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COLORADO SUPREME COURT
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Certiorari to the Colorado Court of Appeals,
11 CA 2030
Denver County District Court No. 05CR4442

GUY LUCERO,

PETITIONER,

v.

THE PEOPLE OF THE STATE OF COLORADO,

RESPONDENT.

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ARGUMENT:

THE ENACTMENT OF SB 16-181 AND SB 16-180 DOES NOT RENDER MR. LUCERO'S APPEAL MOOT OR CURE THE UNCONSTITUTIONALITY OF HIS SETNENCE.

At the oral argument, questions arose about whether S.B. 16-180 and S.B. 16-181 render moot the sentencing issues before the Court. In this supplement, Mr. Lucero explains why this new legislation does not render moot the questions in his appeal, and why this Court must act to correct his unconstitutional sentence.

I. SB 16-181 DOES NOT APPLY TO THIS CASE

It is Mr. Lucero's position that SB16-181, which applies to juveniles convicted as adults of first degree murder, is inapplicable to Mr. Lucero as he was neither charged with nor convicted of first degree murder. This bill cannot satisfy the mandates of *Graham v. Florida* with respect to Mr. Lucero's sentence.

II. SB 16-180 THEORETICALLY MAY APPLY BUT DOES NOT CURE THE UNCONSTITUTIONALITY

The passage of S.B. 16-180 does not transform Guy Lucero's unconstitutional sentence into a constitutional one. In order to understand why this is so, Mr. Lucero will first set forth what S.B. 16-180 actually accomplishes; what is required by the Eighth Amendment under the *Graham-Miller-Montgomery*

trilogy;[1] and the reasons that S.B. 16-180 falls short of these constitutional requirements. By way of illustration, Mr. Lucero will discuss the California Supreme Court's ruling about whether California's post-*Graham* youthful offender parole system rendered sentencing challenges moot.

A. S.B. 16-180: THE CLEMENCY (EARLY PAROLE) RECOMMENDATION PROGRAM

S.B. 16-180 establishes a clemency recommendation program. The bill instructs the Department of Corrections ("DOC") to, by 2017, set up an intensive educational/behavioral program with the ultimate goal to provide select inmates with a formal DOC recommendation letter that the inmate can attach to his or her application for gubenatorial clemency. By design, the future program is not accessible to all juveniles who have effective sentences of life imprisonment without parole. As will be seen below, it is impossible to know whether or not Mr. Lucero will be able to access the program authorized in S.B. 16-180. This fact alone means that his appeal is not mooted by passage of S.B. 16-180.

Even if this Court assumes hypothetically that Mr. Lucero might be one of the select inmates able to access the new clemency recommendation program, the

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[1] *Graham v. Florida*, 560 U.S. 48 (2010); *Miller v. Alabama,* 132 S.Ct. 2455 (2012); *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

legislation has so many restrictions and limitations that this Court cannot deem his appeal moot based on passage of S.B. 16-180.

1. Eligibility to apply to the S.B. 16-180 future clemency recommendation program.

S.B. 16-180 provides that an inmate may apply to be in the clemency recommendation program if

> (1) he or she was a juvenile at the time of the offense,
>
> (2) he or she was convicted for an offense other than a sexual assault,
>
> (3) the district court imposed an adult sentence,
>
> (4) the inmate has a GED or a high school diploma,
>
> (5) the inmate is not receiving DOC services for mental illness,
>
> (6) the inmate has participated in DOC programs that have been offered to him or her, and
>
> (7) the inmate has, according to DOC, demonstrated positive growth through developmental maturity and good behavior.

§ 17–34–101 (1)(a), C.R.S. (2016). If DOC deems these criteria to be met, then an inmate in Mr. Lucero's situation may apply to the program after twenty years. §17–34–101 (1)(a)(I), (II), C.R.S.[2] Although the victims have a right to be heard

[2]"If the felony of which the person was convicted was murder in the first degree, as described in section 18-3-102(1)(b)[felony murder] or (1)(d)[extreme indifference murder], C.R.S., then the offender may petition for placement in the specialized program after serving twenty years of his or her sentence...."

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

2. Eligibility for acceptance to the S.B. 16-180 future clemency recommendation program.

For those individuals who are allowed to apply to the program, DOC's executive director (or his/her designee) decides whether or not to place the inmate in the program, considering the following criteria:

(1) (a) the nature of the offense, (b) the circumstances surrounding the offense, and (c) the extent of the offender's participation in offense;

(2) age and maturity of offender at the time of the offense;

(3) behavior during incarceration;

(4) assessed risks and needs of the offender;

(5) impact of the offense on the victim and victim's immediate family;

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§17–34–101 (1)(a)(II), C.R.S. (2016). In addition, "[i]f the felony of which the person was convicted was not murder in the first degree... then the offender may petition for placement in the specialized program after serving twenty years of his or her sentence...." *Ibid*. If the inmate was convicted of a first-degree murder crime other than felony murder and extreme indifference murder, the inmate may apply after twenty five years. §17-34-101 (1)(III)(a), C.R.S. (2016).

(6) any other factor that DOC deems apropriate.

§17–34–101 (1)(b), C.R.S. (2016). There are no presumptions that an inmate will be admitted, even if the conviction is for juvenile conduct. If DOC rejects the applicant, that person is barred from re-applying for at least three years. §17–34–101 (5), C.R.S. (2016). If the DOC rejects an inmate's application, there is no judicial review. *Ibid*.

3. The S.B. 16-180 "specialized program"

While some of the components of the "specialized program" are outlined in the legislation,[3] virtually nothing is known about what DOC can require the inmate to do in the "specialized program." DOC has authority to set up the program, provide whatever funding it deems appropriate, serve as many (or as few) inmates as it wishes, and utilize whatever process it desires for continuing or terminating an inmate's enrollment in the program, or for making the ultimate determination that the inmate has succeeded or satisfactorily completed the program. The legislation ensures, however, that no one is allowed to complete the program in

[3]These include "more independence in daily life, with additional work-related responsibilities and other program components that will assist and support the offender's successful reintegration into the community of offenders who have never lived independently or functioned in the community as an adult. The specialized program must also include best and promising practices in independent living skills development, reentry services for long-term offenders, and intensive supervision and monitoring." §17–34–102 (2), C.R.S. (2016).

less than three years after the commencing it. §17–34–102 (3), C.R.S. (2016). Anyone who is terminated from the program (apparently, for any reason) is barred from re-applying for at least three years. §17–34–102 (6)(b), C.R.S. (2016).

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

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

(1) to ask the Governor to exercise his discretion to grant early parole.[4]

(2) to have the parole board give input to the Governor, except that, if the parole board wishes to recommend that the inmate be granted early parole, the parole board must first hold a hearing at which the victim is permitted to be heard.[5]

The parole board does not have authority to grant early parole or to authorize anyone's early release. Completion of the specialized program does not assure early parole; nor does it assure the inmate an opportunity to appear before the board. The inmate has no substantive right to early parole. There is no right to judicial review to enforce anything contained in this law.

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[4]"Notwithstanding any provision of law, an offender who successfully completes the specialized program is eligible to apply for early parole pursuant to the provisions of section 17-22.5-403(4.5) or 17-22.5-403.7." §17-34-102 (7), C.R.S. (2016).

[5]§17-22.5-403(4.5)(b), C.R.S. (2016); *Id*., §17-22.5-403.7(6)(a).

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

-- met all of the criteria

-- successfully completed at least three years in the program, and

-- been incarcerated for at least twenty-five years (in the case of a non-homicide offense like the ones here),[6]

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

5. The Governor's Decision

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

The Governor is authorized to grant early parole if "in the governor's opinion, extraordinary mitigating circumstances exist and the inmate's release

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[6]The required period of incarceration is longer for some first degree murder convictions, *see* §17–34–102(8)(b), C.R.S. (2016).

from institutional custody is compatible with the safety and welfare of society." *See* §17-22.5-403(4.5)(a), C.R.S. (2016). *See* §17-22.5-403.7(2), C.R.S. (2015). The governor is directed merely to "consider" the presumptions set forth in Section 17-34-102(8), and to also consider "any relevant evidence presented by any person or agency." *See* §17-22.5-403.7(2); §17-22.5-403 (4.5)(a).[7] The law does not require the Governor to presume anything, nor could it. "Article IV, § 7 gives the Governor the exclusive power to grant reprieves, commutations, and pardons after conviction." *Schwartz v. Owens*, 134 P.3d 455, 458 (Colo. App. 2005). *See id.*, at 459 ("In Colorado, the power of clemency is entirely at the Governor's discretion.... expectation of clemency is 'simply a unilateral hope.')(quoting *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 465 (1981). Thus, the Governor is directed merely to "consider" these presumptions. In the end, it is within the exclusive province of the Governor to decide if the inmate will get early parole.

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[7]The statute is silent about where this "relevant evidence" is supposed to come from in the absence of some sort of evidentiary record in the district court from, for example, a sentencing hearing at which the defendant could have presented mitigating evidence. Especially when very long sentences result from application of mandatory minimum sentencing, it would be quite unusual for there to be an extensive sentencing hearing with "relevant evidence" in the record.

B. SB 16-180 MAY NEVER APPLY TO MR. LUCERO, SO THIS APPEAL IS NOT MOOT

In Mr. Lucero's case, it is not known if DOC will determine that he meets all of the criteria even for submission of an application for the program. While he meets some of the statutory criteria -- he was convicted for juvenile conduct, he has a sentence of at least twenty years, and he was not convicted of a sex assault (application criteria #1 - #3) -- others are unknown. His status on application criteria # 4 (GED or high school diploma) and #5 (not receiving mental health services) is not a matter of record in this case.

Criteria #6 (participation in DOC programs offered to him) and #7 (demonstrated maturity/behavior) are wholly within the discretion of DOC; however, historically, inmates who have an essentially unattainable parole eligibility date ("PED") are not offered many, if any, programs or services, as those are reserved for inmates who have a shorter-term PED.

Even if Lucero is permitted to submit an application, that does not mean that he will receive any services authorized by SB 16-180. There is no requirement that SB 16-180 provide services for all individuals who qualify. It is entirely possible that DOC will allocate services the way it always has, i.e., those nearest

in time to their PED's are most likely to receive services, and those with the longest sentences receive dramatically fewer to no services.

The specialized program is supposed to go into effect in late 2017. Even if the program is on schedule, then, the earliest any of the inmates selected for it might complete the program would be sometime in late 2020 or early 2021. However, the law provides for a report to the legislature if the program is not ready to roll out on time. §17-34-102(5)(a), C.R.S. 2016. There is no guarantee that any of its "benefits" will reach Guy Lucero, or any inmate. Given the massive uncertainties about the scope and resources that may or may not be available to implement the program, this Court cannot conclude that this appeal is moot.

The mootness doctrine requires that the party bringing the claim experience some real-life change in status or that the party receive the benefit he or she was suing to obtain. *See Nowak v. Suthers,* 2014 CO 14, ¶ 12 (prisoner challenging mandatory release date calculation was released from custody); *Beeson v. Kiowa Cty. Sch. Dist. Re-1*, 39 Colo. App. 174, 175, 567 P.2d 801, 803 (1977)(student challenging a school board policy that prohibited married students from participating in extracurricular activities graduated from the university); *Humphrey v. Sw. Dev. Co.,* 734 P.2d 637, 638 (Colo. 1987) (the parties to a water rights dispute reached a settlement after certiorari was granted); *Goedecke v.*

Department of Inst., 198 Colo. 407, 410 n. 5, 603 P.2d 123, 124 n. 5 (1979) (mental patient asserting a right to refuse treatment was released from the hospital during pendency of the appeal). Passage of S.B. 16-180 is simply not the kind of event that can serve to moot the issues in the appeal. Mr. Lucero is still in prison, and there is no reason to believe that he will not remain there absent a grant of relief by this court.

The actual question, thus, is not one of mootness *per se.* The proper question is whether S.B. 16-180 mitigates the unconstitutionality of the 84-year sentence imposed upon Mr. Lucero for a non-homicide offense commited when he was 15-years old in which no one sustained serious injuries is unconstitutional under the Eighth Amendment and Article II, Section 20 of the Colorado Constitution.

C. S.B. 16-180 DOES NOT MITIGATE THE UNCONSTITUTIONALITY OF GUY LUCERO'S SENTENCE.

Even if the specialized program envisioned by SB 16-180 ever comes to pass, and even if Guy Lucero is permitted to apply for that program, it does not moot the case because S.B. 16-180 does not alter the unconstitutionality of Lucero's sentence. It does not provide a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" as mandated by the Eighth Amendment to the U.S. Constitution. *See Graham*, at 2030.

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

By requiring a finding of "extraordinary mitigating circumstances" in order to justify the granting of early release, S.B. 16-180 turns the Eighth Amendment on its head by making it, by definition, the rare juvenile who will be eligible for the recommendation for early parole. By definition,"extraordinary" means what it says: "very unusual and special; different in type or greater in degree than the usual or ordinary."[8] Thus, "extraordinary" would be the rare juvenile, not the other way around as required by the Eighth Amendment. For those who are fortunate enough to end up at the end of this multi-year process with the designation of "extraordinary mitigation," they may receive a positive recommendation and may even -- in the Governor's sole discretion -- receive early parole. But perversely, all of the other juveniles will be relegated to "not extraordinary" and therefore, not "worthy" of release.

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

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[8]Cambridge Dictionaries Online, http://dictionary.cambridge.org/us/dictionary/english/extraordinary (last visited July 5, 2016).

Graham-Miller-Montgomery trilogy, particularly the rule that almost all juveniles[9] are constitutionally entitled to a sentence that provides them with a meaningful opportunity for release based on demonstrated maturity and rehabilitation. SB 16-180, however, operates under the presumption that the juvenile offender should not be released before his parole eligibility date.

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

"Demonstrated maturity and rehabilitation" is a test that focuses on the individual and how much he or she has matured. *Graham, Miller*, and

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

Montgomery teach that almost all juveniles will attain this standard and that it will be the very rare juvenile that does not. By contrast, the "extraordinary mitigating circumstances" does not compel a focus on the juvenile's individual maturity and rehabilitation, but invites a focus on mitigation related to the crime, and a comparison between crimes, victims, inmates, and circumstances of various crimes. SB 16-180 sets up a false promise of nigh-insurmountable obstacles.

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

Even if the high "extraordinary mitigating circumstances" standard is met, the governor is not required to grant early release. The S.B. 16-180 process -- a recommendation by the parole board to the governor and an unfettered decision by the governor as to whether to grant "early release" -- more closely resembles the Governor's constitutional power to "grant reprieves, commutations and pardons after conviction," Colo. Const., Art. IV, §7 -- than it does parole. *See People v. Herrera*, 516 P.2d 626, 628 (Colo. 1973)("The power of commutation ... is the power to reduce punishment from a greater to a lesser sentence."). This is a bill

that provides the Governor with more information to use in exercising his or her power to reduce sentences. It provides no new authority.[10]

Nor does it provide a right to any particular procedures for any particular inmate. There is no judicial involvement or judicial enforcement. There is no requirement for a sentencing hearing at which a record can be made for later use in the specialized clemency recommendation program. There is no requirement that the parole board hold a hearing to permit development of evidence. The legislation does not give the sentencing judge any control over who is accepted into the program.

3. SB 16-180 does not erect a categorical bar, which is required by the Eighth Amendment.

The overarching concept of the *Roper-Graham-Miller* trilogy is that because children are constitutionally different from adults for sentencing purposes, they are categorically excluded from certain punishments. This categorical exclusion rests on psychological, developmental, and neuroscientific studies

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[10]In fact, an enterprising prosecutor may argue that S.B. 16-180 reduces or limits the Governor's clemency powers, by stating that "the governor may grant early parole ... when the offender successfully completes the specialized program..." §17–22.5–403(4.5)(a), C.R.S. 2016. It is unclear whether the preposition "when" is intended to govern merely the timing of the application, or whether it is intended conditionally, to attempt to limit the Governor's constitutional power, as if it states "if the offender successfully completes the specialized program."

demonstrating that children are less culpable for their actions and more amenable to change, and therefore pose a reduced risk of future dangerousness.[11] States must give these offenders "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham,* at 75. *See id.,* at 79 ("a chance to demonstrate maturity and reform"); *id*., at 82 ("a realistic opportunity"). The Juvenile "should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential." *Id.* at 79.

These are not mere aspirational statements for parole boards to "consider." They are categorical rules that apply to courts and the sentences they mete out. They are substantive, categorical Eighth Amendment limits on sentences. Absent a factual determination that the juvenile's crime reflects "irreparable corruption," the maximum possible sentence even for a juvenile convicted of a homicide offense is one that provides a realistic, meaningful opportunity for release based on demonstrated maturity and rehabilitation. *Graham*, at 75, 79, 82; *Miller* at 2469.

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[11]As a recent study of juvenile offenders demonstrated, "even among those individuals who were high-frequency offenders at the beginning of the study, the majority had stopped these behaviors by the time they were 25." Laurence Steinberg, *Give Adolescents the Time and Skills to Mature, and Most Offenders Will Stop*. Chicago, IL: MacArthur Foundation, p. 3 (2014), *available at* http://www.pathwaysstudy.pitt.edu/documents/MacArthur%20Brief%20Give%20Adolescents%20Time.pdf.

S.B. 16-180 is not the panacea the People believe it to be. While, for a few inmates, S.B. 16-180 may be a potential step towards compliance with the United States Supreme Court's mandate in *Graham* and *Miller*, it does not transform Mr. Lucero's unconstitutional sentence into a constitutional one.

4. The California example.

The California Supreme Court has issued two relevant opinions regarding two separate pieces of legislation in that state: *People v. Gutierrez,* 324 P.3d 245 (2014), in which the Court found that Cal. Penal Code §1170 does not satisfy the Eighth Amendment, and *People v. Franklin*, 370 P.3d 1053 (Cal. 2016), in which it found that Cal. Penal Code §3051 does so (and therefore renders the defendant's constitutional claims moot).[12] Because there are no other states with such significant pieces of state legislation with accompanying state supreme court interpretations, the California experience is particularly instructive on the question of whether S.B. 16-180 moots out Mr. Lucero's claims. Because S.B. 16-180 is similar to Cal. Penal Code §1170, and very dissimilar to Cal. Penal Code §3051, this Court can obtain helpful guidance from the California experience in evaluating in its own cases the impact of intervening statutes.

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[12]*People v. Gutierrez* was discussed in the briefing in this case. *People v. Franklin* was not, as it was issued on May 26, 2016.

(a) The California statutes.

Cal. Penal Code §1170 (hereinafter, "§1170") was California's response to *Miller* and *Graham*.[13] It permits a juvenile offender who was serving an LWOP sentence to petition the Court after 15 years to recall the sentence and impose a different sentence. In *People v. Gutierrez,* 324 P.3d 245 (2014), the Court held that §1170 did not render constitutional an otherwise unconstitutional LWOP sentence, because it does not in any way change the sentence; rather, it simply provided for a possible after-the-fact correction of an unconstitutional sentence.

California enacted another bill, codified as Cal. Penal Code §3051 (hereinafter, "§3051").[14] The new law sets up a youthful offender parole system for most juvenile offenders.[14] The salient feature of §3051 -- unlike both §1170 and Colorado's S.B. 16-180 -- is that it actually changes the inmate's parole eligibility date ("PED"): an offender with a determinate sentence is eligible for parole no later than 15 years after sentencing, regardless of the length of the

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[13]*See* Calif. Stats. 2012, ch. 828, §1 (S.B. No. 9)(signed Sept. 30, 2012).

[14]*See* Calif. Stats. 2013, ch. 312, §1 (S.B. No. 261)(signed Sept. 16, 2013).

[14]The new parole system applies to all offenders who were under 23 at the time of their offense except for those convicted of certain sex crimes, repeat offenders, and those sentenced to LWOP following a *Miller*-compliant hearing.

sentence.[15] Thus, §3051 means that all youthful offenders with determinate sentences (like Mr. Lucero) have a PED when they reach the age of approximately 30-35 years old.

Section 3051 also requires explicit parole board regulations that govern when and whether the inmate is actually released on parole. The regulations must require the parole board to"provide for a meaningful opportunity for release," and to "give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law." §3051(e). The statute limits the parole board's authority, even down to what evidence it may consider: if the board uses psychological evaluations or risk assessment instruments, they must be

> administered by licensed psychologists employed by the board and shall take into consideration the diminished culpability of juveniles as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the individual.

[15]Offenders with indeterminate sentences have to wait longer: an offender with an indeterminate sentence of less than 25 years to life gets a parole eligibility date set at 20 years from sentencing; if the indeterminate sentence was 25 or more years to life, then the parole eligibility date is set at 25 years after sentencing.

§3051(f)(1). The parole board must accept and review statements submitted by "Family members, friends, school personnel, faith leaders, and representatives from community-based organizations with knowledge about the individual before the crime or his or her growth and maturity." §3051(f)(1).

(b) The impact of the new California statutes on pending cases, compared with the impact of Colorado's statute on this case.

In *People v. Franklin*, 370 P.3d 1053 (Cal. 2016), the California Supreme Court ruled that, by requiring that Franklin receive a parole hearing during his 25th year of incarceration coupled with §3051's establishment of a genuine youthful parole system mooted Franklin's claim that *Miller* was violated by his mandatory sentence of 50 years to life imprisonment. Several elements of §3051's youthful parole system -- none of which exist in Colorado's S.B. 16-180 -- were key to the California Supreme Court's decision:

1) Nature of the program. The California legislature explicitly intended to, and did, "establish a parole eligibility mechanism" and established a "meaningful opportunity for release." *Franklin*, 370 P.3d at 1060. ***Contrast*** S.B. 16-180, which establishes not an actual opportunity for release, but instead an opportunity for some juveniles to apply for a DOC

program that results not in release, but in a recommendation for an act of grace from the governor, who may or may not grant mercy.

2) Coverage of the law. While both S.B.16-180 and California's §3051 exclude certain category of offenders (e.g. both exclude those convicted of certain sex offenses), the California Statute grants parole eligibility after 15, 20 or 25 years to all non-excluded offenders. ***Contrast*** SB 16-180, which places further limits on those eligible for the "specialized program," allows the DOC to fund or staff the program in any way it wishes, even if that results in a very small number of inmates who can apply for or be accepted, sets up very subjective criteria for DOC to apply, and then allows the DOC to exclude from the program even an inmate who objectively meets all of the criteria.

3) Parole eligibility date ("PED"). The California law alters the otherwise unconstitutional sentence by changing the PED, providing a PED of no more than 25 years for all youthful offenders regardless of the length of their term of years sentence. ***Contrast*** SB 16-180, which does not in any way change the PED or otherwise alter the sentence imposed.

4) Restrictions upon and requirements about the actual parole decision. Section 3051 requires that the parole board's actual parole

decision be "informed by youth-related factors, such as his cognitive ability, character, and social and family background at the time of the offense." *Franklin*, 370 P.3d at 1055. As noted above, even the parole board's use of assessment instruments and psychological evaluations is legislatively restricted so that the *Roper-Graham-Miller* constitutional requirements permeate every aspect of the parole decision. ***Contrast*** S.B. 16-180, which does not require that DOC adopt regulations that would require it to base parole on *Roper-Miller-Graham* factors, and in fact, limits the granting of "early parole: (i.e. clemency) to cases in which the DOC finds "extraordinary mitigating cirumstances." SB-16-180 requires only that the DOC, when deciding whether to accept the juvenile offender into the progam, consider the "age and maturity of offender at the time of the offense," among other considerations. Once accepted into the program there are no statutory guidelines for either the parole board or the governor to consider in determing whether to grant "early parole."

5) Parole board hearings. By moving up the PED, the California law ensures a parole hearing for all juvenile offenders. ***Contrast*** S.B. 16-180, that provides no hearing for most juvenile offenders. Even for those that make it into the "specialized program" and complete it to DOC's

satisfaction, there is no parole board hearing guaranteed; DOC is required to hold a hearing if it is inclined to make a positive recommendation, i.e., to provide those opposing a positive recommendation the opportunity to object to it, but DOC is not required to hold a hearing if it is considering a no-recommenation decision. The bottom line is that S.B. 16-180 does not provide any parole hearing for any particular juvenile offender until that offender's existing PED (which, as noted above, is not changed by S.B. 16-180).

III. CONCLUSION: S.B. 16-180 DOES NOT CURE THE UNCONSTITUTIONALITY OF GUY LUCERO'S SENTENCE.

The remote possibility of being selected into and completing a "specialized program" with the goal of obtaining a favorable DOC recommendation for mercy by the Governor, "does not mitigate the harshness of his sentence." Thus, S.B. 16-180 does not make constitutional otherwise unconstitutional sentences imposed upon juveniles. The Court in *Graham* however made clear that because "the remote possibility of [clemency] does not mitigate the harshness of the sentence," the right for a juvenile offender to seek clemency does not make an otherwise unonstitutional sentence imposed upon him constitutional. *Graham*, 560 U.S. at 70, citing *Solem v. Helm,* 463 U.S. 277, 300-01 (1983).

SB 16-180 closesly resembles Cal.Penal Code §1170, which the California court explicitly held did not render constitutional a sentence handed down under prior California law. *People v. Gutierrez, supra*. California's later adoption of a constitutional sentencing statute (Cal. Penal Code §3051) provides an excellent contrasting example that should reinforce this Court's ruling that S.B. 16-180 does not resolve the Eighth Amendment issues raised in this appeal.

No doubt, the General Assembly's goals in adopting SB-16-180 are laudable. Someday, some juvenile offenders will probably benefit from the specialized program contemplated by S.B. 16-180. However, enactment of the statute does not alter the unconstitutional nature of Mr. Lucero's sentence. Even now, Mr. Lucero contnues to serve a sentence of 84 years with a parole eligibility date after 42 years.

In making its parole decisions, the parole board is presently required to treat Guy Lucero (who committed his crime when he was 15) as it would any adult offender. *See* §17-22.5-404(4), C.R.S. 2016. There exists no requirement in the law that the parole board apply the *Graham/Miller* factors. Thus the passage of neither S.B. 16-180 (nor S.B. 16-181) renders moot Mr. Lucero's claim that his sentence of 84 years is unconsitutional under the Eighth Amendment to the U.S. Constitution and Article II, Section 20 of the Colorado Constitution.

Respectfully submitted this 11th day of September, 2016.

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CERTIFICATE OF SERVICE

I certify that on the 11th day of September 2016, I transmitted via the Integrated Colorado Courts E-filing system (ICCES) the foregoing Supplemental Brief to John Lee, Criminal Appeals Division, Office of the Attorney General.

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