DATE FILED: December 14, 2015 5:06 PM
FILING ID: 1854E04EA3C57
CASE NUMBER: 2013SC624

SUPREME COURT STATE OF COLORADO 2 East 14th Ave. Denver, CO 80203	
On Certiorari to the Colorado Court of Appeals Court of Appeals Case No. 11CA2030	
GUY LUCERO, Petitioner, v. THE PEOPLE OF THE STATE OF COLORADO, Respondent.	▲ **COURT USE ONLY** ▲ Case No. 13SC624
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PEOPLE'S ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

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

The brief complies with C.A.R. 28(g).

It does not exceed 9,500 words. It contains 8,031 words.

The brief complies with C.A.R. 28(b).

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

Or

The opponent did not address standard of review or preservation. The brief contains statements concerning both the standard of review and preservation of the issue for appeal.

I acknowledge that 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/John T. Lee

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ISSUES GRANTED FOR REVIEW

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.[1]

II. Whether a conviction for attempted murder is a non-homicide offense within the meaning of *Graham v. Florida*, 560 U.S. 48.

III. Whether the court of appeals exceeded its authority and violated the principle of party presentation by sua sponte treating the

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[1] Although this Court reframed this question as reflected above, the People note that unlike other divisions of the court of appeals, the division in this case did not extend *Graham* and *Miller* to invalidate Lucero's sentence. *See People v. Rainer*, 2013 COA 51 (holding that aggregate 112-year sentence for two counts of attempted first degree murder, two counts of first degree assault, one count of first degree burglary, and one count of aggravated robbery was unconstitutional under *Graham* because defendant will not have meaningful opportunity for parole within his natural lifetime); *see also People v. Lehmkuhl*, 2013 COA 98 (holding that aggregate 82-year sentence for two counts of first degree burglary, three counts of menacing, one count of motor vehicle theft, and one count of sexual assault was constitutional under *Graham* because defendant's parole eligibility date was not past his life expectancy).

appeal of a properly filed Rule 35(b) motion as if it were an appeal of a Rule 35(c) motion.

INTRODUCTION

The United States Supreme Court's categorical approach under the Eighth Amendment is grounded in the separation of powers and permits a court to restrain the legislative branch's authority to prescribe certain punishments. In exercising that authority, the United States Supreme Court has, in narrow circumstances, precluded legislatures from authorizing the most punitive of punishments based on the commission of a particular crime. But in this case, Lucero does not challenge a specific sentencing statute at all. In his view, he is entitled to an "offender-specific" sentence that does not look at the number and character of crimes that he committed. That stretches the categorical approach far past its breaking point. Nothing in the categorical approach supports Lucero's argument that he is entitled to a specific sentence.

In addition, the holding in *Graham* does not apply to this case for three reasons. First, *Graham* never addressed the entirely separate issue of aggregate sentences based on separate crimes. It did, however, set forth the framework for addressing a categorical challenge. And under that test, nothing in *Graham* suggests that sentencing a juvenile to the equivalent of life without the possibility of parole ("LWOP") based on aggregate sentences for multiple crimes violates the Eighth Amendment. Second, by its own terms, *Graham* does not apply to homicide crimes. Although *Graham* is not dispositive on the issue, the better reading is that attempted murder qualifies under the category of homicide crimes. Third, and nevertheless, as Lucero's sentence does allow for the possibility of parole within his life expectancy, his sentence does not violate the Eighth Amendment.

STATEMENT OF THE CASE AND FACTS

I. The Crime

AB, Lucero's cousin, threw a birthday party for her brother that continued until the early hours of June 25, 2005 (PR. Vol. 19, pp. 238-39). Family and friends gathered at her house, including her next door

neighbor and her boyfriend, DH (PR. Vol. 4, pp. 25-26; PR. Vol. 18, p. 13). When Lucero, fifteen at the time and a North Side Mafia gang member arrived at the party with his girlfriend, he asked AB for alcohol, but she refused (PR. Vol. 19, pp. 244-45). Upset, Lucero turned his attention to DH, a Bloods gang member (PR. Vol. 18, pp. 14, 181-83; PR. Vol. 19, pp. 143-44, 244). Referring to DH as a "slob," a derogatory name used to describe Bloods gang members, Lucero demanded to know why DH was allowed to drink at the party (PR. Vol. 19, pp. 29-32, 143, 204). Several people at the party ordered Lucero to leave (PR. Vol. 18, p. 15; PR. Vol. pp. 144, 246). Before leaving, Lucero warned, "I'm going to bring my dad back, we will return." (PR. Vol. 11, p. 204; PR. Vol. 19, p. 246).

Lucero went to his grandmother's house where he found his father (PR. Vol. 18, pp. 194-95). Lucero detailed to his father what had happened and explained that he wanted to get a gun and go after "those fools" (PR. Vol. 18, p. 197). Lucero's father told him to go and get a gun, and the two agreed to go back to the party and "shoot all of these people" (PR. Vol. 18, p. 198).

After arriving at Lucero's cousin's house, Lucero's father lured DH outside (PR. Vol. 18, pp. 28-29, 37; PR. Vol. 19, pp. 163, 207). When DH walked outside, two cars drove by firing shots (PR. Vol. 19, pp. 39, 168, 207).

Multiple shots were fired (PR. Vol. 18, pp. 28-29, 37; PR Vol. 19, p. 7). DH was not hit, but four other people were shot: JH (PR. Vol. 19, p. 214), LM (PR. Vol. 19, pp. 29-30, 215), Lucero's father (PR. Vol. 19, p. 256), and Lucero's father's girlfriend (PR. Vol. 19, p. 7).

II. Trial Proceedings

On October 3, 2005, the People charged Lucero with three counts of criminal attempt to commit murder, one count of first-degree assault, two counts of second-degree assault, and three counts of crime of violence (PR. Vol. 1, pp. 1-4). At trial, two witnesses identified Lucero as one of the shooters (PR. Vol. 19, pp. 212-13, 267-271, 275). The jury found Lucero guilty of conspiracy to commit murder and criminal attempt to commit murder against DH, and second-degree assault against two other victims (PR. Vol. 1, pp. 60-63, 69-70). The trial court

sentenced Lucero to consecutive sentences totaling eighty-four years in the Department of Corrections (PR. Vol. 20, p. 25).

III. Direct Appeal.

As relevant to the issues presented here, Lucero argued, among other claims on direct appeal, that "(1) his sentences must run concurrently; (2) the trial court abused its discretion by sentencing him to eighty-four years in prison; and (3) his sentences are grossly disproportionate to his crimes." *See People v. Lucero*, No. 07CA0774 (Colo. App. July 2, 2009) (not published pursuant to C.A.R. 35(f)). The Court of Appeals rejected his claims. *Id.* at 29-36. This Court denied Lucero's petition for a writ of certiorari (PR. Vol. 1., p. 203).

IV. Post-conviction Proceedings

On July 6, 2010, Lucero filed a motion for sentence reduction under Crim. P. 35(b) (PR. Vol.2, pp. 244-67). In support of his request, Lucero cited his difficult childhood, his mental health and education struggles, and his age (PR. Vol. 2, pp. 252-54). Citing to *Graham*, Lucero argued that his "sentence must and should be reduced to meet constitutional standards" (PR. Vol. 2, p. 253). He argued that his

sentence was unconstitutional because it "is materially indistinguishable to a juvenile sentenced to life without parole in a non-homicide case" (PR. Vol. 2, p. 319).

The trial court held a hearing on the issue (R. Tr. 6/10/11). Lucero's attorney asked the court to take into consideration the factors set forth in *Graham* (R. Tr. 6/10/11, pp. 18-22). As such, defense counsel argued that the court should reduce Lucero's sentence because "the chances are he's going to die in prison without any meaningful opportunity to obtain release" (R. Tr. 6/10/11, p. 18).

In a written order, the trial court denied Lucero's motion (PR. Vol. 2, p. 332). The trial court explained that though "[m]uch has been made" of Lucero's age at the time of the offense and his father's influence over him, the court had already taken that into account in imposing the original sentence at the bottom of the range (PR Vol. 2, p. 333). The trial court explained its primary purpose in holding the hearing was to "hear directly from this Defendant about what plans he had and why he felt this sentence should be [re-]considered" (PR. Vol. 2, p. 333). Having heard from Lucero, the court was "not convinced" that

Lucero "has truly accepted responsibility for these crimes," and "ha[d] significant reservations that there is a likelihood of rehabilitation of this Defendant" (PR. Vol. 2, p. 333). Thus, the "Court remain[ed] convinced that the length of this sentence was, and is, appropriate" (PR. Vol. 2, p. 333).

V. The court of appeals' opinion.

On appeal, Lucero argued that his aggregate sentence "violates the Cruel and Unusual Punishments Clause of the Federal Constitution's Eighth Amendment and article II, section 20 of the Colorado Constitution, citing *Graham*," because his aggregate sentence "constitutes a de facto LWOP sentence." *People v. Lucero*, 2013 COA 53, ¶ 1. As a preliminary matter, in response to the People's argument that Lucero's claim was not reviewable under Crim. P. 35(b), the division found that "[w]hether or not defendant's claim may be reviewed under Crim. P. 35(b), review is available under Crim. P. 35(c)(2)(I) as a claim '[t]hat the . . . sentence [was] imposed in violation of the Constitution . . . of the United States.'" *Id.* ¶ 5. Reviewing Lucero's claim under Crim. P. 35(c), the division rejected his argument because his sentence did not

"fall within the LWOP category." *Id.* ¶ 12. Rather, because the "parties agree that defendant will be eligible for parole when he is fifty-seven years old," the court concluded that Lucero has a meaningful opportunity for release during his natural lifetime. *Id.* at ¶ 12.

This Court granted certiorari.

SUMMARY OF THE ARGUMENT

The central flaw in Lucero's argument is that instead of arguing that a specific statute allows a court to impose a cruel and unusual punishment, he instead contends that the Eighth Amendment requires that a juvenile receive a specific sentence regardless of what or how many non-homicide offense he commits. But the categorical approach is a limit on the legislature's authority to prescribe punishments. It does not allow a Court to require a specific sentence or prevent the legislature from punishing separate crimes.

Even if this Court attempts to apply the categorical analysis to Lucero's claim, that test confirms his sentence is constitutional. Lucero has not met his burden of proving that there is objective indicia

preventing the aggregation of sentences based on separate crime against multiple victims. Instead, objective evidence establishes the opposite.

In any event, Lucero's challenge fails on two independent grounds. First, *Graham* does not apply to homicide offenses. Lucero was convicted of attempted murder. That is a homicide offense within the meaning of *Graham*. Second, Lucero will have a meaningful chance to obtain release in his lifetime. Thus, even if *Graham* extends to aggregate sentences, Lucero's sentence is constitutional.

On the remaining question, when a defendant argues that his sentence is unconstitutional, he presents a claim that falls under Crim. P. 35(c) and not Crim. P. 35(b). Lucero has argued at all judicial levels of this proceeding that his sentence is unconstitutional under *Graham*. The Court of Appeals correctly reviewed Lucero's claim under Crim. P. 35(c).

ARGUMENT

I. The United States Supreme Court's categorical approach does not extend to aggregate sentences.

Lucero argues that his aggregate sentence is unconstitutional under *Graham*. By attempting to argue that the number of non-homicide offenses is irrelevant to his Eighth Amendment challenge, Lucero's argument turns the categorical approach cases he argues support his position on their head. The categorical approach is used to limit the legislature's authority to authorize the imposition of unduly excessive punishment for the commission of an offense. It has never been used to allow the Court to decide what specific sentence an offender must receive. And it certainly has not been invoked to prevent the legislature from authorizing punishment for subsequent crimes. This Court should reject Lucero's argument.

A. Standard of Review

The People agree that "review of constitutional challenges to sentencing determinations is de novo," *Lopez v. People*, 113 P.3d 713, 720 (Colo. 2005), including a sentence's constitutional proportionality.

Close v. People, 48 P.3d 528, 541 (Colo. 2002). Lucero argued below that his aggregate sentence violated *Graham*.

However, statutes are presumed to be constitutional. *People v. McCullough*, 6 P.3d 774, 779 (Colo. 2000); *People v. Hickman*, 988 P.2d 628, 634 (Colo. 1999). The party challenging the validity of a statute carries the burden of proving unconstitutionality beyond a reasonable doubt. *Id.*

An order denying post-conviction relief may be affirmed on any grounds supported by the record. *People v. Eppens*, 979 P.2d 12, 22 (Colo. 1999). Lucero carries the burden of establishing his claim by a preponderance of the evidence. *People v. Naranjo*, 840 P.2d 319, 325 (Colo. 1992).

B. The categorical approach forecloses the legislature from exceeding its authority under the Eighth Amendment; it does not provide a basis for a Court to autonomously order that a defendant receive a specific sentence.

Lucero argues that the Eighth Amendment recognizes that "juveniles represent a special category of offenders" (O.B., p. 26). He argues that "[a]s a matter of binding federal constitutional law, the focus must be on the juvenile," and it remains "on the juvenile regardless of how many offenses he or she has committed . . ." (O.B., p. 26). Lucero believes that under the United States Supreme Court's categorical approach cases, regardless of how many offenses a juvenile commits, he is entitled to a personalized sentence that allows "release based upon demonstrated maturity and rehabilitation" (O.B., p. 31). But that argument is entirely disconnected from the categorical-approach cases he argues support his request.

The Eighth Amendment prohibits, among other things, "cruel and unusual punishments . . . ." U.S. Const. amend. VIII. A punishment is

"cruel and unusual" when it is "grossly disproportionate to the crime." *Graham*, 560 U.S. at 60.

The United States Supreme Court has recognized that there are two ways to establish that a punishment is cruel and unusual. *Id.* at 59. First, a defendant can raise an as-applied challenge alleging that the length of a term-of-years sentence is disproportionate to the crime committed.[2] *Id.* at 60. Second, a defendant can raise a categorical challenge asserting that an entire class of sentences is unconstitutionally disproportionate given the "nature of the offense" or the "characteristics of the offender." *Id.* While the former empowers a court to invalidate an offender's individual sentence, the latter requires the court to invalidate a specific avenue of the legislature's authority to prescribe criminal sentences. Consistent with the express text of the Eighth Amendment, the use of the categorical approach has always been tethered to whether the punishment is unconstitutionally

[2] Lucero is not raising this claim. That argument was also addressed and rejected in his direct appeal and is not reviewable. *See* § 18-1-409(1), C.R.S. (2015) (providing that a "person convicted shall have the right to one appellate review of the propriety of the sentence). In any event if heard,

disproportionate to the offense because it is "cruel and unusual." *See Graham*, 560 U.S. at 59.

The use of the categorical approach as a limited check on legislative power was first identified in *Weems v. United States*, 217 U.S. 349 (1910). There, the court explained that the purpose of the Eighth Amendment's bar was not limited to prohibiting punishments forbidden at the time the Constitution was adopted, but embodied a principle "capable of wider application than the mischief which gave it birth." *Id.* at 373. The reach of the Eighth Amendment is "progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Id.* at 378. Therefore, the Eighth Amendment allowed a court to restrain legislative "power [that] might be tempted to cruelty." *Id.* at 373.

Since *Weems*, the United States Supreme Court has used the categorical approach to prohibit the legislature from allowing specific forms of punishment. In *Trop v. Dulles*, the Court found that the Eighth Amendment "forbids Congress to punish by taking away citizenship." 356 U.S. 86, 103 (1958). The Court has also banned the imposition of

capital punishment for mentally disabled defendants, *see Atkins v. Virginia*, 536 U.S. 304, 321 (2002), and prohibited the possibility of capital punishment for non-homicide crimes, *see Kennedy v. Louisiana*, 554 U.S. 407, 413 (2008).

The Court has also invalidated specific sentences for particular crimes in the context of juvenile offenders. In *Thompson v. Oklahoma*, a plurality of the Court found that executing offenders who had committed a crime when they were under the age of 16 "offend[ed] civilized standards of decency." 487 U.S. 815, 822 (1988). In reversing Thompson's death sentence, the plurality "reviewed the work product of state legislatures and sentencing juries, and . . . carefully considered the reasons why a civilized society may accept or reject the death penalty in certain types of cases." *Id.* Because the 18 states that had expressly established a minimum age in their death penalty statutes require that the defendant have attained at least the age of 16 at the time of the capital offense, the plurality concluded that the Eighth Amendment "prohibit[s] the execution of a person who was under 16 years of age at the time of his or her offense." *Id.* at 838.

In *Roper v. Simmons*, the Supreme Court extended *Thompson* and held that the Eighth Amendment forbids the imposition of the death penalty on offenders who commit murder before the age of eighteen. 543 U.S. 551, 578 (2005). Recognizing that only six states had executed juveniles since 1989 and that the United States is one of eight countries in the world to execute a juvenile in the previous fifteen years, the Court found that an objective consensus existed against allowing the imposition of capital punishment on juveniles. *Id.* at 575. Still, the Court recognized that "[w]hen a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity." *Id.* at 573-74.

In *Graham*, the court again prohibited a particular punishment. Recognizing that it was applying the "categorical" approach, the Court "first consider[ed] 'objective indicia of society's standards, as expressed in legislative enactments and state practice' to determine whether there is a national consensus against the sentencing practice at issue." 560 U.S. at 61. Then, the Court exercised its own independent judgment, in

light of "the standards elaborated by controlling precedents and by the Court's own understanding of the Eighth Amendment's text, history, meaning, and purpose." *Id*. (citing *Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008)). The Court held that the Eighth Amendment "prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." *Id.* at 82. Although the Court found that a state must give defendants like Graham *some meaningful opportunity to obtain release* based on demonstrated maturity and rehabilitation, it left it to the states, "in the first instance, to explore the means and mechanisms for compliance." *Id.* at 75.

And in *Miller*, the Court held that sentencing schemes mandating life without parole for juvenile offenders are unconstitutional. 132 S. Ct. at 2460, 2469 ("mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments'"); *accord People v. Tate*, 2015 CO 42, ¶¶ 27-35. *Miller* did not, however, categorically ban sentences of life imprisonment for all juvenile offenders where the sentence included the possibility of parole or where the court considered

the offender's individual characteristics. 132 S. Ct. at 2469, 2471, 2474-75.

C. To the extent Lucero argues he is entitled to a particular sentence, his argument does not present an appropriate categorical challenge.

In this case, unlike *Graham*, no specific "sentencing practice itself is in question." *Graham*, 560 U.S. at 61. Rather, Lucero appears to ask this Court to hold that the Eighth Amendment entitled him to a particular sentence. According to Lucero, "[g]iven *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 more stable character" (O.B., p. 31). In his view, that "typically occurs by the time someone reaches his or her early twenties," thus a juvenile could be expected to undergo significant maturation by a "ten-year mark" (O.B., p. 31). Thus, upon a sufficient showing of maturity and rehabilitation, a juvenile would be entitled to release.

But Lucero's request strays far beyond the categorical approach because his argument asks this Court to do far more than prohibit a particular sentence. It was one thing for the United States Supreme Court to use the Eighth Amendment as a check on the legislature's authority to impose a specific punishment because it was "cruel and unusual," but it is quite another to contend that the Eighth Amendment authorizes the Court to decide what sentence an offender must receive. Such a conclusion not only defies a reasonable reading of the Eighth Amendment, but also this Court's recognition that, "[s]ubject to constitutional limitations, it is the prerogative of the legislature to define crimes and prescribe punishments." *People v. Abiodun*, 111 P.3d 462, 464-65 (Colo. 2005); *accord* Colo. Const. Art. V, Sec. 1 ("The legislative power of the state shall be vested in the general assembly . . ."); Colo. Const. Art. III. His argument is also inconsistent with *Graham* itself, because that case made clear that "while the Eighth Amendment prohibits a State from imposing a life without parole sentence on a juvenile non-homicide offender, it does not require the State to release that offender during his natural life." *Id.* at 75.

More troubling, Lucero argues that he is entitled to such a sentence regardless of "whether the juvenile was convicted of one count or five counts or ten counts, and whether there was one victim or multiple victims." (O.B., p. 42). But under that argument, the Court would have to find that the General Assembly is precluded from authorizing criminal punishment for legitimate offenses in certain cases. That raises a significant separation of powers problem. *See, e.g., Tate*, ¶¶47-48 (reasoning that the appropriate solution to *Miller* was to impose the sentence that best reflected the General Assembly's sentencing intent); *see also* Colo. Const. Art. V, Sec. 1 ("The legislative power of the state shall be vested in the general assembly . . ."); Colo. Const. Art. III ("The powers of the government of this state are divided into three distinct departments . . . and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others . . ."). It also brings to life this Court's concern that "were [it] to consider the cumulative effect of all of the sentences imposed, the result would be the possibility that a defendant could generate an

Eighth Amendment disproportionality claim simply because that defendant had engaged in repeated criminal activity." *Close v. People*, 48 P.3d 528, 539 (Colo. 2002). Accordingly, this Court should hold that the Eighth Amendment is offense-specific, and reach the same conclusion as other jurisdictions, that cumulative or consecutive sentencing does not implicate the Eighth Amendment prohibition against cruel and unusual punishment. *See, e.g., United States v. Hong*, 242 F.3d 528, 532 (4th Cir. 2001) (reasoning that Eighth Amendment review of an aggregate sentence takes into consideration the number of offenses an offender committed); *Pearson v. Ramos*, 237 F.3d 881, 886 (7th Cir. 2001) ("[I]t is wrong to treat stacked sanctions as a single sanction. To do so produces the ridiculous consequence of enabling a prisoner, simply by recidivating, to generate a colorable Eighth Amendment claim"); *Hawkins v. Hargett*, 200 F.3d 1279, 1285 n.5 (10th Cir. 1999) (explaining that the "Eighth Amendment analysis focuses on the sentence imposed for each specific crime, not on the cumulative sentence for multiple crimes"), *cert. denied*, 121 S. Ct. 83 (2000); *Rooney v. State*, 690 S.E.2d 804, 810 (Ga. 2010) (holding that "there is no

constitutionally cognizable right to concurrent, rather than consecutive, sentences") (internal quotation omitted).

D. To the extent Lucero only argues that he is constitutionally entitled to a process, he advances only a procedural rule that would not apply retroactively to his case.

To the extent Lucero's argument stops short of arguing he is entitled to an actual sentence and is instead guaranteed a sentencing procedure, such a rule would not apply to his case.

As the United States Supreme Court has made clear, new rules announced in its decisions apply to all cases that are pending on direct review or not yet final. *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004). But for convictions that are already final, the new rule applies in only "limited circumstances." *Id.* at 351-52. A constitutional rule may be applied retroactively if it announces a "new rule" that "breaks new ground " and is either (1) a "watershed" rule that is one "without which the likelihood of an accurate conviction is seriously diminished," or (2) a "substantive rule" that "alters the range of conduct or the class of persons that the law punishes." *Teague v. Lane*, 489 U.S. 288, 310

(1989) (plurality opinion); *see Tate*, ¶ 53 (holding that this Court "has chosen to adopt *Teague* as its test for applying new rules retroactively").

In *Tate*, this Court concluded that *Miller*'s prohibition on mandatory LWOP sentences on juveniles did not apply retroactively. *Tate*, ¶ 10. This Court explained that because the rule did not categorically bar a penalty, but only mandated that a sentencer follow a certain process, it was a procedural rule that did not apply retroactively to cases on collateral review. *Id.*

The same result should follow here. To the extent Lucero argues that *Graham* and *Miller* do not mandate a sentence but a procedure, he does not assert a substantive rule. Thus, a rule that he is entitled to a new procedure would not apply to his case because he is on collateral review. *See Tate*, ¶ 10.

E. An aggregate effective lifetime sentence based on multiple crimes does not violate the Eighth Amendment.

Regardless, it should come as no surprise that even if this Court attempts to apply the categorical test to aggregate sentences, it cannot reach the conclusion Lucero proposes. *Graham* itself considered "only

those juvenile offenders sentenced to life without parole sentence solely for a non-homicide offense." 560 U.S. at 63.

Under the categorical test, a court first considers "'objective indicia of society's standards, as expressed in legislative enactments and state practice to determine whether there is a national consensus against the sentencing practice at issue." *Id.* at 61. Next, the court "determine[s] in the exercise of its own independent judgment whether th[at] punishment in question violates the Constitution." *Id.*

In attempting to meet that test, a defendant carries a "'heavy burden'" of establishing a national consensus against a sentencing practice. *Stanford v. Kentucky*, 492 U.S. 361, 373 (1989), *abrogated on another ground by Roper*, 543 U.S. at 574-75. Lucero has not made that showing here.

There is no national consensus that imposing cumulative sentences approaching a juvenile's life expectancy for multiple crimes amount to cruel and unusual punishment. Rather, no state statutes appear to preclude a cumulative term-of-years sentence on the basis that it exceeds a juvenile's life expectancy. *See* 18 U.S.C. § 3584 (2015);

Alaska Stat. Ann. § 12.55.127 (2015); Ariz. Rev. Stat. Ann., § 13-711 (2015); Ark. Code Ann. § 5-4-403(a) (2015); Cal. Penal Code, § 669 (2015); Colo. Rev. Stat. § 18-1-408 (2015); Conn. Gen. Stat. Ann. § 53a-37 (2015); Del. Code Ann. tit. 11, § 3901(d) (2015); D.C. Code, § 23-112 (2015); Fla. Stat. Ann. § 921.16(1) (2015); Ga. Code Ann. § 17-10-10 (2015); Haw. Rev. Stat. § 706-668.5(1) (2015); Idaho Code Ann., § 18-308 (2015); 730 ILCS 5/5-8-4 (2015); Ind. Code Ann., § 35-50-1-2 (2015); Iowa Code Ann., § 901.8 (2014); Kan. Stat. Ann. § 21-6606 (2015); Ky. Rev. Stat. Ann. § 532.110 (2015); La. Code Crim. Proc. Ann. art. 883 (2015); Me. Rev. Stat. Ann. tit. 17-A § 1256 (2015); Md. Corr. Serv. Art. §9-202(c) (2015); Mass. Gen. Laws Ann., ch. 279 § 8 (2015); Mich. Comp. Laws Ann. § 769.1h (2015); Minn. Stat. Ann. § 609.15 (2015); Miss. Code Ann. § 99-19-21 (2015); Mo. Stat. Ann. § 558.026 (2015); Mont. Code Ann. § 46-18-401 (2015); Neb. Rev. Stat. Ann. 28-1205(3) (2015); Nev. Rev. Stat. Ann., § 176.035 (2015); *Duquette v. Warden*, 919 A.2d 767, 774 (N.H. 2007) (holding that by repealing limit on court's authority to impose consecutive sentences, the legislature returned the court's common law authority to impose consecutive sentences); N.J.

Stat. Ann. § 2C:44-5 (2015); N.M. Stat. Ann. § 33-2-39 (2015); N.Y. Penal Law, § 70.25 (2015); N.C. Gen. Stat. Ann. § 15A-1354 (2015); N.D. Cent. Code Ann. § 12.1-32-11 (2015); Ohio Rev. Code Ann. § 2929.41 (2015); Okla. Stat. Ann. tit. 22, § 976 (2015); Or. Rev. Stat. Ann. § 137.370 (2015); 42 Pa. Cons. Stat. Ann. § 9721 (2015); R.I. Gen. Laws Ann. § 12-19-5 (2015); *Major v. State Dep't of Prob., Parole & Pardon Servs.*, 682 S.E.2d 795, 800-01 (SC 2009) (detailing the different state statues requiring consecutive sentences); S.D. Codified Laws, § 22-6-6.1 (2015); Tenn. Code Ann. § 40-20-111 (2015); Tex. Code Crim. Proc. Ann. art. 42.08 (2015); Utah Code Ann. § 76-3-401 (2015); Vt. Stat. Ann. tit. 13, § 7032 (2015); Va. Code Ann. § 19.2-308 (2015); Wash. Rev. Code Ann. § 9.94A.589 (2015); W. Va. Code Ann. § 61-11-21 (2015); Wis. Stat. Ann. § 973.15 (2015); *Loper v. Shillinger*, 772 P.2d 552, 553 (Wyo. 1989) (holding that a sentencing "judge has discretion to determine whether sentences shall be served consecutively or concurrently").

Indeed, *Graham* itself underscores that it does not apply to aggregate sentences. *Graham*'s finding of a national consensus prohibiting the imposition of LWOP for a single non-homicide offense

included considering the Annino study, which examined only *actual* life sentences and found that 123 juveniles were serving sentences of LWOP for non-homicide offenses in only 11 states, and Colorado was not one of those states. *Graham*, 560 U.S. at 62-64 (citing P. Annino, D. Rasmussen, & D. Rice, *Juvenile Life without Parole for Non-Homicide Offenses: Florida Compared to Nation 2* (Sept. 14, 2009)). This low number of sentences weighed heavily in the Supreme Court's determination that a national consensus existed against the practice of sentencing a juvenile to LWOP for a single, non-homicide offense. *Graham*, 560 U.S. at 63-66. In other words, the study on which the Supreme Court based its holding *only* addressed single, LWOP sentences for a single, non-homicide offense.

The United Supreme Court also had no evidence before it regarding the number of juveniles serving lengthy term-of-years sentences stemming from multiple offenses such that they would not be eligible for parole within their natural life. *See Bunch v. Smith*, 685 F.3d 546, 552 (6th Cir. 2012), *cert. denied*, *Bunch v. Bobby*, 2013 U.S. LEXIS 3202 (April 22, 2013). Thus, *Graham* is devoid of any discussion

regarding juveniles serving lengthy *term-of-years* sentences. *See* 560 U.S. at 113 n.11, 124 (Thomas, J., dissenting) (Alito, J., dissenting). Had the Supreme Court considered lengthy term-of-years sentences for multiple offenses in its analysis, the sentences would not have been exceedingly rare and would not have supported a finding of a national consensus against the practice.

Accordingly, the majority of states and federal circuits to address the issue have concluded that *Graham* does *not* apply to term-of-years sentences. Those cases are well-reasoned and should be followed here. *See, e.g., Bunch*, 685 F.3d at 552-53 (*Graham* "did not analyze sentencing laws or actual sentencing practices regarding consecutive, fixed-term sentences for juvenile non-homicide offenders. This demonstrates that the Court did not even consider the constitutionality of such sentences, let alone clearly establish that they can violate the Eighth Amendment's prohibition on cruel and unusual punishments"); *Goins v. Smith*, 556 Fed. Appx. 434, 439-40 (6th Cir. 2014) (same); *Adams v. State*, 707 S.E.2d 359, 365 (Ga. 2011) ("Clearly, 'nothing in the [*Graham*] opinion affects the imposition of a sentence to a term of

years without the possibility of parole.'" (quoting *Graham*, 560 U.S. at 124 (Alito, J., dissenting)); *Walle v. State*, 99 So. 3d 967, 971 (Fla. App. 2012) (declining to extend the holding in *Graham* to a juvenile who received sentences totaling 65 years for multiple, non-homicide offenses; "[t]he Supreme Court limited the scope and breadth of its decision in *Graham* by stating that its decision 'concern[ed] only those juvenile offenders sentenced to life without parole solely for a non-homicide offense'" (quoting *Graham*, 560 U.S. at 63)); *Diamond v. State*, 2012 Tex. App. LEXIS 3253, at *11-14 (Tex. Ct. App. Apr. 25, 2012) (upholding juvenile's consecutive 99-year and two-year sentences for non-homicide crimes in two separate cases); *State v. Kasic*, 265 P.3d 410, 416 (Ariz. App. 2011) (declining to extend *Graham* to "consecutive term-of-year sentences based on multiple counts and multiple victims"); *People v. Gay*, 960 N.E.2d 1272, 1278 (Ill. Ct. App. 2011) (*Graham* does not apply to consecutive sentences for non-homicide crimes totaling 97 years); *see also Loggins v. Thomas*, 654 F.3d 1204, 1223 (11th Cir. 2011) ("[*Graham*] limited to *life without parole* sentences") (emphasis added); *United States v. Scott*, 610 F.3d 1009, 1018 (8th Cir. 2010), *cert. denied*,

131 S. Ct. 964 (2011) ("*Graham* was limited to defendants *sentenced to life* in prison *without* parole") (emphasis added).

F. Even if *Graham* applies to aggregate sentences, Lucero has a meaningful opportunity for release during his natural life.

But even if *Graham* could be read to encompass term-of-years sentences for multiple offenses, Lucero's sentence complies with *Graham*. As the court of appeals correctly reasoned, Lucero's sentence complies with *Graham* as a factual matter because he has a meaningful opportunity for parole. *See Graham*, 560 U.S. at 75. ("A State is not required to guarantee eventual freedom to a juvenile offender convicted of a non-homicide crime. What the State must do, however, is give defendants . . . some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."). The court of appeals, relying on information supplied by Lucero, found that he did not receive a de facto life sentence because he will be eligible for parole when he is 57 years old. *Lucero*, ¶ 12. Significantly, his parole eligibility date could be sooner based on good behavior and earned time credit. *See* § 17-22.5-

403, C.R.S. (2015); § 17-22.5-405, C.R.S. (2015). Lucero's sentence guaranteeing the possibility of release at 57 years old does not violate the Eighth Amendment. *See Tate*, ¶ 19 (implicitly holding that sentencing juvenile to a sentence of 40 years before the possibility of parole is Constitutional by concluding that in cases where a LWOP sentence for a juvenile homicide offender is not appropriate, the correct sentence "is life in prison with the possibility of parole after forty years").

II. Attempted murder is a homicide crime within the meaning of *Graham*.

Lucero's claim fails on another ground. The rule of *Graham* only applies to a juvenile offender that commits a non-homicide offense. Here, Lucero was convicted of attempted murder. That is a homicide offense within the meaning of *Graham*

A. Standard of Review

Whether attempted murder is a homicide offense within the meaning of *Graham* is a question of law, which this Court reviews de

novo. *See People v. Davis*, 2015 CO 36, ¶ 14. Lucero preserved his claim below.

B. Attempted murder is a homicide crime.

The Supreme Court's holding in *Graham* is premised on a distinction between "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." 560 U.S. at 69. The Court noted, however, that "[s]erious non-homicide 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.* (internal quotations omitted). Relying on that language, Lucero argues that attempted murder is a non-homicide offense under *Graham*.

But there are three distinct aspects of *Graham* that indicate the Court intended to include attempted murder as a homicide crime. First, in distinguishing between homicide and non-homicide offenses, the *Graham* court relied on the Annino study, which defined homicide as murder, *attempted murder*, or felony murder. Annino, at 3-4. Moreover,

in considering worldwide consensus, *Graham* discussed Israel (the only country other than the United States imposing sentences of LWOP for juveniles) and noted that all seven Israeli prisoners serving life sentences for juvenile crimes were convicted of homicide or *attempted* homicide. 560 U.S. at 80-81. Third, *Graham* lists Hawaii as one of the "jurisdictions that permit life without parole for juvenile offenders convicted of homicide crimes only," and cited to the statutes proscribing life without parole for juveniles convicted of first degree murder or attempted first degree murder. *Id.* at p. 2035 (citing, in the Appendix, Haw. Rev. Stat., §§ 571-22, subd. (d) (2006)).

Moreover, classifying attempted murder as a homicide offense is more consistent with the animating principles in *Graham*. The Court premised its holding on a juvenile's immaturity and potential for change. In those regards, a juvenile's culpability for attempted murder is the same as murder. Thus, attempted murder should be considered a homicide offense under *Graham*. *See, e.g., Twyman v. State*, 26 A.3d 215 (Del. 2011) ("[U]nder *Graham*, Attempted Murder in the First Degree appears to fall within the category of crimes for which a life sentence

without parole may be imposed upon a juvenile"); *see also People v. Gipson*, 34 N.E. 3d 560, 576 (Ill. App. 2015) (although not fully deciding the issue, expressing it "seriously question[ed] whether attempted murder constitutes a non-homicide offense."); *Cervantes v. Biter*, 2014 U.S. Dist. LEXIS 79852, *4-5 (C.D. Cal. Feb. 7, 2014) (noting that though "neither *Graham* nor *Miller* addressed the issue, . . . there is good reason to believe that the United States Supreme Court, if it were to address the issue, would conclude that attempted murder is a homicide offense" (citing *Graham*)); *but see Bramlett v. Hobbs*, 463 S.W.3d 283, 288 (Ark. 2015) (attempted capital murder is a non-homicide offenses for purposes of *Graham*); *Gridine v. State*, 175 So. 3d 672, 672 (Fla. 2015) (holding that attempted murder is a non-homicide offense under *Graham* because Florida required that the victim not survive to qualify as homicide); *Manuel v. State,* 48 So. 3d 94, 97 (Fla App. 2010) (same).

III. Lucero presented a Crim. P. 35(c) claim because he challenged the constitutionality of his aggregate sentence.

As the foregoing amply demonstrates, Lucero presents a constitutional challenge to his sentence. And when a defendant argues that his sentence is unconstitutional, he presents a claim that falls under Crim. P. 35(c) and not Crim. P. 35(b). Lucero contends that under the principle of party presentation, the court of appeals erred in not reviewing his claim under Crim. P. 35(b). But the principle of party presentation does not woodenly confine a court to the parties' proposed framing of an issue. Rather, the principle only provides that a court should consider only the issues raised by the parties. As Lucero's constitutional claim could only be reviewed under Crim. P. 35(c), the court of appeals correctly did not violate the principle of party presentation by reviewing the claim Lucero actually raised.

Lucero's answer is that reviewing his claim under Crim. P. 35(c) for the first time on appeal would be unfair because he was not afforded the procedural protections of Crim. P. 35(c) when he litigated his claim below, namely the right to counsel and a hearing. But that argument

ignores that he received exactly that in this case and that this State's courts have considered his Crim. P. 35(c) claim only at his own insistence.

Lucero's remaining claim for relief requesting a new Crim. P. 35(b) hearing should be rejected as well. He was already afforded a full opportunity to present any Crim. P. 35(b) claims. A remand is not appropriate.

A. Standard of Review

As Lucero's standard of review for his brief provides, he presents a "a question of constitutional law; this Court reviews this issue *de novo*" (O.B., p. 8). What rule of criminal procedure that claims falls within, presents a question of law that this Court reviews *de novo*. *People v. Zhuk*, 239 P.3d 437, 438 (Colo. 2010). In interpreting the Criminal Rules of Procedure, this Court "employ[s] the same interpretive rules applicable to statutory construction," *People v. Fuqua*, 764 P.2d 56, 58 (Colo. 1988), and the language of a rule is given its "commonly understood and accepted meaning," *Leaffer v. Zarlengo*, 44 P.3d 1072, 1078 (Colo. 2002). Lucero preserved both claims below that his sentence

was unconstitutional and that the trial court should consider his age and potential rehabilitation in considering his request for sentence reconsideration (PR. Vol. 2, pp. 244-67, 319).

B. Lucero's *Graham* claim was a Crim. P. 35(c) claim.

Here, there can be no dispute that Lucero alleges that his sentence is unconstitutional under the Eighth Amendment. By its plain terms, Crim. P. 35(c) applies when a defendant alleges that the sentence imposed was "in violation of the Constitution . . ." Crim. P. 35(c)(2); *accord People v. Antonio-Antimo*, 29 P.3d 298, 304 (Colo. 2000). Accordingly, this Court has reviewed related challenges under *Miller* in appeals of Crim. P. 35(c) motions. *See People v. Vigil*, 2015 CO 43, ¶ 4; *People v. Jensen*, 2015 CO 42, ¶ 9.

On the other hand, Crim. P. 35(b) provides trial courts the opportunity to review a sentence to ensure it is properly imposed before it is final. *Ghrist v. People*, 897 P.2d 809, 812 (Colo. 1995). A court's review of a Crim. P. 35(b) motion focuses on the fairness of the sentence in light of the purposes of the sentencing laws. *Id.* Lucero's argument

that his constitutional challenge to his sentence was reviewable under Crim. P. 35(b) fatally ignores that any decision to reduce a sentence based on a Crim. P. 35(b) motion remains within the sound discretion of the trial court. *Id.*

Lucero argues, nevertheless, that under the principle of party presentation, the court of appeals erred in considering his motion as a Crim. P. 35(c). That argument misapprehends the principle of party presentation.

Although this Court has yet to specifically apply it, federal courts "follow the principle of party presentation. That is, [they] rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.'" *Greenlaw v. United States*, 554 U.S. 237, 244 (2008). That principle flows from the "general rule, [that the] adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief." *Id.* (internal quotation omitted). Accordingly, the principle is used to

"prevent an appellate court from *altering* a judgment to benefit a nonappealing party." *Id.*

But the principle of party presentation does not require a court to accept a party's incorrect *framing* of an issue. Indeed, though Lucero argues that the "United States Supreme Court has weighed in on a similar topic in *Wood v. Milyard*, 132 S. Ct. 1826 (2012)" (O.B., p. 50), that case is inapposite. There, the Court held that a federal appeals court possesses the authority, although not the obligation, to address the timeliness of a state prisoner's federal *habeas* petition on the court's own initiative. *Wood*, 132 S. Ct. at 1828. The Court held that the circuit court abused its discretion in sua sponte raising an affirmative defense when it was "deliberately" waived. *Id.* at 1830. But in the present case, the court of appeals converted Lucero's motion so that his claim could be reviewed. As the court did not raise a new issue, but instead interpreted Lucero's claim for what it really was, the court of appeals did not violate the principle of party presentation.

Consistent with the foregoing, this Court has repeatedly reviewed a post-conviction claim based on what the issue actually raises rather

than how it was titled at the district court. *See Kazadi v. People*, 291 P.3d 16, 19 (Colo. 2012); *People v. Rockwell*, 125 P.3d 410, 414g (Colo. 2005) (addressing de novo whether the defendant's claim was properly classified as a Crim. P. 35(a) or Crim. P. 35(c) claim); *People v. T.O.*, 696 P.2d 811, 815 (Colo. 1985) (holding that although presented as a Crim. P. 35(a) claim, juvenile court erred in not reviewing the claim because it was cognizable under Crim. P. 35(c)); *accord People v. Isom*, 2015 COA 89, 31; *People v. Collier*, 151 P.3d 668, 670 (Colo. App. 2006); *People v. Wenzinger*, 155 P.3d 415, 418 (Colo. App. 2006). Indeed, Lucero's previously discussed challenges to his sentence are only reviewable to the extent the court of appeals correctly reviewed his argument as a Crim. P. 35(c). The court of appeals did not err in reviewing his claim under the appropriate Rule.

Nor is Lucero's argument saved by his suggestion that the court of appeals' decision to interpret his claim as a Crim. P. 35(c) claim violated his due process rights. Lucero argues that if "the matter had been brought as a Rule 35(c) motion," he could have been entitled to both counsel and a hearing on his claim (O.B., pp. 51-52). But his claim fails

as a factual matter. In raising his *Graham* claim below, Lucero was represented by counsel and given an opportunity to present evidence at a hearing (R. Tr. 6/10/11). Lucero's due process complaints are without factual foundation.[3]

C. Lucero is not entitled to a new Crim. P. 35(b) hearing.

In addition, although Lucero contends he is now entitled to a hearing in which the court considers that he was young when he committed the offenses and the differences between juveniles and adults as discussed in *Miller* and *Graham*, such an individualized sentencing procedure is not required any time a juvenile is sentenced.

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[3] Lucero also contends that interpreting his motion as a Crim. P. 35(c) motion will impact the reviewability of his pending Crim. P. 35(c) motion alleging the ineffective assistance of counsel. However, his concern that his ineffective assistance of counsel claims will be deemed successive by the trial court is not comprised within the issue presented and should not be considered. *See, e.g., Washington v. People*, 186 P.3d 594, 606 (Colo. 2008) (this Court declined to address statutory claims not fairly comprised by issue presented for review); *KN Energy, Inc. v. Great Western Sugar Co.*, 698 P.2d 769, 776 n.8 (Colo. 1985) ("None of these matters are fairly raised by the issues upon which we granted certiorari, and we therefore do not consider them." Regardless, the fact that his counsel decided not to raise additional Crim. P. 35(c) claims when it raised his *Graham* claim does not change the calculus of whether his *Graham* claim was a Crim. P. 35(c) claim.

Rather, it is required only when sentencing a juvenile to life-without-parole, which did not happen here. *Miller*, 132 S. Ct. at 2474-75; *accord Tate*, ¶¶ 25, 28-31.

In any event, in the instant case, Lucero received an individualized sentencing determination, and the trial court had the discretion to impose a lower sentence. At his Crim. P. 35(b) hearing, Lucero was allowed to present evidence regarding his youth, his family dynamics, and his potential for rehabilitation (R. Tr. 6/10/11, pp. 18-22). The trial court acknowledged that it was authorized to reduce his sentence, but chose not to do so given its factual finding that Lucero had not "accepted responsibility" for the severe gravity of his crimes. *See* § 18-1.3-406(1)(a), C.R.S. (2015) (allowing a trial court to modify a crime of violence sentence). Lucero is not entitled to a new Crim. P. 35(b) hearing.

CONCLUSION

Based upon the foregoing arguments and authorities, the People respectfully request that this Court affirm the judgment of the court of appeals.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **PEOPLE'S ANSWER BRIEF** upon **ERIC SAMLER**, **JAMES HOPKINS**, **PHILLIP CHERNER**, **KIMBERLY DVORCHAK**, and **MARSHA LEVICK**, via Integrated Colorado Courts E-filing System (ICCES) on December 14, 2015.

/s/ Tiffiny Kallina