No. 76038

CA No. 16-10388; DC No. 2:15-cr-00176-KJD-GWF

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 APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S ANSWERING BRIEF

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Nevada Supreme Court: Figueroa-Beltran v. United States, No. 76038

Nevada Rule of Appellate Procedure 26.1 Disclosure

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

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Respondent ("the government") agrees with Appellant's (Figueroa-Beltran) jurisdictional statement.

II.

ROUTING STATEMENT

The government agrees with Figueroa-Beltran's routing statement.

III.

ISSUES PRESENTED FOR REVIEW

The government agrees that Figueroa-Beltran's issues presented for review section accurately sets forth the three questions the Ninth Circuit certified to this Court for review, as well as the additional question this Court posed to the parties.

The government observes that those four inquiries boil down to a single issue presented for review: under Nevada's possession-for-sale statute, NRS 453.337, is the type of controlled substance an element of the offense that must be proven, or merely a factual means by which a person can violate a statute with a single set of elements?

IV.

STATEMENT OF THE CASE

In the context of whether a prior state drug conviction qualifies to enhance a federal sentencing guidelines calculation considered by the federal district court at sentencing, the Ninth Circuit certified state-law questions to this Court concerning the elements of Nevada Revised Statute 453.337, possession for sale of certain controlled substances.

Under that statute, "it is unlawful for a person to possess for the purpose of sale flunitrazepam, gamma-hydroxybutyrate, any substance for which flunitrazepam or gamma-hydroxybutyrate is an immediate precursor or any controlled substance classified in schedule I or II." NRS 453.337(1). Unless a greater penalty is provided in certain related statutes, the offense is punishable as follows: first offense - Category D felony; second offense – Category C felony; third or subsequent offense – Category B felony. NRS 453.337(2).

Concluding that this question—whether an NRS 453.337 conviction may qualify as a countable predicate offense for federal sentencing purposes—turns on state law, the Ninth Circuit asked this Court to advise whether the identity of the controlled substance charged is an element of the offense, *i.e.*, must the type of substance possessed for sale be proven to sustain a conviction? The Ninth Circuit asked for this Court's assistance with this question because

it found in tension two prior Nevada Supreme Court decisions: *Sheriff v. Luqman*, 101 Nev. 149, 697 P.2d 107 (1985), and *Muller v. Sheriff*, 93 Nev. 686, 572 P.2d 1245 (1977).

In considering and accepting the certified questions from the Ninth Circuit, this Court also asked the parties to discuss the relevance of *Andrews v. State*, 134 Nev., Adv. Op. 12, 412 P.3d 37 (2018), decided after oral argument in the Ninth Circuit.

This brief addresses those cases—in the context of addressing the central issue in this case, whether the identity of the controlled substance is an element of the offense—and responds to contentions raised in the opening brief.

V.

STATEMENT OF FACTS

A. While Unlawfully in the Country, Figueroa-Beltran Engages in Various Unlawful Controlled-Substance Activity and is Indicted Federally.

In 2012, after being found in possession of one gram of cocaine and 5.8 grams of heroin, Figueroa-Beltran was convicted in the Nevada Eighth Judicial District Court of possession for sale in violation of NRS 453.337, and sentenced to 19-48 months of imprisonment. *United States v. Figueroa-Beltran*,

892 F.3d 997, 1000 (9th Cir. 2018).[1] After being paroled, he was arrested for selling a controlled substance and removed to Mexico. *Id.*

Less than two years later, he illegally reentered the United States and was once again arrested for selling a controlled substance. Meanwhile, he incurred another arrest on 26 drug-related counts. *Id.*

Shortly thereafter, a federal grand jury in Nevada returned an indictment charging Figueroa-Beltran with one count of being a deported alien found unlawfully in the United States, in violation of 8 U.S.C. § 1326. *Id.* In March 2016, Figueroa-Beltran pleaded guilty to that count without a plea agreement. *Id.*

B. The Sentencing Court Considers Figueroa-Beltran's Prior Criminal Convictions as Part of Its Analysis.

At sentencing, as it was required to do, the federal district court calculated Figueroa-Beltran's advisory sentencing guidelines range. *See Peugh v. United States*, 569 U.S. 530, 536 (2013) ("a district court is still required to consult the Guidelines[,] [b]ut the Guidelines are no longer binding, and the district court must consider all of the factors set forth in [18 U.S.C.] § 3553(a) to guide its discretion at sentencing") (citations omitted).

[1] Notwithstanding that he was found with both cocaine and heroin, the criminal information charged Figueroa-Beltran with possessing for sale "a controlled substance, to-wit: Cocaine." *See* Appellant's Appendix, pp. 0001-0002.

As relevant here, because Figueroa-Beltran was convicted of an immigration-related offense, the court consulted guideline § 2L1.2, which provided that the court should increase the calculation by 16 levels if the defendant was previously convicted of "a drug trafficking offense for which the sentence imposed exceeded 13 months." U.S.S.G. § 2L1.2(b)(1)(A)(2015); *see also Figueroa-Beltran*, 892 F.3d at 1001 n.4. The commentary to that guideline defined drug trafficking offense to include any offense "under federal, state, or local law" that prohibits "the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute or dispense." U.S.S.G. § 2L1.2, cmt. app. n. 2(2015).[2]

[2] Although guideline 2L1.2 no longer contains the underlying 16-level enhancement, the divisibility of Nevada's drug statutes is a recurring question that arises in both the sentencing and immigration contexts at the Ninth Circuit and in federal district courts. According to information provided via telephone by the Ninth Circuit's Clerk's Office on June 4, 2019, at least six cases have been formally stayed via written orders, pending the outcome of Figueroa-Beltran's Nevada Supreme Court proceedings (others may have been informally stayed without a written order). Counsel is aware of at least one district court proceeding in the immigration context where the court held a motion to dismiss in abeyance for the same reason, *United States v. Roque*, 2:18-cr-00345-RFB-GWF (a case in which both counsel in this case appeared in the federal district court to argue this recurring issue; the case was since dismissed after the defendant's deportation). Contrary to Figueroa-Beltran's assertion, the Ninth Circuit did not ask this Court to review this specific federal sentencing guideline enhancement (*see* Opening Brief at 4, footnote 1), but rather asked the Court to clarify the divisibility of NRS 453.337, *i.e.*, opine on whether, under Nevada law, the type of controlled substance is an element of the offense.

Applying the analysis known as the "modified categorical approach" (which is discussed further below), and relying on the Ninth Circuit's decision in *United States v. Benitez-Perez*, 367 F.3d 1200, 1203 (9th Cir. 2004), the district court concluded that it was permitted to look at the charging document and judgment of conviction to determine that Figueroa-Beltran's Nevada possession for sale conviction involved cocaine specifically, which is also listed on the federal drug schedules. *See Figueroa-Beltran*, No. 16-10388 (Dkt. Entry 6-1 at 16) (9th Cir. Dec. 22, 2016) (Ninth Circuit Excerpts of Record Vol. 1 at Bates EOR0012). Thus, the court concluded that Figueroa-Beltran's 2012 conviction under NRS 453.337 qualified as a "drug trafficking offense" under the federal sentencing guidelines, and applied the 16-level enhancement. *Figueroa-Beltran*, 892 F.3d at 1001. Figueroa-Beltran appealed this ruling to the Ninth Circuit.

In opposition to Figueroa-Beltran's petition for writ of certiorari to the U.S. Supreme Court, although the Solicitor General observed that this 16-level sentencing enhancement has been superseded, he did so only after presenting two primary arguments for denying the petition: the question presented (1) arose "in an interlocutory posture, which 'alone furnishe[s] sufficient ground for the denial' of the petition," and (2) "implicates no disagreement with any decision of [the Supreme Court] or among the courts of appeals." *Figueroa-Beltran v. United States*, 18-6747, Brief for the United States in Opposition at p. 10 (U.S. Feb. 28, 2019) (quoting *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916)), brief *available at* https://www.supremecourt.gov/DocketPDF/18/18-6747/90177/20190228164633690_18-6747%20Figueroa-Beltran%20final.pdf (last visited June 4, 2019).

C. The Ninth Circuit Examines the Elements of NRS 453.337 and Seeks This Court's Assistance in Understanding Them.

On appeal, the parties disagreed whether Figueroa-Beltran's prior NRS 453.337 conviction was a proper predicate for the sentencing guidelines enhancement applied by the district court. *See Figueroa-Beltran*, 892 F.3d at 1003. The Ninth Circuit thus turned to the "three-step" analysis provided by the Supreme Court. *Id.* at 1001–02. First, the court asked whether the Nevada statute is a "categorical match" with a "federal drug trafficking offense" (*i.e.*, does it "proscribe the same amount of or less conduct than the federally defined offense"). *Id.* at 1002. Under current Ninth Circuit precedent, *see United States v. Leal-Vega*, 680 F.3d 1160, 1167 (9th Cir. 2012), because Nevada's drug schedules criminalize more substances than the federal Controlled Substances Act, the court agreed with the parties that the Nevada statute was not a perfect categorical match. *Id.* at 1002–03.

Turning to the second step of the analysis, the court sought to determine whether NRS 453. 337 is "divisible" as to the overbroad portion of the statute (*i.e.*, the fact that a person could be guilty for possessing-for-sale a drug under Nevada law that is not criminalized under federal law). *Id.* at 1002. To determine divisibility, the court thus recognized it had to determine whether the type of controlled substance charged is an *element* of the Nevada possession-for-sale offense, *i.e.*, part of the legal definition of the crime that

"'the prosecution must prove to sustain a conviction.'" *Id.* (quoting *Mathis v. United States*, 136 S.Ct. 2243, 2248 (2016)).

To answer this question, the court considered the parties' competing citations to Nevada Supreme Court precedent. *Id.* at 1003. Figueora-Beltran argued that this Court's decision, *Sheriff v. Luqman*, 101 Nev. 149, 697 P.2d 107 (1985), established that "the identity of the controlled substance is 'merely a fact'—rather than an 'element of the offense.'" 892 F.3d at 1003. The government, on the other hand, argued that this Court's decision, *Muller v. Sheriff*, 93 Nev. 686, 572 P.2d 1245 (1977), "establishes that § 453.337 is divisible as to its controlled substance requirement," *i.e.*, the type of controlled substance is an element. 892 F.3d at 1003.

Upon reviewing both Nevada Supreme Court decisions, the Ninth Circuit concluded that, "*Luqman* and *Muller* seemingly stand in conflict. *Luqman* suggests that the identity of a controlled substance is a non-elemental factual determination. In contrast, *Muller* appears to conclude that the sale of one controlled substance is an offense distinct from the sale of another, and proof of the identity of the controlled substance at issue is required." 892 F.3d at 1003–04. As a result of this seeming conflict, the Ninth Circuit sought "further guidance" from this Court as to whether "the identity of a controlled substance" is an element. *Id.* at 1004.

To help frame the state-law question presented, the Ninth Circuit broke the inquiry down into three subparts, asking (1) whether NRS 453.337 is "divisible as to the controlled substance requirement (*i.e.*, is it an element), (2) whether *Luqman* concludes it is not an element, and (3) whether *Muller* concludes that controlled substance type is an element, and if the decisions conflict, how to reconcile the conflict. *Id.* at 1004. The court noted that its "phrasing of the questions should not restrict the [Nevada Supreme] Court's consideration of the issues involved," observing that the Nevada Supreme Court "may reformulate the relevant state law questions as it perceives them to be." *Id.*

D. Nevada Supreme Court Proceedings

On July 18, 2018, this Court accepted the certified questions from the Ninth Circuit and added an inquiry of its own, directing the parties to "address *Andrews v. State*, 134 Nev., Adv. Op. 12, 412 P.3d 37 (2018), which was decided after the parties briefed this matter in federal court." Doc. #18-27455. Figueroa-Beltran then sought a stay of proceedings so he could request rehearing en banc at the Ninth Circuit, and, if necessary, seek certiorari from the U.S. Supreme Court. Doc. #18-28585. After Figueroa-Beltran unsuccessfully exhausted all of those options, this Court issued a revised

briefing schedule. Doc. # 19-16537. Figueroa-Beltran filed his opening brief on May 15, 2019, and the government now files its answering brief.

VI.

SUMMARY OF THE ARGUMENT

In reviewing a federal sentencing issue that turns on a question of Nevada law, the Ninth Circuit concluded that two Nevada Supreme Court opinions appear in conflict, thus leaving the court at a crossroads. To be able to proceed with the federal sentencing question before it, the Ninth Circuit certified to this Court a purely state-law issue—must the identity of the controlled substance alleged in a Nevada possession-for-sale charge under NRS 453.337 be proven to sustain a conviction (*i.e.*, is it an element)?

Continuing his pattern of avoiding the answer to this question at all costs—after the Ninth Circuit panel and en banc court, as well as the U.S. Supreme Court, have already declined to entertain Figueroa-Beltran's delay tactics—he now argues that this Court should change its mind and *refuse* to answer the certified state law issue before it because, Figueroa-Beltran claims, the case presents an issue of federal law only. As this Court is well aware from its review and acceptance of the issue presented, this case presents an issue of Nevada law that this Court is best suited to decide. Thus, the Court should disregard Figueroa-Beltran's anti-certification argument.

Turning to the merits of the state-law issue presented, this Court should clarify that, under *Muller v. Sheriff*, 572 P.2d 1245 (Nev. 1977), and *Andrews v. State*, 412 P.3d 37 (Nev. 2018), the identity of the controlled substance under NRS 453.337 is an element of the offense. Applying the same principles and modes of analysis the Court used in those cases, the Court should construe the word "any" to mean "a" controlled substance, and hold that each controlled substance possessed for sale gives rise to a separate offense, *i.e.*, each offense is distinguished from the other by proving the separate identity of each controlled substance. As in *Andrews*, this conclusion is supported by Nevada USCA statutory cross-references to NRS 453.337, the statute's legislative history, and instructive case law from other jurisdictions. The conclusion is further supported by court records from other, completed NRS 453.337 cases involving multiple counts.

Figueroa-Beltran's arguments concerning *Sheriff v. Luqman*, 697 P.2d 107 (Nev. 1985), do not undermine this conclusion because *Luqman* was a case that considered the constitutionality of legislative delegation to an agency. In *Luqman*, the Court found no unconstitutional delegation; the Court did *not* say the identity of the controlled substance in NRS 453.337 is not an element. The case is inapposite to the question presented here.

Finally, that the parties are federal litigants appearing before this Court does not make this Court any less qualified to opine on a purely Nevada law issue. Clarifying the state of existing Nevada law will not present the concerns predicted by Figueroa-Beltran.

VII.

ARGUMENT

A. Standard of Review

The government agrees with Figueroa-Beltran's standard of review, the Court reviews the issue presented in this case de novo.

B. This Court Should Resolve the Certified State-Law Issue Accepted from the Ninth Circuit.

Before addressing the merits of the question presented in this case, Figueroa-Beltran attempts to relitigate an argument the Ninth Circuit and Supreme Court have already declined to entertain: he claims that the Ninth Circuit violated Supreme Court precedent by certifying this issue to the Nevada Supreme Court. *See* Opening Brief at 10-11; *see also United States v. Figueroa-Beltran*, No. 16-10388, Dkt. Entry 47 (Aug. 17, 2018 order denying petition for panel and en banc rehearing, noting that no judge requested a vote concerning en banc rehearing), Dkt Entry 52 (Supreme Court order denying the petition for writ of certiorari before judgment). Whether the Ninth Circuit misapplied the three-step *Mathis* framework, including the first step—

determining the elements of a state crime (*i.e.*, divisibility), as it relates to federal sentencing enhancements—is a question of federal law that the en banc Ninth Circuit and Supreme Court have thus far declined to reach. Notably, that question is not presented here.[3]

Rather, as it was applying *Mathis*, the Ninth Circuit paused its analysis to seek guidance from this Court. *See Mathis*, 136 S. Ct. at 2256 ("The first task for a [federal] court faced with an alternatively phrased statute is thus to determine whether its listed items are elements or means."). Specifically, having reviewed Nevada Supreme Court authority and perceiving an apparent conflict between two decisions, the Ninth Circuit has asked this Court to opine

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[3] Figueroa-Beltran claims that, after completing the first step of the *Mathis* analysis applicable in federal court, the Ninth Circuit "certified the rest of the *Mathis* analysis to this Court." Opening Brief at 19; *see also* Opening Brief at 21 (claiming the Ninth Circuit certified "federal divisibility questions"), 22 (asserting the Ninth Circuit "delegate[d] the federal divisibility inquiry"). The Ninth Circuit did no such thing. This Court is well aware of the questions certified by the Ninth Circuit and accepted by this Court; in no way do any of those questions ask this Court to do the Ninth Circuit panel's job for it. The Ninth Circuit has asked for limited guidance on an issue of state law: is the identity of the controlled substance an element of the Nevada possession-for-sale offense?

This Court need not, as Figueroa-Beltran suggests, "pick up where the Ninth Circuit stopped," Opening Brief at 22, or apply the categorical, modified categorical, or any other federal-law-based approach in responding to this purely state-law question. Figueroa-Beltran's arguments that the Ninth Circuit did not properly apply steps two and three of the *Mathis* analysis are arguments for the en banc Ninth Circuit or the U.S. Supreme Court.

on that conflict, and thereby provide guidance on whether the identity of the controlled substance alleged in a Nevada possession-for-sale case is an element of the offense—a question purely of state law.

In support of his anti-certification argument, Figueroa-Beltran points to a statement by the Assistant Solicitor General during the *Mathis* oral argument. *See* Opening Brief at 21. As the government attorney noted before the Supreme Court, if every single sentencing judge paused every single sentencing proceeding to seek assistance from state courts, this would cause concern about an intrusion on state court resources. But that is not the issue presented here. After reviewing two Nevada Supreme Court cases that the Ninth Circuit concluded stood in contrast with one another, given the frequency with which the issue of divisibility of Nevada drug statutes (whether drug type is an element of the offense) appears in federal court, the Ninth Circuit's narrow request does not fit the hypothetical "extraordinary intrusion" posited during the *Mathis* argument.[4]

Despite his anti-certification argument, Figueroa-Beltran recognizes that this Court "has the discretion to answer certified questions" such as this.

[4] The Supreme Court in *Mathis* predicted that the "threshold inquiry—elements or means?— . . . will be [easy] in many" cases, because usually "a state court decision definitively answers the question." 136 S. Ct. at 2256. But *Mathis* did not envision a situation where two state court decisions appeared in conflict as the Ninth Circuit found here, further illuminating why certification is proper.

Opening Brief at 21. And although this Court likewise has the discretion to decline such certified questions, because the issue presented fits comfortably within this Court's certification factors, and based on the limited nature of the inquiry, the Court's decision to accept the certified questions was an eminently reasonable exercise of that discretion.

In sum, the Ninth Circuit has asked this Court to clarify whether the identity of the controlled substance is an element of the Nevada possession-for-sale offense that must be proven to sustain a conviction. As this Court recognized, the relevant factors—whether the Court's answer will be determinative to an issue in the federal case, existence of controlling Nevada authority, and assistance in settling an important question of law—"are met with respect to the [the Ninth Circuit's] questions." Doc. #18-27455 at 1-2. Thus, as it has already agreed to do, the Court should proceed to advise the Ninth Circuit whether the type of controlled substance in NRS 453.337 is an element.

C. Relevant Sources of Nevada Law Demonstrate That the Identity of the Controlled Substance in a Nevada Possession-for-Sale Charge is an Element of the Offense.

This Court is in the best position to opine, and then advise the Ninth Circuit, on whether the identity of the controlled substance underlying a Nevada possession-for-sale charge is an element of the offense under NRS 453.337. In this section, the government addresses several Nevada sources (case law, statutory authority, and charging practices) to help guide the Court's analysis to conclude that it is an element.

1. Existing Nevada case law suggests that the identity of the controlled substance charged is an element of the offense.

Because the Ninth Circuit framed its certified-question inquiry around what it perceived as an apparent conflict between this Court's decisions in *Luqman* and *Muller*, the government begins by analyzing these cases in the context of the question presented. Per this Court's certification order, it also addresses *Andrews* in this section.

a. Muller v. Sheriff

In 1977, this Court decided *Muller v. Sheriff*, 572 P.2d 1245 (Nev. 1977), the first decision relevant to whether drug type is an element of the offense that must be proven to sustain a conviction. In *Muller*, this Court explained that a single drug transaction involving the sale of two different controlled substances (heroin and cocaine) constituted two separate offenses because two controlled

substances were involved. *Id.* The Court noted that "[t]he sale of heroin and the sale of cocaine are distinct offenses requiring separate and different proof." *Id.* This is so, the court explained, because "the sale of each controlled substance requires proof of an additional fact which the other does not, *viz.*, *the particular . . . identity of the controlled substance sold*." *Id.* (emphasis added, ellipses in original).

Muller did not reach this conclusion because the two substances involved in the transaction (heroin and cocaine) were on different statutory schedules or because the case involved the drug sales statute (as opposed to possession, possession-with-intent, trafficking, etc.). To the contrary, its holding was broad and relied on authority analyzing substances on the same schedule, in the same statute, and under a variety of different drug-prohibition theories (possession, possession-with-intent, and sales). *See, e.g.*, *id.* at 1245 (citing *People v. Lopez*, 337 P.2d 570 (Cal. App. 1959) (sustaining three separate counts for possession of heroin, marijuana, and amidone because "each constitute[s] a single offense because each relate[s] to a different type of narcotic"); *State v. Adams*, 364 A.2d 1237, 1240 (Del. Super. 1976) (sustaining separate counts under possession-with-intent statute because the statute comprises "separate crime[s] with respect to each forbidden substance").

Indeed, while one of the out-of-state decisions on which *Muller* relied could be interpreted as basing its separate-offenses conclusion on the fact that the two substances appeared on different statutory schedules, *Muller* clearly and deliberately rejected that approach. In *State v. Campbell*, the Supreme Court of Tennessee found two distinct offenses were committed by the sale of two substances, and suggested that the necessary and distinct proof separating the two offenses was the drug schedule. *State v. Campbell*, 549 S.W.2d 952, 955 (Tenn. 1977). In reaching its conclusion that each type of drug is a separate element, *Muller* quoted this language from *Campbell*, but notably *omitted* the word "schedule."

Compare:

Campbell, 549 S.W.2d at 955	*with*	*Muller*, 572 P.2d at 1245
[W]e hold that two distinct offenses were committed since the sale of each controlled substance requires proof of an additional fact which the other does not, *viz.*, the particular "schedule" identity of the controlled substance sold (internal quotation marks omitted).		"[T]wo distinct offenses were (probably) committed since the sale of each controlled substance requires proof of an additional fact which the other does not, *viz.*, the particular . . . identity of the controlled substance sold" (quoting *Campbell*, 549 S.W.2d at 955) (ellipses in *Muller*).

Muller's deliberate omission of the word "schedule" demonstrates that this Court eschewed a rule that defines separate controlled substance offenses as only those involving substances appearing on different statutory schedules.

Instead, the distinct proof required in *Muller* is the "identity of the controlled substance sold." 572 P.2d at 1245.

Muller's broad holding suggests that Nevada drug laws are meant to curb drug activities with respect to each forbidden substance, no matter the theory charged. Indeed, Figueroa-Beltran's suggestions that the type of controlled substance is an element under the sales statute (under *Muller*) and the trafficking statute (under *Andrews*), but not the possession-for-sale statute, is contrary to *Muller*'s holding that two substances should be charged and punished separately.[5]

Figueroa-Beltran argues that *Muller* can only be "instructive" as to cases involving "Nevada's pre-1981 drug control regime." Opening Brief at 41. But, as discussed below in connection with *Luqman*, there was no "overhaul" that undermined *Muller* as Figueroa-Beltran claims. *See* Opening Brief at 39.

b. Sheriff v. Luqman

This Court's decision in *Sheriff v. Luqman*, 697 P.2d 107 (Nev. 1985), can be reconciled with its decision in *Muller* because the cases presented entirely different questions. Rather than asking whether the type of controlled substance constitutes an element and therefore a separate crime, as *Muller* did, *Luqman* addressed whether moving the drug schedules from the Revised

[5] *Andrews* is discussed fully below.

Statutes to the Administrative Code was an improper delegation because "scheduling [the] drugs determines the penalties." *Id.* at 110.

The question in *Luqman* was whether an amendment to the statute "unconstitutionally delegate[d] to the state board of pharmacy the legislative power to define the elements of a crime," *Id.* at 109, and the answer was "no." While Figueroa-Beltran would like the Court to interpret that answer as "no, they are not elements," the analysis in the decision makes clear the answer was "no, this was not an unconstitutional delegation." The Court concluded no improper delegation occurred "since the *penalties* for violating [the act] have been established by legislature." *Id.* at 110–11 (emphasis added).

Nevada's state scheme is analogous to the federal scheme. Congress enacts the statutes and sets out the schedules and penalties, and then it defers to the subject-matter experts (in the federal system, the DEA) to decide which substances belong in which schedules. *See Touby v. United States*, 500 U.S. 160, 162, 164 (1991) (the federal Controlled Substances Act authorizes the Attorney General to schedule substances, and in turn, the Attorney General has delegated scheduling to the DEA).

Demonstrating how similar Nevada's system is to the federal scheduling system, the Legislature has instructed the Pharmacy Board to designate, reschedule, or delete any controlled substance consistent with any changes in

federal law. NRS 453.2182. Just as *Luqman* concluded regarding the analogous Nevada system, the federal system is clearly constitutional and, as in the federal system, the particular substance is clearly an element of the offense. Both systems respect the separation of powers interpreted in the U.S. Constitution and stated in the Nevada Constitution.

Figueroa-Beltran attempts to have *Luqman* overshadow the relevant holding in *Muller* by averring that in 1981, an "overhaul" in Nevada's drug laws occurred when Nevada "granted the pharmacy board the power to determine what drugs are prohibited and to list those prohibited substances in the administrative code," Opening Brief at 33-34, but that is incorrect. Under NRS 453.146 (Powers and duties of Board), the pharmacy Board *always* had the power and duty to administer the controlled substance laws. Notably, pre-1981, the Board could "add substances to or delete or reschedule all substances . . . by regulation." *Id.* The 1981 amendment only changed *where* that administration occurred, *i.e.*, in the administrative code rather than revised statutes.[6] Figueroa-Beltran's interpretation of *Luqman* as a watershed decision

[6] The precise amendment was as follows: "The board shall administer the provisions of NRS 453.011 to 453.551 [the Controlled Substances Act], inclusive, and may add substances to or delete or reschedule all substances enumerated in ~~the schedules in NRS 453.161, 453.171, 453.181, 453.191, and 453.201~~ schedules I, II, III, IV and V by regulation." Nev. Rev. Stat. 453.161 (stricken words removed and underlined words added by 1981 amendment). *See*

interpreting Nevada's drug laws is unavailing. Notably, no Nevada court has relied on *Luqman* for the proposition Figueroa-Beltran proposes.

Figueroa-Beltran contends that this Court's decision in *McNeill v. State*, 132 Nev. Adv. Op. 54, 375 P.3d 1022 (2016), further supports the conclusion that the type of controlled substance underlying an NRS 453.337 violation is not an element of the offense. But *McNeill*, a case involving sex-offender condition violations, has nothing to do with the question presented here. *McNeil* stands for the unremarkable proposition that a State administrative agency (in that case, the Board of Parole Commissioners) cannot independently legislate and establish new crimes. There, the Legislature could not delegate authority to the Board to establish new lifetime conditions of supervised release, because such conditions are set forth by statute and any violation thereof constitutes a *new* prosecutable felony. *Id.* at 1025.

The Court said *McNeill* was unlike *Luqman* because the delegation in *Luqman* "retained both the general and specific guidelines listing various factors which are to be taken into account by the pharmacy board when scheduling drugs." *Id.* at 1026; *see also, e.g.*, NRS 453.2186 (cabining Pharmacy Board's discretion by prohibiting inclusion of certain substances). In contrast,

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https://www.leg.state.nv.us/Division/Legal/LawLibrary/Statutes/61st/Stats198104.html#Stats198104page734 (last visited June 5, 2019).

the alleged delegation in *McNeill* involved no legislative grant of authority and no such guidelines.[7] 375 P.3d at 1026. Distinguishing between a proper and an improper delegation says nothing about the elements of NRS 453.337.

Tellingly, post-*Luqman*, the Nevada Supreme Court has never overruled *Muller*, and Nevada Supreme Court decisions, including *Andrews* (which is discussed below), continue to demonstrate that the identity of a controlled substance is an element of the offense because separate crimes result from different substances. *See, e.g.*, *Sheriff, Washoe Cty. v. Shade*, 858 P.2d 840, 842 (Nev. 1993) (finding probable cause that defendant "committed the offenses of possession of cocaine and possession of methamphetamine") (emphasis added); *Richard v. State*, No. 59990, 2014 WL 7107834, at *1 (Nev. Dec. 11, 2014) (sufficient evidence supported separate possession-with-intent-to-sell marijuana and cocaine counts).

As discussed below, unsurprisingly, Nevada charging practices in NRS 453.337 cases comport with *Muller* and later decisions like *Andrews*, *Shade,* and

[7] A hypothetical helps establish the difference between the allowable delegation in *Luqman* and the improper delegation in *McNeill*. If the Pharmacy Board attempted to enact a regulation stating that possessing-with-intent to sell any controlled substance in the parking lot of a sporting event is a crime punishable as a Category B felony, the action would violate separation of powers because the Pharmacy Board may not legislate. As *McNeill* explained, because the Legislature set the penalties for controlled-substance offenses and provided guidelines for the Pharmacy Board, no unconstitutional delegation occurred.

Richard, charging different substances in different counts and requiring separate proof of each controlled substance.

c. Andrews v. State

After the parties submitted their briefs and presented oral argument to the Ninth Circuit, this Court decided *Andrews v. State*, 412 P.3d 37, 38 (Nev. 2018), holding that NRS 453.3385—Nevada's drug trafficking statute—"creates a separate offense for each schedule I controlled substance simultaneously possessed by a person." In reaching this conclusion, the Court asked whether the phrase "any controlled substance" in the drug trafficking statute meant "one," "one or more," "all," or something else. The Court concluded that "any controlled substance" means each particular controlled substance. As shown below, that analysis applies equally to NRS 453.337.

Statutory Cross-References. First, the *Andrews* court looked to the other statutes in Nevada's Uniform Controlled Substances Act (UCSA) that cross-reference § 453.3385, and noted that, "in doing so, these statutes refer to controlled substances in the singular." 412 P.3d at 40. Similarly, Nevada USCA statutes cross-referencing § 453.337 use the singular.

- NRS 453.301 refers to "Everything of value furnished or intended to be furnished in exchange for *a controlled substance* in violation of" Nevada's USCA, and further provides, "If an amount of cash

which exceeds $300 is found in the possession of a person who is arrested for a violation of NRS 453.337 or 453.338, then there is a rebuttable presumption that the cash is traceable to an exchange for *a controlled substance* and is subject to forfeiture."[8] (emphasis added)

- NRS 453.336 provides that, unless a greater penalty is provided in § 453.337 and other relevant statutes, "a person who is convicted of the possession of flunitrazepam *or* gamma-hydroxybutyrate, *or any substance* for which flunitrazepam or gamma-hydroxybutyrate is *an immediate precursor*, is guilty of a category B felony."[9] (emphasis added)

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[8] Figueroa-Beltran argues that this statutory cross-reference is not instructive because two other subparagraphs in § 453.301 refer to activities involving "any controlled substance" in violation of the USCA. *See* NRS 453.301 (2), (10). As *Andrews* recognized, "[m]ost of the statutes establishing offenses in the UCSA refer to controlled substances in the singular," as do most of the references (including the *specific* reference to § 453.337) in this forfeiture statute. Because "the USCA should be interpreted . . . to make uniform the law with respect to the subject of such sections," as it did in *Andrews*, the Court should interpret "any" as "a" controlled substance.

[9] Subsection (1) of this closely-related statute also includes a cross-reference encompassing § 453.337 and referencing a controlled substance in the singular: "A person shall not knowingly or intentionally possess *a controlled substance*, . . . except as otherwise authorized by the provisions of NRS 453.011 to 453.552, inclusive." (emphasis added). Relatedly, in the possession-with-intent context, NRS 453.322 proscribes "possess[ion], with the intent to manufacture or compound *a controlled substance*." (emphasis added)

- NRS 453.3325 prohibits allowing "a child to be present in any conveyance or upon any premises wherein *a controlled substance* other than marijuana: (a) Is being used in violation of the provisions of NRS 453.011 to 453.522, inclusive . . . ." (*i.e.*, including NRS 453.337) (emphasis added).[10]
- NRS 453.570 provides that "[t]he amount of *a controlled substance* needed to sustain a conviction of a person for an offense prohibited by the provisions of NRS 453.011 to 453.552, inclusive, is that amount necessary for identification as a controlled substance by a witness qualified to make such identification" (emphasis added).[11]
- NRS 453.553 provides that, "[i]n addition to any criminal penalty imposed for a violation of the provisions of NRS 453.011 to 453.552, inclusive, any person who . . . possesses for sale . . . *a controlled substance* . . . is subject to a civil penalty for each violation" (emphasis added).

[10] NRS 228.700, defining a child who is endangered by drug exposure, has a similar cross reference, including in its definition a child who is present where "*a controlled substance* is unlawfully possessed, used, sold," etc. "in violation of any of the provisions of NRS 453.011 to 453.552, inclusive" (emphasis added).

[11] This statute also demonstrates that the type of controlled substance must be proven, as discussed further below.

- NRS 453.348 provides that, in any proceeding under NRS 453.337 (among other USCA statutes), "any previous convictions of the offender for a felony relating to controlled substances must be alleged in the indictment." Although this statute is not directly on point because it assumes alleging multiple prior convictions plural, it appears to use "controlled substances" in the plural form to match "convictions" plural.

Legislative History. The Legislative History cited by Figueroa-Beltran supports the same construction for NRS 453.337 as the Court applied to NRS 453.3385 in *Andrews*. For example, it reveals that the new statute was designed to stop drug dealers before they had a chance to consummate a sale by allowing an undercover agent to arrest someone upon negotiating a sale without the actual sale. *See* Compiled Legislative History for S.B. 268, Minutes of Meeting at Pages Five and Six (Bates Stamp 331-332).[12] Those Minutes also reveal a desire for "heavy penalties," which, in the case of § 453.337, increase with multiple prior convictions, suggesting each separate drug should be charged separately to achieve this goal. *Id.* at Bates 331.

Notably, the legislative history shows that § 453.337 "is based on the

[12] *Available at* https://www.leg.state.nv.us/division/research/library/leghistory/lhs/1977/SB268,1977.pdf (last visited June 5, 2019).

California statue" criminalizing possession for sale. *Id.* at Bates 332; *see* Cal. H&S Code § 11351. The Ninth Circuit, sitting en banc and reviewing California case law, has already decided that California's possession statute, which similarly criminalizes controlled substances by cross-referencing schedules, is divisible as to the controlled substance requirement, *i.e.*, the type of controlled substance is an element. *See United States v. Martinez-Lopez*, 864 F.3d 1034, 1040 (9th Cir.) (noting California case law holding that "simultaneous possession of different items of contraband are separate crimes," showing that the type of drug is an element) (internal quotation marks omitted), *cert. denied*, 138 S. Ct. 523, 199 L. Ed. 2d 400 (2017); *see also United States v. Murillo-Alvarado*, 876 F.3d 1022, 1027 (9th Cir. 2017) (extending holding in *Martinez-Lopez* to California possession-for-sale statute). The derivation of § 453.337 from California law provides further evidence that the controlled substance identity is likewise an element under Nevada law.

Finally, in 1983 when the Legislature enacted the trafficking statute—which *Andrews* held punishes each controlled substance separately—the Legislature also amended § 453.337 in tandem so the statutes would work together, reflecting the point at which heavier penalties set in for trafficking certain quantities. *See* Compiled Legislative History for S.B. 7 at p. 24 (amending § 453.337 to add "Unless a great penalty is provided in section 2, 3

or 4 of this act [*i.e.*, the new trafficking provisions], any" person who violates this section shall be punished).[13] The forfeiture provisions discussed above were also added at this time, showing that they further support the interpretation of "a controlled substance." *Id.* at p. 30.

Moreover, just as "the purpose of the severe penalties [behind the trafficking statute] was to incentivize those convicted under the law to reveal the 'higher ups' who usually avoid prosecution," *Andrews*, 412 P.3d at 40–41, charging substances separately under the possession-for-sale statute—thereby resulting in higher penalties based on the number of prior convictions—would have the same effect (*i.e.*, the State could negotiate to charge only one count instead of many if a would-be dealer cooperates against higher ups).

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[13] *Available at* https://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1983/SB007,1983.pdf (last visited June 6, 2019). The statues were again amended in tandem in 1995 when the penalties were adjusted. *See* Compiled Legislative History for S.B. 416 at Bates Stamp 13 (table showing adjusted penalties for drug statutes), available at https://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1995/SB416,1995.pdf (last visited June 6, 2019). The 1997 amendment also suggests that, like the trafficking statute, "any" means "a" controlled substance because it added individual substances flunitrazepam and gamma-hydroxybutyrate by name, as well as any substance that is a precursor (in the singular) to either of those drugs. *See* Compiled Legislative History for S.B. 131 at Bates Stamp 40, available at https://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1997/SB131,1997.pdf (last visited June 6, 2019).

Case Law from Other Jurisdictions. *Andrews* cited favorably several decisions from other courts holding that similarly worded statutes authorized "a separate conviction and punishment for the possession . . . of each controlled dangerous substance covered by the Act, even when there is a simultaneous possession of more than one such substance." 412 P.3d at 41 (quoting *Cunningham v. State*, 567 A.2d 126 (Md. Ct. App. 1989)). *Andrews* agreed with *Cunningham*'s rationale—and specifically its conclusion that the term "any" reflected the legislature's intention to regulate "each controlled dangerous substance, and to authorize a separate conviction for the possession of each substance."[14] *Id.*

Although Nevada's drug trafficking statute includes a trafficking presumption based solely on the quantity possessed, most of the cases cited by *Andrews* involved traditional possession or possession-with-intent statutes which, like Figueroa-Beltran's conviction under NRS 453.337, do not depend on quantity. *See Tabb v. State*, 297 S.E.2d 227, 230 (Ga. 1982) (in possession-

[14] Although *Cunningham* involved two controlled substances that appeared on different schedules, that fact was of no significance in *Andrews*, as evidenced by its citation to decisions from other courts reaching the same conclusion in cases involving two drugs from the *same* schedule. *See id.* (citing, *inter alia*, *Tabb v. State*, 297 S.E.2d 227, 230 (Ga. 1982) (holding that "simultaneous possession of each of the controlled substances listed" on the same drug schedule "is a separate offense for which the legislature meant to impose punishment"); *State v. Williams*, 542 S.W.2d 3, 5 (Mo. App. 1976) (same)).

with-intent-to-distribute statue, "any" means "a" controlled substance); *State v. Williams*, 542 S.W.2d 3, 5 (Mo. Ct. App. 1976) (in possession statute, "any" means "a" controlled substance); *State v. Meadors*, 580 P.2d 903, 907 (Mt. 1978); *Melby v. State*, 234 N.W.2d 634, 640-41 (Wis. 1975) (same); *see also Lopez*, 337 P.2d 570 (California possession statute, now codified as Cal. H&S § 11351, referencing "any controlled substance" provides for multiple convictions for multiple substances, as relied on by this Court in *Muller*) .

Figueroa-Beltran fails to address any of this persuasive out-of-state authority on which *Andrews* relied. Instead, he points to the model USCA, *see* Opening Brief at 52-53, which uses "a controlled substance" in the singular. As *Andrews* recognized, "the USCA should be interpreted so as to effectuate its general purpose and *to make uniform the law with respect to the subject of such sections among those states which enact it*." 412 P.3d at 40 (quotation marks omitted, emphasis in *Andrews*). The Court should reject Figueroa-Beltran's non-uniformity argument to the contrary and keep Nevada law uniform, both internally (trafficking and possession-with-intent) and externally (with the USCA).

The Court should also find unpersuasive the out-of-state authority to which Figueroa-Beltran cites because those state statutes and the reasoning applied are distinct from Nevada's USCA and this Court's reasoning in

Andrews. *See, e.g.*, *Vogel v. State*, 426 So. 2d 863, 881 (Ala. Crim. App. 1980) (based on the plain language of the statute, noting that Alabama's act differs from the USCA and must be interpreted as such because the act, referencing "controlled substances" in the plural form and lumping together possession, sale, etc., "does not impose different penalties based upon the schedules of the involved drugs"); *State v. Butler*, 271 A.2d 17, 18 (N.J. Super. App. Div. 1970) (applying a plain meaning construction, "it is obvious the Legislature intended to proscribe the *acts* individually," *e.g.*, sell, prescribe, administer; thus, with the focus on the actus reus, possession, no matter how many substances, is one crime).

People v. Manning, 374 N.E.2d 200, 201 (Ill. 1978), is also unhelpful because the Illinois statute at issue referred to "a controlled substance" in the singular and was not dealing with statutory ambiguity;[15] moreover, the court noted that different states have come out differently (Wisconsin and Delaware allow multiple counts, Oregon and New Jersey do not). As it did in *Andrews*, the Court should find persuasive the authority from states allowing multiple

[15] *Duncan v. State*, 412 N.E.2d 770, 775 (Ind. 1980), also lacks ambiguity where the statute involves "dealing on a controlled schedule I, II, or III substance." The analysis in *State v. Homer*, 538 P.2d 945, 945 (Or. App. 1975), does not reveal whether ambiguity existed, and the court did not provide an explanation for its conclusion (*e.g.*, plain reading, legislative history, comparative analysis).

counts based on identity of the controlled substance, *e.g.*, *Melby*, 234 N.W.2d 634, especially where Nevada's statute was derived from California's, and, as discussed above, California case law interprets that statute as requiring proof of the identity of the substance.

Figueroa-Beltran's reliance on *Castaneda*, *see* Opening Brief at 55, is misplaced because, in that case, none of the usual tools of statutory construction resolved the ambiguity. As demonstrated above, the same tools the Court applied in *Andrews* are instructive and can be applied to resolve the ambiguity in NRS 453.337. *Compare Castaneda v. State*, 132 Nev. Adv. Op. 44, 373 P.3d 108, 111 (2016) ("Only then, if 'a reasonable doubt persists' after 'all the legitimate tools of interpretation have been applied,' do we reach the rule of lenity urged on us by Castaneda;" only where legislative history "shed[] little light" and comparative out-of-state analysis was inconclusive, rule of lenity applied).

In short, while *Andrews* did not explicitly address NRS 453.337, the Court's analysis concerning the ambiguity of "any" applies equally here. Just as *Andrews* concluded that "the Legislature intended to create a separate offense for each controlled substance simultaneously possess by a person" in the trafficking context, 412 P.3d at 42, because statutory cross-references, the legislative history, and persuasive non-Nevada case law show "any" means

"a," the Court should conclude that the same reasoning applies to each substance simultaneously possessed for sale.

Figueroa-Beltran attempts to distinguish *Andrews* by arguing that it examined the unit of prosecution rather than whether the statute sets forth multiple offenses by listing alternative elements (*i.e.*, alternative types of controlled substances). Opening Brief at 47. But these questions are two sides of the same coin. If the unit of prosecution is "a separate offense for the possession of each controlled substance," 412 P.3d at 41, the distinguishing factor between each unit is the identity of the controlled substance, and to avoid duplicity problems, the identity must be a separate element. It therefore follows that the statute sets forth multiple, alternative offenses (*e.g.*, possession-with-intent to sell cocaine, possession-with-intent-to-sell methamphetamine, and so on). Figueroa-Beltran does not explain why the unit of prosecution would be different in trafficking versus possession-with-intent-to-sell cases, nor does he explain why Nevada would seek to punish more harshly "those who possess large quantities of different controlled substances," but punish would-be drug dealers less severely by allowing grouping of substances.[16]

[16] As Figueroa-Beltran recognizes, the penalties for possessing a controlled substance with intent to sell go up depending on how many prior convictions a defendant has. *See* NRS 453.337. Under *Andrews*'s theory of deterrence, each substance should be charged separately to hold repeat offenders more accountable. And because prior convictions may be used to enhance the

2. Nevada statutory authority suggests that the identity of the controlled substance charged is an element of the offense.

Although the government believes that the Court need only apply the reasoning in *Muller* and *Andrews* to similarly conclude that the identity of the controlled substance charged under NRS 453.337 is an element, in addition to these instructive decisions, the government responds to Figueroa-Beltran's arguments regarding the text of NRS 453.337.

First, as discussed, this statute is based on California's possession-for-sale statute, and California courts interpret that controlled substance requirement as an element. *See United States v. Martinez-Lopez*, 864 F.3d at 1040 (discussing California cases); *United States v. Murillo-Alvarado*, 876 F.3d at 1027 (same).

Second, when proving an NRS 453.337 violation, NRS 453.570 requires a sufficient amount of the controlled substance to allow "identification as a controlled substance by a witness qualified to make such an identification." Presumably, this witness is a lab technician who has tested the substance and can testify as to its identity. No such requirement would be necessary if the identity of the controlled substance need not be proven.

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statutorily available penalty, this further suggests that the identity of the controlled substance has to be proven to sustain a conviction that may later result in harsher penalties.

Third, the fact that the Legislature added specific controlled substances in the singular (*i.e.*, flunitrazepam, gamma-hydroxybutyrate) to the text of the statute shows that the identity of the controlled substance remains an integral part of proving a violation.

The Court should reject Figueroa-Beltran's argument that Nevada's drug schedules provide illustrative examples only rather than alternative charging elements because they include things like isomers and salts of isomers. Opening Brief at 25. This language tracks that of substances scheduled under the federal Controlled Substances Act, and federal law makes clear that synthetic compounds, *e.g.*, in the form of isomers, are specified ways to violate the statute, and must be proven to secure a conviction. *See, e.g.*, *United States v. Kelly*, 874 F.3d 1037, 1049 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 2038 (2018); *see also* NRS 453.219 (district attorney must notify Pharmacy Board of any charges involving a controlled substance analog so it may be specifically scheduled by extraordinary regulation).

3. Nevada charging practices show that the identity of the controlled substance charged is an element of the offense.

Contrary to Figueroa-Beltran's argument, Nevada charging practices in completed cases demonstrate that the identity of the controlled substance

under NRS 453.337 is an element that must be charged and proven to a jury.[17] *See, e.g.*, *Mathis*, 136 S. Ct. at 2257 (if a charging document "referenc[es] one alternative term to the exclusion of all others," this likely indicates that "the statute contains a list of elements").

Here, Figueroa-Beltran's charging document, guilty plea agreement, and judgment of conviction demonstrate that the type of controlled substance is an element (as opposed to factual means) of NRS 453.337.[18] First, the Information references only one controlled substance to the exclusion of all others by alleging that Figueroa-Beltran "willfully, unlawfully, feloniously, knowingly and intentionally possess[ed], for the purpose of sale, a controlled substance, to-wit: Cocaine." Appellant's Appendix, pp. 0001-0002. Next, the Guilty Plea Agreement incorporates that specification by noting a plea of guilty to: "Possession of Controlled Substance with Intent to Sell (Category D Felony – NRS 453.337), as more fully alleged in the charging document

[17] To respond to this argument, for which Figueroa-Beltran relies on Nevada state court records of which he appears to want this Court to take judicial notice, the government files concurrently with this brief a motion for judicial notice attaching additional Nevada state court records. The government requests that the Court consider that motion before reading this section of the Answering Brief, as this section refers to the contents of those documents.

[18] The Information and Judgment may be found at Appellant's Appendix, pp. 0001-0004. The government's motion for judicial notice includes Figueroa-Beltran's guilty plea agreement, a judicially noticeable court record that incorporates by reference the charging document, but which was not part of the federal court record.

attached hereto as Exhibit '1.'" *See* Motion for Judicial Notice, Ex. A (reattaching the Information alleging cocaine). Finally, the Judgment of Conviction references that plea. Appellant's Appendix, p. 0003.

As Figueroa-Beltran notes, charging requirements may also be gleaned from similar documents in other Nevada cases. *See, e.g.*, Opening Brief at 30 (a "limited class of documents" such as "the indictment, jury instructions, or plea agreement" may be helpful to determine the "elements[] a defendant was convicted of"). But as the government argued in response to Figueroa-Beltran's unresolved motion for judicial notice before the Ninth Circuit, the documents Figueroa-Beltran supplies from *State v. Howard*, CR14-1513, in particular are not helpful to resolve the elements question presented here.[19]

[19] The Ninth Circuit never ruled on Figueroa-Beltran's motion for judicial notice, which is the source of the *Howard* documents. Thus, when the court submitted certified questions to this Court, it did not include the motion papers, opposition, and reply. *See* 892 F.3d at 1004 (instructing Ninth Circuit clerk to "forward a copy of this order, under official seal, to the Nevada Supreme Court, together with copies of all briefs and excerpts of record that have been filed in this court"). After certification, this Court invited an appendix with "any portions of the record before the Ninth Circuit that are necessary to this court's resolution of the certified question and were not already provided to this court with the certification order." Doc. #18-27455 at 2. Since the Ninth Circuit never ruled on the motion, and therefore never took notice of the records attached to the pleadings, it is not clear that they are actually part of the record that was "before the Ninth Circuit." As such, this Court may wish to treat that motion for judicial notice as one before this Court to bring those records before the Court.

This is so because the state court never ruled on the duplicity issue briefly asserted and abandoned in that case; instead, the case was resolved with a guilty plea to one count of trafficking. *See generally* Appellant's Appendix, pp. 0053, 0055-0056 (noting that filing of second amended information charging one count of trafficking methamphetamine mooted motion), 0064 (charging document alleging trafficking in "a Schedule I controlled substance: methamphetamine"), 0069 (guilty plea thereto), 076 (judgment).

Rather than attempting to glean prevailing charging practices concerning multiple substances possessed for sale from a case whose resolution did not include an NRS 453.337 count, the Court should look to records of conviction from completed cases involving such counts to determine how the State charges and proves them. The government provides two examples in its concurrently filed Motion for Judicial Notice, one where the defendant went to trial, and the other where the defendant pleaded guilty.

First, in *State v. Keller*, C-16-312717-1, the Information alleged four counts of possession of a controlled substance with intent to sell as follows: Count 4 alleged methamphetamine, Count 5 alleged heroin, Count 6 alleged cocaine, and Count 7 alleged marijuana. *See* Motion for Judicial Notice, Ex. B (Information at 2). The defendant went to trial, and a jury convicted him on all counts. The Jury Instructions and Verdict reflect that the identity of the

substance charged is an element on which the jury had to deliberate. The Jury Instructions recite the specific substance in each possession-with-intent-to-sell count (Instruction No. 3), and require the jury to consider each substance in determining guilt (Instruction No. 11). *See* Motion for Judicial Notice, Ex. C.

The fact that the substantive instruction informs the jury, *e.g.*, "Methamphetamine is a controlled substance," shows that "Methamphetamine" must be proven. If the identity need not be proven, the instruction would have advised the jury that, *e.g.*, "the substance recovered in this case was a controlled substance." Instead, at trial, the jury presumably heard evidence from a law enforcement witness that the substance was tested, and it was methamphetamine. That evidence, coupled with the instruction that methamphetamine is a controlled substance, allowed the jury to make a finding (as it did in the below verdict form), that the defendant possessed methamphetamine for sale. As shown below, the verdict form reflected the jury's verdict as to each specific substance:

COUNT 4 - POSSESSION OF CONTROLLED SUBSTANCE WITH INTENT TO SELL – METHAMPHETAMINE

(Please check the appropriate box, select only one)

☑ Guilty of Possession of Controlled Substance with Intent to Sell

☐ Not Guilty

COUNT 5 - POSSESSION OF CONTROLLED SUBSTANCE WITH INTENT TO SELL – HEROIN

(Please check the appropriate box, select only one)

☑ Guilty of Possession of Controlled Substance with Intent to Sell

☐ Not Guilty

COUNT 6 - POSSESSION OF CONTROLLED SUBSTANCE WITH INTENT TO SELL – COCAINE

(Please check the appropriate box, select only one)

☑ Guilty of Possession of Controlled Substance with Intent to Sell

☐ Not Guilty

COUNT 7 - POSSESSION OF CONTROLLED SUBSTANCE WITH INTENT TO SELL – MARIJUANA

(Please check the appropriate box, select only one)

☑ Guilty of Possession of Controlled Substance with Intent to Sell

☐ Not Guilty

Motion for Judicial Notice, Ex. D (second page of Verdict form). The Judgment of Conviction likewise reflects separate convictions on all four NRS 453.337 counts. *See* Motion for Judicial Notice, Ex. E (Judgment at p. 2).

Second, in *State v. Mure*, C22-552, the Information alleged two counts of possession of a controlled substance with intent to sell: Count 1 alleged marijuana, and Count 2 alleged alprazolam. *See* Motion for Judicial Notice, Ex. F (Information). As part of his guilty plea agreement, the defendant agreed to plead guilty to Count 1, "as more fully alleged in the charging document attached hereto as Exhibit '1'" (*i.e.*, the Information). *See* Motion for Judicial

Notice, Ex. G (Guilty Plea Agreement). Finally, the Judgement of Conviction likewise reflects Count 1. *See* Motion for Judicial Notice, Ex. H (Judgment).

These documents, all of which are from completed cases involving convictions for violations of NRS 453.337, demonstrate how the State charges such violations and further demonstrate that, when a defendant goes to trial, the State must prove the identity of the substance, *i.e.*, it is an element.

D. Potential State Concerns Resulting from Resolution of this Case

Figueroa-Beltran asks the Court to proceed with caution because federal, rather than State, litigants are presenting this case to the Court. Opening Brief at 58-59. Because the federal litigants have presented Nevada legal authorities to the highest court in Nevada, the government believes this Court is well suited to resolve this question of Nevada law. As Nevada court records from cases actually involving convictions for § 453.337 (unlike *Howard*) show, the State *already* has the burden to demonstrate the identity of the controlled substance. Confirming this state of the law is not "prounounc[ing] [that] the identity [of] the controlled substance is an element." Opening Brief at 59.

Neither Figueroa-Beltran nor the government suggested that it would be inappropriate for the Ninth Circuit to certify the perceived *Muller/Luqman* tension to this Court because the parties were not "qualified to advise" this Court on "[t]he potential state consequences," as Figueroa-Beltran now seems

to suggest. Opening Brief at 60. To the contrary, both parties believed that certification was unnecessary because a controlling Nevada case *already* answered the question (*i.e.*, Figueroa-Beltran argued that *Luqman* answered the question, and the government argued that *Muller* answered the question). The Ninth Circuit disagreed, noting that the issue was close enough between *Luqman* and *Muller* that "reasonable minds could differ," and thus ultimately certified this issue to the state's highest court, the entity best suited to resolve this perceived tension in state law.[20]

Should the Court have questions about the institutional position of, *e.g.*, the Nevada Attorney General's office, the Court of course has discretion to request briefing from such a party.

[20] The oral argument is available at https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000012023 (last visited June 7, 2019). The Ninth Circuit asked Figueroa-Beltran about certification at 14:00, and asked the government the same question at 21:38. At 22:08, Judge O'Scannlain remarked that, "Putting *Luqman* and *Muller* together . . . it's still close enough that reasonable minds could differ."

VIII.

CONCLUSION

For the reasons stated above, the government asks that, in light of controlling Nevada precedent, this Court issue an order answering the Ninth Circuit's questions and clarifying that the identity of the controlled substance underlying a Nevada possession for sale charge under NRS 453.337 is an element of the offense.

Dated this 13th day of June 2019.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

The attached Respondent's Answering Brief complies with the formatting, typeface, and type style requirements of NRAP 32(a)(4)-(6), and is proportionately spaced using Calisto MT font with a typeface of 14 points.

I further certify that the Respondent's Answering Brief complies with NRAP 32(a)(7) and contains 9,599 words, excluding the portions exempted by NRAP 32(a)(7)(c).

Finally, I certify that I have read this answering brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is

not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 13th day of June 2019.

s/ Nancy M. Olson
NANCY M. OLSON
Assistant United States Attorney

CERTIFICATE OF SERVICE

I certify that this document was filed electronically with the Nevada Supreme Court on June 13, 2019, electronic service of the foregoing Respondent's Answering Brief shall be made in accordance with the Master Service List as follows:

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s/ Nancy M. Olson
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