IN THE SUPREME COURT IN THE STATE OF NEVADA

THE STATE OF NEVADA, Appellant, vs. ANDRE BOSTON, Respondent.	Case No.: 62931	Electronically Filed Jul 14 2015 08:39 a.m. Tracie K. Lindeman Clerk of Supreme Court

RESPONDENT'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

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar No. 1565
200 Lewis Avenue
PO Box 552212
Las Vegas, NV 89155
(702) 671-2500

ADAM P. LAXALT
Nevada Attorney General
Nevada Bar No. 12426
100 North Carson Street
Carson City, Nevada 89701
(775) 684-1265

Counsel for Appellant

MARTIN W. HART, ESQ.
Nevada Bar No. 5984
The Law Offices of Martin Hart, LLC
229 South Las Vegas Blvd., Suite 200
Las Vegas, NV 89101
(702) 380-4278

Counsel for Respondent

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RESPONDENT'S SUPPLEMENTAL ANSWERING BRIEF

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STATEMENT OF THE ISSUES

I. WHETHER A.B. 267 CURES THE UNCONSTITIONALITY OF MR. BOSTON'S SENTENCE AND RENDERS HIS POST-CONVICTION PETITION MOOT.

STATEMENT OF THE CASE

Respondent, Andre Boston, ("Mr. Boston") incorporates the Statement of the Case as written in Respondent's Answering Brief, filed concurrently herein, on March 10, 2014. Answer, pp. 4-5.

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STATEMENT OF FACTS

Mr. Boston incorporates by reference the Statement of Facts as written in Respondent's Answering Brief, filed concurrently herein, on March 10, 2014. Id. Mr. Boston again contends that the underlying facts of the case are irrelevant to the matter before this Court.

SUMMARY OF ARGUMENT

A.B. 267 fails to cure the unconstitutionality of Mr. Boston's sentence, as entered on October 20, 1988. Though Mr. Boston has been incarcerated since his arrest in 1984, he has only served approximately five (5) years of his Nevada sentence. On October 1, 2015, when A.B. 267 goes into effect, Mr. Boston will *not* be eligible for parole and will be required to serve yet another ten (10) years, for a total of thirty-seven (37) years incarcerated, before he will be eligible for parole.

Further, even if Mr. Boston was eligible for parole on October 1, 2015, A.B. 267 is enforced by a political executive board that considers rehabilitation as its guide; not by a sentencing judge which would look at whether the sentence is cruel and unusual. Simply put, Mr. Boston's sentence is still unconstitutional. A.B. 267 still allows the sentencing court to impose a sentence that is facially unconstitutional. Meanwhile, the defendant remains incarcerated, with an unconstitutional sentence, until an executive board weighs factors pertaining to

rehabilitation, not youth and diminished culpability *at the time of sentencing*; factors a sentencing court is constitutionally mandated to consider at the outset.

ARGUMENT

BECAUSE A.B. 267 FAILS TO CURE MR. BOSTON'S UNCONSTITUTIONAL SENTENCE, THE DECISION SHOULD BE AFFIRMED AND HIS CASE REMANDED FOR RESENTENCING.

The District Court granted, in part, Mr. Boston's petition for writ of habeas corpus. 4 AA 929-34. The District Court determined that Mr. Boston's original sentence of 100 years to life constituted a *de facto* life without the possibility of parole (LWOP) sentence, and according to Graham and progeny, such a sentence was unconstitutional. Id. Mr. Boston's sentence is a *de facto* LWOP sentence because the sentence offered Mr. Boston "no meaningful opportunity for release" in his natural lifetime. Id. The District Court rightfully ordered Mr. Boston be resentenced in accordance with the Eighth and Fourteenth Amendments. Id.

The enactment of AB 267 does not cure the unconstitutionality of Mr. Boston's sentence. First, because of the original sentencing scheme, Mr. Boston is not eligible for parole under AB 267 for another ten (10) years. Second, AB 267(1) is a supplement to the holdings of Graham and Miller and a guide to sentencing courts, but it fails to adequately remedy sentences already imposed.

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A. A.B. 267 Fails to Provide Mr. Boston with a Meaningful Opportunity for Release.

A court must impose a sentence that "provides a meaningful opportunity for release based on demonstrated maturity and rehabilitation." Graham v. Florida, 560 U.S. 48 (2010). As a supplement to Graham and progeny, the Nevada Legislature passed A.B. 267. Section 1 of A.B. 267 requires that the court consider the differences between youths and adults in sentencing. Section 2 bans life without the possibility of parole sentences for juveniles and section 3 imposes a mandatory parole hearing for juvenile offenders after serving fifteen (15) years or twenty (20) years. The State argues "[d]ue to the changes made by A.B. 267 it can no longer be said that [Mr. Boston's] sentences 'do not provide a meaningful opportunity to obtain release' and thus there is no legitimate basis to order resentencing." State's Supp. Brief, p. 9.

The State fails address the difference in functions that a sentencing judge and the parole board serve as well as that of an unconstitutional sentence versus a right to a parole hearing. Of particular importance to the instant case is the fact that Mr. Boston has only served approximately five (5) years towards his Nevada sentence, though he has already served twenty-seven (27) years total since his incarceration for the same series of offenses. Thus, when A.B. 267 goes into effect on October 1, 2015, Mr. Boston will *not* be eligible for parole.

Most importantly, though A.B. 267 offers an opportunity to show he is rehabilitated but does not address the unconstitutionality of the current sentence. Also, the opportunity given to others after 15 or 20 years does not apply to Mr. Boston. Mr. Boston is currently forty-seven (47) years old but has been diagnosed with Stage III Sarcodosis, affecting his lungs, kidneys, larynx, and sinuses. 3 AA 789-91. His lungs operate at fifty percent capacity and he often requires the assistance of an oxygen machine. Id. at 791. The opportunity A.B. 267 provides Mr. Boston for release is not meaningful. The median life expectancy for inmates at NDOC is only 54.7 years old. Id. at 790. Considering his current state of health, Mr. Boston is not poised to live to benefit from A.B. 267 (3). Thus, A.B. 267 fails to provide Mr. Boston a meaningful opportunity for release.

Further, Mr. Boston has already been incarcerated twelve (12) years beyond the minimum of fifteen (15) imposed by A.B. 267. The State insists this Court require him to wait an additional ten (10) years despite the United States Supreme Court and the Nevada Legislature acknowledging the unconstitutionality of his sentence. The original sentencing court not only stacked Mr. Boston's sentences for his Nevada crimes to create a *de facto* life without the possibility of parole sentence, it also stacked his Nevada sentences on top of his California sentence of

ninety-two (92) years.[1] 2 AA 448. His cumulative sentences, as imposed by each jurisdiction, are unconstitutional. Graham did not consider jurisdictionally *de facto* LWOP sentences but its reasoning, the same reasoning that prompted the promulgation of A.B. 267, applies. Jurisdictionally stacked *de facto* LWOP sentences for juveniles are unconstitutional. In addition to other issues, A.B. 267 as applied to Mr. Boston doesn't address time he has already served, and it also fails to cure the unconstitutionality of his Nevada sentences.

Requiring Mr. Boston to remain incarcerated for at least another ten (10) years, for a total of thirty-seven (37) years, despite State-acknowledgement of the unconstitutionality of his present sentence, is unconstitutional. A.B. 267 does not cure Mr. Boston's unconstitutional sentence, therefore, the matter is not moot and this Court should remand his case to the district court for resentencing.

B. A.B. 267(3) Fails to Cure the Unconstitutionality of *De Facto* Life Without the Possibility of Parole Sentences Already Imposed.

Even if Mr. Boston was eligible for parole when A.B. 267 takes effect, the unconstitutionality of Mr. Boston's sentence is not cured.

The legislative, executive, and judicial departments are separate and coequal branches of government. Blackjack Bonding v. Las Vegas Mun. Ct., 116 Nev. 1213, 1218, 14 P.3d 1275, 1279 (2000). One branch of government may not

[1] The court also refused to give Mr. Boston credit for time served. See 2 AA 448. Mr. Boston, despite invoking his speedy trial right, awaited trial for four (4) years and remained incarcerated throughout

exercise the function of another. Nev. Const. art. 3 § 1. The trial, conviction, and sentence of prisoners are well-known judicial duties. Ex parte Darling, 16 Nev. 98, 99 (1881). "Neither the legislature nor the executive department can interfere with the courts in the exercise of these or other duties which pertain exclusively to the judicial department." Id. at 100.

The power to impose a sentence is a basic constitutional function of the judicial branch of government. Nev. Const. art. 3, § 1; id. at art. 6, § 1; see, e.g., Johnson v. State, 118 Nev. 787, 804, 59 P.3d 450, 461 (2002); Harvey v. Dist. Ct., 117 Nev. 754, 768, 32 P.3d 1263, 1273 (2001). Though it is within the power of the legislature to set the range of criminal penalties for a certain offense, Villanueva v. State, 117 Nev. 664, 668, 27 P.3d 443, 445-46 (2001), it is the "function of the judiciary to decide what penalty, within the range set by the Legislature, if any, to impose on an individual defendant." Mendoza-Lobos v. State, 125 Nev. 634,639, 218 P.3d 501, 504-05 (2009); see Johnson, 118 Nev. at 804, 59 P.3d at 461; Sandy v. Dist. Ct., 113 Nev. 435, 440, 935 P.2d 1148, 1151 (1997). When a statute intrudes on the powers of the judicial branch, it is construed as directory, not mandatory. State of Nevada v. American Bankers Ins., 106 Nev. 880, 883, 802 P.2d 1276, 1278 (1990).

The State's argument relieves the judiciary of a constitutional obligation; to sentence a defendant individually, in light of the defendant's circumstances.

Martinez v. State, 114 Nev. 735, 737, 961 P.2d 143, 145 (1998). As determined by Graham and its progeny, youth is an individual circumstance the courts are required to consider. Failure to consider youth at the time of sentencing constitutes a violation of the Eighth and Fourteenth Amendments.

Applying A.B. 267 retroactively to *de facto* LWOP sentences, without having the court resentence the defendant after considering the mandates stated in AB 267(1) and Graham, does not cure the unconstitutionality of the sentence. While AB 267(3) allows a political executive board to consider parole, the parole board considers rehabilitation. That is not the same as considering the prescribed factors that the *court* must consider, including age, diminished culpability, and maturity *at the time of the offense*. AB 267(1). Pursuant to Graham and its progeny, a sentencing court is tasked with considering these factors *at the time of sentencing*. Graham v. Florida, 560 U.S. 48 (2010); Miller v. Alabama, 132 S. Ct. 2455 (2012). Mr. Boston's post-conviction claims are therefore not moot, and this Court should remand the case to the district court for resentencing.

The California case that the State cites to and alleges that legislative action negated the need for resentencing, People v. Scott has been granted review by the California Supreme Court as of July 8, 2015 and the opinion is superseded pending consideration. see People v. Scott 2015 WL 4134907. In People v. Garrett 174 Cal. Rptr. 3rd 119 (2014) and People v. Hernandez 181 Cal. Rptr. 3d 87 (2014), the

appellate court required remand for new sentencing in spite of the legislative "fix". In Garrett the court noted: "The possibility that Garrett will have a board of parole undertake an evaluation 25 years after his sentencing is not a substitute for the trial court's evaluation at sentencing." Id. at 129. These cases are also pending review by the California Supreme Court. Moreover, the Arizona and Wyoming cases to which the State cites are not on point. In State v.Vera 235 Ariz. 571 (2014), the defendant was convicted of first degree murder and sentenced to twenty-five (25) years to life under Ariz Rev. Stat. § 13-571.[2] The court was required to consider the defendant's age as a mitigating factor when it imposed the sentence. Id. at 575. This is fundamentally different than the present case. First, Mr. Boston was not sentenced to a twenty-five (25) year minimum; it was 100-year minimum. 2 AA 446-50. Second, the Vera court imposed a sentence that offered a meaningful opportunity for release and also considered the defendant's youth as a mitigating factor when doing so. 235 Ariz. At 577. Here, the sentencing court did not impose a sentence that offered any meaningful opportunity for release and was not required to consider Mr. Boston's youth when it imposed a *de facto* LWOP sentence. 2 AA 446-50. The case of State v. Mares, 335 P.3d 487 (2014) cited by the State was *murder* and the sentence was actual LWOP. The instant case is stacked sentences creating a life sentence and *not a murder*.

[2] Ariz. Rev. Stat. § 13-751 concerns the sentencing of persons convicted of murder.

If the district court resentences Mr. Boston in accordance with Graham, the *court*, must consider his youth and accompanying diminished culpability, as it should have when he was initially sentenced. He has the potential of receiving a significantly lesser sentence, with possibly a minimum of even less than AB 267's term of fifteen (15) years. Though his maximum exposure will likely still be life, his minimum has the potential of being as little as six (6) years. See NRS §§ 199.305, 193.003, 193.165. Having served twenty-seven (27) years thus far, Mr. Boston could have been before the parole board several times by now.

The enactment of AB 267 does not render Mr. Boston's unconstitutional sentence constitutional. Mr. Boston's case should be remanded for resentencing so that a *judge* may consider Mr. Boston's status as a juvenile, his background and individual circumstances.

CONCLUSION

For the foregoing reasons, Mr. Boston respectfully requests this Court affirm the lower court's ruling and remand his case for resentencing.

RESPECTFULLY SUBMITTED this 13th day of July, 2015.

/s/ Martin Hart

MARTIN HART
Nevada Bar No. 5984
LAW OFFICES OF MARTIN HART LLC
229 South Las Vegas Blvd., Suite 200
Las Vegas, NV 89101

Attorney for Respondent,

ANDRE BOSTON

VERIFICATION

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 supplemental response has been prepared in Times New Roman using Microsoft Word 2007.

I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(8)(B) because, excluding the parts exempted by NRAP 32(a)(7)(C), it contains 10 pages.

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 13th day of July, 2015.

/s/ Martin Hart
MARTIN HART, ESQ.
Nevada Bar No. 5984
LAW OFFICES OF MARTIN HART LLC
229 South Las Vegas Blvd., Suite 200
Las Vegas, NV 89101

CERTIFICATE OF SERVICE

I HEREBY CERTIFY AND AFFIRM that this document was filed electronically with the Nevada Supreme Court on July 13, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM LAXALT
Nevada Attorney General

STEVE WOLFSON
Clark County District Attorney

MARTIN HART
Counsel for Respondent

/s/ Martin Hart
Law Offices of Martin Hart, LLC