No. 17-5674

IN THE
SUPREME COURT OF THE UNITED STATES

ATORRUS LEON RAINER, Petitioner,

v.

STATE OF COLORADO, Respondent.

On Petition for Writ of Certiorari to the
Colorado Supreme Court

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The state's brief in opposition responds to petitions filed in three factually distinct cases. *See Rainer v. Colorado,* Case No. 17-5674; *Lucero v. Colorado,* Case No. 17-5677; *Armstrong v. Colorado,* Case No. 17-5700. In all three cases, the Colorado Supreme Court ("CSC") held that *Graham v. Florida,* 560 U.S. 48 (2010) and *Miller v. Alabama,* 567 U.S. 460 (2012) apply only to juveniles sentenced to "life without parole" for a single offense.[1] Thus, as interpreted by the state court, the Eighth Amendment principles underlying *Graham* and *Miller* have no applicability to juveniles sentenced for multiple offenses, even if the juvenile's aggregate sentence denies the offender any hope for release within their lifetime.

By holding that *Graham* and *Miller* apply only when a juvenile is sentenced to "life without parole" ["LWOP"] for a single offense, the CSC decisions render irrelevant to juvenile sentencing the question of whether a juvenile's [aggregate] sentence condemns him to die in prison and denies him, at the outset, any meaningful opportunity for release based on demonstrated maturity and rehabilitation. In fact, as Colorado state law currently stands, a juvenile's age is irrelevant to constitutional proportionality analysis except when the offender is sentenced to LWOP for a single offense. *See People v. Lucero,* 394 P.3d 1128, 1132, ¶15 (Colo. 2017); *Valenzuela v. People*, 856 P.2d 805, 809 (Colo. 1993).

The state's opposition brief is notable in what it does not contain in several respects.

First, the state makes no attempt to defend the CSC's holding that "*Graham* and *Miller* apply only where a juvenile is sentenced to the specific sentence of life without the possibility of parole for one offense." *Lucero, supra. See* Brief in Opp. at 7-8.

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[1] *See People v. Rainer,* 394 P.3d 1141, 1143-1144, ¶¶3, 8 (Colo. 2017); *Lucero v. People,* 394 P.3d 1128 (Colo. 2017)(the court denominated *Lucero* the lead companion case); *Armstrong v. People,* 395 P.3d 748 (Colo. 2017).

Second, the state does not dispute that the state and federal courts are seriously divided on the issues presented by the petition.[2] *See* Brief in Opp. at 9, n.4.

And, third, the state does not suggest that the issues presented are unimportant or that they should not be resolved by this Court at this time.

Instead of opposing Mr. Rainer's petition on any of the above three grounds, the state factually conflates the three pending Colorado cases to erroneously suggest that all three cases fail to present the issue presented—whether the Eighth Amendment principles set forth in *Graham* and *Miller* apply only when a juvenile is sentenced to life without parole ("LWOP") for a single offense or whether, as a majority of courts have held, they apply equally when a juvenile is sentenced for multiple offenses to an aggregate sentence that, like LWOP, condemns the child to die in prison.

Mr. Rainer will address the state's opposition brief primarily as it relates to his case. And, for clarity's sake, the Table on the following page describes and distinguishes the three Colorado cases addressed in the brief in opposition.

[2] Since the petition was filed, yet another court has decided the issue. *See McCullough v. State*, 233 Md. App. 702, 168 A.3d 1045 (2017), cert. grt'd 2017 WL 5045639 (Md. Oct. 17, 2017). Like the CSC, the Maryland court held that *Graham* applies only to a LWOP sentence. *See id.* at 743-744. However, unlike the CSC, the Maryland court alternatively held that even if *Graham* applied to consecutive sentences, defendant's 100-year sentence would not be cruel and unusual punishment, because he would be parole eligible at 67. *See id.* at 744.

Juvenile offender	Aggregate Sentence/ Offenses	Parole eligibility	Trial court ruling	CCOA ruling
Rainer	224-years initially and 112-years after direct appeal; 2 counts of attempted first degree murder, 2 counts of first degree assault, burglary; aggravated robbery, and crime of violence sentence enhancement	Parole eligible at 75	1) *Graham* not retroactive; 2) 112-year sentence is not like LWOP	Aggregate sentence is a de facto life sentence and violates *Graham* and *Miller* as Rainer does not have meaningful opportunity of release within his life expectancy
Lucero	84-years; attempted first degree murder, conspiracy to commit first degree murder, and 2 assaults	Parole eligible at 57	*Graham* claim den'd after a hearing	Sentence aff'd as Lucero will be parole eligible at about 57 and, thus, has a meaningful opportunity for release during his lifetime
Armstrong	96-years; 2 counts of second degree murder	Parole eligible at about 60	Claim denied	Sentence aff'd as Armstrong will be parole eligible at about age sixty and, thus, she has a meaningful opportunity to obtain release

The CSC reversed the Colorado Court of Appeals ["CCOA"] in *Rainer*. It affirmed the CCOA decisions in *Lucero* and *Armstrong,* albeit on different grounds than those relied on by the CCOA. Applying the analysis it adopted in *Lucero,* the lead companion case, the CSC approved all three juveniles' aggregate sentences, holding simply that *Miller* and *Graham* are not applicable to juveniles who receive consecutive term-of-year sentences for multiple offenses. The CSC limited the reach of *Miller* and *Graham* to juveniles who are sentenced to a sentence denominated "life without parole" for a single offense. Thus, the CSC does not distinguish between Rainer's sentence, which the CCOA determined denied him a meaningful opportunity for release, or any other lengthy aggregate term-of-years sentence—no matter whether the sentence allows any opportunity for a juvenile's release.

Nevertheless, the state devotes a large part of its brief to argue that each of the Colorado defendants has an opportunity for release based on parole eligibility dates and a

new Colorado statute which may allow the governor to grant a juvenile early release if the offender meets certain criteria and the governor approves. *See* Brief in Opp. at 10-15. The CSC, however, expressly states that this new statute, which acts like clemency, "does not affect our holding." *See Lucero, supra,* 394 P.3d at 1131, fn.5. Likewise, whether parole eligibility provides an offender with a realistic opportunity of release is of no relevance when a court holds that *Graham* and *Miller* apply only to a sentence of LWOP. If the CSC's decision stands, Colorado courts will never consider whether a juvenile offender's parole eligibility date provides a meaningful opportunity for release, because Colorado juveniles serving consecutive sentences are not entitled to any opportunity for release absent the Eighth Amendment principles set forth in *Graham* and *Miller*.

Moreover, to the extent the state courts considered whether Mr. Rainer's 112-year sentence denied him the meaningful opportunity for release required by *Graham* and *Miller,* they found his 112-year sentence did. *Compare People v. Rainer,* 2013 COA 51, ¶78 ("Rainer's sentence, which from the outset failed to offer him any meaningful chance at parole during his lifetime 'improperly denies [him] a chance to demonstrate growth and maturity,' as required under *Graham*.") and *Rainer,* 394 P.3d at 1144 (supreme court does not address whether Rainer's sentence denies him a realistic chance of release, since it concludes *Graham* and *Miller* do not apply).

The state also argues that Mr. Rainer's case does not implicate the questions presented because his conviction was not for a "non-homicide" crime. This is simply

wrong.[3] First, all of Mr. Rainer's offenses, including the attempted murder offenses, are non-homicide offenses for Eighth Amendment purposes, since they do not involve a loss of life. *See, e.g., Kennedy v. Louisiana,* 554 U.S. 407, 437-438 (2008). Thus, *Graham's* categorical ban on a sentence of life in prison is applicable.

The state also erroneously argues that *Miller* was not violated because "[e]ach of these Petitioners had the benefit of a discretionary sentencing hearing in compliance with *Miller*." Brief in Opp. at 16. Mr. Rainer's sentencing, however, did not comply with *Miller*. *See* Pet. at 8, quoting *Rainer,* 2015 COA at ¶78 (sentencing court did not take into account Rainer's age or the developmental differences between adults and juveniles in imposing sentence).

In sum, Mr. Rainer's case fairly raises the questions presented concerning whether the Eighth Amendment principles underlying *Graham* and *Miller* apply to juveniles who are sentenced to aggregate sentences.

CONCLUSION

Petitioner Atorrus Rainer respectfully renews his request that this Court grant his petition for writ of certiorari.

[3] The CSC initially granted certiorari in Mr. Rainer's case (and Mr. Lucero's) to decide not only whether *Graham* and *Miller* apply to consecutive term-of-year sentences imposed on juveniles, but also to decide "whether a conviction for attempted murder is a non-homicide offense within the meaning of *Graham v. Florida*." Pet., 37a-38a. However, the court determined that this second issue need not be decided because it was holding that *Graham* and *Miller* do not apply to aggregate sentences. *Lucero,* 394 P.3d at 1134, n.7.

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