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SUPREME COURT STATE OF COLORADO 2 East 14th Ave. Denver, CO 80203	
On Ms. Armstrong's Petition for Writ of Certiorari to the Colorado Court of Appeals Court of Appeals Case No. 11CA2034	▲ COURT USE ONLY ▲
Denver District Court No. 95CR1689	Case Number: 13SC945
PETITIONER: CHERYL ARMSTRONG **vs** **RESPONDENT:** PEOPLE OF THE STATE OF COLORADO	
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Supplemental 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. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

It contains 1,654 words (principal brief does not exceed 9,500 words; reply brief does not exceed 5,700 words).

1 acknowledge my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

___/s/ Nicole M. Mooney_____

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Issue To Be Briefed

Whether S.B. 16-180 provides all juvenile nonhomicide offenders with the constitutionally mandated meaningful opportunity for release upon demonstrated maturity and rehabilitation required by the United State Supreme Court in *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 2030 (2010).

Argument

1. Applicable Law

While the Supreme Court held a State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime, the State must give such a juvenile offender "***some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation***." (Emphasis supplied) *Graham*, 130 S.Ct. at 2030. And in *Montgomery v. Louisiana,* 136 S. Ct. 718, 736-37 (2016), the Court stated: "In light of what this Court has said in *Roper*, *Graham*, and *Miller* about how children are constitutionally different from adults in their level of culpability, however, 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***." (Emphasis supplied).

2. Compliance

While the Court left it "for the State in the first instance, to explore the means and mechanisms for compliance," *Graham*, 130 S.Ct. at 2030, it has provided some indications of what are appropriate means of compliance. It has rejected executive clemency as a "fix" for a sentence that denies hope of release. When addressing executive clemency, the Court stated: "[A life without parole sentence] deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency-the remote possibility of which does not mitigate the harshness of the sentence." *Graham*,130 S.Ct. at 2027. Executive clemency therefore does not provide the reasonable opportunity for release upon demonstrated maturity and rehabilitation required in *Graham*.

In *Montgomery*, the Court ruled "[a] state may remedy a *Miller* [and presumably a *Graham*] violation by permitting juvenile . . . offenders to be considered for parole, rather than by resentencing them." 136 S.Ct. at 736. The Court then cites Wyoming's statute providing parole eligibility to juvenile homicide offenders after 25 years. Wyo. State. Ann. §6-10-301(c) (2013). However, the Court's nod toward parole must be underscored by its understanding that parole is a regular part of the rehabilitative process: "Assuming good

behavior, [parole] is the normal expectation in the vast majority of cases." *Solem v. Helm*, 463 US 277, 300-301 (1983).

What can be drawn from the Court's references is that a reasonable opportunity for release upon demonstrated maturity and rehabilitation is something that is a regular part of the process and is a normal expectation upon good behavior. It cannot be a "remote possibility."

3. What S.B. 16-180 Provides

If a juvenile nonhomicide offender is accepted into the program by the executive director of DOC after serving at least 20 years of his or her sentence; participates in the program at least 3 years; and successfully completes the specialized program, he or she is eligible to apply for "early parole."[1] Ex. AA

While there is a presumption that upon successful completion of the specialized program, the "offender has met the factual burden of presenting extraordinary mitigating circumstances" and the "offender's release to early parole is compatible with the safety and welfare of society," [Ex. AA] it is a presumption with no directive and no requirement that the governor even address it in his or her decision.

[1] S.B. 16-180 is attached here to as Exhibit AA.

Upon meeting the criteria set forth above, a juvenile offender may make application to the governor for early parole and must provide notice and a copy to the State Board of Parole. The State Board of Parole shall review the application and schedule a hearing if it considers making a recommendation for early parole. The State Board of Parole "after considering the presumptions" then shall make a recommendation to the governor.

The governor may grant early parole "if, in the governor's opinion, extraordinary mitigating circumstances exist and the offender's release from institutional custody is compatible with the safety and welfare of society." Ex. AA

4. S.B. 16-180 Does Not Provide Opportunity to All Juvenile Offenders

S.B. 16-180 does not provide a path to release for all juveniles serving extreme sentences. It excludes some juveniles from participation in the specialized program and from the possibility it provides to seek "early parole" from the governor. A juvenile offender is excluded from petitioning the executive director of the Department of Corrections for placement in the specialized program if he or she has been convicted of unlawful sexual behavior. A juvenile offender is also excluded from petitioning for placement in the program if he or she is in a treatment program for serious mental illness. See Ex. AA

5. S.B. 180 Does Not Provide the Reasonable Opportunity for Release Upon Demonstrated Rehabilitation and Maturity Graham Mandates

S.B. 180 provides nothing more than a "remote possibility;" it does not provide a reasonable opportunity for release.

First, it comes down to a totally discretionary decision of the governor. The governor's decision regarding "early parole" is akin to an executive clemency review. There is no requirement that the governor consider, let alone honor, the presumption. The criteria set out in S.B. 16-180 for the governor to consider is comparable to commutation criteria and it provides the same absolute discretion to the governor without any review mechanism. A review of executive clemency includes Colorado Constitution, Article IV, Section 7: "The governor shall have the power to grant reprieves, commutations and pardons after conviction for all offenses except treason." And, pursuant to C.R.S. §16-17-101, a governor may commute a sentence "when proper, advisable, and consistent with public interests and the rights and interests of the offender.

Second, S.B. 16-180 provides nothing additional to existing possibilities for a juvenile's release from prison in Colorado. Early parole through the Governor's Office was already a part of Colorado statutes prior to the enactment of S.B. 16-180. C.R.S. §17-22.5-403 (4) already provides: "The governor may grant

parole to an inmate to whom subsection (2) or (3) of this section applies prior to such inmate's parole eligibility date or discharge date if, in the governor's opinion, extraordinary mitigating circumstances exist and such inmate's release from institutional custody is compatible with the safety and welfare of society."

Conclusion

S.B. 16-180 is a piece of legislation that is not yet more than words on a piece of paper. Whether it will in fact provide any opportunity of release to anyone remains to be seen. Who will be placed in the program is yet to be seen. Whether a female such as Ms. Armstrong will be able to meaningfully participate at a meaningful time is yet to be seen. How many will be placed in the program is yet to be seen. Whether anyone completes the program is yet to be seen. Whether the governor will grant parole to anyone after completing the program remains to be seen.

In addition, S.B. 16-180 does not provide a meaningful opportunity. All juvenile nonhomicide offenders are not eligible to apply for its specialized program. It is not part of any regular or normal rehabilitation process and there can be no expectation of release. There is unfettered discretion in the hands of the executive director of the department of corrections regarding who and how many juveniles are admitted to the specialized program and then there is unfettered

discretion in the hands of the governor whether to grant early parole to any juvenile who completes the program.

For a State's mechanism to provide Graham's mandated "reasonable opportunity for release upon demonstrated maturity and rehabilitation it must provide more than is provided in S.B. 16-180.

Dated this 6th day of July 2016.

Respectfully submitted,
MS&M LAW OFFICE

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CERTIFICATE OF SERVICE

I hereby certify I requested a true and correct copy of the foregoing **Brief** be delivered through the ICCES system on this 6th day of July 2016, and addressed to all parties of record as follows:

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_/s/ Nicole Mooney_____