

IN THE SUPREME COURT OF THE STATE OF NEVADA

STATE OF NEVADA, BOARD OF  
PAROLE COMMISSIONERS

Petitioner,

vs.

THE SECOND JUDICIAL DISTRICT  
COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF  
WASHOE; AND THE HONORABLE  
CONNIE STEINHEIMER, DISTRICT  
JUDGE,

Respondents,

and

MARLIN THOMPSON,

Real Party in Interest.

**Supreme Court Case No.**

District Court Case No. 0781052  
**Electronically Filed**  
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**PETITION FOR WRIT OF MANDAMUS**

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## **ROUTING STATEMENT**

The Nevada Supreme Court should retain this matter because it is presumptively assigned to the Nevada Supreme Court pursuant to Rule 17(a)(1) of the Nevada Rules of Appellate Procedure (NRAP). This matter also raises questions of statewide public importance and first impression regarding the modification of life sentences. *See* NRAP 17(a)(10)-(11).

## **RELIEF SOUGHT**

This Court should determine that life sentences imposed before Nevada's sentencing statutes were modified in 1995 may be modified pursuant to NRS 176.033(2) and allow the District Court to consider the Petition for Modification of Sentence filed by the Nevada Board of Parole Commissioners (Parole Board) in the underlying case on its merits.

## **ISSUE PRESENTED**

(1) Whether life sentences imposed before Nevada's sentencing statutes were modified in 1995 to provide for maximum and minimum terms of imprisonment may be modified pursuant to NRS 176.033(2).

## **I. INTRODUCTION AND SUMMARY OF THE ARGUMENT**

The Parole Board brings this petition to address an inconsistency that has arisen in the application of Nevada law concerning the modification of certain sentences based on their sentence structure. District courts have made differing

rulings as to whether life sentences imposed before the 1995 modification of Nevada's sentencing statutes to provide for maximum and minimum terms of imprisonment may be modified pursuant to NRS 176.033(2). *See* Petitioner's Appendix (App.) 143-150.<sup>1</sup> Accordingly, the Parole Board asks this Court to resolve this important issue.

## **II. FACTS NECESSARY TO UNDERSTAND THE ISSUES PRESENTED BY THE PETITION**

In 1978, Marlin Thompson (Mr. Thompson) was convicted of first-degree murder and attempted first-degree murder pursuant to NRS 200.030. App. 1, 69, 154. He was sentenced in 1979 to a term of fifteen years for the crime of attempted first-degree murder to run consecutively with a term of life with the possibility of parole for the crime of first-degree murder. *Id.*

The Parole Board granted Mr. Thompson parole on the life sentence for first-degree murder in 1990 and granted parole on the fifteen-year sentence for attempted first-degree murder in 1992. *Id.* at 2. Mr. Thompson was released from prison to the community in 1992 and has remained on parole ever since. *Id.*

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<sup>1</sup>This court “may take judicial notice of facts generally known or capable of verification from a reliable source,” and “facts that are ‘[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, so that the fact is not subject to reasonable dispute.’” *Mack v. Estate of Mack*, 125 Nev. 80, 91, 206 P.3d 98, 106 (2009) (quoting NRS 47.130(2)(b) and citing NRS 47.150(1) ).

On September 11, 2017, the Parole Board filed a petition for modification of sentence on behalf of Mr. Thompson pursuant to NRS 176.033. *Id.* at 1-4. The Washoe County District Attorney (District Attorney) opposed the Petition, arguing that the statute in effect at the time of the commission of the crime bars Mr. Thompson from modification of his sentence for his 1979 conviction. *Id.* at 69-72.

A hearing was held on November 30, 2017. App. 78. At the hearing, the District Court directed the parties to provide supplemental briefing. *Id.* Specifically, the District Court asked the parties to address the last portion of NRS 176.033(2) and whether the statute allows the Court to reduce Mr. Thompson's 1979 sentence of life with the possibility of parole after ten years. *Id.* at 79. Supplemental briefing was provided and the District Court ultimately determined that it could not modify Mr. Thompson's sentence based on the statutory language. *Id.* at 79, 82, 89-91, 92-93. Mr. Thompson has appealed this decision. *Id.* at 100, 106-107. The Parole Board also files this writ petition along with a protective appeal to resolve the legal issue in this case. *Id.* at 108, 118-120.

### **III. REASONS FOR GRANTING THE WRIT**

#### **A. This Court Should Entertain the Writ Petition.**

The Nevada Constitution empowers this Court to issue writs of prohibition and mandamus. NEV CONST. art. VI, § 4. Writ relief is an extraordinary remedy

and the decision to entertain a writ petition ultimately lies within this Court's discretion. *Cheung v. Eighth Jud. Dist. Court*, 121 Nev. 867, 869, 124 P.3d 550, 552 (2005). In exercising its discretion, this Court considers whether the petition raises an important issue of law that requires clarification, the interests of public policy, urgency, strong necessity, judicial economy, and sound judicial administration. *Clay v. Eighth Jud. Dist. Court*, 129 Nev. Adv. Op. 48, 305 P.3d 898, 901 (2013). Writ relief is unavailable if the petitioner has a "plain, speedy, and adequate remedy in the ordinary course of law[,]" such as a direct appeal. *See* NRS 34.170; NRS 34.330; *Bradford v. Eighth Jud. Dist. Court*, 129 Nev. Adv. Op. 60, 308 P.3d 122, 123 (2013). The circumstances surrounding this Petition warrant this Court's intervention. This Petition raises important issues of law regarding sentencing structures.

Additionally, because the Parole Board was not a party to the underlying criminal proceedings, the Parole Board likely does not have an available remedy in the form of an appeal. *Hairr v. First Jud. Dist. Court*, 132 Nev. Adv. Op. 16, 368 P.3d 1198, 1200 (2016) ("Because petitioners are not parties to the underlying action and cannot appeal the district court's order denying intervention, a mandamus petition is an appropriate method to seek review of such an order."); *Pan v. Eight Jud. Dist. Court*, 120 Nev. 222, 224, 88 P.3d 840, 841 (2004) (ability

to appeal is generally an adequate legal remedy precluding writ relief). Accordingly, writ relief should issue in this case.

**B. A Writ of Mandamus Should Issue to Correct the District Court’s Erroneous Interpretation of Nevada Law.**

A writ of mandamus may issue to compel the performance of an act that the law requires “as a duty resulting from an office, trust or station.” NRS 34.160. A writ of mandamus may only issue in a case when the party applying shows a clear right to have the respondent do the thing, which he is sought to be compelled to do. *State ex rel. Cohn v. Mack*, 26 Nev. 85, 63 Pac. 1125 (1901). A writ of mandamus may also issue “to control an arbitrary or capricious exercise of discretion.” *State v. Eighth Jud. Dist. Court*, 127 Nev. 927, 931, 267 P.3d 777, 779 (2011). “A manifest abuse of discretion is a clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule.” *Id.* at 932, 267 P.3d at 780 (quotation and alteration omitted).

Even in the context of a writ, “questions of law are reviewed de novo, but deference is given to a district court’s factual findings so long as they are supported by substantial evidence.” *Picardi v. Eighth Jud. Dist. Court*, 127 Nev. 106, 110, 251 P.3d 723, 725 (2011), *abrogation on other grounds recognized by Tallman v. Eighth Jud. Dist. Court*, 131 Nev. Adv. Op. 71, 359 P.3d 113, 120 (2015). “The discretion of this court to entertain a petition for writ . . . will not be

exercised unless legal, rather than factual, issues are presented.” *Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 604, 637 P.2d 534, 536 (1981).

The question in this case is whether Mr. Thompson’s sentence may be modified as a matter of law. The Parole Board seeks resolution of this important legal issue because district courts have taken inconsistent positions as to whether similar sentences may be modified. *See* App. 143-149.

Mr. Thompson was convicted in 1979 of first-degree murder pursuant to NRS 200.030. At the time of Mr. Thompson’s conviction, the 1977 version of NRS 176.033(2) was in effect. In 1977, the statute provided in pertinent part that “the court may modify the original sentence by reducing the term of imprisonment but shall not make the term less than the minimum limit prescribed by the applicable penal statute.” 1977 Statutes of Nevada, 414 (Chapter 232, SB 131).

While this section of the statute was amended in 1995 to change the language from “minimum limit” to “minimum term,” these amendments to the statute did not apply retroactively. 1995 Statutes of Nevada, 1248 (Chapter 443, SB 416). Indeed, the Legislature explicitly declared that the amendments “do not apply to offenses which are committed before July 1, 1995.” *Id.* at section 393.

This statutory change only applied prospectively because it altered the way that criminal defendants were sentenced in the state of Nevada and for the first

time required judges to sentence an offender to a minimum and a maximum term of imprisonment. *See* SB 416 (1995).

At the time of Mr. Thompson’s conviction in 1979, there was no minimum and maximum term of imprisonment requirement in the criminal statutes. Accordingly, the “minimum limit” phrase, and not the “minimum term” phrase of NRS 176.033(2), applies to the Petition filed by the Parole Board in this case. Thus, the applicable version of the statute provides that this Court “may modify the original sentence by reducing the term of imprisonment but shall not make the term less than the minimum limit prescribed by the applicable penal statute.” 1977 Statutes of Nevada, 414 (Chapter 232, SB 131).

This change of the statutory language from “minimum limit” to “minimum term” was significant. As pertinent in this context, “term” denotes a “fixed period of time.” Black’s Law Dictionary, term (10th ed. 2014). However, the term “limit” *inter alia* denotes “[a] restriction or restraint,” or “[a] boundary or defining line.” Black’s Law Dictionary, limit (10th ed. 2014).

The sentencing statute in effect at the time of Mr. Thompson’s conviction provided that

[e]very person convicted of murder of the first degree shall be punished . . . by imprisonment in the state prison for life with or without possibility of parole. If the penalty is fixed at life imprisonment with possibility of

parole, eligibility for parole begins when a minimum of 10 years has been served.

NRS 200.030(6) (1977). Thus, the minimum limit, or “minimum sentence” in this case is ten years. This is the minimum sentence or limit because this is “[t]he least amount of time that a convicted criminal must serve in prison before becoming eligible for parole.” Black’s Law Dictionary, minimum sentence (10th ed. 2014). Accordingly, as a matter of law, the District Court was permitted to modify the original sentence in this case to ten years—the minimum sentence or limit provided by the statute.

The Legislature has provided courts in this state with the ability to remove the continuing obligation to be subject to parole. In *Pinana v. State*, 76 Nev. 274, 283, 352 P.2d 824, 829 (1960), the Nevada Supreme Court explained that “[t]he subject of parole in this state is within the legislative authority given by the constitution to the legislature. Art. 4, Sec. 1, Nevada Constitution.” It is indisputable “that the authority to define and fix the punishment for crime is legislative, and includes the right in advance to bring within judicial discretion for the purpose of executing the statute elements of consideration which would be otherwise beyond the scope of judicial authority . . . .” *State v. Eighth Judicial Dist. Court*, 85 Nev. 485, 488, 457 P.2d 217, 218 (1969) (quoting *Ex Parte United States*, 242 U.S. 27 (1916)). In enacting the changes to NRS 176.033(2), the

Nevada Legislature provided this Court with discretion to modify Mr. Thompson's sentence.

This interpretation of the statutory scheme is harmonious with the Legislative history of AB 560 in 1987 that amended the relief statute, NRS 176.033, to apply to persons subject to life sentences. *See* 1987 Statutes of Nevada, 396 (Chapter 174, AB 560). In 1987, the statute was amended to provide that

at any time after a prisoner has been released on parole and has served one-half of the period of his parole, or 10 consecutive years on parole in the case of a prisoner sentenced to life imprisonment, the state board of parole commissioners, upon the recommendation of the department of parole and probation, may petition the court of original jurisdiction requesting a modification of sentence.

*Id.*

The Department of Public Safety (DPS) introduced AB 560 to remedy the “onerous task” of having “to supervise a person who is paroled on a life sentence, for the rest of his/her life.” App. 130 (Hearing on AB 560 before the Assembly Committee on the Judiciary, 64th Sess. (Nev., April 24, 1987)).<sup>2</sup> DPS further provided that the legislation was sought after the attorney general's office indicated

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<sup>2</sup>Also located at:

<http://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1987/AB560,1987.pdf> (last checked 6/6/18).

that because “there is no such thing as one-half of life,” persons serving life sentences would not be eligible for an early discharge. App. 136-137 (Hearing on AB 560 before the Senate Committee on the Judiciary, 64th Sess. (Nev., May 6, 1987) (Testimony of Rob Calderone, Department of Parole and Probation)).

The bill was consequently “introduced in the form of a question . . . was it purposeful on the legislature’s part to exclude life sentences from the possibility of early discharge from parole, or was that an oversight at the time the legislation was passed? If it was an oversight, the recommendation was that one-half of life would be defined as ten years on parole.” *Id.* DPS provided that eleven people were at that time, under supervision that “would fall into the eligible category. . . .” *Id.* In enacting this amendment, the Legislature affirmed that it was correcting this oversight and allowing those individuals convicted of life sentences to make use of NRS 176.033 after serving ten years on parole.

The Legislature made the requisite changes to NRS 176.033(2) to remedy this very situation and allow for the requested sentence modification. Reading the provisions of NRS 176.033(2) in harmony allows defendants convicted of life sentences to seek modification of their sentences when they are no longer a threat to the public and no longer require the use of state resources for supervision. Based on the pertinent statutory language, the Parole Board submits that Mr. Thompson is eligible to seek modification of his sentence under the statute as a matter of law.

#### IV. CONCLUSION AND RELIEF SOUGHT

For these reasons, the Parole Board respectfully requests that the Court issue a writ of mandamus overturning the District Court's decision and determining that life sentences imposed before Nevada's sentencing statutes were modified in 1995 to provide for maximum and minimum terms may be modified pursuant to NRS 176.033(2).

DATED this 7th day of June, 2018.

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**VERIFICATION PURSUANT TO NRAP 21(a)(5)**

Pursuant to NRAP 21(a)(5), and under penalty of perjury, the undersigned declares that she is counsel for the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of her own knowledge except as to those matters stated on information and belief and as to such matters she believes them to be true. Petitioner personally authorized undersigned counsel to commence this action.

DATED this 7th day of June, 2018.

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## CERTIFICATE OF COMPLIANCE

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 Office Word 2016 in size 14 font in double-spaced Times New Roman. I further certify that I have read this brief and that it complies with NRAP 21.

I hereby certify that 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 that every assertion in this brief regarding matters in the record to be supported by appropriate references to the record on appeal. 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 7th day of June, 2018.

ADAM PAUL LAXALT  
Attorney General

By: /s/ Kathleen Brady  
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Deputy Attorney General

## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing PETITION FOR WRIT OF MANDAMUS with the Clerk of the Court for the Nevada Supreme Court by using the appellate CM/ECF system on June 7, 2018.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that a courtesy copy was emailed to counsel for Respondents and Real Party in Interest simultaneously with the filing of the foregoing.

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