IN THE SUPREME COURT OF THE STATE OF NEVADA

RYAN SCOTT ANDREWS,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

_____/

No. 71214

RESPONDENT'S ANSWERING BRIEF

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RESPONDENT'S ANSWERING BRIEF

I. STATEMENT OF THE LEGAL ISSUES PRESENTED

Whether the district court abused its discretion in denying Appellant Ryan Scott Andrews' (hereinafter, "Andrews") Motion to Strike when the Motion to Strike did not comply with the Nevada Revised Statutes concerning procedure in criminal cases?

Whether two different schedule I controlled substances, which are found in one location and sold as part of one transaction, can be aggregated to support one charge of trafficking in controlled substances under NRS 453.3385?

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II. STATEMENT OF THE CASE

This appeal arises from a judgement of conviction following a jury verdict finding Appellant Andrews guilty of one count of second-level trafficking in a controlled substance and one count of sales of a controlled substance at or near a public park. Originally, Andrews was charged with two counts of first-level trafficking. 1JA 1-2. Prior to trial Andrews moved to "strike" the two counts in the Amended Information, which alleged violations of NRS 453.3385. 1JA 5-8. The crux of Andrews' argument was that the counts in the Amended Information improperly aggregated two different schedule I controlled substances: methamphetamine and heroin. *Id.*

The district court denied Andrews' Motion to Strike. *Id.* at 50-53. The parties reached an agreement of sorts. They agreed that the State would move forward on only one count of second-level trafficking, consisting of the combination of heroin and methamphetamine, instead of the two counts. *Id.* at 62. The State filed a Second Amended Information alleging one count of trafficking, a violation of NRS 453.3385, and one count of unlawful sale of a controlled substance at or near a public park, a violation of NRS 453.321 and NRS 453.3345. *Id.* at 55-58. The trafficking

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count in the Second Amended Information indicated that the controlled substances at issue were methamphetamine and heroin. *Id*. at 55-56. Andrews was convicted at trial of both counts alleged in the Second Amended Information. *Id*. at 68-69. In this appeal, Andrews only challenges his conviction for trafficking methamphetamine and heroin.

III. STATEMENT OF FACTS

The relevant facts for this appeal are simple. Andrews sold a confidential informant two schedule I controlled substances: methamphetamine and heroin. 2JA 132, 146. In order to complete the sale, Andrews removed a bag of methamphetamine and a bag of heroin from the same kitchen drawer. *Id*. at 132-33, 149. Andrews then removed some of each substance, separately weighed the substances, and provided the requested amount of each substance to the confidential informant in different sandwich bags. *Id*. A subsequent search of Andrews' apartment revealed that Andrews possessed 9.532 grams of methamphetamine and 9.445 grams of heroin. 1JA 66-67. The methamphetamine was packaged in three separate plastic bags. 2JA 181, 183, 189. A plastic bag containing approximately one gram of methamphetamine was found in the bedroom of the apartment. 1JA 66-67; 2JA 181, 183, 189. The majority of the methamphetamine was contained in the kitchen drawer. *Id*. The heroin

was packaged in two plastic bags. 1JA 66-67. The heroin was recovered from the kitchen drawer. 2JA 181, 183, 189.

IV. STATEMENT OF THE STANDARD OF REVIEW

The issues in this appeal are subject to two different standards of review. The State agrees that the district court's decision to deny Andrews' Motion to Strike is subject to an abuse of discretion standard of review. The Court should affirm the district court's decision on that basis. However, if this Court reaches the merits of Andrews' argument, the Court should review this matter *de novo* because it involves a question of statutory interpretation.

V. ARGUMENT

A. The District Court Did Not Abuse its Discretion When it Denied Andrews' Motion to Strike.

Andrews filed a motion and sought relief that is not contemplated by the Nevada Revised Statutes. NRS 174.075 governs pleadings and motions filed before trial in a criminal action. NRS 174.075(2) instructs that "defenses and objections raised before trial... may be raised only by a motion to dismiss or to grant appropriate relief, as provided in this title." (emphasis added). Title 14 of the Nevada Revised Statutes does not contain a statute which provides for striking an entire count or charge from an Indictment or Information. Instead, it is evident that a motion to strike is

appropriate only where the defendant seeks to remove surplusage from an Indictment or Information. *See* NRS 173.085 ("The court on motion of the defendant may strike surplusage from the indictment or information.") The purpose of a motion to strike is to remove language which is both unnecessary and prejudicial to the defendant. *See Hulett v. Sheriff, Clark County*, 91 Nev. 139, 141, 532 P.2d 607, 608 (1975) (explaining surplusage and indicating "if appellant deems such surplusage prejudicial, he may move (in the trial court) to have it stricken under NRS 173.085") (citation omitted).

Andrews did not move to strike surplusage. Rather, Andrews sought to "strike" two complete counts in the Information. *See* 1JA 5-8 (Defendant's Motion to Strike Counts I and II). The Motion was based on the anticipated evidence. There is no Nevada authority supporting Andrews' decision to request that the district court "strike" two entire counts based on the evidence that one anticipates will be presented at trial. Since Andrews' Motion did not comply with Nevada's statutes concerning procedure in criminal cases, the district court's decision to deny his Motion is not arbitrary or capricious. Accordingly, the district court did not abuse its discretion when it denied Andrews' Motion to Strike, and the decision

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should be affirmed. *See Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005) ("[a]n abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason") (citation omitted).

B. Andrews' Conviction Should Be Affirmed Because it Is Consistent with Legislative Intent to Allow the Aggregation of Two Schedule I Controlled Substances to Support One Charge.

In order to resolve the merits of the dispute between the parties, the Court must consider what the appropriate unit of prosecution is under NRS 453.3385. The Court's review in this context is *de novo*. *See Jackson v. State*, 128 Nev.Adv.Op. 55, 291 P.3d 1274, 1283 (2012) (noting that determining the appropriate unit of prosecution presents an issue of statutory interpretation and substantive law); *State v. Lucero*, 127 Nev. 92, 95, 249 P3d. 1226, 1228 (2011) (providing that questions of statutory interpretation are reviewed *de novo*).

Pursuant to NRS 453.3385(1), it is a felony for a person to "knowingly or intentionally sell[], manufacture[], deliver[]…[or be] in actual or constructive possession of… any controlled substance which is listed in schedule I, except marijuana, or any mixture which contains any controlled substance." NRS 453.3385(1) designates three levels of punishment for trafficking based on the weight of the substances at issue. NRS 453.3385(1)(a)-(c). Level I and level II trafficking are both Category B

felonies. *Id.* at (a)-(b). A level I trafficking offense carries a minimum sentence of one year to a maximum of six years in prison, where a level II trafficking offense carries a minimum sentence of two years to a maximum of fifteen years in prison. *Id.* A level II offense also provides for a higher fine. *Id.*

Andrews was charged in Count I of the Second Amended Information with a violation of NRS 453.3385(1)(b), or level II trafficking. 1JA 55-56. Andrews asserts that NRS 453.3385 requires the State to file separate charges based on each controlled substance at issue (i.e. one level I trafficking charge for methamphetamine and another level I trafficking charge for heroin). Thus, Andrews attempts to limit NRS 453.3385 by using each individual schedule I controlled substance as the unit of prosecution.

NRS 453.3385 does not expressly address the issue at hand. The statute criminalizes the sale, distribution, possession, etc. of "any controlled substance which is listed in schedule I" and, with respect to mixtures, again references "any such controlled substance." NRS 453.3385(1) (emphasis added.) As this Court recently recognized, the word "any" has multiple conflicting definitions, and "has typically been found ambiguous in connection with the allowable unit of prosecution, for it

contemplates the plural, rather than specifying the singular." *Castaneda v. State*, 132 Nev.Adv.Op. 44, 373 P.3d 108, 111 (2016) (citations omitted). Accordingly, NRS 453.3385 is silent as to the appropriate unit of prosecution and the Court should look to the legislative history and public policy to determine legislative intent. *See Lucero*, 127 Nev. at 95, 249 P.3d at 1228.

While the legislative history of NRS 453.3385 does not directly address the appropriate unit of prosecution, it does discuss the purpose of the statute. NRS 453.3385 was introduced as Senate Bill 7 in 1983 by Senator William Raggio. Senate Bill 7 was introduced to enhance the penalties for heavy trafficking of controlled substances and to limit probation opportunities to those persons who provided substantial assistance. Hearing on S.B. 7, Before Senate Committee on Human Resources & Facilities, 62Leg. (Nev., Feb. 7, 1983); Hearing on S.B. 7, Before Assembly Committee on Judiciary, 62Leg. (Nev., March 10, 1983). NRS 453.3385 has been amended four times since it was enacted in 1983, but the original references to "any controlled substance which is listed in schedule I" and "any such controlled substance" remain unchanged. The legislative history of NRS 453.3385 provides that it was enacted to combat trafficking operations as a whole in Nevada, not any one type of substance.

The Legislature's continued use of the word "any" in the statute, as well as the purpose behind the statute, indicate that the unit of prosecution should be viewed more broadly than Andrews proposes.

In *Sheriff, Humboldt County v. Lang*, 104 Nev. 538, 542, 763 P.2d 56, 58-59 (1988), this Court addressed the overall purpose of NRS 453.3395, which is a similar statute that prohibits trafficking in schedule II controlled substances. In *Lang*, the Court confronted the question of whether the weight discussed in the statute was the actual controlled substance or the total weight of the diluted or cut substance. *Id.* In reaching its conclusion, the Court explained that the Legislature enacted NRS 453.3395 "to deter large-scale distribution of controlled substances, thus decreasing the number of persons potentially harmed by drug use." *Id.* The Court recognized that controlled substances are typically sold in diluted states and more severe penalties are justified for possession of large amounts of diluted controlled substances because the potential number of persons who will partake in the substance is increased. *Id.* Further, the Court reasoned that the possession of large amounts of a diluted controlled substance indicates an intent to engage in the large-scale distribution of controlled substances, which is the conduct the statute was designed to deter. *Id.* The Court refused to read NRS 453.3395 in a restrictive manner

and held that the weight referenced in the statute included the aggregate weight of the entire mixture (or diluted substance), not simply the weight of the controlled substance separated from the mixture. *Id.*

The same policy considerations at issue in *Lang* are present here. Interestingly, Andrews acknowledges that it is proper under NRS 453.3385 to aggregate the weight of the same schedule I controlled substance, even if separately packaged and found in different locations. *See* Opening Brief, p. 10. The State agrees that aggregating the same schedule I controlled substance is permissible. The question becomes whether there is a policy reason or logical basis to treat the sale and possession of two schedule I controlled substances differently than the sale and possession of one schedule I controlled substance? Under Andrews' theory, a drug trafficker who possesses 7 grams of cocaine, 7 grams of methamphetamine, and 7 grams of heroin, should be treated differently than another drug trafficker who possesses three separate packages, weighing 7 grams each, of cocaine. Andrews' position effectively rewards the drug trafficker who routinely possesses and sells multiple schedule I substances, but who is careful enough not to possess a quantity that subjects him to level II trafficking penalties. Andrews may argue that in the hypothetical scenario proposed, the drug trafficker with 7 grams of three separate schedule I substances

could face a higher penalty if the charges are run consecutively. However, it is also true that the charges could just as easily be run concurrently. Under this scenario there is a potential for great disparity in the punishments for the same fundamental crime. Defining the unit of prosecution by each individual schedule I controlled substance does not deter large-scale distribution; it actually encourages drug traffickers to diversify their products and sales. Such a result would conflict with the spirt of NRS 453.3385.

The facts in this case only further demonstrate that Andrews' interpretation of NRS 453.3385 could produce absurd and inconsistent results. Here, Andrews sold two different schedule I substances in the same transaction. 2JA 132, 146. Andrews sold heroin and methamphetamine to the confidential informant at the same time and at the same location. *Id.* In doing so, Andrews retrieved the substances out of the same kitchen drawer to sell smaller quantities of them to the confidential informant. *Id.* at 133. If the heroin and methamphetamine were combined in the same plastic bag, there would be no debate that the State could charge the aggregate weight of the substances. Here, the only difference is that the two schedule I controlled substances were stored in the same kitchen drawer and sold simultaneously, but they were retrieved

from different plastic baggies. As indicated above, Andrews agrees that the same substance, even if separately packaged, can be aggregated. Yet, Andrews then advances the position that multiple packages of two different schedule I controlled substances cannot be aggregated. The distinction advanced by Andrews makes little sense. The distinction is based on the notion that the appropriate unit of prosecution should be defined by baggies, but that term does not appear anywhere in the relevant statutes. It makes just as much sense to limit the unit of prosecution by drawers.

If Andrews was retried consistent with the argument he advances, and was convicted of two counts of level I trafficking, he could then argue on appeal that the convictions are redundant because they involved a single act of selling schedule I substances to one confidential informant. *See State v. Koseck*, 113 Nev. 477, 479, 936 P.2d 836, 838 (1997) (indicating that "[w]hen a defendant receives multiple convictions based on a single act, this court will reverse redundant convictions that do not comport with legislative intent") (internal quotations and citations omitted). If Andrews were successful with that argument, then he would only be subject to one sentence for one to six years in prison, even though he sold and possessed significant quantities of two schedule I controlled substances in the same spatial and temporal proximity. Moreover, there were multiple baggies of

each substance, which is indicative of an intent to engage in the distribution of both substances. Requiring the State to distinguish between the schedule I substances here does not advance the purpose of NRS 453.3385.

This case must be resolved by the dictates of public policy and logic. *See e.g. State v. Quinn*, 117 Nev. 709, 713, 30 P.3d 1117, 1120 (2001) (discussing statutory interpretation and indicating that it "should be in line with what reason and public policy would indicate the legislature intended, and should avoid absurd results") (citation omitted). The Court should not rely on the type of schedule I controlled substance to define the unit of prosecution allowed under NRS 453.3385. Like in *Lang*, the Court should read NRS 453.3385 in a manner which allows the imposition of more severe penalties for the possession of large amounts of schedule I controlled substances. *See Lang*, 104 Nev. at 542, 763 at 58-59.

IV. CONCLUSION

The district court did not abuse its discretion when it denied Andrews' Motion to Strike, because such a motion is not contemplated by Nevada law. Moreover, Andrews' conviction should be affirmed on the merits because the Legislature did not intend for NRS 453.3385 to be limited in the manner Andrews proposes. Therefore, the Court should

affirm Andrews' conviction on Count I, trafficking in a controlled substance.[1]

DATED: March 8, 2017.

CHRISTOPHER J. HICKS
DISTRICT ATTORNEY

By: TERRENCE P. McCARTHY
Chief Appellate Deputy

[1]The undersigned wishes to acknowledge that Deputy District Attorney Marilee Breternitz wrote nearly every word of this brief. Were it not for the timing of vacations and the like, she would certainly be the one signing this document. As it is, the undersigned carries the burden of responsibility while Ms. Breternitz enjoys her time away from the office.

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Corel WordPerfect X3 in 14 Georgia font. However, WordPerfect's double-spacing is smaller than that of Word, so in an effort to comply with the formatting requirements, this WordPerfect document has a spacing of 2.45. I believe that this change in spacing matches the double spacing of a Word document.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it does not exceed 30 pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references 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: March 8, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on March 8, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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