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Criminal Procedure; discipline program-male felons

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ing the Nevada Supreme Court's denial of an appeal or affirmation of a death judgment unless the person sentenced to death obtains either a stay in federal court[10] or a new stay of execution from the Nevada Supreme Court.[11]

BAS

10. *See* 1989 Nev. Stat. ch. 223, sec. 1, at 491 (amending NEV. REV. STAT. § 176.491) (a person sentenced to death must obtain a stay in the federal court to which an application for a writ of certiorari or habeas corpus is made).

11. *Id.* at 491 (amending NEV. REV. STAT. § 176.491) (stay of execution from Supreme Court obtained pursuant to Nevada Revised Statutes sections 34 or 177). The Supreme Court can issue a new stay of execution if a petition for the stay raises new constitutional claims for relief or presents substantial grounds upon which relief might be granted and a valid justification why the claim was not presented in a prior proceeding. *See* Nev. Rev. Stat. § 176.487 (1987).

Criminal Procedure; discipline program—male felons

NEV. REV. STAT. §§ 176.___, 209.___(new); §§ 176.145, 176.158, 176.175, 176.205, 176.221 (amended).
SB 98 (Hickey); 1989 STAT. Ch. 780
*(Effective September 1, 1990)**

Under Chapter 780 the court may require qualified[1] males, convicted of a nonviolent felony, to participate in a regimental discipline program as an alternative to incarceration.[2] The program must include:

* *See* 1989 Nev. Stat. ch. 780, sec. 12, at 1855 (enacting NEV. REV. STAT. § 176.___) (the program becomes effective on September 1, 1990, and the funds for the program are appropriated to the department of prisons immediately).

1. *See* 1989 Nev. Stat. ch. 780, sec. 4, at 1852 (enacting NEV. REV. STAT. § 176.___) (to qualify, a convicted male felon must be at least 18 years old, never imprisoned as an adult for more than six months, and otherwise be eligible for probation). *See id.* sec. 5, at 1853 (amending NEV. REV. STAT. § 176.145) (if appropriate, the presentence investigation must contain a recommendation that the defendant undergo the regimental discipline program).

2. *Id.* sec. 3, at 1852 (enacting NEV. REV. STAT. § 176.___). *See id.* sec. 1, at 1852 (enacting NEV. REV. STAT. § 209.___) (Director of the Department of Prisons must establish the program with the approval of the board of parole commissioners). *See also* NEV. REV. STAT. §§ 176.175 1 (1987) (amended by 1989 Nev. Stat. ch. 780, sec. 7, at 1852) (definition of board); 209.061 (1987) (definition of director). The court may require the defendant to participate in the program before sentencing. 1989 Nev. Stat. ch. 780, sec. 4, at 1852 (enacting NEV. REV. STAT. § 176.___). If the defendant satisfactorily completes the program after a probation violation, he is to be returned to the supervision of the chief parole and probation

(1) Incarceration in a facility;[3] (2) strenuous exercise; (3) military drills; (4) assistance with job placement; and (5) instruction in alcohol and drug abuse prevention, stress management, character building, and rational behavior.[4]

After completion of the program the defendant must return to the court for further sentencing.[5] Time in the program must be deducted from the later imposed sentence.[6]

COMMENT

Chapter 780 provides an alternative to incarceration for qualified males only.[7] In the past many government statutes reflected traditional sex roles, and the U. S. Supreme Court treated gender-based classifications with great judicial deference.[8] Early in the 1970's, gender-based classifications came under closer constitutional scrutiny. The U.S. Supreme Court in *Reed v. Reed*,[9] stated that gender-based classifications are subject to challenge under the Equal Protection Clause.[10] In order to survive a constitutional challenge, a gender-based statute classification must substantially relate to the achievement of an important government objective.[11] The ultimate goals of the Nevada Legislature in enacting Chapter 780 could be to alleviate prison overcrowding and prevent new offenders from becoming permanent participants in the criminal justice system. While these goals are important, the reasons for excluding females are unclear.

One possible justification for excluding women from Chapter 780's provisions could be that the number of women inmates is too small

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officer. *Id. See also id.* (failure to satisfactorily complete the program is a violation of probation). *See generally* Rotman, *Do Criminal Offenders Have a Constitutional Right to Rehabilitation?*, 77 J. CRIM. L. & CRIMINOLOGY 1023 (1986).

3. *See* NEV. REV. STAT. § 209.065 (1987) (definition of facility).

4. 1989 Nev. Stat. ch. 780, sec. 1, at 1852 (enacting NEV. REV. STAT. § 209.___).

5. *Id.* sec. 4, at 1852 (enacting NEV. REV. STAT. § 176.___). The defendant must be returned to the court within 30 days if not eligible for the program, and must be returned to the court no later than 150 days after starting the program. *Id.* The court may request reports of the defendant's participation. *Id.*

6. *Id.* (enacting NEV. REV. STAT. § 176.___).

7. *See* 1989 Nev. Stat. ch. 780, secs. 1-6, at 1852 (enacting NEV. REV. STAT. § 176.___).

8. *See generally* Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 YALE L.J. 913 (1983); Haft, *Women in Prison*, in PRISONERS' RIGHTS SOURCEBOOK 345 (1973); Fabian, *Women Prisoners: Challenge of the Future*, in LEGAL RIGHTS OF PRISONERS 173 (1980).

9. 404 U.S. 71 (1971).

10. *Id.* at 75, 76. *See* U.S. CONST. amend. XIV, § 1.

11. Craig v. Boren, 429 U.S. 190, 197 (1976) (a successful constitutional challenge to a statute that prohibited the sale of 3.2% beer to males under the age of 21 and to females under the age of 18).

to cost-effectively and conveniently operate a program for women.[12] The Supreme Court has said, however, that administrative convenience is not sufficiently substantial to justify gender-based classifications.[13] While prisoners generally are afforded less constitutional protection than members of the public,[14] lower federal courts have rejected convenience and cost-efficiency as justifications for treating women prisoners differently.[15]

The Court has also rejected rationales for gender-based classifications based on stereotypical concepts for the proper role of women.[16] Thus, if the legislature's reason for excluding women is that they belong in the home and do not need job placement assistance, or that women cannot tolerate physical labor, Chapter 780 is not likely to survive a constitutional challenge.[17]

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12. Fabian, *supra* note 8 at 171, 174 (1980) (although the arrest rate for women is rising more rapidly than the rate for men, women still are only a small minority of the total prisoner population). *See* U.S. DEPARTMENT OF JUSTICE, 1987 SOURCEBOOK OF CRIM. JUST. STATISTICS 499 (1988) (395,309 total inmates in United States while only 15,823 female inmates). The percentage of female inmates in 1985 and 1986 in the United States was 8%. *Id.* at 482. In Nevada the total inmate population was 3129 but only 188 of the inmates were female. *Id.* at 499.

13. *Boren*, 429 U.S. at 198-199. *See* Wengler v. Druggist Mutual Ins. Co., 446 U.S. 142, 151 (1980) (the court stated that the state's purpose of convenience was not enough to support a statute which paid workers' compensation death benefits to all widows whose husbands died in work-related accidents, but only paid benefits to a widower if he was disabled or dependent on his wife); Frontiero v. Richardson, 411 U.S. 677, 688-91 (1973) (the court rejected administrative convenience as a justification for a statute which allowed a serviceman to claim his wife as a dependent regardless of whether she was in fact dependent, but only allowed a servicewoman to claim her husband as a dependent if he was dependent on her for more than one half of his support). *See also* Reed v. Reed, 404 U.S. 71, 76 (1971) (the government objective of reducing the workload on the probate courts was insufficient to sustain the statutory gender-based classification for appointment of administrators).

14. Wolff v. McDonnell, 418 U.S. 539, 556 (1974) (lower standard of review for prisoners under the equal protection clause).

15. *See e.g.*, Canterino v. Wilson, 546 F. Supp. 174, 211 (W.D. Ky. 1982) (government reasons such as preserving the state's limited resources or the limitations of a small womens' prison cannot be used to justify denying women equal access to programs routinely provided to men). In *Canterino*, the government argued that security was an important government objective because they would have to make the programs co-ed in order to be equal. *Id.* at 212. The court rejected this argument as insufficient to justify unequal programs. *Id. See also infra* notes 17, 25 (discussing *Glover v. Johnson*).

16. Stanton v. Stanton, 421 U.S. 7, 14 (1975) (preservation of values based on old notions of females as homemakers is not a reasonable objective for a statute which determines a different age of majority for males and females). *See generally* Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989).

17. *See* Glover v. Johnson, 478 F. Supp. 1075 (E.D. Mich. 1984) (class action brought by women prisoners claiming that the state's failure to provide them with academic and vocational training opportunities equal to those of the men violated their constitutional rights). The court concluded that the women's constitutional rights were violated because the opportunities for rehabilitation provided for women were inferior to those provided for men and this action failed to promote state penal objectives of rehabilitation and reintegration of inmates. *Id.* at 1087-1088. *See generally* Note, *Denial of Work Release Programs to Women: A Violation of Equal Protection*, 47 S. CAL. L. REV. 1453 (1974).

The U. S. Supreme Court has upheld gender based discrimination in some cases. In *Rostker v. Goldberg*,[18] the Court permitted Congress to require that only men register for the draft.[19] The governmental objective was to facilitate drafting of combat troops,[20] and since only men were eligible for combat, the male-only statute was substantially related to the government's purpose.[21] Assuming the purpose behind Chapter 780 is to alleviate prison overcrowding and decrease recidivism, excluding women from the program does not appear to be closely tailored to the achievement of this governmental objective; a gender-neutral statute would appear to be equally effective. Currently, eight other states have similar programs enacted through gender-neutral statutes.[22] While regimental discipline programs were initially provided for males only, five states now have programs for females.[23] Generally, the success of women in parole and probation is similar to men;[24] if women are not provided with this program their recidivism rate will remain constant or increase while male recidivism may decrease.

Whether Chapter 780 will withstand constitutional scrutiny depends on the governmental objectives and how the court views the relationship of gender classification to the objectives. Prison officials and legislatures who provide vocational training and education to males only in an effort to alleviate overcrowding and reduce recidivism should be aware that substantially equivalent efforts may be required for similarly situated females.[25]

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18. 453 U.S. 57 (1981).

19. *Id.* at 83. *See also* Michael M. v. Superior Court, 450 U.S. 464 (1981) (a statute making it a crime for a male to have sex with a female under the age of 18 was upheld as constitutional because the statute roughly equalized the deterrence on the sexes in order to prevent teenager pregnancies).

20. Rostker v. Goldberg, 453 U.S. 57, 76 (1981).

21. *Id.* at 77.

22. *See* LA. REV. STAT. ANN. § 15:574.5 (West Supp. 1989) (intensive incarceration and parole supervision program); FLA. STAT. ANN. § 958.04 (West Supp. 1989); GA. CODE ANN. § 42-8-35.1 (Supp. 1988) (special alternative incarceration); 1988 Mich. Legis. Serv. 286 (West) (enacting M.C.L.A. § 771.3b) (special alternative incarceration); N.Y. CORRECTION LAW § 867 (McKinney Supp. 1989) (shock incarceration program); S.C. CODE ANN. § 24-13-910 (Law. Co-op 1989); OKLA. STAT. ANN. tit. 22, §§ 996-996.3 (West Supp. 1989) (delayed sentencing program for young adults); MISS. CODE ANN. § 47-7-47 (Supp. 1988) (earned probation program).

23. COUNCIL OF STATE GOVERNMENTS, *Spit-Shine and Double-Time: State Shock Incarceration Programs*, C.S.G. BACKGROUNDER (compiled by K. Marshall 1989) (the states that have programs for women are Louisiana, Mississippi, New York, Oklahoma, and South Carolina).

24. Fabian, *supra* note 8 at 178.

25. Smolla, *Prison Overcrowding and The Courts: A Roadmap for the 1980's*, 1984 U. ILL. L. REV. 389, 420 (1984). *See* Glover v. Johnson, 478 F. Supp. 1075, 1079 (E.D. Mich.

1984) (under the Equal Protection Clause, prisons must provide female inmates with substantially equivalent treatment and facilities as those provided to male inmates unless their failure to do so is substantially related to the achievement of correctional objectives of rehabilitation and reintegration). *See also* Canterino v. Wilson, 546 F. Supp. 174 (W.D. Ky. 1982) (privileges that are routinely granted to male prisoners, but restricted or denied to similarly situated females will not withstand constitutional scrutiny under the equal protection clause unless this discrimination is substantially related to an important governmental objective).

Criminal Procedure; driving under the influence—sentencing

NEV. REV. STAT. §§ 4.373, 484.3792, 484.3794 (amended).
AB 274 (Committee on Judiciary); 1989 STAT. Ch. 86

Existing law provides that any person[1] found guilty of driving while intoxicated[2] may apply for substance abuse treatment as an alternative to incarceration.[3] Prior law delayed sentencing if the applicant was accepted into a program.[4] Under Chapter 86, any person who applies to the court for a treatment program shall be sentenced immediately, but the sentence will be suspended for up to three years while the offender undergoes treatment.[5]

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1. *See* NEV. REV. STAT. § 484.3794 (amended by 1989 Nev. Stat. ch. 86, sec. 2, at 197) (treatment program only available for first or second time offenders within a seven year span).
2. *See id.* § 484.379 (definition of driving while intoxicated).
3. *Id.* § 484.3794 (amended by 1989 Nev. Stat. ch. 86, sec. 2, at 197).
4. *Id.*
5. *See* 1989 Nev. Stat. ch. 86, sec. 2, at 197 (amending NEV. REV. STAT. § 484.3794) (sentencing will be suspended on condition that the offender is accepted to a treatment program and satisfactorily completes the treatment in compliance with any additional terms of the court). *Id.* If the treatment is not completed, the offender must serve the imposed sentence. *Id.* If the treatment is completed satisfactorily, a reduced imprisonment term and fine will be imposed. *Id. See also* NEV. REV. STAT. § 484.3794 1(c) (upon completion of a treatment program, a first offender within a seven-year period is punishable by a jail term of one day- or 24 hours of community service; a second offense within a seven-year period is punishable with a jail term of five days).