IN THE SUPREME COURT OF THE STATE OF NEVADA

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IAN ANDRE HAGER,

No. 72613

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

______________________________________/

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 SUPPLEMENTAL BRIEF

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APPELLANT'S SUPPLEMENTAL BRIEF

Introduction

The Court has asked for supplemental briefing on four inter-related questions. At bottom, the Court's concern seems to be whether the State's position—that an admission into a mental health court diversion program constitutes an adjudication of mental illness for purposes of NRS 202.360(2)(a)—is viable. We think not. Furthermore, we think that whether Hager's assignment into a mental health court program constituted an adjudication of mental illness is a question of law that this Court ought to decide de novo.

De novo review reveals that the provisions of NRS 202.360(2)(a) through (d) are concerned with distinct mental-health-related events, none of which include assignment into a mental health court diversion program. Subsections (2)(b) through (d) address specific *criminal* procedural events recognized by statute, while, subsection (2)(a) addresses the involuntary *civil* commitment proceedings under NRS 433A.310(1)(b). The mental health court program provided for under NRS 176A.250 through NRS 176A.265 however, is simply not addressed by any provision in NRS 202.360.

Assignment into a mental health court program is not an adjudication of mental illness for the purpose of NRS 202.360(2)(a). But even if such an assignment could be considered an adjudication of mental illness for the purpose of NRS 202.360(2)(a), dismissal and discharge following the successful completion of the program restores the person to the status he or she occupied before arrest and charge. Thus, there being no adjudication of guilt or a conviction or a status (diagnosed as mentally ill), a weapon possession conviction predicated on that status cannot stand.

<u>Argument</u>

"Whether Hager's referral to Washoe County's mental health court program constitutes an adjudication of mental illness for purposes of NRS 202.360(2)(a)" should have been decided by the trial court as a question of law, and not submitted to the jury as a question of fact.

NRS 202.360(2)(a) prohibits a person's possession of any firearm if the person "[h]as been adjudicated as mentally ill or has been committed to any mental health facility by a court of this State, any other state or by the United States." The statute does not define "adjudicated as mentally ill" or "committed to a mental health facility." Nor has the Nevada Supreme Court determined the meaning or scope of these phrases. But they are clearly legal concepts that must be

determined by a court as a matter of law. In the order directing supplemental briefing, this Court referenced *United States v. McLinn*, 896 F.3d 1152 (10th Cir. 2018). The threshold question in *McLinn* was whether "the issue of whether the defendant has been adjudicated a mental defective or committed to a mental institution is a question of law to be determined by the court or a question of fact to be determined by the jury." 896 F.3d at 1156 (emphasis and internal citation omitted). The appellate court—interpreting a similar federal statute, 18 U.S.C. § 922(g)(4)—concluded "that these are questions of law properly determined by the court." The court gave two reasons. First, resolution of the issue involved statutory interpretation, which is "quintessentially legal in nature." *Id.* Second, "every court of appeals to have addressed the issue has held 'that whether a defendant's adjudication or commitment qualifies under the current version of § 922(g)(4) is a question of law to be determined by a judge rather than a question of fact reserved for the jury.'" *Id.* (collecting cases).

The *McLinn* court's reasoning is persuasive and is consistent with this Court's interpretation of statutes, *i.e.*, statutory interpretation is a question a law. *State v. Catanio*, 120 Nev. 1030, 1033, 102 P.3d 588, 590

(2004) ("Statutory interpretation is a question of law subject to de novo review."); *In re Daniel P.*, 129 Nev. 692, 696, 309 P.3d 1041, 1043 (2013) (same); *Wingco v. Gov't Emps. Ins. Co.*, 130 Nev. 177, 179, 321 P.3d 855, 856 (2014) ("This case presents an issue of statutory interpretation, a pure question of law, and thus this court's review is de novo."); *In re P.S.*, 131 Nev. Adv. Op. 95, 364 P.3d 1271, 1271 (2015) ("This case raises issues of statutory interpretation, which this court reviews de novo.").

The trial court did not treat the issue as a question of law, although it had the opportunity to do so. Prior to trial Mr. Hager moved to dismiss the charges on the basis that he had not been adjudicated mentally ill or committed to a mental health facility. See Supplemental Appendix (SA) at 1-11 (Motion to Dismiss to be filed Under Seal Per HIPPA). The State opposed the motion contending that it presented an argument that should have been presented in a pretrial habeas writ, and since Mr. Hager was not willing to waive his right to a speedy trial, the court was without jurisdiction to entertain the argument. SA at 15-19 (Opposition to Defendant's "Motion to Dismiss"). At a pretrial motions hearing, the district court agreed with the State and declined to

rule on the merits. See 1JA 26 ["THE COURT: ... but the Motion to Dismiss very much looks like a Writ of Habeas Corpus when you're asking me to dismiss counts") and 1JA 43 ("THE COURT: I agree with the State. The Motion to Dismiss should have been filed as a writ of Habeas Corpus. I am not going to consider the merits. It's jurisdictionally barred. It was not filed within 21 days. I agree with that aspect of the State's motions. And the Motion to Dismiss is denied based on the untimeliness."). The trial court did not prepare a written order.

Although this Court does not have a trial court merits ruling for review, it should nonetheless resolve the statutory issue in this case de novo. Unlike the court in *McLinn*, 896 P.3d at 1157, this Court has "enough information in the record" to determine whether Mr. Hager's referral to a mental health program constituted an "adjudication of mental illness" for purposes of NRS 201.360(2)(a). And the Court should conclude that it does not.

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NRS 202.360(2)(a) applies to adjudications of mental illness under the provisions of NRS 433A.310(1)(b) and not to a mental health court diversion program under NRS 176A.250 through NRS 176A.265.

In the order directing supplemental briefing this Court notes that NRS 202.360(2)(a) through (d) "enumerate specific mental-health-related determinations that disqualify a person from possessing a firearm," and asks what does NRS 202.360(2)(a) apply to "if it does not apply to a mental health diversion program under NRS 176A.250 through NRS 176A.265?" The answer is that NRS 202.360(2)(a) does not apply to a mental health diversion program under NRS 176A.250 through NRS 176A.265; it applies only to persons who have been adjudicated mentally ill and have been committed to a mental health facility under NRS 433A.310(1)(b).

NRS 202.360(2)(b) through (d) address specific *criminal* procedural events that are recognized in Nevada statutes— for example, a "plea of guilty but mentally ill" is authorized by NRS 174.035(1) ("A defendant may plead not guilty, guilty, guilty but mentally ill or, with the consent of the court, nolo contendere"); and "found guilty but mentally ill" is allowed by NRS 175.501 ("The defendant may be found guilty or guilty but mentally ill of an offense

necessarily included in the offense charged") and NRS 175.533(1) ("During a trial, upon a plea of not guilty by reason of insanity, the trier of fact may find the defendant guilty but mentally ill at the time of the commission of the offense"); and finally, "acquitted by reason of insanity" is allowed under NRS 175.539. In contrast, NRS 202.360(2)(a)'s focus on the phrases "adjudicated as mentally ill" and "committed to any mental health facility" does not refer to any criminal procedural event. Rather, it links to the involuntary *civil* commitment procedures found in NRS 433A.310(1)(b). This is particularly clear when the word "or" in the sentence: "Has been adjudicated as mentally ill *or* has been committed to any mental health facility by a court"—which is not preceded by a comma—is understood not to signal the disjunctive case. See *Dezzani v. Kern & Associates, Ltd.*, 134 Nev. Adv. Op. 9, 412 P.3d 56, 65 (2018) (Pickering, J., dissenting) ("Doubtless, an 'or' preceded by a comma can indicate a disjunctive, such that two words that are separated by an 'or' have two alternative definitions. But an 'or' is not always disjunctive, and 'it is important not to read the word 'or' too strictly where to do so would render the language of the statute dubious.'") (citation omitted). Only under NRS 433A.310(1)(b), does an

adjudication of mental illness inexorably lead to a commitment to a mental health facility by the court.

"To 'commit' means 'to be placed officially in confinement or custody.'" *United States v. McIlwain*, 772 F.3d 688, 694 (11th Cir. 2014) (quoting *American Heritage College Dictionary* 280 (3d ed. 1997)). A commitment "does not include a 'voluntary admission' or 'a person in a mental institution for observation.'" *Id.* 772 F.3d at 694. Under NRS 433A.310(1)(b), if a court finds that a person "has a mental illness and, because of that illness, is likely to harm himself or herself or others if allowed his or her liberty ... the court may order the *involuntary* admission of the person for the most appropriate treatment, including, without limitation, admission to a public or private mental health facility." This statute provides the "mental illness" and "commitment to a mental health facility" concepts captured by NRS 202.360(2)(a). In contrast, admission into a mental health court diversion program is not a "commitment" into the program, because it is voluntary. Indeed, under NRS 176A.250 through NRS 176A.265 the action words are: "assign," "assignment," and "place." Not "commit."

Additionally, placement into a mental health court diversion program does not involve an adjudication of mental illness by a court. Rather, under NRS 176A.255(2)(a)-(c) all that is required is a diagnosis and the court's acknowledgement that the person seeking placement "[a]ppears to suffer from a mental illness or to be intellectually disabled" and that he or she "[w]ould benefit from assignment into a program established under NRS 176A.250." Finally, NRS 202.360(2)(a) does not itself create a prohibition based on an assignment into a mental health court diversion program; it specifically ties the prohibition to a commitment to a "mental health facility." (See NRS 433.233 for identified mental health facilities in Nevada.) This Court should not graft a new element onto an existing statute. *Douglas v. State*, 130 Nev. 285, 293, 327 P.3d 492, 498 (2014) (noting that "courts should not add things to what a statutory text states or reasonably implies.").

As noted above, this Court asked what does NRS 202.360(2)(a) apply to if not to a mental health diversion program under NRS 176A.250 through NRS 176A.265. But the better question is this: If NRS 202.360(2)(a) does not apply solely to events under NRS

433A.310(1)(b), then where else in NRS 202.360 is NRS 433A.310 accounted for? The question answers itself. In Nevada, the only process where a person can be adjudicated to be mentally ill and committed to a mental health facility is under the involuntary civil commitment provisions found in NRS 433A.310(1)(b). Thus, NRS 202.360(2)(a) addresses the involuntary civil commitment event under NRS 433A.310(1)(b), while NRS 202.360(2)(b) through (d) addresses specific criminal procedural events. Mental health diversion programs under NRS 176A.250 through NRS 176A.265 however, do not create a prohibition that is addressed by NRS 202.360.[1]

Even if admission to a mental health court diversion program constituted an adjudication of mental illness under NRS 202.360(2)(a), dismissal and discharge upon successful completion of the program restores the individual to his or her status prior to the "adjudication."

Assignment into a mental health diversion program does not constitute an adjudication of mental illness. But even if admission into a mental health court program could constitute an adjudication of

[1] There is no need for NRS 202.360 to reach mental health diversion court programs under NRS 176A.250. First, if the person assigned into the program fails the program, then he or she will be convicted of a felony and the provisions of NRS 202.360(1)(b) apply. Second, if the person assigned into the program successfully completes the program, then he or she will be discharged and the underlying criminal proceedings will be dismissed. NRA 176A.260(4).

mental illness for the purpose NRS 202.360(2)(a), dismissal and discharge upon the successful completion of the program restores the person "*in the contemplation of the law*, to the status occupied before arrest, indictment or information." NRS 176A.260(4) (italics added).[2] Here that status relates back to a time prior to Hager's arrest in 2013, which preceded his subsequent assignment into the mental health court diversion program, which in turn erases any so-called adjudication of mental illness that was required for him to be placed into the diversion program.

In the order directing supplemental briefing the Court referenced *Cuellar v. State*, 70 S.W.3d 815 (Tex. Crim. App. 2002). *Cuellar* stands for the proposition that a person whose conviction "has been set aside" by order of a court of competent jurisdiction "is not a convicted felon." 70 S.W. 3d at 820 (italics omitted). See also *United States v. Fix*, 264 F.3d 532, 535 (5th Cir. 2001) (stating that because the state court granted Fix a new trial "he cannot be under disability or restriction in regard to

[2] Hager successfully completed the program. On October 17, 2014, a district court judge for the Sixth Judicial District Court entered an order "accept[ing] the Defendant's withdrawal of his plea and dismiss[ing] the above entitled proceedings and ... discharg[ing] [him] from any further obligations, and any convictions entered herein are set aside." 1JA 142 (Order).

the possession of firearms. There is no predicate offense, so the conviction of possession of a firearm by a felon cannot stand."); *United States v. Beck*, 2009 WL 2581416 (W.D. Tex. 2009) *2-*3 (following *Fix* and reaching same conclusion where state court indictments were dismissed by state courts).

But discharge and dismissal under NRS 176A.260(4) accomplishes two distinct things. First, discharge and dismissal means there has been no "adjudication of guilt" and no "conviction" for "any public or private purpose" (except for a couple of matters not applicable here). Second, and more important to this discussion, discharge and dismissal affects a defendant's "status," which is a concept that stands separate and apart from an adjudication of guilt or a conviction. Discharge and dismissal "restores the defendant ... to the status occupied before" arrest, and charge. Thus, assignment into and successful completion of a mental health court diversion program erases, in the contemplation of the law, *any predicate*—whether that predicate is the underlying felony offense or is a status (such as mental illness)—for any purpose, including for the purpose of NRS 202.360(2)(a). Accordingly, even if there had been an adjudication of

mental illness, discharge and dismissal means that the "adjudication" has been erased by operation of law.

The State's interpretation of NRS 202.360(2)(a) cannot be squared with NRS 179A.163, NRS 433A.310(3), and NRS 176A.400.

1.

NRS 176A.265(1) provides that when a defendant is discharged from probation pursuant to NRS 176A.260, "the court shall order sealed all documents, papers and exhibits in the defendant's record, minute book entries and entries on dockets, and other documents relating to the case ... if the defendant fulfills the terms and conditions imposed by the court and the Division." This command, in conjunction with the command found in NRS 176A.260(4)—that the court's discharge is not an adjudication of guilt and is not a conviction so that a defendant "may not be held thereafter under any law to be guilty of perjury or otherwise giving a false statement by reason of failure to recite or acknowledge that arrest, indictment, information or trial in response to an inquiry made of the defendant for any purpose"—recognizes not only the societal stigma attached to a diagnosis of mental illness, but also the finality guaranteed to a defendant who has fulfilled "the terms and conditions" of the mental health court program. This Court should find

these recognitions significant. *Cf.* AB 47 (75th Nevada Legislative Session, 2009) (removing three year waiting period for purposes of sealing records upon discharge from NRS 176A.250 program under NRS 176A.265).

2.

"Can the State's interpretation of NRS 202.360(2)(a) be squared with NRS 179A.163, NRS 433A.310(3), and NRS 176A.400?" This question must be answered "no." NRS 179A.163(1) identifies specific statutes that require the transmittal of mental health records to the Central Repository. They include the *criminal* statutes addressed in NRS 202.360(2)(b) through (d) and the involuntary *civil* commitment statute addressed in NRS 202.360(2)(a). Notably, NRS 176A.250 through NRS 176A.265 are not included in subsection 1 of NRS 179A.163, or elsewhere mentioned in the full statute. Assignment into a mental health court diversion program does not trigger the reporting requirement of NRS 179A.163. Put simply, such an assignment does not trigger the reporting requirement because there has not been an adjudication of mental illness.

NRS 176A.400(2) allows a sentencing court to place a convicted defendant, as a condition of probation for a category C, D, or E felony, into "any alternative program, treatment or activity deemed appropriate by the court." NRS 433A.310(3) provides that "admission to a program of community-based or outpatient services may be used to satisfy" a sentencing court's order under NRS 176A.400(2). The court's placement under this statute likewise does not constitute an adjudication of mental illness. Rather, implicit in the sentencing court's exercise of discretion under NRS 176A.400(2), is the court's acknowledgement—similar to that found in NRS 176A.255(2)(b)-(c)—that a defendant may be suffering from a mental illness or intellectual disability and could benefit from admission into an appropriate program, treatment or activity. Such voluntary placement would not constitute commitment to mental institution, and would not be an adjudication of mental illness within the contemplation of NRS 202.360(2)(a).

Placement into a mental health treatment program as a condition of probation is virtually identical to assignment into a mental health court diversion program. The only difference is that in a diversion

program successful completion of the program results in dismissal of the underlying felony offense, while for the probationer successful completion of the program does not remove the felony conviction. But neither assignment constitutes an adjudication of mental illness. Thus, a district court's placement of a defendant into a mental health program under either NRS 176A.250 or NRS 176A.400 does not require reporting under NRS 179A.163(1) and does not constitute an adjudication of mental illness for the purposes of NRS 202.360(2)(a).

Conclusion

Assignment into a mental health diversion program does not, as a matter of law, constitute an adjudication of mental illness for purposes of NRS 202.360(2)(a). This Court should reverse Hager's convictions based on NRS 202.360(2)(a).

DATED this 12th day of October 2018.

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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 3,416 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 12th day of October 2018.

/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 12th day of October 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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