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SUPREME COURT STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	
On Certiorari to the Colorado Court of Appeals Court of Appeals Case No. 10CA2414	
Petitioner, THE PEOPLE OF THE STATE OF COLORADO, v. Respondent, ATORRUS LEON RAINER.	▲ **COURT USE ONLY** ▲ Case No. 13SC408
CYNTHIA H. COFFMAN, Attorney General REBECCA A. ADAMS, Senior Assistant Attorney General* Ralph L. Carr Colorado Judicial Center 1300 Broadway, 9th Floor Denver, CO 80203 Telephone: (720) 508-6477 E-Mail: rebecca.adams@coag.gov Registration Number: 31044 *Counsel of Record	

SUPPLEMENTAL BRIEF

CERTIFICATE OF COMPLIANCE

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

/s/ Rebecca A. Adams

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Signature of attorney or party

The People submit the following supplemental brief in response to this Court's order that supplemental briefs on the impact of S.B. 16-180 and S.B. 16-181[1] may be filed.

The People maintain that *Graham v. Florida*, 560 U.S. 48 (2010), does not apply to consecutive term-of-years sentences imposed on juveniles convicted of multiple offenses.[2] Regardless, S.B. 16-180 provides a juvenile offender, such as the defendant, with a meaningful opportunity for release during his natural life.

Following oral argument in this case, the governor signed S.B. 16-180 into law. Senate Bill 16-180 provides a specialized program for juveniles convicted as adults. In enacting S.B. 16-180, the legislature acknowledged the recent decisions from the United States Supreme Court and recognized that "children are constitutionally different than adults for purposes of sentencing and should be given a meaningful opportunity for release based on demonstrated maturity and

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[1] S.B. 16-181 addresses juveniles convicted of first degree murder.

[2] The People also maintain that a conviction for attempted murder is a homicide offense within the meaning of *Graham*.

rehabilitation." This language was taken directly from the *Graham* opinion and recognizes the capacity of children to change and their potential for rehabilitation. As the Supreme Court held in *Graham*,

> [a] state is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What a state must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.

560 U.S. at 75.

As pertinent here, S.B. 16-180 provides precisely this opportunity. It allows juvenile offenders convicted as adults of felonies other than first degree murder[3] to petition for placement in a specialized program after serving 20 years of his or her sentence.[4] To participate in the

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[3] Juvenile offenders "convicted of murder in the first degree as described in section 18-3-102(1)(b) or (1)(d), C.R.S." may petition for placement in the specialized program after serving 20 years of his or her sentence, while juvenile offenders "convicted of murder in the first degree, as described in section 18-3-102, C.R.S., but [] not murder in the first degree, as described in section 18-3-102(1)(b) or (1)(d), C.R.S.," may petition for placement in the specialized program after serving 25 years of his or her sentence. § 17-34-101(II), (III), C.R.S.

[4] S.B. 16-180 does not apply to juvenile offenders convicted of unlawful sexual behavior as defined in § 16-22-102(9), C.R.S. (2015), or those in a

program, the juvenile offender must meet certain preliminary requirements, which demonstrate both maturity and rehabilitation. These requirements include:

- obtaining a high school diploma or passing a high school equivalency exam;
- participating in programs offered by the department and demonstrating responsibility and commitment to those programs;
- demonstrating positive growth and change through increasing developmental maturity and quantifiable good behavior during the course of incarceration; and
- accepting responsibility for the criminal behavior underlying the offenses for which the offender was convicted.

§ 17-34-101(1)(a)(I), C.R.S. Participation in the program is open to all offenders regardless of their sentence or parole eligibility date. § 17-34-101(1)(b), C.R.S.

Once an offender is admitted into the specialized program, which is designed to take at least three years to complete; successfully completes the program; and serves at least 25 years of his or her sentence, the offender is eligible to apply for early parole:

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treatment program within the Department of Corrections for a serious mental illness.

> If an offender has served at least twenty-five calendar years of his or her sentence and successfully completed the specialized program, unless rebutted by relevant evidence, it is presumed that:
>
> (I) The offender has met the factual burden of presenting extraordinary mitigating circumstances; and
>
> (II) The offender's release to early parole is compatible with the safety and welfare of society.

§ 17-34-102(8)(a)(I), (II), C.R.S. When an offender applies for early parole after having successfully completed the specialized program, the offender shall make his or her application to the governor's office, and the governor, after considering any relevant evidence and the presumptions set forth above, may grant parole to an offender prior to offender's parole eligibility date:

> When an offender applies for early parole pursuant to this section after having successfully completed the specialized program described in section 17-34-102, the offender shall make his or her application to the governor's office with notice and a copy of the application sent to the state board of parole created in section 17-2-201. The state board of parole shall review the offenders' application and all supporting documents and schedule a hearing if the board considers making a recommendation for early parole, at which

> hearing any victim must have the opportunity to be heard, pursuant to section 24-4.1-302.5(1)(j), C.R.S. Not later than ninety days after receipt of a copy of an offender's application for early parole, the state board of parole, after considering the presumptions set forth in section 17-34-102(8), shall make a recommendation to the governor concerning whether early parole should be granted to the offender.

§ 17-22.5-403.7(2), (6)(a), C.R.S.

The possibility of parole for a juvenile offender does not require that the juvenile *actually* be paroled. *Graham*, 560 U.S. at 75 (holding that the Eighth Amendment "does not require the State to release that [juvenile offender] during his natural life"). Rather, the Eighth Amendment simply requires that the sentence, at the time it is imposed, allow for a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. *Id.* This is precisely what S.B. 16-180 provides. While the defendant is currently parole eligible at age 69,[5] if he successfully completes the specialized program, he will be eligible for early parole at age 43, after serving only 25 years of his sentence.

[5] *See* http://www.doc.state.co.us/oss/, last visited June 30, 2016.

This Court has held that parole eligibility after serving 40 years is constitutional for a juvenile convicted of first degree murder. *People v. Tate*, 2015 CO 42, ¶ 7; *see also Graham*, 560 U.S. at 123, n.13 (Thomas, J., dissenting) ("it would be impossible to argue that there is any objective evidence of agreement that a juvenile is constitutionally entitled to a parole hearing any sooner than 40 years after conviction"). Indeed, defense counsel in *Graham* conceded at oral argument that the "Colorado provision [providing parole eligibility after 40 years] would probably be constitutional." *Graham*, 560 U.S. at 123, n.13 (Thomas, J., dissenting). Thus, the legislature, in enacting S.B. 16-180, has gone further than what is required in *Graham* and *Miller v. Alabama*, 132 S. Ct. 2455 (2012), by providing juvenile offenders with the opportunity to receive parole eligibility after serving only 25 years.

This legislation also allows courts to impose sentences consistent with Colorado's sentencing scheme without this Court having to invalidate or evaluate each sentence on a case-by-case basis. *Cf. Tate*, ¶ 47 (observing that "we must strive to keep as much of the legislature's work intact as possible") (citing *Ayotte v. Planned Parenthood*, 546 U.S.

320, 329 (2006) (court should "try not to nullify more of a legislature's work than is necessary")); *see also Dallman v. Ritter*, 225 P.3d 610, 638 (Colo. 2010) ("we strike as little of the law as possible").

Finally, while executive clemency is insufficient to provide juvenile offenders with a meaningful opportunity for release because of its remote possibility, *Graham*, 560 U.S. at 70, S.B. 16-180 is not executive clemency. In addressing the differences between executive clemency and parole, the Supreme Court held:

> Parole is a regular part of the rehabilitative process. Assuming good behavior, it is the normal expectation in the vast majority of cases. The law generally specifies when a prisoner will be eligible to be considered for parole, and details the standards and procedures applicable at that time. Thus it is possible to predict, at least to some extent, when parole might be granted. Commutation, on the other hand, is an ad hoc exercise of executive clemency. A Governor may commute a sentence at any time for any reason without reference to any standards.

Solem v. Helm, 463 U.S. 277, 300-01 (1983) (internal citations omitted).

The specialized program in S.B. 16-180 provides that the governor has discretion to grant early parole "if, in the governor's opinion,

extraordinary mitigating circumstances exist and the inmate's release from institutional custody is compatible with the safety and welfare of society"; however, where the offender has successfully completed the specialized program, the governor must *presume*, unless rebutted by relevant evidence, both that extraordinary mitigating circumstances exist and that the inmate's release from institutional custody is compatible with the safety and welfare of society. §§ 17-34-102(8)(a)(I), (II); 17-22.5-403, C.R.S.; 17-22.5-403.7, C.R.S. Thus, unlike clemency, S.B. 16-180 is more than a "remote possibility." It is a specialized program of parole eligibility complete with standards and procedures, which specify when an offender will be eligible for parole if he or she complies with the terms of the program.

Because S.B. 16-180 provides the defendant with a meaningful opportunity for release during his natural life based on demonstrated maturity and rehabilitation, even if *Graham* applies to the defendant's sentence, his sentence is constitutional and should be upheld.

CYNTHIA H. COFFMAN
Attorney General

/s/Rebecca A. Adams

REBECCA A. ADAMS, 31044*
Senior Assistant Attorney General
Criminal Appeals Section
Attorneys for Plaintiff-Appellee
*Counsel of Record

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **SUPPLEMENTAL BRIEF** upon **KATHLEEN A. LORD** and **ASHLEY RATLIFF**, via Integrated Colorado Courts E-filing System (ICCES) on June 30, 2016.

/s/ Tiffiny Kallina