IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Petitioner,
vs.
THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE; AND THE HONORABLE CONNIE J. STEINHEIMER, DISTRICT JUDGE,
Respondents,
and,
MATTHEW GLENN HEARN,
Real Party In Interest.
_____/

No. 73475

ANSWER AGAINST ISSUANCE OF REQUESTED WRIT

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The Court has directed the Real Party in Interest to file an answer against issuance of the requested writ.

Introduction

"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,

> [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"). This 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).

NRS 176A.290(1) allows the district court to place a veteran or a member of the military who suffers from a mental illness, alcohol, or drug abuse or posttraumatic stress disorder who has pleaded guilty to any offense for which probation is possible into a program established

pursuant to NRS 176A.280. Under the statute the court may suspend the proceedings and place a defendant on probation without entering a judgment of conviction. Subsection 2 of NRS 176A.290 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 district court, justice court or municipal court, as applicable, 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 district court, justice court or municipal court, as applicable, 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.

The writ petition before the Court concerns only that portion of NRS 176A.290(2) that states, "the district court ... may not assign the defendant to the program *unless the prosecuting attorney stipulates to the assignment.*" (italics added). The district court below held that the above-quoted phrase from the statute unconstitutionally violated Nevada's "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." Petitioner's Appendix (PA) at 86 (Order). The district court also found that the phrase could be severed from the statute while upholding the remainder of the statute. PA 87-88.[1]

The State now seeks a writ of prohibition or mandamus against the proper exercise of judicial power by the district court. The request for a writ of prohibition is easily disposed of. A writ of prohibition is inapplicable here because the district court had jurisdiction in the criminal case to hear, consider, and rule upon Mr. Hearn's "Motion to Hold NRS 176A.290(2) Unconstitutional."[2] See *Goicoechea v. Fourth Judicial Dist. Court*, 96 Nev. 287, 289, 607 P.2d 1140, 1141 (1980) (a writ of prohibition will not lie "if the court sought to be restrained had jurisdiction to hear and determine the matter under consideration."). Additionally, even if the district court erred—and it did not err—a writ of prohibition "does not serve to correct errors; rather its purpose is to prevent courts from transcending the limits of their jurisdiction in the

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[1] At the oral argument held in the district court below, "the State agreed that if the Court found the prosecutorial stipulation language unconstitutional, it was severable from the remainder of the ... statute." PA 81 (Order).

[2] See PA 32-44.

exercise of judicial power." *Mineral County v. State, Dep't. of Conserv.*, 117 Nev. 235, 243, 20 P.3d 800, 805 (2001) (footnote omitted). Because the district court had jurisdiction to rule on the motion, the request for a writ of prohibition should be denied. This Court's focus should be on whether the State has presented a compelling basis for the writ relief it seeks in mandamus.

MEMORANDUM OF POINTS AND AUTHORITIES AGAINST ISSUANCE OF THE REQUESTED WRIT

Standard of Review

"The constitutionality of a statute is a question of law that [the Court] reviews de novo." *Cornelia v. Justice Court*, 132 Nev. Adv. Op. 58, 377 P.3d 97, 100 (2016) (citation and internal quotation marks omitted); *Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502, 509, 217 P.3d 546, 551 (2009) ("The determination of whether a statute is constitutional is a question of law, which this court reviews de novo.") (citation omitted). "Statutory interpretation is a question of law that [this court] review[s] de novo, even in the context of a writ petition." *State v. Second Judicial Dist. Court (Ayden A.)*, 132 Nev. Adv. Op. 33, 373 P.3d 63, 65 (2016) (citation and internal quotation marks omitted, alterations in the original); *Office of Attorney General v. Justice Court*,

133 Nev. Adv. Op. 12, 392 P.3d 170, 172 (2017) ("In the context of a writ petition, questions of statutory interpretation are reviewed de novo.") (citation omitted).

Discussion

A writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from the office, trust or station; or to control a manifest abuse of discretion or which has been exercised in an arbitrary or capricious manner. *Stromberg v. Second Judicial Dist. Court*, 125 Nev. 1, 4, 200 P.3d 509, 511 (2009). Because a writ of mandamus is an extraordinary remedy, this Court has "complete discretion whether to consider [it]." *Cote H. v. Eighth Judicial Dist. Court*, 124 Nev. 36, 39, 175 P.3d 906, 908 (2008); *Grace v. Eighth Judicial Dist. Court,* 132 Nev. Adv. Op. 51, 375 P.3d 1017, 1019 (2016) ("[I]t is within the discretion of this court to determine if a petition will be considered.") (citation and internal quotation marks omitted, alteration in the original). But this Court has said it "will exercise its discretion to consider petitions for extraordinary writs ... when there ... are ... important legal issues that need clarification in order to promote judicial economy and administration." *Office of Attorney General v.*

Justice Court, 392 P.3d at 172 (citation and internal quotation marks omitted, ellipsis in the original).

The constitutionality of that portion of NRS 176A.290(2) that provides the executive branch a veto power over a court's discretionary sentencing determinations is an important question of law that needs clarification. Therefore, "in the interest of judicial economy and to provide guidance to Nevada's lower courts," *Id.*, this Court should exercise its discretion to consider the State's petition for a writ of mandamus.[3] In doing so, the Court should affirm the district court and hold that the language in the statute giving the executive branch a veto over the exercise of judicial sentencing discretion constitutes an unconstitutional violation of the doctrine of separation powers.

The district court's order upholds Nevada's doctrine of separation of powers; its decision to sever the offending language from the statute was proper

Mr. Hearn moved the district court to hold the prosecutor's veto provision contained in NRS 176A.290(2) unconstitutional as a violation of Nevada's doctrine of separation of powers. See PA 32-44. The State

[3] Accord NRAP 17(a)(10) (11) (collectively requiring Supreme Court to hear and decide questions of first impression and matters raising as a principal issue a question of state-wide public importance).

filed a written opposition, PA 45-58, and, after conducting oral argument, the district court granted Mr. Hearn's motion. PA 79-89 (Order). The district court carefully reviewed the arguments put forth by the parties and found Mr. Hearn's arguments—based on an analytic framework established by this Court in *Stromberg v. Second Judicial Dist. Court*, 125 Nev. 1, 200 P.3d 509—to be more persuasive than those advanced by the State, (which were based on inapplicable state and federal authorities). The district court concluded:

> 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 constitutionality 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 courts, 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 [v. Superior Court, 11 Cal. 3d 70 (Cal. 1974)], the Court finds, NRS 176A.290(2) does not prescribe the specific statutory criteria for the prosecutor to make a determination as to whether an offender may qualify for a treatment program. Rather, if the court determines the crime to be violent, [then] the prosecutor may, within his or her 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.*

PA 86 (Order) (italics and alteration added).

Because the district court found that the offending language in NRS 176A.290(2) violated Nevada's separation of powers doctrine, it properly severed that language from the statute noting that "[w]ithout [it], the judiciary retains its discretion to assign or not assign the defendant to the program." And the court found that "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 applicant remains unchanged." PA 87.[4]

In the district court the State agreed that if the court found the prosecutorial stipulation language unconstitutional, it was severable from the remainder of the statute. In its writ petition the State now "urges" this Court to not "reach the issue of severability," claiming that if the Court concludes that NRS 176A.290(2) is unconstitutional, then "the entire statute must fail." Petition at 11-12.[5] The Court should reject the State's new position as untenable, and find that the offending language in NRS 176A.290 can be severed without damaging the rest of

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[4] NRS 0.020(1) expresses a preference for severability. This Court has noted that "[t]he 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 (2014) (internal quotation marks and citation omitted).

[5] In a parenthetical the State adds a similar concern regarding NRS 176A.260, which is a statute dealing with mental health court and which also contains a similar prosecutor's veto provision. Petition at 12. In *Mendoza-Lobos v. State*, 125 Nev. at 636 n.1, 218 P.3d at 502 n.1, the Court interpreted certain provision of NRS 193.165, a weapons enhancement statute. In a footnote the Court noted that its interpretation of NRS 193.165 would henceforth apply to similar provisions found in several statutes identified in the footnote. Similarly, this Court's interpretation of NRS 176A.290(2) will apply to NRS 176A.260 no matter that interpretation. That fact should not preclude this Court from deciding the constitutional issue now before the Court.

the statute.

Petitioner offers no compelling reason for this Court to reverse the district court's order

The State offers a mélange of reasons to vacate the district court's order, but no compelling reason to do so. In fact, it creates a variety of concerns that are simply not persuasive. For example, it claims that "the decision at issue is the decision to not enter a judgment at all, to allow the defendant who has pleaded guilty to a crime of violence, the chance to avoid having any sentence imposed through the diversionary program known as 'Veterans Court.'" Petition at 4. But even without the prosecutor's veto, the court would still have the power to decide if an otherwise eligible defendant will be admitted (or not) into the program. The prosecutor's veto is not the sole block to a defendant's admission into a program; it is however, a complete block to the court's ability to exercise its sentencing discretion. Additionally, as the statute now reads, if the prosecutor did not exercise his or her veto (*i.e.* stipulated to admission), "the defendant who has pleaded guilty to a crime of violence, [is allowed] the chance to avoid having any sentence imposed through the diversionary program known as 'Veterans Court.'" This suggests that the State doesn't mind the result (avoiding having a

sentence imposed on a veteran or member of the military) so much as it minds not having the *definitive* say in the matter. The State next suggests that a ruling contrary to its position means "any court could simply decline to enter a judgment of conviction in any case, for any reason." *Id.* But in any given case where a district court refused to enter a proper judgment, such refusal would be subject to writ review by this Court for abuse of discretion.

Shifting gears, the State instructs the Court on the State's prosecutorial discretion and adds that "the decision to give someone a break and allow them to avoid conviction, is first available to the executive branch police officer who decides whether to make an arrest or not. It then becomes available to the prosecutor who can decide whether to file charges and what charges to file." *Id.* 5-6. And the State adds the observation that it holds the power to dismiss a prosecution. *Id.* at 6. This is all true, but beside the point. The district court's order below does not affect a police officer's initial discretion to arrest or not, a prosecutor's determination on whether and what or how to charge, or that same prosecutor's decision to dismiss a case or go forward.

Finally, the State notes that its power to charge gives it control over the range of sentences available to the court, *Id.*, that the Legislature "can fix the range of sentences and the Court has no authority to deviate from that," *Id.* at 8, and that a district court would have no authority to allow any sort of diversion program or probation "absent an express grant of authority by the Legislature." *Id.* at 9. True enough. None of these points however, compel the Court to vacate the district court's order. In fact, they collectively celebrate Nevada's robust doctrine of separation of powers. The Nevada Legislature has provided the courts a vehicle to provide a more sophisticated response to the needs of veterans and members of the military involved in the criminal justice system. The State is free to charge and frame its accusatory pleading as it deems appropriate, but the doctrine of separation of powers commits to the judiciary the power to decide, subject to legislatively prescribed guidelines, the sentence *or other disposition* to impose upon a defendant. Under the doctrine of separation of powers, the district court's discretionary decision to use an appropriate treatment program cannot be dependent upon or conditioned by the stipulation of the prosecuting attorney. *People v. Thomas*, 109 P.3d 564,

640 (Cal. 2005) (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).

Upon de novo review of the statute, this Court should affirm the district court's order in all respects

The unconstitutionality of a "prosecutor's veto" of the proposed judicial disposition of a case that is properly within a court's jurisdiction is a question of first impression in Nevada. In *Stromberg v. Second Judicial Dist. Ct.*, 125 Nev. 1, 200 P.3d 509, this Court provided the appropriate analytical framework to resolve this question. In *Stromberg* the State asserted that NRS 484.37941, which in certain circumstances allows a district court to sentenced 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. This 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).

This Court found persuasive the reasoning of the California Supreme Court in two 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. Both of these cases in turn relied on the earlier California Supreme Court decision of *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 at 565-69 (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 this 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).

In *Stromberg* this 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*:

"[W]hen 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).[6]

Using the analysis provided in *Stromberg*, this Court, following its de novo review of the statute, should affirm and uphold the district court's order declaring a portion of NRS 176A.290(2) unconstitutional. Additionally, this Court should sever the offending language of the statute as the district court did below. See PA 87 (Order) (finding that "without the prosecutorial stipulation language, the remainder of the statute, standing alone, can be given legal effect, and the remaining portion of the statutes accords with the legislative intent.").

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[6] The State asserts that "this Court need not blindly follow California and should make its own decisions." Petition at 9-10. It is well settled however, that state courts often look to decisions of courts in other states for persuasive authority, "particularly on questions of first impression." See Bryan A. Garner, et al., The Law of Judicial Precedent 724, and generally 724-28 (2016) (part G § 86 ("Out-of-State Precedents as Persuasive Authority")). This Court in *Stromberg* found the California authorities to be persuasive. The California authorities followed by the Court in *Stromberg* are as persuasive here, if not more so.

CONCLUSION

The constitutionality of the prosecutor's veto provision contained in NRS 176A.290(2) is an important question of law that this Court should resolve. Accordingly the Court should entertain the State's writ petition. This Court should however, affirm the district court's ruling that the prosecutorial veto provision of the statute violates the doctrine of separation of powers, as well as, its finding that the offending language of the statute can be severed while giving legal effect to the remaining provisions of the statute fulfilling legislative intent.

In sum, this Court should deny the State's Petition for Writ of Mandamus or, Alternatively, Prohibition.

Dated this 4th day of October, 2017.

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

By: *Kendra G. Bertschy*
KENDRA G. BERTSCHY
Deputy Public Defender

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this answer complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because: This answer has been prepared in a proportionally spaced typeface using Century Schoolbook in 14-point font.

2. I further certify that this answer complies with the page- or type-volume limitations of NRAP 32(a)(7) because it is proportionately spaced, has a typeface of 14 points and contains a total of 3,898 words. NRAP 32(a)(7)(A)(i), (ii).

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

accompanying answer is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 4th day of October 2017.

/s/ John Reese Petty
JOHN REESE PETTY
Chief Deputy, Nevada State Bar No.10

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on 4th day of October 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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Washoe County District Attorney's Office

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Hon. Connie J. Steinheimer
District Court Judge
c/o Audrey A. Austin, Judicial Assistant

John Reese Petty
John Reese Petty
Washoe County Public Defender's Office