IN THE SUPREME COURT OF THE STATE OF NEVADA

IAN ANDRE HAGER,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 72613

Appeal from a Judgment of Conviction in Case Number CR16-1457
The Second Judicial District Court of the State of Nevada
Honorable Scott N. Freeman, District Judge

APPELLANT'S REPLY BRIEF

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Introduction

Mr. Hager was convicted of six counts of possession of a firearm by a prohibited person under NRS 202.360 ("A person shall not own or have in his or her possession or under his or her custody or control any firearm if the person ... ."). As a preliminary matter, to the extent that the State suggests that Mr. Hager is seeking to have this Court read a "specific intent" element into the statute, see Respondent's Answering Brief (RAB) at 8, he is not. Rather, Mr. Hager only seeks an interpretation of the statute that requires some "blameworthy in mind" *mens rea* element be proven before a defendant can be found guilty. The statute should not be considered a strict liability statute. See Appellant's Opening Brief (AOB) at 32-35.

Mr. Hager does not contest that he was in possession of firearms during the time frame alleged in the charging document, *i.e.* between November 6, 2015 and April 8, 2016. He had possession of his firearms because they were returned to him by state and local law enforcement agencies during this period. The only question for the jury was whether he qualified as a "prohibited person" as alleged by the State. Here the

State advanced two claims. First, that Mr. Hager was a prohibited person because he had been adjudicated mentally ill. Second, that Mr. Hager was a prohibited person because he was a user of controlled substances, or was addicted to controlled substances. The evidence presented however, did not meet either prohibition. The State did not prove that Mr. Hager had ever been adjudicated mentally ill. At best the State presented evidence of his court-ordered admission to a district court mental health probationary program, and argued that this admission equated to an adjudication of mental illness. Nor did the State prove that Mr. Hager was a user of, or was addicted to controlled substances during the time alleged in the charging document.

Unfortunately, the jury instructions given to this jury on the "prohibited person" elements misstated the law, were confusing, and failed to adequately guide the jury.

This reply responds to the State's answering brief on these points. Other issues raised in the opening brief are submitted on the arguments made there.

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The Prohibitions

Unlawful user of, or addicted to controlled substances

The State thinks that Mr. Hager's admission in 2012—that he had been addicted to methamphetamine when he was younger—satisfies the statute. RAB at 4. This is consistent with its position at trial.[1] As argued in the Opening Brief, Mr. Hager's statements fail to satisfy the statute because they do not establish his regular and unlawful use over an extended period of time that is contemporaneous with the possession of firearms. See AOB at 26-31. This standard should be adopted by this Court. It is a question that was left open in *Byars v. State*, 130 Nev. Adv. Op. 85, 336 P.3d 939, 943, 947-98 (2014). This case is a perfect vehicle for the Court to establish a coherent standard or definition of "use of a controlled substance."

The statute does not define its terms, but other courts have done so while interpreting other statutes. In the opening brief Mr. Hager

[1] On appeal the State attributes to Mr. Hager a claim that he has been "cured"—and scoffs at the idea in an accompanying footnote. RAB at 4 & n.1. Mr. Hager has never advanced that claim. More importantly, the State's footnote ignores the countless thousands of people who are recovering addicts and who cope daily with their disease. Relapse is a fact in the world for some of the people in this set of persons. Many recover and carry on.

suggested that a three-part test taken from *United States v. Purdy*, 264 F.3d 809 (9th Cir. 2001), and *United States v. Bennett*, 329 F.3d 769 (10th Cir. 2003), and synthesized by the federal district court in *United States v. Grover*, 364 F. Supp.2d 1298 (D. Utah 2005) ought to be adopted by this Court to aid in the interpretation and application of Nevada's statute. AOB at 27-29.[2] That test: (1) regular use of any controlled substance; (2) on an ongoing basis; and (3) contemporaneously with the possession of a firearm, would provide an analytical framework sufficient to enforce the law while at the same time cabin the reach of the statute—an idea the State finds "not useful." RAB at 11.[3] The usefulness of the test lies in its ability to discourage arbitrary and discriminatory enforcement of that portion of the statute. *Cf. State v. Castaneda*, 126 Nev. 478, 482 n.1, 245 P.3d 550, 553 n.1 (2010) (noting that the possibility of arbitrary and discriminatory

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[2] The State does not directly address either *Purdy* or *Bennett*, and mentions *Grover* in passing. RAB at 10.

[3] At the risk of getting ahead of the argument in reply, under this test a jury would be instructed that "an unlawful user of any controlled substance is an individual who regularly and unlawfully uses any controlled substance over an extended period of time that is contemporaneous with the possession of the firearm." The Court should find this test far more preferable than the tautological test of : "a 'user' is 'a person who uses any controlled substance.'"

enforcement of a statute may render it void for vagueness). Under this test, as developed in the opening brief and so not repeated here, Mr. Hager was not a prohibited person. See AOB at 29-31.

Having been adjudicated mentally ill

In the opening brief Mr. Hager noted that there was no evidence presented by the State that he had ever been committed to any mental health facility or that he had been adjudicated mentally ill. AOB at 20-24. The State's theory at trial and on appeal is simply this: Somehow his court-ordered admission into a district court's mental court program, and successful completion of that program, constitutes an adjudication of mental illness. RAB at 6-7. But just saying this does not make it so. First, under NRS 176A.250, the admission into and successful completion of a district court's mental health court program is not an adjudication of mental illness. Second, in contrast, an actual adjudication of mental illness in Nevada is made only under NRS 433A.310(1)(b). *Vu v. Second Judicial Dist. Court*, 132 Nev. Adv. Op. 21, 371 P.3d 1015 (2016) is illustrative. In *Vu* a split court disagreed on whether Mr. Vu's involuntary civil commitment was supported by sufficient evidence. But no member of the court questioned that the

process undertaken there did not constitute the appropriate process to *adjudicate* Mr. Vu mentally ill. Finally, third, if the Legislature had wanted to include admission to a mental health court program as a prohibiting factor it could have done so. See *Sherriff v. Andrews*, 128 Nev. 544, 547, 286 P.3d 262, 264 (2012) (inferring that the Legislature "clearly knows how to prohibit" an act in a statute). Yet here the Legislature identified (in the area of mental illness) only: (1) being adjudicated as mentally ill or being committed to a mental health facility by a court; (2) pleading guilty but mentally ill in a court; (3) being found guilty but mentally ill in a court; and being acquitted by reason of insanity in a court as prohibiting events. See NRS 202.360(2)(a) through (d). Ergo, admission into a district court mental health program is not a prohibiting event under the statute.

As properly understood, the prohibiting terms in the statute did not apply to Mr. Hager and therefore a rational jury could not have concluded that Mr. Hager was guilty beyond a reasonable doubt.

The Instructions

A criminal jury is entitled to accurate, clear and complete jury instructions. See *Crawford v. State,* 121 Nev. 744, 754, 121 P.3d 582,

588 (2005) ("Jurors should neither be expected to be legal experts nor make legal inferences with respect to the meaning of the law; rather, they should be provided with applicable legal principles by accurate, clear, and complete instructions specifically tailored to the fact and circumstances of the case."). Here, as pointed out in the opening brief, the jury received inadequate, confusing and incomplete instructions on the very issues it had to decide. See AOB at 35-42. In response the State seems to agree that the instructions were lacking, but did not constituting error. Indeed, the State suggests that the terms could be left undefined. See RAB at 9-12. Respectfully, this Court should conclude that sufficient error exists in Jury Instructions 16 and 18 to warrant reversal.

CONCLUSION

For the reasons set out above and in the Opening Brief, this Court should reverse Mr. Hager's convictions. This Court should direct the district court to dismiss the case. Alternatively, this Court should direct the district court to dismiss the first three counts because admission into a district court mental health program does not equate to being adjudicated as mentally ill, and remand for a new trial on the

remaining three counts where the jury can determine Mr. Hager's guilt or innocence after being properly instructed on the elements of use of, or being addicted to a controlled substance.

DATED this 8th day of November 2017.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because: This brief has been prepared in a proportionally spaced typeface using Century in 14-point font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, even including the parts of the brief though exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains a total of 1,796 words. NRAP 32(a)(7)(A)(i), (ii).

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied upon is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 8th day of November 2017.

/s/ John Reese Petty
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Chief Deputy, Nevada State Bar No.10

CERTIFICATE OF SERVICE

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

Terrence P. McCarthy, Chief Appellate Deputy,
Washoe County District Attorney

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

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