NACJ
NEVADA ATTORNEYS FOR CRIMINAL JUSTICE

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UNREASONABLE DOUBT

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President's Column — Bill Hart

Is Decriminalizing All Personal Use Drugs the Answer to Those Struggling with Addiction?

In November 2020, the people of Oregon approved, by a large margin of 58.5%, the decriminalization of all small-scale possession of illicit drugs. This was a first-of-its-kind law in the United States since the War on Drugs started in the 1970s, which has widely been seen as a failure. This new outlook was focused on treatment and recovery instead of incarceration and punishment. Oregon had for decades, much like the rest of the country, simply arrested people with addictions and placed them in jail, hiding the problem, but not solving much of anything. Now, three years later, we need to learn from the effects of such a change and consider how to better implement it going forward.

For starters, the Oregon law was implemented a mere 13 weeks after it was approved. This did not allow for proper treatment efforts to be put in place, in order to supplant the arrest and jail model from before. It was estimated that it took until late 2022 for grants to be rolled out to the appropriate places in order to properly provide the services that were envisioned when the bill originally passed.

Addiction is considered a disease, one that has no clear, straight path to overcome. The road to overcoming addiction is long and windy, fraught with roadblocks and relapses along the way. The best way to combat addiction is treatment. Treatment takes many forms, from outpatient counseling to long-term intensive residential treatment. Even with treatment, other roadblocks exist that hinder full recovery, like access to housing, employment, and medical and psychological services. All these factors play a role in the long-term success of anyone fighting their addiction and all of them were considered components of Oregon's new law.

Oregon's Measure 110 was a new way of thinking about how to better combat addiction and society's perceptions of it. Critics argue that it's not working and that we need to go back to the old ways while ignoring that the old ways (the War on Drugs) received 50 years of patience and failed data. Oregon's attempt at a solution is unfinished and requires more time for proper implementation and data collection, but its intentions

Decriminalizing Drug Possession (cont. from page 1)

are still in the right place. To properly combat drug addiction and its fallout we must look outside of the small box that is jail and prison. A holistic approach is one that has a far better probability of long-term success than the revolving door of jail. Continued efforts, like those in Oregon, should be allowed the proper amount of time and resources to prove their worth instead of being scrapped prematurely.

New Year Solutions

By Marcie Ryba and Thomas Qualls Department of Indigent Defense Services

For as long as anyone can remember, the life of the public defender involved being overworked and underpaid. The Department of Indigent Defense Services has set about to rewrite this story. We are happy to announce the new 2024 edition of the public defender story:

More Time with Family and Friends

Based on a comprehensive study by the National Center for State Courts, in November of 2023, the Board on Indigent Defense Services adopted a workload standard for public defenders in Nevada's rural counties.

What this means is the story of the public defender is changing for indigent defense providers in each of Nevada's rural counties. More attorneys will be added to the county rosters and existing caseloads will be spread out among them, freeing them up to focus more attention on the cases they have and to allow for more of a healthy work-life balance. Additional staff and access to investigators will also be part of the new story.

Fair Compensation

The hourly rate for appointed indigent defense attorneys has not been increased since 2003. In 2021, the Department contracted with data analyst Dr. Mitch Herian of Soval Solutions to investigate this matter. Herian's study revealed that $100 in 2003 was equal to $163 in 2022, and that many practitioners were simply unable to take appointed cases, because the rate had not kept up with overhead costs.

By regulation of the Board on Indigent Defense Services, now passed into law, the hourly rate for all appointed indigent defense attorneys in rural counties is now $163 an hour for all non-capital cases, and $210 for capital cases. These rates are tied to the federal CJA panel rates, which automatically increase at the beginning of each calendar year, so they will no longer fall behind inflation. The new rates also apply to post-conviction cases.

The Department also received funding to provide all attorneys on its list with access to the research database Westlaw. This provides its counsel with a resource in exchange for compliance with reporting requirements. It also gives independent rural indigent defense service providers access to the same resources enjoyed by those in organized public defender offices.

Free Training

Prosecutors from across the state have long enjoyed the ability to come together as a

group and receive free training. Beginning in 2021, the Department has been providing its practitioners with two days of focused training and opportunities for community-building. The Fourth Annual Indigent Defense Services Conference in Elko, Nevada, was a deep dive into defending DUI cases.

Opportunities for Travel

All interested attorneys are encouraged to join our rural indigent defense provider list. Once approved, attorneys will be notified of available cases for appointment across our beautiful state.

The workload studies, job notifications, application to join the rural list, and links to new regulations can be found on the Department's website: https://dids.nv.gov/.

Silver State Auction

By Jessica Velazquez
William S. Boyd School of Law

As your law student liaison and the VP of Community Involvement for Boyd's Public Interest Law Association (PILA), I wanted to extend an invitation out to the NACJ to PILA's 25th Silver State Auction!

Every year PILA hosts an auction to raise funds for student scholarships. This year's Silver State Auction is extra special because it marks our 25th anniversary! The auction will be on **February 29th, 2024,** from 6-9pm at the Thomas & Mack Strip View Pavilion. The event includes a sit-down dinner for all attendees, a silent auction, and a live auction for select items. PILA will also be honoring various public interest figures in our community such as Chris Peterson, the Legal Director of the American Civil Liberties Union of Nevada, Melissa Corral from the Thomas & Mack Immigration Clinic, and the Clark County Public Defenders.

All the money raised at the auction goes toward funding scholarships for law students who go into public interest work over the summer. RSVP at the following link: https://PILA2024.givesmart.com. Employees of public interest organizations get free admission! If you wish to contribute to our student scholarships, you can make a donation by visiting this link: engage.unlv.edu/pila.

Feel free to contact me (velazj1@unlv.nevada.edu) for a copy of the auction packet, which provides more information about the event, past scholarship winners, and donor recognition.

Thank you for your support, and I look forward to seeing you on Thursday, February 29th, 2024.

Protecting Young Nevadans from Cruel or Unusual Punishments

By Jonathan Kirshbaum and Shelly Richter

Assistant Federal Public Defenders

In light of recent decisions from this jurisdiction and beyond, the time is right for the defense bar to ask the Nevada Supreme Court to ban life without parole sentences under the state constitution for those under the age of 21. Following the lead of other states, the court should provide broader constitutional protection to these individuals beyond what is now required under the Eighth Amendment.

The Nevada Constitution provides, "cruel or unusual punishments shall not be inflicted." Nev. Const. art. 1, § 6. Textually, this disjunctive language provides broader protection than the Eighth Amendment, which prohibits "cruel and unusual punishments." The Nevada Supreme Court explained that, in interpreting its state constitution, the court is not bound by the United States Supreme Court's interpretations of similar provisions. *See, e.g.*, *Mack v. Williams*, 138 Nev. Adv. Op. 86, 522 P.3d 434, 444 (2022). This should be especially true when the text of the state constitution is broader than the federal one.

Recently, other state supreme courts have interpreted their state constitutions—some of which share language identical to Nevada's—as providing broader protections than the Eighth Amendment. The decisions have struck down harsh sentences for adolescents and young adults in different contexts. *See generally State v. Kelliher*, 873 S.E.2d 366 (N.C. 2022); *People v. Parks*, 987 N.W.2d 161 (Mich. 2022); *In re Monschke*, 482 P.3d 276 (Wash. 2021). These decisions often find multiple reasons why the state constitution provides distinct protections, while highlighting how arbitrary it would be to afford protections to 17-year-olds, but not 18-year-olds.

In January 2024, the Supreme Judicial Court of Massachusetts ("SJC") went further, issuing a compelling decision that can point the way for litigants in Nevada. The SJC held that "a sentence of life without the possibility of parole for emerging adult offenders [defined as those aged 18, 19 or 20 at the time of offense] violates art. 26" of its state constitution. *Commonwealth v. Mattis*, 224 N.E.3d 410, 428 (Mass. 2024).

Under the Massachusetts constitutional framework, punishments must be graduated and proportional to the offender. *Id.* at 420. Thus, evidence about the age of neurobiological maturity guided the SJC. *Id.* The litigant in *Mattis* developed a strong record in the trial court, prompting the judge to make four core findings of fact: late adolescents may lack impulse control in emotionally arousing situations, and they are more prone to risk-taking, more susceptible to peer influence, and have a greater capacity for change. *Id.* at 421. The SJC also analyzed the treatment of late adolescents in the state and elsewhere, finding that Massachusetts, like most states, distinguishes late adolescents from older adults

on a range of issues—someone under 21 cannot buy alcohol or gamble, for example. *Id.* at 426.

Mattis can serve as a guide for litigants in Nevada, where sentencing judges have great discretion, and litigants are free to develop robust records. Article 1, section 6, of the Nevada Constitution should go beyond the Eighth Amendment, which has provided insufficient protections for young people against disproportionate exercises of sentencing discretion. As the SJC concluded, contemporary standards of decency support a state constitutional ban on life without parole sentences for late adolescents.

What Is a Stipulation and Why Are Judges in State Court Ignoring Them?

By Amy and Scott Coffee

Chief Deputy Special Public Defender, and Chief Deputy Public Defender, Clark County

Here is an example of an all-too-common scenario in the Eighth Judicial District. You negotiate a case with the state. Say your client has some prior criminal history and commits a battery with a deadly weapon. From the state's perspective, perhaps the victim is uncooperative or the facts are not compelling. The parties have a meeting of the minds and agree to a plea bargain whereby the client will plead to the battery with a deadly weapon with language in the guilty plea that "the parties agree to a stipulated sentence of 2 to 5 years."

Fast forward to sentencing, and the judge looks at the client's record and says, I think 2 to 5 is too low and I am going to give him 4 to 10 years. Afterward, the client moves to withdraw his plea, or asks to appeal, or ends up in some post-conviction proceeding wondering why his agreement was violated.

The question is, if the parties entered into a stipulation, can the judge change the terms of that agreement? I say no, the judge cannot.

First, we can all agree that a stipulation is not the same as a "recommendation." Language is important and this is an important distinction.

NRS 174.063 sets out language to be used in guilty pleas, including the following sentence: "I have not been promised or guaranteed any particular sentence by anyone. I know that my sentence is to be determined by the court within the limits prescribed by statute. I understand that if my attorney or the State of Nevada or both recommend any specific punishment to the court, the court is not obligated to accept the recommendation."

No dispute there. Also, under *Cripps v. State*, 122 Nev. 764, 770-71 (2006) the judge can tell the client whether they will follow the recommendation of the parties and, under *Cripps*, if the judge changes their mind about following the recommendation, the client can withdraw from the plea agreement. But a stipulation is not a recommendation—it is a contract. "Written stipulations are enforceable contracts."

What Is a Stipulation (cont. from page 5)

Highroller Transportation, LLC v. Nevada Transportation Auth., 139 Nev. Adv. Op. 51 (Nev. App. 2023). Valid stipulations are "controlling and conclusive and both trial and appellate courts are bound to enforce them." *Second Baptist Church v. Mt. Zion Baptist Church*, 86 Nev. 164, 172 (1970).

Stipulations are frequently used in civil cases, often for basic rules of procedure. Court rules usually allow for courts to adopt stipulations, essentially making them binding court orders. The rules assume that the parties set the terms of the stipulation, and the court adopts whatever facts are contained.

If stipulations are binding contracts, then a stipulation in a guilty plea is a binding contract between the state and the defense. As a binding contract, both parties must strictly adhere to its terms. *See Santobello v. New York*, 404 U.S. 257, 262-263 (1971).

In other words, if a stipulation is a binding contract that both parties must strictly adhere to, shouldn't the role of the court be to enforce the agreement of the parties and make sure each side adheres to that agreement? The court retains the right to reject the agreement, but rejection is not the same as changing the terms of the agreement. Surely, under basic rules of contracts, if the court rejects the agreement, then the only remedy must be withdrawal of the plea agreement, as specific performance would be impossible at that point.

In *Stubbs v. State*, 114 Nev. 1412 (1998), the court ignored a stipulation, but this particular issue was not litigated because the defense conceded the point. Otherwise, there does not appear to be any legal authority for the court to change the terms of a binding contract between the parties.

If a stipulation is a binding contract, and the parties are bound to fulfill the terms, then the court may reject the contract or enforce it, but the court does not have authority to change the terms of the contract, without consent of the parties who made the agreement in the first place.

ALL MEMBERS WELCOME TO NACJ BOARD MEETINGS
First Wednesday of Every Month! Noon, ZOOM
Some business, a lot of good information, and brainstorm opportunities

Immigration Consequences of Convictions for Battery with Substantial Bodily Harm

By David Graham Blitzer

Immigration Justice Corps Fellow, UNLV Immigration Clinic

Better results in a criminal proceeding may paradoxically have worse results for immigration purposes. At this time, pleading to **attempted** battery resulting in substantial bodily harm under NRS 200.481(2) has a higher certainty of adverse immigration consequences than the **completed** version of the crime.

Lawful permanent residents want to avoid being convicted of an aggravated felony, as it is the only ground of deportability that can statutorily bar them from applying for Cancellation of Removal, one of the best forms of relief available to avoid deportation.

Both the attempted and completed version of battery resulting in substantial bodily harm often result in immigration charges of a "crime of violence" aggravated felony under 8 U.S.C. § 1101(a)(43)(F), which incorporates the definition under 8 U.S.C. § 16(a): "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." The definition of "physical force" entails "**violent** force—that is, force capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140 (2010) (emphasis in original).

Immigration law can produce frankly strange results because it relies on the categorical approach. The categorical approach analyzes whether a predicate state conviction is a "match" for the generic federal definition of the crime and whether the elements of the state crime are overbroad compared to those of the generic federal definition.

The Ninth Circuit has held that the attempt version of NRS 200.481(2) is a categorical match for the federal definition of a crime of violence. *See United States v. Fitzgerald*, 935 F.3d 814 (9th Cir. 2019) (per curiam). The Ninth Circuit held that it "requires that the defendant act with the specific intent both to commit battery and to bring about substantial bodily harm." *Id.* at 817.

Conversely, the only intent required for a completed battery resulting in substantial bodily harm is the mens rea for battery generally, which is an intent to commit an "offensive touching." *See Hobbs v. State*, 127 Nev. 234, 238 (2011). Thus, the statute does not require proof of "use, attempted use, or threatened use of physical force against the person or property of another" to secure conviction for this offense. There is also no binding precedent stating it is a categorical match, only two unpublished decisions.

In other words, even though pleading to attempted battery with substantial bodily harm may lead to a reduced sentence, at the present time, it also has a higher certainty of immigration consequences. Criminal defense attorneys should be mindful of this when advising clients about the trade-off between a reduced sentence and potential immigration consequences regarding NRS 200.481(2).

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Unreasonable Doubt

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