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12-6-2018

### State v. Second Judicial Dist. Court. (Hearn (Matthew)), 134 Nev. Adv. Op. 96 (Dec. 6, 2018) (en banc)

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#### Recommended Citation

Buono, Taylor, "State v. Second Judicial Dist. Court. (Hearn (Matthew)), 134 Nev. Adv. Op. 96 (Dec. 6, 2018) (en banc)" (2018). *Nevada Supreme Court Summaries*. 1221.

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*State v. Second Judicial Dist. Court. (Hearn (Matthew))*, 134 Nev. Adv. Op. 96 (Dec. 6, 2018)  
(en banc)<sup>1</sup>

## CONSTITUTIONAL LAW: SEPARATION OF POWERS

### **Summary**

The Court affirmed the district court’s decision and held that the prosecutorial consent provision in NRS 176A.290 violated the Nevada Constitution’s separation of powers doctrine.<sup>2</sup> Furthermore, the Court struck the offending language, finding that the provision could be severed from the statute without impacting the legislature’s intent.

### **Background**

NRS 176A.290 provides that district courts may send eligible defendants to a special veterans court program.<sup>3</sup> However, where the offense charged or the defendant’s prior convictions involved the threatened use of force or violence, the defendant is not eligible for the program, “unless the prosecuting attorney stipulates to the assignment.”<sup>4</sup>

Defendant Matthew Hearn was deemed eligible for the veterans court program after being found guilty of battery. However, the State refused to stipulate to his assignment to the program. Hearn requested the district court to find the provision unconstitutional. The district court found that prosecutor stipulation requirement violated the separation of powers doctrine and, finding that the provision was severable, struck it from the statute. This appeal followed.

### **Discussion**

#### *Propriety of writ relief*

The Court has the sole discretion to consider a writ of mandamus and will only do so when there is no “plain, speedy and adequate” legal remedy.<sup>5</sup> Such a writ is a proper remedy when necessary to clarify the constitutionality of an important legal issue.

Here, consideration of the writ is appropriate because Nevada district courts have been resolving the issue inconsistently and the Court must provide guidance to the lower courts. Furthermore, there is no other adequate remedy in law.

#### *Statutory background*

NRS 176A.290 established specialty courts for veterans charged with probation-eligible offenses. When the court assigns a defendant to the program, criminal proceedings are suspended

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<sup>1</sup> By Taylor Buono.

<sup>2</sup> NEV. REV. STAT. § 176A.290 (2017); NEV. CONST. art. 3 § (1)(1).

<sup>3</sup> While NRS 176A.290 was amended in 2017, the Court’s analysis of the 2014 version is applied equally to the current version because the statute was not substantively changed.

<sup>4</sup> NEV. REV. STAT. § 176A.290(2).

<sup>5</sup> *Cote H. v. Eighth Judicial Dist. Court*, 124 Nev. 36, 39, 175 P.3d 906, 908 (2008).

and the defendant is placed on probation.<sup>6</sup> Charges are then dismissed upon successful completion of the program.<sup>7</sup>

The provision at issue here prohibits a district court from assigning a defendant to the veterans court program where the offense or prior convictions “involved the use or threatened use of force or violence . . . unless the prosecuting attorney stipulates to the assignment.”<sup>8</sup>

### *Constitutionality of the prosecutorial consent element*

The Court held that the prosecutorial consent provision was essentially a veto on the judicial branch, thus violating the separation of powers doctrine in the Nevada Constitution.

Like the United States Constitution, Nevada’s Constitution prohibits “any one branch of government from impinging on the functions of another.”<sup>9</sup> The Court previously analyzed the separation of powers doctrine in relation to sentencing decisions, holding that a DUI sentencing statute did not infringe on the prosecutor’s power to determine how to charge an offender, but merely gave courts the option to sentence offenders to a treatment program.<sup>10</sup> That decision indicated that charging decisions fall within executive powers while sentencing decisions are judicial functions.

The decision to assign a defendant to the veterans court program is a sentencing decision because it is an alternative to entering a judgment of conviction. Thus, the decision to assign a defendant to the veterans court program falls within judicial discretion. To require prosecutorial consent to a sentencing decision provides an executive veto over judicial authority. Here, the district court may not assign a violent defendant to the veterans court program without the prosecutor’s stipulation. Thus, the provision at issue offends the separation of powers doctrine because it subjects a judge to control by the prosecuting attorney, and is therefore unconstitutional.

### *Severability*

The Court found that the prosecutorial consent provision is severable and struck the language from the statute.

To determine if statutory language is severable, the Court will analyze whether the remaining statutory language preserves legislative intent. In NRS 176A.290, the Legislature recognized that veterans should be provided with alternatives to incarceration to allow access to treatment for mental health and substance abuse issues that relate to their military service.<sup>11</sup> The Legislature indicated that the primary intended beneficiaries of the program were nonviolent offenders, while the secondary goal was allowing some violent offenders to access veterans court.<sup>12</sup>

The Court held that after striking the offending prosecutorial consent provision, NRS 176A.290(2) now prohibits any violent offender from being assigned to the veterans court program. This differs from the district court and the concurrence, which believe that the court would retain discretion to assign a violent offender to veterans court. However, the statute now

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<sup>6</sup> NEV. REV. STAT. § 176A.290.

<sup>7</sup> NEV. REV. STAT. § 176A.290(4).

<sup>8</sup> NEV. REV. STAT. § 176A.290(2).

<sup>9</sup> *Comm’n on Ethics v. Hardy*, 125 Nev. 285, 292, 212 P.3d 1098, 1103 (2009); NEV. CONST. art. 3 § 1.

<sup>10</sup> *Stromberg v. Second Judicial Dist. Court*, 124 Nev. 1, 2–3, 200 P.3d 509, 510, 513 (2009).

<sup>11</sup> 2009 Nev. Stat., ch. 44, at 100.

<sup>12</sup> *Id.*

states that a defendant with a prior conviction or charged with an offense involving “the use or threatened use of force or violence, the court may not assign the defendant to the program.”<sup>13</sup>

While the statute now does not allow for any violent offender to be assigned to veterans court, contrary to the Legislature’s secondary goal, the Legislature must remedy the issue. The prosecutorial consent provision is severable because the remaining statutory language conforms with the Legislature’s primary intent.

## **Conclusion**

The Court held that the prosecutorial consent provision in NRS 176A.290(2) is unconstitutional because it violates Nevada’s separation of powers doctrine by giving the prosecutor a veto power over the court’s sentencing decision. Furthermore, the offending provision is severable and the remaining language is in accordance with Legislative intent. Accordingly, the Court affirmed the district court’s decision.

*Chief Justice Douglas, concurring:*

The majority’s decision did not need to rely on the separation of powers doctrine to find that the prosecutor cannot exercise an executive veto over judicial sentencing decisions. Instead, the same conclusion may be reached by analyzing the statutory language. While an executive veto would violate the separation of powers doctrine, that is not the case here.

The Court has consistently held that it should avoid considering constitutionality of a statute unless absolutely necessary, and here, statutory construction principles can resolve the issue. Based on the plain meaning of the statute, giving effect to all words, phrases, and provisions, the statute uses the permissive “may” rather than a mandatory “shall” or “must.” As the statute states that the court “may not assign the defendant to the program”<sup>14</sup> the court retains discretion to assign defendants to the program, seeking input from the prosecuting attorney. The statute does not prevent the court from assigning a defendant to the veterans court program, even if the prosecuting attorney does not stipulate.

*Justice Pickering, dissenting:*

The Court has recognized that there are some areas of overlap and interdependence among the branches, and one such area is penalties for criminal offenses. Establishing penalties for criminal offenses is a legislative function while deciding which penalty to impose is a judicial function.<sup>15</sup> Therefore, the judicial function is restrained by the legislative function. Furthermore, the power to suspend or defer sentences and grant probation is a legislative grant and not an inherent judicial power.<sup>16</sup>

The Legislature set bounds for eligibility of the veterans court program. NRS 176A.290(2) does not grant a prosecutorial veto but merely establishes a condition precedent to the court’s exercise of discretion. The court cannot place a violent offender in the veterans court program

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<sup>13</sup> NEV. REV. STAT. § 176A.290(2).

<sup>14</sup> *Id.*

<sup>15</sup> *Mendoza-Lobos v. State*, 125 Nev. 634, 640, 218 P.3d 501, 504–505 (2009).

<sup>16</sup> *Creps v. State*, 94 Nev. 351, 360, 581 P.2d 842, 848 (1978).

without the prosecutor's agreement and the court does not have authority to go outside the bounds set by the legislature. NRS 176A.290(2) sets parameters for court discretion.

The majority determined that assignment to veterans court is a form of sentencing. However, such assignment is actually a deferment of sentencing, where the defendant will only be sentenced if they fail to complete the program. The prosecutorial consent provision creates an eligibility requirement for assignment to the deferred sentencing program and therefore does not violate the separation of powers doctrine.

Additionally, the majority's severance of the prosecutorial consent provision removes all discretionary eligibility for violent offenders to the veterans court program that the Legislature created. In this case, the defendant would thus be ineligible for veterans court because he pleaded guilty to a violent crime. Furthermore, it is the Legislature's duty to make public policy determinations. Here, the Legislature decided to create a path to veterans court for violent offenders, but the majority's decision precludes all such offenders.