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SUPREME COURT, STATE OF COLORADO Colorado State Judicial Building Two East 14th Avenue Denver, Colorado 80203	
Certiorari to the Colorado Court of Appeals Case No. 10CA2414	
THE PEOPLE OF THE STATE OF COLORADO, Petitioner v. ATORRUS LEON RAINER, Respondent	**σ COURT USE ONLY σ**
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ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this answer 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).

[X] It contains 8453 words.
[ ] It does not exceed 30 pages.

The brief complies with C.A.R. 28(k) as it contains, under a separate heading, a statement of whether such party agrees with the opponent'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 and C.A.R. 32.

/s/ Kathleen A. Lord

KATHLEEN A. LORD

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INTRODUCTION

The Eighth Amendment prohibits irrevocably sentencing a child to life in prison without a realistic and "meaningful" opportunity to demonstrate their maturity and rehabilitation to reenter society. Even children who commit horrible crimes must not be forsaken by the imposition of sentences that require them to serve out their lives in prison with no hope of ever being released; these children must be afforded an opportunity to realize their human potential. Since 2005, the Supreme Court, in response to increased scientific knowledge and evolving standards of decency, has profoundly changed its Eighth Amendment jurisprudence governing the sentencing of juvenile offenders. At the core of the Court's decisions in *Graham v. Florida*, 130 S.Ct. 2011 (2010), and *Miller v. Alabama*, 132 S.Ct. 2455 (2012), is the recognition that children are constitutionally different than adults, and due to their lesser culpability and greater capacity for change they cannot be treated as if they were adults for sentencing purposes.

In Mr. Rainer's case, the court of appeals correctly recognized that these core Eighth Amendment tenets apply to all juveniles whose sentences deprive them of a meaningful opportunity for release based on demonstrated maturity and rehabilitation, whether their sentence is denominated "a life without parole

sentence" (LWOP) or some other lengthy term of years sentence. Both sentences suffer from the same constitutional defect: condemning a child to die in prison without any realistic possibility of release, no matter his redemption or what he might do in the years to come.

ISSUES ON CERTIORARI REVIEW

On December 22, 2014, this Court granted the State's petition for writ of certiorari to consider the following two issues:

- Whether the court of appeals erred by extending *Graham v. Florida*, 130 S.Ct. 2011 (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.[1]

- Whether a conviction for attempted murder is a non-homicide offense within the meaning of *Graham v. Florida*, 130 S.Ct. 2011 (2010).[2]

[1] This Court granted certiorari to decide this same issue in four other cases:

- *Lucero v. People*, No. 13SC624 (juvenile sentenced to consecutive sentences for multiple offenses for an aggregate sentence of 84 years).
- *People v. Armstong*, No. 13SC045 (juvenile sentenced to two consecutive 48-year terms for an aggregate sentence of 96-years)
- *People v. Estrada-Huerta*, No. 14SC127 (juvenile sentenced to consecutive sentences for two offenses of 24 years and 16 years to life for an aggregate sentence of 40 years to life)
- *People v. Lehmkuhl*, No. 13SC598 (juvenile sentenced to consecutive sentences for multiple offenses for an aggregate sentence of 76 years to life)

[2] This Court also granted certiorari in *Lucero, supra*, to decide this second issue.

STATEMENT OF THE CASE

Atorrus Rainer was seventeen years old on February 3, 2000, the date of the charged offenses. He was convicted of two counts of attempted first degree murder, two counts of first degree assault, first degree burglary, aggravated robbery and crime of violence (vI p141-151). Pursuant to the crime of violence statute, each separate offense was subject to mandatory consecutive sentencing. *See* §16-11-309(1)(a), C.R.S. (1999) (now codified at §18-1.3-406(1)(a)).

Mr. Rainer was originally sentenced in 2001 to an aggregate sentence of 224 years. The trial court did not consider Mr. Rainer's youth, but rather focused on the severity of the offenses when it imposed maximum consecutive sentences of 48 years for each count of attempted murder and 32 years for each assault, the burglary and the aggravated robbery (vI p156-7; v3 6.15.01 Tr.).

The court of appeals affirmed the convictions, but vacated the consecutive sentences for the two attempted murder and two assault counts because the attempted murder and assault counts as to each victim could have been based on identical evidence (vI p195-226). On remand, the court amended the mittimus to reflect an aggregate sentence of 112 years (vI p248-249).

A few months after the Supreme Court decided *Graham v. Florida*, Mr. Rainer filed a postconviction motion in which he alleged that his 112-year sentence

was the functional equivalent of a life without parole ("LWOP") sentence and, thus, violated the Eighth Amendment and art.II, §20 of the Colorado Constitution and was unconstitutional under *Graham* (vII p453-469). On October 23, 2010, the district court, which did not have the benefit of the Court's 2012 *Miller* decision, denied the motion without a hearing (vII p474-476). In pertinent part, the court ruled that the 112-year aggregate sentence was "not of the same nature" as the LWOP sentenced barred by *Graham*. It was enough that the defendant would be eligible for parole in 2057. (vII p475 ¶7). Since the court believed Mr. Rainer would be eligible for parole at 75 years of age, i.e., before the end of his 112-year sentence, the court ruled the sentence complied with *Graham* and did not violate the Eighth Amendment. In the alternative, the district court ruled that even if a 112-year sentence was like a sentence of LWOP, the *Graham* ruling was not retroactive. (vII p476 ¶8-10)

The court of appeals reversed and remanded for resentencing. *Rainer* at ¶81. The court found that the "term of years sentence imposed on Rainer, which does not offer the possibility of parole until after his life expectancy, deprives him of any 'meaningful opportunity to obtain release' and thereby violates the Eighth Amendment. *Id.* at ¶66, quoting *Graham, supra* at 2033. [A copy of the Westlaw

version of *Rainer*, which has not yet been reported, is attached as Appendix A for the court's convenience].

SUMMARY OF ARGUMENT

I. The Supreme Court has repeatedly held that for Eighth Amendment purposes, children are constitutionally different from adults. These differences make children less culpable and more capable of change and require the courts to take into account these constitutional differences when deciding whether a juvenile's sentence is constitutionally proportionate. Except for the rarest of juveniles convicted of murder, these differences categorically bar a court from sentencing a juvenile to live out their days in prison with no realistic hope of eventual freedom based on demonstrated maturity and rehabilitation.

The question before this Court is whether a juvenile's consecutive sentences for multiple offenses, which function just like a life without parole sentence, violate the Eighth Amendment. The answer should be clear, given all the Supreme Court has said about children, it is the effect on the child of the sentence that counts, not its label. If, as the State argues, the Eighth Amendment protections guaranteed by *Graham* and *Miller* apply only to sentences technically denominated life without parole or "LWOP," the Eighth Amendment proscription against sentencing children to die in prison with no hope of release could be easily

circumscribed by merely charging children with multiple offenses and/or sentencing them to lengthy sentences which would, in fact, deny the child any possibility of release during their lifetime.

In *Rainer*, the court correctly applied *Graham* and *Miller* to a juvenile's multiple consecutive sentences, since the proportionality review in these cases does not focus on the severity of the offense (or the number of the offenses), but rather on the child's status and their lessened culpability and greater capacity for change. In cases like Mr. Rainer's, where his aggregate 112-year sentence denies him any parole eligibility within his expected lifetime, the juvenile is necessarily denied any realistic or meaningful opportunity of release and, thus, it is clear their aggregate sentence violates the Eighth Amendment.

Slightly different and more difficult questions arise when a juvenile offender's sentence, be it life with the possibility of parole or a lengthy aggregate term of years, render him parole eligible sometime within or near the end of his projected life expectancy. These include (1) does Colorado's adult parole system afford juveniles sentenced to lengthy sentences the meaningful opportunity of release based on demonstrated maturity and rehabilitation required by *Graham* and *Miller* and (2) if it does, when must a juvenile offender become parole eligible for the opportunity to qualify as meaningful.

One cannot presume from the mere existence of a "possibility" of parole, that parole eligibility necessarily creates the constitutionally mandated realistic opportunity for release. In fact, Colorado's adult parole system does not ensure offenders the meaningful opportunity of release based on demonstrated maturity and rehabilitation required by the Eighth Amendment. Consequently, juveniles who are sentenced to life or to aggregate term of year sentences likely to exceed their lifetime are serving sentences that violate the Eighth Amendment. Assuming *arguendo* that the mere possibility of parole under Colorado law provides a meaningful opportunity for release, juvenile offenders must still be parole eligible some years before they are likely to die; otherwise, their sentence does not comply with the Eighth Amendment's guarantee that juvenile offenders have a meaningful opportunity to demonstrate their fitness to rejoin society.

II. The Court in *Graham* held the Eighth Amendment categorically prohibits punishing juveniles with life in prison for "nonhomicide" offenses. In doing so, it drew a clear line between homicide, which requires the killing of one human being by another, and other serious nonhomicide offenses. This distinction between homicide and non-homicide offenses is consistent with the lay and statutory definitions of the term, as well as the Supreme Court's other Eighth Amendment jurisprudence.

ARGUMENT

I. The Court of Appeals Correctly Applied *Graham v. Florida*, 130 S.Ct. 2011 (2010), and *Miller v. Alabama*, 132 S.Ct. 2455 (2012), to hold that a Juvenile Offender's 112-year Aggregate Sentence for Multiple Offenses Violates the Eighth Amendment.

A. Issue Preservation and Standard of Review

Mr. Rainer preserved his challenge to the constitutionality of his aggregate 112-year sentence by filing a Rule 35(c) motion for postconviction relief, (vII p453-69), which was denied without a hearing, as a matter of law. (vII p474-476).

Pursuant to C.A.R. 28(k), Mr. Rainer agrees that the general question on which this Court has granted certiorari, whether *Graham* and *Miller* may apply to consecutive term-of-years sentence imposed on a juvenile convicted of multiple offenses, is a question of law and, thus, is subject to de novo review. However, the additional related question, which may or may not be included within this Court's writ of certiorari, of whether a particular sentence provides a juvenile with the constitutionally required meaningful opportunity of release based on demonstrated maturity and rehabilitation, is likely to require additional factual development and is likely a mixed question of law and fact.

B. Law and Analysis

The court of appeals correctly interpreted *Graham* and *Miller* when it vacated Mr. Rainer's 112-year aggregate sentence because such a severe and

lengthy sentence "does not offer him, as a juvenile nonhomicide offender, a 'meaningful opportunity to obtain release' before the end of his expected life span and, thus, constitutes the functional equivalent of a life without parole sentence and is unconstitutional under *Graham* and its reasoning." *Rainer* at ¶38.

1. For the same reasons the Eighth Amendment prohibits sentencing a child to LWOP, children cannot be sentenced to lengthy consecutive sentences for multiple offenses when the aggregate sentence, like a life sentence, denies them any meaningful opportunity for release based on demonstrated maturity and rehabilitation.

A. Pertinent Supreme Court Eighth Amendment Principles [3]

- *General Eighth Amendment Proportionality Law*

Both the United States and Colorado Constitutions prohibit cruel and unusual punishments. U.S. Const. Amend. VIII, XIV; Colo. Const. Art. II. §20. "Embodied in the Constitution's ban on cruel and unusual punishments is the 'precept of justice that punishment for crime should be graduated and proportioned to the offense."" *Graham*, 132 S.Ct. at 2021 (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910).

[3] The court of appeals provides a very good summary of the Supreme Court's pertinent Eighth Amendment jurisprudence at ¶¶ 40-65 of its decision. *See* Appendix A. Rather than repeat or paraphrase the court's analysis, Mr. Rainer focuses on a few basic principles in this section and the law that confirms the Court's proportionality case law focuses on the juvenile's status, not on the nature (or number) of the offenses.

An appropriate proportionality review is central to the analysis of sentencing practices under the Eighth Amendment. *See, e.g.*, *Graham* (citing *Harmelin v. Michigan*, 501 U.S. 957, 997 (1991) (interpreting the Eighth Amendment's ban on cruel and unusual punishment to include punishments that are "grossly disproportionate" to the crime)). Cases addressing the proportionality of sentences "fall within two general classifications. The first involves challenges to the length of term-of-years sentences given in all circumstances in a particular case. The second comprises cases which the court implements the proportionality standard by certain categorical restrictions on the death penalty." *Id*.

The "categorical" classification of cases assesses the proportionality of a sentence "as compared to the nature of the offense or *the characteristics of the offender*." *Id*. at 2022 (emphasis added). In cases in which a particular sentence is deemed unconstitutional for an entire class of offenders, some classes of offenders have characteristics that make them categorically less culpable than other offenders who commit similar or identical crimes.[4]

[4] *See Roper v. Simmons*, 543 U.S. 551 (2005) (striking the death penalty for all defendants who committed crimes before turning 18); *Atkins v. Virginia*, 536 U.S. 304 (2002) (striking the death penalty for defendants who are mentally retarded); *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (striking the death penalty for defendants convicted of rape where the crime was not intended to and did not result in the victim's death); *Graham* (striking sentences of life without parole for juveniles convicted of non-homicide offenses); *Miller* (striking mandatory LWOP

- *Graham* and *Miller*

In *Graham*, the Court concluded and repeatedly emphasized that because of their immaturity and underdeveloped sense of responsibility, juveniles are more vulnerable or negatively influenced by external forces than are adults. *Id.* at 2026 (citing *Roper v. Simmons*, 543 U.S. 551 (2005)). Juveniles therefore constitute a category of offenders that are not as capable of engaging in conduct that is as "morally reprehensible" as adults and, therefore, cannot be reliably "classified among the worst offenders." *Id.* (quoting *Roper* at 569; *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988)). Moreover, juveniles possess a greater potential for change or positive character growth than adults. *Id.* (citing *Roper* at 570).

Given their diminished culpability and greater capacity for change, the Court held that "for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole." *Id.* at 2030. The Court determined a categorical ban on life without parole was required because otherwise there was too great a risk that the nature of the crimes involved would overpower considerations of the offender's youth and attendant circumstance and "[t]he

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for juveniles convicted of murder); *Montgomery v. Louisiana*, 136 S.Ct. 718, 736 (2016) (recognizing *Miller* precludes life without parole for all juveniles whose homicide crimes reflect transient immaturity).

differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive" a sentence of life without parole for a nonhomicide crime "despite insufficient culpability." *Id.* at 2032 (citing *Roper* at 572-573).

In *Miller,* the Court, relying on its prior precedent, made very clear that it is the offenders' juvenile status that implicates the type of Eighth Amendment proportionality review conducted in both *Graham* and *Miller*. *See id.* at 2465 ("*Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform, we explained, 'they are less deserving of the most severe punishments.'" (quoting *Graham*)); *id.* ("Most fundamentally, *Graham* insists that youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole. In the circumstances there, juvenile status precluded a life-without-parole sentence, even though an adult could receive it for a similar crime."); *id.* at 2469 ("By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment.... But given all we have said in *Roper, Graham,* and this decision about children's diminished culpability and

heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.")

- *Montgomery v. Louisiana, 136 S.Ct. 718 (2016)*

In holding that *Miller* must be applied retroactively to all juveniles sentenced to LWOP for murder, the Court recognized that *Miller* 'took as its starting premise the principle established in *Roper* and *Graham* that 'children are constitutionally different from adults for purposes of sentencing.'" *Montgomery, supra* at 733 (citing *Miller,* 132 S.Ct. at 2464 (citing *Roper* and *Graham*). The Court then explained these differences in a way that applies to all juvenile offenders:

> These differences result from children's "diminished culpability and greater prospects for reform," and are apparent in three primary ways:
>
> > First, children have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking.
> >
> > Second, children are more vulnerable to negative influences and outside pressures, including from their family and peers; they have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings.
> >
> > And third, a child's character is not as well formed as an adult's; his traits are less fixed and his actions less likely to be evidence of irretrievable depravity.
>
> As a corollary to a child's lesser culpability, *Miller* recognized that "the distinctive attributes of youth diminish the penological justifications" for imposing life without parole on juvenile offenders. 132 S.Ct. at 2465.

Because retribution "relates to an offender's blameworthiness, the case for retribution is not as strong with a minor as with an adult." *Ibid.* The deterrence rationale likewise does not suffice, since "the same characteristics that render juveniles less culpable than adults—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment." 132 S.Ct., at 2465. The need for incapacitation is lessened, too, because ordinary adolescent development diminishes the likelihood that a juvenile offender forever will be a danger to society. *Id.* Rehabilitation is not a satisfactory rationale, either. Rehabilitation cannot justify the sentence, as life without parole "forswears altogether the rehabilitative ideal." *Id.* at 2465.

These considerations underlay the Court's holding in *Miller* that mandatory life-without-parole sentences for children "pos[e] too great a risk of disproportionate punishment." 132 S.Ct. at 2469. *Miller* requires that before sentencing a juvenile to life without parole, the sentencing judge take into account "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Ibid.* The Court recognized that a sentencer might encounter the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified. But in light of "children's diminished culpability and heightened capacity for change," Miller made clear that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Ibid.*

Miller, then, did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of "the distinctive attributes of youth." 132 S.Ct., at 2465. Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects unfortunate yet transient immaturity. Because *Miller* determined that sentencing a child to life without parole is excessive for all but the rare juvenile offender whose crime reflects irreparable corruption, it rendered life without parole an unconstitutional penalty for a class of defendants because of their status—that is, juvenile offenders whose crimes reflect the transient immaturity of youth. As a result, *Miller* announced a substantive rule of constitutional law.…

Id., 136 S.Ct. at 733-35 (most internal quotation marks and citations omitted).

In *Montgomery*, the Court confirmed that even prisoners like Montgomery, who killed a deputy sheriff, "must be given an opportunity to show that their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored." *Id.* at 736-737.

B. The Colorado Court of Appeals Decision

After a careful review of the Supreme Court's relevant pre-*Graham* Eighth Amendment jurisprudence (*Rainer* at ¶¶40-45), *Graham* itself (*id.* at ¶¶46-54), and subsequent law interpreting *Graham*, including *Miller* (*id.* at ¶¶55-65), the court of appeals determined that *Graham's* holding and reasoning "can and should be extended to term-of-year sentences that result in a de facto life without parole sentence." *Id.* at ¶59. *See* Appendix A.

The court then found, on the basis of the undisputed record, that Mr. Rainer would not be eligible for parole until he was 75 years old and his life expectancy was between 63.8 years and 72 years. *Id.* at ¶66.[5] Thus, Mr. Rainer's first parole

[5] The State contends the record on this point is not undisputed, *see* OB at 31, n.5, but it did not dispute these calculations in the answer brief it filed in the court of appeals. *See Rainer* at ¶6; *see also* Order dated 5.9.13.

In any event, whether Mr. Rainer's first parole eligibility date occurs when he is 75, as the court found, or about 70, as the State now argues, does not impact

eligibility date falls outside his predicted life expectancy.[6] The court held such a sentence violated the Eighth Amendment since "the term of years sentence imposed on Rainer, which does not offer the possibility of parole until after his life expectancy, deprives him of any 'meaningful opportunity to obtain release' and thereby violates the Eighth Amendment." *Id.* at ¶66 (quoting *Graham*, 130 S.Ct. at 2033.

The court determined that Mr. Rainer's aggregate sentence suffered from the same constitutional defects as Graham's:

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whether *Graham* applies to consecutive sentences. Assuming it does, the ultimate question is whether Mr. Rainer's aggregate 112-year sentence violates the Eighth Amendment by denying him any realistic possibility of release within his projected life expectancy.

[6] Because Mr. Rainer's projected life expectancy expires before his parole eligibility date, the court did not consider the question whether an aggregate sentence that results in a juvenile becoming parole eligible for the first time in their forties, fifties, sixties, seventies or eighties might deny a Colorado offender the required "meaningful opportunity to obtain release." This issue was examined by different panels of the court of appeals in the four other cases in which this Court has granted certiorari to decide whether *Graham* and *Miller* apply to consecutive sentences imposed on a juvenile for multiple offenses. *See* fn.2, *supra* at 2. These panels all appear to have assumed that if a juvenile offender becomes eligible for parole any time before their predicted end of life, their sentences do not violate the Eighth Amendment. The problems with this analysis are addressed in pp. 26-30, *infra.*

> We acknowledge, as did the Court in *Graham*, that juvenile defendants such as Rainer "may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives," the holding and reasoning in *Graham* forbid states "from making the judgment at the outset that those offenders never will be fit to reenter society." 130 S.Ct. at 2030. The trial court here appears to have made this very judgment when it imposed Rainer's sentence, and the record shows that, at sentencing, the trial court acknowledged and indeed intended that Rainer would spend the rest of his life in prison. Nor, contrary to the People's argument, did the trial court take into account Rainer's age or the developmental differences between juveniles and adults in imposing Rainer's sentence. Thus, Rainer's sentence, which from the outset failed to offer him any meaningful chance at parole during his lifetime, "improperly denies [him] a chance to demonstrate growth and maturity," as required under *Graham*, 130 S.Ct. at 2029.

2. **The State's criticism of the *Rainer* decision is not well founded.**

The reasoning and concerns underlying *Miller* and *Graham* apply with equal force to juveniles who in all likelihood will never be released from prison due to extremely lengthy aggregate sentences for multiple offenses and who are denied the constitutionally mandated meaningful opportunity of release based on demonstrated maturity and rehabilitation. As Justice Kagan explained in *Miller:*

> While *Graham's* flat ban on life without parole was for nonhomicide crimes, **nothing that *Graham* said about children is crime-specific**. Thus, its reasoning implicates any life-without-parole sentence for a juvenile, even as its categorical bar relates only to nonhomicide offenses. **Most fundamentally, *Graham* insists that youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole**.

Miller at 2458 (emphasis added).

The State nevertheless argues that *Graham's* holding that juveniles must be afforded a reasonable opportunity of release applies only when a single sentence expressly denominated "LWOP" for a single offense is involved. Certainly, it would elevate form over substance, if the State's position were to be adopted. If the State's position were to prevail, the Eighth Amendment's protections for juveniles from *Graham* through *Montgomery*, could be circumvented by the semantic trick of re-characterizing LWOP sentences as life with parole at 100 years or some other lengthy sentence of a number of years that would ensure the juvenile died in prison.

If the State's position were to be accepted, a juvenile's 300-year sentence would be deemed constitutional, even though it would have the same proscribed impact as LWOP: the juvenile would be denied "*a chance to demonstrate maturity and reform*" and "*the opportunity to achieve maturity of judgment and self-recognition of human worth and potential*." *Rainer* at ¶52, quoting *Graham* at 2032 (emphasis in *Rainer*). The juvenile sentenced to 300 years, just like the juvenile sentenced to LWOP, would be denied any hope of living "some years of life outside prison walls."

A. The State erroneously reads *Graham* in its effort to constrict it holding.

The State misreads *Graham* when it claims the case "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." E.g., OB at 6. Nowhere in the *Graham* decision will this Court find the "single sentence" "single offense" limitation suggested by the State. In fact, the Court itself, in referencing the type of sentence under consideration does not always refer to life without parole, it proscribes "life in prison" and condemning a juvenile to "die in prison." Clearly, a lengthy term of years has the precise same effect.

The State attempts to support its claim that *Graham* applies only to a single LWOP sentence for a single offense by reference to a single sentence in the decision: "The instant case concerns only those juvenile offenders sentenced to life without parole solely for a nonhomicide offense." *Id.* at 2023. In context, however, the Court is distinguishing juveniles who were sentenced to LWOP who committed both a homicide and nonhomicide offense and the smaller number of juveniles sentenced to LWOP who committed no homicide (109). *Id.*

Although the State repeatedly asserts that *Graham* applies only "to a single, LWOP sentence for a single, nonhomicide offense," the *Graham* Court never even

refers to a "single offense" or a "single sentence." AB at 26; *see also* AB at 9, 11, 12, 26, 29. Rather, the focus of *Graham* and *Miller* is on the juvenile offender who cannot constitutionally be condemned to die in prison without a meaningful opportunity to obtain release.

Moreover, Graham himself was not convicted of a "single offense." Graham pleaded guilty to two offenses: armed burglary, which carried a maximum LWOP penalty, and attempted armed-robbery, which carried a maximum penalty of 15 years; the trial court initially sentenced Graham to probation, but ultimately imposed the maximum penalty for each offense when Graham's probation was revoked for allegedly committing new offenses. *See id.*

While the Court in *Graham* did not expressly address lengthy term-of-year sentences, like the 112-year sentence in Mr. Rainier's case, the same fundamental concerns that led the Court to outlaw LWOP sentences for nonhomicide offenses and *mandatory* LWOP sentences for juveniles convicted of homicide apply equally to lengthy consecutive sentences that are the functional equivalent of LWOP in the sense they deprive the offender of any "meaningful opportunity to obtain release" and leaves them with "no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope." *Graham* at 2032.

B. The court of appeals correctly determined that the traditional proportionality analysis adopted in *Close* does not apply to a juvenile's LWOP or de facto life sentence.

The State asserts the court of appeals decision to apply *Graham* to juveniles sentenced to extremely lengthy aggregate sentences "effectively overruled this Court's opinion in *Close* [*v. People*, 48 P.3d 528 (Colo. 2002)] (holding an abbreviated proportionality review must consider each separate sentence rather than the aggregate term of multiple sentences)." OB at 7-8. This overstates what the court did in *Rainer*. *See id.* at ¶68. *Close* remains good law, but it does not apply to categorical challenges to sentences imposed on juveniles. It sets forth the standard for traditional proportionality review where a court, in the first instance reviews the severity of the offense and compares it with the punishment.

The court of appeals simply rejected the State's argument that the applicable proportionality analysis must be governed by *Close*, a case involving an adult offender. The court correctly noted that *Close* relied on a line of cases that address "grossly disproportionate" proportionality review, a review that considers whether a particular sentence is grossly disproportion given the nature of the offense. This line of cases notably includes *Harmelin v. Michigan*, 501 U.S. 957 (1991). These cases are "suited for considering a gross proportionality challenge to a particular

defendant's sentence," but not for analyzing whether a particular type of sentence is constitutionally disproportionate for a class of offenders. *Graham*, *supra* at 2023.

In *Miller,* the State made a similar argument to the one advanced by the State here, which relies on *Close* in support of a gross proportionality review that would look at each sentence individually and determine whether it was proportionate to the sentence imposed. In *Miller,* the State similarly argued that the juvenile's LWOP punishment was proportionate to the crime of murder and that any requirement for individualized sentencing for juveniles convicted of homicide "would effectively overrule *Harmelin.*" *Miller* at 2471. The Court rejected this argument as "myopic," stating "*Harmelin* had nothing to do with children and did not purport to apply its holding to the sentencing of juvenile offenders. We have by now held on multiple occasions that a sentencing rule permissible for adults may not be so for children." *Id.* Likewise, this Court's decision in *Close*, which expressly relied on *Harmelin,* had nothing to do with children. Mr. Rainer's proportionality challenge is governed by the proportionality review that applies to juvenile offenders, as set forth in *Graham* and *Miller,* not the gross proportionality review in *Close* and *Harmelin.*

C. While there is a split of authority concerning whether *Graham* applies to multiple sentences that are the functional equivalent of LWOP, the better reasoned cases recognize that any sentence that deprives a juvenile of a "meaningful opportunity of release" violates the Eighth Amendment.

It does not take a law degree to understand that for a juvenile sentenced to prison with no meaningful opportunity of release based on demonstrated maturity and rehabilitation, it matters not a whit whether the sentence is denominated LWOP, life with parole after 100 years or some lengthy aggregate sentence that likewise offers the offender no meaningful opportunity of release within their lifetime. Likewise, the technical name assigned such sentences should not impact the required proportionality review under *Graham*. *See, e.g., Rainer* at ¶*69* (citing *People v. Mendez,* 114 Cal.Rptr.3d 870, 883 (2010) (*citing Graham,*130 S.Ct. at 2030, 2034) ("common sense dictates that a juvenile ... who is not eligible for parole until after he [or she] is expected to die does not have a meaningful, or as the Court put it, 'realistic,' opportunity of release."); *People v. Nunez,* 125 Cal.Rptr.3d 616, 624 (2011) (for a juvenile offender, "[a] term of years effectively denying any possibility of parole is not less severe than a LWOP [life without parole] term").

Nevertheless, at least for now, it is true there is a recognized split in the state and federal courts over whether *Graham* applies to extremely lengthy aggregate term of year sentences imposed or whether *Graham* proscribes only "LWOP." The

court of appeals acknowledged this "split of authority" and chose to follow what it believed were the better reasoned cases. *Rainer* at ¶¶57-59.

Significantly, since the court of appeals decided *Rainer* and since the State filed its opening brief, the Florida Supreme Court has resolved the then-existing split in its own state's courts of appeal and held that *Graham* prohibits the sentencing of juvenile nonhomicide offenders "to prison terms that ensure these offenders will be imprisoned without obtaining a meaningful opportunity to obtain future early release during their natural lives based on their demonstrated maturity and rehabilitation." *Henry v. State*, 175 So.3d 675, 680 (Fla. 2015). In so holding, the Florida Supreme Court wrote:

> In light of *Graham*, and other Supreme Court precedent, we conclude that the Eighth Amendment will not tolerate prison sentences that lack a review mechanism for evaluating this special class of offenders for demonstrable maturity and reform in the future because any term of imprisonment for a juvenile is qualitatively different than a comparable period of incarceration is for an adult. *See id.* at 70–71, 130 S.Ct. 2011 ("Under this sentence a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender.... This reality cannot be ignored."); *Roper*, 543 U.S. at 553, 125 S.Ct. 1183 ("Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment." (citing *Stanford*, 492 U.S. at 395, 109 S.Ct. 2969)).

The State string cites to several cases for the proposition that *Graham* should be narrowly read to apply only to sentences called "LWOP" and not to aggregate

sentences that have exactly the same practical effect, i.e., the juvenile offender will die in prison with no meaningful opportunity of release based on demonstrated maturity and rehabilitation, and these types of cases do continue to exist. However, several of the state's cited cases were decided before *Montgomery* and *Miller*, and are otherwise inapplicable and unpersuasive.[7] Of the nine cases the

[7] Two of the cases relied on by the state are federal decisions, which deny habeas relief and review state court decisions under a highly deferential standard of review. These federal decisions do not consider whether *Graham* should in fact apply to aggregate sentences, only whether the Supreme Court had expressly held that it did. *See, e.g., Bunch v. Smith*, 685 F.3d 546, 552 (6th Cir. 2012); *Goins v. Smith*, 2012 WL 3023306 (N.D. Ohio, 7.24.12)(unpublished). The type of deferential analysis conducted on federal habeas review is reflected in the following passage, which falls for short of an endorsement of the state's position:

> To be sure, Bunch's 89–year aggregate sentence may end up being the functional equivalent of life without parole. For this reason, Bunch argues that he will not be given the "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" called for in *Graham*. 130 S.Ct. at 2030. But in *Graham*, the Court said that a juvenile is entitled to such a "realistic opportunity to obtain release" if a state imposes a sentence of "life." *Id.* at 2034. That did not happen in this case. And since no federal court has ever extended *Graham's* holding beyond its plain language to a juvenile offender who received consecutive, fixed-term sentences, we cannot say that Bunch's sentence was contrary to clearly established federal law.

Notably, the partial premise for the sixth circuit's following decision no longer exists, since at least two federal courts have determined that *Graham* applies to lengthy term of years sentences, even under the highly deferential standard of review. *See McKinley v. Butler,* 809 F.3d 908 (7th Cir. 2016); *Moore v. Biter,* 725 F.3d 1184, 1191–92 (9th Cir.2013).

State cites, all were decided before *Montgomery,* and five were decided before *Miller*. This is significant because *Montgomery* and *Miller* have made even more clear than it was in *Graham* that the Eighth Amendment proscribes any juvenile sentencing that condemns an offender to life in prison without hope. Such sentences are constitutionally void, for all except possibly for a small minority of offenders convicted of murder.

D. Mr. Rainer's 112-year aggregate sentence does not afford him his Eighth Amendment right to a "meaningful opportunity of release based on demonstrated maturity and rehabilitation."

The State argues, in the alternative, that if *Graham* applies to a juvenile offender's consecutive offenses for multiple offenses, Mr. Rainer's 112-year sentence is constitutional as it provides a meaningful opportunity of release based on demonstrated maturity and rehabilitation. The State urges this Court to find compliance with *Graham* and *Miller* whenever a juvenile may at some point be parole eligible. To adopt the State's position, especially in the absence of a factually developed record, would be to endorse the illusory chance for release, not the constitutionally required one, i.e., realistic and meaningful opportunity for release based on demonstrated maturity and rehabilitation. This is because (1) Colorado's adult parole scheme is not structured in a way that provides the requisite meaningful opportunity and (2) any opportunity there is comes too late

for Mr. Rainer for it to comply with the meaningful opportunity contemplated by the Court in *Graham, Miller* and *Montgomery.*

The Supreme Court's recent Eighth Amendment jurisprudence, which affirmatively recognizes that children are constitutionally different for purposes of sentencing and cannot be treated as if they were adults, presents state courts with a challenge: the Supreme Court has mandated that children convicted of nonhomicide crimes (and the vast majority of children convicted of homicide crimes) must be given a realistic or "meaningful opportunity for release based on demonstrated maturity and rehabilitation." But the Court, consistent with principles of comity and federalism, has left to the individual states the ways in which to implement the "foundational principles" underlying its *Graham* and *Miller* decisions.

State courts, faced with this challenge, have tended toward two general types of reactions. Some courts have complained that the Court's guidance is vague at best and have resorted to giving *Graham* the narrowest possible construction. These courts have adopted the State's position: since *Graham* only mentions sentences of "LWOP" and does not expressly refer to consecutive sentences more multiple offenses, only LWOP is constitutionally disproportionate. *See State v. Brown*, 118 So. 3d 341-342 (Ga. 2013).

Other courts have recognized that it is their responsibility to grapple with what is required to enforce a juvenile offender's right to a meaningful opportunity for release based on demonstrated maturity and rehabilitation. These courts have considered what this requires in light of their state's law. These courts generally find, at a minimum, that a juvenile who has no opportunity to release within his expected lifespan is denied the required meaningful opportunity of release. *See, e.g., Rainer, supra; Henry, supra; Bear Cloud v. State*, 334 P.3d 132 (Wy. 2014); *Casiano v. Comm'r of Corrections*, 115 A.3d 1030 (Colo. 2015). Mr. Rainer urges this Court to follow these courts that have carefully considered the constitutional parameters and requirements of juvenile sentencing in deciding whether any given sentence afford the offender a meaningful opportunity of release.

The State is correct that *Graham* does not guarantee that a juvenile offender be released. *See id.* at 2030; *accord Rainer* at ¶51. But the State is not correct when it asserts that *Graham* "simply requires that the sentence at the time it is imposed, allow for the chance for release." AB at 30, citing *Gridine v. State*, 89 So.3d 909, 910 (Fla. App. 1st Dist. 2011).[8]

[8] As explained in the preceding section, the *Gridine* decision the State cites has been overruled, with the Florida Supreme Court now holding that a juvenile's 70-year aggregate sentence violates the Eighth Amendment as it does not provide a meaningful opportunity of release. *See Gridine v. State*, 175 So. 3d 672 (Fla. 2013), relying on *Henry v. State, supra.*

A "chance for release" is a far cry from the meaningful opportunity of release based on demonstrated maturity and rehabilitation the Eighth Amendment mandates in sentencing a juvenile. A chance for release is akin to clemency, which the Court itself recognized in *Graham* does not cure the Eighth Amendment defects in an LWOP sentence.

And even when a defendant technically may become parole eligible during their lifetime, mere parole eligibility does not necessarily equate with the required meaningful opportunity of release. *See, e.g., Hayden v. Keller*, ___ F.3d ___, 2015 WL 5773834 (E.D.N.C. 9.25.15). Consider, by way of example, a parole scheme in which persons convicted of violent offenses are never released, be it by practice or rule. A juvenile convicted of a violent offense and sentenced to a sentence of life with parole under such a system certainly would not, in fact have a meaningful, let alone realistic opportunity of release.

The State asserts that "the likelihood a defendant will receive parole is completely irrelevant to the determination of whether a sentence is constitutional." OB at 34. Mr. Rainer disagrees. If the prospect of parole is entirely remote and does not afford the accused a meaningful opportunity to be released, of course, it is relevant to the constitutionality of a juvenile offender's sentence. For the same reasons the prospect of clemency does not save a juvenile's life sentence, the mere

possibility of parole, which does not afford the offender a meaningful opportunity to obtain release, does not eliminate the Eighth Amendment violation.

Graham and *Miller* require that a realistic hope for release based on demonstrated rehabilitation must be restored for juvenile offenders: "prisoners like Montgomery must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored." *Id.* at 736-737.

Colorado's adult parole scheme does not satisfy *Graham's* requirement for a "meaningful opportunity for release based on demonstrated rehabilitation" because it does not take into account the fact that children are different and provides juvenile offenders with no "meaningful opportunity of release" when they are able to demonstrate maturation and rehabilitation. This is demonstrated by the law governing Colorado's adult parole systems, as set forth in detail in the Colorado Criminal Defense Bar's Amicus brief filed in support of respondent. Moreover, Colorado offenders have no right to release before the expiration of their entire sentence, let alone a right to release based on a finding of rehabilitation.

As a practical matter, a recognition by this Court that juveniles should be afforded a meaningful opportunity for release when they are able to demonstrate maturity and rehabilitation and a clarification as to when this should occur would

avoid unnecessary litigation over applicable actuarial tables and calculated life expectancies and, more importantly, would ensure equal treatment for all juveniles sentenced to lengthy sentences.[9] Moreover, it would implement the Supreme Court's directive that juveniles be given a realistic opportunity for release based on demonstrated rehabilitation. It might also inspire the Colorado legislature to enact legislation that assists in ensuring that juveniles are serving sentences that comport with the Eighth Amendment.

E. The State's argument that the court of appeals' expansion of *Graham* to an aggregate term-of-years sentences for multiple offenses does not apply retroactively is without merit.

Before addressing the substantive merits of the State's non-retroactivity argument, there are two preliminary matters.

First, the State never raised any question concerning the retroactivity of either *Graham* or the *Rainer* Court's application of *Graham* to Mr. Rainer's aggregate 112-year sentence before filing its opening brief on certiorari. Accordingly, the issue is not preserved for this Court's review. *But see People v.*

[9] *See, e.g.,* Amicus Curiae Brief in Support of Atorrus Rainer filed March 2, 2015 by the Office of the Colorado State Public Defender, Appendix (Report Prepared by Laurence Steinberg, Ph.D) (Dr. Steinberg, whose scholarly work on adolescent brain development and behavior has been relied on by the Supreme Court in *Roper, Graham* and *Miller*, explains why he believes the meaningful opportunity of release based on demonstrated maturity and rehabilitation requires review before the offender reaches his late forties).

Tate, 352 P.3d 959, 966, n.4 (Colo. 2015)(court elects to address non-retroactivity issue despite state's concession on appeal).

Second, the state filed its brief before the Supreme Court decided *Montgomery*, and it relies heavily on this Court's *Tate* decision, which held that *Miller* set forth only a procedural constitutional rule and, therefore, did not apply retroactively. *See* AB at 22, 23, 25, 27, 29, citing *Tate*, *supra*. In light of *Montgomery*, however, it is now clear that the *Tate* majority's retroactivity analysis was erroneous. Eight months after *Tate* was decided, the Supreme Court held that *Miller* did more than set forth a procedural rule and its substantive holding must be applied retroactively. *See Montgomery*, 136 S.Ct. at 735 (the individualized sentencing procedure mandated by *Miller* before a juvenile convicted of murder may be sentenced to LWOP "does not replace but rather gives effect to *Miller's* substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity"); *see also People v. Wilder*, 2016 WL 736122, ___ P.3d ___ (Colo. App. Feb. 25, 2016) ("The effect of the *Montgomery* decision is to overrule that portion of *Tate* that concluded that *Miller* is not to be applied retroactively.").

It is far from clear that the state would have raised its new retroactivity argument if it had filed its brief after *Montgomery* was decided, and to the extent

the state's non-retroactivity argument relies on this Court's retroactivity analysis and holding in *Tate*, the argument fails.

In any event, *Rainer* does not create a new constitutional rule that might be subject to retroactivity analysis; it simply applies *Graham* and *Miller* to the facts presented to hold Mr. Rainer's aggregate 112-year sentence violates the Eighth Amendment. There is no doubt that both *Graham* and *Miller* apply retroactively. *See Montgomery*. Accordingly, they apply in Mr. Rainer's case. *See Montgomery*, *supra*. Assuming *arguendo* that the application of *Graham* to multiple sentences that are the functional equivalent of a life in prison sentence is a "new rule," it too would be retroactive for the same reasons *Graham* and *Miller* are.

II. A Conviction for Attempted Murder is a Non-Homicide Offense Within the Meaning of *Graham v. Florida*, 130 S.Ct. 2011 (2010).

A. Issue preservation and Standard of Review

This issue was never argued and was not preserved by the state in the court of appeals. Accordingly, it should be deemed waived. If this Court elects to address this issue, Mr. Rainer agrees it involves a question of law.

B. Discussion

Whether a juvenile's offense is a nonhomicide (governed by *Graham's* categorical ban on LWOP sentences) or a homicide (governed by *Miller's* ban on

mandatory LWOP sentences) is of less significance now than when this Court granted the State's request for certiorari on the issue. The law is now clear that both *Graham* and *Montgomery* must be applied retroactively and that a sentence of life in prison with no hope of release is constitutionally barred for all juveniles convicted of nonhomicide offenses and for the "vast majority" of juveniles convicted of homicides. *See Montgomery, supra* at 734.

In any event, the answer to the question raised on certiorari is clear. Attempted murder is not a homicide offense. The term "homicide" is unambiguous and does not include within its ambit anything other than an actual killing. As a manner of common understanding, Colorado statute, and the Supreme Court's Eighth Amendment jurisprudence, a homicide requires, at a minimum, the killing of one human being by another, and attempted murder does not. *See* §18-3-101(1), C.R.S; s*ee also Kennedy v. Louisiana*, 554 U.S. 407, 437-438 (2008).

Graham itself makes clear that the contrast between nonhomicide offenses and homicides is that the latter require the taking of a human life:

> The Court has 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. [multiple citations omitted]. There is a line "between homicide and other serious violent offenses against the individual." *Kennedy*, 554 U.S. [407, 438 (2008)]. Serious 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.'" *Id.*, at ——, 128 S.Ct., at 2660 (quoting *Coker*, 433 U.S., at 598, 97 S.Ct. 2861 (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). Although an offense like robbery or rape is "a serious crime deserving serious punishment," *Enmund, supra*, at 797, 102 S.Ct. 3368, those crimes differ from homicide crimes in a moral sense.

Graham, 130 S. Ct. at 2027; *see also Gridine v. State*, 175 So.3d 672, 674 (Fla. 2015) (attempted murder is not a homicide offense and 70-year aggregate sentence violated *Graham*), *rev'g* 93 So.3d 360 (Fla. 1st Dist. 2012).

CONCLUSION

Mr. Rainer respectfully asks this Court to affirm the court of appeals decision vacating his sentence and remanding his case so that the sentencing court may take into account his youth at the time of his offenses and sentence him to a constitutional sentence that will afford him a meaningful opportunity for release based on his demonstrated maturity and rehabilitation.

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CERTIFICATE OF SERVICE

I certify that, on March 21, 2016 a copy of this Answer Brief was electronically served through ICCES on Rebecca A. Adams, Senior Assistant Attorney General.

/s/ Kathleen A. Lord

2013 WL 1490107

Colorado Court of Appeals,
Div. VI.

The PEOPLE of the State of Colorado,
Plaintiff–Appellee,
v.
Atorrus Leon RAINER, Defendant–Appellant.

No. 10CA2414
|
Announced April 11, 2013
|
Rehearing Denied May 9, 2013

Synopsis
Background: Defendant who was 17 years old when he burglarized an apartment and shot two victims filed a fifth motion for postconviction relief, arguing that his aggregate sentence of 112 years for two counts of attempted first-degree murder and two counts of first-degree assault violated the Eighth Amendment. The District Court, City and County of Denver, Robert L. McGahey Jr., J., denied the motion. Defendant appealed.

Holdings: The Court of Appeals, Loeb, J., held that:

[1] the rule of *Graham v. Florida* that the Eighth Amendment prohibits the imposition of a life-without-parole sentence on a juvenile who did not commit a homicide is a new substantive rule and, accordingly, applies retroactively to all cases involving juvenile offenders under 18 years of age at the time of the offense, including those cases on collateral review;

[2] defendant showed a justifiable excuse for failing to file his postconviction motion within the statutory limitations period of three years after his convictions became final;

[3] the postconviction motion, although it was defendant's fifth, was not successive; and

[4] as a matter of first impression, the aggregate sentence of 112 years did not offer defendant an opportunity to obtain release before the end of his expected life span and, therefore, constituted the functional equivalent of a sentence of life without the possibility of parole and thereby violated the Eighth Amendment.

Order reversed, sentence vacated, and case remanded for resentencing.

City and County of Denver District Court No. 00CR630, Honorable Robert L. McGahey, Jr., Judge

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Opinion

Opinion by JUDGE LOEB

***1** ¶ 1 Defendant, Atorrus Leon Rainer, appeals the trial court's order denying his Crim. P. 35(c) motion, which argued that his 112–year sentence is unconstitutional, pursuant to *Graham v. Florida*,—— U.S. ——, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010). As a matter of first impression, we conclude that, under the circumstances here, Rainer's aggregate sentence is functionally a life sentence without parole and, thus, constitutes cruel and unusual punishment under the Eighth Amendment. Accordingly, we reverse the order, vacate the sentence, and remand for resentencing.

I. Procedural History and Background

¶ 2 In 2000, when he was seventeen years old, Rainer burglarized an apartment, stealing a stereo. During the incident, he shot two victims multiple times with a handgun, seriously injuring them and leaving them in critical condition. Rainer was arrested and was charged and tried as an adult in the district court, pursuant to Ch. 283, sec. 1, § 19–2–517(1)(a)(II)(A), 1996 Colo. Sess. Laws 1640.

¶ 3 Following a jury trial in 2001, as pertinent here, the jury found Rainer guilty 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 sentence enhancement counts for crimes of violence.

¶ 4 At the sentencing hearing, the parties agreed that Rainer was subject to mandatory statutory sentencing requirements under the then applicable statutory framework for crimes of violence, with a sentencing range of 72 to 224 years. Rainer's counsel argued for the minimum sentence under the statutory sentencing range (72 years) based on Rainer's age, low IQ, learning disability, and family situation. The prosecution asked the court to impose the maximum allowed aggregate sentence of 224 years. After hearing argument and statements from the victims and their family members, the trial court sentenced Rainer to the Department of Corrections for the maximum sentences statutorily allowed: 48 years for attempted first degree murder of each victim, 32 years for first degree assault of each victim, 32 years for first degree burglary, and 32 years for aggravated robbery. The court ordered the sentences to run consecutively for a total prison term of 224 years, reasoning that this was the appropriate sentence given that Rainer had used a deadly weapon to inflict serious lifetime injuries on the victims.

¶ 5 Rainer filed a direct appeal, and in 2004, a division of this court affirmed the convictions but vacated the consecutive sentences for the first degree assault and attempted murder convictions, remanding with directions to impose concurrent rather than consecutive terms on those counts. *People v. Rainer*, (Colo.App. No. 01 CA 1401, Feb. 5, 2004) 2004 WL 1120876 (not published pursuant to C.A.R. 35(f)). The mandate issued on June 13, 2004. On remand, the trial court resentenced Rainer for these counts to run concurrently rather than consecutively, and, consequently, reduced Rainer's original sentence of 224 years to 112 years. Also on remand, Rainer filed a motion for reconsideration of sentence and modification of mandatory sentence for a violent crime, which the trial court denied.

***2** ¶ 6 In January 2005, Rainer filed a motion for postconviction relief pursuant to Crim. P. 35(a) and (c), arguing that his sentence was illegal under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). The trial court denied the motion without a hearing. Rainer appealed, and a division of this court dismissed the appeal as untimely filed.

¶ 7 Rainer then filed a Crim. P. 35(c) motion for postconviction review of the trial court's denial of his motion to suppress statements. The trial court summarily denied the motion, and, on appeal, a division of this court affirmed. *People v. Rainer*, (Colo.App. No. 06CA1765, Feb. 28, 2008) 2008 WL 525686 (not published pursuant to C.A.R. 35(f)).

¶ 8 In 2008, Rainer filed a third motion for Crim. P. 35(c) postconviction relief, based on alleged ineffective assistance of counsel and various trial court errors. The trial court denied the motion on the basis that it did not have jurisdiction, because the mandate had not yet issued from Rainer's previous appeal. Rainer refiled this motion four months later after mandate had issued, and the trial court summarily denied it.

¶ 9 In March 2009, Rainer filed yet another motion for postconviction relief based on ineffective assistance of counsel, which the trial court denied. On appeal, a division of this court affirmed, holding that Rainer's ineffective assistance of counsel claims were successive. *People v. Rainer*, (Colo.App. No. 09CA0071, Feb. 11, 2010) 2010 WL 457332(not published pursuant to C.A.R. 35(f)).

¶ 10 In August 2010, after the Supreme Court's decision in *Graham*, Rainer filed another motion for postconviction relief pursuant to Crim. P. 35(c). He argued that, in light of *Graham's* newly established constitutional prohibition on sentences to life without parole for juvenile offenders who did not commit homicide, his 112–year sentence was unconstitutional. Specifically, Rainer asserted that his aggregate term-of-years sentence was the functional equivalent of a life sentence without the possibility of parole, and thereby constituted cruel and unusual punishment in violation of the Eighth Amendment, pursuant to *Graham*. The prosecution did not file a response to Rainer's motion.

¶ 11 In October 2010, the trial court denied the motion, ruling that Rainer was not entitled to relief under *Graham* for two reasons:

> First of all, Defendant's sentence is not of the same nature as the sentence prohibited in *Graham* [life without parole for a nonhomicide juvenile]. Additionally, even if the Defendant's sentence was of the same nature of that discussed in *Graham*, he would still not be entitled to relief because the rule created in *Graham* will not be

applied retroactively.

¶ 12 This appeal followed.

II. Preliminary Issues

¶ 13 We first must address three interrelated preliminary issues before considering the merits of Rainer's constitutional claim: (1) whether *Graham* applies retroactively to Rainer's sentence; (2) whether Rainer's motion is time-barred under section 16–5–402, C.R.S.2012; and (3) whether his motion is successive under Crim. P. 35(c)(3)(VII). As discussed below, we conclude *Graham* applies retroactively to Rainer's sentence and that his Crim. P. 35(c) motion is neither time-barred nor successive.

A. Retroactivity

***3** ¶ 14 Rainer contends that the trial court erred in ruling that *Graham* does not apply retroactively to his sentence. We agree.

[1]¶ 15 The summary denial of a Crim. P. 35(c) motion for postconviction relief without a hearing presents a question of law we review de novo. *People v. Gardner*, 250 P.3d 1262, 1266 (Colo.App.2010).

¶ 16 Rainer argued in his Crim. P. 35(c) motion that the rule announced in *Graham* should be applied retroactively to his sentence.[1] The trial court expressly rejected Rainer's argument.

[1] As noted, the prosecution did not respond to Rainer's motion in the trial court, nor did the People address the retroactivity issue in their answer brief on appeal. At oral argument, the People conceded that *Graham* applies retroactively to Rainer's sentence. Because the trial court ruled against Rainer on retroactivity, we address this issue notwithstanding the People's concession.

¶ 17 In its ruling, the trial court relied on *Edwards v. People*, 129 P.3d 977, 980–83 (Colo.2006), which adopted the analytical framework for retroactivity set out in *Teague v. Lane*, 489 U.S. 288, 307, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). The trial court here stated:

> According to *Teague*, [a] new constitutional rule[ ] of criminal procedure generally should not be applied retroactively to cases on collateral review unless (1) it places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe, or (2) it requires the observance of "those procedures that are implicit in the concept of ordered liberty." [489 U.S. at 307, 109 S.Ct. 1060.]
>
> The first exception is not relevant because the *Graham* holding does not decriminalize a particular type of conduct.
>
> To fall within the second exception, a new rule must fulfill two criteria: (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 a proceeding." *Edwards*, 129 P.3d at 987 (quoting *Tyler v. Cain*, 533 U.S. 656, 665, 121 S.Ct. 2478, 150 L.Ed.2d 632 (2001)).
>
> Here, Defendant's sentence in no way diminished the accuracy of his conviction or the fairness of the proceeding. Because the rule created in *Graham* does not fall into either one of the categories adopted in *Teague*, it should not be applied retroactively.

¶ 18 We disagree with the trial court's analysis. To the contrary, we conclude that *Edwards* does not control here because that case applies only to new constitutional rules of criminal procedure, and, in our view, *Graham* created a new substantive rule of constitutional law.

[2] [3]¶ 19 "New substantive rules generally apply retroactively," and include rules that apply when a defendant "faces a punishment that the law cannot impose on him." *Schriro v. Summerlin*, 542 U.S. 348, 351–52, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004). A rule is substantive rather than procedural "if it alters the range of conduct or the class of persons that the law punishes." *Id.* at 352, 124 S.Ct. 2519.

¶ 20 The rules announced by the Supreme Court in *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) (barring the death penalty for mentally retarded defendants), and *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (barring the death penalty for juveniles), have consistently been applied retroactively as new substantive rules. *See In re Sparks*,657 F.3d 258, 261–62 (5th Cir.2011) (per curiam) ("the Supreme Court's decision in *Atkins* barring the execution of the mentally retarded has been given retroactive effect, as has the Court's decision in *Roper*" (citation omitted)); *Little v. Dretke*, 407 F.Supp.2d 819,

824 (W.D.Tex.2005); *Baez Arroyo v. Dretke*, 362 F.Supp.2d 859, 883 (W.D.Tex.2005), *aff'd sub nom. Arroyo v. Quarterman*, 222 Fed.Appx. 425 (5th Cir.2007); *see also* Cara H. Drinan, *Graham on the Ground*, 87 Wash. L.Rev. 51, 64–67 n. 108 (2012) (listing cases that have retroactively applied *Roper* and *Atkins*).

***4** [4]¶ 21 Similarly, we conclude that the rule announced in *Graham* is a new substantive rule that should be applied retroactively to all cases involving juvenile offenders under the age of eighteen at the time of the offense, including those cases on collateral review. Like the rules in *Atkins* andRoper, Graham categorically recognizes "a punishment that the law cannot impose upon [a defendant]," *Schriro*, 542 U.S. at 352, 124 S.Ct. 2519, specifically, that it is categorically unconstitutional for nonhomicide juvenile offenders to face a sentence of life imprisonment without parole. *SeeIn re Moss*, 703 F.3d 1301, 1302 (11th Cir.2013) (*Graham* set out a new rule of constitutional law); *In re Sparks*, 657 F.3d at 262 (*Graham* states a new and retroactive rule of constitutional law similar to *Atkins* and *Roper*).

¶ 22 Even if *Teague* applied here, we would conclude that *Graham* applies retroactively because it also falls under the first exception set forth in *Teague*, which "should be understood to cover ... rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Penry v. Lynaugh*, 492 U.S. 302, 330, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), *abrogated on other grounds byAtkins*, 536 U.S. at 321, 122 S.Ct. 2242; *see alsoIn re Moss*, 703 F.3d at 1303 (*Graham* applies retroactively because it "prohibit[s] a certain category of punishment for a class of defendants because of their status or offense" (quoting *Penry*, 492 U.S. at 330, 109 S.Ct. 2934)); *In re Sparks*, 657 F.3d at 262 ("*Atkins* and *Roper* both 'prohibit[ ] a certain category of punishment for a [certain] class of defendants because of their status or offense'; so too does *Graham*, which bars the imposition of a sentence of life imprisonment without parole on a juvenile offender." (citation omitted) (quoting *Penry*, 492 U.S. at 330, 109 S.Ct. 2934)); *Loggins v. Thomas*, 654 F.3d 1204, 1221 (11th Cir.2011) (same).

¶ 23 Accordingly, we conclude that *Graham* applies retroactively to Rainer's case on collateral review because it introduces a substantive new constitutional rule and because it falls under the first *Teague* exception.

B. Timeliness

[5]¶ 24 On appeal, the People contend for the first time that Rainer's motion is time-barred under section 16–5–402(1), C.R.S.2012 and that Rainer cannot establish justifiable excuse or excusable neglect for the untimely filing of his motion. Rainer acknowledges that his motion is untimely, but contends that, because his motion is based on the new substantive rule of law announced in *Graham*, he has established justifiable excuse and, thus, his motion should be considered on its merits. We agree with Rainer.

[6]¶ 25 Whether a motion is untimely, or can be considered on the merits based on justifiable excuse or excusable neglect, is a matter of law we review de novo. *Close v. People*, 180 P.3d 1015, 1019 (Colo.2008).

¶ 26 The parties agree that Rainer's motion is properly characterized as a Crim. P. 35(c) motion. Section 16–5–402(1) imposes a three-year time limitation after the final judgment for a collateral attack on a defendant's non-class 1 felony convictions. Here, Rainer's motion was filed approximately six years after his conviction became final when the mandate issued from his direct appeal. *People v. Hampton*, 876 P.2d 1236, 1238 (Colo.1994).

[7] [8]¶ 27 However, section 16–5–402(2)(d), C.R.S.2012, provides an exception where "the failure to seek relief within the [three-year] period was the result of circumstances amounting to justifiable excuse or excusable neglect." "[T]he applicability of the justifiable excuse or excusable neglect exception must be evaluated by balancing the interests under the facts of a particular case so ... that a defendant [has] the meaningful opportunity required by due process to challenge his conviction." *People v. Wiedemer*, 852 P.2d 424, 441 (Colo.1993). If a defendant's motion for postconviction relief is untimely, the defendant bears the burden of establishing justifiable excuse or excusable neglect. *People v. Abad*, 962 P.2d 290, 291 (Colo.App.1997).

***5** [9]¶ 28 A reviewing court has the discretion to address the merits of an untimely motion for postconviction relief if the motion is premised on newly arising authority of constitutional magnitude. *People v. Gardner*, 55 P.3d 231, 232 (Colo.App.2002) (citing *People v. Kilgore*, 992 P.2d 661 (Colo.App.1999); *People v. Chambers*, 900 P.2d 1249 (Colo.App.1994)).

¶ 29 Accordingly, because *Graham* established a new rule of substantive constitutional law which was not previously available to Rainer before 2010, we conclude that he has established justifiable excuse under section 16–5–402(2)(d), and we choose to address his motion on its merits. *Gardner*, 55 P.3d at 232.

¶ 30 Contrary to the People's argument, Rainer had no legal basis for an Eighth Amendment challenge to his sentence prior to the announcement of *Graham*. There was no Colorado authority or decision of the United States Supreme Court prior to *Graham* that provided a juvenile convicted and tried as an adult with a constitutional right to challenge the imposition of a life sentence with or without the possibility of parole. Indeed, contrary to the dictates of *Graham*, existing case law in Colorado expressly precluded a court from using the age of a defendant as a factor in conducting a proportionality review of a defendant's sentence. *See* *Valenzuela v. People*, 856 P.2d 805, 809 (Colo.1993); *People v. Fernandez*, 883 P.2d 491, 495 (Colo.App.1994).

¶ 31 Thus, we hold that Rainer's motion is not time-barred under section 16–5–402(1).

C. Successiveness

[10]¶ 32 We also reject the People's argument, again made for the first time on appeal, that we should decline to address Rainer's motion on its merits because the motion is successive.

¶ 33 A postconviction motion is properly denied as successive if it alleges claims that were raised and resolved, or that could have been presented, in a prior appeal or postconviction proceeding. *See* Crim. P. 35(c)(3)(VI)-(VII); *People v. Rodriguez*, 914 P.2d 230, 249 (Colo.1996). However, Crim. P. 35(c)(3)(VII)(c) provides an exception for "[a]ny claim based on a new rule of constitutional law that was previously unavailable, if that rule should be applied retroactively to cases on collateral review." Determining whether a claim falls under this exception requires a three-part inquiry: (1) whether the conviction is final; (2) whether the rule is new; and (3) if the rule is new, whether the rule meets the exceptions to nonretroactivity. *People v. Wenzinger*, 155 P.3d 415, 420 (Colo.App.2006).

¶ 34 It is undisputed that Rainer's conviction became final when the mandate issued from his direct appeal in June 2004. Further, as we have discussed and concluded above, *Graham* established a new rule of substantive law which should be applied retroactively. Thus, we further conclude that Rainer's claim is not successive.

III. Merits

¶ 35 Rainer contends that the Eighth Amendment's prohibition of a sentence to life without parole for juvenile nonhomicide offenders, which was established in *Graham*, also applies to sentences that are the functional equivalent of a life sentence without parole imposed on juveniles who commit a nonhomicide offense. Thus, Rainer argues that his 112–year sentence is the functional equivalent of life without parole because it does not afford him any "meaningful opportunity to obtain release" within his lifetime, as required under *Graham*,—— U.S. at ——, ——, 130 S.Ct. at 2030, 2033.

***6** ¶ 36 In support of his contention, Rainer argues that, although he will be technically first eligible for parole in 2057, after serving one-half of his 112–year sentence pursuant to section 17–22.5–403, C.R.S.2012, this possibility does not afford him a meaningful opportunity for release. Specifically, the record shows that in 2057, Rainer will be 75 years of age. Based on statistics from the Centers for Disease Control, Rainer notes that he has a life expectancy of only between 63.8 years and 72 years, and, thus, he argues, he will likely die while still incarcerated. Furthermore, Rainer notes that even if he is still alive when he first becomes eligible for parole, he is unlikely to receive parole at that time, because, according to the Colorado State Board of Parole, almost ninety percent of those eligible for discretionary parole are denied parole when they first become eligible. Accordingly, he asserts that his aggregate sentence is the functional equivalent of life in prison without any realistic opportunity for release, and is, thus, categorically prohibited as cruel and unusual punishment under *Graham.*

¶ 37 Rejecting Rainer's argument, the trial court concluded that *Graham* does not apply to Rainer's sentence:

> The final holding in *Graham* states that "[a] [s]tate need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term." [—— U.S. at ——, 130 S.Ct. at 2034.] Defendant's sentence is in compliance with that holding.... Here, Defendant has an opportunity to be released on parole in 2057, fifty-six years before his sentence is set to expire. Defendant points out that even if he were released on parole at the first possible opportunity, he would still be seventy-five years old by the time he was released. This, however, does not diminish the fact that the Defendant does have an opportunity to be released well before the end of his term.

¶ 38 We disagree with the trial court's analysis. Rather, we conclude that Rainer's aggregate sentence does not offer him, as a juvenile nonhomicide offender, a "meaningful opportunity to obtain release" before the end of his expected life span and, thus, constitutes the functional equivalent of a life sentence without parole and is unconstitutional under *Graham* and its reasoning.

A. Standard of Review

[11] [12] [13]¶ 39 "A trial court has broad discretion over sentencing decisions, and will not be overturned absent a clear abuse of that discretion. However, reviewing courts must pay particular attention to lower courts' applications of legal standards to the facts when defendants' constitutional rights are at stake." *Lopez v. People*, 113 P.3d 713, 720 (Colo.2005) (citation omitted); *see also**People v. Al–Yousif*, 49 P.3d 1165, 1169 (Colo.2002). Therefore, review of constitutional challenges to sentencing determinations is de novo. *Lopez*, 113 P.3d at 720.

B. Relevant Supreme Court Eighth Amendment Jurisprudence Prior to *Graham*

[14] [15]¶ 40 The Eighth Amendment to the United States Constitution prohibits cruel and unusual punishment. *Graham*,—— U.S. at ——, 130 S.Ct. at 2021.[2] "To determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to 'the evolving standards of decency that mark the progress of a maturing society.' " *Id.* (quoting *Estelle v. Gamble*, 429 U.S. 97, 102, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976)).

[2] *See also*Colo. Const. art. II, § 20. The parties have argued this case exclusively under the Eighth Amendment to the United States Constitution, and, thus, we limit our analysis accordingly.

[16]¶ 41 "Embodied in the Constitution's ban on cruel and unusual punishments is the 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.' " *Id.* (quoting *Weems v. United States*, 217 U.S. 349, 367, 30 S.Ct. 544, 54 L.Ed. 793 (1910)).

¶ 42 The Supreme Court's cases addressing the proportionality of sentences fall within two general classifications: the first is concerned with the particular circumstances of the case and whether the defendant's sentence for a term of years is grossly disproportionate given the particular offense. *Id.* at —— – ——, 130 S.Ct. at 2021–22; *see also**Harmelin v. Michigan*, 501 U.S. 957, 1005, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991); *Close v. People*, 48 P.3d 528, 536–38 (Colo.2002) (noting that Colorado has adopted Justice Kennedy's "rule of *Harmelin* " regarding mechanisms for proportionality reviews). The second classification of cases is concerned with categorical rules as applied to either groups of offenses or groups of offenders. *Graham*,—— U.S. at ——, 130 S.Ct. at 2022. For example, Supreme Court categorical rulings related to categories of offenses prohibit the imposition of the death penalty for nonhomicide crimes against individuals. *Id.* (citing *Kennedy v. Louisiana*, 554 U.S. 407, 128 S.Ct. 2641, 171 L.Ed.2d 525 (2008)). Categorical rulings related to categories of offenders prior to *Graham* prohibited the death penalty for defendants who committed their crimes before the age of eighteen, *Roper*, 543 U.S. at 575, 125 S.Ct. 1183, or whose intellectual functioning is in a low range, *Atkins*, 536 U.S. at 321, 122 S.Ct. 2242.

***7** ¶ 43 In the cases adopting categorical proportionality rules, the Court first considers "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. *Roper*, 543 U.S. at 563, 125 S.Ct. 1183. In this phase of the analysis, the Court has regularly relied on social sciences data and statistics to discern "society's evolving standards of decency." *Id.* at 560–77, 125 S.Ct. 1183 (survey of rulings relying on sociological studies, behavioral sciences, and review of national and international practices). Next, guided by "the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose," the Court determines whether the punishment in question violates the Constitution. *Graham*, —— U.S. at ——, 130 S.Ct. at 2022 (quoting *Kennedy*, 554 U.S. at 421, 128 S.Ct. 2641).

¶ 44 Under this analytical framework, the Court's Eighth Amendment jurisprudence has evolved steadily toward more protection for incompetent and juvenile offenders; from its 1989 holding in *Penry* that the Eighth Amendment did not mandate a categorical exemption from the death penalty for the mentally disabled, to the opposite conclusion in *Atkins* in 2002; and from its position in *Stanford v. Kentucky*, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989), that it was not a violation

of the Eighth Amendment to execute a juvenile offender who was older than fifteen when he or she committed a capital crime, to the ruling in *Roper* that it is unconstitutional to impose the death penalty on offenders who were under the age of eighteen at the time of their offense.

¶ 45 As pertinent here, in *Roper*, the Court redefined its categorical prohibition against the death penalty for juveniles based in large part on social science research indicating that youth have lessened culpability and are less deserving of the most severe punishments. 543 U.S. at 569–75, 125 S.Ct. 1183. The Court stated that juvenile offenders are fundamentally different from adults for purposes of sentencing for three reasons: they have "[a] lack of maturity and an underdeveloped sense of responsibility"; they "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure"; and their characters are "not as well formed." *Id.* at 569–70, 125 S.Ct. 1183 (quoting in part *Johnson v. Texas*, 509 U.S. 350, 367, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993)). Because of these characteristics, the Court noted, "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Id.* at 573, 125 S.Ct. 1183.

C. *Graham*

¶ 46 *Graham* is the first Eighth Amendment case where the Court considered "a categorical challenge to a term-of-years sentence" (as opposed to the death penalty). —— U.S. at ——, 130 S.Ct. at 2022. In *Graham*, the Court used the same categorical proportionality analysis employed in *Atkins*, *Roper*, and *Kennedy*, extending it beyond the death penalty to sentences of life without parole for juveniles who have committed nonhomicide offenses.

¶ 47 In *Graham*, sixteen-year-old Terrance Graham was charged with armed burglary and attempted armed robbery of a restaurant in Florida. *Id.* at ——, 130 S.Ct. at 2018. Graham pleaded guilty to both charges and was convicted pursuant to a plea agreement. *Id.* Under the agreement, the trial court withheld adjudication of guilt as to both charges and sentenced Graham to concurrent three-year terms of probation with jail time. *Id.*

¶ 48 Less than six months later, when Graham was seventeen years old, Graham was arrested again after allegedly committing a home invasion and avoiding arrest. *Id.* at ——, 130 S.Ct. at 2018–19. His probation officer filed an affidavit asserting that he had violated probation by committing crimes, possessing a firearm, and associating with persons engaged in criminal activity. *Id.* at ——, 130 S.Ct. at 2019. About a year later, he appeared before the trial court, where he maintained that he had no involvement in the home invasion robbery. *Id.* However, Graham admitted violating his probation by fleeing arrest, even though the court underscored that the admission could expose him to a life sentence based on his previous charges. *Id.*

***8** ¶ 49 After a hearing, the trial court found that Graham had violated his probation by committing a home invasion robbery, possessing a firearm, associating with persons engaged in criminal activity, and fleeing. *Id.* At the sentencing hearing, the trial court had the statutory option to sentence Graham to between five years and life. *Id.* The trial court sentenced Graham to a life sentence, the maximum sentence authorized by law, explaining,

> I don't know why it is that you threw your life away. I don't know why.
>
> But you did....
>
> [I]n a very short period of time you were back before the Court on a violation of this probation, and then here you are two years later standing before me....
>
> ... I don't understand why you would be given such a great opportunity to do something with your life and why you would throw it away.
>
> The only thing that I can rationalize is that you decided that this is how you were going to lead your life and that there is nothing that we can do for you.... We can't do anything to deter you....
>
> ... [I]f I can't do anything to help you, if I can't do anything to get you back on the right path, then I have to start focusing on the community and trying to protect the community from your actions.

Id. at ——, 130 S.Ct. at 2019–20. Because Florida had abolished its parole system, a life sentence gave Graham no possibility of release unless he was granted executive clemency. *Id.*

¶ 50 Graham filed a motion challenging his sentence under the Eighth Amendment. *Id.* The First District Court of Appeal of Florida affirmed, concluding that Graham's sentence was not grossly disproportionate to his crimes and that he was incapable of rehabilitation. *Id.* The Florida Supreme Court denied review, and the United

States Supreme Court granted certiorari. *Id.*

¶ 51 The Court held that "for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole." *Id.* at ——, 130 S.Ct. at 2030. The Court explained:

> A State is not required to guarantee eventual freedom to a juvenile offender convicted of nonhomicide crime. What the State must do, however, is give defendants like Graham *some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation*. It is for the State, in the first instance, to explore the means and mechanisms for compliance. It bears emphasis, however, that while the Eighth Amendment forbids 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.... The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. *It does forbid States from making the judgment at the outset that those offenders never will be fit to reenter society.*

Id. at ——, 130 S.Ct. at 2030 (emphasis added).

¶ 52 The Court further supported its adoption of a new categorical proportionality rule by stating, "[The rule] gives all juvenile nonhomicide offenders *a chance to demonstrate maturity and reform.* The juvenile should not be deprived *of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential.*" *Id.* at ——, 130 S.Ct. at 2032 (emphasis added).

¶ 53 As in its previous Eighth Amendment jurisprudence, the *Graham* Court relied heavily on social science research and principles. First, the opinion conducted a statistical survey of life without parole sentences for juvenile nonhomicide offenders, and concluded, "The sentencing practice now under consideration is exceedingly rare. And 'it is fair to say that a national consensus has developed against it.' " *Id.* at ——, 130 S.Ct. at 2026 (quoting *Atkins*, 536 U.S. at 316, 122 S.Ct. 2242). The Court then relied on the social and hard sciences when considering whether the challenged sentencing practice served "legitimate penological goals." *Id.* It specifically adopted the analysis from *Roper* that juvenile offenders are fundamentally different from adults for purposes of sentencing because (1) they have "a lack of maturity and an underdeveloped sense of responsibility"; (2) they "are more vulnerable or susceptible to negative influences and outside pressures"; and (3) their characters are "not as well formed." *Id.* (quoting *Roper*, 543 U.S. at 569–70, 125 S.Ct. 1183). The Court in *Graham* noted, "No recent data provide reason to reconsider the Court's observations in *Roper* about the nature of juveniles":

> ***9** [D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence. Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of "irretrievably depraved character" than are the actions of adults. *Roper*, 543 U.S. at 570, 125 S.Ct. 1183.... It remains true that "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." [*Id.*]

—— U.S. at ——, 130 S.Ct. at 2026–27 (additional citation omitted). The Court extrapolated the reasoning in *Roper* and applied it to juvenile offenders who commit nonhomicide crimes, stating, "[W]hen compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability. The age of the offender and the nature of the crime each bear on the analysis." *Id.* at ——, 130 S.Ct. at 2027.

¶ 54 With respect to a life without parole sentence, the Court stated that it is "an especially harsh punishment for a juvenile," which "means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days." *Id.* at —— – ——, 130 S.Ct. at 2027–28 (quoting *Naovarath v. State*,105 Nev. 525, 779 P.2d 944, 944 (1989)). The Court held that such a sentence cannot be justified by the valid penological goals of retribution, deterrence, incapacitation, and rehabilitation, given the unique psychological characteristics of juvenile offenders. *Id.* at —— – ——, 130 S.Ct. at 2028–30.

D. Subsequent Case Law Interpreting and Applying *Graham*

¶ 55 The parties have not cited any published Colorado appellate decisions discussing or applying *Graham*.[3] However, the Supreme Court and a number of other federal and state courts have issued opinions discussing the scope of *Graham* 's holding and reasoning.

[3] In *People v. Lucero*, 2013 COA 53, ¶¶ ——, —— P.3d —— (Colo.App.2013), also announced today, another division of this court declined to address and resolve the constitutional issues we consider here, concluding, on the record in that case, that the defendant's sentence was not a de facto sentence to life without parole because he will be eligible for parole consideration at age fifty-seven, well within his natural lifetime.

¶ 56 Since *Graham*, the Supreme Court has continued on its decisional trend of providing more constitutional protections for juvenile offenders. In *Miller v. Alabama*,—— U.S. ——, —— – ——, 132 S.Ct. 2455, 2457–58, 183 L.Ed.2d 407 (2012), the Court explicitly extended the reasoning of *Roper* and *Graham*, holding that a mandatory sentence of life imprisonment without parole for juvenile homicide offenders also violates the Eighth Amendment's prohibition on cruel and unusual punishment. *See**People v. Banks*,2012 COA 157, ¶¶121–23, —— P.3d —— (relying on *Miller* and holding that Colorado's statutory scheme mandating life without parole sentences for first degree murder was unconstitutional as applied to juveniles); *see also**J.D.B. v. North Carolina*,—— U.S. ——, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011) (a child's age properly informs the *Miranda* custody analysis).

¶ 57 Other federal and state courts have also grappled with the full implications of the Court's holding in *Graham*. *See* Michelle Marquis, Note, *Graham v. Florida: A Game–Changing Victory for Both Juveniles and Juvenile–Rights Advocates*, 45 Loy. L.A. L.Rev. 255, 274 (2011) (noting that some scholars contend that *Graham* has "completely altered the landscape of the Court's Eighth Amendment jurisprudence"). Specifically, and as pertinent here, a number of cases nationwide have considered whether the holding in *Graham* should be extended to apply to term-of-year sentences which are materially indistinguishable from life without parole, and the rulings in those cases reveal a split of authority on that issue.[4] Because Colorado has not yet addressed this issue, a summary of these rulings in other jurisdictions helps to inform our analysis.

[4] The division in *Lucero* acknowledged this split of authority, but declined to address the constitutional issue whether *Graham* "applies only to actual life without parole sentences, not de facto life without parole sentences." *Lucero*, ¶ ___.

***10** ¶ 58 In several cases, courts have read *Graham* narrowly and have either explicitly or implicitly rejected the argument that *Graham* applies to lengthy term-of-year sentences that are the functional equivalent of life without parole. *SeeBunch v. Smith*, 685 F.3d 546, 550 (6th Cir.2012) (upholding an Ohio state court's determination that an eighty-nine-year sentence for a juvenile nonhomicide offender did not violate the Eighth Amendment on the basis that *Graham* does not clearly apply to aggregate sentences that amount to the practical equivalent of life without parole); *Goins v. Smith*, 2012 WL 3023306, at *6 (N.D.Ohio No. 4:09–CV–1551, July 24, 2012) (unpublished opinion and order) ("even life-long sentences for juvenile non-homicide offenders do not run afoul of *Graham* 's holding unless the sentence is technically a life sentence without the possibility of parole"); *State v. Kasic*, 228 Ariz. 228, 265 P.3d 410, 415–16 (Ariz.Ct.App.2011) (concurrent and consecutive prison terms totaling 139.75 years for a nonhomicide child offender furthered Arizona's penological goals and was not unconstitutional under *Graham*); *Henry v. State*, 82 So.3d 1084, 1089 (Fla.Dist.Ct.App.2012) (*review granted* Nov. 6, 2012) (based on a formalistic reading of *Graham*, holding that a nonhomicide child offender's ninety-year sentence is not unconstitutional); *Walle v. State*, 99 So.3d 967, 972–73 (Fla.Dist.Ct.App.2012) (refusing to extend *Graham* to aggregate sentences totaling ninety-two years on reasoning that *Graham* applies only to single sentences); *Adams v. State*,288 Ga. 695, 707 S.E.2d 359, 365 (2011) (child's seventy-five-year sentence and lifelong probation for child molestation did not violate *Graham*); *People v. Taylor*,2013 IL App (3d) 110876, 368 Ill.Dec. 634, 984 N.E.2d 580, —— (Ill.App.Ct. 2013) (*Graham* does not apply because the defendant was only sentenced to forty years and not life without possibility of parole); *Diamond v. State*,——S.W.3d ——, ——, 2012 WL 1431232 (Tex.Crim.App. Nos. 09–11–00478–CR & 09–11–00479–CR, Apr. 25, 2012) (upholding a sentence of ninety-nine years for a nonhomicide child offender without mentioning *Graham*).

¶ 59 However, we are more persuaded by the reasoning in a number of other cases where courts have explicitly or implicitly held that *Graham* 's holding or its reasoning can and should be extended to apply to term-of-year sentences that result in a de facto life without parole

sentence.

¶ 60 In several of those cases, courts have relied on *Graham* (or its reasoning) to reverse a juvenile defendant's term-of-years sentence on the ground that it was the functional equivalent of life without parole, and thus unconstitutional under the Eighth Amendment. In *People v. Caballero*,55 Cal.4th 262, 145 Cal.Rptr.3d 286, 282 P.3d 291 (2012), the Supreme Court of California held that term-of-years sentences that extend beyond a juvenile's life expectancy, and are imposed for nonhomicide offenses, violate the Eighth Amendment pursuant to *Graham*. In *Caballero*, the Supreme Court of California reversed an intermediate court, ruling as follows:

> Consistent with the high court's holding in *Graham*... we conclude that sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment. Although proper authorities may later determine that youths should remain incarcerated for their natural lives, the state may not deprive them at sentencing of a meaningful opportunity to demonstrate their rehabilitation and fitness to reenter society in the future.

145 Cal.Rptr.3d 286, 282 P.3d at 295. Consistent with *Graham*, the court further directed that, when sentencing nonhomicide juvenile offenders, California courts must consider the defendant's age and mental development in order to impose an appropriate time when the juvenile will be able to seek parole from the parole board. *Id*. Furthermore, the court ruled that the parole board must base its decisions whether to release juvenile offenders on "demonstrated maturity and rehabilitation," as required under *Graham*. *Id.* (quoting *Graham*,—— U.S. at ——, 130 S.Ct. at 2030)

¶ 61 In its reasoning, *Caballero* drew on *People v. Mendez*, 188 Cal.App.4th 47, 114 Cal.Rptr.3d 870, 886 (2010), a previous California appellate case, in which the court held that a sentence of eighty-four years to life for a nonhomicide child offender constituted cruel and unusual punishment because it was the equivalent of life without parole. The court in *Mendez* acknowledged that *Graham* was not expressly controlling because Mendez's sentence was "not technically" a life without parole sentence, but said, "We are nevertheless guided by the principles set forth in *Graham* ...." *Id*. at 883. Noting that the Court in *Graham* "did not define what constitutes a 'meaningful' opportunity for parole," the *Mendez* court concluded that "common sense dictates that a juvenile who is sentenced at the age of 18 and who is not eligible for parole until after he is expected to die does not have a meaningful, or as the Court put it, 'realistic,' opportunity of release." *Id.* (citing *Graham*,—— U.S. at ——, ——, 130 S.Ct. at 2030, 2034).

***11** ¶ 62 At least three other appellate court decisions in California, prior to and after *Caballero* and *Mendez*, reached the same conclusion. In *People v. Nunez*, 195 Cal.App.4th 414, 125 Cal.Rptr.3d 616, 624 (2011), the court was particularly concerned with "the failure of any penological theory to rationally justify 'the severity of life without parole sentences,' " (quoting *Graham*,—— U.S. at ——, 130 S.Ct. at 2030). It concluded:

> A term of years effectively denying any possibility of parole is not less severe than a LWOP [life without parole] term. Removing the "LWOP" designation does not confer any greater penological justification. Nor does tinkering with the label somehow increase a juvenile's culpability. Finding a determinate sentence exceeding a juvenile's life expectancy constitutional because it is not labeled an LWOP sentence is Orwellian. Simply put, a distinction based on changing a label, as the trial court did, is arbitrary and baseless.
>
> ... Absent any penological rationale, the sentence the trial court imposed precluding any possibility of parole for 175 years is unconstitutional under the Eighth Amendment
>
> ....

Id.; *see also**People v. J.I.A.*, 196 Cal.App.4th 393, 127 Cal.Rptr.3d 141, 149 (2011) (concluding that it was cruel and unusual punishment to sentence a juvenile nonhomicide offender so that he would not be eligible for parole until seventy years of age, "about the time he is expected to die," based on undisputed data from the Centers for Disease Control on life expectancies for incarcerated males), vacated and remanded, —— Cal.4th ——, 148 Cal.Rptr.3d 499,287 P.3d 70 (2012); *People v. Argeta*, 210 Cal.App.4th 1478, 149 Cal.Rptr.3d 243, 244–45 (Cal.Ct.App.2012) (reversing a sentence of 100 years to life for a juvenile offender convicted of aiding and abetting one count of murder and five counts of attempted murder because the sentence was the functional

equivalent of life without parole and unconstitutional under Graham).

¶ 63 As noted above, although two Florida decisions have ruled to the contrary, we are more persuaded by the greater number of Florida cases that have applied *Graham* to sentences that are the functional equivalent of life without parole. In that regard, we are particularly persuaded by the reasoning in *Adams v. State*,—— So. 3d ——, ——, 2012 WL 3193932 (Fla. Dist. Ct.App. No. 1 D 11–3225, Aug. 8, 2012), a case that is factually similar to ours.[5]

[5] Other relevant Florida rulings include *United States v. Mathurin*, 2011 WL 2580775, at *3 (S.D. Fla. No. 09–21075–CR, June 29, 2011) (unpublished order) (holding a combined sentence of 307 years for a child offender convicted of armed robbery and carjacking "constitutionally offensive" under *Graham*); *Floyd v. State*, 87 So.3d 45 (Fla.Dist.Ct.App.2012) (per curiam) (holding that a child sentenced to a combined eighty-year sentence for two counts of armed robbery constituted cruel and unusual punishment as the functional equivalent of a life sentence without parole); and *Smith v. State*, 93 So.3d 371 (Fla.Dist.Ct.App.2012) (declining to rule out that *Graham* can apply to some term of years sentences, but holding an aggregate eighty-year sentence constitutional because Florida's gain time statutes offer "meaningful opportunity to obtain release" as required under *Graham*).

***12** ¶ 64 In *Adams*, the court held that a sentence requiring a nonhomicide juvenile offender to serve at least 58.5 years in prison was a de facto sentence to life, because the defendant would not be eligible for release until he was nearly seventy-six years old, which exceeded his life expectancy according to data from the Centers for Disease Control. *Id.* at ——, at *2. The *Adams* court specifically defined a de facto life sentence as "one that exceeds the defendant's life expectancy." *Id.* After acknowledging the split opinions in Florida and that "the issue framed by this case is one of great public importance," the *Adams* court directly certified to the Florida Supreme Court the question of whether *Graham* applies "to lengthy term-of-years sentences that amount to de facto life sentences." *Id.*

¶ 65 In yet other post-*Graham* cases, several courts have held that some term-of-years sentences may qualify as the functional equivalent of life sentences for purposes of the Eighth Amendment and *Graham*, but have declined to invalidate the sentence at issue on the particular facts and circumstances in each of those cases. *See**Gridine v. State*, 89 So.3d 909 (Fla.Dist.Ct.App.2011) (*review granted* Oct. 11, 2012) (a child's seventy-year sentence for attempted first degree murder was not the functional equivalent of a life sentence, but stating in dicta that some term-of-years sentences may be under *Graham*); *Thomas v. State*, 78 So.3d 644 (Fla.Dist.Ct.App.2011) (child offender's fifty-year sentence was not the functional equivalent of a life sentence, but some term-of-years sentences may be); *Angel v. Commonwealth*,281 Va. 248, 704 S.E.2d 386, 401–02 (2011) (three consecutive life sentences did not violate *Graham* specifically because defendant could petition for parole at age sixty, and, thus his sentence complied with *Graham's* requirement for a "meaningful" opportunity to obtain release based on demonstrated maturity and rehabilitation); *In re Diaz*, 170 Wash.App. 1039 (No. 42064–3–II, Sept. 18, 2012) (unpublished opinion) (acknowledging the argument that *Graham* may apply to term-of-years sentences that are the functional equivalent of life sentences but declining to decide the matter on the basis that it is the role of the legislature to do so).

E. Application of *Graham* to Rainer's Sentence

[17]¶ 66 Based on our consideration of the Supreme Court's Eighth Amendment jurisprudence, and federal and state rulings since *Graham*, we conclude that the term of years sentence imposed on Rainer, which does not offer the possibility of parole until after his life expectancy, deprives him of any "meaningful opportunity to obtain release" and thereby violates the Eighth Amendment. *See Graham*, —— U.S. at ——, 130 S.Ct. at 2033.

¶ 67 On the undisputed record before us, Rainer's sentence qualifies as an unconstitutional de facto sentence to life without parole. As noted earlier, the parties agree that Rainer will not even be eligible for parole until he is seventy-five years of age. Further, the record shows he has a life expectancy of only between 63.8 years and 72 years, based on Center for Disease Control life expectancy tables.[6] Life expectancy data was expressly cited by Rainer both in the trial court and in his briefs on appeal and is not disputed by the People. Furthermore, Rainer notes that, even if he is still alive when he first becomes eligible for parole, he is unlikely to receive it, based on data from the Colorado State Board of Parole, showing that almost ninety percent of those first eligible for discretionary parole are denied release.

[6] Numerous cases, including *J.I.A.*, *Mendez*, *Adams*, and the magistrate judge recommendation in *Thomas v.*

Pennsylvania, 2012 WL 6697971, at *11 (E.D. Penn. No. CV–10–4537, June 5, 2012) (unpublished magistrate's report and recommendation), have utilized Centers for Disease Control life expectancy tables to determine whether a sentence qualifies as the functional equivalent of life without parole. We also note the Supreme Court's extensive reliance on scientific data and statistics in *Roper*, *Graham*, and *Miller*. *See**Roper*, 543 U.S. at 560–77, 125 S.Ct. 1183 (survey of rulings relying on sociological studies, behavioral sciences, and review of national and international practices); *Graham*,—— U.S. at ——, ——, 130 S.Ct. at 2026, 2032; *Miller*, ——U.S. at ——, 132 S.Ct. at 2458; *cf.* *Walle*, 99 So.3d at 971 (court declined to expand the scope of *Graham* to a sentence that is the functional equivalent of life without parole in part because the record on review was devoid of social science data considered in *Graham*).

***13** ¶ 68 In reaching our conclusion, initially we reject the People's argument that our constitutional proportionality analysis in this case should be governed by our supreme court's decision in *Close*. To the contrary, because *Graham* established a categorical proportionality analysis for nonhomicide juvenile offenders sentenced to life without parole, we conclude that the proportionality analysis adopted in *Close*, 48 P.3d at 538, and relied on by the People on appeal, is no longer valid as applied to this particular category of offenders. Specifically, the holding in *Close* relies on the line of cases concerned with the "grossly disproportionate" proportionality review, which considers whether under the particular circumstances of a case, the defendant's sentence for a term of years is grossly disproportionate given the particular offense. *See, e.g.*,*Graham*,——U.S. at —— – ——, 130 S.Ct. at 2021–22; *Harmelin*, 501 U.S. at 1005, 111 S.Ct. 2680; *Close*, 48 P.3d at 532–34. The *Close* proportionality analysis also considers each separate sentence imposed rather than consecutive sentences imposed in the aggregate. *Close*, 48 P.3d at 540. In contrast, *Graham* explicitly conducted a categorical proportionality review for juveniles convicted of nonhomicide offenses, regardless of the offense or particular circumstances of the case, as it had previously done in both *Roper* and *Atkins*. *Graham*,—— U.S. at —— – ——, 130 S.Ct. at 2021–23. Accordingly, we conclude that *Graham* effectively overruled *Close* with respect to this particular class of defendants. *See**Raile v. People*,148 P.3d 126, 130 n.6 (Colo.2006) (state court must follow precedent of United States Supreme Court on matters of federal constitutional law); *People v. VanMatre*, 190 P.3d 770, 774 (Colo.App.2008) (same); *see also**People v. Hopper*, 284 P.3d 87, 93 n.3 (Colo.App.2011) (noting that *Davis v. United States*, 564 U.S. ——, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011), effectively overruled*People v. McCarty*, 229 P.3d 1041 (Colo.2010)).

¶ 69 Further, as discussed above, we are persuaded by the reasoning of those cases that have extended *Graham* to de facto sentences to life without parole. *See**Mendez*, 114 Cal.Rptr.3d at 883 (citing *Graham*,—— U.S. at ——, ——, 130 S.Ct. at 2030, 2034) ("common sense dictates that a juvenile ... who is not eligible for parole until after he [or she] is expected to die does not have a meaningful, or as the Court put it, 'realistic,' opportunity of release."); *Nunez*, 125 Cal.Rptr.3d at 624 (for a juvenile offender, "[a] term of years effectively denying any possibility of parole is not less severe than a LWOP [life without parole] term").

¶ 70 We are also particularly struck by the similarities between Rainer's sentence and the one at issue in *Adams*. In *Adams*, as here, the juvenile nonhomicide defendant faced a sentence under which he could not be considered for release until he was nearly seventy-six years old, which exceeded his life expectancy according to Centers for Disease Control data. The court in *Adams* ruled that this sentence was the functional equivalent of a life sentence without parole, and therefore, prohibited under *Graham*. We are persuaded by the Florida court's reasoning in *Adams*, and reach the same conclusion here with respect to Rainer's sentence.

¶ 71 In our decision to align ourselves with those courts that have extended *Graham* 's holding to sentences that are the functional equivalent of life without parole, we also find instructive the language in *Graham* that readily lends itself to this approach. In *Graham*, the Court did not employ a rigid or formalistic set of rules designed to narrow the application of its holding. Instead, it utilized broad language, condemning the sentence of life without parole in that case for qualitative reasons, such as because it "gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope"; because "[a] young person who knows that he or she has no chance to leave prison before life's end has little incentive to become a responsible individual"; and because the prison system itself sometimes reinforces the lack of development of inmates, leading to "the perverse consequence in which the lack of maturity that led to an offender's crime is reinforced by the prison term." *Graham*,—— U.S. at —— – ——, 130 S.Ct. at 2032–33.

¶ 72 Likewise, *Graham* employed expansive language to define its sentencing requirements for juvenile nonhomicide offenders, stating that sentences must offer "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," *id.* at ——, 130 S.Ct. at 2030; and "give [ ] all juvenile nonhomicide

offenders a chance to demonstrate maturity and reform" and "the opportunity to achieve maturity of judgment and self-recognition of human worth and potential." *Id.* at ——, 130 S.Ct. at 2032. Indeed, even the closing words of the *Graham* opinion do not focus on a specific formalistic definition of what constitutes an allowable term-of-years sentence for a nonhomicide juvenile offender, but provide only that while a state "need not guarantee the [nonhomicide juvenile] offender eventual release ... it must provide him or her with *some realistic opportunity to obtain release*." *Id.* at ——, 130 S.Ct. at 2034 (emphasis added).

***14** ¶ 73 Given what we view as the broad nature of *Graham* 's directives, we conclude that the Court's holding and reasoning should apply to a sentence that denies a juvenile offender any meaningful opportunity for release within his or her life expectancy, or that fails to recognize that "[j]uveniles are more capable of change than are adults, and their actions are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults." *Id.* at ——, 130 S.Ct. at 2026 (quoting *Roper*, 543 U.S. at 570, 125 S.Ct. 1183). Accordingly, Rainer's 112–year sentence, with the virtually nonexistent possibility of parole at the age of seventy-five, violates the holding and reasoning of *Graham* because it virtually "guarantees he will die in prison without any meaningful opportunity to obtain release, ... even if he spends the next half century attempting to atone for his crimes and learn from his mistakes." *Id.* at ——, 130 S.Ct. at 2033; *see also* *Mendez*, 114 Cal.Rptr.3d at 883.

¶ 74 We also find it instructive that, while Colorado appellate courts have not addressed whether *Graham* should apply to nonhomicide juvenile offender sentences that are the functional equivalent of life without parole, the Colorado General Assembly, both before and after *Graham*, has adopted legislation aligned with the principles articulated in *Roper*, *Graham*, and *Miller*.

¶ 75 In 1993, well prior to *Graham*, Colorado established the Youthful Offender System as an alternative sentencing option for certain juveniles. Ch. 2, sec. 5, § 16–11–311, 1993 Colo. Sess. Laws 1st Extra. Sess. 13. The statute, as amended, stated the legislative intent that offenders sentenced to the youthful offender system should "be housed and serve their sentences in a facility specifically designed and programmed for the youthful offender system" and that "offenders so sentenced be housed separate from and not brought into daily physical contact with inmates sentenced to the department of corrections." Ch. 227, sec. 1, § 16–11–311(1)(c), 2000 Colo. Sess. Laws; *see* § 18–1.3–407(1)(a), C.R.S.2012. Establishment of this youth-specific penal system demonstrates that, even before *Graham*, public policy in Colorado was trending toward the view that sentencing and treatment of juveniles in the criminal context should, with few exceptions, be qualitatively different from the treatment of adult offenders. *See also* *Flakes v. People*, 153 P.3d 427, 436 (Colo.2007) ("A decision to impose an adult sentence on a juvenile without judicial findings risks an arbitrary deprivation of a juvenile's liberty interest in avoiding a harsh punishment."); *A.C. v. People*, 16 P.3d 240, 242 (Colo.2001) (noting that an adult sentence is the harsh punishment that the Colorado Children's Code was designed to avoid).

¶ 76 Also, at the time *Graham* was decided, there apparently were no juvenile nonhomicide offenders serving life without parole sentences in Colorado. *Graham*,—— U.S. at ——, 130 S.Ct. at 2024. *See* *United States v. C.R.*, 792 F.Supp.2d 343, 494 (E.D.N.Y.2011) (an important inquiry in determining excessiveness of a term of imprisonment is the "actual sentencing practices" in a jurisdiction) (citing *Graham*,—— U.S. at ——, 130 S.Ct. at 2026; *Thompson v. Oklahoma*, 487 U.S. 815, 831–32, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988); *Roper*, 543 U.S. at 564–65, 125 S.Ct. 1183; *Kennedy*, 554 U.S. at 433–35, 128 S.Ct. 2641); *see also* § 18–1.3–401(4)(b)(I), C.R.S.2012 (as of July 1, 2006, requiring that all juveniles convicted as adults of a class 1 felony be sentenced to a term of life imprisonment with the possibility of parole after serving a period of forty years).

¶ 77 In 2012, the General Assembly enacted House Bill 12–1271, which, as relevant here, exempts most juvenile offenders from certain mandatory minimum crime of violence sentencing provisions under section 18–1.3–406, C.R.S.2012 (including those imposed on Rainer). *See* § 19–2–517(6)(a)(I), C.R.S.2012. The legislative history of House Bill 12–1271 reveals that the provisions in this bill were, in large part, motivated by the social science studies on the development of juveniles that were at the heart of the reasoning articulated by the Supreme Court in *Roper*, *Graham*, and *Miller*. *See* Hearings on H.B. 1271 before the S. Judiciary Comm., 68th Gen. Assemb., 1st Sess. (Mar. 8, 2012) (comments of Senator Giron, co-sponsor) ("[O]ur brains continue to develop well into our mid-twenties.... Children are less culpable than adults and they are also much more likely to respond to rehabilitation. Even the United States Supreme Court has recognized these findings in recent decisions."); *see also* Colorado General Assembly, Summaries by Bill for HB 12–1271, *http://www.leg.state.co.us/CLICS/CLICS2012A/csl.nsf/Committee? OpenFrameSet* (follow "Summaries by Bill"; then follow "HB 12–1271"; then follow "3/08/2012, House Judiciary, Bill Summary" or "3/26/2012, Senate

Judiciary, Bill Summary") (last visited Mar. 6, 2013).

***15** ¶ 78 While we acknowledge, as did the Court in *Graham*, that juvenile defendants such as Rainer "may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives," the holding and reasoning in *Graham* forbid states "from making the judgment at the outset that those offenders never will be fit to reenter society." —— U.S. at ——, 130 S.Ct. at 2030. The trial court here appears to have made this very judgment when it imposed Rainer's sentence, and the record shows that, at sentencing, the trial court acknowledged and indeed intended that Rainer would spend the rest of his life in prison. Nor, contrary to the People's argument, did the trial court take into account Rainer's age or the developmental differences between juveniles and adults in imposing Rainer's sentence. Thus, Rainer's sentence, which from the outset failed to offer him any meaningful chance at parole during his lifetime, "improperly denies [him] a chance to demonstrate growth and maturity," as required under *Graham*. *Id.* at ——, 130 S.Ct. at 2029.

¶ 79 Accordingly, we conclude that Rainer's sentence is the functional equivalent of life without parole and is unconstitutional pursuant to the Eighth Amendment and *Graham*. *Id.* at ——, 130 S.Ct. at 2033.

F. New Arguments

¶ 80 We decline to consider new arguments made by the People during oral argument that were not made either in the trial court or in the People's answer brief on appeal. *See People v. $11,200 U.S. Currency*,—— P.3d ——, ——, 2011 WL 3612233 (Colo.App. No. 10CA1805, Aug. 18, 2011); *People v. Scearce*, 87 P.3d 228, 231 (Colo.App.2003).

G. Remedy

¶ 81 Having determined that Rainer's sentence is unconstitutional under the Eighth Amendment, we remand to the trial court for resentencing consistent with this opinion and the principles announced in both *Graham* and *Miller*. We also direct that Rainer should be appointed counsel to represent him at the resentencing proceeding.

¶ 82 In sentencing Rainer, the trial court must ensure that his sentence is constitutionally proportional in light of the categorical proportionality analysis for youth offenders articulated in *Roper*, *Graham*, and *Miller*.

¶ 83 The order is reversed, the sentence is vacated, and the case is remanded for further proceedings.

JUDGE GABRIEL and JUDGE DUNN concur.

All Citations

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