IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL J. LOCKER, No. 84070
Appellant,
vs.

THE STATE OF NEVADA,
Respondent.
_____/

REPLY TO FAST TRACK RESPONSE

1.

As relevant here, NRS 453.336(2)(a) provides:

> For a first or second offense, if the controlled substance is listed in schedule I or II and the quantity possessed is less than 14 grams ... [a person who violates this section] is guilty of possession of a controlled substance and shall be punished for a category E felony as provided in NRS 193.130. In accordance with NRS 176.211, the court shall defer judgment upon the consent of the person.

Because NRS 176.211 is referenced in NRS 453.336(2), the State asserts that it "is the statute at issue in this case." Fast Track Response (FTR) at 5.[1] And the State claims that "[t]here are two competing provisions of the statute at play here." *Id.* But, as noted

[1] NRS 176.211 was enacted by Laws 2019, c. 633, § 19, eff. July 1, 2020.

below, the State misses the mark in its application of NRS 176.211 to the facts of this case because the two subsections of NRS 176.211 are not in competition with each other. Even if, however, the Court agrees that NRS 176.211 contains "competing" subsections, the specific nature of subsection 3(a)(1) must control. See *Lader v. Warden*, 121 Nev. 682, 687, 120 P.3d 1164, 1167 (2005) ("[W]hen a specific statute is in conflict with a general one, the specific statute will take precedence."); *Sheriff v. Witzenburg*, 122 Nev. 1056, 1061, 145 P.3d 1002, 1005 (2006) (same); and see Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 183 (2012) (noting that under the general/specific canon the specific statute controls; positing, "the specific provision comes closer to addressing the very problem posed by the case at hand and is thus more deserving of credit.").

Subsection 1 of NRS 176.211 provides generally:

> Except as otherwise provided in this subsection, upon a plea of guilty, guilty but mentally ill or nolo contendere, but before a judgment of guilt, the court may, without entering a judgment of guilt and with the consent of the defendant, defer judgment on the case to a specified future date and set forth specific terms and conditions for the defendant. The duration of the deferral period must not exceed the applicable period set forth in

> subsection 1 of NRS 176A.500 or the extension of the period pursuant to subsection 2 of NRS 176A.500. The court may not defer judgment pursuant to this subsection if the defendant has entered into a plea agreement with a prosecuting attorney unless the plea agreement allows the deferral.

In contrast, subsection 3, "which matches the precise situation presented here," *In re Estate of Melton*, 128 Nev. 34, 53 n.11, 272 P.3d 668, 680 n.11 (2012), provides:

> The court:
>
> (a) Upon the consent of the defendant:
>
> (1) *Shall defer judgment for any defendant who has entered a plea of guilty, guilty but mentally ill or nolo contendere to a violation of paragraph (a) of subsection 2 of NRS 453.336*; or
>
> (2) May defer judgment for any defendant who is placed in a specialty court program. The court may extend any deferral period for not more than 12 months to allow for the completion of a specialty court program.
>
> (b) Shall not defer judgment for any defendant who has been convicted of a violent or sexual offense as defined in NRS 202.876, a crime against a child as defined in NRS 179D.0357 or a violation of NRS 200.508. (Italics added.)

"Courts must construe statutes and ordinances to give meaning to all of their parts and language. The court should read each sentence, phrase, and word to render it meaningful within the context of the purpose of the legislation. A reading of legislation which would render any part thereof redundant or meaningless, where that part may be given a separate substantive interpretation, should be avoided." *Bd. of County Com'rs v. CMC of Nevada*, 99 Nev. 739, 744, 670 P.2d 102, 105 (1983) (citations omitted). Stated differently, this Court will not give a statute "a meaning that will nullify its operation, and [looks] to policy and reason for guidance." *Anthony v. Miller*, 137 Nev. Adv. Op. 25, 488 P.3d 573, 575 (2021). Further, "this court will interpret a statute in harmony with other statutes whenever possible." *Id.* (citation omitted).

The directive contained in NRS 453.336(2)—"In accordance with NRS 176.211, the court shall defer judgment upon the consent of the person"—targets subsection (3)(a)(1) of NRS 176.211, which itself specifically references subsection 2 of NRS 453.336. This cross-reference scheme requires deferral where the statutory conditions of both statutes—defendant's consent and the status of the offense as a first or second controlled substance offense—are met. Conversely, subsection 1

of NRS 176.211 covers offenses where deferral is a possibility for offenses other than those specifically covered in NRS 453.336(2).

The separate and distinct nature of these subsections is illustrated by comparing language. For example, subsection 1 starts with a limitation: "Except as otherwise provided in this subsection" a court "may" defer judgment on offenses and conditions that exercise of discretion on a prosecutor's agreement. Subsection 3 however, provides that the court "shall" defer judgment where the violation is of NRS 453.336(2)(a). Notably, both subsection 1 and subsection 3 expressly require the consent of the defendant. *Compare* NRS 176.221(1) ("and with the consent of the defendant") *with* NRS 176.211(3)(a) ("Upon the consent of the defendant"). If, as the State contends, that subsection 3 is submerged by subsection 1, why would it also contain the "consent of the defendant" language? Under the State's reading, this language in NRS 176.211(3)(a) is "redundant or meaningless" even though the language has a separate substantive function.

In sum, the court-constraining language of NRS 176.211(1)—"The court may not defer judgment pursuant to this subsection if the defendant has entered into a plea agreement with a prosecuting

attorney unless the plea agreement allows the deferral"—is applicable to those offenses that a court may defer under that subsection, not NRS 453.336(2)(a) offenses.

2.

Although the statutory language is clear and unambiguous and thus should be afforded its plain meaning, *Chandra v. Schulte*, 135 Nev. 499, 501, 454 P.3d 740, 743 (2019) ("Where a statute is clear and unambiguous, this court gives effect to the ordinary meaning of the plain language of the text without turning to other rules of construction.") (citation omitted), the State turns to legislative history in support of its application of NRS 176.211(1) to all cases. See FTR at 7-8 (arguing that under AB 236 "absent a specific agreement with the prosecutor" in order for a defendant to "obtain the benefit of a deferred judgment, a defendant must have pled guilty to every single charge") (citing Nev. *Minutes on the Senate Committee on Judiciary*, May 31, 2019 p. 9).

The problem with the State's use of this legislative history is that the court-constraining language it heavily relies on was *not* part of Section 19 of AB 236 on May 31, 2019 when the hearing was taking

place. Rather, that language was subsequently placed onto Section 19 of AB 236 through Senate Amendment No. 1107 on June 2, 2019. See https://www.leg.state.nv.us/Session/80th2019/Reports/history.cfm?ID=569 (Assembly Bill 236, Bill History (noting the amendment in Senate and the concurrence by Assembly on June 3, 2019)). Had the Legislature determined that the same plea negotiation constraining language should apply to deferral under NRS 453.336(2) and NRS 176.211(3)(a)(1), it could have included the necessary language in those provisions to accomplish that result. It did not.

3.

Finally, assuming for the sake of argument that the court-constraining language of subsection 1 of NRS 176.211 applies here, Mr. Locker should still prevail. The State argues that because Mr. Locker "entered into an agreement with a prosecuting attorney ... the district court could only defer judgment 'if the plea agreement allows the deferral.'" FTR at 8. Here, notably, the plea agreement did not disallow a deferral and NRS 176.211 is missing in action.

Paragraph 7 of the Guilty Plea Memorandum (GPM) provided in full:

> In exchange for my plea of guilty, the State, my counsel and I have agreed to recommend the following: The State and I will be free to argue for an appropriate sentence. The State will not pursue any other criminal charges arising out of this transaction or occurrence.

JA 6 (GPM). NRS 176.211(1) is not mentioned anywhere in the GPM.

At Mr. Locker's arraignment his counsel stated the plea negotiations as:

> Today [Mr. Locker] will be entering a guilty plea to the sole count alleged in the information, possession of a controlled substance less than 14 grams. In exchange for his plea, the parties will be free to argue for and legally appropriate sentence, and the State will not pursue any additional transactionally-related charges or enhancements.

JA 12 (Transcript of Proceedings: Arraignment). The State agreed. *Id.* Again, the State did not modify the plea agreement or reference NRS 176.211(1) as a basis to preclude deferral.

And at Mr. Locker's sentencing hearing the prosecutor did not mention, let alone invoke NRS 176.211(1) as a basis to deny deferral in this case, even though Mr. Locker had filed an election to participate in a program, JA 20-22, and even though the prosecutor had acknowledged that deferral had been requested. JA 33-34 (Transcript of Proceedings:

Sentencing). There is nothing in the guilty plea memorandum or in the court proceedings to indicate that the plea agreement reached between the parties did not allow for a deferral. Indeed, the negotiations contemplated that the parties would argue for an appropriate sentence.

Because NRS 176.211(3)(a)(1) is a specific statute and thus is controlling, and because it can exist harmoniously with both subsection 1 of NRS 176.211 and NRS 453.336(2), this Court should reverse the district court, vacate the judgment, and remand with instructions to defer Mr. Locker's judgment as provided for by statute.[2]

VERIFICATION

1. I hereby certify that this fast track statement 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 fast track statement has been prepared in a proportionally spaced typeface using Century in 14-point font.

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[2] Initially it appeared that this appeal was presumptively assigned to the Court of Appeals under NRAP 17(b)(1). Given the statutory discussion in both the State's fast track response and in Mr. Locker's replying fast track brief, the Nevada Supreme Court may wish to keep and decide this appeal. See NRAP 17(a)(12).

2. I further certify that this fast track statement complies with the page — or type — volume limitations of NRAP 3C(h)(2) because it is: Proportionately spaced, has a typeface of 14 points, a total of 1,927 words and does not exceed 16 pages.

3. Finally, I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track statement and that the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track statement, or failing to raise material issues or arguments in the fast track statement, or failing to cooperate fully with appellate counsel during the course of an appeal. I therefore certify that the information provided in this fast track statement is true and complete to the best of knowledge, information, and belief.

DATED this 25th day of February 2022.

/s/ John Reese Petty
JOHN REESE PETTY
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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 25th day of February 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Kevin Naughton, Appellate Deputy
Washoe County District Attorney's Office

I further certify that I will have delivered a copy of this document to Michael J. Locker at an address that he has provided to this office.

John Reese Petty
Washoe County Public Defender's Office