THE STATE OF NEVADA, DEPARTMENT OF TAXATION, Petitioner, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF CLARK; and THE HONORABLE ELIZABETH GONZALEZ, District Judge, Respondents, and NEVADA WELLNESS CENTER, LLC, Real Party in Interest.

No. 80637

July 9, 2020 466 P.3d 1281

Original petition for a writ of mandamus or prohibition challenging a district court order compelling discovery.

Petition granted.

Aaron D. Ford, Attorney General, *Steven G. Shevorski*, Chief Litigation Counsel, and *Kiel B. Ireland*, Deputy Attorney General, Carson City, for Petitioner.

Parker, Nelson & Associates and *Theodore Parker* and *Mahogany A. Turfley*, Las Vegas, for Real Party in Interest.

Before the Supreme Court, Parraguirre, Hardesty and Cadish, JJ.

OPINION

By the Court, Hardesty, J.:

In this original writ petition, we must determine whether a government entity has "possession, custody, or control" over the content on the personal cell phones of former workers hired through a temporary employment agency, so as to be required under NRCP 16.1 to disclose that material. This court has yet to define "possession, custody, or control" within the meaning of the Nevada Rules of Civil Procedure. We now hold that a party has "possession, custody, or control" over documents, electronically stored information, or tangible things if the party has either actual possession of or the legal right to obtain the material. We conclude that the personal cell phones here fall outside the government entity's "possession, custody, or control" under NRCP 16.1.

FACTS AND PROCEDURAL HISTORY

Petitioner, the State of Nevada Department of Taxation, licenses and regulates Nevada's marijuana businesses through its Marijuana Enforcement Division. Pursuant to statutory authority, the Department entered into an independent contractor relationship with Manpower, a temporary employment agency. *See* NRS 333.700

(permitting a State agency to engage the services of an independent contractor, subject to the approval of the Board of Examiners, under certain circumstances). Through Manpower, the Department hired and trained eight temporary workers (hereinafter, the Manpower workers) to rank the hundreds of applications received for recreational marijuana establishment licenses pursuant to evaluation criteria in 2018. The contract between Manpower and the Department provided that neither Manpower "nor its employees, agents, nor representatives shall be considered employees, agents, or representatives of the State."

Real party in interest, Nevada Wellness Center, LLC, unsuccessfully applied for recreational marijuana establishment licenses in several jurisdictions throughout the State. Thereafter, Nevada Wellness brought suit against the Department, among other defendants, generally alleging that the Department employed unlawful and unconstitutional application procedures in awarding licenses. Nevada Wellness moved the district court for an order directing the Department "to preserve relevant electronically stored information from servers, stand-alone computers, and/or cell phones." Following a hearing on the motion, the discovery commissioner issued a report and recommendation granting the motion. The discovery commissioner found that the Department both used and trained the Manpower workers to evaluate and score the dispensary applications. The discovery commissioner recommended that the Department make available for copying "all cell phones (personal—only if used for work purposes—and/or business) of each such person that assisted in the processing of" recreational marijuana licenses. The discovery commissioner likewise extended certain protections to the Manpower workers, such as prohibiting access to cell phone data until the Department and Nevada Wellness "agree[ ] to a procedure to protect non-discoverable confidential data or the [c]ourt allows such access by subsequent order."

The Department objected, arguing that it had an independent contractor relationship with Manpower, such that the Department had no control over the Manpower workers and could not mandate their compliance with the discovery order. The district court denied the Department's objection, and when the Department failed to make the Manpower workers' cell phones available for inspection, Nevada Wellness moved to compel their production. The district court granted Nevada Wellness's motion to compel and ordered the Department to "produce the cell phones, as identified in the [report and recommendation], and all information obtained from the cell phones immediately."

The Department now petitions this court for a writ of prohibition or mandamus barring enforcement of the district court's discovery order. The Department maintains that it has no duty to seize, du-

plicate, and produce the Manpower workers' cell phones because the Department lacks "possession, custody, or control" pursuant to NRCP 16.1 over the phones.

DISCUSSION

Writ relief

"A writ of prohibition may issue to arrest the proceedings of a district court exercising its judicial functions when such proceedings are in excess of the jurisdiction of the district court."[1] *Club Vista Fin. Servs., LLC v. Eighth Judicial Dist. Court*, 128 Nev. 224, 228, 276 P.3d 246, 249 (2012); NRS 34.320. Because a writ petition seeks extraordinary relief, the consideration of the petition is within our sole discretion. *Okada v. Eighth Judicial Dist. Court*, 134 Nev. 6, 8, 408 P.3d 566, 569 (2018). Where there is no "plain, speedy and adequate remedy in the ordinary course of law," extraordinary relief may be available. NRS 34.330.

Discovery matters are entrusted to the sound discretion of the district court, and we generally decline to consider discovery orders by writ petition. *Club Vista*, 128 Nev. at 228, 276 P.3d at 249. However, we have elected to intervene where the challenged discovery order would cause irreparable harm, *id*., or where "an important issue of law needs clarification and public policy is served by this court's invocation of its original jurisdiction." *Okada v. Eighth Judicial Dist. Court*, 131 Nev. 834, 840, 359 P.3d 1106, 1110 (2015) (internal quotation marks omitted).

Here, the Department maintains that it has no duty to seize the personal cell phones of the Manpower workers to produce the content therein under NRCP 16.1(a)(1)(A)(ii) because it does not have "possession, custody, or control" of the cell phones of these nonparties. Because this court has yet to define "possession, custody, or control" within the meaning of the Nevada Rules of Civil Procedure, and because diverging federal authority risks imposing inconsistent results for different litigants, we exercise our discretion to consider this petition for a writ of prohibition in the interest of clarifying the law in Nevada.

"[P]ossession, custody, or control" as used in the Nevada Rules of Civil Procedure

"Discovery matters are within the district court's sound discretion, and we will not disturb a district court's ruling regarding discovery unless the court has clearly abused its discretion." *Club Vis-*

[1]We deny the Department's request for mandamus relief because "prohibition is a more appropriate remedy for the prevention of improper discovery than mandamus." *Wardleigh v. Second Judicial Dist. Court*, 111 Nev. 345, 350, 891 P.2d 1180, 1183 (1995).

ta, 128 Nev. at 228, 276 P.3d at 249. However, the interpretation of NRCP 16.1, governing mandatory disclosures, is a question of law that we review de novo. *See Toll v. Wilson*, 135 Nev. 430, 433, 453 P.3d 1215, 1218 (2019); *New Horizon Kids Quest III, Inc. v. Eighth Judicial Dist. Court*, 133 Nev. 86, 89, 392 P.3d 166, 168 (2017).

NRCP 16.1(a)(1)(A)(ii) requires a party to disclose

> a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its *possession, custody, or control* and may use to support its claims or defenses, including for impeachment or rebuttal, and, unless privileged or protected from disclosure, any record, report, or witness statement, in any form, concerning the incident that gives rise to the lawsuit . . . .

(Emphasis added.)[2] The phrase "possession, custody, or control" appears in two other rules relating to discovery within the Nevada Rules of Civil Procedure. *See* NRCP 34 (requests for production); NRCP 45 (subpoenas). Under NRCP 34(a)(1), a party may be required to produce certain materials within the "party's possession, custody, or control," while under NRCP 45(a)(1)(A)(iii) a nonparty may be compelled by subpoena to produce certain materials within "that person's possession, custody, or control." This court has yet to define "possession, custody, or control" as used in these rules. Because these provisions mirror their federal counterparts, we turn to federal authority for guidance. *See Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002) (explaining that federal caselaw interpreting and applying the Federal Rules of Civil Procedure provides strong persuasive authority for this court when interpreting parallel provisions of the Nevada Rules of Civil Procedure).

Federal courts largely employ one of two broad standards when determining whether a party has possession, custody, or control within the meaning of the Federal Rules of Civil Procedure. First, certain courts conclude that a party has "possession, custody, or control" over documents, electronically stored information, or tangible things where the party has actual possession of or a legal right to obtain the same. *See, e.g.*, *Wiwa v. Royal Dutch Petroleum Co.*, 392

[2]As the Department points out, the district court incorrectly applied the unamended version of NRCP 16.1 in its order instead of the version currently in effect. *See In re Creating a Comm. to Update & Revise the Nev. Rules of Civil Procedure*, ADKT 522 (Order Amending the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules, Dec. 31, 2018) (amending the Nevada Rules of Civil Procedure to be effective prospectively on March 1, 2019, as to all pending and future cases). Because the "possession, custody, or control" language that we examine in this opinion was unaffected by the amendments to these rules, the error does not affect our analysis.

F.3d 812, 821 (5th Cir. 2004) (determining that a subpoena requesting all documents to which the party had "access" was overbroad and restricting the scope of the subpoena to documents within the party's "possession, custody, or control" (internal quotation marks omitted)); *In re Citric Acid Litig.*, 191 F.3d 1090, 1107 (9th Cir. 1999) (rejecting a proposed definition of "control" that emphasized "the party's practical ability to obtain the requested documents" in favor of the legal control test); *In re Bankers Tr. Co.*, 61 F.3d 465, 469 (6th Cir. 1995) (explaining that "documents are deemed to be within the 'possession, custody or control' . . . if the party has *actual* possession, custody or control, or has the legal right to obtain the documents on demand"); *Chaveriat v. Williams Pipe Line Co*., 11 F.3d 1420, 1427 (7th Cir. 1993) ("[T]he fact that a party could obtain a document if it tried hard enough and maybe if it didn't try hard at all does not mean that the document is in its possession, custody, or control."); *Searock v. Stripling*, 736 F.2d 650, 653 (11th Cir. 1984) (defining control "as the legal right to obtain the documents requested upon demand").

Other courts interpret "possession, custody, or control" as requiring a party to produce documents, electronically stored information, or tangible things if a party has actual possession of them or the practical ability to produce them—even absent an accompanying legal right to such material. *See, e.g.*, *Shcherbakovskiy v. Da Capo Al Fine, Ltd.*, 490 F.3d 130, 138 (2d Cir. 2007) (explaining that a party must produce documents "if a party has access and the practical ability to possess [them]"); *Lynn v. Monarch Recovery Mgmt., Inc.*, 285 F.R.D. 350, 361 (D. Md. 2012) (explaining that "documents are considered to be under a party's control when that party has the right, authority, or practical ability to obtain the documents from a non-party" (internal quotation marks omitted)); *Ice Corp. v. Hamilton Sundstrand Corp*., 245 F.R.D. 513, 517 (D. Kan. 2007) ("Production of documents not in a party's possession is required if a party has the *practical ability* to obtain the documents from another, irrespective of legal entitlements to the documents." (internal quotation marks omitted)).

Having considered these competing interpretations, we are persuaded by those courts that use the legal control standard when determining whether a party has possession, custody, or control. We thus construe "possession, custody, or control," pursuant to the Nevada Rules of Civil Procedure, as meaning actual possession or "legal control," as that approach best prevents unreasonable results. *See Leven v. Frey*, 123 Nev. 399, 405, 168 P.3d 712, 716 (2007) (explaining that "[w]hen construing an ambiguous statutory provision," a statute's language must be read to produce reasonable results). While we recognize that a practical ability approach may be preferential in certain situations, we ultimately agree with the Ninth Cir-

cuit Court of Appeals that "[o]rdering a party to procure documents that it does not have the legal right to obtain will oftentimes be futile, precisely because the party has no certain way of getting those documents." *Citric Acid*, 191 F.3d at 1108; *see also* 8B Charles Alan Wright et al., *Federal Practice and Procedure* § 2210 (3d ed. 2010) (cautioning courts that apply the practical ability approach to "be alert to the possibility that despite good-faith efforts parties may prove unable to obtain material from nonparties"). Furthermore, the rules of civil procedure provide a mechanism for seeking materials from a nonparty. NRCP 34(c) ("As provided in Rule 45, a nonparty may be compelled to produce documents, electronically stored information, and tangible things or to permit an inspection."). Importantly, NRCP 45 also grants nonparties subject to a subpoena certain protections, such as quashing or modifying the subpoena if it unduly burdens the nonparty. NRCP 45(c)(3)(A)(iv).

We conclude that the legal control test likewise best supports the purpose of these rules by ensuring that nonparties receive these intended safeguards. Accordingly, we hold that documents, electronically stored information, or tangible things are within a party's "possession, custody, or control" within the meaning of the Nevada Rules of Civil Procedure if the party has either actual possession of or the legal right to obtain the same. We now turn to whether the district court's discovery order is enforceable.

The Department does not have possession, custody, or control of the Manpower workers' cell phones

In order for the district court's discovery order to stand, the Department must either have actual possession or the legal right to the contents of the Manpower workers' personal cell phones. The parties do not contend that the Department has actual possession of the cell phones or their content; rather, the pertinent inquiry is whether the Department has the legal right to seize and copy the contents of the Manpower workers' cell phones.

The Department maintains that it lacks any legal right to the content of the cell phones. To support this, the Department highlights its attenuated relationship with the Manpower workers as temporary workers hired through and paid by Manpower. The Department continues that its contract with Manpower explicitly states that neither Manpower "nor its employees, agents, nor representatives shall be considered employees, agents, or representatives of the State." Furthermore, the Department maintains that the discovery order would not only force the Department, a government entity, to seize the personal property of nonparty citizens, but it impermissibly sidesteps the procedural protections available in NRCP 45 when litigants subpoena nonparties.

Nevada Wellness argues that the Department's contract with Manpower grants the Department legal control over the contents of the Manpower workers' cell phones.[3] Specifically, Nevada Wellness cites to the following contract provisions to support this position:

> A. Books and Records. [Manpower] agrees to keep and maintain under generally accepted accounting principles (GAAP) full, true and complete records, contracts, books, and documents as are necessary to fully disclose to the State or United States Government, or their authorized representatives, upon audits or reviews, sufficient information to determine compliance with all State and federal regulations and statutes.
>
> B. Inspection & Audit. [Manpower] agrees that the relevant books, records (written, electronic, computer related or otherwise), including, without limitation, relevant accounting procedures and practices of [Manpower] or its subcontractors, financial statements and supporting documentation, and documentation related to the work product shall be subject, at any reasonable time, to inspection, examination, review, audit, and copying at any office or location of [Manpower] where such records may be found . . . .

The Department maintains that not only are the Manpower workers not parties to this contract, but that these provisions generally refer to financial books and records. We agree with the Department.

Even under a generous interpretation of these contract provisions, we cannot conclude that this language grants the Department the legal authority to demand that the Manpower workers turn over their personal cell phones for inspection and duplication. Instead, the contract explicitly defines and limits the Department's relationship with Manpower and the Manpower workers. Accordingly, we hold that the Manpower workers' cell phones are outside the Department's "possession, custody, or control" under NRCP 16.1 and that the district court exceeded its authority when it compelled the Department to produce that information. Finally, we echo the Department's con-

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[3]Nevada Wellness also relies on our decision in *Comstock Residents Ass'n v. Lyon County Board of Commissioners*, 134 Nev. 142, 414 P.3d 318 (2018), to support the Department's obligation to disclose the contents of the Manpower workers' cell phones. In *Comstock*, we concluded that the Nevada Public Records Act (NPRA) "does not categorically exempt public records maintained on private devices or servers from disclosure," 134 Nev. at 149, 414 P.3d at 323, such that communications regarding official business contained on county commissioners' private cell phones and email accounts "may still constitute a public record subject to disclosure upon request," *id*. at 147-48, 414 P.3d at 323. However, our decision in *Comstock* is inapposite to the case at bar. Not only did *Comstock* concern the NPRA, as opposed to the Nevada Rules of Civil Procedure, but our decision turned on the fact that "the commissioners themselves are governmental entities." *Id*. at 148, 414 P.3d at 323. The same cannot be said of the Manpower workers here.

tention that Nevada Wellness may seek this same information from the Manpower workers directly via NRCP 45.

CONCLUSION

As the Department lacks "possession, custody, or control" over the Manpower workers' cell phones pursuant to NRCP 16.1, we grant the Department's petition and direct the clerk of this court to issue a writ of prohibition instructing the district court to vacate its order granting Nevada Wellness's motion to compel.[4]

Parraguirre and Cadish, JJ., concur.

EDWARD SAMUEL PUNDYK, Appellant, *v.*
THE STATE OF NEVADA, Respondent.

No. 77587

July 16, 2020 467 P.3d 605

Appeal from a judgment of conviction, pursuant to a jury verdict, of murder with the use of a deadly weapon and discharging a firearm at or into an occupied structure. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

Reversed and remanded.

John L. Arrascada, Public Defender, and *John Reese Petty*, Chief Deputy Public Defender, Washoe County, for Appellant.

Aaron D. Ford, Attorney General, Carson City; *Christopher J. Hicks*, District Attorney, and *Jennifer P. Noble*, Chief Appellate Deputy District Attorney, Washoe County, for Respondent.

Before the Supreme Court, Parraguirre, Hardesty and Cadish, JJ.

OPINION

By the Court, Cadish, J.:

In resolving this appeal, we consider the admissibility of psychiatric expert witness testimony regarding a defendant's mental state for purposes of establishing that the defendant meets the not-guilty-by-reason-of-insanity standard under NRS 174.035(6). The Washoe

[4]In light of this opinion, we vacate the stay ordered by this court on March 11, 2020.

County grand jury indicted appellant Edward Pundyk for murder with the use of a deadly weapon and discharging a firearm at or into an occupied structure. Pundyk asserted a defense of not guilty by reason of insanity to the charges. Before trial, the State moved to prevent Pundyk's psychiatric expert witness, Melissa Piasecki, M.D., from testifying that Pundyk was unable to appreciate that his conduct was wrong. Citing *Winiarz v. State*, 104 Nev. 43, 752 P.2d 761 (1988), the State argued that expert witness testimony regarding the mental state of a defendant is not admissible. Pundyk opposed, arguing that NRS 50.295 expressly allows such testimony. The district court granted the State's motion in part, determining that Dr. Piasecki could opine about Pundyk's ability to form intent at the time of the offense but could not provide a conclusion about Pundyk's mental state or his guilt or innocence.

We hold that the district court improperly limited Dr. Piasecki's testimony by not allowing her to opine about Pundyk's mental state at the time of the offense. NRS 50.295 expressly permits an expert witness to testify about ultimate issues within their area of expertise. Dr. Piasecki is a psychiatrist, and whether Pundyk meets the elements of the not-guilty-by-reason-of-insanity standard under NRS 174.035(6) is within her expertise. Because the district court's error was not harmless, we reverse Pundyk's conviction and remand for a new trial consistent with our findings below.

FACTS AND PROCEDURAL HISTORY

The Washoe County grand jury indicted Pundyk for fatally shooting his mother through a fence and for discharging a firearm into a neighbor's home. Pundyk entered a plea of not guilty by reason of insanity and subsequently underwent evaluation at Lake's Crossing Center to determine competency for adjudication. At least four specialists evaluated Pundyk during his stay, and they ultimately found him competent to stand trial.

Before trial, the State moved to prohibit Dr. Piasecki from testifying that Pundyk was unable to appreciate that his conduct was wrong. After a hearing, the district court granted the State's motion in part, determining that Dr. Piasecki could not provide a conclusion about Pundyk's mental state or his guilt or innocence. However, the district court permitted Dr. Piasecki to opine about Pundyk's ability to form intent at the time of the offense. During trial, the district court sustained the State's objections to two of Pundyk's questions to Dr. Piasecki regarding Pundyk's ability to understand his actions and form a specific plan. Ultimately, the district court allowed Dr. Piasecki to testify that Pundyk "was so disconnected from reality at the time" that "he was not able to form the requisite intent." The jury found Pundyk guilty but mentally ill on both charged offenses.

Pundyk appeals, arguing that the district court erred when it limited Dr. Piasecki's testimony.[1]

DISCUSSION

"We review a district court's decision to admit or exclude evidence for an abuse of discretion." *Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001) (citing *State, Dep't of Motor Vehicles & Pub. Safety v. Root*, 113 Nev. 942, 947, 944 P.2d 784, 787 (1997)). To determine if the district court's limitation on Dr. Piasecki's testimony exceeded the bounds of law or reason, we begin with our statutes governing the not-guilty-by-reason-of-insanity plea and expert witness testimony.

NRS 174.035(6) expressly permits a criminal defendant to enter a plea of not guilty by reason of insanity. Under this plea, a defendant has the burden "to establish by a preponderance of the evidence that" he or she did not "[k]now or understand the nature and capacity of his or her act" or "[a]ppreciate that his or her conduct was wrong" due to a "delusional state" caused by "a disease or defect of the mind." NRS 174.035(6).

While Dr. Piasecki proffered expert testimony regarding Pundyk's ability to form the requisite intent at the time of the offenses, Pundyk argues that the district court should have allowed her to further opine about his mental state, i.e., whether he failed to appreciate the wrongfulness of his conduct due to a delusional state. In making this argument, Pundyk relies on NRS 50.295, which provides that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." The State argues that Dr. Piasecki's proposed expert testimony regarding Pundyk's mental state was highly prejudicial opinion testimony not otherwise admissible under NRS 50.295. The State relies on *Winiarz v. State*, 104 Nev. 43, 752 P.2d 761 (1988), asserting that it and subsequent decisions preclude

[1]Pundyk also argues that the district court abused its discretion by giving the jury a transferred intent instruction based on conflicting statements by Pundyk that he did not know who or what was on the other side of his fence. "[T]he doctrine of transferred intent is applicable to all crimes where an unintended victim is harmed as a result of the specific intent to harm an intended victim whether or not the intended victim is injured." *Ochoa v. State*, 115 Nev. 194, 200, 981 P.2d 1201, 1205 (1999). Therefore, we hold that the district court acted within its sound discretion when it gave the jury a transferred intent instruction because there is evidence in the record to support it. *See Brooks v. State*, 124 Nev. 203, 206, 180 P.3d 657, 659 (2008) (holding that district courts have broad discretion to settle jury instructions and will not be overturned "absent an abuse of discretion or judicial error").

expert witnesses from offering opinions about the ultimate issue of a defendant's mental state or condition.

In *Winiarz*, the State's psychiatric expert witness testified that the defendant "murdered her husband in cold blood in a premeditated fashion." 104 Nev. at 46, 752 P.2d at 763 (internal quotation marks omitted). We held that such testimony exceeded the permissible bounds of expert opinion, as it allowed a qualified expert to usurp the jury function of deciding guilt or innocence. *Id*. at 50-51, 752 P.2d at 766. Although we did not reference NRS 50.295 in *Winiarz*, the holding in that decision comports with the rule, as testimony of that nature is tantamount to a legal conclusion and therefore is not "otherwise admissible" under NRS 50.295. *See Collins v. State*, 133 Nev. 717, 724, 405 P.3d 657, 664 (2017) (holding that "[a] witness may not give a direct opinion on the defendant's guilt or innocence in a criminal case"). However, we acknowledge that our decisions regarding psychiatric expert witness testimony on the ultimate issue of mental states have been somewhat incongruous and take this opportunity to reconcile those decisions.

NRS 50.295 expressly allows expert witnesses to proffer testimony that embraces ultimate issues so long as the testimony is otherwise admissible. The otherwise admissible portion of NRS 50.295 is a reference to Nevada's evidence code. Therefore, unless there is an independent basis under Nevada's evidence code for precluding expert witness testimony, an expert witness may proffer testimony that embraces ultimate issues. NRS 50.275 permits expert witnesses to "testify to matters within the scope of" their expertise so long as that testimony "will assist the trier of fact to understand the *evidence* or to determine a *fact in issue*." (Emphases added.) Therefore, expert witness testimony that amounts to a legal conclusion is not admissible because it does not help the trier of fact "understand the evidence" or "determine a fact in issue." *See Collins*, 133 Nev. at 724, 405 P.3d at 664. Thus, we hold that a qualified expert witness may testify regarding whether the defendant meets the elements of the not-guilty-by-reason-of-insanity plea under NRS 174.035(6). Such testimony is factual in nature and helps the trier of fact determine whether the defendant meets that standard. However, we also hold that a qualified expert witness may not offer a direct opinion on the ultimate conclusion that a defendant is not guilty by reason of insanity or the converse. Such testimony is tantamount to a legal conclusion and is not proper under NRS 50.275.

Our decision in *Winiarz* was fact-specific, and we reversed the district court's decision to allow the State's psychiatric expert witness to testify that the defendant was a murderer because of the prejudicial nature of the specific testimony and the "usurpation of the jury function" in offering an opinion as to guilt. 104 Nev. at 50-51, 752 P.2d at 766. Any subsequent decisions that relied solely on *Winiarz* as standing for the proposition that any expert witness testimony regarding the mental state of the defendant is prohibited because

it embraces an ultimate issue do not comport with NRS 50.295,[2] and we disavow their application of *Winiarz*.[3]

Here, Dr. Piasecki sought to testify that "Pundyk was unable to appreciate that his conduct was wrong, meaning [not] authorized by law." The district court determined that Dr. Piasecki could opine about "Pundyk's ability to form the requisite intent at the time of the offense but [could not] provide a conclusion as to his mental state and, therefore his guilt or innocence." The district court abused its discretion when it prevented Dr. Piasecki from opining about Pundyk's mental state, which is relevant to his not-guilty-by-reason-of-insanity plea. NRS 50.295 expressly permits expert witnesses, like Dr. Piasecki, to proffer testimony that embraces ultimate issues, such as a defendant's mental state when he or she has entered a not-guilty-by-reason-of-insanity plea. Given that the jury found Pundyk was suffering from mental illness, as demonstrated by its verdict of guilty but mentally ill, there is a reasonable probability that Dr. Piasecki's testimony would have affected the outcome of the trial. Thus, we cannot hold that the district court's error was harmless. *Bell v. State*, 110 Nev. 1210, 1215, 885 P.2d 1311, 1315 (1994) (holding that an erroneous decision to exclude "testimony is prejudicial if there is a reasonable probability that the witness'[s] testimony would have affected the outcome of the trial"). Therefore, Pundyk's judgment of conviction must be reversed.

CONCLUSION

NRS 50.295 expressly permits expert witnesses to proffer testimony that embraces ultimate issues, which includes opinions about

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[2]We note that our decision in *Winiarz* referenced Federal Rule of Evidence 704(b) (1984), which precluded expert witness testimony regarding whether the defendant had a "mental state or condition constituting an element of the crime charged or of a defense thereto." 104 Nev. at 51 n.6, 752 P.2d at 766 n.6. We expressly disavow that reference. First, Nevada's evidence code does not contain a statute that is analogous to Federal Rule of Evidence 704(b) (1984). Second, Federal Rule of Evidence 704(b) (1984) is contrary to NRS 50.295. *See Estes v. State*, 122 Nev. 1123, 1136 n.36, 146 P.3d 1114, 1123 n.36 (2006) (noting the tension between Federal Rule of Evidence 704(b) (1984) and NRS 50.295).

[3]In *Estes v. State*, the State's psychological expert witness testified, based upon information contained in police reports, that the defendant's behavior during the criminal incident "seemed deliberate and thoughtful." 122 Nev. at 1130, 146 P.3d at 1119. We held that the admission of such testimony was erroneous under *Winiarz* because it was an opinion that the "defendant had the mental state constituting an element of the crime charged." *Id*. at 1136, 146 P.3d at 1123. We did not identify an independent basis under Nevada's evidence code that supported the exclusion of that testimony, and we can see none, as the expert did not offer an opinion as to guilt or innocence or characterize the defendant as a murderer. Therefore, we overrule this aspect of our holding in *Estes* because expert witness testimony that embraces an ultimate issue is permissible under NRS 50.295 so long as it is otherwise admissible under Nevada's evidence code and does not usurp the jury's function of determining the verdict.

a defendant's mental state when he or she has entered a not-guilty-by-reason-of-insanity plea, so long as that testimony is otherwise admissible under Nevada's evidence code and does not stray from psychological opinions about factual matters to conclusions about the appropriate verdict. Applying the correct legal standard to this case, we conclude that the district court abused its discretion by preventing Pundyk's psychiatric expert witness from opining about his mental state for purposes of supporting his not-guilty-by-reason-of-insanity plea under NRS 174.035(6). Because there is a reasonable probability that the psychiatric expert witness testimony would have affected the outcome of the trial, we hold that the district court's error was not harmless. Accordingly, we reverse Pundyk's judgment of conviction and remand this matter to the district court for a new trial consistent with this opinion.

Parraguirre and Hardesty, JJ., concur.

JASON RICHARD LOFTHOUSE, Appellant, *v.*
THE STATE OF NEVADA, Respondent.

No. 70587

July 16, 2020 467 P.3d 609

Appeal from a judgment of conviction, pursuant to a jury verdict, of ten counts of sexual conduct between a teacher and student and two counts of first-degree kidnapping. Eighth Judicial District Court, Clark County; Eric Johnson, Judge.

Affirmed in part, reversed in part, and remanded.

Darin Imlay, Public Defender, and *William M. Waters*, Chief Deputy Public Defender, Clark County, for Appellant.

Aaron D. Ford, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *Alexander G. Chen*, Chief Deputy District Attorney, and *Stacy L. Kollins*, Deputy District Attorney, Clark County, for Respondent.

Before the Supreme Court, En Banc.

OPINION

By the Court, Stiglich, J.:

The Nevada Legislature has criminalized sexual conduct between certain school employees or volunteers and students who are old enough to consent to sexual conduct. In this appeal, we consider

whether that crime is an unlawful act perpetrated upon the person of a minor such that it is a predicate offense for first-degree kidnapping. We conclude it is not. Accordingly, the first-degree kidnapping convictions in this case cannot stand. We therefore reverse the judgment of conviction as to those charges. Because the remaining issues raised on appeal do not warrant further relief, we affirm the judgment of conviction as to the other charges and remand for further proceedings consistent with this opinion.

FACTS

Appellant Jason Lofthouse taught history at a high school in Las Vegas. While doing so, he developed a sexual relationship with one of his female students. At the time, Lofthouse was 32 years old and the student was 17 years old. The sexual conduct between Lofthouse and the student occurred at school and, on two occasions, at nearby hotels. Although text messages between the two indicated that Lofthouse initiated the sexual relationship, the student said she "[m]ost likely" would have entered into a sexual relationship with Lofthouse even if he were just "a guy that [she] met at the mall." By all accounts, the sexual conduct was consensual. Consensual sexual conduct between a teacher and a 17-year-old student is nonetheless a crime as provided in NRS 201.540.[1] Thus, following an investigation after the student told a friend about the relationship, the State charged Lofthouse with ten counts of violating NRS 201.540, a category C felony.[2]

Based on the circumstances surrounding the two sexual encounters at hotels, the State also charged Lofthouse with two counts of another, more serious offense. Alleging that the student was a minor and that Lofthouse transported or enticed her with the intent to perpetrate an unlawful act upon her person (sexual conduct between a teacher and student), the State charged Lofthouse with two counts of first-degree kidnapping, a category A felony.[3] Lofthouse challenged those charges in a pretrial petition for a writ of habeas corpus. The district court rejected Lofthouse's argument that he did not intend to commit a crime upon the student's person on the two occasions when he transported the student to the hotels. At trial, the defense

[1]The conduct at issue here took place in May 2015. NRS 201.540 has been amended several times since then. Throughout this opinion, we refer to the version of NRS 201.540 in effect at the relevant time, *see* 2013 Nev. Stat., ch. 387, § 1(1), at 2098, unless otherwise indicated.

[2]The State also charged Lofthouse with two counts of open or gross lewdness, but the district court dismissed those charges after granting Lofthouse's pretrial petition for a writ of habeas corpus because the State failed to establish probable cause to support the charges.

[3]The State initially alleged two other alternative theories to support the first-degree kidnapping charges—that Lofthouse transported or enticed the student (1) with the intent to keep, imprison, or confine her from her parents or (2) to hold her to unlawful service. The State abandoned those theories at trial.

conceded the consensual sexual conduct but argued that Lofthouse did not kidnap the student. The jury found him guilty on all charges.

DISCUSSION

Lofthouse argues that he cannot be convicted of first-degree kidnapping as a matter of law because the crime he committed—sexual conduct with a student in violation of NRS 201.540—is not a predicate offense for first-degree kidnapping under NRS 200.310(1). Because this issue implicates statutory interpretation, our review is de novo. *Mendoza-Lobos v. State*, 125 Nev. 634, 642, 218 P.3d 501, 506 (2009).

When interpreting a statute, we focus on the words used in the statute. *See Blackburn v. State*, 129 Nev. 92, 95, 294 P.3d 422, 425 (2013) ("Our analysis begins and ends with the statutory text if it is clear and unambiguous."). We give those words their plain and ordinary meanings unless the context requires a technical meaning or a different meaning is apparent from the context. 2A Norman J. Singer & Shambie Singer, *Statutes and Statutory Construction* § 47:27, at 453-54 (7th ed. rev. 2014). When a word has more than one plain and ordinary meaning, the context and structure inform which of those meanings applies. *See Blackburn*, 129 Nev. at 97, 294 P.3d at 426 ("A statute cannot be dissected into individual words, each one being thrown onto the anvil of dialectics to be hammered into a meaning which has no association with the words from which it has violently been separated." (quoting 2A Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutory Construction* § 46:5 n.10 (7th ed. 2008))); *Butler v. State*, 120 Nev. 879, 892-93, 102 P.3d 71, 81 (2004) (explaining that a statute "must be construed as a whole and not be read in a way that would render words or phrases superfluous or make a provision nugatory" (internal quotation marks omitted)); *see also Pereira v. Sessions*, 138 S. Ct. 2105, 2117 (2018) (observing that a court must look at "plain language and statutory context" to determine the meaning a word has in a particular statute when that word "is [a] chameleon" (alteration in original) (internal quotation marks omitted)). We may go beyond the statute's language only when the language lends itself to two or more interpretations that are reasonable considering the text, context, and structure. *See State v. Catanio*, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004) ("An ambiguity arises where the statutory language lends itself to two or more reasonable interpretations.").

We start with the first-degree kidnapping statute to determine what offenses constitute a predicate offense pursuant to the statute. In a 171-word sentence, NRS 200.310(1) encompasses at least seven forms of conduct, each of which constitutes first-degree kidnapping. To summarize, first-degree kidnapping requires movement, restraint, enticement, or concealment of a person with the intent to hold or detain that person to accomplish one of several enumerated

purposes: (1) to obtain a ransom or reward; (2) to commit sexual assault, extortion, or robbery upon or from the person; (3) to kill or inflict substantial bodily harm on the person; (4) to exact money or any other valuable thing from a third party for the person's return; (5) to keep a minor from his or her parents or guardians; (6) to hold a minor to unlawful service; or (7) to "perpetrate upon the person of [a] minor any unlawful act." NRS 200.310(1). The last form of first-degree kidnapping is the one at issue here.

Under that provision, "a person who leads, takes, entices, or carries away or detains any minor *with the intent to . . . perpetrate upon the person of the minor any unlawful act* is guilty of kidnapping in the first degree."[4] *Id.* (emphasis added). This provision thus requires the intent to commit a predicate offense: "any unlawful act" that is "perpetrate[d] upon the person of the minor." The Legislature, however, has not defined those phrases. We therefore look to dictionary definitions from around the time the provision was enacted to aid us in interpreting its meaning. *Douglas v. State*, 130 Nev. 285, 287, 327 P.3d 492, 494 (2014).

The phrase "unlawful act" has a plain and ordinary meaning: an "[a]ct contrary to law." *Unlawful Act*, *Black's Law Dictionary* (4th ed. 1951). Although that phrase is not necessarily limited to criminal acts, *id.*, the context here indicates the Legislature so limited the phrase as used in NRS 200.310(1) given the plain and ordinary meaning of the word "perpetrate": "to commit (as an offense)." *Perpetrate*, *Merriam-Webster's New International Dictionary of the English Language* (2d ed. 1959).

The word "person" has many definitions. NRS 0.039 ("Except as otherwise expressly provided in a particular statute or required by the context, 'person' means a natural person, any form of business or social organization and any other nongovernmental legal entity including, but not limited to, a corporation, partnership, association, trust or unincorporated organization."); *Person*, *Black's Law Dictionary* (4th ed. 1951) ("'Persons' are of two kinds, natural and artificial."); *Person*, *Merriam-Webster's New International Dictionary of the English Language* (2d ed. 1959) (listing nine

[4]This language was added to the first-degree kidnapping statute in 1947. 1947 Nev. Stat., ch. 165, § 1, at 551-52; Nev. Compiled Laws § 10612.05, at 786 (Supp. 1943-1949). Before 1947, the statute provided in relevant part that a person who "lead[s], take[s], entice[s] away, or detain[s] a child under the age of sixteen years with intent . . . to steal any article upon his person" is guilty of kidnapping. 1912 Revised Laws of Nev. § 6419, at 1839; *see also* 1935 Nev. Stat., ch. 75, § 1, at 171. Although no legislative history is available, the 1947 amendment occurred during a period of "sweeping changes" in federal and state kidnapping laws following "a wave of kidnappings" in the late 1920s and 1930s. Note, *A Rationale of the Law of Kidnapping*, 53 Colum. L. Rev. 540, 540 (1953); *see also Chatwin v. United States*, 326 U.S. 455 (1946) (detailing history of Federal Kidnapping Act). The parties have not identified, and we have not located, any other state kidnapping statute with language similar to that added to the Nevada statute in 1947 and at issue here.

definitions including "[a] human being" and "[t]he bodily form of a human being"). Given the context in which "person" is used in NRS 200.310(1), where it is modified by the phrase "of the minor" and is the direct object of the verb "perpetrate," we think it clear that the Legislature meant it in the sense of a natural person's body. *Person*, *Merriam-Webster's New International Dictionary of the English Language* (2d ed. 1959); *see also* Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 Ala. L. Rev. 571, 577 (2011) ("In the specific domain of criminal law, the term 'person,' when used to refer to a target of crime, refers to the human body.").

Considering these terms together, we conclude that the statutory language is not aimed broadly at any crime that merely involves a minor. Interpreting the language in NRS 200.310(1) to include any crime involving a minor would expand an already broad kidnapping statute beyond what is reasonable, leading to absurd results. *See Wright v. State*, 94 Nev. 415, 417, 581 P.2d 442, 443-44 (1978) (observing that NRS 200.310(1) "is broad in its sweep" in the context of considering the circumstances in which the Legislature intended to allow a conviction for first-degree kidnapping based on movement during a robbery), *modified on other grounds by Mendoza v. State*, 122 Nev. 267, 130 P.3d 176 (2006). As we have regularly observed, "statutory construction should always avoid an absurd result." *State v. White*, 130 Nev. 533, 536, 330 P.3d 482, 484 (2014) (quoting *Sheriff v. Burcham*, 124 Nev. 1247, 1253, 198 P.3d 326, 329 (2008) (internal quotation marks omitted)). We thus conclude that the relevant provision in NRS 200.310(1) is more narrowly focused on crimes upon or against a minor's body. *See Upon*, *Merriam-Webster's New International Dictionary of the English Language* (2d ed. 1959) (indicating that "upon" is commonly used in the sense of "[a]gainst").

The question then is whether a violation of NRS 201.540 is a crime against a minor's body. In urging this court to answer that question in the negative, Lofthouse focuses on the fact that the offense is located in NRS Chapter 201, which is titled "Crimes Against Decency and Morals," rather than NRS Chapter 200, which is titled "Crimes Against the Person." We agree that the chapter title can be a useful aid in interpreting a statute within that chapter, provided that the legislative enactment contemplated that the statute would be located in the particular chapter.[5] *See State v. Hughes*, 127 Nev. 626, 629 n.2, 261 P.3d 1067, 1069 n.2 (2011) (explaining that the heading that precedes a group of statutes and the lead or title line for a specific statute may be looked to for interpretive purposes only when they were "part of the legislative enactment"). And here, the

[5]This caveat stems from the fact that the Legislature has left many aspects of the codification process to the Legislative Counsel, including the chapter titles in the Nevada Revised Statutes and the placement of statutes within those chapters. *See* NRS 220.120(3), (5), (6), (8) (authorizing Legislative Counsel to classify and arrange statutes in the NRS, including creating new chapters).

chapter designation was part of the legislative enactment when the offense was first created in 1997. *See* 1997 Nev. Stat., ch. 529, § 1, at 2522 ("Chapter 201 of NRS is hereby amended by adding thereto the provisions set forth as sections 2 to 10, inclusive of this act."); *id.* § 9, at 2522-23 (adopting provision codified at NRS 201.540). That chapter designation indicates that the Legislature considered the offense set forth in NRS 201.540 to be a crime against public decency and morals more than against the person. We are not convinced, however, that the chapter title alone is dispositive as to legislative intent. *Cf. Frazier v. People*, 90 P.3d 807, 811 (Colo. 2004) (observing that a statute's title "is a useful aid in construing a statute" but it "is not dispositive of legislative intent"). In particular, focusing solely on the offense's placement in a particular chapter may exclude from the kidnapping statute's coverage crimes that are clearly against a minor's body.[6] Thus, along with the chapter title, we must look at the specific offense to determine whether it constitutes a crime against a minor's body, focusing on its elements and the overall statutory context. *Cf. State v. Kindell*, 326 P.3d 876, 881 (Wash. Ct. App. 2014) ("Courts have applied a common sense analysis focusing on the statutory elements of the particular crime supporting the burglary charge to determine whether that crime is a predicate crime under the burglary statutes.").

As relevant here, the elements of the offense set forth in NRS 201.540 are (1) sexual conduct between (2) a school employee[7] who is (a) 21 years of age or older and (b) in a position of authority[8] at a public school and (3) a student who is (a) 16 or 17 years of age and (b) enrolled at the same public school. NRS 201.540(1). The sexual-conduct element includes a wide array of acts upon or with the student's body. *See* NRS 201.520 (defining "sexual conduct" for purposes of NRS 201.540). The offense thus clearly involves an *act* that is committed on a minor's body.[9] But that does not nec-

[6]An example is lewdness with a child under 16 years of age, which is also found in NRS Chapter 201 and has as its gravamen "any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child." NRS 201.230(1)(a)-(b).

[7]The statute also applies to volunteers. NRS 201.540(1)(b).

[8]For a short period of time, NRS 201.540 was not limited to offenders who were "in a position of authority." The Legislature removed that language effective October 1, 2015, *see* 2015 Nev. Stat., ch. 287, § 10, at 1445-46; *id.* § 14, at 1449, but then added it back into the statute effective October 1, 2017, *see* 2017 Nev. Stat., ch. 375, § 8.3, at 2320; *id.* § 24(2), at 2321. The requirement was in the statute at the time of the conduct at issue here, *see* 2013 Nev. Stat., ch. 387, § 1, at 2098-99, and it appears in the current version of the statute.

[9]The word "minor" refers to a person who is under 18 years of age, unless the Legislature has explicitly provided otherwise. *See Hughes*, 127 Nev. at 628-30, 261 P.3d at 1069-70 (concluding that, unless the Legislature states otherwise, the term "minor" means a person who is not yet of full legal age, which under NRS 129.010 is 18 years). At the relevant time, NRS 201.540 only applied when the student was a minor. *See* 2013 Nev. Stat., ch. 387, § 1(1)(c), at 2098. An

essarily mean that a violation of NRS 201.540 is a crime against the student's person for purposes of the kidnapping statute. A crime against an individual is typically focused on harm to the individual. *See generally* Ristroph, *supra*, at 578 ("To call a crime an offense 'against the person' is to identify the harm of the offense as an injury to a human body.").

At the relevant time, it generally was not unlawful to engage in sexual conduct with a consenting minor who was 16 years of age or older.[10] *See* 2013 Nev. Stat., ch. 426, § 34, at 2427 (defining "[s]tatutory sexual seduction," codified at NRS 200.364, in terms of sexual conduct with a person under 16 years of age). NRS 201.540 departs from that general rule when the sexual conduct occurs between a student and a school employee who is in a position of authority. The statute makes no exception for consensual sexual conduct, even though the student otherwise has the legal capacity to consent to such conduct. And while the statute requires that the offender be "in a position of authority," NRS 201.540(1)(b), it does not require proof that the offender exploited or used his or her position of authority to influence or coerce the student to engage in the sexual conduct. NRS 201.540 thus criminalizes sexual conduct regardless of whether the student actually consented or the offender actually exploited the student. This suggests that the focus is not on harm to the individual student.

Because the statute is indifferent regarding the student's actual consent or the offender's actual exploitation of the student, we conclude that it is the offender's status that is the gravamen of the offense outlined in NRS 201.540.[11] The offender's status of school employee or volunteer in a position of authority lends itself to the perception that the offender influenced or exploited the student. It is thus the offender's status that makes the sexual conduct unlawful.

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amendment in 2015 expanded the statute to include students who are 18 years old. *See* 2015 Nev. Stat., ch. 287, § 10(1)(c), at 1445.

[10]This is still true today. *See* NRS 200.364(10) (defining "statutory sexual seduction" as "ordinary sexual intercourse, anal intercourse or sexual penetration committed by a person 18 years of age or older with a person who is 14 or 15 years of age and who is at least 4 years younger than the perpetrator"); NRS 200.366(1)(b) (providing that "[a] person is guilty of sexual assault if he or she . . . [c]ommits a sexual penetration upon a child under the age of 14 years").

[11]Other statutes that criminalize sexual conduct are more clearly aimed at addressing harm to the person. *See, e.g.*, NRS 200.366 (sexual assault); NRS 200.400(4) (battery with intent to commit sexual assault). Notably, those offenses are punished more severely than a violation of NRS 201.540. *Compare* NRS 200.366(2) (providing that sexual assault is a category A felony carrying a sentence of life in prison with or without parole depending on whether there was substantial bodily harm), *and* NRS 200.400(4) (providing that battery with intent to commit sexual assault is a category A felony with a sentence of life in prison with or without the possibility of parole depending on circumstances), *with* NRS 201.540(1) (providing that offense is a category C felony punishable by no more than five years' imprisonment).

Given that NRS 201.540 is predominately concerned with the appearance of impropriety rather than actual impropriety, we conclude its focus is on decency and morals rather than harm to a particular individual. Because this is consistent with the chapter in which the Legislature chose to codify the offense and the gravamen of the offense, and without a clear statement of intent by the Legislature to treat a violation of NRS 201.540 as a crime against the minor's person for purposes of NRS 200.310, we conclude that Lofthouse's convictions of first-degree kidnapping cannot stand.[12]

Lofthouse also argues that (1) nine of the convictions under NRS 201.540 must be reversed because the unit of prosecution is a single teacher-student sexual relationship, (2) the prosecutor committed misconduct warranting reversal, (3) the district court violated his right to confrontation, (4) a witness improperly opined on his guilt, and (5) cumulative error warrants reversal. We have considered those arguments and conclude that they lack merit.

CONCLUSION

Because we conclude that none of the issues raised warrant relief from the convictions for violating NRS 201.540, we affirm the judgment as to those convictions. But we hold that a violation of NRS 201.540 is not a predicate offense for first-degree kidnapping under NRS 200.310(1). We therefore reverse the judgment as to the convictions of first-degree kidnapping and remand for further proceedings consistent with this opinion.[13]

Pickering, C.J., and Gibbons, Hardesty, Parraguirre, Cadish, and Silver, JJ., concur.

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[12]Given this conclusion, we do not need to address Lofthouse's other arguments related to the first-degree kidnapping convictions. But we note that the same concerns that arise with dual convictions for first-degree kidnapping and a predicate offense like sexual assault or robbery, *see, e.g.*, *Mendoza*, 122 Nev. 267, 130 P.3d 176; *Wright*, 94 Nev. 415, 581 P.2d 442, may also arise when the predicate offense is a crime committed against the person of a minor.

[13]Given this decision, we do not address Lofthouse's arguments regarding the language in the judgment of conviction setting forth the aggregate minimum and maximum sentence.

GIBRAN RICHARDO FIGUEROA-BELTRAN, Appellant, *v.*
UNITED STATES OF AMERICA, Respondent.

No. 76038

July 16, 2020 467 P.3d 615

Certified question, pursuant to NRAP 5, regarding a federal sentencing enhancement for a prior conviction of possession of a controlled substance with intent to sell under NRS 453.337. United States Court of Appeals for the Ninth Circuit; Diarmuid F. O'Scannlain and Johnnie B. Rawlinson, Circuit Judges; Sarah S. Vance, District Judge.

Question answered.

Stiglich, J., with whom Pickering, C.J., agreed, dissented.

Rene L. Valladares, Federal Public Defender, and *Cristen C. Thayer*, Assistant Federal Public Defender, Las Vegas, for Appellant.

Nicholas A. Trutanich, United States Attorney, District of Nevada, *Elizabeth O. White*, Appellate Chief, and *Nancy M. Olson* and *Elham Roohani*, Assistant United States Attorneys, Las Vegas, for Respondent.

Before the Supreme Court, En Banc.

OPINION

By the Court, Gibbons, J.:

The United States Court of Appeals for the Ninth Circuit has certified three questions to this court pursuant to NRAP 5. Although we accept the certified questions, we reframe them into one question to better reflect existing state law principles: Is the identity of a substance an element of the crime articulated in NRS 453.337? NRS 453.337 prohibits a person from possessing, for the purpose of sale, flunitrazepam, gamma-hydroxybutyrate, or any schedule I or II controlled substance. We conclude that the identity of a substance is an element of the crime described in NRS 453.337, such that each schedule I or II controlled substance simultaneously possessed with the intent to sell constitutes a separate offense.

FACTS AND PROCEDURAL HISTORY

In 2012, Gibran Richardo Figueroa-Beltran, a native of Mexico, was convicted of possession of a controlled substance with intent to sell in violation of NRS 453.337 for his simultaneous possession of heroin and cocaine and sentenced to 19 to 48 months in prison.

Figueroa-Beltran was paroled approximately one year later, but he was subsequently arrested for selling a controlled substance and deported to Mexico. Figueroa-Beltran illegally reentered the United States and again was arrested for selling a controlled substance. While the charges relating to Figueroa-Beltran's most recent arrest were pending in state court, in federal court Figueroa-Beltran was charged with, and pleaded guilty to, being a deported alien found unlawfully in the United States in violation of 8 U.S.C. § 1326 (2012). Figueroa-Beltran was sentenced to 41 months in prison, which included a 16-level sentencing enhancement due to his 2012 conviction in Nevada for violating NRS 453.337. *See* United States Sentencing Commission, *Guidelines Manual* (U.S.S.G.), § 2L1.2 (Nov. 2015).

U.S.S.G. § 2L1.2 provides that a 16-level enhancement may be added to a sentence if the defendant has been convicted of a drug trafficking offense for which the defendant received a sentence of more than 13 months. A drug trafficking offense is defined as "an offense under . . . state . . . law that prohibits . . . the possession of a controlled substance (or a counterfeit substance) with intent to . . . distribute, or dispense." U.S.S.G. § 2L1.2, comment. (n.1)(B)(iv) (2015). Figueroa-Beltran appealed to the Ninth Circuit, challenging the federal district court's application of the 16-level enhancement to his sentence, arguing that his conviction under NRS 453.337 did not qualify as a predicate drug trafficking offense under the federal sentencing guidelines.

Federal courts employ "a three-step analysis to determine whether a prior conviction under state law qualifies as a predicate drug trafficking offense under the federal sentencing guidelines." *United States v. Martinez-Lopez*, 864 F.3d 1034, 1038 (9th Cir. 2017). Without considering the facts underlying the conviction, the federal court must first determine whether the state law is a categorical match with the federal drug trafficking law. *Id.* Under this first step, federal courts "look only to the statutory definitions of the corresponding offenses." *Id.* (internal quotations omitted). "If a state law proscribes the same amount of or less conduct than that qualifying as a federal drug trafficking offense, then the two offenses are a categorical match" and the enhancement applies. *Id.* (internal quotations omitted). In the instant case, the Ninth Circuit determined, and the government conceded, that because "the schedules referenced in NRS 453.337 criminalize more substances than are listed in the federal Controlled Substances Act," NRS 453.337 is not a categorical match to its federal counterpart. *United States v. Figueroa-Beltran*, 892 F.3d 997, 1002-03 (9th Cir. 2018); *see also* 21 U.C.S.A. § 801 et seq. (West 1970).

When a state statute is not a categorical match to its federal counterpart, federal courts must then employ the second step of the analysis

and ask whether the state statute is divisible. *Martinez-Lopez*, 864 F.3d at 1038. A statute is divisible when it lists one or more elements in the alternative, thereby defining multiple, alternative versions of the same crime. *Mathis v. United States*, 579 U.S. 500, 505 (2016); *Descamps v. United States*, 570 U.S. 254, 261-62 (2013). Conversely, a statute is indivisible if it sets forth alternative means through which a defendant satisfies a single element of the offense. *See Mathis*, 579 U.S. at 504-05.

Only if the state statute is divisible may the court proceed to the third step in the analysis and apply the modified categorical approach. *Martinez-Lopez*, 864 F.3d at 1039. "At this step," a federal court "examine[s] judicially noticeable documents of conviction to determine which statutory phrase was the basis for the conviction." *Id.* (internal quotations omitted). Under this approach, if Figueroa-Beltran pleaded or was found guilty of the elements of a crime that would also constitute a federal drug trafficking offense (i.e., the crime involved a substance criminalized in both NRS 453.337 and the federal Controlled Substances Act), the prior state conviction may serve as a predicate offense under the federal sentencing guidelines and warrant a sentence enhancement. *Id.*

When reviewing Figueroa-Beltran's appeal, the Ninth Circuit concluded that no controlling Nevada precedent clearly resolved whether a substance's identity is an element of the crime articulated in NRS 453.337. *See Figueroa-Beltran*, 892 F.3d at 1003. Such a determination would have assisted the Ninth Circuit in determining whether NRS 453.337 was divisible for federal sentencing purposes. Thus, the Ninth Circuit filed its certified questions with this court.

DISCUSSION

Rule 5 of the Nevada Rules of Appellate Procedure permits this court to accept and answer certified questions from "federal courts when the answers may be determinative of part of the federal case, there is no controlling [Nevada] precedent, and the answer will help settle important questions of law." *Savage v. Pierson*, 123 Nev. 86, 89, 157 P.3d 697, 699 (2007) (alteration in original) (internal quotations omitted). "As the answering court, our role is limited to answering the questions of law posed to [us;] the certifying court retains the duty to determine the facts and to apply the law provided by the answering court to those facts." *Progressive Gulf Ins. Co. v. Faehnrich*, 130 Nev. 167, 170, 327 P.3d 1061, 1063 (2014) (alteration in original) (internal quotations omitted). Thus, "[w]e accept the facts as stated in the certification order and its attachments." *Id*. (alteration and internal quotations omitted).

Figueroa-Beltran argues that the divisibility of a state statute for purposes of a federal sentencing enhancement is a purely federal

question and, thus, this court should not answer the Ninth Circuit's questions.[1] Because the questions posed by the Ninth Circuit raise important questions of law that are not currently answered by existing Nevada law, we exercise our discretion under NRAP 5 and accept the questions. Moreover, because our state law has not applied the federal concept of divisibility to our criminal statutes, we reframe the questions posed by the Ninth Circuit to a single question: Is the identity of a substance an element of the crime articulated in NRS 453.337?[2] *See Chapman v. Deutsche Bank Nat'l Tr. Co.*, 129 Nev. 314, 317-18, 302 P.3d 1103, 1105 (2013) (explaining that this court has discretion to rephrase a certified question).

Defining elements for purposes of this inquiry

Before we can determine whether a drug's identity is an element of the crime articulated in NRS 453.337, we must define the difference between an element of a crime and a means of committing the crime. Elements of crimes "are the constituent parts of a crime's legal definition[, i.e.,] the things the prosecution must prove to sustain a conviction." *Mathis*, 579 U.S. at 504 (internal quotations omitted). "At a trial, they are what the jury must find beyond a reasonable doubt to convict the defendant." *Id*. "[A]t a plea hearing, they are what the defendant necessarily admits when he pleads guilty." *Id.* Unlike elements, facts "are mere real-world things—extraneous to the crime's legal requirements. . . . They are circumstance[s] or event[s] having no legal effect [or] consequence . . . . [T]hey need neither be found by a jury nor admitted by a defendant." *Id.* (alterations in original) (citation and internal quotations omitted). *Mathis* describes the following hypothetical: suppose a statute lists use of a deadly weapon as an element of a crime and provides that the use of a knife, gun, bat, or similar weapon would all satisfy this element. *Id.* at 506. The United States Supreme Court explained that because this list specifies different ways of satisfying a single element (use of a deadly weapon)

[1]The Ninth Circuit certified the following questions to this court:

(1) Is NRS 453.337 divisible as to the controlled substance requirement?

(2) Does this court's decision in *Sheriff v. Luqman*, 101 Nev. 149, 697 P.2d 107 (1985), conclude that the existence of a controlled substance is a "fact" rather than an "element" of NRS 453.337 rendering the statute indivisible? If so, can this conclusion be reconciled with *Muller v. Sheriff*, 93 Nev. 686, 572 P.2d 1245 (1977)?

(3) Does this court's decision in *Muller* conclude that offenses under NRS 453.337 comprise "distinct offenses requiring separate and different proof," rendering the statute divisible as to the controlled substance requirement? If so, can this conclusion be reconciled with *Luqman*?

[2]The amended version of NRS 453.337 that takes effect July 1, 2020, does not impact our analysis.

of a single crime, a jury does not need to find (nor does the defendant need to admit) that any particular item was used. *Id.* "A jury could convict even if some jurors conclude[d] that the defendant used a knife, while others conclude[d] he used a gun, so long as all agreed that the defendant used a deadly weapon." *Id.* (alterations in original) (internal quotations omitted).

To better illustrate the differences between when a statute is divisible or indivisible, consider the crime of burglary. Suppose a burglary statute requires (1) entering (2) a structure (3) with the intent to commit a felony therein. Thus, there are three things the prosecution must prove and, accordingly, three elements of this offense. Assume the statute further provides that entering includes, but is not limited to, entry by force, threat, or invitation. Entry by invitation is not an element of the offense. Rather, it is a means of satisfying the entry element. As such, the statute would be indivisible as to the entry element. Alternatively, consider a burglary statute prohibiting entry into a building or an automobile. *Descamps*, 570 U.S. at 261-62. Here, such a statute sets forth elements in the alternative; thus, two different ways of satisfying the same crime. *Id.* One may commit burglary through entry of a building or through entry of an automobile. *Id.* As such, the statute would be divisible as to the place that was entered. Thus, the objective of this inquiry is to determine whether the Legislature intended to create multiple, separate offenses or a single offense capable of being committed in several different ways.

Interpretation of NRS 453.337

Figueroa-Beltran argues that the identity of a controlled substance under NRS 453.337 is a means of committing the offense, rather than an element. Figueroa-Beltran suggests the State does not need to prove beyond a reasonable doubt that a defendant possessed a particular controlled substance, just that he or she possessed a controlled substance. Under this view, some jurors could find the defendant possessed heroin, while others could find that he or she possessed cocaine; the jury does not have to unanimously agree on the *particular* identity of the controlled substance the defendant possessed, as long the jury unanimously agrees that the defendant possessed a controlled substance.

NRS 453.337 is ambiguous

Whether a substance's identity is an element of this offense is a matter of statutory interpretation. "The goal of statutory interpretation is to give effect to the Legislature's intent." *Williams v. State, Dep't of Corr.*, 133 Nev. 594, 596, 402 P.3d 1260, 1262 (2017) (internal quotations omitted). "To ascertain the Legislature's intent,

we look to the statute's plain language." *Id.* "[W]e avoid statutory interpretation that renders language meaningless or superfluous." *Hobbs v. State*, 127 Nev. 234, 237, 251 P.3d 177, 179 (2011). "If the statute's language is clear and unambiguous, we enforce the statute as written." *Id.* "Only when the statute is ambiguous, meaning that it is subject to more than one reasonable interpretation, do we look beyond the language [of the statute] to consider its meaning in light of its spirit, subject matter, and public policy." *Id*. (alteration in original) (internal quotations omitted); *see also State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011) (explaining that when a statute is ambiguous, this court may then look to legislative history and construe the statute in a manner consistent with reason and public policy). "Likewise, this court will interpret a rule or statute in harmony with other rules and statutes." *Clay v. Eighth Judicial Dist. Court*, 129 Nev. 445, 451, 305 P.3d 898, 902 (2013) (internal quotations omitted).

Applying these rules, we necessarily start with the statutory language. Under NRS 453.337(1), a possession-for-sale 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." Figueroa-Beltran argues the term "any" renders the statute ambiguous. We agree.

We have previously considered the term "any" in criminal statutes to assist us in determining the appropriate unit of prosecution. "Unit of prosecution," in the instant matter, would refer to how many counts of possession-for-sale under NRS 453.337 the State could charge a defendant when the defendant simultaneously possessed different controlled substances. Typically, the term "any" is considered ambiguous as it relates to unit of prosecution. *See Castaneda v. State*, 132 Nev. 434, 438, 373 P.3d 108, 111 (2016). "The word 'any' has multiple, conflicting definitions, including (1) one; (2) one, some, or all regardless of quantity; (3) great, unmeasured, or unlimited in amount; (4) one or more; and (5) all." *Id.* (internal quotations omitted). In *Castaneda*, we determined the unit of prosecution under a statute prohibiting the possession of child pornography photographs. *Id.* at 442-43, 373 P.3d at 113-14. There, we interpreted the term "any" to mean "a," such that simultaneous possession of multiple photos depicting child porn constituted a single offense. *Id.*

In contrast, this court in *Andrews v. State*, 134 Nev. 95, 99, 412 P.3d 37, 40 (2018), determined that the term "any" in Nevada's drug trafficking statute created a separate offense for each controlled substance possessed. *Andrews* addressed NRS 453.3385(1), which provides that it is unlawful to knowingly or intentionally sell or possess

"*any* controlled substance which is listed in schedule I."[3] (Emphasis added.) In construing the term "any," we looked to comparable statutes under NRS Chapter 453, Nevada's Uniform Controlled Substances Act (UCSA), to shed light on the proper unit of prosecution and determine whether the term "any" should be interpreted to mean a single controlled substance. *Andrews*, 134 Nev. at 99, 412 P.3d at 40. We acknowledged that most statutes establishing offenses under the UCSA refer to controlled substances in the singular, such as "the" controlled substance or "a" controlled substance. *Id.* Thus, we held that the term "any" in NRS 453.3385 creates a separate offense for each schedule I controlled substance simultaneously possessed. *See id.* at 99-100, 412 P.3d at 40-41.

As both *Castaneda* and *Andrews* have construed the same term "any" in different ways, we conclude that the term is ambiguous. Thus, "any controlled substance" as used by the Legislature in NRS 453.337 could mean, alternatively, "one controlled substance," "some controlled substances," or "all controlled substances" listed under schedule I or II, or under both schedules. "Any" may refer to a controlled substance in the singular, suggesting that the State may charge a defendant with one count of the offense for each controlled substance simultaneously possessed. This would suggest that substance identity is an element that must be proven for each count. Alternatively, "any" may refer to controlled substances in the plural, such that simultaneous possession of different substances only constitutes one count. This would suggest that substance identity is a means of committing the offense, rather than an element that must be proven. Thus, because we conclude the term "any" in NRS 453.337 is subject to more than one reasonable interpretation, the provision is ambiguous.

Caselaw indicates the substance's identity is an element of the crime described in NRS 453.337

Since the statute's text does not establish whether the identity of a substance is an element of the offense or a means of committing the offense, "we turn to other legitimate tools of statutory interpretation, including related statutes, relevant legislative history, and prior judicial interpretations of related or comparable statutes by this or other courts." *Castaneda*, 132 Nev. at 439, 373 P.3d at 111.

NRS 453.337's legislative history sheds little light, directly or indirectly, on whether a substance's identity is an essential element of the offense. The State argues that because the Legislature based NRS 453.337 on California's possession-for-sale statute, we should

[3]We note that the amended version of NRS 453.3385, which takes effect on July 1, 2020, adds language to include schedule II controlled substances and changes the statutory punishment scheme. This amendment, however, does not affect our analysis.

follow California precedent interpreting its drug statutes as providing that drug identity is an element.[4] The California Supreme Court has consistently affirmed multiple convictions under a single drug statute for simultaneous possession or transportation of different controlled substances. *See, e.g.*, *Martinez-Lopez*, 864 F.3d at 1040-41 (citing to various California Supreme Court cases). These cases suggest that the California Supreme Court has interpreted its statutory drug scheme as providing that drug identity is an element. Nevertheless, because the Nevada Legislature in enacting NRS 453.337 did not adopt the identical provision codified at California Health & Safety Code § 11351, *see In re Application of Skaug*, 63 Nev. 101, 108, 164 P.2d 743, 746 (1945) (expressing the principle that when a state adopts the provisions of another state's statute, it not only adopts the text of that statute, it also adopts "the construction placed upon it by the highest court of the state from which it [was] adopted"), California precedent does not answer the question presented here. Thus, we look to persuasive caselaw to assist us in determining whether substance identity is an element of the crime described in NRS 453.337.

Our decision in *Muller v. Sheriff*, 93 Nev. 686, 687, 572 P.2d 1245, 1245 (1977), involved the unit of prosecution under NRS 453.321, which prohibits the sale of a controlled substance. The State charged Pierre Muller with one count of selling heroin (schedule I) and one count of selling cocaine (schedule II) after making a simultaneous sale of both controlled substances to an undercover narcotics agent. *Id.* at 686, 572 P.2d at 1245. Muller argued on appeal that since he sold both controlled substances at the same time and in the same transaction, his conduct did not constitute two separate offenses. *Id.* at 687, 572 P.2d at 1245. We disagreed and explained "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."[5] *Id.* (internal quotations omitted).

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[4]In enacting NRS 453.337, the Legislature considered California's possession-for-sale statute, which at the time provided the following:

> [E]very person who possesses for sale (1) any controlled substance specified in subdivision (b) or (c) of Section 11054, specified in paragraph (11), (12), or (17) of subdivision (d) of Section 11054, or specified in subdivision (b) or (c) of Section 11055, or (2) any controlled substance classified in Schedule III, IV, or V which is a narcotic drug, shall be punished by imprisonment in the state prison for two, three, or four years.

Cal. Health & Safety Code § 11351 (1977); *see* 1976 Cal. Stat., ch. 1139, § 66, at 5079 (amending § 11351 effective July 1, 1977).

[5]The version of NRS 453.321 in effect at the time Muller was charged provided in relevant part: "Except as authorized by the provisions of NRS 453.011 to 453.551, inclusive, it is unlawful for any person to sell, exchange, barter, supply or give away a controlled or counterfeit substance." 1973 Nev. Stat., ch. 673, § 17, at 1213. Though this statute has been amended several times since its enactment, these amendments do not impact the persuasive value of this case.

As discussed above, and as is especially relevant here, in *Andrews*, we concluded that "any" in NRS 453.3385 created a separate offense for each schedule I controlled substance simultaneously possessed. NRS 453.3385(1)(a) makes it unlawful to knowingly or intentionally sell or possess "any controlled substance listed in schedule I" and imposes different penalties depending on the quantity of the controlled substance involved. NRS 453.3385(1)(a) punishes possession of over 4 grams but less than 14 grams of a schedule I controlled substance with 1-6 years in prison, while NRS 453.3385(1)(b) punishes possession of 14 grams but less than 28 grams of a schedule I controlled substance with 2-15 years in prison. Ryan Andrews possessed over 9 grams of heroin and over 9 grams of methamphetamine, both schedule I controlled substances. 134 Nev. at 95, 412 P.3d at 38. The State ultimately charged Andrews under NRS 453.3385(1)(b) with possession of more than 14 grams of controlled substances after combining both substances' quantities. *Id*. at 96, 412 P.3d at 38. After concluding that the term "any" referenced "a" controlled substance, this court cited to NRS 453.013 for the proposition "that the UCSA 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." *Id.* at 99, 412 P.3d at 40 (emphasis omitted). This court then looked to NRS 453.3385's legislative history, which provides that the statute's purpose "was to curb the heavy trafficking of controlled substances." *Id.* at 100, 412 P.3d at 40. Thus, this court concluded a separate offense for the possession of each controlled substance furthered the legislative intent. *Id.* at 100, 412 P.3d at 41.

Andrews linked the unit of prosecution to the identity of the specific drug. Thus, *Andrews* indicates the identity of a substance is an element of the crime. *See, e.g.*, *Vogel v. State*, 426 So. 2d 863, 880 (Ala. Crim. App. 1980) (explaining "that the necessity of a different showing of proof for each separate drug would support treating different drugs in separate counts of an indictment, and justify separate sentences"), *aff'd*, 426 So. 2d 882 (Ala. 1982); *Melby v. State*, 234 N.W.2d 634, 641 (Wis. 1975) ("[E]ach substance is different and the illegality of each must be determined independently . . . . [Thus] three different prohibited substances gives rise to three separate criminal charges . . . ."). As explained in *State v. Adams*, 364 A.2d 1237, 1240 (Del. Super. Ct. 1976), what must be proven for each unit of prosecution relates to the elements of the crime:

> Proof of the identity of the item possessed is an element of the offense . . . . Where possession of separate drugs is charged, while the evidence relating to possession may be the same for each charge, the evidence describing the substance and establishing its drug identity . . . would undoubtedly differ with respect to each drug charged. Hence, the totality of evidence

> required to prove one count would not establish all of the elements required with respect to the other counts.

Thus, we conclude our decisions in *Muller* and *Andrews* indicate that the particular identity of a substance is an element that must be proven to sustain a conviction under NRS 453.337.[6]

NRS 453.570 also points toward substance identity being an element of NRS 453.337 because it requires that the type of drug be proven at trial. 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 . . . is that amount necessary for identification as a controlled substance by a witness qualified to make such identification." Because a witness must positively identify a substance as a specific controlled substance, a substance's identity is necessarily an element of the crime described in NRS 453.337. *See Hamilton v. State*, 94 Nev. 535, 536, 582 P.2d 376, 377 (1978) (holding there was sufficient evidence to support conviction under NRS 453.321 for the sale of heroin where "[a]n expert witness identified the substance in the balloon as heroin"); *Bolden v. Sheriff*, 93 Nev. 8, 9, 558 P.2d 628, 628 (1977) (stating "[p]roof beyond a reasonable doubt that the substance sold was in fact contraband must be offered at trial").

Further, the identity of a substance determines the applicable schedule of controlled substances, which may determine the applicable punishment. Controlled substances are classified according to their potential for abuse, medical use, and potential dependence. *See* NRS 453.166; NRS 453.176; NRS 453.186; NRS 453.196; NRS 453.206. For example, the State Board of Pharmacy places substances in schedule I if the substance "[h]as high potential for abuse" and "no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision." NRS 453.166. Alternatively, the Board places a substance in schedule II if the substance "has high potential for abuse," "has accepted medical use in treatment in the United States, or accepted medical use with severe restrictions," and "abuse of the substance may lead to severe psychological or physical dependence." NRS 453.176. NRS 453.337 outlines the applicable sentences for a violation of the statute, unless the greater penalties described in NRS 453.3385

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[6]Figueroa-Beltran argues this court's decision in *Sheriff v. Luqman*, 101 Nev. 149, 697 P.2d 107 (1985), is inconsistent with our conclusion here. At issue in *Luqman* was whether the Legislature had unconstitutionally delegated its authority to the State Board of Pharmacy when it directed the "[B]oard to classify drugs into various schedules according to the drug's propensity for harm and abuse." *Id.* at 153, 697 P.2d at 110. Because *Luqman* applied to a special circumstance involving legislative delegation of power, we conclude the *Luqman* court's reasoning for why there was no unconstitutional delegation of authority does not apply here.

(dealing with flunitrazepam; gamma-hydroxybutyrate; precursors to flunitrazepam or gamma-hydroxybutyrate; and schedule I controlled substances, except marijuana), NRS 453.339 (dealing with marijuana and concentrated cannabis), or NRS 453.3395 (dealing with schedule II controlled substances) apply.

Accordingly, even though the use of the term "any" in NRS 453.337 is ambiguous, *Muller* and *Andrews* demonstrate that the identity of a substance is an element that must be proven to sustain a conviction under NRS 453.337. We find further support for the idea that a substance's identity is an element of the crime in the requirement that the State must be able to establish the identity of the drug and because the drug's identity may impact the applicable sentence. Based on the foregoing, we conclude that the identity of a substance is an element that must be proven to sustain a conviction under NRS 453.337, rather than a means of committing the offense.

CONCLUSION

The Ninth Circuit certified three questions to this court, which we have reframed into one question: Is the identity of a controlled substance an element of the crime articulated in NRS 453.337? We hold that the identity of a substance is an element of the crime set forth in NRS 453.337.

Hardesty, Parraguirre, Cadish, and Silver, JJ., concur.

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

As framed by this court, the question to be answered is whether the identity of a substance is an element of the unlawful-possession-for-sale crime identified in NRS 453.337. Because I believe the answer is clear from the plain language of the statute, and because the caselaw and statutes relied upon by the majority are unpersuasive or distinguishable, I respectfully dissent.

In relevant part, NRS 453.337 lists three elements necessary to convict a defendant: (1) "possess[ion]," (2) "for the purpose of sale," (3) of "any controlled substance classified in schedule I or II."[1] From the plain language, the controlled substance's identity is not an element. There is no reference to, or identification of, a particular substance in this language. The identity of the specific type of substance is merely a means of satisfying the "any controlled substance classified in schedule I or II" element. Consider the hypo-

[1]The statute lists three other substances—(a) flunitrazepam, (b) gamma-hydroxybutyrate, and (c) any substance for which (a) and (b) is an immediate precursor. These substances do not appear to be at issue in Figueroa-Beltran's matter and do not appear to be of concern to the federal court's questions. *See United States v. Figueroa-Beltran*, 892 F.3d 997, 1000 (9th Cir. 2018) (identifying the issue as whether NRS 453.337, "which criminalizes conduct related to certain controlled substances identified by reference to the Nevada Administrative Code, is divisible under federal law").

thetical referenced by the majority and discussed in *Mathis v. United States*, 579 U.S. 500, 506 (2016): the use-of-a-deadly-weapon element may be satisfied by different means—a knife, gun, bat, or similar weapon. The list of means merely specifies ways of satisfying the element; each method does not constitute an element. *Id.* To further prove the point, if one of those means were removed, such as the bat, the element of the offense (use of a deadly weapon) would remain the same. There would be merely one less method of satisfying the element. Similarly, if a particular controlled substance were removed from schedule I or II, NRS 453.337 would not change. The elements, as listed above, would remain the same. There would be simply one less means of satisfying the "any controlled substance classified in schedule I or II" element. Thus, the identity of the substance does not constitute an element.

While I believe the plain language of NRS 453.337 answers the question posed, I address the majority's reliance on our unit-of-prosecution caselaw. First, reliance on *Muller v. Sheriff*, 93 Nev. 686, 572 P.2d 1245 (1977), is misguided because of the different statutory scheme in effect at the time. *Muller* addressed the unit of prosecution for since-repealed drug statutes where the "drugs which were deemed to constitute controlled substances were specifically set out by statute." *Sheriff v. Luqman*, 101 Nev. 149, 152, 697 P.2d 107, 109 (1985). At the time of Muller's conviction in the 1970s, heroin and cocaine were specifically listed in separate statutes—NRS 453.161 and NRS 453.171—and Muller was *necessarily* charged under these separate statutes with one count of selling heroin (a schedule I controlled substance) and one count of selling cocaine (a schedule II controlled substance). *Muller*, 93 Nev. at 686, 572 P.2d at 1245. Because heroin and cocaine were identified under separate statutes, the *Muller* court correctly noted that the sale of each required proof of a fact that the other did not—the identity of a substance set out in NRS 453.161 or NRS 453.171.

Today, on the other hand, our statutes do not specifically identify all controlled substances; rather, the State Board of Pharmacy determines our scheduled substances in schedules found within our administrative code. *See* NRS 453.166; NRS 453.176; NAC 453.510-453.550. The Legislature's decision to remove the identity of scheduled substances from our statutes indicates a change in law since the time *Muller* was decided. *See McKay v. Bd. of Sup'rs of Carson City*, 102 Nev. 644, 650, 730 P.2d 438, 442 (1986) ("It is ordinarily presumed that the legislature, by deleting an express portion of a law, intended a substantial change in the law."). Further, by deleting the list of scheduled substances from the statutes, the Legislature removed any indication in the statutes that the specific identity of a scheduled substance constitutes an integral part of the crime. We recognized as much in *Sheriff v. Luqman*, 101 Nev. at 153-54, 697 P.2d at 110, where we reasoned that the Legislature del-

egated to the State Board of Pharmacy the power to determine the *facts*—not elements—of our drug statutes when delegating the power to schedule substances. That the identity of a scheduled substance is a fact our drug laws depend upon to operate does not dictate the conclusion that the identity of a scheduled substance is an element:

> [T]he power to define what conduct constitutes a crime lies exclusively within the power and authority of the legislature. . . . [But the legislature] may delegate the power to determine the facts or state of things upon which the law makes its own operations depend. Thus, the legislature can make the application or operation of a statute complete within itself dependent upon the existence of certain facts or conditions, the ascertainment of which is left to the administrative agency.

Id. at 153, 697 P.2d at 110 (citations omitted).

Second, as I remain steadfast in my dissent from its outcome, I disagree with the majority's reliance on *Andrews v. State*, 134 Nev. 95, 412 P.3d 37 (2018). In *Andrews*, I argued that NRS 453.3385 does not distinguish between the different substances classified in schedule I for purposes of trafficking charges, so neither should this court. *See id.* at 102-03, 412 P.3d at 42-43 (Stiglich, J., dissenting). Likewise, NRS 453.337 does not distinguish between the different substances classified in schedule I or II. Therefore, the identity of a specific substance should not be treated as an element of the statute, creating separate crimes for each identified substance, where the statute does not formulate such a distinction. This conclusion is in accord with other states that have interpreted the possession of multiple controlled substances—criminalized by a single statute—as a single offense, thereby implying that the identity of a substance is not an element of the crime. *See Duncan v. State*, 412 N.E.2d 770, 775-76 (Ind. 1980); *State v. Butler*, 271 A.2d 17, 17-18 (N.J. App. Div. 1970); *State v. Homer*, 538 P.2d 945, 946 (Or. Ct. App. 1975). By recognizing the identity of a substance as an element of NRS 453.337, the majority recognizes a distinction not contemplated by the Legislature.

Additionally, I find the majority's reliance on NRS 453.570 unpersuasive. It is worth noting that NRS 453.570 does not contain a requirement that the witness specifically identify the controlled substance involved. But to the extent NRS 453.570 can be assigned persuasive influence, I cannot place such an emphasis on NRS 453.570's language so as to overcome the plain language of NRS 453.337. And insofar as any significance can be given to the determination of an applicable punishment when answering the question presented to this court, I disagree with the notion that it is the identity of a substance that controls. It is clear that the statute assigns punishment based on schedules, NRS 453.337, and in some circumstances weight, NRS 453.3383. The majority recognizes "the iden-

tity of a substance determines *the applicable schedule of controlled substances, which may determine the applicable punishment*." Majority op., *supra*, at 395 (emphasis added). Thus, it is not the identity of the substance but the scheduling (or weight) that determines punishment.

As the plain language of NRS 453.337 does not include the identity of a controlled substance, such identity is not an element of the crime. I therefore dissent.