

IN THE SUPREME COURT OF THE STATE OF NEVADA

IAN ANDRE HAGER,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

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Oct 12 2018 10:41 a.m.
No. 72613 Elizabeth A. Brown
Clerk of Supreme Court

**Appeal from a Judgment of Conviction, Case No. CR16-1457
The Second Judicial District Court of the State of Nevada
Honorable Scott N. Freeman, District Judge**

SUPPLEMENTAL APPENDIX

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¹ Does not include exhibits filed with motion.

SEALED

CODE NO. 2315
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

STATE OF NEVADA,

Plaintiff,

v.

Case No. CR16-1457

IAN ANDRE HAGER,

Dept. No. 9

Defendant.

MOTION TO DISMISS TO BE FILED UNDER SEAL PER HIPAA (D-2)

COMES NOW, IAN HAGER, by and through his attorney of record, Katheryn Hickman, and hereby respectfully requests that this Court dismiss the case currently pending against Mr. Hager. This motion is based on the attached points and authorities, all papers and pleadings on file, and any evidence presented to this Court. Further, Mr. Hager requests a hearing in this matter.

POINTS AND AUTHORITIES

FACTUAL HISTORY

Mr. Hager is currently set for trial on December 12, 2016. He faces six separate counts, alleging possession of a firearm by a prohibited person. Counts 1-3 allege that Mr. Hager is prohibited from owning a firearm after being adjudicated mentally ill in the Sixth and/or

1 Second Judicial District Courts of Nevada, and committed to Mental Health Court, or after
2 having been committed to any mental health facility. Counts 4-6 allege that Mr. Hager is
3 prohibited from possessing a firearm while being an unlawful user of, or addicted to, any
4 controlled substance.

5 In February of 2013, Mr. Hager was arrested for Carrying a Concealed Weapon and
6 Prohibited Person in Possession of a Firearm. He pled guilty to Count 1, Carrying a Concealed
7 Weapon, a felony. On March 13, 2013, Mr. Hager's attorney filed an Application for the
8 Treatment or Diversion Pursuant to Chapter 453.3363 or NRS 458. (*Exhibit 1*). This application
9 is not accompanied by an evaluation finding Mr. Hager to be an addict, nor does it contain
10 information regarding Mr. Hager's addiction.
11

12 On April 19, 2013, Mr. Hager's attorney filed a Written Notice of Application for
13 Treatment Pursuant to NRS 179A.250 and Withdraw of Application Pursuant to NRS 458.
14 (*Exhibit 2*). At sentencing, the Court suspended further proceedings pursuant to NRS
15 176A.250, and, among other conditions, required Mr. Hager to apply for the Washoe County
16 Mental Health Program, and if eligible, that he enter into and complete such program. The
17 Court also ordered Mr. Hager to attend the Humboldt County Drug Court program until proof
18 was provided that he had been accepted into Mental Health Court Program. (*Exhibit 3*). The
19 Court made no findings regarding Mr. Hager's mental health, whether or not he is a danger to
20 himself or others, or if he lacked the mental capacity to contract or manage his own affairs. At
21 the time of sentencing, Mr. Hager was out of custody, and reporting to pretrial services, with no
22 violations.
23

24 Mr. Hager was accepted into the Mental Health Court Program on May 9, 2013. He was
25 found to be eligible by a specialty courts officer. (*Exhibit 4*). At the time that Mr. Hager was
26

1 accepted into Mental Health Court, he was found to be suffering from PTSD. He self-reported
2 to Mental Health Court that his substance abuse history involved “methamphetamine from ’98
3 to ’02, short relapse in ’12. Oxycotton [sic] in ’11-prescribed for pain management but abuse
4 after a death in the family.” He also reported that his drug of choice is “meth” and that he last
5 smoked “Dec. 15th 2012.”¹ (*Orientation data, Exhibit 5*). Mr. Hager participated in Mental
6 Health Court from May 10, 2013 through May 9, 2014, when his case was dismissed. During
7 that time, Mr. Hager had zero violations, was never remanded to the Washoe County Jail as a
8 sanction, and did not test dirty for any substance. In essence, he ran a perfect program.

10 On June 4, 2014, a Petition and Order of Dismissal and Discharge and Setting Aside of
11 Conviction was filed in MH13-0034, signed by the Washoe County Specialty Court Judge.
12 (*Exhibit 6*). On October 17, 2014, CR13-6258, the originating case out of Humboldt County
13 was dismissed. (*Exhibit 7*).

15 Since Mr. Hager’s successful completion of Mental Health Court, he has been contacted
16 by law enforcement two times, not counting his arrest in the present case. In March of 2015
17 (Sparks Police Department Case #15-2096), Mr. Hager was contacted at his residence because
18 he was allegedly suicidal. Four firearms were collected and booked into evidence at that time: a
19 Marlin .22 rifle, a Browning .22 rifle, a Colt 1911 .45 caliber pistol, and a Remington 870
20 shotgun. Mr. Hager was transported to a medical facility for emergency admission, but was not
21 committed, and was not brought before a judge or “adjudicated” in any way in that case.

25 ¹ The PSI prepared for CR13-6258 states that “Mr. Hager began the casual use of marijuana at 11 years of age,
26 cocaine and methamphetamine at 12 years of age, tried ecstasy and psilocybin mushrooms a few times between 14
and 23 years of age and became addicted to prescription medication (OxyContin) at 26 years of age. The defendant
said he last used methamphetamine in January, 2013. Mr. Hager expressed that both alcohol and controlled
substances can be problematic for him if he does not have a positive direction.”

1 Further, there is no evidence that Mr. Hager was admitted to the hospital involuntarily, and the
2 State does not allege this encounter in the charging document.

3 In August of 2015, (Sparks Police Department Case #15-8049), it was reported that Mr.
4 Hager was suicidal, with a gun to his head. Mr. Hager was not transported to a hospital, but was
5 allowed to stay in his home with a friend.

6
7 On December 8, 2015, Mr. Hager filled out ATF (Alcohol, Tobacco and Firearms)
8 Form 4473, in an attempt to have his firearms returned to him by the Sparks Police Department.
9 (*Exhibit 8*). This is a form promulgated by the Bureau of Alcohol, Tobacco, Firearms and
10 Explosives that is generally filled out when a person attempts to acquire firearms. Question
11 11.e inquires “Are you an unlawful user of, or addicted to, marijuana or any depressant,
12 stimulant, narcotic drug, or any other controlled substance.” Mr. Hager replied in the negative.
13 Question 11.f inquires “Have you ever been adjudicated mentally defective (*which includes a*
14 *determination by a court, board, commission, or other lawful authority that you are a danger to*
15 *yourself or to others or are incompetent to manage your own affairs*) **OR** have you ever been
16 committed to a mental institution?” Mr. Hager again answered in the negative. Notably, ATF
17 Form 4473 defines the terms “adjudicated mentally defective” and “committed to a mental
18 institution” in the same manner as federal law, and requires a finding of dangerousness, or that
19 a person lacks the mental capacity to contract and manage his own affairs. More than a month
20 later, after conducting an NICS check on Mr. Hager, and making inquiries of court records, on
21 January 14, 2016, the evidence technician from the Sparks Police Department returned to Mr.
22 Hager four firearms: a Winchester shotgun, a Marlin rifle, a Blue Browning rifle, and a Colt
23 pistol.
24

25
26 ///

1 In the current case, Mr. Hager allegedly posted videos of himself on Facebook. Officers
2 became concerned when they perceived that Mr. Hager was making possible threats to
3 Detective Johnson from the Reno Police Department. Mr. Hager has not been charged for
4 making any potential threat to anyone. The majority of the relevant videos, for the purpose of
5 this case, depict Mr. Hager with alleged firearms, inside of his home. He is often depicted
6 consuming alcohol. In a video posted to Facebook on February 26, 2016, Mr. Hager is seen
7 holding up a bag that appears to contain a white substance. He also appeared to be consuming
8 alcohol. Mr. Hager then sat at a table, and appeared to snort something. The white substance is
9 not seen on the video, and it is not readily apparent if Mr. Hager actually consumed anything.
10 During his interview with Detective Rowe, he states that this was “meth,” but he was not drug
11 tested at the time of the video, nor at the time of his arrest. The alleged white substance was
12 never tested by the Washoe County Crime Lab or any other crime lab. There are no drug
13 results. Further, other than this one video, there is no evidence of any other drug use by Mr.
14 Hager, since December of 2012 or January of 2013.

17 ARGUMENT

18 1. Mr. Hager has not been “adjudicated as mentally ill” nor has he been
19 committed to a mental health facility.

20 NRS 202.360(2)(a) makes it illegal for a person to have in his possession or under his
21 custody or control any firearm if the person has been adjudicated as mentally ill or has been
22 committed to any mental health facility by a court of this State, any other state, or the United
23 States. NRS 202.360 does not provide a definition for “adjudicated mentally ill” nor does it
24 provide a definition for “committed to a mental health facility.”

25 However, NRS 202.360 closely mirrors 18 U.S.C. § 922(g)(4), which prohibits any person
26 who has been “adjudicated mentally defective” or “committed to any mental institution” from

1 possessing a firearm. Federal law, unlike the Nevada statutes, provides a definition and guidance
2 for the above terms. 27 C.F.R. §478.11 defines “adjudicated mentally defective” as:

3 a). A determination by a court, board, commission or other lawful authority that a person,
4 as a result of marked subnormal intelligence or mental illness, incompetency, condition or
5 disease:

6
7 1) Is a danger to himself or others; or

8 2) Lacks the mental capacity to contract or manage his own affairs.

9 b) The term shall include-

10 1) A finding of insanity by a court in a criminal case; and

11 2) Those persons found incompetent to stand trial or found not guilty by reason of lack of
12 mental responsibility pursuant to articles 50a and 72b of the Uniform Code of Military
13 Justice, 10 U.S.C. 850a, 876b.

14
15 27 C.F.R. § 478.11 defines “committed to a mental institution” as “a formal commitment
16 of a person to a mental institution by a court, board, commission or other lawful authority. The
17 term includes a commitment to a mental institution involuntarily. The term includes commitment
18 for mental defectiveness or mental illness. It also includes commitments for other reasons, such as
19 drug use. The term does not include a person in a mental institution for observation or a voluntary
20 admission to a mental institution.”

21 In *U.S. v. Vertz*, 102 F. Supp.2d 787(2000), the Government alleged that the defendant had
22 been “adjudicated mentally defective” as he had been consistently diagnosed with mental health
23 disorders, was permanently medically disqualified due to psychiatric reasons, and was receiving
24 VA benefits for a service connected psychiatric disability. *Id.* at 788. Further, the defendant was
25

26 ///

1 adjudicated by a judge to be a “person requiring treatment because he is mentally ill.” *Id.* The
2 Court found that such an adjudication was not sufficient to bring the defendant within the statute,
3 because the Court made no finding that he was a danger to himself or others, or that he lacked the
4 mental capacity to contract or manage his own affairs. *Id.*

5
6 The mechanism for tracking people and informing gun dealers of those that cannot
7 lawfully possess firearms is the National Instant Criminal Background Check System (NICS),
8 which is updated when states submit mental health information to NICS. In 2008, the NICS
9 Improvement Amendments Act of 2007 was signed into law. This law, among other things,
10 provides financial incentives for states to provide to NICS information relevant to whether a
11 person is prohibited from possessing firearms, including the names and other relevant identifying
12 information of persons adjudicated as a mental defective or those committed to mental institutions.
13 *Pub. L. No. 110-180 §§ 102, 104, 121 Stat. 2559 (2008).*

14
15 NRS 179A.163 was added to Nevada statutes in 2009, in an effort to comply with the
16 NICS Improvement Amendments Act of 2007. This statute specifically lists the statutes which
17 require the State of Nevada to transmit a record to the Central Repository, which in turn reports the
18 information to NICS. The relevant portions of the listed statutes are:

19 **1.NRS 159.0593: Determination of whether proposed ward is prohibited from possessing**
20 **firearm under federal law.**

21 1. If the court orders a general guardian appointed for a proposed ward, the court shall
22 determine, by clear and convincing evidence, whether the proposed ward is a person with a mental
23 defect who is prohibited from possessing a firearm pursuant to 18 U.S.C. § 922(d)(4) or (g)(4). If a
24 court makes a finding pursuant to this section that the proposed ward is a person with a mental
25 defect, the court shall include the finding in the order appointing the guardian and cause, within 5
26 business days after issuing the order, a record of the order to be transmitted to the Central
Repository for Nevada Records of Criminal History, along with a statement indicating that the
record is being transmitted for inclusion in each appropriate database of the National Instant
Criminal Background Check System.

2. As used in this section:

(a) “National Instant Criminal Background Check System” has the meaning ascribed to it in
NRS 179A.062.

1 (b) "Person with a mental defect" means a person who, as a result of marked subnormal
2 intelligence, mental illness, incompetence, condition or disease, is:

(1) A danger to himself or herself or others; or

3 (2) Lacks the capacity to contract or manage his or her own affairs.

2. NRS 174.035: Types of pleas; procedure for entering plea.

4 8. If the court accepts a plea of guilty but mentally ill, pursuant to this section, the court shall
5 cause, with 5 business days after acceptance of the plea, on a form prescribed by the Department
6 of Public Safety, a record of that plea to be transmitted to the Central Repository for Nevada
7 Records of Criminal History along with a statement indicating that the record is being transmitted
8 for inclusion on each appropriate database of the National Criminal Background Check System.

**3. NRS 175.533: Finding of guilty but mentally ill upon a plea of not guilty by reason of
9 insanity; required findings; effect of finding.**

10 3. If the trier of fact finds a defendant guilty but mentally ill pursuant to subsection 12, the
11 court shall cause, with 5 business days after the finding, on a form prescribed by the Department
12 of Public Safety, a record of that plea to be transmitted to the Central Repository for Nevada
13 Records of Criminal History along with a statement indicating that the record is being transmitted
14 for inclusion on each appropriate database of the National Criminal Background Check System.

**4. NRS 175.539: Acquittal by reason of insanity; Defendant to be examined; hearing to be
15 held to determine whether defendant is mentally ill; procedure for committing defendant to
16 custody of Division of Public and Behavioral Health.**

17 4. If the court accepts a verdict acquitting a defendant, pursuant to this section, the court shall
18 cause, with 5 business days after accepting the verdict, on a form prescribed by the Department of
19 Public Safety, a record of that plea to be transmitted to the Central Repository for Nevada Records
20 of Criminal History along with a statement indicating that the record is being transmitted for
21 inclusion on each appropriate database of the National Criminal Background Check System.

5. NRS 178.425: Procedure on finding defendant incompetent.

22 6. If a defendant is found incompetent pursuant to this section, the court shall cause, with 5
23 business days after the finding, on a form prescribed by the Department of Public Safety, a record
24 of that plea to be transmitted to the Central Repository for Nevada Records of Criminal History
25 along with a statement indicating that the record is being transmitted for inclusion on each
26 appropriate database of the National Criminal Background Check System.

**6. NRS 433A.310: Findings and order; conditions for admission to program of community
based or outpatient services; expiration and renewal of admission to facility or program;
alternative courses of treatment; transmittal of record to Central Repository for Nevada
Records of Criminal History.**

1. Except as otherwise provided in NRS 432B.6076 and 432B.6077, if the district
court finds, after proceedings for the involuntary court-ordered admission of a person:

(a) That there is not clear and convincing evidence that the person with respect to whom
the hearing was held has a mental illness or exhibits observable behavior such that the person is
likely to harm himself or herself or others if allowed his or her liberty or if not required to
participate in a program of community-based or outpatient services, the court shall enter its
finding to that effect and the person must not be involuntarily admitted to a public or private
mental health facility or to a program of community-based or outpatient services.

(b) That there is clear and convincing evidence that the person with respect to whom the
hearing was held has a mental illness and, because of that illness, is likely to harm himself or
herself or others if allowed his or her liberty or if not required to participate in a program of

1 community-based or outpatient services, the court may order the involuntary admission of the
2 person for the most appropriate course of treatment, including, without limitation, admission to
3 a public or private mental health facility or participation in a program of community-based or
4 outpatient services. The order of the court must be interlocutory and must not become final if,
within 30 days after the involuntary admission, the person is unconditionally released pursuant
to NRS 433A.390.

5 5. If the court issues an order involuntarily admitting a person to a public or private
6 mental health facility or to a program of community-based or outpatient services pursuant to
7 this section, the court shall, notwithstanding the provisions of NRS 433A.715, cause, within 5
8 business days after the order becomes final pursuant to this section, on a form prescribed by the
Department of Public Safety, a record of the order to be transmitted to the Central Repository
for Nevada Records of Criminal History, along with a statement indicating that the record is
being transmitted for inclusion in each appropriate database of the National Instant Criminal
Background Check System.

9 6. As used in this section, "National Instant Criminal Background Check System" has the
10 meaning ascribed to it in NRS 179A.062.

11 The statutes specifically enumerated in NRS 179A.163 closely track the federal definition
12 "adjudicated mentally defective" in that there must be a finding of dangerousness to oneself or
13 others, or that the person lacks the capacity to contract and manage their own affairs, or the
14 person has been found not guilty by reason of insanity, guilty but mentally ill, or incompetent.
15

16 Further, NRS 179A.163 allows for the "relief of disabilities" that meets the NICS
17 Improvement Amendments Act of 2007. This relief allows a person, after having been adjudicated
18 mentally ill or committed to a mental institution pursuant to the above statutes to apply for relief
19 from the prohibition on the purchase and possession of firearms and ammunition. Noticeably, the
20 "relief of disabilities" clause would not allow a person who successfully completes Mental Health
21 Court to apply for relief.
22

23 The Washoe County Mental Health Court was created pursuant to NRS 179A.250, which
24 allows for the establishment of a program for the treatment of mental illness or intellectual
25 disabilities. A person is eligible to participate in Mental Health Court if he has been diagnosed
26

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1 with a serious mental illness, as defined by NRS 433.164². Chapter 433 does not include any
2 provision for the reporting of participation in Mental Health Court to NICS, nor does Mental
3 Health Court report its participants to NICS. In fact, the legislative intent of chapters 433 to 433C
4 are to eliminate the forfeiture of any civil and legal rights of any person and the imposition of any
5 legal disability on any person, based on an allegation of mental illness, by any method other than a
6 separate judicial proceeding resulting in a determination of incompetency, wherein the civil and
7 legal rights forfeited and the legal disabilities imposed are specifically stated. Further, participation
8 in Mental Health Court is voluntary, and does not include a finding that the defendant is a danger
9 to himself or others. Finally, the laws that govern the creation of, and the participation in, Mental
10 Health Court are not included in NRS 179A.163, and do not require the transmission of records to
11 NICS. Quite simply, a person voluntarily participating in Mental Health Court has not been
12 “adjudicated mentally ill” nor “committed to a mental institution” and is not precluded from
13 possessing a firearm pursuant to NRS 202.360.
14

15
16 In the current case, Mr. Hager is not prohibited from possessing a firearm because of his
17 participation in Mental Health Court. He was found to be eligible because he had a qualifying
18 diagnosis under NRS 433.164. He had not been found to be a danger to himself or others, found
19 incompetent, not guilty by reason of insanity, or committed involuntarily to a mental institution.
20 As such, Counts one, two and three should be dismissed.
21

22
23 ² NRS 433.164 “Mental illness” defined. “Mental illness” means a clinically significant disorder of thought,
mood, perception, orientation, memory or behavior which:

24 1. Is listed in the most recent edition of the clinical manual of the *International Classification of Diseases*,
25 *ICD-9-CM*, code range 295 to 302.9, inclusive, 306 to 309.9, inclusive, or 311 to 316, inclusive, or the
corresponding code in the most recent edition of the *American Psychiatric Association’s Diagnostic and Statistical*
Manual of Mental Disorders, DSM-IV, Axis I; and

26 2. Seriously limits the capacity of a person to function in the primary aspects of daily living, including,
without limitation, personal relations, living arrangements, employment and recreation.

1 2. Mr. Hager is not an unlawful user of, nor is he addicted to any controlled substance.

2 NRS 202.360(1)(d) prohibits a person from owning a firearm or from having a firearm in
3 his possession or under his custody or control if he is an unlawful user of, or addicted to, any
4 controlled substance. Controlled substance has the meaning ascribed to it in 21 U.S.C. § 802(6),
5 “which is a drug or other substance, or immediate precursor, as defined in section 102 of the
6 Controlled Substance Act. The term includes, but it not limited to, marijuana, depressants,
7 stimulants, and narcotic drugs. The term does not include distilled spirits, wine, malt beverages, or
8 tobacco.” 27 C.F.R. § 478.11. “Unlawful user” and “addict” are not defined in the NRS; however,
9 federal law does provide a definition in 27 C.F.R. § 478.11:
10

11 “A person who uses a controlled substance and has lost the power of self-control with
12 reference to the use of controlled substance; and any person who is a current user of a
13 controlled substance in a manner other than as prescribed by a licensed physician.
14 Such use is not limited to the use of drugs on a particular day, or within a matter of
15 days or weeks before, but rather that the unlawful use has occurred recently enough
16 to indicate that the individual is actively engaged in such conduct. A person may be
17 an unlawful current user of a controlled substance even though the substance is not
18 being used at the precise time the person seeks to acquire a firearm or receives or
19 possesses a firearm. An inference of current use may be drawn from evidence of a
20 recent use or possession of a controlled substance or a pattern of use or possession
21 that reasonably covers the present time, e.g., a conviction for use or possession of a
22 controlled substance within the past year; multiple arrests for such offenses within the
23 past 5 years if the most recent arrest occurred within the past year; or persons found
24 through a drug test to use a controlled substance unlawfully, provided that the test
25 was administered within the past year. For a current or former member of the Armed
26 Forces, an inference of current use may be drawn from recent disciplinary or other
administrative action based on confirmed drug use, e.g., court-martial conviction,
nonjudicial punishment, or an administrative discharge based on drug use or drug
rehabilitation failure.”

1 In the present case, the Court can decide as a matter of law that there is no evidence to
2 support the allegation that Mr. Hager is an unlawful user of, or addicted to, an unlawful substance,
3 and that no rational jury could find that he is an addict or an unlawful user of a controlled
4 substance. He self-reported his last use of methamphetamine to be somewhere between December

1 2012 and January of 2013. He was supervised by Mental Health Court for a year and tested clean.
2 He has had zero arrests involving the use of a controlled substance, and in all of his contacts with
3 law enforcement, there have been no allegations of suspected narcotics used. Additionally, in the
4 present case, Mr. Hager's home was searched after his arrest. Sparks Police Department did not
5 find any indicia of drug use, to include actual controlled substances, or paraphernalia. Finally, a
6 search was performed of Mr. Hager's cell phone, and did not result in photos, text messages, or
7 other evidence to support the State's allegation in this case.
8

9 At the preliminary hearing in the case, the State introduced a video depicting Mr. Hager,
10 snorting what was alleged to be methamphetamine. This was the only evidence presented
11 involving the use of a controlled substance. There are no firearms present in this video. The State
12 is unable to show that the alleged substance was methamphetamine, as no drug test of the
13 substance or of Mr. Hager was ever conducted, nor can it show that Mr. Hager actually consumed
14 the white substance. The video does not support an inference of current use, nor does it support a
15 pattern of use. There is no evidence to support the State's theory in this case, and Counts Four,
16 Five and Six should be dismissed as a matter of law.
17

18 CONCLUSION

19 Based upon the foregoing, Mr. Hager respectfully requests that this Court dismiss the
20 case pending against him.

21 AFFIRMATION PURSUANT TO NRS 239B.030

22 The undersigned does hereby affirm that the preceding document does not contain the
23 social security number of any person.

24 DATED this 17th day of November, 2016. JEREMY T. BOSLER
25 Washoe County Public Defender

26 By: /s/ Katheryn Hickman
KATHERYN HICKMAN
Deputy Public Defender

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CERTIFICATE OF SERVICE

I, LINDA GRAY, hereby certify that I am an employee of the Washoe County Public Defender's Office, Reno, Washoe County, Nevada, and that on this date I forwarded a true copy of the foregoing document through electronic service to:

LUKE PRENGAMEN, Deputy District Attorney

DATED this 17th day of November, 2016.

/s/ LINDA GRAY
LINDA GRAY

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8
9 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
10
11 IN AND FOR THE COUNTY OF WASHOE.

12 * * *

13 THE STATE OF NEVADA,

14 Plaintiff,

Case No. CR16-1457

15 v.

Dept. No. 9

16 IAN ANDRE HAGER,

17 Defendant.

18
19 OPPOSITION TO DEFENDANT'S "MOTION TO DISMISS"

20 Comes now the State of Nevada, by and through Luke Prengaman, Chief Deputy
21 District Attorney, and hereby opposes the Defendant's "MOTION TO DISMISS TO BE
22 FILED UNDER SEAL PER HIPAA." This Opposition is based on the attached
23 Memorandum of Points and Authorities.

24 DATED this 28th day of November, 2016.

25 Christopher J. Hicks
26 Washoe County District Attorney

27 By /s/ LUKE PRENGAMAN

28 Luke Prengaman

6094

Chief Deputy District Attorney

1 POINTS AND AUTHORITIES

2 I. ARGUMENT

3 A. The Defendant's Motion should be denied for failure to comply with NRS 34.700.

4 According to NRS 34.700, a defendant who wishes to allege a want of probable cause to
5 detain him for trial or to "otherwise challeng[e] the court's right or jurisdiction to proceed
6 to the trial of a criminal charge" must file a pretrial petition for a writ of habeas corpus
7 "within 21 days after the first appearance of the accused in the district court."¹ The
8 defendant must also "[w]aive[] the 60-day limitation for bringing an accused to trial."² The
9 provisions of NRS 34.700 are mandatory: NRS 34.700(1) states that a pretrial petition
10 "may not be considered" unless these conditions are met, and NRS 34.710(1)(a) states that
11 "[a] district court shall not consider any pretrial petition for habeas corpus . . . [b]ased on
12 alleged lack of probable cause or otherwise challenging the court's right or jurisdiction to
13 proceed to the trial of a criminal charge unless a petition is filed in accordance with NRS
14 34.700."³

15 The Defendant's Motion to Dismiss comprises an attack the State's evidence
16 supporting the charged offenses; it seeks the dismissal of the charges "as a matter of law"
17 based upon a claimed lack of supporting evidence. It is therefore either 1) a thinly veiled
18 allegation of a want of probable cause to detain the Defendant for trial, or 2) a challenge to
19 "the court's right or jurisdiction to proceed to the trial of a criminal charge." Either way,
20 the appropriate vehicle for making the challenge was the petition for a pretrial writ of
21 habeas corpus.⁴ The Defendant, however, failed to comply with the mandatory provisions

22
23 ¹ NRS 34.700(1).

24 ² NRS 34.700(1)(b).

25 ³ See NRS 34.710(1)(a). See also *Sheriff v. Jensen*, 95 Nev. 595, 596, 600 P.2d 222, 223 (1979)
26 (Pretrial petition for a writ of habeas corpus filed 31 days after arraignment was not cognizable
27 and district court erred in giving it consideration; "The requirements of this statute are
28 mandatory, and where, as here, the requirements are not complied with, the petition is neither
cognizable below nor reviewable here"); *Sheriff v. Marshall*, 96 Nev. 304, 305, 608 P.2d 1101,
1101 (1980) (pretrial petition for a writ of habeas corpus that "did not contain the waiver and
consents required by NRS 34.375(1)(b)" was "not cognizable in the district court").

29 ⁴ Styling his challenge as a "Motion to Dismiss" instead of a pretrial petition does not change
its substance, and does not free him from the requirements of NRS 34.700. Cf. *Pangallo v. State*,
112 Nev. 1533, 1536, 930 P.2d 100, 102 (1996) ("Similarly, this court has never concerned itself

1 of NRS 34.700(1). He failed to file his challenge within 21 days of his arraignment, and he
2 elected to invoke his right to trial within 60 days rather than waiving it as required.
3 Accordingly, his Motion cannot be considered and should be denied.

4 **B. The Defendant's Motion should be denied because it lacks a legal basis.**

5 The Defendant provides no legal authority for his novel request that the Court pre-
6 judge the evidence and rule on this case summary-judgment-style – “as a matter of law” –
7 at this juncture based on the Defendant's unsworn summary recitation of “facts” and
8 citation to the evidence offered at the Preliminary Examination.⁵ For this additional
9 reason, the Court should reject the Motion on its face.⁶

10 **II. CONCLUSION**

11 The Defendant's Motion to Dismiss was filed in violation of NRS 34.700(1), and
12 therefore is not cognizable. It is also unsupported by any legal authority. The Motion
13 should therefore be denied.

14
15 with the fact that inmates have described their requests to receive credit for time spent in jail as
16 motions rather than habeas petitions. However, although we will not dismiss the appeal of such a
17 request simply because it is not labeled a petition for habeas relief, we must dismiss such an
18 appeal where the movant or petitioner has not met the relevant substantive statutory
19 requirements for such a request”, *overruled on other grounds by Griffin v. State*, 122 Nev. 737,
137 P.3d 1165 (2006).

20 ⁵ *Cf. State v. Combs*, 116 Nev. 1178, 1180–81, 14 P.3d 520, 521 (2000) (“As an initial matter,
21 we note that respondent's motion to dismiss the charges at the close of the State's case-in-chief was
22 not properly made, and should not have been granted by the district judge. Instead, respondent
23 should have moved for an advisory instruction to acquit pursuant to NRS 175.381(1).
24 Alternatively, the district court could have entered a judgment of acquittal, if the jury found
25 appellant guilty of Count III”); *State v. Wilson*, 104 Nev. 405, 407, 760 P.2d 129, 130 (1988) (“it
26 was error for the trial court to take the case from the jury by dismissing the action at the close of
27 the prosecution's case in lieu of giving the jury an advisory instruction to acquit because of
28 insufficient evidence”); NRS 175.381(1) (“If, at any time after the evidence on either side is closed,
29 the court deems the evidence insufficient to warrant a conviction, it may advise the jury to acquit
the defendant, but the jury is not bound by such advice”).

⁶ *Cf. Maresca v. State*, 103 Nev. 669, 672-73, 748 P.2d 3, 6 (1987) (issues need not be
addressed unless presented with “relevant authority and cogent argument”); *Cordova v. State*, 116
Nev. 664, 669 n.3, 6 P.3d 481, 485 n.3 (2000) (claims summarily rejected where proponent fails to
provide authority in support thereof); *Rivera-Gomez v. de Castro*, 843 F.2d 631, 635 (1st Cir. 1988)
(“Judges are not expected to be mindreaders. Consequently, a litigant has an obligation to spell out
its arguments squarely and distinctly, or else forever hold its peace” (internal quotation marks and
citation omitted)); *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) (“It is not enough
merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's
work, create the ossature for the argument, and put flesh on its bones”).

1 AFFIRMATION PURSUANT TO NRS 239B.030

2 The undersigned does hereby affirm that the preceding document does not contain the
3 social security number of any person.

4 DATED this 28th day of November, 2016.

5 Christopher J. Hicks
6 Washoe County District Attorney

7 By /s/ LUKE PRENGAMAN
8 Luke Prengaman
9 6094
 Chief Deputy District Attorney

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/s/LUKE PRENGAMAN
LUKE PRENGAMAN

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:

Jennifer P. Noble, Chief Appellate Deputy
Washoe County District Attorney's Office

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

John Reese Petty
Washoe County Public Defender's Office