

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,

Petitioner,

vs.

THE FOURTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF ELKO;
AND THE HONORABLE NANCY PORTER,

Respondents,

and

ANTHONY CHRIS ROBERT MARTINEZ,

Real Party in Interest.

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Feb 14 2020 08:22 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

Fourth Judicial District Court, Elko
The Honorable Nancy Porter, District Court Judge

**ANSWER TO PETITION FOR WRIT OF PROHIBITION OR
MANDAMUS**

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1 Since prosecutorial overcharging would constitute a matter
2 of statewide public importance and, furthermore, that this is a
3 principal issue in this jurisdiction, Mr. Martinez stipulates with
4 the State of Nevada that this Court should retain this appeal.
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6

7 FACTUAL AND PROCEDURAL HISTORY

8 Mr. Martinez is satisfied with the State of Nevada's
9 recitation of the procedural and factual history pertaining to the
10 instant Petition.
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12

13 STANDARD OF REVIEW

14 Pursuant to NRS 34.320, "The writ of prohibition is the
15 counterpart of the writ of mandate. It arrests the proceedings of
16 any tribunal, corporation, board or person exercising judicial
17 functions, when such proceedings are without or in excess of the
18 jurisdiction of such tribunal, corporation, board or person."
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22 NRS 34.330, which applies to writs of prohibition states that
23 "The writ may be issued only by the Supreme Court, the Court of
24 Appeals or a district court to an inferior tribunal, or to a
25 corporation, board or person, in all cases where there is not a
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27

1 plain, speedy and adequate remedy in the ordinary course of law.

2
3 It is issued upon affidavit, on the application of the person
4 beneficially interested.”

5
6 Under NRS 34.160, which applies to writs of mandamus,
7 “The writ may be issued by the Supreme Court, the Court of
8 Appeals, a district court or a judge of the district court, to compel
9 the performance of an act which the law especially enjoins as a
10 duty resulting from an office, trust or station; or to compel the
11 admission of a party to the use and enjoyment of a right or office
12 to which the party is entitled and from which the party is
13 unlawfully precluded by such inferior tribunal, corporation, board
14 or person. When issued by a district court or a judge of the district
15 court it shall be made returnable before the district court.”

16
17 NRS 34.170, which also applies to writs of mandamus,
18 states that “This writ shall be issued in all cases where there is
19 not a plain, speedy and adequate remedy in the ordinary course of
20 law. It shall be issued upon affidavit, on the application of the
21 party beneficially interested.”

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1 In Nevada, the comparable statute is NRS 202.360(1), which
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3 states the following:

4 A person shall not own or have in his or her possession
5 or under his or her custody or control any firearm if
6 the person:

7 (a) Has been convicted in this State or any other
8 state of a misdemeanor crime of domestic violence as
9 defined in 18 U.S.C. § 921(a)(33);

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

16 (c) Has been convicted of a violation of NRS
17 200.575 or a law of any other state that prohibits the
18 same or substantially similar conduct and the court
19 entered a finding in the judgment of conviction or
20 admonishment of rights pursuant to subsection 7 of
21 NRS 200.575;

22 (d) Except as otherwise provided in NRS 33.031, is
23 currently subject to:

24 (1) An extended order for protection against
25 domestic violence pursuant to NRS 33.017 to 33.100,
26 inclusive, which includes a statement that the adverse
27 party is prohibited from possessing or having under his
28 or her custody or control any firearm while the order is
29 in effect; or

(2) An equivalent order in any other state;

(e) Is a fugitive from justice;

(f) Is an unlawful user of, or addicted to, any
controlled substance; or

1 (g) Is otherwise prohibited by federal law from
2 having a firearm in his or her possession or under his
3 or her custody or control.

4 A person who violates the provisions of this subsection
5 is guilty of a category B felony and shall be punished
6 by imprisonment in the state prison for a minimum
7 term of not less than 1 year and a maximum term of
8 not more than 6 years, and may be further punished by
9 a fine of not more than \$5,000.

10 (Emphasis added.)

11 When considering the Nevada statute in this regard, the
12 operative word is “any.” How can the gravamen of the Nevada
13 statute be any different from the gravamen of the federal statute
14 barring felons from possessing firearm? It cannot be so.

15 It is clear that Nevada as well as the United States have a
16 vested interest in making sure that felons do not possess firearms.
17 Federal precedent in this regard dismantles the State’s argument
18 that it can charge not just one but five separate felonies against
19 Mr. Martinez based solely on the quantity of firearms that Mr.
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24 Martinez allegedly possessed.

25 Keen is far from the only federal case that is adverse to the
26 State of Nevada’s position on the instant Petition. In Bell v.
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1 United States, 349 U.S. 81, 82-84, 75 S. Ct. 620, 622 (1955), the
2
3 nation's high court ruled that the U.S. Government could not seek
4 multiple convictions under the Mann Act when there was merely
5 one transaction. That court cited the Mann Act's pertinent
6 section, which reads, "Whoever knowingly transports in
7 interstate or foreign commerce . . . any woman or girl for the
8 purpose of prostitution or debauchery, or for any other immoral
9 purpose . . . 'Shall be fined not more than \$ 5,000 or imprisoned
10 not more than five years, or both.' § 2 of the Act of June 25, 1910,
11 36 Stat. 825, now 18 U. S. C. § 2421." Id. at 81-82, 621.
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16 (Emphasis added.)

17
18 The most striking commonality between Nevada's ex-felon
19 in possession of a firearm statute and the Mann Act is the
20 presence of the word "any." The United States Congress could
21 have easily defined the unit of prosecution as being a felony for
22 each "woman or girl" transported in foreign or interstate
23 commerce, but it declined to do so.
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1 By analogy, the state legislature here in Nevada had every
2 opportunity to define the unit of prosecution as each and every
3 firearm (or even bullet), but declined to do so. As such, the
4 district court's order forbidding the State of Nevada's
5 overcharging was sound.
6

7
8 Although there is no published case directly on point as to
9 the unit of prosecution pertaining to ex-felons charged with the
10 possession of multiple firearms, there is precedent from this Court
11 regarding the unit of prosecution pertaining to child pornography.
12 This precedent hardly does the State of Nevada any favors.
13
14

15 In Wilson v. State, 121 Nev. 345, 358, 114 P.3d 285, 294
16 (2005), this Court asserted that "the intent of the Legislature in
17 passing NRS 200.700 to 200.760, inclusive, was to criminalize the
18 use of children in the production of child pornography, not to
19 punish a defendant for multiple counts of production dictated by
20 the number of images taken of one child, on one day, all at the
21 same time. If the Legislature intended this statute to punish a
22 party for every individual photograph produced of a sexual
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1 performance, it certainly could have effectuated that intent in the
2 statute. Therefore, we conclude that the facts of this case
3 demonstrate a single violation of NRS 200.710, not multiple acts
4 in violation of the law.”
5

6
7 The text of NRS 200.710 that was in effect in Wilson was as
8 follows:
9

10 1. A person who knowingly uses, encourages, entices or
11 permits a minor to simulate or engage in or assist
12 others to simulate or engage in sexual conduct to
13 produce a performance is guilty of a category A felony
14 and shall be punished as provided in NRS 200.750.

15 2. A person who knowingly uses, encourages, entices,
16 coerces or permits a minor to be the subject of a sexual
17 portrayal in a performance is guilty of a category A
18 felony and shall be punished as provided in NRS
19 200.750, regardless of whether the minor is aware that
20 the sexual portrayal is part of a performance.

21 Id. at 356, 293.

22 Furthermore, this Court made it clear that the “clear import
23 of both subsections is to criminalize the use of a child in a
24 performance involving a sexual act or portrayal.” Id.

25 Correspondingly, the clear import of NRS 202.360(1) is to
26 disarm felons. It is not to punish a defendant separately for each
27

1 and every firearm that he/she allegedly possesses. The presence
2 of the word “any” in that statute is important to understanding
3 the gravamen.
4

5 Another case involving child pornography in this jurisdiction
6 is instructive as to the use of the word “any.” In Castaneda v.
7 State, 373 P.3d 108, 111 (Nev. 2016), the State’s position was that
8 NRS 200.730, “is plain and unambiguous: It authorizes a separate
9 conviction for each pornographic image possessed. Emphasizing
10 the word ‘any’ in the phrase ‘*any* film, photograph or other visual
11 presentation,’ the State maintains that NRS 200.730 makes it a
12 crime to possess even a single photograph depicting child
13 pornography. From this it follows, the State submits, that each
14 such photograph or image a person possesses constitutes a
15 separate crime.” (Emphasis in original.) However, this Court
16 said that “[c]onsistent with the rule of lenity, though, we are
17 obligated to construe statutes that contain ambiguity in the
18 proscribed conduct in the accused's favor . . . consistent with their
19 reasoning and the rule of lenity long established in our law,
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1 Castaneda's simultaneous possession at one time and place of 15
2 images depicting child pornography constituted a single violation
3 of NRS 200.730.” Id. at 114-15.
4

5 The State’s position in its Petition is inconsistent with this
6 Court’s past application of the rule of lenity. If there is one thing
7 that is clear, it is the fact that the State cannot unequivocally
8 argue that the text of NRS 202.360(1) puts someone on notice in
9 Nevada that possessing five separate firearms while being an ex-
10 felon would constitute five separate category B felonies. Pursuant
11 to Castaneda, this Court should deny the State of Nevada’s
12 instant Petition.
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17 The State cites Andrews v. State, 412 P.3d 37 (Nev. 2018), to
18 support its position. Andrews involved the unit of prosecution in
19 drug trafficking cases in this jurisdiction and held that “the
20 weights of different controlled substances may not be aggregated
21 together to form a single offense under NRS 453.3385.” Id. at 42.
22 This Court cited NRS 453.3385, which read as follows:
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1 [A] person who knowingly or intentionally sells,
2 manufactures, delivers or brings into this State or who
3 is knowingly or intentionally in actual or constructive
4 possession of. . . any *controlled substance which is*
5 *listed in schedule I, except marijuana, or any mixture*
6 *which contains any such controlled substance*, shall be
punished. . . if the quantity involved:

7 1. Is 4 grams or more, but less than 14 grams, for a
8 category B felony by imprisonment in the state prison
9 for a minimum term of not less than 1 year and a
10 maximum term of not more than 6 years and by a fine
11 of not more than \$50,000.

12 2. Is 14 grams or more, but less than 28 grams, for a
13 category B felony by imprisonment in the state prison
14 for a minimum term of not less than 2 years and a
15 maximum term of not more than 15 years and by a fine
16 of not more than \$100,000.

17 3. Is 28 grams or more, for a category A felony by
18 imprisonment in the state prison . . . [f]or life with the
19 possibility of parole, with eligibility for parole
20 beginning when a minimum of 10 years has been
21 served; or. . . [f]or a definite term of 25 years, with
22 eligibility for parole beginning when a minimum of 10
23 years has been served, and by a fine of not more than
24 \$500,000.

25 Id. at 39. (Emphasis in original).

26 The problem with applying Andrews to the instant case is
27 that there is a specific reason why society would not want a drug
28 dealer peddling different types of hard drugs instead of a
29 comparable quantity of one specific hard drug. Would society

1 want people to have more ways to get addicted to hard drugs or
2 less? Less is the right answer. It would seem more morally
3 blameworthy for a person to deal three separate types of hard
4 drugs that total 18 grams than a person dealing only one type of
5 hard drug with the same exact quantity.
6
7

8 This societal concern for the trafficking of differing types of
9 schedule I controlled substances does not apply in the context of
10 disarming an ex-felon. After all, the specific moral
11 blameworthiness targeted in that statute is directly related to
12 quantity – especially when considering that possessing 5 grams of
13 methamphetamine can get a person a maximum of 6 years in
14 prison whereas possessing 30 grams of methamphetamine can get
15 a person a maximum of life in prison. The legislature did not
16 come close to proscribing such progressive penalties for an ex-
17 felon based on the quantity of firearms that he/she possesses.
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23 One case out of Virginia bolsters Mr. Martinez's position in
24 that regard. In Acey v. Commonwealth, 511 S.E.2d 429, 434 (Va.
25 App. 1999), the holding was that the appellant could not be
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1 convicted for multiple counts of being an ex-felon in possession of
2 a firearm when the applicable statute's purpose was to prevent
3 the possession of a firearm by felons – thus making the number of
4 firearms possessed “irrelevant.”
5

6
7 Likewise, in State v. Garris, 663 S.E.2d 340, 347-48 (N.C.
8 App. 2008), it was stated, “the imposition of a single punishment
9 for illegally possessing multiple firearms is consistent with the
10 punishment we impose for other crimes, such as larceny, in North
11 Carolina. Specifically, N.C. Gen. Stat. § 14-72(b)(4) states that the
12 larceny ‘[o]f any firearm’ is a felony. N.C. Gen. Stat. § 14-
13 72(b)(4)(2007). In regard to larceny, this Court has held that the
14 Legislature, by enacting N.C. Gen. Stat. § 14-72(b)(4) with the
15 language of ‘any,’ did not intend to create a separate unit of
16 prosecution for each firearm stolen nor to allow multiple
17 punishments for the theft of multiple firearms.”
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24 This Court should follow the persuasive authority from both
25 Virginia and North Carolina and deny the State's request to
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1 charge Mr. Martinez with five separate violations of NRS
2 202.360(1).
3

4 CONCLUSION

5 The State of Nevada's Petition for Writ of Prohibition or
6 Mandamus should be denied. The language of NRS 202.360(1)
7 does not permit the filing of five (5) separate counts for Possession
8 of a Firearm by a Prohibited Person when the gravamen of the
9 offense is the disarming of ex-felons.
10
11
12

13 DATED this 14th day of February, 2020.
14

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3. Finally, I hereby certify that I have read this answering brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all the applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the

1 record to be supported by a reference to the page and volume
2 number, if any, of the transcript or appendix where the matter
3 relied on is found.
4

5 I understand that I may be subject to sanctions in the event
6 that the accompanying brief is not in conformity with the
7 requirements of the Nevada Rules of Appellate Procedure.
8
9

10 DATED this 14th day of February, 2020.

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20 CERTIFICATE OF SERVICE

21 (a) I hereby certify that this document was electronically
22 filed with the Nevada Supreme Court on the 14th day of
23 February, 2020.
24
25

26 Elko County
27 Public Defender

1 (b) I further certify that on the 14th day of February, 2020,
2
3 electronic service of the foregoing document shall be made in
4
5 accordance with the Master Service List to Aaron Ford, Nevada
6
7 Attorney General; and Tyler Ingram, Elko County District
8
9 Attorney.

10 (c) I further certify that on the 14th day of February, 2020, I
11
12 faxed the foregoing document to the Honorable Nancy Porter,
13
14 (775)753-4611.

15 DATED this 14th day of February, 2020.

16 SIGNED: /s/ Benjamin C. Gaumond

17 Employee of the Elko County Public Defender
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26 Elko County
27 Public Defender