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SUPREME COURT, STATE OF COLORADO

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Certiorari to the Court of Appeals, 11CA1932

District Court, City and County of Denver, 04CR3018

PETITIONER:
ALEJANDRO ESTRADA-HUERTA

RESPONDENT:
PEOPLE OF THE STATE OF COLORADO

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Case Number: 14SC127

REPLY BRIEF

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies 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:

1. The brief complies with C.A.R. 28(g). It contains 2,701 words.

2. C.A.R. 28(a)(7)(A) does not apply to this brief. For each issue raised, the opening brief contains under a separate heading before the discussion of the issue a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

The undersigned acknowledges that the brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

s/ Antony Noble

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ARGUMENT

The court of appeals did not err by extending *Graham v. Florida* and *Miller v. Alabama* to consecutive term-of-years sentences imposed on juveniles convicted of multiple offenses.

In *Graham v. Florida*, the United States Supreme Court ruled that "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." *Graham v. Florida*, 560 U.S. 48, 82 (2010). If a state "imposes a sentence of life it must provide [the juvenile] with some realistic opportunity to obtain release before the end of that term." *Id.* at 82. That opportunity must be "meaningful" and "based on demonstrated maturity and rehabilitation." *Id*. at 50. In *Miller v. Alabama*, the Supreme Court ruled that the "imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." *Miller v. Alabama*, 132 S.Ct. 2455 (2012). "[T]he distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Id.* at 2465.

In the opening brief, Mr. Estrada-Huerta, a juvenile offender, contends that his consecutive, term-of-years sentences totaling forty years to life for kidnapping and sexual assault are inconsistent with the rulings in *Graham* and *Miller*.

In the answer brief, the attorney general contends that (1) *Graham* does not

apply to consecutive, terms-of-years sentences, (2) *Graham* should not apply retroactively, and (3) Mr. Estrada has a meaningful opportunity for release from his sentence of forty years to life.

A. *Graham* and *Miller* prohibit consecutive term-of-years sentences that deny juvenile offenders a meaningful opportunity for release based on demonstrated maturity and rehabilitation.

In the answer brief, the attorney general contends that "*Graham* did not address cases, such as the instant case, where the juvenile was convicted of multiple counts and received a lengthy term-of-years sentence in which the juvenile is eligible for parole." (Answer Brief, p. 9.) Relying on the dissenting opinions, the attorney general contends that the United States Supreme Court in *Graham* "confined its analysis to categorical proportionality review of a *single* LWOP sentence imposed for a *single* offense." (Answer Brief, p. 11 (emphases in original).) The attorney general concludes that the "majority of states and federal circuits to address the issue have concluded that *Graham* does *not* apply to term-of-years sentences." (Answer Brief, pp. 14-15.)

Relying on the facts in *Graham*, the attorney general has narrowly construed *Graham*'s holding as only prohibiting "a single mandatory sentence of life without the possibility of parole" for a juvenile "convicted of a single, nonhomicide offense." (Answer Brief, p. 5.) The Supreme Court's decisions, however, are

construed broadly. Indeed, a federal court may grant federal habeas corpus relief when a state court has misapplied a "governing legal principle" to "a set of facts different from those of the case in which the principle was announced." *See Wiggins v. Smith*, 539 U.S. 510, 520 (2003).

Under *Graham*, a juvenile sentence is unconstitutional if it does not provide a meaningful opportunity for release "based on demonstrated maturity and rehabilitation." *Graham*, 560 U.S. at 50. Even though Mr. Estrada-Huerta's sentence is forty years to life rather than life without parole, and, even though he was sentenced for two offenses rather than one offense, the governing legal principles in *Graham* apply equally to his sentence as they did to Mr. Graham's sentence. Similarly, the governing legal principles in *Miller* apply to his sentence.

The Supreme Court has not construed *Graham* as narrowly as the attorney general. Indeed, one of the juveniles in *Miller* was convicted of multiple offenses and this played no part in the Supreme Court's analysis. *See Miller*, 132 S. Ct. at 2461. Moreover, the Supreme Court has remanded some juvenile cases in which there were multiple offenses for consideration in light of *Miller*. *See*, *e.g.*, *Bear Cloud v. Wyoming*, 133 S. Ct. 183 (2012); *Mauricio v. California*, 133 S. Ct. 524 (2012); *Whiteside v. Arkansas*, 133 S. Ct. 65, 66 (2012); *Guillen v. California*, 133 S. Ct. 69 (2012); *Blackwell v. California*, 133 S. Ct. 837 (2013).

Relying on opinions from three federal circuits, two state supreme courts, and three state courts of appeals (including one unpublished opinion and one opinion that has been superseded by the state supreme court), the attorney general contends that "[t]he majority of states and federal circuits to address the issue have concluded that *Graham* does *not* apply to term-of-years sentences." (Answer Brief, pp 14-16 (emphasis in original).) The opinions relied on by the attorney general are not persuasive.

In *Bunch v. Smith*, for example, the Sixth Circuit in a federal habeas corpus case found that the petitioner's consecutive, fixed-term sentence "does not violate clearly established federal law." *Bunch v. Smith*, 685 F.3d 546, 552 (6th Cir. 2012). This case is not persuasive because of the "restricted standard of review" in federal habeas corpus cases. *See State v. Ronquillo*, 361 P.3d 779, 785 (Wash. Ct. App. 2015); *see also State v. Ragland*, 836 N.W.2d 107, 121 (Iowa 2013) ("the Court in *Bunch* was confined to a very narrow standard of review"). Indeed, many courts have declined to follow or have distinguished *Bunch*. *See*, *e.g.*, *State v. Null*, 836 N.W.2d 41, 73 (Iowa 2013); *Ragland*, 836 N.W.2d at 121; *Moore v. Biter*, 725 F.3d 1184, 1194 n.6 (9th Cir. 2013); *Casiano v. Comm'r of Correction*, 115 A.3d 1031, 1069 (Conn. 2015); *Bear Cloud v. State*, 334 P.3d 132, 143 (Wy. 2014); *People v. Rainer*, 2013 COA 51; *Ronquillo*, 361 P.3d at 785. *Bunch* is also

distinguishable from this case because Mr. Estrada-Huerta was given a consecutive, indeterminate sentence rather than a consecutive, fixed-term sentence.

In *Goins v. Smith*, an unpublished habeas corpus case, the Sixth Circuit affirmed the federal district court's finding that the petitioner's consecutive, fixed-term sentence did not violate *Graham*, ruling that *Bunch* was controlling. *Goins v. Smith*, 556 Fed. Appx. 434, 440 (6th Cir. 2014).

In *Adams v. State*, the Georgia Supreme Court quoted from Justice Alito's dissent in *Graham*—"[n]othing in the Court's opinion affects the imposition of a sentence to a term of years without the possibility of parole[,]" *Adams v. State*, 707 S.E.2d 359, 365 (Ga. 2011) (quoting *Graham*, 560 U.S. at 124 (Alito, J., dissenting))—but, in that case, the juvenile was serving concurrent sentences totaling twenty-five years in prison, not consecutive, term-of-years sentences. *Id.*

In *Walle v. State*, a Florida District Court of Appeal found that *Graham* did not apply to a juvenile's consecutive, term-of-years sentences. *Walle v. State*, 99 So.3d 967, 971-2 (Fla. Dist. Ct. App. 2012). In reaching this conclusion, however, the court relied on the decision in *Henry v. State*, 82 So.3d 1084 (Fla. Dist. Ct. App. 2012), which has since been reversed by the Florida Supreme Court. *See Walle*, 99 So.3d at 971-972 (quoting *Henry*, 82 So.3d at 1089); *Henry v. State*, 175 So.3d 675, 680 (Fla. 2015) ("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.'") (reversing *Henry*, 82 So.3d 1084); *see also Ronquillo*, 361 P.3d at 785 ("In *Walle*, the Florida Court of Appeal interpreted *Graham* and *Miller* narrowly and in doing so relied on another Court of Appeal opinion that has since been called into question by the Florida Supreme Court.").

In *Diamond v. State*, the Texas Court of Appeals, without any reference to *Graham* in the majority opinion, ruled that a juvenile's ninety-nine-year sentence for aggravated robbery was not cruel and unusual punishment under the Eighth Amendment and the state constitution. *Diamond v. State*, 419 S.W.3d 435, 441 (Tex. App. 2012). In reaching this conclusion, the majority was addressing the sentence for aggravated robbery rather than the the total consecutive sentences, and did not analyze that sentence under *Graham*. *Id.* at 440 (juvenile's "sentence of ninety-nine years is within the statutory range authorized by the Legislature for the crime of aggravated robbery."). In a dissenting opinion, however, Justice Gaultney, referring to *Graham*, stated that "[n]inety-nine years is not a sentence of life without parole, but similar sentencing difficulties and considerations are present in this case." *Id.* at 443.

In *State v. Kasic*, the Arizona Court of Appeals narrowly construed *Graham*, finding that the Supreme Court "made clear" that "[t]he instant case concerns only

those juvenile offenders sentenced to life without parole solely for a nonhomicide offense." *State v. Kasic*, 265 P.3d 410, 414 (Ariz. Ct. App. 2011). Commenting on *Kasic*, the Washington Court of Appeals noted that the juvenile was sentenced to 139.75 years on thirty-two counts relating to a one-year spree of arsons, most of them committed after he turned eighteen, and that the Arizona Court of Appeals concluded the sentences were not "categorically" barred under *Graham*. *See Ronquillo*, 361 P.3d at 785 (citing *Kasic,* 265 P.3d at 411-15).

In *People v. Gay*, the defendant, an adult suffering from mental illness, and not a juvenile, claimed that *Graham* applied to his consecutive sentences imposed in multiple cases because he "belongs to a class of categorically less culpable persons to whom the penological justifications for such sentences do not apply." *People v. Gay*, 960 N.E.2d 1272, 1278 (Ill. App. Ct. 2011). Although the Illinois Court of Appeals found that *Graham* does not apply to consecutive, term-of-years sentences in separate cases, the case was resolved on a procedural issue. *Id.* (addressing *Graham* claim but after "agree[ing] with the State that defendant's claim exceeds the scope of the postconviction proceedings").

In *Loggins v. Thomas*, another habeas corpus case under a restricted standard of review, the Eleventh Circuit, referring to *Graham* and *Roper*, ruled that "[a] fairminded jurist certainly could conclude that neither of those decisions clearly

establishes that a criminal who commits a murder when he is a juvenile cannot be sentenced to life without parole." *Loggins v. Thomas*, 654 F.3d 1204, 1223-24 (11th Cir. 2011). *Loggins* is not persuasive because, in that case, the juvenile was serving life without the possibility of parole for first-degree murder rather than consecutive, term-of-years sentences for non-homicide offenses, and the decision was issued prior to the Supreme Court's decision in *Miller*. *Id.* at 1206-7.

In *United States v. Scott*, another habeas corpus case under a restricted standard of review, the Eighth Circuit found that *Graham* "did not call into question the constitutionality of using prior convictions, juvenile or otherwise, to enhance the sentence of a convicted adult." *United States v. Scott*, 610 F.3d 1009, 1018 (8th Cir. 2010). This case is not persuasive because the defendant was an adult who claimed that his prior juvenile convictions could not be used to enhance the sentence for his adult convictions. *Id.*

Contrary to the attorney general's argument, most courts to address the issue have determined that *Graham* or *Miller* apply to consecutive, term-of-years sentences. *See*, *e.g.*, *Ronquillo*, 361 P.3d at 785 (*Miller* applies to consecutive sentence of 51.3 years); *Henry*, 175 So.3d at 679 (*Graham* should be applied to consecutive, term-of-years prison sentences); *Bear Cloud,* 334 P.3d at 144 (holding that a consecutive sentence of just over forty-five years was the de facto equivalent

of a life sentence without parole); *Null*, 836 N.W.2d at 72 ("*Miller's* principles are fully applicable to a lengthy term-of-years aggregate sentences"); *Moore*, 725 F.3d at 1187 (consecutive, term-of-years sentences violated *Graham*); *People v. Caballero*, 282 P.3d 291, 295 (Cal. 2012) (*Graham* applies to consecutive, term-of-years sentences); *see also Casiano*, 115 A.3d at 1047 ("a fifty year term and its grim prospects for any future outside of prison effectively provide a juvenile offender with 'no chance for fulfillment outside prison walls, ... no hope.'").

Contrary to the attorney general's arguments, *Graham* and *Miller* prohibit consecutive, term-of-years sentences that deny juvenile offenders a meaningful opportunity for release based on demonstrated maturity and rehabilitation.

B. *Graham* applies retroactively to consecutive, term-of-years sentences.

The attorney general contends that *Graham* should not be applied retroactively to consecutive, term-of-years sentences because the new rule announced in *Graham* only applies to "a single life-without-parole sentence for a single, nonhomicide offense." (Answer Brief, pp. 18-19.) Although retroactivity was not addressed by the court of appeals in this case, the attorney general urges this court to reverse the court of appeals' decision in *Rainer, supra*, finding that *Graham* is retroactive to cases on collateral review. (Answer Brief, pp. 19-20.)

This court should affirm the court of appeals' decision in *Rainer*, finding

that "the rule announced in *Graham* is a new substantive rule that should be applied retroactively to all cases involving juvenile offenders under the age of eighteen at the time of the offense, including those cases on collateral review." *Rainer*, ¶21. The court of appeals in *Rainer* correctly found that new substantive rules generally apply retroactively, and include rules that apply when a defendant "faces a punishment that the law cannot impose on him." *Rainer*, ¶19 (quoting *Schriro v. Summerlin,* 542 U.S. 348, 351-52 (2004)). The court also correctly found that a rule is substantive rather than procedural "if it alters the range of conduct or the class of persons that the law punishes." *Id.* (quoting *Shriro*, 542 U.S. at 352). Additionally, the court of appeals was correct to find that, even if *Teague v. Lane*, 489 U.S. 288 (1989) is applied, *Graham* applies retroactively because "it also falls under the first exception set forth in *Teague*, which 'should be understood to cover ... rules prohibiting a certain category of punishment for a class of defendants because of their status or offense.'" *Rainer*, ¶22 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989)).

Other courts that have addressed this issue have decided that *Graham* applies retroactively to consecutive, term-of-years sentences challenged on collateral review. *See*, *e.g.*, *Moore,* 725 F.3d at 1190-91 (*Graham* applies retroactively to consecutive, term-of-years sentences challenged on collateral

review because "[i]t applies to a class of defendants, juvenile nonhomicide offenders, defined by: (1) the status of the defendants (juveniles); and (2) the type of offense (nonhomicide crimes)") (following *In re Sparks*, 657 F.3d 258, 260 (5th Cir. 2011)); *State v. Zuber*, --- A.3d ---, 2014 WL 10585011 (N.J. Super. Ct. App. Div. Oct. 30, 2015) (*Graham* applies retroactively to consecutive, term-of-years sentences because it "expressly prohibited a particular type of sentence as it applies to an entire class of offenders.") (internal quotation marks omitted).

Accordingly, this court should find that *Graham* announced a new substantive constitutional rule that applies retroactively to consecutive, term-of-years sentences that deny a juvenile offender a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.

B. The total consecutive sentence of forty years to life imposed in this case is inconsistent with *Graham* and *Miller*.

The attorney general contends that the total consecutive sentence of forty years to life does not violate *Graham* because "Colorado's statutory sentencing scheme provides [Mr. Estrada-Huerta] with a meaningful opportunity for release based on demonstrated maturity and rehabilitation." (Answer Brief, p. 27.) The attorney general contends that parole eligibility at the age of forty-two provides a meaningful opportunity for release during his lifetime. (Answer Brief, p. 27.)

In making this argument, however, the attorney general has not addressed Mr. Estrada-Huerta's claim that his sentence denies him a meaningful opportunity to be released "based on demonstrated maturity and rehabilitation." (Opening Brief, pp. 19-21.) The Supreme Court has recognized that the adult brain continues to mature into the early twenties. A juvenile offender is therefore in the position to demonstrate maturity and rehabilitation in his late twenties. A sentence that does not allow a juvenile offender a meaningful opportunity for release until his forties or fifties therefore violates the principles in *Graham* and *Miller* because a juvenile offender who has rehabilitated in his late twenties is continued to be incarcerated for the sole purposes of retribution, deterrence, or incapacitation, which, according to the Supreme Court, are not adequate penological justifications for a juvenile sentence. *See Graham*, 560 U.S. at 74; *see also Miller*, 132 S.Ct. 2465 ("the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes.").

CONCLUSION

WHEREFORE, Petitioner Alejandro Estrada-Huerta respectfully requests that the court vacate his sentence of forty years to life and to remand this case for resentencing in compliance with *Graham v. Florida* and *Miller v. Alabama*.

Respectfully submitted,
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s/ Antony Noble

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of December 2015, this **REPLY BRIEF** was served via ICCES on Senior Assistant Attorney General Rebecca Adams.

s/ Antony Noble