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### Summary of Rogers v. State, 127 Nev. Adv. Op. No. 88

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*Nevada Law Journal*

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*Rogers v. State*, 127 Nev. Adv. Op. No. 88 (Dec. 29, 2011)<sup>1</sup>  
CRIMINAL LAW AND PROCEDURE – HABEAS CORPUS

**Summary**

An appeal from a district court denial of a petition for a writ of habeas corpus, with consideration of the scope and applicability of *Graham v. Florida* to a term-of-years sentence.<sup>2</sup>

**Disposition/Outcome**

The Court affirmed in part and reversed in part, holding that the district court abused its discretion in denying the petition without appointing counsel for the appellant. Because failure to appoint post-conviction counsel prevented a meaningful litigation of the petition, the Court expressed no opinion on the applicability of *Graham* to a term-of-years sentence.

**Factual and Procedural History**

In 1988 at 17 years old, Michael Rogers (“Rogers”) committed brutal sexual offenses against two women. He pled guilty and was convicted of three counts of sexual assault (“counts three, four, six”), and three counts of sexual assault with a deadly weapon causing substantial bodily harm (“counts eleven, twelve, fourteen”). Rogers was sentenced to three consecutive terms of life with the possibility of parole for counts three, four and six, and a total of six consecutive terms of life without the possibility of parole for counts eleven, twelve and fourteen, to be served consecutively to the terms imposed in three, four, and six.

In September 2010, Rogers filed a proper person post-conviction petition for a writ of habeas corpus, claiming that the sentences of life without the possibility of parole for counts eleven, twelve, and fourteen were cruel and unusual punishment. He also claimed the manner of imposing consecutive sentences was cruel and unusual punishment. Both claims were based on the recent decision in *Graham*, where the United States Supreme Court held that the Constitution prohibits a sentence of life without parole for a juvenile offender who did not commit a homicide.<sup>3</sup> Finally, Rogers moved for appointment of counsel on the grounds that he was indigent.

The district court denied Rogers request to be provided with counsel. However, though his petition was untimely, the district court decided that *Graham* applied retroactively pursuant to the retroactivity analysis in *Colwell v State*,<sup>4</sup> and that *Graham* provided good cause in this case. Therefore, the district court commuted Rogers’ sentences for counts eleven, twelve, and fourteen to life sentences with the possibility of parole after ten years, but did not specifically address whether Rogers’ consecutive sentences also constituted cruel and unusual punishment.

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<sup>1</sup> By Amanda Ireland

<sup>2</sup> 560 U.S. \_\_\_\_, 130 S. Ct. 2011 (2010).

<sup>3</sup> *Id.* at 2030.

<sup>4</sup> 118 Nev. 807, 59 P.3d 463 (2002).

## **Discussion**

The per curiam opinion of the Court noted that Rogers was required to demonstrate good cause and prejudice to overcome the procedural default of untimely petition.<sup>5</sup> The Court recognized that good cause could be established where the legal basis for a claim was not available for a prior, timely petition. Additionally, NRS 34.750(1) provided for discretionary appointment of post-conviction counsel based on factors such as petitioner's indigency, the severity of the consequences to the petitioner, and the difficulty of the issues presented. Here, petitioner was indigent, his six consecutive terms of life imprisonment were severe, and his petition raised difficult issues relating to the scope and applicability of *Graham*. Thus, the Court concluded the district court abused its discretion in denying the petition without appointing counsel for Roger.

The Court next addressed the fact that the district court failed to address whether Roger's multiple consecutive sentences amounted to cruel and unusual punishment under *Graham*. In so doing, the district court left unresolved whether *Graham* applied only to a sentence of life without parole or whether it applied also to a lengthy sentence structure imposing a total sentence functionally equivalent to life without parole. Other courts addressing juveniles and non-homicide offenses have split on *Graham*'s applicability to a term of years sentence that would be functionally equivalent to a life-without-parole sentence.<sup>6</sup>

The Court affirmed for lack of good cause the district court's denial of Rogers' claims that trial counsel was ineffective for failing to have Rogers evaluated prior to sentencing, or to present mitigating evidence at sentencing. However, the Court reversed and remanded the district court's partial denial of Roger's petition to appoint counsel to assist him with his post-conviction proceedings.

## **Conclusion**

Failure to appoint post-conviction counsel prevented a meaningful litigation of Rogers' petition and failed to resolve whether multiple consecutive sentences amounted to cruel and unusual punishment under *Graham*.

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<sup>5</sup> NEV. REV. STAT. § 34.726(1), 810(3) (2007).

<sup>6</sup> Compare *People v. Ramirez*, 123 Cal. Rptr. 3d 155 (Ct. App.) (declining to apply *Graham* to a term-of-years sentence that amounted to 120 years to life), *petition for review granted*, 255 P.3d 948 (Cal. 2011), with *U.S. v. Mathurin*, No. 09-21075-CR, 2011 WL 2580775 (S.D. Fla. June 29, 2011) (applying *Graham* to a mandatory-minimum sentence of 307 years), among other cases.