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Colorado Supreme Court
STATE OF COLORADO
2 East 14th Avenue
Denver, CO 80203

Certiorari to the Court of Appeals, 2011CA2034
District Court, Denver County, 1995CR1689

THE PEOPLE OF THE STATE OF COLORADO,

Respondent,

v.

Cheryl Armstrong,

Petitioner.

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Supreme Court
Case No:
2013SC945

Brief of *Amici Curiae* Juvenile Law Center, *et. al.*, on Behalf of Petitioner Cheryl Armstrong

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

STATEMENT OF INTEREST

Founded in 1975, **Juvenile Law Center** is the oldest 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.

The **Colorado Juvenile Defender Center (CJDC)** is a non-profit organization dedicated to excellence in juvenile defense and advocacy, and justice for all children and youth in Colorado. A primary focus of CJDC is to reduce the prosecution of children in adult criminal court, remove children from adult jails, and reform harsh prison sentencing laws through litigation, legislative advocacy, and community engagement. CJDC works to ensure all children accused of crimes receive effective assistance of counsel by providing legal trainings and resources to attorneys. CJDC also conducts nonpartisan research and educational policy campaigns to ensure children and youth are constitutionally protected and treated

in developmentally appropriate procedures and settings. Our advocacy efforts include the voices of affected families and incarcerated children.

The **Center for Children's Law and Policy (CCLP)** is a public interest law and policy organization focused on reform of juvenile justice and other systems that affect troubled and at-risk children, and protection of the rights of children in such systems. The Center's work covers a range of activities including research, writing, public education, media advocacy, training, technical assistance, administrative and legislative advocacy, and litigation. CCLP works locally in DC, Maryland, and Virginia, and also across the country to reduce racial and ethnic disparities in juvenile justice systems, reduce the use of locked detention for youth and advocate safe and humane conditions of confinement for children. CCLP helps counties and states develop collaboratives that engage in data-driven strategies to identify and reduce racial and ethnic disparities in their juvenile justice systems and reduce reliance on unnecessary incarceration. CCLP staff also work with jurisdiction to identify and remediate conditions in locked facilities that are dangerous or fail to rehabilitate youth.

The **Coalition for Juvenile Justice (CJJ)** is a non-profit, non-partisan, nationwide coalition of State Advisory Groups (SAGs), allied staff, individuals, and organizations. CJJ is funded by our member organizations and through grants

secured from various agencies. CJJ envisions a nation where fewer children are at risk of delinquency; and if they are at risk or involved with the justice system, they and their families receive every possible opportunity to live safe, healthy, and fulfilling lives. CJJ serves and supports SAGs that are principally responsible for monitoring and supporting their state's progress in addressing the four core requirements of the Juvenile Justice and Delinquency Prevention Act (JJDPA) and administering federal juvenile justice grants in their states. CJJ is dedicated to preventing children and youth from becoming involved in the courts and upholding the highest standards of care when youth are charged with wrongdoing and enter the justice system.

The **National Center for Youth Law** (NCYL) is a private, non-profit organization that uses the law to help children in need nationwide. For more than 40 years, NCYL has worked to protect the rights of low-income children and to ensure that they have the resources, support, and opportunities they need to become self-sufficient adults. NCYL provides representation to children and youth in cases that have a broad impact. NCYL also engages in legislative and administrative advocacy to provide children a voice in policy decisions that affect their lives. NCYL supports the advocacy of others around the country through its legal journal, *Youth Law News*, and by providing trainings and technical assistance.

One of NCYL's priorities is to reduce the number of youth subjected to harmful and unnecessary incarceration and expand effective community based supports for youth in trouble with the law. NCYL has participated in litigation that has improved juvenile justice systems in numerous states, and engaged in advocacy at the federal, state, and local levels to reduce reliance on the justice systems to address the needs of youth, including promoting alternatives to incarceration, and improving children's access to mental health care and developmentally appropriate treatment. One of the primary goals of NCYL's juvenile justice advocacy is to ensure that youth in trouble with the law are treated as adolescents, and not as adults, and in a manner that is consistent with their developmental stage and capacity to change within the juvenile justice system.

The **Youth Law Center** (YLC) is a San Francisco-based national public interest law firm working to protect the rights of children at risk of or involved in the juvenile justice and child welfare systems. Since 1978, Youth Law Center attorneys have represented children in civil rights and juvenile court cases in California and two dozen other states. The Center's attorneys are often consulted on juvenile policy matters, and have participated as amicus curiae in cases around the country involving important juvenile system issues. YLC attorneys have written widely on a range of juvenile justice, child welfare, health and education

issues, and have provided research, training, and technical assistance on legal standards and juvenile policy issues to public officials in almost every State. The Center has long been involved in public policy discussions, legislation and court challenges involving the treatment of juveniles as adults. Center attorneys were consultants in the John D. and Catherine T. MacArthur Foundation project on adolescent development, and have recently authored a law review article on juvenile competence to stand trial. The imposition of life without parole sentences upon juveniles is an issue that fits squarely within the Center's long-term interests.

STATEMENT OF FACTS

Amici adopt the Statement of Facts as articulated in the brief of Defendant-Petitioner Armstrong.

SUMMARY OF ARGUMENT

In 2010, the U.S. Supreme Court held in *Graham v. Florida*, 560 U.S. 48 (2010) that life without parole sentences for juvenile offenders committing nonhomicide offenses violate the Eighth Amendment's ban on cruel and unusual punishments. The Court explained: "The juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential. . . . Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope." *Id.* at 2032. *Graham* held that a sentence that provides no "meaningful opportunity to obtain release" is unconstitutional. *Id.* at 2033.

Petitioner Armstrong was convicted of complicity to second degree murder for offenses that took place when she was 16. She was sentenced to 96 years in prison, and must serve at least forty years before becoming eligible for parole. Because complicity to second degree murder is a non-homicide crime and because Ms. Armstrong's sentence deprives her of a "meaningful opportunity to obtain release," it is the functional equivalent of life without parole and is unconstitutional despite being labeled as a term-of-years sentence. This Court should follow the U.S. Supreme Court's mandate in *Graham* and hold that Petitioner Armstrong's sentence is unconstitutional and remand for a new sentencing hearing.

ARGUMENT

I. *Graham* And *Miller* Affirm The United States Supreme Court's Recognition That Children Are Categorically Less Deserving Of The Harshest Forms of Punishment

In *Roper v. Simmons*, 543 U.S. 551 (2005), *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, 132 S. Ct. 2455 (2012), the U.S. Supreme Court recognized that children are fundamentally different from adults and categorically less deserving of the harshest forms of punishments.[1] Relying on *Roper*, the U.S. Supreme Court in *Graham* cited three essential characteristics which distinguish youth from adults for culpability purposes:

> [a]s compared to adults, juveniles have a "lack of maturity and an underdeveloped sense of responsibility"; they "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure"; and their characters are "not as well formed."

560 U.S. at 68 (citing *Roper*, 543 U.S. at 569-70). *Graham* found that "[t]hese salient characteristics mean that '[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet

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[1] *Roper* held that imposing the death penalty on juvenile offenders violates the Eighth Amendment, 543 U.S. at 578; *Graham* held that life without parole sentences for juveniles convicted of nonhomicide offenses violate the Eighth Amendment, 560 U.S. at 82; and *Miller* held that mandatory life without parole sentences imposed on juveniles convicted of homicide offenses violate the Eighth Amendment, 132 S. Ct. at 2469.

transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.' Accordingly, 'juvenile offenders cannot with reliability be classified among the worst offenders.'" *Id.* (quoting *Roper*, 543 U.S. at 569, 573). The Court concluded that "[a] juvenile is not absolved of responsibility for his actions, but his transgression 'is not as morally reprehensible as that of an adult.'" *Graham*, 560 U.S. at 68 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988)). The *Graham* Court found that because the personalities of adolescents are still developing and capable of change, an irrevocable penalty that afforded no opportunity for release was developmentally inappropriate and constitutionally disproportionate. The Court further explained that:

> Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of "irretrievably depraved character" than are the actions of adults. *Roper*, 543 U.S. at 570. It remains true that "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Id.*

Id. 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.

In reaching these conclusions about a juvenile's reduced culpability, the U.S. Supreme Court has relied upon an increasingly settled body of research confirming the distinct emotional, psychological and neurological attributes of youth. The

Court clarified in *Graham* 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." *Graham*, 560 U.S. at 68. Thus, the Court underscored that because juveniles are more likely to be reformed than adults, the "status of the offenders" is central to the question of whether a punishment is constitutional. *Id.* at 68-69.

The U.S. Supreme Court in *Miller* expanded its juvenile sentencing jurisprudence, banning mandatory life without parole sentences for children convicted of homicide offenses. Reiterating that children are fundamentally different from adults, the Court held that a sentencing scheme that mandates life without parole for juvenile offenders violates the Eighth Amendment and that the sentencer must take into account the juvenile's "lessened culpability", "greater capacity for change," and individual characteristics before imposing this harshest available sentence. *Miller*, 132 S. Ct. at 2460 (quoting *Graham*, 560 U.S. at 68, 74). 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*, 560 U.S. at 68-69); *Roper*, 543 U.S. at 570. 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." 132 S. Ct. at 2465. The Court instead 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.*

II. Second Degree Murder Under A Theory Of Complicity Is A Nonhomicide Crime Under *Graham v. Florida* Because It Does Not Require That A Defendant Kill Or Intend To Kill The Victim

Graham held that a juvenile who does not commit homicide cannot be sentenced to life without parole. *Graham* forbids the imposition of this sentence on juveniles "who do not kill, intend to kill, or foresee that life will be taken" because they "are categorically less deserving of the most serious forms of punishment than are murderers . . . [A] juvenile offender who did not kill or intend to kill has a twice diminished moral culpability." *Graham v. Florida,* 560 U.S. 48, 69 (2010).

Armstrong was not the principal in the homicide, and she undisputedly did not kill. In fact, she was not present when the death occurred; she was outside of the house where the death took place, in a car. The jury also rejected the prosecution's charge that she was involved in planning a killing: the jury did not

convict her of first-degree murder but rather found her guilty of second-degree murder, which specifically includes a finding that she acted without deliberation. Because Armstrong did not kill or intend to kill, *Graham* bars her from being sentenced to life without parole.

A. Colorado's Intent Standard For Complicity To Second Degree Murder Does Not Rise To The Level Of "Intent To Kill" As Contemplated By Graham.

In Colorado, "a person commits the crime of murder in the second degree if: (1) he causes the death of the person knowingly, but not after deliberation." CRSA 18-3-103. The Colorado legislature has specifically defined second degree murder as a general intent, rather than a specific intent, crime. CRSA 18-1-501(6); *People v. Marcy*, 628 P.2d 69, 75-76 (Colo. 1981). By rejecting the first degree charge offered by the prosecution, the jury specifically refused to find that Armstrong had the specific intent to kill or that there was deliberation.

Further, Colorado courts use an inappropriate standard of the foreseeability of death when determining intent for juveniles. The Supreme Court of Colorado has stated that "[a] person acts 'knowingly' or 'willfully', with respect to a result of his conduct, when he is aware that his conduct is practically certain to cause that result." *Id.* at 78). "'Practical certainty' has been used interchangeably with the term 'more than merely a probable result.'" *Id.* (citing *People v. Del Guidice*, 606

P.2d 840 (Colo. 1979)). The Colorado courts' use of likelihood of death in determining intent is inappropriate in the context of juveniles because it does not account for the decreased ability of juveniles to foresee the consequences of their actions. The United States Supreme Court has repeatedly noted the developmental and neurological research showing the diminished ability of juveniles to foresee the consequences of their actions. *See, e.g., Miller*, 132 S.Ct. at 2464 ("[C]hildren have a 'lack of maturity and an underdeveloped sense of responsibility,' leading to recklessness, impulsivity, and heedless risk-taking") (quoting *Roper*, 543 U.S. at 569); *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2404 (2011) (noting that the common law has long recognized that the "reasonable person" standard does not apply to children). These cases preclude ascribing the same level of anticipation or foreseeability to a juvenile who takes part in a crime – even a dangerous crime – as the law ascribes to an adult. As Justice Breyer explained in his concurring opinion *in Miller*:

> At base, the theory of transferring a defendant's intent is premised on the idea that one engaged in a dangerous felony should understand the risk that the victim of the felony could be killed, even by a confederate. Yet 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 2477 (Breyer, J., concurring) (internal citations omitted). Because adolescents' risk assessment and decision-making capacities differ from those of adults in ways that make it unreasonable to presume that juveniles would reasonably know or foresee that death may result from their actions, their risk-taking should not be equated with malicious intent.

Even when a juvenile may foresee some likelihood that death will result, acting with the knowledge that death is "more than a merely probable result" is not the same as acting with the "intent to kill" described by *Graham*; as Colorado's own first and second degree murder statutes reflect, acting with a specific intent to kill is a more serious and more culpable crime. *Graham* emphasizes that juveniles who do kill and intend to kill and are thus subject to life without parole demonstrate unparalleled "moral depravity." 560 U.S. at 69. This description simply cannot be applied to a defendant like Armstrong. Because the jury rejected the notion that she acted after deliberation, she is protected by *Graham*'s holding.

B. The Jury's Finding Of Intent Is Further Weakened By The Confusing Language Of The Jury Instructions On Accomplice Liability.

Colorado requires a finding of a "dual mental state" for complicity liability: "Complicity liability exists when (1) the complicitor has the culpable mental state required for the underlying crime committed by the principal; and (2) the

complicitor assists or encourages the commission of the crime committed by the principal 'with the intent to promote or facilitate,' § 18-1-603, such commission." "Complicity is not a theory of strict liability. It is not sufficient that the defendant intentionally engaged in acts which ultimately assisted or encouraged the principal. Rather, the complicitor must intend that his conduct have the effect of assisting or encouraging the principal in committing or planning the crime committed by the principal." *Bogdanov v. People*, 941 P.2d at 247, 251 (1997); *see also People v. Bass*, 155 P.3d 547, 551 (Colo. App. 2006). This means that in order to convict Armstrong for second degree murder under a theory of complicity, they must find that she caused the death of a person "knowingly, but not after deliberation." CRSA 18-3-03.

However, the instructions given to the jury at Armstrong's trial failed to clarify the dual mental state requirement. Instruction Number 13 simply laid out the elements for second degree murder without discussion or explanation of how the murder charge and the accomplice charge are intertwined. Instruction 11 provided the following information about complicity liability:

> A person is guilty of an offense committed by another person if he is a complicitor. To be guilty as a complicitor, the following must be established beyond a reasonable doubt:
> 1) A crime must have been committed
> 2) Another person must have committed all or part of the crime

3) The defendant must have had knowledge that the other person intended to commit all or part of the crime
4) The defendant did intentionally aid, abet, advise, or encourage the other person in the commission or planning of the crime.

But see Bogdanov, 941 P.2d at 255; *Bass*, 155 P.3d at 551. These jury instructions do not mention anything about the standard of intent for the underlying crime or the dual intent requirement. Therefore, it is not clear that the jury's finding that Armstrong "knowingly" caused a death was proper.

The plain language of the complicity instruction suggests that the complicitor need not have knowledge of the full extent of the crime that the principal intended to commit. For instance, Armstrong may have known that the principals intended to commit some crime when she drove with them to the house where the murder was committed. However, the jury instructions do not require her to know that a principal intended to commit a murder. Therefore, these instructions allow her to be held liable for murder when she only had knowledge that a principal intended to commit another crime, like robbery or assault. *But see Bogdanov*, 941 P.2d at 255 (finding the "all or part of" language to be error, but not plain error); *People v. Osborne,* 973 P.2d 666 (Colo. App. 1998) (holding that if the defendant did not commit an essential element of the crime, the "all or part of" language was erroneous, but was harmless because it was superfluous).

Both of these aspects of the jury instructions conflict with the *Bogdanov* dual intent requirement and prevent a clear showing that the jury properly found the required *mens rea* of "knowing."

Finally, there are serious logical inconsistencies in Armstrong's conviction for second degree murder under a theory of complicity. By definition, second degree murder is unpremeditated; in complicity cases, the accomplice need not be present when the crime was committed. In fact, in this case, Cheryl Armstrong was in a car outside the apartment where the killing occurred. These uncontested facts do not support a determination that Cheryl could be held liable for the principal's decision to kill when she did not act with deliberation and also was not present in the moment to encourage or abet him in killing.

III. Petitioner's Sentence Violates The Eighth Amendment Because It Deprives Petitioner Of A Meaningful Opportunity For Release

Petitioner Armstrong was convicted of nonhomicide offenses that she committed as a juvenile. *People v. Armstrong*, No. 11CA2034 (Colo. App. Oct. 19, 2013). She was sentenced to 96 years to life, and will be around 60 years old when she first becomes parole eligible. *Id.* Because Petitioner's sentence is the functional equivalent of life without parole and fails to provide a meaningful

opportunity for release, this Court should hold that her sentence is unconstitutional pursuant to *Graham*.

A. *Graham v. Florida* Requires That Juveniles Convicted Of Nonhomicide Offenses Receive A "Meaningful Opportunity To Obtain Release"

In *Graham v. Florida*, the U.S. Supreme Court held the Eighth Amendment forbids States from "making the judgment at the outset that [juvenile nonhomicide] offenders never will be fit to reenter society." 560 U.S. at 75. Instead, States must give these offenders "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* In *Graham*, the Court explained that juveniles who commit nonhomicide offenses "should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential." *Id.* at 79. Due to their stage of development, juveniles are more impulsive and susceptible to pressure and less mature and responsible than adults; at the same time, they possess a greater capacity for rehabilitation, change and growth than do adults. *Id.* at 68. Emphasizing these unique developmental characteristics, the Court held that juveniles who are convicted of nonhomicide offenses require distinctive treatment under the Constitution.

Miller v. Alabama, 132 S. Ct. 2455 (2012), banning mandatory life without parole sentences for juvenile *homicide* offenders, confirms that a life without

parole sentence is unconstitutional for a juvenile convicted of nonhomicide crimes, even multiple nonhomicide offenses. *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). Under *Miller* and *Graham,* a juvenile convicted of only nonhomicide crimes 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 Miller*, 132 S. Ct. 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.").[2]

B. Even When Juveniles Commit Multiple Nonhomicide Offenses, They Are Entitled To A "Meaningful Opportunity to Obtain Release" Under *Graham*

A court cannot, "at the outset," decide that a child who has not committed homicide should be sentenced to die in prison. *Graham*, 560 U.S. at 75. Sentencing

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[2] Although *Amici,* throughout the brief, distinguish between juveniles convicted of homicide and nonhomicide offenses, *Amici* do not intend to suggest that extreme term-of-years sentences are constitutionally appropriate for juveniles who commit homicide offenses. Appropriate sentencing for juveniles convicted of homicide offenses is not at issue in this case.

Petitioner to die in prison is no more constitutional because it involved *multiple* convictions of nonhomicide offenses – it remains a sentence contrary to U.S. Supreme Court precedent. The U.S. Supreme Court has found that people who do not kill or intend to kill are categorically less culpable than people who commit homicide offenses. *Graham*, 560 U.S. at 69. The fact that a child was convicted of *multiple* nonhomicide counts does not alter this equation. *See, e.g., Gridine v. State*, No. SC12-1223, 2015 WL 1239504 (Fla. Mar. 19, 2015) (holding a seventy-year prison sentence for a juvenile convicted of multiple nonhomicide offenses unconstitutional). The U.S. Supreme Court has equated life without parole for juveniles with death sentences for adults. *See Miller*, 132 S. Ct. at 2466 (viewing life without parole "for juveniles as akin to the death penalty"); just as an adult who was convicted of multiple *nonhomicide* offenses could not receive the death penalty, *see, e.g., Coker v Georgia*, 433 U.S. 584, 599 (1977) (plurality opinion) (banning the death penalty for an individual convicted of rape and robbery), a juvenile who is convicted of *multiple* nonhomicide offenses cannot be sentenced to die in prison, an otherwise unconstitutional sentence. The U.S Supreme Court has been clear: "[a]s it relates to crimes against individuals . . . the death penalty should not be expanded to instances where the victim's life was not taken." *Kennedy v. Louisiana*, 554 U.S. 407, 437 (2008). Where no life has been taken, a

child analogously cannot be sentenced to die in prison – even if the child is convicted of multiple offenses.

The brutality or cold-blooded nature of a nonhomicide offense provides no exception to *Graham*'s categorical ban on life without parole for nonhomicide offenders. *See Graham*, 560 U.S. at 78 (noting that, absent a categorical ban, "'[a]n unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity'" should require a less severe sentence) (quoting *Roper v. Simmons*, 543 U.S. 551, 573 (2005)).

C. A Sentence That Precludes A "Meaningful Opportunity To Obtain Release" Is Unconstitutional Regardless Of Whether It Is Labeled "Life Without Parole"

A sentence for nonhomicide offenses that provides the juvenile offender no meaningful opportunity to re-enter society is unconstitutional. The Supreme Court's Eighth Amendment jurisprudence has clarified that the constitutionality of a sentence depends on the actual impact of the sentence upon the individual, not how a sentence is labeled. For example, the U.S. Supreme Court took this commonsense and equitable approach in *Sumner v. Shuman,* 483 U.S. 66 (1987), where it noted that "there is no basis for distinguishing, for purposes of deterrence,

between an inmate serving a life sentence without possibility of parole and a person serving several sentences of a number of years, the total of which exceeds his normal life expectancy." 483 U.S. 66 at 83.

Graham established "a categorical rule [which] gives all juvenile nonhomicide offenders a chance to demonstrate maturity and reform." 560 U.S. at 79. Labels and semantics should not enable courts to escape the clear mandate of *Graham* that children who commit nonhomicide offenses must be provided a meaningful opportunity for release from prison. Courts cannot circumvent the categorical ban on life without parole for juveniles who did not commit homicide simply by choosing a lengthy term-of-years sentence – here at least 40 years without parole – instead of life without parole. As the Iowa Supreme Court noted, in vacating mandatory 60-year sentences for juvenile homicide offenders pursuant to *Miller* and *Graham*, "it is important that the spirit of the law not be lost in the application of the law." *State v. Ragland*, 836 N.W.2d 107, 121 (Iowa 2013). *See also Moore v. Biter*, 725 F.3d 1184, 1193 (9th Cir. 2013) ("*Graham's* focus was not on the label of a 'life sentence' – but rather on the difference between life in prison with, or without, possibility of parole."); *Henry v. State*, No. SC12-578, 2015 WL 1239696, at *4 (Fla. Mar. 19, 2015) (holding that *Graham* forbids term-of-years sentences that preclude any "'meaningful opportunity to obtain release

based on demonstrated maturity and rehabilitation.'") (citing *Graham*, 560 U.S. at 75).

To hold that a sentence that precludes a meaningful opportunity for release does not violate *Graham* because it was not formally labeled "life without parole" defies commonsense and cannot be squared with the Supreme Court's Eighth Amendment jurisprudence.

D. Whether A Sentence Provides A Meaningful Opportunity For Release Is Not Contingent On Whether The Sentence Exceeds A Juvenile's Life Expectancy

Though a sentence that exceeds a juvenile offender's life expectancy clearly fails to provide a meaningful opportunity for release,[3] whether an opportunity for

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[3] *See People v. Rainer*, 2013 COA 51, *reh'g denied* (May 9, 2013), *cert. granted,* 2014 CO 81 (holding that a sentence where a juvenile nonhomicide offender becomes eligible for parole after his statistical life expectancy violates *Graham*); *People v. Caballero*, 282 P.3d 291, 295 (Cal. 2012) ("sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment."); *Thomas v. Pennsylvania*, No. 10-4537, 2012 WL 6678686, at *2 (E.D. Pa. Dec. 21, 2012) (vacating a sentence in which a 15-year-old offender would not be parole-eligible until age 83 noting that "[t]his Court does not believe that the Supreme Court's analysis would change simply because a sentence is labeled a term-of-years sentence rather than a life sentence if that term-of years sentence does not provide a meaningful opportunity for parole in a juvenile's lifetime. 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 on their label."); *but see Diamond v. State*, 419 S.W.3d 435 (Tex. Crim. App. 2012)

release is *meaningful* should not depend on anticipated dates of death. In *State v. Null*, 836 N.W.2d 41 (Iowa 2013), the Iowa Supreme Court held that a sentence for a juvenile nonhomicide offender granting parole eligibility at age 69, although not labeled "life without parole," merited the same analysis as a sentence explicitly termed "life without parole" and was unconstitutional under *Graham*. The Court was explicit that whether a sentence complied with *Graham* was not dependent on an analysis of life expectancy or actuarial tables. The Court stated:

> [W]e do not believe the determination of whether the principles of *Miller* or *Graham* apply in a given case should turn on the niceties of epidemiology, genetic analysis, or actuarial sciences in determining precise mortality dates. In coming to this conclusion, we note the repeated emphasis of the Supreme Court in *Roper*, *Graham*, and *Miller* of the lessened culpability of juvenile offenders, how difficult it is to determine which juvenile offender is one of the very few that is irredeemable, and the importance of a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."

(upholding a child's consecutive 99 year and 2 year sentences without any discussion of *Graham*); *Burnell v. State*, No. 01-10-00214-CR, 2012 WL 29200 (Tex. App. Jan. 5, 2012) (holding that a 25-year sentence does not violate *Graham*); *State v. Kasic*, 265 P.3d 410 (Ariz. Ct. App. 2011) (upholding an aggregate term 139.75 years based on 32 felonies, including one attempted arson continued into defendant's adulthood); *State v. Brown*, 118 So. 3d 332, 341 (La. 2013) (upholding consecutive term-of-years sentence rendering the defendant eligible for parole at 86); *Bunch v. Smith*, 685 F.3d 546, 551 (6th Cir. 2012) (upholding a sentence where the earliest possibility of parole was at age 95); *Angel v. Com.*, 704 S.E.2d 386, 402 (Va. 2011) (finding that *Graham* was not violated because juveniles sentenced to life without parole for nonhomicide offenses in Virginia would be eligible for release at age 60).

Null, 836 N.W.2d at 71-72.

Life expectancy is a poor measure of whether a sentence provides a meaningful opportunity for release. First, the life expectancy of inmates who have been sentenced as juveniles is difficult to determine For instance, the average life span for an American male is 76. *See People v. Mendez*, 114 Cal. Rptr. 3d 870, 882 (2010) (citing National Center for Health Statistics, Centers for Disease Control, *National Vital Statistics Reps.* (June 28, 2010) table 2, vol. 58, No. 28). However, "[life] expectancy within prisons and jails is considerably shortened." *People v. J.I.A.*, 196 Cal. App. 4th 393, 127 Cal. Rptr. 3d 141, 149 (2011) (citing The Commission on Safety and Abuse in America's Prisons, Confronting Confinement, p. 11 (June 2006), *available at* http://www.vera.org/sites/default/files/resources/downloads/Confronting_Confinement.pdf); *see also* Jason Schnittker et al., Enduring Stigma: The Long-Term Effects of Incarceration on Health, 48 J. of Health & Soc. Behav. 115, 115-30 (2007); Michael Massoglia, Incarceration as Exposure: The Prison, Infectious Disease, and Other Stress-Related Illnesses, 49 J. of Health and Soc. Behav. 56, 56-71 (2008); Michael Massoglia et al., No Real Release, 8 Contexts 38, 38-42 (2009). There is evidence that inmates who were sentenced to life without parole as juveniles have even shorter life expectancies than adults serving the same

sentence. Campaign for the Fair Sentencing of Youth, *Michigan Life Expectancy Data for Youth Serving Natural Life Sentences, available at* http://fairsentencingofyouth.org/wp-content/uploads/2010/02/Michigan-Life-Expectancy-Data-Youth-Serving-Life.pdf. Moreover, even if life expectancy data were perfectly accurate, a full 50% of people will die *before* the age indicated by the statistic. Adele Cummings & Stacie Nelson Colling, *There Is No Meaningful Opportunity in Meaningless Data: Why It Is Unconstitutional to Use Life Expectancy Tables in Post-Graham Sentences*, 18 U.C. DAVIS J. JUV. L. & POL'Y 267, 283 (2014).

Second, a meaningful opportunity for release must mean more than simply release to die at home. For an opportunity for release to be "meaningful" under *Graham,* review must begin long before a juvenile reaches old age. Providing an opportunity for release only after decades in prison denies these young offenders an opportunity to live a meaningful life in the community and meaningfully contribute to society. *See, e.g., State v. Pearson*, 836 N.W.2d 88, 96 (Iowa 2013) (striking down a 35 year sentence that would render the juvenile eligible for parole at age 52 because it violated Miller by "effectively depriv[ing] of any chance of an earlier release and the possibility of leading a more normal adult life."). Finding employment near age 60, with felony convictions and no work experience outside

of prison, will make it unlikely that Petitioner would be able to become a productive, tax-paying member of society upon his release. Petitioner is also unlikely to be able to engage in other aspects of a meaningful life, like starting a family. *See, e.g., State v. Null*, 836 N.W.2d 41, 71 (Iowa 2013) ("The prospect of geriatric release, if one is to be afforded the opportunity for release at all, does not provide a 'meaningful opportunity' to demonstrate the 'maturity and rehabilitation' required to obtain release and reenter society as required by *Graham*.").

Finally, allowing possible release from prison long before a juvenile offender reaches his geriatric years is consistent with research showing that juvenile recidivism rates experience an enormous drop long before late adulthood. The Supreme Court has noted that "'[f]or most teens, [risky and antisocial] behaviors are fleeting; they cease with maturity as an individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood.'" *Roper*, 543 U.S. at 570 (quoting Steinberg & Scott, *Less Guilty by Reason of Adolescence: Development Immaturity, Diminished Responsibility, and the Juveniles Death Penalty*, 58 Am. Psychologist 1009, 1014 (2003). In a study of juvenile offenders, "even among those individuals who were high-frequency offenders at the beginning of the study, the majority had stopped these

behaviors by the time they were 25." Laurence Steinberg (2014) *Give Adolescents the Time and Skills to Mature, and Most Offenders Will Stop*. Chicago, IL: MacArthur Foundation, p. 3, *available at* http://www.pathwaysstudy.pitt.edu/documents/MacArthur%20Brief%20Give%20Adolescents%20Time.pdf. Therefore, most juvenile offenders would no longer be a public safety risk once they reached their mid-twenties, let alone their thirties, forties, and fifties. Because most juveniles are likely to outgrow their antisocial and criminal behavior as they mature into adults, review of the juvenile's maturation and rehabilitation should begin relatively early in the juvenile's sentence, and the juvenile's progress should be assessed regularly. *See, e.g., Research on Pathways to Desistance: December 2012 Update*, Models for Change, p. 4, *available at* http://www.modelsforchange.net/publications/357 (finding that, of the more than 1,300 serious offenders studied for a period of seven years, only approximately 10% report continued high levels of antisocial acts. The study also found that "it is hard to determine who will continue or escalate their antisocial acts and who will desist[,]" as the "original offense . . . has little relation to the path the youth follows over the next seven years.").

Therefore, review for juvenile offenders should be early and regular. Early and regular assessments enable the reviewers to evaluate any changes in the

juvenile's maturation, progress and performance. Regular review also provides an opportunity to confirm that the juvenile is receiving vocational training, programming and treatment that foster rehabilitation. *See, e.g., Graham*, 560 U.S. at 74 (noting the importance of "rehabilitative opportunities or treatments" to "juvenile offenders, who are most in need of and receptive to rehabilitation").

Petitioner's sentence, which requires her to serve more than forty years before she may even be considered for parole, is at odds with *Graham*. Moreover, *Miller*, *Graham* and *Roper* make clear that juvenile offenders' capacity to change and grow, combined with their reduced blameworthiness and inherent immaturity of judgment, set them apart from adult offenders in fundamental – and constitutionally relevant – ways. *Graham* prohibits a judgment of incorrigibility to be made "at the outset," 560 U.S. at 73; Armstrong's 96 year sentence for a nonhomicide offense makes precisely this prohibited judgment and is thus unconstitutional.

E. The Parole Review Process Must Ensure That The Opportunity For Release Is Truly Meaningful For Juvenile Offenders

Once eligible for parole, the parole process for juvenile offenders must provide a meaningful, and realistic opportunity for release. In *People v. Rainer*, the Colorado Court of Appeals recognized that "even if [a defendant] is still alive when he first becomes eligible for parole, he is unlikely to receive it, based on data

from the Colorado State Board of Parole, showing that almost ninety percent of those first eligible for discretionary parole are denied release." 2013 COA 51, ¶ 36, *reh'g denied* (May 9, 2013), *cert. granted*, 2014 CO 81, ¶ 36. These overwhelming numbers illustrate that the parole board is not giving the weight to the "maturity and rehabilitation of offenders" that the Supreme Court mandated in *Graham*. 560 U.S. at 75. A "meaningful opportunity for release" requires that the parole board focus on the characteristics of the youth, including his or her lack of maturity at the time of the crime, not merely the circumstances of the offense. The parole board must not allow the facts of the crime to overshadow the juvenile's immaturity at the time of the offense and the progress and growth achieved while incarcerated. *See, e.g., Roper*, 543 U.S. at 573 (cautioning against the "unacceptable likelihood" that "the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course."). Colorado's parole scheme conflicts with the mandate of *Graham* by requiring the parole board to consider factors that are completely unrelated to the juvenile's "maturity and rehabilitation," such as the testimony or written statement of the victim or victim's family. Colo. Rev. Stat. Ann. § 17-22.5-404. Additionally, for the opportunity for release to be meaningful, the juvenile's young age at the time of the offense and incarceration cannot be a factor that makes release *less* likely. *Cf. Roper*, 543 U.S.

at 573 (noting that "[i]n some cases a defendant's youth may even be counted against him"); Ga. Comp. R. & Regs. r. 475-3-.05(8)(e) (automatically assigning a higher risk score to inmates admitted to prison at age 20 or younger for the purposes of assessing parole eligibility in Georgia).[4]

Colorado's parole statute also requires the parole board to consider "mitigating factors from the criminal case." Colo. Rev. Stat. Ann. § 17-22.5-404(VIII)(4)(a). When dealing with juvenile offenders, the parole board should consider the factors that *Miller* found relevant to a youth's diminished culpability. 132 S. Ct. at 2468-69. These factors include: (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 . . . 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

[4] Additionally, parole boards should be mindful that any risk assessment tools that favorably assess inmates with a stable employment histories or stable marriages may not be applicable to inmates who were incarcerated as children and therefore had little or no opportunity to establish an employment history or stable marital relationships prior to their incarceration. *See, e.g.,* Ga. Comp. R. & Regs. r. 475-3-.05(8)(g) (Georgia regulations giving lower risk scores to inmates who were employed at the time of their arrest); Mich. Comp. Laws Ann. § 791.235 (3)(a) (noting that the parole board in Michigan can consider an inmate's marital history).

enforcement and a criminal justice system designed for adults; and (5) "the possibility of rehabilitation." *Id.*

IV. Depriving A Juvenile Convicted Of Complicity to Second Degree Murder Of A Meaningful Opportunity for Release Is Inconsistent With The Logic Of *Graham* And *Miller.*

Graham emphasizes the "twice diminished" moral culpability of juvenile offenders who do not kill. 560 U.S. at 69. As discussed at length above, Armstrong undisputedly did not kill; she was not even present when the death took place.

It is inconsistent with the logic of *Graham* - which mandates proportionality and graduation of sentences based on culpability and the nature of the offense – to sentence punish second degree murder accomplices with the same maximum level of punishment, the functional equivalent of life without parole, as juveniles convicted of more serious crimes with greater degrees of culpability. 560 U.S. 48 at 59 ("Embodied in the Constitution's ban on cruel and unusual punishments is the 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'" (citing *Weems v. United States*, 217 U.S. 349, 367, (1910). A defendant convicted of complicity to second degree murder is categorically less culpable because of her lack of deliberation, lack of personal participation, and lower standard of intent.

This sentence is also contrary to *Miller*, which states that life without parole sentences should be rare and reserved for the worst offenders:

> But given all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and 22 heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. . . . Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it 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. Because of the lack of both premeditation and personal participation in the killing, an accomplice to second degree murder is categorically less culpable than an accomplice to first degree murder; a first degree murder triggerman; or a second degree murder triggerman. Therefore, a functional life without parole sentence, which implicitly deems Armstrong the "worst of the worst," is clearly inappropriate.

CONCLUSION

The United States Supreme Court has mandated that sentencers undertake an individualized analysis for children accused of serious crimes in order to reflect our society's evolving standards of decency and to take account of our greater understanding of adolescent development. The Court has found that any child who commits nonhomicide offenses must have a meaningful opportunity to be released from prison. Accordingly, *Amici* respectfully request that this Court invalidate Petitioner Armstrong's unconstitutional sentence and remand the case for a new sentencing hearing. This will ensure that Colorado is appropriately applying the United States Supreme Court's decisions on juvenile sentencing and that the prohibition on life without parole sentences for nonhomicide offenses is not subverted by semantics.

Respectfully Submitted,

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Dated: April 28, 2015

Colorado Supreme Court STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203 Certiorari to the Court of Appeals, 2011CA2034 District Court, Denver County, 1995CR1689 THE PEOPLE OF THE STATE OF COLORADO, Respondent, v. Cheryl Armstrong, Petitioner.	
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Certificate of Compliance	

I hereby certify that 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 and 32. It contains 7, 377 words.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

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Supreme Court
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