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

GUY LUCERO,
PETITIONER,

v.

THE PEOPLE OF THE STATE OF COLORADO,
RESPONDENT.

Case No.2013SC624

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OPENING BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that except for length 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. Specifically, the undersigned certifies that: The brief does not comply with C.A.R. 28(g) as it contains 13027 words. An appropriate motion is being filed.

The brief complies with C.A.R. 28(k): It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.

\s\ Eric A. Samler

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ISSUES PRESENTED

I. WHETHER THE COURT OF APPEALS ERRED BY EXTENDING GRAHAM v. FLORIDA, 560 U.S. 48 (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.

II. WHETHER A CONVICTION FOR ATTEMPTED MURDER IS A NON-HOMICIDE OFFENSE WITHIN THE MEANING OF GRAHAM v. FLORIDA, 560 U.S. 48 (2010).

III. WHETHER THE COURT OF APPEALS EXCEEDED ITS AUTHORITY AND VIOLATED THE PRINCIPLE OF PARTY PRESENTATION BY SUA SPONTE TREATING THE APPEAL OF A PROPERLY FILED RULE 35(B) MOTION AS IF IT WERE AN APPEAL OF A RULE 35(C) MOTION.

STATEMENT OF THE CASE AND FACTS

In 2006, Lucero was tried as an adult and convicted of the following offenses committed when he was fifteen years old: conspiracy to commit first degree murder, attempted first degree murder, and two counts of second degree assault. All of his sentences aggravated as crimes of violence. He received consecutive sentences totaling eighty-four (84) years in the custody of the Department of Corrections:

-- 32 years for the conspiracy,

-- 32 years for the attempted first degree murder, and

-- 10 years each for two separate counts of second degree assault.

His conviction and sentences were affirmed on direct appeal. *People v. Lucero,* 2009 WL 1915113 (Colo. App. No. 07CA0774, July 2, 2009) (not published).

In 2011, Lucero filed a timely Crim. P. 35(b) motion seeking reduction of his sentence. That motion was denied. In its published opinion, the Court of Appeals (hereinafter COA) characterized the Rule 35(b) motion as one challenging the constitutionality of the sentence under *Graham v. Florida*, 569 U.S. 48 (2010). *People v. Lucero*, 2013 COA 53, ¶5 (April 11, 2013).

The Court got one fundamental fact wrong: Lucero's Rule 35(b) motion did not argue that his sentence is *automatically* unconstitutional. Rather, he argued that, in making its *discretionary* decision under Rule 35(b), the district court should take into account its obligations under *Graham* to fully consider Lucero's youth, and that the district court should reduce the sentence because failure to do so would violate the principles espoused in *Graham*.

In his motion, Lucero told the district court he intended to present evidence; however, at the hearing, the district court ordered the parties to proceed by way of

offer of proof. The Court's opinion omits this critical fact, stating merely that there was a hearing "at which defendant addressed the court." *Id*., ¶4.

The Court is correct in that the district court, in its denial of the Rule 35(b) motion, mentioned Lucero's age in its order; however the district court did not conduct a proportionality review or refer to *Graham* or its applicability. *Ibid.*

The prosecution urged the COA to dismiss the Rule 35(b) appeal because a trial court's exercise of its discretion under Rule 35(b) is not reviewable. In response, Lucero argued that the trial court abused its discretion (and violated the constitutional prohibition against cruel and unusual punishment) in not holding an evidentiary hearing and making a meaningful consideration of Lucero's youth in violation of *Graham* and *Miller*. Neither party asked the Court to regard the matter as if it had been filed under Crim. P. Rule 35(c).

In its opinion, the Court did not reach the question of whether the Rule 35(b) order was appealable. Instead, it regarded the claim as if it had been filed, argued, and decided under Rule 35(c) and denied it because, among other reasons, there was insufficient evidence in the record. *Id*., at ¶15.

The Court did not reach the question of whether *Graham* required a more thorough Rule 35(b) hearing, or whether the trial court abused its discretion in

refusing to take evidence or to meaningfully consider youth; nor did the Court apply case law related to the trial court's obligation to hold an evidentiary hearing on a Rule 35(c) motion.[1] Instead, even though "[t]he parties agree that he will be eligible for parole for the first time when he is fifty-seven years old," *id*., at ¶ 3, the Court ruled that *Graham* does not apply at all, because life expectancy statistics give Lucero a fighting chance to beat death in a race to the prison gates:

> defendant's sentence does not fall within the LWOP category. The parties agree that defendant will be eligible for parole when he is fifty-seven years old. We therefore conclude that defendant has 'a meaningful opportunity for release' during his natural lifetime. *See Graham*, 560 U.S. at 76.
> ...
> We therefore conclude that defendant's sentence provides for a meaningful opportunity for release within his natural life span. Accordingly, he has failed to carry his burden of establishing that his sentence is unconstitutional under *Graham*.

Lucero, at ¶¶ 12, 18.

At oral argument in the Court of Apeals the People took the position that neither *Graham* nor *Miller* apply because those cases bar only automatic, non-discretionary LWOP sentences for "non-homicide crimes." *Lucero*, at ¶11.

[1]After the opinion issued, Lucero filed his Rule 35(c) motion raising ineffective assistance claims, as well as a claim that his life imprisonment without parole sentence is unconstitutional. He explained this in his petition for rehearing, which was denied on July 11, 2013. The Rule 35(c) motion is still pending in the district court, which has not yet regained jurisdiction over this case.

According to this argument, if Lucero's convictions for attempted murder and conspiracy to commit murder are, in fact, "homicide crimes," then the sentencing judge was under no obligation to ensure that Lucero's aggregate sentence – even if it is an effective life imprisonment sentence – provide a meaningful opportunity for release. Even though the COA did not address this question, this Court has granted *certiorari* to decide it.

SUMMARY OF THE ARGUMENT

Under Colorado law and the U.S. Constitution, a homicide offense is one in which, at a minimum, the life of the victim was taken.[2] In this case, the life of the victim was not taken. Thus, Lucero's aggregate 84-year sentence must comply with *Graham v. Florida, supra*. However, his sentence fails that constitutional test, because it does not provide for a meaningful opportunity for release before the end of that term.

The Eighth Amendment's requirement for some realistic, meaningful opportunity to obtain release is a different type of proportionality analysis than

[2]The death of the victim is necessary, but may not alone be sufficient, for a finding that the offense is a "homicide offense" within the meaning of *Graham* and *Miller*. Because in Mr. Lucero's case the life of the victim was not taken, he does not address the scope of the term "homicide offense" in a case in which the victim's life was taken but the defendant was not personally responsible for the killing.

that used in cases that do not involve juvenile offenders. The Eighth Amendment test for juvenile sentences focuses on the characteristics of the offender – i.e., the juvenile – not the characteristics of the offense. Thus, in construing the length of the sentence for purposes of a *Graham* analysis, the court must always consider the total length of the aggregated sentence – which in this case is 84 years.

When the *Graham* Court required courts to provide in their sentences a meaningful opportunity for release, the Court could not have meant technical release from one sentence segment (for example, the 32-year sentence for the attempted murder) and commencement of the next sentence segment (for example, the consecutive 32-year sentence for the conspiracy). That would defeat the purpose of requiring a meaningful opportunity for release *from prison* prior to expiration of the term.

A sentence that includes service of a period of parole following incarceration is not beyond the reach of the Eighth Amendment. Thus, the sentencing court cannot avoid applying *Graham* and *Miller* simply by looking to the then-estimated parole eligibility date – in this case, the year 2046. Under existing law, Lucero's sentence authorizes his confinement until his mandatory release date – which is presently set at 2088. Any "pick by number" approach

begs the constitutional question: whether the prescribed sentence is constitutional under the Eighth Amendment, given the offender's youth at the time of the offense. This Court should return the focus to that question, and order the district court to hold a meaningful sentencing hearing and impose a sentence that complies with the Eighth Amendment to the U.S. Constitution.

Mr. Lucero also challenges the COA's *sua sponte* conversion of his Rule 35(b) motion to a Rule 35(c) motion. Not only did the COA deny Mr. Lucero an opportunity to challenge the constitutionality of his sentence through a fully litigated Rule 35(c) hearing, by *sua sponte* converting his properly filed Rule 35(b) motion (that had been treated as such by the parties and the district court), there is the real risk that his *bona fide* Rule 35(c) motion may be deemed successive. That is particularly troubling here when Mr. Lucero has significant meritorious post-conviction claims. This Court should find that the COA violated the rule of party presentation and order it to decide the case for what it is – an appeal of the denial of a Rule 35(b) motion. In so doing, this Court should make clear that the instant litigation in no way bars future litigation by virtue of the COA's language regarding the motion as one filed under Crim. P. Rule 35(c).

ARGUMENT

STANDARD OF REVIEW

Because this is a question of constitutional law, this Court reviews this issue *de novo*. *Lopez v. People*, 113 P.3d 713, 720 (Colo.2005). Lucero preserved this issue by arguing in the COA that his sentence is unconstitutional under *Graham, supra*, and by asking the district court to resentence him to a term that complies with the Eighth Amendment to the United States Constitution.

I. BECAUSE THE LIFE OF THE VICTIM WAS NOT TAKEN, MR. LUCERO STANDS CONVICTED OF A "NON-HOMICIDE OFFENSE" WITHIN THE MEANING OF *GRAHAM v. FLORIDA*, 560 U.S. 48 (2010).

In *Graham*, the United States Supreme Court ruled that the U.S. Constitution does not permit a juvenile offender to be sentenced to life in prison without parole ("LWOP") "for a nonhomicide crime." *Graham*, 560 U.S. at 52-53. The Court declared that if a sentence of life is to be imposed upon a juvenile offender who did not commit a homicide, the sentence "must provide him or her with some realistic opportunity to obtain release before the end of that term." *Graham*, 560 U.S. at 82. This Court asks a fundamental question specific to Lucero's offenses for conspiracy and attempt: this Court wants to know whether

these are, in fact, “non-homicide” offenses within the meaning of *Graham* and *Miller*. As will be seen below, there can be no doubt that Mr. Lucero was sentenced for “non-homicide” offenses.

Colorado law defines "Homicide" as “the killing of a person by another.” §18-3-101(1), C.R.S. Under Colorado's definition, because no death occurred, Mr. Lucero was convicted of a non-homicide offense.

This Court, however, does not ask whether Mr. Lucero’s offense of conviction is homicide under Colorado law but whether it is a “non-homicide offense within the meaning of *Graham* .” Although the question is slightly different, the answer is the same.

In *Graham*, the Court distinguished between the culpability of those who commit homicide and non-homicide offenses:

> 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. *Kennedy* [*v. Louisiana*, 554 U.S. 407 (2008)]; *Enmund [v. Florida],* 458 U.S. 782 [(1982)]; *Tison v. Arizona,* 481 U.S. 137 (1987); *Coker [v. Georgia*], 433 U.S. 584 [(1977)]. There is a line 'between homicide and other serious violent offenses against the individual.' *Kennedy,* 554 U.S., at 438. 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 438 (quoting *Coker,* 433

> U.S., at 598 (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, those crimes differ from homicide crimes in a moral sense.
>
> It follows that, when 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.

Graham, 560 U.S. at 69.

The *Graham* Court's use of the phrase "a juvenile offender who did not kill or intend to kill" has led some to argue that if the defendant "intended to kill" but did not, this is sufficient to remove the case from the ambit of *Graham*. When the phrase is read in full context, however, it is clear that the distinguishing factor between a homicide and a non-homicide for the *Graham* Court was the loss of a life and "irrevocability" of such an act:

> To be sure, *Graham* 's flat ban on life without parole applied only to nonhomicide crimes, and the Court took care to distinguish those offenses from murder, based on both moral culpability and consequential harm.

Miller, 132 S. Ct. at 2465.

Furthermore, the death penalty cases cited by the *Graham* Court distinguished between offenses that resulted in the death of the victim and those that did not; and nonhomicide offenses -- regardless of their number or severity -- cannot expose the defendant to the death penalty. *Kennedy v. Louisiana,* 554 U.S. at 437-38 ("the death penalty should not be expanded to instances where the victim's life was not taken"), cited in *Graham*, 560 U.S. at 60-61. Because

> – the Court equates an LWOP sentence for a juvenile to the death penalty for an adult (*Graham, Miller*), and
>
> – the court clearly prohibits the imposition of a death sentence for any crime that did not result in the victim's death (*Kennedy*),

it follows that the Court in *Graham* and *Miller* clearly intended to prohibit the imposition of a LWOP sentence for a juvenile whose offense (or offenses) did not result in the death of a person. It is beyond dispute that Mr. Lucero's actions did not result in a death.[3] This is a non-homicide offense.

[3]Because Mr. Lucero's action did not result in a death, this Court need not decide in the context of this case whether a court can impose an effective LWOP sentence upon a juvenile who did not personally kill, intend to kill, or contemplate that life would be taken, *Enmund v. Florida, supra,* or one who had substantial participation in the killing in addition to a reckless disregard for human life, *Tison v. Arizona, supra.* It is probable that, even when a victim has been killed, a juvenile who did not personally satisfy such standards cannot be considered so morally culpable and depraved as to warrant the complete forfeiture of any "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham,* 560 U.S. at 73.

Just recently, the Florida Supreme Court, in *Gridine v. State*, __ So. 3d __ , available at 2015 WL 1239504 (Fla. Mar. 19, 2015), held that a trial judge violated *Graham* by imposing a seventy-year sentence on a fourteen-year old for the crime of attempted first degree murder. The Court rejected out of hand the lower court's conclusion that *Graham* does not apply when a defendant intends to kill but "simply" fails. The Court based its conclusion not only on Florida's statutory definition of homicide (which is similar to that of Colorado), but also on the *Graham* Court's language about the irrevocability of a homicide.

Because Mr. Lucero was convicted of a non-homicide crime, *Graham* and *Miller* apply. This Court must next determine whether the sentence imposed upon Mr. Lucero guarantees him a meaningful opportunity for release upon a showing of rehabilitation and maturity.

II. *GRAHAM v. FLORIDA*, AND *MILLER v. ALABAMA*, APPLY TO LUCERO'S CONSECUTIVE TERM-OF-YEARS SENTENCES.

This Court has asked whether the COA erred in applying *Graham* and *Miller* to invalidate Mr. Lucero's consecutive term-of-years sentence. However, Mr. Lucero's sentence was not invalidated. Instead, the COA ruled that neither *Graham* nor *Miller* apply, and it upheld his sentence. *Lucero*, at ¶¶ 12, 18.

This Court's question is understandably read to ask whether the *Graham/Miller* rule applies to juveniles sentenced to term-of-years sentences, rather than LWOP and if so, whether it applies to the aggregate sentence when the sentence imposed consist of consecutive terms-of-years sentences. Mr. Lucero assumes the Court is asking this question because it has previously held in *Close v. People*, 48 P.3d 528 (Colo. 2002), that the court, when conducting an abbreviated proportionality review for an adult defendant who is convicted of a crime of violence or as an habitual offender "must look separately at each sentence imposed and engage in a proportionality review of each of those sentences ... [rather than] look[ing] at the cumulative impact of all of the sentences and engage in a proportionality review of that cumulative sentence." *Id.* at 538.[4] Of course, applying this analysis directly contradicts the requirement of *Graham* and *Miller* that a sentence imposed upon a juvenile offender give that juvenile a meaningful opportunity for release upon reaching maturity. Thus, this Court's question strikes at the heart of the matter: how can a judge sentencing a juvenile offender on

[4]*See* Judge Dailey's concurring opinion in *People v. Lehmkuhl*, 2013 COA 98, ¶ 29, *cert. granted*, No. 13SC598, 2014 WL 7331019 (Colo. Dec. 22, 2014). Judge Dailey rejected the notion that *Graham* effectively overrules *Close* with respect to juveniles.

multiple serious counts ensure that the juvenile receives that constitutionally-required "meaningful opportunity for release?"

Determining whether the sentence imposed upon Lucero guarantees a meaningful opportunity for release upon a showing of rehabilitation and maturity begins with the question this Court has asked: whether, when evaluating the sentence, this Court is to look upon only the sentence imposed for each individual count (the "sentence segment"), or whether the Court should instead determine whether the aggregate sentence violates the precepts of *Graham*. To answer this question, this Court must understand and embrace:

(1) the difference between an "offense-centric" traditional proportionality analysis and the "offender-centric" categorical exclusion articulated in *Graham* and *Miller* (Section A below),
(2) the legal reasoning and the science -- i.e., the neuroscience, and psychological and social science -- that permeates the U.S. Supreme Court's decisions in *Roper*, *Graham*, and *Miller* (Section B below) and
(3) the constitutional requirement that the sentence include a meaningful opportunity for release during its term (Section C below).

In this section, Mr. Lucero will address each of these and then demonstrate why his aggregate sentence of 84 years violates the Eighth Amendment to the United States Constitution and Article II, Section 20 of the Colorado Constitution.

A. THE OFFENDER-CENTRIC, EIGHTH AMENDMENT "CATEGORICAL EXCLUSION" ANALYSIS IN *ROPER, GRAHAM* AND *MILLER* IS DIFFERENT THAN TRADITIONAL PROPORTIONALITY ANALYSIS.

The central precept behind the Supreme Court decisions in *Roper v. Simmons,* 543 U.S. 551 (2005*), Graham,* and *Miller* is that children are constitutionally different for sentencing purposes, and they are categorically excluded from certain punishments. This categorical exclusion rests on psychological, developmental, and neuroscientific studies demonstrating that children are less culpable for their actions and more amenable to change, and therefore pose a reduced risk of future dangerousness. This categorical exclusion approach focuses on not the offense, but on the child's inherent capacity for growth, change, and rehabilitation.

This Eighth Amendment categorical exclusion analysis is quite different from the proportionality analysis exemplified by cases such as *Solem v. Helm*, 463 U.S. 277, 292 (1983), *Harmelin v. Michigan,* 501 U.S. 957 (1991), *Ewing v. California,* 538 U.S. 11 (2003), and *Close v. People*, 48 P.3d 528 (Colo. 2002), where the focus is on the offense. *See Graham, supra*, at 61 (distinguishing proportionality cases like *Harmelin* and *Solem, supra*, from categorical exclusion cases like *Roper v. Simmons, supra,* and *Atkins v. Virginia,* 536 U.S. 304 (2002)).

Because this type of proportionality review focuses on the offense, it arguably makes sense for the court to examine the sentence imposed on each count and determine if the sentence imposed for that particular offense raises an inference of gross disproportionality. However, *Graham* and *Miller* Courts have made it clear that juvenile cases are analyzed under not the traditional proportionality approach (focus on offense), but the categorical exclusion approach (focus on the juvenile offender). *Graham, supra*, at 61; *Miller*, *supra*, at 2463. In fact, the *Miller* Court specifically rejected the applicability of *Harmelin* to cases involving juveniles:

> *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. Capital punishment, our decisions hold, generally comports with the Eighth Amendment—except it cannot be imposed on children. See *Roper,* 543 U.S. 551; *Thompson,* 487 U.S. 815. So too, life without parole is permissible for nonhomicide offenses—except, once again, for children. See *Graham,* 560 U.S., at 75. Nor are these sentencing decisions an oddity in the law. To the contrary, ' '[o]ur history is replete with laws and judicial recognition' that children cannot be viewed simply as miniature adults.'*J.D.B.*[*v. North Carolina* 131 S.Ct. 2394, 2404(2011)] (quoting *Eddings* [*v. Oklahoma,* 455 U.S. 104 ,115–116 (1982)], citing examples from criminal, property, contract, and tort law). So if (as *Harmelin* recognized) "death is different," children are different too. Indeed, it is the odd legal rule that does *not* have some form of exception for children. In that context, it is no surprise that the law relating to society's harshest punishments recognizes such a distinction. Cf. *Graham,* 560 U.S., at 91, (ROBERTS, C.J.,

> concurring in judgment) ("*Graham* 's age places him in a significantly different category from the defendan[t] in ... *Harmelin* "). Our ruling thus neither overrules nor undermines nor conflicts with *Harmelin.*

Miller, supra at 2470.

Thus, when reviewing the sentence imposed upon a juvenile to determine whether it comports with the Eighth Amendment's prohibition against cruel and unusual punishment, the review is not "offense-centric" as in the usual Eighth Amendment proportionality review, but is "individual centric." The question is not whether the particular offense is of such a character as to warrant the imposition of a harsh sentence, but rather whether the juvenile is of such a character as to warrant the imposition of a sentence that does not provide for a meaningful opportunity for release. Thus the focus must be on (1) the characteristics of the juvenile and (2) the opportunity for the juvenile to obtain release upon demonstrated maturity and rehabilitation. As will be seen in the next two sections, neither one of these two "individual-centric" factors are dependent upon the number of charges or their severity.

B. SCIENTIFIC DEVELOPMENTS PERMEATE THE U.S. SUPREME COURT'S DECISIONS IN *ROPER*, *GRAHAM*, AND *MILLER*, AND COMPEL THE SENTENCER TO FOCUS ON THE JUVENILE OFFENDER WHEN IMPOSING SENTENCE.

As early as 1982, the United States Supreme Court had recognized that youthful offenders are not suitable for society's harshest punishments. *See Eddings v. Oklahoma, supra* at 115 ("[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological change.") *See also Johnson v. Texas*, 509 U.S. 350, 367 (1993) ("A lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.")

However, throughout the 1980's and into the 1990's, the "perceived increase in juvenile crime" and the fear of the "coming generation of super-predators" led states to enact laws that transferred more juveniles to adult court and resulted in longer sentences, often longer than the sentences meted out to their adult counterparts:

> The fear of juvenile predators may be reflected in sentencing practices nationwide. According to one study, in eleven out of the seventeen years between 1985 and 2001, youth convicted of

> murder in the United States were more likely to enter prison with a life without parole sentence than adult murder offenders. ... Another study during approximately the same time frame indicates that for violent, weapons-related, and other crimes, juvenile offenders transferred to criminal court were more often sentenced to prison and for longer periods of time than their adult counterparts.

State v. Null, 836 N.W.2d 41, 54 (Iowa 2013).[5] Even though courts had a vague notion that the youthfulness of the offender was a relevant sentencing consideration, the heinousness of the crime always seemed to weigh heavier on the scales of justice. Later, in *Graham v. Florida,* the Supreme Court explained that a categorical ban on certain sentences for youthful offenders is necessary because "an uncceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity militates in favor of a less severe sentence." *Graham*, 560 U.S. at 78, quoting *Roper v. Simmons*, *supra,* 543 U.S. at 573. In other words, when it comes to juvenile sentencing in the absence of

[5]The Iowa Supreme Court cites two studies: Human Rights Watch & Amnesty International, The Rest of Their Lives: Life Without Parole for Child Offenders in the United States 2 (2005); and Donna Bishop & Charles Frazier, Consequences of Transfer, in The Changing Borders of Juvenile Justice: Transfer of Adolescents to the Criminal Court 227, 234 -36 (Jeffrey Fagan & Franklin E. Zimmering eds., 2000).

categorical bans on certain practices, the natural tendency to focus on the crime(s) will almost always eclipse the importance of the offender's youth.

By the early 2000's, the generation of predicted "juvenile superpredators" had not emerged, but children all over the country had been subjected to mandatory sentences including life imprisonment without parole. Those who had fueled the hysteria began to have second thoughts.[6] Developments in brain science enabled scientists to document the fact that the adolescent brain does not complete maturation until the mid-twenties.[7]

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[6]As the Iowa Supreme Court observed, two professors who had championed the view that the "juvenile superpredator" would soon be among us, John J. Dilulio Jr., and James Alan Fox, subsequently recanted and in fact joined in the amicus brief on behalf of the petitioner in *Miller v. Alabama*.

> [Professors Dilulio and Fox] further declared that these predictions did not come to pass, that juvenile crime rates had in fact decreased over the recent decades, that state legislative actions in the 1990s were taken during an environment of hysteria featuring highly publicized heinous crimes committed by juvenile offenders, and that recent scientific evidence and empirical data invalidated the juvenile superpredator myth.

State v. Null, at 56.

[7]See, e.g. Elizabeth S. Scott & Laurence Steinberg , Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist 1009 (2003), and Jeffrey Arnett, Reckless Behavior in Adolescence: A Developmental Perspective, 12 Developmental Rev. 339 (1992), cited along with numerous other scientific studies in *Roper v. Simmons*, *supra*, at 569-73.

By 2005, the research about juvenile brain development had reached the United States Supreme Court, spurring it to carve out categorical exclusions for juvenile offenders, barring the death penalty (*Roper v. Simmons* (2005)), effective life imprisonment sentences for nonhomicide crimes (*Graham v. Florida* (2010)), and mandatory LWOP sentences – even for homicides – with a strong presumptions that even for homicides the sentence must provide a meaningful opportunity for release (*Miller v. Alabama* (2012)). In the *Roper/Graham/Miller* "trilogy," the Court more formally acknowledged the scientific underpinnings in support of the proposition that juveniles should not be treated the same as adults for sentencing purposes. The thread throughout *Atkins, Roper,* and *Graham* was that a particular punishment was deemed to constitute cruel and unusual punishment as applied to a group of individuals that society considered less responsible for their actions.

Miller v. Alabama

The Court's decision in *Miller* was the inevitable next step in the evolving Eighth Amendment jurisprudence that had gotten underway after the turn of the century. In *Graham*, the Court held that the Eighth Amendment prohibits imposition of LWOP on juvenile offenders who did not kill or intend to kill. In

Miller, the Court expressly rejected limitations on *Graham's* applicability to non-homicide cases: "none of what [*Graham*] said about children—about their distinctive (and transitory) mental states and environmental vulnerabilities is crime-specific." 132 S.Ct. at 2465.

The Court in *Miller* held that, across the board for all types of crimes, "children are constitutionally different from adults for purposes of sentencing," *id.,* at 2464, because their "diminished culpability and greater prospects for reform [makes them] ... less deserving of the most severe punishments." *Miller, quoting Graham,* 560 U.S. at 68. The *Miller* Court reviewed its findings from *Roper* which pointed out "three significant gaps between juveniles and adults:"

> 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.

Miller, at 2464 (internal quotation marks and citations omitted), *quoting Roper*, at 569-70. These developmental, scientific facts are what must drive this Court's decision about whether, in Colorado, the sentencer should be looking at the

number of offenses or whether instead, consistent with *Miller*, the sentencer must be guided by the youthfulness of a juvenile offender like Guy Lucero.

It is these innate differences between a juvenile offender and an adult criminal that constitutionally require that the juvenile be treated differently at sentencing, where the focus is not exclusively on the crime, but on the juvenile and that juvenile's capacity for change. While the "harm to a victim is not diluted by the age of the offender,"[8] the sentencer must nevertheless consider the defendant's youthfulness because " 'punishment should be directly related to the personal culpability of the criminal defendant.' " *Thompson v. Oklahoma, supra* at 834 (quoting *California v. Brown,* 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)). As the Iowa Supreme Court recognized,

> A constitutional framework that focused only on the harm the defendant caused would never have produced *Roper,* which involved a profoundly heinous crime. *See* 543 U.S. at 556–58, 573–74.

State v. Lyle, *supra,* 854 N.W.2d at 398. Likewise, focusing only on the number of offenses (or their severity) would not produce a constitutional sentencing scheme today in Colorado.

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[8] *State v. Lyle*, 854 N.W.2d 378, 398 (Iowa 2014), citing *Schall v. Martin* 467 U.S. 253, 264–65 (1984).

The post-Miller era

The scientific research and widespread recognition by courts, policymakers, and scholars has continued even during and after the *Roper/Graham/Miller* trilogy.[9] In 2008, the key scientists whose research had been so instrumental in the *Roper* case collected and synthesized the scientific findings.[10] In 2012, the United States Justice Department recommended that the practice of imposing lengthy prison terms on juveniles be abandoned:

> Laws and regulations prosecuting [juveniles] as adults in adult courts, incarcerating them as adults, and sentencing them to harsh punishments that ignore and diminish their capacity to grow must be replaced or abandoned.

U.S. Department of Justice, *Report of the Attorney General's National Task Force on Children Exposed to Violence* xviii (2012).

Following the Court's 2012 decision in *Miller*, there has been a watershed of caselaw relying upon the now-indisputable scientific evidence. The Iowa Supreme Court's opinion in *State v. Null* provides an excellent example of a state

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[9]See, e.g. Civil Justice Clinic of Quinnipac University School of Law, and the Allard K. Lowenstein International Human Rights Clinic of Yale Law School, Youth Matters; Second look for Connecticut's Children Serving Long Prison Sentences, March 2013.

[10]Elizabeth S. Scott & Laurence Steinberg, Rethinking Juvenile Justice 34 (2008)(*cited* in *Null, supra*, at 55)

court's recognition of the scientific underpinnings supporting the *Roper/Graham/Miller* trilogy:

> juveniles achieve the ability to use adult reasoning by mid-adolescence, but lack the ability to properly assess risks and engage in adult-style self-control.... The influence of peers tends to replace that of parents or other authority figures. Risk evaluation is not generally developed. Adolescents also differ from adults with respect to self-management and the ability to control impulsive behavior. Finally, identity development, which is often accompanied by experimentation with risky, illegal, or dangerous activities, occurs in late adolescence and early adulthood.

Null, supra, at 55, *citing* Scott & Steinberg, *supra,* at 34.

Conclusion

The *Roper, Graham, Miller* trilogy represents a paradigm shift in how the Court views children in the criminal justice system. *"Graham* is the first case ever to side with minors in their claim that they have a right to be treated as children even when the state does not agree." Martin Guggenheim, *Graham v. Florida and a Juvenile's Right to Age-Appropriate Sentencing,* 47 Harv. C.R.-C.L. L. Rev. 457, 487. Professor Guggenheim argues that "*Graham* suggests for the first time that treating children differently from adults, even when it comes to sentences well below the most severe, is not simply something states may choose; rather, it is

something to which children have a right." *Id.* at 489.[11] *Roper*, *Graham* and *Miller* make it clear: for Eighth Amendment purposes juveniles represent a special category of offenders. As a matter of binding federal constitutional law, the focus must be on the juvenile, not on the offenses committed. The focus remains on the juvenile regardless of how many offenses he or she has committed that could theoretically be stacked for consecutive service.

[11]Not only was Mr. Lucero only 15 years old at the time of the incident, there exist a plethora of mitigating factors that were not considered by the sentencing court, all of which are set forth in the Rule 35(c) petition that was filed subsequent to the COA' Opinion. These factors include Mr. Lucero's chaotic, abusive poverty-stricken background; the fact Mr. Lucero was low intellectually functioning and was a special education student all of his young life; that at age seven years old he was diagnosed with Axis I depressive disorder and ADHD; and at age eleven he was diagnosed with bipolar disorder and prescribed multiple medications, none of which he was taking at the time of the incident.

C. BECAUSE THE FOCUS IS ON THE JUVENILE, THE SENTENCE MUST PROVIDE A MEANINGFUL OPPORTUNITY FOR RELEASE.

Because the "signature qualities" of youth are all "transient," *Miller*, at 24 (quoting *Johnson v. Texas,* 509 U.S. at 368),[12] the Supreme Court requires that the sentence must allow a child upon reaching maturity to demonstrate that the factors that contributed to the offense are no longer present. The transitory nature of youth thwarts the criminal justice system's desire to set a sentence at the outset; rather, it presents the rationale for providing a meaningful opportunity for release, which hinges upon the later ability to present proof of maturity and rehabilitation:

> science establishes that for most youth, the qualities are transient. That is to say, they will age out. A small proportion, however, will not, and will catapult into a career of crime unless incarcerated. [Scott and Steinberg, *supra* at 53] (estimating that only about five percent of young offenders will persist in criminal activity into adulthood). Unfortunately, however, it is very difficult to identify which juveniles are adolescence-limited offenders, whose antisocial behavior begins and ends during adolescence and early adulthood, and those who are life-course-persistent offenders whose antisocial behavior continues into adulthood. *Id.* at 54 (internal quotation marks omitted).

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[12] "'[Y]outh is more than a chronological fact.' *Eddings v. Oklahoma,* 455 U.S 104 (1982). It is a time of immaturity, irresponsibility, 'impetuousness[,] and recklessness.' *Johnson,* 509 U.S., at 368. It is a moment and condition of life when a person may be most susceptible to influence and to psychological damage.' *Eddings,* 455 U.S. at 115. And its 'signature qualities' are all 'transient.' *Johnson v. Texas,* 509 U.S. 350, 368 (1993)." *Miller*, at 24.

Null, at 55-56.[13] Because the juvenile's developmental transiency makes it impossible to predict when he or she might reach that level of maturity and be appropriate for release, the meaningful opportunity for review is the linchpin of the Supreme Court's holdings.

The entire premise of the *Roper/Graham/Mille*r trilogy is that because a juvenile's emotional/psychological makeup is not fully formed at the time of the commission of the offense, and because he or she is not only more capable of change and growth than adults, but is almost *certain* to change and grow as he or she matures physically, emotionally, intellectually and psychologically, immutable decisions about how long that juvenile should be separated from society should not be made while the offender is still a juvenile. Instead, this issue should be revisited when the juvenile matures, at which time the offender must be given a "meaningful opportunity to obtain release based on demonstrated maturity and

[13]In addition to Scott & Steinberg, supra, the Iowa Supreme Court cites Beth A. Colgan, Constitutional Line Drawing at the Intersection of Childhood and Crime, 9 Stan. J. C.R. & C.L. 79, 81-85 (2013) (summarizing advances in brain imaging and social science); Elizabeth S. Scott & Laurence Steinberg, Social Welfare and Fairness in Juvenile Crime Regulation, 71 La. L.Rev. 35, 64- 66 (2010); Elizabeth S. Scott & Laurence Steinberg, Blaming Youth, 81 Tex. L.Rev. 799, 811-21 (2003).

rehabilitation." *Graham*, 560 U.S. at 73.[14] The Court in *Graham* was concerned not with labels but rather with impact and outcome, and dictated the latter: every juvenile convicted of a nonhomicide offense must be provided with a meaningful opportunity for release based upon demonstrated maturity and rehabilitation.

Some divisions of the Colorado Court of Appeals have gotten off track into a reliance upon actuarial life expectancy tables. This Court should reject reliance on actuarial tables and instead follow the lead of the Iowa Supreme Court in *State v. Null, supra,* which refused to rely upon the "niceties" of actuarial tables to determine whether a particular sentence imposed on a particular individual provided for a meaningful opportunity for release as required by *Graham*:

> we do not believe the determination of whether the principles of *Miller* or *Graham* apply in a given case should turn on the niceties of epidemiology, genetic analysis, or actuarial sciences in determining precise mortality dates. In coming to this conclusion, we note the repeated emphasis of the Supreme Court in *Roper*, *Graham*, and *Miller* of the lessened culpability of juvenile offenders, how difficult it is to determine which juvenile offender is one of the very few that is irredeemable, and the importance of a 'meaningful opportunity to

[14]The choice of the term "meaningful opportunity" is neither accidental nor careless but rather conclusively demonstrates that the court believes that any review process which determines whether and when a juvenile should be released must be a meaningful review process. Cf. *Matthews v. Eldridge,* 424 U.S. 319, 333 (1976) ("the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.")

> obtain release based on demonstrated maturity and rehabilitation.' *Graham*, 560 U.S. at 75. We also note that in the flurry of legislative action that has taken place in the wake of *Graham* and *Miller*, many of the new statutes have allowed parole eligibility for juveniles sentenced to long prison terms for homicides to begin after fifteen or twenty-five years of incarceration.

State v. Null, *supra,* 836 N.W.2d at 71-72, citing state laws from Arkansas, California, Delaware, Louisiana, Nebraska, North Carolina, Pennsylvania, Utah, and Wyoming.[15] Since the *Null* decision, additional reforms have been occurring all around the country.[16] The gist of all these approaches is to set a period of review some years after the initial sentencing. None of these approaches ask trial

[15]Cal. Penal Code § 1170(d)(2) (2015)(allowing juveniles, after serving 15 years imprisonment, to request reduction of the sentence from LWOP to life with parole after 25 years); Del.Code Ann. tit. 11 § 4209A (Laws 2013, chs. 1–61) (establishing parole eligibility for juveniles convicted of first degree murder at 25 years); N.C. Gen. Stat. Ann. §15A–1340.19A(2012) (same); 18 Pa. Cons. Stat. Ann. § 1102.1(a)(2012) (establishing parole eligibility for first-degree murder at 25 years (for juveniles under age 15) or 35 years (for older juveniles); Utah Code Ann. §§ 76–5–202(3)(e), 76–3–207.7 (setting parole eligibility at 25 years); Wyo. Stat. Ann. § 6–10–301(c) (same);Ark. Code Ann. § 5-10-101 (c)(a)(b)(2) (2013) (setting parole eligibility after 28 years);.La. Rev. Stat. Ann. 15:574.4 (E) (La.2013) (setting parole eligibility after 35 years); Neb. Rev. Stat. § 28 105.02 (2013)(giving a trial court discretion to impose a term-of-years sentence ranging from 40 years to life after considering specific factors related to youth).

[16] *See e.g.* Fla. Stat. Ann. § 921.1402(2014) (providing for judicial review (1) after 25 years for any juvenile who receives a sentence of more than 25 years (including juveniles sentenced to life imprisonment), and (2) after 15 years of a juvenile sentenced to more than 20 years; and further providing that, if the juvenile is not resentenced after the initial review, he is entitled to a subsequent judicial review after 10 more years).

courts to utilize actuarial tables to guess the potential life span of the juvenile who stands before the court.

Science demonstrates, and more importantly because the United States Supreme Court has specifically recognized, that the vast majority of those who commit crimes as juveniles, age out of this behavior by the time they are in their mid- to late twenties. Requiring that individual to wait additional decades before being provided the opportunity to demonstrate that he has achieved the necessary maturity and rehabilitation to justify being released from prison does not satisfy the requirement that the release occur at a meaningful point in time.

Given *Graham*'s emphasis on adolescent brain development and maturation, it would be logical to tie the timing of an initial review to when one can expect an individual to have obtained a fully mature brain and a more stable character. Brain and character maturation typically occurs by the time someone reaches his or her early twenties thus, juvenile offenders could be expected to undergo significant change by a ten-year mark. A "meaningful opportunity to obtain release based upon demonstrated maturity and rehabilitation" means more than simply having the opportunity to be released prior to death. It means that the individual should have the opportunity to demonstrate that he has achieved maturity and

rehabilitation within a reasonable time of achieving said maturity and rehabilitation, not twenty to thirty years after the fact. See *State v. Pearson*, 836 N.W. 2d 88 (Iowa 2013) (holding unconstitutional a sentence of 50 years (with parole eligibility after 35 years) imposed upon a 17-year-old defendant convicted of two counts of first-degree robbery and two counts of first-degree burglary).[17]

The fact that an actuarial table may indicate that Mr. Lucero may be alive when he becomes eligible for parole review does not mean the sentence imposed satisfies the requirements of *Graham* and *Miller*. This Court should not rely upon the "niceties of epidemiology, genetic analysis, or actuarial sciences in determining precise mortality dates"[18] to determine whether Guy Lucero's sentence provides for a meaningful opportunity for release as required by *Graham* and *Miller*. Mr. Lucero's sentence, which provides for parole review when he is in his late-fifties, does not satisfy the requirement that he receive a meaningful opportunity for release at a meaningful time as it "effectively deprive[s] [him] of

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[17] By contrast, Mr. Lucero, who was 15 at the time of the offense received a sentence of 84 years of which he currently must serve 42.

[18] *State v. Null*, *supra,* 836 N.W.2d at 71-72. See also Cummings, Adele & Nelson Colling, Stacie, *There is No 'Meaningful Opportunity' in Meaningless Data: Why it is Unconstitutional to Use Life Expectancy Tables in Post-Graham Sentences*, 18 UC Davis Journal of Juvenile Law & Policy 2 (Summer 2014).

an earlier release and the possibility of leading a more normal adult life." *Pearson, supra,* 836 N.W.2d at 96.[19]

D. NEITHER THE NUMBER OF COUNTS NOR THE LABEL PUT ON THE SENTENCE RELIEVES THE SENTENCING COURT OF ITS CONSTITUTIONAL OBLIGATION.

The fact that the juvenile committed multiple crimes, or the fact that the sentence is not called "life imprisonment," does not relieve the sentencer of the constitutional obligation to impose a sentence that provides a meaningful opportunity for release. The characteristics of youth apply to the offender, regardless of the number of offenses or the number of separate sentences he receives in a case. Focusing on the individual sentence segments ignores the actual outcome of the aggregate consecutive sentence imposed on the particular juvenile. Thus, it is the aggregate length of the sentence – not its label – that is dispositive.

[19]Furthermore, the Colorado parole system is not designed to -- and does not, in practice -- provide the type of review contemplated by the *Graham* and *Miller* Courts. See the Amicus Brief being filed by the Colorado Criminal Defense Bar which discusses in depth why the existing Colorado parole process is a constitutionally-inadequate substitute for the Graham/Miller requirement that the sentence imposed by the court guarantee a meaningful opportunity for release.

The United States Supreme Court has held that regardless of the label put on a sentence, the Court must consider its actual result. In *Harmelin*, 501 U.S. at 996, Justice Scalia noted that there is a "negligible difference between life without parole and ... a life sentence with eligibility for parole after 20 years, or even a lengthy term sentence without eligibility for parole given to a 65 year old man." Similarly, in *Sumner v. Shuman,* 483 U.S. 66, 83 (1987), the Court recognized that "there is no basis for distinguishing for purposes of deterrence between an inmate serving a life sentence without possibility of parole and a person serving several sentences of a number of years the total of which exceed his normal life expectancy."

While the United States Supreme Court has not yet taken up this specific question about the applicability of *Miller* to an aggregate sentence made up of consecutive segments, well-reasoned state Supreme Courts have done so. The Wyoming Supreme Court concluded that ignoring the aggregate result of consecutive sentences would violate the constitutional rules announced in the *Roper/Graham/Miller* trilogy:

> the teachings of the *Roper/Graham/Miller* trilogy require sentencing courts to provide an individualized sentencing hearing to weigh the factors for determining a juvenile's 'diminished culpability and greater

> prospects for reform' when, as here, the aggregate sentences result in the functional equivalent of life without parole. To do otherwise would be to ignore the reality ... [and would produce] exactly the result that *Miller* held was unconstitutional.

Bear Cloud v. State, 334 P.3d 132, 141 (Wyo. 2014). The Indiana Supreme Court reached the same result: *Brown v. State,* 10 N.E.3d 1, 8 (Ind. 2014) (Court should "focus on the forest—the aggregate sentence—rather than the trees—consecutive or concurrent, number of counts, or length of the sentence on any individual count.")

The Florida Supreme Court has also rejected the notion that *Graham* does not apply to an aggregate sentence. *Henry v. State*, ___So. 3d __, 2015WL 1239696 (Fla. March 19, 2015). The Florida Supreme Court focused on the fact that the U.S. Supreme Court is concerned with sentences imposed upon juvenile offenders, and that it is "the status of juvenile offenders [that] warrants different considerations by the states whenever such offenders face criminal punishment as if they are adults." *Id*., *2 *citing Roper*, 343 U.S. at 553. The Florida Supreme Court does not believe that the *Graham* Court was concerned with whether or not the sentence was labeled an LWOP sentence or whether or not it was comprised of

distinct sentence segments; rather, the Florida Supreme believes that the U.S. Supreme Court is requiring that courts focus on the effect of the sentence:

> we believe that the *Graham* court had no intention of limiting its new categorical rule to sentences denominated under the exclusive term of 'life in prison.' Instead we have determined that *Graham* applies to ensure that juvenile nonhomicide offenders will not be sentenced to terms of imprisonment without affording them a meaningful opportunity for early release based on a demonstration of maturity and rehabilitation. *See Graham,* 560 U.S. at 75.

Id. at *4. Accord, *Gridine v. State*, *supra* (holding that a sentence with a mandatory minimum term of 25 years and a cap of 70 years violated *Graham*).

In *State v. Riley*, __ A.3d ___, 315 Conn. 637 at *7 (2015), the Connecticut Supreme Court recognized that "the Supreme Court's incremental approach to assessing the proportionality of juvenile punishment [in *Roper, Graham* and *Miller*] counsels against viewing these cases through an unduly myopic lens." The Connecticut Court looked beyond the core holdings of these three cases and examined their logical implications. The Connecticut Supreme Court noted the U.S. Supreme Court's reliance upon:

-- scientific evidence from social science and neuroscience "establishing constitutionally significant differences between adult and juvenile brains" which the sentencer must consider;

-- the strong presumption against sentences that do not provide for a meaningful opportunity for release, even for juvenile offenders who commit a homicide; and
-- the essential similarity between a LWOP sentence for a juvenile and a death sentence for an adult.

This Court should join the Supreme Courts of Wyoming, Indiana, Florida and Connecticut, and the reasoning and logic of lower courts in those and other states and announce the obvious: the harshness of an effective life imprisonment sentence is not reduced simply because it consists of an aggregate sentence comprised of separate segments rather than one unitary sentence.

Mr. Lucero acknowledges that the 6th Circuit Court of Appeals in *Bunch v. Smith*, 685 F.3d 546, 550-53 (6th Cir. 2012), a federal habeas case brought under the AEDPA (28 U.S.C. §2254) declined to overturn an Ohio State Court ruling that *Graham* does not apply to consecutive fixed term sentences. This Court should reject the reasoning in *Bunch v. Smith* for two reasons: (1) it was decided in the unique and inapplicable context of federal habeas statutes, and (2) it lacks persuasive value.

Bunch v. Smith was a case interpreting the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. §2254. The role of a federal court reviewing a state court decision under AEDPA is quite different than the role of

this Court in this case. In an AEDPA case, the question is not whether the state court's interpretation was *correct* but rather whether it was an *unreasonable application of clearly established federal law*. The Sixth Circuit's ruling that the petitioner failed to show that the state court decision was "unreasonable" does not mean that the state court was correct, or that the Sixth Circuit agreed with or endorsed the state court's opinion. The *Bunch* opinion is simply an expression of the limited role of the federal court under notions of federalism as set forth in AEDPA.

The function of this Court is far different than a federal court reviewing the denial of a state prisoner's habeas petition under AEDPA. This Court does not defer on questions of law to the intermediate appellate court or the district court. In other words, here, the question is not whether the Court of Appeals' interpretation of federal law is *unreasonable* but rather whether it is *correct*. For this reason, this *Bunch v. Smith* is not valid guidance for this Court.

Another reason this Court should disregard *Bunch v. Smith* is that its ultimate logic would create a constitutional equal protection problem if applied here. If this Court were to hold that the *Graham* requirement (that a juvenile convicted of a nonhomicide offense must receive a sentence that provides for a

meaningful opportunity for release) does not apply if the juvenile is convicted of more than one crime and those sentences are run consecutively, then not only does a juvenile who commits a homicide receive greater protections than a juvenile who commits a less serious offense, the juvenile who committed the multiple offenses would be subjected to the same harshest penalties as an adult who committed the same crimes. See *Bear Cloud v. State,* 334 P.3d at 142 ("[A] juvenile offender sentenced to a lengthy aggregate sentence 'should not be worse off than an offender sentenced to life in prison without parole who has the benefit of an individualized hearing under *Miller*.' *Null*, 836 N.W.2d at 72.")

It is very troubling that Mr. Lucero will have to serve more time than a juvenile convicted of first degree murder (life with possible parole after forty years) even though his actions, while admittedly very serious, resulted in neither death nor permanent serious injuries.[20] This is contrary to the fundamental holding in *Roper*, *Graham* and *Miller*, that "because juveniles have diminished culpability and greater prospects for reform," they are therefore "constitutionally

[20]The Colorado legislature has yet to weigh in on this issue; however, the most recent legislative enactment on this topic -- which predated both *Graham* and *Miller* -- was a statute providing that the penalty for a juvenile who commits a class one homicide is life imprisonment with the possibility for parole after forty years. §18-1.3-401(4)(b) C.R.S.

different from adults for purposes of sentencing" and thus "less deserving of the most severe punishments." *Miller*, 132 S.Ct. at 2464, *quoting Graham*, 560 U. S., at 68.

Courts should not deny a juvenile a meaningful opportunity for release as required by *Graham* just because he was convicted of more than one count. As a California Court of Appeals Court noted, the *Graham* case involved a recidivist juvenile offender who committed numerous violent offenses and thus "[a] distinction premised on the multiple offenses or victims that often underlie a *de facto* LWOP ...finds no traction in *Graham." People v. De Jesus Nunez,* 195 Cal. App. 4th 414, 125 Cal. Rptr. 3d 616, 623-24 (Cal. App.).[21] In all of the U.S. Supreme Court's categorical exclusion cases, the crimes have been numerous and horrific,[22] – but that did not prevent the Supreme Court from adopting a

[21]The California Supreme Court granted review, but later dismissed it. *People v. Nunez*, 255 P.3d 951 (Cal. 2011) (granting review and superceding opinion); *People v. Nunez,* 287 P.3d 71 (Cal. Oct. 17, 2012) (dismissing review).

[22]*See e.g. Coker v. Georgia,* 433 U.S. 584, 599 (1977)(defendant was categorically excluded from the death penalty even though, while serving previous sentences for murder, rape, kidnaping, and aggravated assault, he was convicted of escape from prison, armed robbery, rape, and other offenses); *Kennedy v. Louisiana,* 554 U.S. 407, 413 (2008) (applying a categorical exclusion even though the defendant was convicted of a violent rape of an 8-year-old child and even though the Court called the crime "one that cannot be recounted in these pages in a way sufficient to capture in full the hurt and horror inflicted on his victim" or society's revulsion at the conduct); *Atkins v. Virginia,* 536 U.S. 304

categorical rule as it did in *Roper, Graham*, and *Miller*. It is precisely *because* the crimes are so horrific that the system cannot be counted on to appropriately compensate for the offender's youth, necessitating the categorical bar that protects juvenile offenders like Guy Lucero.[23]

While the number of crimes a juvenile commits is a relevant consideration when a *Graham/Miller* analysis is done, the mere existence of multiple offenses and an aggregated sentence does not "remove the case from the ambit of *Miller*'s [or *Graham's*] principle." *Null*, 836 N.W.2d at 73.

For these reasons, this Court should not issue a rule that permits the trial court to ignore the actual effect of the aggregate consecutive sentence, and to instead consider only the sentence on each separate count as if each was the only operative sentence. Such a rule -- while perhaps logical in Wonderland -- is not logical in the real world and in fact, is arbitrary, baseless, cruel, and unusual.

(2002) (announcing a categorical bar even though the defendant was convicted of abduction, armed robbery, and capital murder).

[23]In the capital trial that resulted in the death penalty for Christopher Simmons, the prosecutor's closing argument urged that Simmons' youth was an aggravating factor – a reason to impose the death penalty – rather than a mitigating fact. *See Roper*, 543 U.S. at 558.

E. CONCLUSION

The constitutional requirement that all sentences for juveniles convicted of nonhomicide offenses provide that juvenile with a meaningful opportunity for release upon demonstrated maturity and rehabilitation applies whenever the juvenile's offense does not result in the death of a human being and further applies regardless of the number of offenses for which the juvenile was convicted. Because an LWOP sentence cannot be imposed upon a juvenile who does not commit a homicide, a juvenile who is convicted *of multiple* non-homicide offenses cannot be constitutionally sentenced to die in prison. *Graham*'s constitutional requirement that a juvenile convicted of a nonhomicide crime be guaranteed a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" applies whether the juvenile was convicted of one count or five counts or ten counts, and whether there was one victim or multiple victims.

III. THE COURT OF APPEALS EXCEEDED ITS AUTHORITY AND VIOLATED THE PRINCIPLE OF PARTY PRESENTATION BY *SUA SPONTE* TREATING THE APPEAL OF A PROPERLY FILED RULE 35(B) MOTION AS IF IT WERE AN APPEAL OF A RULE 35(C) MOTION.

Instead of deciding whether the district court's Rule 35(b) order was appealable, the COA *sua sponte* "converted" the Rule 35(b) appeal to a Rule 35(c) appeal:

> As a threshold matter, the People contend that defendant's claim is unreviewable under Crim. P. 35(b). Whether or not defendant's claim may be reviewed under Crim. P. 35(b), review is available under Crim. P. 3 5(c) (2) (I) as a claim '[t]hat the ... sentence [was] imposed in violation of the Constitution ... of the United States.' *See People v. Collier,* 151 P.3d 668, 670 (Colo. App.2006); *People v. Wenzinger,* 155 P.3d 415, 418 (Colo. App.2006). We therefore need not determine the reviewability of defendant's claim under Crim. P. 35(b).

People v. Lucero, ¶5, 2013 COA 53. Mr. Lucero asks this Court to make three rulings:

(A) The COA violated the rule of party presentation;

(B) The substance of Mr. Lucero's motion is a request to reduce sentence under Crim. P. Rule 35(b); and

(C) The COA's mis-characterization in no way creates a successive petition bar to his Rule 35(c) motion.

First, Mr. Lucero will provide additional background to the proceedings and the COA's characterization of them.

A. FACTUAL BACKGROUND

The motion filed by Mr. Lucero was abundantly clear −−he was asking the court to reconsider the imposition of the sentence of 84 years imprisonment and when making a decision, take into account numerous factors specific to Mr. Lucero, as well as the factors that the U.S. Supreme Court stated should be considered when sentencing juveniles. *See Graham, supra*. The People responded with a standard opposition to any reduction of sentence focusing solely on the crime itself without any mention of or response to any case law cited by Mr. Lucero.

At the hearing the district court treated the motion like a standard Rule 35(b) motion to reduce sentence, advising the parties that it usually does not grant hearings on motions to reduce sentences and that it intended to proceed by offer of proof. Mr. Lucero's attorney advised the court of that Mr. Lucero's immediate family had, since the crime, become responsible citizens working hard to better themselves, and that Mr. Lucero was doing the same. Counsel then discussed how

the courts' view of juvenile sentencing has shifted over the last few years since *Graham*, questioning the propriety of imposing long sentences upon juveniles – particularly for non-homicide offenses. Counsel did not argue that the sentence imposed upon Mr. Lucero did not pass constitutional muster, nor did the prosecutor address any constitutional claims. The prosecutor argued only that the facts of the crime and what the prosecutor characterized as a lack of remorse or acceptance of responsibility militated against any reduction in the sentence. R.Tr. 6/10/11 pp 25-26.

The court, in its order denying the motion, first stated that it was considering the motion under Crim P. 35(b) and that it was Mr. Lucero's burden to demonstrate why a reduction would be appropriate. CF p 332. The court, without citation to a single case or constitutional provision, concluded that Mr. Lucero's age at the time of the crime did not require a reconsideration of the sentence amd in its opinion Mr. Lucero did not meet this burden and that the original sentence was appropriate. *Ibid.* The court did not address the legality or constitutionality of the sentence, because it was never challenged at the hearing.

Despite all of this, the COA treated Mr. Lucero's Rule 35(b) motion as if it were a Rule 35(c) motion, and then proceeded to make a factual determination as

to whether the sentence imposed was a *de facto* life sentence even though the district court neither heard such evidence, nor made such a ruling. *Lucero*, 2013COA53, ¶¶ 1, 12. The Court, after faulting Lucero's attorneys for failing to present statistical evidence in the district court, concluded that neither *Graham* nor *Miller* applies because Mr. Lucero failed to prove that he has a *de facto* life sentence. *Id.,* ¶¶ 1, 12 15.

B. THE COA VIOLATED THE RULE OF PARTY PRESENTATION.

"It is axiomatic that in any appellate proceeding [the Supreme Court] may consider only issues that have actually been determined by another court or agency and have been properly presented for our consideration." *Comm. for Better Health Care for All Colorado Citizens by Schrier v. Meyer,* 830 P.2d 884, 888 (Colo. 1992), citing *Dempsey v. Romer,* 825 P.2d 44, 57 n. 13 (Colo.1992); *Ortho Pharmaceutical Corp. v. Heath,* 722 P.2d 410, 415 n. 3 (Colo.1986); *Colgan v. Department of Revenue, Div. of Motor Vehicles,* 623 P.2d 871, 874 (Colo.1981). See also *People v. Salazar*, 964 P.2d 502, 507 (Colo. 1998); *Colby v. Progressive Cas. Ins. Co.,* 928 P.2d 1298, 1301 (Colo.1996); *Boatright v. Derr,* 919 P.2d 221,

227 (Colo.1996). This rule applies not simply to this Court, but to the Colorado Court of Appeals. See e.g. *Moody v. People*, 159 P.3d 611, 614-17 (Colo. 2007).

C. THE COA'S VIOLATION OF THE RULE OF PARTY PRESENTATION HAS A DEVASTATING IMPACT UPON LUCERO'S ABILITY TO LITIGATE NOT ONLY THE UNCONSTITUTIONALITY OF HIS SENTENCE, BUT ALSO THE UNCONSTITUTIONALITY OF HIS CONVICTIONS.

The rule of party presentation is important not simply as an academic interest nor as a potential restraint on judicial activism. It preserves important rights that ensure proper functioning of the judicial system. Here, its violation devastatingly impacts Mr. Lucero's ability to litigate his constitutional rights, both in this case and in future litigation of his Rule 35(c) motion.

The rule of party presentation preserves the litigant's right to present evidence in the district court and have use of that evidence in support of the appeal. In *Moody*, *supra,* this Court noted the pitfalls in considering the issue of standing for the first time on appeal: it may deprive the criminal defendant of the ability to make a complete factual record for review on the standing issue.

That is precisely what occurred here. The COA faults Lucero's attorneys for failing to present statistical evidence in the district court to prove that his case

falls within the gambit of *Graham* and *Miller*. *Lucero*, 2013COA53, ¶15. If this claim had been filed under Rule 35(c), or had any party or the district court treated this as a Rule 35(c) motion while it was still in the district court, evidence would have been offered and the district court would have been required to address the constitutionality of the sentence. However, because the court and parties proceeded under Rule 35(b), the district court did not analyze whether, under *Graham*, a sentence of 84 years imprisonment for a non-homicide was the functional equivalent of life imprisonment or otherwise constitutionally infirm. Evidence was neither offered nor presented on whether the sentence provides a meaningful opportunity for release. Not surprisingly, Mr. Lucero did not prevail on this issue in the COA, in large part (as the COA notes) because there was no evidence introduced in the district court. The COA's violation of the rule of party presentation deprived Mr. Lucero of his ability to litigate in this appeal the constitutional challenge to his sentence – once the COA made that the issue.

There is another, even more devastating result of the COA's *sua sponte* conversion of his Rule 35(b) motion to a Rule 35(c) motion: Mr. Lucero may now be denied the opportunity to ever fully litigate not only this potential constitutional challenge to his sentence, but also all of the other constitutional issues related to

his conviction for these offenses. This is because courts may now feel obligated to regard the Rule 35(c) motion as a successive petition subject to the procedural bars in Crim. P. Rule 35(c)(3)(VI)("The court shall deny any claim that was raised and resolved in a prior appeal or postconviction proceeding on behalf of the same defendant....") and (VII) ("The court shall deny any claim that could have been presented in [a] postconviction proceeding previously brought...."). These provisions could be used to bar:

-- any challenges to the constitutionality of his sentence based upon *Graham, Miller*, and/or the Colorado Constitution, because those issues were "raised and resolved" by the COA in this appeal; and/or

-- any other challenges to the constitutionality of his sentence, or any challenges to his conviction, because those issues "could have been presented" in his previous Rule 35(b) motion (as converted).

Mr. Lucero has numerous meritorious post-conviction claims based upon significant constitutional violations that he has a right to pursue under Crim. P. Rule 35. He has already filed a postconviction motion in the district court setting forth claims relating to his representation both at trial and in plea negotiations. These are federal claims raised under the Sixth, Eighth, and Fourteenth

Amendments to the U.S. Constitution, as well as claims under the Colorado Constitution and Colorado statutes.

The Court's conversion of his appeal deprived Mr. Lucero of the opportunity to fully challenge the constitutionality of his sentence under the Eighth Amendment and Article II, Section 20 of the Colorado Constitution. It results in a failure of the Colorado state courts to provide a full and fair opportunity for Mr. Lucero to litigate his federal constitutional claims, and therefore deprives Colorado courts of the opportunity to rule on these matters before they may be pursued in federal court. *See Martinez v. Ryan*, 132 S.Ct. 1309 (2012). *See also Silva v. People*, 156 P.3d 1164 (Colo. 2007).

The United States Supreme Court has weighed in on a similar topic in *Wood v. Milyard*, 132 S. Ct.1826 (2012) where the defendant, after losing his Crim. Pro. Rule 35(c) on the merits in Colorado state court, filed a federal habeas petition. In the U.S. District Court, the State of Colorado said that it was not conceding, but not challenging, the timeliness of the habeas petition. TheTenth Circuit *sua sponte* ordered briefing on the timeliness issue and then, without addressing the merits, held the federal petition to be time barred. The Tenth Circuit explicitly ruled that it had authority to raise timeliness on its own motion.

The United States Supreme Court disagreed, ruling that a federal court does not have *carte blanche* to depart from the principle of party presentation. *Wood v. Milyard*, 132 S. Ct. at 1828. Doing so (as the COA has done) "discounts" the district court's labor and makes the appellate court one not of review, but of "first view." *Id*.,132 S. Ct. at 1834. Thus, the Supreme Court found that the Tenth Circuit abused its discretion in employing its procedural maneuver rather than deciding the issues on their merits as the lower court had done.

The COA's decision to regard the Rule 35(b) appeal as a Rule 35(c) appeal and "reach the merits" of the sentencing questions actually accomplishes the opposite. It denies Mr. Lucero's rights to due process, equal protection, and all of the underlying claims that he would have raised in a post-conviction motion -- the Eighth and Fourteenth Amendment claims regarding his sentence, his Sixth and Fourteenth amendment claims regarding trial counsel's ineffective assistance of counsel, and due process claims related to the conviction itself.

The Court's actions also deprive Mr. Lucero of his statutory, state constitutional, and federal constitutional rights to effective assistance of post-conviction counsel, and his right to not have his federal claims barred because of

ineffective assistance of state postconviction counsel. *Martinez v. Ryan, supra*; *Silva v. People, supra*. If the matter had been brought as a Rule 35(c) motion, Mr. Lucero would have (or should have) been allowed to present evidence to show that his sentence was imposed "in violation of the Constitution or laws of the United States or the constitution or laws of this state." Crim. P. 35(c)(2)(I). Pursuant to Crim. P. 35(c)(3), the district court would have been obligated to hold an evidentiary hearing, because (on both the instant issue and his additional claims), Mr. Lucero would have asserted facts that, if true, would provide a basis for relief. *See People v. Simpson*, 69 P.3d 79, 81 (Colo. 2003); *White v. Denver Dist. Court,* 766 P.2d 632, 636 (Colo.1988).

The issue before the district court was simple – should it reconsider the sentence of Mr. Lucero under Crim. P. 35(b). It chose not to. After *Miller* and *Graham* it is clear that the Eighth Amendment requires that a court contemplating a very lengthy sentence for a juvenile must consider the mitigating factors of "youth and its attendant circumstances," including

- -- first and foremost, the hallmark features of youth in general, i.e. impetuousness, of immaturity, irresponsibility, 'impetuousness and recklessness, as well as
- -- Lucero's specific psychological impairments and immaturity,

-- the family and home environment that surrounded Lucero and from which he was unable to extricate himself,
-- the circumstances of the offense,
-- Lucero's suggestibility and malleability and desire to "prove himself" to obtain acceptance, and of course,
-- the possibility of rehabilitation.

Miller, at 2465-66. Failure to consider all of these factors, as the judge did here, is a constitutional violation that infected the Rule 35(b) hearing and was properly grounds for an appeal of the judge's refusal to reduce the sentence. This should have been the COA's focus.

If the COA wanted to treat the Rule 35(b) appeal as a Rule 35(c) appeal, it should have first remanded the case to the district court with instructions that the district court should consider the matter as a Rule 35(c) claim. This would have allowed Mr. Lucero to supplement the previously-filed Rule 35(b) motion with his constitutional challenges to the conviction and sentence. Instead, the COA acted outside of its authority and inconsistent with controlling case precedent by *sua sponte* treating Mr. Lucero's motion as if it had been filed under Rule 35(c) without first remanding it to the district court for further proceedings under Rule 35(c).

D. THE COA'S CHARACTERIZATION OF THE MATTER AS A RULE 35(c) MOTION IS INCORRECT.

Setting aside the COA's violation of the rule of party presentation, the COA was wrong on the merits: Lucero's motion was not a constitutional challenge, but a motion for a sentence reduction. The Court's reliance upon *Collier, supra*, and *Wenzinger, supra* is misplaced and the ruling runs afoul of this Court's decision in *People v. Bridges*, 662 P.2d 161 (Colo. 1983).

In *Collier*, *supra,* the defendant, time-barred from filing a Rule 35(c) motion, filed a Rule 35(a) motion arguing that his sentence was unconstitutional and therefore "illegal." *Collier*, 151 P.3d at 671 ("Defendant's motion asserts five claims that his conviction and sentence are unconstitutional, which are cognizable under Crim. P. 35(c), and one claim that his sentence was imposed in an illegal manner, which is cognizable under Crim. P. 35(a)."). The trial court determined that the defendant was challenging the constitutionality of his sentence and entered rulings on those issues. The COA held that the substance of the motion controls and because Collier challenged the constitutionality of the sentence, it would treat the motion as one filed under Rule 35(c) and therefore the claims

challenging the constitutionality of his sentence were time barred. The COA upheld the district court's denial of the postconviction motion.

In *Wenzinger, supra,* following an unsuccessful direct appeal, the defendant filed a Rule 35(a) motion raising a claim under *Blakely v. Washington,* 542 U.S. 296 (2004), that the state violated his right to a jury at his pre-*Blakely* sentencing. The trial court denied the motion concluding that *Blakely* was not retroactive. In the Rule 35(a) appeal, the People argued that the claim was successive (under Rule 35(c)) because, in the direct appeal, the defendant had made the same constitutional argument under *Apprendi v. New Jersey,* 530 U.S. 466 (2000). The COA treated the Rule 35(a) motion as if it had been a Rule 35(c) motion but did not decide the People's procedural challenge; instead, the COA ruled that *Blakely v. Washington* would not be applied retroactively to the defendant's case.

Both *Collier* and *Wenzinger* concern the interpretation of Crim. P. 35(a) and what is meant by the terms "illegal sentence" and "not authorized by law." Both opinions conclude that these terms refer to sentences that violate statutes and exclude constitutional challenges to the sentence. Neither *Collier* nor *Wenzinger* concerned a Rule 35(b) motion that challenges the propriety of a sentence. Both

cases address whether a defendant improperly characterized his motion as Rule 35(a) motion in order to avoid a procedural bar that would have applied to a constitutional challenge. Neither case addressed whether the denial of the Rule 35(a) motions was reviewable on appeal.

Unlike this case, the district courts in both *Collier* and *Wenzinger* treated the motions as Rule 35(c) motions and therefore the defendants were not denied the opportunity of litigating their Rule 35(c) motions, regardless of whether or not the motion had been properly denominated. Here, the district court treated Lucero's motion as a Rule 35(b), not a Rule 35(c). He never had the opportunity to litigate the Rule 35(c) motion, so it is fundamentally unfair to deprive him of that future opportunity while the case is on appeal from denial of the Rule 35(b) motion.

The decision of the COA is inconsistent with *Bridges*, *supra*, a case similar to the instant one. In *Bridges,* the defendant filed a Rule 35(b) motion seeking a reduction of sentence. One of his grounds was that, after his original sentence was imposed, the General Assembly had adopted a new sentencing scheme that was "less severe." While conceding that the district court was not bound by the new

law, the defendant urged the district court to nevertheless consider the new scheme in determining the propriety of the sentence imposed.

The district court partially granted Bridges' Rule 35(b) motion; while retaining features of the old sentencing scheme, the court reduced the defendant's sentence to bring it more in line with the new sentencing scheme. The People appealed, claiming the trial court's order was an unlawful sentence reduction under Crim. P. 35(c) -- which would make it an appealable order. This Court rejected the People's argument because while the district court might have used the new sentencing scheme as a *guideline* along with other evidence presented, it did so only "in the interest of fairness" and not because the court felt "bound by law to resentence the defendant under the [new] presumptive sentencing law." *Id.* at 164. This procedural context mirrors what happened here, at least until the COA "converted" his motion for reduction of sentence into a Rule 35(c) motion.

E. THIS COURT SHOULD REMAND TO THE DISTRICT COURT WITH INSTRUCTIONS TO HOLD A FULL SENTENCING HEARING THAT COMPLIES WITH *GRAHAM* AND *MILLER*.

However this Court regards the present appeal, a remand to the district court is required:

-- If the matter continues as an appeal of the denial of a Rule 35(b) motion, this Court should remand for a full resentencing hearing because the district court's Rule 35(b) procedures and order did not comply with *Graham* and *Miller*, or,

-- If this Court decides to regard the motion as if it had been filed under Rule 35(c), this Court should

> (1) rule that the sentence is unconstitutional and remand for a full resentencing hearing that complies with the dictates of *Graham* and *Miller*, and
>
> (2) permit the district court to consider the claims raised in the currently pending Crim.P. Rule 35(c).

CONCLUSION

For all of the reasons set forth above, Mr. Lucero respectfully requests that this Court rule that the sentence imposed upon him is unconstitutional as it does not comply with the dictates of *Graham* and *Miller*. Before holding a resentencing

hearing in this matter, the district court should first consider the claims raised in the currently pending Crim.P. Rule 35(c) motion and determine whether Mr. Lucero is entitled to a new trial or to other relief before determing if a sentencing hearing which complies with the dictates of *Graham* and *Miller* is necessary.

Respectfully submitted this 13th day of April 2015.

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CERTIFICATE OF SERVICE

I certify that on April 13, 2015, I transmitted via Integrated Colorado Courts E-filing system (ICCES) the foregoing motion for extension of time to John Lee, Criminal Appeals Division, Office of the Attorney General.

/s/ Eric A. Samler
Eric A. Samler