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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. 11CA2034 Petitioner, CHERYL ARMSTRONG, v. Respondent, THE PEOPLE OF THE STATE OF COLORADO.	▲ **COURT USE ONLY** ▲ Case No. 2013SC945
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SUPPLEMENTAL ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

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

/s/ Joseph G. Michaels
Signature of attorney or party

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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.

SUMMARY OF THE ARGUMENT

Senate Bill 16-180 provides a more meaningful opportunity for release based on demonstrated maturity and rehabilitation than anything required by *Graham v. Florida*, 560 U.S. 48 (2010). By passing S.B. 16-180 and S.B. 16-181, the legislature ensured that juveniles like Armstrong have a meaningful opportunity for release.

Additionally, the bills provide a narrow legislative fix to a comprehensive sentencing scheme and do not require this Court to excise or revise additional parts of the sentencing scheme or invade the province of the legislature in determining an appropriate sentence for juveniles. The bills also remove what would be a de facto case-by-case analysis for *every* juvenile sentence, should this Court determine that *Graham* does apply to consecutive term-of-year sentences.

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

The statute does not present a "clemency" situation like the ad hoc executive clemency discussed in *Graham*. Rather, it is a specific release pipeline designed to achieve the meaningful opportunity for release based on identified characteristics for a specific class of offenders that, ultimately creates a presumption of rehabilitation. In that context, S.B. 16-180 and S.B. 16-181 provide a direct avenue towards release eligibility, whether couched as "clemency" or "parole." Regardless, S.B. 16-180 provides a juvenile offender, such as Armstrong, with a meaningful opportunity for release during her natural life.

However, Armstrong's sentence does not implicate *Graham*, 560 U.S. 48, because *Graham* does not apply to consecutive term-of-years sentences imposed on juveniles convicted of multiple offenses.[2] Further Armstrong has "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 75.

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[2] The People also maintain that Armstrong's convictions for complicity to second-degree murder are homicide offenses within the meaning of *Graham*, due to the "severity and irrevocability" of murder. *See Graham*, 560 U.S. at 63, 67 ("Juvenile offenders who committed both homicide and nonhomicide crimes present a different situation for a sentencing judge than juvenile offenders who committed no homicide.").

INTRODUCTION

Following oral argument in this case, the governor signed S.B. 16-180 and S.B. 16-181 into law. Senate Bill 16-180 creates 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 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.

Senate Bill 16-180 not only provides this opportunity, it goes further than what *Graham* requires.

I. The bill exceeds *Graham*'s scope and codifies an expanded coverage for all juveniles consistent with *Graham*'s requirement for a meaningful opportunity for release.

A. Standard of Review

The People do not suggest Armstrong is challenging S.B. 16-180 as unconstitutional, so much as insufficient under *Graham*. However, the standard for reviewing a statute's constitutionality, which is a legal question this Court reviews de novo, provides an appropriate framework for reviewing the sufficiency of S.B. 16-180. *City of Greenwood Village v. Petitioners for Proposed City of Centennial*, 3 P.3d 427, 440 (Colo. 2000). This Court presumes the legislature comports with constitutional standards in enacting a statute, and defendants bear a heavy burden to demonstrate a statute's unconstitutionality beyond a reasonable doubt. *Id.*; *People v. Allman*, 2012 COA 212, ¶ 7 (same).

When interpreting a statute, this Court must give effect to the legislature's purpose and intent by examining the plain and ordinary meaning of the statutory language. *People v. Madden*, 111 P.3d 452,

457 (Colo. 2005). If the statute is susceptible to different interpretations, this Court must adopt the interpretation comporting with constitutional standards. *People in Interest of C.M.*, 630 P.2d 593, 594 (Colo. 1981).

B. Law and Analysis

Graham "concern[ed] only those juvenile offenders sentenced to life without parole solely for a non-homicide offense." 560 U.S. at 63 (emphasis added). Thus, *Graham* analyzed a juvenile sentenced to (1) a single sentence, of (2) life without the possibility of parole, for (3) a single non-homicide offense. *Id.*[3]

Graham did not address multiple sentences aggregated together as a result of repeat criminal behavior or a cumulative sentence that still allowed for the possibility of parole. *Id.*; *see also id.* at 113 n.11 (Thomas, J., dissenting) (Court did not consider juveniles serving lengthy term-of-year sentences); *id.* at 124 (Alito, J., dissenting) ("Nothing in the Court's opinion affects the imposition of a sentence to a

[3] *Graham* found that Colorado statutes already "forbid life without parole for juvenile offenders." 560 U.S. at 85 (citing § 18-1.3-401(4)(b), C.R.S. (2015)).

term of years without the possibility of parole.") (emphasis added); *accord Bunch v. Smith*, 685 F.3d 546, 552-53 (6th Cir. 2012) ("[Graham] did not analyze sentencing laws or actual sentencing practices regarding consecutive, fixed-term sentences for juvenile nonhomicide offenders."), *cert. denied*, *Bunch v. Bobby*, 2013 U.S. LEXIS 3202 (Apr. 22, 2013).

By enacting S.B. 16-180, the legislature has ensured that *all* juveniles—not just the juveniles convicted of a single nonhomicide offense serving an LWOP sentence (a class of offender that does not exist in Colorado)—are eligible for release upon meeting certain, delineated requirements. Consequently, the legislature's enactment of S.B. 16-180 goes far beyond what *Graham* requires.

1. S.B. 16-180's requirements are sufficiently detailed to notify defendants of the requirements they must meet to achieve the presumption of rehabilitation.

Senate Bill 16-180 allows juvenile offenders convicted as adults of felonies other than first degree murder[4] to petition for placement in a specialized program after serving 20 years of his or her sentence.[5] To participate in the 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;

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[4] 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) 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.

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

- 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:

> 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 the 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. Further, because *Graham* only applied to a juvenile who committed a single nonhomicide offense and received a single sentence as a result of that offense to a single term of LWOP,[6] S.B. 16-180 far exceeds *Graham*'s requirement that a juvenile must have a meaningful opportunity for release.

In any event, 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. The Supreme Court has also

[6] The only two class 1 felony offenses in Colorado that are nonhomicide offenses are first-degree kidnapping and treason, neither of which is at issue here. *See* § 18-3-301(2), C.R.S. (2015); § 18-11-101, C.R.S. (2015).

indicated, albeit implicitly, that a juvenile serving 40 years in prison would not violate the Eighth Amendment. *See 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").[7]

Indeed, defense counsel in *Graham* conceded that the "Colorado provision [providing parole eligibility after 40 years] would probably be constitutional." *Id.* at 123, n.13 (Thomas, J., dissenting). Thus, again, 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.

[7] The *Graham* majority did not dispute this threshold.

2. S.B. 16-180 leaves Colorado's sentencing scheme intact by providing a juvenile-specific avenue of accelerated rehabilitation and review.

In *Tate*, this Court acknowledged the principle of "keep[ing] as much of the legislature's work intact as possible." *Tate*, ¶ 47 (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"). The legislature's passage of S.B. 16-180 is consistent with *Graham* and this principle. Senate Bill 16-180 allows courts to impose sentences under Colorado's sentencing scheme without this Court having to invalidate or evaluate each sentence on a case-by-case basis.

3. Armstrong does not have standing to challenge S.B. 16-180's language excluding sex offenders and juveniles receiving mental health treatment.

Armstrong suggests S.B. 16-180 does not provide the early parole opportunity to all offenders because it excludes sex offenders and

juveniles receiving mental health treatment. As such, she contends, it is not sufficient. But she does not have standing to make that argument. *People v. Galvadon*, 103 P.3d 923, 925 (Colo. 2005) (general concept of standing asks whether a person is asserting his or her own rights—no those of a third person—and whether the person has alleged an injury in fact). More importantly, however, is that this argument suggests the statute is otherwise sufficient because it *does* provide a path to release for the other juveniles. But because Armstrong is neither a sex offender nor receiving mental health treatment, S.B. 16-180 provides her an accelerated path to release and she has no standing to assert rights on behalf of sex offenders or juveniles receiving mental health treatment. *Cf. id.*; *see also Rakas v. Illinois*, 439 U.S. 128, 128-29 (1978).

4. Armstrong has not established that the statute is insufficient under *Graham*.

Even assuming *Graham* requires a bill like S.B. 16-180, Armstrong has not carried her burden of establishing that S.B. 16-180 is insufficient. *See Graham*, 560 U.S. at 111 (Thomas, J., dissenting)

("it is the 'heavy burden' of petitioners to establish a national consensus against [a sentencing practice]") (quoting *Stanford v. Kentucky*, 492 U.S. 361, 373 (1989)); *cf. also City of Greenwood Village*, 3 P.3d at 440 (defendant bears a heavy burden to establish the unconstitutionality of a statute beyond a reasonable doubt); *People v. Lovato*, 2014 COA 113, ¶ 12 ("defendant has the burden of establishing the unconstitutionality of a statute, as applied [to her], beyond a reasonable doubt") (internal quotations omitted).

5. S.B. 16-180 is consistent with *Graham*'s penological concerns and the goal of rehabilitation.

When considering a state's sentencing practice under a categorical approach, *Graham* stated that "penological justifications for the sentencing practice are also relevant." 560 U.S. at 71. *Graham* rejected the penological goals of retribution, deterrence, incapacitation, and rehabilitation as being legitimate when imposing an LWOP sentence. *Id.* As a result, imposing such a sentence on a juvenile was cruel and unusual as a sentencing practice. *Id.* at 71-72.

But S.B. 16-180 significantly alters Colorado's sentencing scheme as applied to juvenile offenders. As a result of S.B. 16-180, Colorado's juveniles will *never* face a sentence of LWOP or even an effective sentence of life without parole based on an aggregation of offenses and sentences. Instead, regardless of the length of an offender's sentence, he or she will have the possibility of parole after serving 25 years and meeting the presumption of rehabilitation requirements set forth in S.B. 16-180. As a result, unlike the practices *Graham* denounced, Colorado's sentencing scheme does not "forswear altogether the rehabilitative ideal" and as not made an "irrevocable judgment about that [juvenile]'s value and place in society." Instead, S.B. 16-180 embraces the rehabilitative idea consistent with *Graham* by explicitly conditioning early parole on a program designed to help the juvenile reintegrate into society and establish a presumption of rehabilitation. *See* § 17-34-102(2), C.R.S. This system goes significantly further than *Graham* requires.

Finally, as of this writing, Armstrong is parole eligible on August 8, 2036, when she will be approximately 58 years old (not counting any

additional good time and earned time credits she will earn before then).[8] *Graham* does not require a defendant to actually be paroled; it requires a meaningful possibility of parole. 560 U.S. at 75. Armstrong has that possibility.

II. S.B. 16-180 creates a specialized, juvenile-specific program for early parole, not clemency.

The People agree that executive clemency, as a general vehicle applicable to all offenders regardless of age, is an insufficient mechanism to guarantee a meaningful opportunity of release to a true *Graham* defendant. *See Graham*, 560 U.S. at 70. But S.B. 16-180 is neither general executive clemency nor as arbitrary or ad hoc as general executive clemency. Rather, S.B. 16-180 enacts a "specialized program" to make an entire special class of offenders—juveniles—eligible "for early parole." § 17-34-102(7), C.R.S. And it emphasizes consideration of that class *because of* the class's characteristics.

In addressing the differences between executive clemency and parole, the Supreme Court held:

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[8] *See* http://www.doc.state.co.us/oss/ (last visited July 14, 2016).

> 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. Nothing about this

program is "ad hoc" or without standards. *Cf. Solem*, 463 U.S. at 300-01. Nor does S.B. 16-180 anywhere identify the process as clemency. Rather, it creates a presumption of rehabilitation that the governor must consider. *See* Colo. Const. Art. IV, § 2 (governor "shall take care that the laws be faithfully executed").

In contrast, executive clemency is open to *all* prisoners in Colorado and is authorized by the Colorado Constitution, Colo. Const. Art. IV, § 7, but it is an "extraordinary measure." *See* . Indeed, general executive clemency applications are "simply a unilateral hope." *Schwartz v. Owens*, 134 P.3d 455, 458 (Colo. App. 2005) (quoting *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981)).

The application for executive clemency carries no presumption of rehabilitation and, unlike S.B. 16-180, there is no declaratory language expressing an intent to provide a meaningful opportunity for release. *Compare* Colo. Const. Art. IV, § 7; § 16-17-102, C.R.S. (2015); *with* S.B. 16-180 (Section 1. Legislative Declaration (1)(a), (2)[9]). Instead of

[9] Legislative Declaration Section 1(2) explicitly identifies S.B. 16-180's purpose of allowing a juvenile to "earn early release."

providing a presumption of rehabilitation, and unlike S.B. 16-180, the process of executive clemency only requires that good character evidence be "given such weight" as the governor deems "just and proper." § 16-17-102. The governor has "sole discretion" in this decision, *id.*, but nothing entitles a defendant to any kind of clemency relief. *Schwartz*, 134 P.3d at 458.

In contrast, S.B. 16-180 has specifically entitled juvenile defendants not only to a specific proceeding, but also a *presumption* of rehabilitation that does not exist in the general executive clemency process. It also explicitly states that its purpose is to rehabilitate all juvenile offenders to earn early release, S.B. 16-180 (Section 1(2). Legislative Declaration), whereas general executive clemency has no formal purpose of rehabilitation, but rather grants release (commutation or pardon) contingent on the defendant establishing good behavior and rehabilitation on an ad hoc basis, not as part of an organized program.

Additionally, with general executive clemency, the governor is under no duty to acknowledge receipt of an application for clemency or

even take any action at all. *See Schwartz*, 134 P.3d at 458-59. In contrast, S.B. 16-180 not only requires the *executive director*—not the executive clemency advisory board—to either accept the juvenile into the specialized program or reject her, § 17-34-101(2), C.R.S.; § 17-34-101(4)(a)-(b), C.R.S.; § 17-34-101(5), C.R.S., but it also requires the director to re-consider any denied application for this rehabilitative program three years later. § 17-34-101(5).

Senate Bill 16-180 then further requires the *parole board*—again, not the executive clemency advisory board—to schedule a hearing for juveniles being considered for early parole. § 17-22.5-403(4.5)(b), C.R.S. In contrast, for general executive clemency, any recommendation for clemency goes through the executive clemency advisory board. *See Schwartz*, 134 P.3d at 458.

Thus, unlike general executive 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.

The People agree with Armstrong that *Montgomery v. Louisiana*, 136 S. Ct. 718, 736-37 (2016), highlighted how juveniles should be given the opportunity to show their crime did not reflect irreparable corruption and that they should have some hope for years of life outside prison walls. Senate Bill 16-180 provides precisely that: a juvenile-specific rehabilitation and review program that yields a meaningful possibility of release somewhere around the juvenile's fortieth to forty-fifth birthday. That not only honors *Graham*'s spirit, but it goes significantly further than *Graham* requires.

CONCLUSION

Armstrong's sentences do not raise *Graham* concerns and are constitutional under the Eighth Amendment. Because S.B. 16-180 provides Armstrong with a meaningful opportunity for release during her natural life based on demonstrated maturity and rehabilitation, even if *Graham* applied to her sentences, her sentences are constitutional and should be upheld. This Court should hold that *Graham* does not apply, that S.B. 16-180 provides relief beyond

Graham's requirements, and that Armstrong's sentences are constitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **SUPPLEMENTAL ANSWER BRIEF** upon **NICOLE M. MOONEY**, via Integrated Colorado Courts E-filing System (ICCES) on July 20, 2016.

/s/ Tiffiny Kallina

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