IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,

Appellant,

v.

ANDRE BOSTON,

Respondent.

CASE NO: 62931

APPELLANT'S REPLY 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

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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

Respondent's erroneous focus on the retroactive application of Graham misses the point. The State does not dispute that Graham applies retroactively; rather, the question is whether Graham is the applicable rule.

Respondent complains that the State is taking inconsistent positions in this case and an unrelated appeal. Respondent's Answering Brief, p. 11-12. However, Respondent is arguing apples when this appeal is about oranges. The State did not oppose the retroactive application of Graham in Rogers v. State, 127 Nev. Adv. Op.

88, 267 P.3d 802 (2011), because aspects of that case correctly invoked Graham. The United States Supreme Court held in Graham that "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." Graham, 560 U.S. at 82, 130 S.Ct. at 2034. The appellant in Rogers was sentenced to life without parole for crimes that he committed while he was a juvenile.[1] Rogers, 127 Nev. at __, 267 P.3d at 803-04. Indeed, the State specifically told the lower court that it would be disingenuous to argue that Graham is not retroactive where it is applicable. 4 AA 906. Unlike Rogers this matter does not involve a sentence of life without parole. As such, the lower court's decision to ignore the procedural bars based on Graham was wrong not because it applied Graham retroactively but because it applied Graham at all.

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

Reversal is warranted because the lower court stretched Graham far beyond its holding without justification. The Supreme Court reached the holding it did in Graham because of a national consensus against life wihout parole sentences for juveniles. The record before this Court is silent as to any consensus against multiple consecutive fixed-term sentences against juveniles, does not address the significant

[1] To the extent that Rogers involved the erroneous application of Graham to consecutive term of year sentences the State has, consistent with its position in this matter, sought appellate review of the lower court's misuse of Graham. See, State v. Rogers, Nevada Supreme Court Case Number 64422.

differences between life without parole and a fixed-term sentence and is mute as to the policy tensions at the heart of Graham.

This Court sent this matter back to the lower court because "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—is complex and novel." 4 AA 799. Despite this Court's mandate to fully explore this issue, Respondent did little more than offer minimal statistical evidence regarding the life expectancy of Nevada inmates and the life expectancy of the general population. 4 AA 787-93, 803-07. Nor did the lower court address this Court's concern. 4 AA 930-33.

The model for making an argument that Graham should reach multiple fixed-term sentences is Graham itself, where the Court began with a search for national consensus. Graham, 560 U.S. at 62, 130 S.Ct. at 2023. The Court indicated that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." Id. (quotation marks and citation omitted). The Graham Court went on to discuss the various state laws related to the imposition of life without parole sentences on nonhomicide juvenile offenders. Yet the record before this Court contains no discussion of the legislative responses of the various states to Graham or to the question of the appropriateness of multiple fixed-term sentences against a juvenile. Similarly, the record before this Court is silent as

to actual sentencing practices related to the imposition of lengthy fixed-term sentences on juvenile offenders despite the fact that Graham relied heavily upon such data as it related to sentences of life without parole. Id. at 62-65, 130 S.Ct. at 2023-25.

It is impossible to affirm the lower court without such a foundation. The failure to determine whether there was a consensus against the imposition of multiple fixed-term sentences against juveniles requires reversal. The distinction between Graham's reliance upon evidence of a national consensus against the imposition of life without parole on juveniles and the lack of similar evidence against imposing multiple fixed-term sentences on juveniles has not been lost on courts that have reviewed the same issue that is before this Court. The Sixth Circuit wisely declined to expand Graham for this very reason:

> The Court, however, did not analyze sentencing laws or actual sentencing practices regarding consecutive, fixed-term sentences for juvenile nonhomicide offenders. This demonstrates that the Court did not even consider the constitutionality of such sentences, let alone clearly established law that they can violate the Eighth Amendment's prohibition on cruel and unusual punishments.

Bunch v. Smith, 685 F.3d 546, 552 (6th Cir. 2012), cert. denied, __ U.S. __, 133 S.Ct. 1996 (2013). The fact that the United States Supreme Court declined to review Bunch suggests that it agrees with the Sixth Circuit's decision to decline to expand Graham.

Nor is the Sixth Circuit alone in refusing to expand Graham to forbid multiple fixed-term sentences against juveniles without evidence of a national consensus against such a practice. The Supreme Court of Louisiana faced the question of whether Graham "applies in a case in which the juvenile offender committed multiple offenses resulting in cumulative sentences matching or exceeding his life expectancy without the opportunity of securing early release from confinement." State v. Brown, 118 So.3d 332, 332 (2013). The Court found Graham inapplicable because:

> … we see nothing in Graham that even applies to sentences for multiple convictions, as Graham conducted no analysis of sentences for multiple convictions and provides no guidance on how to handle such sentences. … In our view, Graham does not prohibit consecutive term of year sentences for multiple offenses committed when a defendant was under the age of 18, even if they might exceed a defendant's lifetime, and absent any further guidance from the United States Supreme Court, we defer to the legislature which has the constitutional authority to authorize such sentences.

Brown, 118 So.3d at 341-42.

The lower court's assumption that Graham must apply despite the lack of a record supporting that belief is premised in the view "that the imposition of each of these sentences to run consecutively, with a minimum time to be served of more than 100 years, constitutes the functional equivalent of life without parole." 4 AA 932. However, this outcome driven approach ignores important distinctions between life without parole and fixed-term sentences that are relevant to the Eighth Amendment

calculus. The Nevada Legislature has made it clear that life without the possibility of parole is supposed to mean exactly that. NRS 213.085(1)-(2).[2] However, a fixed-term sentence is specifically designed to offer the possibility of a significantly earlier release date. As an offender who received a fixed-term sentence Respondent has a statutory right to consideration for parole after one-third of his sentence has been served. NRS 213.120(1). Further, Nevada's parole system specifically addresses the concerns raised by Graham regarding the ability of juvenile offenders to mature and demonstrate meaningful rehabilitation:

> … a prisoner who was sentenced to life imprisonment with the possibility of parole and who was less than 16 years of age at the time that the prisoner committed the offense for which the prisoner was imprisoned must, if the prisoner still has a consecutive sentence to be served, be granted parole from his or her current term of imprisonment to his or her subsequent term of imprisonment or must, if the prisoner does not still have a consecutive sentence to be served, be released on parole, if:
>
> (a) The prisoner has served the minimum term of imprisonment imposed by the court;
>
> (b) The prisoner has completed a program of general education or an industrial or vocational training program;
>
> (c) The prisoner has not been identified as a member of a group that poses a security threat pursuant to the procedures for identifying security threats established by the Department of Corrections; and

[2] The State recognizes that Nevada's truth in sentencing law was rendered prospective only by Miller v. Ignacio, 112 Nev. 930, 921 P.2d 882 (1996). However, the possibility of commutation is very different from the statutory right to parole eligibility after completing a mere one-third of a sentence. NRS 213.120(1).

(d) The prisoner has not, within the immediately preceding 24 months:

(1) Committed a major violation of the regulations of the Department of Corrections; or

(2) Been housed in disciplinary segregation.

NRS 213.1215(2).

Courts have declined to expand Graham where there is a statutory parole framework that addresses the concerns raised by Graham. In Brown the Louisiana Supreme Court reversed priors decisions applying Graham because the Louisiana Legislature had sufficiently addressed Graham. 318 So.3d at 339-41. Similar to the situation here, the Brown Court faced a juvenile defendant who could not benefit from the legislative response to Graham. Brown, 318 So.3d at 341. Even under those circumstances the Brown Court held that Graham did not apply because Graham, and the evidence of national consensus supporting Graham, did not address multiple fixed-term sentences that were likely to exceed a juvenile defendant's life expectancy. Brown, 318 So.3d at 341-42. Similarly, the Supreme Court of Virginia rejected a Graham challenge by a juvenile who was sentenced to several life and fixed-term sentences such that "the effect of these sentences is that Angel will spend the rest of his life confined in the penitentiary." Angel v. Commonwealth, 281 Va. 248, 704 S.E.2d 386, cert. denied, __ U.S. __, 132 S.Ct. 344 (2011). The Court declined to extend Graham because a statute adequately addressed the concerns raised in Graham. Id. at 273-75, 704 S.E.2d at 401-02.

However, the strongest basis for reversal is the lower court's failure to address the policy tension at the heart of Graham. On the one hand the Graham Court was very concerned that juvenile offenders receive "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" but it was also aware of society's responsibility "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." Id. at 71, 75, 130 S.Ct. at 2028, 2030. Graham addressed the balance between those two values when the question was the appropriateness of a singular sentence of life without parole upon a nonhomicide juvenile offender. This Court directed the lower court to address the balance when the question was the appropriateness of multipled fixed-term sentences. However, Respondent did little more than offer minimal statistical evidence regarding the life expectancy of Nevada inmates and the life expectancy of the general population along with a naked assertion that a term of years sentence was the same as a sentence of life without parole. 4 AA 787-93, 803-07. Nor did the lower court address this Court's concern. 4 AA 930-33.

The lower court's failure to revisit the balance between the policy concerns identified in Graham is particularly troubling under the facts of this case. One of the key factual distinctions between Graham and this matter is that the offender in Graham will receive substantial punishment for his victimization of several of

Florida's citizens, whether the sentence is life without parole or multiple fixed-term sentences, the victims in Graham will walk away knowing that the person who violated them will receive substantial and meaningful punishment. Respondent's Nevada victims will receive no such validation. This Court lacks jurisdiction over Respondent's California sentences so any "discounting" of his global sentence would be imposed completely on K.K., A.K., B.K. and the people of Nevada. Respondent did not complete serving his California sentences until September 30, 2010. 4 AA 937-47. In the Eighth Amendment context "the judicial exercise of independent judgment requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question." Graham, 560 U.S. at 67, 130 S.Ct. at 2026. This exercise of independent judgment vests a significant amount of discretion in the judiciary to make choices about morality and fairness. The fact that Respondent has served little or no time for his victimization of K.K., A.K. and B.K. must have some weight in the constitutional balance.[3]

[3] The disingenuous way out of dealing with this issue would be to claim that any sentence is not before this Court, however, such a response would ignore the fact that the State will never be permitted to challenge the unfairness of imposing an Eighth Amendment volume discount wholly upon the people of Nevada and Respondent's Nevada victims since the State may not appeal a sentence in a criminal case. NRS 177.015(3). The discussion of the fundamental unfairness of imposing the lower court's unjustified expansion of Graham totally upon Nevada and Respondent's Nevada victims must occur now or it will never happen. An outcome that does not consider the unfairness to the people of Nevada, K.K., B.K. and A.K.

CONCLUSION

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

Dated this 25th day of March, 2014.

Respectfully submitted,

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would be at odds with the expansive nature of Eighth Amendment jurisprudence and would amount to telling the people of Nevada that victim impact has no place in the Eighth Amendment calculus.

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 2,249 words and is 10 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 25th day of March, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY AND AFFIRM that this document was filed electronically with the Nevada Supreme Court on March 25, 2014. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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