

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,

Appellant,

v.

ANDRE BOSTON,

Respondent.

Electronically Filed  
Jun 24 2015 09:19 a.m.  
Tracie K. Lindeman  
Clerk of Supreme Court

CASE NO: 62931

**APPELLANT'S SUPPLEMENTAL 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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**STATEMENT OF THE ISSUES**

A.B. 267 cures any alleged Eighth Amendment violation.

**STATEMENT OF THE CASE**

Appellant would incorporate by reference the Statement of the Case included in Appellant's Opening Brief. (Appellant's Opening Brief, filed September 16, 2013, p. 2-6). Additionally, Respondent's Answering Brief was filed on March 10, 2014. Appellant's Reply Brief was filed on March 25, 2014. On June 19, 2015, this Court directed supplemental briefing.

**STATEMENT OF THE FACTS**

Appellant incorporates by reference the Statement of Facts included in Appellant's Opening Brief. (Appellant's Opening Brief, filed September 16, 2013, p. 7-11).

## **SUMMARY OF THE ARGUMENT**

A.B. 267 disposes of the lower court's concern that Andre Boston's (Respondent) "cumulative sentences ... violate the Eighth Amendment of the United States Constitution's prohibition of cruel and unusual punishments under the Graham case." (4 Appellant's Appendix (AA) 929-34). The essence of the ruling below was that "the sentences imposed on Boston ... are in violation of the Eighth Amendment because they do not provide a meaningful opportunity to obtain release." (4 AA 933). This belief caused District Court to conclude that Respondent should be resentenced. Id. However, even if the interpretation of Graham v. Florida, 560 U.S. 48, 130 S.Ct. 2011 (2010), adopted below is correct, the remedy is inappropriate in light of the policy decision codified in A.B. 267. Nevada now provides an opportunity for release to almost all offenders who committed their offenses when they were juveniles regardless of their sentences. As such, the decision of the District Court should be reversed.

## **ARGUMENT**

### **A.B. 267 CURES ANY ALLEGED EIGHTH AMENDMENT VIOLATION**

Even if the lower Court's interpretation of Graham was correct, reversal is warranted because A.B. 267 corrects any alleged constitutional violation and as such Respondent does not need to be resentenced.

The judge below concluded that Respondent's sentences violated the Eighth Amendment because "they do not provide a meaningful opportunity to obtain release." (4 AA 933). The remedy imposed was to resentence Respondent in a manner consistent with the lower court's interpretation of Graham. Id. However, A.B. 267 renders this remedy inappropriate because Nevada now provides Respondent a meaningful opportunity to be released:

Notwithstanding any other provision of law, ... a prisoner who was sentenced as an adult for an offense that was committed when he or she was less than 18 years of age is eligible for parole as follows:

(a) For a prisoner who is serving a period of incarceration for having been convicted of an offense or offenses that did not result in the death of a victim, after the prisoner has served 15 calendar years of incarceration, including any time served in a county jail.

A.B. 267, 78<sup>th</sup> Leg., § 3 (Nev. 2015).

This matter is substantially similar to People v. Scott, 235 Cal. App.4<sup>th</sup> 397, 185 Cal. Rptr.3d 235 (CA App. 2015). On habeas review Scott, who had been convicted as a juvenile, "sought resentencing, arguing that the imposition of an indeterminate sentence of 120 years to life is a de facto life sentence[.]" Id. at 401, 185 Cal. Rptr.3d at 238. The habeas court "granted the petition, vacated defendant's sentence and ordered the trial court to hold a resentencing hearing." Id. at 401, 185 Cal. Rptr.3d at 237-38. Prior to resentencing, "the Legislature passed, and the governor signed, legislation enacting section 3051, which provides for juvenile

offenders in defendant's position to be afforded a parole hearing after a maximum wait of 25 years, depending on the sentence imposed." Id. at 401, 185 Cal. Rptr.3d at 238. At the resentencing hearing the prosecution argued that this change in law "cured the constitutional deficiency posed by defendant's sentence." Id. "The trial court accepted the People's argument, found that defendant would be eligible for a parole review in 25 years under section 3051, and resentenced defendant to 120 years to life." Id.

On appeal the California Court of Appeals noted that section 3051 was in response to the United States Supreme Court's holdings in Graham and Miller v. Alabama, 567. U.S. \_\_\_, 132 S.Ct. 2455 (2012), and the California Supreme Court's opinion in People v. Caballero, 55 Cal.4<sup>th</sup> 262, 282 P.3d 291 (2012). Scott, 235 Cal. App.4<sup>th</sup> at 402-09, 185 Cal. Rptr.3d at 328-45. The Scott Court affirmed the decision of the trial court to re-impose the original sentence because "the definite parole eligibility schedule ... described in section 3051, is both constitutionally permissible and an orderly mechanism to provide juveniles convicted as adults of serious nonhomicide crimes with a meaningful opportunity for release within their lifetimes." Scott, 235 Cal. App.4<sup>th</sup> at 412, 185 Cal. Rptr.3d at 246-47. The Court noted that the legislative change "abolished de facto life sentences." Id. at 412, 185 Cal. Rptr.3d at 247. The Court also pointed out that "section 3051 provides certainty

and predictability to both juvenile offenders and sentencing courts.” Id. at 413, 185 Cal. Rptr.3d at 247.

California is not alone in concluding that legislative intervention can cure Eighth Amendment errors alleged under Graham and Miller. See, State v. Mares, 2014 WY 126, p. 11-26, 335 P.3d 487, 493-98 (2014) (life sentence of juvenile offender converted to life with the possibility of parole after twenty-five years through the operation of amended parole statutes); State v. Vera, 235 Ariz. 571, 334 P.3d 754 (Ariz. App. 2014) (rejecting Miller challenge because statutory change provided juvenile with a meaningful opportunity for release); State v. Randles, 235 Ariz. 547, 549, 334 P.3d 730, 732 (Ariz. App. 2014), rev. denied, 2015 LEXIS 126 (AZ), (rejecting Graham challenge because statutory change satisfied “the requirements of the Eighth Amendment by expressly providing that juvenile offenders sentenced to life imprisonment shall be eligible for parole upon completion of their minimum sentence”).

This Court is correct in concluding that “it appears that the issue in this appeal regarding the interpretation and application of *Graham* to aggregate sentences will be moot when A.B. 267 takes effect on October 1, 2015.” (Order Directing Supplemental Briefing and Inviting Amicus Briefing, filed June 19, 2015, p. 2).

However, reversal of the ruling below is still required since any alleged Eighth Amendment violation has been cured by A.B. 267 and as such the lower court’s



holding is wrong as a matter of law. Due to the changes made by A.B. 267 it can no longer be said that Respondent's sentences "do not provide a meaningful opportunity to obtain release" and thus there is no legitimate basis to order resentencing. (4 AA 933). The lower court's order must be reversed due to the change in circumstances brought on by A.B. 267.

### **CONCLUSION**

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

Dated this 24<sup>th</sup> day of June, 2015.

Respectfully submitted,

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BY */s/ Jonathan E. VanBoskerck*

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## **CERTIFICATE OF COMPLIANCE**

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 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 type-volume limitations of NRAP 32(a)(8)(B) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 1,093 words and 8 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 NRAP 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 24<sup>th</sup> day of June, 2015.

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 June 24, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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