

Nos. 17-5677, 17-5674, 17-5700

In the Supreme Court of the United States

GUY LUCERO, ATORRUS LEON RAINER, and
CHERYL ARMSTRONG,
Petitioners,

v.

STATE OF COLORADO,
Respondent.

On Petition for Writ of Certiorari to
The Colorado Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioners argue that their cases implicate a split among lower courts that has arisen under the Eighth Amendment's cruel-and-unusual-punishment clause—namely, whether that clause is violated when a juvenile who commits multiple non-homicide crimes may be sentenced to lengthy consecutive sentences that preclude the realistic possibility of release from prison before the end of the juvenile's life expectancy. That issue, however, is not presented in these cases. Instead, the question presented is as follows:

Does the Eighth Amendment preclude a State from imposing consecutive prison sentences on juvenile offenders convicted of killing, conspiring to kill, or attempting to kill multiple victims, when those offenders have a significant opportunity for parole within their natural life expectancies, including through a special program for juvenile offenders that grants them an opportunity for release before they reach middle age?

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STATEMENT

Petitioners are three juvenile offenders who were each convicted in unrelated cases on multiple counts of killing, conspiring to kill, or attempting to kill multiple victims. The trial judge in each case had discretion as to what sentence to impose and decided to impose lengthy, consecutive sentences. Each Petitioner now maintains that under *Graham v. Florida*, 560 U.S. 48 (2010), his or her sentence violates the Eighth Amendment's prohibition on cruel and unusual punishment. Although Petitioners correctly note that the lower courts are divided on whether juvenile offenders given consecutive sentences for multiple non-homicide crimes must be afforded a "meaningful opportunity for parole," Petitioners' cases do not present an appropriate vehicle for addressing that question, for two reasons.

First, based on time credits they have already earned, Petitioners will each become parole eligible within their natural life expectancy: Lucero at age 56, Armstrong at age 57, and Rainer at age 69. With the possibility of additional time credits earned each month, they ultimately can be parole eligible even earlier: Lucero at around age 49, Armstrong at around age 53, and Rainer at around age 60. And recent Colorado legislation affords them an opportunity to apply to enter a specialized program for juvenile offenders that could result in their release as soon as their late 30s or early 40s. Each Petitioner will thus have a "meaningful opportunity for parole" within his or her natural life expectancy.

Second, each Petitioner was convicted of murder, conspiracy to commit murder, or attempted murder. These cases therefore do not fall within the class of “non-homicide” offenders addressed in *Graham*.

1. Petitioner Guy Lucero. In 2005, 15-year-old Lucero was refused alcohol at a party. Lucero—a member of a gang called the “North Side Mafia”—demanded to know why a member of a rival gang was allowed to drink. He then left the party but warned that he would return with his father, who was also a member of the North Side Mafia. When they returned, Lucero’s father lured the rival gang member out of the house. A car then drove by, firing shots that inflicted non-fatal injuries on four people.

Lucero was tried as an adult. Two witnesses identified Lucero at trial as one of the shooters. The jury convicted Lucero of his various crimes against multiple victims: conspiracy to commit first-degree murder, attempted first-degree murder, and two counts of second-degree assault. Although the court could have sentenced him to as much as 128 years, the judge exercised his discretion to impose a more lenient sentence, totaling 84 years. The sentences were ordered to run consecutively.¹

¹ Under Colorado law, both conspiracy to commit first-degree murder and attempted first-degree murder are class 2 felony crimes of violence; for each offense, the court could have imposed between 16 and 48 years. Colo. Rev. Stat. §§ 18-1.3-401, 406. Second-degree assault is a class 4 felony crime of violence; for each second-degree assault conviction, the court could have imposed between 5 and 16 years. *Id.* The trial court sentenced Lucero to 32 years each for his convictions for conspiracy to commit first-degree murder and attempted first-degree murder, and 10 years for each conviction for second-degree assault.

On direct appeal, the Colorado Court of Appeals affirmed Lucero's convictions and sentence. *People v. Lucero*, No. 07CA0774, slip. op. at 35–36 (Colo. App. Jul. 2, 2009).

In 2010, this Court held in *Graham* that the Eighth Amendment prohibits the imposition of a life-without-parole sentence on a juvenile offender for a non-homicide offense. 560 U.S. at 82. Citing *Graham*, Lucero filed a motion in the trial court arguing that his aggregate sentence of 84 years was unconstitutional because it was the equivalent of life without parole. The district court held a hearing but denied the motion, noting that it had taken Lucero's youth into "significant consideration" at the time of sentencing and stating that the sentences were appropriate due to the nature of the crimes and the court's reservations about whether Lucero had accepted full responsibility for his acts.

The Colorado Court of Appeals affirmed, rejecting Lucero's argument that his aggregate sentence violated the Eighth Amendment under *Graham* and this Court's subsequent decision in *Miller v. Alabama*, 567 U.S. 460 (2012). See *People v. Lucero*, ___ P.3d ___, 2013 WL 1459477 (Colo. App. Apr. 11, 2013). The court found that Lucero had a meaningful opportunity for release because he would be parole eligible at age 57, and his life expectancy was 75 years. *Id.* at *3.

The Colorado Supreme Court granted Lucero's petition for writ of certiorari and affirmed. *Lucero v. People*, 394 P.3d 1128 (Colo. 2017). Unlike the court of appeals, which had upheld Lucero's sentence on the ground that it complied with *Graham* by affording a meaningful opportunity for parole, the Colorado Supreme

Court concluded that *Graham* and *Miller* do not apply to, and therefore do not invalidate, a consecutive term-of-years sentence such as that received by Lucero. *Id.* at 1133.

2. Petitioner Cheryl Armstrong. In 1995, Armstrong, then 16, drove two friends to the house of her former boyfriend, who she believed was expecting a child with someone else. Upon arriving, Armstrong parked and stayed inside the car. Her friends entered the house, where they shot and killed the former boyfriend and his pregnant female companion.

Armstrong was tried as an adult. The jury found that she was complicit in the murders and convicted her on two counts of second-degree murder. The trial court imposed the maximum possible sentence—48 years on each count—to run consecutively, for a total sentence of 96 years.² The Colorado Court of Appeals affirmed her convictions on direct appeal. *People v. Armstrong*, No. 96CA0044 (Colo. App. Nov. 14, 1996).

After this Court decided *Graham*, Armstrong filed a motion in the trial court arguing that her 96-year sentence violated the Eighth Amendment because it was a “virtual life sentence” that denied her a meaningful opportunity for release. The district court denied the motion and the Colorado Court of Appeals affirmed,

² In Colorado, the completed crime of second-degree murder is a class 2 felony crime of violence. Colo. Rev. Stat. § 18-3-103(3). Colorado law therefore classified Armstrong’s completed murders just as seriously as Lucero’s crime of conspiracy to commit first-degree murder and Lucero’s and Rainer’s crimes of attempted first-degree murder. *See* Colo. Rev. Stat. §§ 16-11-309, 18-1-105 (1995).

concluding that Armstrong would be eligible for parole at about age 60, and therefore had a meaningful opportunity for release in compliance with *Graham* and *Miller*. *People v. Armstrong*, No. 11CA2034 (Colo. App. Oct. 17, 2013).

The Colorado Supreme Court granted certiorari and affirmed, albeit on different grounds. *Armstrong v. People*, 395 P.3d 748 (Colo. 2017). Applying the reasoning set forth in its *Lucero* opinion, the court observed that Armstrong was sentenced not to life without the possibility of parole, but instead to two consecutive sentences of 48 years. *Id.* at 750. Holding that *Graham* and *Miller* do not apply to such a term-of-years sentence, the Colorado Supreme Court affirmed the court of appeals. *Id.*

3. Petitioner Attorus Rainer. In 2000, when he was 17, Rainer and a companion burglarized an apartment and stole a stereo. During the burglary, Rainer shot one of the home's inhabitants four times and another inhabitant three times, leaving both in critical condition. Neither victim died from their wounds.

Rainer was tried as an adult, and the jury convicted him of two counts of attempted first-degree murder, two counts of first-degree assault, one count of first-degree burglary, and one count of aggravated robbery. They also found him eligible for sentence-enhancements for committing crimes of violence. The sentencing judge decided to impose the maximum possible period of incarceration on each count, resulting in an aggregate sentence of 224 years.

On direct appeal, the Colorado Court of Appeals affirmed Rainer’s convictions, but concluded that the two sentences for attempted first-degree murder and the two sentences for first-degree assault were required to run concurrently rather than consecutively. *People v. Rainer*, No. 01CA1401, slip. op. at 30–31 (Colo. App. Feb. 5, 2004). On remand, the trial court accordingly reduced Rainer’s aggregate sentence to 112 years.³

After this Court decided *Graham*, Rainer filed a motion in the trial court arguing that his aggregate sentence was unconstitutional because it was the functional equivalent of life without parole and denied him a meaningful opportunity for release. The district court denied the motion.

The Colorado Court of Appeals reversed and vacated the sentence. *People v. Rainer*, ___ P.3d ___, 2013 WL 1490107 (Colo. App. Apr. 11, 2013). The court stated that, according to statistics from the Centers for Disease Control and Prevention, Rainer’s life expectancy was between 63 and 72 years. *Id.* at *12. Therefore, the court concluded that Rainer’s 112-year sentence, with parole eligibility at age 75, was the “functional equivalent of life without parole” and violated the Eighth Amendment under *Graham* and *Miller*. *Id.* at *15.

³ As class 2 felony crimes of violence, the sentencing range for each of the attempted first-degree murder convictions was 16 to 48 years. Colo. Rev. Stat. §§ 18-1.3-401, 406. As class 3 felony crimes of violence, the sentencing range for the aggravated robbery and the first-degree burglary convictions was 10 to 32 years. *Id.*

The Colorado Supreme Court granted certiorari and reversed. *People v. Rainer*, 394 P.3d 1141 (Colo. 2017). Applying the reasoning of its *Lucero* opinion, the court noted that Rainer had not been sentenced to life without the possibility of parole, but instead had been sentenced to consecutive terms of years for six separate crimes. *Id.* at 1144. The court held that *Graham* and *Miller* do not apply to, and therefore do not invalidate, Rainer’s term-of-years sentence. *Id.*

4. The Colorado Supreme Court’s Rationale. The Colorado Supreme Court issued decisions in all three Petitioners’ cases on the same day, but most thoroughly explained its rationale in *Lucero*, the lead opinion. It began by noting that the defendants in *Graham* and *Miller* had both been given the specific sentence of “life without the possibility of parole” for a single offense. 394 P.3d at 1132. In *Graham*, this Court found a national consensus against imposing that specific penalty on juvenile non-homicide offenders and therefore held that the Eighth Amendment requires States to give such offenders “some meaningful opportunity to obtain release.” *Id.* (citing *Graham*, 560 U.S. at 668–75). And in *Miller*, this Court held that the Eighth Amendment prohibits *mandatory* sentences of life without parole for juvenile homicide offenders. *Id.* (citing *Miller*, 567 U.S. at 479). However, it did not extend that prohibition to either (1) life sentences with the possibility of parole or (2) sentences of life without parole that were not mandatory and instead were the result of judicial discretion, in consideration of the offender’s youth and attendant circumstances. *Id.* (citing *Miller*, 567 U.S. at 479, 483, 489).

The Colorado Supreme Court then noted that Petitioner Lucero, unlike the offenders in *Graham* and *Miller*, had not received a sentence of life without the possibility of parole. Rather, he received four consecutive sentences to terms of years for four separate crimes. *Id.* at 1132. His 84-year sentence thus was not a sentence to “life without parole,” but instead was “an aggregate term-of-years” sentence. *Id.* at 1133. The Colorado Supreme Court concluded: “Life without parole is a specific sentence, imposed as punishment for a single crime, which remains distinct from aggregate term-of-years sentences resulting from multiple convictions.” *Id.*

Acknowledging that courts had come to different conclusions about whether *Graham* and *Miller* apply to lengthy, aggregate term-of-years sentences, the Colorado Supreme Court sided with the courts that have concluded that *Graham* and *Miller* do not apply to such sentences. *Id.* Consistent with its reasoning in *Close v. People*, 48 P.3d 528 (Colo. 2002), the court concluded that the Eighth Amendment’s proportionality principle does not turn solely on the aggregate length of the sentences, but instead requires consideration of each individual crime and each sentence imposed. *Lucero*, 394 P.3d at 1133–34. Thus, the aggregate length of Lucero’s sentences for multiple offenses by itself could not constitute an Eighth Amendment violation. *Id.*

Applying its conclusion in *Lucero* to the other two Petitioners, the Colorado Supreme Court concluded that because Armstrong and Rainer had not received sentences of life without parole, but instead had received aggregate term-of-years

sentences, *Graham* and *Miller* did not apply. *Armstrong*, 395 P.3d at 750; *Rainer*, 394 P.3d at 1144.

REASONS FOR DENYING THE PETITIONS

Petitioners accurately note that state and federal courts are divided over whether the Eighth Amendment precludes the imposition of consecutive sentences that have the effect of denying juvenile offenders a meaningful opportunity for release in their lifetimes.⁴ But Petitioners' cases in no way implicate that jurisdictional split. Under Colorado's system of earned time credits, as well as under new legislation specifically designed to grant juvenile offenders the ability to seek early release, all three Petitioners have a "meaningful opportunity" for parole in their lifetimes. Separately, all three Petitioners were convicted of either killing, conspiring to kill, or attempting to kill multiple victims. Their offenses therefore are not properly considered "non-homicide" crimes for purposes of *Graham*.

⁴ Some courts have concluded that *Graham* and *Miller* apply to invalidate consecutive term-of-years sentences that extend beyond a juvenile offender's natural lifetime. *See, e.g., Budder v. Addison*, 851 F.3d 1047 (10th Cir. 2017); *McKinley v. Butler*, 809 F.3d 908 (7th Cir. 2016); *Moore v. Biter*, 725 F.3d 1184 (9th Cir. 2013); *State v. Zuber*, 152 A.3d 197 (N.J. 2017); *State v. Charles*, 892 N.W.2d 915 (S.D. 2017); *State v. Ramos*, 387 P.3d 650 (Wash. 2017); *People v. Reyes*, 63 N.E.3d 884 (Ill. 2016); *State v. Moore*, 76 N.E.3d 1127 (Ohio 2016); *Casiano v. Comm'r of Corr.*, 115 A.3d 1030 (Conn. 2015); *Henry v. State*, 175 So.3d 675 (Fla. 2015); *State v. Boston*, 363 P.3d 453 (Nev. 2015); *Brown v. State*, 10 N.E.3d 1 (Ind. 2014); *Bear Cloud v. State*, 334 P.3d 132 (Wyo. 2014); *State v. Null*, 836 N.W.2d 41 (Iowa 2013); *People v. Caballero*, 282 P.3d 291 (Cal. 2012). Other courts disagree. *See, e.g., United States v. Walton*, 537 Fed. Appx. 430 (5th Cir. 2013); *Bunch v. Smith*, 685 F.3d 546 (6th Cir. 2012); *Lucero v. People*, 394 P.3d 1128 (Colo. 2017); *State v. Ali*, 895 N.W.2d 237 (Minn. 2017); *Willbanks v. Dep't of Corr.*, 522 S.W.3d 238 (Mo. 2017); *Vasquez v. Com.*, 781 S.E.2d 920 (Va. 2016); *Adams v. State*, 707 S.E.2d 359 (Ga. 2011).

I. Petitioners' cases do not implicate the question presented because they have a meaningful opportunity for parole in their lifetimes.

All three Petitioners will become eligible for parole within their natural life expectancies. Their ability to earn further time credits and apply to enter a new, specialized program for juvenile offenders will only shorten the time before which they can become parole eligible.

A. By statute, Petitioners have earned, and will continue to earn, time credits that already make them eligible for parole within their life expectancies.

A person sentenced to prison in Colorado for a class 2, 3, or 4 felony—and who has not previously been convicted of a crime of violence—“shall be eligible for parole after such person has served fifty percent of the sentence imposed upon such person, less any time authorized for earned time granted pursuant to [Colorado’s earned time statute].” Colo. Rev. Stat. § 17-22.5-403. And under the earned time statute, ten days per month are deducted from an inmate’s sentence if the inmate has made consistent progress in certain specified categories and has not harassed any victims of the crime. *Id.* § 17-22.5-405. In other words, Petitioners earn credits against their sentences simply by complying with the routine expectations that exist for all inmates.

For example, in deciding whether to certify earned time credits, case managers review Petitioners’ “attendance, promptness, performance, cooperation, care of materials, and safety” in their work and training. *Id.* § 17-22.5-405(1)(a). Regarding group living, case managers consider “housekeeping, personal hygiene, cooperation,

social adjustment, and double bunking.” *Id.* § 17-22.5-405(1)(b). They also consider participation in counseling sessions and involvement in self-help groups. *Id.* § 17-22.5-405(1)(c). To receive the credits, Petitioners must make progress toward the goals and programs established by the Colorado diagnostic program, *id.* § 17-22.5-405(1)(d), as well as in the literacy corrections program or the correctional education program, *id.* § 17-22.5-405(1)(f). And, of course, Petitioners must not “harass[] the[ir] victim[s] either verbally or in writing.” *Id.* § 17-22.5-405(1)(e).

None of these requirements are onerous, and it is unsurprising that Petitioners have successfully demonstrated the ability to earn time credits since the time their parole eligibility dates were calculated for the lower court proceedings. At the time of this writing, Petitioner Guy Lucero is 28 years old and will become eligible for parole on November 21, 2045, when he will be 56. Petitioner Cheryl Armstrong, who is now 39 years old, will become eligible for parole on March 29, 2036, when she will be 57. Petitioner Atorrus Rainer, now 35 years old, will become eligible for parole on April 21, 2051, when he will be 69.⁵ Due to the time credits earned by Petitioners just in the last few years, these ages are reduced from those listed in the lower court opinions, which stated that Lucero would be parole eligible at age 57, Armstrong at age 60, and Rainer at age 75.

⁵ The Petitioners’ parole hearing dates and current estimated parole eligibility dates are publicly available through the offender search page of the Colorado Department of Correction’s website, <http://www.doc.state.co.us/oss>.

Except in months when they commit disciplinary infractions—something that is within their own power to avoid—Petitioners will continue to earn time credits and advance the date of their parole eligibility. Petitioners can earn 120 days of credit every year, so that three years from now, it is entirely possible for their parole eligibility dates to be nearly a year sooner. Factoring in this ability to earn additional time credits, it is reasonable to estimate that all three Petitioners will become eligible for parole no later than age 60.⁶

The lower courts recognized that Lucero and Armstrong will both be parole eligible within their natural life expectancies. *See Lucero*, 394 P.3d at 1131; *Armstrong*, 395 P.3d at 750.⁷ Regarding Rainer, the Colorado Court of Appeals stated that he would not be parole eligible within his life expectancy, but only because it calculated his parole eligibility age as 75 and his life expectancy, based on Centers for Disease Control life expectancy tables, as between 63 and 72. *See Rainer*, 394 P.3d at 1143. But now, under those same tables, he has a life expectancy of another 39.8

⁶ For example, because Petitioner Rainer can earn 10 days per month (or 120 days per year) under Colo. Rev. Stat. § 17-22.5-405, during the 25 years that will elapse between January 1, 2018 and January 1, 2043, Rainer can earn 3,000 days credit, advancing his parole eligibility date by 8.2 years; instead of being parole eligible at age 69, he would be eligible before his 61st birthday.

⁷ Even the lone Colorado Supreme Court justice that disagreed with the majority's application of *Graham* and *Miller* concurred in the judgment because Lucero and Armstrong would be eligible for parole within their natural life expectancies. *See Lucero*, 394 P.3d at 1138–39 (Gabriel, J., concurring in the judgment) (“Lucero has not established that he, in fact, received a de facto [life without parole] sentence in this case.”); *Armstrong*, 395 P.3d at 750 (Gabriel, J., concurring in the judgment) (“[T]he State has given Armstrong some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.”) (quotation marks omitted).

to 40.1 years beyond his current age of 35.⁸ In other words, Rainer can now expect to live to about age 75, which is years beyond his current parole eligibility age of 69, even if he never earns any additional time credits.

Given that Petitioners will all be eligible for parole within their natural life expectancies, they cannot persuasively argue that they lack a “meaningful opportunity for parole” within their lifetimes. Their cases therefore are poor vehicles for assessing whether sentences that deny such an opportunity comport with the Eighth Amendment.

B. Under recent Colorado legislation, Petitioners can apply to enter a special program for juvenile offenders that would provide an opportunity for parole in their late 30s or early 40s.

Colorado’s system of earned time credits is nothing new. It was adopted nearly thirty years ago, and while it has changed over time, it continues to give the vast majority of Colorado inmates an incentive to comply with prison rules and thereby shorten the time before they have the opportunity to show that they should be paroled back into the community.

Just last year, however, Colorado created a new opportunity for an even faster path to parole eligibility for juvenile offenders. Under the new legislation, a juvenile offender, “after serving twenty years of his or her sentence,” can apply for a

⁸ See National Vital Statistics Reports, vol. 66, no. 3, Table A (April 11, 2017) (reporting 2013 United States life expectancy data for 35-year-old non-Hispanic black males).

specialized program upon meeting certain straightforward requirements.⁹ Colo. Rev. Stat. § 17-34-101 (2017). The program, which takes at least three years to complete, is designed to ensure that juvenile offenders who have never lived independently or functioned in the community as an adult have the necessary skills to successfully reintegrate into society upon their release. *See id.* § 17-34-102(2) & (3). In deciding whether to accept an inmate into the program, prison officials consider criteria such as “the nature of the offense” and “the extent of the offender’s participation in the criminal conduct,” as well as the “age and maturity of the offender at the time of the offense.” *Id.* § 17-34-101(2); *see also* Colo. Dep’t of Corrections Admin. Regulation 650-06, Juveniles Convicted as Adults Program, *available at* <http://tinyurl.com/ycgqpoam>.¹⁰ Offenders who are denied admission to the program or terminated from the program may reapply after three years. Colo. Rev. Stat. § 17-34-101(5)–(6). Offenders who successfully complete the specialized program are then eligible to apply for early parole. Colo. Rev. Stat. §§ 17-34-102(7); 17-22.5-403(4.5).¹¹

⁹ After serving 20 years in prison, a juvenile offender may apply for the program if he or she: (A) has not been released on parole; (B) has not been convicted of unlawful sexual behavior; (C) is not in a treatment program for a serious behavioral or mental health disorder; (D) has obtained a high school diploma or passed a high school equivalency exam; (E) has participated in, and demonstrated responsibility and commitment to, prison programs; (F) has demonstrated positive growth and change through increasing developmental maturity and quantifiable good behavior; and (G) has accepted responsibility for the criminal behavior underlying his or her conviction. Colo. Rev. Stat. § 17-34-101(1)(a)(A)–(G). There is no reason Petitioners would not be able to meet these requirements.

¹⁰ Other criteria include the offender’s behavior while in prison, the assessed needs and risks of the offender, the impact of the offense on the victims, and other factors determined to be relevant in assessing the offender’s demonstrated rehabilitation. *See* Colo. Rev. Stat. § 17-34-101(2).

¹¹ Within 90 days of a juvenile offender’s application for early parole, the state parole board reviews the application and makes a recommendation to the governor. Colo. Rev. Stat. § 17-34-403(4.5)(b). The

Under this new program, Petitioners and similarly situated juvenile offenders will have a realistic opportunity for an early parole after serving 20 years of their sentence, plus the three years or so that it would take them to complete the new program and for review of their early parole applications. Armstrong, who was sentenced in 1995, has already served more than 20 years in prison. Rainer, sentenced in 2001, will soon have served the necessary time, and Lucero, sentenced in 2007, has served half the time necessary to meet the program’s time-served requirement. Thus, instead of becoming parole eligible in their 50s or 60s, Petitioners now have a “meaningful opportunity” for an early parole as soon as their late 30s or early 40s. Indeed, most of the juvenile offenders who are charged and convicted as adults in Colorado—and who typically are sentenced in their late teens or early 20s—should be able to apply for the program by around age 40 and, if they satisfy program requirements, complete it by around age 43.¹²

II. Petitioners’ cases do not implicate the questions presented because their convictions were not for “non-homicide” crimes.

Miller allows courts, after a discretionary sentencing hearing, to impose a sentence of life without parole for “homicide” crimes committed by juveniles. *See* 567

governor may then grant early parole if “extraordinary mitigating circumstances exist and the offender’s release from institutional custody is compatible with the safety and welfare of society.” *Id.* § 17-34-403(4.5)(a). However, if the offender has served at least 25 years of his or her sentence, there is a rebuttable presumption that these criteria have been met. *Id.* § 17-34-102(8)(a).

¹² Colorado’s legislature has even made this new program available to juvenile offenders who are convicted of first-degree murder and sentenced to life without parole. Such offenders are eligible to apply for the program after serving 25 years in prison. *See* C.R.S. § 17-34-101(1)(a)(III).

U.S. at 480. Each of these Petitioners had the benefit of a discretionary sentencing hearing in compliance with *Miller*. Their claims therefore necessarily rest not on *Miller*, but on *Graham*.¹³ And in *Graham*, this Court limited its holding to the conclusion that an opportunity for parole must be afforded to juveniles convicted of *non-homicide* crimes. 560 U.S. at 74–75. Differentiating between homicide and non-homicide offenders, the Court observed that “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 than are murderers.” *Id.* at 69.¹⁴ Here, because Petitioners were all convicted of either killing, conspiring to kill, or attempting to kill their victims, their cases do not properly present the question of whether *Graham* should be extended to lengthy consecutive sentences for multiple non-homicide crimes.

A. Armstrong was convicted of two counts of second-degree murder, based on the killings of two separate victims.

Although Petitioner Armstrong did not kill the victims in her case, she was convicted of second-degree murder based on her complicity in their deaths. In other

¹³ See Lucero Pet’n at i (asking whether *Graham* applies to an “aggregate sentence imposed for multiple *non-homicide* offenses”) (emphasis added); Armstrong Pet’n at 5 (noting that the Colorado Supreme Court “did not address ... whether a conviction for second-degree murder under a complicity theory is a nonhomicide offense” for purposes of *Graham*); Rainer Pet’n at i (asking whether *Graham* should “apply when a juvenile is sentenced to consecutive sentences for multiple *nonhomicide* offenses”) (emphasis added).

¹⁴ Although *Miller* noted that *Graham*’s discussion of the distinctive “mental traits and environmental vulnerabilities” of children was not “crime-specific,” *Miller* was itself limited to the imposition of mandatory life-without-parole sentences. *Miller*, 567 U.S. at 473.

words, she both “intend[ed]” that the killings would occur and could “foresee that life [would] be taken.” *Graham*, 560 U.S. at 69. She therefore falls outside the scope of *Graham* and the questions presented by Petitioners.

In Colorado, a person commits second-degree murder by knowingly causing the death of another. C.R.S. § 18-3-103(1). A person acts “knowingly” when he or she is aware of the nature of his or her conduct and relevant surrounding circumstances. *See* C.R.S. § 18-1-501(6). Here, Armstrong drove two friends to the house where her ex-boyfriend and his new girlfriend were. Although she stayed in the car while her friends entered the house and shot the victims, she was tried and convicted based on her complicity. Under Colo. Rev. Stat. § 18-1-603, a person is legally accountable for another’s criminal behavior if, “with the intent to promote or facilitate the commission of the offense,” she “aids, abets, advises, or encourages the other person in planning or committing the offense.” The jury’s guilty verdict on two charges of second-degree murder reflects its conclusion that Armstrong not only knew that her friends were going to shoot the victims, but also that she intended to promote or facilitate the offense and aided, abetted, advised, or encouraged her friends to complete the crime. In other words, she drove her two friends to the house because she wanted the victims killed.

Because Petitioner Armstrong was not sentenced only on non-homicide crimes, she falls outside *Graham*.

B. Lucero was convicted of conspiracy to commit first-degree murder.

Likewise, Petitioner Lucero's crimes were not limited to non-homicide crimes. One of his convictions was for conspiracy to commit first-degree murder. In Colorado, a person commits conspiracy if, "with the intent to promote or facilitate its commission," he either (1) agrees with others that they "will engage in conduct which constitutes a crime" or an attempt to commit a crime, or (2) "agrees to aid" the others in the planning or commission of the crime or attempted crime. *See* Colo. Rev. Stat. § 18-2-201(1). A person commits first-degree murder if, "[a]fter deliberation and with the intent to cause the death of a person other than himself, he causes the death of that person or of another person." *Id.* § 18-3-102(1)(a).

The facts here show that Lucero "intend[ed]" to kill. *See Graham*, 560 U.S. at 69. After he was denied alcohol at a party, Lucero insulted a member of a rival gang and demanded to know why the rival gang member was allowed to drink. He then left the party, warning that he would return with his father, who—like Lucero—was a gang member. When they returned, Lucero's father lured the rival gang member out of the house, where he was the target of a drive-by shooting. Purely by chance, the shooting only injured, but did not kill, the victims. At trial, Lucero was identified as the shooter.

Under these facts, Lucero's conviction for conspiracy to commit first-degree murder necessarily reflects the jury's conclusion that he intended to promote or facilitate a murder "after deliberation" and "with the intent to kill." *See* Colo. Rev.

Stat. §§ 18-2-201(1); 18-3-102(1)(a). The jury thus must also have concluded that he “intend[ed]” his victims’ deaths. *See Graham*, 560 U.S. at 69. The fact that both his intended victim and the people who were injured survived does not insulate him from a conviction for conspiracy to commit first-degree murder. Nor is it appropriate to lump him together with “defendants who do not kill, intend to kill, or foresee that life will be taken.” *Graham*, 560 U.S. at 69. He therefore is not a non-homicide offender for purposes of *Graham*.

C. Both Lucero and Rainer were convicted of attempted first-degree murder.

In addition to his conviction for conspiracy to commit first-degree murder, Lucero—like Rainer—was also convicted of attempted first-degree murder. Neither of them, then, are appropriately labeled as “non-homicide” offenders under *Graham*. In Colorado, a person commits criminal attempt if, “acting with the kind of culpability otherwise required for the commission of the offense,” the person “engages in conduct constituting a substantial step toward the commission of the offense.” Colo. Rev. Stat. § 18-2-101(1). A “substantial step” is “any conduct ... which is strongly corroborative of the firmness of the actor’s purpose to complete the commission of the offense.” *Id.* As mentioned above, a person commits first-degree murder if, “[a]fter deliberation and with the intent to cause the death of a person other than himself, he causes the death of that person or another person.” *Id.* § 18-3-102(1)(a).

The facts of Lucero's case were described above and illustrate why his convictions for attempted first-degree murder make him a "homicide" offender. As for Rainer, during the course of a burglary he shot two of the home's inhabitants multiple times each, leaving both in critical condition. By convicting both Lucero and Rainer of attempted first-degree murder, their respective juries necessarily concluded that these offenders had, after deliberation, intended to cause the death of another and that each took a "substantial step" toward completing those murders. *See* Colo. Rev. Stat. §§ 18-2-101(1); 18-3-102(1)(a). Rainer's crimes, like those committed by Lucero and Armstrong, are not properly considered non-homicide offenses for purposes of *Graham* and do not implicate the split among lower courts asking whether lengthy, consecutive sentences for non-homicide crimes violates the Eighth Amendment.

CONCLUSION

The petitions for writ of certiorari should be denied.

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