

No. \_\_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES

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SYDNEY L. THIESZEN

*PETITIONER,*  
VS.

STATE OF NEBRASKA

*RESPONDENT.*

ON PETITION FOR A WRIT OF CERTIORARI TO  
THE SUPREME COURT OF THE STATE OF NEBRASKA

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PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

The Nebraska Supreme Court affirmed a sentence of 70 years' to life imprisonment for a juvenile convicted of first degree murder. The questions presented are:

1. Whether the Eighth Amendment to the United States Constitution and *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct 2455 (2012), *Montgomery v. Louisiana*, 577 U.S. \_\_\_, 136 S. Ct. 718 (2016), and *Tatum v. Arizona*, 580 U. S. \_\_\_, 137 S. Ct. 11 (2016), permit a juvenile convicted of a homicide offense to be sentenced to the functional equivalent of life without parole.
2. Whether a *de facto* sentence of life without parole for a juvenile denies the offender a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation demanded by the Eighth Amendment to the United States Constitution in violation of *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455 (2012), *Montgomery v. Louisiana*, 577 U.S. \_\_\_, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016), and *Tatum v. Arizona*, 580 U. S. \_\_\_, 137 S. Ct. 11 (2016).

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IN THE  
**SUPREME COURT OF THE UNITED STATES**

No. \_\_\_\_\_

Sydney L. Thieszen,

*Petitioner,*

v.

State of Nebraska

*Respondent*

On Petition for a Writ of Certiorari to the  
Nebraska Supreme Court

**PETITION FOR WRIT OF CERTIORARI**

Petitioner respectfully requests that a writ of certiorari issue to review the judgement below.

**OPINIONS BELOW**

The decision of the Supreme Court of the State of Nebraska sustaining the sentence imposed by the district court appears at Appendix A to the petition and is reported at *State v. Thieszen*, 300 Neb. 112, 912 N.W.2d 696 (2018).

The sentencing order of the York County District Court of Nebraska appears at Appendix B to the petition and is unpublished.

**JURISDICTION**

The date on which the Supreme Court of the State of Nebraska decided this case was June 1, 2018. A copy of that decision appears at Appendix A.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

This case involves the Eighth Amendment to the United States Constitution which provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Section 1 of the Fourteenth Amendment to the United States Constitution provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The sentencing statute for the underlying offense is Neb. Rev. Stat. § 28-105.02 (Reissue 2016), which has been reprinted at Appendix C.

## **STATEMENT OF THE CASE**

### **A. BACKGROUND**

#### **1. Introduction**

This case involves a constitutional challenge by petitioner, Mr. Sydney L. Thieszen, to his sentence of 70 years' to life imprisonment for the offense of first degree murder. At the time of the offense, petitioner was 14 years of age. The offense occurred on September 17, 1987. The original Information in 1987 charged him with first degree murder and use of a firearm to commit a felony. The district court denied a motion to

transfer jurisdiction to juvenile court in 1988. Petitioner pled guilty to second degree murder and use of a firearm to commit a felony in 1988. On June 7, 1988, Petitioner was sentenced to life imprisonment for second degree murder and 80 to 240 months for use of a firearm to commit a felony.

In 1994, petitioner filed a motion for postconviction relief which alleged that the count of second degree murder in the Amended Information failed to allege malice as an element of the offense. On July 25, 1995, the district court vacated the conviction for second degree murder. Petitioner was recharged with first degree murder and use of a firearm to commit a felony. On May 18, 1996, a jury found petitioner guilty of first degree murder and use of a firearm to commit a felony. On June 13, 1996, he was sentenced to life imprisonment for first degree murder and a consecutive term of imprisonment of 80 to 240 months for use of a firearm to commit a felony.

Pursuant to *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct 2455 (2012) and its progeny, petitioner received a new sentencing hearing on the count of first degree murder. On April 21, 2017, he was sentenced to 70 years' to life imprisonment. The sentence was affirmed by the Nebraska Supreme Court on June 1, 2018.

## **2. Procedural Summary**

On June 13, 1996, petitioner was sentenced in the York County District Court to life imprisonment for first degree murder with a consecutive term of imprisonment of 80 to 240 months for use of a firearm to commit a felony. He was 14 years old at time of the murder. Petitioner sought postconviction relief from his life sentence. On December 30, 2015, pursuant to *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct 2455 (2012) and its

progeny, the district court granted postconviction relief and vacated petitioner's life sentence. On April 21, 2017, he was sentenced to 70 years' to life imprisonment. The sentence was affirmed by the Nebraska Supreme Court on June 1, 2018. *See Appendix A.*

### **3. Preservation of Issues**

The federal questions for which review is sought were raised at the mitigation hearing and the sentencing hearing through the introduction of evidence, oral argument and a written brief to the district court. In the Nebraska Supreme Court, the federal questions were raised in the second and third Assignments of Error. Appellant's Brief to the Nebraska Supreme Court at pages 3 through 65 addresses those questions.

In the Nebraska Supreme Court, the federal questions were raised in the second and third Assignments of Error and were specifically addressed in *State v. Thieszen*, 300 Neb. 112, 912 N.W.2d 696 ( 2018) at pages 300 Neb. 126-127, 912 N.W.2d at 706. The Nebraska Supreme Court stated that it had rejected similar claims in the past that a sentence of a lengthy term-of-years could amount to a de facto sentence of life imprisonment. *Id.* citing *State v. Smith*, 295 Neb. 957, 979, 892 N.W.2d 52, 66 (2017), *cert. denied* — U.S. —, 138 S.Ct. 315, 199 L.Ed.2d 208 and *State v. Russell*, 299 Neb. 483, 908 N.W.2d 669 (2018).

### **4. Summary of Facts**

After school on September 17, 1987, at the age of 14, petitioner ran part of the way home. His father met him and drove him the rest of the way home. When they got home, his father and petitioner's brother Shea left the house to do some farming. His

mother was at work. She left a note on the table for petitioner's father saying that petitioner and his 12-year-old sister Sacha were to be punished for not doing their chores. Only Sacha was home with petitioner. She told petitioner about the note. Petitioner wanted to run away. He asked his sister to also run away. He did not know where he was going to go except "anywhere away from there." Sacha said she would call the police. Petitioner had a pistol with him at the time. He had previously taken it from his brother Sheldon's room and loaded it with his own bullets. The pistol was tucked into his gym shorts and covered by his shirt. Sacha and petitioner argued as she continued to say she would call the police. He then hit her with a wooden dowel that was on a shelf going down the stairs. She bled and started running and screaming. She ran up the stairs, he followed her. She went into the bathroom and bent over the sink. He pointed the gun at her head and shot her.

Sacha fell to the ground after she was shot. Petitioner picked her up and put her in the bathtub and shot her a couple more times. He said he did not aim because he could not look at her. He fired the additional shots because he did not know if she was dead, and he did not want her to suffer. He shut the tub door and wiped up some blood from the wall and the sink.

Petitioner then went to his room and reloaded the gun. He did not change clothes. He took about \$100 from his dresser. He put the wooden dowel in a laundry basket. He left the house with no destination in mind. He then saw the family van and took it. He had experience driving farm trucks. He drove south on county roads until he reached Salina, Kansas, where he stopped and slept in the van. Petitioner was apprehended.

**B. RESENTENCING PROCEEDINGS IN THE DISTRICT  
COURT**

Petitioner was granted postconviction relief under *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct 2455 (2012) and *Montgomery v. Louisiana*, 577 U.S. \_\_\_, 136 S. Ct. 718 (2016). A mitigation hearing was held on March 15, 2017. Petitioner offered evidence under *Miller* and *Montgomery* and pursuant to Neb. Rev. Stat. § 28-105.02 (Reissue 2016). (Appendix C) A sentencing hearing was then held on April 21, 2017.

Petitioner offered evidence concerning the three significant differences between juveniles and adults identified in the *Montgomery v. Louisiana*, *supra* at \_\_\_, 136 S.Ct at 733 as essentially: 1) juveniles have a lack of maturity and an underdeveloped sense of responsibility; 2) juveniles are more vulnerable to negative influences; and 3) juveniles' characters are not as well-formed and their actions are less likely to be evidence of irretrievable depravity.

In respect to the immaturity of the adolescent brain, the testimony of Dr. Kayle Pope and Dr. Kirk Newring was presented. Dr. Pope is a board certified child and adolescent psychiatrist. She is the medical director at Boys Town in the neurobehavioral research center. Her expertise includes childhood psychiatry and adolescent brain development. Dr. Newring is a psychologist and conducted a forensic psychological evaluation of petitioner. The experts explained the manner in which the adolescent brain is formed, the limits of adolescent decision making and the application of the three *Miller* factors to petitioner.

Evidence was also offered from a number of other sources as to the impairment and immaturity in decision making, coping skills, impulsivity, lack of insight, and

susceptibility to pressuring and negative peer influences. The evidence received at the mitigation hearing includes numerous records received from the Nebraska Department of Correctional Services (NDCS), the original presentence investigation report from 1988, as well as transcripts from hearings and depositions, and other reports and documents.

Evidence was submitted as to petitioner's vulnerability to negative influences.

The same sources of information addressed this factor.

The third difference involves capacity to change. Dr. Newring conducted a forensic psychological evaluation of Sydney in 2014, and prepared a report. Shortly before the mitigation hearing in 2017, he visited petitioner and reviewed NDCS documents that were created after the 2014 report. Newring updated the report. It was received at the mitigation hearing. He concluded that petitioner has no symptoms of a major mental disorder and there was a low risk of petitioner committing future acts of violence. Additionally, evidence included the testimony of a correctional officer, the letters of individuals who knew petitioner and were able to address his growth and maturity during incarceration, and the allocution of petitioner.

The district court's oral comments at sentencing reflect the conclusion that petitioner was impetuous and immature at the time of the offense. The court observed that petitioner's biological mother was abusive, and Sydney was raised in an abusive environment until he was four. Petitioner was eventually placed in a home with a structured discipline environment. The court found petitioner's intellectual capacity was above average. The court found that petitioner misbehaved despite the structured religious and disciplined environment. The district court found that there was evidence

of premeditation, that petitioner lacked remorse and that petitioner had misconduct reports following his incarceration.

The district court then sentenced to petitioner to 70 years' to life imprisonment to be served consecutively to the prior sentence on the conviction for using a firearm to commit a felony.

### **C. NEBRASKA SUPREME COURT RULING**

Petitioner filed his brief to the Nebraska Supreme Court arguing the district court imposed a *de facto* sentence of life imprisonment without parole in violation of *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct 2455 (2012), *Montgomery v. Louisiana*, 577 U.S. \_\_\_, 136 S. Ct. 718 (2016), and *Tatum v. Arizona*, 580 U. S. \_\_\_, 137 S. Ct. 11 (2016). The Nebraska Supreme Court affirmed the challenged sentence. *State v. Thieszen*, 300 Neb. 112, 912 N.W.2d 696 (2018). In contrast to the district court, the Nebraska Supreme Court went into extensive detail about the evidence of mitigation in this case. In the end, the Nebraska Supreme Court ruled that it had previously decided in *State v. Smith*, 295 Neb. 957, 979, 892 N.W.2d 52, 66 (2017), *cert. denied* — U.S.—, 138 S.Ct. 315, 199 L.Ed.2d 208 and *State v. Russell*, 299 Neb. 483, 908 N.W.2d 669 (2018) that a lengthy term-of-years sentence does not amount to a *de facto* sentence of life imprisonment.

In *State v. Smith, supra*, the Nebraska Supreme Court affirmed the sentence of 90 years to life imprisonment for a nonhomicide offense. The Court restated the holding in *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011(2010), but drew attention to matters which *Smith* holds were not attended to by *Graham*. In particular, the Nebraska

Supreme Court held that this Court's decision in *Graham* does not decide the question of whether a lengthy term-of-years sentence is, for constitutional purposes, the same as a sentence of life imprisonment without the possibility of parole; that *Graham* leaves to states to explore the means and mechanisms of compliance with that decision; that the U.S. Supreme Court provides little guidance as to what constitutes a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation; and that *Graham* does not mandate a meaningful life outside of prison, only a meaningful and realistic opportunity for release.

*Smith* surveyed the decisions of other courts of last resort and concluded there is no consensus among the jurisdictions interpreting *Graham* as to whether a *de facto* life sentence is barred under the principles of that decision.

*Smith* concluded that the possibility of release at age 62 for an individual with a possible life expectancy of 78.8 years does not violate the Eighth Amendment to the United States Constitution nor the principles of *Graham*.

*Russell* follows *Smith* and applied the reasoning of that *Graham* case to a murder case under *Miller*. *Russell* goes on to note a recent change in the approach under New Jersey jurisprudence in *State v. Zuber*, 442 N.J.Super. 611, 126 A.3d 335 (2015), *reversed* 227 N.J. 422, 152 A.3d 197 (2017). In *Russell*, a sentence that prevented the petitioner from becoming eligible for parole until age 72 was found to afford a meaningful and realistic opportunity for release.

## **REASONS FOR GRANTING THE PETITION**

Review is warranted for two reasons. First, the Nebraska Supreme Court is a state court of last resort and has decided that the Eighth Amendment to the United States Constitution, as well as *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct 2455 (2012), *Montgomery v. Louisiana*, 577 U.S. \_\_\_, 136 S. Ct. 718 (2016), and *Tatum v. Arizona*, 580 U. S. \_\_\_, 137 S. Ct. 11 (2016), permit a juvenile convicted of a homicide offense to be sentenced to the functional equivalent of life without parole in a way that conflicts with the decisions of other state courts of last resort. Second, the Nebraska Supreme Court has decided that a sentence for a juvenile convicted of a homicide offense and sentenced to a lengthy term-of-years is not a *de facto* sentence of life and does not deny the meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation demanded by the Eighth Amendment in a way that directly conflicts with *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct 2455 (2012), *Montgomery v. Louisiana*, 577 U.S. \_\_\_, 136 S. Ct. 718 (2016), and *Tatum v. Arizona*, 580 U. S. \_\_\_, 137 S. Ct. 11 (2016).

- A. THE NEBRASKA SUPREME COURT IS A STATE COURT OF LAST RESORT AND HAS DECIDED THAT THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND *MILLER V. ALABAMA*, 567 U.S. 460, 132 S.Ct 2455 (2012), *MONTGOMERY V. LOUISIANA*, 577 U.S. \_\_\_, 136 S. Ct. 718 (2016), AND *TATUM V. ARIZONA*, 580 U. S. \_\_\_, 137 S. Ct. 11 (2016) PERMIT A JUVENILE CONVICTED OF A HOMICIDE OFFENSE TO BE SENTENCED TO THE FUNCTIONAL EQUIVALENT OF LIFE WITHOUT PAROLE IN A WAY THAT CONFLICTS WITH THE DECISIONS OF OTHER STATE COURTS OF LAST RESORT**

## **1. The Precedents of the United States Supreme Court**

In *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct 2455 (2012), this Court held that the Eighth Amendment prohibits mandatory life without parole sentences for juvenile offenders. In *Montgomery v. Louisiana*, 577 U.S. \_\_\_, 136 S.Ct 718 (2016), this Court held that *Miller* applies retroactively to cases on postconviction collateral review.

In *Montgomery*, this Court reviewed its findings in prior cases:

*Miller* took as its starting premise the principle established in [*Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183 (2005)] and [*Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011(2010)] that children are constitutionally different from adults for purposes of sentencing. These differences result from children's diminished culpability and greater prospects for reform, and are apparent in three primary ways:

First, children have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking. Second, 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. And third, a child's character is not as well formed as an adult's; his traits are less fixed and his actions less likely to be evidence of irretrievable depravity.

577 U. S. at \_\_\_, 136 S.Ct. at 733 (alterations; citations and internal quotation marks omitted).

In giving retroactive effect to *Miller*, the *Montgomery* Court noted that states are not required to relitigate sentences in every case in which a juvenile received mandatory life without parole. The Court suggested a state may remedy a *Miller* violation by making offenders parole eligible. The Court explained: “Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity – and who have since matured – will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment.” *Id.* at 736. The Court further explained: “Those prisoners who have shown an inability to reform will continue to serve life sentences. The opportunity for release will be afforded to those who demonstrate the truth of *Miller*’s central intuition – that children who commit even heinous crimes are capable of change.” *Id.*

Finally, the *Montgomery* Court wrote: “In light of what this Court has said in *Roper*, *Graham*, and *Miller* about how children are constitutionally different from adults in their level of culpability, however, prisoners like *Montgomery* must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored.” *Id.* at 736-737.

In *Tatum v. Arizona*, \_\_ U.S. \_\_, 137 S.Ct. 11 (2016), this Court held that a sentencing court may not impose a sentence of life without parole for a juvenile offender unless the court makes a finding that the defendant is irreparably corrupt.

## **2. The Decision of the Nebraska Supreme Court**

The Nebraska Supreme Court affirmed a sentence of 70 years’ to life imprisonment for a 14 year old juvenile convicted of first degree murder. *State v.*

*Thieszen*, 300 Neb. 112, 912 N.W.2d 696 (2018). (Appendix A) The Nebraska Supreme Court has fixed a position that even a sentence of life imprisonment for a juvenile offender passes muster under the United States Constitution if a sentencing court considers a juvenile offender’s “youth and attendant characteristics” thus taking into account how children are different. *State v. Russell*, 299 Neb. 483, 495–96, 908 N.W.2d 669, 677 (2018) (quoting *Miller* 567 U.S. at 480, 483, 132 S.Ct. at 2455).

In *State v. Smith*, 295 Neb. 957, 892 N.W.2d 52 (2017), *cert. denied*, 2017 U.S. LEXIS 6073 (U.S., Oct. 10, 2017), the Nebraska Supreme Court reached the same result. The Nebraska Supreme Court noted that the United States Supreme Court has not decided the question of whether a lengthy prison sentence is the same as life without parole for constitutional purposes. *Id. Smith* stated that the United States Supreme Court has provided little guidance as to what constitutes a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. *Id* at 976-77, 892 N.W.2d at 65.

*Smith* then surveyed the decisions of other courts of last resort and concluded that there is no consensus in respect to how the decision of *Graham* is to be interpreted. *Id* at 978, 892 N.W.2d at 65–66. The decision then aligned itself with other jurisdictions that hold that *Graham* does not require that defendants have a meaningful life outside of prison. “Rather, *Graham* requires only a meaningful and realistic opportunity for release.” *Id* at 979, 892 N.W.2d at 66.

### **3. The Decisions of Other Courts of Last Resort**

The following decisions of other jurisdictions were identified and discussed in *State v. Smith*, 295 Neb. 957, 892 N.W.2d 52 (2017), *cert. denied*, 2017 U.S. LEXIS 6073 (U.S., Oct. 10, 2017):

These cases are identified as triggering the protections afforded by *Graham* and *Miller*: *Casiano v. Commissioner of Correction*, 317 Conn. 52, 115 A.3d 1031 (2015), *cert. denied*, \_\_\_\_ U.S. \_\_\_, 136 S. Ct. 1364, 194 L.Ed. 2d 376 (2016) (50 years for murder is a *de facto* life sentence); *Brown v. State*, 10 N.E.3d 1 (Ind. 2014) (noting multiple sentences reduced under *Graham* and its progeny); *State v. Null*, 836 N.W.2d 41 (Iowa 2013) (mandatory minimum of 52.5 for second degree murder is a *de facto* life sentence); *State v. Zuber*, 442 N.J. Super. 611, 126 A.3d 335 (2015), *reversed* 227 N.J. 422, 152 A.3d 197 (2017) (remanding for resentencing in light of *Graham*, *Miller*, and *Montgomery* and holding defendants who serve lengthy term-of-years sentences should be treated no worse than those with life without parole sentences); and *Bear Cloud v. State*, 334 P.3d 132 (Wyo. 2014) (*Miller* case where aggregate sentence making person parole eligible at age 61 required resentencing).

Petitioner observes that recent applicable decisions of the Iowa Supreme Court such as *State v. Roby*, 897 N.W.2d 127 (Iowa 2017) base their holdings on interpretations of the Iowa Constitution.

Additionally, since the decision in *Smith*, the Wyoming Supreme Court has issued additional guidance in *Sam v. State*, 2017 WY 98, 401 P.3d 834 (2017). The *Sam* case involves a 16 year-old boy convicted of first degree murder, aggravated assault and

battery, and ten counts of attempted aggravated assault and battery. Among the assignments of error were claims that the sentences imposed exceeded the limits of *Bear Cloud, supra* and *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct 2455 (2012). The defendant was sentenced to consecutive sentences of a minimum of 52 years with a possibility of release on parole at 70 years of age. The Court reversed the sentences finding that the aggregation of sentences exceeded the 45/61 standard of *Bear Cloud, supra*, as well as *Miller* and its progeny. The 45/61 standard reflects the sentence at issue in the *Bear Cloud* case where the effect of the sentencing structure provided that the earliest possible parole date for the defendant was after 45 years or when he would be 61 years of age. *Sam* reaffirms the holding in *Bear Cloud* that a sentence that is equal to or exceeds the 45/61 standard is a *de facto* life without parole sentence.

The following cases were identified as upholding a release of persons in his or her late sixties or early seventies as satisfactory under *Graham*: *People v. Lehmkuhl*, 369 P.3d 635 (Colo. App. 2013) (note: the Supreme Court of Colorado on *petition for writ of certiorari* granted the petition on the issue reframed as whether a consecutive term-of-years sentence is invalidated by *Graham* and *Miller* but petitioner subsequently died and the petition was dismissed); *Williams v. State*, 197 So. 3d 569 (Fla. App. 2016) (50 year sentence is not a *de facto* life sentence); *State v. Zuber, supra*; *Silva v. McDonald*, 891 F. Supp. 2d 1116 (C.F. Cal. 2012); and *Thomas v. State*, 78 So. 3d 644 (Fla. App. 2011) (50 year sentence not equivalent to life without parole).

The following cases were not discussed by the Nebraska Supreme Court but represent the decisions of other courts of last resort: *State ex rel. Morgan v. State*, 217

So. 3d 266 (La. 2016) (*Graham* case reversing sentence of 99 years without parole and finding the sentence to be the functional equivalent of a life without parole sentence); *People v. Franklin*, 63 Cal. 4th 261, 370 P.3d 1053, 202 Cal. Rptr. 3d 496 (2016) (sentences which are the functional equivalent to life without parole are not permitted for juvenile defendants under *Graham* and *Miller*); *State v. Springer*, 856 N.W.2d 460, 470 (S.D. 2014), *cert. denied*, — U.S. —, 135 S.Ct. 1908, 191 L.Ed.2d 775 (2015) (a *Graham* case, kidnapping, sentenced to 261 years, or 132 flat time found not a *de facto* life sentence because Springer would be parole eligible in 33 years, when he will be 49).

There is a clear contrast among the courts of last resort. Nebraska has decided an important federal question in a way that conflicts with decisions of other state courts of last resort.

**B. THE NEBRASKA SUPREME COURT HAS DECIDED THAT A SENTENCE FOR A JUVENILE CONVICTED OF A HOMICIDE OFFENSE AND SENTENCED TO A LENGTHY TERM-OF-YEARS IS NOT A *DE FACTO* SENTENCE OF LIFE AND DOES NOT DENY THE MEANINGFUL OPPORTUNITY TO OBTAIN RELEASE BASED ON DEMONSTRATED MATURITY AND REHABILITATION DEMANDED BY THE EIGHTH AMENDMENT IN A WAY THAT DIRECTLY CONFLICTS WITH *MILLER V. ALABAMA*, 567 U.S. 460, 132 S.CT 2455 (2012), *MONTGOMERY V. LOUISIANA*, 577 U.S. \_\_\_, 136 S. CT. 718 (2016), AND *TATUM V. ARIZONA*, 580 U. S. \_\_\_, 137 S. CT. 11 (2016).**

The Nebraska Supreme Court has decided that even a sentence of life imprisonment without the possibility of parole for a juvenile offender passes muster under the United States Constitution so long as the sentencer considered specific, individualized factors before handing down that sentence, thus taking into account how children are different. *State v. Russell*, 299 Neb. 483, 495–96, 908 N.W.2d 669, 677

(2018) (quoting *Miller* 567 U.S. at 480, 483, 132 S.Ct. at 2455); *State v. Smith*, 295 Neb. 957, 892 N.W.2d 52 (2017), *cert. denied*, 2017 U.S. LEXIS 6073 (U.S., Oct. 10, 2017).

Any sentence which is less than life without the possibility for parole must also be upheld if such procedural safeguards were in place at the time of sentencing. Under these cases there is no debate as to the functional equivalency of a sentence of imprisonment involving a lengthy term of years and a sentence of life without parole.

The Nebraska Supreme Court does not require a focus on whether a sentencing court properly considered whether petitioner was a child “whose crimes reflect transient immaturity” or is one of “those rare children whose crimes reflect irreparable corruption” under *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct 2455 (2012) and *Montgomery v. Louisiana*, 577 U.S. \_\_\_, 136 S. Ct. 718 (2016).

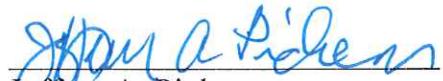
The Nebraska Supreme Court focuses in the first instance on process—asking whether an offender received individualized sentencing. To the extent the length of a sentence is considered, the Nebraska Supreme Court finds that the mere opportunity to die outside the walls of a prison sufficiently meets the threshold of a meaningful opportunity for release. *State v. Smith*, 295 Neb. 957, 979, 892 N.W.2d 52, 66 (2017), *cert. denied*, 2017 U.S. LEXIS 6073 (U.S., Oct. 10, 2017).

The Eighth Amendment to the United States Constitution and *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct 2455 (2012), *Montgomery v. Louisiana*, 577 U.S. \_\_\_, 136 S. Ct. 718 (2016), and *Tatum v. Arizona*, 580 U. S. \_\_\_, 137 S. Ct. 11 (2016) do not permit a homicide offender who has not been shown to be irreparably corrupt to face a sentence which gives no more than opportunity to die outside the prison walls.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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