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 Appendix

Rene Valladares
Federal Public Defender,
District of Nevada
*Cristen C. Thayer
Assistant Federal Public Defender
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cristen_thayer@fd.org

*Counsel for Gibran Richardo Figueroa-Beltran

ALPHABETICAL INDEX

CHRONOLOGICAL INDEX

Dated May 15, 2019.

Respectfully submitted,

Rene L. Valladares
Federal Public Defender

/s/Cristen C. Thayer
CRISTEN C. THAYER
Assistant Federal Public Defender

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CLERK OF THE COURT

INFM
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
AGNES BOTELHO
Deputy District Attorney
Nevada Bar #0011064
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

I.A. 06/06/12
1:30 P.M.
PD

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

GIBRAN RICARDO BELTRAN-FIGUEROA, aka,
Gibran Ricardo Beltranfigueroa,
#2854921

Defendant.

Case No: C-12-281735-1
Dept No: XV

INFORMATION

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

STEVEN B. WOLFSON, District Attorney within and for the County of Clark, State of Nevada, in the name and by the authority of the State of Nevada, informs the Court:

That GIBRAN RICARDO BELTRAN-FIGUEROA, aka, Gibran Ricardo Beltranfigueroa, the Defendant(s) above named, 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, within the County of Clark, State of Nevada, contrary to the form, force and effect of statutes in such cases made and provided, and against the peace and dignity of the State of Nevada, did then and there wilfully, unlawfully, feloniously, knowingly, and intentionally possess, for the

///

purpose of sale, a controlled substance, to-wit: Cocaine.

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY /s/AGNES BOTELHO
AGNES BOTELHO
Deputy District Attorney
Nevada Bar #0011064

DA#12F07361X/pm
LVMPD EV#1205073104
(TK5)

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CLERK OF THE COURT

JOCP

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

GIBRAN RICARDO BELTRAN-FIGUEROA
aka Gibran Ricardo Beltranfigueroa
#2854921

Defendant.

CASE NO. C281735-1

DEPT. NO. XV

JUDGMENT OF CONVICTION

(PLEA OF GUILTY)

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, STEPHEN IMMERMAN, Deputy Public Defender, and good cause appearing,

THE DEFENDANT IS HEREBY ADJUDGED guilty of said offense and, in addition to the $25.00 Administrative Assessment Fee, $60.00 Drug Analysis Fee, and $150.00 DNA Analysis Fee including testing to determine genetic markers, the Defendant is sentenced to the Nevada Department of Corrections (NDC) as follows: TO

AUG 21 2012

A MAXIMUM of FORTY-EIGHT (48) MONTHS with a MINIMUM parole eligibility of NINETEEN (19) MONTHS; with ONE HUNDRED ONE (101) days Credit for Time Served.

DATED this 22 day of August, 2012

ABBI SILVER
DISTRICT JUDGE

CASE NO. 16-10388

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. GIBRAN RICHARDO FIGUEROA-BELTRAN, Defendant-Appellant.	D.C. No. 2:15-cr-00176-KJD-GWF-1 (Nevada, Las Vegas)

APPELLANT GIBRAN RICHARDO FIGUEROA-BELTRAN'S MOTION FOR JUDICIAL NOTICE AND TO SUPPLEMENT THE RECORD ON APPEAL

RENE L. VALLADARES
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Assistant Federal Public Defender
*AMY B. CLEARY
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*Counsel for Appellant Gibran Richardo Figueroa-Beltran

Appellant Gibran Richardo Figueroa-Beltran moves this Court to take judicial notice of, and supplement the record on appeal with, documents filed in a Nevada state prosecution and a federal prosecution. These judicially noticeable court records directly relate to whether Nev. Rev. Stat. § 453.337 is divisible and will assist the Court in determining whether the district court erred in applying the 16-level sentencing enhancement against Mr. Figueroa-Beltran.

I. The documents at issue are proper for judicial notice and directly relate to matters raised in this appeal.

This Court may take judicial notice on appeal. Fed. R. Evid. 201(f) ("Judicial notice may be taken at any stage of the proceeding."). Particularly pertinent here, this Court may take notice of and supplement the appellate record with "proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue." *Trigueros v. Adams*, 658 F.3d 983, 987 (9th Cir. 2011) (granting appellant's motion for judicial notice of state court documents that related to the timeliness of the appellant's state habeas proceedings); *Rosales-Martinez v. Palmer*, 753 F.3d 890, 894-95 (9th Cir. 2014) (granting a motion to supplement the record where the documents provided "relevant and material details" for resolving the issues on appeal); *United States v. Wilson*, 631 F.2d 118, 119 (9th Cir. 1980) ("[A] court may take judicial notice of its own records in other cases, as well as the records of an inferior court in other cases.").

Mr. Figueroa-Beltran asks the Court to take judicial notice of and supplement the appellate record with the following records:

- Amended Information filed in *Nevada v. Howard*, CR14-1513, (2d Jud. Dist. Nev.), attached hereto as Exhibit 1.
- State's Opposition to Defendant's Motion to Dismiss filed in *Nevada v. Howard*, CR14-1513, (2d Jud. Dist. Nev.), attached hereto as Exhibit 2.[1]
- Sentencing Memorandum filed in *United States v. Jordan-McFeely*, 3:16-cr-0011-HDM-VPC, Dkt. #31 (D. Nev. Oct. 7, 2017), attached hereto as Exhibit 3.

These publicly available court documents directly relate to Mr. Figueroa-Beltran's appellate claim that Nev. Rev. Stat. § 453.337 is a categorically overbroad and indivisible statute that may not be used to enhance a sentence under U.S.S.G. § 2L1.2. OB, pp. 21-36; RB, pp. 1-15. The court documents show Nevada district attorneys do not treat the identity of the controlled substance as an element of Nev. Rev. Stat. § 453.337.

In *Nevada v. Howard*, the State charged the defendant in the same count with possessing for the purpose of sale both methamphetamine and marijuana under Nev.

[1] The Amended Information and the State's Opposition may also be found as Exhibit A to the Sentencing Memorandum filed in *United States v. Jordan-McFeely*. 3:16-cr-0011-HDM-VPC, Dkt. #31-1 (D. Nev. Oct. 7, 2016).

Rev. Stat. § 453.337. Mot. Judicial Notice, Ex. 1, p. 2. The defendant moved to dismiss the count as duplicitous. Mot. Judicial Notice, Ex. 2, p. 2. The State opposed, explaining the "identity and quantity of each enumerated drug is not an element of [Nev. Rev. Stat. § 453.337]." Mot. Judicial Notice, Ex. 2, p. 3. The State further argued the "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." Mot. Judicial Notice, Ex. 2, p. 4. *Howard* further indicates the identity of the controlled substance is not an element of Nev. Rev. Stat. § 453.337, and thus the statute is not divisible.

In *United States v. Jordan-McFeely*, 3:16-cr-0011-HDM-VPC, Dkt. #31 (D. Nev.), the defense brought *Howard* to the district court's attention and objected to any enhancement based on a prior conviction for Nev. Rev. Stat. § 453.337. Mot. Judicial Notice, Ex. 3, p. 17. The district court rejected the argument and the defendant appealed. The Opening Brief is due March 31, 2017. *United States v. Jordan-McFeely*, 16-10456 (9th Cir.).

III. Conclusion

The documents addressed herein are publicly available court records that directly relate to the sentencing issues raised in this appeal. For the reasons set forth, Mr. Figueroa-Beltran asks this Court to grant his motion, take judicial notice, and supplement the record on appeal with the attached Exhibits 1-3.

Dated this 24th day of March, 2017.

Respectfully submitted,

RENE L. VALLADARES
Federal Public Defender

/s/ Cristen C. Thayer
CRISTEN C. THAYER
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

I hereby certify that, on March 24, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing documents by First-Class Mail, postage pre-paid, dispatched the foregoing documents to a third party commercial carrier for delivery, or sent the foregoing documents through electronic mail, within 3 calendar days, to the following non-CM/ECF participants: Gibran Figueroa-Beltran.

/s/Lauren Pullen
Employee of the Federal Public Defender

Case: 16-10388, 03/24/2017, ID: 10371423, DktEntry: 23-2, Page 1 of 5

EXHIBIT "1"

EXHIBIT "1"

DA #14-10108

NHP 140400996

CODE 1800
Richard A. Gammick
#001510
P.O. Box 11130
Reno, NV 89520
(775) 328-3200
Attorney for State of Nevada

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE

* * *

THE STATE OF NEVADA,

Plaintiff,

v.

JEFFREY SCOTT HOWARD,

Defendant.
_____/

Case No.: CR14-1513

Dept. No.: D06

AMENDED INFORMATION

RICHARD A. GAMMICK, District Attorney within and for the County of Washoe, State of Nevada, in the name and by the authority of the State of Nevada, informs the above entitled Court that JEFFREY SCOTT HOWARD, the defendant above named, has committed the crimes of:

COUNT I. TRAFFICKING IN A CONTROLLED SUBSTANCE, a violation of NRS 453.3385(3), a felony, in the manner following, to wit:

That the said defendant JEFFREY SCOTT HOWARD, on or about the 12th day of April, 2014, did willfully, unlawfully, knowingly, and/or intentionally be in actual or constructive possession of 28 grams or more of a Schedule I controlled substance or a mixture

which contains a Schedule I controlled substance, to wit: methamphetamine.

COUNT II. POSSESSION OF CONTROLLED SUBSTANCE FOR THE PURPOSE OF SALE, a violation of NRS 453.337, a felony, in the manner following, to wit:

That the said defendant JEFFREY SCOTT HOWARD, on or about the 12th day of April, 2014, at Sparks Township, within the County of Washoe, State of Nevada, did willfully, unlawfully and knowingly have 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.

COUNT III. POSSESSION OF A CONTROLLED SUBSTANCE, a violation of NRS 453.336, a felony, in the manner following, to wit:

That the said defendant JEFFREY SCOTT HOWARD, on or about the 12th day of April, 2014, at Sparks Township, within the County of Washoe, State of Nevada, did willfully, unlawfully and knowingly have in his possession a Schedule I controlled substance(s), to wit: marijuana in a quantity greater than one ounce, and/or methamphetamine, and/or MDMA and/or psilocybin and/or a Schedule II controlled substance, to wit: hydrocodone at I80 and East Fourth St. Sparks, Washoe County, Nevada.

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All of which is contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the State of Nevada.

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By: /s/DIANNE DRINKWATER
DIANNE DRINKWATER
7375
Deputy District Attorney

The following are the names and addresses of such witnesses as are known to me at the time of the filing of the within Information:

NEVADA HIGHWAY PATROL
JULES LAPRAIRIE
DAVID S. LEWIS

WASHOE COUNTY DISTRICT ATTORNEY
JOHN STALLINGS

The party executing this document hereby affirms that this document submitted for recording does not contain the social security number of any person or persons pursuant to NRS 239B.230.

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By /s/ DIANNE DRINKWATER
DIANNE DRINKWATER
7375
Deputy District Attorney

PCN: NHP0012264C;
NHP0012791C-HOWARD

EXHIBIT "2"

EXHIBIT "2"

2645
Christopher J. Hicks
#007747
P.O. Box 11130
Reno, NV 89520
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

* * *

THE STATE OF NEVADA,

Plaintiff,

v.

JEFFREY SCOTT HOWARD,

Defendant.
_____/

Case No.: CR14-1513

DEPT: 6

STATE'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

COMES NOW, the State of Nevada, by and through CHRISTOPHER J. HICKS, District Attorney of Washoe County, and Dianne S. Drinkwater, Deputy District Attorney, and hereby files this Opposition to Defendant's Motion to Dismiss. This opposition is based on the attached memorandum of points and authorities.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. Procedural Background

On April 12, 2014, defendant was arrested and charged with Trafficking in a Controlled Substance and various other offenses based on his possession of illegal drugs discovered during traffic stop by officers of the Nevada Highway Patrol.

On September 25, 2014, the defendant waived his preliminary hearing based on an agreement with the state to plead guilty pursuant to certain negotiations. The defendant ultimately withdrew from those negotiations, and the State filed an Amended Information reinstating the original charges against him: Count I alleging Trafficking in a Controlled Substance, Count II alleging Possession of a Controlled Substance for the Purpose of Sale, and Count III alleging Possession of a Controlled Substance - all arising from a single incident in which the defendant is alleged to have simultaneously possessed various illegal drugs.

The case is now set for a jury trial to commence on November 16, 2015.

On August 25, 2015, defendant filed a Motion to Dismiss to which the State now files this opposition.

II. Points and Authorities

Defendant now seeks to dismiss Counts II and III of the Information as duplicitous arguing by alleging the possession of multiple controlled substances in each count, the State has impermissibly charged more than one offense in each count. NRS 173.075(2).

A. Allegations contained within Count II and Count III are not rendered duplicitous by alleging multiple drugs when fall within the same statute, carry the same potential penalty, and arise from a single act.

A charging document is duplicitous when it alleges two or more distinct and separate offenses into a single count. U.S. v. Mancuso, 718 F.3d 780, 782(9th Cir. 2013.) Duplicitous charges are those alleged in a single charge but under two distinct statutes, carrying different penalties, and involving different evidence. U.S. v. Ramos, 666 F.2d 469, 473 (11th Cir. 1982).

In the instant case, defendant is charged in Count II with Possessing for the Purpose of Sale methamphetamine and/or marijuana in a quantity greater that one ounce. Count III charges the defendant with possessing marijuana in a quantity greater than one ounce and/or methamphetamine and/or MDMA and/or psilocybin and/or hydrocodone. Defendant argues that by alleging multiple controlled substances in each count, the State has rendered them duplicitous. Defendant has cited no legal authority for this conclusory statement and it is inconsistent with the State's review of existing case law.

The offense charged in each count is a single offense with the elements enumerated by NRS 453.337 and 453.336 respectively. The identity and quantity of each enumerated drug is not an element of either offense. The classification of an illegal drug as Schedule I, II, III, IV or V is established by administrative regulation by the Nevada Pharmacy Board and is found in the Nevada Administrative Code rather than in the Nevada Revised Statutes. The charging statute and potential punishment for a violation of each statute by each drug is

identical, and each relies on the same evidence derived from a single incident of the defendant simultaneously possessing each of the drugs alleged. The 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. There is no basis on which to allege multiple counts when the drugs are in the same legal classification but happened to be of different types. New York v. Martin, 153 A.D.2d 807, 805 (1989); New York v. Rivera, 257 A.D.2d 425, 426, (1999).

The presentation of multiple factual scenarios by which the statute would be violated does not render the charge duplicitous. U.S. v. Folks, 236 F.3d 384, 391-392 (7th Cir. 2001). "…the allegation in a single count of the commission of a crime by several means should be distinguished from the allegations of several offenses in the same count. Although drawing the line between these two concepts may be difficult in practice, in theory the latter type of allegation is duplicitous, while the former is not." U.S. v. Murray, 618 F.2d 892, 899 (2nd Cir. 1980).

Though the application of the doctrine in this context has not been specifically addressed by the Nevada Supreme Court, it is consistent with the Court's analyses in other areas. (Alternative means of intoxication not an element on which jury must unanimously agree, but rather manner and means of committing offense. Dossy v. State, 114 Nev. 904, 909, 964 P.2d 782, 784-785 (1998); jury need not unanimously agree on manner and means in murder charge. Tabish v. State, 119 Nev. 293, 312-313, 72 P3d 584, 596-597 (2003), Schad v.

Arizona, 501 U.S. 624, 630-641 (1991). There is no rational reason or legal basis on which to apply a different rule or analysis to the charges against the defendant. The jury need not unanimously agree on the means by which the statue was violated, just that it was violated.

Likewise, a conspiracy to commit multiple, discrete offenses, is not duplicitous since the crime is the conspiracy, not the crimes intended to be committed, and only single statute is violated for which only a single punishment may be imposed. Braverman v. U.S., 317 U.S. 49, 54 (1942). The elements of the offense would be those of the conspiracy rather the elements of the underlying, intended offenses.

The analogy is clear: the crime here is the possession of the illegal drugs and the identity of those drugs is the manner and means by which the respective statutes are violated.

The scant case law that exists in this specific area supports the State's analysis. In U.S. v. Ramirez-Martin, 273 F.3d 903, 914 (9th Cir. 2001), the defendant was charged with both the attempted and completed transport of illegal aliens in violation of federal law. In reaching its conclusion, the court analyzed the intent required by the specific federal statutes involved. In this case, the state has alleged a violation of only one statute and a single act of "possession" the illegal drugs. There are no discrete acts requiring the statutory interpretation and distinctions in the intent required to violate those statutes as done in Ramirez-Martin.

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In U.S. v. Vargas-Castillo, 329 F.3d 715, 720 (9th Cir. 2003), the defendant argued he had been charged twice for the same offenses by multiple charges alleging Possession with the Intent to Distribute both cocaine and marijuana, as well as the importation of both cocaine and marijuana. The Court reasoned that the federal statutes involved permitted multiple counts for the cocaine and marijuana since, under federal law, the two drugs are classified into different schedules and the weights involved for each would carry different penalties. Under Nevada law, however, the drugs listed in Counts II and III of the Amended Information each carry exactly the same penalties and are violations of the same statute.

In U.S. v. Mancuso, 713 F.3d 780, 793 (2013), in analyzing a duplicity challenge, the court reiterated that there is "no general requirement that the jury reach agreement on the preliminary facts issues which underlie the verdict, *citing* Schad v. Arizona, *infra* at 631-632. "It does not matter that different jurors may have different pieces of testimony credible, as long as the jury is unanimous on the bottom line conclusion that Mancuso was guilty of the acts charged." Mancuso at 793.

In the instant case, it is not necessary that the jury unanimously agree on which, or all, of the specific illegal drugs possessed by defendant – only that that unanimously agree that he violated the statute charged.

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B. Dismissal Not Appropriate Remedy if Court Finds Counts II and III duplicitous.

If the Court is, however, persuaded that Count II and Count III are duplicitous, dismissal is not the appropriate remedy.

> "Nevertheless, the rules about…duplicity are pleading rules, the violation of which is not fatal to an indictment. Defendant's remedy is to move to require the prosecution to elect…the charge within the count upon which it will rely. Additionally, a duplicitous...indictment is remediable by the court's instruction to the jury particularizing the distinct offense charged in each count in the indictment." U.S. v. Ramirez, at 915.

Accordingly, if despite the legal authority cited herein, the Court finds Count II and Count II duplicitous, the remedy sought by defendant is not supported by legal precedent and must be denied.

III. Conclusion

For the reasons stated herein, the State asks the defendant's Motion to Dismiss be, in all things, denied.

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 18th day of September, 2015.

DIANNE S. DRINKWATER
District Attorney
Washoe County, Nevada

By/s/ DIANNE S. DRINKWATER
DIANNE S. DRINKWATER
7375
Deputy District Attorney

CERTIFICATE OF SERVICE BY E-FILING

I certify that I am an employee of the Washoe County District Attorney's Office and that, on this date, I electronically filed the foregoing with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

CHRISTOPHER FREY, ESQ.
WASHOE COUNTY PUBLIC DEFENDERS OFFICE
RENO, NEVADA

DATED this 18th day of September, 2015.

/s/ *Stacey S. Salsbery*
Stacey S. Salsbery

EXHIBIT "3"

EXHIBIT "3"

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Federal Public Defender
Nevada State Bar No. 11479
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Attorney for DEVON CARL JORDAN-MCFEELY

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, v. DEVON CARL JORDAN-MCFEELY, Defendant.	Case No. 3:16-cr-0011-HDM-VPC **DEFENDANT'S SENTENCING MEMORANDUM**

Certification: This sentencing memorandum is timely filed.

The defendant, DEVON CARL JORDAN-MCFEELY, by and through his attorney of record, Assistant Federal Public Defender Lauren Gorman, submits this Sentencing Memorandum for the Court's consideration in fashioning a sentence "sufficient, but not greater than necessary" to meet sentencing goals. The defendant reserves the right to supplement this memorandum with additional authorities or information as the Court may permit at or before the sentencing hearing presently scheduled before this court on October 18, 2016 at 9:00 am.

I. OBJECTIONS TO THE PRESENTENCE INVESTIGATION REPORT

We object to the offense level 26 as the offenses of robbery and possession of a controlled substance for the purposes of sale do not constitute a crime of violence or controlled substance offense, respectively. Instead, the correct base offense level is 20 pursuant to 2K2.1(a)(4)(B). After adding two levels pursuant to subsection (b(1), the final offense level before acceptance is a 22 and 19 after acceptance of responsibility. The correct guideline range is 46-57 months.

A. Nevada robbery is not a crime of violence under U.S.S.G. 4B1.2

To determine whether an offense of conviction is a "crime of violence," courts must presumptively apply the categorical approach by "look[ing] only to the fact of conviction and the statutory definition of the prior offense." *Taylor v. United States*, 495 U.S. 575, 602. (1990).

Because the residual clause is now void for vagueness, the government only has two options to establish that a particular crime is a "crime of violence" under U.S.S.G. § 4B1.2: by proving the offense is one set forth in the enumerated offense clause or that it satisfies the physical force clause. Nevada robbery does not satisfy the physical force clause, robbery was not an enumerated offense at the time that the offense at issue was committed, and Nevada robbery does not meet the generic federal definition or robbery.

As an initial matter, Counsel acknowledges that the Ninth Circuit in a recent unpublished decision rejected a similar argument to the one counsel makes here. Specifically, in *United States v. Tate*, No. 15-10283, 2016 WL 4191909 (9th Cir. Aug. 9, 2016), the Ninth Circuit held that California robbery was a crime of violence under *United States v. Becerril–Lopez*, 541 F.3d 881 (9th Cir. 2008):

> *Becerril–Lopez* controls here: Tate, who committed robbery under § 211, necessarily committed either generic robbery or generic extortion, which are both listed as crimes of violence in §§ 4B1.2(a)(2) and 4B1.2's Application Note 1. U.S.S.G. § 4B1.2

> app. n.1. Thus, Tate categorically committed a crime of violence, and the sentencing court properly assigned Tate a base offense level of 20 under U.S.S.G. § 2K2.1(a)(4)(A).

United States v. Tate, No. 15-10283, 2016 WL 4191909, at *2 (9th Cir. Aug. 9, 2016). The appellant in that case has filed a petition for rehearing en banc, which is pending as of the writing of this memorandum. In light of the pending en banc petition and the circumstance that the Ninth Circuit elected not to publish its decision in *Tate*, limiting its precedential value, Mr. McFeely submits that this court is not bound by that decision.

1. Enumerated Offense Clause

After August 1, 2016, robbery is an enumerated offense and not merely listed in the commentary. Mr. McFeely has a right under the *Ex Post Facto* Clause to be sentenced under the guideline in effect when the crime was committed if the result is less severe. *Peugh v. United States*, 133 S. Ct. 2072 (2013). Therefore, Mr. McFeely has a right to be sentenced under the pre- August 1, 2016 guideline because the instant offense was committed when that version of the guideline was in effect.

2. Commentary to U.S.S.G. § 4B1.2

Before August 1, 2016, robbery was enumerated only in the commentary of U.S.S.G. 4B1.2. The United States Sentencing Commission promulgates the Sentencing Guidelines, pursuant to an express delegation of rulemaking authority by Congress. *Stinson v. United States*, 508 U.S. 36, 44 (1993). Therefore, the Guidelines are "the equivalent of legislative rules adopted by [other] federal agencies." *Id.* at 45.

The Sentencing Reform Act[1] (SRA) requires the Commission to provide Congress with any proposed guideline amendments at least six months before the effective date of those

[1] Pub. L. No. 98–473, tit. II, ch. 2, § 218(a)(5), 98 Stat. 1037, 2027 (1984), as amended by 18 U.S.C. § 3551 *et seq.* (1988 ed. and Supp. III), 28 U.S.C. §§ 991–998 (1988 ed. and Supp. III).

amendments and allows Congress to modify or disapprove of any such amendments before their effective date. 28 U.S.C. § 994(p). The Supreme Court determined this requirement makes the Commission "fully accountable to Congress." *Mistretta v. United States*, 488 U.S. 361, 393-94 (1989).

However, Congress does not review amendments to the commentary under 28 U.S.C. § 994(p) and does not expressly authorize the issuance of commentary at all. *See Stinson*, 508 U.S. at 40-41. Guideline commentary is therefore only valid if (1) it interprets or explains a guideline; and (2) it is not "inconsistent with, or a plainly erroneous reading of, that guideline." *Id.* at 38. Otherwise, the Commission could send guidelines to Congress for review, which is necessary to comport with the Separation of Powers and required by the SRA, *see* 28 U.S.C. § 994(p), but then issue binding rules in the form of commentary that Congress never approved, violating the Separation of Powers and the SRA. *See United States v. St. James*, 569 F. App'x 495, 497 (9th Cir. Apr. 14, 2014) (noting "delegation of authority to the Commission to promulgate policy statements and *interpretive* commentary is consistent with separation-of-powers principles") (emphasis added) (citing *Mistretta*, 488 U.S. at 390; *United States v. Fox*, 631 F.3d 1128, 1133 (9th Cir. 2011)).

The Supreme Court also makes clear "[t]he functional purpose of commentary (of the kind at issue here [*i.e.*, interpreting the term 'crime of violence']) is to assist in the interpretation and application of" the actual guidelines. *Stinson*, 508 U.S. at 45. Every federal circuit acknowledges the commentary is inherently limited by the actual text of the guideline.

For example, the Fourth Circuit holds the guidelines' commentary "does not have freestanding definitional power" and only has force insofar as it interprets or explains a guideline's text. *United States v. Leshen*, 453 F. App'x 408, 413-15 (4th Cir. Nov. 10, 2011) (finding prior state sex offenses did not qualify as crimes of violence, despite government argument that offenses fell within the commentary); *accord United States v. Shell*, 789 F.3d 335, 340-41 (4th Cir. 2015) ("[T]he government skips past the text of § 4B1.2 to focus on its

commentary," but "it is the text, of course, that takes precedence."). Following this principal, the Tenth Circuit rejected the government's suggestion that it need not qualify manslaughter as a crime of violence under the text of § 4B1.2 because manslaughter was listed in the commentary. *United States v. Armijo*, 651 F.3d 1226, 1236 (10th Cir. 2011). The Tenth Circuit found that, if this were the case, the commentary would be "utterly inconsistent with the language of § 4B1.2(a)." *Id.* at 1236-37.[2]

Thus, guideline commentary has no freestanding definitional power. The only valid function of commentary is to interpret or explain the text of a guideline. Commentary that does not interpret or explain any existing text of a guideline is invalid, and commentary that is

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[2] *See also United States v. Chuong Van Duong*, 665 F.3d 364, 368 (1st Cir. 2012) (disregarding application note that conflicted with text of guideline); *United States v. Piper*, 35 F.3d 611, 617 (1st Cir. 1994) (conflicting commentary "carries no weight"); *United States v. Potes-Castillo*, 638 F.3d 106, 111 (2d Cir. 2011) (rejecting government reading of commentary that was inconsistent with text of guideline); *United States v. Cruz*, 106 F.3d 1134, 1139 (3d Cir. 1997) (disregarding commentary to the extent that it appeared to require greater scienter than text of guideline); *United States v. Dison*, 330 F. App'x 56, 61-62 (5th Cir. May 14, 2009) ("[I]n case of an inconsistency between an Application Note and Guideline language, we will apply the Guideline and ignore the Note."); *United States v. Webster*, 615 F. Appx. 362, 363 (6th Cir. 2015) ("As a general matter, the text of a guideline trumps commentary about it."); *United States v. Raupp*, 677 F.3d 756, 759 (7th Cir. 2012) (finding guideline commentary authoritative unless it conflicts with the text); *United States v. Stolba*, 357 F.3d 850, 852-53 (8th Cir. 2004) (rejecting enhancement arguably supported by commentary that conflicted with the guideline because "the proper application of the commentary depends upon the limits—or breadth—of authority found in the guideline"); *United States v. Landa*, 642 F.3d 833, 836 (9th Cir. 2011) (stating if there is a potential conflict between the text and the commentary, the text controls); *United States v. Armijo*, 651 F.3d 1226, 1236-37 (10th Cir. 2011) (rejecting government's claim that, because offense was listed in commentary, there was no need for it to qualify under *Begay*'s interpretation of the residual clause, as "[t]o read application note 1 as encompassing non-intentional crimes would render it utterly inconsistent with the language of § 4B1.2(a)"); *United States v. Wilks*, 464 F.3d 1240, 1245 (11th Cir. 2006) (commentary is not binding if it contradicts the "plain meaning of the text" of guidelines); *United States v. Fox*, 159 F.3d 637, 1998 WL 388801, at *2 (D.C. Cir. May 6, 1998) (rejecting commentary that purports to "substantially alter[]" the requirements of guideline's text because commentary has force "only to the extent that it is not inconsistent with the text").

inconsistent with or a plainly erroneous reading of the existing guideline's text must be disregarded in favor of the text.

The offenses listed in § 4B1.2's commentary that are not also listed in § 4B1.2(a)(2)'s enumerated offense clause are murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, extortionate extension of credit, and burglary of a dwelling. U.S.S.G. § 4B1.2 cmt. n.1. Several of these offenses, as defined by applicable statutes, have been held or can be shown *not* to satisfy the force clause.[3]

When the offense at issue does not satisfy the force clause under the categorical approach (or the modified categorical approach if it applies), the commentary listing the offense must be disregarded because, after *Johnson*, the commentary does not interpret any existing text of the guideline and is also flatly inconsistent with the remaining guideline text. Moreover, even if the commentary could be argued to be valid in a particular case, the commentary offense must still satisfy the *generic* definition of that offense. *Taylor,* 495 U.S. at 600-02 (1990).

3. Nevada robbery does not satisfy the generic definition of robbery

Even if this court disagrees with Mr. McFeely and finds that robbery is an enumerated offense for the purposes of evaluating whether robbery is a crime of violence under 4B1.2, Nevada robbery is still not a crime of violence because it fails to meet the generic definition of robbery.

The Ninth Circuit has previously acknowledged robbery under California law is broader than the generic form of robbery because it includes threats to property. *United States v. Becerril-Lopez*, 541 F.3d 881, 891 (9th Cir. 2008). *Becerril-Lopez* is applicable here insofar as Nevada robbery is "very similar" to California's robbery and, "[i]n the ordinary case, conduct

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[3] *See, e.g., Becerril-Lopez*, 541 F.3d at 891 (finding robbery under California Penal Code § 211 does not meet the physical force clause); *see also United States v. Woods*, 576 F.3d 400 (7th Cir. 2009) (stating no one contends involuntary manslaughter under Illinois Criminal Code § 720 5/4-6 meets the force clause).

satisfying the definition of robbery in California would also satisfy the definition of robbery in Nevada." *United States v. Prince*, 772 F.3d 1173, 1178 (9th Cir. 2014). The Nevada definition of robbery includes violence against property, the same issue that causes the California robbery statute to be overbroad. Thus, Nevada's robbery statute is broader than generic robbery. *Becerril-Lopez*, 541 F.3d at 891.

Becerril-Lopez, while acknowledging the mismatch between generic robbery and the state statute at issue, created a hybrid offense involving some but not all of the elements of both robbery and extortion to create a crime of violence under § 2L1.2— a "robtortion." The panel stated that, if California robbery "involved a threat not encompassed by generic robbery, it would necessarily constitute generic extortion and therefore be a 'crime of violence' under U.S.S.G. § 2L1.2." *Becerril-Lopez*, 541 F.3d at 892 (citation omitted).

Five years after *Becerril-Lopez*, the Supreme Court clarified the categorical approach, reminding courts to "look only to the statutory definitions—*i.e.*, the elements—of a defendant's [offense] and not to the particular facts underlying [the offense]" in determining whether the offense qualifies as a "crime of violence." *Descamps*, 133 S. Ct. at 2283. The categorical approach requires courts to 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). When the most innocent conduct penalized by a statute does not constitute a "crime of violence" under § 4B1.2, the conviction is not a categorical match and the inquiry must end. *United States v. Wenner*, 351 F.3d 969, 972 (9th Cir. 2003); *see also Descamps*, 133 S. Ct. at 2286. *Descamps* also reiterated the categorical approach requires courts to"compare the elements of the statute forming the basis of the defendant's conviction with the elements of the 'generic' crime—*i.e.*, the offense as commonly understood." 133 S. Ct. at 2281. Under the categorical approach, a prior conviction qualifies as a predicate only if "the statute's elements are the same as, or narrower than, those of the generic offense." *Id.*

Descamps prohibits the mixing and matching of elements undertaken in *Becerril-Lopez* to create a hybrid generic offense. Under *Descamps*, "if the statute sweeps more broadly than the generic crime, a conviction under that law cannot count as an ACCA predicate, even if the defendant actually committed the offense in its generic form." *Descamps*, 133 S. Ct. at 2283. When "the statute of conviction 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 2292 (emphasis added). In this case, there is a mismatch between Nevada robbery and the generic federal robbery.

4. Nevada robbery is indivisible and does not satisfy 2010 Johnson's requisite level of force

Because robbery was not an enumerated offense at the time Mr. McFeely committed this offense, because the commentary does not have freestanding definitional power, and because, regardless, Nevada robbery does not match the federal generic definition of robbery, the only way that Mr. McFeely's conviction for robbery would constitute a crime of violence is if it satisfied the physical force clause of 4B1.2.

The physical force clause states that a "crime of violence" must "ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another." U.S.S.G. § 4B1.2(a)(1). Under the categorical approach, the sentencing court must ask whether the statutory definition of the prior offense, whether a federal or state statute, requires proof the defendant used, attempted to use, or threatened to use physical force against another person. *United States v. Snyder*, 5 F.Supp.3d 1258, 1262 (D. Or. 2014) (appeal pending). The "physical force" must be "violent force" or "force capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140 (2010) ("*Johnson* 2010"). The use of force must be intentional and not merely reckless or negligent. *United States v. Lawrence*, 627 F.3d 1281, 1284 (9th Cir. 2010); *see also Leocal v. Ashcroft*, 543 U.S. 1, 12-13 (2004). A

statute simply stating the words "violent force" or a combination of those words is not enough to comport with the *Johnson* 2010 definition. *Johnson*, 559 U.S. 133 (2010).

The sentencing court must determine whether the statute of conviction criminalizes conduct not included in U.S.S.G. § 4B1.2's definition of "crime of violence." At this stage in the analysis, the court must compare *Johnson* 2010's definition of violent force to the statute of conviction's definition of violence and/or force. Ultimately, if the statute of conviction criminalizes conduct that does not amount to the *Johnson* 2010 threshold of "violent force," the statute is overbroad.

If the sentencing court finds the statute overbroad—meaning the statute of conviction criminalizes conduct not included in U.S.S.G. § 4B1.2's definition of "crime of violence"—then the court must determine whether the statute of conviction is divisible and can be divided into violations that constitute crimes of violence under § 4B1.2 and others that do not. *See United States v. Dixon*, 805 F.3d 1193, 1196 (9th Cir. 2015) (citing *Descamps*, 133 S. Ct. at 2283-84; *Rendon v. Holder*, 764 F.3d 1077, 1084-86 (9th Cir. 2014)). This divisibility analysis occurs whether the government's attempt to show a crime is one of violence under the physical force clause or enumerated clause.

To be divisible, the "statute must contain 'multiple, alternative elements of functionally separate crimes.'" *Dixon*, 805 F.3d at 1196 (quoting *Rendon*, 764 F.3d at 1085)). If the "statute is divisible, a court may then take into consideration certain documents, such as charging documents or a plea agreement, to determine whether the defendant was convicted of violating a prong of the statute that meets the" definition of a crime of violence under § 4B1.2. *Dixon*, 805 F.3d at 1196 (citing *Rendon*, 764 F.3d at 1083-84). If, however, the statute at issue defines as criminal more conduct than is included in § 4B1.2's definition of crime of violence, the statute is ***not divisible***, and a conviction under that statute cannot serve as a predicate crime of violence conviction for the purpose of increasing a defendant's sentencing range under the Guidelines. *See Dixon*, 805 F.3d at 1196 (citing *Descamps*, 133 S. Ct. at 2283-86).

Notably, a statute is not divisible merely because it is worded in the disjunctive. *Dixon*, 805 F.3d at 1198. Rather, the court must determine whether a disjunctively worded phrase supplies "alternative elements" that are essential to a jury's finding of guilt or "alternative means" that are not required for a finding of guilt. *Id.* That is, to be divisible, a statute must contain alternative elements requiring the prosecutor to "select the relevant element from its list of alternatives." *Id.* (*quoting Rendon*, 764 F.3d at 1085). A statute is not divisible if it contains only "alternative means, meaning a jury need not agree as to how the statute was violated, only that it was." *Dixon*, 805 F.3d at 1198.

The feature that distinguishes elements from means is the need for juror agreement. *Descamps*, 133 S. Ct. at 2298. If the statute is divisible, the government must then show that the specific subsection the defendant was convicted under is a categorical match to the generic federal offense. If the government is unable to do this, the inquiry ends and the crime cannot be considered a crime of violence.

Nevada robbery has two disjunctively worded phrases that contribute to the statute's overbreadth: "force or fear" and "person or property." Nev. Rev. Stat. § 200.380. Nevada law does not require unanimity as to whether a person used force, violence, or fear of injury to accomplish a taking. In fact, the jury instruction in *Aquino v. Neven*, No. 2:11-cv-01587, 2015 WL 4997272, * 3-4 (D. Nev. Aug. 20, 2015), tracked the language in the robbery statute.[4] Both

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[4] The robbery jury instruction stated:

> Robbery is the unlawful taking of personal property from the person of another, or in her presence, against her will, by means of force or violence or fear of injury, immediate or future, to her person or property. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking, in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

Aquino v. Neven, No. 2:11-cv-01587, 2015 WL 4997272, * 3-4 (D. Nev. Aug. 20, 2015).

the robbery statute at issue in this case and the jury instruction in *Aquino* explains that a robbery occurs by "means of force or violence or fear of injury." There is no indication that the jury must find either force, violence, or fear of injury in order to support the conviction. Instead, and as the *Acquino* court noted, "to prove that a defendant committed robbery, the State need not prove that the defendant took the victim's property by means of fear. Rather, the State can alternatively carry its burden of proof by showing that the defendant took the victim's property by means of force or violence." *Id.* at * 4. There is no need for the jury to agree on which method of committing the offense the defendant used. Thus, the disjunctively worded phrases in the statute and the jury instruction in *Acquino* demonstrate the robbery statute provides alternate means, not alternative elements of the crime.

Jury unanimity is also not required with respect to whether an accused makes threats to a person or threats to property. *See Acquino*, 2015 WL 4997272, at * 3. The jury instruction simply states that the taking be "against her will, by means of force or violence or fear of injury, immediate or future, to her person or property." *Id.* There is no need for the jury to determine whether the taking was to the person or the property.

This lack of jury unanimity clearly demonstrates that the robbery statute provides alternative means, not alternative elements of the crime and is therefore indivisible. Consequently, the Nevada robbery statute is a not crime of violence within the meaning of the physical force clause and therefore does not qualify as a crime of violence under 4B1.2.

B. The Possession of a Controlled Substance for the Purpose of Sale conviction does not qualify as a "controlled substance offense"

To determine whether a prior conviction qualifies as a "controlled substance offense" under U.S.S.G. § 4B1.2, courts use the approach set forth in *Taylor v. United States*, 495 U.S. 575, 602 (1990). *United States v. Charles*, 581F.3d 927, 934 (9th Cir. 2009). The *Taylor* approach instructs sentencing courts to "look only to the statutory definitions, i.e. the elements of a prior offense, and not the particular facts underlying those convictions when making a

comparison between a prior conviction and a federal generic crime." *See Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013). If this approach, which *Descamps* prescribes as the starting point, reveals that the elements of the state crime are the same or narrower than the elements of the generic federal offense, then the state crime is a categorical match and every conviction under that state statute serves as a predicate generic federal offense. *See Id.*; *Taylor*, 495 U.S. at 599.

When a state statue is "overbroad," meaning that it criminalizes conduct that goes beyond the elements of the federal offense, we turn to step two: determining whether the state statute is "divisible" or "indivisible." *Descamps*, 133 S. Ct. at 2283; *Medina-Lara v. Holder*, 771 F.3d 1106, 1111 (9th Cir. 2014)). A statute is divisible if a jury must unanimously agree on the particular offense of which the defendant has been convicted. *Lopez-Valencia*, 798 F.3d 863, 869 (9th Cir. 2015). A statute is indivisible if the jury may disagree on the facts at issue, yet still convict. *Id.* If the state statute is indivisible, our inquiry ends, because a conviction under an indivisible overbroad statute can never serve as a predicate offense. *Id.* at 868.

Only when a state statute is overbroad and divisible do we turn to step three-the modified approach. *Descamps v.* U.S., 133 S. Ct. at 2285. At this step, we may examine certain documents from the record of conviction to determine the elements of the divisible statute the defendant was convicted of violating. *Id.* (*citing Shepard v. U.S.*, 544 U.S. 13, 26). The modified approach merely helps implement the categorical approach when a defendant was convicted of violating a divisible statute. *Id.* The modified approach thus acts not as an exception, but instead as a tool. *Id.* It retains the central feature of the categorical approach: a focus on the elements, rather than the facts, of a crime. *Id.*

Recently, in *Mathis*, the Supreme Court resolved a circuit split over whether there is an exception to the established rule that a defendant's crime of conviction can count as a predicate only if its elements match those of a generic offense, when a statute happens to list various means by which a defendant can satisfy an element. *United States v. Mathis*, 136 S. Ct. 2243

(2016). The Supreme Court reiterated that it is impermissible for "a particular crime [to] sometimes count towards enhancement and sometimes not, depending on the facts of the case." *Id.* at 2251 (*quoting Taylor v.* U.S., 495 U.S. at 601). "A sentencing judge may look only to the elements of the [offense] not to the facts of [the] defendant's conduct." *Id.*

The Supreme Court in *Mathis* further held that that there is no exception to the rule when the crime of conviction enumerates various alternative factual means of satisfying a single element. *Id.* Therefore, if a state crime enumerates various factual means of satisfying a single element, the state crime is indivisible and the modified categorical approach is not applicable. *See Id.* Accordingly, an indivisible state statute can never serve as a predicate generic federal offense even if the defendant's actual conduct (i.e. the facts of the crime) fits within the generic offense's boundaries. *See Id.* at 2248.

1. Nev. Rev. Stat 453.337 punishes conduct that is not punishable under the federal Controlled Substances Act and is, therefore, overbroad

According to the PSI, Mr. McFeely's conviction for Possession of a Controlled Substance with intent to Sell qualifies as a "controlled substance offense" under U.S.S.G. §4B1.2. A controlled substance offense is defined as:

> [A]n offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of 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.

U.S.S.G. § 4B1.2(b). The Ninth Circuit has interpreted the term "controlled substance" as used in the federal guidelines and held it must be a controlled substance listed in the Controlled Substances Act. *United States v. Leal-Vega*, 680 F.3d 1160, 1167 (9th Cir. 2012). While it is

true *Leal-Vega* dealt with "controlled substance offense" in the context of U.S.S.G. §2L1.2. the rationale employed by that court applies with equal force in the context of U.S.S.G. §4B1.2.

First, the Ninth Circuit explained that there is no meaningful differences between U.S.S.G. §4B1.2's "controlled substance offense" and U.S.S.G. §2L1.2's definition of "drug trafficking offense." *United States v. Charles*, 581 F.3d 927, 934-35 (9th Cir. 2009).

Second, as *Leal-Vega* recognized,

> [t]he underlying theory of *Taylor* is that a national definition of the elements of a crime is required so as to permit uniform application of federal law in determining the federal effect of prior convictions.... Without defined elements a comparison of the state statute with a federally-defined generic offense is not possible.

Id. at 1165 (quoting *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 11558 (9th Cir. 2008)). The court in *Leal-Vega* went on to explain that "[t]he purpose of the generic definition as envisioned in *Taylor* was to ensure that there is some 'uniform definition independent of the labels employed by various [s]tates' criminal codes.'" *Id.* at 1166 (quoting *United States v. Aguila–Montes de Oca*, 655 F.3d 915, 920 (9th Cir.2011) (en banc)). When applying *Taylor* principles to determine whether a California drug statute qualified as a "drug trafficking offense," *Leal-Vega* made clear that "the meaning of 'drug trafficking offense' should not 'depend on the definition adopted by the State of conviction.' *Id.* (quoting Taylor, 495 U.S. at 589, 110 S.Ct. 2143; see also *United States v. Hudson*, 6 18 F.3d 700, 703–05 (7th Cir.2010) ("There is no reason why the guidelines [sic] must be restricted to a particular state's concept of what is meant by that term."). Ultimately, the *Leal-Vega* court found as follows:

> In order to effectuate the goal set forth in Taylor of arriving at a national definition to permit uniform application of the Sentencing Guidelines, we hold that the term "controlled substance," as used in the "drug trafficking offense" definition in U.S.S.G. § 2L1.2, means those substances listed in the CSA.

Id. at 1167. This same logic extends to interpreting the meaning of a "controlled substance offense" under U.S.S.G. §4B1.2.

Turning to the state statute in question, Nev. Rev. Stat. 453.337(1) makes it a crime 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." Nev. Rev. Stat. 453.337(1). The schedules relate to substances scheduled under Nevada state law. The relevant federal generic offense under the Controlled Substances Act is 21 U.S.C. § 841(a)(1), which states that "it shall be unlawful for any person knowingly or intentionally (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance."

At first blush, the elements of Nev. Rev. Stat. 453.337 and 21 U.S.C. § 841(a)(1), the most closely resembling generic federal offense, may appear to "match" such that Nev. Rev. Stat. 453.337 categorically qualifies as a drug trafficking offense. But it does not. Nevada, through its Schedules I and II, criminalizes the possession of more substances than does federal law. For example, Nevada listed 1,4-Butanediol in Schedule I, and Benzolyecgonine in Schedule II. *See* Nev. Admin. Code 453.510-520 (2010). Neither of these drugs are scheduled federally.

Accordingly, Mr. McFeely could have been convicted under Nev. Rev. Stat. 453.337 of a felony for possessing with intent to sell Benzolyecgonine. But that person would not have been subject to prosecution for possession of that same substance under federal law. Because Nev. Rev. Stat. 453.337 punishes possession with intent to sell controlled substances that are not illegal to possess with the intent to sell under federal law, Nev. Rev. Stat. 453.337 is therefore overbroad.

2. Nev. Rev. Stat 453.337 is not divisible

If a statute is categorically overbroad, this Court may turn to the modified categorical approach by reviewing a limited number of judicially admissible documents to determine if the

defendant admitted or the prior court found conduct to narrow down the overbroad statute. *Shepard v. United States*, 544 U.S. 13, 24 (2005). But this Court may only employ the modified categorical approach if "a divisible statute formed the basis of the defendant's conviction." *Descamps v. United States*, ---U.S.---, 133 S. Ct. 2276, 2293 (2013).

As the Ninth Circuit recently explained, "*Descamps* addressed the proper method for distinguishing divisible statutes from indivisible statutes. The critical distinction is that while indivisible statutes may contain multiple, alternative *means* of committing the crime, only divisible statutes contain multiple, alternative *elements* of functionally separate crimes." *Rendon v. Holder*, 764 F.3d 1077, 1084-85 (9th Cir. 2014) (emphasis in original). "To be clear, it is black-letter law that a statute is divisible only if it contains multiple alternative elements, as opposed to multiple alternative means. Thus, when a court encounters a statute that is written in the disjunctive (that is, with an 'or'), that fact alone cannot end the divisibility inquiry." *Id.* at 1086 (citation omitted); *see also United States v. Dixon*, 805 F.3d 1193, 1198 (9th Cir. 2014). Rather, the court must determine whether a disjunctively worded phrase supplies "alternative elements" that are essential to a jury's finding of guilt or "alternative means" that are not required for a finding of guilt. *Id.*

The feature that distinguishes elements from means is the need for juror agreement. *Descamps*, 133 S. Ct. at 2298. To be divisible, a statute must contain alternative elements requiring the prosecutor to "select the relevant element from its list of alternatives." *Dixon*, 805 F.3d at 1198 (quoting *Rendon*, 764 F.3d at 1085). Divisibility "hinges on whether the jury must unanimously agree on the fact critical to the federal statute." *Lopez-Valencia v. Lynch*, 798 F.3d 863, 868-69 (9th Cir. 2015) (citing *Rendon*, 764 F.3d at 1085). If "'the jury may disagree' on the fact at issue 'yet still convict,'" then the statute is indivisible. *Id.* at 869. The Supreme Court in *Mathis* further held that that there is no exception to the rule when the crime of conviction enumerates various alternative factual means of satisfying a single element. *Mathis*, 136 S. Ct. at 2251.

Nev. Rev. Stat. 453.337 is not divisible. As stated above, Nev. Rev. Stat. 453.337 makes it a crime to 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." The presence of the word "or" between the substances in Nev. Rev. Stat. 453.337 does not render the statute divisible. Importantly, "[i]t is well-established [in Nevada] that jurors do not have to agree on the preliminary factual issues which underlie a verdict, so long as they agree that the crime occurred." *James v. State*, No. 57178, 2012 WL 5378147, at *8 (Nev. Oct. 31, 2012) (unpublished order). Thus, it is conceivable that a jury could convict a defendant for Possession with Intent to Sell without reaching an agreement as to substance the defendant sold.

Of note, the District Attorney's office in Nevada both charges multiple controlled substances in a single count and takes the official position in litigation that the specific controlled substance at issue is a means and not an element. (Exhibit A, Nevada Amended Information and State's Opposition to Defendant's Motion to Dismiss)("The 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.") This circumstance overwhelmingly militates in favor of the conclusion that Nev. Rev. Stat. 453.337 is indivisible.

As shown above, Nev. Rev. Stat. 453.337 is categorically overbroad. Therefore, a conviction under the statute does not qualify as a "controlled substance offense" under U.S.S.G.§ 4B1.2. As a result, the 2011 conviction for Possession of Controlled Substance with Intent to Sell cannot form the basis of a higher offense level.

II. MR. MCFEELY REQUESTS A SENTENCE OF 46 MONTHS IN LIGHT OF THE 3553(A) FACTORS

Title 18, Section 3553(a) of the United States Code directs sentencing courts to impose the minimally-sufficient sentence to achieve the statutory purposes of punishment—justice, deterrence, incapacitation, and rehabilitation—by imposing a sentence sufficient, but not

greater than necessary, to comply with the purposes set forth in 18 U.S.C. § 3553(a)(2). *Kimbrough v. United States*, 552 U.S. 85, 101 (2007). Section 3553(a) represents a cap above which this Court is statutorily prohibited from sentencing, even when a greater sentence may be recommended by the Sentencing Guidelines. *Id.* The Guidelines are statutorily subordinate to the parsimony principle of § 3553. *Id.*

Section 3553(a)(2) states that the sentence imposed in any case should fulfill the following needs: (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. 18 U.S.C. § 3553(a)(2).

Section 3553(a) further directs sentencing courts to consider, inter alia, the nature and circumstances of the offense and the history and characteristics of the defendant, the kinds of sentences available, the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct, and the need to provide restitution to any victims of the offense. 18 U.S.C. § 3553(a)(1), (3), (6), (7).

A sentence of 46 months is "sufficient, but not greater than necessary" to address the factors of 18 U.S.C. § 3553.

A. Mr. McFeely's history and characteristics

Mr. McFeely was raised in the small town of Susanville, California where he lived with his mother and older sister. He was a bright child and very socially adept and friendly. He recalls an overall good childhood until the age of nine when he was molested by a family friend. His mother caught the family friend in the act and called the police. The molestation ended that day, but Mr. McFeely struggled with the experience emotionally for years thereafter and recalls feeling angry and hurt. Despite this early adversity, Mr. McFeely did well in school, loved

sports and was well-liked. When he was eleven Mr. McFeely suffered from appendicitis and it was diagnosed after the organ ruptured. Mr. McFeely became septic and underwent emergency surgery and was in a fragile condition for a period thereafter. He recalls that the experience further shook his sense of safety and security and left him a very anxious child.

After that hospitalization, his family moved to Reno, Nevada and shortly thereafter his mother was diagnosed with cancer and was given a poor prognosis. He had recently lost his grandparents and recalls not having the emotional tools to handle his grief and fear. He was also in the throes of adolescence and felt a loss of a sense of control over his life and future. He turned to drugs and alcohol and started hanging around with a bad crowd in school. He ended up going to prison at the young age of nineteen following a robbery conviction. Mr. McFeely experienced severe trauma in prison. He was young. His brain was not even fully developed. He was jumped and beaten with a mop ringer. He survived riots and observed horrific acts of violence. He spent almost three years of his sentence in solitary confinement. Solitary confinement entails confinement behind a solid steel door for 22 to 24 hours a day, severely limited contact with other human beings, infrequent phone calls and rare non-contact family visits, extremely limited access to rehabilitative or educational programming, grossly inadequate medical and mental health treatment and restricted reading material and personal property. It has long been noted that solitary confinement, a measure used frequently in America's prison system, has dramatic and deleterious effects on the psychological and physical health of those placed in it. See Weir, Kristin, *Alone, in 'the hole' Psychologists probe the mental health effects of solitary confinement* (May 2012)(available at http://www.apa.org/monitor/2012/05/solitary.aspx). Mr. McFeely recalls having no idea how to navigate this dangerous world and how to survive alone in a cell. Mr. McFeely tried to take advantage of whatever programming there was in prison and did manage to obtain his GED in prison and successfully complete the Commitment to Change and Anger Management program. (Exhibit B)

Mr. McFeely was out of custody between 2008 and 2016 with the exception of a few days. After he was released in 2008 it took Mr. McFeely time to adjust to the free world and to being around other people. He was badly shaken by his experience. Eventually he got a job and started going to school to obtain his culinary arts degree. (See Exhibit C, Report Card for Summer Bridge Program). He became close with his current fiancée, Latosha Lee, who helped him find stability and peace and generally reintegrate back into society. He spent time with her children and found that he loved being a father figure to them. They call him dad. Latosha Lee has a kidney disease and he helped her manage her health and the two of them shouldered the burden of caring for Mr. McFeely's mother who has significant health problems. Mr. McFeely's mother has various health problems including Multiple Sclerosis and Diabetes. She was and is Oxygen at night and periodically throughout the day. She takes injectable insulin and multiple other medications. Moreover, she suffers from polyps and other adverse effects associated with her previous treatment for colon cancer. With Mr. McFeely's help she was able to stay medically stable.

Mr. McFeely also engaged in a great deal of volunteer work before he went to prison in connection with his revocation of probation. Evelyn Mount is Latosha Lee's grandmother and through her, Mr. McFeely became involved in food drives, feeding the homeless bimonthly, Thanksgiving and Christmas holiday food box giveaways. He prepared over 500 backpacks for children in the community before school started. In the five years he has been with Ms. Lee, he has become far more involved with this community.

Mr. McFeely was generally doing well until he was in a life altering motorcycle accident that almost killed him. It left him out of commission for a few years in many respects and in chronic pain. His body was never the same again. He was and is limited physically. He was depressed and in pain, suffering from the physical effects of his accident and symptoms associated with Post-Traumatic Stress Disorder. He discovered around this time that Ecstasy or MDMA alleviated many of his symptoms.

What Mr. McFeely describes with regard to MDMA mitigating his symptoms has a basis in clinical literature. Indeed, the treatment possibilities of MDMA are currently being explored by researchers with very promising results. "MDMA, often known as Ecstasy or Molly, has for decades been used as a party drug — consumed in clubs, fuel for all-night raves. But lately, the substance is also being used in very different settings, for a very different purpose: to treat post-traumatic stress disorder. The Food and Drug Administration has approved phase two clinical studies of the treatment, and they're now underway in four locations. Results so far have been promising." From Club To Clinic: How MDMA Could Help Some Cope With Trauma, National Public Radio, September 13, 2015 (available at http://www.npr.org/2015/09/13/439963019/researchers-turn-to-popular-club-drug-to-treat-ptsd).

In 2014, when Mr. McFeely was riding on his motorcycle, he was pulled over and found in possession of twenty pills of Ecstasy. Those pills were never trafficked and never possessed with the intent to distribute. They were for personal use. He pled guilty to possession with intent to distribute to avoid a trafficking charge based on the weight of the pills and the parties and the court understood this and accepted the plea as a legal fiction. (Exhibit D, transcript of proceedings in Case No. CR14-1745)(3:22-4:4)(9:10-13)(Nordvig: For the Court's information, this is a legal fiction. The Court: And that is coming off of a trafficking or what/ So it is a reduction? Nordvig: It is a reduction. A pill case, your Honor. So – it is done by weight. And that's part of the reason)(The Court: All right, in your own words, what did you do that leads you to this situation. The Defendant: Umm, that day I bought some pulls for the purpose of use.").

Mr. McFeely was ultimately sentenced to three years of probation. During the year of probation he was on before he was revoked, he went to counseling (Exhibit E, certificates), he maintained a job, working sixty hours a week. He continued to develop his relationship with his fiancée Latosha Lee and take care of her three children. He continued his volunteer work.

Notably, since Mr. McFeely has been in prison, his mother has had to move out of the home she shared with him and Ms. Lee and move in with her niece.

With respect to this offense, Mr. McFeely did go to the shooting range with his fiancée and they did possess firearms that they both enjoyed shooting. Nevertheless, the firearms were never used in connection with any criminal activity. And were kept and maintained for sporting purposes. When Mr. McFeely was arrested in connection with this case, he was cooperative. He ultimately had his probation revoked and his suspended sentence imposed because of his arrest in connection with this case.

In this case, he pled without the benefit of a plea agreement. He has taken responsibility with his actions. His hope is that his fiancée, who plans to marry him while he is in custody, will wait for him and they can continue their lives together. They both understand that Mr. McFeely can never possess firearms again. (Exhibit F, Letters of Support).

B. The Nature and seriousness of the offense, respect for the law and just punishment

The Supreme Court in *United States v. Booker*, 543 U.S.220, 125 S. Ct. 738 (2005), found critically important that a defendant's sentence consist of "a strong connection between the sentence imposed and the offender's **real conduct.**" *Booker* at 220 U.S. 246, 125 S. Ct. 757 (emphasis added).

Mr. McFeely stands convicted of a serious offense, but it must be remembered that this is a status offense. But for his status as a felon, the underlying conduct would not be illegal. There is no victim and no harm to any individual as a result of this offense. Both Mr. McFeely and his fiancée grew up with firearms. Mr. McFeely's father was in the Navy. Moreover, he grew up going to shooting ranges and having firearms at home. Mr. McFeely possessed the guns at issue for the purposes of going to the shooting range with his fiancée. The guns were never used in connection with any crime nor were they intended to be used in such a manner. Indeed, the firearms were technically owned by Mr. McFeely's fiancée though Mr. McFeely

possessed them within the meaning of the law. (PSR at 54). Two of them were purchased by her and one was purchased for her by him for her birthday present. The firearms were out that day because they did not have the kids that day, so took them out in order to clean them and go to the shooting range together. Mr. McFeely shouldn't have possessed a firearm because he had a felony conviction but context is important. Particularly given this context, the recommended sentence of 98 months is grossly disproportionate to the gravity of the offense.

Moreover, Mr. McFeely has already been punished for the conduct underlying this case in other ways that should be taken into account in deciding the sentence in this case. At the time of the instant offense Mr. McFeely was under a probationary sentence for his 2014 conviction for possession of a controlled substance for sale. The conviction involved Mr. McFeely possessing 20 pills of Ecstasy that Mr. McFeely had for personal use. Mr. McFeely had been sentenced to probation and a suspended sentence in connection with that offense. After one year of probation during which Mr. McFeely was gainfully employed, working sixty hours a week, engaged to be married and taking care of his mother, he had his probation revoked as a result of the conduct underlying this case and was sentenced to the suspended term of imprisonment –twelve to thirty two months. Moreover, that revocation of probation had important consequences in this case as well. Mr. McFeely went from receiving one criminal history point for this 2014 conviction, to five points as the conviction itself now garners three points in light of the revocation and the circumstance that Mr. McFeely was under a criminal justice sentence gives Mr. McFeely two more points. Years in custody have already been added to Mr. McFeely's life as a result of the conduct in this case. A just sentence must take that circumstance into account.

C. Protection of the Public

A sentence of forty-six months adequately protects the public. A sentence of almost four years consecutive to his state sentence is very severe punishment for this offense. Moreover, it is likely that Mr. McFeely will be sentenced to three additional years of supervised release after

he finishes prison. This proposed sentence adequately protects the public. Mr. McFeely is engaged to be married to Latasha Lee. She has no criminal history. She is gainfully employed and the mother of three children. Mr. McFeely also reports, and Ms. Lee confirms, that during the years prior to this offense, he had made important strides in terms of his general stability. Particularly in the year prior to this offense, Mr. McFeely was working more than full time, taking care of Ms. Lee's three children and his mother. He was volunteering once a month at the homeless shelter downtown and doing volunteer work with Evelyn Mount's community outreach. Mr. McFeely did not use the firearms at issue in connection with any criminal activity. While under supervision, Mr. McFeely will be closely monitored by the Department of Probation. He will receive treatment and therapy as needed. The public needs no additional protection from Mr. McFeely.

D. The Need to Avoid Unwarranted Sentencing Disparities

Title 18 U.S.C. § 3553(a)(6) states the Court should consider avoiding "unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." The proposed sentence is a guideline sentence under the correct guideline in this case. Moreover, a sentence of 46 months for a status offense even a serious one, does not create any disparities and certainly no unwarranted disparities.

III. CONCLUSION

The offenses of Nevada robbery and possession of a controlled substance for the purposes of sale do not constitute a crime of violence or controlled substance offense, respectively. The correct base offense level is 20 pursuant to 2K2.1(a)(4)(B). After adding two levels pursuant to subsection (b(1), the final offense level before acceptance is a 22 and 19 after acceptance of responsibility. The correct guideline range is 46-57 months. In addition or in the

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alternative, a sentence of 46 months consecutive to the state sentence is appropriate in this case in light of the 3553(a) factors.

DATED this 7th day of October 2016.

RENE L. VALLADARES
Federal Public Defender

By: */s/ Lauren Gorman*
LAUREN GORMAN
Assistant Federal Public Defender
Attorney for Devon Carl Jordan McFeely

CERTIFICATE OF ELECTRONIC SERVICE

The undersigned hereby certifies that she is an employee of the Federal Public Defender for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on October 11, 2016, she served an electronic copy of the above and foregoing DEFENDANT'S SENTENCING MEMORANDUM by electronic service (ECF) to the person named below:

DANIEL G. BOGDEN
United States Attorney
MEGAN RACHOW
Assistant United States Attorney
333 Las Vegas Blvd. So. 5th Floor
Las Vegas, NV 89101

/s/ Bonnie S. Bell
Employee of the Federal Public Defender

CA No. 16-10388

District Court No. 2:15-cr-00176-KJD-GWF

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GIBRAN RICHARDO FIGUEROA-BELTRAN,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

GOVERNMENT'S RESPONSE TO APPELLANT'S MOTION FOR JUDICIAL NOTICE AND TO SUPPLEMENT RECORD ON APPEAL

STEVEN W. MYHRE
Acting United States Attorney

ELIZABETH O. WHITE
Appellate Chief

NANCY M. OLSON
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Attorneys for the United States

Date submitted: April 3, 2017

I.

The United States responds in opposition to Defendant-Appellant Gibran Figueroa-Beltran's motion for judicial notice and to supplement the record on appeal. Dkt. Entry 23-1 (filed March 24, 2017). The Court should deny the motion because the incomplete documents submitted by Figueroa-Beltran cannot be used to prove the fact purported by Figueroa-Beltran and the documents will not assist the Court in determining whether the district court erred in applying a 16-level sentencing enhancement, especially where the motion cherry-picked its attachments by including only select state court documents, and where the motion does not disclose that the state court never ruled on the disputed issue. The motion is also an improper attempt to bolster a new argument raised for the first time in reply.

A. The Court Should Not Take Judicial Notice of the Documents Because the Motion Seeks to Use the Documents to Prove a Fact Subject to Reasonable Dispute, and Presents an Incomplete Picture of the Unrelated State Court Proceeding.

1. Analytical Framework

Federal Rule of Evidence 201 allows courts to take judicial notice of "adjudicative facts." Fed. R. Evid. 201. The type of facts that may be

judicially noticed include facts "not subject to reasonable dispute" because those facts are "generally known" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." *Id.*

Court documents that are matters of public record subject to ready determination of their accuracy are typically judicially noticable, "with recognition of the limitation that the judicially noticed fact in each instance is the existence of a document, not the truth of the matters asserted in the documents." *Jarreau-Griffin v. City of Vallejo*, 531 B.R. 829, 830 (E.D. Cal. 2015) (*citing Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006)); *see also Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001) (proper to take judicial notice of "*undisputed* matters of public record" such as fact that defendant signed extradition form, but improper to take judicial notice of disputed facts such as whether waiver was voluntary); *M/V Am. Queen v. San Diego Marine Constr. Corp.*, 708 F.2d 1483, 1491 (9th Cir. 1983) (stating general rule that "a court may not take judicial notice of proceedings or records in another cause so as to supply, without formal introduction of

evidence, facts essential to support a contention in a cause then before it").

"In order for a fact to be judicially noticed under Rule 201(b), indisputability is a prerequisite." *United States v. Jones*, 29 F.3d 1549, 1553 (11th Cir. 1994); *see also Lee*, 250 F.3d at 689–90. Moreover, the arguments raised by the parties in another proceeding do not carry preclusive effect where the issue on appeal was not actually litigated and necessarily decided in that proceeding. *Holder v. Holder*, 305 F.3d 854, 866 (9th Cir. 2002).

2. The Documents Attached to the Motion Do Not Assist the Court Because They Do Not Demonstrate an Indisputable Fact.

The Court should deny the motion because the documents submitted by Figueroa-Beltran do not show a judicially noticeable indisputable facts, *i.e.*, his allegation that "Nevada district attorneys do not treat the identity of the controlled substance as an element of Nev. Rev. Stat. § 453.337." Motion at 3. The fact that one Deputy District Attorney in one county in Nevada made this argument in one case does not create the type of generally known fact about the nature of Nevada Revised Statute § 453.337 that Figueroa-Beltran purports. Notably,

before the Nevada court ruled on the underlying motion to dismiss, the State filed a second amended information charging only distribution of methamphetamine, to which the defendant pleaded guilty. *See* Exhibit 1 (second amended information), Exhibit 2 (Minutes of Change of Plea). Thus the state court provided no authority on which Figueroa-Beltran could rely.

Additionally, the Supreme Court's guidance in *Mathis* does not suggest that examining pleadings filed in a never-decided motion to dismiss in an unrelated state court case will help courts determine whether a particular fact is an element or factual means of committing a crime. *See Mathis v. United States*, 136 S. Ct. 2243, 2256-57 (2016) (directing courts to review a "state court decision definitely aswer[ing] the question," the text of "the statute on its face," and/or "peek at the [record] documents" in *that* case).

At best, the Court could take judicial notice of the facts that these documents were publicly filed and that the Nevada court never issued a ruling on the merits. Because these facts do not assist the Court in deciding the issue on appeal, however, the Court should deny the motion.

3. The Documents Attached to the Motion Do Not Assist the Court Because They Present an Incomplete Picture.

The Court should deny the motion for the additional reason that the documents attached to the motion are cherry-picked from the state court record and present an incomplete and possibly misleading picture regarding the nature of the proceedings. The motion asks the Court to accept as undisputed the purported fact that the identity of a charged controlled substance is a factual means under Nevada law. In support, it attaches (1) limited pleadings from a state court case (a now-superseded information and an opposition to a motion since mooted by a guilty plea), and (2) a federal sentencing memorandum raising similar *Nevada v. Howard* arguments. Motion at 3-4.

The Court should deny the motion because the attached documents will not assist the Court in deciding an issue in this appeal because the motion fails to disclose other pertinent state court documents from *Nevada v. Howard*. Without additional documents providing this Court a complete picture of the arguments made in reply, the fact that the State filed a second amended information, the fact that the defendant pleaded guilty, and importantly the fact that the state court never ruled on the motion to dismiss (which may have provided

some helpful state authority), the documents attached to the motion are unhelpful.

B. The Court Should Deny the Motion Because It Supports an Argument Improperly Raised for the First Time in Reply.

This Court need not consider arguments raised for the first time in a reply brief. *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) ("on appeal, arguments not raised by a party in its opening brief are deemed waived").

The Court should deny the motion because the documents for which Figueroa-Beltran seeks judicial notice are submitted to support an argument raised for the first time in his reply brief. In his opening brief, Figueroa-Beltran argued that Nevada Revised Statute § 453.337 is overbroad and indivisible. *See* OB at 26, 29. Specifically, he argued that the statute is indivisible based on the general principle that jurors do not have to agree on preliminary factual issues (OB 30), and that *Muller v. Sherriff*, 572 P.2d 1245 (Nev. 1977) does not demonstrate divisibility (OB 31). Figueroa-Beltran never claimed that the pleadings in *Nevada v. Howard* demonstrate indivisibility.

Figueuroa-Beltran raised this argument for the first time in reply (Reply Br. at 9), and improperly attempts to bolster the argument by

seeking judicial notice of the documents attached to the motion. The argument appears in the section of the brief replying to the government's argument that the record documents in *this* case show that the statute is divisible. The government did not make any arguments regarding district attorney practices in Nevada; rather, Figueroa-Beltran clearly raised a new argument in reply. Thus, the Court should deny the motion to take judicial notice of documents supporting a waived argument.

C. Supplemental *Nevada v. Howard* Documents

If the Court grants the motion, the government requests that the Court take judicial notice of additional documents from *Nevada v. Howard* so that the Court has a complete picture of the proceedings in that unrelated case. For the Court's convenience, the attached Appendix includes the following: case docket, motion to dismiss, reply to opposition to motion to dismiss, second amended information, guilty plea memorandum, minutes of change of plea, and judgment.

II.

CONCLUSION

For the reasons stated above, the United States respectfully requests that this Court deny the motion for judicial notice and to supplement the record.

Dated this 3rd day of April, 2017.

Respectfully submitted,

STEVEN W. MYHRE
Acting United States Attorney

ELIZABETH O. WHITE
Appellate Chief

s/ Nancy M. Olson
NANCY M. OLSON
Assistant United States Attorney
501 Las Vegas Blvd S., Ste. 1100
Las Vegas, NV 89101
Attorneys for the United States

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing GOVERNMENT'S RESPONSE TO APPELLANT'S MOTION FOR JUDICIAL NOTICE AND TO SUPPLEMENT RECORD ON APPEAL with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the Appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Appellate CM/ECF system.

Dated: April 3, 2017

s/ Maritess Recinto
MARITESS RECINTO
Paralegal
U.S Attorney's Office

EXHIBIT 1

Second Amended Information

DA #14-10108

SPD

SCODE 1800
Christopher J. Hicks
#7747
P.O. Box 11130
Reno, NV 89520
(775) 328-3200

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE

* * *

THE STATE OF NEVADA,

Plaintiff,

v.

Case No.: CR14-1513

Dept. No.: D06

JEFFREY SCOTT HOWARD,
also known as
BRANDON LEE KEMPTON,

Defendant.
_____/

SECOND AMENDED INFORMATION

CHRISTOPHER J. HICKS, District Attorney within and for the County of Washoe, State of Nevada, in the name and by the authority of the State of Nevada, informs the above entitled Court that JEFFREY SCOTT HOWARD also known as BRANDON LEE KEMPTON, the defendant above named, has committed the crime of:

TRAFFICKING IN A CONTROLLED SUBSTANCE, a violation of NRS 453.3385(2), a felony, in the manner following:

That the said defendant JEFFREY SCOTT HOWARD, on the 12th day of April A.D., 2014, or thereabout, and before the filing of this Information, did willfully, unlawfully, knowingly, and/or

intentionally be in actual or constructive possession of 14 grams or more but less than 28 grams of a Schedule I controlled substance or a mixture which contains a Schedule I controlled substance: methamphetamine.

All of which is contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the State of Nevada.

CHRISTOPHER J. HICKS
District Attorney
Washoe County, Nevada

By: /s/DIANNE DRINKWATER
DIANNE DRINKWATER
7375
DEPUTY DISTRICT ATTORNEY

The following are the names and addresses of such witnesses as are known to me at the time of the filing of the within Information:

RENO POLICE DEPARTMENT
SEAN GIBSON
KEITH PLEICH

NEVADA HIGHWAY PATROL
JULES LAPRAIRIE
DAVID S. LEWIS
EDDIE BOWERS

SPARKS POLICE DEPARTMENT
ERIC MARCONATO

WASHOE COUNTY DISTRICT ATTORNEY
STEPHANIE M. SHUMAN
MICHELLE M. BAYS
JOHN STALLINGS
JOEL C REYNOLDS

WASHOE COUNTY CRIME LABORATORY
BRAD TAYLOR

KYMBERLIE DOLBY, 137 DAYTON VILLAGE PKWY # D DAYTON, NV 89403

The party executing this document hereby affirms that this document submitted for recording does not contain the social security number of any person or persons pursuant to NRS 239B.230.

CHRISTOPHER J. HICKS
District Attorney
Washoe County, Nevada

By/s/DIANNE DRINKWATER
DIANNE DRINKWATER
7375
DEPUTY DISTRICT ATTORNEY

PCN: NHP0012264C; NHP0012791C-HOWARD

EXHIBIT 2

Minutes of Change of Plea

FILED
Electronically
2015-11-06 03:11:53 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 5225038

CASE NO CR14-1513 **STATE V JEFFREY SCOTT HOWARD**

DATE, JUDGE OFFICERS OF COURT PRESENT	APPEARANCES-HEARING	CONT'D TO
11/6/15 HONORABLE LYNNE SIMONS DEPT. 6 Y. Gentry (Clerk) Schonlau (Reporter) Masters (Bailiff)	**PRETRIAL MOTIONS (change of plea)** Deputy District Attorney Dianne Drinkwater represented the State. Defendant was present with counsel, Chris Frey, Esq. COURT advised it has received and reviewed the Second Amended Information. TRUE NAME AS STATED ON LINE 12 OF THE SECOND AMENDED INFORMATION; defense counsel in receipt of Second Amended Information; waived formal reading. Counsel for the Defendant addressed the Court and advised a global resolution has been reached; that Defendant will be pleading pursuant to negotiations in this case and in CR15-0950B; that the pleas are dispositive of CR14-1676 and CR15-1203 which will be dismissed at time of sentencing; that Defendant will be entering a plea in CR14-1677 on Count I and that case will run concurrently with this case and CR15-0950B; that parties are jointly recommending 48-120 months on this case and the same recommendation in CR15-0950B; that CR15-0950B will run consecutively to this case. Counsel for State addressed the Court and concurred with defense counsel. Defendant sworn. COURT canvassed Defendant. Counsel for State read the elements of the charge to which the Defendant is pleading guilty. COURT further canvassed Defendant. Defendant pled guilty to the Second Amended Information. COURT found Defendant's plea to be voluntary and accepted the guilty plea and set sentencing for January 13, 2016. PSI Ordered. Counsel for State advised the Court that the State will not be seeking habitual criminal enhancement. COURT ORDERED Trial and Motion to Confirm Hearing vacated. DEFENDANT was present in custody.	**1/13/16 @ 9:00 a.m. Sentencing**

EXHIBIT 3

Guilty Plea Memorandum

CODE 1785
Christopher J. Hicks
#7747
P.O. Box 11130
Reno, NV. 89520
(775)328-3200
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE

* * *

THE STATE OF NEVADA,

Plaintiff,

v.

JEFFREY SCOTT HOWARD ,

Defendant.

_____/

Case No. CR14-1513

Dept. No. D06

GUILTY PLEA MEMORANDUM

1. I, JEFFREY SCOTT HOWARD, understand that I am charged with the offenses of: TRAFFICKING IN A CONTROLLED SUBSTANCE, a violation of NRS 453.3385(2), a felony.

2. I desire to enter a plea of guilty to the offense of TRAFFICKING IN A CONTROLLED SUBSTANCE, a violation of NRS 453.3385(2), a felony, as more fully alleged in the charges filed against me.

3. By entering my plea of guilty I know and understand that I am waiving the following constitutional rights:

A. I waive my privilege against self-incrimination.

B. I waive my right to trial by jury, at which trial the

State would have to prove my guilt of all elements of the offense beyond a reasonable doubt.

C. I waive my right to confront my accusers, that is, the right to confront and cross examine all witnesses who would testify at trial.

D. I waive my right to subpoena witnesses for trial on my behalf.

4. I understand the charge against me and that the elements of the offense which the State would have to prove beyond a reasonable doubt at trial are that on the 12th day of April A.D., 2014, I did willfully, unlawfully, knowingly, and/or intentionally be in actual or constructive possession of 14 grams or more but less than 28 grams of a Schedule I controlled substance or a mixture which contains a Schedule I controlled substance: methamphetamine.

5. I understand that I admit the facts which support all the elements of the offense by pleading guilty. I admit that the State possesses sufficient evidence which would result in my conviction. I have considered and discussed all possible defenses and defense strategies with my counsel. I understand that I have the right to appeal from adverse rulings on pretrial motions only if the State and the Court consent to my right to appeal in a separate written agreement. I understand that any substantive or procedural pretrial issue(s) which could have been raised at trial are waived by my plea.

6. I understand that the consequences of my plea of guilty are that I must be imprisoned for a period of 2 to 15 years in the

Nevada State Department of Corrections and that I am not eligible for probation unless the Court determines that I have complied with the provisions of NRS 453.3405. I understand that I must also be fined up to $100,000.00.

7. In exchange for my plea of guilty, the State, my counsel and I have agreed to recommend the following: The parties will jointly recommend I be sentenced to a term of 48- 120 months in the Nevada Department of Corrections. I also agree that I will plead guilty to Trafficking in a Controlled Substance, a violation of NRS 453.3385(2) in CR 15-0950(B) in which the parties will also jointly recommend I be sentenced to a term of 48 - 120 months in the Nevada Department of Corrections to be serviced consecutively to the sentence in this case. The State will dismiss all other criminal charges against me in this case, along with charges against me in CR15-1203 and CR14-1676 at the time of sentencing and will not seek to have me sentenced as a habitual criminal. I understand and stipulate that I am not eligible for probation or a reduced sentenced pursuant to NRS 453.3405.

8. I understand that, even though the State and I have reached this plea agreement, the State is reserving the right to present arguments, facts, and/or witnesses at sentencing in support of the plea agreement.

9. Where applicable, I additionally understand and agree that I will be responsible for the repayment of any costs incurred by the State or County in securing my return to this jurisdiction.

10. I understand that NRS 453.3405 provides:

A. Except as provided in subsection 2, the 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 he has actually served the mandatory minimum term of imprisonment prescribed by the section under which he was convicted.

B. The judge, upon an appropriate motion, may reduce or suspend the sentence of any person convicted of violating any of the provisions of NRS 453.3385, 453.339, or 453.3395 if he finds that the convicted person rendered substantial assistance in the identification, arrest or conviction of any of his accomplices, accessories, coconspirators or principals or of any other person involved in trafficking in a controlled substance in violation of NRS 453.3385, 453.339 or 453.3395. The arresting agency must be given an opportunity to be heard before the motion is granted. Upon good cause shown, the motion may be heard in camera.

11. I understand that the State, at their discretion, is entitled to either withdraw from this agreement and proceed with the prosecution of the original charges or be free to argue for an appropriate sentence at the time of sentencing if I fail to appear at any scheduled proceeding in this matter OR if prior to the date of my sentencing I am arrested in any jurisdiction for a violation of law OR if I have misrepresented my prior criminal history. I understand and agree that the occurrence of any of these acts constitutes a material breach of my plea agreement with the State. I further

understand and agree that by the execution of this agreement, I am waiving any right I may have to remand this matter to Justice Court should I later withdraw my plea.

12. I understand and agree that pursuant to the terms of the plea agreement stated herein, any counts which are to be dismissed and any other cases charged or uncharged which are either to be dismissed or not pursued by the State, may be considered by the court at the time of my sentencing.

13. I understand that the Court is not bound by the agreement of the parties and that the matter of sentencing is to be determined solely by the Court. I have discussed the charge, the facts and the possible defenses with my attorney. All of the foregoing rights, waiver of rights, elements, possible penalties, and consequences, have been carefully explained to me by my attorney. My attorney has not promised me anything not mentioned in this plea memorandum, and, in particular, my attorney has not promised that I will get any specific sentence. I am satisfied with my counsel's advice and representation leading to this resolution of my case. I am aware that if I am not satisfied with my counsel I should advise the Court at this time. I believe that entering my plea is in my best interest and that going to trial is not in my best interest. My attorney has advised me that if I wish to appeal, any appeal, if applicable to my case, must be filed within thirty days of my sentence and/or judgment.

14. I understand that this plea and resulting conviction will likely have adverse effects upon my residency in this country if

I am not a U. S. Citizen. I have discussed the effects my plea will have upon my residency with my counsel.

15. I offer my plea freely, voluntarily, knowingly and with full understanding of all matters set forth in the Indictment and in this Plea Memorandum. I have read this plea memorandum completely and I understand everything contained within it.

16. My plea of guilty is voluntary, is not the result of any threats, coercion or promises of leniency.

17. I am signing this Plea Memorandum voluntarily with advice of counsel, under no duress, coercion, or promises of leniency.

18. I do hereby swear under penalty of perjury that all of the assertions in this written plea agreement document are true.

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 6th day of November, 2015.

DEFENDANT

TRANSLATOR/INTERPRETER

Attorney Witnessing Defendant's Signature

Prosecuting Attorney

EXHIBIT 4

Judgment

FILED
Electronically
2016-01-19 11:37:03 AM
Jacqueline Bryant
Clerk of the Court
Transaction # 5324946

CODE 1850

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

STATE OF NEVADA,

Plaintiff,

vs.

JEFFREY SCOTT HOWARD,

Defendant.

/

Case No. CR14-1513

Dept. No. 6

JUDGMENT OF CONVICTION

The Defendant, having entered a plea of Guilty, and no legal reason or cause existing to preclude entry of judgment against him, the Court rendered judgment in open court on January 13, 2016 and Judgment of Conviction[1] is entered accordingly as follows:

1. Jeffrey Scott Howard is guilty of the crime of Trafficking in a Controlled Substance, a violation of NRS 453.3385(2), a Category B felony, as charged in the Second Amended Information.

2. He is punished by:

a) Imprisonment in the Nevada Department of Corrections for a maximum term of one hundred twenty (120) months with a minimum parole eligibility of

[1] Judgment of Conviction is entered in three proceedings on this date in which Jeffrey Scott Howard is the Defendant: CR14-1513, CR14-1677 and CR15-0950B. Time served is 326 days in CR14-1513 and CR14-1677, which run concurrently. No credit for time served is ordered in CR15-0950B, which runs consecutively to CR14-1513.

forty-eight (48) months with credit for three hundred twenty-six (326) days time served, to be served concurrently with CR14-1677.

b) Payment to the Clerk of the Second Judicial District Court of the following amounts:

1. Twenty-Five Dollars ($25.00) administrative assessment fee;

2. Three Dollar ($3.00) administrative assessment for obtaining a biological specimen and conducting a genetic marker analysis;

3. Sixty Dollar ($60.00) chemical analysis fee; and

5. Fine of One Hundred Dollars ($100.00).

Counsel for the Defendant waived the Five Hundred Dollar ($500.00) fee for legal representation and, therefore, said fees are not ordered.

Any fine, fee or administrative assessment imposed upon the Defendant as reflected in this Judgment of Conviction constitutes a lien, as defined in Nevada Revised Statutes (NRS 176.275). Should the Defendant not pay these fines, fees, or assessments, collection efforts may be undertaken.

Dated the 19th day of January, 2016.

DISTRICT JUDGE

EXHIBIT 5

Motion to Dismiss

CODE 2295
JEREMY T. BOSLER, NO. 4925
350 S. CENTER ST., 5TH FLOOR
RENO, NV 89509
(775) 337-4800
ATTORNEY FOR DEFENDANT

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF WASHOE

THE STATE OF NEVADA,

Plaintiff,

v.

JEFFREY SCOTT HOWARD,

Defendant.

CASE NO: CR14-1513

DEPT. NO.: 6

MOTION TO DISMISS COUNTS II AND III AS DUPLICITOUS

Comes Now, JEFFREY SCOTT HOWARD, Defendant, by and through JEREMY T. BOSLER, Washoe County Public Defender, and CHRISTOPHER FREY, Deputy Public Defender, and hereby moves to dismiss counts II and III as duplicitous.

This motion is based on the attached points and authorities, all other documents and papers filed herein, and relevant statutory and constitutional provisions.

FACTS

Mr. Howard is charged by Amended Information with three counts: Trafficking (NRS 453.3385(3)), Possession of a Controlled Substance for Purpose of Sale, and Possession of a Controlled Substance. Count I alleges that Mr. Howard was in possession of a trafficking quantity of a single substance: methamphetamine. However, count II alleges that Mr. Howard

possessed two independent controlled substances for the purpose of sale: "methamphetamine and/or marijuana." Count III alleges simple possession of a myriad of others, to wit: "marijuana in a quantity greater than one ounce, and/or methamphetamine, and/or MDMA and/or psilocybin and/or a Schedule II controlled substance, to wit: hydrocodone."

ARGUMENT

When a single count joints two or more "distinct and separate offenses," the count is duplicitous and subject to dismissal. *Gordon v. Dist. Ct.*, 112 Nev. 216, 228-29, 913 P.2d 240, 247-48 (1996). Although it is permissible to charge "alternative means" of committing a crime, NRS 173.075(2), "alternative offenses must be charged in separate counts." *Jenkins v. Dist. Ct.*, 109 Nev. 337, 339–40, 849 P.2d 1055, 1057 (1993).

The crime of possession for the purpose of sale and simple possession share a single *actus reus*: the act of possession. *See* NRS 453.337; NRS 453.336. The identity of the substance itself does not serve as an "alternative means" by which possession occurs. Accordingly, it is impermissible to proliferate inside a single count multiple controlled substances to support a single act of unlawful possession. Rather, those substances may constitute separate offenses, but they are not available for the State to pursue in this prosecution. *See* NRS 173.035(4) (where a plea agreement is aborted at arraignment, an amended information may only charge "the offenses which were in the criminal complaint upon which the preliminary examination was waived"). The Criminal Complaint below is a

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mirror image of the three-count Amended Information. Exhibit I.

CONCLUSION

Based on the above, counts II and II must be dismissed.

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 24th Day of August, 2015.

JEREMY T. BOSLER
Washoe County Public Defender

By: _____
CHRISTOPHER FREY
Deputy Public Defender

CERTIFICATE OF SERVICE

I, CHRISTOPHER FREY, hereby certify that I am an employee of the Washoe County Public Defender's Office, Reno, Washoe County, Nevada, and that on this date I electronically forwarded a true copy of the foregoing document to:

Dianne Drinkwater, Deputy District Attorney
District Attorney's Office

DATED this 24th Day of August, 2015.

By: _____
CHRISTOPHER FREY
Deputy Public Defender

INDEX OF EXHIBITS

1. Criminal Complaint — Exhibit 1

EXHIBIT 6

Reply to State's Opposition to Motion to Dismiss

CODE 3790
WASHOE COUNTY PUBLIC DEFENDER
CHRISTOPHER FREY, BAR #10589
P.O. BOX 11130
RENO, NV 89520-0027
(775) 337-4800
ATTORNEY FOR DEFENDANT

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

THE STATE OF NEVADA,

Plaintiff,

v.

JEFFREY SCOTT HOWARD,

Defendant.
_____/

CASE NO: CR14-1513

DEPT. NO.: 6

REPLY TO STATE'S OPPOSITION TO MR. HOWARD'S MOTION TO DISMISS

COMES NOW, the Defendant, JEFFREY SCOTT HOWARD, by and through his attorney of record, JEREMY T. BOSLER, Washoe County Public Defender, and CHRISTOPHER FREY, Deputy Public Defender, and hereby replies to the State's Opposition to Defendant's Motion to Dismiss filed on September 18, 2015.

This motion is based upon the attached points and authorities and any testimony, documentary, and real evidence as may be presented at the hearing on this matter.

ARGUMENT

I. THE IDENTITY OF A SUBSTANCE AS "CONTROLLED" IS THE DEFINING ELEMENT OF POSSESSION OF A CONTROLLED SUBSTANCE FOR SALE AND SIMPLE POSSESSION OF A CONTROLLED SUBSTANCE.

Charging alternative means of committing a crime is different from joining separate crimes in a single count. The State loses track of this distinction when it claims that "the

identity" of a "drug" is "not an element" of an offense under NRS 453.337 and NRS 453.336, *see* Opposition at 3: 20-23, but is merely "the manner and means by which the offense was committed." *See id.* at 4: 3-5. This claim runs contrary to basic common sense.

The nature of a given substance as "controlled" is, in fact, the defining element of any violation of NRS 453.337 or NRS 453.336. Under these statutes, it is an offense to unlawfully possess a "controlled substance" for sale or otherwise. *See* NRS 453.337; NRS 453.336. The act of possession itself does nothing inherently to inform whether the possession is lawful or criminal. Innocent possession, rather, is distinguished from criminal possession only by the identity of the substance possessed—i.e., whether the substance is "controlled." *See People v. Butler*, 161 Misc. 2d 980, 986, 615 N.Y.S.2d 843, 847 (Sup. Ct. 1994) (noting that the element of "controlled substance" is determinative of criminal liability for unlawful possession and constitutes "an element that is the very essence of the crime charged").

II. THE STATE'S NEW YORK AND FEDERAL AUTHORITY IS NON-BINDING AND ASSUMING NEW YORK CASELAW IS AN ANALYTICAL GUIDE COUNTS II AND III ARE DUPLICITOUS.

The State fails to cite any Nevada legal authority to support its counterintuitive claim that a substance's identity is a means of commission rather than an element. Rather, it relies on a pair of older and lightly-reasoned decisions from lower New York appellate courts, and several seemingly unconnected citations to decisions from various federal Circuit Courts of Appeal that resolved factually inapposite claims of duplicity.

The State's New York cases have no binding impact on the present analysis, and neither decision is considered controlling in its own jurisdiction. The duplicity issue in *People v. Rivera*, for example, was deemed waived on appeal and was referenced in dicta only. 257 A.D.2d 425, 426 (1999) ("We decline to review this claim in the interest of justice. Were we to

do so, we would find that the count charging defendant with criminal possession of a controlled substance in the third degree was not duplicitous under the facts presented, since it properly aggregated all the drugs simultaneously found in defendant's constructive possession.").

Moreover, *Rivera*'s dictum purported to reflect an unreflective application of the analysis of *People v. Martin*, had the issue been properly preserved for the court's review. *Martin*, however, has been criticized as conclusory in its reasoning, and is not considered an analytical guide in New York to issues of duplicity in additive drug counts. *See Butler*, 161 Misc. 2d at 986, 615 N.Y.S.2d at 846 (noting that *Martin* "could, at least, be deemed instructive" but declining to follow its meager reasoning).

Even assuming that the Nevada Supreme Court would adopt New York's approach to issues of duplicitous charging in additive drug counts, counts II and III here would fail what appears to be New York's three-part test: (1) "whether, under a particular count alleged to be duplicitous, a defendant can be convicted of any one of the crimes charged should the district attorney not prosecute the defendant for the other(s)", *see id.* (citing *People v. Klipfel*, 160 N.Y. 371, 54 N.E. 788 (1899)); (2) whether "gravamen" of charged act is duplicated within the charge; and (3) whether the charging language "runs afoul of the policy reasons underlying the prohibition of duplicity.'" *Id.* at 161 Misc. 2d at 986, 615 N.Y.S.2d at 847.

Counts II and III of the Amended Information fail each part of this test. First, within each count Mr. Howard is alleged to have unlawfully possessed multiple controlled substances. Thus, Mr. Howard could be convicted of possessing any one of the multiple controlled substances alleged should the prosecutor not pursue the others. Second, for reasons already described above, the "gravamen" of each count is the "controlled" nature of the substance possessed. *See Butler*, 161 Misc. 2d at 986, 615 N.Y.S.2d at 847 (the identity of a substance as

"controlled" is "an element that is the very essence of the crime charged").The proliferation of multiple controlled substances within each count therefore duplicates the gravamen of the prohibited act of unlawful possession of a controlled substance.

Finally, the additive nature of the charging language of counts II and III clearly violates the policy against duplicity. Though formulated somewhat differently by different sources, the policy is comprised of an accused's right to: (1) fair notice of the charge against him, (2) sufficient precision in the charging instrument to safeguard against double jeopardy, and (3) sufficient specificity to ensure the reliability of a unanimous verdict. *See Butler*, 161 Misc. 2d at 982, 615 N.Y.S.2d at 845; *United States v. Alsobrook*, 620 F.2d 139, 142 (6th Cir. 1980) (the dangers of duplicitous charging "include the possibility that the defendant may not be properly notified of the charges against him, that he may be subjected to double jeopardy, that he may be prejudiced by evidentiary rulings during the trial, and that he may be convicted by a less than unanimous verdict"); *see also* LaFave, Criminal Procedure 19.2(e) (1984) ("Duplicity can result in prejudice to the defendant in the shaping of evidentiary rulings, in producing a conviction on less than a unanimous verdict as to each separate offense, in sentencing, in limiting review on appeal, and in exposing the defendant to double jeopardy.").

Here, count II contains two predicate controlled substances: methamphetamine and marijuana. Count III contains five: marijuana, methamphetamine, MDMA, psilocybin, and hydrocodone. Each count contains multiple predicate controlled substances, and thus multiple independent grounds for a conviction. Consequently, should either count be submitted to a jury as charged, "there is a risk that a conviction [for either] would not be unanimous." *Cf. Butler*, 161 Misc.2d at 986, 615 N.Y.S.2d at 847. Additionally, should Mr. Howard be acquitted of possessing one controlled substance, and convicted of possessing another, he would be unable

to ascertain "which act of possession would be immune from reprosecution under the double jeopardy doctrine." *Id.* For these reasons, even assuming New York caselaw governed the present analysis counts II and III must be dismissed. *See People v. Medinas*, 180 Misc. 2d 251, 262, 689 N.Y.S.2d 345, 353 (Sup. Ct. 1999) (citing *People v. Butler*, 161 Misc.2d 980, 615 N.Y.S.2d 843 Sup. Ct. 1994) (for the proposition that "possession of cocaine and heroin at the same time must be charged as two separate offenses").

The State's reliance on federal decisions from various Circuit Courts of Appeal fails to alter this conclusion.[1] The State cites *United States v. Ramirez-Martinez*, 273 F.3d 903, 915 (9th Cir. 2001) approvingly because here, unlike in that case, "there are no discrete acts" just "a single act of 'possession.'" Opposition at 5: 23-25. This is wrong. The State in counts II and III has alleged multiple acts of possession regarding multiple different controlled substances and, therefore, multiple separate crimes, inside a single count. Moreover, the "discrete act" analysis of *Ramirez-Martinez* appears to have since been overruled, *see United States v. Lopez*, 484 F.3d 1186 (9th Cir. 2007), and in any event is not a prerequisite to a finding of duplicity.[2]

The next case, *United States v. Vargas-Castillo*, 329 F.3d 715, 719 (9th Cir. 2003) involves a multiplicity challenge to the charging importation of marijuana and cocaine in separate counts. *See* Opposition at 6: 1. This is the obverse of a duplicity challenge. It thus renders *Vargas-Castillo* distinguishable. If anything, in denying the multiplicity challenge, the

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[1]The State also relies on a conspiracy case, *Braverman v. U.S.*, 317 U.S. 49, 54 (1942). However, counts II and III do not involve a conspiracy charge.

[2]If the acts alleged in counts II and III are not "discrete," by the same token they cannot be said to constitute a "continuing offense." *See United States v. Mancuso*, 718 F.3d 780, 792 (9th Cir. 2013) ("The continuous nature of [an offense] prevents the indictment from being duplicitous." (Quoting *United States v. Anderson*, 605 F.3d 404, 415 (6th Cir.2010)).

court in *Vargas-Castillo* recognized that charging the importation of different controlled substances offenses in separate counts was permissible, thus implying that compounding different controlled substances inside a single count would be improper.

Finally, similar to *Vargas-Castillo*, the holding in *United States v. Mancuso*, 718 F.3d 780, 790 (9th Cir. 2013) undercuts the State's position and supports the present challenge. In *Vargas-Castillo*, the court held that the challenged count "joined two or more distinct and separate offenses into a single count" and determined that the count was duplicitous. *Id.* For all the reasons described above, the same is true here as to counts II and III.

III. THE STATE HAS FAILED TO CARRY ITS BURDEN OF JUSTIFYING THE LAWFULNESS OF ITS CHARGING LANGUAGE.

Regarding Nevada decisional authorities, the State fails to cite a single factually similar case demonstrating the lawfulness of its duplicitous charging of counts II and III, while faulting Mr. Howard for failing to provide authority squarely holding that such charging is impermissible. To the extent that the State suggests that its inability to locate a controlling Nevada decision satisfies its burden of persuasion on this issue, its claim is misguided.

The State carries the burden of proof and persuasion at virtually all stages of a criminal case. *See, e.g., Sheriff v. Middleton*, 112 Nev. 956, 962, 921 P.2d 282, 286 (1996) (State carries the burden of proof on probable cause at a preliminary hearing); *Carl v. State*, 100 Nev. 164, 165, 678 P.2d 669, 669 (1984) (the State bears the burden of proof at trial); *Gordon v. State*, 83 Nev. 177, 179, 426 P.2d 424, 426 (1967) ("The burden rests with the prosecution to establish probable cause for an arrest"); *Howe v. State*, 112 Nev. 458, 463, 916 P.2d 153, 157 (1996) (State's burden to prove the fact and scope of consent in Fourth Amendment context); *State v. Ruscetta*, 123 Nev. 299, 302, 163 P.3d 451, 454 (2007) (State's burden to prove voluntariness of consent for purposes of Fourth Amendment); *Illinois v. Rodriquez*, 497 U.S. 177, 181 (1990)

("The burden of establishing that common authority [in the context of analyzing the lawfulness of a warrantless home entry] rests upon the State.").

When the State fails to meet its burden of or proof or persuasion in any phase of a criminal proceeding, including in the context of pretrial challenges to the sufficiency of a charging document, an accused is warranted relief. *Cf. State v. Lucero*, 127 Nev. Adv. Op. 7, 249 P.3d 1226, 1230 (2011) (the rule of lenity affords the accused the benefit of liberal interpretation of a statute in case of an ambiguity). As the State acknowledges, the difference between "alternative means" and a separate "offense" is not clearly demarcated by the text of NRS 173.075(2). *See* Opposition at 4: 19-21. Neither is caselaw completely illustrative. Accordingly, any statutory ambiguity must be construed in Mr. Howard's favor.

IV. DUPLICITY UNDER NRS 173.075(2) IS DETERMINED BY REFERENCE TO EXTANT CASELAW UNDER THE STATUTE NOT ANALOGIES TO DISTINGUISHABLE AREAS OF LAW.

The Nevada cases that the State does cite pertain to the unanimity requirement in the context of jury verdicts. *See* Opposition at 4: 19-26; 5: 1-5. While a jury generally must be unanimous regarding a finding of guilt, the State alleges the same unanimity is not required regarding the "means" of a crime's commission. This argument fails.

First, the analogy takes for granted the truth of its premise. In other words, it assumes that charging multiple independent predicate controlled substances within a single count is the equivalent of charging alternative "means" of committing violations of NRS 453.337 and NRS 453.336, and therefore legal. For the reasons already described above, this is incorrect. *See Butler*, 161 Misc. 2d at 986, 615 N.Y.S.2d at 847 (the identity of a substance as "controlled" is "an element that is the very essence of the crime charged").

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Second, the State's cases are readily distinguishable. Although *Dossey v. State* held that alternative means of intoxication could be permissibly charged within a single DUI count, these specific alternative means of intoxication were enumerated within the DUI statute itself. 114 Nev. 904, 909, 964 P.2d 782, 784 (1998); *see also* NRS 484C.110. This is unlike NRS 453.337 and NRS 453.336, which prohibit only the possession of a "controlled substance," and are silent as to means of commission. Moreover, the means by which somebody becomes intoxicated are not the "gravamen" of a DUI charge; the fact of intoxication is. Accordingly, in *Dossey*, unlike the present case, there was no duplicity at issue in charging intoxication by the alternative means outlined in the text of the DUI statute.

The same analysis distinguishes the present case from *Tabish v. State*, 119 Nev. 293, 313, 72 P.3d 584, 597 (2003) and *Schad v. Arizona*, 501 U.S. 624, 631 (1991). *Tabish* and *Schad* pertained to whether a jury must be unanimous in its finding regarding the factual theory for the commission of a single crime. The present matter does not pertain to alternative factual theories to support a single crime; it pertains to multiple free-standing crimes alleged inside a single criminal count. *See Butler*, 161 Misc. 2d at 986, 615 N.Y.S.2d at 847 (the identity of a substance as "controlled" is "an element that is the very essence of the crime charged").

Moreover, *Tabish* was a first-degree murder prosecution. Nevada's first-degree murder statute, like the DUI statute at issue in *Glossey*, explicitly specifies separate means of committing that crime. *See* NRS 200.030; NRS 200.010. The question in *Tabish* was whether a unanimous verdict was required on the State's alternative theories of premeditated versus felony murder. First-degree murder requires malice. NRS 200.010. Felony murder, as a theory of liability, allows malice for first-degree murder to be implied from the commission of an attendant felony. *See Nay v. State*, 123 Nev. 326, 332, 167 P.3d 430, 434 (2007) ("[T]he legal

fiction underlying the felony-murder rule [is] that the intent to commit the felony supplies the malice for the murder."). The means by which malice is expressed is not the "gravamen" of first-degree murder; the fact of malice is. Accordingly, premeditated murder under NRS 200.030(1)(a) and felony murder under NRS 200.030(1)(b) are both statutorily-recognized alternative theories of malice and, therefore, first-degree murder. They are not free-standing crimes. As such, the charging of alternative statutory theories in *Tabish* and *Glossey* did not implicate the notice, unanimity, and double jeopardy concerns that underlie the policy against duplicitous charging. *See Butler*, 161 Misc. 2d at 982, 615 N.Y.S.2d at 845; *Alsobrook*, 620 F.2d at 142; LaFave, Criminal Procedure 19.2(e) (1984).

Indeed, existing caselaw under NRS 173.075(2) supports the conclusion that duplicity does not occur where the challenged charging language tracks a statute's alternative means of committing the offense. In *Gordon v. Dist. Ct.*, the court determined that there was no duplicity in the challenged racketeering counts because NRS 207.400(1), Nevada's racketeering statute, "sets out various means of committing the offense of racketeering," and the challenged counts tracked those statutory alternatives. 112 Nev. 216, 229, 913 P.2d 240, 248 (1996). The same is true for the statutes at issue in *Glossey* and *Tabish*. Unlike those statutes, NRS 435.337 and NRS 453.336 do not specify alternative ways to commit the offense of unlawful possession of controlled substances. Accordingly, without any statutory endorsement for doing so, alleging multiple controlled substances inside a single count is duplicitous.

V. DISMISSAL IS THE REMEDY.

The State is committed to the charges as presently framed. *See* NRS 173.035(4). Counts II and III are duplicitous for the reasons described. The remedy is dismissal.

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Dismissal is the remedy for insufficient and improperly pleaded charging instruments generally. *See Simpson v. Dist. Ct*, 88 Nev. 654, 660, 503 P.2d 1225, 1230 (1972) (granting writ of prohibition against further proceedings on indefinite indictment); *State v. Hancock*, 114 Nev. 161, 164, 955 P.2d 183, 185 (1998) (affirming dismissal of improperly pleading indictment); *Lane v. Torvinen*, 97 Nev. 121, 122-23, 624 P.2d 1385, 1386 (1981) (affirming dismissal of two counts of indictment lacking factual specificity regarding the State's theory of accomplice liability); *cf. Ex parte Rovnianek*, 41 Nev. 141, 168 P. 327, 328 (1917) ("[I]f the indictment does not allege every substantial element of the crime in question, no crime is in fact charged, and hence the petitioner should be discharged.").

Dismissal is the remedy for duplicitous charging adopted by other courts in factually similar circumstances.[3] *See Butler*, 161 Misc. 2d at 987, 615 N.Y.S.2d at 847 ("[B]ecause its submission to a jury could undermine the reliability of a unanimous verdict and could prevent the defendant from adequately raising a double jeopardy claim should subsequent prosecution for the same offenses alleged in the count transpire, the court is left with no choice save to dismiss the count."). And while the State purports to rely on "legal precedent" to claim a different remedy, it fails to cite any authority that is controlling. *See* Opposition at 7: 12.

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[3]Other options embraced by different courts have been to require an election of predicates inside the duplicitous count, special verdict forms, or a unanimity instruction. *See, e.g., United States v. Sturdivant*, 244 F.3d 71, 79 (2d Cir. 2001).

CONCLUSION

Based on the foregoing, counts II and III must be dismissed.

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 13th day of October, 2015.

JEREMY T. BOSLER
Washoe County Public Defender

By: /s/CHRISTOPHER FREY
CHRISTOPHER FREY
Deputy Public Defender

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Washoe County Public Defender's Office, Reno, Washoe County, Nevada, and that on this date I electronically forwarded a true copy of the foregoing document to:

DIANNE DRINKWATER, DEPUTY DISTRICT ATTORNEY
DISTRICT ATTORNEY'S OFFICE

DATED this 13th day of October, 2015.

/s/JEREMY RUTHERFORD
JEREMY RUTHERFORD

EXHIBIT 7

Docket Sheet

Second Judicial District Court
State of Nevada
Washoe County

Electronic Filing

Case Summary for Case: CR14-1513

STATE VS. JEFFREY SCOTT HOWARD (D6)

Case Number	CR14-1513	**Plaintiff**	STATE OF NEVADA et al
Case Type	CRIMINAL	**Defendant**	JEFFREY SCOTT HOWARD
Opened	09-26-2014	**Judge**	HONORABLE LYNNE K. SIMONS - Division D6
Status	REOPEN		

Show/Hide Participants

File Date	Case History
	Notice of Electronic Filing
03-08-2017	**Filed**
	Proof of Electronic Service Transaction 5985504 - Approved By: NOREVIEW : 03-08-2017:09:18:39
	Mtn for Transfer
03-08-2017	**Filed by: TERRENCE P. MCCARTHY, ESQ.**
Plaintiff	Mtn for Transfer ... MOTION TO TRANSFER PETITION - Transaction 5985292 - Approved By: TBRITTON : 03-08-2017:09:17:40
	Pet Post-Conviction Relief
03-06-2017	**Filed by: JEFFREY SCOTT HOWARD**
Defendant	Pet Post-Conviction Relief PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)
	Notice of Electronic Filing
02-19-2016	**Filed**
	Proof of Electronic Service Transaction 5377654 - Approved By: NOREVIEW : 02-19-2016:14:02:10
	Transcript
02-19-2016	**Filed**
	Transcript Pretrial Motions -11-6-15 - Transaction 5377648 - Approved By: NOREVIEW : 02-19-2016:13:59:31 : this document can only be accessed at the court
	Notice of Electronic Filing
01-25-2016	**Filed**
	Proof of Electronic Service Transaction 5335448 - Approved By: NOREVIEW : 01-25-2016:15:48:55
	*****Minutes**
01-25-2016	**Filed**
	***Minutes Sentencing 1/13/16 - Transaction 5335433 - Approved By: NOREVIEW : 01-25-2016:15:47:28
	Notice of Electronic Filing
01-19-2016	**Filed**
	Proof of Electronic Service Transaction 5324952 - Approved By: NOREVIEW : 01-19-2016:11:38:43
	Judgment of Conviction
01-19-2016	**Filed**
	Judgment of Conviction Transaction 5324946 - Approved By: NOREVIEW : 01-19-2016:11:37:38
	Notice of Electronic Filing
12-30-2015	**Filed**
	Proof of Electronic Service Transaction 5299874 - Approved By: NOREVIEW : 12-30-2015:16:49:13
	PSI - Confidential
12-30-2015	**Filed by: DIV. OF PAROLE & PROBATION**
Plaintiff	Document withheld. Document Security Level Exceeded Document withheld. Document Security Level Exceeded
	Notice of Electronic Filing
12-10-2015	**Filed**
	Proof of Electronic Service Transaction 5273778 - Approved By: NOREVIEW : 12-10-2015:15:23:29
	Evaluations
12-10-2015	**Filed by: CHRISTOPHER FREY, ESQ.**
Defendant	Document withheld. Document Security Level Exceeded
	Notice of Electronic Filing
11-06-2015	**Filed**
	Proof of Electronic Service Transaction 5225042 - Approved By: NOREVIEW : 11-06-2015:15:13:13
	*****Minutes**
11-06-2015	**Filed**
	***Minutes PreTrial Mtns (Change of Plea) 11/6/15 - Transaction 5225038 - Approved By: NOREVIEW : 11-06-2015:15:12:22
	Notice of Electronic Filing
11-06-2015	**Filed**
	Proof of Electronic Service Transaction 5223775 - Approved By: NOREVIEW : 11-06-2015:10:19:30
11-06-2015	

	Guilty Plea Memo/Agreement	
	Filed	
	Guilty Plea Memo/Agreement Transaction 5223768 - Approved By: NOREVIEW : 11-06-2015:10:18:29	
	Notice of Electronic Filing	
11-05-2015	**Filed**	
	Proof of Electronic Service Transaction 5222633 - Approved By: NOREVIEW : 11-05-2015:15:34:01	
	Second Amended Information	
11-05-2015 Plaintiff	**Filed by: DIANNE DRINKWATER, ESQ.**	
	Second Amended Information Transaction 5222582 - Approved By: MFERNAND : 11-05-2015:15:32:54	
	Notice of Electronic Filing	
10-19-2015	**Filed**	
	Proof of Electronic Service Transaction 5194984 - Approved By: NOREVIEW : 10-19-2015:13:50:38	
	Opposition to Mtn	
10-19-2015 Plaintiff	**Filed by: DIANNE DRINKWATER, ESQ.**	
	Opposition to Mtn ... STATE'S OPPOSITION TO DEFENDANT'S MOTION TO STRIKE NOTICE OF INTENT TO SEEK HABITUAL STATUS - Transaction 5194867 - Approved By: TBRITTON : 10-19-2015:13:55:51	
	Notice of Electronic Filing	
10-16-2015	**Filed**	
	Proof of Electronic Service Transaction 5191944 - Approved By: NOREVIEW : 10-16-2015:08:45:19	
	Opposition to Mtn	
10-16-2015 Defendant	**Filed by: CHRISTOPHER FREY, ESQ.**	
	Opposition to Mtn ... OPPOSITION TO STATE'S MOTION TO ADMIT PRIOR BAD ACTS - Transaction 5191810 - Approved By: YVILORIA : 10-16-2015:08:44:21	
	Notice of Electronic Filing	
10-15-2015	**Filed**	
	Proof of Electronic Service Transaction 5191203 - Approved By: NOREVIEW : 10-15-2015:14:46:53	
	Reply to/in Opposition	
10-15-2015 Defendant	**Filed by: CHRISTOPHER FREY, ESQ.**	
	Reply to/in Opposition REPLY TO STATE'S OPPOSITION TO MR. HOWARD'S MOTION TO SUPPRESS - Transaction 5191148 - Approved By: YVILORIA : 10-15-2015:14:46:05	
	Request for Submission	
10-15-2015 Defendant	**Filed by: CHRISTOPHER FREY, ESQ.**	
	Request for Submission Transaction 5191148 - Approved By: YVILORIA : 10-15-2015:14:46:05 DOCUMENT TITLE: MOTION TO SUPPRESS ON AUGUST 25, 2015 WITH STATE'S OPPOSITION TO DEFENDANT'S MOTION TO SUPPRESS HAVING BEEN FILED 9-15-15 AND DEFENDANT REPLY TO STATE'S OPPOSITION TO DEFENDANT'S MOTION TO SUPPRESS PARTY SUBMITTING: CHRISTOPHER FREY DATE SUBMITTED: OCTOBER 15, 2015 SUBMITTED BY: YVILORIA DATE RECEIVED JUDGE OFFICE:	
	Request for Submission	
10-15-2015 Defendant	**Filed by: CHRISTOPHER FREY, ESQ.**	
	Request for Submission Transaction 5191148 - Approved By: YVILORIA : 10-15-2015:14:46:05 DOCUMENT TITLE: MOTION TO DISMISS, STATE'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND REPLY TO STATE'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PARTY SUBMITTING: CHRISTOPHER FREY DATE SUBMITTED: OCTOBER 15, 2015 SUBMITTED BY: YVILORIA DATE RECEIVED JUDGE OFFICE:	
	Notice of Electronic Filing	
10-13-2015	**Filed**	
	Proof of Electronic Service Transaction 5185266 - Approved By: NOREVIEW : 10-13-2015:09:26:27	
	Reply to/in Opposition	
10-13-2015 Defendant	**Filed by: CHRISTOPHER FREY, ESQ.**	
	Reply to/in Opposition REPLY TO STATE'S OPPOSITION TO MR. HOWARD'S MOTION TO DISMISS - Transaction 5185187 - Approved By: TBRITTON : 10-13-2015:09:25:25	
	Notice of Electronic Filing	
10-09-2015	**Filed**	
	Proof of Electronic Service Transaction 5181782 - Approved By: NOREVIEW : 10-09-2015:16:07:39	
	Mtn to Strike	
10-09-2015 Defendant	**Filed by: CHRISTOPHER FREY, ESQ.**	
	Mtn to Strike... MOTION TO STRIKE NOTICE OF INTENT TO SEEK HABITUAL STATUS - Transaction 5181759 - Approved By: MFERNAND : 10-09-2015:16:06:27	
	Notice of Electronic Filing	
09-18-2015	**Filed**	
	Proof of Electronic Service Transaction 5148507 - Approved By: NOREVIEW : 09-18-2015:13:43:59	
	Opposition to Mtn	
09-18-2015 Plaintiff	**Filed by: DIANNE DRINKWATER, ESQ.**	
	Opposition to Mtn ... STATE'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS - Transaction 5148394 - Approved By: YVILORIA : 09-18-2015:13:43:10	
	Notice of Electronic Filing	
09-17-2015	**Filed**	
	Proof of Electronic Service Transaction 5146036 - Approved By: NOREVIEW : 09-17-2015:12:00:56	

09-17-2015 Plaintiff	**Notice** **Filed by: DIANNE DRINKWATER, ESQ.** Notice ... STATE'S NOTICE OF INTENT TO SEEK HABITUAL CRIMINAL STATUS - Transaction 5145890 - Approved By: MCHOLICO : 09-17-2015:11:59:00
09-16-2015	**Notice of Electronic Filing** **Filed** Proof of Electronic Service Transaction 5144322 - Approved By: NOREVIEW : 09-16-2015:14:49:10
09-16-2015	**Notice of Electronic Filing** **Filed** Proof of Electronic Service Transaction 5144311 - Approved By: NOREVIEW : 09-16-2015:14:46:58
09-16-2015 Plaintiff	**Opposition to Mtn** **Filed by: DIANNE DRINKWATER, ESQ.** Opposition to Mtn ... STATE'S OPPOSITION TO DEFENDANT'S MOTION IN LIMINE TO EXCLUDE PRIOR FELONY CONVICTION AND OTHER ACTS - Transaction 5144125 - Approved By: MCHOLICO : 09-16-2015:14:48:23
09-16-2015 Plaintiff	**Motion** **Filed by: DIANNE DRINKWATER, ESQ.** Motion ... STATE'S MOTION TO INTRODUCE PRIOR BAD ACTS PURSUANT TO NRS 48.045 - Transaction 5144121 - Approved By: MCHOLICO : 09-16-2015:14:46:04
09-15-2015	**Notice of Electronic Filing** **Filed** Proof of Electronic Service Transaction 5142531 - Approved By: NOREVIEW : 09-15-2015:15:27:02
09-15-2015 Plaintiff	**Opposition to Mtn** **Filed by: DIANNE DRINKWATER, ESQ.** Opposition to Mtn ... STATE'S OPPOSITION TO DEFENDANT'S MOTION TO SUPPRESS - Transaction 5142261 - Approved By: MFERNAND : 09-15-2015:15:26:04
09-15-2015	**Notice of Electronic Filing** **Filed** Proof of Electronic Service Transaction 5141278 - Approved By: NOREVIEW : 09-15-2015:10:47:02
09-15-2015	**Order...** **Filed** Order ... ON MOTION FOR EQUAL ACCESS TO JUROR INFORMATION - Transaction 5141269 - Approved By: NOREVIEW : 09-15-2015:10:46:00
09-08-2015	**Notice of Electronic Filing** **Filed** Proof of Electronic Service Transaction 5131145 - Approved By: NOREVIEW : 09-08-2015:15:29:01
09-08-2015	***Minutes **Filed** ***Minutes Mtn to Confirm Trial 9/2/15 - Transaction 5131137 - Approved By: NOREVIEW : 09-08-2015:15:28:01
08-28-2015	**Notice of Electronic Filing** **Filed** Proof of Electronic Service Transaction 5118175 - Approved By: NOREVIEW : 08-28-2015:16:53:56
08-28-2015 Plaintiff	**Notice of Witnesses** **Filed by: DIANNE DRINKWATER, ESQ.** Notice of Witnesses NOTICE OF EXPERT WITNESS PURSUANT TO NRS 174.234 - Transaction 5117968 - Approved By: YVILORIA : 08-28-2015:16:52:58 - Exhibit 1 - Exhibit 2
08-25-2015	**Notice of Electronic Filing** **Filed** Proof of Electronic Service Transaction 5110667 - Approved By: NOREVIEW : 08-25-2015:13:46:55
08-25-2015	**Notice of Electronic Filing** **Filed** Proof of Electronic Service Transaction 5110670 - Approved By: NOREVIEW : 08-25-2015:13:46:54
08-25-2015 Defendant	**Mtn to Dismiss** **Filed by: CHRISTOPHER FREY, ESQ.** Mtn to Dismiss ... MOTION TO DISMISS COUNTS II AND III AS DUPLICITIOUS - Transaction 5110211 - Approved By: TBRITTON : 08-25-2015:13:45:39 - Exhibit 1
08-25-2015 Defendant	**Mtn to Suppress** **Filed by: CHRISTOPHER FREY, ESQ.** Mtn to Suppress... MOTION TO SUPRESS - Transaction 5110193 - Approved By: TBRITTON : 08-25-2015:13:44:33
08-25-2015	**Notice of Electronic Filing** **Filed** Proof of Electronic Service Transaction 5110107 - Approved By: NOREVIEW : 08-25-2015:11:16:02
08-25-2015 Defendant	**Mtn in Limine**

	Filed by: CHRISTOPHER FREY, ESQ. Mtn in Limine MOTION IN LIMINE TO EXCLUDE EVIDENCE OF PRIOR FELONY CONVICTION AND OTHER ACTS - Transaction 5109247 - Approved By: TBRITTON : 08-25-2015:11:15:01
08-24-2015	**Notice of Electronic Filing** **Filed** Proof of Electronic Service Transaction 5107947 - Approved By: NOREVIEW : 08-24-2015:12:31:00
08-24-2015 Defendant	**Request for Submission** **Filed by: CHRISTOPHER FREY, ESQ.** Request for Submission MOTION FOR EQUAL ACCESS TO JUROR INFORMATION ON AUGUST 3, 2015 (NO PAPER ORDER PROVIDED) - Transaction 5107718 - Approved By: MCHOLICO : 08-24-2015:12:30:10 PARTY SUBMITTING: CHRISTOPHER FREY, ESQ. DATE SUBMITTED: 08/24/15 SUBMITTED BY: MCHOLICO DATE RECEIVED JUDGE OFFICE:
08-14-2015	**Notice of Electronic Filing** **Filed** Proof of Electronic Service Transaction 5094361 - Approved By: NOREVIEW : 08-14-2015:10:55:50
08-14-2015 Plaintiff	**Opposition to Mtn** **Filed by: DIANNE DRINKWATER, ESQ.** Document withheld. Document Security Level Exceeded
08-13-2015	**Notice of Electronic Filing** **Filed** Proof of Electronic Service Transaction 5093473 - Approved By: NOREVIEW : 08-13-2015:16:24:34
08-13-2015	**Request Agree Ord Recp Discv** **Filed** Request Agree Ord Recp Discv Transaction 5093250 - Approved By: TBRITTON : 08-13-2015:16:22:53
08-03-2015	**Notice of Electronic Filing** **Filed** Proof of Electronic Service Transaction 5073970 - Approved By: NOREVIEW : 08-03-2015:09:57:36
08-03-2015 Defendant	**Motion** **Filed by: CHRISTOPHER FREY, ESQ.** Motion ... MOTION FOR EQUAL ACCESS TO JUROR INFORMATION - Transaction 5073777 - Approved By: YLLOYD : 08-03-2015:09:56:26
05-08-2015	**Notice of Electronic Filing** **Filed** Proof of Electronic Service Transaction 4944389 - Approved By: NOREVIEW : 05-08-2015:09:44:52
05-08-2015	***Minutes **Filed** ***Minutes 4/1/15 - MOTION FOR CONTINUANCE - Transaction 4944385 - Approved By: NOREVIEW : 05-08-2015:09:42:39
03-26-2015	**Notice of Electronic Filing** **Filed** Proof of Electronic Service Transaction 4878892 - Approved By: NOREVIEW : 03-26-2015:09:36:04
03-26-2015 Defendant	**Opposition to Mtn** **Filed by: CHRISTOPHER FREY, ESQ.** Opposition to Mtn ... OPPOSITION TO MOTION TO REVOKE BAIL - Transaction 4878605 - Approved By: MELWOOD : 03-26-2015:09:35:19
03-24-2015	**Notice of Electronic Filing** **Filed** Proof of Electronic Service Transaction 4875217 - Approved By: NOREVIEW : 03-24-2015:11:16:34
03-24-2015 Defendant	**Notice of Appearance** **Filed by: JAMES B. LESLIE, ESQ.** Notice of Appearance JIM LESLIE FOR THE DEFENDANT - Transaction 4875118 - Approved By: YLLOYD : 03-24-2015:11:15:44
03-24-2015	**Notice of Electronic Filing** **Filed** Proof of Electronic Service Transaction 4874781 - Approved By: NOREVIEW : 03-24-2015:09:11:39
03-24-2015 Plaintiff	**Motion** **Filed by: DIANNE DRINKWATER, ESQ.** Motion ... MOTION TO REVOKE BAIL - Transaction 4874713 - Approved By: MCHOLICO : 03-24-2015:09:10:46
03-19-2015	**Notice of Electronic Filing** **Filed** Proof of Electronic Service Transaction 4867948 - Approved By: NOREVIEW : 03-19-2015:09:12:49
03-18-2015 Plaintiff	**Application for Setting** **Filed by: DIANNE DRINKWATER, ESQ.** Application for Setting APRIL 1, 2015 @ 9:00AM MOTION FOR CONTINUANCE - Transaction 4867632 - Approved By: MCHOLICO : 03-19-2015:09:12:03
03-11-2015	**Notice of Electronic Filing** **Filed**

	Proof of Electronic Service Transaction 4855757 - Approved By: NOREVIEW : 03-11-2015:13:51:12
	Non-Opposition
03-11-2015 Plaintiff	**Filed by: DIANNE DRINKWATER, ESQ.** Non-Opposition ... STATE'S STATEMENT OF NON-OPPOSITION - Transaction 4855160 - Approved By: MFERNAND : 03-11-2015:13:50:22
	Notice of Electronic Filing
03-10-2015	**Filed** Proof of Electronic Service Transaction 4853151 - Approved By: NOREVIEW : 03-10-2015:11:18:14
	Mtn to Continue
03-09-2015 Defendant	**Filed by: CHRISTOPHER FREY, ESQ.** Mtn to Continue Transaction 4852268 - Approved By: MELWOOD : 03-10-2015:11:16:58 - Exhibit 1 - Exhibit 2
	Notice of Electronic Filing
03-02-2015	**Filed** Proof of Electronic Service Transaction 4839351 - Approved By: NOREVIEW : 03-02-2015:10:21:21
	*****Minutes**
03-02-2015	**Filed** ***Minutes Status Hearing 2/25/15 - Transaction 4839346 - Approved By: NOREVIEW : 03-02-2015:10:20:21
	Notice of Electronic Filing
02-17-2015	**Filed** Proof of Electronic Service Transaction 4820546 - Approved By: NOREVIEW : 02-17-2015:16:06:37
	*****Minutes**
02-17-2015	**Filed** ***Minutes Status Hearing 2/11/15 - Transaction 4820535 - Approved By: NOREVIEW : 02-17-2015:16:05:34
	Notice of Electronic Filing
01-26-2015	**Filed** Proof of Electronic Service Transaction 4788937 - Approved By: NOREVIEW : 01-26-2015:15:56:10
	Notice of Appearance
01-26-2015 Defendant	**Filed by: CHRISTOPHER FREY, ESQ.** Notice of Appearance CHRISTOPHER FREY, ESQ - Transaction 4788605 - Approved By: MELWOOD : 01-26-2015:15:55:06
	Notice of Electronic Filing
01-21-2015	**Filed** Proof of Electronic Service Transaction 4782543 - Approved By: NOREVIEW : 01-21-2015:15:54:16
	Ord Appointing Counsel
01-21-2015	**Filed** Ord Appointing Counsel Order Appointing Public Defender - Transaction 4782532 - Approved By: NOREVIEW : 01-21-2015:15:52:57
	Notice of Electronic Filing
01-21-2015	**Filed** Proof of Electronic Service Transaction 4780999 - Approved By: NOREVIEW : 01-21-2015:09:03:43
	Transcript
01-21-2015	**Filed** **Transcript Arraignment 12/3/14 - Transaction 4780992 - Approved By: NOREVIEW : 01-21-2015:09:02:53 : this document can only be accessed at the court**
	Notice of Electronic Filing
01-20-2015	**Filed** Proof of Electronic Service Transaction 4779568 - Approved By: NOREVIEW : 01-20-2015:13:53:00
	*****Minutes**
01-20-2015	**Filed** ***Minutes Motion to Withdraw as Counsel of Record - Transaction 4779561 - Approved By: NOREVIEW : 01-20-2015:13:51:59
	Notice of Electronic Filing
01-06-2015	**Filed** Proof of Electronic Service Transaction 4760349 - Approved By: NOREVIEW : 01-06-2015:09:44:40
	*****Minutes**
01-06-2015	**Filed** ***Minutes ARRAIGNMENT 12/3/14 - Transaction 4760337 - Approved By: NOREVIEW : 01-06-2015:09:43:43
	Notice of Electronic Filing
12-22-2014	**Filed** Proof of Electronic Service Transaction 4745674 - Approved By: NOREVIEW : 12-22-2014:10:19:02
	Amended Information
12-18-2014 Plaintiff	**Filed by: DIANNE DRINKWATER, ESQ.** Amended Information Transaction 4745081 - Approved By: SHAMBRIG : 12-22-2014:10:18:05
12-17-2014 Defendant	**Motion**

	Filed by: RICHARD P. DAVIES, ESQ. Motion ... MOTION TO WITHDRAW AS ATTORNEY OF RECORD
11-05-2014	**Notice of Electronic Filing** **Filed** Proof of Electronic Service Transaction 4682880 - Approved By: NOREVIEW : 11-05-2014:13:47:47
11-05-2014	**Ord Granting Continuance** **Filed** Ord Granting Continuance Transaction 4682879 - Approved By: NOREVIEW : 11-05-2014:13:46:58
10-06-2014	**Notice of Electronic Filing** **Filed** Proof of Electronic Service Transaction 4637794 - Approved By: NOREVIEW : 10-06-2014:09:53:50
10-06-2014 Plaintiff	**Waiver of Preliminary Exam** **Filed by: DIANNE DRINKWATER, ESQ.** Waiver of Preliminary Exam Transaction 4637649 - Approved By: SHAMBRIG : 10-06-2014:09:52:35
10-06-2014 Plaintiff	**Information** **Filed by: DIANNE DRINKWATER, ESQ.** Information Transaction 4637649 - Approved By: SHAMBRIG : 10-06-2014:09:52:35
10-01-2014	**General Receipt** **Filed** General Receipt
10-01-2014	****Bailbond Posted** **Filed** **Bailbond Posted
09-30-2014	**Notice of Electronic Filing** **Filed** Proof of Electronic Service Transaction 4628676 - Approved By: NOREVIEW : 09-30-2014:08:23:52
09-29-2014	**Pretrl Srvcs Assessment Report** **Filed** Pretrl Srvcs Assessment Report Transaction 4628298 - Approved By: SHAMBRIG : 09-30-2014:08:22:49
09-26-2014	**Notice of Electronic Filing** **Filed** Proof of Electronic Service Transaction 4626245 - Approved By: NOREVIEW : 09-26-2014:14:21:07
09-26-2014	**Application for Setting - eFile** **Filed** Application for Setting eFile ARRAIGNMENT 10-8-14 AT 9:00 - Transaction 4626236 - Approved By: NOREVIEW : 09-26-2014:14:19:54

CASE NO. 16-10388

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. GIBRAN RICHARDO FIGUEROA-BELTRAN, Defendant-Appellant.	D.C. No. 2:15-cr-00176-KJD-GWF-1 (Nevada, Las Vegas)

APPELLANT GIBRAN RICHARDO FIGUEROA-BELTRAN'S REPLY IN SUPPORT OF MOTION FOR JUDICIAL NOTICE AND TO SUPPLEMENT THE RECORD ON APPEAL

RENE L. VALLADARES
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*Counsel for Appellant Gibran Richardo Figueroa-Beltran

Simultaneously with his Reply Brief, Appellant Gibran Richardo Figueroa-Beltran filed a Motion for Judicial Notice and to Supplement the Record on Appeal. App. Dkt. #23. Mr. Figueroa-Beltran requested the Court take judicial notice of and supplement the record with state and federal court documents that indicated the identity of the controlled substance is not an element of Nev. Rev. Stat. § 453.337. App. Dkt. #23, Exhibit 1 (Amended Information, *State v. Howard*, CR14-1513 (Sec. Jud. Dist. Nev.)); Exhibit 2 (State's Opposition to Defendant's Motion to Dismiss, *State v. Howard*, CR14-1513 (Sec. Jud. Dist. Nev.)); Exhibit 3 (Defendant's Sentencing Memorandum, *United States v. Jordan-McFeely*, 3:16-cr-00011-HDM-VPC (D. Nev)). The government filed a Response. App. Dkt. #26. Mr. Figueroa-Beltran now briefly replies.

The government requests that if the Court grants Mr. Figueroa-Beltran's Motion, then the Court should take notice of the state records the government attached to its Response. App. Dkt. #26, p. 7. The documents offered by both parties are judicially noticeable, publicly-filed state court records. Mr. Figueroa-Beltran thus joins the government's request to take notice of all the court records submitted by the parties.

The first and second amended charging documents in *State v. Howard* demonstrate inconsistency, ambiguity, and a lack of clarity in Nevada law as to

whether the identity of the controlled substance is an element of Nev. Rev. Stat. § 453.337. The Supreme Court's demand for certainty in assessing whether Mr. Figueroa-Beltran was convicted of an offense no broader than a generic federal drug trafficking offense is not met here. *See Mathis v. United States*, 136 S. Ct. 2243, 2257 (2016) (citing *Taylor v. United States*, 495 U.S. 575 (1990)). Mr. Figueroa-Beltran respectfully requests this Court take judicial notice of the state court records from *State v. Howard* provided by both parties and reverse and remand for resentencing.

Dated this 10th day of April, 2017.

Respectfully submitted,

RENE L. VALLADARES
Federal Public Defender

/s/ Cristen C. Thayer
CRISTEN C. THAYER
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

I hereby certify that, on April 10, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing documents by First-Class Mail, postage pre-paid, dispatched the foregoing documents to a third party commercial carrier for delivery, or sent the foregoing documents through electronic mail, within 3 calendar days, to the following non-CM/ECF participants: Gibran Richardo Figueroa-Beltran.

/s/Lauren Pullen
Employee of the Federal Public Defender

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