IN THE SUPREME COURT OF THE STATE OF NEVADA

RYAN SCOTT ANDREWS,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 71214

Appeal from a Judgment of Conviction in CR16-0323
The Second Judicial District Court of the State of Nevada
Honorable Janet J. Berry, District Judge

APPELLANT'S REPLY BRIEF

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The district court's ruling was not an abuse of discretion; it was wrong

The State first argues a procedural point: Mr. Andrews's motion and the relief it sought are "not contemplated by the Nevada Revised Statutes." Respondent's Answering Brief (RAB) at 4. Looking to NRS 174.075(2)—which provides 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"—the State essentially argues that Mr. Andrews's motion to strike was not a motion to dismiss or a request for a form of relief within the title. RAB at 4-5. True that Mr. Andrews's motion was not titled a "Motion to Dismiss." But dismissal was the actual relief it sought; and that relief is available under the title.

Although styled differently, here Mr. Andrews challenged—pretrial—the legal propriety of the charging document. *Cf.* NRS 174.095 (stating that any defense or objection "which is cable of determination without the trial of the general issue may be raised before trial by motion."). So the fact that Mr. Andrews's counsel's motion was not artfully titled should not be dispositive.

There is a second reason why this Court should reject the State's procedural argument. The State below raised a similar argument before the district court. See 1JA 12 (Opposition to Motion to Strike Counts I and II) (arguing that there is no authority for the requested remedy (striking counts)). The district court however, in denying Mr. Andrews's motion, did not rest its decision on this ground. In fact, the district court did not mention it in its order. Instead, it reached the merits and concluded—in error—that the statute and the law allows for the combining of different Schedule I narcotics in order to reach the threshold level of trafficking charges. 1JA 53 (Order).

Thus, Mr. Andrews does not contend that the district court abused its discretion in denying his motion. Rather, Mr. Andrews contends that as a matter of law the district court got the legal issue wrong. And that the legal issue before this Court is ripe for decision.

The State's merit argument is not a dispositive argument

On the merits, the State argues that the statute (NRS 453.3385) "does not expressly address the issue at hand, RAB at 7, and that the legislative history "does not directly address the unit of prosecution" question. RAB at 8. The State then says that the legislative purpose of

the statute suggests that NRS 453.3385 "was enacted to combat trafficking operations as a whole in Nevada, not any one substance." Adding, "[t]he Legislature's 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." RAB at 8-9.

But the statute uses "any" in this way: "*any* controlled substance which is listed in schedule I, except marijuana, or *any* mixture which contains *any* such controlled substance." NRS 453.3385. As used in the statute, the first "any" must mean "a." If that were not the case, then a person simultaneously possessing two or more controlled substances would be subject to only one possession charge because the term "any" would mean "all." And "all" would mean a single set consisting of two or more controlled substances. Hence, a single possession count based on the set.

The third "any" in the statute must be read in conformity with the first "any." *Cf. Savage v. Pierson*, 123 Nev. 86, 94, 157 P.3d 697, 702 (2007) (noting that a rule of statutorily construction holds that "when the same word is used in different statutes that are similar with respect to purpose and content, the word will be used in the same sense, unless

the statutes' text indicates otherwise.") (footnote omitted). So any mixture containing "a" controlled substance would be subject to the statute—even though the "mixture" is by definition not pure controlled substances—so long as the quantity of that mixture reached a requisite statutory weight.

Other courts have reached the conclusion offered by Mr. Andrews. In *Cunningham v. State*, 567 A.2d 126 (Md. 1989), the defendant "simultaneously possessed, in a single bag, separate quantities of heroin and cocaine." *Id.* at 127. The court found that the use of the word "any" in its dangerous substance statute "demonstrate[d] the intention of the legislature to regulate each controlled dangerous substance, and to authorize a separate conviction for the possession of each substance." *Id.* at 129. Building on *Cunningham*, the court in *Wells v. State*, 93 So.3d 155, 164 (Ala. Crim. App. 2011), reasoned that "different controlled substances cannot be aggregated for the purpose of determining the amount of a controlled substance to support a trafficking charge."

The State offers policy arguments and hypotheticals in an effort to defeat Mr. Andrews's argument. RAB at 10-13. But policy arguments

are best addressed to the Legislature, not courts. And the descending "what if" arguments advanced by the State do not guide in interpreting the statute. Simply put, the statute should not be interpreted to allow for the aggregating of different controlled substances for the purpose of reaching a trafficking level. Under our statute, trafficking levels can only be met in two ways: by having either the requisite quantity of a prohibited controlled substance, or by having a mixture containing a prohibited controlled substance that combined with a diluting agent reaches a trafficking amount. Neither prong was met here.

CONCLUSION

This Court should reverse the conviction on Count I and remand.

DATED this 22nd day of March 2017.

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CERTIFICATE OF COMPLIANCE

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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 a reference to the page of the transcript or appendix where the matter relied upon is to be found. I understand that I may be subject to sanctions in the event that the

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DATED this 22nd day of March 2017.

/s/ *John Reese Petty*
JOHN REESE PETTY
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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 22nd day of March 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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