In the SUPREME COURT OF THE STATE OF NEVADA

Cases No. 48649 and No. 48650

IN THE MATTER OF WILLIAM M., A MINOR

William M., Appellant, v. State of Nevada, Respondent

AND

IN THE MATTER OF MARQUES B., A MINOR

Marques B., Appellant, v. State of Nevada, Respondent

BRIEF OF AMICI CURIAE ACLU of NEVADA and JUVENILE LAW CENTER

Allen Lichtenstein
Nevada Bar No. 003992
Lee Rowland
Nevada Bar No. 10209
c/o ACLU of Nevada
732 South Sixth Street, Suite 200A
Las Vegas, Nevada 89101

Attorneys for Amicus Curiae
ACLU of Nevada

Marsha Levick
Lourdes Rosado
Juvenile Law Center
The Philadelphia Building, Fourth Floor
1315 Walnut Street, Suite 400
Philadelphia, PA 19107

Attorneys for Amicus Curiae
Juvenile Law Center

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STATEMENT OF INTEREST OF *AMICI CURIAE*

In November 2007, seventeen-year-old Marques B. and seventeen-year-old William M. were certified for prosecution in adult criminal court pursuant to Nevada's presumptive certification statute, NEV. REV. STAT. ANN. §§ 62B.390(2) AND (3) (West, Westlaw through 2005 73rd Reg. Sess. and 22nd Spec. Sess., stat. and const. provisions effective Nov. 2006). At the request of this Court, the American Civil Liberties Union of Nevada ("ACLUN") and the Juvenile Law Center ("JLC") jointly submit this brief as *amici curiae* in the appeals of Marques B. and William M.

The ACLUN is a non-profit civil liberties organization concerned with the protection of civil rights as laid out in the Bill of Rights and the U.S. and Nevada Constitutions. The ACLUN is a state affiliate of the American Civil Liberties Union, the nation's largest non-profit legal organization. The mission of the ACLUN is to preserve all Constitutional guarantees and liberties through public education, legislative advocacy, and litigation. The ACLUN is particularly concerned with the retention of rights for the most vulnerable individuals in our society, including juveniles and criminal defendants. ACLUN believes that each juvenile should retain his right to due process of law and his privilege against self-incrimination. As laid out in this Brief, the ACLUN believes that Nevada's transfer statute violates these crucial guarantees, and therefore welcomes the opportunity to brief these issues before this Court.

The JLC is a non-profit children's advocacy organization based in Pennsylvania. Founded in 1975 as a non-profit legal service, Juvenile Law Center (JLC) is one of the oldest public interest law firms for children in the United States. Through legal advocacy, research, publications, public education and training, JLC works to ensure that the child welfare, juvenile justice and other public systems provide vulnerable children with the protection and services

they need to become happy, healthy and productive adults. JLC has a particular interest and expertise in the issues relevant to this case. JLC has litigated cases concerning the requirements of fundamental fairness for youth subject to certification to the adult system, as well as participated as amicus curiae in cases pending before state and federal courts around the country concerning the constitutional rights of youth in the juvenile justice system generally.

In addition to ACLUN and JLC, several advocates for juvenile justice, criminal justice, and constitutional rights have requested to be included in this Brief as *amici* to lend their support for the arguments laid out in this brief. They include Nevada Attorneys for Criminal Justice, the Thomas and Mack Legal Clinic at the Boyd School of Law, the National Alliance on Mental Illness in Nevada, Nevada Disability Advocacy and Law Center, the Clark County Special Public Defender's Office, and the Washoe County Public Defenders Office, among others. A full list of each organization and individual, and their statements of interest in this case, are laid out in Appendix D.

This Court has asked *amici* ACLUN and JLC to address the constitutionality of NEV. REV. STAT. ANN. §§ 62B.390(2) and (3) on a variety of grounds. *See* this Court's Order Requesting Amici Curiae Participation and Directing Additional Briefing in Cases No. 48649 and No. 48650 (Oct. 18, 2007). ACLUN and JLC along with other *amici* listed in Appendix D, will address whether NEV. REV. STAT. ANN. §§ 62B.390(2) and (3) violate a juvenile's rights to procedural due process and protection against self-incrimination as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. *Amici* ask this Court to find that NEV. REV. STAT. ANN. §§ 62B.390(2) and (3) violate Appellants' rights to due process and against self-incrimination, based on the fundamentally unfair procedural requirement that requires children to admit guilt in order to rebut the presumption of certification to adult court.

INTRODUCTION

This case involves two minors, William and Marques, who were both certified to adult court under the provisions of NEV. REV. STAT. ANN. § 62B.390, Nevada's certification statute. Because their charged crimes involved firearms, both children were subject to a presumption of certification under NEV. REV. STAT. ANN. § 62B.390(2), with an opportunity to present mitigating factors under NEV. REV. STAT. ANN. § 62B.390(3) to rebut the presumption. In order to rebut the presumption, NEV. REV. STAT. ANN. § 62B.390(3) requires a juvenile defendant to show by "clear and convincing evidence" that emotional, behavioral, or substance abuse problems substantially contributed to the commission of the alleged crime.

As the facts in this case clearly show, this procedural burden requires a child to confess to the crime in order to fight his certification to adult court. This is not mere rhetoric; the facts before this court show that the certification hearing judge in William's case explicitly refused certification because William maintained his innocence. The requirements of NEV. REV. STAT. ANN. § 62B.390(3) are an affront to the constitutional right against self-incrimination. The high standard of proof, combined with the requirement that any mitigating factors be linked directly to the circumstances of the crime, is grossly unfair and thus also violates the basic tenets of due process.

Worse still, Nevada's statute does not provide children facing certification any protection whatsoever for any mitigating but potentially incriminating factors that a child might proffer in an attempt to rebut presumptive certification. Highly prejudicial facts presented to maintain juvenile court jurisdiction may be used against the child at any stage in the criminal process. Indeed, under this Court's holdings, even if the juvenile is able to meet his near-impossible

burden under NEV. REV. STAT. ANN. § 62B.390(3), a judge may still use his powers of discretionary transfer to certify the child to adult court. This toxic combination of factors violates both the Fifth Amendment's right against self-incrimination as well as the due process clause's requirements of basic fairness in juvenile proceedings. *Amici* urge this Court to find that Nevada's presumptive certification statute violates the constitutional protection against self-incrimination and the promise of due process for children subject to its provisions, and to reverse the certifications and remand to juvenile court for jurisdiction and reconsideration.

ARGUMENT

I. THE CERTIFICATIONS OF WILLIAM AND MARQUES TO ADULT COURT MUST BE REVERSED BECAUSE NEVADA'S PRESUMPTIVE CERTIFICATION STATUTE VIOLATES THEIR RIGHT AGAINST SELF-INCRIMINATION UNDER THE UNITED STATES AND NEVADA CONSTITUTIONS.

William's and Marques's certifications to adult court must be reversed because Nevada's statute essentially required them to admit their crime in order to remain in juvenile court. Under NEV. REV. STAT. ANN. § 62B.390(2), when the state petitions the juvenile court to certify cases involving firearms to adult court and establishes probable cause, it is presumed that the case will be certified to adult court. The burden then shifts to the child to present evidence of mitigating circumstances to rebut the presumption, including proof by clear and convincing evidence that the child's actions were the result of substance abuse or emotional or behavioral problems that can be treated in the juvenile court. NEV. REV. STAT. ANN. § 62B.390(3)(b). As this Court held in *Anthony Lee R.*, 112 Nev. 1406, 1416-17, 952 P.2d 1, 7-8 (Nev. 1997), a child attempting to rebut the presumption with mitigating circumstances must demonstrate that one of these conditions "substantially contributed to" or "substantially influenced" the child's actions in the alleged offense. Thus, William and Marques must admit, in evaluations with experts appointed

by the court to aid in the rendering of the certification decision, that they committed the crime to provide the required nexus between the condition and the conduct. The statute, however, contains no prohibition on the use of the admission in future proceedings; nor has this Court ruled that the admission or later use of such evidence is prohibited. Without such protection, the statute violates their Constitutional right against self-incrimination.

A. Nevada's presumptive certification statute violates a child's right against self-incrimination by failing to prohibit the admission at subsequent proceedings of inculpatory statements made by the child to aid the juvenile court in determining whether the statutory requirements for certification are met.

The Fifth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, provides that "[n]o person ... shall be compelled in any criminal case to be witness against himself." U.S. Const., Amends. V, XIV. *See also Malloy v. Hogan*, 378 U.S. 1, 6 (1964). The privilege against self-incrimination has long been interpreted to mean that a defendant may refuse "to answer official questions put to him in any ... proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973) (citation omitted). The United States Supreme Court has held that the state may not impose substantial penalties, including the imposition of a harsher sentence, on a defendant who invokes his Fifth Amendment right against self-incrimination. *Lefkowitz v. Cunningham*, 431 U.S. 801, 805 (1977). Similarly, this Court has found that the "imposition of a harsher sentence based upon the defendant's exercise of his constitutional rights is an abuse of discretion." *Bushnell v. State*, 97 Nev. 591, 593, 637 P.2d 529, 531 (1981) (citations omitted).

Certification of a youth to an adult court is "the worst punishment the juvenile system is empowered to inflict." Note, *Separating the Criminal from the Delinquent: Due Process in Certification Procedure*,40 S.Cal.L.Rev. 158, 162 (1967). *See also Kent v. United States,* 383 U.S. 541, 554 (1966) (the result of a transfer hearing is of "tremendous consequences"); *Kemplen v. Maryland*, 428 F.2d 169, 174 (4th Circ. 1970) ("nothing can be more critical to the accused than determining whether there will be a guilt determining process in an adult-type criminal trial. The waiver proceeding can result in dire consequences indeed for the guilty accused."). In the instant case, Nevada's presumptive certification statute imposes a substantial penalty on Appellants – certification to adult court, with exposure to significantly longer sentences without the rehabilitative services of the juvenile court – for failing to discuss their involvement in the alleged offenses in their effort to rebut certification.

The right to be free from compelled self-incrimination during a pre-trial court-ordered examination of a defendant's mental state at the time of the alleged offense is clearly protected by the United States Constitution. *Estelle v. Smith*, 451 U.S. 454 (1981). In *Estelle*, the United States Supreme Court held that statements made to a psychiatrist during a court-ordered psychiatric examination were inadmissible during both the guilt and penalty phases of a criminal trial. *Id.* at 473. The defendant was charged with murder, and prior to the trial, the trial court ordered a psychiatric examination for the purpose of determining whether the defendant was competent to stand trial. *Id.* at 456-57. The defendant was deemed competent in the psychiatric examination, convicted and sentenced to death. *Id.* at 457-60. During the sentencing hearing, the examining psychiatrist testified to admissions that the defendant made to him, as well as his own personal conclusions as to the continuing danger posed to society by the defendant. *Id.* at 458-60. The United States Supreme Court held that the admission of the psychiatrist's

testimony, which included the admissions made by the defendant while the defendant took part in a court-ordered examination, violated the defendant's Fifth Amendment privilege against self-incrimination. *Id.* at 468-69.

The United States Supreme Court's earlier decision *In re Gault,* 387 U.S. 1 (1967), which was cited by and relied upon in *Estelle*, *see* 451 U.S. at 462, makes it clear that the protection against self-incrimination applies to Nevada's certification proceeding: "the availability of the [Fifth Amendment] privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites." *Gault,* 387 U.S. at 49. The admissions that NEV. REV. STAT. ANN. § 62B.390(3)(b) requires William and Marques to make during the certification proceeding to rebut the presumption of eligibility for adult court would be incriminating and create just the "exposure" that *Estelle* held the Fifth Amendment protects against.[1] This exposure, the possibility of subsequent use of the child's incriminating statements and the child's conviction of a crime based on those statements, violate the child's right against self-incrimination.

Indeed, at least 19 other states have secured youths' right against self-incrimination when undergoing examinations conducted to aid the court in determining the critical question of

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[1] While juvenile defendants could avoid compelled self-incrimination by simply electing not to 'fight' certification to adult court, the harsh consequences of certification are so grave as to make any such decision a Hobbesian 'choice.' *See Kemplen,* 428 F.2d at 174, and Brief of *amicus curiae* NJDC, *passim.* Thus, in order to avoid self-incrimination, a child would be forced to automatically accept certification, which would eviscerate the purpose of NEV. REV. STAT. ANN. § 62B.390(3)(b) and render the statute meaningless. Assuming that the legislature intended the statute to provide a meaningful opportunity to rebut a presumption of certification, it cannot be conditioned on the waiver of a constitutional right. This Court has in fact held that the legislative intent behind NEV. REV. STAT. ANN. § 62B.390 is "that the presumption be rebuttable under some circumstances." *Anthony Lee R.*, 952 P.2d at 8, 112 Nev. at 1417. It would be a perversion of justice for "some circumstances" to mean circumstances in which juveniles have given up their Fifth Amendment rights. In addition, a defendant's refusal to self-incriminate prevents his lawyer from advocating a zealous defense – which would generally include an attempt to rebut the presumption of certification due to the more serious consequences available in adult court. *See* Brief of *amicus curiae* NJDC *passim.*

whether a youth should be tried in juvenile or adult court. *See* Appendices A and B. Twelve states accomplish this by statute;[2] courts in at least seven states have issued rulings to protect a youth's rights against self-incrimination in the transfer/waiver context even where statute or court rule does not explicitly do so.[3]

For example, in an Arizona transfer case, the court ordered the youth to undergo a mental examination but failed to also order limits upon the use of any statements made by the youth during the evaluation. *In re Appeal In Pima County, Juvenile Action No. J-77027-1*, 679 P.2d 92, 93-94 (Ariz. App. Ct. 1984). Consequently, the youth, on advice of counsel, refused to

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[2] For example, Michigan law provides the following:

> **(G) Psychiatric Testimony.**
>
> (1) A psychiatrist, psychologist, or certified social worker who conducts a court-ordered examination for the purpose of a waiver hearing may not testify at a subsequent criminal proceeding involving the juvenile without the juvenile's written consent.
>
> (2) The juvenile's consent may only be given:
>
> (a) in the presence of an attorney representing the juvenile or, if no attorney represents the juvenile, in the presence of a parent, guardian, or legal custodian;
>
> (b) after the juvenile has had an opportunity to read the report of the psychiatrist, psychologist, or certified social worker; and
>
> (c) after the waiver decision is rendered.
>
> (3) Consent to testimony by the psychiatrist, psychologist, or certified social worker does not waive the juvenile's privilege against self-incrimination.

MICH. COMP. LAW ANN. § 3.950(G)(1) (West, Westlaw through orders received June 19, 2007). Similarly, Maryland's statute substantially limits the admission into evidence at adjudicatory hearings and criminal trials of statements made during pre-trial evaluations and in transfer hearings. MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-12(b) and (c) (West, Westlaw through 2007 Reg. Sess. and 2007 First Spec. Sess.) *See* Appendix A for a complete list of state statutes.

[3] *See, e.g., In the Interest of A.D.G.*, 895 P.2d 1067, 1072-73 (Col. App. Ct. 1994), *cert. denied* June 5, 1995 (reaching the same result in similar case, upon finding that juvenile court cannot penalize youth for exercising his right to silence in a psychological evaluation by basing the transfer decision on the refusal to cooperate). *See* Appendix B for a complete list of state decisions.

participate in the examination. *Id.* at 93. The court later ordered that the case be transferred to adult court based on its determination that the youth was not amenable to treatment; the record demonstrated that the court's determination was based in large part on the juvenile's refusal to cooperate in the court-ordered psychological examination. *Id. at 94-95.* The Arizona appellate court held that by failing to order limits on the use of the youth's statements, and then "penalizing" the youth for refusing to cooperate by transferring the case to criminal court, the juvenile court violated the youth's right against self-incrimination. *Id.* at 95-96. Similarly, in the instant cases, the juvenile courts violated the youths' privilege by not imposing use limitations on their statements in the court-ordered evaluations in the absence of any statutory prohibitions and then ordering that the cases be certified to adult court.[4]

The above-described protections in both statute and case law recognize that the accused's "description and explanation of the circumstances of the alleged offense ... may significantly affect decisions about punishment or transfer for adult proceedings," and that "[a]s to the circumstances and gravity of the offenses alleged, the juvenile may be the only witness who can present any mitigating circumstances for the court to consider." *Ramona R. v. Superior Court,* 693 P.2d 789, 792 (Cal. 1985) (citations omitted). A youth subject to the possibility of transfer to adult court should not be faced with the "unfair choice" of withholding critical information from the examiners in an effort to remain in juvenile court, or divulging such information and having his statements used against him in subsequent juvenile and criminal proceedings. *Id.*

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[4] That the youth in the instant cases did not explicitly invoke their right to remain silent during the clinical evaluations and probation interviews, *see Part I.b,. infra*, is immaterial given the harsh consequence they would face if they did so assert. *See Dzul v. State*, 118 Nev. 681, 689, 56 P.3d 875, 880-81 (2002) (noting exception to general rule that requires an affirmative invocation of privilege where the state creates a "classic penalty situation" such that the accused faces harsher penalties as a consequence of invoking the privilege) (citation omitted).

(citations omitted). Strict limits on the use of information obtained in evaluations are necessary because the "privilege against self-incrimination requires the prosecution in a criminal trial to produce sufficient evidence to establish the defendant's guilt *before* he must decide whether to remain silent." *Id.* at 794 (citation omitted) (emphasis in the original).

These legal protections are further required precisely because examinations conducted to aid the court in determining certification necessarily involve "evidence of a testimonial or communicative nature" that falls within the scope of the privilege against self-incrimination. *In the Interest of Bruno*, 388 So. 2nd 784, 787 (La. 1980) (citation omitted). With respect specifically to securing the Fifth Amendment rights of the accused during pre-trial evaluations, the vast majority of courts and legislatures around the nation strictly limit the admissibility into evidence of pre-trial evaluations administered to serve the court in making critical decisions in the accused's case.

Indeed, the Nevada Supreme Court has held, in accordance with *Estelle*, that admission into evidence at trial of statements that were made by an accused during a court-ordered mental examination violates the defendant's right against self-incrimination. *Esquivel v. State,* 96 Nev. 777, 778, 617 P.2d 587, 587 (1980). In *Esquivel*, this Court held that it was reversible error for the prosecution to introduce statements made by the defendant to a psychiatrist during a court-ordered mental health examination. *Id.* This Court held that a person being examined by a court-appointed physician should feel free "to discuss all the facts relevant to the examination without the guarded fear that the statements may be used against him." *Id.* This Court reached a similar conclusion in *McKenna v. State*, 98 Nev. 38, 39-40, 639 P.2d 557, 558-559 (1982). In *McKenna*, the court ordered a mental examination for the limited purpose of inquiring into the defendant's sanity. *McKenna*, 98 Nev. at 38, 639 P.2d at 558. The later admission at trial of the

defendant's statements regarding the circumstances surrounding a cellmate's murder violated the defendant's constitutional right against self-incrimination and was again held reversible error by this Court. *Id.* at 39-40, 639 P.2d at 558-559.

In addition, this Court's cases specifically recognize the prejudice to all parties from the specter of the reliance on statements encumbered by the "guarded fear" of the maker. *See Esquivel*, 96 Nev. at 778, 617 P.2d at 587. The *Esquivel* court recognized that a defendant may be less forthcoming if he has a reason to fear the later use of his statements. *Id.* The *McKenna* court noted that it would be "impossible to meet the objectives of [the] examination" without a prohibition on the use of the statements in later proceedings to prove guilt. *McKenna,* 98 Nev. at 39, 639 P.2d at 558.[5] Likewise, in the instant case, it would be impossible to achieve the objectives of the statutory provision giving a child the opportunity to rebut the presumption of eligibility for transfer unless the child is assured, at the time of the pre-trial statement, that the statements cannot be subsequently used against him. Like the defendants in *Esquivel* and *McKenna*, William and Marques should not be subject to the possibility that an incriminating statement made for the limited purpose of rebutting the presumption of certification can be used to convict them during any adjudication of their case.

Finally, the Nevada legislature has actually acknowledged the proscriptions of *Estelle*, *Esquivel* and *McKenna* in provisions governing regular juvenile adjudicatory proceedings. The Nevada statute authorizing a juvenile court to order an evaluation by a "qualified professional" of a child alleged to have committed an offense with a firearm provides in pertinent part that:

> If a child is evaluated by a qualified professional pursuant to this section, *the statements made by the child to the qualified professional during the evaluation*

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[5] This Court's holdings also are consistent with the law in thirty other states that substantially limit, if not completely prohibit, the admission at trial of statements made in pre-trial, court-ordered evaluations. *See* Appendix C.

> *and any evidence directly or indirectly derived from those statements may not be used for any purpose in a proceeding which is conducted to prove that the child committed a delinquent act or criminal offense*. The provisions of this subsection do not prohibit the district attorney from proving that the child committed a delinquent act or criminal offense based upon evidence obtained from sources or by means that are independent of the statements made by the child to the qualified professional during the evaluation.

NEV. REV. STAT. ANN. § 62C.060(5) (West, Westlaw through Reg. Sess. 74th Leg. 2007) (emphasis added). In creating this provision, the Nevada legislature has acknowledged and affirmatively acted to protect a child's right against self-incrimination in the pre-trial stage. This Court must act here to ensure Nevada's children the full benefit of the Fifth Amendment's guarantees in these certification proceedings as well.

B. William's and Marques's certifications to adult court must be reversed as they could not fully develop rebuttal evidence for the court without first waiving their constitutional right against self-incrimination.

Nevada's presumptive certification statute places an unconstitutional burden on William and Marques because it requires each of them to fully discuss the circumstances of the charged offense with the court in order to meet the burden of proof and does not provide protection against self-incrimination. Indeed, the juvenile courts recognized the conflict inherent in the children meeting their burden without divulging details of their involvement in the charged offenses. As the juvenile court stated at William's certification hearing:

> the burden must be met by clear and convincing evidence that the alleged conduct was a result of alcohol use. Defense must establish a nexus between the alcohol abuse and the alleged conduct. *Minor has stated he was not present at the scene of the crime; therefore, burden cannot be met.*

(William M. Appendix at 8-9) (emphasis added). Similarly in Marques's case, the juvenile court seized on the child's denial that he was present at the scene of the crime as foreclosing the possibility that the child could meet his burden. (*See* Marques B. Appendix at 6.) ("There must

be a nexus which indicates the alleged crime was the result of Cannabis abuse or related disorders. Minor stated he was not present at the scene of the crime, burden cannot be met.")

To meet the statutory burden, William and Marques needed to present expert evidence describing how their respective substance abuse and other emotional and mental disorders "substantially contributed to" or "substantially influenced" their actions in the charged offenses. For clinicians and other independent evaluators to opine on this issue, William and Marques would have had to fully discuss the circumstances surrounding their actions at the time of the alleged incidents. This discussion would include an explanation of the sequence of events, the interactions of the various parties and the details of the consumption or use of certain substances and the effect of such use or consumption, namely the commission of the alleged crime.

Because the current law does not protect the content of the expert's opinions, William and Marques were unable to share the details of the circumstances of the charged offense or convey their mental condition at the time of the charged offense without risking the subsequent admission into evidence at the adjudicatory stage of any incriminating statements. William was actively discouraged from divulging offense-specific information in discussions with his probation officer. In her certification report on William, the probation officer specifically noted that when William attempted to discuss the circumstances of the offense, she told him not to say anything. (William M. App. at 73.)[6] The probation officer who interviewed Marques

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[6] The government asserts that the in lieu of discussing his involvement in the offense, William could have presented testimony from other witnesses that he was a substance abuser at the time or under the influence at the time of the alleged offense, and then call an expert to say that "it is common for individuals who suffer from such disorders to engage in the specific activity leading to the charges, and that it is probable that if Defendant committed these offenses, it was caused by the substance abuse/disorder." Respondent's Br. in William M. at 6 n. 4 (emphasis added). While the trial court has great discretion in admitting expert testimony, *Baltazar-Monterrosa v. State*, 122 Nev. 606, ---, 137 P.3d 1137, 1142 (2006), *amici* assert that the court could give little weight to the type of testimony hypothesized by the government due to the high level of speculation on which it would be based. The government itself points out that it is not enough for the boys to establish that they had a past history of

acknowledged that he did not obtain detailed information from Marques (Marques B. App. at 95.) Consequently, Marques's interviewing probation officer concluded that "[w]hat remains unknown is whether Marques acted out of physical need or mental imbalance." (Marques B. App. at 95.)

Because the statements made by a child to a probation officer or other expert can be used against the child, neither William nor Marques was able to meet the requirements of the statute to overcome the presumption of certification to adult court. In the absence of securing the juveniles' Fifth Amendment rights, the purported statutory exception to certification is a nullity. As evidenced by the statute's application to William and Marques here, the lack of constitutional protection makes it both impossible for the child to remain in juvenile court if he asserts his Fifth Amendment right to silence and prevents the court from considering relevant evidence of the extent to which emotional or mental disorders or substance abuse played a significant role in the alleged commission of the charged offenses. If the statute included protection against self-incrimination, William and Marques would have had the opportunity to argue that they should remain in juvenile court by participating in an open and protected discussion of the circumstances of the offenses.

For these reasons, this Court should hold that any statements made by a child during interviews and evaluations conducted to aid the court in determining whether to certify pursuant to NEV. REV. STAT. ANN. § 62B.390 are inadmissible in any other proceeding except the certification hearing and then only for the limited purpose of rebutting the statutory presumption.. Because William and Marques did not have this protection, this Court should

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drug use or emotional disorders and instead they must show how these factors substantially influenced or contributed to the alleged offense. Respondent's Br. in William at 5-6. As demonstrated *supra*, the boys could not develop such evidence without first waiving their rights against self-incrimination.

reverse their certification to adult court, and remand to the juvenile court to permit William and Marques to develop the record in a manner that protects their rights against self-incrimination.

II. NEVADA'S PRESUMPTIVE CERTIFICATION STATUTE VIOLATES APPELLANTS' RIGHTS TO PROCEDURAL DUE PROCESS.

Juveniles retain not only their right against self-incrimination in certification proceedings, but also their right to Due Process under the Fifth and Fourteenth Amendments to the U.S. Constitution. The U.S. Supreme Court has firmly established that the basic requirements of due process apply to juvenile transfer proceedings. In *Kent v. United States*, 383 U.S. 541, 560 (1966), the Court held that certification to adult court is a "critically important" stage of the criminal process, where the proceedings "must measure up to the essentials of due process and fair treatment." *Id.* at 561-62, citing *Pee v. United State*s, 274 F.2d 556, 559 (D.C. Cir.1959). The United States Supreme Court refrained from mandating that specific procedural requirements be granted by the state, but clearly held that once a hearing was granted as a matter of statutory right, as in Nevada, such hearing must comport with basic due process and remain fundamentally fair. 383 U.S. at 560-562. *See also Juvenile Male v. Commonwealth of Northern Mariana Islands,* 255 F.3d 1069, 1072 n.3 (9th Cir. 2001).

A. Nevada's presumptive certification statute violates procedural Due Process because the "clear and convincing" standard cannot be met absent an admission of guilt and thus does not comport with fundamental procedural fairness.

As discussed in Point I A *supra*, Nevada grants juveniles the statutory right to rebut presumptive certification to adult court under NEV. REV. STAT. ANN. § 62B.390(2), which creates a presumption in favor of adult court jurisdiction for any minor charged with a sexual assault involving the use or threatened use of force or violence or with an offense or attempted offense

involving the use or threatened use of a firearm. Since Nevada has created a statutory right to present evidence rebutting the presumption of certification, *Kent* requires that the procedures available to the juvenile must comport with the essentials of due process. Unfortunately, however, Nevada's transfer procedure is a toxic combination of constitutional burdens on the statutory right to rebut presumptive transfer.

In this case, Appellants William and Marques would have been forced to admit, in either court-ordered evaluations or testimony at the certification hearing, that they committed the charged crime in order to avail themselves of their statutory right to rebut the presumption of transfer under NEV. REV. STAT. ANN. § 62B.390(3)(b): that their actions (that is, the crime charged) were "substantially the result of the substance abuse or emotional or behavioral problems of the child."[7] This burden placed on appellants implicates a host of constitutional concerns because a child must admit participation in the crime to both the court and his attorney, violating the Fifth Amendment's prohibition against self incrimination (*see* discussion, *supra)* and the Sixth Amendment's right to counsel (*see* Brief of *amicus curiae* National Juvenile Defender Center). These constitutional concerns stand alone and are fully briefed before this Court. However, the infringement of these two constitutional provisions, considered in conjunction with the very high burden placed on juveniles attempting to rebut transfer ("clear and convincing evidence"), the prejudicial nature of the required showing, and the fact that a judge, after hearing this required "admission" may still certify the child as a matter of discretion,

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[7] In a due process challenge to the language of NEV. REV. STAT. ANN. § 62B.390(3) as void for vagueness, this Court held in *Anthony Lee. R.*, 112 Nev. 1406, 1416-17, 952 P.2d 1, 7-8 (Nev. 1997), that a juvenile must show only that the child's substance abuse or emotional problems "substantially contributed to" or "substantially influenced" the child's actions. This Court has not specifically considered a due process challenge to NEV. REV. STAT. ANN. § 62B.390 other than this challenge based on vagueness.

collectively create a process that is so completely stacked against the juvenile defendant that it also offends basic principles of due process.

It should first be assumed, as this Court has noted, that the legislative intent behind NEV. REV. STAT. ANN. § 62B.390 is "that the presumption be rebuttable under some circumstances." *Anthony Lee R.*, 952 P.2d at 8, 112 Nev. at 1417. Yet the combination of procedures required to rebut the transfer makes this an almost impossible result. The state may assume for the purposes of transfer that the juvenile has committed a crime, within the limits of the constitution. *See, e.g., United States v. Miguel,* 338 F.3d 995, 1003 n. 23 (9th Cir.2003) ("The transfer statute suggests that assuming the truth of the allegations is entirely appropriate."). However, this is a far cry from requiring the juvenile to *prove* his involvement in a crime by drawing a close nexus – under *Anthony Lee R.*, a substantial contribution – between a history of abuse or problems and the crime itself.

First, the state requires the juvenile to make a showing by "clear and convincing evidence" that the exemptions in NEV. REV. STAT. ANN. § 62B.390(3) apply. In order to do this, a juvenile must draw a direct tie between substance abuse or emotional problems and the challenged crime. In this case, the respondent prosecutors have alleged that this connection can be proven in a hypothetical manner, in order to maintain some semblance of due process:

> Hypothetically, a Defendant who does not wish to acknowledge guilt could gather witnesses (or declarations from witnesses) that establish that Defendant was a substance abuser at the time of the offense, or that on the day/night of the offense he was under the influence of the substance. Then, defense counsel could call an expert witness and establish that it is common for individuals who suffer from such disorders to engage in the specific activity leading to the charges, and that it is probable that if Defendant committed these offenses, it was caused by the substance abuse/disorder.

Respondent's Br. in William M. at 6 n.4.

Respondent's argument misses the mark. Far from assuaging constitutional concerns, Respondent's tortured hypothetical shows the absurd procedural requirements placed upon a juvenile who wishes to rebut certification. A juvenile – statistically likely to be represented by appointed counsel – would have to conjure an elaborate history of substance abuse, put on an expert witness,[8] and show a "probable" or "common" analogy to the charged crime. After all of this, a juvenile would still be likely to fail the procedural requirement that "clear and convincing evidence" of the substantial link between his substance abuse and the charged crime be shown. The facts in this very case show the absurdity of this approach, and prove that the required procedures under NEV. REV. STAT. ANN. § 62B.390 are so completely stacked against the juvenile as to offend the protections of procedural due process.

The records in both William's and Marques's cases reflect that no amount of hypothetical or expert testimony would have been sufficient to meet the burden of NEV. REV. STAT. ANN. § 62B.390(3) as interpreted by trial judges. Admitting their presence at and involvement in the charged crimes was an absolute necessity to meet the burden of rebutting the presumption of transfer.[9] The procedural burden of NEV. REV. STAT. ANN. § 62B.390(3) cannot be met absent

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[8] The provision of an expert witness in a transfer proceeding is particularly difficult for indigent juveniles, whose counsel would have to petition the court for permission to expend resources on an expert called in to testify solely on hypotheticals and assumptions. This may not be a request that would be granted in many cases, and in spite of Respondent's contention, is virtually certain to incur opposition from the state prosecutor in each case. Indeed, the state would be within its rights to object to the admission of any expert testimony based not on facts, but on hypothetically similar situations, and to impeach such an expert. Thus, Respondent's suggestion that expert testimony is a panacea for fulfilling the requirements of NEV. REV. STAT. ANN. § 62B.390(3)(B) is disingenuous.

[9] In spite of respondent's contention that the juvenile judge in this case "did not state that [rebutting the presumption] is an impossibility or that defendant failed to meet his burden specifically because he chose not to acknowledge guilt," Respondent's Br. in William M. at 2, the juvenile court record in this case explicitly belies this characterization. Indeed, the record shows that the procedural burden in this case *requires* a defendant to implicate himself to avail himself of the "clear and convincing" standard. In the juvenile court minutes of the certification hearing in William M.'s case on November 20, 2006, the juvenile court judge wrote that "[m]inor has stated he was not present at the scene of the crime; therefore,

an admission of guilt by defendant. As such, Nevada's presumptive transfer provison impermissibly burdens the right against self-incrimination, and is clearly in violation of the basic requirements of the Due Process Clause. This prejudicial and punitive burden cannot meet the requirement of fundamental fairness under *Kent*, and should be struck down by this Court as violative of juveniles' right to due process of law.

It should be noted that the "clear and convincing" standard alone is unlikely to *per se* violate the constitutional guarantees of due process in the context of a rebuttable presumption. For instance, an Illinois appellate court has found a similar transfer statute permissible in requiring "clear and convincing evidence that the minor would be amenable to the care, treatment, and training programs available through the facilities of the juvenile court." *People v. Beltran,* 765 N.E.2d 1071, 1075 (Ill. App. Ct. 2002) (citing 705 IL. COMP. STAT. 405/5-805(2)(b)). What sets Nevada's procedural burden apart is that the burden of proof is the nexus between the substance abuse or emotional problems and the *alleged criminal conduct itself.* The defendant is not merely required to carry the burden of proving his amenability to treatment or that his retention in juvenile court serves public safety; he must also establish his reduced culpability for the crimes alleged within the allowable, narrow statutory framework. This procedural burden is far too high and clearly implicates the Fifth and Sixth Amendments, and in so doing, violates the requirements of basic fairness set out in *Kent.*

B. The fundamental unfairness of Nevada's transfer statute is exacerbated by the fact that even after a juvenile meets the coercive "clear and convincing" standard by admitting guilt, a judge retains the right to transfer the juvenile as a matter of discretion.

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burden cannot be met." (William M. Appendix at 8-9) Marques' juvenile judge echoed this exact thought process, and foreclosed the possibility that Marques could ever meet his burden, because he maintained his innocence. (*See* Marques B. Appendix at 6.)

Finally, Nevada's transfer statute further offends the principles of fundamental fairness by providing that even if a minor were to meet the "clear and convincing" standard by making the required admissions, a judge retains the right to certify the minor under his discretionary transfer power. This Court has specifically ruled in *In re William S,* 122 Nev. 432, 132 P.3d 1015 (2006), that after a juvenile rebuts the presumption of transfer under NEV. REV. STAT. ANN. § 62B.390(3)(b), the judge retains the right to transfer the juvenile at his discretion. *William S.,* 122 Nev. at --, 132 P.3d at 1018.

The deep flaw in this discretionary transfer right is that it comes *after* a minor has already presented the highly prejudicial admission of guilt required under NEV. REV. STAT. ANN. § 62B.390(3)(b) – a fact that is clearly likely to influence a judge's decision to transfer. Not only is a juvenile required to waive his right against self-incrimination in order to avail himself of his statutory right to rebut, but then all of the highly prejudicial "clear and convincing" evidence obtained – as *Amici* argue, unconstitutionally – may be used by the Court as supporting reasons for discretionary transfer.

This statutory framework places juveniles like William and Marques in an untenable position, and are notable in their *un*fairness. Extorting an admission from juveniles for the purported purpose of avoiding transfer and then allowing the use of such admissions to support transfer and ultimately guilt at the trial stage is completely at odds with the standard of fundamental fairness required in juvenile proceedings. As such, we believe this Court should find that the procedural requirement of "clear and convincing" evidence of a nexus to the crime, and the lack of protection afforded that evidence, clearly violate the standards set out in *Kent* and the requirements of fundamental Due Process.

As an end note, *amici curiae* ACLUN and JLC also incorporate the arguments in the brief of *amicus curiae* National Juvenile Defender Center that the transfer procedure violates a juvenile's right to effective counsel. As noted above, the Due Process argument is inextricably intertwined with the protection against self-incrimination. While these constitutional violations should be considered separately, when viewed in conjunction with the procedural flaws listed above, it becomes clear that the transfer system is profoundly broken and violates several constitutional protections. Measured against the procedural due process standard of fundamental fairness under the Fourteenth Amendment, the fact that the unconstitutionally high burden on defendants also gives rise to these separate constitutional violations should be relevant to this Court under the fairness standard.

CONCLUSION

Amici curiae urge this Court to hold that Nevada's presumptive transfer statute, as set forth in NEV. REV. STAT. ANN. §§ 62B.390(2) and (3), violates the constitutional rights of children facing certification to adult court. By making the rehabilitative promise of juvenile court contingent upon a confession, the transfer process gives juvenile defendants the impossible choice of testifying against themselves or facing the adult criminal system, with its harsher penalties and punishment-oriented ethos. Further, if a child does attempt to rebut the presumption of transfer, any information they give may be used against them, and the judge still retains the authority to transfer any juvenile as a matter of discretion. No child should be forced to make this choice, and the U.S. and Nevada constitutions protect their right not to do so. William's and Marques's stories illuminate the constitutional infirmity of this choice: both children maintained their innocence, and were *penalized* for it with certification. Not one more child should be put in the situation that is reflected in the records to William's and Marques's

cases. Nevada's presumptive transfer statutes violate the Fifth Amendment's protection against self-incrimination, and are offensive to the tenets of basic fairness required by the Due Process Clause of the Fifth and Fourteenth Amendments.

Respectfully Submitted this 31st Day of January, 2008:

Lee Rowland, Bar No. 10209
Allen Lichtenstein, Bar No. 3992
ACLU of Nevada
732 South Sixth Street, Suite 200A
Las Vegas, NV 89101
(702) 366-1536
(702) 366-1331 (fax)

Marsha Levick, Pa. Bar No. 22535
Lourdes Rosado, Pa. Bar No. 77109
Juvenile Law Center
The Philadelphia Building, Fourth Floor
1315 Walnut Street, Suite 400
Philadelphia, PA 19107
(215) 625-0551
(215) 625-2808 (fax)

Certificate of Service

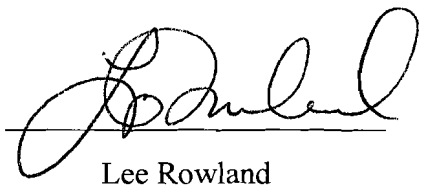
I hereby certify that I deposited a true and correct copy, postage prepaid, via the U.S. Mail, of the foregoing Amicus Brief of ACLUN and JLC to the following individuals on January 30, 2008:

Kristina Wildeveld
1100 South Tenth Street
Las Vegas, Nevada 89104
(702) 257-9500

Catherine Cortez Masto
Nevada Attorney General
100 North Carson St.
Carson City, Nevada 89701
(775) 684-1265

David Roger
Clark County District Attorney
Regional Justice Center
200 Lewis Ave.
P.O. Box 552212
Las Vegas, Nevada 89155
(702) 671-2500

Teresa Lowry
Chief Deputy District Attorney
DA's Office, Juvenile Division
601 North Pecos Rd.
Las Vegas, Nevada 89101
(702) 455-5320



Lee Rowland

Appendix A

State statutes securing youths' right against self-incrimination when undergoing examinations for transfer/waiver

Alabama. ALA. CODE § 15-19-5 (West, Westlaw through 2007 Sess.) (statements made by the defendant during examination to determine youthful offender status may not be used against defendant until sentencing after defendant has been found guilty); **Georgia.** GA. CODE ANN. § 15-11-30.2(e) (West, Westlaw through 2007 Sess.) (prohibiting use of statements made by juvenile in transfer proceedings in later criminal proceedings over juvenile's objection); **Iowa.** IOWA CODE ANN. § 232.45(11) (West, Westlaw through Acts of the 2007 1st Reg. Sess.) (statements made during intake or waiver hearing are inadmissible in case-in-chief in subsequent criminal proceedings over child's objections); **Louisiana.** LA. CHILD. CODE ART. ANN. 862(C)(2) (West, Westlaw through 2007 Sess.) (transfer hearing record is not admissible in subsequent criminal proceedings except for impeachment); *See also In Interest of Bruno*, 388 So. 2d 784, 787 (La. 1980) (statements made in court-ordered examination for purposes of waiver hearing inadmissible at trial on the issue of guilt or innocence); **Maryland.** MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-12(b) and (c) (West, Westlaw through 2007 Reg. Sess. and 2007 First Spec. Sess.) (statements in court-ordered evaluations are inadmissible at any adjudicatory hearing except on the issue of respondent's competence to participate in such proceedings and responsibility for his conduct, or in a criminal proceeding prior to conviction) (statements made at waiver hearing cannot be used in adjudication or criminal trial unless a person is charged with perjury and the statement is relevant to that charge); **Michigan.** MICH. COMP. LAW ANN. § 3.950(G)(1) (West, Westlaw through orders received June 19, 2007) (psychiatrist, psychologist, or certified social worker who conducts a court-ordered examination for the purpose of a waiver

hearing may not testify at a subsequent criminal proceeding involving the juvenile without the juvenile's written consent); **Mississippi**. MISS. CODE ANN. § 43-21-157 (West, Westlaw through 2007 Reg. Sess. and 1st Exec. Sess.) (testimony at the hearing is not admissible in any proceeding other than the transfer hearing); **New Jersey.** N.J. STAT. § 2A:4A-29 (West, Westlaw through L.2007, c. 246 and J.R. No. 16) (testimony at waiver hearing is not admissible in any hearing to determine delinquency or guilt); **North Dakota.** N.D. CENT. CODE § 27-20-34(6) (West, Westlaw through 2007 Sess.) (statements made by the child at the transfer hearing are not admissible against the child over objection in the criminal proceedings following the transfer except for impeachment); **Tennessee.** TENN. CODE ANN. § 37-1-134(f)(1) (West, Westlaw through 2007 First Reg. Sess.) (statements made by the juvenile at a transfer hearing are not admissible against the child, over objection, in further criminal proceedings); **Virginia.** VA. CODE ANN. § 16.1-269.2(A) (West, Westlaw through 2007 Reg. Sess.) (any statement by a juvenile at a transfer hearing shall not be admissible against him over objection in any criminal proceedings following the transfer, except for impeachment purposes); **Wyoming.** WYO. STAT. ANN. § 14-6-237(e) (West, Westlaw through 2007 Sess.) (statements made by juvenile in transfer hearing are not admissible against him over objection in criminal proceeding following the transfer).

Appendix B

State case law securing youths' right against self-incrimination when undergoing examinations for transfer/waiver

Alaska, *R.H. v. State,* 777 P.2d 204, 211 (Alaska Ct. App. 1989) (court-ordered psychological evaluation for use in determining amenability violates a child's privilege against self-incrimination); **Arizona**, *See In re Appeal In Pima County, Juvenile Action No. J-77027-1*, 679 P.2d 92, 95-96 (Ariz. Ct. App. 1984) (court's failure to order limits upon use which could be made of juvenile's statements made pursuant to a court-ordered mental evaluation for transfer determination and its penalizing of juvenile for refusing to cooperate in the mental evaluation violated juvenile's privilege against self-incrimination); **California**, *Ramona R. v. Superior Court,* 693 P.2d 789, 810 (Cal. 1985) (testimony of minor during fitness hearing, or statements made to probation officers, cannot be used at trial); **Colorado**, *In the Interest of A.D.G.,* 895 P.2d 1067, 1072-73 (Col. App. Ct. 1994), *cert. denied* June 5, 1995 (juvenile cannot be ordered to undergo psychological examination over objection in transfer proceeding because it would infringe on is or her Fifth Amendment right against self-incrimination); **Indiana**, *Cf. Clemons v. State,* 317 N.E.2d 859, 866 (Ind. Ct. App. 1974), *cert. denied*, 423 U.S. 859 (1975) (Fifth Amendment privilege against self-incrimination is inapplicable in the juvenile court waiver hearing setting where a confession by the juvenile may not be viewed as inculpatory and where it may not be used in a later criminal or delinquency adjudication; **Minnesota**, *In re S.J.T.*, 736 N.W.2d 341, 350 (Minn. Ct. App. 2007) (Presumptive certification does not violate privilege against self-incrimination because courts can grant tranasactional immunity to provide protection against further use of testimony and compelled investigation); and **New Mexico**, *Christopher P. v. State*, 816 P.2d 485, 488-89 (N.M. 1991) (privilege against self-incrimination prohibits forcing

juvenile to make inculpatory statements during court-ordered evaluations prepared for transfer hearing).

Appendix C

State statutes, court rules and case law limiting the admissibility of pre-trial, court-ordered evaluations

Alabama. ALA. R. CRIM. P. 11.2(b)(1) (results of compulsory examination of defendant's mental competency to stand trial are not admissible as evidence in a trial for the offense charged); ALA. R. CRIM. P. 11.8 (the state may not use evidence obtained by a compulsory mental examination of the defendant to assess competency in a criminal proceeding unless the defendant offers evidence in support of a plea of not guilty by reason of mental disease or defect); ALA. R. EVID. 503(d)(2) (statements in court-ordered evaluation only admissible with respect to the particular purpose for which the examination is ordered unless the court orders otherwise); **Alaska.** ALASKA R. EVID. 504(d)(6) (statements in court-ordered evaluation only admissible with respect to the particular purpose for which the examination is ordered unless the judge orders otherwise); **Arizona**. 16A A.R.S. R. CRIM. PROC. 11.7 (statement in court-ordered examination inadmissible unless defendant raises insanity defense); **Arkansas.** ARK. R. EVID. 503(d)(2) (statements in court-ordered evaluation only admissible with respect to the particular purpose for which the examination is ordered unless the court orders otherwise); **California**. *Cf. Baqleh v. Superior Court*, 122 Cal. Rptr. 2d 673, 692-93 (Cal. Ct. App. 2002) (statements made during competency evaluation inadmissible at guilt and sentencing phases); **Colorado**. COLO. REV. STAT. ANN. § 19-2-1305(3) (West, Westlaw through First Reg. Sess. of Sixty-Sixth Gen. Assem. 2007) (mental competency examination inadmissible as to issues raised by not guilty plea); **Connecticut**. CONN. GEN. STAT. ANN. § 46b-124(j) (West, Westlaw through 2007 Jan. Reg. Sess. and public acts from June Sp. Sess. approved by Gov. on or before October 5, 2007) (statements in mental health evaluations conducted in juvenile matter may only be used for treatment and planning

purposes); **Delaware.** DEL. R. EVID. 503(d)(2) (statements in court-ordered evaluations not privileged with respect to the particular purpose for which the examination is ordered unless the court orders otherwise); **Florida**. FLA. R. JUV. P. 8.095(d)(5) (information learned in competency evaluation admissible only for the limited purpose of determining competency to proceed); Fla. R. Crim. P. 3.211(e) (limiting use of competency evidence against defendant for any purpose other than determining competency); **Hawaii.** HAW. R. EVID. 504.1(d)(2) (statements in court-ordered evaluations not privileged with respect to the particular purpose for which the examination is ordered unless the court orders otherwise); **Idaho**. IDAHO R. EVID. 503(d)(2) (exception to psychotherapist-patient privilege with respect to particular purpose for which examination is ordered by the court order); **Illinois**. 740 ILL. COMP. STAT. ANN. 110/10(a)(4) (West, Westlaw through P.A. 95-707 of 2007 Reg. Sess.) (statements in court-ordered evaluations admissible only on issues regarding physical or mental condition and only if defendant informed that statements would not be confidential); **Maryland**. MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-12 (West, Westlaw through 2007 Reg. Sess. and 2007 First Spec. Sess.) (statements in court-ordered evaluations are inadmissible at any adjudicatory hearing except on the issue of respondent's competence to participate in such proceedings and responsibility for his conduct, or in a criminal proceeding prior to conviction); **Massachusetts**. MASS. GEN. LAWS Ch. 233, § 20B(b) (West, Westlaw through Ch. 9 of 2008 2nd Ann. Sess.) (if a judge finds that the patient, after having been informed that the communications would not be privileged, has made communications to a psychotherapist in the course of a psychiatric examination ordered by the court, such communications shall be admissible only on issues involving the patient's mental or emotional condition but not as a confession or admission of guilt); **Michigan**. MICH. COMP. LAWS ANN. § 330.2028(3) (West, Westlaw through P.A.2007,

No. 221) (results of examination of defendant's mental competency to stand trial inadmissible as to guilt); **Minnesota**. 49 MINN. STAT. ANN., R. CRIM. P. 20.02(5) and (6) (West, Westlaw through Nov. 1, 2007), MINN. R. JUV. DEL. P. 13.04 (West, Westlaw through Nov. 1, 2007) (statements in court-ordered evaluations only admissible as to defense of mental illness or mental deficiency); **Mississippi**. MISS. R. UNIF. CIR. AND CTY. CT. 9.07 (when defendant raises insanity defense, no statement made by accused in examination to determine mental state shall be admitted against defendant on issue of guilt in any proceeding); MISS. R. EVID. 503(d)(2) (no privilege in court-ordered examination with respect to particular purpose for which examination was ordered); **Missouri**. MO. SUP. CT. R. 123.01, MO. REV. STAT. § 552.020(14) (West, Westlaw through 2007 First Extraordinary Sess. 94th Gen. Assem.) (No statement made by the accused in the course of any examination or treatment pursuant to this section and no information received by any examiner or other person in the course thereof, whether such examination or treatment was made with or without the consent of the accused or upon his motion or upon that of others, shall be admitted in evidence against the accused on the issue of guilt); **Nebraska**. NEB. REV. ST. § 27-504(4)(b) (West, Westlaw through First Reg. Sess. 100th Leg. 2007) (statements in court-ordered examinations not privileged only in respect to the particular purpose for which the examination is ordered unless judge orders otherwise); **New York.** N.Y. C.P.L.R. § 730.20(6) (McKinney 2007) (statement made by a defendant in a competency examination shall be inadmissible in evidence except on the issue of mental condition); **Ohio**. OHIO JUV. R. 32(B) (statements in court-ordered examinations may be utilized only for purposes specified in court order until there is an admission or adjudication of child); **Oregon**. ORE. REV. STAT. ANN. § 419A.255(3) (West, Westlaw through 2007 Reg. Sess. 74th Leg. Assem.) (no information in court-ordered evaluations may be admitted into evidence to establish criminal or civil liability;

such evidence may be admitted as part of pre-sentence investigation after guilt has been established or admitted in criminal court, or in connection with a proceeding in another juvenile court); OR. REV. STAT. ANN. § 40.230(4)(A) (West, Westlaw through 2007 Reg. Sess. 74th Leg. Assem.) (if judge orders examination of the physical condition of the patient, no privilege exists with respect to the purpose for which the judge ordered the examination unless judge orders otherwise); **Rhode Island**. R.I. GEN. LAWS § 40.1-5.3-3(n) (through 2007 legislation) (statements made during examination to determine defendant's mental competency to stand trial inadmissible as to any issue other than mental condition); **South Carolina.** S.C. CODE ANN. § 44-22-90(A)(4) (West, Westlaw through 2007 Reg. Sess.) (information in court-ordered evaluations admissible only on issues involving the patient's mental condition); *see also Hudgins v. Moore*, 524 S.E.2d 105, 108 (S.C. 1999) (recognizing the need to protect the integrity of a court-ordered mental health examination by forbidding the use of the information obtained for purposes other than that ordered by the court); **Tennessee.** TENN. CODE ANN. § 24-1-207(a)(2) (West, Westlaw through 2007 First Reg. Sess.) (statements in court-ordered evaluation admissible only on issues involving the patient's mental or emotional condition and only if patient advised that communications not privileged); TENN. R. CRIM. P. 12.2 (no statement made by the defendant in court-ordered evaluation, no testimony by the expert based on such statement, and no other fruits of the statement are admissible in evidence against the defendant in any criminal proceeding, except for impeachment purposes or on an issue concerning a mental condition on which the defendant has introduced testimony); **Vermont**. VT. STAT. ANN. TIT. 13, § 4816(c) (West, Westlaw through First Sess. of 2007-2008 Vt. Gen. Assem.) (no statement made in the course of the examination by the person examined, whether or not he has consented to the examination, shall be admitted as evidence in any criminal proceeding for the purpose of

proving the commission of a criminal offense or for the purpose of impeaching testimony of the person examined); **Virginia**. VA. CODE ANN. § 16.1-360 (West, Westlaw through 2007 Reg. Sess.) (statements made during examination of defendant's mental competency to stand trial inadmissible at adjudicatory or disposition hearings); **Washington**. *See State v. Decker*, 842 P.2d 500, 503-04 (Wash. Ct. App. 1993) (holding that the court may grant immunity – use and derivative use – to respondent in a pre-dispositional evaluation); **Wyoming.** WYO. STAT. ANN. § 33-27-123(a) (West, Westlaw through 2007 Gen. Sess.) (limited exceptions to privilege for communications to psychologists, including when examination is court ordered).

Appendix D

Statements of Interest of Proposed *Amici Curiae*

Statements of Interest – ACLU brief

Kathleen Boutin

Kathleen Boutin endorses this brief, as an individual and not as a representative of any organization, in support of appellants because as a former ward of the State of Nevada herself, and a well-known Nevada community activist, Ms. Boutin had the opportunity to observe the tragic results when homelessness among unaccompanied minors and involvement in the juvenile justice system intersect, and how those results can be averted for unaccompanied & homeless youth who are represented by strong defense counsel. Ms. Boutin feels that that the current practice of transferring juveniles is damaging to homeless communities and families, and that children facing certification should have the aid of strong, well-trained, well-resourced defense counsel.

Allen F. Breed

Allen F. Breed endorses this brief as a correctional professional expert of over 60 years. As a long term employee of the California Youth Authority where I served as Director of the Department and Chairman of the Youthful Offender Parole Board; as Director of the National Institute of Corrections; and for the past 25 years as a Special Master for Federal Courts, I strongly support Appellants' briefs in the Matter of William M. and Marques B. vs. State of Nevada, Respondent.

Allen F. Breed, Criminal Justice Consultant

P. O. Box 698

San Andreas, California 95249

Clark County Special Public Defender's Office

The Clark County Special Public Defender's Office represents persons accused of murder and capital offenses, including several juvenile defendants. In association with their representation of juveniles accused of murder, the CCSPD also represents juveniles on lesser charges, including charges that are subject to the certification process. The CCSPD believes that the issue presented in this proceeding is of great importance to these clients and the ruling by the Court will have a significant impact upon CCSPD's future cases, thus warranting CCSPD's involvement as amicus curiae.

National Alliance on Mental Illness of Nevada

We in NAMI have worked as advocates for Mental Health Courts to assist with the most humane approach to treatment of those with mental health issues who find their way into the Criminal Justice System. NAMI of Nevada is currently undertaking to work more and more with children and adolescent mental health issues. We are in definite support of any justice that is kind and supports recovery with treatment as opposed to criminalization of those with mental health issues. And what better way to begin this therapeutic justice than with our young.

Nevada Attorneys for Criminal Justice

The Nevada Attorneys for Criminal Justice is a voluntary organization whose members are attorneys who defend people, including juveniles, accused of violating criminal laws. NACJ's members believe that both the criminal justice system and the ideal of justice are enhanced by the considered and fair application of statutory and constitutional principles to every criminal proceeding. NACJ's members believe that the issues presented in

this matter are of great importance to the citizens of this state and that the impact of this Court's decision in this matter will go far beyond the parties to this action and the individual concerns presented by this case. Because this Court's decision will impact other juvenile cases, we submit that involvement by amicus curiae is warranted.

Nevada Disability Advocacy & Law Center

Nevada Disability Advocacy & Law Center (NDALC) is a private, nonprofit organization and serves as Nevada's federally-mandated protection and advocacy system for the human, legal, and service rights of children, juveniles and adults with disabilities pursuant to 42 U.S.C. §§15041 et. seq., 10801 et. seq.; and 29 U.S.C. §794e. NDALC was designated as Nevada's protection and advocacy system by the Governor in March 1995. NDALC's mission includes protecting and advocating for the human and legal rights of juveniles with disabilities and NDALC's agency priorities include advocating for juveniles with disabilities in the juvenile justice system. As such, the issues presented in the consolidated appeals pending before the Nevada Supreme Court, In the Matter of William M, a minor vs. The State of Nevada, case number 48649, and, In the matter of Marques B, a minor, vs. The State of Nevada, case number 48650, are of great concern to NDALC as they impact the 6th and 14th Amendment rights of Nevada juveniles with disabilities in the juvenile justice system. NDALC requests to sign on as Amicus to the Brief of Amicus Curiae National Juvenile Defender Center in Support of Appellants.

Cordell E. Stokes

Cordell E. Stokes endorses this brief as an individual and not as a representative of any organization. In 2007 I was appointed by Supreme Court Justice, Michael Cherry, as the Senior Director for the Las Vegas Clark County Urban League, to the Supreme Court of the State of Nevada, Indigent Defense Commission, whereas the Commission was created for the purposes of studying the issues and concerns with respect to the selection, appointment, compensation,

qualification's, performance standards and case loads of counsel assigned to represent indigent defendants in criminal and juvenile delinquency cases throughout Nevada. As a professional I have over 12 years experience in both the private sector and non-profit sector either advocating for equal justice under the law in the juvenile/criminal justice system, or implementing programs designed to prepare youth and adult for workforce sector(s) and other preventive/educational programming designed to avoid involvement in the juvenile/criminal justice system.

Through fact-finding efforts and community involvement, disparity in the overall justice system is apparent and realized at all levels, thus ensuring the integrity of indigent defense, and in particular the current practice of transferring juveniles (M.B. & W.M) is of upmost importance. Therefore, I truly believe that a strong and effective juvenile justice system is the most effective conduit, or legal mechanism for legally dealing with juveniles entering the justice system, with proper judicial oversight.

Cordell E. Stokes
Vice President Business Development
& Governmental Affairs
Branch-Hernandez and Associates
2480 North Decatur, Suite 140
Las Vegas, Nevada 89108

Thomas and Mack Legal Clinic, William S. Boyd School of Law

The Thomas and Mack Legal Clinic at the William S. Boyd School of Law, University of Nevada Las Vegas houses clinics that provide advocacy for children, youth and families in Nevada. These clinics include Juvenile Justice, Child Welfare, Immigration, Education, and Criminal Appellate. The Juvenile Justice clinic in particular provides legal assistance to children charged in delinquency cases in Clark County, Nevada. The Criminal Appellate Clinic represents youth tried as adults and young adults. The Child Welfare and Education Clinics represent youth in foster care and special education, youth who often find themselves in the juvenile or adult

criminal justice systems. The Immigration Clinic also represents delinquent and dependent children who have immigration issues. The larger mission of the Thomas and Mack Legal Clinic is to offer students integrated academic and practice-based educational experiences, to teach them to be reflective practitioners and multi-disciplinary professionals, to improve the quality of and access to legal systems, and to provide service to communities in need of legal assistance in Nevada. It achieves this mission by integrating legal, social work and educational expertise in its legal representation of, by conducting research into the special needs of children and families at risk, and by providing a resource to the community on issues affecting children, families and the communities from which they come.

Jose Antonio Tijerino

Jose Antonio Tijerino endorses this brief as an individual and community leader. As the head of the national Hispanic Heritage Foundation which works to identify, inspire, and prepare young Latinos for leadership and to serve as role models, I believe it is our responsibility to provide any opportunity for redemption – no matter how small or remote. Cesar Chavez once said: "Our conviction is that human life is a very special possession given by God to man and that no one has the right to take that away, in any cause, however just ..." In light of research which has shown that youth placed in adult facilities are at greater risk of victimization and suicide, and have higher rates of recidivism, I support a separate youth facility for the young offenders to serve their just sentences. And be provided with even the smallest glimmer of an opportunity to see the light.

Washoe County Public Defender's Office

The Washoe County Public Defender's office represents children accused of committing delinquent acts and children accused of being a child in need of supervision. In the course of our representation, we also advocate for and defend children facing the adult certification process. Our office also collaborates with the Washoe County Department of Juvenile Services in the Juvenile Detention Alternatives Initiative (JDAI). The goal of JDAI is to keep juveniles out of

detention facilitates while at the same time trying to find alternate ways of preventing delinquent behavior. We are interested in this issue because the adult certification process directly impacts our clients and has serious consequences for the youth we represent on a daily basis.

Mental Health America

Mental Health America (formerly known as the National Mental Health Association) is the country's leading nonprofit dedicated to helping ALL people live mentally healthier lives. With our more than 320 affiliates nationwide, we represent a growing movement of Americans who promote mental wellness for the health and well-being of the nation – everyday and in times of crisis. Mental Health America envisions a just, humane and healthy society in which all people are accorded respect, dignity, and the opportunity to achieve their full potential free from stigma and prejudice. Mental Health America believes that mental illnesses can influence an individual's mental state at the time he or she commits a crime, can affect how "voluntary" and reliable an individual's statements might be, can compromise a person's competence to stand trial and to waive his or her rights, and may have an effect upon a person's knowledge of the criminal justice system. The process of determining guilt and imposing sentence is necessarily more complex for individuals with mental illnesses. A high standard of care is essential with regard to legal representation as well as psychological and psychiatric evaluation for individuals with mental illnesses. Mental Health America is dedicated to promoting mental health, preventing mental disorders and achieving victory over mental illness through advocacy, education, research and service.

The Office of the Clark County Public Defender

The Office of the Clark County Public Defender represents citizens of Clark County accused of crimes who cannot afford representation. The office is dedicated to aggressive, quality

representation and provides a full range of litigation services for their clients. The juvenile division of the office strives to provide excellence in juvenile delinquency defense and to promote justice for all children. The juvenile division also works 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. We strive to support juvenile defenders through training and networking. The Clark County Public Defender-Juvenile Division goals include ensuring that all children in the justice system must have ready and timely access to capable, well-resourced, well-trained legal counsel. Further, we believe that all children are entitled to legal representation that is individualized; developmentally and age appropriate; and free of racial, ethnic, gender, social, and economic bias. We recognize that a child's underdeveloped sense of responsibility and subsequent lack of maturity, vulnerability to peer pressure, and less-fixed transitory personalities make them less culpable than adult offenders and believe that children are more appropriately treated in the juvenile justice system.