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SUPREME COURT
STATE OF COLORADO

2 East 14th Avenue
Denver, CO 80203

On Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 11CA1932

Petitioner,

ALEJANDRO ESTRADA-HUERTA,

v.

Respondent,

THE PEOPLE OF THE STATE OF COLORADO.

▲ **COURT USE ONLY** ▲

Case No. 14SC127

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ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

☒It contains **4741** words (principal brief does not exceed 9500 words; reply brief does not exceed 5700 words).

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☒In response to each issue raised, the appellee must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

/s/ Rebecca A. Adams

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STATEMENT OF THE ISSUE

Whether the court of appeals erred by extending *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, 132 S. Ct. 2455 (2012), to invalidate a consecutive term-of-years sentence imposed on a juvenile convicted of multiple offenses.

STATEMENT OF THE CASE AND THE FACTS

The defendant, Alejandro Estrada-Huerta, was 17 years old[1] at the time of his offenses (PR. CF, v. I, p. 1). The defendant was charged under the direct file statute with two counts of second degree kidnapping, three counts of sexual assault, unlawful sexual contact, and false imprisonment after he and four companions seized the fifteen-year-old victim, forcibly placed her in a truck, drove off, and sexually assaulted her before forcing her into another vehicle where she was again sexually assaulted (PR. CF, v. I, pp. 1-3); *see People v. Estrada-Huerta*, (Colo. App. No. 06CA1814, April 10, 2008) (not published

[1] The defendant was born on September 5, 1986 and his crimes were committed on July 10, 2004 (PR. CF, v. I, pp. 1-3). Thus, the defendant was 17 years, 10 months, and 5 days old at the time he committed the charged offenses.

pursuant to C.A.R. 35(f)) (*Estrada-Huerta I*). The People dismissed the unlawful sexual contact and false imprisonment counts before trial (PR. CF, v. I, pp. 103-106). Following a jury trial, the defendant was convicted of the remaining counts (PR. CF, v. I, p. 137).

On April 21, 2006, after several counts were merged, the trial court sentenced the defendant to 24 years to life for second degree kidnapping and 16 years to life for each sexual assault count (PR, v. I, p. 137). The sentences on the sexual assault counts were ordered to run concurrently to each other and consecutively to the sentence on the kidnapping charge for an aggregate term of 40 years to life in prison (PR. CF, v. I, p. 137).

The defendant's convictions and sentence were affirmed on direct appeal (PR. CF, v. I, pp. 175-185). *Estrada-Huerta I*, *supra*.

On May 16, 2011, the defendant filed a Crim. P. 35(c) motion for postconviction relief (PR. CF, v. I, p. 201). As pertinent here, the

defendant claimed his sentence was unconstitutional under *Graham v. Florida*, 560 U.S. 48 (2010) (PR. CF, v. I, pp. 201-213).[2]

On August 2, 2011, the trial court denied the motion by written order (PR. CF, v. I, pp. 217-22). The court noted that the defendant was not sentenced to life without parole, but to 40-years-to-life and would be eligible for parole upon completion of 40 years minus any credits earned (PR. CF, v. I, p. 220). As such, the court held that *Graham* did not apply (PR. CF, v. I, pp. 220-221).

On appeal, the court of appeals analyzed the defendant's sentence under *Graham* but held that his sentence does not violate the holding of *Graham* because he is eligible for parole at age 58, which is within his expected lifetime. *People v. Estrada-Huerta*, (Colo. App. No. 11CA1932, Dec. 12, 2013) (not published pursuant to C.A.R. 35(f)) (*Estrada-Huerta II*).

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[2] The defendant also claimed that his sentence was disproportionate in violation of the Eighth Amendment, that his sentence violated his right to equal protection of the law, and that his counsel was ineffective (PR. CF, v. I, p. 214). The trial court rejected those claims, and those claims are not the subject of this appeal (PR. CF, v. I, pp. 221-22).

SUMMARY OF THE ARGUMENT

The court of appeals erred by extending *Graham v. Florida*, 560 U.S. 48 (2010) to invalidate consecutive term-of-years sentences imposed on a juvenile convicted of multiple offenses. *Graham* does not apply to this case because the defendant did not receive a life sentence. Rather, the trial court imposed multiple, consecutive sentences based on the number of egregious crimes committed by the defendant. Even if *Graham* is applicable to this case, the court of appeals' expansion of *Graham* does not apply retroactively, and in any event, the defendant has a meaningful opportunity for parole within his lifetime.

ARGUMENT

I. The court of appeals erred by extending *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, 132 S. Ct. 2455 (2012), to invalidate consecutive term-of-years sentences imposed on a juvenile convicted of multiple offenses.

The court of appeals expanded the Supreme Court's holding in *Graham* and held that the defendant's term-of-years sentences were the

functional equivalent to life without parole (LWOP). The court of appeals erred.

Graham held that a single mandatory sentence of life without the possibility of parole was an impermissible sentence to impose on juveniles who were convicted of a single, nonhomicide offense. To hold that an aggregate term of years sentence violates *Graham*'s holding would impose an unwarranted constitutional requirement on all juvenile sentencing procedures, eradicate Colorado's sentencing scheme, provide "discounts" for bad behavior by incentivizing crime sprees, and expand the holding of *Graham* beyond the analysis upon which its holding was based. This Court must reverse the ruling of the court of appeals.

A. Standard of Review

The People agree the "review of constitutional challenges to sentencing determinations is de novo." *Lopez v. People,* 113 P.3d 713, 720 (Colo. 2005). Likewise, this Court reviews a sentence's

constitutional proportionality de novo. *Close v. People*, 48 P.3d 528, 541 (Colo. 2002).

An order denying postconviction relief may be affirmed on any ground supported by the record. *People v. Eppens,* 979 P.2d 14, 22 (Colo. 1999). In a postconviction action, reviewing courts presume that the prior proceedings were properly conducted and that the result is legal and valid. *People v. Naranjo*, 840 P.2d 319, 325 (Colo. 1992); *Kailey v. Colo. State Dep't of Corr.*, 807 P.2d 563, 567 (Colo. 1991). The defendant carries the burden to establish his claim by a preponderance of the evidence. *Naranjo*, 840 P.2d at 325.

B. Law and Analysis

The court of appeals applied *Graham* to the defendant's consecutive term-of-years sentences. In concluding that the case applies to the sentences at issue here, the court of appeals broadened the holding of *Graham* and effectively overruled this Court's opinion in *Close*, 48 P.3d at 540 (holding that an abbreviated proportionality

review must consider each separate sentence rather than the aggregate term of multiple sentences).

1. *Graham* does not apply to consecutive term-of-years sentences.

The Eighth Amendment's prohibition of cruel and unusual punishment "guarantees individuals the right not to be subjected to excessive sanctions." *Miller v. Alabama*, 132 S. Ct. 2455, 2463 (2012) (quoting *Roper v. Simmons,* 543 U.S. 551, 560 (2005)). Rather, "punishment for [the] crime should be graduated and proportioned" to both the offender and the offense. *Id.* (internal quotation omitted); *accord People v. Tate*, 2015 CO 42.

In *Roper,* the Supreme Court set forth a categorical rule that the Eighth Amendment forbids the imposition of the death penalty on offenders who commit murder before age 18. 543 U.S. at 578. The Court reasoned, "[w]hen 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 and his potential to attain a mature

understanding of his own humanity." *Id.* at 573-74. *Roper*, prohibiting capital punishment sentences for juveniles, restricted the most severe sentence possible against juveniles.

Graham took *Roper* a step further and scaled back the next most severe sentence for juveniles where murder was not involved by prohibiting a life-without-parole sentence for a single, nonhomicide offense. In *Graham*, the juvenile defendant pleaded guilty to one crime—first degree armed burglary with assault or battery—and was sentenced to the maximum penalty of LWOP. 560 U.S. at 53-57. In reviewing his sentence, the Supreme Court recognized that its previous treatment of Eighth Amendment challenges to non-capital, "term-of-years" sentences differed from its analysis of capital sentences. *Id.* at 59-60. *Graham* applied a "categorical" approach to sentencing, in which it "first consider[ed] 'objective indicia of society's standards, as expressed in legislative enactments and state practice' to determine whether there is a national consensus against the sentencing practice at issue." *Id.* at 61. Next, the Court exercised its own independent

judgment, in light of "the standards elaborated by controlling precedents and by the Court's own understanding of the Eighth Amendment's text, history, meaning, and purpose." *Id.* (citing *Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008)).

The Court determined that a juvenile sentence of LWOP for a *single, nonhomicide* offense violated the Eighth Amendment. *Graham* explicitly stated that "while the Eighth Amendment prohibits a State from imposing a life without parole sentence on a juvenile nonhomicide offender, *it does not require the State to release that offender* during his natural life." *Id.* at 75. *Graham*'s holding was limited to "those juvenile offenders sentenced to life without parole solely for a nonhomicide offense." *Id.* at 63. *Graham* did not address cases, such as the instant case, where the juvenile was convicted of multiple counts and received a lengthy term-of-years sentence in which the juvenile is eligible for parole. *Id.*

Under *Graham*, consistent with what the trial court did here, the sentencing court must exercise its independent judgment and examine

the culpability of the offender, the nature of the offenses committed, and the severity of the punishment in question, including whether the punishment "serves legitimate penological goals." *Id*. at 67; *see also id*. at 60-61.

Subsequently, the Supreme Court decided *Miller*, which held that a sentencing scheme *mandating* LWOP for juvenile offenders was unconstitutional. 132 S. Ct. at 2460, 2469 ("mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments'"); *accord Tate*, ¶¶ 27-35. Nevertheless, it did not categorically ban life imprisonment without parole for all juvenile offenders where the prison term *included* the possibility of parole or where the court considered the offender's individual characteristics. *Miller*, 132 S. Ct. at 2469, 2471, 2474-75.

Here, the defendant did not receive a single life sentence as conceived by *Graham*. Rather, he received multiple term-of-years sentences for multiple violent and dangerous offenses. Contrary to the

court of appeals' analysis, *Graham* explicitly confined its analysis to categorical proportionality review of a *single* LWOP sentence imposed for a *single* offense. 560 U.S. at 63. Neither is at issue here. Indeed, in *Graham*'s dissents, both Justices Thomas and Alito noted that "[n]othing in the Court's opinion affects the imposition of a sentence to a *term of years* without the possibility of parole." *Id.* at 124 (Alito, J., dissenting) (emphasis added); *id*. at 113 n.11 (Thomas, J., dissenting) (Court did not consider juveniles serving lengthy term-of-year sentences).

As noted above, *Graham* "first consider[ed] 'objective indicia of society's standards, as expressed in legislative enactments and state practice' to determine whether there is a *national consensus* against the sentencing practice at issue," *People v. Rainer*, 2013 COA 51, ¶ 43 (quoting *Roper*, 543 U.S. at 563) (emphasis added), and then considered whether the punishment violates the Constitution. *Graham*, 560 U.S. at 61.

In applying *Graham* to the defendant's term-of-years sentences, the court of appeals ignored the *nature* of the data relied on by the Court in *Graham*, including the Annino study, which examined only *actual* life sentences and found that only 123 juveniles were serving sentences of LWOP for nonhomicide offenses in only 11 states, and Colorado was not one of those states. *Graham*, 560 U.S. at 62-64 (citing P. Annino, D. Rasmussen, & D. Rice, Juvenile Life without Parole for Non-Homicide Offenses: Florida Compared to Nation 2 (Sept. 14, 2009)).

This low number of sentences weighed heavily in the Supreme Court's determination that a national consensus existed against the practice of sentencing a juvenile to LWOP for a single, nonhomicide offense. *Graham*, 560 U.S. at 63-66. In other words, the study on which the Supreme Court based its holding *only* addressed single, LWOP sentences for a single, nonhomicide offense.

The Supreme Court had no evidence before it regarding the number of juveniles serving lengthy term-of-years sentences stemming from multiple offenses such that they would not be eligible for parole

within their natural life. *See Bunch v. Smith*, 685 F.3d 546, 552 (6th Cir. 2012), *cert. denied*, *Bunch v. Bobby*, 2013 U.S. LEXIS 3202 (April 22, 2013). At the time *Graham* was decided, no juvenile nonhomicide offenders were serving LWOP sentences in Colorado. The defendant was serving his sentence at the time *Graham* was decided, and his sentence was *not* considered a "life sentence" by the *Graham* court.

Indeed, *Graham* is devoid of any discussion regarding juveniles serving lengthy *term-of-years* sentences. *See* 560 U.S. at 113 n.11, 124 (Thomas, J., dissenting) (Alito, J., dissenting). Had the Supreme Court considered lengthy term-of-years sentences for multiple offenses in its analysis, the sentences would not have been exceedingly rare and would not have supported a finding of a national consensus against the practice.

The court of appeals failed to address whether there was a "national consensus" against lengthy term-of-years sentences—a determination that was *not* made in *Graham* and one on which *Graham*'s LWOP decision hinged—before applying *Graham* to the

sentence at the sentence at issue here. *See Graham*, 560 U.S. at 111 (Thomas, J., dissenting) ("it is the 'heavy burden' of petitioners to establish a national consensus against [a sentencing practice]") (quoting *Stanford v. Kentucky*, 492 U.S. 361, 373 (1989)); *accord Walle v. State*, 99 So.3d 967, 971 (Fla. App. 2d Dist. 2012). The defendant did not meet this heavy burden.

What the *Graham* court found particularly disturbing, in addition to the absolute rarity of a life-without-parole sentence based on a single nonhomicide offense, *see* 560 U.S. at 62-67 (citing Annino), was that Florida had "abolished its parole system," and thus, "a life sentence gives a defendant no possibility of release" absent executive clemency. *Id.* at 57. That is not the case here; Colorado has a parole system in place and allows defendants a very realistic possibility of release.

The majority of states and federal circuits to address the issue have concluded that *Graham* does *not* apply to term-of-years sentences. Those cases are well-reasoned and should be followed here. *See Bunch*, 685 F.3d at 552-53 (*Graham* "did not analyze sentencing laws or actual

sentencing practices regarding consecutive, fixed-term sentences for juvenile nonhomicide offenders. This demonstrates that the Court did not even consider the constitutionality of such sentences, let alone clearly establish that they can violate the Eighth Amendment's prohibition on cruel and unusual punishments"); *Goins v. Smith*, 556 Fed. Appx. 434, 439-40 (6th Cir. 2014) (same); *Adams v. State*, 707 S.E.2d 359, 365 (Ga. 2011) ("Clearly, 'nothing in the [*Graham*] opinion affects the imposition of a sentence to a term of years without the possibility of parole.'" (quoting *Graham*, 560 U.S. at 124 (Alito, J., dissenting)); *Walle*, 99 So.3d at 971 (declining to extend the holding in *Graham* to a juvenile who received sentences totaling 65 years for multiple, nonhomicide offenses; "[t]he Supreme Court limited the scope and breadth of its decision in *Graham* by stating that its decision 'concern[ed] only those juvenile offenders sentenced to life without parole solely for a nonhomicide offense'" (quoting *Graham*, 560 U.S. at 63)); *Diamond v. State*, 2012 Tex. App. LEXIS 3253, at *11-14 (Tex. Ct. App. Apr. 25, 2012) (upholding juvenile's consecutive 99-year and two-

year sentences for nonhomicide crimes in two separate cases); *State v. Kasic*, 228 Ariz. 228, 233 (Ariz. Ct. App. 2011) (declining to extend *Graham* to "consecutive term-of-year sentences based on multiple counts and multiple victims"); *People v. Gay*, 960 N.E.2d 1272, 1278 (Ill. Ct. App. 2011) (*Graham* does not apply to consecutive sentences for nonhomicide crimes totaling 97 years); *see also Loggins v. Thomas*, 654 F.3d 1204, 1223 (11th Cir. 2011) ("[Graham] limited to *life without parole* sentences") (emphasis added); *United States v. Scott*, 610 F.3d 1009, 1018 (8th Cir. 2010), *cert. denied*, 131 S. Ct. 964 (2011) ("*Graham* was limited to defendants *sentenced to life* in prison *without* parole") (emphasis added).

As Judge Dailey wrote in his special concurrence in *People v. Lehmkuhl*, 2013 COA 98, nothing in *Graham* suggests its holding was even applicable outside the single sentence for a single crime analysis, and any opinion extending *Graham* beyond its limited holding is improper—particularly where the court of appeals erroneously determines that such a ruling implicitly overrules this Court's

precedent. *Lehmkuhl*, ¶ 26 (Dailey, J., specially concurring). The better rule, fully supported by *Graham*'s rationale, is that *Graham* applies only to a single sentence of LWOP for a nonhomicide offense—not to cases where "a juvenile has received a number of consecutive, individual sentences that, when accumulated, result in a lengthy aggregate term of imprisonment." *Id*.

As mentioned above, the defendant's "sentence" is actually a composite of numerous sentences stemming from multiple convictions for high-risk criminal behavior. Unlike *Graham* or *Miller*, where the sentence at issue was imposed for one crime, the sentences here are cumulative. This Court has held that, for cruel and unusual punishment purposes, sentences should be assessed *separately*, even if the sentences are to be served consecutively. *Close*, 48 P.3d at 540. The court of appeals incorrectly held that *Graham* effectively overruled this Court's decision in *Close*. *Rainer*, ¶ 68; *see also Kasic*, 228 Ariz. at 233 (recognizing that the proper analysis, even after *Graham*, focuses on the sentence imposed for each specific crime, not the cumulative sentence,

even if a defendant faces a total sentence exceeding a normal life expectancy as a result of consecutive sentences; and affirming, as not unconstitutional under *Graham*, concurrent and consecutive prison terms totaling 139.75 years for a nonhomicide juvenile offender). Thus, reviewing courts should not consider the *total* sentence in the aggregate, but rather should consider each sentence independently to determine whether it is unconstitutional. *See State v. Berger*, 134 P.3d 378, 384 (Ariz. 2006) (sentence does not become disproportionately long simply because it is consecutive to another sentence for a separate offense or because the sentences are lengthy in the aggregate, "even if a defendant faces a total sentence exceeding a normal life expectancy").

2. The court of appeals' expansion of *Graham* to aggregate term-of-years sentences for multiple offenses should not apply retroactively.

As a threshold matter, however, the defendant is precluded from relief because even if *Graham* itself is retroactive—a question not before this Court—the court of appeals' expansion of *Graham* to aggregate

term-of-years sentences is not a holding from the Supreme Court announcing either a new watershed rule of criminal procedure or a new substantive constitutional rule and, thus, does not entitle defendants to retroactive relief. This outcome is particularly appropriate where defendants have exhausted their direct appeals and only bring their challenges on collateral review.

Here, the defendant's conviction is final. For that reason alone, this Court should decline to apply any *Graham* expansion. *Cf. Griffith v. Kentucky,* 479 U.S. 314, 328 (1987) ("new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final").

The People acknowledge that the court of appeals found *Graham* to be a new substantive rule that should be applied retroactively to include cases on collateral review. *Rainer*, ¶ 14. However, *Rainer* was wrongly decided on this point because its holding expanded, rather than applied, *Graham*. The error in *Rainer* is particularly apparent given this Court's decision not to retroactively apply such watershed doctrines

as *Blakely* or *Crawford* to cases where the convictions were already final. *See Edwards v. People*, 129 P.3d 977, 978-79 (Colo. 2006) (*Crawford v. Washington,* 541 U.S. 36 (2004)); *Lopez,* 113 P.3d at 716 (*Blakely v. Washington,* 542 U.S. 296 (2004)); *accord Tate*, ¶¶ 58-60 (explaining why *Ring v. Arizona*, 536 U.S. 584 (2002) (discussing requirement for jury to decide aggravating factors necessary to impose death penalty), was not a watershed rule that applied retroactively).

When a defendant seeks to apply a new rule of constitutional law and the state argues against retroactive application, this Court must first resolve the retroactivity question before addressing the merits of the claim. *Horn v. Banks*, 536 U.S. 266, 271 (2002); *see also Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion) (providing that new "watershed rules of criminal procedure implicating fundamental fairness and accuracy of the criminal proceeding" will apply retroactively). Because *Graham* did not address lengthy term-of-years sentences, by definition there is no new watershed rule of criminal procedure or new substantive rule of federal constitutional law.

In determining whether a new rule applies retroactively to cases on postconviction review, three factors must be considered: (1) whether the defendant's conviction is final; (2) whether the rule in question is in fact new; and (3) if the rule is new, whether it meets either of the two *Teague* exceptions to the general bar on retroactivity. *Edwards*, 129 P.3d at 983 (adopting *Teague*'s retroactivity analysis); *accord Tate*, ¶¶ 97-98 (Hood, J. concurring in part and dissenting in part).

Under the first factor, the defendant's conviction is final. Under the second factor, *Graham* announced a new categorical rule: prohibiting a single life-without-parole sentence for a single, nonhomicide offense. But *Graham* did not address the aggregate term-of-years analysis that the court of appeals applied, so that rule—while "new"—was not one mandated by the Supreme Court. Thus, the aggregate term-of-years analysis fails the second factor.

Under the third factor, the two *Teague* exceptions to the retroactivity bar are (a) whether the rule is a new watershed rule of criminal procedure, 489 U.S. at 301, 307-10, or (b) whether the rule is a

new substantive rule that "alters the range of conduct or the class of persons that the law punishes."[3] *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004); *Edwards*, 129 P.3d at 979. Thus, a rule is procedural when it regulates "the manner of determining the defendant's culpability," but is substantive "if it alters the range of conduct or the class of persons that the law punishes," *Schriro*, 542 U.S. at 353 (quoted with approval in *Tate*, ¶ 57).

Here, the rule announced by the court of appeals does not meet either of the *Teague* exceptions. A new watershed rule is not simply "fundamental" in some abstract sense; rather, the rule must be one "without which the likelihood of an accurate conviction is seriously diminished." *Schriro*, 542 U.S. at 352; *Teague*, 489 U.S. at 311. Indeed, new watershed rules of criminal procedure are "necessary to the

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[3] Because *Edwards*, 129 P.3d 977, adopted *Teague*, the defendant may not benefit from a broader retroactivity analysis, and any suggestion that *Teague* should not apply to state postconviction appeals is unavailing. *Tate*, ¶ 53 & n.7. This outcome is particularly appropriate because *Teague* addressed retroactive application of federal constitutional law, and *Miller* and *Graham* likewise address federal constitutional questions.

fundamental fairness of the criminal proceeding." *Sawyer v. Smith*, 497 U.S. 227, 241-42 (1990).

The Supreme Court has stated that the class of watershed rules is extremely narrow. *Schriro*, 542 U.S. at 352 (cited with approval in *Tate*, ¶ 56). As in *Tate*, ¶ 56, the watershed exception does not apply here because (1) infringement of the rule must seriously diminish the likelihood of obtaining an accurate conviction, and (2) the rule must alter our understanding of the bedrock procedural elements essential to the fairness of the proceeding. *Edwards*, 129 P.3d at 979. Here, the defendant's sentence in no way diminished the accuracy of his conviction or the fairness of the proceeding. Nor is there any argument that *Graham* altered elements necessary to secure a conviction. *Cf. Tate*, ¶ 56 (watershed exception does not apply with respect to *Miller* LWOP sentencing because accuracy of conviction not at issue). Thus, it is not a watershed rule.

A new substantive rule either places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making

authority to proscribe," *Teague*, 489 U.S. at 311, or prohibits a certain category of punishment for a class of defendants because of their status or offense. *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002). Because no Supreme Court case has created any rule holding that lengthy cumulative prison sentences violate a juvenile-defendant's constitutional rights, and because the court of appeals expanded (rather than applied) an existing sentencing doctrine by extending *Graham*, there exists no new substantive constitutional rule regarding lengthy, aggregate prison sentences.

While *Graham* may have announced a new categorical rule, the court of appeals changed that rule and imposed one not originating from any Supreme Court case. Consequently, even assuming this Court decides that expanding the holding of *Graham* is warranted, that expansion would not be retroactive to cases on collateral review. *Cf. Tate*, ¶¶ 60-61 ("Because *Miller* is procedural in nature, and is not a

"watershed" rule of procedure, it does not apply retroactively to cases on collateral review of a final judgment.").

The only punishment *Graham* recognized as "a punishment that the law cannot impose upon" a juvenile-defendant, *see Schriro*, 542 U.S. at 352, is LWOP for a single, nonhomicide offense. That punishment is not at issue here, and thus, *Graham*'s holding has no retroactive effect on aggregate term-of-years sentences.

3. Assuming the court of appeals correctly expanded *Graham*, the defendant has a meaningful opportunity for release during his natural life.

The possibility of parole for a juvenile offender does not require that the juvenile *actually* be paroled. *Graham*, 560 U.S. at 75 (Eighth Amendment "does not require the State to release [juvenile offender] during his natural life"). Rather, it simply requires that the sentence, at the time it is imposed, allow for the chance for release. *Cf. Gridine v. State*, 89 So.3d 909, 910-11 (Fla. App. 1 Dist. 2011) (citing *Graham*, 560 U.S. at 75) (state not required to guarantee eventual freedom to

juvenile offender so long as there exists meaningful opportunity for release based on demonstrated maturity and rehabilitation; 70-year sentence upheld).

The defendant was sentenced to an aggregate term of 40 years to life in prison. The court of appeals determined that the defendant would be eligible for parole at age 58:

> Here, the record reflects that defendant will be eligible for parole within his expected lifetime. The trial court sentenced defendant to forty years to life on April 21, 2006, and granted him 649 days of presentence confinement credit. Even without considering the possibility that defendant will receive sentence credits while he is in prison, defendant will be eligible for parole in approximately 2044. Because defendant was born in 1986, he will thus be eligible for parole when he is fifty-eight years old, which is within his life expectancy. *See* § 13-25-103, C.R.S. 2013 (defendant's life expectancy is 78.1 years); *see also Lehmkuhl*, ¶ 14 (approving use of section 13-25-103 to determine a juvenile offender's life expectancy for purposes of evaluating whether his sentence violates Graham).

Estrada-Huerta II, slip op. at 4. However, according to the Department of Corrections website, the defendant is currently eligible for parole on July 2, 2029, at age 42.[4]

Additionally, under § 17-22.5-405(1), C.R.S. (2014), the defendant can earn up to 10 days per month of additional "earned time" credit. This could reduce the time by up to one-third. § 17-22.5-405(4), C.R.S. (2014). Thus, Colorado's statutory sentencing scheme provides the defendant with a meaningful opportunity for release based on demonstrated maturity and rehabilitation. The defendant's parole-eligibility date will get earlier if he continues to accrue earned time; this, in effect, rewards his ability to mature and rehabilitate. Thus, the date listed on the DOC website is not the earliest date the defendant would be eligible for parole; rather, that is the *latest* date he would be eligible for parole if he failed to earn any more time. Even parole eligibility at age 42 certainly provides a meaningful opportunity for relief during the defendant's lifetime. As such, even if this Court

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[4] *See* www.doc.state.co.us/oss/, last visited October 9, 2015.

determines that the court of appeals appropriately expanded *Graham*, the defendant is not entitled to relief.

CONCLUSION

The defendant's sentence is constitutional under *Graham*. *Graham* does not apply to aggregate term-of-years sentences, and *Graham*'s holding and analysis demonstrate the Supreme Court did not consider those issues. Thus, the court of appeals' expansion of *Graham* is unwarranted; *Graham* should be limited to its facts and applied only to a single sentence of life without parole for a single, nonhomicide offense.

Even if the expansion is warranted, it should not apply retroactively, and in any event, the defendant has a reasonable possibility of parole within his lifetime and is not entitled to relief under *Graham*.

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AG FILE: DOCUMENT7

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within ANSWER BRIEF upon ANTONY NOBLE and TARA JORFALD via Integrated Colorado Courts E-filing System (ICCES) on October 16, 2015.

/s/ Cortney Jones