

No 17-5677

IN THE SUPREME COURT OF THE UNITED STATES

GUY LUCERO, PETITIONER,

versus

STATE OF COLORADO, RESPONDENT

REPLY TO BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES SUPREME COURT

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Mr. Lucero need not reply to everything that has been said by the State of Colorado in its Brief in Opposition. Instead, Mr. Lucero will focus on the State's claim that the subsequent passage by the Colorado General Assembly of Sections 17-34-101 and 17-34-102, C.R.S. (2016) provides to Mr. Lucero and other similarly situated juvenile offenders the meaningful opportunity for release required by *Graham v. Florida*, 560 U.S. 48 (2010). Mr. Lucero will demonstrate that existence of these statutes do not justify declining to issue this Court's writ of *certiorari*. Even if the specialized program envisioned by the General Assembly ever comes to pass, and even if Mr. Lucero is permitted to apply for that program, it does not alter the unconstitutionality of Mr. Lucero's sentence. It does not provide a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" as mandated by the Eighth Amendment to the U.S. Constitution. *See Graham*, at 2030.

Mr. Lucero will also briefly focus on the State of Colorado's argument that a conviction for conspiracy to commit first-degree murder qualifies as a "homicide offense" as that term is used in *Graham, supra* and *Miller v. Alabama*, 567 U.S. 460 (2012), and therefore the categorical ban upon life-without-parole sentences does not apply to Mr. Lucero. The State takes that position even though (1) the Colorado Supreme Court did not reach that issue, and (2) after *Graham, supra*, no court has held that a juvenile can be subjected a sentence of life imprisonment without parole ("LWOP") for an act that does not result in a death.

- I. The establishment by the Colorado General Assembly of a specialized clemency recommendation program for juvenile offenders does not affect the constitutionality of the sentence imposed upon that juvenile.**
 - a. The provisions of sections 17-34-101 and -102, C.R.S. (2016) do not cure the unconstitutionality of Mr. Lucero's sentence.**

The General Assembly's limited clemency recommendation program may never provide relief to any juvenile offenders, because of the nature of the program, the limitation on who can participate, and the vast discretion afforded to the Colorado Department of Corrections ("CDOC") to exclude individuals even if, on paper, they appear to be statutorily eligible. In this Reply, Mr. Lucero will contrast the new statutes with what this Court in *Graham, supra*, *Miller, supra*, and *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016) held to be required by the Eighth Amendment.

- b. §§ 17-34-101 and -102 merely establish a clemency recommendation program.**

Rather than establishing an early parole program for juvenile offenders, in practice, the two statutes establish a clemency recommendation program. The statutes instruct the CDOC to establish an intensive educational/behavioral program with the ultimate goal to provide select inmates with a formal CDOC recommendation letter that an inmate can attach to his or her application for gubernatorial clemency. By design, the future program is not accessible to all juveniles who have effective sentences of life imprisonment without parole. It is impossible to know whether or not Mr. Lucero or any other particular individual will be able to access the program authorized in the statute. This fact alone means that the statutes do not transform an otherwise unconstitutional sentence into a constitutional one. Even if this Court assumes hypothetically that Mr.

Lucero or any other particular individual might be one of the select inmates able to access the new clemency recommendation program, the legislation has so many restrictions and limitations that the mere existence of the program does not affect the constitutionality of the sentence.

i. The size and nature of the program as well as continuing viability is completely dependent upon adequate future funding by the legislature.

Section 17–34–102 provides CDOC with discretion in the program’s size, implementation, policies and procedures, and, importantly, full control over whom to accept into the program. The viability of the program is dependent upon the availability of adequate funding by both the legislature and by the amount of its budget CDOC decides to allocate to the program. CDOC is free to develop a program that services only a small number of those who are statutorily eligible.

ii. Eligibility to apply to the future clemency recommendation program.

The statutes provide that an inmate may apply to be in the clemency recommendation program if

- (1) he or she was a juvenile at the time of the offense,
- (2) he or she was convicted for an offense other than a sexual assault,
- (3) the district court imposed an adult sentence,
- (4) the inmate has a GED or a high school diploma,
- (5) the inmate is not receiving DOC services for mental illness,
- (6) the inmate has participated in DOC programs that have been offered to him or her, and

(7) the inmate has, according to DOC, demonstrated positive growth through developmental maturity and good behavior.

§17–34–101(1)(a), C.R.S. (2016).

If DOC deems these criteria to be met, then an inmate in Mr. Lucero's situation may apply to the program after twenty years. §17–34–101(1)(a)(I), (II), C.R.S (2016).

Although the victims have a right to be heard on the inmate's application, §24–4.1–302.5(1),(j), C.R.S. (2016), the inmate has no right to be heard. The legislation does not give the sentencing judge any control over who is allowed to apply or any role to play in that decision. There is no judicial review of any of the decisions about whether or when an inmate can apply for the future clemency recommendation program.

iii. Eligibility for acceptance to the future clemency recommendation program.

For those individuals who are allowed to apply to the program, CDOC'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 are no presumptions that an inmate will be admitted, even if the conviction is for juvenile conduct. If CDOC rejects the applicant, that person is barred from re-applying for at least three years. §17–34–101(5), C.R.S. (2016). If CDOC rejects an inmate's application, there is no judicial review. *Ibid*

iv. The "specialized program"

While some of the components of the "specialized program" are outlined in the legislation, virtually nothing is known about what CDOC can require the inmate to do in the "specialized program." CDOC 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 commencing it. §17-34-102(3), C.R.S. (2016). Anyone who is terminated from the program (apparently, for any reason) is barred from re-applying for at least three years. §17-34-102(6)(b), C.R.S. (2016).

v. The Inmate's Procedural Rights upon Completion of the Specialized Program.

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

- (1) to ask the Governor to exercise his or her discretion to grant early parole as an act of clemency. §17-34-102 (7), C.R.S. (2016);
- (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 inmate has no

substantive right to early parole.

There is no right to judicial review to enforce anything contained in this law. An individual has no right to challenge CDOC's decision regarding his or her eligibility, rejection for the program, termination from the program, or any determination that the offender did not successfully complete the program. There is no avenue for relief and no judicial review if the prisoner is not recommended for early release.

The law sets forth two "presumptions" that, with everything else before the Parole Board, are supposed to guide its decision whether to recommend clemency: if (and only if) the inmate has

- met all of the criteria
- successfully completed at least three years in the program, and
- been incarcerated for at least twenty-five years,

Then the Parole Board will presume that (1) there are extraordinary mitigating circumstances, and (2) early parole is "compatible with the safety and welfare of society." §17-34-102(8)(a)(I) and (II), C.R.S. (2016). The Parole Board is supposed to use these presumptions to determine if it will recommend the inmate for the exercise of gubernatorial discretion.

vi. The Governor's Decision

Under the statute, the Governor is empowered to grant early parole, but he or she does not have to do so. *See* §§17-22.5-403.7(2), -403 (4.5)(a), C.R.S. (2016).

The Governor is authorized to grant early parole if "in the governor's opinion, extraordinary mitigating circumstances exist and the inmate's release from 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). The governor is directed merely to "consider" the presumptions set forth in §17-34-102(8), and to also consider "any relevant evidence presented by any person or agency." *See* §17-22.5-403.7(2); §17-22.5-403 (4.5) (a). The law does not require the Governor to presume anything, nor could it. "Article IV, § 7 [of the Colorado Constitution] gives the Governor the exclusive power to grant reprieves, commutations, and pardons after conviction." *Schwartz v. Owens*, 134 P.3d 455, 458 (Colo. App. 2005). *See id.*, at 459 ("In Colorado, the power of clemency is entirely at the Governor's discretion.... expectation of clemency is 'simply a unilateral hope.')(quoting *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 465 (1981)). Thus, the Governor is directed merely to "consider" these presumptions. In the end, it is within the exclusive province of the Governor to decide if the inmate will get early parole.

c. The statutory scheme may never apply to Mr. Lucero.

In Mr. Lucero's case, it is not known whether CDOC will determine that he meets all of the criteria even for submission of an application for the program. While he meets some of the statutory criteria -- he was convicted for juvenile conduct, he has a sentence of at least twenty years, he was not convicted of a sex assault, he has received his GED and it is believed that he is not receiving mental health services (application criteria #1 - #5) -- other criteria are wholly within CDOC's discretion, *e.g.* criteria #6 (participation in CDOC programs offered to him) and #7 (demonstrated maturity/behavior).

Even if Guy Lucero is permitted to submit an application, that does not mean that he will receive any services authorized by the statutes. There is no requirement that

services be provided for all individuals who qualify. There is no guarantee that any of its "benefits" will reach Guy Lucero, or any inmate. Given the massive uncertainties about the scope and resources that may or may not be available to implement the program, this Court cannot conclude that the mere passage of the statutes transforms an unconstitutional sentence into a constitutional one.

d. The requirement for "extraordinary mitigating circumstances" means that, by definition, the program and its benefits are available to the few, not the many.

The statutes require that the CDOC find "extraordinary mitigating circumstances" in order to justify a recommendation for early release. This turns the Eighth Amendment on its head by making it the rare juvenile who will be eligible for the recommendation for early parole. By definition, "extraordinary" means what it says: "very unusual and special; different in type or greater in degree than the usual or ordinary."¹ Thus, "extraordinary" would be the rare juvenile, not the other way around as required by the Eighth Amendment. For those who are fortunate enough to end up at the end of this multi-year process with the designation of "extraordinary mitigation," they may receive a positive recommendation and may even -- in the Governor's sole discretion -- receive early parole. But perversely, all of the other juveniles will be relegated to "not extraordinary" status and therefore, not "worthy" of release.

The requirement that the juvenile offender demonstrate "extraordinary mitigating circumstances" in order to justify being released from prison after serving 25 years is

¹ Cambridge Dictionaries Online, <http://dictionary.cambridge.org/us/dictionary/english/extraordinary> (last visited July 5, 2016).

contrary to the Eighth Amendment rules established in the *Graham-Miller-Montgomery* trilogy, particularly the rule that almost all juveniles are constitutionally entitled to a sentence that provides them with a meaningful opportunity for release based on demonstrated maturity and rehabilitation.² The Statutes, however, operate under the presumption that the juvenile offender should not be released before his parole eligibility date.

It is of no moment that the relatively few juvenile offenders who can get into and complete the specialized program enjoy a theoretical "presumption" that (1) there are extraordinary mitigating circumstances, and that (2) early parole is "compatible with the safety and welfare of society." §17-34-102(8) (a) (I) and (II), C.R.S. (2016). That does not mean any juvenile offender is going to get paroled early. Neither DOC nor the Governor has to answer for any decision they make. The Governor, who has the ultimate say, need only "consider" these "presumptions" along with anything else. Under this system, where the parole opponents are entitled to a hearing but the person seeking parole is not, this Court must regard these "presumptions" as a mere suggestion to the Governor.

"Demonstrated maturity and rehabilitation" is a test that focuses on the individual and how much he or she has matured. *Graham, Miller, and Montgomery* teach that almost all juveniles will attain this standard and that it will be the very rare juvenile that does not. By contrast, the "extraordinary mitigating circumstances" standard does not compel a focus on the juvenile's individual maturity and rehabilitation, but invites a focus

² The "rare" exception occurs when a juvenile commits a homicide, and when the crime reflects "irreparable corruption" or "permanent incorrigibility." *Montgomery, supra*, at 726, 734.

on mitigation related only to the crime, and a comparison between crimes, victims, inmates, and circumstances of various crimes. The program sets up a false promise of high-insurmountable obstacles.

e. The Governor's clemency power is wholly discretionary; the bill creates neither a substantive entitlement to early parole nor a guarantee for any particular procedures.

Even if the high "extraordinary mitigating circumstances" standard is met, the governor is not required to grant early release. The process established by the statutes -- a recommendation by the parole board to the governor and an unfettered decision by the governor as to whether to grant "early release" -- more closely resembles the Governor's constitutional power to "grant reprieves, commutations and pardons after conviction," Colo. Const., Art. IV, §7 -- than it does parole. *See People v. Herrera*, 516 P.2d 626, 628 (Colo. 1973) ("The power of commutation ... is the power to reduce punishment from a greater to a lesser sentence."). The process simply provides the Governor with more information to use in exercising his or her power to reduce sentences. It provides no new authority.

Nor does it provide a right to any particular procedures for any particular inmate. There is no judicial involvement or judicial enforcement. There is no requirement that the parole board hold a hearing to permit development of evidence.

f. The Statutes do not erect a categorical bar, which is required by the Eighth Amendment.

The overarching concept of the *Roper*³-*Graham-Miller* trilogy is that because children are constitutionally different from adults for sentencing purposes, they are

³ *Roper v. Simmons*, 543 U.S. 551 (2005).

categorically excluded from certain punishments. This categorical exclusion rests on psychological, developmental, and neuroscientific studies demonstrating that children are less culpable for their actions and more amenable to change, and therefore pose a reduced risk of future dangerousness. States must give these offenders “some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” *Graham*, at 75. *See id.*, at 79 (“a chance to demonstrate maturity and reform”); *id.*, at 82 (“a realistic opportunity”). The juvenile “should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential.” *Id.* at 79.

These are not mere aspirational statements for parole or clemency boards to “consider.” They are categorical rules that apply to courts and the sentences they mete out. They are substantive, categorical Eighth Amendment limits on sentences. The maximum possible sentence for a juvenile convicted of a nonhomicide offense is one that provides a realistic, meaningful opportunity for release based on demonstrated maturity and rehabilitation. *Graham*, at 75, 79, 82; *Miller* at 2469.

While, for a few inmates the program “implemented” in Sections 17-34-101 and -102 may be a potential step towards compliance with this Court's mandate in *Graham*, it is not a panacea transforming the multitude of unconstitutional sentences imposed upon juveniles over the last thirty years. In *Graham* this Court made clear that “the remote possibility of [clemency] does not mitigate the harshness of the sentence.” *Graham*, 560 U.S. at 70, citing *Solem v. Helm*, 463 U.S. 277, 300-01 (1983). The remote possibility that Mr. Lucero or any other juvenile who received a lengthy sentence might be selected into

and might complete a "specialized program" with the goal of obtaining a favorable CDOC recommendation for mercy by the Governor does not mitigate the harshness of the sentence imposed.

This is an important issue nationally for this Court to decide. Colorado's statutory scheme does not satisfy the Eighth Amendment, and it should not serve as a model for any other state legislature considering what reforms to adopt. This case presents an opportunity for this Court to draw a bright line and rule that a clemency recommendation program does not satisfy the Eighth Amendment.

II. Conspiracy to commit first degree murder is not a "homicide offense" as the State of Colorado argues.

Colorado urges this Court to deny *certiorari* on the theory that *Graham v. Florida, supra*, does not categorically ban the imposition of a life without parole sentence on a juvenile convicted of conspiracy to commit first-degree murder.

Initially it should be noted the Colorado Supreme Court did not reach that issue, instead holding that *Graham's* categorical ban does not apply to a term-of-year sentence but applies to only a sentence denominated as "life imprisonment without parole." The Colorado Supreme Court further ruled that *Graham* does not apply to an aggregate sentence resulting from consecutive term-of-year sentences. Because the Colorado Supreme Court did not rely upon the State's theory, this Court should not rely upon it as a ground for denying *certiorari*.

More importantly, however, the State of Colorado's theory is incorrect. In *Graham*, this Court distinguished between the culpability of those who commit homicide and non-homicide offenses noting that while

[s]erious nonhomicide crimes 'may be devastating in their harm ... but 'in terms of moral depravity and of the injury to the person and to the public,' ... they cannot be compared to murder in their 'severity and irrevocability.' ' .*Kennedy v. Louisiana*, 554 U.S. 407, 438 (2008)]. (quoting *Coker v. Georgia*, 433 U.S. 584, 598 [(1977)] (plurality opinion)). This is because '[l]ife is over for the victim of the murderer,' but for the victim of even a very serious nonhomicide crime, 'life ... is not over and normally is not beyond repair.' *Ibid.* (plurality opinion).

Graham, 560 U.S. at 69. For this Court, the distinguishing factor between a homicide and a non-homicide is the loss of a life and "irrevocability" of such an act:

To be sure, *Graham*'s flat ban on life without parole applied only to nonhomicide crimes, and the Court took care to distinguish those offenses from murder, based on both moral culpability and consequential harm.

Miller, 132 S. Ct. at 2465.

Furthermore, the death penalty cases cited by this Court in *Graham* distinguished between offenses that resulted in the death of the victim and those that did not; and nonhomicide offenses -- regardless of their number or severity -- cannot expose the defendant to the death penalty. *Kennedy v. Louisiana*, 554 U.S. at 437-38 ("the death penalty should not be expanded to instances where the victim's life was not taken"), cited in *Graham*, 560 U.S. at 60-61. Because

- this Court equates an LWOP sentence for a juvenile to the death penalty for an adult (*Graham, Miller*), and
- this Court clearly prohibits the imposition of a death sentence for any crime that did not result in the victim's death (*Kennedy*),

it follows that this Court in *Graham* and *Miller* clearly intended to prohibit the imposition of a LWOP sentence for a juvenile whose offense (or offenses) did not result in the death of a person. It is beyond dispute that Mr. Lucero's actions did not result in a

death. Because Mr. Lucero was not convicted of a homicide offense, *Graham's* categorical ban applies to him.

CONCLUSION

WHEREFORE, this Court should issue a writ of *certiorari* and explicitly hold that this Court's holding in *Graham v. Florida, supra*, that all non-homicide juvenile offenders must receive sentences that provide for a meaningful opportunity for release, applies with equal force to juveniles convicted of more than one offense and whose aggregate sentence for multiple convictions constitutes *de facto* life imprisonment without parole.

Respectfully submitted,

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