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| SUPREME COURT<br>STATE OF COLORADO<br><br>2 East 14th Ave.<br>Denver, CO 80203 | |
| On Ms. Armstrong's Petition for Writ of Certiorari to the<br>Colorado Court of Appeals<br>Court of Appeals Case No. 11CA2034<br>Denver District Court No. 95CR1689 | ▲ COURT USE ONLY ▲ |
| **PETITIONER**:<br>CHERYL ARMSTRONG<br>**vs**<br>**RESPONDENT:**<br>PEOPLE OF THE STATE OF COLORADO | Case Number: 13SC945 |
| Attorney for Petitioner:<br>Nicole M. Mooney, Reg. No. 41084<br>MS&M Law Office<br>Alternate Defense Counsel<br>PO Box 3089<br>Denver, CO 80201<br>Tel: (303) 952-0398 Fax: (303) 993-2387<br>nicolemariemooney@yahoo.com | |

# REPLY BRIEF

## CERTIFICATE OF COMPLIANCE

I hereby certify that except for length this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that: The brief complies with C.A.R. 28(g) as it contains 4533 words.

__/s/ Nicole M. Mooney_____

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**"Children are constitutionally different from adults for purposes of sentencing."** *Miller v. Alabama*, 132 S.C. 2455, 2464 (2012).

**"[C]hildren are . . . uniquely capable of growth and change, and a sentence that gives them no opportunity to show their capacity to change is a sentence that denies the differences between children and adults."** Alison Parker, the U.S. Director for Human Rights Watch (found at Huffingtonpost.com, Saki Knafo "Here are all the countries where children are sentenced to die in prison," published 9/20/2013 (accessed November 24, 2015)).

**"The distant and minute chance of geriatric release at a time when the offender has no realistic opportunity to truly reenter society or have any meaningful life outside of prison deprives the offender of hope. Without hope, these juvenile offenders are being discarded in cages and left to abject despair rather than with any meaningful reason to develop their human worth. This result falls far short of the hallmarks of compassion, mercy and fairness rooted in this nation's commitment to justice."** *LeBlanc v. Mathena*, Civil Action No. 2:12cv340, United States District Court for the Eastern District of Virginia (Memorandum and Order, July 1, 2015).

Undoubtedly, a tragedy occurred on April 17, 1995—two lives and an unborn child were lost. They were taken by Donnell Carter and Greg Romero.

After being convicted of being complicit in two counts of second-degree murder, the youthful life of Cheryl Armstrong was then thrown away without regard to her capacity to rehabilitate and mature and grow. Ms. Armstrong has now been in prison for approximately 20 years and has matured, rehabilitated, and grown into a thoughtful, educated, responsible, and remorseful adult. Despite her rehabilitation, maturity, and growth, she has no prospect at all of even the possibility of release for another 20-plus years from now. Admittedly, Ms. Armstrong's operative sentence involved two consecutive 48-year sentences totaling 96 years. But, regardless of the mechanics of the sentence, such a sentence did, and does, indeed deny Cheryl Armstrong any realistic hope of a chance at meaningful life outside of prison walls.

**1. Ms. Armstrong's Arguments are Properly Before the Court**

In its Answer Brief, the State submits Ms. Armstrong's argument that second-degree murder is not a homicide offense within the meaning of *Graham* is not preserved. [Answer Brief, 8] Ms. Armstrong disagrees.

The Court re-framed the issues in this case and several others. This Court specifically ordered argument on "Whether a conviction for second-degree murder under a complicity theory is a non-homicide offense within the meaning of *Graham [v. Florida*, 560 U.S. 48, 130 S.Ct. 2011 (2010)]." This issue absolutely

includes whether Ms. Armstrong "committed homicide." Therefore, this argument is directly in response to the issues framed by this Court. See *People v. Aarness*, 150 P.3d 1271, 1277 (Colo. 2006) (Court may raise *sua sponte* issues inextricably intertwined with the issue raised to the Court).

In addition, Ms. Armstrong's allegations in her Crim. P. 35(c) motion in the district court and her arguments in the Court of Appeals include the argument that her convictions of second-degree murder under a complicity theory are not homicide offenses within the meaning of *Graham*. Allegations raised in the Crim. P. 35(c) motion are reviewable by the appellate courts. See *People v. Goldman*, 923 P.2d 374, 375 (Colo. App. 1996). In her Crim. P. 35(c) motion for postconviction relief, Ms. Armstrong argued her "virtual" life sentence violated the Eighth Amendment pursuant to *Graham, supra*. [Id. at 239-242] On appeal, the Court of Appeals acknowledged Ms. Armstrong argued *Graham* applied to her case because (1) she did not "commit homicide," and (2) her 96-year sentence is the functional equivalent of life in prison without the possibility of parole. [Opinion, p. 21]

The State's argument leads to absurd results. Must every legal principal and proposition and legal authority have been raised before in the district court in order for it to be argued in the appellate courts? Of course not. Ms. Armstrong's

argument that second-degree murder is not a homicide offense is a derivative, adjunct argument to the allegation she did not commit homicide. It also directly responds to the issue posed by this Court. It should be considered by this Court in deciding these important questions of first impression.

For these reasons, all arguments made in Ms. Armstrong's briefs are properly before this Court.

**2. Armstrong received a functional life sentence**

The State urges a rigid interpretation of the Supreme Court's holding in *Graham*. According to the State, *Graham* applies only when a juvenile defendant is convicted for a "single, nonhomicide offense" and is sentenced to a juvenile sentence of "life without parole." [Answer Brief, 10-15] This reads the United State Supreme Court's line of cases, including *Graham*, too narrowly and fails to consider the Court's reasoning and analysis.

There is no principled reason to distinguish between a sentence labeled a life sentence and a functional life sentence. Regardless of the label, he outcome is the same. There is no meaningful difference in sentencing a juvenile to life without parole or the functional equivalent. Either way, the judge improperly decides a juvenile is "irredeemable," and forever a risk to society. *Graham* at 73. Either way, the juvenile is denied a **"**meaningful opportunity to obtain release**."** *Id.* at 75.

Either way, the juvenile is given a sentence that "means denial of hope; ... that good behavior and character improvement are immaterial; ... that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days." *Id.* at 70. Neither sentence allows for a chance for the juvenile to demonstrate she "will be fit to reenter society." *Id.* at 75; *Moore v. Biter,* 725 F.3d 1184, 1192 (9th Cir.2013) ("Both sentences deny the juvenile the chance to return to society. *Graham* thus applies to both sentences."). The Supreme Court's focus in *Graham* and *Miller* "was not on the label of a 'life sentence'" but rather on whether a juvenile would, as a consequence of a lengthy sentence without the possibility of parole, actually be imprisoned for the rest of his life. *Casiano v. Comm'r of Correction*, 115 A.3d 1031, 1044-45 (2015); *Biter,* 725 F.3d at 1192; see also *Thomas v. Pennsylvania,* Docket No. CV–10–4537, 2012 WL 6678686, *2 (E.D.Pa. December 21, 2012) ("the Supreme Court's analysis would [not] change simply because a sentence is labeled a term-of-years sentence rather than a life sentence"). Both sentences are unconstitutional and do not recognize that kids are different than adults for the purposes of the Eighth Amendment.

The Court focuses in *Graham* on the effect of a juvenile receiving a sentence without realistic, meaningful hope of release and discusses in *Miller* how such a

sentence should be uncommon and rare. 132 S.Ct. 2469. The Court underscores the sense of hopelessness and the grim prospects of any future outside of prison that any lengthy sentence would provide for a juvenile: "[N]o chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope." 130 S.Ct. 2011. As reasoned by the Supreme Court of Connecticut:

> the United States Supreme Court viewed the concept of "life" in *Miller* and *Graham* more broadly than biological survival; it implicitly endorsed the notion that an individual is effectively incarcerated for "life" if he will have no opportunity to truly reenter society or have any meaningful life outside of prison.

*Casiano*, 115 A.3d at 1047 (holding that *Graham* and *Miller* apply to lengthy term-of-year sentences and that a term of fifty years imprisonment without parole for a juvenile offender implicate the procedures set forth in *Miller*). As explained by a California court, juvenile sentencing cases are concerned with whether "there is *some meaningful life expectancy left* " when the offender becomes eligible for release. (Emphasis added) *People v. Perez,* 214 Cal.App.4th 49, 57, 154 Cal.Rptr.3d 114, *cert. denied*, —— U.S. ——, 134 S.Ct. 527 (2013). As our Court of Appeals and still other states have concluded, "[i]n *Graham,* the Court did not employ a rigid or formalistic set of rules designed to narrow the application of its

holding." *People v. Rainer,*2013 COA 51, ¶71 (Colo. App.2013); *accord Biter,* 725 F.3d at 1192; *People v. Caballero,* 55 Cal.4th at 267, 145 Cal. Rptr. 3d 286, 282 P.3d 291 (2012) *(Graham* applies "regardless of ... how a sentencing court structures the life without parole sentence."). Rather, *Graham* "utilized broad language," in condemning sentences that "`give[] no chance for fulfillment outside prison walls.'" *Rainer* at ¶ 71 quoting *Graham* at 79.

Moreover, adopting an overly formalistic approach to *Graham*, such as the one urged by the State in this case, would render it meaningless. The *Graham* rule could be avoided by a Court instead crafting a term of years sentence with the same effect. Imagine, for example, that the judge had sentenced Terrance Graham to 97 years for armed burglary (instead of "life imprisonment") and 15 years for attempted armed robbery (both were within the judge's discretion under Florida law). There is no rationale based on the reasoning of *Graham* that this hypothetical 112-year sentence would be constitutional, when a life sentence without the possibility of parole is not. Yet that hypothetical is precisely this case. As the Iowa Supreme Court explained: "the unconstitutional imposition of a... life-without-parole sentence is not fixed by substituting it with a [long, term-of- years sentence] that is the practical equivalent of a life sentence without parole." *State v. Ragland*, 836 N.W.2d 107, 121 (Iowa 2013). Here, "[i]f the States were to have complete

autonomy to define [sentences] as they wished, the Court's decision in *[Graham]* could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality." See *Hall v. Florida,* ___ U.S. ___, 134 S.Ct. 1986, 1999 (2014). Quite simply, "a government system that resolves disputes could hardly call itself a system of justice with a rule that demands [protections] only to those youths facing a sentence of life without parole and not to those youths facing .... the functional equivalent of life without parole." *Ragland,* 836 N.W.2d at 121-22.

**3. *Graham* applies to consecutive nonhomicide sentences that equate with life without parole.**

For the same reasons, there is no meaningful basis for limiting *Graham* to single sentences**,** rather than applying it to consecutive aggregate sentences that amount to life without parole. Initially, the language in *Graham* demonstrates that its holding is not limited to single life without parole sentences, as opposed to aggregate sentences. The Court's repeated references to juvenile "nonhomicide offender[s]," (used 25 times in the text of the majority opinion) and juveniles "who did not commit homicide**,"** *Graham,* 560 U.S. at 72, 74, demonstrate that the Court imposed a "flat ban" on a sentence for juvenile nonhomicide offenders irrespective of whether their sentence included multiple consecutive counts. *Miller,* 132 S.Ct, at 2466 at n.6. More critically, *Graham's* reasoning applies equally to functional life

sentences such as Ms. Armstrong's sentence. *See Henry v. State*, ___ So. 3d ___, 2015WL1239696 (Case No. SC121-578, Released March 19, 2015) **(**Florida Supreme Court concluded the *Graham* Court had no intention of limiting its new categorical rule to sentence denominated under the exclusive term of "life in prison"); *Thomas, supra* ("The Court's concerns about juvenile culpability and inadequate penological justification apply equally in both situations, and there is no basis to distinguish sentences based their label."); *Caballero,* 55 Cal. 4th at 268, 145 Cal. Rptr. 3d 286, 282 P.3d 291 *("Graham's* analysis does not focus on the precise sentence meted out. Instead ... it holds that a state provide a juvenile offender 'with some realistic opportunity to obtain release' from prison in her expected lifetime" quoting *Graham* at 82).

**4. Across the country, courts are applying the principles of *Graham* and *Miller* to functional life without parole sentences.**

The State claims that the majority of states and federal circuits that have addressed the issue have concluded *Graham* does not apply to term of years aggregate sentences. Admittedly, there are courts across the country reaching the conclusion *Graham* does not apply to term of years aggregate sentences. See, e.g. *State v. Brown,* 118 So.3d 332, 335 (La. 2013) (holding that *Graham* does not apply to a "juvenile offender who committed multiple offenses resulting in cumulative sentences matching or exceeding his life expectancy without the

opportunity [for] early release.").[1] However, a review of federal and state courts across the country reveals a movement to invalidate juvenile sentences under the Eighth Amendment that, based on consecutive and term of year sentences, are functional life sentences. *Hayden v. Keller*, ___ F. Supp. 3d ___, 2015 WL 5773634 (E.D. N.C. Sept. 25, 2015) (Nonhomicide juvenile offender's life sentence which was labeled as one "with parole" is in actuality the functional equipment of LWOP and violates the Eighth Amendment); *Biter,* 725 F.3d 1184, 1186-87 (striking 254-year aggregate juvenile nonhomicide sentence); *Thomas, supra* (same for 65 to 150 years); *United States v. Mathurin,* 2011 WL 2580775 (S.D. Fla. June 29, 2011) (same for 307 years); *Gridine v. State*, ___So. 3d ___, 2015WL1239504 (Fla., March 19, 2015) (70- year prison sentence for nonhomicide juvenile offender did not provide a meaningful opportunity for future release and was unconstitutional under *Graham*): *Henry, supra* (*Graham* applies to a term-of-years prison sentence if the sentence at issue does not provide a meaningful opportunity for release based on demonstrated maturity and rehabilitation); *State v. Ronquillo*, ___ P.3d ___, 2015 WL 6447740 (Wash. App.

[1] Other cases reaching this result are cited by the State at pp. 15-16. Armstrong would note that the Florida case cited by the State was effectively overturned by the Florida Supreme Court. The State cited *Walle v. State*, 99 So.3d 967, 971 (Fla. App.2d Dist. 2012). This case has been effectively overruled by the Florida Supreme Court's decisions in *Henry, supra*, and *Gridine, supra*, cited above and in the Opening Brief.

Oct. 26, 2015) (Applying *Miller* to 51.3 year aggregate sentence which it considered a de facto life sentence); *Casiano*, 115 A.3d 1030 (*Miller* applied to 50-year sentence without the possibility of parole); *Bear Cloud v. State*, 334 P.3d 132, 141-44 (Wyo. 2014) (*Miller* applies not only to "life without parole" cases but also to sentences that are the functional equivalent life without parole); *Null v. State*, 836 N.W.2d 41, 73 (Ia. 2013) (Imposition of aggregate sentence does not remove case from ambit of *Miller* principles); *Caballero,* 55 Cal.4th 262, 145 Cal. Rptr. 3d 286, 282 P.3d 291 (same for 110 years).

Contrary to these decisions and in a decision relied on by the State, the Sixth Circuit concluded that *Graham* did not "clearly establish" for federal habeas purposes that consecutive, fixed-term sentences for juveniles who have been convicted on multiple nonhomicide counts are unconstitutional when they amount to the practical equivalent of life without parole. *Bunch v. Smith,* 685 F.3d 546, 547 (6th Cir. 2012), *cert. denied,* 133 S.Ct. 1996 (2013). However, that decision was decided under the strict standard required by "AEDPA," and the Sixth Circuit even acknowledged that a court "on direct review" could reach the opposite conclusion. *Id.* at 552.[2]

[2] *Bunch* was decided under the Anti-Terrorism and Effective Death Penalty Act("AEDPA"), which requires that a Supreme Court case be "clearly established" before it may be applied in federal habeas proceedings. 28 U.S.C. § 2254(d).

The formalistic rigid interpretation urged by the State and implemented by some courts is too narrow and contrary to the Court's reasoning in *Graham*. Ms. Armstrong asserts the authority on the issue concluding the imposition of a functional life sentence violates the Eighth Amendment is more persuasive. The reasoning and analysis of *Miller* and *Graham* are applicable to such sentences and should be applied to them. Functional life sentences should have the same protections as sentences with the label "life without parole."

**5. Where a juvenile complicitor did not kill and the jury did not find she possessed an intent to kill, the juvenile's offense should be considered a nonhomicide pursuant to *Graham*.**

The State argues there is nothing in the Court's rationale in *Graham* to indicate it viewed, or would view, second-degree murder under a complicity theory as a nonhomicide offense. [Answer Brief, p. 21] However, even the State must admit that under a complicity theory, one is held accountable for an offense committed by another. Such accountability is the only way in which Ms.

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*Bunch,* 685 F.3d at 547. AEDPA's stringent standard sets an exceedingly high bar. *See Schriro v. Landrigan,* 550 U.S. 465, 473 (2007) (stating AEDPA's standard is "a substantially higher threshold" than standard asking whether decision was incorrect). Even though the Sixth Circuit held that *Graham* did not apply on AEDPA review, it recognized that a court on "direct review" would face a different question that could lead to a different outcome. *Bunch, 685* F.3d at 552; *see also Ragland,* 836 N.W.2d at 121 (distinguishing *Bunch* because "the Court in *Bunch* was confined to a very narrow standard of review").

Armstrong was found guilty. She did not commit homicide; she did not shoot anyone and was not even present in the house when the shooters fired their guns.

Such accountability is at odds with what is known about juvenile brains and abilities. Juvenile's risk assessment and decision-making capacities differ from those of adults in ways that make it unreasonable to infer that a juvenile who decides to aid in a crime would reasonably know or foresee that death may result from that crime. Their risk-taking should not be equated with malicious intent. Nor should their recklessness be equated with indifference to human life. Juveniles "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2403 (2011). The Court recognized that juveniles "lack of maturity and underdevelopment sense of responsibility. . . often result in impetuous and ill-considered actions and decisions." *Graham*, 560 U.S. at 72. " The ability to consider the full consequences of a course of action and to adjust one's conduct accordingly is precisely what we know juveniles lack the capacity to do effectively." 132 S.Ct. at 2476 (Breyer, concurring) (internal citation omitted).

Furthermore, an intent to kill cannot be inferred from participation or aiding in the commission of an offense. In this case, the jury did not specifically find Ms. Armstrong killed or intended to kill. An accomplice, especially a juvenile

accomplice, is less culpable than the actual shooter, and more generally, a person who did not kill or intend to kill is less culpable than an intentional killer. It follows from the Supreme Court's reasoning in *Roper, Graham, Miller*, and *J.D.B.,* that the Court would not categorize a juvenile complicitor as one of the "uncommon," more serious, most culpable juvenile offenders for whom a life without parole sentence is proportionate or appropriate. See *Miller*, 132 S.Ct. at 2476-77 (Breyer, J., concurring). A sentencing court confronting a juvenile found culpable under a complicity theory of liability should consider the "twice diminished moral culpability" of a juvenile defendant who was not the actual killer and whom the jury did not find had an intent to kill. *Graham*, 560 U.S. at 69.

The State argues that complicity theory cannot be compared to felony murder. But, those theories are comparable. Under both, a defendant is held legally accountable for another's actions and is sentenced more severely based thereon. Other courts have addressed the applicability of *Graham* and *Miller* to felony murder convictions and concluded they are applicable. One such court concluded that subjecting a juvenile who did not kill or intend to kill anyone to a murder prosecution in adult court based on the premise it was foreseeable to the juvenile that someone might be killed is problematic because juveniles do not foresee like adults do. *Layman v. State*, 17 N.E.3d 957, 968 (Ind. App. 2014)

(May, J., concurring). See *State v. Mantich*, 824 N.W.2d 716, 731-32 (Neb. 2014) (Because the court concluded the juvenile is entitled to be resentenced under *Miller*, it did not reach this argument to extend *Graham* to a juvenile convicted of felony murder. However, it stated that if resentenced to life imprisonment with no minimum term that permits parole eligibility, the juvenile could raise the *Graham* argument in an appeal from that sentence).

**6. Second degree murder, which includes no jury finding of an intent to kill, should be considered a nonhomicide for the purposes of Graham**.

The State argues there is nothing in the Supreme Court's reasoning to suggest it would view second-degree murder under a complicity theory as a nonhomicide offense. In support, the State discusses Justices Breyer and Sotomayor's concurrence in *Miller* as supportive of that argument. However, Ms. Armstrong submits the concurrence provides a basis to conclude a court must look past sentencing labels to determine whether *Graham* and *Miller* apply in particular cases. According to the Justices, "the kinds of homicide that can subject a juvenile offender to life without parole must exclude instances where the juvenile himself neither kills nor intends to kill the victim." 132 S.Ct. at 2475-76. The Justices further recognized: "The upshot is that Jackson [who was convicted of felony murder], who did not kill the clerk, might not have intended to do so either . . . . In that case, the Eighth Amendment simply forbids imposition of a life term without

the possibility of parole." *Id.* Therefore, it follows that these Justices would conclude that if Jackson, or Ms. Armstrong, were not found to have an intent to kill, the Eighth Amendment forbids imposition of an effective life sentence. A conviction of second-degree murder, such as Ms. Armstrong's convictions, does not include a finding of an intent to kill.

There is no sound basis to argue the jury found Ms. Armstrong possessed the specific intent to kill.[3] Indeed, a second-degree murder conviction precludes a finding a defendant possessed a specific intent to kill--especially where the jury found Ms. Armstrong not guilty of first-degree murder. A general intent of knowingly and acting without deliberation is distinct and separate from a specific intent to kill. There is a cognizable and real difference between a specific intent to kill and acting knowingly and without deliberation. This difference is grounds to distinguish it and other homicide offenses with lesser mental states from first-degree murder when applying *Graham* in Colorado.

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[3] The *Blakely* rule is concerned specifically with defendants' constitutional protections in criminal proceedings, particularly the right to a jury determination, beyond a reasonable doubt, that facts exist that exposed the defendant to criminal penalties. *Lopez v. People*, 113 P.3d 713, 726 (Colo. 2005), as modified on denial of reh'g (June 27, 2005). One Court has determined the Sixth Amendment mandates that a jury make the findings set forth by *Miller, supra. People v. Skinner*, ___ N.W.2d ___, 2015 SL 4945986 (Mich. App., Aug. 20, 2015).

### 7. An evidentiary hearing is needed to determine whether Ms. Armstrong's sentence provides a meaningful opportunity for release.

The State argues the Court of Appeals appropriately determined Ms. Armstrong's sentence is not a "de facto life sentence" because she will be eligible for parole when she is about 60 years old. [Answer Brief, 17] However, whether Ms. Armstrong's specific sentence provides a meaningful opportunity for release depends on factual determinations. As a result, the case should be remanded for such a hearing. See *People v. Ellis*, 2015 COA 108; *People v. Wilder*, 2015 COA 14.

The State presents arguments about the effect of her sentence and parole eligibility based on good behavior and earned time. [Answer Brief, 18-19] As discussed by the division in *Ellis*, such credits are discretionary and should not be considered in making a determination of meaningful opportunity for release. 2015 COA 108, ¶¶24-25. And, such determinations are necessarily factual ones that should be determined at an evidentiary hearing. In addition, whether a sentence if a functional life sentence is a factual issue. And, as discussed in the Opening Brief, it should not be enough that a juvenile could obtain geriatric release. In sum, the possibility of release is meaningful is also a factual determination requiring an evidentiary hearing.

The State also argues that Ms. Armstrong already received an individualized sentencing determination at her original sentencing hearing and that the court had an opportunity to reconsider her sentence when she filed her Crim. P. 35(b) motion. But, at the time of sentencing and the 35(b) motion, the district court did not have the benefit of the United State Supreme Court's decisions in *Roper*, *Graham*, and *Miller,* or access to the social science research on which those decisions so strongly rely which establish a clear connection between youth and decreased moral culpability for criminal conduct. To the contrary, at that time, there was a fear of the juvenile super-predator. Colorado, like many states, responded to a mythical prediction that youth crime was going to skyrocket in the early 90's and communities would be overrun by young "superpredators." See Hearings on the Juvenile Justice and Delinquency Prevention Act: Hearing Before the Subcomm. On Early Childhood, Youth, and Families of the S. Comm. on Economic and Educational Opportunities, 104th Cong., 90 (1996) (statement of Rep. Bill McCollum, Chairman, House Judiciary Comm.) ("Brace yourself for the coming generation of 'super-predators.'"); Peter Annin, 'Superpredators' Arrive: Should We Cage the New Breed of Vicious Kids?, Newsweek, Jan. 22, 1996, at 57; John J. Dilulio, Jr., The Coming of the Super-Predators, Wkly. Standard, Nov. 27, 1995, at 23.

And, at the time of Ms. Armstrong's sentencing, Colorado case law provided that a defendant's age could not be considered. Prior to *Roper*, Colorado courts consistently rejected the claim that age be considered as a factor in proportionality review. *Valenzuela v. People*, 856 P.2d 805 (Colo. 1993); *People v. Fernandez*, 883 P.2d 491 (Colo. App. 1994); *People v. Moya*, 899 P.2d 212, 219 (Colo. App. 1994); *People v. Mandez*, 997 P.2d 1254, 1273 (Colo. 1999). We now know age may well mitigate a defendant's culpability and youth can be a substantial and compelling factor to justify a lower sentence than would be appropriate for an adult in similar circumstances. Court proceedings conducted prior to the United States Supreme Court's relevant decisions without the benefit of the social science research regarding the juvenile mind are not an appropriate vehicle to deny a juvenile defendant's *Graham* claim.

**8. Conclusion**

Ms. Armstrong reaffirms the arguments made in her Opening Brief. For the reasons stated herein and those stated in the Opening Brief, Ms. Armstrong requests this Court conclude her operative sentence violates the Eighth Amendment. The Court should reverse the decision of the Court of Appeals, vacate her sentence, and remand her case for a re-sentencing hearing at which evidence can be received regarding the length and effect of her sentence on which

to base a finding of whether her sentence if a functional life sentence, and also evidence regarding appropriate youth-centered individual factors as set out in *Miller, supra*, with directions to sentence her in a manner consistent with *Graham'*s prohibition of an functional life sentence for a juvenile defendant who did not commit homicide.

Dated the 11th day of December 2015.

Respectfully submitted,

_/s/ Nicole M. Mooney_____
Nicole M. Mooney, Reg. No. 41084
Attorney for Cheryl Armstrong

**Certificate of Service**

I hereby certify I requested a true and correct copy of the foregoing REPLY BRIEF be delivered through the ICCES system on this 11th day of December 2015, and addressed to all parties of record as follows:

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_/s/ Nicole Mooney_____