

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

IAN ANDRE HAGER,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

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No. 72613

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**PETITION FOR REHEARING**

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**PETITION FOR REHEARING**

**I. Introduction**

A jury convicted Ian Andre Hager (“Hager”) of six felonies, each involving possession of a firearm by a prohibited person. Counts I through III recited that Hager possessed an assault rifle (Count I) and handguns (Count II) and three other firearms (Count III). Those first three counts alleged that he was prohibited from possessing those guns by virtue of having been adjudicated mentally ill. The second set of crimes listed the same guns but listed the nature of the prohibition as Hager being a user of controlled substances or being addicted to controlled substances. On August 29, 2019, the Court vacated and remanded the judgment of conviction. The State seeks rehearing. NRAP 40(c)(2)(A) and (B).

## **II. Legal Standard**

The Court may consider rehearing when the Court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case. NRAP 40(c)(2)(A) and (B).

## **III. Facts**

In its Opinion, *Hager v. State*, \_\_\_ P.3d\_\_\_, 135 Nev. Op. 34, 2-5 (2019), the Court recognized the following facts. In February 2013, Hager was arrested for outstanding warrants during a traffic stop in Humboldt County. During the arrest, the police found two firearms. The Humboldt County district attorney charged Hager with illegally carrying a concealed weapon. Pursuant to negotiations, Hager pleaded guilty to carrying a concealed weapon. His criminal case was suspended, and Hager was referred by the Sixth Judicial District Court to the mental health specialty court program that the Second Judicial District Court established under NRS 176A.250 through NRS 176A.265.

A licensed mental health professional diagnosed Hager with post-traumatic stress disorder (PTSD). Hager was accepted into Washoe County's mental health court diversion program. As part of the intake

process, a presentence investigator interviewed Hager, and Hager admitted that he had been addicted to methamphetamine between the ages of 12 and 19, Hager also maintained that, with the exception of a one-time use of methamphetamine in January 2013, he no longer used drugs.

In May 2014, Hager successfully completed the Second Judicial District Court program and was discharged. Humboldt County dismissed its criminal case against him. After his discharge and dismissal, the matter was sealed, and Hager filled out paperwork asking the State to return his confiscated firearms, which the State did in August 2015.

In 2015, police responded to additional disturbances at Hager's residence, and confiscated his firearms. After Hager completed the necessary paperwork and background check, the police again returned Hager's firearms to him, this time in January 2016.

A month later, in February 2016, Hager contacted a detective to discuss the investigation of his brother's 2012 death. Hager believed his brother had been murdered, but police had concluded that the death resulted from an accidental methamphetamine overdose. Hager asked the detective to reopen the investigation. After police declined to reopen the investigation, Hager was infuriated. Hager sent the detective a link to a video showing Hager expressing anger toward the police investigation of

his brother's death, and snorting a white substance from a baggy to illustrate how much methamphetamine a person can consume without overdosing. The video depicted Hager with firearms beside him.

After reviewing this post along with other social media posts, police took Hager into custody for illegal possession of firearms. During a search of Hager's home, police found firearms, a glass pipe, and empty baggies commonly used to hold drugs. Police did not find controlled substances or trace evidence of them. Hager admitted during his interview with police that he possessed the firearms in his home and that the substance he snorted in the Facebook video was methamphetamine. At trial, however, Hager testified the substance was salt.

#### **IV. The Court's Order Vacating and Remanding**

After ordering supplemental briefing, this Court issued a published opinion considering two questions:

First, is a defendant who is assigned to and successfully completes a mental health specialty court diversion program under NRS 176A.250 through NRS 176A.265 (2013) thereby "adjudicated as mentally ill," making it illegal for him to possess a firearm under NRS 202.360(2)(a)? Second, was it harmless error to instruct the jury in a way that theoretically allowed Hager to be convicted of illegal possession of a firearm by an "unlawful user" of a controlled substance under NRS 202.360(1)(d) based on a single current use of the substance?

*Hager v. State*, \_\_\_ P.3d\_\_\_, 135 Nev. Op. 34 (2019).

With respect to the first question, the Court concluded that Hager's assignment to mental health court in 2013 "did not constitute a sufficient adjudication of mental illness for NRS 202.360 (2)(a) to apply." *Hager, supra*, at 9. On the second question, regarding the jury instruction concerning Hager's "unlawful user" status, the Court found that Jury Instruction 16 "failed to capture the concept of regular use, proximate in time to the illegal firearm possession charged." *Id.* at 19.

## **V. Argument**

### **A. In Analyzing Whether Jury Instruction 16 Constituted Harmless Error, the Court Overlooked a Material Portion of the Record, Wherein the Prosecutor Offers to the Jury an Interpretation of Law Consistent with this Court's Opinion.**

This Court found that "jury instruction 16 failed to capture the concept of regular use, proximate in time to the illegal firearm possession charged." *Id.* at 19. In its Opinion, this Court acknowledged that the jury was presented with evidence that Hager was addicted to methamphetamine from 1997-2004, relapsed in 2013, and sent law enforcement a video depicting himself ingesting methamphetamine with firearms in the background. It concluded that the State's evidence "was enough to show that Hager either maintained his prior addiction to methamphetamine or was using the drug regularly, proximate to, or contemporaneous with his

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firearm possession between December 2015 and April 2016.” 135 Nev. Adv. Op. 34 at 17.

Instruction 16 read as follows:

A person is “addicted to” any controlled substance if he habitually takes or otherwise uses any controlled substance, other than any maintenance dosage of a narcotic or habit-forming drug administered pursuant to a pilot clinic program for the treatment of narcotic addicts pursuant to Chapter 453 of the Nevada Revised Statutes, to the extent that the person endangers the health, safety or welfare of himself or herself or any other person.

A “user” of any controlled substance is a person who uses any controlled substance.

In order for a person who is an unlawful user of or addicted to any controlled substance to be guilty of Possession of a Firearm by a Prohibited Person, he must have owned or had a firearm in his possession or under his possession or under his custody or control while addicted to or while an unlawful user of any controlled substance.

1 JA 161.

This Court found that jury instruction 16 was given in error. *Hager, supra*, 18-19. It next analyzed, pursuant to *Cortinas v. State*, 124 Nev. 1013, 195 P.3d 1315 (2008), whether or not the instructional error in this case is harmless beyond a reasonable doubt. It reasoned that “...the jury equally could have convicted Hager based on the video that depicted him snorting meth in the presence of firearms in 2016—a single use that

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qualified Hager as an “unlawful user” due to the objected-to error in instruction 16.” *Hager* at 19.

In its harmless error analysis, this Court overlooked the portion of the record wherein the prosecutor expressly discussed instruction 16 and proffered an explanation of the instruction that was consistent with this Court’s interpretation. In his closing argument, the prosecutor told the jury that to be found guilty, Hager’s use and/or possession of the controlled substance had to be contemporaneous with his possession of the firearms:

A user of any controlled substance is a person who uses any controlled substance. And a user can quit using and if a user quits using, he can possess firearms. But while a user of any controlled substance, he is prohibited from possessing firearms. *And as I told you before, in order to prove the Defendant guilty, it’s not just that he was a user and then at some point, at any time in the future he possessed. He must have been a user at the time of possession of the firearms, or he must have been an addict at the time of the possession.*

5 JA 936-937 (Emphasis Added).

This Court has already found that the evidence adduced at trial was sufficient to support a jury’s conclusion that Hager “either maintained his prior addiction to methamphetamine or was using the drug regularly, proximate to, or contemporaneous with his firearm possession between December 2015 and April 2016.” *Hager* at 17. That ample evidence, when considered together with the prosecutor’s express argument to the jury that

Hager's use and/or addiction had to be contemporaneous with the firearm possession, leads to the conclusion that any error in instruction 16 was harmless. Rehearing is warranted.

B. The Court Misapprehended A Material Question of Law Regarding the Statute Applicable to Hager's Acceptance into Mental Health Court.

In order to assign a defendant to treatment under NRS 176A.250, there must first be a judicial determination that the defendant "suffers from a mental illness." NRS 176A.260. In its opinion, this Court posited the question as "is a defendant who is assigned to and successfully completes a mental health specialty court diversion from under NRS 176A.250 through NRS 176A.265 (2013) thereby 'adjudicated as mentally ill,' making it illegal for him to possess a firearm under NRS 202.360(2)(a)?" 134 Nev. Adv. Op 34 at 2 (p.2).

Later in the opinion, the Court finds that Hager's assignment to mental health court "does not constitute a sufficient adjudication of mental illness for NRS 202.360(2)(a) to apply." In reaching that conclusion, the Court relies on different statute in a different chapter. It cites NRS 176.255(2)(b), which provides that mental health court eligibility in justice court cases lies where the defendant "'*appears to suffer* from mental illness or to be intellectually disabled.' NRS 176.255(2)(b) (emphasis added)."

That statute contemplates the circumstances under which a justice court may transfer original jurisdiction over a case to a district court—not a district court’s finding that a defendant is eligible for mental health court:

1. *A justice court or a municipal court may, upon approval of the district court, transfer original jurisdiction to the district court of a case involving an eligible defendant.*
2. As used in this section, “eligible defendant” means a person who:
  - (a) Has not tendered a plea of guilty, guilty but mentally ill or nolo contendere to, or been found guilty or guilty but mentally ill of, an offense that is a misdemeanor;
  - (b) Appears to suffer from mental illness or to be intellectually disabled; and
  - (c) Would benefit from assignment to a program established pursuant to NRS 176A.250.

In Hager’s case, he was not referred to mental health court via NRS 176.255(2)(b). He was not referred from a justice court, but instead from the Sixth Judicial District Court to the Second Judicial District Court. 3 JA 490. It was the Second Judicial District Court that determined that Hager met the criterion outlined in NRS 176A.260, after he presented a qualifying diagnosis of post-traumatic stress disorder. In deciding Hager’s eligibility, the district court did so pursuant to NRS 176A.260, not NRS 176.255(2)(b). NRS 176A.260 does not contain the inconclusive “appears to suffer” language; instead, it required an unequivocal finding of mental illness:

176A.260. Conditions and limitations on assignment of defendant to program; effect of violation of terms and conditions; discharge of defendant upon fulfillment of terms and conditions; effect of discharge

1. Except as otherwise provided in subsection 2, *if a defendant who suffers from mental illness* or is intellectually disabled tenders a plea of guilty, guilty but mentally ill or nolo contendere to, or is found guilty or guilty but mentally ill of, any offense for which the suspension of sentence or the granting of probation is not prohibited by statute, the court may:

- (a) Without entering a judgment of conviction and with the consent of the defendant, suspend further proceedings and place the defendant on probation upon terms and conditions that must include attendance and successful completion of a program established pursuant to NRS 176A.250; or
- (b) Enter a judgment of conviction and place the defendant on probation upon terms and conditions that must include attendance and successful completion of a program established pursuant to NRS 176A.250.

NRS 176A.260. (Emphasis Added).

In its supplemental brief, the State argued that in considering whether Hager had been adjudicated mentally ill, the statute relevant to this Court's consideration was NRS 176.260. The language in that statute is unequivocal. The record does not reflect that Hager was referred to mental health court from a justice court. Yet this Court's conclusion that Hager's assignment to mental health court "does not constitute a sufficient adjudication of mental illness" is dependent on its misapprehension that

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NRS 176.250, a statute governing justice court referral, was applied to Hager. Rehearing is warranted.

## **VI. Conclusion**

Based on the foregoing, the State respectfully asserts that rehearing is appropriate.

DATED: September 16, 2019.

**CHRISTOPHER J. HICKS**  
**DISTRICT ATTORNEY**

By: **JENNIFER P. NOBLE**  
Chief Appellate Deputy

**CERTIFICATE OF COMPLIANCE**

1. I hereby certify that this petition 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 petition has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Georgia 14.

2. I further certify that this petition complies with the type-volume limitations of NRAP 40(b)(3) because, excluding the parts of the petitions exempted by NRAP 32(a)(7)(c), it does not exceed 4,667 words (the petition contains 2,192 words).

3. Finally, I hereby certify that I have read this appellate petition, 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 petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the petition regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in

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the event that the accompanying petition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: September 16, 2019.

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**CERTIFICATE OF SERVICE**

I hereby certify that this document was filed electronically with the Nevada Supreme Court on September 16, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

John Reese Petty  
Chief Deputy Public Defender

/s/ Margaret Ford  
MARGARET FORD