IN THE SUPREME COURT OF

THE STATE OF NEVADA

THE STATE OF NEVADA, Appellant, vs. ANDRE D. BOSTON, Respondent.	**Supreme Court No.: 62931**

AMICUS CURIAE BRIEF

NEVADA ATTORNEYS FOR CRIMINAL JUSTICE INC.
AMERICAN CIVIL LIBERTIES UNION OF NEVADA
CLARK COUNTY PUBLIC DEFENDER
NATIONAL JUVENILE DEFENDER CENTER

Appeal from Order Granting in Part and Denying in Part Petition for Writ of Habeas Corpus (Post-conviction)

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STATEMENT OF IDENTITY OF THE AMICUS CURIAE

Nevada Attorneys for Criminal Justice, Inc. (NACJ), in conjunction with the American Civil Liberties Union of Nevada (ACLUNV), the Clark County Public Defender and the National Juvenile Defender Center present this Amicus Curiae brief. This brief is filed pursuant to NRAP 29 and based upon the invitation of the Nevada Supreme Court to NACJ requesting briefing.

Nevada Attorneys for Criminal Justice, Inc., is a Nevada domestic non-profit cooperative corporation, which is comprised of over 200 criminal defense attorneys who practice in both public and private sectors. NACJ was founded in 1989 and is a member affiliate of the National Association of Criminal Defense Attorneys. NACJ provides a voice for criminal defense practitioners; provides Continuing Legal Education to its members and others; apprises its members of developments in the law and practice; provides scholarships for students of Boyd Law School and for members who wish to attend the National Criminal Defense College. NACJ members are state, county and federal Public Defenders and private practitioners who represent indigent defendants and retained clients.

The following organizations join in this Amicus Brief:

The American Civil Liberties Union of Nevada (ACLUNV) is a non-profit, non-partisan organization, which works to defend and advance the civil liberties and civil rights of all Nevadans. Grounded in the principles of liberty, justice, democracy

and equality, the ACLUNV defends and preserves these rights and liberties guaranteed by the Constitution and laws of the United States and Nevada through public education, advocacy, and litigation. The ACLUNV is dedicated to criminal justice reform and advocated for the passage of AB267 during the 2015 legislative session.

The Office of the Clark County Public Defender provides zealous representation for clients accused of crimes. The attorneys are dedicated to aggressive, quality representation and provide a full range of criminal litigation service to the clients. The juvenile division provides zealous representation for youths accused in delinquency actions in the juvenile court.

The National Juvenile Defender Center (NJDC) is a non-profit, non-partisan organization dedicated to promoting justice for all children by ensuring excellence in juvenile defense. NJDC responds to the critical need to build the capacity of the juvenile defense bar and to improve access to counsel and quality of representation for children in the justice system. NJDC gives juvenile defense attorneys a permanent and enhanced capacity to address practice issues, improve advocacy skills, build partnerships, exchange information, and participate in the national debate over juvenile justice. NJDC provides support to public defenders, appointed counsel, law school clinical programs, and non-profit law centers to ensure quality representation in urban, suburban, rural, and tribal areas. NJDC also offers a wide

range of integrated services to juvenile defenders, including training, technical assistance, advocacy, networking, collaboration, capacity building, and coordination. The National Juvenile Defender Center is helping to shape national and international law in an effort to abolish juvenile life without parole (JLWOP) sentences in the United States—the harshest sentence an individual can receive short of death, which violates international human rights standards of juvenile justice. NJDC has participated as Amicus Curiae before the United States Supreme Court, as well as federal and state courts across the country in support of this position.

I. LAW AND ARGUMENT

A. AB 267 §3 REQUIRES ELIGIBILITY FOR RELEASE TO THE STREET AFTER JUVENILE OFFENDER SERVES 15 OR 20 CALENDAR YEARS BEHIND BARS; CONSECUTIVE NATURE OF SENTENCES IMMATERIAL

This Court requested briefing regarding the applicability of AB 267 §3 to juvenile offenders serving consecutive sentences. In short, juvenile offenders are eligible for release after 15 (or 20) years behind bars; whether a juvenile offender received consecutive sentences is irrelevant to parole eligibility under AB 267 §3.

The Court's "objective in construing statutes is to give effect to the legislature's intent." *Salas v. Allstate Rent-A-Car, Inc*., 116 Nev. 1165, 1168 (2000). Here, the plain language demonstrates the legislative intent to provide juvenile offenders a chance to re-enter society without regard to the consecutive nature of their sentences. The Legislative history further supports this point. AB 267 was meant to ensure that **no child is sentenced to die in prison**; it was not intended to parole youthful offenders from one term of imprisonment to another.

1. The Plain Language Of AB 267 §3 Permits Juvenile Offenders a Chance To Leave Prison After Serving a Total of 15 or 20 Years

To determine the legislative intent, courts must "first look[] at the plain language of a statute." *Allstate Ins. Co. v. Fackett*, 125 Nev. 132, 138 (2009). AB267 §3 states in pertinent part:

> 1. 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**.
> > …

The language is clear; inmates – like Respondent Boston – sentenced for non-homicide crimes committed as juveniles, are eligible for parole after serving a total of 15 calendar years of their sentence.

Importantly, a Court must "resist reading words or elements into a statute that do not appear on its face." *Webb v. Shull*, 270 P.3d 1266, 1269 (2012). AB 267 does not reference any calculation beyond "calendar years" in determining parole eligibility. It does not refer to time served *per sentence*; it does not discuss aggregation of sentences; and it does not mention parole to a consecutive sentence. Thus, AB 267 must be read without regard to any factor beyond calendar years.

Furthermore, the words "eligible for parole" in this statute mean a juvenile offender is eligible <u>to leave the prison walls</u> and re-enter society after 15 years behind bars. The term "parole" is commonly understood as "a conditional release of a prisoner serving an indeterminate or unexpired sentence."[1] The Court must give the term "parole" its ordinary meaning, and understand the word "eligible for parole"

[1] *See, e.g.:* http://www.merriam-webster.com/dictionary/parole.

to mean eligible for release from prison. *See Grath v. State Dep't of Pub. Safety*, 123 Nev. 120, 123 (2007)("[The Court] presumes that the Legislature intended to use words in their usual and natural meaning.").

The District Attorney's supplemental briefing agrees with this point, stating with AB267's passage, "Nevada now provides an opportunity **for release** to almost all offenders who committed their offenses when they were juveniles **regardless of their sentences**." *See* DA Supplemental Brief, 5 (emphasis added). Thus, regardless of the number, or consecutive nature of a prisoner's sentences, juvenile offenders have an opportunity to leave prison after 15 or 20 years.

2. Legislative History of AB267 Supports Consideration for Parole to the Street after Either 15 or 20 Years Imprisonment

Yet, if this Court determines AB267 "is susceptible to more than one reasonable interpretation," then any ambiguity must be resolved by looking to the legislative history and "construing the statute in a manner that conforms to reason and public policy." *Great Basin Water Network v. Taylor*, 126 Nev. 187, 196 (2010).

The legislative history is consistent with the plain language interpretation of AB 267, demonstrating that this bill meant to grant the opportunity for release, not the opportunity to begin to serve a consecutive sentence.

The legislative record establishes the purpose of AB 267 is to ensure that "**no**

child should be sentenced to die in prison."[2] Thus, it could not have been the intent of the legislature to consider consecutive sentencing under §3 of AB267, and thus parole juvenile offenders from one sentence to the next; such an interpretation would result in some juveniles being condemned to spend their life in prison without any possibility of release. This undermines the purpose of the bill.

Testimony during the AB267 legislative hearings supports this argument. During the Assembly hearing, Megan Hoffman, testifying in her individual capacity but with experience gained as the Chief of the Non-Capital Habeas Unit of the Office of the Federal Public Defender, testified that consideration of aggregation of consecutive sentences was unnecessary under AB 267 because parole is granted after serving either 15 or 20 year in prison, per agreement of the District Attorneys and the bill supporters.[3] Further, Assembly Judiciary Vice Chair Erv Nelson specifically inquired whether §3 would mean that "anyone" currently serving out a sentence now would be eligible for parole.[4] The response, was an unreserved, yes.[5]

3. Any Other Interpretation Produces Absurd Results

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[2] An Act Revising Sentencing for Juveniles: Hearing on A.B. 267 Before the S. Comm. on Judiciary, 2015 Leg., 78th Sess. 17 (Nev. 2015) (statement of James Dold, Member, Campaign for the Fair Sentencing of Youth).
[3] An Act Revising Sentencing for Juveniles: Hearing on A.B. 267 Before the A. Comm. on Judiciary, 2015 Leg., 78th Sess. 17 (Nev. 2015) (statement of Megan Hoffman, Assistant Federal Defender, Federal Public Defender).
[4] *Id*. (statement of Erven Nelson, Assemblyman, Nevada State Assembly.)
[5] *Id*. (statement of James Dold, Member, Campaign for Fair Sentencing of Youth.)

Courts must "seek to avoid interpretations that yield unreasonable or absurd results.'" *J.E. Dunn Nw., Inc. v. Corus Const. Venture, LLC*, 249 P.3d 501, 506 (2011)(internal citations omitted). Yet, holding that AB 267 §3 requires parole from one consecutive sentence allows a juvenile sentenced to one 80-year sentence without parole to leave prison after 15 or 20 years, but juvenile sentenced to two (2) consecutive forty-year sentences without parole would be forced to stay in prison significantly longer. Each inmate is sentenced to same number of years in prison, yet, all other factors being equal, one is deemed parole eligible while the other is not.

The only logical interpretation is that AB 267 deems all juvenile offenders eligible for parole after serving 15 or 20 years of their sentence, regardless of the number or consecutive nature of that sentence.

B. AB 267 DOES NOT RENDER ALL EIGHTH AMENDMENT CLAIMS MOOT

Contrary to the District Attorney's argument, AB 267 §3 does not render all Eighth Amendment arguments moot.[6] Respondent Boston, and those similarly situated, may still argue that their sentences are disproportionate under the Eighth Amendment, as well as maintain their parole eligibility. AB267 §3 creates only a possibility of release on parole; it does not alter judicial responsibility to exam the

[6]Amici submit no opinion regarding whether Respondent Boston was disproportionately sentenced. Rather, this argument applies to the general interpretation of AB267 in relation to claims under the Eighth Amendment.

constitutionality of a particular sentence to an individual. Moreover, Nevada's current parole factors do not allow for the constitutionally mandated evaluation of youthful rehabilitation as explained in *Graham v. Florida*, 130 S. Ct. 2011 (2010). The Legislative history of AB267 further demonstrates the bill was not meant to supplant Eighth Amendment remedies. **AB267 does not alter a prisoner's Constitutional protection against imposition of a grossly disproportionate sentence.**

1. Court, Not Parole Board, Must Review Constitutional Challenges To Disproportionate Sentencing Under the Eighth Amendment

The Eighth Amendment of the United States Constitution prohibits "extreme sentences that are grossly disproportionate to the crime." *Id*. at 2037 (2010); *see also United States v. Williams*, 636 F.3d 1229, 1232 (9th Cir. 2011). A sentence may be challenged under the Eighth Amendment in two ways: (1) as specifically disproportionate "given all the circumstances in a particular case." *Graham*, 130 S.Ct. at 2021; and (2) as a showing that "an entire class of sentences is unconstitutionally disproportionate given the severity of the sentence, the gravity of the crime, and the type of offender." *Id.*

Importantly,

> "**the task of interpreting the Eighth Amendment remains [the Court's] responsibility**. 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." *Id.* at 2026 (emphasis added).

AB267 §3 merely creates the possibility of parole for juvenile offenders after evaluation by the Parole Board. It does not vitiate the Court's duty to remedy a constitutionally unsound sentence. As Respondent Boston's supplemental brief, further explains this argument, for the brevity's sake, Amicus incorporate that argument by reference here.

2. Nevada Parole System Does Not Satisfy Eighth Amendment And *Graham v. Florida* Mandates

Moreover, as neither the Nevada Parole Board nor AB267 require consideration of a juvenile offender's maturity and rehabilitation for release, Eighth Amendment remedies must be retained. In *Graham*, the Court specifically held that to comply with the Eighth Amendment "the State must … give defendants [sentenced for non-homicide crimes committed as juveniles] **some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation**." *Graham*, 130 S. Ct. at 2030 (emphasis added). Subsequently, like the District Court in this case, Courts addressed this requirement by granting re-sentencing hearings, during which a judge evaluated the relative culpability and immaturity of a juvenile as compared to an adult offender. This procedure must be maintained; the parole board evaluation is not an equivalent.

Under the current discretionary parole system, the Parole Board not only fails to consider the special circumstances of youth, it specifically assigns youth as a

"Risk Factor" – making the chance of a juvenile offender's release less likely.

When evaluating an inmate for release, the Parole Board first evaluates the severity of the crime committed, in relation to a number of "Risk Factors." If the "Risk Factors" are high and the crime committed is even of medium severity – the parole board will deny parole without regard to any other mitigating factor.[7] Most significantly, the very first "Risk Factor" the Parole Board considers in assessing whether to recommend release is the "Age at First Arrest."[8] **The younger the age, the higher the risk factor**. If an offender was a juvenile at the time of their first arrest, they are assigned two (2) "risk factor" points. The number of risk factors is then totaled to determine whether an offender is a low risk, a medium risk or a high risk.[9] Thus, the system currently employed by the Parole Board to determine whether an individual is granted parole makes it less likely juvenile offenders will be released.[10]

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[7]Nevada Discretionary Release Parole Guideline Worksheet, Version 2 (Nov. 1, 2012) *Available at:* http://parole.nv.gov/uploadedFiles/parolenvgov/content/Information/Discretionary_Release_Parole_Guideline_Worksheet.pdf

[8]Nevada Parole Risk Assessment Worksheet (Nov. 1, 2012) *Available at:* http://parole.nv.gov/uploadedFiles/parolenvgov/content/Information/NV_ParoleRiskAssessmentForm.pdf

[9] *Id.*

[10]Whether parole boards can ever achieve the constitutional analysis required under *Graham* is an open question across the country, as similar laws come into effect. *See, e.g.* Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 Ind. L.J. 373 (2014)("Simply making a

Although AB 267 provides parole opportunities for juvenile offenders, it does not provide the Parole Board with any new factors to consider based on the juvenile status of the offender.[11]

This system does not comply with the Eighth Amendment requirements set forth in *Graham.* Thus, AB 267 does not moot any Eighth Amendment claims.

3. Legislative History Demonstrates AB 267 Was Not Meant To Supplant Relief Under the Eighth Amendment

The legislative history of AB 267 demonstrates the bill was not meant to foreclose relief under the Eighth Amendment for juvenile offenders. During the 2015 Legislative Session no legislator, Parole Board representative, prosecutor, or other individual's testimony suggested on the record that the opportunity for parole consideration in §3 of the bill would foreclose a convicted juvenile's right to seek redress under the Eighth Amendment. The Campaign for the Fair Sentencing of Youth, testifying at the request of the bill's sponsor, explained *Graham's* requirements as background information but never asserted that AB 267 would replace or deprive individuals of other forms of relief.[12]

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juvenile offender eligible for parole under an existing parole system may not guarantee compliance with *Graham*'s mandate.")

[11] Indeed, the original draft of the bill enumerated factors for the Parole Board to consider, but these factors were later removed.

[12] An Act Revising Sentencing for Juveniles: Hearing on A.B. 267 Before the A. Comm. on Judiciary, 2015 Leg., 78th Sess. (Nev. 2015)(statement of James Dold, Member, Campaign for the Fair Sentencing of Youth.

AB267 §3 is meant to affect only the Parole Board's role in determining whether current prisoners can be released or still pose a threat to society, *under the existing standards*. AB 267 leaves the judiciary with the responsibility to determine Eighth Amendment issues, not the parole board.

III. CONCLUSION

For the foregoing reasons, Joint Amicus respectfully request that this Court interpret AB 267 to apply without regard to consecutive sentences, and hold AB 267 does not moot all Eighth Amendment claims.

DATED on this 20th day of July, 2015.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on July 20, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this Amicus 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 Amicus brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 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 further certify that this Amicus Brief complies with formatting requirements of NRAP 32(a)(4) and with the type-face requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this Amicus Brief has been prepared in a proportionally spaced typeface using Microsoft Word for Mac 2011 in Times New Roman size 14-font.

I further certify that this brief complies with the page-or types volume limitations set the Nevada Supreme Court in its June 19, 2015 order because this brief's substance does not exceed 10 pages.

DATED on this 20th day of July, 2015.

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