No. 17-5700

IN THE SUPREME COURT OF THE UNITED STATES

CHERYL ARMSTRONG, PETITIONER,

versus

STATE OF COLORADO, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

AMENDED REPLY BRIEF

Attorney for Petitioner:

NICOLE M. MOONEY
Bar No. 302572
MS&M Law Office
PO Box 3089
Denver, CO 80201

(303) 952-0398

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IN THE
SUPREME COURT OF THE UNITED STATES

REPLY BRIEF

Petitioner respectfully renews her request that a writ of certiorari issue to review the judgment below. Contrary to the Respondent's assertion in its Brief in Opposition (BIO) that Ms. Armstrong, Mr. Rainer, and Mr. Lucero's cases are not appropriate vehicles, the questions presented in these cases as a result of the Colorado Supreme Court's decisions therein are proper and accurately represent the issues presented.

Through these cases, this Court should resolve this meaningful issue that has arisen following this Court's decision in *Graham v. Florida*, 560 U.S. 48, 75 (2010) of whether the *Graham* ruling applies to a term-of-year sentence, such as the 96-year sentence of the Petitioner, which is an effective life without parole sentence. Children suffering both of these sentences face the same prospect from the outset—living out their entire life in prison. Courts across the country are split on this issue.[1] Without this Court's action to resolve the issue, children across this country

[1] In particular, the Petitioner points the Court to its decision to deny the Government's Petition for Writ of Certiorari in *Budder v. Addison*, 851 F.3d 1047, *cert. denied Byrd v. Budder*, Case No. 17-405, 2017 WL 4155601, U.S., Nov. 27, 2017. The Colorado Supreme Court's decision in this case as well as the accompanying cases is in conflict with this Tenth Circuit decision in which the Court concluded: "[W]e cannot read the Court's categorical rule as excluding juvenile offenders who will be imprisoned for life with no hope of release for nonhomicide crimes merely because the state does not label this punishment as "life without parole." The Constitution's protections do not depend upon a legislature's

will continue to be treated disparately without regard to maturity and rehabilitation but, rather, dependent on the nomenclature of their sentence and the jurisdiction and state in which they live. The Petitioner's co-defendants who were sentenced to mandatory life without parole sentences have the opportunity to demonstrate their maturity and rehabilitation at a re-sentencing hearing.[2] In contrast, the Petitioner, without intervention by this Court, is without such opportunity in the Colorado courts.

Petitioner stands on the positions and arguments made in her Petition for Writ of Certiorari. In this reply, she will limit her response to the Respondent's arguments in its Brief in Opposition.

I. *Graham* requires a meaningful opportunity for release—not an opportunity to be eligible for parole or clemency.

In its BIO, the Respondent repeatedly contends that the Petitioners' sentences do not trigger *Graham* because they have a "meaningful opportunity for parole" in their lifetimes. [See, e.g., BIO, pp. 9, 10, 21] However, what the Respondent actually argues is that, in its opinion, the Petitioners will be eligible to seek parole sometime late in life and this is enough. But, such a reading inaccurately portrays what *Graham* requires. This Court in *Graham* held:

A State is not required to guarantee eventual freedom to a juvenile offender

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semantic classifications.[6] Limiting the Court's holding by this linguistic distinction would allow states to subvert the requirements of the Constitution by merely sentencing their offenders to terms of 100 years instead of "life."" 851 F.3d at 1056.

[2] The opportunity of re-sentencing also provides juveniles like Petitioner's co-defendants an opportunity and opening to seek a joint resolution of the case with prosecutors.

> convicted of a nonhomicide crime. What the State must do, however, is give defendants like Graham **some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation**.

560 U.S. at 75 (emphasis supplied). As discussed below, in Colorado, parole eligibility is not synonymous with release. Furthermore, the "special program" to which the State prefers is a path provided to prisoners who were direct-filed in the adult system as juveniles to seek clemency from the governor and, therefore, should not be considered the "meaningful opportunity for release" required in *Graham*. This will also be discussed more fully below.

II. Parole eligibility is not the meaningful opportunity for release decreed in the Graham ruling.

In *Montgomery v. Alabama*, 136 S.Ct. 718, 736 (2016), this Court ruled "[a] state may remedy a *Miller* [and presumably a *Graham*] violation by permitting juvenile . . . offenders to be considered for parole, rather than by resentencing them.". The Court then cites Wyoming's statute providing parole eligibility to juvenile homicide offenders after 25 years. Wyo. State. Ann. §6-10-301(c) (2013). However, this nod toward parole must be underscored by this Court's understanding that parole is a regular part of the rehabilitative process: "Assuming good behavior, [parole] is the normal expectation in the vast majority of cases." *Solem v. Helm*, 463 US 277, 300-301 (1983). What can be drawn from the Court's references is that a reasonable opportunity for release upon demonstrated maturity and rehabilitation is something that is a regular part of the process and is a normal expectation upon good behavior. It cannot be a remote possibility.

The parole system in place in Colorado does not provide a meaningful process for considering a juvenile's release. It provides no more than a remote possibility of release. Thus, the parole eligibility date is not an appropriate tool to determine if and when a juvenile will have a reasonable opportunity to obtain release.

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 *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, the Colorado 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[3]. The 84% rate was the lowest denial percentage of the period 2004-08; in FY2005 the denial rate was 90%. *Id*, p. 8. In *People v.*

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

Ranier, 2013 COA 51, ¶ 36, a division of the Colorado Court of Appeals recognized that 90% of offenders are denied parole at first eligibility.

III. Eligibility for Colorado's "special program" is not the meaningful opportunity for release decreed in the *Graham* ruling.

The Respondent argues in the BIO that Colorado's "special program" is sufficient to satisfy *Graham*. According to the Respondent, §17-34-101 (C.R.S. 2016) and §17-34-102 (C.R. S. 2016)[4] resolve any potential constitutional problem upon a sentence of any length imposed upon a juvenile offender. However, this program is a path to seek clemency from the governor and this does not satisfy *Graham*.

While this Court left it "for the State in the first instance, to explore the means and mechanisms for compliance," *Graham*, 130 S.Ct. at 2030, it has provided some indications of what are appropriate means of compliance. It has rejected executive clemency as a "fix" for a sentence that denies hope of release. When addressing executive clemency, the Court stated: "[A life without parole sentence] deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency-the remote possibility of which does not mitigate the harshness of the sentence." *Graham*,130 S.Ct. at 2027. Executive clemency therefore does not provide the reasonable opportunity for release upon demonstrated maturity and rehabilitation required in *Graham*.

[4] Colorado Senate Bill 16-180.

A. Even this Opportunity is not provided to All Juvenile Offenders

Colorado statutes do not provide a path to release for all juveniles serving extreme sentences. It excludes some juveniles from participation in the specialized program and from the possibility it provides to seek "early parole" from the governor. A juvenile offender is excluded from petitioning the executive director of the Department of Corrections for placement in the specialized program if he or she has been convicted of unlawful sexual behavior. A juvenile offender is also excluded from petitioning for placement in the program if he or she is in a treatment program for serious mental illness. See §17-34-101(1)(a).

B. What the "Special Program" will provide is uncertain

For those individuals who are allowed to apply to the program, DOC's executive director (or his/her designee) decides whether or not to place the inmate in the program, considering the following criteria:

> (1) (a) the nature of the offense, (b) the circumstances surrounding the offense, and (c) the extent of the offender's participation in offense;
> (2) age and maturity of offender at the time of the offense;
> (3) behavior during incarceration;
> (4) assessed risks and needs of the offender;
> (5) impact of the offense on the victim and victim's immediate family;
> (6) any other factor that DOC deems appropriate.

§17–34–101(1)(b), C.R.S. (2016). There is no presumption an inmate will be admitted even if the conviction is for juvenile conduct.

Virtually nothing is known about what DOC can require the inmate to do in the "specialized program." Sec. 17–34–102, C.R.S. (2016), provides DOC with the

discretion in how to implement the program, the size of the program, who is accepted into the program as well as the policies and procedures to be developed. DOC has authority to set up the program, provide whatever funding it deems appropriate, serve as many (or as few) inmates as it wishes, and utilize whatever process it desires for continuing or terminating an inmate's enrollment in the program, or for making the ultimate determination that the inmate has succeeded or satisfactorily completed the program. The legislation ensures, however, that no one is allowed to complete the program in less than three years after the commencing it. §17–34–102 (3), C.R.S. (2016).

C. It Provides Chance to Seek Clemency Not a Reasonable Opportunity to Obtain Release

An inmate who successfully completes the program is awarded the statutory right

> (1) to ask the Governor to exercise his discretion to grant early parole.[5]
> (2) to have the parole board give input to the Governor, except that, if the parole board wishes to recommend that the inmate be granted early parole, the parole board must first hold a hearing at which the victim is permitted to be heard.

The parole board does not have authority to grant early parole or to authorize anyone's early release. Completion of the specialized program does not assure early parole; nor does it assure the inmate an opportunity to appear before the board.

The governor may grant early parole "if, in the governor's opinion, extraordinary mitigating circumstances exist and the offender's release from

[5] "Notwithstanding any provision of law, an offender who successfully completes the specialized program is eligible to apply for early parole pursuant to the provisions of section 17-22.5-403(4.5) or 17-22.5-403.7." §17-34-102 (7), C.R.S. (2016).

institutional custody is compatible with the safety and welfare of society." *See* §17-22.5-403(4.5) (a), C.R.S. (2016). *See* §17-22.5-403.7(2), C.R.S. (2015). However, "[i]n Colorado, the power of clemency is entirely at the Governor's discretion.... expectation of clemency is 'simply a unilateral hope.'" *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 465 (1981).

A review of the statutory provisions shows the "special program" provides nothing more than a remote possibility; it does not provide a reasonable opportunity for release. It comes down to a totally discretionary decision of the governor. The governor's decision regarding "early parole" is akin to an executive clemency review. Pursuant to C.R.S. §16-17-101, a governor may commute a sentence "when proper, advisable, and consistent with public interests and the rights and interests of the offender. " In addition, early parole through the Governor's Office was already a part of Colorado statutes prior to the enactment of S.B. 16-180. C.R.S. §17-22.5-403 (4) already provides: "The governor may grant parole to an inmate to whom subsection (2) or (3) of this section applies prior to such inmate's parole eligibility date or discharge date if, in the governor's opinion, extraordinary mitigating circumstances exist and such inmate's release from institutional custody is compatible with the safety and welfare of society."

In conclusion, S.B. 16-180 is a piece of legislation that is not yet more than words on a piece of paper. Whether it will in fact provide any opportunity of release to anyone remains to be seen. Who will be placed in the program is yet to be seen. How many will be placed in the program is yet to be seen. Whether anyone

completes the program is yet to be seen. Whether the governor will grant parole to anyone after completing the program remains to be seen. For a State's mechanism to provide Graham's mandated "reasonable opportunity for release upon demonstrated maturity and rehabilitation it must provide more than is provided in "special program."

IV. Ms. Armstrong's offenses are nonhomicide offenses included within the *Graham* ruling.

In its BIO, the Respondent contends the Petitioner's offense is not a *Graham* offense. However, in *Graham*, this Court stated: **"**For a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole." 30 S.Ct. at 2030. Therefore, *Graham* applies when a juvenile is convicted under a complicity theory of second-degree murder. Ms. Armstrong did not commit homicide; she was convicted of two counts of second-degree murder under a conspiracy theory. She was not present when her co-defendants shot the victims.

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)[6] *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

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

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.

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 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. C.R.S. §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.

Complicity theory is inconsistent with what is known about Adolescent Development. Criminal responsibility is a complex concept. *Bogdanov*, 941 P.2d at 254-55. As applied to children, Colorado's complicity doctrine is inconsistent with this 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. v. North Carolina*, 564 U.S. 261, 131 S.Ct. 2394 (2011), this 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 v. Simmons*, 543 U.S. 551, 569 (2005). 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.

Miller v. Alabama, 567 U.S. 460, 132 S.Ct. 2455, 2476 (2012) (internal citations omitted).

Conclusion

WHEREFORE, this Court should issue its writ of *certiorari* and explicitly determine whether its holding in *Graham* and *Miller* that all non-homicide juvenile offenders and all juvenile homicide offenders whose crimes do not reflect irreparable corruption, must receive sentences that provide for a meaningful opportunity for release upon demonstrated rehabilitation and maturity applies with equal force to juveniles, such as the Petitioner, convicted of more than one offense whose aggregate sentence denies them a realistic, reasonable, and

meaningful opportunity to obtain release upon demonstrated rehabilitation and maturity.

Respectfully submitted,

/s/ Nicole M. Mooney
NICOLE M. MOONEY
Bar No. 302572
MS&M Law Office
PO Box 3089
Denver, CO 80201
(303) 952-0398