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

PETITION FOR REHEARING

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PETITION FOR REHEARING

Matthew Glenn Hearn (Mr. Hearn), the Real Party in Interest, by his counsel, John Reese Petty, Chief Deputy Washoe County Public Defender and Kendra G. Bertschy, Deputy Washoe County Public Defender, petitions the Court, pursuant to Rule 40 of the Nevada Rules of Appellate Procedure (NRAP), for a rehearing of part of the Court's opinion filed on December 6, 2018. Mr. Hearn respectfully requests this Court to grant the petition for rehearing, withdraw the prior opinion, and restructure the opinion regarding the categorical preclusion of all violent offenders from eligibility for assignment into veterans court such that all otherwise eligible offenders may be assigned to veterans court subject only to the exercise of sound judicial discretion.

1. INTRODUCTION

On December 6, 2018, a divided Court filed an opinion agreeing with the district court's conclusions that: (1) language contained within NRS 176A.290(2) constituted a prosecutorial veto over a judge's sentencing decision, in violation of the Nevada Constitution's separation of powers doctrine; and (2) that the veto provision was severable. *State v. Second Judicial Dist. Court (Hearn)*, 134 Nev. Adv. Op. 96, ___ P.3d. ___,

___ (2018) (2018 WL 6423898 at *1[1]) (*Hearn*); and *Id.* at *3 ("[W]e hold that the prosecutorial veto within NRS 176A.290 violates the Nevada Constitution's prohibition against one branch of government 'exercis[ing] any functions, appertaining to either of the others.' Nev. Const. art. 3, § 1(1)."") (alteration in the original); and *Id.* at *4 (agreeing with the district court that the remaining language after severance accorded with "the legislative intent behind NRS 176A.290(2) and its associated statutes.").

Mr. Hearn and the district court below believed that after striking the offending language from the statute, a district court would retain complete discretion whether to admit *all* otherwise eligible offenders—whether or not the underlying offense constituted a violent offense—to veterans court. Here, critically, a majority of this Court disagreed and concluded that severance "render[s] all offenders deemed violent by a court ineligible for the veterans court program." *Id.* at *4. The majority's severance conclusion reaches a monstrous result[2] not intended by either

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[1] References to the Court's opinion in this petition utilize Westlaw's signaling; *i.e.*, *1, *2, etc.

[2] Aptly stated this way: "[N]o veteran charged with or who has a history of violent crime can participate in veterans court going forward—even, presumably, in a case where both the district court and the prosecutor believe assignment is appropriate." *Hearn*, at * 7 (Pickering, J., dissenting).

Mr. Hearn or by the district court and rests on a misapprehension of important facts. Because the majority correctly found that the prosecutorial veto provision violated Nevada's separation of powers doctrine, this petition seeks a rehearing only on the severance piece of the majority's opinion. This petition respectfully requests that the opinion on severance be restructured such that *all* otherwise eligible veterans may be assigned into veterans court subject only to the sound exercise of the district court's sentencing discretion.

2. ARGUMENT

This petition is based on NRAP 40(c)(2)(A), which allows the Court to entertain petitions for rehearing "[w]hen the court has overlooked or misapprehended a material fact in the record or a material question of law in the case." While the Court will not entertain petitions for rehearing that are of "no practical consequence," the Court will act on petitions for rehearing that "are necessary to promote substantial justice." See *Gordon v. Eighth Judicial Dist. Court*, 114 Nev. 744, 745, 961 P.2d 142, 143 (1998) ("Under our long established practice, rehearings are not granted to review matters that are of no practical consequence. Rather, a petition for rehearing will be entertained only

when the court has overlooked or misapprehended some material matter, or when otherwise necessary to promote substantial justice.") (quoting *In re Herrmann*, 100 Nev. 149, 151, 679 P.2d 246, 247 (1984)) (internal quotation marks omitted); and *Duckworth v. State*, 114 Nev. 951, 953, 966 P.2d 165, 166 (1998) ("A petition for rehearing will be granted only if this court overlooked or misapprehended a material matter or if rehearing will promote substantial justice.").

Proper severance does not require the categorical preclusion of all violent offenders from assignment into veterans court.

To reach this result: that "the legal effect of ... severance is to render all offenders deemed violent by a court ineligible for the veterans court program," the majority separated legislative purpose into two parts: (1) a "primary intent" and (2) a "secondary goal." Quoting from the Legislature's enacting language the majority said:

> Thus, "to enable the criminal justice system to address the unique challenges veterans and members of the military face as a result of their honorable service," the Legislature authorized "[t]he establishment of specialty treatment courts for veterans and members of the military who are nonviolent offenders." This language indicates that the *primary* intended beneficiaries of the veterans court are "nonviolent offenders." The fact that the Legislature provided for the admittance of some violent offenders, pursuant to

> prosecutorial stipulation, indicates there was a secondary goal of allowing some violent offenders the benefit of veterans court. However, the remaining language after severance accords with the Legislatures primary intent.

Hearn, at *4 (citations omitted, some italics omitted, alteration in the original). But the creation of "primary" and "secondary" purposes is, at best, only an inference drawn by the majority; they are not an explicit command by the Legislature. Thus, the majority's passage overstates the reason for the insertion of the prosecutorial veto provision into the statute. At a hearing of the Senate Committee on Judiciary, held on April 14, 2009, the following exchange took place between Senator Valerie Wiener, Vice Chair, and the Honorable Peter I. Breen, Senior District Judge:

> SENATOR WIENER:
> Page 7 of the bill, lines 1 through 6, says the court may not assign a veteran to the program if he was convicted of a felony involving the threatened use or use of violence unless the prosecutor stipulates to the assignment. Does this language mirror the mental health court language as a reason not to assign? What would be a situation where there would be a stipulation?
>
> SENIOR DISTRICT JUDGE BREEN:
> Most of the specialty courts have a general underlying requirement that the crime not be one of violence. However, if you are dealing with

> mental health court, it is hard to find a client who has not committed some act of violence. Resisting arrest could be an act of violence. Violence has been interpreted as something more with the use of force. *The requirement for the district attorney to stipulate to admission was included when the mental health statute was established so the Nevada District Attorneys Association would agree to this statute.* The district attorneys have been good about letting people into our mental health courts who, without their medications, might be violent and need that kind of treatment.

Minutes of the Senate Committee on Judiciary 75th Session (April 14, 2009) at page 15 (italics added). This testimony indicates that the prosecutorial veto provision was included in the statute's language in order to secure the Nevada District Attorneys Association's support for the bill. Thus, the prosecutorial veto provision inserted into the statute does not indicate a "secondary goal of allowing some violent offenders the benefit of the veterans court" so much as it reflects a political reality: the sponsors and proponents of the bill did not want to lose the support of—or gain the opposition of—the powerful Nevada District Attorneys Association.

Had the Legislature wanted to make violent offenders ineligible for assignment into a treatment program under NRS 176A.280, it could have done so by including that class of offender in NRS 176A.287.

"Ineligibility" for a treatment program or veterans court is set out in NRS 176A.287(1), which limits ineligibility only to defendants who have "previously been assigned to such a program" or who have been "discharged or released from the Armed Forces of the United States, a reserve component thereof or the National Guard under dishonorable conditions." But even these persons "may [still] be assigned to a program of treatment established pursuant to NRS 176A.280" if an appropriate court "determines that extraordinary circumstances exist which warrant the assignment of the defendant into the program." NRS 176A.287(2). This language indicates a legislative preference for liberal assignment into veteran court or treatment programs established under NRS 176A.280.

"When interpreting a statute, this court resolves any doubt as to legislative intent in favor of what is reasonable, and against what is unreasonable. A statute should be construed in light of the policy and spirit of the law, and the interpretation should avoid absurd results." *Hunt v. Warden*, 111 Nev. 1284, 1285, 903 P.2d 826, 827 (1995) (citations omitted). "In construing a statute, this court considers the statutory scheme as a whole and avoids an interpretation that leads to absurd

results." *State v. Tatalovich*, 129 Nev. 586, 590, 309 P.3d 43, 44 (2013) (citation omitted). The proper severance of the offending language *plus* the word "not" in the statute would eliminate the categorical preclusive effect reached by the majority. Consider this, as enacted NRS 176A.290(1) and (2) provided:

> 1. Except as otherwise provided in subsection 2 and NRS 176A.287, if a defendant described in NRS 176A.280 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 district court, justice court or municipal court, as applicable, 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.
>
> 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 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.

But with the offending language, including the preceding word "not" removed from the statute, subsection 2 of statute reads:

> 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 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.

Under this formation of the statute a district court retains complete discretion whether to assign an otherwise eligible offender[3] into veterans court and must consider the factors set forth above in making that determination for violent offenders. The consideration and weighing of sentencing factors is per force a court's responsibility.

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[3] *I.e.*, someone not precluded by NRS 176A.287(1).

In sum, the legislative history behind NRS 176A.290(2) does not compel the result reached by the majority, and the majority could have upheld the result reached by the district court simply by eliminating the offending language *plus* one additional word; thereby leaving the assignment of *all* otherwise eligible offenders—whether the underlying offense is a violent offense or not—to the sound discretion of the district court judge.

3. CONCLUSION

The majority's preclusive severance conclusion carries significant consequences for that class of otherwise eligible offenders. Accordingly, substantial justice requires this Court to grant the petition, withdraw the prior opinion, and restructure the opinion such that all otherwise eligible offenders may be assigned into veterans court or treatment program subject only to the exercise of sound judicial discretion.

Dated this 20th day of December 2018.

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

2. I further certify that this petition 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 2,447 words. See NRAP 40(b)(3) (limiting a petition for rehearing to 4,667 words).

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

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

DATED this 20th day of December 2018.

/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 20th day of December 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Jennifer P. Noble, Chief Appellate Deputy
Washoe County District Attorney's Office

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