IN THE SUPREME COURT OF THE STATE OF NEVADA



ALFORD P. CENTOFANTI III.,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE DONALD M. MOSLEY, DISTRICT JUDGE

Respondents,

And

THE STATE OF NEVADA,

Real Party in Interest.



Case No. 43895

# ANSWER TO PETITION FOR WRIT OF MANDAMUS/FOR WRIT OF PROHIBITION

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COMES NOW, the State of Nevada, Real Party in Interest, by DAVID ROGER, District Attorney, through his deputy, CLARK A. PETERSON, on behalf of the above-named respondents and submits this Answer to Petition for Writ of Mandamus/for Writ of Prohibition in obedience to this Court's order filed September 8, 2004 in the above-captioned case. This Answer is based on the following memorandum and all papers and pleadings on file herein.

Dated this 28th day of September, 2004.

DAVID ROGER
Clark County District Attorney
Nevada Bar # 002781

BY _____
CLARK A. PETERSON
Chief Deputy District Attorney
Nevada Bar #006088
Attorney for Respondent

## MEMORANDUM OF POINTS AND AUTHORITIES

## ISSUE PRESENTED

Whether the district court properly denied Defendant's procedurally barred Motion for New Trial because it lacked jurisdiction.

## PROCEDURAL HISTORY

On December 20, 2000, Alfred Centofanti, hereinafter Defendant, was arrested after he shot and killed his ex-wife, Gina Centofanti. The morning of the shooting, Defendant picked up the murder weapon along with several other guns from police impound. The weapons had been impounded as a result of an earlier domestic violence incident. Later that night, Gina was supposed to come by Defendant's home to visit Nicolas, the infant child they had together. She tried to reschedule, but Defendant insisted she come over that night. When she arrived, she set her purse down on the table along with her keys. There was no sign of a struggle or an altercation of any kind. Instead, Defendant produced his 9 mm Ruger and shot Gina seven times—four shots to the body and three shots to the head. He never missed even once.

He was charged with Murder with Use of A Deadly Weapon by criminal complain in case 00F21542X. The matter was presented to the Clark County Grand Jury and a True Bill was returned on January 10, 2001. An Indictment was filed on January 17, 2001, in case C172534X. Defendant pled not guilty and the matter was set for trial.

After much litigation, trial finally commenced on March 15, 2004. At trial, Defendant maintained he killed his ex-wife in self-defense. The evidence, however, clearly contradicted this claim. Defendant is over six-feet tall and over 200 pounds. Gina was barely more than five feet tall and under 125 pounds. She was wearing gym clothes and was obviously unarmed. At trial, Defendant conceded she was unarmed.

Defendant's own shooting reconstruction expert testified that the head shots came after the shots to the body and that Gina was moving away from Defendant as she was being shot. He also admitted that there is no evidence to indicate she was attacking him and that the shooting was most likely broken down into two incidents—first the body shots, then the head shots. Defendant's own forensic expert admitted on cross-examination that "this case would be difficult to present as her attacking him." The State's expert described the shots to the head as "execution style" shots. Blood spatter experts concluded that the blood pattern on the floor near Gina's head and on a nearby exercise bike were consistent with her being shot in the head while her head was on or near the ground.

Defendant's claim of self-defense was rejected by the jury and he was convicted of First Degree Murder with Use of A Deadly Weapon. The jury returned this verdict on April 16, 2004. (PA 1)[1]

Defendant filed his Motion for New Trial on June 28, 2004—42 calendar days after the date of the verdict. (PA 2)

At no time was a request made by Defendant to extend the time for filing a Motion for New Trial pursuant to NRS 176.515.

The State filed its Opposition on August 10, 2004. (PA 44-69)

After argument on the Motion, the district court ruled that the motion had been filed outside of the statutory-prescribed seven day time frame and denied Defendant's Motion for lack of jurisdiction. (PA 149) The district court entered an Order Denying Defendant's Motion for New Trail on September 2, 2004. (PA 155-156). In that Order, the district court ruled:

> It is hereby ordered that the Defendant's Motion for New Trial, shall be, and it is denied, on jurisdictional ground because it does not allege newly discovered evidence regarding the Defendant and was filed more than seven (7) days after the verdict in this case.

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[1] Citations are to Petitioner's Appendix "PA" with the relevant Bates-stamped page number.

(PA 155-156).

It is from this Order that Defendant brings the instant Petition. However, though the Motion was denied purely on jurisdictional grounds, Defendant's instant Petition addresses only the alleged merits of his claim and nowhere in it does he provide any authority for why the district court abused its discretion in ruling that it lacked jurisdiction because the Motion was filed outside the seven (7) day period.

On September 8, 2004, this Court issued an Order Directing Answer and Granting Temporary Stay.

## ARGUMENT

Defendant's Petition should be denied for several reasons. First, Defendant has a plain, speedy and adequate remedy at law. Second, the district court did not abuse its discretion or exceed its jurisdiction when it properly denied the motion on jurisdictional grounds. Third, even presuming the truth of the merits of Defendant's claim, case authority clearly indicates he is not entitled to relief. Fourth, Defendant overreaches in his Petition, asking this Court to grant his motion when at best his remedy is remand for a hearing.

### I. STANDARD OF REVIEW

Both mandamus and prohibition are extraordinary remedies, and are only appropriate when a plain, speedy and adequate remedy at law is not available. NRS 34.170; NRS 34.330; State v. District Court (Romano), 120 Nev. Adv. Op. No. 69 (2004).

"A writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office, trust or station, NRS 34.160...." State v. District Court (Romano), 120 Nev. Adv. Op. No. 69 (2004); Panko v. District Court, 111 Nev. 1522, 1525, 908 P.2d 706, 708 (1995). Mandamus will not lie to control discretionary action unless it is manifestly abused or is exercised arbitrarily or capriciously. Office of the Washoe County DA v. Second Judicial Dist. Court, 5 P.3d 562, 566 (2000). Thus a writ of mandamus will issue to control a court's arbitrary or

capricious exercise of its discretion." Id. citing Marshall v. District Court, 108 Nev. 459, 466, 836 P.2d 47, 52 (1992); City of Sparks v. Second Judicial Dist. Court, 112 Nev. 952, 954, 920 P.2d 1014, 1015-1016 (1996); Round Hill Gen. Imp. Dist. V. Newman, 97 Nev. 601, 637 P.2d 534 (1981).

A "writ of prohibition is the counterpart of the writ of mandate" and is available to halt a tribunal's proceedings "when such proceedings are without or in excess of the jurisdiction of such tribunal." NRS 34.320. A writ of prohibition does not serve to correct errors; its purpose is to prevent courts from transcending the limits of their jurisdiction in the exercise of judicial but not ministerial power. Olsen Family Trust v. District Court, 110 Nev. 548, 551, 874 P.2d 778, 780 (1994); Low v. Crown Point Mining Co., 2 Nev. 75 (1866).

Petitions for extraordinary relief are not meant to control discretionary acts, "'unless discretion is manifestly abused or is exercised arbitrarily or capriciously.'" State v. District Court (Romano), 120 Nev. Adv. Op. No. 69 (2004); State of Nevada v. Dist. Ct. (Anzalone), 118 Nev. 140, 147, 42 P.3d 233, 237-38 (2002) (quoting Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 604, 637 P.2d 534, 536 (1981)). Finally, whether to grant the extraordinary remedy of writ relief is within the court's sound discretion. State v. District Court (Romano), 120 Nev. Adv. Op. No. 69 (2004).

## II. DEFENDANT HAS A PLAIN SPEEDY AND ADEQUATE REMEDY AT LAW

NRS 177.045 provides that "...any decision of the court in an intermediate order or proceeding, forming a part of the record, may be reviewed." Similarly, NRS 177.015 provides that the party aggrieved in a criminal action may appeal to the Supreme Court "from an order ... granting or refusing a new trial" and that the defendant may appeal from a "final judgment or verdict in a criminal case." Thus, Defendant can appeal from the order denying his motion.

Here, however, judgment has yet to be entered—which opens another avenue of appellate attack. When Defendant files his direct appeal from his judgment of

conviction he may include in that appeal any claims he has regarding the denial of his motion for new trial, as his motion for new trial was raised prior to the judgment. See, e.g., Steese v. State, 114 Nev. 479, 960 P.2d 321 (1998).

In Steese, the the jury returned a verdict of guilty on March 1, 1995. On March 15, 1995, Steese filed a motion for a new trial or a directed verdict. The court held a hearing on April 20, 1995, and denied the motion on May 28, 1995. On April 21, 1995, the court entered a judgment of conviction and sentenced Steese. On April 21, 1995, Steese filed his notice of appeal from the judgment of conviction. On June 28, 1995, Steese filed a motion to dismiss or, in the alternative, a new trial. Both these motions were based upon allegations of prosecutorial misconduct, including intimidation of defense witnesses and suppression of evidence. On September 1, 1995, the court held a hearing on this motion. On February 23, 1996, the district court issued findings of fact, conclusions of law, and an order denying this motion. On April 1, 1996, Steese filed a notice of appeal from the district court's order denying his second motion for a new trial. The State moved to consolidate these two appeals. On April 12, 1996, this court ordered Steese to cure certain jurisdictional defects. On July 26, 1996, this court denied as moot the motion to consolidate, holding that Steese could state all grounds for appeal in his appeal from the judgment of conviction.

This Court has addressed denial of motions for new trial along with issues regarding the conviction on direct appeal. See, e.g., Young v. State, 103 Nev. 233, 737 P.2d 512 (1987)(direct appeal addressed trial issues and denial of motion for new trial); Isbell v. State, 97 Nev. 222, 626 P.2d 1274 (1981)(addressing trial issues and denial of motion for new trial on direct appeal); Walker v. State, 95 Nev. 321, 594 P.2d 710 (1979)(addressing conviction and denial of motion for new trial).

In this case, joint consideration of appeal from the judgment and appeal from the denial of the motion for new trial in one direct appeal is appropriate since the motion for new trial and its denial occurred before the final entry of judgment and sentence of the defendant, since this Court has stayed the sentencing of Defendant. In

fact, this Court, under a similar statute, has held that direct appeal from the judgment is the appropriate time to consider appeal of any intermediate, pre-judgment orders. Martinez v. State, 77 Nev. 184, 360 P.2d 836 (1961)(decision under prior similar statute; differentiating between motions for new trial based on newly discovered evidence brought after the judgment and motions that are brought before the judgment which may be reviewed as part of the appeal from the judgment).

As a result, because Defendant may raise the issue of the denial of his motion for new trial as part of his direct appeal, he has a plain, speedy and adequate remedy at law and is thus without need for extraordinary relief. NRS 34.170; NRS 34.330; State v. District Court (Romano), 120 Nev. Adv. Op. No. 69 (2004). In fact, it appears that even Defendant's counsel admits that he does have a remedy at law. In the instant Petition, counsel states: "therefore, even though appellate review may be available later, ...," which is essentially an admission that he does have an adequate appellate remedy. For this reason, Defendant's Petition should be denied.

## III. THE DISTRICT PROPERLY RULED THAT IT LACKED JURISDICTION TO GRANT DEFENDANT'S MOTION

Defendant's motion for new trial was denied by the district court on the sole basis that it does not allege newly discovered evidence and was not filed within seven (7) days of the verdict. Defendant in his instant Petition does not provide any authority for the position that the seven (7) day window does not apply. This is a fatal flaw in his Petition.

NRS 176.515 provides that a motion for new trial based on any grounds other than newly discovered evidence must be made within seven (7) days after the verdict. Here, Defendant was not seeking a new trial based on newly discovered evidence. Thus, his motion was required to be filed within seven (7) days of the verdict. The verdict was received on April 16, 2004. The motion was due on or about April 23, 2004. Defendant did not file his Motion for New Trial until June 28, 2004, nearly two months late.

The case law interpreting this deadline interprets it strictly and as a matter of jurisdiction. In Depasquale v. State, 106 Nev. 843, 851, 803 P.2d 218, 223 (1990), the defendant was convicted of first degree murder and sentenced to death. He filed his motion for new trial eight (8) days after the verdict. The denied the motion as untimely. On appeal, this Court held the defendant missed the deadline and the district court's denial of the motion was proper. Id.

In fact, the district court lacks jurisdiction to consider untimely motions for new trial. The language of NRS 176.515 is taken verbatim from the Federal Rule of Criminal Procedure 33. This Court has relied on Rule 33 in interpreting NRS 176.515. The time limits in Rule 33 have been held to be jurisdictional. If a motion is not timely filed, the court lacks power to consider it. U.S. v. Dukes, 727 F.2d 34, 38 (2nd Cir. 1987). Since Defendant's motion was untimely, and no request to extend time had been made pursuant to NRS 176.515, the district court lacked jurisdiction to consider it. In fact, had the district court granted the untimely motion, the State would have would have appropriately appealed (and/or in the alternative petitioned for a writ of prohibition) from the district court order granting the motion because doing so would have been in excess of its jurisdiction.

Defendant attempts to claim, without any cited authority, that the two (2) year time limit of NRS 176.515 should apply to his motion, rather than the seven (7) day limitation. However, the two (2) year time limit is for newly discovered evidence. NRS 176.515(3). It must be conceded by Defendant that the instant motion does not, in truth, deal with newly discovered evidence. Newly discovered evidence, in the meaning of NRS 176.515, means evidence that is "material to movant's defense" and which is "such as to render a different result probable on retrial." McLemore v. State, 94 Nev. 237, 577 P.2d 871 (1978); see also Pacheco v. State, 81 Nev. 639, 408 P.2d 715 (1965)(decision under former similar statute). In short, newly discovered evidence must relate to innocence, not to other alleged procedural defects in the trial that do not bear on the facts of the case. Here, Defendant's claim does not constitute

"newly discovered evidence" in that it is not material to his defense and in no way suggests that it would render a different result probable on retrial. Thus the two (2) year limitation does not apply to his motion.

For the above reasons, the district court did not "manifestly abuse" its discretion or exercise its discretion "arbitrarily or capriciously." In fact, because of the jurisdictional bar, the district court took the only action that was within its jurisdiction—it denied the motion on jurisdictional grounds. Because the district court did not abuse its discretion, Defendant is not entitled to extraordinary relief and the instant Petition should be denied.

## IV. EVEN ASSUMING *ARGUENDO* THE TRUTH OF DEFENDANT'S CLAIM, HE MAY NOT PREVAIL BY WAY OF A MOTION FOR NEW TRIAL

Even presuming the truth of the claims in Defendant's Petition for sake of argument, his claim still fails as a matter of law. It is well established that alleged juror misconduct during voir does not constitute the type of misconduct covered by a motion for new trial. Motions for new trial only cover conduct which occurs after the jury has been impaneled and sworn. State v. Marks, 15 Nev. 33 (1880); State v. Harvey, 148 P.2d 820 (1944). Here, the alleged misconduct in Defendant's motion occurred prior to the swearing of the jury.

In fact, in Harvey, supra, this Court addressed the issue that a motion for new trial is not the vehicle by which juror's competency can be challenged. In Harvey, one of the jurors had been convicted fifteen years before of a felony in the district court of the United States for the District of Oregon and had been sentenced to two years and six months in a federal prison. Harvey raised this issue in a motion for new trial after the verdict. Harvey alleged that the conviction of the juror was unknown to him and his counsel when the jury was being impaneled, and was not known to them until after the verdict of the jury; that his attorneys were misled by the juror's answers in reference to his qualifications and particularly wherein he stated in answer to a question that he knew of no reason why he could not act as a fair and impartial juror

in the case; that the juror was disqualified to act as such by reason of said conviction, and had Harvey known of this he would have been challenged on the part of defendant. By reason of these facts appellant contends that he did not receive a fair and impartial trial, and therefore the court committed reversible error in denying his motion for a new trial. Harvey, supra, at 820-822 (interpreting prior similar statutory section; current statutory sections regarding motions for new trial grew out of Nevada Compiled Laws sections 11032 and 10940, on which the Harvey decision was based).

This Court in Harvey held that "objection to the competency of a juror cannot be taken by an accused for the first time after verdict and relied upon as a ground of motion for a new trial." Id. at 821. Further, this Court noted that "incompetency on account of a former conviction for felony is a mere arbitrary disqualification in the nature of a penalty against an individual who might be otherwise qualified for jury service. While the moral stigma may be thought in a measure to unfit such a person for serving on a jury, yet it does not follow that if he is sworn and acts that he will act unfairly." Id.

Though this court went on to discuss the issue of intentional concealment regarding the prior conviction, this Court noted "[t]he conviction was fifteen years before the trial and it is altogether improbable, even if the juror ever knew that it was a disqualification, that this knowledge was then in his mind." Id. at 821-822.

Essentially, Defendant in his motion sought to challenge the competency of the person to sit as a juror. Competence is covered in NRS 6.010. NRS 6.010 provides that jurors must be electors who reside in the county and who do not have "convictions for treason, felony or other infamous crime." However, challenges to competency must be made at the time they are examined. After a jury is sworn, there are only limited statutory circumstances in which an individual juror can be removed. NRS 175.061, 175.071 and 175.081 provide the manner in which sworn jurors can be removed from service. Had a juror become disqualified during the trial, that juror could be replaced by statute with an alternate. See McKenna v. State, 96 Nev. 811,

813, 618 P.2d 348, 349 (1980). There is no statutory remedy for removal of a juror later (allegedly) found to be incompetent.

In Ford v. U.S., 201 F.2d 300 (5th Cir. 1953), the Federal Court addressed the issue of a juror with a prior felony serving on the jury. In Ford, the juror in question had been twice previously convicted of felonies in Florida. These facts were first discovered by appellants after verdict in this case. It was not shown that the juror was actually biased or prejudiced against the defendants, instead Ford relied upon the statutory disqualification growing out of the previous convictions of felony. Ford urged that by the inclusion of this juror upon the trial panel, they were deprived of a lawfully constituted jury, and should for that reason be awarded a new trial.

The court in Ford held that while previous conviction of a felony does not render the convicted person fundamentally incompetent to sit as a juror, it is a ground of challenge for cause, which the defendant may insist upon or waive, as he elects. If not seasonably exercised, the objection is waived. It is the right and duty of a defendant to discover on voir dire examination, or from other sources, whether a potential juror is subject to disqualification for cause. Where the objection to a juror relates not to actual prejudice, such disqualification is ordinarily waived by failure to assert it until after verdict, even though the facts which constitute the disqualification were not previously known to the defendants. The objection based upon the previous felony convictions comes too late after verdict, no actual bias or prejudice being shown.

The United States Supreme Court has spoken with disapproval on the issue of challenging the competence of jurors after a trial has completed:

> Allegations of juror misconduct, ***incompetency***, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process.

Tanner v. U.S., 483 U.S. 107, 121 (1987), citing Government of Virgin Islands v. Nicholas, 759 F.2d 1073, 1081 (3rd Cir. 1985).

Similarly, another requirement of a "competent" juror is that they reside in the county in which the trial is held. Courts have held that residence (known as "alienage"), like prior convictions, is challengeable prior to the juror being sworn. After trial, however, alienage may not be challenged. Several courts have reached this result.

In McComb v. Fourth Jud. Dist. Ct., 136 P. 563 (1913) this Court held that although the alienage of a juror is good cause of challenge, the court will not set aside the verdict of the jury in a criminal case on that ground, where the trial has been allowed to proceed without any objection having been made to the juror's disqualification, even where there is evidence, from the affidavits of the juror and the prisoner, that the fact of alienage was not disclosed by the one, nor known to the other, before the trial.

In McCall v. State, 97 Nev. 514, 634 P.2d 1210 (1981), this Court addressed appellant's argument that he was denied his right to a jury trial before twelve citizens because one juror was an alien. Prior to voir dire, defense counsel received the juror's questionnaire indicating that she was a citizen of British Columbia. Appellant failed to object at the time of voir dire, but moved for a mistrial subsequent to trial and sentencing when he discovered that the juror was an alien. Failure to object to the seating of an alien juror at the time of voir dire constitutes a waiver.

In U.S. v. Haywood, 452 F.2d 1330 (D.C.Cir. 1971) the Federal court held that regarding the non-residency of a juror, such a factor does not impair the impartial and intelligent performance of a juror's duties. As a general rule, a party who fails to object to the service of a juror on grounds of residence, for whatever reason, should be deemed to have waived the objection because violations of residency requirements do not reach these "essential qualities" of a juror.

Thus, even assuming *arguendo* the truth of Defendant's claim, those facts do not warrant the granting of a motion for new trial both because the alleged misconduct does not fall within the period covered by a motion for new trial and because as a

matter of law issues such as alienage and prior convictions do not, standing alone, invalidate a trial.

## V. DEFENDANT OVERREACHES WHEN HE ASKS THIS COURT TO COMPEL THE DISTRICT COURT TO GRANT HIS MOTION FOR NEW TRIAL

Though the district court below denied Defendant's motion for new trial on purely procedural grounds, Defendant's petition asks not just that the district court's order be overturned but that this Court actually address the merits and order the district court to grant Defendant's motion.[2] Defendant vastly overreaches in his request. Nothing in the record requires such a result and he is entitled to no such remedy. Instead, Defendant's motion fails on the merits.

Defendant argued below that he is deserving of a new trial as a matter of law based on juror misconduct. The analysis of these issues must be 1) did any misconduct occur; and 2) if there was misconduct, is it sufficiently prejudicial to the defendant to justify a new trial. Meyer v. State, 119 Nev. 554, 80 P.3d 447, 457 (2003).

Defendant cites NRS 6.010 for the proposition that Mrs. Barrs is not qualified to serve on a jury. This justification for a new trial must fail because she was in fact qualified to sit on the jury. NRS 6.010 reads:

> Except as otherwise provided in this section, every qualified elector of the State, whether registered or not, who has sufficient knowledge of the English language, and who has not been convicted of treason, a felony, or other infamous crime, and who is not rendered incapable by reason of physical or mental infirmity, is a qualified juror of the county in which he resides. A person who has been convicted of a felony is not a qualified juror of the county in which he resides until his civil rights to serve as a juror has been restored pursuant to NRS 176A.850, 179.285, 213.090, 213.155 or 213.157.

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[2] Defendant's Petition includes the caption "B. The District Court Should Be Compelled To Grant Defendant's Motion For A New Trial." It should also be noted that, though his motion below raises several grounds, the only ground raised in the instant Petititon relates to alleged misconduct by juror Caren Barrs.

NRS 213.157 which reads in pertinent part:

> 1. Except as otherwise provided in subsection 2, a person convicted of a felony in the State of Nevada who has served his sentence and has been released from prison:
>
> (a) Is immediately restored to the following civil rights:
> (1) The right to vote; and
> (2) The right to serve as a juror in a civil action.
>
> ...
>
> (c) Six years after the date of his release from prison, is restored to the right to serve in a criminal action.

Of course, since the felony conviction was in Florida and not Nevada, the Court must look to Florida law to see if Florida automatically restores a person's civil rights after completion of sentence.

Fla. Stat. § 940.05 (2004), states:

> Any person who has been convicted of a felony may be entitled to the restoration of all the rights of citizenship enjoyed by him or her prior to conviction if the person has:
>
> (1) Received a full pardon from the board of pardons;
>
> (2) Served the maximum term of the sentence imposed upon him or her;
> or
>
> (3) Been granted his or her final release by the Parole Commission.

In State v. Haden, 370 So. 2d 849, 851 (Fla. App. 1979), referring to Fla. Stat. § 940.05, the Florida court explained:

> On September 10, 1975, certain Rules of Executive Clemency of Florida were promulgated which were effective November 1, 1975. Included therein were two provisions material to this case. By Section 9 of the Rules it was provided that 'A. When a person receives final release from the Florida Parole and Probation Commission, Department of Offender Rehabilitation or county jail, his civil rights shall be automatically reinstated, except the right to possess or own a firearm shall be specifically withheld.'

Under that provision of the clemency rules, restoration of civil rights would be automatic following completion of service of sentence by one who so completed his sentence on or after November 1, 1975. Mrs. Barrs' Judgment of Conviction was filed on July 10, 1980, and she was sentenced to four (4) years probation. Her civil rights

were, therefore, automatically restored sometime in 1984. Consequently, she was qualified to serve on the jury.

Even if for some reason the above automatic restoration does not apply to Mrs. Barrs, certainly in her mind she was qualified to serve as a juror. She was surprised to hear of these allegations. She is a licensed nurse, and informed the State that the matter of her 20-year-old prior was addressed during that licensing process. She has voted for some time. She has also attempted to participate in jury duty on prior occasions, indicating clearly that she believed she had a right to do so.

The only issue, if in fact for some reason she did not receive automatic restoration, is whether she committed misconduct by failing to inform the parties of the conviction during voir dire. Whether Mrs. Barrs' failure to mention her prior felony warrants a new trial is a two step inquiry. The first inquiry is whether there was "misconduct." To constitute misconduct, the failure of a juror to answer a question touching upon potentially prejudicial information must amount to an "intentional concealment." Canada v. State, 113 Nev. 938, 941, 944 P.2d 781, 783 (1997); Lopez v. State, 105 Nev. 68, 89, 769 P.2d 1276, 1290 (1989); Hale v. Riverboat Casino, 100 Nev. 299, 305, 682 P.2d 190, 193 (1984). As the United States Supreme Court has stated, "To invalidate the result of a three-week trial because of a juror's mistaken, though honest response to a question, is to insist on something closer to perfection than our judicial system can be expected to give." Hale, 100 Nev. at 306, 682 P.2d at 194, quoting McDonough Power Equipment v. Greenwood, 464 U.S. 548, 104 S.Ct. 845, 850 (1984).

In the affidavit attached to the State's Response, Mrs. Barrs explained that she believed she did disclose her prior felony conviction. She entered the appropriate data via telephone and in person and was told to appear for jury duty. She also wrote the information down on the Jury Commissioner information sheet. In addition, it is undisputed that she was surprised to hear of these allegations. She is a licensed nurse, and informed the State that the matter of her 20-year-old prior was addressed during

that licensing process. She has voted for some time. She has also attempted to participate in jury duty on prior occasions, indicating clearly that she believed she had a right to do so. There has been no "intentional concealment" on her part, and thus there is no juror misconduct warranting a new trial. See Echavarria v. State, 108 Nev. 734, 740, 839 P.2d 589, 593-595 (1992) (failure to disclose assault by juror was not intentional because juror considered it a "fight" not an assault where he was a victim).

The second inquiry, if intentional concealment is found by the court, is whether the misconduct amounted to harmless or prejudicial error. Canada, 113 Nev. at 941, 944 P.2d at 783, citing Geary v. State, 110 Nev. 261, 265, 871 P.2d 927, 930 (1994) vacated on other grounds by Geary v. State, 112 Nev. 1434, 930 P.2d 719 (1996); see also, Hale, 100 Nev. at 306, 682 P.2d at 194. "A new trial must be granted unless it appears, beyond a reasonable doubt, that no prejudice has resulted." Canada, 113 Nev. at 941, 944 P.2d at 783, quoting Lane v. State, 110 Nev. 1156, 1163, 881 P.2d 1358, 1362-64 (1994). Not every incident of misconduct justifies a new trial. Meyer v. State, 80 P.3d 447 453 (2003). Factors to be considered when determining whether juror misconduct constituted harmless error include "whether the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged." Canada, 113 Nev. at 941, 944 P.2d at 783, quoting Rowbottom v. State, 105 Nev. 472, 486, 779 P.2d 934, 943 (1989).

The character of the error made by Mrs. Barrs (if any error at all) is minimal. It is a crime that occurred more than twenty years ago. The crime was for obtaining property in return for a worthless check. Her civil rights had been restored and she was allowed to regain her right to vote as well as her nursing license. Most importantly however, Mrs. Barrs told the Jury Commissioner on more than one occasion about the felony conviction. She did not intentionally conceal the conviction. In fact, the Jury Commissioner told her to appear for jury service and she did so. Additionally, Mrs. Barrs told the court and attorneys about the substantially more troubling facts regarding her son and his period of incarceration for major crimes.

There is absolutely no prejudice to the defendant in this case. Normally, a juror's prior conviction for any crime would be prejudicial to the State and not the Defendant. Also, Defendant had no problem with Mrs. Barrs being on the jury in light of the fact her son is currently in prison in New York, having served eighteen years of incarceration, which she did disclose during voir dire. The question of guilt or innocence was not so close in this case that a twenty year old worthless check conviction for one juror would prejudice the defendant.

In this case, the Defendant was found guilty based on overwhelming evidence—including his own testimony in which he actually blatantly lied to the jury to set up his own defense. The matter was fairly and vigorously tried on both sides. The jury took its duty very seriously. There is no evidence of any prejudice to the Defendant.

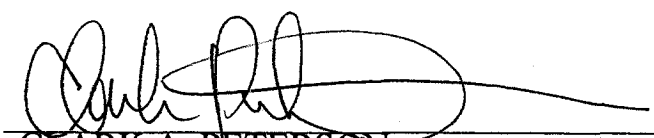
Thus, for the reasons set forth above, there is no basis for this Court to compel the district court to grant Defendant's motion. At worst, this Court could remand the matter for the district court to consider the matter on the merits. However, as explained above, the Court appropriately denied the Defendant's motion on jurisdictional grounds.

## CONCLUSION

For the reasons set forth above, the State respectfully requests that the Defendant's Petition for Writ of Prohibition and/or Writ of Mandamus be denied.

Dated 28th day of September, 2004.

DAVID ROGER
Clark County District Attorney

BY 
CLARK A. PETERSON
Chief Deputy District Attorney
Nevada Bar #006088

(702) 455-4711

## CERTIFICATE OF MAILING

I hereby certify and affirm that I mailed a copy of the foregoing Answer to Petition for Writ of Mandamus/for Writ of Prohibition to the attorney of record listed below on 28th day of September, 2004.

Carmine Colucci, Esq.
Carmine J. Colucci, Chtd.
629 South Sixth Street
Las Vegas, Nevada 89101

## CERTIFICATE OF SERVICE

I hereby certify and affirm that a copy of the foregoing Answer to Petition for Writ of Mandamus/for Writ of Prohibition was served via facsimile :

Judge Donald M. Mosley
Department XIV
Clark County Courthouse
200 South Third Street
Las Vegas, Nevada 89101

Fax Number: 382-6040

Employee, Clark County
District Attorney's Office

PETERSON, Clark //english