

1
2 IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
Clerk of Supreme Court

4 THE STATE OF NEVADA,

5 Petitioner,

6 vs.

7 THE FOURTH JUDICIAL
8 DISTRICT COURT OF THE
9 STATE OF NEVADA IN AND
10 FOR THE COUNTY OF ELKO;
AND THE HONORABLE
NANCY PORTER, DISTRICT
JUDGE,

11 Respondent,

12 and

13 ANTHONY CHRIS ROBERT
MARTINEZ,

14 Real Party in Interest.

15 **PETITION FOR WRIT OF PROHIBITION OR MANDAMUS**

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1 **PETITION FOR WRIT OF PROHIBITION OR MANDAMUS**

2 **I. INTRODUCTION**

3 This petition asks the Court to examine and decide whether NRS
4 202.360 (1) allows the State to charge, and for the Defendant to be
5 convicted of, one count of prohibited person in possession of any firearm
6 for *each* firearm he possessed, or if NRS 202.360 (1) only allows the State
7 to charge, and for the Defendant to be convicted of, only one count of
8 prohibited person in possession of any firearm for all firearms he possessed
9 (i.e. unit of prosecution).

10 **II. ROUTING STATEMENT**

11 Matters raising as a principal issue a question of statewide public
12 importance, and/or an issue upon which there is an inconsistency in the
13 published decision of the Court of Appeals or of the Supreme Court are
14 retained by the Supreme Court. NRAP 17(a)(12). The district court's
15 order consolidating five counts alleging five separate violations of NRS
16 202.360 (1) for each firearm possessed into one count for all five (5)
17 firearms possessed by the Defendant, provides an opportunity for this
18 Court to determine the appropriate unit of prosecution, which, as far as the
19 State can tell, has never been done in a *published and citable* decision. As
20 outlined below, there also appears to be an inconsistency in the published

1 decisions. Therefore, the State respectfully requests that the Supreme
2 Court of Nevada retain and decide this petition.

3 **III. FACTS AND PROCEDURAL HISTORY**

4 In the Criminal Information, the State alleged, among several other
5 felonies, including two counts of attempted murder with the use of a
6 firearm, that Defendant violated NRS 202.360 (1), possession of a firearm
7 by a prohibited person, and that he had been previously convicted of at
8 least one felony offense. Petitioners Appendix (“PA”) 1. The State
9 alleged one count of NRS 202.360 (1) for each firearm the Defendant
10 allegedly possessed, for a total of five counts, consisting of counts ten
11 through fourteen. PA 1. Four of the firearms were located in the vehicle
12 Defendant was driving at the time of the allegations, and the fifth firearm
13 was located outside of the vehicle where the Defendant is alleged to have
14 fired the firearm at two police officers. PA 10.

15 On July 15, 2019, Defendant filed a Motion to Consolidate counts
16 ten through fourteen. PA 22. On July 22, 2019, the State filed its
17 Opposition to Motion to Consolidate. PA 30. On November 12, 2019, the
18 District Court filed its Order Granting Motion to Consolidate Counts ten
19 through fourteen. PA 36.

1 **V. STANDARD OF REVIEW**

2 A writ of prohibition may issue to arrest the proceedings of a
3 District Court exercising its judicial functions, when such proceedings are
4 in excess of the jurisdiction of the District Court. NRS 34.320. A writ of
5 prohibition may issue only where there is no plain, speedy, and adequate
6 remedy at law. NRS 34.330.

7 While the State contemplated an appeal versus this petition, it
8 ultimately concluded that it does not have an appellate remedy because the
9 District Court consolidated counts ten through fourteen. The District Court
10 did not use any variation of the word “dismiss.” The reason the State
11 contemplated both avenues is because it questioned whether the District
12 Court’s Order effectively amounted to a dismissal of four counts; however,
13 the plain language of NRS 177.015 does not provide the State with an
14 appellate remedy because it does not contemplate the granting of a Motion
15 to Consolidate. Thus, the State’s opinion is that it does not have an
16 appellate remedy and this petition is the only mechanism available.

17 Where there is no “plain, speedy, and adequate remedy in the
18 ordinary course of law,” extraordinary relief may be available. NRS
19 34.170; NRS 34.330; *see Oxbow Constr., LLC v. Eighth Judicial Dist. Ct.*,
20 130 Nev. 867, 872, 335 P.3d 1234, 1238 (2014). A petitioner bears the

1 burden of demonstrating that the extraordinary remedy of mandamus or
2 prohibition is warranted. *Gardner on Behalf of L.G. v. Eighth Judicial*
3 *Dist. Ct.*, 405 P.3d 651, 653 (Nev. 2017); *see also Pan v. Eighth Judicial*
4 *Dist. Ct.*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004).

5 An appeal is generally an adequate remedy precluding writ relief.
6 *Pan*, 120 Nev. at 224, 88 P.3d at 841; *see also Bradford v. Eighth Judicial*
7 *Dist. Ct.*, 129 Nev. 584, 586, 308 P.3d 122, 123 (2013). The State does not
8 have the right to appeal from “a final judgment or verdict in a criminal
9 case.” NRS 177.015(3). The Court may also consider writ petitions when
10 an important issue of law needs clarification and considerations of sound
11 judicial economy are served. *Renown Reg'l Med. Ctr. v. Second Judicial*
12 *Dist. Ct.*, 130 Nev. 824, 828, 335 P.3d 199, 202 (2014).

13 In the context of writ petitions, this Court reviews District Court
14 orders for an arbitrary or capricious abuse of discretion. *Int'l Game Tech.*,
15 124 Nev. at 197, 179 P.3d at 558. “An arbitrary or capricious exercise of
16 discretion is one founded on prejudice or preference rather than on reason,
17 or contrary to the evidence or established rules of law....” *State v. Eighth*
18 *Judicial Dist. Ct. (Armstrong)*, 127 Nev. 927, 931-32, 267 P.3d 777, 780
19 (2011) (internal quotations and citations omitted). “A manifest abuse of
20 discretion is a clearly erroneous interpretation of the law or a clearly

1 erroneous application of a law or rule.” *Armstrong*, 127 Nev. at 932, 267
2 P.3d at 780 (internal quotations omitted). Questions of law are reviewed
3 de novo, even in the context of writ petitions. *Moseley v. Eighth Judicial*
4 *Dist. Ct.*, 124 Nev. 654, 662, 188 P.3d 1136, 1142 (2008).

5 The State respectfully submits that this is an important issue of law
6 which needs clarification. While the State respects the District Court’s
7 Order, it is not binding on future cases within or without Elko County.
8 Judicial economy would be well served if this Honorable Court weighed in
9 on the issue so that not only will this instant case proceed in the proper
10 manner, but also so Defendants and prosecutors alike know how to proceed
11 in the future when this issue arises again – and undoubtedly it will.

12 **VI. QUESTION PRESENTED**

13 A. What is the appropriate unit of prosecution for NRS 202.360(1)?

14 **VII. ARGUMENT**

15 A. This Court Should Hold That NRS 202.360(1) allows the State
16 of Nevada to charge, and the Defendant to be convicted of, one
17 count for each firearm a Defendant possesses in violation of
NRS 202.360(1), and Require the District Court to enter an
Order consistent with that holding.

18 In this petition, the State seeks a ruling from this Court that 1) the
19 State can charge, and the Defendant can be convicted of, one count for
20

1 each firearm the Defendant possesses in violation of NRS 202.360(1), and
2 2) directs the District Court to enter an Order consistent with that holding.

3 Statutory interpretation does not go beyond the statutory language unless
4 there is an ambiguity. *State v. Lucerio*, 127 Nev. 92, 94, 249 P.3d 1226,
5 1228 (2011). Statutes should be given their plain meaning and must be
6 construed as a whole and not be read in a way that would render words or
7 phrases superfluous or make a provision nugatory. *Mangarella v. State*,
8 117 Nev. 130, 133, 17 P.3d 989, 991 (2001).

9 NRS 202.360(1) provides that:

10 1. A person shall not own or have in his or her possession or under
11 his or her custody or control any firearm if the person:

...

12 (b) Has been convicted of a felony in this State or any other State,
13 or in any political subdivision thereof, or of a felony in violation of
14 the laws of the United States of America, unless the person has
15 received a pardon and the pardon does not restrict his or her right to
16 bear arms;

...

15 A person who violates the provisions of this subsection is guilty of a
16 Category B Felony and shall be punished by imprisonment in the
17 state prison for a minimum term of not less than 1 year and a
18 maximum term of not more than 6 years, and may be further
punished by a fine of not more than \$5,000.

19 “Firearm” is defined as including “any firearm that is loaded or unloaded
20 and operable or inoperable.” NRS 202.360(3)(b).

1 The language of NRS 202.360 does not suggest that the Legislature
2 intended that the State could only charge one count, and the Defendant
3 could only be convicted of one count, for all of the firearms in the
4 prohibited person's possession. The statute uses the singular language
5 "any firearm" instead of the plural language any "firearms." This language
6 is plain and unambiguous.

7 In *Washington v. State*, 132 Nev. Adv. Rep. 65 (2016), the Supreme
8 Court of Nevada upheld separate convictions for discharging a firearm at
9 or into a structure for each bullet that was fired from the firearm. In
10 analyzing the validity of those separate convictions, the Court said that it
11 was not an issue of double jeopardy as *Washington* argued, but rather an
12 issue of redundancy, which also includes "unit of prosecution." The Court
13 wrote:

14 [A] claim that convictions are redundant stems from the legislation
15 itself and the conclusion that it was not the legislative intent to
16 separately punish multiple acts that occur close in time and make up
17 one course of criminal conduct. Determining the unit of prosecution
18 under a criminal statute thus involves a matter of statutory
19 interpretation. Statutory interpretation is a question of law subject to
20 de novo review. We must attribute the plain meaning to a statute
that is not ambiguous. An ambiguity arises where the statutory
language lends itself to two or more reasonable interpretations.

The legislation at issue here is NRS 202.285 (1), which provides that
[a] person who willfully and maliciously discharges a firearm at
or into any house, room, [or] apartment is guilty of either a

1 misdemeanor or felony depending on whether the structure is
2 abandoned or occupied. The unit of prosecution in NRS 202.285
3 does not turn on the word firearm but instead on the meaning of the
4 verb discharges. NRS Chapter 202 does not define the term
5 discharge. However, the commonly understood meaning, in the
6 context of a firearm, is the act of the bullet leaving the weapon.

7 Our conclusion that the unit of prosecution is the act of the bullet
8 leaving the weapon is supported by a similar statute, NRS 476.070
9 (1), and by the statutory definition of a firearm. NRS 476.070 (1)
10 provides that [a]ny person who discharges any bullet, projectile or
11 ammunition of any kind which is tracer or incendiary in nature on
12 any grass, brush, forest or crop-covered land is guilty of a
13 misdemeanor. Similarly, NRS 202.253 (2) defines [f]irearm as any
14 device designed to be used as a weapon from which a projectile may
15 be expelled through the barrel by the force of any explosion or other
16 form of combustion. The use of single nouns—bullet, projectile, and
17 ammunition in NRS 476.070 (1) and a projectile in NRS 202.253
18 (2)—demonstrates the fact that discharges, as used in NRS 202.285
19 (1), contemplates a discrete shot or explosion.

20 Id. at 806-807 (internal quotations and citations omitted).

21 The Court in *Washington*, as quoted above, focused its attention on
22 the verb discharges, rather than firearm. The State respectfully suggests
23 that an analysis similar to the one used in *Washington*, and the plain
24 meaning of the statute, and/or persuasive authority, should lead to the same
25 conclusion that multiple counts of possession of a firearm by a felon for
26 each firearm possessed is not redundant.

1 Importantly, as the District Court pointed out in its Order granting
2 the Motion to Consolidate, the Supreme Court of Nevada clarified its
3 holding in *Castaneda v. State*, 373 P.3d 108 (2016) in *Andrews v. State*,
4 412 P.3d37 (2018). In *Andrews*, this Court held that *Castaneda* does NOT
5 mean that a statute’s use of the word ‘any’ means that a defendant can only
6 be charged with and convicted of one charge for simultaneous acts.

7 In fact, in *Andrews*, this Court concluded that the use of “any
8 controlled substance” in NRS 453.3385 meant that the Legislature intended
9 to create a separate offense for each controlled substance simultaneously
10 possessed and did not apply the rule of lenity. *Id.* at 40. NRS 202.360(1),
11 just like NRS 453.3385, uses the word “any” and the singular form of the
12 verb (firearm and substance). Any firearm is the same as any controlled
13 substance. The Supreme Court of Nevada held that the rule of lenity didn’t
14 apply in *Andrews*, but the District Court concluded that the rule of lenity
15 applied in this case which creates an inconsistency in the law.

16 Finally, in *Andrews*, this Court relied on persuasive case law from
17 other jurisdictions, including *Cunningham v. State*, 318 Md. 182 (1989);
18 *Tabb v. State*, 250 Ga. 317 (1982); and *State v. Williams*, 542 S.W.2d 3
19 (1976); *State v. Meadors*, 177 Mont. 100 (1978); and *Melby v. State*, 70
20 Wis. 2d 368 (1975). This Court specifically included that persuasive

1 authority, it appears, to support the position that the respective statutes
2 allowed for multiple charges and convictions for any controlled substance
3 simultaneously possessed, notwithstanding the use of the word “any.”
4 *Andrews* at 41. It seems that everything about the analysis and ruling in
5 *Andrews* is applicable to this case. If so, the only conclusion that we can
6 reach is that NRS 202.360(1) should be interpreted the same.

7 **VIII. CONCLUSION**

8 The State respectfully requests that this Court issue a writ of
9 prohibition or mandamus directing the District Court to enter an Order
10 reversing its Order granting the Defendant’s Motion to Consolidate and to
11 allow counts ten through fourteen to stand as separate allegations for which
12 a jury could convict the Defendant of each count – one for each firearm
13 possessed in violation of NRS 202.360(1).

14 Respectfully Submitted this 25 day of November, 2019.

16 By: _____

17 TYLER J. INGRAM
18 District Attorney
19 State Bar Number: 11819
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1 **CERTIFICATE OF COMPLIANCE**

2 I hereby certify that this petition complies with the formatting
3 requirements of NRAP 32(a)(4), the typeface requirements of NRAP
4 32(a)(5) and the type style requirements of NRAP 32(a)(6). This petition
5 has been prepared in a proportionally spaced typeface using Microsoft
6 Office Word 2007, in size 14 point Times New Roman font.

7 I further certify that this petition complies with the page or type-
8 volume limitations of NRAP 32(a)(7) because, excluding the parts of the
9 petition exempted by NRAP32(a)(7)(C), because it contains 2,267 words.

10 I hereby certify that I have read this petition, and to the best of my
11 knowledge, information, and belief, it is not frivolous or interposed for any
12 improper purpose. I further certify that this petition complies with all
13 applicable Nevada Rules of Appellate Procedure, in particular NRAP
14 28(e), which requires every assertion in the petition regarding matters in
15 the record to be supported by appropriate references to the record on

16 ///

17 ///

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1 appeal. I understand that I may be subject to sanctions in the event that the
2 accompanying petition is not in conformity with the requirements of the
3 Nevada Rules of Appellate Procedure.

4 DATED this 25 day of November, 2019.

5
6 By: 

TYLER J. INGRAM

District Attorney

State Bar Number: 11819

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