

IN THE SUPREME COURT OF THE STATE OF NEVADA

GIBRAN RICHARDO
FIGUEROA-BELTRAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent.

Electronically Filed
Jul 08 2019 05:11 p.m.
Elizabeth A. Brown
Clerk of Supreme Court
Supreme Court Case No. 16-10388

Ninth Circuit Court of Appeals
Case No. 16-10388

Respondent's Reply to Response to Motion for Judicial Notice

The government files this reply to Figueroa-Beltran's response (#19-28564) to the government's motion for judicial notice (#19-26896), submitted alongside the government's answering brief (#19-25668).

I. Certified Question Background

Sometimes federal cases before the Ninth Circuit Court of Appeals require the court to analyze an underlying question of state law. In turn, sometimes the Ninth Circuit certifies to the high court of a state such a state law question, because the answer to that question will help the court resolve the pending federal issue. That is precisely what happened here: the Ninth Circuit certified to this Court the question of whether the identity of the controlled substance charged under NRS 453.337, Nevada's possession-for-

sale statute, is an element of the offense. As Figueroa-Beltran concedes in his reply brief, “The federal divisibility inquiry is legally distinct from this Court’s constitutional construction of NRS 453.337.” Reply Brief at 22. As the Ninth Circuit made clear in its opinion submitting certified questions to this Court—and as this Court properly understood in its Certification Order—the Ninth Circuit seeks assistance construing NRS 453.337, *not* with performing a federal sentencing divisibility analysis.

II. Points and Authorities

Other NRS 453.337 Cases. In his opening brief, Figueroa-Beltran relies on *State v. Howard*, CR 14-1513 (Nev. D. Ct.), in support of his argument that the identity of the controlled substance is not an element of NRS 453.337. *See* Opening Brief at 29-31. Figueroa-Beltran has not asked the Court to take judicial notice of the *Howard* documents on which he relies.¹

¹ As the government noted in its answering brief, Figueroa-Beltran asked the Ninth Circuit to take judicial notice of the *Howard* documents, but the court never ruled on the motion. Since the *Howard* documents were not made part of the record before the Ninth Circuit, it appears that the *Howard* documents are not yet before this Court. *See* Answering Brief at 38 n.19 (describing procedural history). Figueroa-Beltran did not address this issue in his reply brief or his response to the government’s motion for judicial notice. The government continues to assume that Figueroa-Beltran wishes for the Court to take judicial notice of the *Howard* documents, even though he did not address this procedural anomaly and has not expressly made this request to the Court. *See, e.g.*, Reply Brief at 20-21 (continuing to rely on *Howard*).

In its answering brief and its motion for judicial notice, the government explained that it believes the Court can resolve the state law question presented without resorting to documents from other cases. *See* Answering Brief at 35 (arguing the Court may resolve the issue by applying *Muller* and *Andrews*); Motion for Judicial Notice at 4 (same). To *respond* to Figueroa-Beltran’s arguments relying on documents from another Nevada case, however, the government provided responsive documents from two cases that, unlike *Howard*, involved convictions for NRS 453.337 violations. *See* Answering Brief at 36-42 (supplemental argument responding to *Howard* documents).

Responding to Figueroa-Beltran’s arguments does not amount to agreeing with Figueroa-Beltran’s position that such documents “can only be relevant to the *federal* divisibility inquiry.” Response to MJN at 5. To the contrary, the government’s answering brief and motion for judicial notice make clear its position that this certified-question appeal does not require the Court to perform a federal divisibility analysis. Rather, it asks the Court to resolve a question of Nevada law. *See, e.g.*, Answering Brief at 12-15.

If the Court elects to consider Figueroa-Beltran’s arguments concerning *Howard*, as explained in its brief and motion, then the government respectfully requests that the Court also consider the *Keller* and *Mure* documents attached

to its motion. *See* Motion for Judicial Notice, Exhibits B through H. NRS 47.130; NRS 47.150(2); NRS 47.170.

Figueroa-Beltran Guilty Plea Agreement. Similar to the *Keller* and *Mure*, documents, the government attached Figueroa-Beltran's guilty plea agreement relating to his state conviction to respond Figueroa-Beltran's arguments. *See, e.g.*, Answering Brief at 36-37 & nn.17-18; Motion for Judicial Notice at 4. The government does not believe that this Court needs to reach this argument to resolve the state-law question presented, but it submitted the missing record for completeness. Whether the Ninth Circuit would consider this record (which was inadvertently not made part of the district court sentencing record) is a question separate and distinct from this Court's decision to consider (or not) this judicially noticeable document.

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III. Conclusion

If the Court elects to reach Figueroa-Beltran's *Howard* arguments, and in connection therewith reviews the *Howard* documents that he apparently wants the Court to judicially notice, then the government respectfully requests that the Court grant its motion for judicial notice to consider documents responsive to the *Howard* arguments.

Dated: July 8, 2019

Respectfully submitted,
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CERTIFICATE OF SERVICE

I certify that this document was filed electronically with the Nevada Supreme Court on July 8, 2019, electronic service of the foregoing Motion for Judicial Notice shall be made in accordance with the Master Service List as follows:

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