency," and emphasized that obtaining clemency is such a "remote possibility" that it "does not mitigate the harshness of the sentence." *Id.* at 2027 (citing *Solem*, 463 U.S. at 300-301). The Court noted that a "State is not required to guarantee eventual freedom to a juvenile offender convicted of a non-homicide crime, but the State must give defendants…some *meaningful* opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 2030 (emphasis added). Just this month, the Court reaffirmed the insufficiency of clemency in meeting this mandate in the context of juvenile sentences. The Court remanded a youth's case back to Wyoming "for further consideration in light of *Miller v. Alabama,*" where the juvenile defendant was sentenced to a life *with* the possibility of clemency sentence. *Bear Cloud v Wyoming*, No. 11-10616, 2012 WL 2002444 (US October 1, 2012). *Bear Cloud* represented a "'categorical challenge' to a life sentence for felony-murder" under both *Miller* and *Graham v. Florida, id.* at 400, and is thus directly relevant to Appellant's case. As we described at length above, the opportunity to go before a clemency board comprised of the top officials in a state, and then to still have to be granted parole by a parole board, as is the practice in Nebraska, does not provide a meaningful opportunity to obtain release. Instead, the infrequency with which commutations are granted renders that "opportunity" irrelevant for purposes of analyzing the constitutionality of an LWOP sentence.

B. Any Life Without Parole Sentence For A Juvenile Who Did Not Kill Or Intend To Kill Is Inconsistent With Behavioral And Neuroscientific Research And Is Unconstitutional Pursuant To *Miller* And *Graham*

No evidence was presnted at trial that Appellant killed anyone. In fact, the the State conceded at trial that Appellant was not the shooter in either homicide. Pursuant to *Miller* and *Graham*, juveniles such as Appellant convicted of murder absent a finding that they killed are constitutionally ineligible to receive life without parole sentences.

Nebraska's felony murder statute requires no finding that the defendant actually killed; instead, like felony murder statutes across the country, it creates a legal fiction in which intent to kill is inferred from the intent to commit the underlying felony. *See* NEB. REV. STAT. § 28-303(2). Such intent cannot be inferred when the offender is a juvenile. Pursuant to *Graham*, juveniles who do not kill cannot be sentenced to life without parole. 130 S. Ct. at 1025. Moreover, pursuant to *Miller*, only the most serious juvenile offenders should receive life without parole. *See Miller,* 132 S. Ct. at 2469 (noting that "*appropriate occasions for sentencing juveniles to this harshest possible penalty* [life without parole] *will be uncommon*" (emphasis added). Quoting *Roper* and *Graham*, *Miller* further notes that the "juvenile offender whose crime reflects irreparable corruption" will be "rare." *Id.*)

The Nebraska standard jury instructions on felony murder do not specifically instruct the jury about the lack of intent to kill required to convict of first degree (felony) murder. This lapse is particularly significant here, where Appellant was convicted as an aider/abetter, not as the shooter. Indeed, the jury instructions given in his case required the jury to find only that he "either alone *or by aiding another* did kill" each victim "during the perpetration of or attempt to perpetrate the felony of Robbery." *See T. Jury Instruction No. 4, Sections I, III*, obtained from the Office of the Public Defender. Another instruction requires the jury to find only that "in the commission of said Murder in the First Degree a deadly weapon, a firearm, was used either by Defendant alone or by aiding another." *Id.*

1. Any Life Without Parole Sentence For A Juvenile Convicted Of Felony Murder Is Unconstitutional Pursuant To *Miller* And *Graham*

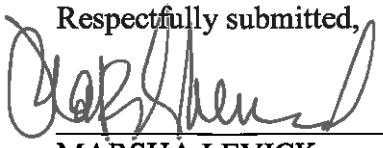
Under Nebraska law, a conviction of first degree murder requires no finding that a defendant killed. *See* NEB. REV. STAT. § 28-303, NEB. REV. STAT. § 28-206. Sentencing a juvenile convicted of felony murder to life without parole – where there has been no such finding -- is unconstitutional under *Graham*. Miller, 132 S. Ct. at 2475-76 (Breyer, J., concurring)

Miller confirms that a life without parole sentence is unconstitutional for a juvenile convicted of felony murder. *Miller* found that, "given all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, *we think appropriate occasions for sentencing juveniles to this harshest possible penalty* [life without parole] *will be uncommon.*" 132 S. Ct. at 2469 (emphasis added). Therefore, to the extent juvenile life without parole sentences are ever appropriate, *Miller* necessitates they be imposed only in the most extreme circumstances. Under *Miller*, a juvenile convicted of felony murder by definition, cannot be categorized as one of the most culpable juvenile offenders for whom a life without parole sentence would be proportionate or appropriate. *See id.* at 2476 (Breyer, J., concurring) ("The dissent itself here would permit life without parole for 'juveniles who commit the worst types of murder,' but that phrase does not readily fit the culpability of one who did not himself kill or intend to kill.").

IV. CONCLUSION

This Honorable Court should hold that Juan Castañeda's life without parole sentence is unconstitutional, vacate the sentence, and remand the instant matter for resentencing for a Class IB felony.

Respectfully submitted,



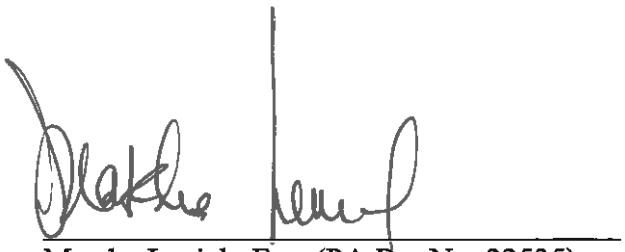
MARSHA LEVICK
PA Attorney I.D. 22535
Deputy Director and Chief Counsel
EMILY KELLER
PA Attorney I.D. 22535
LAUREN FINE
PA Attorney I.D. 311636
JUVENILE LAW CENTER
The Philadelphia Building
1315 Walnut Street, Suite 400
Philadelphia, PA 19107

CERTIFICATE OF SERVICE

I, Marsha Levick, Esq., hereby certify that I have served a true and correct copy of this brief via first-class U.S. mail on this 16th day of October, 2012 to:

Jon Bruning, Esq.
Attorney General of the State of Nebraska
Office of the Attorney General
2115 State Capitol
Lincoln, NE 68509

Thomas C. Riley, Esq.
Douglas County Public Defender
1819 Farnam Street
H05 Civic Center
Omaha, NE 68183



Marsha Levick, Esq. (PA Bar No. 22535)
Counsel of Record for Amicus Curiae
JUVENILE LAW CENTER
1315 Walnut St.
Suite 400
Philadelphia PA 19107
(215) 625-0551
Fax: (215) 628-2808