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SUPREME COURT STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	
On Certiorari to the Colorado Court of Appeals Court of Appeals Case No. 11CA1932	
Petitioner, ALEJANDRO ESTRADA-HUERTA, v. Respondent, THE PEOPLE OF THE STATE OF COLORADO.	▲ **COURT USE ONLY** ▲ Case No. 2014SC127
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SUPPLEMENTAL ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

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

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

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The People submit the following supplemental brief in response to this Court's order that supplemental briefs on the impact of S.B. 16-180 and S.B. 16-181[1] may be filed.

SUMMARY OF THE ARGUMENT

Because Estrada-Huerta is a sex offender, S.B. 16-180 and S.B. 16-181 are inapplicable to him. Nevertheless, S.B. 16-180 and S.B. 16-181 properly exclude sex offenders because, as Colorado courts have long recognized, sex offenders require different treatment and rehabilitation. In any event, however, Estrada-Huerta's sentence does not implicate *Graham v. Florida*, 560 U.S. 48 (2010), and, further, he has "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 75.

INTRODUCTION

Following oral argument in this case, the governor signed S.B. 16-180 and S.B. 16-181 into law. Senate Bill 16-180 creates a specialized program for juveniles convicted as adults. In enacting S.B. 16-180, the

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

legislature acknowledged the recent decisions from the United States Supreme Court and recognized that "children are constitutionally different than adults for purposes of sentencing and should be given a meaningful opportunity for release based on demonstrated maturity and rehabilitation." This language was taken directly from the *Graham* opinion and recognizes the capacity of children to change and their potential for rehabilitation. As the Supreme Court held in *Graham*,

> [a] state is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What a state must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.

560 U.S. at 75.

However, S.B. 16-180 explicitly exempts sex offenders from its coverage. *See* § 17-34-101(1)(a)(I)(B), C.R.S. (juvenile offenders convicted of unlawful sexual behavior as defined in § 16-22-102(9), C.R.S. (2015), are ineligible). Consequently, the People agree that Estrada-Huerta is not entitled to relief under either S.B. 16-180 or S.B. 16-181. Nevertheless, his sentence is constitutional, and the

legislature's enactment is consistent with the established understanding of the need for specific sex offender treatment.

ARGUMENT

I. Sex offenders, including juvenile sex offenders, require different treatment, evaluation, and rehabilitation programs than those for non sex-offenders or juvenile offenders generally.

A. Standard of Review

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

When interpreting a statute, this Court must give effect to the legislature's purpose and intent by examining the plain and ordinary meaning of the statutory language. *People v. Madden*, 111 P.3d 452, 457 (Colo. 2005). If the statute is susceptible to different interpretations, this Court must adopt the interpretation comporting with constitutional standards. *People in Interest of C.M.*, 630 P.2d 593, 594 (Colo. 1981).

B. The legislature properly excluded sex offenders from S.B. 16-180.

Sex offenders are a different class of criminal offenders and require different treatment, evaluation, management, and monitoring programs. As such, the legislature had just cause to exclude juvenile sex offenders—a class of offenders it specifically *included* in Colorado's sex offender treatment program requirements—from S.B. 16-180.

In 1992, the legislature enacted a comprehensive sentencing scheme for sex offenders entitled "Standardized Treatment Program for Sex Offenders." § 16-11.7-101, C.R.S. (2015). Its goal was to create a sex offender-specific system to reduce recidivism and ensure the safety

both of victims and the public. *Id.*; *see also Hernandez v. People*, 176 P.3d 746, 753 (Colo. 2008). The legislature found that, to best protect the public, it was "necessary to comprehensively evaluate, identify, treat, manage, and monitor adult sex offenders who are subject to the supervision of the criminal justice system *and juveniles who have committed sexual offenses* who are subject to the supervision of the juvenile justice system." § 16-11.7-101(1), C.R.S. (2015) (emphasis added). Its goal was to "create a program that establishes evidence-based standards for the evaluation, identification, treatment, management, and monitoring" of both adult sex offenders and juvenile sex offenders in order to "prevent offenders from reoffending and enhance the protection of victims and potential victims." § 16-11.7-101(2), C.R.S. (2015).

Thus, the legislative declaration twice made clear that it viewed juvenile sex offenders as needing sex offender-specific treatment, management, and monitoring. *Id.* And, as of 2015, this included any juvenile who has committed a sex offense as defined in section 16-11.7-102(3), C.R.S. (2015), on or after July 1, 2002. *See* § 16-11.7-102(1.5),

C.R.S. (2015); *see also People v. Lenzini*, 986 P.2d 980, 983 (Colo. App. 1999) ("Article 11.7 was enacted to provide the state with a program of standardized procedures to deal with *all* sex offenders.") (emphasis in original).

As a result, the legislature created the sex offender management board ("SOMB"). § 16-11.7-103, C.R.S. (2015). In doing so, it established an exhaustive list of duties to create a standardized system for treatment. § 16-11.7-103(4)(a)-(e), C.R.S. (2015). This included a system to evaluate and identify sex offenders; create procedures for the management, monitoring, treatment, and intervention of sex offenders; develop a sex offender risk assessment screening instrument; and enact necessary changes and modifications. *Id.*; *see also Allen v. People*, 2013 CO 44, ¶ 8 (acknowledging the system for the comprehensive evaluation, identification, treatment, management, and monitoring of sex offenders).

The legislature also required specific evaluations for both adult sex offenders and juvenile sex offenders who were being considered for parole. § 16-11.7-104, C.R.S. (2015). These included specific risk

assessments, monitoring procedures to protect victims and potential victims, and treatment evaluation. *Id.*

Finally, it required open ended treatment, "required, as part of any sentence to probation" or prison, to "undergo treatment to the extent appropriate to such offender" based on the results of the evaluation and any subsequent recommendations—in short, to ensure the offender was progressing with the sex offense-specific treatment and would not pose a risk to the community. § 16-11.7-105, C.R.S. (2015). This, too, applied specifically to juvenile sex offenders. *Id.*

In short, the legislature specifically requires each and every sex offender to receive both a sex offense-specific evaluation and to participate in sex offense-specific treatment. *See* § 16-11-102(1)(b), C.R.S. (2015) (presentence investigation); § 16-11.7-104(1), C.R.S. (2015) (sex offender evaluation and identification); § 16-11.7-105 (treatment based upon evaluation). Further, only SOMB-approved treatment providers can evaluate and treat sex offenders sentenced through the criminal justice system. *See* § 16-11.7-106, C.R.S. (2015).

The legislature has not restricted sex offense treatment only to adult offenders. On the contrary, it has specifically included juvenile sex offenders as needing the same treatment, as well as for the community to receive the same treatment- and monitoring-related protections for all sex offenders, adult or juvenile. In short, the sex offender treatment program was premised on sex offenders evincing the need for enhanced treatment due to a greater risk of recidivism. Because section 16-11.7-101 *et seq.* specifically *included* juveniles, and because S.B. 16-180 specifically *excluded* juvenile sex offenders and it is presumed that the legislature is aware of its previous enactments, *see Colorado Water Conservation Bd. v. City of Central*, 125 P.3d 424, 434 (Colo. 2005), this Court must concluded that the legislature specifically excluded juvenile sex offenders based on its recognition of their need for additional sex offense-specific treatment (and evaluation, management, and monitoring).

In any event, Estrada-Huerta has not established either that juvenile sex offenders possess the same mental faculties as juvenile offenders who have not committed a sex offense or that juvenile sex

offenders are equally capable of establishing adult maturity and being rehabilitated such that they do not put the community at risk in a manner as do non-sex offenders. It is his burden to do so, especially because Colorado's legislature has already determined that sex offender treatment and rehabilitation practices apply to juvenile sex offenders. *See Graham*, 560 U.S. at 111 (Thomas, J., dissenting) ("it is the 'heavy burden' of petitioners to establish a national consensus against [a sentencing practice]") (quoting *Stanford v. Kentucky*, 492 U.S. 361, 373 (1989)); *cf. also City of Greenwood Village*, 3 P.3d at 440 (defendant bears a heavy burden to establish the unconstitutionality of a statute beyond a reasonable doubt); *People v. Allman*, 2012 COA 212, ¶ 7 (same); *accord People v. Lovato*, 2014 COA 113, ¶ 12 ("defendant has the burden of establishing the unconstitutionality of a statute, as applied [to him], beyond a reasonable doubt") (internal quotations omitted).

Consequently, this Court must presume that S.B. 16-180 is a constitutional exercise that recognizes that juvenile sex offenders must be exempted from the streamlined release process because, as explicitly

addressed in 16-11.7-101 *et seq.*, their minds are formed differently and they require additional treatment and offense-specific programs. Because sex offenders are different and the penological goals for rehabilitating sex offenders—including juvenile sex offenders—require a different approach, and because Colorado has a statutory scheme in place that specifically addresses that treatment, monitoring, and rehabilitation goal, the fact that sex offenders are exempted from S.B. 16-180 does not render S.B. 16-180 ineffective or constitutionally insufficient.

II. Estrada-Huerta's sentence does not violate *Graham*, and it gives him a reasonable possibility of parole.

To reiterate the People's position, even in lieu of S.B. 16-180: although Estrada-Huerta is ineligible for relief under S.B. 16-180, that does not mean his sentence violates *Graham*.[2] *Graham* "concerns only those juvenile offenders sentenced to life without parole solely for a non-homicide offense." 560 U.S. at 63 (emphasis added). *Graham* referred

[2] To that end, the People agree with Estrada-Huerta that passage of S.B. 16-180 does not moot the greater issue of *Graham*'s scope and application.

to (1) a single sentence, of (2) life without the possibility of parole. It did not address multiple sentences aggregated together as a result of repeat criminal behavior or a cumulative sentence that still allowed for the possibility of parole. *Id.*; *see also id.* at 113 n.11 (Thomas, J., dissenting) (Court did not consider juveniles serving lengthy term-of-year sentences); *id.* at 124 (Alito, J., dissenting) ("Nothing in the Court's opinion affects the imposition of a sentence to a *term of years* without the possibility of parole.") (emphasis added); *accord Bunch v. Smith*, 685 F.3d 546, 552-53 (6th Cir. 2012) ("[Graham] did not analyze sentencing laws or actual sentencing practices regarding consecutive, fixed-term sentences for juvenile nonhomicide offenders."), *cert. denied*, *Bunch v. Bobby*, 2013 U.S. LEXIS 3202 (Apr. 22, 2013).

The issue of cumulative term-of-year sentences was not before the Court, even if the Court ultimately may address it in the future. As such, should this Court decide that, as a policy matter, *Graham* applies to aggregate term-of-year sentences, that holding cannot be made retroactive to Estrada-Huerta because the Supreme Court has not yet expressed such a substantive rule of constitutional law. *See Teague v.*

Lane, 489 U.S. 288, 309 (1989) (holding that retroactively applying constitutional rules not in existence when conviction becomes final undermines principle of finality); *Edwards v. People*, 129 P.3d 977, 979, 983 (Colo. 2006) (adopting *Teague*).

In any event, this Court has held that parole eligibility after serving 40 years is constitutional for a juvenile convicted of first-degree murder. *People v. Tate*, 2015 CO 42, ¶ 7. The Supreme Court has also indicated, albeit implicitly,[3] that a juvenile serving 40 years in prison would not violate the Eighth Amendment. *See Graham*, 560 U.S. at 123, n.13 (Thomas, J., dissenting) ("it would be impossible to argue that there is any objective evidence of agreement that a juvenile is constitutionally entitled to a parole hearing any sooner than 40 years after conviction"). Indeed, defense counsel in *Graham* conceded at oral argument that the "Colorado provision [providing parole eligibility after 40 years] would probably be constitutional." *Id*. at 123, n.13 (Thomas, J., dissenting).

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

As of this writing, Estrada-Huerta is parole-eligible on May 2, 2029, when he will be approximately 42 years old,[4] and will have been in prison for approximately 25 years. *Graham* does not require a defendant to actually be paroled; it requires a meaningful possibility of parole. 560 U.S. at 75. By serving a sentence of approximately 25 years with a parole-eligibility date at age 42, Estrada-Huerta has that possibility.[5]

CONCLUSION

Senate Bill 16-180 neither has any impact on Estrada-Huerta's sentence nor is it constitutionally inadequate for not addressing sex offenders. In any event, Estrada-Huerta's sentence does not raise *Graham* concerns and is constitutional under the Eighth Amendment. This Court should hold that *Graham* does not apply, that S.B. 16-180

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[4] *See* http://www.doc.state.co.us/oss/ (last visited July 12, 2016).

[5] Indeed, by serving approximately 25 years of his aggregate 40 years to life sentence before he is parole eligible (*see* PR. CF, vol. I, p. 137), Estrada-Huerta is receiving almost exactly the same parole-eligibility relief that SB 16-180 provides. *See* § 17-34-101(1)(a)(I), C.R.S.; § 17-34-102(7), (8)(a), C.R.S.

provides relief beyond *Graham*'s requirements, and Estrada-Huerta's sentence is constitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

/s/ Tiffiny Kallina

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