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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. 10CA2414	
THE PEOPLE OF THE STATE OF COLORADO, Petitioner, v. ATORRUS LEON RAINER, Respondent.	▲ **COURT USE ONLY** ▲ Case No. 13SC408
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PEOPLE'S OPENING BRIEF

CERTIFICATE OF COMPLIANCE

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

The brief complies with C.A.R. 28(g).

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For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R. , p.), not to an entire document, where the issue was raised and ruled on.

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

/s/ Rebecca A. Adams

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2. Whether a conviction for attempted murder is a nonhomicide offense within the meaning of *Graham v. Florida*, 560 U.S. 48 (2010).

STATEMENT OF THE CASE AND THE FACTS

When the defendant, Atorrus Rainer, was 17 years old, he burglarized an apartment, stealing a stereo. During the burglary, the defendant shot one victim in the stomach and shot the second victim in the face. After the second victim fell to his knees, the defendant shot him three more times in the shoulder, upper arm, and wrist. The defendant yelled to a companion to come inside and take the stereo, which he did. The defendant then walked into the kitchen where the first victim was on the ground and shot him two more times. *See People v. Rainer*, (Colo. App. No. 01CA1401, Feb. 5, 2004) (not published pursuant to C.A.R. 35(f)).

Following a jury trial, the defendant was convicted of two counts of attempted first degree murder, two counts of first degree assault, one count of first degree burglary, one count of aggravated robbery, and crime of violence (PR, CF, v. I, pp. 141-51, 155-56). The trial court sentenced the defendant to the Department of Corrections (DOC) for 48 years for attempted first degree murder of the first victim, 48 years for attempted first degree murder of the second victim, 32 years for first degree assault of the first victim, 32 years for first degree assault of the second victim, 32 years for first degree burglary and 32 years for aggravated robbery, all to be served consecutively, for a total of 224 years (PR, CF, v. I, pp. 155-56).

The defendant appealed, and a division of the court of appeals affirmed his convictions but vacated the consecutive sentences for the first degree assault and attempted murder convictions, and the case was remanded with directions to amend the mittimus to impose concurrent, rather than consecutive, terms of imprisonment for the assault and attempted murder convictions as to each victim (PR, CF, v.

I, pp. 195-226). *People v. Rainer*, (Colo. App. No. 01CA1401, Feb. 5, 2004) (not published pursuant to C.A.R. 35(f)).

On remand, the defendant filed a Crim. P. 35(b) motion for sentence reconsideration (PR, CF, v. I, pp. 228-31). The trial court entered an amended mittimus to run counts 1, 2, 3, and 4 concurrently, resulting in an aggregate sentence of 112 years in the DOC (PR, CF, v. I, p. 248), and denied the motion for sentence reconsideration, finding that a modification of the sentence was not appropriate (PR, CF, v. I, pp. 247-49).

Thereafter, the defendant filed multiples motions for postconviction relief, which were denied by the trial court (PR, CF, v. I, pp. 25-56. 266-68; PR, CF, v. II, pp. 317-21, 326-27, 343-63, 365, 369-89, 390, 409-29). *See People v. Rainer*, (Colo. App. No. 06CA1765, Feb. 28. 2008) (not published pursuant to C.A.R. 35(f)); *People v. Rainer*, (Colo. App. No. 09CA0071, Feb. 11, 2010) (not published pursuant to C.A.R. 35(f)).

In 2010, the Supreme Court announced *Graham v. Florida*, 560 U.S. 48 (2010), holding that the Eighth Amendment prohibited a

sentence of life-without-parole for a juvenile who was convicted of a single, nonhomicide offense. On August 23, 2010, the defendant filed another motion for postconviction relief, arguing that his 112-year sentence is the "functional equivalent" of life in prison without the possibility of parole (LWOP) and is unconstitutional under *Graham* (PR, CF, v. II, pp. 453-69). The trial court denied the motion, finding that (1) the defendant's sentence was not equivalent to a sentence to LWOP and was, therefore, not contrary to *Graham*, and (2) *Graham* does not apply retroactively (PR, CF, v. II, pp. 474-76).

The court of appeals reversed the trial court's order, holding that the defendant's term-of-years sentences were the functional equivalent of LWOP and remanded for resentencing, despite *Graham*'s explicit disclaimer that it applied only to "those juvenile offenders sentenced to life without parole solely for a nonhomicide offense"—i.e., to a single sentence of life without parole for a single nonhomicide offense. *Graham*, 560 U.S. at 63; *People v. Rainer*, 2013 COA 51.

SUMMARY OF THE ARGUMENT

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 against multiple victims. *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 against multiple victims. 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.

A conviction for attempted murder is a homicide offense within the meaning of *Graham v. Florida*, 560 U.S. 48 (2010), and as a result, *Graham* does not apply to the defendant's case because the defendant was convicted of multiple homicide offenses.

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 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 *Graham*'s holding beyond the analysis upon which its holding was based. This Court must reverse the ruling of the court of appeals.

A. Standard of Review

"[R]eview 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

In an issue of first impression, the court of appeals addressed whether *Graham* and *Miller* apply to consecutive term-of-years sentences. In concluding that the cases apply to the sentences at issue here, the court of appeals broadened the holding of *Graham* and

effectively overruled this Court's opinion in *Close*, *supra* (holding that an abbreviated proportionality review must consider each separate sentence rather than the aggregate term of multiple sentences).

1. *Graham* and *Miller* do 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*, 132 S. Ct. at 2463 (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 against multiple victims. 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," *Rainer*, ¶ 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.

While the court of appeals was correct in its recitation of the *approach* taken by the Supreme Court, it 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). While the court of appeals acknowledged that at the time *Graham* was decided, no juvenile nonhomicide offenders were serving LWOP sentences in Colorado, it ignored the fact that the defendant was serving his sentence at the time *Graham* was decided and that his

sentence was *not* considered a "life sentence" by the *Graham* court. *Rainer*, ¶ 76.

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 concluding that the sentence at issue here was unconstitutional. *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.

In reaching its decision that lengthy aggregate term-of-years sentences are included within the purview of *Graham*, the court of appeals acknowledged that the majority of states and federal circuits to address the issue have concluded that *Graham* does *not* apply to term-of-years sentences but, nevertheless, chose to rely on California[1] and

[1] *See People v. Caballero*, 282 P.3d 291, 295 (Cal. 2012) (110-year-to-life sentence and first eligibility for parole after minimum of 100 years unconstitutional).

select Florida[2] opinions to support its adoption of the minority view. *Rainer*, ¶¶ 58-65 (citing cases); *see also People v. Lehmkuhl*, 2013 COA 98[3] (applying minority view that broadens *Graham*'s holding to include aggregate term-of-years-sentences).

The cases rejecting the argument that *Graham* applies to lengthy term-of-years sentences 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.*

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[2] The state courts of appeals in Florida are split on whether *Graham* applies to lengthy term-of-years sentences. *Compare Guzman v. State*, 2013 Fla. App. LEXIS 3961, at *7 n.2 (Fla. App. 4th Dist. Mar. 13, 2013), *with Johnson v. State*, 2013 Fla. App. LEXIS 4196 (Fla. App. 5th Dist. Mar. 15, 2013); *Walle*, 99 So.3d at 971. This is largely because Florida does not have a parole system in place.

[3] *Cert. granted, Lehmkuhl v. People*, 2014 Colo. LEXIS 1131 (Colo. Dec. 22, 2014).

Smith, 556 Fed. Appx. 434, 439-40 (6th Cir. 2014)707 (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 *Lehmkuhl*, 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* applied 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 against multiple victims. 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' rationale expanding *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, and especially—as here—where the defendant has already enjoyed several postconviction appeals.

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 claims' merits. *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 met: (1) the defendant's conviction must be final; (2) the rule in question must be new; and (3) if the rule is new, it must meet either of the two *Teague* exceptions to the general bar on retroactivity. *Edwards v. People*, 129 P.3d 977, 983 (Colo. 2006) (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."[4] *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004); *Edwards*, 129 P.3d at 979.

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[4] 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.

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

The Supreme Court has stated that watershed rules are extremely narrow. *Schriro*, 542 U.S. at 352 (cited with approval in *Tate*, ¶ 56). 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). 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.

Further, the application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality, without which the criminal law is "deprived of much of its deterrent effect." *Teague*, 489 U.S. at 309; *accord People v. Montoya*, 647 P.2d 1203, 1206 (Colo. 1982) ("The state has a legitimate interest in maintaining the finality of judgments as well as in providing uniformity of punishment. Consequently, the fixing of punishments for offenders based upon the date on which their crimes were committed is reasonably related to these legitimate governmental interests and is not violative of equal protection of laws."). 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.

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). Under this framework, the court of appeals' holding extending *Graham* is not a new rule that should be applied retroactively. *See, e.g.*, *Chambers v. State*, 831 N.W.2d 311, 329 (Minn. 2013) (by requiring sentencing court to consider potentially mitigating circumstances of offender's youth and attendant characteristics, *Miller* does not create a requirement that is "functional equivalent of an element," because it does not require court to find any particular fact before imposing LWOP in juvenile homicide case) (citing *Ring v. Arizona,* 536 U.S. 584, 609 (2002)).

Even if the court of appeals properly expanded *Graham*, retroactive application to cases on collateral review is inappropriate. Likewise, the constitutional prohibition against ex post facto laws does not apply to judicial decision-making. *Rogers v. Tennessee*, 532 U.S. 451, 459-60 (2001). *Rogers* held that no due process violation occurs when the judicial decision is a "routine exercise of common law decision-making in which the court brought the law into conformity with reason and common sense." *Id.* at 467. It reasoned that due process does not prohibit the "process of judicial evolution" of the law. *Id.* at 462.

That is exactly what the court of appeals did when it interpreted and expanded *Graham*: it essentially reasoned that *Graham*'s spirit would prohibit aggregate term-of-years sentences for multiple offenses. But this holding was unwarranted, given *Graham*'s core analysis, research, and underpinnings. Expanding *Graham* was an unsupported, routine exercise of judicial decision-making that the court of appeals erroneously believed *Graham* required. But because *Graham* only categorically barred a single, LWOP sentence imposed for a single, nonhomicide offense, and because the court of appeals expanded this

approach to aggregate term-of years sentencing, retroactivity is not implicated.

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 *Graham*'s holding 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.").

Declining retroactive application is further appropriate given the complete absence of applicability of *Graham*'s holding to any Colorado inmate: the study underpinning *Graham*'s holding only cited 123 inmates in 11 states; Colorado was not represented in these numbers and thus any retroactive application of *Graham*'s specific, narrow holding would not affect Colorado prisoners. *See Graham*, 560 U.S. at 62-67 (citing *Annino*).

Teague was particularly concerned with the burden widespread retroactivity would place on states' judicial resources. 489 U.S. at 311. But to expand *Graham* to apply to aggregate term-of-years sentences would exponentially balloon those 123 prisoners beyond calculation. This is precisely the antithesis of retroactive application, certainly as it pertains to juveniles convicted of multiple offenses and facing consecutive lengthy aggregate sentences, and this illuminates how narrow *Graham*'s holding was.

Here, the defendant's conviction has long been 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").

While 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, *Rainer* was wrongly decided on this point because its holding expanded, rather than applied, *Graham*. *Rainer*'s error 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*, 129 P.3d at 978-79 (*Crawford*); *Lopez,* 113 P.3d at 716 (*Blakely*); *accord Tate*, ¶¶ 58-60 (explaining why *Ring*, 536 U.S. 584 (discussing requirement for jury to decide aggravating factors necessary to impose death penalty), was not a watershed rule that applied retroactively).

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 finds no retroactive effect on aggregate term-of-years sentences.

Because the court of appeals' expansion of *Graham* is not retroactive, the defendant's appeal is both untimely and successive.

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 112 years in prison. The court of appeals determined that the defendant would be

eligible for parole at age 75.[5] *Rainer*, ¶¶ 36, 67. In reaching this determination, the court concluded that pursuant to section 17-22.5-403, C.R.S. (2014), the defendant must serve half of his sentence—or 56 years—before he is eligible for release. Because the defendant was 19 when he was sentenced, the court concluded that he would be 75 when he was first eligible for parole. *Id.* However, in doing so, the court disregarded the statutory scheme addressing earned time credit and its impact on parole eligibility. *See* § 17-22.5-403(1); § 17-22.5-405(4), C.R.S. (2014) (earned time may reduce total sentence by up to 30%).

The court of appeals' refusal to acknowledge the impact of earned time credit on defendant's parole eligibility failed to account for the entirety of Colorado's parole system and overlooked statutes that have the potential to lower defendant's parole eligibility date such that he would be eligible for parole prior to the expiration of his life expectancy. Indeed, according to the Department of Corrections website, defendant

[5] While the court of appeals' opinion states that "the parties agree that Rainer will not even be eligible for parole until he is seventy-five years of age," the People made no such concession. *Rainer*, ¶ 67.

is currently eligible for parole on February 1, 2052, at age 70—not age 75 as stated by the court of appeals. [6]

Under section 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). 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.

Additionally, while the court of appeals relied on data from the Centers for Disease Control in determining the defendant's life

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[6] *See* http://www.doc.state.co.us/oss/, last visited June 29, 2015. Being parole-eligible at age 70 means he has already reduced his sentence by five years since the court of appeals' decision, when the court determined that he would not be parole-eligible until he was 75 years old. *Rainer*, ¶ 67.

expectancy to be between 63.8 years and 72 years, the Colorado Legislature reached a different result. *See Rainer*, ¶ 67. Section § 13-25-103, C.R.S. (2013), contains a mortality table to "establish the expectancy of continued life of any person from any period of such person's life." § 13-25-102, C.R.S. (2013). Section 13-25-103, provides that a man at age 19, the defendant's age when he was sentenced, has a life expectancy of 77.7 years. If this Court were to rely on the defendant's statutory life expectancy, even parole eligibility at age 75 would not exceed his life expectancy.[7] *See Lehmkuhl*, ¶ 14 (holding trial court did not err in using statutory mortality table to determine life expectancy); *see also Juarez v. People*, 855 P.2d 818, 820 n.6 (Colo. 1993) (applying statutory mortality table to criminal case); *People v. Mershon*, 844 P.2d 1240, 1248 (Colo. App. 1992) (same), *aff'd in part and rev'd in part*, 874 P.2d 1025 (Colo. 1994).

Moreover, the court of appeals' reliance on the fact that "almost ninety percent of those eligible for discretionary parole are denied

[7] The mortality table provides that a man who has reached the age of 33—the defendant's current age—has a life expectancy of 78.4 years. § 13-25-103.

parole when they first become eligible" is inappropriate because the likelihood a defendant will receive parole is completely irrelevant to the determination of whether a sentence is constitutional. *Rainer*, ¶ 36; *cf. Lehmkuhl*, ¶ 19. All *Graham* requires is a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." 560 U.S. at 75. It is up to the Colorado State Board of Parole to determine a defendant's parole readiness; it is not the court's role to speculate whether a violent offender, such as the defendant, will be parole-appropriate.

The court of appeals also determined that the trial court did not properly consider the defendant's age or the developmental differences between juveniles and adults in imposing sentence. *Rainer*, ¶ 78. However, *Miller* does not require an individualized sentencing hearing *any time* a juvenile is sentenced; it only requires one in order to impose the ultimate punishment of life without the possibility of parole—a sentence that was not imposed in this case. 132 S. Ct. at 2474-75; *accord Tate*, ¶¶ 25, 28-31. Nevertheless, the record here reflects that the court recognized the defendant's age, as well as several other

mitigating factors, in imposing his sentence (PR. Tr. 6/15/2001). Thus, the defendant received the individualized sentencing to which he was entitled. *See Lehmkuhl*, ¶ 22.

II. A conviction for attempted murder is a homicide offense within the meaning of *Graham v. Florida*, 560 U.S. 48 (2010).

A. Standard of Review

Whether attempted murder is a homicide offense within the meaning of *Graham* is a question of law, which this Court reviews de novo. *See People v. Davis*, 2015 CO 36, ¶ 14.

B. Law and Analysis

In *Graham*, the Supreme Court "recognized 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." 560 U.S. at 69 (emphasis added). Here, the defendant's convictions for two counts of attempted murder necessarily demonstrate the jury found he acted with the intent to kill the victims.

In distinguishing between homicide and nonhomicide offenses, the *Graham* court relied on the Annino study, which defined homicide as

murder, *attempted murder*, or felony murder. Annino, at 3-4. Moreover, in considering worldwide consensus, *Graham* discussed Israel (the only country other than the United States imposing sentences of LWOP for juveniles) and noted that all seven Israeli prisoners serving life sentences for juvenile crimes were convicted of homicide or *attempted* homicide. 560 U.S. at 80-81.

In fact, in *Miller*, 132 S. Ct. at 2461-62, defendant Jackson was convicted of felony murder and the Court treated his conviction as a homicide offense even though Jackson did not fire the gun or intend to kill the victim. *See also Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008) (addressing, inter alia, the difference between a "crime [that] did not result, and was not intended to result, in death of the victim"); *Twyman v. State*, 26 A.3d 215 (Del. 2011) (attempted first degree murder is a homicide offense); *but see Bramlett v. Hobbs*, 2015 Ark. 146 (Ark. 2015) (attempted capital murder is a nonhomicide offenses for purposes of *Graham*); *Caballero*, *supra* (concluding that *Graham* applied to a fourteen-year-old defendant's sentence of 110-years to life imprisonment for attempt to commit murder); *Manuel v. State,* 48 So.

3d 94, 97 (Fla Dist. Ct. App. 2010) (attempted murder is a nonhomicide offense under *Graham*).

Thus, defendant's convictions for attempted murder constitute "homicide" offenses, and his sentences do not run afoul of *Graham*, which applies only to nonhomicide crimes, or *Miller*, which only prohibits *mandatory* LWOP sentences. *See Miller*, 132 S. Ct. at 2469 (requiring sentencing court "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison"); *accord Tate*, ¶¶ 25, 28-31.

CONCLUSION

The defendant's sentence is constitutional under *Graham* and *Miller*. *Graham* does not apply to his homicide offense, nor does it 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. This Court should hold that the court of appeals incorrectly expanded *Graham*'s unambiguous holding. *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 not unwarranted, it should not apply retroactively, and in any event, the defendant has a reasonable possibility of parole within his lifetime.

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AG FILE: DOCUMENT3

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **PEOPLE'S OPENING BRIEF** upon **ASHLEY RATLIFF** and **KATHLEEN LORD**, via Integrated Colorado Courts E-filing System (ICCES) on June 30, 2015.

/s/ Tiffiny Kallina