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### **Figueroa-Beltran v. United States, 136 Nev. Adv. Op. 45 (Jul. 16, 2020)**

Jorge "Coco" Padilla

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CRIMINAL LAW: SEPARATE CONVICTIONS FOR SIMULTANEOUS POSSESSION  
UNDER DRUG TRAFFICKING STATUTES

**Summary**

In answering the rephrased certified question from the Ninth Circuit, this Court ultimately concluded that a substance’s identity is an element to the crime articulated in NRS 453.377. Because the statute was determined to be ambiguous, the Court relies on the holding in *Muller* and *Andrews* to support the conclusion that the units of prosecution are charged as a separate offense for each controlled substance simultaneously possessed. Therefore, the statute establishes multiple, separate offenses for each controlled substance that is identified.

**Facts and Procedural History**

Gibran Richardo Figuroa-Beltran (“Figuroa-Beltran”) is a native of Mexico who was unlawfully residing in the United States. In 2012, Figuroa-Beltran was convicted for possession of a controlled substance with intent to sell in violation of NRS 453.337<sup>2</sup> for simultaneously possessing heroin and cocaine. He was sentenced to 19–48 months in prison but was paroled approximately one year later. Upon his release, he was again arrested for selling a controlled substance and then removed to Mexico. Following his removal, Figuroa-Beltran illegally reentered the United States. Still unlawfully residing in the United States, he was newly arrested for selling a controlled substance.

In federal court, Figuroa-Beltran pleaded guilty to unlawfully residing in the United States after a previous deportation.<sup>3</sup> He was sentenced to 41 months in prison by way of a 16-level sentencing enhancement based upon his 2012 conviction. Such an enhancement may be imposed if the defendant had a previous drug trafficking conviction which resulted in a prison sentence of more than 13 months.<sup>4</sup> Under the federal sentencing guidelines, a drug trafficking offense is defined as “an offense under . . . state . . . law that prohibits . . . the possession of a controlled substance (or a counterfeit) with intent to . . . distribute, or dispense.”<sup>5</sup> Figuroa-Beltran appealed to the Ninth Circuit Court of Appeals to challenge the application of the 16-level enhancement and argued that his conviction under NRS 453.337 did not qualify as a drug trafficking offense under the federal sentencing guidelines.

To determine if the prior conviction under NRS 453.337 qualifies as a drug offense under the federal sentencing guidelines, the Ninth Circuit conducts a three-step analysis<sup>6</sup>:

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<sup>1</sup> By Jorge “Coco” Padilla.

<sup>2</sup> NEV. REV. STAT. § 453.337

<sup>3</sup> 8 U.S.C. § 1326 (2012).

<sup>4</sup> U.S. SENT’G COMM’N (U.S.S.G.) § 2L1.2.

<sup>5</sup> U.S.S.G. § 2L1.2, comment. (n.1)(B)(iv)(2015).

<sup>6</sup> *United States v. Martinez-Lopez*, 864 F.3d 1034, 1038 (9th Cir. 2017).

1. *Categorical Match.* The court must determine if the state law prohibits the same or less conduct than the federal drug trafficking offense. If so, then the two offenses are a categorical match and the 16-level enhancement applies. Here, the Ninth Circuit found that there are more criminalized substances identified in the schedules in NRS 453.337 than in the federal Controlled Substances Act. Therefore, the state and federal offenses are not a categorical match.

2. *Is the state statute divisible?* After finding a state statute is not a categorical match to its federal counterpart, the Court must classify the statute as divisible or indivisible. A statute is divisible when the statute defines various versions of committing an offense. In the alternative, a statute is indivisible if the statute defines multiple versions to satisfy only one element of the offense.

3. *Modified Categorical Approach.* If the state statute is found to be divisible, the Court applies the modified categorical approach. In essence, the Court determines the statutory language that was the basis for the conviction.

The Ninth Circuit established that NRS 453.337 is not a categorical match to its federal counterpart but was not able to determine whether the state statute was divisible or indivisible. The Circuit found no controlling Nevada precedent which classified a substance's identity as an element of the offense articulated in NRS 453.337. A finding of a substance's identity as an element would assist the Ninth Circuit in determining if the state statute is divisible. As a result, the Ninth Circuit filed certified questions with the Nevada Supreme Court.

## **Discussion**

The Nevada Supreme Court is permitted to accept and answer certified questions from the Ninth Circuit but shall limit its answer to the question of law certified by the Ninth Circuit.<sup>7</sup> The court does not determine the facts, they merely accept the facts found in the certification order from the Circuit Court. Although the Ninth Circuit certified three questions, the court has discretion to rephrase the certified questions. The court used its discretion to reframe the questions into a single question because the state criminal laws have not experienced the federal concept of divisibility. The reframed question: Is the identity of a substance an element of the crime articulated in NRS 453.337?

### *Defining elements for purpose of this inquiry*

First, the Court outlined the difference between an element of a crime and the facts for committing the crime. Elements are defined as the parts of a crime which the prosecution must prove to sustain a conviction and what the jury must find beyond a reasonable doubt to convict a defendant.<sup>8</sup> On the other hand, facts are defined as having no legal effect or consequence and must not be found by the jury nor admitted by the defendant.

The Court illustrated two examples to differentiate between a divisible and indivisible statute. The first example is through a hypothetical in *Mathis*. The hypothetical supposes that a statute lists the use of a deadly weapon as an element of a crime. The statute provides that a knife,

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<sup>7</sup> NRAP 5.

<sup>8</sup> *Mathis v. United States*, 136 S. Ct. 2245, 2248 (2016).

gun, bat, or similar weapon will satisfy this element. The Court outlines that, because the statute lists different ways of satisfying the deadly weapon element, the jury must not identify the specific weapon which was used. The jury merely needs to conclude that a deadly weapon was used. Hence, the statute is indivisible as for the use of a deadly weapon.

The second example uses an analysis of a burglary statute. The example supposes that a burglary statute requires (1) entering (2) a structure (3) with the intent to commit a felony therein. To sustain a conviction, the prosecution must prove the three elements to this crime. Supposing the statute further defines “entering” to include entry by force, threat, or invitation. These classifications of entering are not elements of the statute but rather provide a means to satisfy the entry element and would thus be indivisible. By contrast, the Court illustrates if the statute were to prohibit entry into a building or automobile. The statute would create two distinct ways of committing the same burglary offense— by entering a building or by entering an automobile. Thus, this statute would be divisible.

The Court used these two examples to conclude that the purpose of the Ninth Circuit certified question was to determine if the Legislature meant for the state statute to create multiple ways to commit one single offense or multiple, separate offenses. Here, Figueroa-Beltran argues that the identity of a controlled substance is merely a means of committing a crime and not an element. He argues that the state must not prove the particular controlled substance which he possessed, but just that he possessed a controlled substance. Similar to the first example, Figueroa-Beltran is saying that it does not matter if the jury concluded that he possessed heroin or cocaine, but only that they can conclude that he possessed a controlled substance.

### *NRS 453.337 is ambiguous*

Statutory interpretation will determine whether the identity of a substance is an element of the offense. To understand the Legislature’s intent, the Court will first look at the plain language of the statute.<sup>9</sup> If the language is clear and unambiguous, the statute will be enforced as written. However, if the statute can be interpreted in more than one way, the Court will look past the plain language and will consider the spirit, subject matter, public policy, and legislative history.

The Court found that the statute is ambiguous. Under the NRS 453.337(1) language, “it is unlawful for a person to possess for the purpose of sale . . . , *any* substance which . . . is an immediate precursor or any controlled substance classified in schedule I or II.” (emphasis added). The term “any” makes the statute ambiguous. The “any” term can determine how many times a defendant violates NRS 453.337 for simultaneously possessing different substances. Also known as the unit of prosecution. The Court finds that the “any” term is ambiguous when it relates to unit of prosecution because it can be interpreted in many variations. In the past, the Court in *Castaneda v. State*<sup>10</sup> held that the “any” term was used as “a” so to mean that simultaneously possessing multiple photos of child porn was considered as only one offense.

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<sup>9</sup> Williams v. State, Dep’t of Corr., 133 Nev. 594, 596, 402 P.3d 1260, 1262 (2017).

<sup>10</sup> 132 Nev. 434, 438, 373 P.3d 108, 111 (2016).

However, the Court previously determined in *Andrews v. State*<sup>11</sup> that the “any” term, as applied to Nevada drug trafficking statutes, created separate offenses for the simultaneous possession of two different substances. In *Andrews*, the Court reasoned that the Nevada Uniform Controlled Substances Act (UCSA) referenced to controlled substances in the singular which indicated the “any” term to create separate offenses for the simultaneous possession of different substances.

Because the Court found that the “any” term was reasonably interpreted in more than one way in *Castaneda* and *Andrews*, the Court concluded the statute is ambiguous and must look beyond the plain language.

*Caselow indicates the substance’s identity is an element of the crime described in NRS 453.337*

There is minimal legislative history that indicates the Legislature’s intent to classify the substance’s identity as an element of the crime articulated in NRS 453.337. The Court acknowledged the State’s argument that because the Nevada Legislature modeled the statute from the California possession-for-sale statute, which has been supported by the California Supreme Court to impose multiple convictions for the simultaneous possession of different controlled substances. However, the Court held that California precedent does not apply to the question presented because the Nevada Legislature did not adopt the identical language from the California statute. Thus, this Court looked to persuasive caselaw to determine if a substance’s identity is an element of the crime articulated in NRS 453.337.

The Court referenced to its decision in *Muller v. Sherriff*<sup>12</sup> which indicates the use of a substance’s identify as an element of NRS 453.321. Pierre Muller made a simultaneous sale of heroin (schedule I) and cocaine (schedule II) and was charged with the two corresponding offenses. Although the defendant argued that he sold the two controlled substances simultaneously and should only classify as one offense, the Court explained that each sale required the identity of the controlled substances sold.

The Court then returned to the reasoning in *Andrews* to explain how NRS 453.3385(1) imposes different penalties based upon the quantity of the controlled substance possessed or sold. The penalty for possessing 4 grams but less than 14 grams of a schedule I controlled substance is 1-6 years in prison, whereas the penalty for possessing 14 grams but less than 28 grams is 2-15 years in prison. In *Andrews*, the defendant possessed 9 grams of heroin and 9 grams of methamphetamine, both schedule I controlled substances. The Court sentenced the defendant based upon the fact that he had 14 grams of controlled substances after combining both substances’ quantities. *Andrews* established the unit of prosecution to the identity of the substance, meaning that the identify of a substance is an element of the crime.

The Court identified that NRS 453.570 requires the type of controlled substance to be identified at trial for offenses in violation of NRS 453.011 to 453.552. The fact that a witness must identify a controlled substance at trial means that the substance’s identity is an element of the crime articulated in NRS 453.337. Additionally, the Court concluded that the identity of a substance will

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<sup>11</sup> 134 Nev. 95, 99, 412 P.3d 37, 40 (2018).

<sup>12</sup> 93 Nev. 686, 687, 572 P.2d 1245, 1245 (1977).

determine its classification under the schedules of controlled substances and its corresponding punishment. The Court reasoned that the identification of the controlled substance is necessary to determine which specific provision has been violated depending on the type and quantity of such substances.

### **Conclusion**

This Court holds that a substance's identity is an element of the crime articulated in NRS 453.337 in their response to the Ninth Circuit's certified questions.

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### **Dissent**

Stiglich, J., with whom Pickering, C.J., agrees, dissenting:

The two justices found that the plain language of NRS 453.377 does not include the controlled substance's identity as an element because the identity of a particular substance satisfies the element of any controlled substance. They justified this reasoning with the fact that if one of the controlled substances were to be removed from the schedule I or II, the statute would not change.

They stated that although the plain language is sufficient to answer the question posed, the justices take issue with the majority's reliance on unit-of-prosecution caselaw and *Muller*. At the time that *Muller* was decided, the two controlled substances, heroin and cocaine, were identified in separate statutes, which have since been repealed. The defendant was charged with the two separate offenses because the controlled substances were listed in two separate statutes. Today, the controlled substances are not listed in separate statutes, but rather they are classified on a schedule of substances as determined by the Board of Pharmacy and supported by the administrative code. The deletion of the particular controlled substances in the statutes indicates that the identity of the substance is not an element of the crime articulated in NRS 453.337.

Additionally, Justice Stiglich took issue with the majority's reliance on *Andrews* because there she argued that NRS 453.3385 does not make a distinction between the different substances and neither should the Court. She applied the plain language interpretation in this case because the statute does not create a distinction which establishes the identity of a substance as an element.

Lastly, the dissent disagreed with the majority's idea that the identity of a substance will determine its classification under the schedules of controlled substances and its corresponding punishment, but rather asserted that it is the weight that determines the punishment.