IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,

Appellant,

v.

ANDRE BOSTON,

Respondent.

CASE NO: 62931

APPELLANT'S OPENING BRIEF

Appeal From Order Granting in Part and Denying in Part Petition for Writ of Habeas Corpus (Post-Conviction)
Eighth Judicial District Court, Clark County

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500
State of Nevada

CATHERINE CORTEZ MASTO
Nevada Attorney General
Nevada Bar No. 003926
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Appellant

MARTIN HART, ESQ.
Nevada Bar #005984
The Law Offices of Martin Hart, LLC
229 South Las Vegas Blvd., Suite 200
Las Vegas, Nevada 89101
(702) 380-4278

Counsel for Respondent

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Eighth Judicial District Court, Clark County

JURISDICTIONAL STATEMENT

This Court exercises jurisdiction over an appeal from a district court order granting a petition for writ of habeas corpus (post-conviction) pursuant to Nevada Revised Statutes (NRS) 2.090(1) and/or NRS 34.575(2).

STATEMENT OF THE ISSUES

1. Whether the district court erred in finding Graham v. Florida, 560 U.S. 48, 130 S.Ct. 2011 (2010), constituted good cause to overcome the untimely and successive nature of Defendant's Petition for Writ of Habeas Corpus.
2. Whether the district court's expansion of Graham was improper as a matter of constitutional law.

3. Whether this Court should adopt the reasoning of persuasive authority that treats separate sentences individually.

STATEMENT OF THE CASE

On July 7, 1988, the Juvenile Division of the Eighth Judicial District Court of the State of Nevada (Juvenile Court) filed an Order certifying Andre Dupree Boston (Defendant) to be tried as an adult. 1 AA 1-6. Juvenile Court's Order detailed the facts and rationale underlying the decision to certify Defendant. 1 AA 1-6. The Order indicated that Defendant's crimes were of a heinous and premeditated nature. 1 AA 3. Defendant's mother had previously placed Defendant into a Psychiatric Hospital because she discovered sex magazines and writings by Defendant describing his plans to abduct, hold for ransom, rape and rob others. 1 AA 4. A psychologist or psychiatrist described Defendant as being a time bomb. 1 AA 4.

Additionally, Juvenile Court considered that Defendant had previously been convicted in California of four Counts of Rape with Force and Violence, five Counts of Oral Copulation with Use of a Weapon, and one Count of Sodomy. 1 AA 4-5. Juvenile Court was also aware that Defendant had been placed at the California Youth Authority until he was involved in an escape plan; thereafter, he was housed at Folsom Prison. 1 AA 5.

Juvenile Court also considered that Defendant came from an affluent family, resided with his natural mother and father, his mother was his primary caretaker, and Defendant was the oldest of three children. 1 AA 5. Prior to Defendant's sexual assaults, his mother had found ski masks, gloves, and turtlenecks in Defendant's closet. 1 AA 5 Lastly, Defendant's was tested while at the California Youth Authorities and had an I.Q. of 103. 1 AA 5.

After waiver of jurisdiction by Juvenile Court, Defendant was charged by way of Criminal Complaint. 1 AA 7-12. Defendant's preliminary hearing was held and on July 26, 1988, and Defendant was bound over to district court. 1 AA 13.

On August 2, 1988, an Information was filed charging Defendant, as follows: Count 1 – Burglary; Count 2 – Lewdness with a Minor with Use of a Deadly Weapon; Count 3 – Assault with a Deadly Weapon; Count 4 – Battery with Intent to Commit a Crime with Use of a Deadly Weapon; Count 5 – First Degree Kidnapping with Use of a Deadly Weapon; Counts 6-12 – Sexual Assault with Use of a Deadly Weapon; Count 13 – Robbery with Use of a Deadly Weapon; Count 14 – Attempt Dissuade Victim or Witness from Reporting a Crime with Use of a Deadly Weapon. 1 AA 14-20.

On August 11, 1988, Defendant was arraigned in District Court and invoked his right to trial within 60 days. On September 12, 1988, Defendant's jury trial

commenced. 1 AA 21 - 2 AA 428. On September 15, 1988, the jury returned verdicts of Guilty as to Counts 1-8 and 10-14 of the Information. 2 AA 424-41.

On October 20, 1988, Defendant was sentenced to the Nevada Department of Corrections: Count 1: Ten (10) years; Count 2: Ten (10) years, plus a consecutive sentence of ten (10) years for Use of a Deadly Weapon, sentence to run consecutive to Count 1; Count 3: Six (6) years, sentence to run consecutive to Count 2; Count 4: Ten (10) years, plus a consecutive sentence of ten (10) years for Use of a Deadly Weapon, sentence to run consecutive to Count 3: Count 5: Life, plus a consecutive sentence of Life for Use of a Deadly Weapon, sentence to run consecutive to Count 4; Count 6: Life, plus a consecutive sentence of Life for Use of a Deadly Weapon, sentence to run consecutive to Count 5; Count 7: Life, plus a consecutive sentence of Life for Use of a Deadly Weapon, sentence to run consecutive to Count 6; Count 8: Life, plus a consecutive sentence of Life for Use of a Deadly Weapon, sentence to run consecutive to Count 7; Count 10: Life, plus a consecutive sentence of Life for Use of a Deadly Weapon, sentence to run consecutive to Count 8; Count 11: Life, plus a consecutive sentence of Life for Use of a Deadly Weapon, sentence to run consecutive to Count 10; Count 12: Life, plus a consecutive sentence of Life for Use of a Deadly Weapon, sentence to run consecutive to Count 11; Count 13: Fifteen (15) years, plus a consecutive sentence of fifteen (15) years for Use of a Deadly Weapon, sentence to run consecutive to

Count 12; Count 14: Three (3) years, plus a consecutive sentence of three (3) years for Use of a Deadly Weapon, sentence to run consecutive to Count 13, with no credit for time served. 2 AA 446-50. Defendant's sentences were to run consecutive to his California sentence. 2 AA 446-50.

Judgment of Conviction was filed on November 7, 1988. 2 AA 446-49. Defendant filed a Notice of Appeal on November 1, 1988. 2 AA 442-45. This Court denied appellate relief on October 24, 1989. 2 AA 452-53.

On October 22, 1990, Defendant filed a Petition for Writ of Habeas Corpus (Post-Conviction). 3 AA 455-590. The State responded on November 28, 1990. 3 AA 591-607. On December 14, 1990, the district court denied habeas relief. 3 AA 608-17. A Findings of Fact, Conclusions of Law and Order was filed on December 18, 1990. 3 AA 618-21.

Defendant filed a Notice of Appeal on January 11, 1991. 3 AA 622-23. On September 30, 1991, this Court issued an order remanding the case for an evidentiary hearing as to whether Defendant received ineffective assistance of counsel. 3 AA 624-28.

An evidentiary hearing was conducted on September 4, 1992. 3 AA 629-64. On October 14, 1993, the district court again denied habeas relief. 3 AA 665-68.

Defendant filed a Notice of Appeal on July 25, 1994. 3 AA 669. On October 7, 1994, this Court filed an Order dismissing Defendant's appeal. 3 AA 670-72.

Defendant filed a Second Petition for Writ of Habeas Corpus on January 5, 2011. 3 AA 673-753. The State filed its Response and Motion to Dismiss on March 4, 2011. 4 AA 754-62. On March 23, 2011, the district court granted the State's Motion and dismissed Defendant's Petition as untimely, successive and in violation of laches. 4 AA 763-70.

On April 19, 2011, Defendant filed a Notice of Appeal. 4 AA 771-77. On February 3, 2012, this Court remanded and directed the district court to determine "whether Graham applies only to a sentence of life without parole or whether Graham applies to a lengthy sentence structure that is the functional equivalent of life without parole." 4 AA 778-86.

A Supplemental Petition was filed on November 27, 2012. 4 AA 787-879. A Second Supplemental Petition was filed on December 24, 2012. 4 AA 880-888. The State responded on January 23, 2013. 4 AA 889-903. On March 4, 2013, the district court heard argument. 4 AA 904-28. On March 22, 2013, the district court filed its Order Granting in Part and Denying in part Defendant's Petition for Writ of Habeas Corpus. 4 AA 929-34. District Court found Defendant's "cumulative sentences … violate the Eighth Amendment of the United States Constitution's prohibition of cruel and unusual punishments under the Graham case." Id.

The State filed a Notice of Appeal on April 3, 2013. 4 AA 935-36.

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STATEMENT OF THE FACTS

On October 1, 1983, twelve year-old K.K. was asleep in her family's home. 1 AA 38-39. At approximately 5:00 a.m., K.K. awoke to find a black male intruder in her bedroom (later determined to be Defendant). 1 AA 39, 47-48. Defendant put his hand over K.K.'s mouth and told her to be quiet. 1 AA 39, 42. Defendant produced a knife, forced covers over K.K.'s head and began fondling her. 1 AA 39-42. K.K. called to her mother (B.K.) who came to K.K.'s bedroom. 1 AA 42-43. Defendant thrust the knife towards B.K. causing her to recoil. 1 AA 67-68. After Defendant jabbed the knife towards B.K., he jumped out the kitchen window. 1 AA 67-69. Defendant was completely nude. 1 AA 68.

On November 14, 1983, fifteen year old A.K. (K.K.'s older sister) left the family home at approximately 6:30 a.m. 1 AA 85. As A.K. walked to school, Defendant jumped out of some nearby bushes, threatened A.K. with a butcher knife and forced her behind some bushes. 1 AA 87-90. A.K. began to scream and tried to run, but Defendant put the butcher knife to A.K.'s throat and dragged her behind the bushes. 1 AA 89-90. Defendant was wearing a bandana over his face and was also wearing camouflage pants. 1 AA 87.

As Defendant was attempting to sexually assault A.K., a garage door opened at a nearby residence. 1 AA 89-91. Upon hearing this, Defendant put tape and a bandana over A.K. eyes, forced her into his car and drove away. 1 AA 91-92, 94.

Richard Forsberg opened his garage door and noticed a body on the ground and a black male kneeling by it. 1 AA 163-64. He went into his house, called the police and returned to find the people gone. 1 AA 164. A.K.'s school books and papers were all that remained. 1 AA 164.

Upon driving A.K. away, Defendant indicated that he was the person who attacked K.K. 1 AA 95-96. Defendant made several statements that indicated he had been watching her on previous days. 1 AA 83-121. Defendant repeatedly threatened to kill A.K. if she did not cooperate with his demands. 1 AA 83-121.

A.K. told Defendant she was a virgin and he said she would not be "afterwards." 1 AA 96-97. Defendant ordered A.K. to remove her clothing and sexually assaulted her by putting his penis insider her vagina. 1 AA 97. Defendant commented on how "tight" her "pussy" was and how he might have to "loosen her up." 1 AA 98. After sexual intercourse, Defendant told A.K. to clean herself because she was bleeding. 1 AA 99. Defendant forced A.K. to clean the blood off his penis because he did not want her "to taste her own blood." 1 AA 100. Defendant pushed A.K.'s head towards his penis and forced her to perform fellatio. 1 AA 100. Defendant again subjected A.K. to vaginal intercourse. 1 AA 103.

Defendant asked A.K. if she had ever had anal sex and when she said no, he told her to turn over and sodomized her. 1 AA 103. Defendant then told her, "now

she was an experienced woman." 1 AA 104. During one of the sexual assaults, Defendant told A.K. to act like she was enjoying it. 1 AA 105.

At one point, Defendant took money from A.K.'s purse. 1 AA 107-08. Defendant eventually released A.K., after telling her he had written down her class schedule so he could get her whenever he wanted. 1 AA 107-09.

Shortly after victimizing K.K. and A.K., Defendant committed a similar offense in California. On December 2, 1983, sixteen year old A.S. was walking home from school. 1 AA 199-200. A black male (later identified as Defendant) wearing a bandana over his face began running at A.S. and threw her to the ground. 1 AA 200-01. Defendant was wearing camouflage plants and a camouflaged t-shirt. 1 AA 200.

A.S. began screaming but Defendant put a knife to her throat and told her to shut up or he would kill her. 1 AA 201. Defendant forced A.S. down a tunnel and covered her eyes with tape and his bandana. 1 AA 202-03. Defendant lifted up A.S.'s shirt, unhooked her bra and began fondling her breasts. 1 AA 203. Defendant ordered A.S. to take her pants off and threatened to kill her if she did not obey. 1 AA 203. Defendant put his penis inside A.S.'s vagina. 1 AA 204. Defendant told A.S. that her vagina was too tight and that if she did not "loosen up" he would cut her vagina. 1 AA 204.

Defendant heard a noise and forced A.S. into a blue Chevette. 1 AA 204-05. Once in the car, Defendant began driving around, threatened to kill A.S., forced her to perform fellatio and sodomized her. 1 AA 207-08. Eventually, Defendant released A.S. and she immediately sought help. 1 AA 209.

On December 6, 1983, Wane Connady contacted the Monrovia Police Department. 2 AA 324. He observed a blue Chevette parked near one of the crime scene on December 1st or 2nd. 2 AA 320-21. As he passed the vehicle, he saw a black male with a bandana covering the lower part of his face. 2 AA 321. Since this appeared unusual he committed the license number to memory. 2 AA 323.

A search of the blue Chevette with that license number revealed a Kleenex box in the right rear floor area and various tissue wads in the vehicle. 1 AA 237-44. Additionally, a roll of tape was found which was similar to the tape recovered from A.K. in color, texture, width and thickness. 2 AA at 245-46.

K.K., B.K., A.K. and A.S. all identified Defendant from photographic lineups as the person who victimized them. 1 AA 47-48, 75-76, 114-15, 211-12.

SUMMARY OF THE ARGUMENT

The district court's Order granting Defendant's petition for writ of habeas corpus and setting aside Defendant's sentences was premised upon a misinterpretation of Graham v. Florida, 560 U.S. 48, 130 S.Ct. 2011 (2010). The district court incorrectly expanded the United States Supreme Court's holding in

Graham, which held that "for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole." Id. at __, 130 S.Ct. at 2030. The district court ignored the limited nature of the holding and the precise language of Graham and erroneously expanded Graham's prohibition to the "functional equivalent" of life without parole notwithstanding the number of people victimized or the number of crimes committed. The district court cannot expand the Supreme Court's ruling beyond the limitations set forth in its opinion; specifically, that Graham applies solely to a single sentence of life without parole.

ARGUMENT

I.
THE DISTRICT COURT ERRED IN FINDING GRAHAM v. FLORIDA, 560 U.S. 48, 130 S.Ct. 2011 (2010), CONSTITUTED GOOD CAUSE TO OVERCOME THE UNTIMELY AND SUCCESSIVE NATURE OF DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS

The district court erroneously found Graham provided good cause for Defendant's otherwise untimely and successive petition. 4 AA 929-34. The district court believed Defendant demonstrated prejudice and that he sufficiently rebutted the State's assertion of laches. Id. The district court erred in applying an incorrect and overly expansive interpretation of Graham. Defendant's underlying petition is time-barred, successive, and barred by laches. Graham did not apply to Defendant's case and as such cannot provide good cause to overcome the

procedural bars. Thus, Defendant's underlying petition is procedurally barred without a showing of good cause.

"Application of the statutory procedural default rules to post-conviction habeas petitions is mandatory." State v. Eighth Judicial District Court, 121 Nev. 225, 112 P.3d 1070, 1074 (2005). NRS 34.726(1) states that "unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within one (1) year after entry of the judgment of conviction or, if an appeal has been taken from the judgment, within one year after the Supreme Court issues its remittitur."

NRS 34.810(1)(b) bars consideration of issues that could have been raised in previous proceedings. NRS 34.810(2) bars successive petitions which raise grounds for relief that have been previously denied on the merits or petitions that raise new or different grounds for relief that constitute an abuse of the writ. Second or successive petitions will only be decided on the merits if the petitioner can show good cause and prejudice. NRS 34.810(3).

NRS 34.800 creates a rebuttable presumption of prejudice to the State if "[a] period exceeding five years between the filing of a judgment of conviction, an order imposing a sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the filing of a petition challenging the validity of a judgment of conviction…." "[P]etitions that are filed many years after conviction

are an unreasonable burden on the criminal justice system. The necessity for a workable system dictates that there must exist a time when a criminal conviction is final." Groesbeck v. Warden, 100 Nev. 259, 261, 679 P.2d 1268, 1269 (1984), *superseded by statute as recognized by* Hart v. State, 116 Nev. 558, 1 P.3d 969 (2000)

The district court should not have found Graham applicable to Defendant's sentences, as will be discussed *infra*; thus, the court should have dismissed Defendant's petition as untimely, successive, and barred by laches.

II.
THE DISTRICT COURT'S EXPANSION OF GRAHAM WAS IMPROPER AS A MATTER OF CONSTITUTIONAL LAW

In Graham, the United States Supreme Court held that

> for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole. This clear line is necessary to prevent the possibility that life without parole sentences will be imposed on juvenile nonhomicide offenders who are not sufficiently culpable to merit that punishment. Because 'the age of 18 is the point where society draws the line for many purposes between childhood and adulthood,' those who were below that age when the offense was committed may not be sentenced to life without parole for a nonhomicide crime.

Graham, 560 U.S. at __, 130 S. Ct. at 2030, *quoting* Roper v. Simmons, 543 U.S. 551, 574, 125 S. Ct. 1183 (2005).[1]

[1] In Graham, sixteen year-old Terrance Graham pled guilty pursuant to a plea agreement. 560 U.S. at __, 130 S.Ct. at 2018. Under the plea agreement, the state

A. The Supreme Court Explicitly Limited Its Decision to a Sentence of Life Without Parole for a Nonhomicide Offense

The district court's order stated that "Graham's holding, and the reasons for it, are equally applicable [to Defendant's case]." 4 AA 929-34. However, the district court is incorrect first, because the plain language of Graham is limited to single sentences of life without parole and second, because such an expansion is completely untethered from the original justifications for which the constitutional rule was created.

First, the Supreme Court explicitly limited the scope and breadth of Graham by stating that its decision "concern[ed] only those juvenile offenders sentenced to life without parole solely for a nonhomicide offense." Graham, 560 U.S. at __, 130 S.Ct. at 2023. Thus all three factors must be present for Graham to apply: (1) the offender was a juvenile when he committed his offense; (2) the sentence imposed applied to a singular nonhomicide offense; and, (3) the offender was sentenced to life without the possibility of parole. While the first Graham factor is found in

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trial court withheld adjudication of guilt and sentenced Graham to probation. Id. Subsequently, Graham violated the terms of his probation by committing additional crimes. Id. at __, 130 S.Ct. at 2018-2019. The trial court adjudicated him guilty of the original charges, revoked his probation, and sentenced Graham to life in prison for the armed burglary conviction. Id. at __, 130 S.Ct. at 2020. Because Florida had abolished its parole system, a life sentence gave a defendant no possibility of release unless he is granted executive clemency. Id.; see Fla. Stat. § 921.002(1)(e)(2003). The United States Supreme Court reversed the judgment and concluded that the Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. Id. at __, 130 S.Ct. at 2034.

Defendant's case, neither the second nor third is present. The defendant in Graham was sentenced for a single conviction, armed burglary with assault or battery; Defendant was sentenced for thirteen (13) felony convictions relating to two different victims. The defendant in Graham received a sentence of life without the possibility of parole; all of Defendant's individual sentences had the possibility of parole. Unlike Florida's abolished parole system, a sentence of "Life" under the versions of NRS 200.320 and NRS 200.366 in effect at the time of both the offenses and sentencing included the possibility of parole after five (5) years. NRS 200.320 (amended by Laws 1967, p. 469; Laws 1973, p. 1804); NRS 200.366 (added by Laws 1977, p. 1626). Accordingly, Graham on its face does not apply.

Second, the Graham decision is grounded in objective data regarding states' sentencing laws. The Graham Court considered "objective indicia of society's standards, as expressed in legislative enactments and state practice" to determine whether there was a national consensus against sentencing juveniles to life without parole. Graham, 560 U.S. at __, 130 S.Ct. at 2022-2030. The Court began its analysis of objective indicia by comparing and compiling statistics regarding whether state legislatures have passed laws allowing for the imposition of a sentence of life without parole on a juvenile. Id. at __, 130 S.Ct. at 2022-26. The Court then examined "actual sentencing practices in jurisdictions where the sentence in question is permitted by statute" to determine the number of juveniles

currently serving sentences of life without parole. Id. Based on this and other data, the Graham Court justified its holding because sentencing juveniles to life without parole was "exceedingly rare. And it is fair to say that a national consensus has developed against it." Id. at __, 130 S.Ct. at 2026.

The "community consensus" and the statistics analyzed specifically *do not include* lengthy term-of-year sentences that are the functional equivalent of life without parole. Nor do the statistics discussed and analyzed include consecutive sentences, for multiple crimes, which in the aggregate amount to the functional equivalent of life without parole. In fact, Justice Thomas pointed out in his dissenting opinion that the majority opinion did not consider statistics or sentences involving juveniles sentenced to lengthy term-of-years sentences (e.g., 70 or 80 years' imprisonment). Id. at __, 130 S.Ct. at 2052 (Thomas, J., dissenting). Justice Alito also noted that "[n]othing in the Court's opinion affects the imposition of a sentence to a term of years without the possibility of parole. Indeed, petitioner conceded at oral argument that a sentence of as much as 40 years without the possibility of parole 'probably' would be constitutional." Id. at __, 130 S.Ct. at 2058 (Alito, J., dissenting). The fact the Supreme Court failed to consider such statistics and analysis in its determination of whether to expand historical conceptions of the Eighth Amendment can only lead to one conclusion – the Court did not intend for its decision to encompass lengthy term-of-year sentences.

Moreover, the district court's misapplication of Graham is inconsistent with Miller v. Alabama, __ U.S. __, 132 S.Ct. 2455 (2012). Miller extended some of the principles articulated in Graham to forbid a sentencing scheme that *madated* life in prison without the possibility of parole for juvenile homicide offenders. Id. Notably, Miller did not prohibit a juvenile from being sentenced to life without the possibility of parole; rather, the only requirement is that the sentencing authority have discretion to impose a different punishment. Id. __, 132 S.Ct. at 2469. Thus, there is nothing inherently unconstitutional about a juvenile ultimately spending his life incarcerated, the key factor as articulated in Miller is the discretion involved at sentencing. This is consistent with Graham because:

> A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. It is for the State, in the first instance, to explore the means and mechanisms for compliance. It bears emphasis, however, that while the Eighth Amendment forbids a State from imposing a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life. Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does forbid States from making the judgment at the outset that those offenders never will be fit to reenter society.

Graham, 560 U.S. at __, 130 S.Ct. at 2030.

Defendant's consecutive sentences were graduated and proportional to the heinous crimes he committed. Defendant's individual sentences comply with both Graham and Miller. Defendant has a meaningful opportunity to be released on each sentence during his lifetime. The fact that Defendant committed so many distinct crimes should not enure to his benefit. Rather, Defendant's situation is similar to the situation contemplated in Graham: "Those who commit truly *horrifying crimes* as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives." Id. __, 130 S.Ct. at 2030.

Further, that courts across the country are split over how to apply Graham's principles and whether Graham prohibits sentencing a juvenile nonhomicide offender to consecutive sentences, which in the aggregate exceed the defendant's life expectancy, only further supports the position that there is not a national consensus against such a sentence.[2]

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[2] Since the Supreme Court decided Graham in 2010, several state and lower federal courts have grappled with these issues and reached different results. Examples of cases holding de facto life without parole sentences of juveniles convicted of nonhomicide crimes to violate the Eighth Amendment include People v. Caballero, 55 Cal.4th 262, 282 P.3d 291 (2012) (110–year–to–life sentence and first eligibility for parole after minimum of 100 years); Floyd v. State, 87 So.3d 45 (Fla.Dist.Ct.App.2012) (eighty-year sentence and first opportunity for release at age eighty-five); and Adams v. State, —— So.3d ——, ——, 2012 WL 3193932 (Fla. Dist. Ct.App. No. 1D11–3225, Aug. 8, 2012) (sixty-year sentence and first opportunity for release around age seventy-six). Cases rejecting Graham challenges to sentences claimed to be de facto life without parole include: Bunch v. Smith, 685 F.3d 546 (6th Cir. 2012) (declining to apply Graham to consecutive, fixed-term sentences, 89 years aggregate); State v. Kasic, 228 Ariz. 228, 265 P.3d

B. The Penological Justifications Underpinning Graham Are Inapplicable to Defendant

Graham's Eighth Amendment evaluation analyzed the relevant penological justifications. "A sentence lacking any legitimate penological justification is by its nature disproportionate to the offense. With respect to life without parole for juvenile nonhomicide offenders, none of the goals of penal sanctions that have been recognized as legitimate – retribution, deterrence, incapacitation, and rehabilitation – provides an adequate justification." Id. at __, 130 S.Ct. at 2028.

When considering whether retribution was a legitimate reason to punish, Graham stated: "Society is entitled to impose severe sanctions on a juvenile nonhomicide offender to express its condemnation of the *crime* and to seek restoration of the moral imbalance caused by the *offense*…whether viewed as an attempt to express the community's moral outrage or as an attempt to right the

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410 (2011) (same, 139.75 years aggregate); Henry v. State, 82 So.3d 1084 (Fla.Dist.Ct.App.2012) (*review granted* 107 So.3d 405) (same, aggregate total of 90 years); Adams v. State, 707 S.E.2d 359, 288 Ga. 695 (2011) (same, mandated sentence of 25 years in prison followed by life on probation with no possibility of probation or parole for minimum prison time of 25 years); Walle v. State, 99 So.3d 967 (Fla.Dist.Ct.App.2012) (same, aggregate total of 65 years which was to run concurrently with a 27 year sentence); Angel v. Commonwealth, 281 Va. 248, 704 S.E.2d 386 (2011) (state statute permitting prisoners at age sixty or older who have served at least ten years of their sentence to petition for conditional release provides the "meaningful opportunity for release" required by Graham); and United States v. Scott, 610 F.3d 1009 (8th Cir. 2010) (upholding the mandatory sentence of life without parole for defendant's third drug conviction when the prior two drug offenses were committed when defendant was a juvenile).

balance for the *wrong* to the *victim*, the case for retribution is not as strong with a minor as with an adult." Id. (emphasis added). Notably, Graham's elaboration of retributive principles considered only a single crime, a distinct offense, a particular wrong, and a lone victim.

Graham's sentence for only one felony conviction pales in comparison to Defendant's thirteen (13) felony convictions involving thee victims with deadly weapon enhancements on twelve of those convictions. The fact that Defendant committed multiple sexual assaults, battery, robbery, burglary, kidnapping and lewdness with a child under the age of 14 and did so with the use of a deadly weapon is the basis for his lengthy sentence. Additionally, Defendant's sentence was ordered to run consecutive to his California sentence. Retributive based punishment oftentimes incorporates an aspect of vindicating the value of the victim as an *individual* member of our community. Defendant's consecutive sentences reflect an acknowledgement of the relative worth of each victim as well as a proportional response to each crime. The district court's order granting Defendant's petition amounts to a failure to consider a fundamental difference between Graham and this case – Graham involved one crime and one victim while this matter involved two distinct series of criminal acts involving three victims in Nevada and sentencing that considered three distinct series of criminal acts involving a total of four victims.

When considering whether deterrence was a legitimate justification, Graham expounded that juveniles are less susceptible to deterrence because they lack maturity, responsibility, and are less likely to consider punishment when making decisions. Id. at __, 130 S.Ct. at 2029-2030. However, expanding Graham's holding in line with the district court's order obviates any reason to discuss either general or specific deterrence. Rather, juveniles would have an incentive to commit as many crimes as possible before turning 18 years of age. Granting Defendant's petition was in effect gifting the juvenile criminals of Nevada with a "volume discount." Essentially, the district court's extension of Graham was the equivalent of a "buy one, get one free," coupon or "buy one get 3, 4, 5, or 6 free." The rationale underlying the district court's order can be taken to only one logical conclusion – if a juvenile is going to commit one serious crime, that juvenile should commit multiple serious crimes because he is guaranteed not to serve consecutive sentences for multiple victims, dates, locations, or offenses. The policy consequence of such a choice boils down to telling additional victims that the harm inflicted upon them is so meaningless to the community that not only will the juvenile who victimized them receive reduced consequences, he will receive no punishment whatsoever.

The Graham Court also stated that neither incapacitation nor rehabilitation is a penological goal which is satisfied by sentencing a juvenile to life without parole.

In so stating, the Court expressed its concern that "[r]ecidivism is a serious risk to public safety, and so incapacitation is an important goal…[b]ut while incapacitation may be a legitimate penological goal sufficient to justify life without parole in other contexts, it is inadequate to justify that punishment for juveniles who did not commit homicide. To justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible." Id. at __, 130 S.Ct. at 2028-2029.[3] The Graham Court was uncomfortable with imposing upon a judge the heavy responsibility of determining whether a juvenile offender who commits a singular offense will likely become a repeat offender upon release. Where a juvenile offender commits multiple offenses, however, the Court's apprehension should become less relevant because sentencing judges will have the benefit of the objective fact of multiple distinct offenses to guide their discretion.

Here, the Nevada sentencing court did not have to speculate as to whether Defendant will continue to commit crimes. The sentencing court did not impose consecutive sentences based upon Defendant's actions in one offense. The Court

[3] The Court highlighted that a sentence of life without parole for a juvenile offender will average more years and a greater percentage of his life in prison than a sentence for an adult offender. The ages of the victims of Defendant's heinous sexual attacks were twelve, fifteen, and sixteen. Accordingly, K.K., A.K., and A.S. will spend a disproportionate amount of their lives having been the victim of Defendant's gruesome and vile attacks.

imposed consecutive sentences because Defendant committed three sexual attacks, among other crimes, in two different states.

Defendant has demonstrated that he will repeatedly victimize young girls if given the opportunity. Graham's incapacitation of a juvenile versus recidivism weighing analysis loses much of its force when viewed through the prism of the facts of Defendant's case. In Graham, a juvenile was imprisoned for life for committing an armed burglary – an offense which can be committed if one simply enters a structure with the intent to commit a crime. Whereas Defendant's series of offenses demonstrates sophisticated planning, a total lack of empathy and rapid recidivism.

In sum, the very specific and tailored Eighth Amendment analysis underpinning the Court's holding in Graham is patently inapplicable to Defendant's factual circumstance. The district court erred when it vastly expanded Graham's holding, taking it into territory not contemplated by the Court's painstaking Eighth Amendment survey of societal norms. The district court misconstrued Graham by assuming that the existence of severe punishment and a juvenile in any fact pattern triggers an identical Eighth Amendment conclusion about societal norms regarding the punishment of juvenile offenders. The societal norms as distilled in Graham are wholly different and require an entirely different Eighth Amendment analysis when viewed under the factual circumstances of

Defendant's case. The district court should not have expanded the United States Supreme Court's constitutional jurisprudence and then attempted to cloak it with Graham. Indeed, the district court's dramatic expansion of what constitutes cruel and unusual punishment would require a new, much different survey and analysis of societal attitudes toward punishing juveniles who commit multiple crimes against multiple victims. That analysis appears nowhere in Graham--or the district court's order.

C. Expansion of Graham Would Strand Courts in an Impossible and Impractical Sentencing Quagmire

Not only did the lower court gift Defendant with an unjustified windfall, it mandated an unworkable sentencing scheme. Both the district courts and this Court would be forced to address difficult factual questions regarding the longevity of specific defendants and face the impossible task of "discounting" a sentence to the point that many victims will receive little or no justice.

Graham specifically cautions: "Categorical rules tend to be imperfect, but one is necessary here." Id. at __, 130 S.Ct. at 2030. This caveat justifies judicial restraint in applying Graham. If this Court concludes that Graham does not apply to aggregate term-of-years sentences, the path is clear. If, on the other hand, a term-of-years sentence can be a *de facto* life sentence that violates the Eighth Amendment, Graham offers no guidance whatsoever. The State submits this was

intentional: the Court did not give direction since Graham was never intended to stretch so far.

Expansion of Graham would create a slippery slope that would end in an impossible quagmire. The district courts and this Court would have to answer impossible and impractical questions, such as: 1) at what number of years would the Eighth Amendment become implicated in the sentencing of a juvenile: twenty, thirty, forty, fifty, some lesser or greater number; 2) would the number vary from offender to offender based on actuarial tables to include race, gender, socioeconomic class or other criteria; 3) does the number of crimes and victims matter; 4) would the court retroactively grant concurrent credit on separate counts, offenses, and cases; 5) would this Court retroactively grant concurrent credit on cases in different jurisdictions; 6) which jurisdiction must modify its sentences to avoid constitutional infirmity? The questions would need to be answered without any of the necessary tools and appropriate data. Accordingly, this Court should reject the district court's dangerous expansion of Graham and apply the holding the United States Supreme Court actually wrote.

Indeed, this case demonstrates why the district court's expansion of Graham is so impractical. The limited record before this Court does no contain the vast amounts of information regarding societal values, penological theories, or psychological effects that the Supreme Court had at its disposal in evaluating the

Eighth Amendment claim in Graham. Additionally, the district court lacks jurisdiction to modify Defendant's California sentences so any "discounting" of Defendant's global sentence would be imposed completely on K.K., A.K., B.K. and the people of Nevada. On September 30, 2010, Defendant completed serving his California sentences and began accruing credit towards his Nevada convictions. 4 AA 937-47. Therefore, Defendant has served little or not time associated with his sexual attacks on either of the young Nevada victims.

III.
THIS COURT SHOULD ADOPT THE REASONING OF PERSUASIVE AUTHORITY THAT TREATS SEPARATE SENTENCES INDIVIDUALLY

The authority that limits Graham to its actual holding is more consistent with existing Nevada law that requires separate sentences to be treated individually.

The precise issue raised in Defendant's case was recently addressed by the United States Court of Appeals for the Sixth Circuit. The defendant argued that his 89-year sentence was the functional equivalent of life without parole and, therefore, violated the Eighth Amendment's prohibition on cruel and unusual punishments. Bunch v. Smith, 685 F.3d 546, 549 (6th Cir. 2012). The Sixth Circuit held that Graham did not establish that "consecutive, fixed-term sentences for juveniles who commit multiple nonhomicide offenses are unconstitutional when they amount to the practical equivalent of life without parole." Id. at 550. While Bunch and Graham were both juvenile offenders who did not commit homicide,

the Court emphasized that Bunch had been sentenced to consecutive, fixed-term sentences – the longest of which was 10 years – for committing *multiple nonhomicide offenses*. Id. The Sixth Circuit found that the Graham *"analysis did not encompass consecutive, fixed-term sentences."* Id. at 551 (emphasis added).

Likewise, the Court of Appeals of Arizona recently encountered a sentence structure similar to that of Defendant. See Arizona v. Kasic, 265 P.3d 410, 228 Ariz. 228 (2011). In Kasic, the longest prison term the defendant received for any single count was 15.75 years. The Arizona court viewed the sentences separately, not in the aggregate, and held as follows:

> Here, unlike Graham, who was sentenced to life without parole for one felony conviction, Kasic was convicted of thirty-two felonies involving multiple victims . . .
>
> As a general rule, we do not consider the imposition of consecutive sentences in the proportionality inquiry, State v. Berger, 212 Ariz. 473, ¶ 27, 134 P.3d 378, 383 (2006), and Kasic has not convinced us that departure from the general rule would be appropriate in this case. "A defendant has no constitutional right to concurrent sentences for ... separate crimes involving separate acts." State v. Jonas, 164 Ariz. 242, 249, 792 P.2d 705, 712 (1990). The proper analysis "focuses on the sentence imposed for each specific crime, not the cumulative sentence." United States v. Aiello, 864 F.2d 257, 265 (2d Cir.1988). "[I]f a sentence for a particular offense is not disproportionately long, it does not become so merely because it is consecutive to another sentence for a separate offense or because the consecutive sentences are lengthy in aggregate." Berger, 212 Ariz. 473, ¶ 28, 134 P.3d at 384. "This proposition holds true even if a defendant faces a total sentence exceeding a normal life expectancy as a result of consecutive sentences." Id.

265 P.3d at 233. The Kasic Court concluded: "We agree with the state that although Florida's penological goals were not sufficient to justify the life without parole sentence imposed in Graham, different considerations apply to consecutive terms-of-years sentences based on multiple counts and multiple victims." Id. at 233-234.

Bunch and Kasic applied Graham as written, which is what the district court should have done in Defendant's case. Defendant's sentence was a consecutive, fixed-term of years to life, not life without the possibility of parole. No language in Graham suggests that its narrow holding would apply to the sentence imposed on Defendant. If the Graham Court intended to broaden the class of offenders within the scope of its decision, it would have held that the Eighth Amendment prohibits any juvenile offender from receiving the functional equivalent of a life sentence without the possibility of parole for non-homicide offenses. Additionally, language in Graham supports the holdings in Bunch and Kasic: "while the Eighth Amendment forbids a State from imposing a life without parole sentence on a juvenile nonohomicide offender, it does not require the State to release that offender during his natural life." Graham, 560 U.S. at __, 130 S.Ct. at 2030.

Moreover, the emphasis placed upon the separate and individual nature of each sentence in Bunch and Kasic is a better fit with existing Nevada law than an expansionist misinterpretation of Graham. NRS 176.033 and NRS 176.035 make

clear that a "sentence" is imposed for each offense an offender is convicted of committing. NRS 176.035 reads in pertinent part: "whenever a person is convicted of two or more offenses, and sentence has been pronounced for one offense, the court in imposing any subsequent sentence may provide that the sentences subsequently pronounced run either concurrently or consecutively with the sentence first imposed…" Therefore, under Nevada law, a sentence is offense specific. A defendant does not receive a sentence for a case. Rather, a sentence is imposed for each offense. A separate and distinct consideration is whether or not multiple sentences will run concurrently or consecutively.

Defendant's sentences were individually permissible because each included the possibility of parole. That Defendant was simultaneously convicted and sentenced for various offenses does not warrant a reduction in the severity of punishment for each individual crime. Viewing Defendant's sentence in the aggregate would be akin to the concept of "sentencing packaging" which this Court has already rejected. See Wilson v. State, 123 Nev. 587, 170 P.3d 975 (2007). In Wilson, this Court set forth Nevada's stance on composite sentencing and whether or not Nevada would adopt a similar structure to the federal government:

> [F]ederal courts have read into the statutory authorization of direct appeal and subsequent resentencing the concept of a sentencing package. Under the sentencing package doctrine, courts treat the

> penalties imposed on multiple counts as individual components of a single comprehensive sentencing plan.

Id. at 592-593, 170 P.3d at 978 (quotation marks, footnote and citation omitted).

The Wilson Court considered whether Nevada's double jeopardy protections prohibited increasing a defendant's sentence after the defendant's conviction had been partially vacated on appeal. Although the Wilson's primary focus was on double jeopardy, the facts and underlying rationale are applicable here. Wiley Wilson was convicted of four (4) counts of Using a Minor in the Production of Pornography and four (4) counts of Possession of a Visual Presentation Depicting Sexual Conduct of a Person under 16 Years of Age and sentenced to 4 terms of 24 to 72 months to run concurrently with 4 consecutive terms of 10 years to Life on the production charges. Id. at 589, 170 P.3d at 976 On direct appeal, this Court reversed three of the four production convictions and remanded for resentencing. Id. at 589-90, 170 P.3d at 976.

At resentencing, the district court modified the sentences of Wilson's remaining convictions by increasing the 24 month minimum of the possession counts to a 28 month minimum and ordered that all sentences run consecutive rather than concurrent. Id. at 590, 170 P.3d at 976. On appeal from Wilson's resentencing, the State urged this Court to hold: "when a defendant successfully challenges part of a multiple count conviction on direct appeal, the district court may effectuate its original sentencing intent by increasing the sentences associated

with the remaining counts without violating double jeopardy, provided that, considered in the aggregate the duration of the new sentences does not exceed the original punishment." Id. at 591, 170 P.3d at 977. This Court rejected the State's argument. Id.

This Court refused to consider a defendant's aggregate sentence the benchmark for a resentencing. In keeping with this Court's rationale in Wilson, this Court should now hold that Defendant's aggregate sentence is not the applicable benchmark for a Graham analysis. Defendant's individual counts should be evaluated under Graham as standalone sentences that do not violate the Eighth Amendment.

CONCLUSION

Based upon the foregoing, the State respectfully prays that this Court reverse the lower court's grant of habeas relief.

Dated this 16th day of September, 2013.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar # 001565

BY */s/ Parker P. Brooks*
PARKER P. BROOKS
Deputy District Attorney
Nevada Bar #011927
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NAAP 32(a)(4), the typeface requirements of NAAP 32(a)(5) and the type style requirements of NAAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NAAP 32(a)(7) because, excluding the parts of the brief exempted by NAAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points or more and contains no more than 14,000 words or does not exceed 30 pages.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NAAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 16th day of September, 2013.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Parker P. Brooks*
PARKER P. BROOKS
Deputy District Attorney
Nevada Bar #011927
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF SERVICE

I HEREBY CERTIFY AND AFFIRM that this document was filed electronically with the Nevada Supreme Court on September 16, 2013. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

CATHERINE CORTEZ MASTO
Nevada Attorney General

MARTIN HART, ESQ.
Counsel for Respondent

PARKER P. BROOKS
Deputy District Attorney

JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney

/s/ j. garcia
Employee, Clark County
District Attorney's Office

JEV/Parker Brooks/jg