No. 76038

In the Nevada Supreme Court

Gibran Richardo Figueroa-Beltran,

Appellant,

v.

United States of America

Respondent.

Certified Questions under NRAP 5 from the
United States Court of Appeal for the Ninth Circuit

Appellant's Opening Brief

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Nevada Rule of Appellate Procedure 26.1 Disclosure

The undersigned counsel of record certifies the following are persons and entities as described in Nevada Rule of Appellate Procedure 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

Office of the Federal Public Defender, District of Nevada

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Jurisdictional Statement

This case originated in the United States Court of Appeal for the Ninth Circuit as a direct appeal from a federal criminal judgment of conviction in the United States District Court for the District of Nevada. After appellate briefing and oral argument, the Ninth Circuit certified three questions to this Court under Nevada Rule of Appellate Procedure 5 on June 8, 2018. Doc. #18-21957. This Court accepted the certified questions on July 18, 2018, and set a briefing schedule. Doc. #18-27455.

This Court stayed briefing to allow Appellant Gibran Richardo Figueroa-Beltran to litigate his Petition for Writ of Certiorari to the United States Supreme Court. Docs. ##18-31669, 18-37827, 19-00725, 19-07500. After the United States Supreme Court denied Figueroa-Beltran's certiorari petition, this Court re-set the briefing schedule. Doc. #19-16537. Figueroa-Beltran timely files this Opening Brief.

Routing Statement

Under Nevada Rule of Appellate Procedure 17(a)(6), the Supreme Court shall hear this case because it involves certified questions from a federal court.

Statement of the Questions

The Ninth Circuit certified, and this Court accepted, the following questions:

I. Is NRS 453.337 divisible as to the controlled substance requirement?

II. Does the decision in *Luqman* conclude that the existence of a controlled substance is a "fact" rather than an "element" of NRS 453.337, rendering the statute indivisible? If so, can this conclusion be reconciled with *Muller*?

III. Does the decision in *Muller* conclude that offenses under NRS 453.337 comprise "distinct offenses requiring separate and different proof," rendering the statute divisible as to the controlled substance requirement? If so, can this conclusion be reconciled with *Luqman*?

This Court also requested the parties:

IV. Address *Andrews v. State*, 134 Nev. Adv. Op. 12, 412 P.3d 37 (2018), which was decided after the parties briefed this matter in federal court.

Statement of the Case

This certified-question case concerns a federal criminal defendant who appealed the length of his prison sentence to the Ninth Circuit Court of Appeals but has now completed his prison term, been removed from the United States, and is serving his supervised release term. The Ninth Circuit certified questions to this Court relating to whether the federal district court properly used a prior Nevada drug conviction to calculate Appellant Figueroa-Beltran's advisory incarceration range under the federal Sentencing Guidelines.

I. Advisory Federal Sentencing Guidelines

Given the role the federal Sentencing Guidelines played in the district court's determination of Figueroa-Beltran's now-expired incarceration term, it is necessary to briefly address the evolution of the Guidelines to place their application in context.

For nearly two decades, federal district courts were required to impose criminal sentences under the federal Sentencing Guidelines, a determinate sentencing system the United States Sentencing Commission drafted and codified at Congress' direction. *See generally* Sentencing Reform Act of 1984 (SRA), *as amended*, 18 U.S.C. § 3551 *et seq.*, 28 U.S.C. § 991 *et seq.* (establishing Sentencing Commission's

powers and duties). However, in *Booker v. Washington*, 543 U.S 220, 243-45 (2005), the Supreme Court found the SRA's mandatory nature violated the Sixth Amendment. As then written, the SRA required district courts to impose punishments under the Sentencing Guidelines greater than that authorized by facts found by a jury or admitted to by a defendant during the change of plea. *Id.* The Supreme Court resolved the constitutional infirmity by severing and excising the mandatory compliance provisions of the SRA. *Id.* at 245. These modifications rendered the Sentencing Guidelines "advisory, requiring a sentencing court to consider Guidelines ranges . . . but permit the court to tailor the sentence in light of other statutory concerns as well." *Id.*

After *Booker*, federal district courts impose sentences using the factors in 18 U.S.C. § 3553(a), where the Guidelines are just "one factor among several courts must consider in determining an appropriate sentence." *Kimbrough v. United States*, 552 U.S. 85, 90 (2007). An overriding parsimony principle governs judicial consideration of the § 3553(a) factors and requires all sentences be "sufficient but not greater than necessary" to achieve the overarching sentencing purposes of "retribution, deterrence, incapacitation, and rehabilitation." *Tapia v.*

United States, 564 U.S. 319, 325 (2011); 18 U.S.C. § 3551(a); 18 U.S.C. § 3553(a)(2). The § 3553(a) factors to be considered are the:

(1) nature and circumstances of the offense and the history and characteristics of the defendant—§ 3553(a)(1);

(2) kinds of sentences available—§ 3553(a)(3);

(3) Sentencing Guidelines, advisory range, and Sentencing Commission policy statements—§ 3553(a)(4)-(5);

(4) need to avoid unwarranted sentencing disparity among defendants with similar records found guilty of similar conduct—§ 3553(a)(6); and

(5) need to provide restitution—§ 3553(a)(7).

Though the Guidelines are advisory and just one factor to be considered at sentencing, they "assist federal courts across the country in achieving uniformity and proportionality in sentencing." *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1908 (2018).

II. Federal Sentencing Proceedings

Figueroa-Beltran was charged with and pled guilty to one count of illegally reentering the country. 8 U.S.C. § 1326. One issue Figueroa-Beltran challenged at sentencing was whether his 2012 conviction

under NRS 453.337 qualified as a "drug trafficking offense" under the then-existing federal Guidelines' definition applicable to his offense of conviction. *See* U.S.S.G. § 2L1.2 (2016) (defining "drug trafficking offense" as "an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of, or offer to sell a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense").[1]

The district court held that Figueroa-Beltran's prior Nevada conviction categorically matched the federal definition at issue, used that conviction to calculate Figueroa-Beltran's advisory incarceration

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[1] In November 2016, the United States Sentencing Commission amended U.S.S.G. § 2L1.2 to remove the enhancement Figueroa-Beltran challenges in his federal appeal, and, by extension, the enhancement the Ninth Circuit has asked this Court to address. *Notice of submission to Congress of amendments to the sentencing guidelines effective November 1, 2016*, United States Sentencing Commission, 81 F. Reg. 27262, 27269-27274.

In fact, in its response to Figueroa-Beltran's Petition for Writ of Certiorari to the United States Supreme Court, the Solicitor General argued the Court should not review the Ninth Circuit's certification order because the version of § 2L1.2 applied here is no longer in effect. *Figueroa-Beltran v. United States*, 18-6747, Brief for the United States in Opposition, pp.17-18 (U.S. Feb. 28, 2019).

range, and imposed the low-end of the range. *United States v. Figueroa-Beltran*, 892 F.3d 997, 1001 (9th Cir. 2018).

III. Ninth Circuit Briefing and Argument

Figueroa-Beltran timely appealed to the Ninth Circuit. Figueroa-Beltran argued, *inter alia*, the district court erroneously calculated his advisory incarceration range by using the prior Nevada conviction under NRS 453.337 to enhance his base offense level. *Figueroa-Beltran*, 892 F.3d at 1001.

The parties agreed NRS 453.337 was broader than the federal drug trafficking definition because Nevada's schedules I and II criminalize more drugs than are listed in the federal Controlled Substances Act. *Figueroa-Beltran*, 892 F.3d at 1002-03. The only remaining question was whether NRS 453.337 was a "divisible statute" such that the identity of the controlled substance was an element of the offense or merely the means of violating the prohibited controlled substance possession acts. *Figueroa-Beltran*, 892 F.3d at 1003.

Figueroa-Beltran submitted that under *Sheriff v. Luqman*, 101 Nev. 149, 697 P.2d 107 (1985), the identity of the controlled substance possessed with the intent to sell could not be an element because an

executive agency, the pharmacy board, controlled Nevada's drug schedules and could only set forth "facts" or "conditions" guiding "the application or operation of a statute complete within itself." *Figueroa-Beltran*, 892 F.3d at 1003. The government believed, however, *Muller v. Sheriff*, 93 Nev. 686, 572 P.2d 1245 (1977), controlled because it held that, under Nevada's pre-1981 drug control regime when the Legislature set the drug schedules in the Revised Statutes, "the sale of each controlled substance requires proof of an additional fact which the other does not, viz., the particular . . . identity of the controlled substance sold." *Figueroa-Beltran*, 892 F.3d at 1003.

At oral argument, the Ninth Circuit panel asked the parties whether it should certify the divisibility question to this Court. Both Figueroa-Beltran and the government agreed certification was unnecessary for the panel to resolve this federal question. *United States v. Figueroa-Beltran*, 16-10388, Dkt. #39, 14:00-14:25, 21:40-23:42.[2]

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[2] Available at https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000012023.

IV. Ninth Circuit's Certification Order

The Ninth Circuit panel issued an order certifying three questions to this Court. *Figueroa-Beltran*, 892 F.3d 997. The certification order recognized the panel "cannot say with confidence that the Nevada precedent definitively answers the question whether NRS 453.337 is divisible as to the identity of a controlled substance" because of a perceived conflict in Nevada case law. *Figueroa-Beltran*, 892 F.3d at 1004. The order then asks this Court to decide whether NRS 453.337 is "divisible," whether *Luqman* or *Muller* are reconcilable, and, if not, which case controls. *Figueroa-Beltran*, 892 F.3d at 1004.

A month before the Ninth Circuit's certification order, Figueroa-Beltran completed the prison component of his sentence and was released from Bureau of Prisons' custody. Without notice to the Ninth Circuit or undersigned counsel, the government removed Figueroa-Beltran from the United States on June 1, 2018. Figueroa-Beltran is serving his three-year term of supervised release.

Summary of the Argument

The Ninth Circuit certified three questions to this Court concerning the federal divisibility analysis used for federal sentencing purposes when a state statute criminalizes more conduct than the federal definition. The statute at issue, NRS 453.337, prohibits the possession of substances in schedules I and II for the purpose of sale. Under federal divisibility analysis, NRS 453.337's controlled substances are not divisible because, after consulting the relevant Nevada sources of law, the Court cannot be "certain" the controlled substances are alternative elements of or, rather, various means of violating NRS 453.337.

The Ninth Circuit also asked whether this Court's *Luqman* or *Muller* decisions established whether the controlled substances listed in the Nevada Administrative Code by the pharmacy board are alternative elements or the various means of violating NRS 453.337. When addressing NRS 453.337 as it fits in Nevada's current drug-control framework, *Luqman* held the pharmacy board does not set forth elements and acts only as a fact-finder for facts or conditions guiding the application or operation of a statute complete within itself. As only

the Legislature may create crimes, the separation of powers doctrine precludes the pharmacy board from creating elements of an offense. *Muller*, in contrast, addressed the drug sale statute, NRS 453.321, in Nevada's old drug-control framework when the Legislature codified the drug schedules in statutes. Thus, *Muller* has no application here.

Finally, this Court requested the parties address *Andrews*, a recent panel decision on Nevada's drug trafficking statute. *Andrews* held that the simultaneous trafficking of different schedule I substances are separate offenses and thus the weight of those substances cannot be aggregated to elevate the defendant's mandatory minimum and maximum sentence. *Andrews* primarily reached this conclusion because statutes that cross-referenced the drug trafficking statute indicated the weight of a single substance set the punishment. NRS 453.337, however, does not have instructive cross-referencing statutes. Because Nevada sources of law do not resolve the unit of prosecution ambiguity, the rule of lenity counsels that NRS 453.337 be construed to make the simultaneous possession of multiple schedule I or II substances for purposes of sale a single offense.

Argument

The Ninth Circuit's certified questions ultimately ask this Court to apply the federal divisibility doctrine to assist it in determining whether Figueroa-Beltran's federal sentence was unreasonably enhanced for a prior NRS 453.337 conviction under the advisory Sentencing Guidelines. This federal issue is not a state question the Ninth Circuit should have asked this Court to resolve. The federal divisibility of a state statute for purposes of enhancement under the Guidelines is a purely federal question, and one the United States Supreme Court has provided federal courts the tools to resolve. This Court should decline to answer the Ninth Circuit's certified questions.

Moreover, though posited as three separate certified questions, Supreme Court precedent is clear that all three questions are wholly encompassed in the Ninth Circuit's first question: "Is Nev. Rev. Stat. § 453.337 divisible as to the controlled substance requirement?" As explained below, the Supreme Court set forth a three-part test that federal courts must apply to resolve divisibility, which address all of the Ninth Circuit's questions as part of that single inquiry. Faithful application of Supreme Court precedent requires the federal divisibility

inquiry in the first question to consider the second and third questions regarding this Court's decisions in *Luqman* and *Muller*, as well as this Court's request that the parties address the Court's panel decision in *Andrews*.

Further, the specific analysis the Supreme Court requires federal courts to use in resolving divisibility does not include stopping litigation and certifying questions to state courts. By doing so, the Ninth Circuit has violated Supreme Court precedent, extended this litigation to the point that Figueroa-Beltran completed his prison term, and potentially created precedent for additional intrusions into state court resources even though federal law already provides the necessary analysis. If the Ninth Circuit was uncertain after applying the divisibility analysis, it was required to find NRS 453.337 indivisible for federal purposes—not ask this Court to make divisibility findings through the certification process. The Ninth Circuit's decision to disregard Supreme Court authority here is unprecedented.

Nonetheless, in the event this Court deems it appropriate to answer the Ninth Circuit's questions, NRS 453.337 is not divisible. Figueroa-Beltran therefore responds by addressing each inquiry

separately as submitted by the Ninth Circuit, with cross-references to separate sections of his brief as appropriate.

I. Standard of Review

This Court reviews constitutional and statutory construction questions de novo. *Matter of Halverson*, 123 Nev. 493, 509, 169 P.3d 1161, 1172 (2007).

II. NRS 453.337 is not a "divisible" criminal statute under the controlling federal analysis.

Resolution of the Ninth Circuit's first certified question—whether NRS 453.337 is "divisible as to the controlled substance requirement"—turns on the categorical approach the United States Supreme Court formalized for determining whether a federal sentencing enhancement can be used to increase a defendant's criminal punishment. *Figueroa-Beltran*, 892 F.3d at 1000 ("The issue for decision in this case is whether Nevada Revised Statute § 453.337, which criminalizes conduct related to certain controlled substances identified by reference to the Nevada Administrative Code, is divisible under federal law for the purpose of applying the federal sentencing guidelines.").

Application of the federal divisibility analysis reveals NRS 453.337 is indivisible as to the controlled substance requirement for federal sentencing purposes.

A. Divisibility and the Categorical Approach

There are several federal statutes and Sentencing Guidelines that increase a federal sentence if a certain number and type of prior convictions exist. The federal doctrine of "divisibility" derives from the categorical approach the Supreme Court first formalized in *Taylor v. United States*, 495 U.S. 575 (1990), for determining if a prior conviction qualifies as a federal sentencing enhancement. A problem arises when a prior conviction occurred under a statute that may be violated in multiple ways.

Taylor implemented an analysis called the "categorical approach" that "generally requires the trial court to look only to the fact of conviction and the statutory definition of the prior offense" to determine if it matches the elements of the federal generic crime to allow application of the federal sentencing enhancement. 495 U.S. at 602. The categorical approach prohibits courts from considering the facts of the prior offense and limits analysis to the language of the statute of

conviction. *Id.* at 600. Additionally, courts must always presume "the conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized, before determining whether even those acts are encompassed by the generic federal offense." *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013).

Over the years, the Supreme Court has refined nuances of the categorical approach. *Shepard v. United States* addressed the defendant's conviction under a "divisible" statute—a statute that provided alternative elements, one set matching the federal generic offense and an alternative set that did not match the federal generic offense because it criminalized a broader range of conduct. 544 U.S. 13, 26 (2005). *Shepard* held that when dealing with a divisible statute, courts may consider the charging document, the plea agreement, plea colloquy transcript, or a comparable judicial record to determine the precise elements the defendant was convicted under. *Id.* These documents are called "*Shepard* documents," and the approach applied in *Shepard* is called the "modified categorical approach." *See Johnson v. United States*, 559 U.S. 133, 145 (2010).

In *Descamps v. United States*, the Supreme Court narrowed the applicability of the modified categorical approach, making clear it applies *only* if a defendant was convicted under a divisible statute. 570 U.S. 254, 263-64 (2013). The Court reaffirmed a statute is divisible when it "lists multiple, alternative elements, and so effectively creates 'several different . . . crimes.'" *Id.* at 264. Only when a divisible statute is at issue may courts review *Shepard* documents to assess whether the defendant was convicted of alternative elements that match the federal generic offense. *Id.* at 265. When a statute is not divisible courts may *not* look beyond the statute of conviction. *Id.* Rather, when an indivisible statute "is overbroad or missing elements of the generic crime," there is a "mismatch in elements, [and] "a person convicted under that statute is never convicted of the generic crime." *Id.* at 276. The predicate conviction does not qualify as a sentencing enhancement and the inquiry ends. *Id.* at 276-77.

Most recently, in *Mathis v. United States*, the Supreme Court reemphasized that the categorical approach focuses "solely on whether the elements of the crime of conviction sufficiently match the elements of [the federal generic crime], while ignoring the particular facts of the

case." 136 S. Ct. 2243, 2248 (2016). *Mathis* also made clear how federal courts are to ascertain the possible divisibility of alternatively worded state statutes, the very issue present here.

Mathis directed federal courts to review "authoritative sources of state law" to assess if the state statute sets out: (1) alternative elements defining multiple crimes, making it divisible; or (2) alternative means a defendant can be convicted of if the offense is indivisible. 136 S. Ct. at 2256. Step one of the *Mathis* analysis requires federal courts to first consider whether the state's case law definitively answers the divisibility question. *Id.* at 2256. ("When a ruling of that kind exists, a sentencing judge need only follow what it says.").

If state case law fails to "definitively answer[] the question," step two of the *Mathis* analysis requires federal courts to consider whether the statutory language itself definitively resolved the divisibility question. *Id.* (noting "[i]f statutory alternatives carry different punishments, then under [*Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)] they must be elements"*).*

If the statutory language "fails to provide clear answers" as to divisibility, *Mathis* suggested a third possible step—federal courts may

"peek" at "record documents" solely for guidance on whether the statutory terms are elements or means of the offense. *Id.* at 2256-57.

The *Mathis* steps will resolve most divisibility questions. *Mathis*, 136 S. Ct. at 2257. If, however, at the end of the *Mathis* inquiry federal courts are not "certain" the state statute is divisible into alternative elements or means, the Supreme Court requires the divisibility inquiry end with the conclusion that the statute is indivisible for federal purposes. *Id.*

B. Proper application of the *Mathis* divisibility analysis reveals NRS 453.337 is indivisible as to the controlled substance requirement.

The statute at issue here, NRS 453.337, provides:[3]

> 1. Except as otherwise authorized by the provisions of NRS 453.011 to 453.552, inclusive, it is unlawful for a person to possess for the purpose of sale flunitrazepam, gamma-hydroxybutyrate, any substance for which flunitrazepam or gamma-hydroxybutyrate is an immediate precursor or any controlled substance classified in schedule I or II.
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> 2. Unless a greater penalty is provided in NRS 453.3385, 453.339 or 453.3395, a person who violates this section shall be punished:

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[3] The Legislature has not altered NRS 453.337 since Figueroa-Beltran's 2012 conviction.

(a) For the first offense, for a category D felony as provided in NRS 193.130.

(b) For a second offense, or if, in the case of a first conviction of violating this section, the offender has previously been convicted of a felony under the Uniform Controlled Substances Act or of an offense under the laws of the United States or any state, territory or district which, if committed in this State, would amount to a felony under the Uniform Controlled Substances Act, for a category C felony as provided in NRS 193.130.

(c) For a third or subsequent offense, or if the offender has previously been convicted two or more times of a felony under the Uniform Controlled Substances Act or of any offense under the laws of the United States or any state, territory or district which, if committed in this State, would amount to a felony under the Uniform Controlled Substances Act, for a category B felony by imprisonment in the state prison for a minimum term of not less than 3 years and a maximum term of not more than 15 years, and may be further punished by a fine of not more than $20,000 for each offense.

3. The court shall not grant probation to or suspend the sentence of a person convicted of violating this section and punishable pursuant to paragraph (b) or (c) of subsection.

The parties agree that NRS 453.337 is categorically overbroad for federal sentencing enhancement purposes. *Figueroa-Beltran*, 892 F.3d at 1002-03. This is because Nevada's drug schedules I and II criminalize more controlled substances than the federal Controlled Substances Act. *Compare* NAC 453.510, 453.520 (2012) (listing 1,4-Butanediol and Gamma butyrolactone in schedule I, and Benzolyecgonine in schedule II), *with* 21 C.F.R. § 1308.11-1308.15 (2012). NRS 453.337 therefore criminalizes the possession with intent to sell more substances than that criminalized by federal law.

Because NRS 453.337's overbreadth is undisputed and not part of the certified questions, this Court need not weigh in on this aspect of the categorical approach. The next step is to assess whether NRS 453.337 is divisible under the *Mathis* test.

1. After concluding Nevada case law did not definitively resolve divisibility, the Ninth Circuit improperly certified the rest of the *Mathis* analysis to this Court.

Though the Supreme Court, in *Mathis*, provided a complete framework for assessing the divisibility of an overbroad state statute, the Ninth Circuit failed to follow *Mathis* here. After reviewing two decisions from this Court (further discussed in Sections II and III in

this brief), the Ninth Circuit concluded it could not "[w]ithout further guidance . . . say with confidence that the Nevada precedent definitively answers the question whether § 453.337 is divisible as to the identity of a controlled substance." *Figueroa-Beltran*, 892 F.3d at 1001. The Ninth Circuit then stopped at step one of the *Mathis* inquiry and certified three questions to this Court.

But *Mathis* directs federal courts to follow three steps to assess divisibility: consult decisional state case law, consult the statutory text, and if those sources "fail[ed] to provide clear answers," courts may "peek" at "record documents" solely for guidance on whether the statutory terms are elements or means of the offense. 136 S. Ct. at 2256-57. If those sources do not provide "certainty" that the state statute is divisible, the federal divisibility inquiry ends with the conclusion the statute is indivisible. *Mathis*, 136 S. Ct. at 2257.

Mathis's analysis does not include stopping the federal litigation to certify divisibility issues to state courts. Indeed, during oral argument in *Mathis*, the Assistant to the Solicitor General noted the government's concerns about burdening state courts with certified questions on the federal divisibility analysis:

> And if you're talking about sentencing judges who sentence every day and have to use the modified categorical approach, you know, certifying to the State courts, I think that really would be, you know, an extraordinary intrusion.

Transcript of Oral Argument, p. 49, *Mathis v. United States*, No. 15-6092 (Apr. 26, 2016). The Supreme Court declined to include certification to state courts part of *Mathis*'s divisibility analysis.

This Court, of course, has the discretion to answer certified questions from federal courts. *See* NRAP 5(a).[4] Here, however, the federal doctrine of divisibility arises from the categorical approach the Supreme Court first formalized in *Taylor* for purposes of federal sentencing enhancements and involves a federal divisibility question the Supreme Court advised federal courts how to answer in *Mathis*. The Ninth Circuit's decision to certify *federal* divisibility questions to

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[4] NRAP 5(a) recognizes the Court may "answer questions of law certified to it by . . . a Court of Appeals of the United States . . . if there are involved in any proceeding before those courts questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court or Court of Appeals of this state."

this Court violates Supreme Court precedent. The Ninth Circuit was required to complete the three-step *Mathis* analysis, not delegate the federal divisibility inquiry to this Court through certification. Figueroa-Beltran respectfully requests this Court decline to answer the Ninth Circuit's certified questions, questions that can only be answered by undertaking the federal divisibility analysis the Supreme Court directed the Ninth Circuit and all federal courts to conduct under *Mathis*.

Should this Court engage in the federal divisibility analysis, however, *Mathis* instructs the Court must pick up where the Ninth Circuit stopped and apply second and third divisibility steps, using the applicable federal governing standards.

2. NRS 453.337's text reveals the controlled substance requirement is a means, not an element.

After concluding Nevada case law did not resolve the divisibility inquiry,[5] *Mathis* required the Ninth Circuit to determine if the

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[5] As discussed below and argued in the Ninth Circuit, Figueroa-Beltan submits Nevada case law does resolve this issue, demonstrating that NRS 453.337 is indivisible as to the controlled substance requirement.

statutory language itself definitively established divisibility, i.e., whether the substances referenced in NRS 453.337 are elements of separate crimes or merely means of committing a single crime. 136 S. Ct. at 2256. The Ninth Circuit failed to conduct this analysis. Had it done so, it would have concluded the text of NRS 453.337 enumerates different means rather than different elements for purposes of federal sentencing.

NRS 453.337 does not "itself identify which things must be charged (and so are elements) and which need not be (and so are means)." *Mathis*, 136 S. Ct. at 2256. Unlike the California statute cited in *Mathis*, NRS 453.337 does not specify what facts are "sufficient to allege" in an indictment for possessing drugs for purpose of sale. *See id.* (citing Cal. Penal Code Ann. § 952 (2008) ("In charging theft it shall be sufficient to allege that the defendant unlawfully took the labor or property of another.")). There is no indication in the text of NRS 453.337 whether the identity of the particular substance a defendant possesses for sale—whether flunitrazepam, gamma-hydroxybutyrate, a precursor to those compounds, or a schedule I or II controlled substance—is an element of the crime upon which the jury

must unanimously agree. That is, nothing in the text prohibits the State from securing a conviction on a single NRS 453.337 count based on jurors' varying beliefs about which controlled substance a defendant possessed.

Moreover, the "statutory alternatives" in NRS 453.337—that is, the various substances listed in the statute—do not "carry different punishments." *Mathis*, 136 S. Ct. at 2256. Different punishments for different substances would require the conclusion that those substances constituted elements, rather than means. *Id.* Here, NRS 453.337 imposes uniform sentences regardless of the particular substance involved. Punishment is only differentiated based on the existence of prior drug offense convictions, not the type or weight of the controlled substances involved. NRS 453.337(2)(a)-(c). Thus, one of the key indicators of divisibility the Supreme Court identified in *Mathis* is absent from NRS 453.337.

The substances NRS 453.337 lists are more similar to "illustrative examples" than an exhaustive list for several reasons. First, NRS 453.337's text does not itself list each individual banned substance. Rather, it enumerates several specific substances and then

cross-references two separate schedules that in turn list numerous controlled substances. NRS 453.337(1).

Second, the language used in those cross-referenced schedules indicates the enumerated substances make up only a non-exhaustive list of the substances criminalized under NRS 453.337. For example, schedule I lists a number of opiates, "including, without limitation, their isomers, esters, ethers, salts and salts of isomers, esters and ethers." NAC 453.510(2). It likewise lists the "salts, isomers and salts of isomers" of (1) a series of "opium derivatives," (2) a series of "hallucinogenic substances," (3) "any material, compound, mixture or preparation which contains any quantity of phencyclidine, mecloqualone or methaqualone having a depressant effect on the central nervous system," and (4) "any material, compound, mixture or preparation which contains any quantity of [certain] substances having a stimulant effect on the central nervous system." NAC 453.510(3), (4), (6), and (7). Schedule I does not identify the "salts, isomers and salts of isomers" in question, indicating the substances actually enumerated by name are only "illustrative examples" of controlled substances. *Mathis*, 136 S. Ct. at 2256.

Schedule I also lists "[p]eyote . . . whether growing or not, the seeds thereof, any extract from any part of such plant, and every compound, manufacture, salts, derivative, mixture, or preparation of such plant, its seeds or extracts." NAC 453.510(4). As such, "every . . . preparation" of peyote or "its seeds or extracts" qualifies as a schedule I substance, even though schedule I itself does not identify what such "preparation[s]" might comprise.

Schedule I further lists "Tetrahydrocannabinols (natural or synthetic equivalents of substances contained in the plant, or in the resinous extractives of Cannabis, sp. or synthetic substances, derivatives and their isomers with similar chemical structure and pharmacological activity *such as* the following" substances. NAC 453.510(9) (emphasis added). The non-exhaustive term "such as" indicates the substances actually named in schedule I do not comprise the entire universe of substances banned by that schedule. *Mathis*, 136 S. Ct. at 2256. In other words, the substances schedule I lists, as incorporated by reference in NRS 453.337, are only "illustrative examples" of controlled substances, demonstrating the identity of a particular substance is a means not an element. *Id.*

Under *Mathis*, the Ninth Circuit should have analyzed the text of NRS 453.337 and concluded the controlled substance requirement is a means. This Court, now tasked with stepping in the shoes of the Ninth Circuit to apply the second step of the *Mathis* analysis, should conclude the controlled substance requirement of NRS 453.337 is a means for purposes of federal sentencing.

3. A "peek" at record documents reveals the controlled substance requirement is a means, not an element.

Even a "peek" at "record documents" solely for guidance on whether the controlled substance requirement in NRS 453.337 is an element or a means fails to provide "certainty." *Mathis*, 136 S. Ct. at 2256-57. The Ninth Circuit did not engage in this step either, though *Mathis* included this as a possible third and final step in divisibility analysis.

The federal government, who carries the burden of proof at sentencing, offered only two documents into the record—the underlying information and the judgment of conviction. Appellant's Appendix, pp. 0001-0004. The information alleged Figueroa-Beltran, "having committed the crime of **POSSESSION OF CONTROLLED SUBSTANCE WITH INTENT TO SELL (Category D Felony –**

NRS 453.337), on or about the 7th day of May, 2012, . . . did . . . wilfully, unlawfully, feloniously, knowingly, and intentionally possess, for the purpose of sale, a controlled substance, to-wit: Cocaine." Appellant's Appendix, pp. 0001-0002. Though the information identifies the drug at issue, cocaine, the information's use of the term "to-wit" indicates drug identity is not an element. "To-wit" means "That is to say; namely." Black's Law Dictionary (10th ed. 2014). "Namely" indicates the substance identity is a factual issue. The charging document lists a controlled substance to place the defendant on notice of the charged offense, not necessarily that the identity of the substance is an element. *See* NRS 173.075(1) ("The indictment or the information must be a plain, concise and definite written statement of the essential *facts* constituting the offense charged.") (emphasis added).

Furthermore, the judgment does not specify what controlled substance Figueroa-Beltran pled guilty to possessing:

> The Defendant previously appeared before the Court with counsel and entered a plea of guilty to the crime of POSSESSION OF CONTROLLED SUBSTANCE WITH INTENT TO SELL (Category D Felony), in violation of NRS 453.337; thereafter, on the 16th day of August, 2012, the Defendant was present in court for sentencing with his counsel, . . . , and good cause appearing,

> THE DEFENDANT IS HEREBY ADJUDGED
> guilty of said offense . . . .

Appellant's Appendix, pp. 0003-0004. The judgment's silence suggests the identity of a particular controlled substance is a means of violating NRS 453.337, not an element of the offense. *See Mathis*, 136 S. Ct. at 2257. When considered together, the record documents from Figueroa-Beltran's own case do not "speak plainly" to whether NRS 453.337 is divisible. *Mathis*, 136 S. Ct. at 2257.

Documents in other NRS 453.337 cases suggest the statute is indivisible for federal sentencing purposes. The amended information in *State v. Howard*, CR14-1513, charged the defendant in a single NRS 453.337 count with "willfully, unlawfully and knowingly hav[ing] in his possession and under his dominion and control a Schedule I controlled substance(s), to wit, *methamphetamine and/or marijuana* in a quantity greater than one ounce, for the purpose of and with the intent that said controlled substance(s) be sold." Appellant's Appendix, p. 0013 (emphasis added). The charging of multiple substances in a single count, joined by the phrase "and/or," would be impossible if each individual substance constituted a separate element of the offense. Indeed, when the *Howard* defendant moved to dismiss the information

as duplicitous, the State admitted: "[t]he identity of specific drugs alleged to have been possessed is the *manner and means by which the offense was committed rather than an element* of the charged crime." Appellant's Appendix, pp. 0018, 0020 (emphasis added).

As *Howard* demonstrates, the State of Nevada charges the particular substance as a means, not an element, of NRS 453.337. *Mathis* did not limit a court's "peek at the record documents" to the particular documents in a defendant's case. It limited the peek to "to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of." *Mathis*, 136 at 2249 (citing *Shepard*, 544 U.S. at 26).

This is unsurprising: permitting sentencing courts to look only at a defendant's own documents would give rise to wild inconsistency, as courts would find the same statute divisible in some cases but not in others, depending on the language different prosecutors happened to use in their indictments. This outcome would be inconsistent with the rationale underlying the categorical approach, which deems it "impermissible for a particular crime to sometimes count towards

enhancement and sometimes not, depending on the facts of the case." *Mathis*, 136 S. Ct. at 2251 (cleaned up).

Record documents in NRS 453.337 cases do not "speak plainly" to the statute's divisibility. *Mathis*, 136 S. Ct. at 2257. As a result, the government did not, and cannot, carry its burden of meeting "*Taylor*'s demand for certainty." *Id.* Resort to the modified categorical approach is therefore not permitted. *Id.* This Court must therefore conclude what the Ninth Circuit should have concluded: NRS 453.337 is not divisible under *Mathis* as to the controlled substance requirement for purposes of federal sentencing.

C. Any uncertainty or ambiguity as to whether NRS 453.337 is divisible for federal sentencing purposes must be resolved in Figueroa-Beltran's favor.

While the Supreme Court expected the *Mathis* analysis would resolve most divisibility inquiries, it provided a default position when ambiguity still existed at the conclusion of the analysis. *Mathis*, 136 S. Ct. at 2257. If federal courts are not "certain" a state statute is divisible into alternative elements or means at the end of the *Mathis* inquiry, federal courts must end the divisibility inquiry with the conclusion that the statute is indivisible. *Id.*

The Ninth Circuit's uncertainty at the first step of *Mathis*—whether Nevada state law resolved the question of divisibility—and any uncertainty it may have had thereafter in applying the *Mathis* analysis should have been resolved through application of this default position, not through certification to this Court. Nonetheless, if this Court is unable to find with certainty that NRS 453.337 is divisible after applying the federal *Mathis* divisibility analysis for purposes of Figueroa-Beltran's federal sentencing enhancement, *Mathis* requires this Court to conclude NRS 453.337 is indivisible.

III. *Luqman* instructs that the identity of a controlled substance cannot be an element because an executive agency schedules the substances.

The Ninth Circuit's second certified question has two parts. The first is whether this Court's en banc decision in *Sheriff v. Luqman*, 101 Nev. 149, 697 P.2d 107 (1985), concludes that the existence of a controlled substance is a "fact" rather than an "element" of NRS 453.337. *Figueroa-Beltran*, 892 F.3d at 1004. The second is whether this conclusion can be reconciled with this Court's decision in *Muller v. Sheriff*, 93 Nev. 686, 572 P.2d 1245 (1977). *Figueroa-Beltran*, 892 F.3d at 1004.

Luqman stands for the proposition that the pharmacy board, an executive agency, cannot set forth the elements of an offense under Nevada's strict constitutional separation of powers. Therefore, the pharmacy board's scheduling of specific substances is necessarily *not* setting forth myriad alternative elements for NRS 453.337. Furthermore, this Court need not "reconcile" *Luqman* and *Muller*: they are cases that simply address different statutes in two different drug control regimes that the Legislature has implemented over the years. Figueroa-Beltran addresses in detail why *Muller* is not instructive in Section III of this brief.

Before discussing *Luqman*, a brief history of Nevada's drug law framework is instructive. In 1981, the Legislature restructured the state's drug control regime. 1981 Nev. Stats. ch. 402 §§ 1-39 at 734-750. "Prior to the 1981 amendment, those drugs which were deemed to constitute controlled substances were specifically set out by statute" by the Legislature. *Luqman*, 101 Nev. at 152, 697 P.2d at 109. In 1981, the Legislature repealed the statutory schedules of controlled substances, and granted the pharmacy board the power to determine

what drugs are prohibited and to list those prohibited substances in the administrative code. *Id.*

Nevada's post-1981 drug statutes "authorize[] the state pharmacy board to classify drugs into various schedules according to the drug's propensity for harm and abuse." *Luqman*, 101 Nev. at 153, 697 P.2d at 110. The Legislature's intent for the 1981 amendments "was to relegate the classification of controlled substances *exclusively* to the pharmacy board." *Id.* at 152, 697 P.2d at 109 (emphasis added).

The defendants in *Luqman* argued this arrangement—which remains in place today—"unconstitutionally delegate[d] to the state board of pharmacy the legislative power to define the elements of a crime." 101 Nev. at 151, 697 P.2d at 108. This was so, according to the defendants (one of whom was charged with violating NRS 453.337), because "the scheduling of drugs determines the penalties which may result from violation of any of the [drug statutes]." *Id.*

This Court disagreed, holding the substances listed in the administrative code were simply "facts or conditions" guiding "the application or operation of a statute complete within itself." *Luqman*, 101 Nev. at 153, 697 P.2d at 110. The Legislature only "delegate[d] the

facts or state of things upon which the law makes its own operations depend." *Id.* "The agency is only authorized to determine the facts which will make the statute effective." *Id.* The pharmacy board was therefore only granted the authority "to make findings as to the medical propriety of a drug and its potential for abuse," which were "interpreted on the basis of the particular guidelines set forth for each schedule by the legislature." *Id.* at 111, 697 P.2d at 154.

Because the pharmacy board was placed only in the "role of a fact finder" when placing drugs into the administrative schedules—a role that did not involve "defin[ing] the elements of a crime"—the delegation was constitutional. *Id.* at 108, 110, 697 P.2d at 151, 154. *Luqman*'s holding makes sense only if the numerous controlled substances constitute the various means or ways to violate NRS 453.337, not alternative elements creating hundreds of offenses.

Luqman's holding rested on Nevada's strict separation-of-powers doctrine. "The separation of powers doctrine is the most important foundation for preserving and protecting liberty by preventing the accumulation of power in any one branch of government." *Berkson v. LePom*e, 126 Nev. 492, 498, 245 P.3d 560, 564 (2010). Indeed, unlike

the United States Constitution, Nevada's Constitution contains an express separation-of-powers clause:

> Section 1. **Three separate departments; separation of powers; legislative review of administrative regulations.**
>
> 1. The powers of the Government of the State of Nevada shall be divided into three separate departments,—the Legislative,—the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution.

Nev. Const. art. III, § 1.1.

The Nevada Constitution therefore "embraces separation of powers to an even greater extent than the United States Constitution." *Berkson*, 126 Nev. at 501 n.5, 245 P.3d at 566 n.5; *Comm'n on Ethics v. Hardy*, 125 Nev. 285, 292, 212 P.3d 1098, 1103-04 (2009) ("Unlike the United States Constitution, which expresses separation of powers through the establishment of the three branches of government, Nevada's Constitution goes one step further; it contains an express provision prohibiting any one branch of government from impinging on the functions of another.") (citations omitted).

Thus, this Court explained in *Luqman* it is "well settled" that "in Nevada that the power to define what conduct constitutes a crime lies exclusively within the power and authority of the legislature." *Luqman*,

110 Nev. at 153, 697 P.2d at 110. An executive agency such as the pharmacy board cannot establish the elements of an offense.

In 2016, this Court, sitting en banc, confirmed it meant what it said in *Luqman*. In *McNeill v. State*, the defendant, a convicted sex offender on lifetime supervision, challenged whether he could be prosecuted for violating parole conditions not set forth in the lifetime supervision statute. 132 Nev. Adv. Op. 54, 375 P.3d 1022, 1024-25 (2016). This Court granted the defendant his requested relief because the lifetime supervision statute did not delegate authority to the parole board to impose supervision conditions that were not enumerated in the statute. *Id.* at 1025.

The *McNeill* holding relied on the plain language of the lifetime supervision statute and the separation-of-powers principles pronounced in *Luqman*. "Without a doubt, the Legislature may not delegate its power to legislate." *McNeill*, 375 P.3d at 1025 (citing *Luqman*, 101 Nev. at 153, 697 P.2d at 110). Because a violation of a lifetime supervision condition is a new crime, if the lifetime supervision statute authorized the parole board to create additional conditions, then the board "would effectively have authority to create law." *McNeill*, 375 P.3d at 1025.

This Court rejected that outcome because *Luqman* instructs that administrative agencies cannot be granted the power to define the elements of a crime. *Id.* Rather, administrative agencies can "merely act[] as a fact finder" based on the specific legislative guidelines set forth in the enacting statutes. *Id.*

Luqman, reaffirmed by *McNeill*, instructs that the drugs listed on Nevada's administrative schedules are simply myriad factual ways by which a person can violate Nevada's drug statutes, not a list of alternative elements. *Luqman* turned on whether the pharmacy board established the elements of an offense when scheduling drugs, i.e., acting as the Legislature. This Court held that the pharmacy board did no such thing. It follows that the identity of the scheduled drugs, which the pharmacy board determines, are not elements of NRS 453.337.

IV. *Muller* addresses the unit of prosecution for different drug statutes in Nevada's former drug regime and does not inform the analysis of NRS 453.337.

The third certified question from the Ninth Circuit also has two parts. First, whether the decision in *Muller v. Sheriff*, 93 Nev. 686, 572 P.2d 1245 (1977), concludes that offenses under NRS 453.337 comprise "distinct offenses requiring separate and different proof," rendering the

statute divisible as to the controlled substance requirement. *Figueroa-Beltran*, 892 F.3d at 1004. Second, whether that conclusion can be reconciled with *Luqman*. *Id.*

The answer to the first inquiry is no. *Muller*, which did not address NRS 453.337, does not control NRS 453.337's meaning. The answer to the second inquiry is therefore not necessary to reach. In any event, as briefly addressed above and more fully explained below, *Luqman* and *Muller* do not have to be reconciled because the cases addressed different stages of Nevada's drug control regime.

Muller addressed Nevada's criminal drug statutory scheme *before* the 1981 drug scheme overhaul, at a time when "those drugs which were deemed to constitute controlled substances were specifically set out by statute." *Luqman*, 101 Nev. at 109, 697 P.2d at 152. In *Muller*, the defendant was charged and convicted of one count of selling heroin and one count of selling cocaine. 93 Nev. at 686, 572 P.2d at 1245. The defendant sold both drugs to an undercover agent in one transaction and received payment simultaneously. *Id.* at 687, 572 P.2d at 1245. The defendant argued on appeal that, "since the sale of the different controlled substances was consummated simultaneously in one

transaction, his conduct [did] not constitute two separate offenses for which he may have been charged." *Id.*

This Court disagreed, explaining that,

> [t]he sale of heroin and the sale of cocaine are distinct offenses requiring separate and different proof . . . . Here the record shows that "two distinct offenses were (probably) committed since the sale of each controlled substance 'requires proof of an additional fact which the other does not,' viz., the particular . . . identity of the controlled substance sold."

Id.

At the time of Muller's conviction, heroin and cocaine were scheduled in separate statutes, and Muller was charged as such. Count One charged Muller with violating NRS 453.321 (offer, attempt or commission of unauthorized act relating to controlled or counterfeit substance unlawful) and NRS 453.161, identifying the schedule I substances including heroin. *Muller*, 93 Nev. at 686, 572 P.2d at 1245. Count Two charged Muller with violating NRS 453.321 and NRS 453.171, identifying the schedule II substances including cocaine. *Muller*, 93 Nev. at 686, 572 P.2d at 1245. As each count charged possession of substances scheduled under different statutes, each count

necessarily required that a different controlled substance be proven as an element to meet the different statutes charged for each offense.

Muller addressed the 1977 schedules I and II codified by the Legislature in the Revised Statutes, statutes which have since been repealed. To the extent it remains instructive, *Muller* is only instructive as to Nevada's pre-1981 drug control regime.

Additionally, the text of NRS 453.321 (both at the time of *Muller* and currently) is materially distinguishable from the text of NRS 453.337. In 1977, NRS 453.321 made it "unlawful for any person to import, transport, manufacture, compound, sell, exchange, barter, supply, give away or administer *a controlled or counterfeit substance* or to offer or attempt to do any such act." NRS 453.321(1) (1977) (emphasis added). The current version of NRS 453.321 similarly refers to controlled or counterfeit substance in the singular. NRS 453.321(1)(a) (making it unlawful for a person to "Import, transport, sell, exchange, barter, supply, prescribe, dispense, give away or administer a controlled or counterfeit substance").

NRS 453.337, on the other hand, makes it unlawful "for a person to possess for the purpose of sale flunitrazepam, gamma-

hydroxybutyrate, any substance for which flunitrazepam or gamma-hydroxybutyrate is an immediate precursor or *any controlled substance classified in schedule I or II*." NRS 453.337(1). As explained in the next section, the use of the word "any" renders NRS 453.337 ambiguous as to its unit of prosecution, an ambiguity not resolved by interpretive aids and that must be interpreted in Figueroa-Beltran's favor under the principle of lenity.

V. *Andrews* does not inform the Court's analysis of NRS 453.337 because it addresses the unit of prosecution for a different drug statute.

This Court also directed the parties to address the recent panel opinion *Andrews v. State*, 134 Nev. Adv. Op. 12, 412 P.3d 37 (2018). Doc. #19-16537. *Andrews* is not instructive here. Rather, this Court's en banc opinion in *Castaneda v. State*, 132 Nev. Adv. Op. 44, 373 P.3d 108 (2016), provides the informative reasoning for assessing the proper construction of NRS 453.337.

A. *Andrews* turned on statutory text and legislative history that is not instructive for interpreting NRS 453.337.

Andrews addressed the proper unit of prosecution for Nevada's drug trafficking statute, NRS 453.3385, which states:

> 1. Except as otherwise authorized by the provisions of NRS 453.011 to 453.552, inclusive, a person who knowingly or intentionally sells, manufactures, delivers or brings into this State or who is knowingly or intentionally in actual or constructive possession of flunitrazepam, gamma-hydroxybutyrate, any substance for which flunitrazepam or gamma-hydroxybutyrate is an immediate precursor or any controlled substance which is listed in schedule I, except marijuana, or any mixture which contains any such controlled substance, shall be punished . . . .

NRS 453.3385(1). Unlike the penalties for possession with intent to sell which turn on the number of prior drug convictions, *see* NRS 453.337(2), the penalties under the drug trafficking statute turn on controlled substance weight.

For example, if a person is convicted of trafficking 28 grams or more of a controlled substance, the offense is punishable as a category A felony, which carries a penalty of life with the possibility of parole or a definite term of 25 years, both with parole eligibility after a minimum of ten years has been served. NRS 453.3385(1)(c). If, on the other hand, a person is convicted of trafficking more than four grams but less than 14 grams, the offense is a category B felony punishable by a term of 1-6 years in prison. NRS 453.3385(1)(a).

In *Andrews* the Court was "asked to determine whether the simultaneous possession of different schedule I controlled substances constitutes separate offenses under NRS 453.3385 or whether the weight of the controlled substances must be aggregated to form a single offense." 412 P.3d at 38. The defendant argued different drugs could not be aggregated together, and, therefore, because he had less than 14 grams of heroin and less than 14 grams of methamphetamine, he should have been charged with two counts of trafficking in a controlled substance, each carrying a 1-6 year sentence, rather than a single count aggregating the amounts and carrying a possible life term with a minimum parole eligibility of ten years. *Id.* The Court agreed.

In siding with *Andrews*, the Court first found that the plain text of the drug trafficking statute was ambiguous. 412 P.3d at 39-40. The statute's use of the word "any" created ambiguity as to whether the statute mandated that each schedule I substance simultaneously trafficked be charged as an individual offense such that the amounts could not be aggregated in one count. *Id.*

The Court then considered other statutes in Nevada's Uniform Controlled Substances Act. *Andrews*, 412 P.3d at 40. The Court noted

that most of the drug statutes "refer to controlled substances in the singular," including the sale statute at issue in *Muller*, NRS 453.321. *Andrews*, 412 P.3d at 40. Four other statutes, however, used the term "any" when referencing controlled substances, including NRS 453.337. *Andrews*, 412 P.3d at 40.

But what shed light on the drug trafficking statute at issue, however, was that other statutes referred to NRS 453.3385, "and in doing so, these statutes refer to controlled substances in the singular." *Andrews*, 412 P.3d at 40; *see* NRS 453.3383 ("For the purposes of NRS 453.3385, 453.339 and 453.3395, the weight of *the controlled substance* as represented by the person selling or delivering it is determinative if the weight as represented is greater than the actual weight of the controlled substance.") (emphasis added); NRS 453.3405(1) ("[T]he adjudication of guilt and imposition of sentence of a person found guilty of trafficking in *a controlled substance* in violation of NRS 453.3385, 453.339 or 453.3395 must not be suspended and the person is not eligible for parole until the person has actually served the mandatory minimum term of imprisonment prescribed by the section under which the person was convicted.") (emphasis added). The Court concluded

that statutes referencing NRS 453.3385 indicated a violation concerned a single controlled substance and the weight of the single substance was the "relevant inquiry." *Andrews*, 412 P.3d at 40.

The Court then analyzed the drug trafficking statute's legislative history, finding its primary purpose "was to curb the heavy trafficking in controlled substances." *Andrews*, 412 P.3d at 40. The Court thus concluded that Andrews's interpretation of NRS 453.3385 as "creating a separate offense for the possession of each controlled substance furthers the legislative intent of deterring large-scale drug trafficking by imposing harsher penalties for those who possess large quantities of different controlled substances." *Andrews*, 412 P.3d at 40.

Finally, the Court reasoned that Maryland case law, which also relied on other state's decisions, supported Andrews's reading of NRS 453.3385. *Andrews*, 412 P.3d at 41. The Court thus held "the Legislature intended to create a separate offense for each controlled substance simultaneously possessed by a person" and " that the weights of different controlled substances may not be aggregated together to form a single offense under NRS 453.3385." *Andrews*, 412 P.3d at 42.

Andrews simply does not assist this Court in determining whether NRS 453.337 is divisible. Neither party in *Andrews* addressed *Luqman*'s constitutional separate of powers holding about Nevada's drug-control regime. Appellant's Opening Brief, *Andrews v. State*, No. 71214, Doc. No. 17-04255; Respondent's Answering Brief, *Andrews v. State*, No. 71214, Doc. No. 17-07900; Appellant's Reply Brief, *Andrews v. State*, No. 71214, Doc. No. 17-09597. Thus, the *Andrews* panel did not have occasion to address *Luqman*'s interplay with the proper construction of Nevada's drug trafficking statute.

Furthermore, the unit of prosecution inquiry is not the same as the federal divisibility inquiry. The unit of prosecution analysis determines whether the text of a statute separates out into multiple offenses conduct that the defendant, usually, argues constitutes only one offense. *Castaneda*, 373 P.3d at 110 (explaining the defendant was not asserting a double jeopardy challenge but instead asked the Court to "read NRS 200.730, the statute under which he was charged, and determine the unit of prosecution it allows in this case, specifically, whether Castaneda's simultaneous possession of 15 digital images of child pornography constitutes one crime or 15 crimes").

Federal divisibility, in contrast, assesses whether the statute sets forth numerous alternative offenses as provided in alternative elements, or, rather, comprises a single set of elements that can be violated in numerous ways. *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016) ("A single statute may list elements in the alternative, and thereby define multiple crimes."); *id.* (recognizing that other statutes constitute "a different kind of alternatively phrased law: not one that lists multiple elements disjunctively, but instead one that enumerates various factual means of committing a single element").

Even setting aside the constitutional separation of powers and federal divisibility distinctions, *Andrews*'s statutory construction and legislative history reasoning does not apply to NRS 453.337. Similar to the drug trafficking statute in *Andrews*, NRS 453.337's use of the word "any" renders the statute ambiguous. *Castaneda*, 132 Nev. Adv. Op. 44, 373 P.3d at 111 ("[T]he word 'any' has 'typically been found ambiguous in connection with the allowable unit of prosecution,' for it contemplates the plural, rather than specifying the singular."). But this is where the similarities end.

First turning to statutes that cross-reference NRS 453.337 for guidance, none establish that the identity of the schedule I or II substance is an element, such as in *Andrews* for NRS 453.3385. *Andrews*, 412 P.3d at 40. A school statute defining "immorality" excepts from that definition "an act forbidden by NRS 453.337." NRS 391.650(4)(a). A statute requiring the prosecution to place prior drug convictions for which it will seek sentencing enhancements in the charging document similarly sheds no light on NRS 453.337's construction. *See* NRS 453.348 ("In any proceeding brought under NRS 453.316, 453.321, 453.322, 453.333, 453.334, 453.337, 453.338 or 453.401, any previous convictions of the offender for a felony relating to controlled substances must be alleged in the indictment or information charging the primary offense . . . .").

Nevada's statute criminalizing unlawful possession not for purpose of sale statute cross-references NRS 453.337 for penalty purposes and uses the word "any" just as NRS 453.337 does. *See* NRS 453.336(3) ("Unless a greater penalty is provided in NRS 212.160, 453.337 or 453.3385, a person who is convicted of the possession of flunitrazepam or gamma-hydroxybutyrate, or any substance for which

flunitrazepam or gamma-hydroxybutyrate is an immediate precursor, is guilty of a category B felony . . . .").

Finally, while a property forfeiture statute uses the phrase "a controlled substance" in relation to 453.337, it does not provide the same level of clarity as the cross-referencing statutes in *Andrews*. To cast a wide net for forfeitable proceeds relating to drug offenses, NRS 453.301(9) defines proceeds as: "[e]verything of value furnished or intended to be furnished in exchange for a controlled substance in violation of the provisions of NRS 453.011 to 453.552, inclusive . . . ." The forfeiture statute also states: "[i]f an amount of cash which exceeds $300 is found in the possession of a person who is arrested for a violation of NRS 453.337 or 453.338, then there is a rebuttable presumption that the cash is traceable to an exchange for a controlled substance and is subject to forfeiture pursuant to this subsection." NRS 453.301(9).

However, two other subsections in that same property forfeiture statute refer to NRS 453.337 and use the phrase "any controlled substance." NRS 453.301(2) states: "All raw materials, products and equipment of any kind which are used, or intended for use, in

manufacturing, compounding, processing, delivering, importing or exporting any controlled substance in violation of the provisions of NRS 453.011 to 453.552 . . . ." NRS 453.301(10) states: "All firearms, as defined by NRS 202.253, which are in the actual or constructive possession of a person who possesses or is consuming, manufacturing, transporting, selling or under the influence of any controlled substance in violation of the provisions of NRS 453.011 to 453.552, inclusive . . . ." The internal inconsistencies in the forfeiture statute as to "any controlled substance" and "a controlled substance" in relation to NRS 453.337 are thus unhelpful in determining whether NRS 453.337 sets forth alternative elements.

The legislative history of NRS 453.337 for its 1977 enactment and 1981 amendment do not indicate that the identity of the schedule I or II controlled substances is an element. For the 1977 enactment of NRS 453.337, various Nevada legislators debated the proper penalties for the state's drug offenses, but did not touch upon whether the identity of the schedule I or II controlled substance is an element or means of violating

NRS 453.337. *See* Compiled Legislative History for S.B. 268.[6] For the 1981 amendment of NRS 453.337, the legislative minutes similarly do not address NRS 453.337's elements and thus do not assist the Court's inquiry here.[7]

Additionally, the model act upon which the Legislature based its earliest codified drug laws is the Uniform Controlled Substances Act of 1970. *Egan v. Sheriff*, 88 Nev. 611, 614 n.2, 503 P.2d 16, 19 n.2 (1972) ("The Uniform Controlled Substances Act, Stats. of Nev. 1971, ch. 667, p. 1999 *et seq.*, supplanted the Uniform Narcotic Drug Act, effective January 1, 1972."); NRS 453.013 ("NRS 453.011 to 453.348, inclusive, shall be so applied and construed as to effectuate its general purpose and to make uniform the law with respect to the subject of such sections

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[6] *Available at* https://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1977/SB268,1977.pdf.

[7] *See* Assembly Committee on Commerce, Minutes for May 18, 1981, pp. 1239-40, 1253, 1262; Senate Committee on Commerce and Labor, Minutes for March 16, 1981, pp. 881; Senate Committee on Human Resources and Facilities, Minutes for March 31, 1981, p. 959; Senate Committee on Human Resources and Facilities, Minutes for April 2, 1981, pp. 984-85, 991-96; Senate Committee on Human Resources and Facilities, Minutes for April 24, 1981, pp. 1238, 1257; Senate Committee on Human Resources and Facilities, Minutes for April 30, 1981, pp. 1331, 1339-42; Senate Committee on Human Resources and Facilities, Minutes for May 25, 1981, p. 1623.

among those states which enact it."); *SFR Investments Pool 1 v. U.S. Bank*, 130 Nev. 742, 744, 334 P.3d 408, 410 (2014) ("[I]n addition to the usual tools of statutory construction, we have available the comments of the National Conference of Commissioners on Uniform State Laws, national commentary, and other states' cases to explicate."), *holding modified by Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortg., a Div. of Wells Fargo Bank, N.A.*, 388 P.3d 970 (Nev. 2017).

The model act consistently refers to the phrase controlled substance in the singular—"a controlled substance"—when proscribing offenses. For instance, the model section which sets forth the prohibited acts and penalties for possessing with intent to deliver drugs uses the phrase "a controlled substance":

> (a) Except as authorized by this Act and except as provided in Section 409, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, **a controlled substance**.
>
> (1) Any person who violates this subsection with respect to:
>
> (i) **a controlled substance** classified in Schedule I or II which is a narcotic drug, is guilty

> of a crime and upon conviction may be imprisoned for not more than [ ], or fined not more than [ ], or both;
>
> (ii) **any other controlled substance** classified in Schedule I, II, or III, is guilty of a crime and upon conviction may be imprisoned for not more than [ ], fined not more than [ ], or both;
>
> (iii) **a substance** classified in Schedule IV, is guilty of a crime and upon conviction may be imprisoned for not more than [ ], fined not more than [ ], or both;
>
> (iv) **a substance** classified in Schedule V, is guilty of a crime and upon conviction may be imprisoned for not more than [ ], fined not more than [ ], or both.

Unif. Controlled Substances Act 1970 § 401 Prohibited Acts A—Penalties (Last Revised or Amended in 1973) (emphases added). That the Nevada Legislature instead chose to use the term "any" in NRS 453.337 indicates a conscious break from the consistent use of the singular "a" in the model act. This suggests the Legislature did not intend the simultaneous possession of different drugs be parceled out into separate drug offenses under NRS 453.337.

Furthermore, the United States Supreme Court stated in *Mathis* that "[i]f statutory alternatives carry different punishments, then under [*Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)] they must be elements." 136 S. Ct. at 2256. Because Nevada's drug trafficking statute, NRS 453.3385, ties the weight of the controlled substance trafficked to the penalty, the proper interpretation is a restrictive one that does not permit aggregating the weight of multiple different substances. *Andrews*, 412 P.3d at 41. NRS 453.337, however, does *not* tie the amount of drugs possessed to the penalty; the penalty is tied only to the number of relevant prior drug convictions. NRS 453.337(2).

For these reasons, *Andrews* does not assist with the proper construction of NRS 453.337.

B. The en banc decision in *Castaneda* provides helpful analysis for interpreting NRS 453.337.

Instead of *Andrews*, this Court's opinion in *Castaneda*—on which *Andrews* relied to hold "any" is ambiguous as to the unit of prosecution—provides instructive reasoning for resolving NRS 453.337's ambiguity. *Andrews*, 412 P.3d at 39. *Castaneda* assessed the unit of prosecution for a statute prohibiting "possession" of "any film, photograph, or other visual presentation" constituting child

pornography. 373 P.3d at 113. This Court first recognized that the text and the legislative history of the child pornography statute at issue "shed[] little light on the unit of prosecution it authorizes." *Id.* at 112. Thus, relying on the rule of lenity, this Court held the unit of prosecution was one offense for simultaneous possession of multiple child pornography images. *Id.* at 114-15 ("Castaneda's simultaneous possession at one time and place of 15 images depicting child pornography constituted a single violation of NRS 200.730.").

Castaneda relied, in part, on the United States Supreme Court's decision in *Bell v. United States*, 349 U.S. 81 (1955), that "famously held that the simultaneous transportation of two women across state lines constituted one, not two, violations of the Mann Act, which was ambiguous in that it made it a crime to knowingly transport 'any woman or girl' across state lines for immoral purposes without defining the unit of prosecution." *Castaneda*, 373 P.3d at 111. The Supreme Court acknowledged that when "Congress has the will it has no difficulty in expressing it—when it has the will, that is, of defining what it desires to make the unit of prosecution." *Bell*, 349 U.S. at 83. But, when "Congress leaves to the Judiciary the task of imputing to

Congress an undeclared will, the ambiguity should be resolved in favor of lenity." *Id.* Thus, "if Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses, when we have no more to go on than the present case furnishes." *Id.* at 84.

Consistent with the reasoning in *Castaneda* and *Bell*, in the absence of statutory text or legislative history guidance, other states have similarly construed their drug statutes as creating one offense for simultaneous possession of multiple controlled substances:

- "It is apparent that this section, while listing several distinct offenses which might be committed, such as possession, sale and the like, only applies to 'controlled substances enumerated in schedules I, II, III, IV and V' and further makes no differentiation between penalties for offenses involving substances in schedule I and, for instance, schedules IV or V." *Vogel v. State*, 426 So. 2d 863, 881 (Ala. Crim. App. 1980), *aff'd* 426 So. 2d 882 (Ala. 1982).

- "In our opinion, in the absence of a statutory provision to the contrary, the simultaneous possession of more than one type of controlled substance, under the circumstances shown on this record, constituted a single offense, and only one sentence should have been imposed." *People v. Manning*, 374 N.E.2d 200, 202 (Ill. 1978).

- "Our statute . . . is entitled 'Unlawful dealing on a controlled schedule I, II, or III substance,' and is clearly intended to proscribe dealing in drugs. The statute does not specifically state that the penalties are intended to be additive when different substances are involved in a single transaction. It is our opinion,

therefore, that a single sales transaction between the same principals at the same time and place which violates a single statutory provision does not justify conviction of and sentence for separate crimes even though more than one controlled substance is involved." *Duncan v. State*, 412 N.E.2d 770, 775-76 (Ind. 1980).

- Interpreting statute prohibiting possessing "any narcotic drug" and holding it "would do violence to the Legislature's intent to say that if a person had ten different types of narcotic drugs in his possession at one time that he would be guilty of ten separate crimes [because if] such were the intent, the Legislature would have said so in clear language." *State v. Butler*, 271 A.2d 17, 18 (N.J. App. Div. 1970).

- Holding simultaneous possession of two drugs "constituted but one offense." *State v. Homer*, 538 P.2d 945, 946 (Or. 1975).

This Court should reach the same conclusion here. The plain text of NRS 453.337 does not indicate whether the offense is divisible, and its legislative history is inconclusive. Thus, under *Castaneda*—and *Mathis*—the rule of lenity controls. This Court should adopt Figueroa-Beltran's reading of NRS 453.337 that results in one offense for the simultaneous possession for purpose of sale multiple substances in schedule I and II.

VI. Potential state concerns resulting from the certified questions.

A final notable distinction between the instant case and *Andrews* is that, of course, *Andrews* was litigated by a state defendant and state

prosecution. Those parties were best suited to advise the Court about potential repercussions the proposed interpretations may have in the state district courts. These crucial institutional positions are missing in this certified federal question case.

It appears the federal government's position would place a higher burden on Nevada prosecutors to precisely charge and prove a specific controlled substance. Yet, the *Howard* case (addressed above in Section I) indicates state prosecutors read the statute same way as Figueroa-Beltran and charge simultaneous possession of multiple substances in one count under NRS 453.337. *Supra*, pp. 29-30.

Additionally, should this Court adopt the federal government's reading of NRS 453.337 and pronounce the identity the controlled substance is an element, this Court will likely need to decide whether its decision will apply retroactively. For example, state post-conviction litigants who were not properly advised of the elements before pleading guilty, or who were convicted by a jury without the jury being properly charged on NRS 453.337's elements, and other similarly worded statutes such as NRS 453.338, may be entitled to retroactive relief. *See*, *e.g.*, NRS 176.165 ("To correct manifest injustice, the court after

sentence may set aside the judgment of conviction and permit the defendant to withdraw the plea."). Nevada does not have model jury instructions. Therefore, it is unknown how juries have been instructed on the elements of NRS 453.337, and, in particular, whether they were instructed that the identity of the substance is an element the State must prove beyond a reasonable doubt.

The potential state consequences of re-interpreting Nevada's drug laws is not something on which the parties before the Court are best qualified to advise. Thus, Figueroa-Beltran and the federal government asked the Ninth Circuit not to certify the federal divisibility questions to this Court. The Ninth Circuit rejected the parties' unified position and—as the first federal court to ever do so—certified the federal divisibility questions to this Court. Figueroa-Beltran respectfully requests the Court reconsider accepting the Ninth Circuit's certified questions.

Conclusion

Figueroa-Beltran requests this Court reconsider whether the Ninth Circuit certified questions of state law. Alternatively, Figueroa-Beltran requests this Court hold the various controlled substances scheduled by the pharmacy board are simply a factual means of violating NRS 453.337, and not alternative elements.

Dated: May 15, 2019.

Respectfully submitted,

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/s/Cristen C. Thayer
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Certificate of Compliance

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook, 14-point font.

2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it is proportionately spaced and has a typeface of 14 points or more and contains 11,074 words.

3. Finally, I certify that I have read this appellate 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 applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in

conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: May 15, 2019.

Respectfully submitted,

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Certificate of Service

I hereby certify that on May 15, 2019, I electronically filed the foregoing with the Clerk of the Nevada Supreme Court by using the appellate electronic filing system. Participants in the case who are registered users in the appellate electronic filing system will be served by the system and include: Elham Roohani, Assistant Federal Public Defender.

/s/Brandon Thomas
An Employee of the
Federal Public Defender