I believe that the Court can use that as another reason why even the legislative intent is unclear, but it seems to put the power again with the judge and the court at the sentencing phase, however. So it doesn't make sense as to why then the statute would include a veto power from the State.

THE COURT: Okay. As I said, I want to consider this a little bit further. I have read your briefs. I appreciate your oral arguments today. But I am not prepared to enter a written decision. I think the case requires a written decision. I don't know if you perceived, you sort of implied maybe you had in this district received some decisions on this issue, so I don't know how many you have, but I don't believe it has ever been taken to the Supreme Court. So I do want to make sure I provide a written decision.

MS. BERTSCHY: Your Honor, as an officer of this court, I do have an obligation to let you know it is pending before the Supreme Court.

THE COURT: There is an issue pending?

MS. BERTSCHY: Yes.

THE COURT: Okay. I appreciate that. Is it out of this district or another one?

MS. BETSCHY: Yes, Your Honor, this district.

THE COURT: Do you know the name of the case pending?

MS. BERTSCHY: I do, Your Honor.

MR. ALEXANDER: State versus Omsberg, Your Honor.

MS. BERTSCHY: I was clarifying how you say the name. O-M-S-B-E-R-G.

THE COURT: When was that appeal filed?

MS. BERTSCHY: I can provide that to the Court. I do know when the order was filed out of this Second Judicial District Court. I have the case number. I don't have the Supreme Court case number available.

THE COURT: Does the State?

MR. ALEXANDER: No. No. I talked with our appellate department about this actual case. They declined to mention they had filed an appeal. I am unaware the case was on appeal.

THE COURT: I will tell you we looked this morning and nobody in my office found there was an appeal.

MS. BERTSCHY: It is my understanding it has been appealed. I will look into that and provide that to all parties if it has. If not, I will provide that information as well.

THE COURT: Okay. Because your information, Mr. Alexander, is your office had not appealed that decision?

MR. ALEXANDER: That is my understanding, Your Honor.

THE COURT: Okay. That is kind of what I thought, but I thought maybe there was another case somewhere floating around. Let me know. Thank you counsel.

Counsel, your sentencing is continued until I reach a decision. We'll notify you of the next hearing.

MS. BERTSCHY: Thank you, Your Honor. I had previously discussed requesting to be able to address Mr. Hearn's custody status at the last hearing. I anticipated us having sentencing today. I will file a motion if that is required by this Court, I don't know if we could get a court date, so Mr. Hearn at least has a date set for a hearing on the bail or would I be required to first set forth that motion?

THE COURT: You need to file the motion. I am not sure, the State may not even oppose it. You all may reach some conclusion and stipulate to it without a hearing. Once I get my decision, we are going to put you on calendar for the sentencing immediately. So we just have to get the decision done.

MS. BERTSCHY: Thank you, Your Honor.

THE COURT: You're welcome. Court's in recess.

(Whereupon, the proceedings were concluded.)

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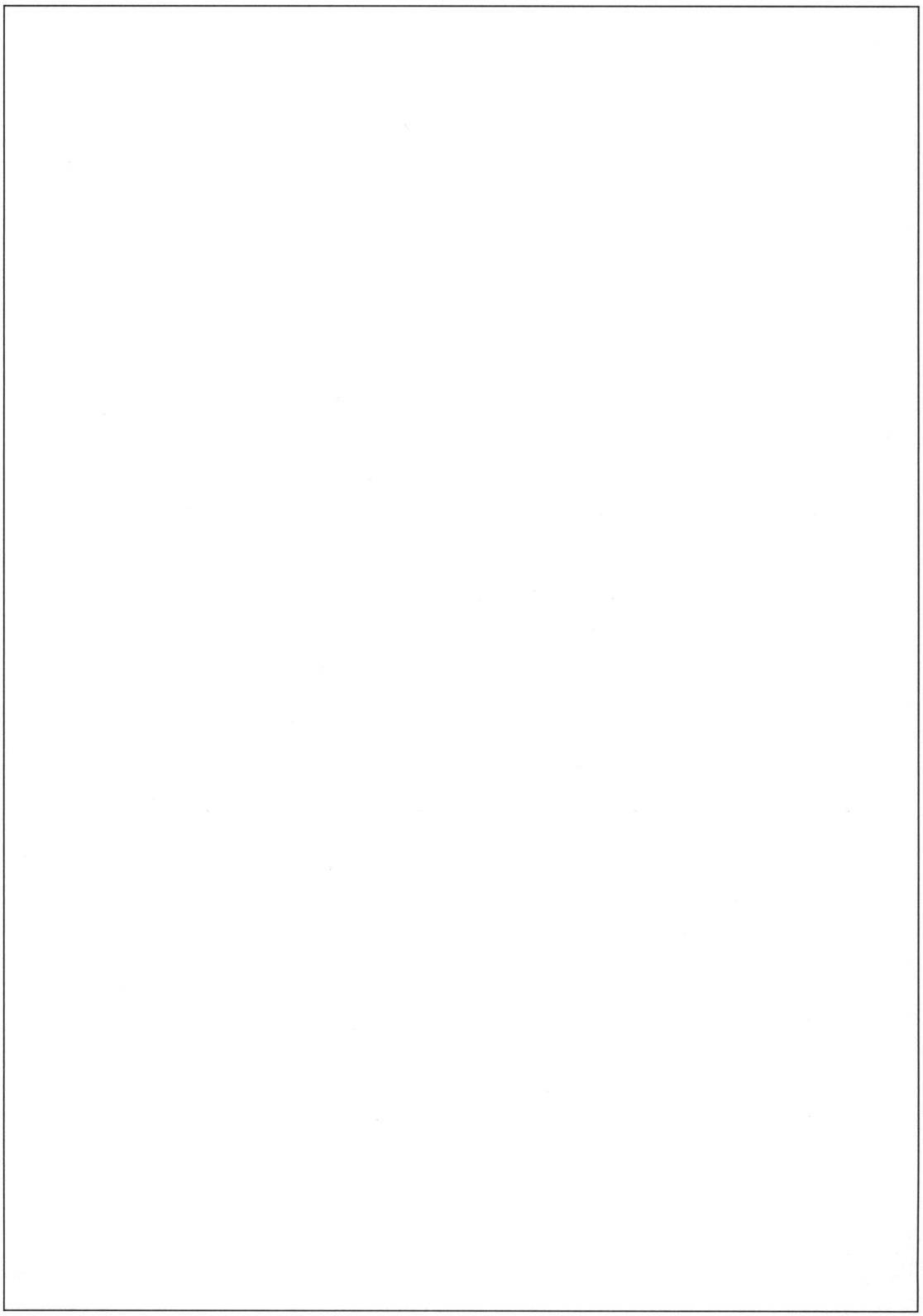

STATE OF NEVADA,)
) ss.
COUNTY OF WASHOE.)

I, Judith Ann Schonlau, Official Reporter of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, DO HEREBY CERTIFY:

That as such reporter I was present in Department No. 4 of the above-entitled court on Wednesday, June 21, 2017, at the hour of 10:30 a.m. of said day and that I then and there took verbatim stenotype notes of the proceedings had in the matter of THE STATE OF NEVADA vs. MATTHEW GLENN HEARN, Case Number CR17-0502.

That the foregoing transcript, consisting of pages numbered 1-19 inclusive, is a full, true and correct transcription of my said stenotypy notes, so taken as aforesaid, and is a full, true and correct statement of the proceedings had and testimony given upon the trial of the above-entitled action to the best of my knowledge, skill and ability.

DATED: At Reno, Nevada this 10th day of July, 2017.

/s/ Judith Ann Schonlau
JUDITH ANN SCHONLAU CSR #18

CERTIFIED COPY

The document to which this certificate is attached is a full, true and correct copy of the original on file and of record in my office.

DATE: SEP 15 2017

JACQUELINE BRYANT, Clerk of the Second Judicial District Court, in and for the County of Washoe, State of Nevada.

By _____ Deputy

FILED
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Jacqueline Bryant
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

CODE No. 2195
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR17-0502

MATTHEW GLENN HEARN, Dept. No. 4

Defendant.
_____/

MOTION TO STAY THE PROCEEDINGS PENDING RESOLUTION OF A PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

COMES NOW, the State of Nevada and moves this court to temporarily stay these proceedings pending the resolution of petition for writ of mandamus or prohibition. This motion is based upon the records of this court and the following points and authorities.

POINTS AND AUTHORITIES

Defendant Hearn is charged with Battery by a Prisoner. He has entered his guilty plea. When the cause came for sentencing, Hearn sought referral to Veterans Court. The prosecutor informed the court that, pursuant to NRS 176A.290(2), he was not stipulating to the transfer of the defendant to the Veterans Court. Subsequently, on

June 30, 2017, this court ruled that the relevant portion of NRS 176a.290(2) was unconstitutional via the Separation of Powers Clause, and severable, and that the Court did not require the agreement of the prosecutor in order to transfer the defendant to the Veterans Court.

The State has prepared a Petition for Writ of Mandamus or Prohibition asserting that the court erred in its order of June 30, 2017. The State intends to have it on file with the Supreme Court by the close of business on Friday, July 14, 2017. To that end, the State has asked to make sure that someone is available in chambers to accept service on that Friday.

The court certainly has the power to deny the stay and perhaps deny the Supreme Court the opportunity to review the court's order. Exercise of that power to preclude review, however, would be unseemly.

NRAP 8 requires that the motion for a stay be made in the first instance in the district court. A stay can only be sought in the Supreme Court if that is denied. The reason for the stay is fairly simple. If the case goes forward as it is, the State will have no opportunity to seek review and the question of whether the prosecutor can withhold agreement may go unresolved.

In general, the factors to be considered in determining whether to grant a stay are set out in *State v. Robles-Nieves*, 129 Adv. Op. No 55, 306 P.3d 399 (2013). While the State would not expect the court to agree that the State is likely to succeed in the appellate court, the other factors weigh in favor of a stay, including the likelihood that denying the stay will render the petition moot. Another factor concerns the potential for prejudice to Defendant Hearn. None is obvious. In fact, the State suspects that

/ / /

continued efforts at rehabilitation will serve him well. As those factors seem to weigh in favor of a stay, this court should grant the motion.

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED: July 14, 2017.

CHRISTOPHER J. HICKS
District Attorney

By /s/ TERRENCE P. McCARTHY
TERRENCE P. McCARTHY
Chief Appellate Deputy

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Second Judicial District Court on July 14, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

John Reese Petty
Chief Deputy Public Defender

/s/ DESTINEE ALLEN
DESTINEE ALLEN

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EXHIBIT 1

EXHIBIT 1

CODE No. 1075
CHRISTOPHER J. HICKS
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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR17-0502

MATTHEW GLENN HEARN, Dept. No. 4

Defendant.

_____/

AFFIDAVIT OF TERRENCE P. McCARTHY

I am an attorney and am employed as the Chief Appellate Deputy District Attorney for the Washoe County District Attorney. I have drafted a Petition for Writ of Mandamus or Prohibition in this case, concerning NRS 176A.190(2). I expect to be finished and to have the petition served and filed not later than the afternoon of Friday, July 14, 2017.

I have sought a stipulation to grant the stay but counsel for Hearn has declined to make that agreement. I am informed and believe that the sentencing is to be set for August 10, 2017. I would not expect the Supreme Court to rule on the petition before that date.

/ / /

This motion is made in good faith and not for any improper purpose.

(Signature)

Terrence McCarthy
(Printed Name)

STATE OF NEVADA

COUNTY OF WASHOE

Subscribed and sworn to before me
on this 14th day of July, 2017
by Terrence P. McCarthy.

C. Galli
Notary Public

C. GALLI
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 96-2503-2 - Expires April 27, 2020

CODE 2945

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

THE STATE OF NEVADA,

Plaintiff,

vs. Case No. CR17-0502

MATTHEW GLENN HEARN, Dept. No. 4

Defendant.
_____/

ORDER GRANTING STIPULATION FOR RELEASE, STIPULATION TO STAY SENTENCING HEARING, AND VACATING THE SENTENCING HEARING

Based upon the stipulation by the parties in this matter, and good cause appearing:

MATTHEW GLENN HEARN is hereby released from the Washoe County Jail to the Douglas County Jail to satisfy the misdemeanor Bench Warrant issued in case number 17-CR-0199. Upon resolution of that case, Mr. Hearn shall be promptly returned to the Washoe County Jail to be released on his own recognizance with direct transport through the Inmate Assistance Program to the Ridge House for the inpatient program for treatment of drugs and alcohol. Upon Defendant's release he is to be under the supervision of Court Services.

Furthermore, the request to stay the Sentencing Hearing and hold the hearing in abeyance pending resolution of the State's Petition for Writ of Mandamus or Prohibition is hereby GRANTED.

///

The Sentencing Hearing set for August 10, 2017 at 11:00 am is hereby VACATED.

IT IS SO ORDERED.

IT IS HEREBY FURTHER ORDERED that a status hearing is set in this matter for November 16, 2017 at 9:00 a.m.

DATED this 2 day of August, 2017.

Connie J. Steinheimer
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on September 21, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

John Reese Petty
Chief Deputy Public Defender

Kendra Bertschy
Deputy Public Defender

Destinee Allen
Washoe County District Attorney's Office

in custody over this issue.

THE COURT: Right. Counsel, Mr. Graham.

MR. GRAHAM: Well, your Honor, I would be opposed to an own recognizance release. I have no issue with the defendant's service, but based on what I can gather from his criminal history is that he's been -- even when he was in the military he was committing crimes.

The negotiation for probation is that he doesn't have any prior felony convictions, and I'm not entirely convinced, based on this, on his criminal history, that that won't occur. What I mean by that is he has several non-dispositions or his criminal history isn't complete, based on what I can see.

I also show that he has a warrant out of Kansas. So it looks like -- I can't tell if that's still active, but it was active as of January of 2017.

THE COURT: Okay. So we're not ready today. I'm not going to grant an OR. You can do more work with regard to the Veterans Court and talk to the State about his criminal history, see what else you can come up with. You're welcome to bring it back up. If you want to have a hearing, just notify the clerk.

MS. BERTSCHY: Thank you, your Honor.

THE COURT: Okay. So we'll see you back at your

sentencing, if not before.

THE DEFENDANT: Okay. I understand. Thank you.

THE COURT: All right. You're welcome.

(Proceedings concluded.)

STATE OF NEVADA)
)
COUNTY OF WASHOE)

I, KRISTINE A. BOKELMANN, Certified Court Reporter of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, do hereby certify:

That I was present in Department No. 4 of the above-entitled Court and took stenotype notes of the proceedings entitled herein, and thereafter transcribed the same into typewriting as herein appears.

That the foregoing transcript is a full, true, and correct transcription of my stenotype notes of said proceedings.

DATED: At Reno, Nevada, this 13th day of April, 2017.

/s/ Kristine A. Bokelmann

KRISTINE A. BOKELMANN, CCR NO. 165

CERTIFIED COPY

The document to which this certificate is attached is a full, true and correct copy of the original on file and of record in my office.

DATE: SEP 15 2017

JACQUELINE BRYANT, Clerk of the Second Judicial District Court, In and for the County of Washoe, State of Nevada.

By _____ Deputy

CODE 1930
WASHOE COUNTY PUBLIC DEFENDER
KENDRA BERTSCHY, #13071
P.O. BOX 11130
RENO, NV 89520-0027
(775)337-4800
ATTORNEY FOR DEFENDANT

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

Dept. No. 4

DOCUMENT SUBMITTED BY DEFENSE TO BE CONSIDERED AT SENTENCING

See Attached Document.

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the following document does not contain the social security number of any person.

Dated this 26th day of May, 2017.

JEREMY T. BOSLER
Washoe County Public Defender

By: /s/Kendra Bertschy
KENDRA BERTSCHY
Deputy Public Defender

WASHOE COUNTY
PUBLIC DEFENDER
ADVOCACY INTEGRITY COMMUNITY

P.O. BOX 11130
RENO, NEVADA 89520-0027
(775) 337-4800
(800) 762-8031
FAX (775) 337-4856

Person Contacted: Deputy James Cook

Contact Date: May 16, 2017

Investigator: Staci Moffatt

Person Address: Washoe County Jail Intake

Defendant: Matthew Glenn Hearn

PD Case #: 17-2266

Court Case#: CR17-0502

Attorney: Kendra Bertschy

Narrative:

On May 16, 2017, I contacted Deputy James Cook, at his place of employment. Deputy Cook agreed to speak with me and provided the following statement.

Deputy Cook recalls the incident involving inmate Matthew Glenn Hearn. I explained to Deputy Cook that Mr. Hearn had given me permission to discuss his confidential information including the diagnosis of PTSD, combat related flashbacks, Mr. Hearn's recent hospitalization for PTSD as well as his service and deployment with the US Army and the desire to participate in services for his PTSD.

Deputy Cook recalls that prior to the incident with Mr. Hearn, Deputy Cook observed Mr. Hearn to be acting odd, repeating questions and displaying odd behavior in the intake area. Deputy Cook stated following the incident with Mr. Hearn, Deputy Cook had a conversation with Deputy Solano who knows Mr. Hearn from before his Army service and had talked about how different Mr. Hearn is following his deployment. Deputy Solano was on duty and joined the conversation briefly noting that Mr. Hearn as he is now is not the Mr. Hearn he knew in high school and how Mr. Hearn changed after the war.

Deputy Cook read an apology letter that Mr. Hearn has written to him which also notes Mr. Hearn's desire to participate in services and get help.

Deputy Cook stated that he had some soreness following the incident but no significant injuries and nothing needing treatment. Deputy Cook stated he also learned from the incident as far as things he can do differently at work in the future. Mr. Hearn has been at WCJ six other times but he is not an individual that Deputy Cook recognized or dealt with prior to this incident. Deputy Cook is in agreement with Mr. Hearn participating in Veteran's Court or another Diversion program and receiving services on a long term basis for his PTSD as well as any other needs. Deputy Cook agrees to long term services (12 months or more) with supervision as he agrees that Mr. Hearn would benefit from the services on a long term basis and that if he was not compliant with services he would face consequences for that.

Deputy Cook does not intend to be present for the sentencing on June 1, 2017 and was in agreement of my writing this report to provide to the DDA and to the Court.

Read and approved by Deputy James Cook: J Cook # 2503 Date: 5/25/17

CERTIFICATE OF SERVICE

I certify that I am an employee of the WASHOE COUNTY PUBLIC DEFENDER'S OFFICE, and that on the 26th day of May, 2017, I electronically served, a true copy of the attached document, addressed to:

DEPUTY DISTRICT ATTORNEY
Electronic Service

DEPARTMENT OF PAROLE & PROBATION
Electronic Service

/s/Linda Gray
LINDA GRAY

FILED
Electronically
CR17-0502
2017-05-31 08:48:55 AM
Jacqueline Bryant
Clerk of the Court
Transaction # 6124159 : tbritton

CODE 1930

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

STATE OF NEVADA,

Plaintiff(s), **Case No. CR17-0502**

vs.

MATTHEW GLENN HEARN, **Dept. No. SCD**

Defendant(s).

_____/

ACCEPTANCE LETTER: VETERANS COURT

This letter is to inform you that Matthew Hearn is eligible and has been accepted into the Veterans Court program on the charges of Battery by Prisoner, Probationer or Parolee. To qualify for Veterans Court the client has been found to be a veteran or a current member of the military. The client also appears to have a mental illness, substance abuse, or posttraumatic stress disorder which appears to be related to military service, including any readjustment to civilian life problems.

In order for the defendant to be transferred into Veterans Court, please ensure the following steps are taken:

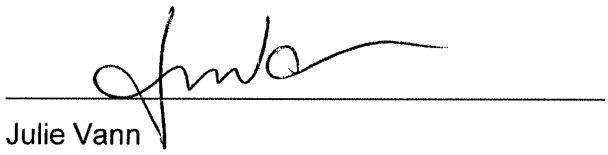
The original Order Transferring Jurisdiction to Veterans Court can be either mailed or sent through inter-office mail to Specialty Courts.

For defendants transferring from outside the jurisdiction of Washoe County, please fax a copy of the defendant's Criminal Complaint or Amended Criminal Complaint and Minutes or Docket sheet to (775) 325-6617.

The defendant should be placed on the first Veterans Court docket after sentencing, on a Monday at 9:30 in Courtroom A.

Affirmation:

Pursuant to NRS 239B.030, this document does not contain social security numbers.



Julie Vann
Specialty Courts Officer
Phone (775) 325-6641
Fax (775) 325-6617

6/12

CODE NO. 2490
WASHOE COUNTY PUBLIC DEFENDER
JOHN REESE PETTY, Nevada State Bar Number 10
KENDRA G. BERTSCHY, Nevada State Bar Number 13071
P.O. Box 11130
Reno, Nevada 89520-0027
(775) 337-4800
Attorneys for Defendant

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

THE STATE OF NEVADA,

Plaintiff,

vs. Case No. CR17-0502

MATTHEW GLENN HEARN, Dept. No. 4

Defendant.
_____ /

MOTION TO HOLD NRS 176.290(2) UNCONSTITUTIONAL

Comes Now, MATTHEW GLENN HEARN, Defendant, by and through the Washoe County Public Defender's Office and Deputy Public Defender KENDRA G. BERTSCHY and Chief Deputy JOHN PETTY and hereby moves this court for an order holding that NRS 176A.290(2), in part, is unconstitutional on the basis that it violates the separation of powers doctrine as contained in the Nevada Constitution, Article 3, Section 1(1). This motion is support.

This motion is supported by the statutes and cases cited in the attached Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

PROCEDURAL HISTORY

Matthew Glenn Hearn (hereinafter "Mr. Hearn") was arrested on March 15, 2017 and charged with Battery by Prisoner, in violation of NRS 200.481(f), a felony. Mr. Hearn waived

his right to a preliminary hearing and was arraigned in District Court and pled guilty to the sole charge on April 11, 2017. The Defense filed a Psychological Evaluation on May 10, 2017. Mr. Hearn applied for Veteran's Court after entering his plea and was accepted prior to sentencing on May 31, 2017.

The parties appeared for a Sentencing Hearing on June 1, 2017. The parties stipulated to continue the hearing in order to allow for additional time to negotiate and discuss Veteran's Court. The State informed the Defense via email the afternoon of June 5, 2017 that the State would not be agreeing to Veteran's Court as a diversion. At the Sentencing Hearing on June 6, 2017, the State invoked NRS 176A.290(2), and informed the Court that it was declining to stipulate to Mr. Hearn's admittance because he plead guilty to a violent offense. Defense argued that NRS 176A.290(2) is unconstitutional and requested to orally argue or brief the issue. The Court granted the request to brief the issue and set forth a briefing schedule.

LEGAL ARGUMENT

NRS 176A.290 establishes a specialty court for military veterans. It sets forth qualifying standards, procedures for failure to meet certain terms and conditions, and procedures for successful completion of the terms and conditions. NRS 176A.290(2) establishes a prosecutor's veto provision, allowing a prosecutor veto power of a defendant's entry into the specialty court. NRS 176A.290(2) states:

> 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. . .
> (emphasis added).

For the reasons argued below, the prosecutor's veto provision contained in NRS 176A.290(2)—providing that in certain circumstances a district court may not assign a defendant to a program established by NRS 176A.280 "unless the prosecuting attorney stipulates to the assignment"—violates the separation of powers doctrine. The "prosecutor's

veto" provision of NRS 176A.290(2) violates the separation of powers doctrine found in Article 3, Section 1(1) of the Constitution of the State of Nevada. We acknowledge that there are no Nevada Supreme Court cases directly on point, however the Supreme Court's discussion of the separation of powers doctrine in other cases, and its approval of the reasoning in two California cases that have decided this issue, supports our conclusion. For example, the Supreme Court has noted that Nevada *embraced* the separation of powers doctrine and incorporated it into its constitution even though there is no overarching requirement that it do so. Additionally, the Court has repeatedly identified the purpose of the doctrine as preventing one governmental branch from *encroaching* on either of the other two branches of government—emphasizing its desire to particularly keep the powers of the judiciary separate from those of either the legislative or executive branches. And, as relevant here, the Court has made clear that it is the sole *function* of the judiciary to decide what penalty, within the range of penalties set by the Legislature, to impose on an individual defendant. Finally, by approving California's chronological distinction between a prosecutor's *charging* decision and the trial court's authority to *dispose* of a case after its jurisdiction has been invoked, the Nevada Supreme Court has provided the analytic framework necessary to declare the prosecutor's veto provision of NRS 176.290(2) an unconstitutional violation of the separation of powers doctrine.

A. Separation of Powers

"States are not required to structure their governments to incorporate the separation of powers doctrine, but Nevada has embraced this doctrine and incorporated it into its constitution." *Commission on Ethics v. Hardy*, 125 Nev. 285, 291, 212 P.3d 1098, 1103 (2009) (citation omitted). Nev. Const. art. 3, § 1(1) provides that:

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> [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 in this constitution.

Under this doctrine no branch of government may exercise powers appertaining to the other two branches. Nor may one branch of government encroach upon the powers of either of the other two branches of government. *Berkson v. LePome*, 126 Nev. 492, 498, 245 P.3d 560, 564 (2010) (remarking that "[t]he separation of powers doctrine is the most important foundation for preserving and protecting liberty by preventing the accumulation of power in any one branch of government."); *Commission on Ethics v. Hardy*, 125 Nev. at 292, 212 P.3d at 1103 ("purpose of the separation of powers doctrine is to prevent one branch of government from encroaching on the powers of another branch"). The Nevada Supreme Court 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. at 498, 245 P.3d at 564-65 (citing *Galloway v. Truesdell*, 83 Nev. 13, 19, 422 P.2d 237, 242 (1967)). And the Court has made clear that "while it is the function of the Legislature to set criminal penalties, *it is the function of the judiciary to decide what penalty*, within the range set by the Legislature, if any, to impose on an individual defendant." *Mendoza-Lobos v. State*, 125 Nev. 634, 639-40, 218 P.3d 501, 504-05 (2009) (italics added) (citations omitted); and *Id.* at 641, 218 P.3d at 506 ("The power to impose a sentence is a basic constitutional function of the judicial branch of government over which this court has inherent authority.") (citations omitted); and see *Stromberg v. Second Judicial Dist. Ct.*, 125 Nev. 1, 8, 200 P.3d 509, 513 (2009) (drawing a distinction between a prosecutor's charging decision and the exercise of a court's sentencing

discretion under NRS 484.37941—making the latter "simply a choice between the legislatively prescribed penalties set forth in the statute").

B. *Stromberg* and Persuasive California Cases

The unconstitutionality of a "prosecutor's veto" of a proposed judicial disposition of a case that is properly within the court's jurisdiction is a question of first impression in Nevada. But the Nevada Supreme Court, in *Stromberg v. Second Judicial Dist. Ct.*, 125 Nev. 1, 200 P.3d 509 (2009), has already provided the analytical framework to resolve this question. In *Stromberg* the State asserted that NRS 484.37941, which in certain circumstances allows a district court to sentence a felony DUI offender as a second-time DUI misdemeanant upon the successful completion of an authorized treatment program, violated the separation of powers doctrine because it gave "the district court the power to determine how to charge a DUI offender, a decision that is exclusively within the province of the executive branch of government represented by the prosecutor." 125 Nev. at 6, 200 P.3d at 512. The Court rejected this assertion because "the district court's decision to grant or deny an offender's application for treatment [under the statute] *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 [the statute] is simply a choice between the legislatively prescribed penalties set forth in the statute." 125 Nev. at 8, 200 P.3d at 513 (italics added).

In reaching this conclusion the Court found persuasive the reasoning of the California Supreme Court in two of its cases: *Esteybar v. Municipal Court for Long Beach Judicial District*, 485 P.2d 1140 (Cal. 1971), and *People v. Superior Court of San Mateo County*, 520 P.2d 405 (Cal. 1974). See *Stromberg*, 125 Nev. at 7-8, 200 P.3d at 512-13. But both of these cases in turn relied on an earlier California Supreme Court decision in *People v. Tenorio*, 473

P.2d 993 (Cal. 1970), and are now a part of a continuing development of California law. See e.g. *People v. Thomas*, 109 P.3d 564, 565-69 (Cal. 2005) (reviewing California case law and concluding based on precedent that the "prosecutor consent" provision at issue there violated California's separation of powers doctrine). These cases establish a broader narrative (embraced by the Nevada Supreme Court in *Stromberg*): the power to determine whether to bring charges, what charges to bring, and against which persons is within the discretion of the prosecution. But after the charging decision has been made and the proceedings instituted, the prosecutorial die has been cast and the separation of powers doctrine commits to the judiciary the power to decide, subject to legislatively prescribed guidelines, the sentence or other disposition to impose upon a defendant. *People v. Birks*, 960 P.2d 1073, 1086 (Cal. 1998) (recognizing the prosecution's authority "to frame the accusatory pleading at the outset"); *People v. Tenorio*, 473 P.2d at 996 ("When the decision to prosecute has been made, the process which lead to acquittal or to sentencing is fundamentally judicial in nature."); *People v. Superior Court of San Mateo*, 520 P.2d at 410 (noting that after the "prosecutorial die … has … been cast[] … [t]he case is before the court for disposition, and disposition is a function of the judicial power no matter what the outcome.") (internal quotation marks omitted).[1]

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[1] Other jurisdictions are in accord: See *State v. Krotzer*, 548 N.W.2d 252, 254 (Minn. 1996) ("The final disposition of a criminal case is ultimately a matter for the presiding judge. … [O]nce the legislature has defined the range of punishments for a particular offense, *it cannot 'condition the imposition of the sentence by the court upon the prior approval of the prosecutor.*'") (citation omitted) (alteration and italics added); *cf. State v. Easley*, 322 P.3d 296 (Idaho 2014) ("The post-judgment prosecutorial veto violates the Separation of Powers doctrine. Whatever authority prosecutors have as 'judicial officers,' that authority does not extend to determining sentences when a defendant has been adjudicated guilty of a violation. That is the court's authority. It cannot be contracted away."); *State v. Jones*, 689 P.2d 561, 564 (Ariz.Ct.App. 1984) (striking down statute that conditioned the court's power to impose a sentence less than the mandatory minimum on the prosecutor's recommendation).

In *Stromberg* the Supreme Court found the California Supreme Court's analysis that drew "a line between the prosecutor's decision in how to charge and prosecute a case and the [district] court's authority to dispose of a case after its jurisdiction has been invoked" to be "particularly compelling." 125 Nev. at 7, 200 P.3d at 512. And quoted approvingly from *People v. Superior Court of San Mateo County*: "when the jurisdiction of a court has been properly invoked by the filing of a criminal charge, the *disposition* of that charge becomes a judicial responsibility." 125 Nev. at 7, 200 P.3d at 513 (citations omitted) (italics in the original) (internal quotation marks omitted).

Given this express approval of California's analysis there is no reason to believe that the Nevada Supreme Court would retreat from it if called upon to answer the question presented here. This is particularly true because NRS 176A.290—which is located in the legislatively designated chapter on "probation and sentence"—provides in the first subsection of the statute that the district court "may, without entering a judgment of conviction … 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." NRS 176A.290(1) (italics added). This is significant because in *Stromberg* the Supreme Court had also concluded "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." 125 Nev. at 8, 200 P.3d at513 (italics added) (citing NRS 176A.100 (giving the district court broad discretion to suspend a sentence and grant probation)). Under the plain language of NRS 176A.290(1) however, the district court is expressly given the discretion to suspend the proceedings and "grant probation." That is, under the statute the district court's grant of probation is a grant of

probation *in fact*, and not a mere analogy.[2] The "in fact" nature of this grant of probation under NRS 176A.290(1) is underscored by the added fact that a defendant's failure to comply with the terms and conditions of this grant of probation has consequences. See NRS 176A.290(3)(a), (b) (providing for entry of judgment and for incarceration if the defendant violates the terms and conditions of probation).

Because sentencing is the function of the judiciary and because "more sophisticated responses to the wide range of anti-social behavior traditionally subsumed under the heading of 'crime[]'" have been developed, "alternative means of disposition have been confided to the judiciary." *People v. Superior Court of San Mateo County*, 520 P.2d at 410. The program for the treatment of veterans and members of the military is one such "sophisticated response" or "alternative means", and thus, a district court's discretionary use of an appropriate treatment program cannot depend on, or be conditioned upon, the stipulation of the prosecuting attorney. *People v. Thomas*, 109 P.3d at 640 (the Legislature "cannot abort the *judicial process* by subjecting a judge to the control of the district attorney") (citation and internal quotation marks omitted) (italics in the original). Because the "prosecutor's veto" provision of NRS 176A.290(2) interferes with the judicial process by conditioning the exercise of judicial power

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[2] The Nevada Supreme Court's prudence in keeping within the judiciary the power to decide what penalty, if any, to impose on an individual defendant distinguishes Nevada from other States that have concluded that sentencing is not an exclusive function of the court. Compare *Billis v. State*, 800 P.2d 401, 417 (Wyo. 1990) ("sentencing is not inherently or exclusively a judicial function"); *In Re R.W.V.*, 942 P.2d 1317, 1320 (Colo.App. 1997) ("Although sentencing traditionally is a judicial function, it is not within the sole province of the judiciary."). And the grant of probation in fact provision of NRS 176A.290(1) distinguishes Nevada from other States that hold that deferred sentences are not actual sentences. with *State v. Pierce*, 657 A.2d 192, 196-97 (Vt. 1995) ("a deferred sentence is not a sentence at all, but rather a postponement of sentence"; a prosecutor's veto power over court's power to defer sentences did not violate the separation of powers doctrine).

upon the approval of the executive branch—the "prosecuting attorney"—it violates the doctrine of separation of powers.

C. The Offending Language in NRS 176A.290(2) can be Severed

Nevada has expressed in NRS 0.020(1) a preference for severability. It states:

> If any provision of the Nevada Revised Statutes, or the application thereof to any person, thing or circumstance is held invalid, such invalidity shall not affect the provisions or application of NRS which can be given effect without the invalid provision or application, and to this end the provisions of NRS are declared to be severable.

"The severability doctrine obligates the judiciary 'to uphold the constitutionality of legislative enactments 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) (quoting *Rogers v. Heller*, 117 Nev. 169, 177, 18 P.3d 1034, 1039 (2001)). Before language can be severed from a statute however, "a court must first determine 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." *Id*. (citing *Cnty. Of Clark v. City of Las Vegas*, 92 Nev. 323, 336-37, 550 P.2d 779, 788-89 (1976)).

i. The statute standing alone can be given legal effect

Subsection 2 of NRS 176A.290 currently provides:

> 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.

Nothing in this statute requires a district court to assign an otherwise eligible defendant into a program, even with the prosecutor's stipulation, if the district court determines that the offense involved the use or threatened use of force or violence or that the defendant had previously been convicted of a felony that involved the use or threaten use of force or violence. And nothing in the statute precludes the prosecuting attorney from stipulating to the assignment even where a court has determined that the offense involved the use or threatened use of force or violence or that the defendant had previously been convicted of a felony that involved the use or threaten use of force or violence. In fact, the statute does not automatically exclude from eligibility those defendants whose offenses involved the use or the threatened use of force or violence or who have previously been convicted of a felony that involved the use or the threatened use of force or violence. Under this statute as written, some defendants whose offenses involved the use or the threatened use of force or violence or who have previously been convicted of a felony that involved the use or the threatened use of force or violence *can* be assigned into an appropriate treatment program, whiles others cannot—depending on the prosecutor's stipulation. Thus, if the offending language—"unless the prosecuting attorney stipulates to the assignment"—is severed from the statute, the district court will still have the judicial discretion to assign (or not) an otherwise eligible defendant into a program even where the offense involved the use or threatened use of force or violence or that the defendant had previously been convicted of a felony that involved the use or threaten use of force or violence. Striking the offending language will not affect the district court's judicial process; except to say that the district court's judicial power will no longer be subject to the control of the prosecuting attorney.

ii. The remaining portion of the statute accords with legislative intent

NRS 176A.290, like other diversion statutes, reflects a legislative response to "the wide range of anti-social behavior traditionally subsumed under the heading of 'crime.'" Severing the offending language from NRS 176A.290(2) would not undermine the purpose of the statute. The purpose of the statute is to provide "alternative means" to dispose of cases in a fashion that benefits the defendant and society at large. Here the statute allows the district court to assign an eligible defendant—*i.e.*, one who is "a veteran or a member of the military and who suffers from mental illness, alcohol or drug abuse or posttraumatic stress disorder"—into a treatment program and "suspend further proceedings and place the defendant on probation" upon terms and conditions. NRS 176A.290(1). If the offending language is severed, a district court can continue to fulfill the purpose of the statute. Striking the offending language would not change the eligibility criteria found in NRS 176A.290(1), it would not change the district court's discretion to assign (or not) an otherwise eligible defendant into a treatment program under NRS 176A.290(2), and it would not change how the district court handles violations of the terms and condition of probation under NRS 176A.290(3), or how the district court disposes of a case upon a defendant's successful completion of the treatment program under NRS 176A.290(4). Thus, NRS 176A.290 is severable under NRS 0.020(1).

CONCLUSION

The provision of NRS 176A.290(2)—requiring the stipulation of the prosecutor before a district court can assign an otherwise eligible defendant into an appropriate program of treatment as contemplated by NRS 176A.280—is an unconstitutional violation of Article 3, Section 1(1) of the Constitution of the State of Nevada. And this Court can, consistent with

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Nevada's statutory preference in favor if severability, strike the offending language from the statute while preserving the remainder of the statute.

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned hereby affirms, pursuant to NRS 239B.030, that this document does not contain the social security number of any person.

DATED this 9th day of June, 2017.

JEREMY T. BOSLER
WASHOE COUNTY PUBLIC DEFENDER

By: /s/ John Reese Petty
JOHN REESE PETTY
Chief Deputy Public Defender

By: /s/ Kendra G. Bertschy
KENDRA G. BERTSCHY
Deputy Public Defender

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Washoe County Public Defender's Office, Reno, Washoe County, Nevada; that on this 9th day of June, 2017, I electronically filed the foregoing documents with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

SEAN ALEXANDER
DEPUTY DISTRICT ATTORNEY

/s/ Linda Gray
LINDA GRAY

FILED
Electronically
CR17-0502
2017-06-16 02:07:14 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 6153103 : csulezic

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v.

MATTHEW GLENN HEARN,

Defendant.

_____/

Case No. CR17-0502

Dept. No. D04

OPPOSITION TO DEFENDANT'S MOTION TO HOLD NRS 176A.290(2) UNCONSTITUTIONAL

The State of Nevada, by and through CHRISTOPHER J. HICKS, Washoe County District Attorney, and SEAN ALEXANDER, Deputy District Attorney, hereby files its Opposition to the Defendant's Motion to Hold NRS 176A.290(2) Unconstitutional.[1] The State's Opposition is based upon the attached Memorandum of Points and Authorities, all papers on file, and any oral argument or evidence that may be presented in court.

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[1] Given the issue presented, pursuant to Local Criminal Rule 7(h) the State respectfully requests that the Court permit this briefing to exceed the ten-page limit.

MEMORANDUM OF POINTS AND AUTHORITIES

A. STATEMENT OF FACTS & PROCEDURAL HISTORY

The Defendant was charged with one count of Battery by a Prisoner for his conduct during a March 15, 2017, attack upon Deputy Cook, an employee at the Washoe County Jail. Just prior to the attack, Deputy Cook contacted his co-worker, Deputy Malizia, and requested assistance with placing the Defendant into a holding cell due to the Defendant's disrespectful behavior towards the jail's medical staff.[2] At that time, the Defendant was in the intake lobby on the phone.

Deputy Malizia approached the Defendant and instructed him to hang up the phone. The Defendant responded by stating: "I am on the fucking phone!" and slamming the phone onto the hook switch. He then turned to his left in an aggressive manner. Deputy Cook attempted to gain control of his left arm while Deputy Malizia attempted to gain control of his right arm. A struggle ensued. During the struggle, the Defendant managed to place Deputy Cook in headlock.

At sentencing, the State declined to stipulate to the Defendant's assignment to the Veteran's Court program pursuant to NRS 176A.290(2). This Court then set a briefing schedule on the constitutionality of the prosecutorial consent provision contained in NRS 167A.290(2).

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[2] This statement of facts is taken from the police report(s) generated in this case.

B. ARGUMENT

I. ARGUMENT SIMILAR TO THE DEFENDANT'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.

In *United States v. Ayarza*, 874 F.2d 647 (9th Cir. 1989), the United States Court of Appeals for the 9th Circuit considered a defendant's challenge to a federal statute allowing a federal prosecutor to prevent a judge from imposing a downward turn in sentencing in cases where the accused has provided substantial assistance. *Ayarza*, 874 F.2d at 652-653. There, the defendant asserted that the federal statute violated the separation of powers doctrine by giving a prosecutor "unbridled discretion to decide who is entitled to a sentencing reduction" based on his or her assessment of the accused's substantial assistance. *Id.* at 653. The 9th circuit, however, disagreed, reasoning that other federal courts have found that 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.* (*citing United States v. Severich*, 676 F.Supp. 1209 (S.D. Fla. 1988), aff'd, 872 F.2d 434 (11th Cir. 1989). *See also United States v. Grant*, 886 F.2d 1513, 1514 (8th Cir. 1989) (*citing United States v. Huerta*, 878 F.2d 89, 91-93 (2d Cir. 1989); *United States v. Musser*, 856 F.2d 1484, 1487 (11th Cir. 1988) (Holding that "there is no 'constitutional right' to the availability of a substantial assistance provision, 'and hence no grounds upon which to challenge Congress' manner of enacting it.'").

Here, this Court, similar to the 9th Circuit in *Ayarza*, should hold that NRS 176A.290(2)'s prosecutorial consent provision does not violate the separation of powers doctrine, especially where it merely vests the government with the authority to recommend a reduced sentence. Like the federal statute at issue in *Ayarza*, NRS 176A.290(2) vests the State with the power to permit or deny a particular outcome based upon the application of statutory criteria. In this regard, NRS 176A.290(2) is clear and purposeful: where a veteran has committed an offense involving the use or threatened use of violence, stipulation of the prosecuting attorney is necessary to trigger Veteran's Court eligibility. Thus, like a federal prosecutor determining that a defendant is or is not eligible for a reduced sentence based upon his or her substantial assistance, the State's determination that the Defendant has committed a crime involving the use or threatened use of violence does nothing to strip this Court of its ultimate sentencing determination. Accordingly, like the court in *Ayarza*, this Court should determine that the Defendant's challenge to the prosecutorial consent provision of NRS 176A.290(2) is without merit.

II. NRS 176A.290(2) DOES NOT VIOLATE THE SEPARATION OF POWERS WHERE IT COMPORTS WITH THE STATE'S POWER TO INITIATE, CONTROL & TERMINATE PROSECUTIONS BEFORE ENTRY OF FINAL JUDGMENT.

NRS 176A.290(2) requires the prosecutor to consent to veteran's-treatment diversion only if the crime to which the defendant pleaded or was found guilty is a crime of actual or threatened violence. The Defendant claims that this provision allows the executive to unconstitutionally invade the sentencing power of the judiciary and,

as such, violates the separation of powers provision of the Nevada Constitution. Nev. Const. art. 3 § 1. However, "[u]nlike interpreting the constitution or adjudicating disputes, sentencing is not inherently or exclusively a judicial function." *Geraghty v. United States Parole Commission*, 719 F.2d 1199, 1211 (3d Cir. 1983). As such, the provision is constitutional.

Although Nevada has not addressed this precise issue, the decisions of other jurisdictions are persuasive.[3] The State urges this Court to study and adopt the reasoning of the Wyoming Supreme Court in *Billis v. State*, 800 P.2d 401 (Wyo. 1990), where the Wyoming Supreme Court engaged in an exhaustive analysis of the separation-of-powers question as it pertained to prosecutorial consent to diversionary sentencing programs. In *Billis*, the defendants proffered what the Wyoming court called an "air-tight-compartment" conception of the separation of powers between its three branches of government.

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[3] The Defendant relies upon *Stromberg v. Dist. Court*, 125 Nev. 1, 200 P.3d 509 (2009). That case is distinguishable, however, because it considered the converse of the question presented in this case: Does the district court's decision to reduce a felony-DUI charge after successful completion of a felony-DUI diversion program violate the separation-of-powers doctrine by unconstitutionally invading the power of the executive? The Court answered that it does not, but it did not hold that executive involvement in pre-sentencing diversion conversely did violate the doctrine. Many governmental activities involve interplay between the powers of the various branches; this is one of those instances. The Defendant also cites to cases out of California, namely, *Esteybar v. Municipal Court for Long Beach Judicial District*, 5 Cal. 3d 119, 485 P.2d 1140 (1971), and *People v. Superior Court (On Tai Ho)*, 520 P.2d 405, 113 Cal. Rptr. 21 (1974). However, as discussed in Section III., these cases are distinguishable and should not sway a decision on the constitutionality of NRS 176A.290(2)'s prosecutorial consent provision.

Billis, 800 P.2d at 413-415 (Wyo. 1990). According to that idea, "one department of government may not encroach upon functions belonging to another, … [in order to] preserve each of the powers in separate, air-tight compartments." *Id*. at 414. This sterile, quasi-Platonic view of the division of powers, the court noted, did not conform either to the reality of government or the principle of checks and balances found in both the Wyoming and United States Constitutions:

> Under both the Federal Constitution and our state constitution, although the legislative bodies propose and enact laws, the executive bodies exercise veto power, which by its nature injects the executive department into the business of the legislative department. Under both constitutions the judicial department has and exercises the power to adjudicate and declare legislative enactments unconstitutional, which by its nature injects the judicial department into the business of the legislative department. Under both constitutions, although the judicial department adjudicates and imposes legislatively determined sentences upon adjudicated criminal defendants, the executive department has and exercises a pardon power, which by its nature injects the executive department into the business of both the legislative and judicial departments.

Id. Thus, the court concluded that the only conception of the separation of powers consonant with both constitutions was one that incorporated "a pragmatic, flexible view of differentiated governmental power." *Id*. at 415.

Applying this conception to the prosecutorial consent provision, the Wyoming court — after "tracing the evolution of the prosecutor's *nolle prosequi* power" — concluded that the prosecutorial consent provision of the challenged statute was "the product of the legislative department's correct recognition of the executive department's power to initiate, control, and terminate criminal

prosecutions before the judicial department exercises its power to enter a final judgment." *Id.* at 421. Because this action comports with the Wyoming and Federal Constitutions' requirement of pragmatic and flexible government, the requirement of prosecutorial consent does not violate the separation of powers. *Id.* at 415. Other jurisdictions have come to the same conclusions when faced with analogous challenges. *See People in Interest of R.W.V.*, 942 P.2d 1317, 1320-21 (Colo. Ct. App. 1997) ("The juvenile nevertheless contends that the statutory grant of prosecutorial veto power over the trial court's ability to defer sentences following a juvenile's entry of a guilty plea violates separation of powers principles. We disagree. … The deferred adjudication statute gives the prosecution authority analogous to its authority to plea bargain."); *see also Id.* at 1321-22 (collecting cases).

The State submits that the "air-tight-compartment" conception of the separation of powers reflected in the Defendant's Motions and seemingly advanced by the California Supreme Court in *Esteybar v. Municipal Court for Long Beach Judicial District*, 5 Cal. 3d 119, 485 P.2d 1140 (1971), and *People v. Superior Court (On Tai Ho)*, 520 P.2d 405, 113 Cal. Rptr. 21 (1974), does not conform to Nevada's view of the separation of powers. "On the contrary, the structure of government is such that the branches must interact. That is what keeps any one branch from dominating the government." *Whitehead v. Nevada Comm'n on Judicial Discipline*, 110 Nev. 874, 909, 878 P.2d 913, 935 (1994) (Leavitt, J., dissenting); *see also Clean Water Coal. v. The M Resort, LLC*, 255 P.3d 247, 253 (2011). The prosecutorial

consent requirement of NRS 176A.290(2), which conditions the diversion of only violent offenders into the Veterans' Court treatment program, occurs after plea or verdict, but before sentencing; as such, it does not interfere with the judicial function of formal adjudication and pronouncement of sentence. *Accord Billis*, 800 P.2d 401. Accordingly, the Defendant's Motion should be denied.

III. NRS 176A.290(2)'S PROSECUTORIAL CONSENT PROVISION IS NOT UNCONSTITUTIONAL; IT IS A PRELIMINARY ELIGIBILITY REQUIREMENT & THEREFORE DOES NOT CONSTITUTE AN EXECUTIVE INFRINGEMENT UPON A MATTER OF JUDICIAL DISCRETION.

A veto is the "power of one governmental branch to prohibit an action by another branch." Black's Law Dictionary (10th ed. 2014). A veto that allows a prosecutor to overrule a judicial determination made as part of a judge's adjudicatory function violates the doctrine of separation of powers and is therefore unconstitutional. *Esteybar v. Municipal Court for Long Beach Judicial District*, 5 Cal. 3d 119, 127-128, 485 P.2d 1140, 1143-1144 (1971); *People v. Superior Court (On Tai Ho)*, 520 P.2d 405, 412, 113 Cal. Rptr. 21, 28 (1974).

If it appears, based on statutorily established eligibility criteria, that a defendant might be eligible for a diversion program, then the process of adjudication begins and a judge's adjudicatory function is triggered. *Sledge v. Superior Court*, 520 P.2d 412, 414, 113 Cal. Rptr. 28, 30 (1974) (citing *People v. Superior Court (On Tai Ho)*, 520 P.2d 405, 407, 113 Cal. Rptr. 21, 23 (1974)). Prior to that time, however, 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. *Sledge v. Superior Court*, 520 P.2d 412, 414, 113 Cal. Rptr. 28, 30 (1974). Statutes are presumed valid and the challenger of the law has the burden of proving its unconstitutionality. *Nelson v. State*, 123 Nev. 534, 540, 170 P.3d 517, 522 (2007).

In support of his argument, the Defendant cites two California cases: *Esteybar v. Municipal Court for Long Beach Judicial District*, 5 Cal. 3d 119, 485 P.2d 1140 (1971), and *People v. Superior Court (On Tai Ho)*, 520 P.2d 405, 113 Cal. Rptr. 21 (1974). However, both are distinguishable from the instant case. Further, his argument fails to take account of the California Supreme Court's decision in *Sledge v. Superior Court*, 520 P.2d 412, 113 Cal. Rptr. 28 (1974).

Both *Esteybar* and *On Tai Ho* dealt with situations where statutory provisions permitted a prosecuting attorney to override a judge's discretion in the exercise of his or her adjudicatory function. In *Esteybar*, the California Supreme Court confronted a statute requiring a judge to obtain the prosecutor's consent before exercising his or her discretion to hold a defendant to answer on either a felony or a misdemeanor. *Esteybar v. Municipal Court for Long Beach Judicial District*, 5 Cal. 3d 119, 127-128, 485 P.2d 1140, 1143-1144 (1971). There, the Court determined that the prosecutor consent provision violated the separation of powers doctrine because it required the judge to obtain the executive branch's approval before exercising his or her discretion.[4] *Id.* In *On Tai Ho*, the

[4] California Penal Code section 17(b)(5), the statute at issue in *Esteybar*, stated that:
(b) When a crime is punishable, *in the discretion of the court*, by imprisonment in the state prison or by fine or imprisonment

California Supreme Court confronted a statute requiring a judge to obtain a prosecutor's consent before exercising his or her discretion to sentence a defendant to a drug diversion program. *People v. Superior Court (On Tai Ho)*, 520 P.2d 405, 412, 113 Cal. Rptr. 21, 28 (1974). There, the Court ruled, as it did in *Esteybar*, that the statute violated the separation of powers doctrine because it forced the court to defer to the prosecutor on a matter solely within court's discretion.[5] *Id.* at 412. However, these are not the scenarios presented by the instant statute.

Unlike the statutes in *Esteybar* and *On Tai Ho*, NRS 176A.290(2) does not contain a provision that allows a prosecutor to override a decision left to a judge's discretion. NRS 176A.290(1) and 176A.290(2) set forth Nevada's Veteran's Court eligibility criteria, one of which is that the prosecuting attorney must stipulate to a defendant's Veteran's Court diversion assignment in cases involving a

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in the county jail, it is a misdemeanor for all purposes under the following circumstances:
(5) When, at or before the preliminary examination and with the consent of the prosecuting attorney and the defendant, the magistrate determines that the offense is a misdemeanor…
California Penal Code section 17(b)(5) (as amended in 1969) (emphasis added).

[5] California's diversion scheme, at the time of *On Tai Ho*, consisted of Penal Code sections 1000-1000.4. It began with eligibility requirements to be applied by the prosecuting attorney contained in then Penal Code section 1000. If those were met, the prosecuting attorney was then required to advise the accused or his lawyer of his or her diversion eligibility under section 1000.1. Upon notification, and if the defendant consented and waived his right to a speedy trial, the prosecuting attorney was then required to refer the case to probation department. Once referred, the probation department was charged with conducting an investigation and presenting its findings and recommendations to the sentencing court. Upon submission of the probation department's findings and recommendations, the sentencing court was then required to hold a hearing where it would determine whether the defendant should be diverted. At that hearing, however, the sentencing court could not divert the defendant without the prosecutor's consent under then Penal Code section 1000.2.

qualifying plea to an offense involving "the use or threatened use of force or violence." NRS 176A.290(2). It is only once these criteria are met that the process of adjudication begins and the judge's discretion to grant diversion manifests itself. Thus, where the prosecuting attorney does not consent to a violent offender's assignment to Veteran's Court as diversion, the eligibility criteria are not met and the sentencing judge's discretion to send the accused to Veteran's Court as diversion is not triggered. Accordingly, the refusal of a prosecutor to consent to a violent offender's assignment to Veteran's Court as diversion under NRS 176A.290(2) does not implicate, let alone violate, the separation of powers doctrine. Here, *Sledge v. Superior Court*, 520 P.2d 412, 113 Cal. Rptr. 28 (1974), is instructive.

In *Sledge*, the California Supreme Court, on the same day that it reached its decision in *People v. Superior Court (On Tai Ho)*, 520 P.2d 405, 113 Cal. Rptr. 21 (1974), ruled that a prosecutor's preliminary determination that a defendant was not qualified for a drug diversion program did not amount to a violation of the separation of powers doctrine. *Sledge v. Superior Court*, 520 P.2d at 414. The Court reasoned that the prosecutor's determination, which was made pre-trial and pursuant to standards prescribed by statute, did not "constitute an act of judicial authority and [therefore did not] violate the constitutional requirement of separation of powers." *Id.* at 414, 416. Here, a similar result should follow.

Like the eligibility requirements at issue in *Sledge*, the eligibility requirement at issue here is specifically vested with the

prosecutor. And, like the eligibility requirements there, the eligibility requirement at issue here is made pre-trial and prior to the beginning of the adjudicatory process. Thus, like the requirements there, the requirement at issue here cannot be said to constitute a judicial function being exercised by the executive branch in violation of the doctrine of separation of powers. Accordingly, the Defendant's attempt to classify the eligibility requirement in NRS 176A.290(2) as an unconstitutional prosecutorial veto should be denied.

C. CONCLUSION

This Court should deny the Defendant's Motion to declare the prosecutorial consent provision of NRS 176A.290(2) unconstitutional. Federal courts considering similar arguments have held that a prosecutor's ability to block a particular sentencing option does not violate the separation of powers doctrine. *See* Section I. The provision also comports with the State's power to initiate, control, and terminate prosecutions before entry of judgment. *See* Section II. Lastly, because the provision constitutes part of the Veterans' Court preliminary admissibility criteria, it does not infringe upon a matter of judicial discretion. *See* Section III.

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AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

Dated this 16th day of June, 2017.

CHRISTOPHER J. HICKS
District Attorney
Washoe County, Nevada

By /s/ SEAN ALEXANDER
SEAN ALEXANDER
Deputy District Attorney

CERTIFICATE OF SERVICE BY E-FILING

I certify that I am an employee of the Washoe County District Attorney's Office and that, on this date, I electronically filed the foregoing with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

WASHOE COUNTY PUBLIC DEFENDER

DATED this 16th day of June, 2017.

/s/Shelly Luke
SHELLY LUKE

4185

JUDITH ANN SCHONLAU

CCR #18

75 COURT STREET

RENO, NEVADA

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

BEFORE THE HONORABLE CONNIE J. STEINHEIMER, DISTRICT JUDGE

-o0o-

THE STATE OF NEVADA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CASE NO. CR17-0502
	)	DEPARTMENT NO. 4
MATTHEW GLENN HEARN,	)	
	)	
Defendant.	)	
	)	

TRANSCRIPT OF PROCEEDINGS

MOTION/SENTENCING

WEDNESDAY, JUNE 21, 2017, 10:30 A.M.

Reno, Nevada

Reported By: JUDITH ANN SCHONLAU, CCR #18
NEVADA-CALIFORNIA CERTIFIED; REGISTERED PROFESSIONAL REPORTER
Computer-aided Transcription

A P P E A R A N C E S

FOR THE PLAINTIFF: OFFICE OF THE DISTRICT ATTORNEY
BY: SEAN ALEXANDER, ESQ.
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FOR THE DEFENDANT: OFFICE OF THE PUBLIC DEFENDER
BY: KENDRA BERTSCHY, ESQ.
DEPUTY PUBLIC DEFENDER
350 S. CENTER STREET
RENO, NEVADA

PAROLE AND PROBATION: Carlos Perez

RENO, NEVADA; WEDNESDAY, JUNE 21, 2017; 10:30 A.M.

-oOo-

THE COURT: this is the time set for oral argument regarding Veterans Court unconstitutionality. We also set this for sentencing. You have submitted the motion and the opposition. I am going to hear oral arguments today. I don't think I am going to rule on the motion today, so I am going to let the Division leave, because I do not believe we'll proceed to sentencing today. Thank you very much

PAROLE AND PROBATION: Thank you, Your Honor.

THE COURT: Ms. Bertschy.

MS. BERTSCHY: Thank you, Your Honor. Kendra Bertschy on behalf of Mr. Hearn who is present seated next to me in custody. As the Court has instructed, we are here regarding my request to find the statute regarding Veterans Court unconstitutional for the reasons I outlined in my motion.

If the Court may allow, if I may continue I guess with my reply on our argument?

THE COURT: Okay.

MS. BERTSCHY: Thank you, Your Honor. I received the opposition filed by the State. I will discuss it in terms of regarding their argument specifically regarding the

argument for the Federal court's finding that the similar sentencing option doesn't violate the Separation of Powers Doctrine. I would argue that the case law provided by the State should not be considered by this Court to be dispositive. Specifically, it is distinguishable when you look at the case cited of United States vs. Ayarza, 874 P.2nd 647, 9th Circuit, 1989. What this is discussing is the sentencing guidelines that was enacted by the Federal Court. In enacting the sentencing guidelines that was under part of the Judicial Commission which is part of the Judicial branch, it found it didn't violate the separation of powers but it is a different legal doctrine that was discussed in there in terms of it was already under the Judicial branch..

Here what is happening in our case, the Court should have the discretion to have the full range of options before the Court, yet our legislature has decided to give the veto power to the State, which my argument is that violates the Separation of Powers Doctrine.

Specifically regarding the case of, in the second part of the argument from the State, regarding Stromberg and the State's reliance on Sledge, I argue this is also distinguishable and believe this Court should rely on the case law of Stromberg recited in my brief which relied on the California case of Esteybar vs. Municipal Court located at 5

Cal. 3rd 119, 122, 95 Cal. Rptr. 524, 485 P.2d 1140, 1971 as well as the People v. Superior Court On Tai Ho, 11 Cal. 3rd, 59, 61, 113 Cal Rptr. 21 from 1974. And specifically the California Supreme Court has continued to reject this argument from the State when the jurisdiction of the court has been properly invoked by filing a criminal charge, the disposition of that charge becomes a judicial responsibility. With the development of a more specific response to the wide range of antisocial behavior traditionally subsumed under the heading of "crime", alternative means of disposition have been confined to the judiciary.

That is why we believe that the decision of whether or not Mr. Hearn or any defendant should be allowed to be placed in Veterans Court is fully within the discretion of the Court, and the State should not be granted this veto power allowing at sentencing for the Court to be basically pigeon holed to not be allowed to have the decision to place someone in Veterans Court or in Veterans Court on a diversionary status.

I don't believe I cited to this in my brief, but the California court has also distinguished On Tai Ho and Sledge in the case of Davis vs. Municipal Court located at 46 Cal. 3rd, 64, 249 Cal. Rptr. 300, 757 P.2d 11 from the year 1988. In the distinguishment, it indicated it is very important for

the Court to focus on when the State has the discretionary power. Is it something with just the charge or at sentencing where, yes, the Judge is the one who has the power of discretion in order to determine what the appropriate sentence should be. At the point we are looking at the judicial phase of the criminal proceeding at judgment, it is improper for the District Court to be granted this judicial authority of a veto decision.

THE COURT: What is the name of that case?

MS. BERTSCHY: Davis vs. Municipal Court.

THE COURT: You say you did not cite that in your brief?

MS. BERTSCHY: I don't believe I did. I looked this morning. I didn't see it in there. But it is discussing the distinction between On Tai Ho and Sledge which is one of the cases that the State is relying upon. Based off that case, I believe that this Court has the authority pursuant to NRS 176A.290 where that statute is excluding this Court from -- where it is limiting the judge to the largely non-discretionary task of applying specific legislative eligibility criteria. So the statute is giving the District Attorney broadest discretion-making authority to countermand a judicial determination which we argue is unconstitutional and should only be up to this Court.

Regarding the second part of my motion that the statute can still be granted legal effect if you strike this specific veto power from the statute, I would just submit on what I filed with this Court, Your Honor.

THE COURT: Okay. Thank you. Mr. Alexander.

MR. ALEXANDER: Thank you Your Honor. Just to get it out of the way, I don't disagree with Ms. Bertschy about the severance part of her motion. If we just excise that portion, it basically says the Court may not assign the offender if the crime involved used the threat of force or violence, we could still enforce that and give it effect. So I don't have an issue with that portion of her motion, Your Honor.

But in regards to the other aspects, I think the State's position is adequately set forth in the briefs submitted to the Court. Just to give some of the highlights, moving to the first argument made by defense counsel, I do believe the Ayarza case does provide the court with authority to get to where the State wants it to be. The defendant did attempt to distinguish it by saying, hey, the Judicial Commission gave the power. The Judicial branch gave the power to the prosecutor. I think we confront a similar situation here where the legislature gives the prosecutor the power. It is the same type of scenario just different branches of the government. I think that gets you where you need to be.

It doesn't necessarily violate the separation of powers. What it does is give the power to enter or deny a particular sentence or outcome based on the application of statutory criteria, namely, did that crime involve the use or threat of use of force and violence. If it does, the the State has the discretion to block that sentencing option just as it did in Ayarza as far as downward turning sentencing goes in cases involving substantial assistance.

Our second argument, Your Honor, we are urging the Court to adopt the reasons in Billis. It is a Wyoming case. The cite for that case--

THE COURT: I have it.

MR. ALEXANDER: Thank you Your Honor. That case is virtually analogous to the case here on the deal with the prosecutorial consent provision. It is virtually identical to ours. Basically, it says under the statute both defendant and the State consent the Court may defer further prosecution proceedings placing the defendant on probation without entry of judgment of guilt or conviction. That is reading from the case Your Honor. We confront a similar situation here. But if Your Honor does place the defendant into the diversion, Veterans Court diversion program with the State's consent, there is no entry of judgment. He's treated as a probationer. And there the Court found there was no violation of the

separation of powers.

Stromberg, the case relied on by the defendant is distinguishable in the State's opinion. We addressed that issue on page 5 footnote 3 of our brief. There specifically that case dealt with the Court's actions during sentencing following successful completion of a term of DUI diversion. It is not the same as here where we are talking about a pre-sentence application like the one we would see in Billis.

Moving to our last argument, Your Honor --

THE COURT: I am going to stop you there. The Wyoming court specifically found that not necessarily in Billis but prior to Billis that the determination of sentencing was not solely a judicial determination.

MR. ALEXANDER: Correct.

THE COURT: In Nevada, it does appear the Nevada Supreme Court has determined that it is solely a judicial decision. How do you rectify using a Wyoming case that seems to imply a different standard? There are different standards from state to state and from the Federal jurisdiction. How do you use a Wyoming case that has a different standard for the judicial function?

MR. ALEXANDER: Well, Your Honor, I mean if he is being placed on the Court's accepting a plea but then the defendant is not being sentenced to incarceration, there is no

judgment of conviction entered. Is he really sentenced at that point?

THE COURT: You mean if he receives diversion?

MR. ALEXANDER: That's correct.

THE COURT: So you are arguing that the determination of diversion is not a judicial determination?

MR. ALEXANDER: Not necessarily, Your Honor. I'm merely -- I think it is -- I mean if we are talking about a sentence, there is a Judgment of Conviction involved. There is a finality to it. If it is diversion, it is still up in the air.

THE COURT: But DUI Court you get diversion, you don't have a Judgment of Conviction, a felony DUI. There is no Judgment of Conviction. So why do you find that not persuasive in that case?

MR. ALEXANDER: Well, Your Honor, I just, I would like to retain the prosecutorial consent provision. That's what my brief is attempting to do. That is why I believe Billis is more persuasive.

THE COURT: Okay.

MR. ALEXANDER: With the Court's permission, obviously, if I can move to my third point.

THE COURT: Yes.

MR. ALEXANDER: Just in quick summation, we think it

is an eligibility criteria. That is why we hung our hat on Sledge attempting to distinguish On Tai Ho and the Esteybar decision. That is adequately set forth in the brief. I don't need to belabor the point. That ties into our first argument where we think it gives the power to say eligible or not eligible based on the status of the offense.

THE COURT: The question I had when I read that argument, in reviewing the statute, it seems it gives the prosecutor the ability to say yea or nay, but it also tells the Court that you can determine whether or not it is a crime of violence.

MR. ALEXANDER: That's correct.

THE COURT: So how can the prosecutor say nay if the judge says it is not really a crime of violence?

MR. ALEXANDER: Well, I think there is a couple of scenarios presented by that question, Your Honor. The first is the obvious, certain crimes that the defendants enter a plea to such as assault with a deadly weapon, robbery, battery, etcetera, those undoubtedly as an element of the crime involve the use or threat of force and violence. I think the court would be hard pressed to find, to hold a hearing and find that is not the case.

Then there is the other option where, the other scenarios where the defendant enters a plea to a legal fiction

or they enter a plea to an underlying offense that doesn't involve the threat or use of force or violence, but the State wants to argue the underlying facts in an attempt to block the defendant's entry into the diversion program. In that case, I think the Court would have the hearing power, and, you know, for instance if it is a legal fiction, they can determine look, I am going to determine that the crime doesn't involve the use or threat of use of force or violence, or it does, or if the State is trying to hang its hat on one of the larger charges the defendant didn't end up pleading to, as a factual basis for a determination, I could see the Court blocking that and saying, hey, that is not the crime you convicted the defendant of so I am not going to consider it and I am going to place him in the diversion program.

THE COURT: Well what is the significance of the statute that says for purpose of this subsection in determining whether an offense involved force or violence, the Court should consider facts and circumstances surrounding the offense, not just the named charge without limitation whether the defendant intended to place another person in reasonable apprehension of bodily harm. So you could commit a battery without actually placing someone in a reasonable apprehension of bodily harm. Traditionally, battery is an unlawful touching.

MR. ALEXANDER: Yes, Your Honor. The defendant could be unconscious. You could hit them, I am sorry, where the victim could be unconscious.

THE COURT: Even if they are not conscious, touching somebody is not necessarily reasonable apprehension of bodily harm.

MR. ALEXANDER: You are correct, Your Honor. I think that would be more of a misdemeanor circumstance. If we are talking about a felony case that is up here in front of Your Honor, you know, if it is a battery, it likely involved, you know, placing the person in reasonable apprehension of immediate bodily harm. Furthermore, I think the language in there is kind of more, you know, including but not limited to. It not necessarily that Your Honor has to determine that the person was placed in reasonable apprehension of immediate bodily harm. It is just something you can consider.

THE COURT: It usually says, when it says the Court shall consider, that usually means I have to do it, not may consider.

MR. ALEXANDER: Yes, Your Honor. No, I agree that Your Honor has to consider that, but I don't think it is the ultimate determination. Your Honor does have the discretion to determine whether or not it involved the use or threat of use of force or violence and just potentially, you know--

THE COURT: Well, just kind of another scenario, if the Court determines it did not involve reasonable apprehension of bodily harm, the State charged the crime with a title that seems to imply that and the defendant pled to the charge, but the court makes that finding, do you think that the prosecutor still can say, well, even though you made that finding, we believe we have the power to veto this?

MR. ALEXANDER: I don't think so at that point because the court's determination is it didn't. I mean the State, obviously the State would disagree. I think there could be a fight at a higher level over that. But I think at that point, if the Judge decides, it is decided. What else am I going to do?

THE COURT: The only other question I have for you, do you know of any decision of the Nevada Supreme Court involving this?

MR. ALEXANDER: I do not, Your Honor.

THE COURT: Did you have anything else, Ms. Betschy?

MS. BERTSCHY: Your Honor, I would just add regarding the Court's, the last question regarding any recent cases prior to that regarding the issue within the statute, there seems to be a disconnect of the State having the veto power, but then further on in that same subsection discussing it is up to the judge to consider the violent nature of the offense.

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. 73475

PETITIONER'S APPENDIX

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DA #17-3066

WCSO WC17-001348

CODE 1800
Christopher J. Hicks
#7747
P.O. Box 11130
Reno, NV 89520
(775) 328-3200

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE

* * *

THE STATE OF NEVADA,

Plaintiff,

v.

Case No.: CR17-0502

Dept. No.: D04

MATTHEW GLENN HEARN,

Defendant.

_____/

INFORMATION

CHRISTOPHER J. HICKS, District Attorney within and for the County of Washoe, State of Nevada, in the name and by the authority of the State of Nevada, informs the above entitled Court that MATTHEW GLENN HEARN, the defendant above named, has committed the crime of:

BATTERY BY PRISONER, a violation of NRS 200.481.2f, a category B felony, (50229) in the manner following:

That the said defendant on the 15th day of March, 2017, or thereabout, and before the filing of this Information, at and within the County of Washoe, State of Nevada, did willfully and unlawfully, while a prisoner in lawful custody or confinement, use force or

///

violence upon the person of DEPUTY JAMES COOK by putting the victim in a headlock and strangling him.

All of which is contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the State of Nevada.

CHRISTOPHER J. HICKS
District Attorney
Washoe County, Nevada

By: /s/ SEAN ALEXANDER
SEAN ALEXANDER
12665
DEPUTY DISTRICT ATTORNEY

The following are the names and addresses of such witnesses as are known to me at the time of the filing of the within Information:

WASHOE COUNTY SHERIFFS OFFICE
JAMES COOK
RONALD MUELLER
ZACHARY MALIZIA

The party executing this document hereby affirms that this document submitted for recording does not contain the social security number of any person or persons pursuant to NRS 239B.230.

CHRISTOPHER J. HICKS
District Attorney
Washoe County, Nevada

By /s/ SEAN ALEXANDER
SEAN ALEXANDER
12665
DEPUTY DISTRICT ATTORNEY

PCN: WASO0071337C

CODE 1785
Christopher J. Hicks
#7747
P.O. Box 11130
Reno, NV 89520
(775) 328-3200

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE

* * *

THE STATE OF NEVADA,

Plaintiff,

v.

Case No. CR17-0502

Dept. No. D04

MATTHEW GLENN HEARN,

Defendant.

_____/

GUILTY PLEA MEMORANDUM

1. I, MATTHEW GLENN HEARN, understand that I am charged with the offense of: BATTERY BY PRISONER, a violation of NRS 200.481, a category B felony.

2. I desire to enter a plea of guilty to the offense of, BATTERY BY PRISONER, a violation of NRS 200.481, a category B felony, as more fully alleged in the charge filed against me.

3. By entering my plea of guilty I know and understand that I am waiving the following constitutional rights:

A. I waive my privilege against self-incrimination.

B. I waive my right to trial by jury, at which trial the

///

State would have to prove my guilt of all elements of the offense beyond a reasonable doubt.

C. I waive my right to confront my accusers, that is, the right to confront and cross-examine all witnesses who would testify at trial.

D. I waive my right to subpoena witnesses for trial on my behalf.

4. I understand the charge against me and that the elements of the offense which the State would have to prove beyond a reasonable doubt at trial are that on March 15th, 2017, or thereabout, in the County of Washoe, State of Nevada, I did, willfully and unlawfully, while a prisoner in lawful custody or confinement, use force or violence upon the person of DEPUTY JAMES COOK by putting the victim in a headlock and strangling him.

5. I understand that I admit the facts which support all the elements of the offense by pleading guilty. I admit that the State possesses sufficient evidence which would result in my conviction. I have considered and discussed all possible defenses and defense strategies with my counsel. I understand that I have the right to appeal from adverse rulings on pretrial motions only if the State and the Court consent to my right to appeal in a separate written agreement. I understand that any substantive or procedural pretrial issue(s) which could have been raised at trial are waived by my plea.

6. I understand that the consequences of my plea of guilty are that I may be imprisoned for a period of 1 to 6 years in the

Nevada State Department of Corrections and that I am eligible for probation. I may also be fined up to $10,000.00.

7. In exchange for my plea of guilty, the State, my counsel and I have agreed to recommend the following: The State will not object to probation if I have no prior felonies.

8. I understand that, even though the State and I have reached this plea agreement, the State is reserving the right to present arguments, facts, and/or witnesses at sentencing in support of the plea agreement.

9. I also agree that I will make full restitution in this matter, as determined by the Court. Where applicable, I additionally understand and agree that I will be responsible for the repayment of any costs incurred by the State or County in securing my return to this jurisdiction.

10. I understand that the State, at their discretion, is entitled to either withdraw from this agreement and proceed with the prosecution of the original charges or be free to argue for an appropriate sentence at the time of sentencing if I fail to appear at any scheduled proceeding in this matter OR if prior to the date of my sentencing I am arrested in any jurisdiction for a violation of law OR if I violate any terms of a presentence release OR if I have misrepresented my prior criminal history. I understand and agree that the occurrence of any of these acts constitutes a material breach of my plea agreement with the State. I further understand and agree that by the execution of this agreement, I am waiving any right I may have to remand this matter to Justice Court should I later

withdraw my plea.

11. I understand and agree that pursuant to the terms of the plea agreement stated herein, any counts which are to be dismissed and any other cases charged or uncharged which are either to be dismissed or not pursued by the State, may be considered by the court at the time of my sentencing.

12. I understand that the Court is not bound by the agreement of the parties and that the matter of sentencing is to be determined solely by the Court. I have discussed the charge, the facts and the possible defenses with my attorney. All of the foregoing rights, waiver of rights, elements, possible penalties, and consequences, have been carefully explained to me by my attorney. My attorney has not promised me anything not mentioned in this plea memorandum, and, in particular, my attorney has not promised that I will get any specific sentence. I am satisfied with my counsel's advice and representation leading to this resolution of my case. I am aware that if I am not satisfied with my counsel I should advise the Court at this time. I believe that entering my plea is in my best interest and that going to trial is not in my best interest. My attorney has advised me that if I wish to appeal, any appeal, if applicable to my case, must be filed within thirty days of my sentence and/or judgment.

13. I understand that this plea and resulting conviction will likely have adverse effects upon my residency in this country if I am <u>not</u> a U. S. Citizen. I have discussed the effects my plea will have upon my residency with my counsel.

14. I offer my plea freely, voluntarily, knowingly and with full understanding of all matters set forth in the Information and in this Plea Memorandum. I have read this plea memorandum completely and I understand everything contained within it.

15. My plea of guilty is voluntary and is not the result of any threats, coercion or promises of leniency.

16. I am signing this Plea Memorandum voluntarily with advice of counsel, under no duress, coercion, or promises of leniency.

17. I do hereby swear under penalty of perjury that all of the assertions in this written plea agreement document are true.

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 11 day of April, 2017.

DEFENDANT

TRANSLATOR/INTERPRETER

Attorney Witnessing Defendant's Signature

Prosecuting Attorney

Code No. 4185

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

THE HONORABLE CONNIE STEINHEIMER, DISTRICT JUDGE

-o0o-

STATE OF NEVADA,

Plaintiff,

vs.

MATTHEW GLENN HEARN,

Defendant.
_____/

Case No. CR17-0502

Dept. No. 4

TRANSCRIPT OF PROCEEDINGS

ARRAIGNMENT

TUESDAY, APRIL 11, 2017

RENO, NEVADA

Reported by: Kristine A. Bokelmann, CCR No. 165

Job Number: 386266

APPEARANCES:

For the Plaintiff: NICKOLAS GRAHAM
Deputy District Attorney
One South Sierra Street
Reno, Nevada 89501
(775) 337-5700

For the Defendant: KENDRA BERTSCHY
Deputy Public Defender
350 South Center Street
Reno, Nevada 89501
(775) 337-4800

For the Division of
Parole & Probation: MICHAEL GREGG

RENO, NEVADA, TUESDAY, APRIL 11, 2017, 9:48 A.M.

-oOo-

THE COURT: Matthew Hearn. I'm sorry, Mr. Hearn. I think your lawyer is still in another department.

THE DEFENDANT: Yes, ma'am.

THE COURT: So we'll just call you back up in a few minutes.

(Proceedings continued.)

THE COURT: Next matter is Matthew Hearn. Good morning. This is the time set for arraignment on an Information filed March 31st, 2017. Counsel, are you ready to proceed?

MS. BERTSCHY: Yes, your Honor. Thank you. I've received the Information that was filed on March 31st. I've reviewed it with Mr. Hearn.

I apologize. For the record, this is Kendra Bertschy on behalf of Mr. Hearn, who is present and in custody. His name is correctly spelled on line 12 and we would waive a formal reading.

Today Mr. Hearn will be pleading guilty to the sole count of battery by a prisoner, which is a category B felony. He understands that he -- the consequences of his plea are that he may be in prison for a period of up to six

years in the Nevada State Department of Corrections. He is eligible for probation, and he may also be fined $10,000.

In exchange for his plea of guilty, the parties will recommend that the State will have no objection to probation if he does not have any prior felonies.

And if I may approach with the signed guilty plea memorandum.

THE COURT: You may.

Is that a complete statement of the negotiations?

MR. GRAHAM: It is, your Honor.

MS. BERTSCHY: And your Honor, separate and apart from this agreement, he would be requesting an own recognizance release.

THE COURT: Do you have any agreement from the State?

MR. GRAHAM: No, your Honor.

THE COURT: Okay. Mr. Hearn, do you understand what's going on here today?

THE DEFENDANT: Yes, ma'am, I do.

THE COURT: Do you have any questions about what's happening?

THE DEFENDANT: No, your Honor. I'd just like to say that --

MS. BERTSCHY: May I have one moment?

THE COURT: Yeah.

MS. BERTSCHY: Thank you, your Honor.

THE COURT: Okay. So I could kind of hear what you were saying, and you wanted to make sure I knew you were a veteran. And I do ask that question before we're done.

I'm going to ask you a series of questions, and the point of these questions is to determine if you understand what's going on and if you understand your constitutional rights and what you'll be waiving if you plead guilty.

THE DEFENDANT: Yes, ma'am. I understand.

THE COURT: So that's what we're going to do here today, okay? So you understand what's happening?

THE DEFENDANT: I do.

THE COURT: Okay.

THE DEFENDANT: I just wanted to apologize, honestly.

THE COURT: All right. Well, you can do that, but there's also other times that maybe it's more appropriate.

THE DEFENDANT: Understood. Yeah.

THE COURT: Have you taken any drugs or medication today?

THE DEFENDANT: No, I'm not under any medication right now.

THE COURT: Okay. And how are you feeling?

THE DEFENDANT: I've just been in custody a long time over this.

THE COURT: How long have you been in custody over this?

THE DEFENDANT: Since the beginning of the month, about March 15th, March 7th.

THE COURT: Around the middle of March?

THE DEFENDANT: Yes, ma'am. I'm on a hundred percent serious connected disabled for PTSD and that's kind of how this incident started.

THE COURT: Okay. You seem a little -- are you having difficulty focusing on what we're doing?

THE DEFENDANT: Yeah, I'm tired and I am anxious. I do have anxiety and sleep issues.

THE COURT: Okay. Did you not sleep well last night?

THE DEFENDANT: No, not at all.

THE COURT: Was it because you were worried about what was going to happen today?

THE DEFENDANT: Yeah. I mean, I am concerned about my future.

THE COURT: Okay. So we can't get through this plea unless you take a deep breath and you just answer my

questions. Take it slow, and we'll get through it and we can keep moving forward with your case.

THE DEFENDANT: Yes, ma'am.

THE COURT: If you don't feel like you can do that today, if you need more time --

THE DEFENDANT: No, I can. I totally can. 100 percent.

THE COURT: All right. The other thing you can't do is you can't interrupt me.

THE DEFENDANT: Understood.

THE COURT: Okay. This lady over here is taking down everything I say and everything you say, and when you interrupt me, she can't do that. Okay? You understand?

THE DEFENDANT: I apologize.

THE COURT: You don't have to apologize. Just don't do it, okay?

THE DEFENDANT: Understood.

THE COURT: So we know what's going on. Have you been happy with your attorney so far?

THE DEFENDANT: Not especially, but it's okay.

THE COURT: Well, is there anything specific that she's done that made you unhappy?

MS. BERTSCHY: Your Honor, for the record, I wasn't the attorney at the last MSC and his first MSC.

THE COURT: Okay. So this lady standing with you today, is there anything that makes you uncomfortable going forward entering a plea with her?

THE DEFENDANT: No, we can go ahead and enter a plea. It's fine.

THE COURT: All right. Now, I'm going to ask you some -- if you understand some rights, so listen to what I have to say.

Do you understand you have a right to plead not guilty, have a trial by jury, be confronted by the witnesses against you, bring witnesses here on your own behalf, testify or not testify at that jury trial? Do you understand all those rights?

THE DEFENDANT: Yes, your Honor.

THE COURT: Do you understand you have a right against self-incrimination? That means that you can refuse to make any statements, and the State has to prove you guilty beyond a reasonable doubt? Do you understand all of that?

THE DEFENDANT: Yes, your Honor.

THE COURT: Now, do you understand you'll be giving up all of those rights if you plead guilty?

THE DEFENDANT: Yes, your Honor.

THE COURT: Your attorney handed me something, a

document that's several pages long and it's called a Guilty Plea Memorandum. Did you read this document?

THE DEFENDANT: Yes, your Honor.

THE COURT: Did you understand it?

THE DEFENDANT: Yes, your Honor.

THE COURT: Do you have any questions about it?

THE DEFENDANT: No, ma'am.

THE COURT: Did you sign it?

THE DEFENDANT: Yes, ma'am.

THE COURT: Okay. Now I'm going to ask the clerk to read the charge you're pleading guilty to, and when she's done, I'm going to ask you if you understand it.

THE DEFENDANT: Yes, ma'am.

THE CLERK: Battery by a prisoner, a violation of NRS 200.481(2)(f), a category B felony, in the manner following: That the said defendant, on the 15th day of March 2017, or thereabout, and before the filing of this Information, at and within the County of Washoe, State of Nevada, did willfully and unlawfully, while a prisoner in lawful custody or confinement, use force or violence upon the person of Deputy James Cook by putting the victim in a headlock and strangling him.

THE COURT: Anything about that charge you do not understand?

THE DEFENDANT: No, your Honor.

THE COURT: Did you do what it says you did in the charge?

THE DEFENDANT: Yes, I did. And there's nothing to dispute it.

THE COURT: Okay. Do you know what the penalty is, the maximum penalty?

THE DEFENDANT: Six years, your Honor.

THE COURT: One to six years in prison. You understand that?

THE DEFENDANT: I do understand.

THE COURT: And fine?

THE DEFENDANT: Up to $10,000.

THE COURT: Now, do you understand that if you hurt the deputy, you'd have to pay restitution too?

THE DEFENDANT: I understand.

THE COURT: Has anyone made any threats to get you to enter this plea?

THE DEFENDANT: No, your Honor.

THE COURT: Has anyone told you that you would be guaranteed probation, release from custody, or any other particular result if you plead guilty?

THE DEFENDANT: No, your Honor.

THE COURT: Has anyone made any statements to get

you to enter this plea that you haven't told me about?

THE DEFENDANT: No, your Honor.

THE COURT: In light of all my questions and your answers, do you still wish to go forward?

THE DEFENDANT: Yes, your Honor.

THE COURT: Which branch of the military were you in?

THE DEFENDANT: I was in the United States Army.

THE COURT: And what were the dates of your service?

THE DEFENDANT: I served from 2005 to 2009.

THE COURT: And what was the status of your discharge?

THE DEFENDANT: Honorable discharge.

THE COURT: Now, you say that you have been diagnosed with PTSD already?

THE DEFENDANT: Yes, ma'am. My job was I used to look for explosives.

THE COURT: Okay. And have you been in treatment in the Veterans Hospital?

THE DEFENDANT: Yes, ma'am.

THE COURT: And do you have someone that you've worked with regularly?

THE DEFENDANT: Yeah, I do. I have a social

worker.

THE COURT: Okay. Now, with all the questions we've talked about, are you entering this plea of your own free will?

THE DEFENDANT: Yes, your Honor.

THE COURT: How do you plead to the charge?

THE DEFENDANT: Guilty.

THE COURT: The Court finds that your plea is voluntary, that you fully understand the nature of the offense and the consequences of your plea. Therefore, I will accept your plea of guilt and we'll set a date for sentencing.

THE CLERK: June 1st at 9:00 o'clock.

THE COURT: Counsel, you wanted to be heard?

MS. BERTSCHY: Yes, your Honor. As you heard Mr. Hearn indicate, he is a veteran and he's 100 percent disabled. What I'm requesting is for his own recognizance release with court supervision. I believe, given the charges, that it is appropriate for a court supervision to include that Mr. Hearn provide his Pretrial Service officer with information about anger management or any other program that he's receiving at the VA Hospital, and my understanding is that he can receive support there.

He was raised in Nevada. He has a child that

resides in Florida; however, he does have relatives who are supportive of him here in Nevada.

He received, as you heard, an honorable discharge, and I think that would be appropriate for him to be able to receive treatment that he needs at the VA Hospital.

From what I've heard today, it sounds like he's not receiving medication, which he may need for his anxiety as well as PTSD. So I would be requesting for the Court to allow him to receive that treatment.

If this Court is concerned with his own recognizance release, I would request for the Court to grant an OR release through IAP to either New Frontiers or The Empowerment Center.

THE COURT: What have you done since he's been in? You've had 30 days. Have you had an evaluation done yet?

MS. BERTSCHY: No, your Honor. I was looking through the notes after I spoke with Mr. Hearn, and the attorney who handled the case unfortunately did not do that. So what I've already discussed with Mr. Hearn is looking into getting a release in order to obtain the information from the VA Hospital as well as his DD 214 to see whether or not he'd be a good candidate for the Veterans Court. He informs me that he wishes to proceed with that court, and so I'll be looking into that.

THE COURT: When I review his Pretrial risk assessment, it's a 12. He has failures to appear. That's why he got in custody in the first place. He hasn't cooperated. And without something more than just we'll let him out and we think we'll check with Veterans Court, I'm not very interested in an OR today.

I want you to do some more. I want to find out, you know, get ahold of his social worker, do something to give us an indication of who Pretrial Services can work with. But I'm also not interested in Mr. Hearn sitting in custody for too long. I mean, this is -- you all have had a little time to do this, and so I expect it to be done.

MS. BERTSCHY: Yes, your Honor, and I apologize to Mr. Hearn that this should have been addressed at his last hearing and unfortunately it wasn't. So I don't know if this Court would be willing to put this on calendar or for -- I believe I would be able to get to this this week. I believe that this is an issue that needs to be resolved immediately.

I don't know how quickly -- if I'm unable to obtain a release from him, I don't know how quickly the VA Hospital would provide me with his information, but I don't know if we could do a status maybe in a week or two weeks. I agree with this Court that I don't want him just remaining