DATE FILED: February 8, 2016 6:48 PM
FILING ID: ABC749388F2AE
CASE NUMBER: 2013SC945

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	▲ COURT USE ONLY ▲
Denver District Court No. 95CR1689	Case Number: 13SC945
PETITIONER: CHERYL ARMSTRONG **vs** **RESPONDENT:** PEOPLE OF THE STATE OF COLORADO	
Attorney for Petitioner: Nicole M. Mooney, Reg. No. 41084 MS&M Law Office ADC-Appointed Counsel PO Box 3089 Denver, CO 80201 Tel: (303) 952-0398 Fax: (303) 993-2387 nicolemariemooney@yahoo.com	

SUPPLEMENTAL AUTHORITY

COMES NOW Defendant-Appellant, Cheryl Armstrong, by and through counsel, Nicole M. Mooney of MS&M Law Office, as appointed by

the Office of the Alternate Defense Counsel, and respectfully submits this Supplemental Authority for the Court's consideration:

1. **On the Issue of whether *Graham* applies to consecutive nonhomicide sentences that equate with life without parole:**

State v. Boston, ___ P.3d ___, 2015 WL 9586803 (Nev. 12/31/1015):

In this case, the 16-year-old defendant was convicted of numerous nonhomicide offenses involving several victims and was sentenced to 14 life sentences with the possibility of parole, plus a consecutive 92-year sentence. The Nevada Supreme Court concluded *Graham* applies when an aggregate sentence that is the equivalent of a life without parole sentence is imposed against a juvenile defender convicted of more than one nonhomicide offense.

After reviewing the conflicting cases on the issue of whether *Graham* applies to aggregate sentences, the Court noted the most significant concern for a non-functional-equivalent court is that *Graham* provides no direction on how to determine when aggregate sentences are the functional equivalent of a sentence of life without the possibility of parole. The Court also pointed out that nowhere in the *Graham* decision does the Supreme Court specifically limit its holding to offenders who were convicted for a *single* nonhomicide offense. And that if it were to read the Supreme Court's holding in that manner it would undermine the

Supreme Court's goal of "prohibit[ing] States from making the judgment at the outset that those offenders never will be fit to reenter society." *Miller* at 75. Therefore, it concluded the functional-equivalent approach best addresses the concerns enunciated by the U.S. Supreme Court regarding the culpability of juvenile offenders and the potential for growth and maturity of these offenders.

McKinley v. Butler, ___ F.3d ___, 2016 WL 29032 (7th Cir. 1/14/2016):

Applying the language of *Miller* and *Graham* to both discretionary life sentences and "de-facto" life sentences. This case involved a 100-year sentence (consecutive 50-year prison terms, one for the murder and one for the use of a firearm to commit it) imposed on a 16-year-old teen who shot and killed a 23-year-old man after being told to do so by his 15-year-old friend.

The Court focused on the Supreme Court's language that "children are different." It returned the case to state court for reconsideration and articulated factors that should be considered. "The state court might begin by reflecting on the considerations that should inform a decision on the length of a prison sentence. One is the need to prevent the defendant from committing crimes upon release; the likelier that he is to recidivate, the longer the appropriate sentence. Another pertinent consideration is the need to deter other potential criminals, who if rational

will consider the length of the sentences being meted out to persons who commit crimes similar to the crimes these potential criminals commit or intend to commit; the longer the sentence, the greater the cost that the would-be criminals face. Last is the perceived need for long sentences for the most serious crimes, in order to assuage the indignation that such crimes arouse in the general public. But a defendant's youth and immaturity may influence consideration of each of these factors, because children have diminished culpability, greater prospects for reform, and less ability to assess consequences than adults. See *Miller v. Alabama*, *supra*, 132 S. Ct. at 2464–65."

"Murder is of course one of the most serious crimes, but murders vary in their gravity and in the information they reveal concerning the likelihood of recidivism by the murderer. In the case of a 16-year-old kid handed a gun by another kid and told to shoot a designated person with it, it is difficult to predict the likelihood of recidivism upon his release from prison or to assess the deterrent effect of imposing a long sentence on him, without additional information. A competent judicial analysis would require expert psychological analysis of the murderer and also of his milieu. Does he inhabit a community, a culture, in which murder is routine? Are other potential murderers likely to be warned off murder upon learning that a 16-year-old kid has been sentenced to life in prison, or are

they more likely to think it a fluke? Is the length of a sentence a major factor in deterrence? Given that criminals tend to have high discount rates, meaning that they weight future events very lightly, does it matter greatly, so far as deterrence is concerned, whether a murderer such as McKinley is sentenced to 20 years in prison or 100 years? And here is where *Miller* plays a role. It does not forbid, but it expresses great skepticism concerning, life sentences for juvenile murderers. Its categorical ban is limited to life sentences made mandatory by legislatures, but its concern that courts should consider in sentencing that "children are different" extends to discretionary life sentences and *de facto* life sentences, as in this case. A straw in the wind is that the Supreme Court vacated, for further consideration in light of *Miller*, three decisions upholding as an exercise of sentencing discretion juveniles' sentences to life in prison with no possibility of parole: *Blackwell v. California*, 133 S. Ct. 837 (2013); *Mauricio v. California*, 133 S. Ct. 524 (2013); *Guillen v. California*, 133 S. Ct. 69 (2012)."

"Neither *Miller*—which obviously had no bearing on the original sentencing of McKinley since it hadn't been decided yet—nor any of the questions raised in this opinion was addressed by the sentencing judge, who treated McKinley as if he were not 16 but 26 and as such obviously deserving of effectively a life sentence."

2. On the issue of the constitutionality of a functional life sentence:

Montgomery v. Alabama, 577 U.S. ___, slip op. p. 3 (January 26, 2015):

The *Miller* court explained that "a lifetime in prison is a disproportionate sentence for all but the rarest of children, those whose crimes reflect "irreparable corruption.'" (*Miller*, slip op. at 17 quoting *Roper v. Simmons*, 543 U.S. 551, 573 (2005)).

Montgomery, 577 U.S. ___, slip op. p. 21:

Cites with approval the Wyoming statute wherein juvenile homicide offenders are eligible for parole after 25 years as a remedy to a *Miller* violation.

3. On the issue of the constitutionality of a functional life sentence for a juvenile defendant convicted of second-degree murder under a theory of accountability:

People v. House, ___ N.E.3d ___, 2015 IL App (1st) 110580, 2015 WL 9428803 (12/24/2015):

As in *Miller*, defendant's sentence involved the convergence of the accountability statute and the mandatory natural life sentence. While defendant (who was 19 at the time of the offense) had a greater involvement in the commission of the offenses than the defendant in *Miller*, after considering the evidence and defendant's relevant culpability, the Court questioned the propriety of

mandatory natural life for a young defendant convicted under a theory of accountability. Although the defendant acted as a lookout during the commission of the crime and was not the actual shooter, he received a mandatory natural life sentence, the same sentence applicable to the person who pulled the trigger.

4. On the issue of propriety of a *Graham* and/or *Miller* re-sentencing hearing despite the fact the age of defendant was raised in proceedings that occurred prior to *Graham* and *Miller* decisions:

Montgomery, 577 U.S. ___, Slip op., p. 17:

Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects 'unfortunate yet transient immaturity."

5. Regarding any issue of whether the rule in *Graham* is retroactive:

Montgomery, 577 U.S. ___, slip op., 17-18:

"*Miller* is no less substantive than are *Roper* and *Graham*."

Dated this 8th day of February 2016.

Respectfully submitted,

_/s/_Nicole M. Mooney_____
Nicole M. Mooney (Reg. No. 41084)

CERTIFICATE OF SERVICE

I hereby certify I requested a true and correct copy of the foregoing **Supplemental Authority** be delivered through the ICCES system on this 18th day of February 8, 2016, 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_____