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

OPENING 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 does not comply with C.A.R. 28(g) as it contains 11731 words. An appropriate motion is being filed.

The brief complies with C.A.R. 28(k): It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.

__/s/ Nicole M. Mooney______

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"What hope does he have?" asked Justice Sotomayer in a discussion at oral argument in *Jackson v. Florida*, U.S. Supreme Court Case No. 10-9647.[1] In vacating a life sentence, the Court stated: "This sentence forswears altogether the rehabilitative ideal. It reflects an irrevocable judgment about a child's value and place in society. It is at odds with our knowledge of every child's capacity to for change. *Miller v. Alabama*, 132 S.Ct. 2455, 2465 (2012) *quoting Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 2030 (2010).

Youth matters. Youth is always mitigating. Under our Constitution, youth must be acknowledged and treated differently at sentencing. The signature qualities of youth are fundamentally different than those of adults. As applicable to this case, youth should not be sentenced to die in prison and legal principles of accountability that are at the heart of the theories such as complicity that hold adults accountable for the actions of others should not apply with equal force to juveniles. Cheryl Armstrong, who was a 16-year-old youth, should not be sentenced to die in prison when she was found guilty of second-degree murder under a complicity theory, did not commit homicide, and there was no jury finding that she possessed a specific intent to kill. She must have a meaningful opportunity to obtain release upon demonstrated maturity and rehabilitation.

[1]Case was companion case and decided in *Miller v. Alabama*, ___ U.S. ___, 132 S.Ct. 2455 (2012).

This case should be remanded to the district court for a re-sentencing hearing at which evidence can be offered regarding (1) the effect of a 96-year sentence and whether such a sentence provides a meaningful opportunity to obtain release upon demonstrated maturity and rehabilitation as required by Graham, and (2) the circumstances and qualities of youth and, in particular, Cheryl Armstrong's circumstances. Relevant factors, as provided by the *Miller* Court, include the juvenile's age at the time of the offense; her diminished culpability and heightened capacity for change; the circumstances of the crime; the extent of her participation in the crime; her family, home and neighborhood environment; her emotional maturity and development; the extent that familial and/or peer pressure may have affected her; her past exposure to violence; her drug and alcohol history; her ability to deal with the police; her capacity to assist her attorney; the presence of any drug and/or alcohol problems; her mental health history; and her potential for rehabilitation. 132 S.Ct. at 2468. Such a hearing has never been conducted in this case.

Issues on Writ of Certiorari

Whether a conviction for second-degree murder under a complicity theory is a non-homicide offense within the meaning of *Graham, supra*.

Whether the court of appeals erred [in Rainer] by extending *Graham*, and *Miller,* to invalidate a consecutive term-of-years sentence imposed on a juvenile convicted of multiple offenses.

Statement of the Facts

On April 17, 1995, Donnell Carter and Greg Romero entered a home where in a matter of moments they shot and killed two people.[2] Cheryl Armstrong who was 16 years old at the time, never entered the home and never held or fired a weapon. She sat in a parked car about a block away.

A jury convicted Ms. Armstrong of being complicit. Under a complicity theory, she was convicted of two counts of second-degree murder. Although instructed on the offenses, the jury did not convict Ms. Armstrong of first-degree murder, after deliberation; felony murder; or second-degree burglary. [File, p. 132-

[2] Romero and Carter were each convicted of first-degree murder, after deliberation, and are serving juvenile life without parole sentences.

138] Ms. Armstrong was sentenced to consecutive[3] 48-year terms of imprisonment--an operative sentence of 96 years.

It appears that in the Court of Appeals, the parties agreed Ms. Armstrong would be eligible for parole when she is about 60 years old. *State v. Armstrong*, 11CA2034 (Decided Oct. 17, 2013) (not published pursuant to C.A.R. 35(f)). She would need to live until she was 100 years old or more to reach her mandatory release date of January 28, 2085. [4]

Procedural Background

Following her conviction, Ms. Armstrong's appellate counsel only challenged the trial court's denial on timeliness grounds of her challenge for cause to a prospective juror. The Court of Appeals affirmed and this Court denied her Petition for Writ of Certiorari. *State v. Armstrong*, 96CA44 (Decided Nov. 14, 1996) (not selected for publication). The mandate issued in February 1997.

In July 1997, appellate counsel filed a Crim. P. 35(b) motion alleging the consecutive 48-year sentences were the maximum possible sentence and equated to a life sentence. The Court was urged to consider Armstrong's youth, lack of prior

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[3] Colorado statutes require a mandatory consecutive sentence for any person convicted of two or more separate crimes of violence arising out of the same incident. A court has no discretion in this determination. C.R.S. §16-11-309(1)(a), now C.R.S. §18-1.3-406(1)(a).

[4] Mandatory release date found at www.doc.state.co.us (accessed 4/21/15).

criminal history, and negligible likelihood of future criminal behavior, her genuine remorse, and her relative culpability. [PR CF,206-08] The court summarily denied the motion. [Id. at 209] It must be remembered that at the time of Ms. Armstrong's sentencing and the motion for reconsideration, age could not be considered for sentencing proportionality purposes., see, e.g., *Valenzuela v. People*, 856 P.2d 805, 810 (Colo. 2013), and *Roper, Graham*, and *Miller* were not yet decided.

Another attorney was appointed in March 1999 for the purposes of filing a Crim. P. 35(c) motion [Id. at 216, 220] but never entered an appearance or filed a 35(c) motion.

Finally, on May 17, 2011, yet another attorney filed a 35(c) motion on Armstrong's behalf. In this motion, justifiable excuse or excusable neglect was pleaded due to prior counsel's irreconcilable conflict of interest in simultaneously representing Ms. Armstrong and a codefendant for purposes of filing motions for postconviction relief. Substantively, the 35(c) motion alleged trial counsel was ineffective in failing to object to the complicity instruction and that Ms. Armstrong's "virtual" life sentence violated the Eighth Amendment pursuant to *Graham, supra*. [Id. at 221-254] The postconviction court concluded Ms. Armstrong alleged facts that if proven may constitute justifiable excuse or excusable neglect but then summarily denied the merits of the motion without an

evidentiary hearing. [Id. at 287-293] The district court concluded Ms. Armstrong was not entitled to relief under *Graham* because her offense and sentence were not of the same nature as those prohibited by *Graham* and the rule created in *Graham* was not retroactive. [Id. at 290-291]

On appeal, the Court of Appeals affirmed. As relevant to this proceeding, the division concluded Ms. Armstrong's 96-year sentence is not the functional equivalent of a sentence of life without parole. "[P]ersuaded by the reasoning" in *People v. Lehmkuhl*, 2013 COA 98, *cert. granted* No. 13SC598, 2014 WL 7331019 (Colo. Dec. 22, 2014), in which the defendant was sentenced to 76 years to life in prison, the division concluded *Graham* did not apply to Ms. Armstrong's sentence because the 96-year sentence was not a "de facto" life sentence. [Slip op., 23] The Court of Appeals was apparently relying, as the *Lehmkuhl* division did, on the Colorado statutory life expectancy table (C.R.S. §13-25-103 which is now repealed[5] and replaced with C.R.S. §13-25-102) to conclude the 96-year sentence herein was not a "de facto" life sentence because Ms. Armstrong's life expectancy--based on that table--exceeded her first parole eligibility date.

[5] C.R.S. §13-25-103, repealed by S.B. 14-048.

Standard of Review

Because this is a question of constitutional law, this Court reviews this issue *de novo*. *Lopez v. People*, 113 P.3d 713, 720 (Colo.2005). Ms. Armstrong preserved this issue by arguing in the district court and then the Court of Appeals that her sentence is unconstitutional under *Graham*, pursuant to the Eighth Amendment to the United States Constitution.

Summary of the Argument

Based on the United States Supreme Court's decisions in *Roper, Graham, J.D.B*., and *Miller*, youth are indisputably different in a constitutional context especially for the purposes of the Eighth Amendment and sentencing. Youth are categorically less culpable and therefore less deserving of the most severe punishments. The severe, and sometimes mandatory, sentences appropriate for adults should not be automatically and as a matter of course applied to youth.

In *Graham*, the Court held that sentencing at the outset a juvenile who did not commit homicide to die in prison is cruel and unusual punishment and, thus, unconstitutional. A juvenile convicted of a nonhomicide crime must be provided a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.

A conviction for second-degree murder under a complicity theory is a nonhomicide offense pursuant to *Graham*. A complicitor did not commit homicide but, rather, is found to be legally accountable for the actions of another. A juvenile convicted as a complicitor should not held accountable as having committed a homicide that was committed by another. Complicity theory is inconsistent with what is known about adolescent development.

In addition, neither a conviction for second-degree murder nor being complicit includes a finding of intent to kill. The Supreme Court provided a juvenile who did not kill or intend to kill has a "twice diminished moral culpability" to that of an adult murderer. There is a cognizable and real different between a specific intent to kill versus acting knowingly and without deliberation. This difference is significant and dispositive to a *Graham* analysis.

The Court of Appeals [in *Rainer*] properly applied *Graham* and *Miller* to invalidate a consecutive term-of-years sentence imposed on a juvenile convicted of multiple offenses. In *Graham*, the Court held a sentence for a juvenile who had not committed homicide must provide a reasonable opportunity for release upon demonstrated maturity and rehabilitation. The name or label given a sentence should not determine whether *Graham* applies but rather the focus should be the effect of that sentence. An effective life sentences denies the very same

meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation the Supreme Court concluded in *Graham* was violative of the Eighth Amendment. In addition, *Graham* applies to any operative sentence, whether single or aggregate, that is an effective life sentence. The focus is juveniles being sentenced at the outset to die in prison and not given an opportunity to be released from prison. This focus is on the outcome—irredeemable life in prison--not the specific name or type of sentence.

Reasonable opportunity for release upon demonstrated maturity and rehabilitation requires a meaningful review upon attaining maturity, not a possibility of release prior to death. Comparing a statistic from a life expectancy table to a parole eligibility date with no other considerations does not satisfy *Graham*'s mandate. This Court should not utilize the approach used by the divisions of the Court of Appeals. Such statistics do not apply to individuals, do not reflect any individual's life expectancy, do not reflect a prison population, and should not be considered in isolation. A parole eligibility date also is not a time at which a juvenile has a meaningful opportunity to obtain release. An individualized approach is required with an individualized hearing focused on the juvenile, his or her sentence, and the effect of that sentence, and whether the sentence provides a meaningful opportunity to demonstrate maturity and rehabilitation and to obtain

release.

Applying these principles to this case, Cheryl Armstrong's convictions based on being complicit to second-degree murder are nonhomicide offenses. Her 96-year sentence is an effective life sentence that is cruel and unusual punishment to which *Graham*'s ban must apply. Cheryl Armstrong must receive a sentence that provides a reasonable opportunity to obtain release upon demonstrated maturity.

Argument

I. Cruel and Unusual Punishment and Youth

The Eighth Amendment prohibits cruel and unusual punishment. "The standard of extreme cruelty . . . necessarily embodies a moral judgment. The State must respect the human attributes even of those who have committed serious crimes. *Graham*, 130 S.Ct. at 2021.

As it has applied the Eighth Amendment to our understanding of youth and development, the United States Supreme Court has validated, adopted and confirmed in the cases of *Roper v. Simmons,* 543 U.S. 551 (2005), *Graham, supra*, *Miller, supra*, and *J.D.B. v. North Carolina*, ___ U.S. ___, 131 S.Ct. 2394 (2011), that youth is different, that youth is always a mitigating factor.

> From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exits that a minor's

> character deficiencies will be reformed. Indeed, the relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside."

Roper at 570. The very real differences inherent in youth render them "categorically less culpable" than adults. Because juveniles have lessened culpability, they are less deserving of the most severe punishments. 543 U.S. at 569-570.

The cases of *Roper, Graham, J.D.B.,* and *Miller* clearly have developed a new framework to assess a youth's culpability. This framework is based on commonsense, social science, and the new and ongoing scientific research on adolescent brain development. In a constitutional context, minors are undeniably different from adults.

The effort to recognize the fundamental differences in youth and how that should impact sentencing youth continues. The implementation of *Graham* and *Miller* also continues and must occur as mandated by the Supreme Court. Groups have spoken out against the practice of imposing length prison terms on juveniles. In 2012, the United States Justice Department recommended against the practice. "Laws and regulation prosecuting [juveniles] as adults in adult courts,

incarcerating them as adults, and sentencing them to harsh punishments that ignore and diminish their capacity to grow must be replaced or abandoned. U.S. Department of Justice, *Report of the Attorney General's National Task Force on children Exposed to Violence,* xviii (2012). Similarly, the United National Report of the Special Rapporteur on torture and other inhuman or degrading treatment or punishment states: "Life imprisonment and lengthy sentences, such as consecutive sentencing, are grossly disproportionate and therefore cruel, inhj]uman or degrading when imposed on a child.[6]" Report, p. 16. And, "[i]n light of the unique vulnerability of children . . . [they[must be subject to sentences that promote rehabilitation and re-entry into society." *Id.*

II. *Graham* held that sentencing a juvenile who did not commit homicide to die in prison is cruel and unusual punishment.

"For a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole." *Graham*, 130 S.Ct. at 2030. *Graham* provides a categorical ban against life sentences that determine at the outset a juvenile will die in prison for those below the age of 18 convicted of a

[6] Report found at http://fairsentencingofyouth.org/wp-content/uploads/2015/03/UN-Report-of-the-Special-Rapporteur-on-torture-and-other-cruel-inhuman-or-degrading-treatment-or-punishment-March-2015.pdf?utm_source=Special+Rapporteur+blasts+US+for+JLWOP&utm_campaign=Special+Rapporteur+condemns+JLWOP&utm_medium=email (accessed 3/21/15).

"nonhomicide" crime. *Id*. While the Court held a State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime, the State must give such a juvenile offender "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id*. The Eighth Amendment forbids a State from making a judgment at the outset a juvenile who did not commit homicide is irredeemable and never will be fit to reenter society. *Id*.

In reaching its decision, the *Graham* Court recognized prior cases involving adult defendants in which it had concluded "defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment." 130 S.Ct. at 2027.

The Court discussed how juveniles are inherently less culpable then adults. As 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 character are "not as well formed." The failings of a minor should not be equated with those of an adult for there is a greater possibility that a minor's character deficiencies will be reformed. *Graham*, 130 S.Ct. at 2026-27 *quoting Roper*, 543 U.S. at 570. Juveniles cannot with reliability be classified among the worst offenders and her

transgression is not as morally reprehensible as that of an adult." *Graham*, 130 S.Ct. at 2026 *quoting Thompson v. Oklahoma*, 478 U.S. 815, 835 (1988). In discussing *Graham*, the *Miller* Court pointed out that a sentencer misses too much if he or she must treat every child as an adult. *Miller,* 132 S.Ct. at 2468.

The Court also cautioned that when considering an appropriate sentence for a youth, the crime itself should not overshadow the always mitigating factors of youth. It is the status of the offender that is the central question to whether a punishment is constitutional when applied to juveniles. *Graham*, 130 S.Ct. at 2027. A court must "go beyond a mere recitation of the nature of the crime." The Court cautioned the nature of the crime cannot overwhelm the analysis in the context of juvenile sentencing. *State v. Null*, 836 N.W.2d 41, 74-75 (Iowa 2013), *quoting Graham*, 130 S.Ct. at 2032 and *Roper*, 543 U.S. at 572-73. The Court cautioned 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." *Roper*, 543 U.S. at 573. *See also Graham*, 130 S.Ct. at 2032.

While the Court acknowledged Graham deserved to be separated from society for some time in order to prevent an "escalating pattern of criminal conduct," the Court did not believe this translated into him necessarily being a risk

to society for the rest of his life. A judgment at the outset that a juvenile offender need be separated from society for the rest of her life is improper. Such a judgment as related to a juvenile is not supported by the penological goals of retribution, deterrence, incapacitation, and rehabilitation. A juvenile's transient rashness, proclivity for risk, and inability to assess consequences lessen a juvenile's moral culpability and enhance the prospect that as years go by and neurological development occurs these deficiencies will be reformed. 130 S.Ct. at 2027, *quoting Roper*, 543 U.S. at 570. The Court recognized the difficulty in differentiating between a juvenile offender whose crime reflects unfortunate yet transient immaturity and the "rare" juvenile offender whose crime reflects irreparable corruption. 130 S.Ct. at 2026*, quoting Roper*, 543 U.S. at 573.

As illustrated in the *Amici Curiae* briefs submitted in *Graham*, developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. And the fundamental differences continue to exist until youth are in their mid-20s. *See* Brief for J. Lawrence Aber *et al.* as *Amici Curiae* supporting petitioners, *Graham, supra*; Brief for American Psychological Association *et al.* supporting petitioners, *Graham,* supra. Particularly relevant here is that the research shows the "most dramatic change in behavior occurred *between 16 and 19 years of age*, especially with respect to

'perspective' (i.e., the consideration of different viewpoint and broader contexts of decisions), and 'temperance' (i.e., the ability to limit impulsivity and evaluate decision before acting)." Brief for the American Psychological Association et al. as Amici Curiae Supporting Respondent at 7, *Roper, supra.*

III. A conviction for second-degree murder under a complicity theory is a nonhomicide offense within the meaning of *Graham*.

The specific issue asked by this Court is whether a conviction for second-degree murder under a complicity theory is a non-homicide offense within the meaning of *Graham, supra*.

A. A complicitor did not commit homicide.

The *Graham* principle applies when a juvenile did not "commit homicide." *Graham*, 130 S.Ct. at 2030. Therefore, *Graham* applies when a juvenile is convicted under a complicity theory of second-degree murder. While Ms. Armstrong was convicted of second-degree murder, which is a "homicide" offense in Colorado[7] because a death occurred, defendants like Ms. Armstrong did not commit homicide. In this case, Carter and Romero committed the homicide: They killed the victims. To commit means "to do." www.merriam-webster.com.

[7] Homicide is defined by Colorado statute as "the killing of a person by another." C.R.S. §18-3-101(1). In addition, Article 3 Part 1 of Chapter 18 is entitled "Homicide and Related Offenses" and includes murder in the second degree.

A juvenile convicted under a complicity theory did not "commit homicide." Complicity is "a theory of law by which a defendant becomes accountable for a criminal offense committed by another" despite not having committed the offense. See *People v. Close*, 867 N.W.2d 82 (Colo. App. 1993)[8] *citing People v. Wheeler*, 772 P.2d 101, 103-04 (Colo. 1989). See also, C.R.S. §18–1–603. When convicted under a complicity theory, a juvenile offender is held accountable for the actions of another: Someone else necessarily committed the homicide. An accomplice is less culpable than a shooter, and, more generally, a person who did not kill or intend to kill is less culpable than an intentional killer. A sentencing court confronting a child 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 did not intend to kill." See *Miller*, 132 S.Ct. at 2475-77 *quoting Graham*, 130 S.Ct. at 2017[9].

Specifically in Colorado, complicity is a legal theory by which an accomplice may be held criminally liable for a crime committed by another person if, with the intent to promote or facilitate the commission of the offense, the

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[8] Disapproved on other grounds in *Bogdanov v. People*, 941 P.2d 247, fn 9 (Colo. 1997).

[9] In *People v. Gutierrez*, 342 P.3d 245 (2014), Moffett's case was remanded for further proceedings where the court sentence without a presumption in favor of life without parole.

accomplice aids, abets, advises, or encourages the principal in planning or committing the offense. §18–1–603. To establish responsibility under the complicity statute, the prosecution must prove that (1) the principal committed the crime; (2) the complicitor knew that the principal intended to commit the crime; and (3) the complicitor, having the requisite knowledge, aided, abetted, or encouraged the principal in the commission of the crime. *Wheeler*, 772 P.2d at 103 (Colo. 1989); *People v. Theus-Roberts*, 2015 COA 32. Under complicity theory, the only relevant issue is "the knowledge" of the complicitor that the principal is engaging in or about to engage in criminal conduct. *People v. Moore,* 877 P.2d 840, 847 (Colo.1994).

The only other culpability found to be possessed by a complicitor is an intent to aid, abet, or encourage the principal. §18–1–603. This is certainly a much less culpable intent then the intent to kill discussed by the Supreme Court in *Graham* and *Miller*. In the complicity context, "intent" retains its "common meaning" and is not synonymous with the statutory definition of "intent" which applies to other crimes. *Grissom v. People*, 115 P.3d 1280, 1284 (Colo. 2005) *quoting Wheeler*, 772 P.2d at 104.

B. Complicity theory is inconsistent with what is known about Adolescent Development.

As recognized by this Court, "[c]riminal responsibility is a complex concept." *Bogdanov*, 941 P.2d at 254-55. As applied to children, Colorado's complicity doctrine is inconsistent with U.S. Supreme Court's decisions and what is known about adolescent development. The idea that one who is in complicity with another is equivalent to the principal, *People v. Saiz*, 600 P.2d 97, 102 (Colo. App. 1979), is inconsistent with what is known about adolescent development. The doctrine of complicity requires accountability, foreseeability, risk assessment, and decision-making skills not yet developed in children.

Roper, Graham, J.D.B., and *Miller* preclude ascribing the same level of anticipation or foreseeability to a juvenile as the law ascribes to an adult. In *J.D.B.,* the Court recognized the common law "reasonable person" standard does not apply to children. Specifically, the Court has observed adolescents "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." *J.D.B*., 131 S.Ct. at 2403 (internal quotation omitted). In the criminal sentencing context, the Court has recognized that adolescents' "lack of maturity and underdeveloped sense of responsibility . . . often result in impetuous and ill-considered actions and decisions." *Graham*, 130 S.Ct. at 2028 *quoting Johnson v. Texas*, 509 U.S. 350, 367 (1993). The Court

acknowledged adolescents have "[d]ifficulty in weighing long-term consequences" and "a corresponding impulsiveness." 130 S.Ct. at 2032. They also "have less control, or less experience with control, over their own environment." *Roper*, 543 U.S. at 569. As recognized by Justice Breyer,

> 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 2476 (internal citations omitted).

Adolescents' risk assessment and decision-making capacities differ from those of adults in ways that make it unreasonable to infer that a juvenile would reasonably know or foresee that another will kill someone. It follows their risk-taking should not be equated with malicious intent. As *J.D.B*. makes clear, what is "reasonable foreseeable" to an adult is not "reasonable foreseeable" to a child. *J.D.B*., 131 S.Ct. at 2404. Adolescent offenders are not making the same calculations as adults when they engage in dangerous and possibly criminal behavior. Adolescents "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." 131 S.Ct. at 2405

(internal quotation omitted). “Considerable evidence supports the conclusion that children and adolescents are less capable decision makers than adults in ways that are relevant to their criminal choices. Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, 18 The Future of Children 15, 20 (2008).

Adolescents are also likely less capable than adults are in using their capacity to reason logically “in making real-world choices partly because of lack of experience and partly because teens are less efficient than adults at processing information.” Id. at 20. Adolescents are also less likely to perceive risks and are less risk-averse than adults. Id. at 21. Adolescents are overrepresented statistically in virtually every category of reckless behavior. *Roper*, 543 U.S. at 569 quoting Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEV’L REV. 339, 339 (1992). Adolescents have difficulty thinking realistically about what may occur in the future. Brief for the American Psychological Association et al. as Amici Curiae Supporting Petitioners at 3-13, *Graham, supra* (Nos. 08-7412, 08-7621).

Next, youth’s recklessness should not be equated with indifference to human life. An adolescent’s behavior is a reflection of impulsiveness and inability to

accurately assess risks and exercise good judgment in face of those risks – characteristics an adolescent will outgrow as they mature.

The Court's recognition that juveniles are more vulnerable or susceptible to negative influences and outside pressures than adults is equally applicable to determine they have lessened culpability under a complicity theory. Because certain criminal behaviors can heighten status among adolescent peers, youth may face peer pressure to engage in criminal activities they would otherwise avoid. Scott and Steinberg, *Adolescent Development*, at 20-21. The influence of peers is especially significant in a case where two or more youth are involved. Youth may make a spur of the moment decision to participate out of fear f social rejection or loss of social status if he or she refuses. Id. at 22.

For these reasons, a youth's decision to participate therefore is often not the rational, calculated choice that is presupposed when applying complicity theory to an adult offender. And a juvenile convicted under a complicity theory should not be held as accountable as the principle or treated as the principle for the purposes of sentencing.

C. A complicitor's lessened culpability is similar to that of an adult defendant convicted of felony murder for participation.

Complicity is a theory of liability similar to the felony murder rule[10]. In both, the jury need not find the defendant possessed intent to kill. And in both, the defendant may not have been the principle. Juveniles convicted under these theories may still fall under *Graham's* protections. There is authority to distinguish between the principle and the complicitor when that person did not kill the victim.

In *Miller*, Justices Breyer and Sotomayor, in concurrence, recognize that when the Court's reasoning in *Graham* is faithfully applied, "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. These justice also 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.*

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[10] The felony murder rule is one of the most widely criticized features of American criminal law. *Making the Best of Felony Murder*, 91 B.U.L. Rev. 403, FN 1 (March 2011). Felony murder erodes the relationship between criminal liability and moral culpability. *People v. Dillon*, 34 Cal.3d 441, 194 Cal. Rptr. 390, 402 (1983).

In *Arrington v. State*, 113 So.3d 20 (Fla. 2d DCA 2012), *review denied*, 104 So.3d 1087 (Fla. 2012), the court recognized that some juveniles convicted of felony murder did not kill and did not intend to kill. According to the *Arrington* court, a distinction exists between the juvenile defendant who committed the offense and was convicted of felony murder, and the juvenile convicted of felony murder when someone else actually committed the murder. The court concluded that in felony murder cases where the juvenile defendant did not actually commit the murder, the court must be permitted to engage in a case-specific analysis to determine whether the sentencing statute is unconstitutional as applied to the particular defendant. *Id*. "Florida's statutorily mandated life-without-parole sentence for juveniles convicted of felony murder when they were not the actual killer raises a sufficient risk of a cruel and unusual sentence that trial courts must consider whether such a sentence is proportionate given the circumstances of the juvenile's crime." 82 So.3d 1082.

An analogy may also be drawn to the following recognition by the Supreme Court when discussing the propriety of the death penalty for an adult convicted of felony murder: "The focus must be on his culpability, not on that of those who committed the robbery and shot the victims, for we insist on 'individualized consideration as a a constitution requirement in imposing the death sentence.'"

Enmund v. Florida, 458 U.S. 782, 798 (1982), *quoting Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (footnote omitted).

D. The Graham holding should apply when a juvenile is convicted of second-degree murder because there is no finding of intent to kill.

Although not part of its specific holding that it violates the Eighth Amendment to sentence a child to die in prison if that child did not commit homicide," the Court also stated that "[w[hen compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability." 130 SCt. at 2027. If this Court expands the specific holding of *Graham* to include a requirement that the juvenile must not have committed homicide *or intended to kill*, *Graham* necessarily applies to a conviction of second-degree murder.

A juvenile convicted of second-degree murder does not possess the requisite intent to kill that under *Graham* that would allow the imposition of a life sentence. As relevant here, a person commits the crime of murder in the second degree if he "causes the death of a person knowingly, but not after deliberation." C.R.S. §18-3-103(1)(a) (1995). When found guilty of second-degree murder, a person is found to have acted knowingly and to have acted without the exercise of reflection and judgment. C.R.S. §18-3-101(3). The General Assembly purposely changed the

mens rea for second-degree murder from intentionally to knowingly. Knowingly was substituted for intentionally by virtue of the 1977 amendment to the Colorado Criminal Code. Colo. Sess. Laws 1977, ch. 224, 18-3-102(1)(d) at 960. By changing this element, the legislature changed the mens rea from a specific intent to a general intent. *People v. Marcy*, 628 P.2d 69, 77 (Colo. 1981). The General Assembly's specific purpose in amending this language was to make the offense one of general intent. *People v. Vigil*, 127 P.3d 916, 932 (Colo. 2006).

In a *Graham* analysis, there is a sound basis for drawing a line between first-degree murder, which requires a person act after deliberation and with an intent to cause the death of another, C.R.S. §18-3-102, and other types of offenses in Colorado that result in the death of another person. The legal term, "intend to kill" has a very specific meaning in Colorado law and is a specific intent. In Colorado, only in first-degree murder is there an element that the defendant act "[a]fter deliberation and with the intent to cause the death of a person other than himself." §18-3-102(1)(a). First, only the offense of first-degree murder requires an intent to kill and to act after deliberation. First-degree murder after deliberation required both a specific intent to kill and a decision to kill made after the exercise of reflection and judgment concerning the act. *Marcy*, 628 P.2d at 77 *citing* C.R.S. §§ 18-3-101(3); 18-3-102(1)(a). In addition, in Colorado, courts and the

legislature have always treated first-degree murder as qualitatively different than other offenses. It is the only offense the legislature has determined to invariably warrant only a sentence of death or life imprisonment without the possibility of parole for an adult. C.R.S. §18-1.3-401. As a specific intent crime, the defenses available when charged with first-degree murder are different than other offenses involving the death of another. See, e.g., §18-1-804(1). And, surely, the United States Supreme Court did not intend that a juvenile who commits manslaughter, which has a mens rea of recklessness, C.R.S. §18-3-104, or criminally negligent homicide, C.R.S. §18-3-105, could be subjected to a life sentence. Although manslaughter and criminally negligent homicide involve the death of another person, the level of culpability certainly does not arise to a level that a life sentence would be appropriate under the Eighth Amendment.

For these reasons, a juvenile convicted of second-degree murder in Colorado should fall within *Graham*'s ban. Second-degree murder includes no specific intent to kill. 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 different between a specific intent to kill and acting knowingly and without deliberation. Our legislature has codified and recognized this difference when

distinguishing between first-degree murder and second-degree murder. This difference is significant and dispositive to a *Graham* analysis.

IV. The Court of Appeals [in *Rainer*] properly applied *Graham* and *Miller* to invalidate a consecutive term-of-years sentence imposed on a juvenile convicted of multiple offenses where the sentence was an effective life sentence.

The other question raised by this Court appears to address the propriety of the division's decision in *Rainer*. In the instant case, the division concluded *Graham* did not apply to Armstrong's sentence because it was not a "de facto" life sentence. [Slip op., p. 23] Ms. Armstrong argues *Graham* and *Miller* should apply to invalidate consecutive term-of-years sentences that are effective life sentence.

In *Graham*, the Court held a sentence afforded a juvenile who had not committed homicide must provide a reasonable opportunity for release upon demonstrated maturity and rehabilitation. The name or label given a sentence should not determine whether *Graham* applies but rather the focus should be the effect of that sentence. The *Graham* Court focused on whether a sentence foreclosed the possibility of release and denied hope of an opportunity for a second chance at life. This focus applies whether the juvenile's sentence is for a single offense or a multiple offense and whether the juvenile's sentence is for a lengthy term of years or has the title of life without parole.

A. Graham applies to sentences for terms of years.

The same motivation behind the mandates of *Graham* and *Miller* apply to any sentence that is the practical equivalent to life without parole. See *State v. Ragland*, 836 N.W.2d 107, 121 (Iowa 2013). An effective life sentences denies the very same meaningful opportunity to obtain release based on demonstrated maturity add rehabilitation the Supreme Court concluded in *Graham* was violative of the Eighth Amendment. See *People v. Caballero*, 282 P.3d 291 (Cal. 2012).

When discussing the State's deterrent argument in favor of a mandatory death sentence for an inmate who kills while serving a life without parole sentence, the Court in attacking the argument found "there is no basis for distinguishing . . . 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." *Sumner v. Shuman,* 483 U.S. 66, 83 (1987). Similarly, in the *Graham* context, there is no sound reason to distinguish between a sentence labeled life without parole and a term of years' sentence that has the same effect.

In *Graham*, the Supreme Court provided guidance on what type of sentence violates the Eighth Amendment when applied to a juvenile convicted of nonhomicide offenses. It spoke in terms of outcome, not label. If such a juvenile's

sentence does not provide a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation, it violates the Eighth Amendment. 130 S.Ct. at 2030. It also described such a sentence as one that means "denial of hope; it means that good behavior and character improvement are immaterial; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit . . . he will remain in prison for the rest of his days." *Id.* at 2027 *quoting Naovarath v. State*, 105 Nev. 525, 526, 779 P.2d 944 (1989). An effective life sentence denies hope in exactly the same manner as a sentence labeled life without parole. Under both sentences, a juvenile is sentenced at the outset to die in prison. Both sentences have the same result and the Eighth Amendment should apply to them equally.

The *Miller* decision is instructive on *Graham*'s broader applicability. In *Miller*, the Court reversed the lower court's decision that *Graham* should be "narrowly tailored" to its context of life without parole cases for nonhomicide offenses involving juveniles and emphasized the Court's determination that children are constitutionally different. The Court stated:

> While *Graham's* flat ban on life without parole was for nonhomicide crimes, nothing that *Graham* said about children is crime-specific. Thus, its reasoning implicates any life-without-parole sentence for a juvenile, even as its categorical bar relates only to nonhomicide offenses. Most

> fundamentally, *Graham* insists that youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole. The mandatory penalty schemes at issue here, however, prevent the sentencer from considering youth and from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender. This contravenes *Graham's* (and also *Roper's*) foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children.

Miller at 2458. Notably, at the time of Cheryl Armstrong's sentencing, Colorado law deemed age irrelevant to constitutional proportionality review. *See, e.g, Valenzuela* 856 P.2d at 810.

Courts across the country including a division of our Court of Appeals have invalidated term of years' sentences pursuant to *Graham*. See, e.g., *People v. Rainer*, 2013 COA 51 (Aggregate sentence of 112 years with first parole eligibility at 75 years of age is functional equivalent of life without parole because it affords no meaningful opportunity for release); *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."). *Adams v. State*, ___ So.3d ___, 2012 WL 3193932 (Fl. App. 1 Dist. Aug. 8,

2012) (Sentence requiring juvenile convicted of non-homicide offense to serve at least 58.5 years in prison was de facto life sentence violating the 8th Amendment); *Floyd v. State*, 87 So.3d 45 (Fla. 1st DCA 2012) (sentence for nonhomicide offense where earliest possible release will be at 85 years of age violated *Graham* as it was not a meaningful opportunity to obtain release); *People v. Mendez*, 188 Cal. App. 4th 47 (Cal. App. 2010) (84-year sentence unconstitutional for nonhomicide offense. At resentencing sentenced to 48 years to life); *Caballero*, 55 Cal. 4th 262 (110-year sentence violated *Graham*); *Null*, 836 N.W.2d 41 (52.5 minimum prison term with aggregated 75-year sentence violated 8th Amendment); *Henry v. State*, ___ So. 3d ___, 2015WL1239696 (Case No. SC12-578, Released March 19, 2015) (Consecutive sentences of 90 years for 17-year-old violated 8th Amendment): *Gridine v. State*, ___So. 3d ___, 2015WL1239504 (Case No. SC12-1223, Released March 19, 2015) (70-year prison sentence for 14-year-old convicted of attempted first-degree murder, attempted armed robbery, and aggravated battery unconstitutional).

As recognized by the Iowa Supreme Court, nothing in *Roper, Graham*, or *Miller* is crime-specific. It concluded:

> [W]e do not regard the juvenile's potential future release in his or her late sixties after a half century of incarceration sufficient to escape the rationales of *Graham* or *Miller*. 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' . . . as required by Graham."

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

Recently, the Florida Supreme Court declared unconstitutional in separate cases an aggregate 90-year sentence (convicted of counts of sexual battery, robbery, kidnapping, carjacking, burglary, possession of marijuana), *Henry*, *supra*, and a 70-year sentence (included a 25-year minimum mandatory prison term for three offenses that included an attempted first-degree murder conviction). *Gridine, supra.* That Court stated:

> In light of the United States Supreme Court's long-held and consistent view that juveniles are different—with respect to prison sentences that are lawfully imposable on adults convicted for the same criminal offenses—we conclude that, when tried as an adult, the specific sentence that a juvenile nonhomicide offender receives for committing a given offense is not dispositive as to whether the prohibition against cruel and unusual punishment is implicated. Thus, we believe that the *Graham* Court had no intention of limiting its new categorical rule to sentences denominated under the exclusive term of "life in prison." Instead, we have determined that *Graham* applies to ensure that juvenile nonhomicide offenders will not be sentenced to terms of imprisonment without affording them a meaningful

opportunity for early released based on a demonstration of maturity and rehabilitation.

Henry, at slip op., p. 10. It also held "the Eighth Amendment will not tolerate prison sentences that lack a review mechanism for evaluating this special class of offenders for demonstrable maturity and reform in the future." *Id*.

B. Graham applies to any operative sentence, whether single or aggregate, for a nonhomicide offense or offenses that is an effective life sentence.

Graham must apply to a juvenile's operative sentence whether it is a single sentence or an aggregate sentence. Under *Graham*, children who did not commit homicide or intend to kill cannot be sentenced at the outset to spend their life in prison without the opportunity to obtain release and return to society. The focus is on juveniles being sentenced at the outset to die in prison and not given an opportunity to be released from prison. This focus is on the outcome—irredeemable life in prison--not the specific name or type of sentence. The fault found by the *Graham* Court is not allowing these children an opportunity to obtain release upon demonstrated maturity and rehabilitation. Whether the sentence is a single or aggregate sentence does not change the reality of juveniles being forced to spend their life in prison without such an opportunity.

Given the broad language utilized by the Court when describing the type of sentences prohibited by the Eighth Amendment for youth committed of nonhomicide offenses, the *Graham* Court could not have had an intention of limiting its new categorical rule to sentence denominated under the exclusive term of "life in prison." The nomenclature of the sentence that a juvenile nonhomicide offender receives for committing a given offense is not dispositive as to whether the prohibition against cruel and unusual punishment is implicated. See *Henry, supra.*

The *Rainer* division properly concluded, consistent with *Graham*, that a juvenile defendant's aggregate, or operative, sentence should be examined as a whole. It recognized the holding in *Close v. People*, 48 P.3d 528, 540 (Colo. 2002) that for the purposes of an abbreviated proportionality review each separate sentence must be examined rather than the aggregate term of multiple sentences. But, it then concluded *Close* was not applicable to juvenile offenders in a *Graham* analysis.

The Court's own analysis in the *Miller* decision is further authority that *Graham* should apply to a juvenile aggregate sentence even though a proportionality analysis would be different for an adult. The Court stated:

"*Harmelin*[11] *[v. v. Michigan,* 501 U.S. 957 (1991)] had nothing to do with children and did not purport to apply its holding to the sentencing of juvenile offenders. We have by now held on multiple occasions that a sentencing rule permissible for adults may not be so for children." 132 S.Ct. at 2471.

Similarly, *Close* had nothing to do with children, and Ms. Armstrong's proportionality challenge is governed by the standards set forth in *Graham* and *Miller,* not the gross proportionality review in *Close*.

In addition, an analysis of the United Supreme Court's cases indicates a lengthy aggregate sentence amounting to life without parole may trigger the applicability of *Graham* or *Miller*. Graham himself was not convicted of a "single offense." Graham pleaded guilty to two offenses: armed burglary, which carried a maximum LWOP penalty, and attempted armed-robbery, which carried a maximum penalty of 15 years; the court initially sentenced Graham to probation, but ultimately imposed the maximum penalty for each offense. *See Graham*, 130 S.Ct. at 2018-20. In addition, one of the juvenile offenders in the *Miller* case was convicted of multiple crimes, 132 S.Ct. at 2461, and the Court did not recognize this as a distinction of any significance.

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[11] Upheld a mandatory LWOP sentence of an adult for cocaine possession and, in doing so, refused to extend the constitutional requirement of individualized sentencing for death sentences to mandatory LWOP or term-of-year sentences.

Furthermore, there should not be disparate treatment of sentences between *Miller* and *Graham* cases. If this Court were to hold that *Graham* does not apply if the juvenile is convicted of more than one crime and those sentences run consecutively, then a juvenile who commits a homicide receives greater protections than a juvenile who commits a less serious offense. The Supreme Court in several cases involving aggregate crimes granted certiorari, vacated the sentence, and remanded for consideration in light of *Miller*. See *Blackwell v. California*, ___U.S. ___, 133 S.Ct. 837 (2013) (Sentenced to LWOP for convictions of first degree murder with felony murder special circumstances, burglary, and attempted robbery); *Bear Cloud v. Wyoming*, ___U.S. ___, 133 S.Ct. 183 (2012) (LWOP sentence for convictions of first-degree murder, conspiracy to commit aggravated burglary, and aggravated burglary). As other courts have recognized, "a juvenile offender sentenced to a lengthy aggregate sentence 'should not be worse off than an offender sentenced to life in prison without parole who has the benefit of an individualized hearing under *Miller.*'" *Bear Cloud v. State*, 334 P.3d 132, 142 (Wyo. 2014) *quoting Null*, 836 N.W.2d at 72.

In addition, the juvenile who committed the multiple offenses would be subjected to the same harshest penalties as an adult who committed the same crimes. This is contrary to the fundamental holding in *Roper*, *Graham* and *Miller*,

that "because juveniles have diminished culpability and greater prospects for reform," they are therefore "constitutionally different from adults for purposes of sentencing" and thus "less deserving of the most severe punishments." *Miller*, 132 S.Ct. at 2464 *quoting Graham*, 130 S.Ct. at 2026.

C. Reasonable opportunity for release upon demonstrated maturity and rehabilitation requires a meaningful review upon attain maturity not a possibility of release prior to death.

Graham demands a youth convicted of nonhomicide offenses have a reasonable opportunity for release upon demonstrated maturity and rehabilitation. If rehabilitated, a juvenile should be released from prison. He or she should not continue to be imprisoned for punishment or retribution. The Supreme Court held these goals should not be applied to a juvenile to justify continued imprisonment. *Graham*, 132 S.Ct. at 2028-29. In addition, it is not enough to merely ensure a juvenile an opportunity to be released in the very twilight years of life. See *Null*, 836 N.W.2d at 71. It is not sufficient to compare a juvenile defendant's life expectancy to the parole eligibility date with no other considerations when considering whether a juvenile received an effective life sentence. This does not satisfy *Graham*'s mandate.

In *Graham,* the Court did not employ a rigid or formalistic set of rules designed to narrow the application of its holding. Instead, it utilized broad

language condemning sentencing a youth to die in prison without a meaningful opportunity for release:

> [I]t gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope; because “[a] young person who knows that he or she has no chance to leave prison before life’s end has little incentive to become a responsible individual;” and because the prison system itself sometimes reinforces the lack of development of inmates, leading to “the perverse consequence in which the lack of maturity that led to an offender’s crime is reinforced by the prison term.”

130 S.Ct. at 2032-33.

> Terrance Graham's sentence guarantees he will die in prison without any meaningful opportunity to obtain release, no matter what he might do to demonstrate that the bad acts he committed as a teenager are not representative of his true character, even if he spends the next half century attempting to atone for his crimes and learn from his mistakes. The State has denied him any chance to later demonstrate that he is fit to rejoin society based solely on a nonhomicide crime that he committed while he was a child in the eyes of the law. This the Eighth Amendment does not permit.

Id. at 2033.

The *Graham* Court purposefully declined to specify when during the course of a juvenile offender’s incarceration a state must offer the chance of release. It

clearly believed rehabilitation of juvenile offenders must be the goal of their incarceration. *Graham*'s application is much more than a statistical review. It requires much more than providing any slight chance for release in a juvenile's elderly years. "Oftentimes, it is important that the spirit of the law not be lost in the application of the law."* *Ragland*, 836 N.W.2d at 121.

For an opportunity for release to be "meaningful" under *Graham*, review must begin long before a juvenile reaches old age. As stated by the Iowa Supreme Court, "we do not regard the juvenile's potential future release in his or her late sixties after a half century of incarceration sufficient to escape the rationales of *Graham* or *Miller.* The prospect of release shortly before death, 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.* *Null*, 836 N.W.2d at 71. And, "applying the teachings of *Rope*r, *Graha*m, and *Miller* only when mortality tables indicate the offender will likely die in prison without ever having the opportunity for release based on demonstrated maturity inadequately protects the juvenile's constitutional rights." *Pearson*, 836 N.W.2d at 98 (Cady, C.J., concurring specially).

The approach used by divisions of the Court of Appeals comparing parole eligibility to a life expectancy table does not properly implement *Graham.* See *People v. Rainer*, 2013 COA 51 (Aggregate sentence of 112 years with first parole eligibility at 75 years of age is functional equivalent of life without parole because it affords no meaningful opportunity for release); *People v. Lucero*, 2013 COA 53 (consecutive sentence totaling 84 years with parole eligibility at 57 years not unconstitutional); *Lehmkuhl*, 2013 COA 98 (Based on record before it, sentence of 76 years to life with parole eligibility at 67 years of age not unconstitutional. Trial court adequately considered age and other mitigating factors before imposing sentence); *People v. Estrada-Huerta*, No. 11CA1932, 2013 WL 6512698 (Colo. App. 12/12/2013) (Upheld sentence of 40 years to life based on life expectancy from statutory table that placed life expectancy at 78.1). It is an easy determination that *Graham* is violated where a sentence exceeds a defendant's life expectancy. Such was the case with the 112-year sentence in *Rainer*, 2013 COA 51, where, according to Centers for Disease Control tables, his life expectancy was between 63.8 and 72 years and he was not eligible for parole until 75 years of age. However, there are many problems with using statistics and tables to determine whether a sentence violates *Graham*. Cummings, Adele & Nelson Colling, Stacie, *There is No 'Meaningful Opportunity' in Meaningless Data: Why it is*

Unconstitutional to Use Life Expectancy Tables in Post-Graham Sentences, 18 UC Davis Journal of Juvenile Law & Policy 2 (Summer 2014). No one knows the life expectancy of prisoners but we do know it is less than civilians. *Id*. And, life expectancy tables provide an average at best and are not applicable to one individual. *Id*. Finally, as recognized by our legislature in §13-25-102 even when a life expectancy table is appropriate evidence it should be received "with other evidence as to health constitution, habits, and occupation of the person regarding the person's expectancy of continued life."

The approach used by the divisions of the Court of Appeals should be abandoned. A hearing regarding the particular individual is needed. The *Graham* inquiry does not, and should not, end with a comparison of life expectancy to parole eligibility. The approach used by the divisions endorses such a mechanical application of statistics. Under this approach, a sentence is constitutional where one's life expectancy according to some statutory table exceeds one's parole eligibility date. See *Lehmkuhl, supra*. The divisions looked for an opportunity for release but none of these divisions considered whether such an opportunity for release was a meaningful or realistic one. Compare Cummings & Nelson, supra. This position cannot be reconciled with *Graham's* language. *Graham* requires not

just an opportunity however miniscule; it requires a meaningful opportunity for re-entry into society upon demonstrated maturity and rehabilitation.

A meaningful opportunity for release must mean review comes at a point in time to provide the prisoner the chance to live a meaningful life outside of prison. *Graham* should not be understood to mean only that a prisoner must have a chance to be released shortly prior to his expected date of death. Rather, the chance of release must be meaningful. There are three distinct components to a state providing a meaningful opportunity for release: (1) Individuals must have a chance of release at a meaningful point in time, (2) rehabilitated prisoners must have a realistic likelihood of being released, and (3) the parole board or other releasing authority must employ procedures that allow an individual a meaningful opportunity to be heard. Sarah Russell, *"Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment,"* 89 Ind. L.J. 373, 383 (2014) ("*Review for Release*"). See, also, *Solem v. Helm*, 463 U.S. 277, 300 (1983) (In cruel and unusual punishment analysis, the likelihood of release is relevant).

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 regularly assessed. *See, e.g. Research on Pathways*

to Desistance; December 2012 Update, Models for Change, available at: http://www.modelsforchange.net/publications/357. The Supreme Court has recognized that for most teens, risk-taking and antisocial behaviors are fleeting; they cease with maturity as individual identity becomes settled. *Roper*, 543 U.S. at 570 (internal quotation omitted). The importance of "rehabilitative opportunities or treatment" to "juvenile offenders, who are most in need of and receptive to rehabilitation" follows from that recognition. *Graham*, 130 S.Ct. at 2030. Regular review after the time a juvenile has attained maturity provides an opportunity to confirm the juvenile is receiving vocational training, programming, education and treatment that foster rehabilitation and to then determine whether the juvenile should be released based on demonstrated maturity and rehabilitation.

It is of significance that in contrast to divisions of our Court of Appeals, the Supreme Court did not speak in terms of parole eligibility. Rather, it demanded a juvenile receive a meaningful opportunity for release upon demonstrated maturity and rehabilitation. By use of this terminology that it has also used in procedural due process cases,[12] it is clear the Court believes that meaningful review process that determines whether and when a juvenile should be

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[12] See, e.g., *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976) ("fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner")

released. It also evidences a belief the Eighth Amendment requires certain procedural protections at a hearing to review a juvenile sentence to determine whether release is appropriate. Such procedural protections ensure the decision maker gives meaningful consideration to the release decision and makes reliable judgments. If the opportunity to apply for parole is to satisfy the Eighth Amendment, a state's parole system must actually use a meaningful process for considering release and not simply provide a pro forma consideration of the relevant factors.

The parole system in place in Colorado does not provide a meaningful process for considering a juvenile's release. Thus, the parole eligibility date is not an appropriate tool to determine when a juvenile will have a reasonable opportunity to obtain release. As discussed in the Amicus Brief filed by CCDB, Colorado's parole system is set up for adult offenders and does not provide a juvenile a meaningful opportunity to obtain release. Colorado's parole system is designed for a different purpose and operates free from constitutional constraints. In adult cases, states do not need to provide prisoners with a realistic chance of release or a meaningful hearing and the *possibility* of parole provides no more than a mere hope that the benefit will be obtained. There is no right to due process and the decision of the board to grant or deny parole is not subject to judicial review.

See Amicus Brief of Colorado Criminal Defense Bar; *In re Question Concerning State Judicial Review of Parole Denial Certified by U.S. Court of Appeals for Tenth Circuit*, 199 Colo. 463, 610 P.2d 1340, 1341(1980). In addition, our Parole Board's hostility to granting release is historic. "[I]n Fiscal Year 2008 the Board denied 15,000, or 84 percent, of the 17,800 requests for discretionary parole." *The State Board of Parole Performance Audit*, by the State Auditor, (2008), p.2[13]. The 84% rate was the lowest denial percentage of the period 2004-08; in FY2005 the denial rate was 90%. *Id*, p. 8. See also *Ranier,* 2013 COA 51, ¶ 36 ¶ 36 (recognizing that 90% of offenders are denied parole at first eligibility).

Our legislature has not yet addressed the impact of *Miller* and *Graham* on Colorado's sentencing of youth. In other states, legislatures have acted to allow parole eligibility for juveniles sentenced to long prison terms for homicides to begin after fifteen or twenty years of incarceration. Cal. Penal Code § 1170(d)(2) (2015)(allowing juveniles, after serving 15 years imprisonment, to request reduction of the sentence from LWOP to life with parole after 25 years); Del.Code Ann. tit. 11 § 4209A (Laws 2013, chs. 1–61) (establishing parole eligibility for juveniles convicted of first degree murder at 25 years); N.C. Gen. Stat. Ann.

[13] Located at http://www.leg.state.co.us/OSA/coauditor1.nsf//95C6261FDF903AD887257519005D4D40/$file/1975+Parole+Board+Perf+Nov+2008.pdf?OpenElement

§15A–1340.19A(2012) (same); 18 Pa. Cons. Stat. Ann. § 1102.1(a)(2012) (establishing parole eligibility for first-degree murder at 25 years (for juveniles under age 15) or 35 years (for older juveniles); Utah Code Ann. §§ 76–5–202(3)(e), 76–3–207.7 (setting parole eligibility at 25 years); Wyo. Stat. Ann. § 6–10–301(c) (same);Ark. Code Ann. § 5-10-101 (c)(a)(b)(2) (2013) (setting parole eligibility after 28 years);.La. Rev. Stat. Ann. 15:574.4 (E) (La.2013) (setting parole eligibility after 35 years); Neb. Rev. Stat. § 28 105.02 (2013)(giving a trial court discretion to impose a term-of-years sentence ranging from 40 years to life after considering specific factors related to youth); Fla. Stat. Ann. § 921.1402 (2014) (providing for judicial review after 25 years for any juvenile who receives a sentence of more than 25 years (including juveniles sentenced to life imprisonment), and (2) after 15 years of a juvenile sentenced to more than 20 years; and further providing that, if the juvenile is not resentenced after the initial review, he is entitled to a subsequent judicial review after 10 more years). Such reviews allow juveniles a meaningful opportunity to obtain release at a time release is meaningful and after juveniles have had the opportunity to fully mature.

This Court should conclude the approach used by the divisions of the court of Appeals was inappropriate and does not properly apply *Graham*. Colorado courts should look at juvenile sentences on an individual basis and determine

whether the particular sentence provides a meaningful opportunity to obtain release upon demonstrated maturity and rehabilitation. This individual approach requires an individualized hearing focused on the juvenile, his or her sentence, and the effect of that sentence, and whether the sentence provides a meaningful opportunity to demonstrate maturity and rehabilitation and to obtain release.

V. Based on the Principles Set Forth by the Supreme Court in *Roper, Graham*, and *Miller*, Cheryl Armstrong's convictions of being complicit to second-degree murder are for nonhomicide offenses. Her sentence is an effective life sentence that is cruel and unusual punishment to which *Graham*'s ban must apply. Cheryl Armstrong must receive a sentence that provides a reasonable opportunity to obtain release upon demonstrated maturity.

Cheryl Armstrong's 96-year sentence violates the Eighth Amendment pursuant to the Supreme Court's decision in *Graham*. It is an effective life sentence that should fall within *Graham*'s protections. Given this sentence, Cheryl Armstrong does not have a reasonable opportunity to obtain release on demonstrated maturity and rehabilitation. It should be vacated as unconstitutional. If this Court cannot determine a 96-year sentence is an effective life sentence based on the information before it, then an evidentiary hearing is needed to determine whether it is an effective life sentence.

As discussed above, the label given the sentence and the manner in which the sentence was made does not change the effect of this sentence. A sentence of

96 years in prison is an effective life sentence. A 96-year sentence at the age of 16 is judgment from the outset that Cheryl Armstrong was irredeemable and never would be fit to reenter society. This sentence was a "denial of hope; it means that good behavior and character improvement are immaterial; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit . . . [s]he will remain in prison for the rest of [her] days." *Id.* at 2027 (internal quotation omitted). For a 16-year-old, a parole eligibility date that is more than 40 years cannot be considered a meaningful opportunity to obtain release as required by *Graham*. A youth cannot imagine being 60 years of age, and certainly cannot see a potential release at approximately the age of 60 as any opportunity to have a life outside of prison. And a youth certainly would never expect to survive in prison past the age of 100, which Cheryl Armstrong would need to do to reach her mandatory release date.

And, as discussed above, comparing life expectancy data to the parole eligibility date and considering the parole eligibility date as the date to determine whether a sentence provides meaningful opportunity for release are improper. As recognized by the division in *Rainer,* "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.

Regarding the issue of whether Ms. Armstrong's conviction is a nonhomicide conviction, Ms. Armstrong submits it is. A conviction for second-degree murder under a complicity theory is a "nonhomicide" pursuant to *Graham*. A juvenile convicted of second-degree murder under a complicity theory did not "commit homicide" and the jury did not find she possessed the requisite intent—an intent to kill. The jury in this case necessarily found Ms. Armstrong possessed two mens reas. First, to be complicit, she had to possess an intent to promote or facilitate the commission of the crime. This is a very different quality of intent than a specific intent to kill. Second, this Court has stated regarding a complicitor's requisite mental state that "because the defendant could not have *intended* his participation to further the crime unless he also intended the crime to occur. For him to intend that the crime occur, he would necessarily share the principal's mental state." *Bogdanov*, 941 P.2d at 254. As discussed above, the required mens rea for second-degree murder as relevant to this case is not intent to kill; it is to act knowingly without deliberation. §18-3-103. As discussed above, this general intent does not arise to the same level as a specific intent to kill.

Here, the jury was not instructed that it needed to find Cheryl Armstrong killed or intended to kill in order to convict her. Instead, a complicity instruction was given which permitted her conviction for second-degree murder without proof she acted with prior calculation or with a specific intent to kill. The complicity instruction stated Cheryl was guilty of complicity if:

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.

[CF, p. 115] That instruction did not require the jury find that Cheryl either actually killed someone or even intended to kill someone.

For these reasons, the offense in this case is subject to *Graham's* ban on life sentences for children who have not committed a homicide offense, as that term was meant in *Graham*. Furthermore, it is clear that neither the prosecutor nor the court ever considered Ms. Armstrong's youth, characteristics of youth, and circumstances as mitigating factors as required by *Roper, Graham*, and *Miller.* At sentencing, the prosecutor argued instead that Cheryl Armstrong was part of the class of juvenile predators the fear of which was reflected in sentencing practices

in the 1990s. See *Null*, 836 N.W.2d at 54 (Throughout the 1980s and into the 1990s, the perceived increase in juvenile crime and the fear of a coming generation of super-predators led to the lengthening of sentences for juveniles). He stated, "And it's a strange, new world that we've been exposed to in this case. We're exposed to kids who are out of control, kids who either have no parents or dysfunctional parents or parents who make excuses and let their kids get away with murder." [R Tr, p. 2359]. It is also clear the Court did not consider Ms. Armstrong's youth, the nature of youth, or the transient characteristics of youth as mitigating when it determined that given her involvement the maximum sentence was required. [Id. at 2362].

Conclusion

For the reasons stated above and in the Amici briefs, this Court should apply *Graham*'s ban to operative life sentences for single or aggregate offenses that do not provide a reasonable opportunity for release upon demonstrated maturity and rehabilitation.

In complicity cases where the juvenile defendant did not commit homicide and there is no finding the juvenile defendant possessed an intent to kill, *Graham* should apply. Adult theories of liability and sentencing practices that preclude taking into account the characteristics of individual juvenile defendants are

unconstitutionally disproportionate punishments. As Justice Frankfurter wrote over sixty years ago, "[c]hildren have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children." *May v. Anderson*, 345 U.S. 528, 536 (1953).

It should apply to ban a sentence under these circumstances that deems juveniles irredeemable and leaves a child in prison without hope of obtaining release even if he or she can demonstrate maturity and rehabilitation. *Graham* should certainly apply to the sentence of a juvenile defendant found guilty of second-degree murder, manslaughter, or criminally negligent homicide under a complicity theory. Alternatively, in complicity cases, the trial court should be required to engage in a case-specific analysis in which the mitigating factors of youth set forth in *Miller* are considered, to determine whether the sentencing statute is unconstitutional as applied to the particular defendant. See *Arrington,* 113 So.3d at 22 (in felony murder cases where the juvenile defendant did not actually commit the murder, the trial court must engage in case-specific analysis to determine whether sentencing statute is unconstitutional as applied to the particular defendant).

For these reasons, Ms. Armstrong requests this Court 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 of her sentence and appropriate youth-centered individual factors are considered as set out in *Miller, supra*, with directions to sentence her in a manner consistent with Graham's prohibition of an effective life sentence for a juvenile defendant who did not commit homicide.

Dated the 29th day of April 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 OPENING BRIEF be delivered through the ICCES system on this 29th day of April 2015, and addressed to all parties of record as follows:

Office of the Attorney General
ATTN Patricia Rae Van Horn
1300 Broadway, 9th Fl
Denver, CO 80203

_/s/ Nicole Mooney_________