IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,

Petitioner,

v.

THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, AND THE HONORABLE CONNIE J. STEINHEIMER, DISTRICT JUDGE,

Respondents.

and

MATTHEW GLENN HEARN,

Real Party In Interest.

No. _____/

PETITION FOR WRIT OF MANDAMUS OR, ALTERNATIVELY, PROHIBITION

ROUTING STATEMENT

This case is presumptively assigned to the Supreme Court because a Petition for Writ of Mandamus invokes the original jurisdiction of the Supreme Court (NRAP 17(1)) and it is not described in NRAP 17(2). The underlying criminal charge is Battery by a Prisoner, a Category B felony, in violation of NRS 200.481(1)(a), (2)(f). While there are conflicting opinions

by district court judges, the State is unaware of any published conflicting opinions by the Court of Appeals or the Supreme Court.

THE RELIEF SOUGHT

Comes now, the State of Nevada and petitions this Court to issue a Writ of Mandamus or Prohibition to the Honorable Connie Steinheimer and the Second Judicial District Court, commanding the respondents to vacate an order issued on June 30, 2017, in *State v. Hearn*, Case No. CR17-0502, finding a certain provision of NRS 176.290(2) to be unconstitutional (and severable), or, alternatively, prohibiting the respondents from refusing to give effect to the statute despite the Order of June 30, 2017. In short, the district court erred in finding that the requirement of the statute, requiring the stipulation of the prosecutor before allowing avoidance of a conviction by transferring a case to Veterans Court, was a violation of the Separation of Powers Doctrine. The Legislature does indeed have the power to give the prosecutor what was called "veto authority" over an application of a defendant to avoid conviction for a felony by having the case transferred to Veterans Court. The Order is appended hereto as Exhibit A.

Real Party in Interest Hearn stands accused of Battery by a Prisoner. For purposes of this writ, the State does not dispute that Real Party in Interest Hearn is a veteran of the armed services of the United States. For

purposes of this writ the State assumes that Hearn suffers from mental illness and that mental illness is related to his service. Ordinarily, that would make the defendant eligible for discretionary assignment to Veterans Court. *See* NRS 176A.290(1). However, the next section of that statute, NRS 176A.290(2), provides that in cases of a crime of violence (such as battery by a prisoner), assignment to the Veterans Court requires the stipulation of the prosecutor. The district court termed that a "prosecutorial veto" and ruled that the Constitution prohibits giving such authority to the prosecutor. The State contends that there is no discretion involved in the court's decision (as the constitutionality of a statute is a matter of law) and that the district court erred in its conclusion.

WHY THE WRIT SHOULD ISSUE

The State now contends that this Court should consider this petition for extraordinary relief and grant the petition and issue the writ.

While extraordinary relief is discretionary, the State would point out first that it has no remedy at law other than this petition. Furthermore, as indicated in the attached affidavit, the issue is unsettled and has resulted in differing rulings among the various judges of the Second Judicial District Court. Furthermore, the State is informed and believes that at least one other county has run into the same problem of competing orders.

ARGUMENT

The State acknowledges that the judiciary has the sole authority to decide what sentence to impose when one is convicted of a crime, within the limits set by the Legislature. However, the Respondent does not propose to decide what judgment to enter. Instead, the decision at issue is the decision to not enter a judgment at all, to allow the defendant who has pleaded guilty to a crime of violence, the chance to avoid having any sentence imposed through the diversionary program known as "Veterans Court." That is not a traditional judicial role. Instead, the decision to file a criminal charge and see it through to conviction and imposition of sentence, or acquittal, is traditionally the prosecutorial role. If respondent were right in its analysis, then any court could simply decline to enter a judgment of conviction in any case, for any reason. In fact, carried to its logical conclusion, one would argue that a court sometimes has the discretion to dismiss a criminal case before judgment (such as with a sanction for discovery violations), then the court must have the *exclusive* authority to dismiss before judgment, and therefore a court could enter a *nolle pros* dismissal without the motion of the prosecutor, simply because courts sometimes have the authority to dismiss on other grounds without the consent of the prosecutor. That is most assuredly not the state of the law. This Court held as much in *State v. Burkholder*, 112 Nev. 535, 915

P.2d 886 (1996). The Court held that even if the district court enters an order suppressing evidence, it could not go on to dismiss a criminal case based on the evidence it anticipated would be presented at trial. That is, the decision to decline to enter judgment is subject to the rules enacted by the Legislature, including the rule giving the prosecutor a voice in the decision under some circumstances. The prosecutor who, before trial, anticipates an acquittal, has the authority to *nolle pros* and terminate the prosecution, but the district court judge has no authority to make that same decision. Likewise, a prosecutor can decide not to file charges at all, or to *nolle pros* after filing, simply upon determining that the accused deserves a break. The district court has no such authority.

Previously, this Court noted that the central issue of separation of powers is a matter of history. " 'Judicial Power' is the authority to hear and determine justiciable controversies." *Galloway v. Truesdell*, 83 Nev. 13, 20, 422 P.2d 237, 242 (1967). That definition seems a bit circular. The decision to terminate a prosecution, to avoid imposition of judgment, simply because the court feels that the defendant could benefit from avoiding a conviction, is not a traditional role of the court. It is instead, a traditional role of the prosecutor. That decision, the decision to give someone a break and allow them to avoid conviction, is first available to the executive branch police officer who decides whether to make an arrest or

not. It then becomes available to the prosecutor who can decide whether to file charges, and what charges to file. That same decision remains with the executive branch prosecutor who can decide to dismiss the prosecution at nearly any time just to allow the accused to avoid conviction. That same decision ought to never be available to the judiciary, as that would override the decision to seek a conviction at all, but the Legislature has made diversion a judicial decision under some circumstances. In the case of violent crimes, the Legislature has called upon the judiciary and the executive to share that decision.

There are quite a few circumstances in which the prosecutor's decision affects the role of the judiciary. For example, when one is charged with burglary, and has previously been convicted of burglary, the prosecutor's decision on whether to charge or prove the prior conviction will affect the court's role in sentencing. *See* NRS 205.260(2). Likewise, in the case of a habitual criminal allegation, the court has broad discretion to dismiss an allegation, but the prosecutor has the sole discretion to bring the allegation in the first place. *See Crutcher v. District Court*, 111 Nev. 1286, 903 P.2d 823 (1995). In fact, in every criminal case, the prosecutor controls the range of sentences available to the court by its decision of what crime to charge. When the prosecutor elects to charge only a misdemeanor,

no matter how the court feels about that decision, the court is limited to the sentencing range set out for misdemeanors.

More akin to the immediate case is the federal guidelines on sentencing. Leniency based on providing assistance to law enforcement was entirely dependent upon a motion from the prosecutor and when the prosecutor declined to make the motion, the court had no authority to grant the leniency that would come with the motion. *Wade v. United States*, 504 U.S. 181, 184, 112 S. Ct. 1840, 1843 (U.S. 1992). The Supreme Court considered the separation of powers argument accepted by the district court in the instant case, and rejected it.

There is little doubt that the Legislature could, if it wished, give the court the discretion to commit an accused person to a rehabilitation program in a drunk driving case, where the State has alleged it is a third offense, even if the result was to then have the court impose a more lenient sentence. *See Stromberg v. District Court*, 125 Nev. 1, 200 P.3d 509 (2009). Where the district court went wrong was in concluding that that is the *only* way a legislature can handle such programs. In *Stromberg*, the Legislature allocated the power exclusively to the judiciary, and the Constitution did not prohibit that allocation. The question now is whether the Constitution mandated that allocation, and only that allocation of

power, with the Legislature having no authority to grant any bit of the decision to the executive branch.

Courts that have considered it have generally determined that there is considerable overlap of powers in this arena. Even something as basic as the roles of the various parties in a trial is subject to overlap. While the parties (including the prosecutor) generally present the evidence in a trial, a judge may also examine witnesses and even call a witness to the stand. NRS 50.145. So, the notion that there can be no overlap in the respective duties of the executive prosecutor and the judicial District Court Judge ought to be rejected. There is considerable overlap.

The Legislature can fix the range of sentences and the Court has no authority to deviate from that. So, if a court imposes probation where the Legislature has precluded probation, that is an unlawful sentence. *See Wicker v. State*, 111 Nev. 43, 888 P.2d 918 (1995). Once a court imposes sentence, the decision to grant parole is reserved to the executive, subject to the limits imposed by the legislative branch. Because of those notions, one Court found a very similar statute concerning juveniles, allowing a program to completely avoid conviction, but requiring the prosecutor's agreement, did not violate the very similar separation of powers clause of the Colorado constitution. *People v. R.W.V.*, 942 P.3d 1317 (Colo.App. 1997). Likewise,

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we get the same result in Vermont. *State v. Pierce*, 657 A.2d 192 (Vermont 1995). In New Jersey, the reviewing court approved of a program of pretrial intervention for a charged person that was dependent upon the agreement of both the prosecutor and the judiciary. *State v. Lopes*, 673 A.2d 1379 (N.J. Super. 1995). That Court recognized that there is often an overlap between the duties of the executive and the judiciary.

Federal courts have also held that statutes such as the instant one do not run afoul of the Separation of Powers Doctrine. *United States v. Nathan*, 816 F.2d 230, 234 (6th Cir. 1987).

The Court may note that the district court would have no authority at all to allow any sort of diversion program, or probation, absent an express grant of authority by the Legislature. The conclusion of the district court to the effect that the *only* option is to grant that authority exclusively to the judiciary, is incorrect. One of the many options is to allow the court to allow diversion and eventual dismissal, only with the prosecutor's agreement. The wisdom of such a statute should be debated in the Legislature but the wisdom of it is not reviewable by the judiciary.

The State acknowledges that our neighbor to the west has reached a contrary conclusion and invalidated a statute requiring the prosecutor's agreement when it comes to diversion programs. This Court has even

referred to some of those cases in *Stromberg*.[1] However, this Court need not blindly follow California and should make its own decisions and reject the notion that diversion, a decision to disrupt the prosecution before final judgment, is exclusively a judicial decision. Florida reached the conclusion that is urged by the state when it held that the decision to terminate a prosecution before the final judgment is exclusively reserved to the prosecutor. *Barnett v. Antonacci*, 112 So.3d 400 (Fla.App 2013). That was not entirely correct, of course, because the judicial branch retains the power to terminate a prosecution for various reasons, including things like defects in the charging instrument. Still, we can see the basic idea that terminating a prosecution before final judgment is certainly not an exclusive judicial function. That is the principle distinction between the instant case and *Stromberg*. In *Stromberg*, the rehabilitation program did not lead to dismissal. It just gave the defendant the opportunity to show that some degree of leniency was warranted, but the court was still going to impose a sentence. In the instant case, the diversion does not necessarily

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[1] Even California has recognized an indirect prosecutorial veto. In *Davis v. Municipal Court*, the 757 P.2d 11 (Cal. 1988), the rule at issue allowed pre-trial diversion for "wobblers," or charges that could be filed either as a felony or a misdemeanor, only if the prosecutor elected to charge the misdemeanor version. That, held the California Court, was not a violation of Separation of Powers.

lead to sentencing. Instead, the program is designed to stop the prosecution before judgment. That decision, to stop the prosecution short of a conviction or acquittal, is not a decision that is traditionally assigned exclusively to the judiciary. So, this Court should conclude that the district court erred in concluding that the Separation of Powers Doctrine demands that the decision be made exclusively by the judicial branch.

The district court also concluded that the section concerning the prosecutor's stipulation was severable. When a court determines that a part of a statute is unconstitutional, the question of severability can be tricky. In general, the question is one of legislative intent. *Hernandez v. Bennett-Haron*, 128 Nev. Adv. Op. 54, 287 P.3d 305, 316 (2012). In one section of NRS 176A.290, the Legislature gave the court great discretion to allow diversion, but in the other section the Legislature clearly and unambiguously provided that diversion for one accused of a violent crime requires the agreement of both the judiciary and the executive branch. It would be difficult to conclude that the Legislature intended to allow diversion for both types of cases, with no distinction between violent offenses and others. Indeed, the State urges this Court not to reach the issue of severability and instead to rule that the Real Party in Interest did not meet its burden of showing that the statute is clearly unconstitutional. If the Court declines to do that, then the appropriate ruling is that the

entire statute must fail (along with the similarly structured statutes concerning mental health court, NRS 176a.260).

DATED: July 17, 2017.

CHRISTOPHER J. HICKS
DISTRICT ATTORNEY

By: _____
TERRENCE P. McCARTHY
Chief Appellate Deputy

EXHIBIT A

EXHIBIT A

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Clerk of the Court
Transaction # 6175667

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

THE STATE OF NEVADA,

Plaintiff,

vs.

MATTHEW GLENN HEARN,

Defendant.

Case No. CR17-0502

Department No.: 4

ORDER

Matthew Glen Hearn (hereinafter "Hearn") was charged with Battery by Prisoner, a felony in violation of NRS 200.481(f). Hearn pled guilty, applied for, and was accepted to Veteran's Court. At the sentencing hearing held on June 6, 2017, the State of Nevada (hereinafter "the State") informed that Court that pursuant to NRS 176A.290(2), it would not stipulate to Hearn's assignment to the Veteran's Court Program. Hearn argued NRS 176A.290(2) is unconstitutional, and the Court permitted additional briefing on the issue. Hearn filed a *Motion to Hold NRS 176.290(2) Unconstitutional* on June 9, 2017. The State filed its *Opposition to Defendant's Motion to Hold NRS 176A.290(2) Unconstitutional* on June 16, 2017. The Court heard oral arguments on the matter on June 21, 2017, and took the matter under advisement.

Hearn contends the prosecutorial veto set forth in NRS 176A.290(2), which provides "the court may not assign the defendant to the program unless the prosecuting attorney stipulates to the assignment...," violates the separation-of-powers doctrine because it interferes with the judicial process by conditioning the exercise of judicial power upon the approval of the executive branch. Although there is no case directly on point, Hearn claims in Stromberg v. Second Judicial Dist. Ct., 125 Nev. 1, 200 P.3d 509 (2009), the Nevada Supreme Court set forth the analytical framework to resolve this question. Hearn argues Stromberg and the line of California cases cited therein dictate that the charging power lies within the discretion of the prosecution, but after the charging decision has been made and the proceedings instituted, the judiciary has the power to sentence or otherwise dispose of the case.

NRS 176A.290 is located in the chapter on "probation and sentence," and permits the court to, without entering a judgment of conviction, suspend further proceedings and place the defendant on probation. This is significant, Hearn contends, because in Stromberg, the court concluded that the decision to permit a defendant to enter a treatment program is "analogous to the decision to sentence an offender to probation and therefore is a decision that properly falls within the discretion of the judiciary." Hearn contends, the Nevada Supreme Court's jurisprudence in keeping within the judiciary the power to decide what penalty if any to impose distinguishes Nevada from states that have concluded sentencing is not the exclusive function of the court. Hearn further argues the offending language in NRS 176A.290(2) can be severed.

Relying on United States v. Ayarza, 874 F.2d 647 (9th Cir. 1989), the State alleges an argument similar to Hearn's has been rejected by federal courts holding that a prosecutor's ability to block a particular sentencing option does not violate the separation-of-powers doctrine. The State contends, NRS 176A.290(2) vests the State with the power to permit or deny a particular outcome based upon the statutory criteria, and the State's determination does nothing to strip the court of its ultimate sentencing determination. Additionally, the State contends, NRS 176A.290(2) does not violate the separation-of-powers where it comports with the State's power to initiate, control, and terminate prosecutions before entry of final judgment. The State urges

the Court should adopt the reasoning applied by the Wyoming Supreme Court in Billis v. State, 800 P.2d 401 (Wyo. 1990), wherein the court rejected an "air-tight-compartment" conception of the separation of powers between its government branches.

The State attempts to distinguish Stromberg, and argues while the Nevada Supreme Court found the decision to reduce a felony DUI charge after successful completion of a diversion program did not violate the separation-of-powers, it did not hold that executive involvement in pre-sentencing diversion conversely did violate the doctrine. The prosecutorial consent requirement of NRS 176A.290(2) occurs after a plea or verdict, but before sentencing, and as such it does not interfere with the judicial adjudication and pronouncement of sentence. Citing to Sledge v. Superior Court, 11 Cal. 3d 70, 113 Cal. Rptr. 28, 520 P.2d 412 (1974), the State asserts, a prosecutor, pursuant to statutory guidelines, may make a preliminary determination of diversion eligibility without violating the separation of powers doctrine as his or her preliminary eligibility determination does not constitute a judicial act. The State distinguishes the California cases Hearn relies on by asserting NRS 176A.290(2) does not contain a provision that allows a prosecutor to override a decision left to a judge's discretion. At oral arguments, the State agreed that if the Court found the prosecutorial stipulation language unconstitutional, it was severable from the remainder of the Veteran's Court statute.

The Court must determine whether NRS 176A.290(2) violates the separation of powers doctrine by mandating the prosecutor stipulate to a violent offender's assignment to a treatment program. In relevant part, NRS 176A.290[1] provides,

> 1. Except as otherwise provided in subsection 2, if a defendant who is a veteran or a member of the military and who suffers from mental illness, alcohol or drug abuse or posttraumatic stress disorder as described in NRS 176A.285 tenders a plea of guilty, guilty but mentally ill or nolo contendere to, or is found guilty or guilty but mentally ill of, any offense for which the suspension of sentence or the granting of probation is not prohibited by statute, the court may, without entering a judgment of conviction and with the consent of the defendant, suspend further proceedings and place the defendant on probation upon terms and conditions that must include attendance and successful completion of a program established pursuant to NRS 176A.280.

[1] NRS 176A.290(2) was amended, effective June 8, 2017. Hearn was arrested on March 15, 2017, so the Court considers the legislation prior to the amendments.

> 2. If the offense committed by the defendant involved the use or threatened use of force or violence or if the defendant was previously convicted in this State or in any other jurisdiction of a felony that involved the use or threatened use of force or violence, the court may not assign the defendant to the program unless the prosecuting attorney stipulates to the assignment. For the purposes of this subsection, in determining whether an offense involved the use or threatened use of force or violence, the court shall consider the facts and circumstances surrounding the offense, including, without limitation, whether the defendant intended to place another person in reasonable apprehension of bodily harm. [2]

The Nevada Constitution, Article 3, Section 1(1) provides:

> [t]he powers of the Government of the State of Nevada shall be divided into three separate departments,--the Legislative,--the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution.

Unlike the United States Constitution, the Nevada Constitution specifically directs that a person in one branch may not exercise the powers belonging to another branch. Comm'n on Ethics v. Hardy, 125 Nev. 285, 292, 212 P.3d 1098, 1103–04 (2009)(noting, "[u]nlike the United States Constitution, which expresses separation of powers through the establishment of the three branches of government, Nevada's Constitution goes one step further; it contains an express provision prohibiting any one branch of government from impinging on the functions of another")(internal citation omitted).

The Nevada Supreme Court has determined "[t]he division of powers is probably the most important single principle of government declaring and guaranteeing the liberties of the people." Whitehead v. Nevada Comm'n on Judicial Discipline, 110 Nev. 874, 879, 878 P.2d 913, 916–17 (1994)(internal quotation omitted). Therefore, Nevada has been "especially prudent to keep the powers of the judiciary separate from those of either the legislative or the executive branches." Berkson v. LePome, 126 Nev. 492, 498–99, 245 P.3d 560, 564–65 (2010).

The Court finds review of Stromberg v. Second Judicial Dist. Court, 125 Nev. 1, 200 P.3d 509 (2009), as well as the body of California jurisprudence relied on in Stromberg is necessary. In Stromberg, the Nevada Supreme Court considered whether NRS 484.37941 violates the separation-of-powers doctrine by giving the judiciary the power belonging to the

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[2] Subsection (3) and (4) or NRS 176A.290 dictates how the court handles proceedings where the defendant violated the condition of his or her probation and how the court disposes of the case after successful completion of the program.

executive branch. NRS 484.37941 permitted the district court, in certain circumstances, to treat a felony DUI offender as a second-time misdemeanment upon the successful completion of the program. During the program, the district court was to suspend the proceedings and place the offender on probation. Id. at 9, 514, n. 2. The court found the California's Supreme Court's decisions in Esteybar v. Municipal Court for Long Beach Judicial District, 5 Cal.3d 119, 95 Cal.Rptr. 524, 485 P.2d 1140 (1971), and People v. Superior Court of San Mateo County (On Tai Ho), 11 Cal.3d 59, 113 Cal.Rptr. 21, 520 P.2d 405 (1974), to be instructive. Stromberg, 125 Nev. at 7, 200 P.3d at 512. It found particularly compelling the "analysis drawing a line between the prosecutor's decision in how to charge and prosecute a case and the court's authority to dispose of a case after its jurisdiction has been invoked." Id., at 7, 512.

In Stromberg the court compared the circumstances before it to San Mateo County, wherein the California Supreme Court considered whether it was constitutional for a district attorney to exercise veto power over the court's decision to order a defendant charged with a drug offense to be diverted into a pre-trial treatment program. Stromberg, 125 Nev. at 7, 200 P.3d at 513 (citing to San Mateo Cnty., 520 P.2d at 406-07). Further, the California Supreme Court found it was not. It reasoned that after a criminal charge was filed, the disposition of the charge became a judicial responsibility. San Mateo Cnty., 520 P.2d at 410. The California Supreme Court noted that the disposition of cases is no longer limited to either sentencing or acquitting, as new choices such as probation have been developed. Id.

In finding the separations-of-powers doctrine was not violated, Nevada Supreme Court in Stromberg reasoned:

> We are persuaded by the reasoning in *Esteybar* and *San Mateo County* for two reasons. First, similar to the scenarios discussed above, the district court's decision to grant or deny an offender's application for treatment pursuant to NRS 484.37941 follows the prosecutor's decision to charge an offender for a third-time DUI. After the charging decision has been made, any exercise of discretion permitted by NRS 484.37941 is simply a choice between the legislatively prescribed penalties set forth in the statute. Moreover, we conclude that the district court's decision to allow an offender to enter a program of treatment is analogous to the decision to sentence an offender to probation and therefore is a decision that properly falls within the discretion of the judiciary.

Stromberg, 125 Nev. at 8, 200 P.3d at 513.

The State maintains Sledge v. Superior Court, 11 Cal. 3d 70, 73, 113 Cal. Rptr. 28, 520 P.2d 412, (1974) is instructive. In Sledge, the California Supreme Court considered whether a statute which tasked the prosecutor with the pre-trial determination of whether the defendant was eligible for the program violated the separation-of-powers doctrine. The statute at issue prescribed the factual showing necessary to support the initiation of diversion proceedings, specifically mandating the defendant must have no prior narcotics conviction; no probation or parole violations; the offense charged must not involve actual or threatened violence; and there must be no evidence of his commission of a narcotics offense other than those listed in the statute. Sledge, 11 Cal. 3d at 73. The court in Sledge determined, "the preliminary screening for eligibility conducted by the district attorney pursuant to section 1000, based on information peculiarly within his knowledge and in accordance with standards prescribed by the statute, does not constitute an exercise of judicial authority and hence does not violate the constitutional requirement of separation of powers." Id. at p. 76.

In Sledge, the court explained the difference between the formal diversion hearing and the pretrial determination as to whether a defendant is even eligible for the program:

> In On Tai Ho. . . we emphasize that at the formal diversion hearing mandated by section 1000.2 the trial court is called upon to 'consider' the evidence submitted—i.e., to weigh its materiality, relevance, credibility, and persuasiveness, and to decide whether, in the judgment of the court, the evidence justifies the conclusion that the defendant would be benefited by diversion into a program of education, treatment, or rehabilitation. These, we hold, are judicial acts...By contrast, in discharging his duties under section 1000 the district attorney need not decide what facts are material and relevant to eligibility, as the Legislature has specified them in the statute. Credibility is not an issue when the information is obtained from official records and reports. And the statute leaves no room for weighing the effect of the facts: if for example the defendant has a prior narcotics conviction, subsection (1) of subdivision (a) of the statute automatically excludes him from the program. There is no provision here, as there was in the statutes considered in People v. Navarro (1972) 7 Cal.3d 248, 102 Cal.Rptr. 137, 497 P.2d 481, and People v. Clay (1971) 18 Cal.App.3d 964, 96 Cal.Rptr. 213, for the exercise of judicial discretion to admit an otherwise ineligible defendant to the program 'in the interests of justice,' and therefore no risk of arbitrary prosecutorial refusal to concur in that decision.

Sledge, 11 Cal. 3d. at 74.

In Davis v. Municipal Court, 46 Cal. 3d 64, 249 Cal. Rptr. 300, 757 P.2d 11, the California Supreme Court harmonized San Mateo County (On Tai Ho) and Sledge. It noted:

> Taken together, *On Tai Ho* and *Sledge* establish that when a district attorney is given a role during the "judicial phase" of a criminal proceeding, such role will violate the separation-of-powers doctrine if it accords the district attorney broad, discretionary decisionmaking authority to countermand a judicial determination, but not if it only assigns the district attorney a more limited, quasi-ministerial function. Neither case, however, contains any suggestion whatsoever that a district attorney improperly exercises "judicial authority" in violation of the separation-of-powers doctrine when he exercises his traditional broad discretion, *before* charges are filed, to decide what charges ought to be prosecuted, even when that charging decision affects the defendant's eligibility for diversion.

Davis, 46 Cal. 3d at 85.

The Court has also reviewed the case law the State advances from other jurisdictions. In Billis v. State, 800 P.2d 401 (Wyo. 1990), the Wyoming Supreme Court determined the separation-of-powers doctrine was not violated by a statute that required the state's consent in order for the court to defer the proceedings and place the defendant on probation without entering a judgment of conviction. In so holding, the court reasoned that the framers did not intend to create "air-tight compartments" for each branch's power, but rather, the "framers intended an integration of dispersed powers into a balanced, workable government." Id. at 414. The court explained the judiciary has the exclusive power to adjudicate, pronounce a judgment and carry it into effect, but it has no inherent power to suspend a sentence or grant probation, rather this is the province of the legislature.

Further, the Wyoming Supreme Court stated, "[u]nlike interpreting the constitution or adjudicating disputes, sentencing is not inherently or exclusively a judicial function." Id. at 416-17 (internal quotations omitted). Additionally, the court articulated, this "statute demonstrates the legislative department's proper understanding that until the judicial department enters *a judgment of guilt or conviction* (final judgment) the prosecutor possesses the executive department's power to control and terminate the prosecution at any time before final judgment." Id. at 421 (emphasis in original). The court also concluded that the deferral of the proceedings and placement of a defendant on probation without entering a judgment of guilty or conviction under the statute was not a sentence by definition. Id. at 422.

In United States v. Ayarza, 874 F.2d 647 (9th Cir. 1989), the 9th Circuit found that the Sentencing Reform Act which conditioned a downward adjustment of sentences upon the motion

of the government did not violate the separation-of-powers doctrine. In so holding, the 9th Circuit cited favorably to an opinion from the Southern District of Florida (affirmed by the 11th Circuit) which found, "the sentencing process is not inherently judicial, and that even if it were, the government's authority to recommend a reduced sentence was not impermissibly obtrusive." Id., at 653.

Based on the analysis in Stromberg, as well as Nevada's constitutional mandate that a person in one branch may not exercise the powers belonging to another branch, the Court finds when evaluating the constitutionally of the prosecutorial stipulation provision in NRS 176A.290(2), it is proper to apply the analysis employed in Stromberg and the California cases cited therein. The Court finds that in Nevada, unlike Wyoming and the federal circuits, sentencing and alternative methods such as probation and diversion are inherently judicial. See Stromberg, 125 Nev. at 8; 200 P.3d at 513 (finding the "district court's decision to allow an offender to enter a program of treatment is analogous to the decision to sentence an offender to probation and therefore is a decision that properly falls within the discretion of the judiciary"); Mendoza-Lobos v. State, 125 Nev. 634, 641, 218 P.3d 501, 506 (2009)(finding "[t]he power to impose a sentence is a basic constitutional function of the judicial branch of government over which this court has inherent authority").

Unlike the statute considered in Sledge, the Court finds, NRS 176A.290(2) does not prescribe the specific statutory criteria for the prosecutor to make a determination as to whether the offender may qualify for a treatment program. Rather, if the court determines the crime to be violent, than the prosecutor may, within his or her own discretion, preclude the offender from acceptance to the program. The Court finds this discretionary power is one reserved for the judiciary, especially as it has no bearing on the prosecutor's charging power.

Therefore, the Court finds the NRS 176A.290(2) violates the separation of powers doctrine by conditioning the judicial department's discretion to place certain offenders into a treatment program on the prosecutor's (discretionary) stipulation.

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Severability

Because the Court finds the prosecutorial veto language is unconstitutional, it must determine whether it can sever the phrase, "unless the prosecuting attorney stipulates to the assignment," and uphold the reminder of the statute. The court must uphold the constitutionality of statutes "where it is possible to strike only the unconstitutional provisions." Sierra Pac. Power v. State Dep't of Tax., 130 Nev. Adv. Op. 93, 338 P.3d 1244, 1247 (2014); see also NRS 0.020(1)(dictating that if a provision of the Nevada Revised Statutes is deemed invalid, "such invalidity shall not affect the provision or application of NRS which can be given effect without the invalid provision...."). To determine whether the offending language can be severed, the court must consider "whether the remainder of the statute, standing alone, can be given legal effect, and whether preserving the remaining portion of the statute accords with legislative intent." Sierra Pac. Power, 130 Nev. Adv. Op. 93, 338 P.3d at 1247.

The Court finds that without the prosecutorial stipulation language, the remainder of the statute, standing alone, can be given legal effect, and the remaining portion of the statute accords with the legislative intent. If the language "unless the prosecuting attorney stipulates to the assignment" is stricken, NRS 176A.290(2) reads:

> If the offense committed by the defendant involved the use or threatened use of force or violence or if the defendant was previously convicted in this State or in any other jurisdiction of a felony that involved the use or threatened use of force or violence, the court may not assign the defendant to the program. For the purposes of this subsection, in determining whether an offense involved the use or threatened use of force or violence, the court shall consider the facts and circumstances surrounding the offense, including, without limitation, whether the defendant intended to place another person in reasonable apprehension of bodily harm.

Without the offending language, the judiciary retains its discretion to assign or not assign the defendant to the program. Additionally, the Court finds severing the prosecutorial stipulation language would not change the intent of NRS 176A.290(1),(3) (4), as the initial eligibility for placement into a program would remain the same, and how the court handles both successful and unsuccessful program applicants remains unchanged.

Further, the Legislative Counsel's Digest from 2009 (the year when NRS 176A was enacted) also supports the conclusion that the legislative intent of the statute will be advanced if the prosecutorial stipulation language is stricken and the statute upheld. The Legislative Counsel's Digest provides that the bill authorizes a district court to establish a program for the treatment of certain eligible defendants who are veterans or members of the military. In relevant part, the digest states,

> WHEREAS, As a grateful state, we must honor the military service of our men and women by providing them with an alternative to incarceration and permitting them to access proper treatment for mental health and substance abuse problems resulting from military service.
> WHEREAS, The establishment of specialty treatment courts for veterans and members of the military who are nonviolent offenders will enable the criminal justice system to address the unique challenges veterans and members of the military face as a result of their honorable service and permit such veterans and members of the military to heal and reenter society...

VETERANS—MILITARY JUSTICE—TREATMENT, 2009 Nevada Laws Ch. 44 (A.B. 187).

As can be seen from the digest, the legislature enacted this scheme to help heal veterans. Without the offending language, the judiciary may help further the goal of placing veteran offenders into treatment programs, while still excluding violent offenders from the program.

Considering the purpose of NRS 176A, the Court finds the prosecutorial stipulation language from NRS 176A.290(2) shall be stricken, and the remainder of the statute will be upheld. At the sentencing hearing, the Court welcomes argument from both Hearn and the State as to whether Hearn should be placed into a treatment program.

Based on the forgoing, and good cause appearing,

IT IS HEREBY ORDERED that Matthew Glenn Hearn's Motion to Hold NRS 176A.290(2) unconstitutional is GRANTED, and the language "unless the prosecuting attorney stipulates to the assignment" shall be severed from the statute.

DATED this 29 day of June, 2017.

Connie J. Steinheimer
DISTRICT JUDGE

CERTIFICATE OF SERVICE

CASE NO. CR17-0502

I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the STATE OF NEVADA, COUNTY OF WASHOE; that on the 30 day of June, 2017, I filed the **ORDER** with the Clerk of the Court.

I further certify that I transmitted a true and correct copy of the foregoing document by the method(s) noted below:

_____**Personal delivery to the following: [NONE]**

X **Electronically filed with the Clerk of the Court, using the eFlex system which constitutes effective service for all eFiled documents pursuant to the eFile User Agreement.**

KELLY KOSSOW, ESQ. for STATE OF NEVADA
DARCY CAMERON, ESQ. for STATE OF NEVADA
SEAN ALEXANDER, ESQ. for STATE OF NEVADA
DIV. OF PAROLE & PROBATION
KENDRA BERTSCHY, ESQ. for MATTHEW HEARN

_____**Transmitted document to the Second Judicial District Court mailing system in a sealed envelope for postage and mailing by Washoe County using the United States Postal Service in Reno, Nevada: [NONE]**

_____**Placed a true copy in a sealed envelope for service via:**

_____ Reno/Carson Messenger Service – **[NONE]**

_____ Federal Express or other overnight delivery service **[NONE]**

DATED this 30 day of June, 2017.

Audrey A Austin

AFFIDAVIT OF TERRENCE P. McCARTHY

STATE OF NEVADA

COUNTY OF WASHOE

I, TERRENCE P. McCARTHY, do hereby swear under penalty of perjury that the assertions of this affidavit are true.

1. I am an attorney, employed as the Chief Appellate Deputy of the Washoe County District Attorney.

2. In preparing this petition, I have discussed this case with other members of my office and other district attorney's offices. I am informed and believe that two judges of the Second Judicial District Court have ruled that the statute requiring the prosecutor's agreement for assigning a person accused of a violent crime to specialty courts is prohibited by the Constitution. Those include the now-retired Honorable Janet Berry and the Honorable Judge Connie Steinheimer in the instant case. However, I am also informed and believe that statutes using the exact same language but relating to mental health court, have been recognized as valid by one sitting judge of the Second Judicial District, and two senior judges who routinely handle Veterans and Mental Health Courts.

3. I have learned that the smaller counties generally do not have a Veterans Court, but they have occasionally "transferred" people to Washoe and Clark Counties for enrollment in the Veterans or Mental Health Courts.

4. I have reviewed the attached Order, and found it to be a true and correct copy of the Order on file in the district court in case number CR17-0502.

5. I have filed this petition in good faith, in the interests of Justice, and not for any improper purpose. I believe that the petition accurately describes the history of the case in the district court and the ruling of the district court.

TERRENCE P. McCARTHY

Subscribed and sworn to before me
on this 17th day of July, 2017
by Terrence P. McCarthy

Notary Public

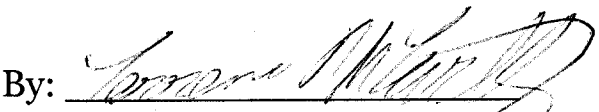
C. THEUMER
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 16-1804-2 - Expires January 5, 2020

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this petition has been prepared in a proportionally spaced typeface using Word 2013 in 14 Georgia font.

2. I hereby certify that I have read this petition, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further that this petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the petition regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied upon is to be found. I understand that I may be subject to sanctions in the event that the accompanying petition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: July 17, 2017.

By: 

TERRENCE P. McCARTHY
Chief Appellate Deputy
Nevada Bar No. 2745
P. O. Box 11130
Reno, Nevada 89520
(775) 328-3200

CERTIFICATE OF MAILING

Pursuant to NRAP Rule 25, I hereby certify that I am an employee of the Washoe County District Attorney's Office and that, on July 17, 2017, I deposited for mailing through the U.S. Mail Service at Reno, Washoe County, Nevada, postage prepaid, a true copy of the foregoing document, addressed to:

John Reese Petty
Chief Deputy Public Defender
Washoe County Public Defender's Office
350 S. Center St., #6
Reno, NV 89501

Kendra Bertschy
Deputy Public Defender
Washoe County Public Defender's Office
350 S. Center St., #6
Reno, NV 89501

I further certify that on this date, a copy of this document was hand-delivered to the Chambers of the Honorable Connie J. Steinheimer, for the Respondent and the Second Judicial District Court.

Destinee Allen

Destinee Allen
Washoe County District Attorney's Office