IN THE SUPREME COURT OF THE STATE OF NEVADA

SHANELL CATHRINE MARTIN, Appellant, v. THE STATE OF NEVADA, Respondent.	CASE NO. 83665 **REPLY TO FAST TRACK RESPONSE**

1) Diversion was mandatory pursuant to Nevada law and the plea agreement in this case.

Under NRS 176.211(1)-(3):

1. Except as otherwise provided in this subsection, upon a plea of guilty, guilty but mentally ill or nolo contendere, but before a judgment of guilt, the court may, without entering a judgment of guilt and with the consent of the defendant, defer judgment on the case to a specified future date and set forth specific terms and conditions for the defendant. The duration of the deferral period must not exceed the applicable period set forth in subsection 1 of NRS 176A.500 or the extension of the period pursuant to subsection 2 of NRS 176A.500. The court may not defer judgment pursuant to this ***sub***section if the defendant has entered into a plea agreement with a prosecuting attorney unless the plea agreement allows the deferral.
2. The terms and conditions set forth for the defendant during the deferral period may include, without limitation, the:

(a) Payment of restitution;
(b) Payment of court costs;
(c) Payment of an assessment in lieu of any fine authorized by law for the offense;
(d) Payment of any other assessment or cost authorized by law;
(e) Completion of a term of community service;
(f) Placement on probation pursuant to NRS 176A.500 and the ordering of any conditions which can be imposed for probation pursuant to NRS 176A.400; or
(g) Completion of a specialty court program.
3. The court:
(a) Upon the consent of the defendant:
(1) **Shall** defer judgment for any defendant who has entered a plea of guilty, guilty but mentally ill or nolo contendere to a violation of paragraph (a) of subsection 2 of NRS 453.336; or
(2) May defer judgment for any defendant who is placed in a specialty court program. The court may extend any deferral period for not more than 12 months to allow for the completion of a specialty court program.
(b) Shall not defer judgment for any defendant who has been convicted of a violent or sexual offense as defined in NRS 202.876, a crime against a child as defined in NRS 179D.0357 or a violation of NRS 200.508.

(Emphasis added.)

NRS 453.336(2)(a), likewise, requires diversion on a second offense of violating NRS 453.336:

For a first or second offense, if the controlled substance is listed in schedule I or II and the quantity possessed is less than 14 grams, or if the controlled substance is listed in schedule III, IV or V and the quantity possessed is less than 28 grams, is guilty of possession of a controlled substance and shall be punished for a category E felony

> as provided in NRS 193.130. In accordance with NRS 176.211, the court **shall** defer judgment upon the consent of the person.

(Emphasis added.)

The State position, if followed, would serve to disregard the first 3 letters of the word "***sub***section" under NRS 176.211(1) and disregard the word "**shall**" under NRS 176.211(3)(a)(1). The State keeps claiming (erroneously) that it must consent to diversion for Ms. Martin to receive it. That is incorrect. This was a plea of guilty pursuant to NRS 176.211(3), which requires diversion for a first or second offense of NRS 453.336. That applies to the instant plea agreement because Ms. Martin's plea was pursuant to a second offense of NRS 453.336.

Even if this Court disagrees with that interpretation of NRS 176.211, the State should still lose on this appeal. The State agreed that a first or second offense of NRS 453.33**6** necessitates diversion under the plain language of the plea agreement. Now, the State want to include offenses under NRS 453.33**7** as prior offenses for purposes of disqualifying Ms. Martin for mandatory diversion. The State did not include that language in the plea agreement and if it felt that

convictions under NRS 453.33**7** counted as strikes against Ms. Martin for purposes of mandatory diversion, it should have said so. The State remained silent on that point in the plea agreement and cannot make that point for the first time on direct appeal.

The State erroneously stated that Ms. Martin was convicted of "simple possession" on both a prior "possession for purposes of sale" matter as well as an "attempted trafficking in a controlled substance" matter. Since neither of those prior cases entailed a conviction under NRS 453.336, the State's argument must fail. If the State's position succeeds in this regard, then the statute "NRS 453.336" will be the same as "NRS 453.337." Surely the State knows the difference between the number "6" and the number "7." Those two statutes are not the same.

The State avers, "to say that Ms. Martin has only one conviction for possession of a controlled substance goes against conventional wisdom." Since Ms. Martin never said that she has only one conviction for possession of a controlled substance on this appeal, she need not

respond to that argument. She had precisely one conviction under NRS 453.336 prior to her sentencing in the instant case.

The State's reliance on LaChance v. State, 130 Nev. 263, 273 (2014), is misplaced. That case entailed an analysis of whether, for double-jeopardy purposes, an infraction under NRS 453.336 is a lesser-included offense of NRS 453.337 and this Court answered in the affirmative. Id. at 273-75. The instant case is not a matter of double-jeopardy, so LaChance does not apply.

The State claims, "As it is, and so conveniently unrepresented by counsel for Appellant, Ms. Martin has one previous conviction for possession for purposes of sale and one conviction for attempted trafficking in a controlled substance." That argument would carry weight if it were not for the fact that counsel for Ms. Martin moved for the release of the Presentence Investigation Report that included the information for those two prior convictions. Ms. Martin's prior convictions were not "unrepresented."

The legislature could have very handily included infractions under NRS 453.337 as strikes against Ms. Martin for purposes of mandatory

diversion under NRS 176.211(3). After all, NRS 453.3363(1) disqualifies a defendant from diversion under that statute if he/she/they were "convicted of any offense pursuant to NRS 453.011 to 453.552, inclusive" among other disqualifiers. The legislature, for purposes of NRS 176.211(3), was not as expansive in how it would disqualify a defendant from diversion.

However, what is most fatal to the State's position on this appeal is the fact that the State necessarily charged this case as a first or second infraction of NRS 453.336 by the plain language of its own criminal information.

In the criminal information against Ms. Martin, she was charged with "POSSESSION OF A CONTROLLED SUBSTANCE, A CATEGORY E FELONY AS DEFINED BY NRS 453.336." *Joint Appendix 1* (emphasis added). No where in the criminal information did it indicate that it was anything other than a first or second offense under NRS 453.336. *Joint Appendix 1-2*.

Under NRS 453.336(2)(a), for a first of second offense of possession of a controlled substance listed in schedule I or II that is less than 14

grams, the defendant is guilty of a category E felony. Under NRS 453.336(2)(b):

> For a third or subsequent offense, if the controlled substance is listed in schedule I or II and the quantity possessed is less than 14 grams, or if the controlled substance is listed in schedule III, IV or V and the quantity possessed is less than 28 grams, or if the offender has previously been convicted two or more times in the aggregate of any violation of the law of the United States or of any state, territory or district relating to a controlled substance, is guilty of possession of a controlled substance and shall be punished for a category D felony as provided in NRS 193.130, and may be further punished by a fine of not more than $20,000.

If the State believed that Ms. Martin had committed either a "third or subsequent offense" under NRS 453.336, then it could have charged Ms. Martin with a category **D** felony under NRS 453.336(2)(b). The State elected not to do so. It necessarily charged Ms. Martin under NRS 453.336(2)(a) by stating that the charge in the criminal information is a category **E** felony. As such, it is impossible for the district court to have sentenced Ms. Martin for a "third or subsequent offense" when it was sentencing Ms. Martin for a category **E** felony. After all, it is never under any other category than a category **D** felony

for a district court to sentence a criminal defendant under NRS 453.336(2)(b).

But somehow, the State has come to the opinion that to receive diversion under NRS 176.211(3)(a)(1), "Ms. Martin would have had to have plead [*sic*] straight up the charge at her arraignment." No where in the plain language of NRS 176.211(3)(a)(1) does it indicate that someone who pleads "straight up" can receive diversion whereas someone who pleads pursuant to a plea agreement is automatically disqualified. The defense does not comprehend how the State could concoct such an argument – especially when the State **stipulated** in the plea agreement that a first or second offense under NRS 453.336 would necessarily result in a sentence of diversion. Why would the State so stipulate then, later, change its mind on this appeal?

If that argument of the State is given any heed, it would discourage plea bargaining. Is there not a public policy reason for encouraging plea bargaining?

The high court in Maryland stated, "[g]enerally, courts will not tolerate broken plea agreements, for there are strong public policy

reasons supporting the rapid disposition of criminal charges through plea bargaining." State v. Parker, 334 Md. 576, 597, 640 A.2d 1104, 1114 (1994).

It is crystal clear that the Nevada legislature, in enacting these new laws on mandatory diversion, aimed to reduce the influx of low-level drug offenders entering the Nevada Department of Corrections. It is baffling that the State would take such a position that would suggest that the legislature was **discouraging** plea bargaining by only allowing diversion for an infraction under NRS 453.336 where there is no plea agreement. There is no rational explanation for why the legislature would want to do that. Surely, the State does not even attempt to offer such a rationale.

This Court should overturn Ms. Martin's felony conviction and require the district court to order Ms. Martin into diversion.

2) The State has broken the plea agreement at both the district court level and on this appeal.

The State, in arguing that it did not violate the plea agreement, states that it was "untrue" for the defense "to say that the State

specifically agreed to diversion under NRS 176.211." The State did violate the plea agreement in both district court and in this Court. It violated the plea agreement at the district court level by implicitly stating that NRS 176.211 diversion was not available when, under the plain language of NRS 176.211, it was mandatory. The State violated the plea agreement on this appeal by stating that it did not agree that diversion was mandatory because the language in the plea agreement to that "effect" was boilerplate. That is a meritless argument.[1]

This matter should be reversed and remanded to the district court. The District Attorney's Office of Elko County should be held to its end of the bargain.

VERIFICATION

1. I hereby certify that this reply to fast track response complies with the formatting requirements of NRAP 32(a)(4), the typeface

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[1] The State provides zero evidence that such language is "boilerplate." As a matter of fact, there is only one other plea agreement that undersigned counsel has ever drawn up that has had this type of

requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this reply to fast track response has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in size 14 Century Schoolbook font.

2. I further certify that this reply to fast track response complies with the page- or type-volume limitations of NRAP 3C(h)(2) because it is either:

[x] Proportionately spaced, has a typeface of 14 points or more, and contains 2,325 words; or

[ ] Monospaced, has 10/5 or fewer characters per inch, and contains ____ words or ____ lines of text; or

[ ] Does not exceed 5 pages.

3. Finally, I recognize that pursuant to NRAP 3C, the Supreme Court of Nevada may sanction an attorney for failing to raise material

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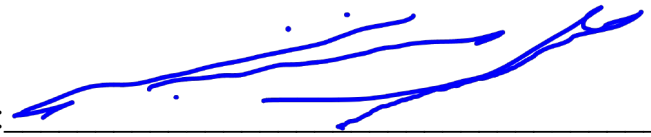
language in it. Lanzalaca v. State, Nevada Supreme Court Case Number 83780.

issues or arguments in the reply to fast track response, or failing to cooperate fully with appellate counsel during the course of an appeal.

4. I therefore certify that the information provided in this reply to fast track response is true and complete to the best of my knowledge, information and belief.

DATED this 8th day of January, 2022.

BEN GAUMOND LAW FIRM, PLLC

By: 

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CERTIFICATE OF SERVICE

(a) I hereby certify that this document was electronically filed with the Nevada Supreme Court on the 8th day of January, 2022.

(b) I further certify that on the 8th day of January, 2022, electronic service of the foregoing document shall be made in accordance

with the Master Service List to Aaron Ford, Nevada Attorney General; Tyler J. Ingram, Elko County District Attorney; and Ryan I. McCormick, Deputy Elko County District Attorney.

(c) I further certify that on the 8th day of January, 2022, I mailed one copy with postage prepaid to Shanell Cathrine Martin, NDOC # 1172591, Florence McClure Women's Correctional Center, 4370 Smiley Road, Las Vegas, NV 89115-1808.

DATED this 8th day of January, 2022.

Benjamin C. Gaumond, Owner
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