

1 IN THE SUPREME COURT OF THE STATE OF NEVADA

2 IN THE MATTER OF WILLIAM M., A)
3 MINOR,)

No. 48649

4 _____)
5 WILLIAM M.,)
6 Appellant,)
7 vs.)
8 THE STATE OF NEVADA,)
9 Respondent.)

10 _____)
11 IN THE MATTER OF MARQUES B., A)
12 MINOR,)

No. 48650

13 _____)
14 MARQUES B.,)
15 Appellant,)
16 vs.)
17 THE STATE OF NEVADA,)
18 Respondent.)

19 **BRIEF OF AMICUS CURIAE NATIONAL JUVENILE DEFENDER CENTER**
20 **IN SUPPORT OF APPELLANTS**

21 Joel A. Eisenberg
22 Nevada Bar No. 10344
23 BAKER & MCKENZIE LLP
24 Two Embarcadero Center, 11th Floor
25 San Francisco, California 94110
26 (415) 984 3891
27 *Attorneys for Amicus Curiae*
28 Douglas B. Sanders
Sasha Reyes
Sarah Clanton
Liquita L. Thompson
Angela C. Vigil

Robin Walker Sterling
Special Counsel
National Juvenile Defender Center
1350 Connecticut Avenue NW Suite 304
Washington, DC 20036
(202) 452-0010
Attorney for Amicus Curiae

Oral Argument Requested

TABLE OF CONTENTS

I. INTEREST OF AMICUS CURIAE NATIONAL JUVENILE DEFENDER CENTER..... 1

II. NEVADA’S CERTIFICATION STATUTE VIOLATES A CHILD’S CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION..... 3

A. Nevada’s Presumptive Certification Statute Unconstitutionally Interferes With The Child’s Right to Effective Assistance of Counsel During Certification Proceedings..... 3

B. Trampling On Constitutional Protections For Children Subject To Transfer Is Improper Because Certification Erodes Public Safety..... 10

C. Because Presumptive Certification Provisions May Have Harmful, Long-Lasting Effects On Children, The Need For Effective Assistance Of Counsel Is Essential. 13

 1. *The Prosecution of Youth as Adults Ignores the Well-established Developmental Differences Between Juvenile and Adult Offenders Most Recently Relied Upon by the United States Supreme Court in Placing Limitations on Juvenile Sentencing*..... 13

 2. *Prosecuting Youth as Adults Places Them at Significant Risk of Physical and Emotional Injury* 15

 3. *Because of Well-Established Racial Disparities in the Justice System, the Presumptive Certification Provision at Issue is Likely to Infringe Disproportionately Upon the Constitutional Rights of Youth of Color*..... 17

D. National Standards Support The Premise That Children Facing Transfer To Adult Court Need Effective Assistance of Counsel. 20

CONCLUSION..... 24

1 **TABLE OF AUTHORITIES**

2 **CASES**

3 *Anthony Lee R. v. State*, 952 P.2d 1 (Nev. 1997).....4

4 *Arizona v. Fulminante*, 499 U.S. 279 (1991).....9

5 *Breed v. Jones*, 421 U.S. 519 (1975)6

6 *Brooks v. Tennessee*, 406 U.S. 605 (1972)6, 7, 8, 10

7 *Eddings v. Oklahoma*, 455 U.S. 110 (1982)15

8 *Ferguson v. Georgia*, 365 U.S. 570 (1961)3, 7, 8, 10

9 *In re Gault*, 387 U.S. 1 (1967)3, 5, 6, 8

10 *Geders v. U.S.*, 425 U.S. 80 (1976).....6, 7

11 *Gideon v. Wainwright*, 372 U.S. 335 (1963)5

12 *Herring v. New York*, 422 U.S. 853 (1975)6, 8

13 *Johnson v. Texas*, 509 U.S. 350 (1993)14

14 *Kent v. U.S.*, 383 U.S. 541 (1966).....6, 10, 21

15 *Powell v. State*, 287 U.S. 45 (1932).....3, 5, 8

16 *Roper v. Simmons*, 543 U.S. 551 (2005).....13, 14, 15

17 *Strickland v. Washington*, 466 U.S. 668 (1984)6

18 *U.S. v. Cronic*, 466 U.S. 648 (1984).....9

19 *U.S. v. Decoster*, 624 F.2d 196 (D.C. Cir. 1976).....7

20 *U.S. v. Green*, 680 F.2d 183 (D.C. Cir. 1982)7

21 *Washington v. Strickland*, 693 F.2d 1243 (5th Cir. 1982)7

22 *In re Winship*, 397 U.S. 358 (1970)6

23

24

25

26

27

28

1 **STATUTES**

2 Nev. Rev. Stat. 43-210115
3 Nev. Rev. Stat. 3-30515
4 Nev. Rev. Stat. 62A.3604
5 Nev. Rev. Stat. 62B.330(e)5
6 Nev. Rev. Stat. 62B.390.....1, 2, 3, 4, 5, 10, 11, 18, 21, 22, 24
7 Nev. Rev. Stat. 122.02015
8 Nev. Rev. Stat. 202.02015
9 Nev. Rev. Stat. 202.05515
10 Nev. Rev. Stat. 213.1555
11 Nev. Rev. Stat. 213.1575
12 Nev. Rev. Stat. 293.48515
13
14

15 **OTHER AUTHORITIES**

16 Affidavit of Marty Beyer14, 23, 24
17 Alfred Blumstein, Jacqueline Cohen, & David Farrington, *Criminal Career Research: Its*
18 *Value for Criminology* 26, Criminology 1 (1988)14
19 Amanda Burgess-Proctor, Kendal Holtrop, & Francisco A. Villarruel, Campaign for
20 Youth Justice, *Youth Transferred to Adult Court: Racial Disparities* 2 (2006).....17, 18
21 American Bar Association, *Youth in the Criminal Justice System: Guidelines for*
Policymakers and Practitioners 1-2 (2000).....23, 24
22 Amnesty International & Human Rights Watch, *The Rest of Their Lives: Life Without*
23 *Parole for Child Offenders in the United States* (2005)13
24 Angela McGowan et al., Center for Disease Control and Prevention, Task Force on
25 Community Preventive Services, *Effects on Violence of Laws and Policies*
26 *Facilitating the Transfer of Juveniles from the Juvenile Justice System to the*
Adult Justice System, 32(4S), Am. J. Preventive Med. S7 (2007).....11, 12
27
28

1 Campaign for Youth Justice, *Jailing Juveniles: The Dangers of Incarcerating Youth in*
2 *Adult Jails In America* 10 (2007).....16, 17

3 Campaign for Youth Justice, *The Consequences Aren't Minor: The Impact of Trying*
4 *Youth as Adults and Strategies for Reform* 11 (2007)18

5 Clark County, Nevada, Department of Juvenile Justice Services, *Disparate Treatment*
6 *Based on Race and Economics 2004 Report, Report for Senate Bill 232*20

7 Clark County, Nevada, Department of Juvenile Justice Services, *Disparate Treatment*
8 *Based on Race and Economics 2005 Report, Report for Senate Bill 232*19, 20

9 David Farrington, *Age and Crime?* 7 *Crime and Justice: An Annual Review of Research,*
10 189 (1986).....14

11 Donna Bishop *et al.*, *The Transfer of Juveniles to Adult Criminal Court: Does It Make A*
12 *Difference?*, 42 *Crime & Delinq.* 171 (1996).....12

13 Donna Bishop, *et al.*, *The Transfer of Juveniles to Criminal Court: Reexamining*
14 *Recidivism Over the Long Term*, 43 *Crime & Delinquency* 548 (1997)12

15 Donna Bishop, *Juvenile Offenders in the Adult Criminal Justice System*, 17 *Crime &*
16 *Just.* 81 (2000).....12

17 Donna Bishop & Charles Frazier, *Consequences of Waiver, The Changing Borders of*
18 *Juvenile Justice: Transfer of Adolescents to the Criminal Court* 26112, 13

19 Erik Erikson, *Identity: Youth and Crisis* (1968)14

20 Howard N. Snyder & Melissa Sickmund, National Center for Juvenile Justice, *Juvenile*
21 *Offenders and Victims: 2006 National Report* 214 (2006).....19

22 Howard Snyder & Melissa Sickmund, Office of Juvenile Justice and Delinquency
23 *Prevention, Juvenile Offenders and Victims: 2006 National Report* 188 (2006)17

24 IJA/ABA *Juvenile Justice Standards Annotated: A Balanced Approach* (Robert E.
25 Shepherd, ed., 1996)21

26 IJA/ABA *Juvenile Justice Standards, Standards Relating to Transfer Between Courts* 2
27 (Robert E. Shepherd, ed., 1996).....21, 22, 23

28 Jason Ziedenberg, *Drugs and Disparity: The Racial Impact of Illinois' Practice of*
Transferring Young Drug Offenders to Adult Court (2001).....17

1 Jessica Short & Christy Sharp, *Disproportionate Minority Contact in the Juvenile Justice*
2 *System* (2005).....17

3 John Roman, *Putting Juveniles in Adult Jails Doesn't Work*, Washington Examiner,
4 January 5, 200812

5 Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the*
6 *Role of Child's Counsel in Delinquency Cases*, 81 Notre Dame L. Rev. 245
7 (2005)..... 8-9

8 Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence:*
9 *Developmental Immaturity, Diminished Responsibility, and the Juvenile Death*
10 *Penalty*, 58 Am. Psychologist 1009 (2003)14, 15

11 Mary Beckman, *Crime, Culpability and the Adolescent Brain*, 305 Science 596 (2004)14

12 Michael Pinard, *Offender Reentry And The Collateral Consequences Of Criminal*
13 *Convictions: An Introduction*, 30 N.Y.U. Rev. of L. & Soc. Change 585 (2006).....13

14 Michael Pinard, *The Logistical And Ethical Difficulties Of Informing Juveniles About*
15 *The Collateral Consequences Of Adjudications*, 6 Nev. L.J. 1111 (2006).....13

16 Michelle Leighton & Connie de la Vega, *Sentencing Children to Die in Prison*,
17 University of San Francisco School of Law (2007).....13

18 Mike Males & Dan Macallair, *The Color of Justice: An Analysis of Juvenile Adult Court*
19 *Transfers in California* (2000).....17

20 National Council on Crime and Delinquency (NCCD), *And Justice for Some: Differential*
21 *Treatment of Youth of Color in the Justice System* (2007)17, 18, 19

22 Richard E. Redding, *The Effects of Adjudicating and Sentencing Juveniles as Adults*, 1
23 *Youth Violence and Juvenile Justice* 128 (2003)12

24 Simon I. Singer, Jeffrey Fagan, & Akiva Liberman, *The Reproduction of Juvenile Justice*
25 *in Criminal Court: A Case Study of New York's Juvenile Offender Law*, *The*
26 *Changing Borders of Juvenile Justice: Transfer of Adolescents to the Criminal*
27 *Court* (Jeffrey Fagan & Franklin E. Zimring, eds., 2000)12

28 Thomas Grisso, *Double Jeopardy: Adolescent Offenders With Mental Disorders*,
University of Chicago Press (2004).....14

1 **I. INTEREST OF AMICUS CURIAE NATIONAL JUVENILE DEFENDER**
2 **CENTER.**

3 In November 2007, seventeen-year-old Marques B. and seventeen-year-old William M.
4 were certified for prosecution in adult criminal court pursuant to Nevada’s presumptive
5 certification statute, Nev. Rev. Stat. §§ 62B.390(2) and (3).¹ At the request of this Court, the
6 National Juvenile Defender Center (“NJDC”) submits this brief as *amicus curiae* in the appeals
7 of Marques and William.² (See Order Requesting *Amici Curiae* Participation And Directing
8 Additional Briefing, dated October 18, 2007.)

9 The NJDC was created to ensure excellence in juvenile defense and promote justice for
10 all children. The NJDC responds to the critical need to build the capacity of the juvenile defense
11 bar in order to improve access to counsel and quality of representation for children in the justice
12 system. The NJDC gives juvenile defense attorneys a more permanent capacity to address
13 important practice and policy issues, improve advocacy skills, build partnerships, exchange
14 information and participate in the national debate over juvenile justice.

15 The NJDC provides support to public defenders, appointed counsel, child advocates, law
16 school clinical programs and non-profit law centers to ensure quality representation and justice
17 for youth in urban, suburban, rural and tribal areas. It offers a wide range of integrated services
18 to juvenile defenders and advocates. The NJDC has significant experience assisting in cases
19 such as Marques’ and William’s, where the ability of counsel to adequately represent their child
20 clients has been eviscerated or significantly compromised.

21
22
23
24

¹ On October 3, 2006, Marques was charged with conspiracy to commit robbery, two counts of robbery with the use
25 of a deadly weapon, discharging a firearm endangering a person, and possession of a firearm. (See Appellant
26 Marques’ Brief, Appendix at 10-13.) On October 11, 2006, William was charged with conspiracy to commit
27 robbery, burglary while in possession of a firearm, and robbery while in possession of a deadly weapon. (See
28 Appellant William’s Brief, Appendix at 40-42.) Marques and William are not co-defendants.

² Twenty-three juvenile and youth advocacy groups have joined the NJDC’s Brief. Their statements of interest are
attached to their Motion for Leave to Join Amicus Brief filed contemporaneously with this Brief and included in the
Appendix to this Brief at 1-23.

1 This Court requested *amici* to address the constitutionality of Sections 62B.390(2) and
2 (3) on several grounds, (*See Order*). The NJDC, along with the other *amici* who have requested
3 permission to sign onto this Brief, will address whether Sections 62B.390 (2) and (3) violate a
4 juvenile’s rights to due process and to effective assistance of counsel, as guaranteed by the Sixth
5 and Fourteenth Amendments to the United States Constitution.³ *Amici* contend that Sections
6 62B.390(2) and (3) violate Appellants’ rights to effective assistance of counsel because the
7 provisions impermissibly interfere with counsel’s representation of the juvenile client.
8

9 In addressing these Constitutional violations, *amici* augment their arguments with a
10 discussion of current social science and adolescent development research, which demonstrate the
11 statute’s misguided approach to addressing youth crime, as well as the disproportionate effect
12 certification has on communities of color. While *Amici* vehemently oppose any presumptive
13 certification scheme that denies youth fundamental constitutional rights, the challenged
14 provisions also fail to take account of widely accepted research describing the factors that are
15 most closely associated with juvenile delinquency, thus denying youth – and the courts – the
16 opportunity to present and consider evidence most relevant to the propriety of transfer. In stark
17 contrast to the statute’s ostensible goals, Sections 62B.390(2) and (3) actually lead to the
18 increased transfer of children like Marques and William to adult criminal court, contribute to the
19 erosion of public safety, increase the likelihood of physical and emotional harm to children
20 certified to adult criminal court and exacerbate racial disparities in the juvenile justice system.
21
22
23
24
25

26 ³ *Amici* incorporate the arguments made by the American Civil Liberties Union in their brief filed on January 31,
27 2008, as if set forth herein. *Amicus* ACLU addresses the questions of whether the provisions violate a juvenile’s
28 constitutional rights under the Sixth Amendment, in violation of his right not to incriminate himself, and under the
Due Process Clause of the Fifth and Fourteenth Amendments, in light of the burden-shifting provision.

1 **II. NEVADA’S CERTIFICATION STATUTE VIOLATES A CHILD’S**
2 **CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL**
3 **GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE**
4 **UNITED STATES CONSTITUTION.**

5 Nevada’s presumptive certification statute contravenes the Constitutional right to
6 effective assistance of counsel extended to children accused of crimes because it impedes
7 counsel’s role as the child’s legal advisor. The statute has the practical effect of requiring
8 counsel to direct the child facing presumptive certification to admit guilt in order to keep the
9 child in juvenile court and avoid adult criminal proceedings. Rather than providing “the guiding
10 hand of [defense] counsel at every step in the proceedings,” the statute ties counsel’s hands
11 behind his back.⁴ *In re Gault*, 387 U.S. 1, 36 (1967).

12 **A. Nevada’s Presumptive Certification Statute Unconstitutionally Interferes**
13 **With The Child’s Right to Effective Assistance of Counsel During**
14 **Certification Proceedings.**

15 Sections 62B.390(2) and (3) of Nevada’s juvenile code dictate the criteria for
16 presumptive certification:

17 [U]pon a motion by the district attorney and after a full investigation, the juvenile
18 court shall certify a child for proper criminal proceedings as an adult to any court that
19 would have jurisdiction to try the offense if committed by an adult, if the child:

20 (a) Is charged with:

21 (1) A sexual assault involving the use or threatened use of force or
22 violence against the victim; or

23 (2) An offense or attempted offense involving the use or threatened use of
24 a firearm; and

25 (b) Was 14 years of age or older at the time the child allegedly committed the
26 offense.

27 Nev. Rev. Stat. 62B.390(2). An accused child can overcome this presumption only by proving,

28 ⁴ In extending the right to effective assistance of counsel to juveniles, *Gault* drew on long-standing United States Supreme Court precedent emphasizing the importance of a criminal defendant’s right to the “guiding hand” of defense counsel. *Ferguson v. Georgia*, 365 U.S. 570, 572 (1961); *Powell v. State*, 287 U.S. 45, 69 (1932).

1 by clear and convincing evidence, that the child either is incompetent to stand trial or committed
2 the crime as a result of emotional, behavioral or substance abuse problems:

3 The juvenile court shall not certify a child for criminal proceedings as an adult . . . if
4 the juvenile court specifically finds by clear and convincing evidence that:

5 (a) The child is developmentally or mentally incompetent to understand his
6 situation and the proceedings of the court or to aid his attorney in those
7 proceedings; or

8 (b) The actions of the child were substantially the result of the substance abuse or
9 emotional or behavioral problems of the child and the substance abuse or
10 emotional or behavioral problems may be appropriately treated through the
11 jurisdiction of the juvenile court.

12 Nev. Rev. Stat. 62B.390(3).

13 This Court has interpreted Section 62B.390(3)(b) to require that the child’s emotional,
14 behavioral or substance abuse problems “substantially influenced or contributed to the juvenile’s
15 criminal actions.” *Anthony Lee R. v. State*, 952 P.2d 1, 7-8 (Nev. 1997). Section 62B.390(3), as
16 interpreted by this Court, forces the child facing presumptive certification into a constitutional
17 quandary. Under Section 62B.390(3)(b), the child must forfeit his Fifth Amendment right
18 against self-incrimination by offering a confession linking his actions to the emotional,
19 behavioral or substance abuse problems that caused the alleged crime. Failure to meet this
20 burden forces the child to face trial, conviction and sentencing as an adult. *See id.*

21 This untenable statutory scheme severely compromises counsel’s obligation and ability to
22 zealously represent his client. In order to remain in juvenile court – where the benefits are very
23 significant under Nevada law⁵ – counsel must actually help his client implicate himself in the

24 _____
25 ⁵ Conviction and sentencing in adult court bars the child’s access to the juvenile court system, which is designed “to
26 promote the establishment, supervision and implementation of preventive programs that are designed to prevent a
27 child from becoming subject to the jurisdiction of the juvenile court” and to return children to full citizenship. *See*
28 Nev. Rev. Stat. 62A.360. The impact of transfer to adult court is devastating: (1) Once certified for adult court, the
juvenile court must also certify the child for adult criminal proceedings “for any other related offense arising out of
the same facts as the offense for which the child was certified, regardless of the nature of the related offense.” Nev.
Rev. Stat. 62B.390(4); (2) If convicted in adult court, the child thereafter will be subject to adult court regardless of

1 illegal behavior at the certification hearing, thereby waiving his Fifth Amendment rights. If the
2 sacrifice of his Fifth Amendment rights fails to rebut presumptive certification, the child loses
3 his only chance to remain in juvenile court.

4 Such minimalization of defense counsel’s role as the child’s legal adviser runs afoul of
5 the seminal case *In re Gault*, 387 U.S. 1 (1967). *Gault* held that juveniles facing delinquency
6 proceedings have the right to counsel under the Due Process Clause of the United States
7 Constitution, applied to the states through the Fourteenth Amendment. *Id.* at 41. In extending
8 the right to counsel to children, the *Gault* Court observed that juveniles need ““the guiding hand
9 of counsel at every step in the proceedings against [them].”” *Id.* at 36. The child’s right to
10 counsel means the right to effective assistance of counsel – juveniles need legal representation:
11 “to cope with problems of law, to make skilled inquiry into facts, to insist upon regularity of the
12 proceedings, and to ascertain whether he has a defense and to prepare and submit it.”⁶ *Id.* at 36.

13
14
15 The introduction of defense attorneys to the juvenile court system was meant to infuse the
16 informal juvenile court process with more of the zealously-guarded constitutional protections of
17 adult criminal court and their attendant adversarial tenor. In addition to the right to counsel and
18 the privilege against self-incrimination, *Gault* also extended to youth the right to notice of the
19 charges against them and the right to confront and cross-examine adverse witnesses. *Gault*, 387
20 U.S. at 56-57. The United States Supreme Court has similarly extended other critical rights to

21
22 the nature or severity of any subsequent alleged crime. Nev. Rev. Stat. 62B.330(e); (3) An adult criminal felony
23 conviction can affect eligibility for financial aid for higher education, for the military, and for public housing and
24 benefits; and (4) Certain convicted felons are ineligible for automatic restoration of the right to vote even after
25 release from prison, completion of probation and after honorable discharge from parole. Nev. Rev. Stat. 213.155;
26 213.157.

27 ⁶ The United States Supreme Court grounded the extension of the right to counsel in two Sixth Amendment cases:
28 *Gideon v. Wainwright*, 372 U.S. 335 (1963), and *Powell v. State*, 287 U.S. 45 (1932), that require counsel to be
effective. In *Powell*, the United States Supreme Court reversed the convictions of three African American men who
were charged and convicted of rape, then a capital crime, because they had not received effective assistance of
counsel. Unlike *Gideon*, in which the defendant represented himself, the *Powell* defendants had been assigned
attorneys; in fact, the court had assigned every attorney in the courtroom. However, the mere presence of counsel
did not amount to the exercise of the right to counsel. Indeed, the defendants in *Powell* were entitled to counsel who
would offer zealous representation, and on whose judgment they could rely.

1 children in the juvenile justice system: (1) a youth cannot be adjudicated delinquent unless the
2 state proves his guilt beyond a reasonable doubt, *In re Winship*, 397 U.S. 358 (1970); (2) a
3 delinquency proceeding constitutes being placed “in jeopardy” and bars future prosecution for
4 the same allegations. *Breed v. Jones*, 421 U.S. 519 (1975). Most important to the case before
5 this Court, the rights afforded to children facing potential transfer to adult criminal court “must
6 measure up to the essentials of due process and fair treatment.” *Kent v. U.S.*, 383 U.S. 541, 562
7 (1966).
8

9 Effective assistance requires that defense counsel have the “opportunity to participate
10 fully and fairly in the adversary fact-finding process.” *Herring v. New York*, 422 U.S. 853, 857
11 (1975). In *Herring*, the Supreme Court emphasized the importance of broadly construing the
12 right to counsel to preclude the government from imposing restrictions on the functions of
13 defense counsel:
14

15 *[T]he right to the assistance of counsel has been understood to mean that there*
16 *can be no restrictions upon the function of counsel in defending a criminal*
17 *prosecution in accord with the traditions of the adversary fact-finding process that*
has been constitutionalized in the Sixth and Fourteenth Amendments.

18 *Herring*, 422 U.S. at 857 (emphasis added). A state violates the right to effective assistance of
19 counsel when it “interferes in certain ways with the ability of counsel to make independent
20 decisions about how to conduct the defense.” *Strickland v. Washington*, 466 U.S. 668, 686
21 (1984) (citing *Geders v. U.S.*, 425 U.S. 80 (1976) (state attempted to bar attorney-client
22 consultation during overnight recess); *Herring*, 422 U.S. at 857-865 (state attempted to bar
23 summation by defense in bench trial); *Brooks v. Tennessee*, 406 U.S. 605, 612-13 (1972) (state
24
25
26
27
28

1 attempted to require defendant to be first defense witness); *Ferguson v. Georgia*, 365 U.S. 570,
2 593-96 (1961) (state attempted to bar direct examination of defendant)).⁷

3 Accordingly, the United States Supreme Court consistently has reined in state abuses of
4 power that interfere with the constitutional right to effective assistance of counsel. In *Brooks*,
5 the United States Supreme Court found unconstitutional a Tennessee statute that eliminated
6 defense counsel’s right to decide when the accused should take the stand. 406 U.S. at 613. The
7 statute provided that a “defendant desiring to testify shall do so before any other testimony for
8 the defense is heard by the court trying the case.” *Id.* at 606. Under the statute, if the defendant
9 did not take the stand at the beginning of the defense, he effectively waived his right to testify.

10
11 The United States Supreme Court reasoned that requiring the accused and his counsel to
12 decide whether to testify without the opportunity to evaluate the worth of all other evidence
13 “restricts the defense – particularly counsel – in the planning of its case.” *Id.* The Tennessee
14 statute not only violated the defendant’s right to remain silent and right to due process, but it also
15 violated the Sixth Amendment right to effective assistance of counsel because it deprived the
16 defendant of the “‘guiding hand of counsel’ in the timing of this critical element of defense.” *Id.*
17 at 611-612. Thus, the statute was unconstitutional because a state may not restrict the decision of
18
19
20

21 ⁷ Prejudice is presumed where a state establishes a procedural mechanism limiting defense counsel’s ability to
22 advise a client. See *Geders*, 425 U.S. at 88-92 (where right to effective assistance of counsel was infringed by a
23 state court order barring defendant from overnight consultation with counsel, defendant need not demonstrate, or
24 even claim, prejudice); see also *U.S. v. Green*, 680 F.2d 183 (D.C. Cir. 1982) (defendant need not show prejudice
25 where the government interferes to restrict effective representation). This presumption is a protective measure
26 designed to deter any state action that might hinder effective representation. *Washington v. Strickland*, 693 F.2d
27 1243, 1259 (5th Cir. 1982) (“Although such limited interference is not inherently prejudicial, a rule of automatic
28 reversal serves to deter the state from engaging in action that poses a direct threat to the defendant’s right to effective
assistance of counsel.”), *rev’d on other grounds by Strickland v. Washington*, 466 U.S. 668 (1984) (citing *U.S. v.*
Decoster, 624 F.2d 196, 201 (D.C. Cir. 1976) (“Because these impediments constitute direct state interference with
the exercise of a fundamental right, and because they are susceptible to easy correction by prophylactic rules, a
categorical approach is appropriate.”), *on rehearing different result based on other grounds*, 624 F.2d 196 (1979),
cert. denied, 444 U.S. 944 (1979)). Undeniably, an accused child suffers prejudice *per se* and need not demonstrate
or claim prejudice when the State acts to restrict counsel’s representation of that child.

1 counsel and the accused as to whether and when the accused should take the stand in the course
2 of presenting his defense. *Id.* at 613.

3 Following the reasoning of *Brooks*, in *Ferguson* the United States Supreme Court found
4 unconstitutional a Georgia law that precluded defense counsel from eliciting the defendant's
5 testimony through direct examination. *Ferguson*, 365 U.S. at 593-96. Again, the state's
6 interference with counsel's ability to advise the client regarding the presentation of his version of
7 the facts was unconstitutional, because the statute deprived the defendant of "the guiding hand
8 of counsel at every step in the proceedings."⁸ *Id.* at 572 (quoting *Powell*, 287 U.S. at 69).

9
10 Nevada's statute is more egregious than the statutes invalidated in *Brooks* and *Ferguson*
11 because it effectively requires counsel to direct a child facing adult court proceedings to *testify to*
12 *his guilt before trial even begins*. Not only does it control when and whether the child testifies, it
13 also prescribes the substance of the testimony long before the prosecution has met its obligation
14 to prove guilt beyond a reasonable doubt. In order to remain under juvenile court jurisdiction
15 and eligible for juvenile court sanctions and rehabilitation, the child must admit guilt. Admitting
16 guilt before trial even starts denies the child the fundamental right to present many valid defenses
17 – most importantly, an innocence defense. The statute offers no protection or immunity for the
18 pre-trial admission; it does not restrict its use in any subsequent proceeding.

19
20 The statute controverts the now widely understood tenet after *Gault* – that defense
21 attorneys owe their juvenile clients the same duty of loyalty as adult clients. *See*, Kristin
22 Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's*

23
24
25
26
27
28

⁸ Similarly in *Herring v. New York*, the United States Supreme Court found unconstitutional New York's state law that gave the trial judge discretion to deny counsel an opportunity to make a summation of evidence before the court rendered its judgment. 422 U.S. 853 (1975). The Court found that a total denial of counsel's ability to make a closing argument is a denial of the basic right of the accused to present his defense. *Id.* at 859. New York's interference with counsel's ability to fully defend his client through presentation of a closing argument was an impermissible interference with counsel's representation of the defendant and constituted a denial of the defendant's Sixth Amendment guarantees. *See id.* at 865.

1 *Counsel in Delinquency Cases*, 81 Notre Dame L. Rev. 245, 255-56 (2005). This duty of loyalty
2 requires counsel to zealously represent the “expressed interests” of their juvenile clients, and not
3 the “best interests” as determined by the attorney. *Id.* By effectively forcing defense counsel to
4 create inculpatory evidence, which the prosecution may use in later proceedings against the
5 child, the statute prevents counsel from representing the “expressed interests” of their client.
6

7 Moreover, the required admission effectively nullifies the prosecution’s burden to prove
8 guilt beyond a reasonable doubt. Whether the statements are offered under oath at the hearing,
9 or as part of a court-ordered evaluation, such an admission of involvement, in the child’s own
10 words, is the most damaging type of evidence against a defendant. *See Arizona v. Fulminante*,
11 499 U.S. 279, 296 (1991) (“A confession is like no other evidence. Indeed, the defendant’s own
12 confession is probably the most probative and damaging evidence that can be admitted against
13 him.”).
14

15 This breakdown in the adversarial process violates the right to effective assistance of
16 counsel: “The right to the effective assistance of counsel is thus the right of the accused to
17 require the prosecution’s case to survive the crucible of meaningful adversarial testing. . . . [I]f
18 the process loses its character as a confrontation between adversaries, the [Sixth Amendment]
19 constitutional guarantee is violated.” *U.S. v. Cronin*, 466 U.S. 648, 657 (1984) (adding that
20 “[w]hile a criminal trial is not a game in which the participants are expected to enter the ring
21 with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators”) (internal
22 quotations omitted).
23

24 Nevada’s presumptive certification statute is an unconstitutional state interference with
25 effective assistance of counsel because it infringes on children’s’ privilege against self-
26 incrimination and, in so doing, thrusts the state in the middle of defense counsel’s decision-
27
28

1 making process. *See Brooks*, 406 U.S. at 612-13, *Ferguson*, 365 U.S. at 593-96. Defense
2 counsel has no choice but to create evidence of guilt by proffering his client’s own incriminating
3 testimony to the juvenile court in a transfer hearing in the hope of remaining in juvenile court.
4 The admission of guilt during the transfer hearing is all the more harmful because such
5 admission does not guarantee juvenile court jurisdiction.
6

7 The Nevada statute restricts defense counsel’s ability to plan the case and eliminates
8 defense counsel’s “opportunity to participate fully and fairly in the adversary fact-finding
9 process.” *Brooks*, 406 U.S. at 612. The statute has established a certification proceeding that
10 fails to measure up to the essentials of due process and fair treatment. *See Kent*, 383 U.S. at 562.
11 Thus, Section 62B.390 is a patent violation of a child’s constitutional right to effective assistance
12 of counsel. This Court should hold that Section 62B.390 is unconstitutional.
13

14 **B. Trampling On Constitutional Protections For Children Subject To Transfer
15 Is Improper Because Certification Erodes Public Safety.**

16 The Nevada statute’s unconstitutional interference with the child’s right to counsel makes
17 it more likely that children will be transferred to adult court, actually eroding public safety.
18 Because the statute requires accused children to implicate themselves in order to prove that they
19 are appropriate candidates for juvenile treatment, innocent children who have been wrongly
20 accused will likely be unsuccessful in meeting the statute’s requirement that their actions be
21 linked to behavioral and substance abuses. Thus, innocent children will be transferred to adult
22 criminal court.⁹ Children who fail to understand the statute’s nexus requirement also will fail to
23 convince a court to keep them in juvenile court custody. Others who fail to make persuasive
24 statements for fear of crippling their chances of success at trial by making an incriminatory
25 admission will fail to meet the requirements of Sections 62B.390(2) and (3). The result is more
26

27 ⁹ For example, in William’s case, the judge transferred him because he could not demonstrate a nexus between the
28 mitigating conduct and the alleged crime since he maintained his innocence. *See William’s App.* at 82-106.

1 children transferred to adult court for reasons that the statute could never have intended. If
2 convicted and sentenced in adult court, studies show that these children are more likely to
3 recidivate – sooner, more frequently and with more violent crimes – than those retained in the
4 juvenile justice system.

5
6 In 2007, the Centers for Disease Control and Prevention’s Task Force on Community
7 Preventive Services reviewed the effects of transfer laws on violent crime and found
8 “insufficient evidence” to determine whether transfer laws are effective in preventing or reducing
9 violence in the general juvenile population. Angela McGowan et al., Center for Disease Control
10 and Prevention, Task Force on Community Preventive Services, *Effects on Violence of Laws and*
11 *Policies Facilitating the Transfer of Juveniles from the Juvenile Justice System to the Adult*
12 *Justice System*, 32(4S) Am. J. Preventive Med. S7, S17 (2007), included in Appendix at 38-59.
13 The Task Force reviewed existing studies conducted in geographically diverse localities to
14 determine whether transfer laws and policies have had a deterrent effect (both specific and
15 general) on the perpetration of violent crime. Thus, the Task Force concluded that the findings
16 are inconsistent with respect to one of the primary goals of criminal statutes – general deterrence.

17
18 The majority of the studies showed that transferred juveniles had a higher rate of
19 recidivism. The Task Force identified six studies that examine the possibility of specific
20 deterrence. Appendix at 43. To evaluate whether a specific deterrent effect exists, the
21 examination focused on the difference in the rate of recidivism and the reported incidents of
22 harm to those juveniles transferred to adult court as compared to those who remained in juvenile
23 court. Of the six studies, only one found any evidence that transfer deters re-offending. *Id.* at
24 45. One study found no effect. *Id.* The remaining four studies all found evidence that juveniles
25 certified to criminal court committed more violent crimes, and a larger number of crimes, than
26
27
28

1 juveniles retained in the juvenile system. *Id.* Based on “strong evidence that juveniles
2 transferred to the adult justice system have greater rates of subsequent violence than juveniles
3 retained in the juvenile justice system,” the Task Force concluded that “strengthened transfer
4 policies are harmful for those juveniles who experience transfer,” and that “[t]ransferring
5 juveniles to the adult justice system is counterproductive as a strategy for deterring subsequent
6 violence.”¹⁰ *Id.* at 46.

8 Increased recidivism rates by transferred youth should not be a surprise. Because the
9 adult system provides punishment in lieu of rehabilitation, transferred youth in the adult prison
10 system, also called “crime college,” necessarily learn recidivist behavior. *See* John Roman,
11 *Putting Juveniles in Adult Jails Doesn’t Work*, Washington Examiner, January 5, 2008.
12 Incarcerated juveniles are more likely to “learn social rules and norms that legitimate[sic]
13 domination, exploitation, and retaliation” from adult inmates. Donna Bishop & Charles Frazier,
14 *Consequences of Waiver*, *The Changing Borders of Juvenile Justice: Transfer of Adolescents to*
15 *the Criminal Court* at 261-64 (Jeffrey Fagan & Franklin E. Zimring, eds., 2000). Upon release
16 from prison as adults they are less likely to grow into productive, law-abiding members of
17 society.¹¹ A criminal conviction may also foster recidivism by foreclosing a transferred youth’s
18
19

20 ¹⁰ Several other studies show that youth transferred to criminal court re-offend at a higher rate than youths retained
21 in the juvenile justice system. For example, a 1996 study from Florida, where thousands of juveniles are tried in
22 adult courts, showed that transferred youth re-offend at a higher rate and with graver offenses than youths who were
23 retained in the juvenile justice system. Donna Bishop *et al.*, *The Transfer of Juveniles to Adult Criminal Court:*
24 *Does It Make A Difference?*, 42 *Crime & Delinq.* 171 (1996); Donna Bishop, *Juvenile Offenders in the Adult*
25 *Criminal Justice System*, 17 *Crime & Just.* 81 (2000) (reaffirming results of the 1996 study that recidivism was more
26 likely and more serious for transferred youth). Similar results were found in a comparison of 15- and 16-year olds
27 with identical charges in New York and New Jersey. After release, youths who had been processed in criminal court
28 had higher recidivism rate than those in juvenile court. Simon I. Singer, Jeffrey Fagan, & Akiva Liberman, *The*
Reproduction of Juvenile Justice in Criminal Court: A Case Study of New York’s Juvenile Offender Law, *The*
Changing Borders of Juvenile Justice: Transfer of Adolescents to the Criminal Court (Jeffrey Fagan & Franklin E.
Zimring, eds., 2000).

¹¹ Additional research concludes that the interests of community are not served by putting juveniles in adult prison.
Richard E. Redding, *The Effects of Adjudicating and Sentencing Juveniles as Adults*, 1 *Youth Violence and Juvenile*
Justice 128 (2003); Donna Bishop, *et al.*, *The Transfer of Juveniles to Criminal Court: Reexamining Recidivism*
Over the Long Term, 43 *Crime & Delinquency* 548 (1997).

1 future opportunities, *e.g.*, eligibility for financial aid, eligibility to enlist in the military and
2 eligibility for public housing and benefits. *Id.* at 260.¹² The transferred child also forgoes the
3 opportunities for treatment available in juvenile system that dramatically reduce recidivism. *See*
4 Affidavit of Marty Beyer, ¶16, Appendix at 35-36.

5
6 **C. Because Presumptive Certification Provisions May Have Harmful, Long-
7 Lasting Effects On Children, The Need For Effective Assistance Of Counsel
8 Is Essential.**

9 *1. The Prosecution of Youth as Adults Ignores the Well-established
10 Developmental Differences Between Juvenile and Adult Offenders Most
11 Recently Relied Upon by the United States Supreme Court in Placing
12 Limitations on Juvenile Sentencing.*

13 Juveniles and adults have developmental differences substantial enough to mandate
14 differential treatment in a myriad of legal contexts.¹³ In *Roper v. Simmons*, 543 U.S. 551
15 (2005), a sentencing case that relied on developmental research to strike down the juvenile death
16 penalty as a violation of the Eighth Amendment’s cruel and unusual punishment clause, the
17 United States Supreme Court concluded that “the differences between juvenile and adult
18 offenders are too marked and too well understood to risk allowing a youthful person to receive

19 ¹² *See also* Michael Pinard, *The Logistical And Ethical Difficulties Of Informing Juveniles About The Collateral
20 Consequences Of Adjudications*, 6 Nev. L.J. 1111 (2006) (describing the need to catalog the range of consequences
21 of juvenile adjudications); Michael Pinard, *Offender Reentry And The Collateral Consequences Of Criminal
22 Convictions: An Introduction*, 30 N.Y.U. Rev. of L. & Soc. Change 585 (2006).

23 ¹³ As the growth in the population of youth in the adult system continues largely unabated, understanding the effects
24 of transfer on young offenders is critical. In the early 1990s, concern about rising violent crime led lawmakers
25 nationwide to both narrow the jurisdiction of juvenile court and mandate adult sentences for younger and younger
26 youth. Although juvenile violent crime arrests subsequently plummeted 46% from 1994 to 2005, the effects of these
27 legislative changes have been far-reaching. In 1980, only two juveniles in the U.S. were sentenced to life without
28 parole; by 1996, 152 young people were sent to prison for life for crimes they had committed before they were 18
years old. Amnesty International & Human Rights Watch, *The Rest of Their Lives: Life without Parole for Child
Offenders in the United States* at 32 (2005). As of 2005, there were 2,225 juveniles serving life without parole in
adult prisons in 38 states. *Id.* at 35. Over half (59%) of juveniles sentenced to life without parole are first-time
offenders, and African-American juveniles are ten times more likely to be given a sentence of life without parole.
Id. at 28, 39. The U.S. is only one of two countries in the world sentencing juveniles to life without parole; the other
is Israel (Israel has 7 juveniles serving life without parole and has not issued such a sentence since 2004). *See*
Michelle Leighton & Connie de la Vega, University of San Francisco School of Law, *Sentencing Children to Die in
Prison* at 2 (2007). Between 1990 and 2004, the number of offenders under 18 in adult jails in the U.S. increased
208%. *Id.* at 6.

1 the death penalty despite insufficient culpability.” *Roper*, 543 U.S. at 572-73. Specifically, the
2 *Roper* Court found that juveniles are less culpable than the average adult offender for three
3 reasons: (1) juveniles lack maturity and responsibility, (2) juveniles are more vulnerable and
4 susceptible to outside influences, particularly negative peer influences, and (3) compared to
5 adults, juveniles are not as well formed in character and personality, and have a much greater
6 potential for rehabilitation.¹⁴ *Id.* at 569-70. Although the United States Supreme Court
7 recognized these distinctive characteristics of adolescence in the context of considering a
8 challenge to the juvenile death penalty, the research findings apply generally to all adolescents
9 under the age of eighteen, not just those facing the possibility of a death sentence. *See Roper*,
10 543 U.S. 569-70. Nevada’s presumptive certification statute does not permit a juvenile court to
11 fully consider a child’s developmental differences as mitigation evidence in certification
12 proceedings.¹⁵
13
14

15
16 ¹⁴ The United States Supreme Court noted that juveniles of all ages are not as well formed in character and
17 personality as adults. *Roper*, 543 U.S. at 570 (citing Erik Erikson, *Identity: Youth And Crisis* (1968)). The
18 relevance of youth as a mitigating factor “derives from the fact that the signature qualities of youth are transient; as
19 individuals mature, the impetuosity and recklessness that may dominate in younger years can subside.” *Id.*
20 (citing *Johnson v. Texas*, 509 U.S. 350, 368 (1993)); *see also* Laurence Steinberg & Elizabeth S. Scott, *Less Guilty*
21 *by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*,
22 58 *Am. Psychologist* 1009, 1014 (2003). New research into the structure and function of the teenage brain suggests
23 that significant brain development occurs during adolescence through the late teens and into the early twenties.
24 Mary Beckman, *Crime, Culpability and the Adolescent Brain*, 305 *Science* 596 (2004). The resulting immaturity in
the adolescent brain contributes to the poor decision making capacity of all juveniles. Thomas Grisso, *Double*
Jeopardy: Adolescent Offenders With Mental Disorders, University of Chicago Press at 105 (2004). Such research
gives a medical and “hard evidence” edge to the information above describing the distinct psychological
development of teens. The United States Supreme Court acknowledged that even experts in psychology struggle to
differentiate between “transient immaturity” and “irreparable corruption” in juvenile offenders. *Roper*, 543 U.S. at
573. In fact, the vast majority of offenders age out of delinquent behavior and go on to lead productive, law-abiding
lives. Alfred Blumstein, Jacqueline Cohen, & David Farrington, *Criminal Career Research: Its Value for*
Criminology 26 *Criminology* 1 (1988); *see also* David Farrington, *Age and Crime?* 7 *Crime and Justice: An Annual*
Review of Research 189 (Michael Tonry & Norval Morris eds., 1986).

25 ¹⁵ Affidavit of Marty Beyer Appendix at 24-37. An expert in research on juvenile offending as well as a practicing
26 clinician, Dr. Beyer states that the immaturity of youth, as well as trauma and/or disabilities that youth may be
27 suffering from are closely associated with delinquent behavior. By limiting the court’s consideration of mitigating
28 evidence to “substance abuse or emotional or behavioral problems,” the statute falls far short of the mark. Failure to
take account specifically of the immaturity of youth – a key component of the *Roper* decision – or their physical or
emotional trauma or their educational or mental disabilities leaves the court with an incomplete picture of
delinquency and its contributing factors, potentially sweeping many more youth into the adult system than properly

1 Consistent with the United States Supreme Court’s finding that juveniles lack maturity
2 and responsibility, Nevada law recognizes that “the age of 18 is the point where society draws
3 the line for many purposes between childhood and adulthood.” *See Roper*, 543 U.S. at 574. For
4 example, individuals younger than eighteen in Nevada cannot vote, Nev. Rev. Stat. 293.485;
5 youths sixteen and seventeen years old must get parental consent to be married, Nev. Rev. Stat.
6 122.020; youths under twenty one years old may not drink or purchase alcohol, Nev. Rev. Stat.
7 202.020 and 202.055; and unmarried youths under nineteen years old cannot enter into a binding
8 legal contract. Nev. Rev. Stat. 43-2101, Nev. Rev. Stat. 3-305. Thus, Nevada’s presumptive
9 certification statute runs contrary to *Roper* and the bulk of Nevada law.
10

11 The cases before this Court also illustrate the *Roper* Court’s second finding, that
12 “juveniles are more vulnerable or susceptible to negative influences and outside pressures
13 including peer pressure.” *Roper*, 543 U.S. at 569; *see Eddings v. Oklahoma*, 455 U.S. 110, 115
14 (1982); Steinberg, *Less Guilty by Reason of Adolescence* at 1014. Here, Marques is charged with
15 another juvenile, and William is charged with two other suspects. The issue of peer influence is
16 squarely presented and underscores the need for effective assistance of counsel to consider and
17 present evidence related to peer influence at the certification hearing.
18

19 2. *Prosecuting Youth as Adults Places Them at Significant Risk of Physical*
20 *and Emotional Injury.*

21 Young people detained or incarcerated with adults face an increased risk of severe mental
22 health problems that often lead to suicide. Juveniles in the adult system experience greater rates
23 of mental disorders and related problems, such as substance abuse, impulsive aggression,
24 parental depression and substance abuse, and a dysfunctional family setting – factors that are
25

26 belong there. The statute thus utterly fails in its ostensible purpose to establish some rational sorting mechanism for
27 distinguishing among and between youth charged with delinquent acts. By identifying only a fraction of youth most
28 likely to benefit from juvenile court jurisdiction and intervention, the presumptive certification provision disserves
both the children and the communities in which they live.

1 generally believed to contribute to suicidal behavior in the general population. *See* Campaign
2 for Youth Justice, *Jailing Juveniles: The Dangers of Incarcerating Youth in Adult Jails In*
3 *America* 10 (2007). These problems are exacerbated by the fact that most adult facilities are not
4 equipped to deal with the unique needs of youth, lacking the screening, assessment and treatment
5 tools that would allow staff to identify and address mental health problems in youth. *Id.* at 11.
6

7 Although the exact suicide rates of youth held in adult facilities remains incomplete, the
8 CDC has estimated that youth held in adult jails are thirty-six times more likely to commit
9 suicide than their counterparts in juvenile facilities. *See id.* at 10. For every successful suicide
10 among inmates between fifteen and twenty-four years-old, there are 100 to 200 attempted
11 suicides. *Id.* The U.S. Department of Justice's Bureau of Justice Statistics has found that jail
12 inmates under eighteen had the highest suicide rate of all inmates (101 per 100,000 during 2000-
13 2002). *Id.* These statistics do not improve for youth held in adult facilities for even a short
14 period of time. The Bureau of Justice Statistics found that almost a quarter of suicides take place
15 on the day of admission to jail or the following day, and almost half of suicides occur within the
16 first week. *Id.*
17

18 In addition to an increased risk of self-harm, youth detained or incarcerated in adult
19 facilities face a heightened probability of suffering rape and physical assault by adult prisoners.
20 In 2005 and 2006, youth under the age of eighteen were the victims in 21% and 13% respectively
21 of all substantiated, reported incidents of inmate sexual violence, particularly stark numbers
22 because youth typically make up only 1% of inmates in adult facilities. *Id.* at 13. Without
23 appropriate or feasible alternatives, corrections staff often react to this increased risk by isolating
24 youth from the general population, further aggravating their mental health issues. *Id.* at 14. In
25 light of these increased risks of suicide and physical harm, it is all the more important for
26
27
28

1 juveniles facing presumptive certification to have a meaningful right to effective assistance of
2 counsel to challenge the state’s case.

3 3. *Because of Well-Established Racial Disparities in the Justice System, the*
4 *Presumptive Certification Provision at Issue is Likely to Infringe*
5 *Disproportionately Upon the Constitutional Rights of Youth of Color.*

6 The overrepresentation of youth of color in the justice system across the country has been
7 well documented. Overrepresentation refers to “a situation in which a larger proportion of a
8 particular group is present at various stages within the juvenile justice system . . . than would be
9 expected based on its proportion in the general population.” Howard Snyder & Melissa
10 Sickmund, Office of Juvenile Justice and Delinquency Prevention, *Juvenile Offenders and*
11 *Victims: 2006 National Report* 188 (2006). At each stage of the juvenile justice process,
12 including intake, detention, referral, and disposition, most studies find that youth of color are
13 more likely than their white counterparts to be involved in the system. National Council on
14 Crime and Delinquency, *And Justice for Some: Differential Treatment of Youth of Color in the*
15 *Justice System* (2007), available at [http://www.nccd-crc.org/nccd/pubs/2007jan_justice_for](http://www.nccd-crc.org/nccd/pubs/2007jan_justice_for_some.pdf)
16 [some.pdf](http://www.nccd-crc.org/nccd/pubs/2007jan_justice_for_some.pdf); see also Amanda Burgess-Proctor, Kendal Holtrop, & Francisco A. Villarruel,
17 Campaign for Youth Justice, *Youth Transferred to Adult Court: Racial Disparities* 2, 7-9 (2006)
18 (summarizing research that suggests that “race does matter” in juvenile justice processing).

19
20 Transfer statutes, in particular, disproportionately affect youth of color. Jessica Short &
21 Christy Sharp, *Disproportionate Minority Contact in the Juvenile Justice System* at 7 (2005).¹⁶
22 Youth of color are more likely to be prosecuted in adult criminal courts than white youth.
23 Burgess-Proctor et al., *supra*, at 9 (noting that, while not many studies on racial disparities in
24

25
26 ¹⁶ See also Mike Males & Dan Macallair, *The Color of Justice: An Analysis of Juvenile Adult Court Transfers in California*
27 (2000), available at <http://www.buildingblocksforyouth.org/colorofjustice/coj.html>; Jason Ziedenberg, *Drugs and Disparity: The*
28 *Racial Impact of Illinois’ Practice of Transferring Young Drug Offenders to Adult Court* (2001), available at
<http://www.buildingblocksforyouth.org/illinois/illinois.html>.

1 transfer exist, those that have been done have documented overrepresentation at this stage of the
2 process). In the instant case, Marques is African American, and William M. is Hispanic.
3 According to statistics from the Office of Juvenile Justice and Delinquency Prevention
4 (“OJJDP”), between 1985-1995, African American youth were more likely than white youths to
5 be transferred to criminal court across all offenses, age categories and years. *Id.*
6

7 Racial disparities are often most pronounced in cases involving drug or gun charges, like
8 the charges in Marques’ and William’s cases, which may lead to transfer to adult court.¹⁷ In
9 2003, for example, white youth were 69% of the petitioned drug cases nationwide, but 58% of
10 the transferred drug cases. In contrast, African American youth comprised only 29% of the
11 petitioned drug cases, but 41% of the transferred drug cases. NCCD, *supra*, at 2 (describing this
12 disparity as youth enjoying an 11% “waiver advantage” while African American youth carry a
13 12% “waiver disadvantage” for drug cases); *see also* Burgess-Proctor et al., *supra*, at 9 (black
14 males charged with drug offenses were substantially more likely to be tried as adults than white
15 counterparts).
16

17 Given these disparities, it is not surprising that youth of color are significantly more
18 likely to be incarcerated in adult prisons than white youth. *See* Campaign for Youth Justice, *The*
19 *Consequences Aren’t Minor: The Impact of Trying Youth as Adults and Strategies for Reform* 11
20 (2007). In fact, approximately three out of four new admissions of children under age eighteen
21 to adult prisons in the United States are children of color. *And Justice for Some* at 34.
22

23 Statistics on the demographics of the juvenile justice population in Nevada mirror racial
24 disparities nationwide. At the decision point of detention, for example, youth of color were
25 detained at greater rates than white youth in the state in 2003. To analyze disproportionality,
26

27 ¹⁷ Section 62B.390(2)(a)(2) places all offenses “involving the use or threatened use of a firearm” in the class of cases
28 that are presumptively certified.

1 OJJDP measures Disproportionate Minority Contact by creating a “relative rate index,” which is
2 used to compare the detention rates for racial and ethnic groups to the rate for whites. A ratio
3 greater than 1.0 for a group of minority youth compared to white youth indicates
4 overrepresentation. In Nevada, the relative rate index for detention was 3.5 for African
5 Americans and 1.2 for Hispanics, suggesting overrepresentation. *Id.* at 23-24. When data is
6 analyzed for youth of color in the aggregate, the statewide detention ratio of youth of color to
7 white youth custody rates was 1.7; the ratio for youth committed in public facilities was 1.5; and
8 the ratio for youth committed in private facilities was 1.2. Howard N. Snyder & Melissa
9 Sickmund, National Center for Juvenile Justice, *Juvenile Offenders and Victims: 2006 National*
10 *Report* 214 (2006).

12 Nevada’s custody rates also reveal disproportionality for youth of color in Nevada. The
13 custody rates for each group detained in juvenile proceedings were as follows (calculated in 2003
14 as the number of juvenile offenders in detention per 100,000 juveniles): 289 for white youth, 958
15 for African American youth, 332 for Hispanic youth, and 405 for American Indian youth. *Id.* at
16 213. Disparities for youth in adult facilities in Nevada are similarly striking. While the rate of
17 new commitments to adult prison in 2002 (calculated per 100,000 youth aged 10-17 years in the
18 general population) of white youth is 6.4, the rate for African American youth is 8.5, and that for
19 Hispanic youth is 22.7. *And Justice for Some* at 36.

22 In Clark County, where the instant cases originated, statistics from 2004 and 2005
23 confirm overrepresentation of youth of color in the county’s juvenile justice system. Clark
24 County, Nevada, Department of Juvenile Justice Services, *Disparate Treatment Based on Race*
25 *and Economics 2005 Report, Report for Senate Bill 232* at 13 (“2005 Clark County Report”);
26 Clark County, Nevada, Department of Juvenile Justice Services, *Disparate Treatment Based on*
27
28

1 *Race and Economics 2004 Report, Report for Senate Bill 232* at 13 (“2004 Clark County
2 Report”). African American youth comprised about 14% of the Clark County School District
3 (“CCSD”) population, but 31% of the arrests in 2005, whereas white youth comprised 41% of
4 the population and 31% of arrests. 2005 Clark County Report at 5. Similarly, African
5 Americans represented 38% of all detained youths in Clark County, 42% of the commitments to
6 Spring Mountain Youth Camp (“SMYC”), and 35% of commitments to state correctional
7 facilities, where as white youth constituted 27% of youth detained, 23% of commitments to
8 SMYC, 30% of youth committed to state facilities. *Id.* at 12. More telling are the statistics
9 relating to transfer – of the 64 Clark County youth certified to adult status, 39% were African
10 American and only 17% were white youth in 2005.¹⁸ *Id.*

11
12 Effective assistance of counsel is a significant check on a system that allows racial
13 disproportionality. Nevada’s transfer statute, which interferes with counsel’s representation,
14 makes it more likely that youth of color also will continue to be disproportionately impacted by
15 the statute.
16

17 **D. National Standards Support The Premise That Children Facing Transfer To**
18 **Adult Court Need Effective Assistance of Counsel.**

19 Several national organizations have developed standards and best practices that protect
20 the child’s constitutional rights in transfer or certification proceedings. As detailed below, the
21 Nevada presumptive certification statute fails to comport with the guidelines suggested by
22 experts in the field.

23 The IJA/ABA Juvenile Justice Standards on Transfer Between Courts offers a balanced
24 approach to ensuring that juveniles facing certification enjoy full due process protections. In
25

26 ¹⁸ Although overrepresentation for Clark County’s Hispanic youth, who comprised approximately 35% of the
27 CCSD population in 2005, was not apparent at all stages of the system, overrepresentation was evident at the
28 certification stage. In that year, 41% of youth certified to adult status in the Clark County were Hispanic. 2005
Clark County Report at 12.

1 1971, the Institute of Judicial Administration (IJA) and the American Bar Association (ABA)¹⁹
2 formed a Joint Commission on Juvenile Justice Standards, with a goal of researching,
3 developing, and producing comprehensive juvenile justice standards, annotated with explicit
4 policies and guidelines.²⁰ First published in 1980, the IJA/ABA *Juvenile Justice Standards* were
5 the result of critical thought, discussion, writing and editing by over 300 experts, representing a
6 spectrum of disciplines including juvenile defense practitioners, the judiciary, social work,
7 corrections, law enforcement, and education across the country over a ten-year period.
8

9 The Standards most pertinent to this case offer specific guidance for court's making
10 transfer decisions, including several that address the due process concerns raised by Nev. Rev.
11 Stat. 62B.390. See IJA/ABA, *Juvenile Justice Standards, Standards Relating to Transfer*
12 *Between Courts 2* (Robert E. Shepherd, ed., 1996), included in Appendix at 60-104. As an initial
13 matter, in stark contrast to Sections 62B.390(2) and (3), Standards 1.1 A and 1.1 C create a
14 rebuttable presumption that fifteen-, sixteen-, and seventeen-year-olds should be treated as
15 *juveniles*, instead of adults. Appendix at 74-78. The Standards echo *Kent's* admonishment about
16 the serious nature of certification proceedings, staking the unequivocal position that, "only
17 juveniles in extraordinary factual situations with extraordinary histories should be transferred to
18 the criminal court," and even then, only in accordance with procedures designed to accord
19 maximum procedural protections to the juvenile and in compliance with precise and exacting
20 behavioral standards. *Id.* at 70.
21

22
23 Central to the issue in this case, Standard 2.3 explicitly addresses children's rights at the
24 certification hearing. The Standard differs from Nevada's presumptive certification provisions in
25

26 ¹⁹ The ABA is the world's largest voluntary professional membership organization, and for over 125 years it has
27 placed a high priority on promoting justice that requires fair treatment and is based on sound reason. Its Juvenile
28 Justice Committee works specifically to improve the administration of justice for youth.

²⁰ For a description of the project, see *IJA/ABA Juvenile Justice Standards Annotated: A Balanced Approach* xvi-
xviii (Robert E. Shepherd, ed., 1996).

1 several respects. Standard 2.3 E provides that “the prosecuting attorney should bear the burden
2 of proving that probable cause exists to believe that the juvenile has committed a class one or
3 class two juvenile offense and that the juvenile is not a proper person to be handled by the
4 juvenile court.” *Id.* at 73. Sections 62B.390(2) and (3) conversely place the burden of proving
5 amenability to treatment on the defense.
6

7 Standards 2.3 I and 2.3 J address Fifth Amendment protections at the certification
8 hearing. Standard 2.3 I provides that “[t]he juvenile may remain silent at the waiver hearing. No
9 admission by the juvenile during the waiver hearing should be admissible to establish guilt or to
10 impeach testimony in any subsequent proceeding, except a perjury proceeding.” *Id.* at 73. The
11 Comments to the Standard emphasize that the privilege against self-incrimination should be
12 available at the hearing which serves as the bridge between the juvenile and adult systems. *Id.* at
13 99. Further, the Standard controls the use of statements by giving “the juvenile power to bar the
14 introduction in any subsequent criminal trial or other proceeding, except for perjury, of
15 admissions made during the waiver hearing,” because “[s]uch statutes encourage candor at the
16 waiver hearing,” so “[a] better-informed waiver decision should result.” *Id.* at 99-100.
17

18 Standard 2.3 J further protects the child’s rights by empowering the child to seek the
19 recusal of the presiding officer at the waiver hearing from presiding at any subsequent criminal
20 trial or juvenile court adjudicatory hearing relating to allegations in the petition initiating
21 juvenile court proceedings. *Id.* at 73. Although Standard 2.3 J is recommended whether or not
22 the juvenile testifies, it operates to limit the effects of admission of damaging testimony in
23 subsequent proceedings following the certification hearing. *Id.* at 100-101.
24

25 Similarly, a subsequent Task Force convened by the American Bar Association Criminal
26 Justice Section Standards and Juvenile Justice Committees addressed the policy and procedural
27
28

1 implications of the growing number of juveniles being transferred to criminal court to be
2 prosecuted and sentenced as adults as a result of legislative changes in the 1990s. This broad
3 cross-section of juvenile and criminal justice representatives produced a White Paper that
4 provided desired and needed guidance to those involved with youth in the criminal justice
5 system. American Bar Association, *Youth in the Criminal Justice System: Guidelines for*
6 *Policymakers and Practitioners* 1-2 (2000). The White Paper establishes a developmental
7 framework for dealing with youth from the time of arrest through incarceration and is firmly
8 rooted in current research. *Id.*

10 The White Paper discusses several critical points that bear on transfer decisions. First, it
11 describes adolescence as a developmental period characterized by rapid and dramatic change and
12 roiling unpredictability – the most intense period of change in human behavior other than
13 infancy. *Id.* at 39. Physical maturity and appearance may not correspond readily to intellectual,
14 emotional, social, or moral maturity, so that children who look, for all intents and purposes, like
15 adults, still have the maturity of children. This incongruence is particularly true with respect to
16 black and Hispanic youth, who, studies show, mature physically earlier than other youth. *Id.*
17 There also will often be wide variability among and within individuals. That is, teenagers of the
18 same age may be quite different developmentally, and an individual youth may act in a mature
19 manner one day, and be completely immature the next. *See* Affidavit of Marty Beyer, ¶ 12,
20 Appendix at 28.

23 Because adolescence is a period of great malleability, youth also are the most amenable
24 to significant and lasting life change. Experts describe adolescence as “a period of tremendous
25 plasticity in response to features of the environment.” *Youth in the Criminal Justice System* at
26 40. Adolescents facing transfer stand before the court not only fully capable of rehabilitation,
27
28

1 but also uniquely vulnerable to far-reaching damage if they are transferred to the criminal justice
2 system. See Affidavit of Marty Beyer, ¶16, Appendix at 35-36.

3 **CONCLUSION**

4 Nevada's presumptive certification statute places an unconstitutional burden on the
5 child's right to effective assistance of counsel during certification proceedings. Counsel is
6 placed in the untenable position of directing the client to forfeit his constitutional right against
7 self-incrimination in order to argue that the child should remain in juvenile court. Because
8 Sections 62B.390(2) and (3) impermissibly interfere in counsel's representation of the child,
9 making it more likely that the harmful effects of certification to adult court will be realized, this
10 Court should hold that Nevada's presumptive certification statute is unconstitutional and reverse
11 the certification of Marques and William to adult court.
12

13
14 Respectfully submitted,

15
16 _____
One of the Attorneys for *Amicus Curiae*

17 Joel A. Eisenberg
18 Nevada Bar No. 10344
BAKER & MCKENZIE LLP
19 Two Embarcadero Center, 11th Floor
San Francisco, California 94110
20 (415) 984 3891
Attorney for Amicus Curiae
21 Douglas B. Sanders
22 Sasha Reyes
Sarah Clanton
23 Liquita L. Thompson
Angela C. Vigil

Robin Walker Sterling
Special Counsel
National Juvenile Defender Center
1350 Connecticut Avenue NW Suite 304
Washington, DC 20036
(202) 452-0010
Attorney for Amicus Curiae

24 Dated: January 30, 2008
25
26
27
28

1 **CERTIFICATE OF COMPLIANCE**

2 I hereby certify that I have read this appellate brief, and to the best of my knowledge,
3 information, and belief, it is not frivolous or interposed for any improper purpose. I further
4 certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in
5 particular N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the
6 record to be supported by a reference to the page of the transcript or appendix where the matter
7 relied on is to be found. I understand that I may be subject to sanctions in the event that the
8 accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate
9 Procedure.
10

11
12 January 30, 2008

13
14 _____
15 Joel A. Eisenberg
16 Nevada Bar No. 10344
17 BAKER & MCKENZIE LLP
18 Two Embarcadero Center, 11th Floor
19 San Francisco, California 94110
20 (415) 984 3891
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I, Joel Eisenberg, certify that on January 30, 2008, a true and correct copy of the foregoing, **Brief Of Amicus Curiae National Juvenile Defender Center In Support Of Appellants** was served, via Federal Express, to:

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

One of the Attorneys for *Amicus Curiae*