IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI
DIVISION IV

STATE OF MISSOURI,
Plaintiff,

v.

ALYSSA DAILEN BUSTAMANTE
Defendant.

Case No. 09AC-CR03516

FILED
FEB 17 2011
BRENDA A. UMSTATTD
CLERK CIRCUIT COURT
COLE COUNTY, MISSOURI

filed
[illegible]
2-17-11

STATE'S RESPONSE TO DEFENDANT'S MOTION TO DECLARE §565.020.2 RSMo. UNCONSTITUTIONAL

COMES NOW, the State of Missouri by and through Prosecuting Attorney Mark A. Richardson, and for its response to the Defendant's motion states as follows:

1. The mandatory sentence for a juvenile convicted of first degree murder of life without the opportunity for parole does not violate the Constitutions of Missouri or the United States. The identical issues raised by Defendant were heard and rejected by the Missouri Supreme Court in *State v. Andrews,* --- S.W.3d ----, 2010 WL 5209310 (Mo. Dec 21, 2010) (NO. SC91006).

2. First, the Defendant claims that life-without-parole for juvenile murderers constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. In rejecting this idea, the Missouri Supreme Court in *Andrews* cited two cases noted by Defendant, *Roper v. Simmons,* 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) and *Graham v. Florida,* ---U.S. ----, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010). Based on the review of *Graham* and *Roper*, the *Andrews* Court held that the defendant's constitutional argument is flawed because *Roper* expressly and *Graham* implicitly recognize that life-without-parole is not cruel and unusual punishment for a minor who is convicted of a homicide. In upholding the juvenile's conviction and sentence of life-without-parole for first degree murder, the Court in

Andrews referred to the concurring opinion of Justice Roberts in *Graham* noting "nothing inherently unconstitutional about imposing sentences of life-without-parole on juvenile offenders."

3. In *Roper,* the Court held that the Eighth Amendment prohibited the execution of murderers who committed their offenses before their eighteenth birthday. *Roper*, 543 U.S. at 568, 578-79. But in analyzing the deterrent effect of imposing the death penalty on juvenile offenders, the Court stated that it was "worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person." *Id.* at 572.

4. The *Graham* case held that the Eighth Amendment prohibits the imposition of life-without-parole sentences on juveniles who commit *non-homicide* offenses. *See Graham v. Florida*, 130 S. Ct. 2011, 2030 (2010) ("This Court now holds that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life-without-parole."). In reaching this holding, the Court noted that only six jurisdictions prohibited life-without-parole sentences for juvenile offenders. *Id.* at 2023. Forty-four other states, the District of Columbia, and the federal government allow the imposition of a life-without-parole sentence to be imposed on juvenile offenders, even those as young as 13. *Id.* Only seven states limited that sentence to homicide offenses. *Id.* Twenty-six states have life-without-parole as the mandatory sentence for anyone- adult or juvenile- convicted of first degree murder. This represents an overwhelming national consensus that life-without-parole for the worst juvenile offenders is an appropriate and lawful punishment.

5. To support its decision to draw a constitutional line against life-without-parole sentences for juveniles committing non-homicide offenses, the Court in *Graham* observed that

there "is a line 'between homicide and other serious violent offenses against the individual.' " *Id*, at 2027 (quoting *Kennedy v. Louisiana*, 123 S. Ct. 2641, 2659-60 (2008)). "This is because '[l]ife is over for the victim of the murderer . . . .' " *Id.* (quoting *Coker v. Georgia*, 433 U.S. 584, 598 (1977)) (alteration in original). "Although an offense like robbery or rape is a 'serious crime deserving serious punishment,' those crimes differ from homicide in a moral sense." *Id.* (quoting *Enmund v. Florida*, 458 U.S. 782, 797 (1982)). The Court qualified its holding by stressing that a State need not release the non-homicide offender during his or her "natural life": "Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives." *Id.* at 2030. The Constitution requires only that states provide a meaningful opportunity for release, but only for juvenile *non-homicide* offenders.

6. Other cases considering the effect of the holding in *Roper* have determined that its application is limited to the capital-punishment context. "*Roper* held that executing a person for conduct that occurred before the offender was eighteen violates the Eighth Amendment, but it permitted imposing a sentence of life imprisonment based on conduct that occurred when the offender was a juvenile." *United States v. Salahuddin*, 509 F.3d 858, 863 (7th Cir. 2007). "The Court's reasoning in *Roper* was based 'in large measure on the "special force" with which the Eighth Amendment applies when the state imposes the ultimate punishment of death.' " *Id.* at 864 (quoting *United States v. Mays*, 466 F.3d 335, 340 (5th Cir, 2006)). "The reasoning in *Roper* therefore applies 'with only limited, if any, force outside of the context of capital punishment.' " *Id.* (quoting *United States v. Feemster*, 483 F.3d 583, 588 (8th Cir.2007)). In *Harmelin v. Michigan*, 501 U.S. 957 (1991), the Court held that a sentencing scheme that calls for an automatic life-without-parole sentence, rather than an individualized punishment determination,

is not "cruel and unusual" under the Eighth Amendment. *Id.* at 995-96.

7. The *Andrews* case is not the first time that a Missouri court has considered the application *of Roper* in sentencing a defendant to a term of years for an offense committed when he was a juvenile. In *Burnett v. State*, 311 S.W.3d 810 (Mo. App. E.D. 2009), the court held that the imposition of a 60-year sentence for child kidnapping, first-degree assault, forcible sodomy, and attempted forcible rape on a defendant who was only fifteen when he committed the offenses did not violate the Eighth Amendment. *Id.* at 814-16. In reaching this holding, the court explained why it "decline[d] to extend the reasoning of *Roper*" to the sentence imposed in that case:

> "We note initially that *Roper* operates only to prohibit the imposition of the death penalty on juvenile offenders. It is quite clear that the *Roper* Court envisioned the possibility that serious crimes, such as this one, committed by a young offender might deserve a long prison sentence: "When a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life . . . ." In fact, the *Roper* Court affirmed the Missouri Supreme Court's decision, which re-sentenced the defendant to life imprisonment without eligibility for probation. Additionally, the United States Supreme Court has stated that decisions applying the prohibition of cruel and unusual punishments to capital cases are of limited assistance in deciding the constitutionality of a prison sentence. Because *Roper* was based largely on the "special force" with which the Eighth Amendment applies to imposition of the death penalty, it does not compel us to consider the factors articulated therein in non-capital cases." *Id.* at 815-16 (citations and footnote omitted) (quoting *Roper*, 543 U.S. at 574).

This reasoning militates against the application of *Roper* to a life-without-parole sentence for a juvenile convicted of first-degree murder.

8. The courts in other jurisdictions that have considered the claim Defendant raises here have uniformly rejected it. *See State v. Allen*, 958 A.2d 1214, 1233-36 (Conn. 2008) (declining to extend *Roper* to a life-without-parole sentence imposed on murderer who was under 18); *Wallace v. State*, 956 A.2d 630, 641 (Del. 2008) (declining to extend *Roper* to a life-without-

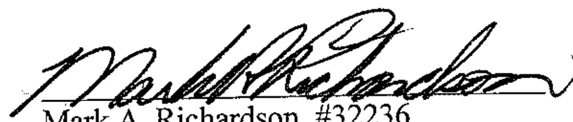
parole sentence imposed on a 15-year-old murderer); *State v. Craig*, 944 So.2d 660, 682-63 (La. App. 2006), *cert. denied*, 552 U.S. 1062 (2007) (declining to extend *Roper* to a life-without-parole sentence imposed on a 17-year-old murderer); *State v. Pierce*, 225 P.3d 1146, 1146-48 (Ariz. App. 2010) (declining to extend *Roper* to a natural-life sentence imposed on 16-year-old convicted of first-degree murder).

9. Defendant further argues that Missouri's sentencing scheme for juveniles convicted of first degree murder violates the Sixth Amendment made applicable to the states in the Due Process Clause of the Fourteenth Amendment to the United States Constitution and as espoused in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Specifically, Defendant asserts that a jury should be allowed to mitigate defendant's punishment by considering her age. The *Andrews* Court dismissed this argument as inapplicable since the consideration of age was done during the certification process. The fact that the juvenile is certified does not increase the maximum penalty imposed by law triggering due process considerations in *Apprendi*. The Court held:

"The certification of Andrews did not enhance the potential maximum sentence for the crime he was alleged to have committed. His certification did not expose him to any greater punishment than authorized by the jury's verdict as required to violate *Apprendi.* 530 U.S. at 494, 120 S.Ct. 2348. This is because the judgment that certified Andrews to be tried as an adult did not impose any sentence on him whatsoever. Instead, it only determined that his case would be heard in a circuit court of general jurisdiction rather than the juvenile division of the circuit court-a decision to which other courts have determined *Apprendi* does not apply." *State v. Andrews,* --- S.W.3d ----, 2010 WL 5209310 (Mo. Dec 21, 2010) (NO. SC91006) at 5.

10. This identical matter having been heard and rejected by the highest Courts in Missouri and in the United States, the rule of stare decisis demands that those decisions be

followed by this court. In order to maintain continuity, predictability and stability of the law we must accept that precedent shall be followed. It would be error for the Court to sustain Defendant's motion to declare the imposition of a life-without-parole sentence on Defendant, if convicted of first degree murder, unconstitutional. The right of the people to seek and obtain a sentence of life-without-parole for the defendant should not be usurped by judicial fiat as suggested by the defense.



Mark A. Richardson #32236
Assistant Prosecuting Attorney
311 E. High Street, 3rd Floor
Jefferson City, Missouri 65101
Phone: 573-634-9180

Attorney for Plaintiff

CERTIFICATE OF SERVICE

A copy of the foregoing had been handed /mailed/faxed/ to Donald Catlett, Woodrail Centre, 1000 W. Nifong, Bldg 7, Suite 100, Columbia, MO 65203, attorney for defendant, on the 17th day of February, 2011.

Mark A. Richardson #32236