IN THE SUPREME COURT OF THE STATE OF NEVADA

JIM MCGOWEN, Trustee of McGowen & Fowler, PLLC and/or DOES 1-10, inclusive; and DOES 11-20,

Petitioner,

Vs.

THE SECOND JUDICIAL DISTRICT COURT, in and for the County of Washoe, State of Nevada, and THE HONORABLE DAVID A. HARDY, District Judge,

Respondent,

STEVEN B. CRYSTAL, individually and as Trustee of the Barbara L. Crystal Decedent Trust,

Real Party in Interest

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Second Judicial District
Court Case No. CV17-00281

Dept. 15

ANSWER OF REAL PARTY IN INTEREST TO PETITION FOR WRIT OF MANDAMUS

WOODBURN AND WEDGE
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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Appellants' counsel, Woodburn and Wedge, is a professional corporation organized under the laws of the State of Nevada.

Dated this 20 day of November, 2017.

WOODBURN AND WEDGE

By: _____

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Attorneys for Steven B. Crystal, individually and as Trustee of the Barbara L. Crystal Decedent Trust

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ANSWER OF REAL PARTY IN INTEREST TO PETITION FOR WRIT OF MANDAMUS

Real Party in Interest, Steven B. Crystal, individually and as Trustee of the Barbara L. Crystal Decedent Trust ("Crystal"), respectfully submits its Answer in Opposition ("Answer") to the Petition for Writ of Mandamus ("Petition"), filed by Jim McGowen, Trustee of McGowen & Fowler, PLLC and/or DOES 1-10, inclusive; and DOES 11-20, ("Petitioner" or "McGowen"), and denies that said Writ should issue.

I. Introduction

This Petition is without merit and the Writ should not issue. The issue of how and by whom service of a summons and complaint can be made on a defendant is clear. Nevada Rules of Civil Procedure 4(c) is unambiguously worded. It states "Process shall be served by the sheriff of the county where the defendant is found, or by a deputy, or by **any person who is not a party** and who is over 18 years of age...." (Emphasis added). The meaning of the words "any person who is not a party" is clear and unambiguous. There is simply no issue at hand; and the District Court was correct in its ruling and denial of the Motion to Quash Service.

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II. Information Required by NRAP 21(a)

A. Routing Statement

This is a matter presumptively retained by the Supreme Court pursuant to NRAP 17(a)(11) as a matter of statewide importance, namely who may effect service of process pursuant to NRCP 4(c).

B. Relief Sought

Real Party in Interest, Steven B. Crystal, individually and as Trustee, requests this Court to deny the Petition for Writ of Mandamus.

C. Issue Presented

The only issue presented is whether an employee of a party's attorney can serve process pursuant to NRCP 4(c).

III. Statement of Facts and Procedural History

The material facts are not in dispute. On February 9, 2017, Plaintiff and his counsel appeared at a scheduled deposition in the matter of *Crystal v. Bush* and related claims, Second Judicial District Court Case No. CV16-00865, Department 4. The deposition took place at Sunshine Litigation Services in Reno, Nevada. Upon arrival, Crystal's attorney W. Chris Wicker, as well as Mr. Crystal, were surprised to see that the Petitioner Jim McGowen was present. Mr. Wicker did not know, nor did he have any reason to suspect that Defendant would be in attendance. Mr. McGowen was not a party in the *Crystal v. Bush* matter. App. Vol. I, 54 at ¶ 3; App.

Vol. I, 104 at ¶ 3. There was no trickery or deceit on behalf of Mr. Crystal or a sinister motive as alleged by McGowen. App. Vol. II, 386 at ¶ 4. Indeed, there was no reason for McGowen to be in attendance and Mr. Wicker and Mr. Crystal were surprised to see him that day. Crystal was not involved in any collusion with any other party, and was not a part of, or aware of, any request to get McGowen to Nevada. App. Vol. I, 104 at ¶4. Mr. Wicker did not object to Mr. McGowen's presence during the deposition. Mr. Wicker did, however, believe it was an opportunity to obtain personal jurisdiction over McGowen and serve him in the present matter. App. Vol. I, 54 at 3, 4; Vol. II, 208:1-2.

When Mr. Wicker found out that Mr. McGowen was present, he called Mr. Anderson and requested him to prepare a complaint for claims that Mr. Crystal had against Mr. McGowen as Trustee. App. Vol. I, 54 at ¶ 4. Wicker did not know how long Mr. McGowen would be available so everything was rushed. App. Vol.II, 77:24-28:1. The Summons and Complaint were drafted by Plaintiff's counsel, Dane Anderson, and brought to the location where the deposition was being held. Mr. Anderson directed his assistant, Dianne Kelling, to file the Complaint and get a summons issued. App. Vol. I, 109 at ¶ 4, 5, 8. Ms. Kelling brought the issued Summons and a copy of the Complaint to Sunshine Litigation Services where the deposition was being conducted. App. Vol. I, 94 at ¶ 2, 3. Mr. McGowen stepped out of the deposition room and was met by Mr. Wicker and Ms. Kelling. Defendant

was served with process by Ms. Kelling. App. Vol. I, 54-55 at ¶ 8, 9, 10; App. Vol. I, 95 at ¶ 8, 9. The text message from Ms. Kelling to Mr. Anderson indicates "service was accomplished." App. Vol. I, 95 at ¶ 10; 103. There is no factual dispute that Petitioner was served with process, the only dispute is whether Ms. Kelling could validly serve process pursuant to NRCP 4(c).

McGowen moved to quash the service of summons and complaint under NRCP 12 and 4(c), on the grounds that service cannot be made by counsel or an employee of counsel, for the plaintiff, and on further ground that McGowen was tricked or deceived into entering the jurisdiction, rendering him immune from process. App. Vol. I, 7-30. The District Court denied the motion with respect to trickery and deceit, finding that McGowen had voluntarily entered the jurisdiction for business purposes, and his presence was neither facilitated nor encouraged by counsel for Crystal. App. Vol. II, 385 at ¶ 1; 386 at ¶ 4. With respect to service, the Court also concluded that service by counsel is permitted under the rules stating, "Although counsel should be cautious, service by process by an adverse attorney or his or her employee is not prohibited in Nevada." App. Vol. II, 386 at ¶ 3.

Petitioner asserts this Petition for Writ of Mandamus as a last ditch attempt to try and quash service and have the case against his dismissed. His Petition for a Writ does not raise any challenge to service of process by trickery or deceit, and does not contest the fact he was personally served with process while physically present in

the jurisdiction. His sole argument is that service by counsel or counsel's employee is invalid and thus should be void. There is no legal basis for this argument and as such, the Writ should not issue.

IV. Why The Writ Should Not Issue.

Crystal agrees with Petitioner's analysis the purpose of a Writ of Mandamus and the factors that may be considered by a Court when deciding whether to issue the discretionary Writ. The primary standard controlling the exercise of discretion is "judicial economy." *Smith v. Eighth Judicial District Court*, 113 Nev. 1343, 1345, 950 P.2d 280, 281 (1997). The Court in *Smith* recognized that there are very few petitions that warrant extraordinary relief, and that the Courts spend an enormous amount of time and effort processing such petitions. The Court will exercise discretion with respect to certain petitions where no disputed factual issues exist. *Id.*

There are no disputed factual issues before the Court as stated by Petitioner. *See* Petition For Writ of Mandamus, p. 7. Despite the fact that Petitioner claims it to immaterial whether plaintiff's attorney or his secretary actually served McGowen, the District Court has found that Petitioner was served by Dianne Kelling, an employee of Woodburn & Wedge Law Firm. App. Vol. II, 386 at ¶ 2. There are no material issues of fact relating to service. Petitioner does not deny that he was served. Petitioner was physically present in the State of Nevada when he was personally served by a non-party. Minimum contacts are not required to be shown to justify

personal jurisdiction when service is by personal service upon Defendant while physically present in the forum state. App. Vol. II, 386 at ¶ 5. Petitioner is now attempting to make a legal issue out of the clear and unambiguous language of NRCP 4(a). There is simply no issue to be made.

The District Court was correct in its ruling, as it has given literal interpretation to the unambiguous wording of NRCP 4(c), as amended in 2004. The Court has not violated authority nor is its ruling inconsistent with precedent. The Court correctly distinguishes the issues raised in *Sawyer v Sugarless Shops*, 106 Nev. 265, 792 P.2d 14 (1990), and the principles upon which Petitioner tries to rely. App. Vol. II, 386 at ftnt 1. The case involved an independent equitable action by Sawyer to set aside a default judgment against him. The appeal was treated as an appeal from a grant of summary judgment. In *Sawyer*, counsel for a party instructed his secretary to place the Summons and Complaint in a sealed envelope, which was delivered to a process server. The process server and a witness delivered the sealed envelope to a person alleged to be Sawyer. The process server and witness did not personally know what was in the sealed envelope and did not tell the person, allegedly Sawyer, what was in the envelope. In an affidavit, Sawyer denied being served and the process server and witness could not say what was in the envelope. Since summary judgment had been granted, the Supreme Court reversed saying that Sawyer's affidavit had to be accepted as true. The issue in *Sawyer* was what documents were served upon whom.

An employee of plaintiff's attorney was part of the service efforts. After deciding the case, in dicta, the Supreme Court noted there was no disinterested party with personal knowledge of the service. This is interesting because legal secretaries provide process to process servers on a regular basis. The Court's comment was based on the fact the secretary put the process in a sealed envelope. The *Sawyer* court noted service of process can become "a battle of credibility and testimony," and "[s]omething as fundamental and decisive as service *is best* taken away from the parties or their counsel or counsel's employees." (Emphasis added). *Sawyer* at 270. Petitioner has argued that this phrase creates a rule against service of process by an attorney or the attorney's employee. That is simply not the case. Although service of process under the old rule may be "best taken away from" the parties or their counsel, this was not a hardline rule. It was a recommendation based upon the old rule and the facts of the *Sawyer* case, where the main issue at play was that the two affiants who had allegedly served Sawyer, were unaware of the nature of the documents contained in the sealed envelope and Sawyer stated by affidavit that he had not been served with process.

Petitioner claims that the District Court acknowledged "that its ruling is inconsistent with this Court's controlling precedent in *Sawyer*...." Pet. at p. 7. That is not entirely accurate. The District Court noted petitioner's argument based on *Sawyer* that it created a per se rule but did not agree it was controlling precedent.

The District Court merely noted the argument and said, "*Sawyer* was abrogated when, in response to it, the Nevada Supreme Court amended NRCP 4 to expressly require service by a non-party." App. Vol. II, 386 at ftnt 1.

Petitioner also relies on an older Nevada case decided on a service statute no longer in effect. In that case, the Supreme Court held that common law prohibited a party and the party's counsel from effecting service of process. *Nevada Cornell Silver Mines v. Hankins,* 51 Nev. 420, 429–432, 279 P. 27, 29–30 (1929). In that case the relevant statute said, "Summons shall be served by the sheriff of the county where the defendant is found, or by his deputy, or by any citizen of the United States over twenty-one years of age. Rev. Laws, §5022. *Id.* at p. 29. The Court applied the common law to find a party and its counsel could not serve process. *Id.* at 31. *Sawyer* was decided when the service rule was part of the Nevada Rules of Civil Procedure and allowed service by any citizen over the age of 18. The *Sawyer* language was similar to the statute, except the age, that was in place when *Hankins* was decided.

In 2004, the Nevada Supreme Court amended NRCP 4(c) to expressly require service by a non-party. *See* NRCP 4(c). This in effect superseded the common law previously discussed in *Hankins* and *Sawyer* because it defined a disinterested party as any person who is not a party. Despite what Petitioner alleges, and his reliance on the comments found in the drafter's notes, the wording of the statue as amended is

explicitly clear. Had the drafters intended another meaning, they would have taken the opportunity to include such express words in the statute. The amendment came after the decision in Sawyer, thus had the drafters wanted to expressly prohibit counsel or counsel's employees from effecting service, such language would have been included. It was not, and thus the unambiguous wording of the statute must be taken literally, which is "any person not a party." Counsel for the plaintiff is not a party, and counsel's employee is certainly not a party.

The wording of NRCP 4 is explicitly clear. There is no issue in need of clarification and nothing has been left open to interpretation by the amendment of NRCP 4(c) in 2004. "Any person not a party," is crystal clear and Petitioner does not have any basis on which to bring this instant Petition. It is a waste of this Court's resources and time, there is no issue in need of extraordinary relief, and it is certainly not in the interest of judicial economy to hear such a Petition. For such reasons and those set forth below, the Writ should not issue.

V. NRCP Rule 4(c) Does Not Prohibit Service of Summons and Complaint by the Attorney for Plaintiff or His or Her Employee.

Petitioner has recited the history of service of process and the origins of NRCP 4, dating it back to case law from 1929. This was before the Nevada Rules of Civil Procedure were first adopted by the Court in 1952. While fascinating to read Petitioner's interpretation of history, it does not provide an answer to the issue at

hand. The issue at hand can be answered very quickly and easily by reading the plain language of NRCP 4(c).

As stated by Petitioner, the rules have been amended over time with changes including lowering the age limit from 21 to 18 for any citizen to make service. The Court appointed committee in 1998 proposed a further revision to NRCP 4(c), which was formally adopted in 2004. NRCP 4(c) was changed to read as follows:

> Process shall be served by the sheriff of the county where the defendant is found, or by a deputy, or *by any person who is not a party* and who is over 18 years of age, except that a subpoena may be served as provided in Rule 45; where the service of process is made outside of the United States, after an order of publication, it may be served either by any person who is not a party and who is over 18 years of age or by any resident of the country, territory, colony or province, who is not a party and who is over 18 years of age. (Emphasis added).

This wording is very clear and cannot possibly be interpreted to mean anything else, as suggested by Petitioner.

The proposed change in 1998, which was formally adopted in 2004, came after the ruling in the *Sawyer* case, which is heavily relied upon by Petitioner. This is a classic example of why one must not simply read the head notes, but understand the main issues and actual ruling in a case. It is true that the court said "[s]omething as fundamental and decisive as service is best taken away from the parties or their counsel or counsel's employees." However, as discussed above, the facts and issues in Sawyer can be distinguished from the issue at hand. The affiants who had allegedly served Sawyer, were unaware of the nature of the documents contained in

the sealed envelope. Evidence concerning the contents of the envelope could be supplied only by an employee of the California attorney representing Sugarless, and thus the court said there was no disinterested party with personal knowledge of the service of process. The court did not conclude that service must be taken away from counsel or counsel's employees, it was simply a recommendation to avoid a similar issue as was presented in the case. Thus, the real problem was the people serving the envelope did not know what they were serving and Sawyer's affidavit contradicted them. *Sawyer* at 269.

Petitioner misses the main point of the case and in turn, attempts to interpret the change of language in NRCP 4(c) to conform to a ruling that never quite existed. Petitioner maintains that the committee's express statement and the drafter's notes show the true intent to conform the statute to the holding in *Sawyer*. However, one must realize that it is the wording of the statute or rule that becomes the law, not the comments made by the committee or the drafter's notes. Furthermore, the comments and notes only strengthen the position that the service of process by counsel or counsel's employee's is not, and has not been expressly prohibited. The committee's statement does not use such words. It does however, state that the revised provision is consistent with the current Federal rule, and the common law rule followed in Nevada, requiring that service be made by a disinterested party which was defined in the revision simply as a "party." Petitioner argues that the drafter's notes

demonstrate the intent to codify *Sawyer,* including the alleged prohibition of service by the attorney, however, the rule does not support that claim. The court in *Sawyer* talked about "the parties or their counsel or counsel's employees." *Sawyer* at 270. This is not a trivial distinction. Every practitioner, including the *Sawyer* court knew the difference between a party and their counsel or counsel's employees. The revision to the rules that superseded the common law rule specifically uses the term "party" not "parties and their counsel or counsel's employees" as used in *Sawyer.* Therefore the District Court was correct that the new rule abrogated Sawyer to the extent it suggested service restrictions. App. Vol. II, 386 at ftnt 1. Only the final wording of the statute becomes the law. The drafter's, having had the advantage of reading Sawyer and all prior versions of NRCP 4 and the Federal equivalent, chose the clear and plain words "any person who is not a party" which is used in FRCP (4)(c)(2). The wording is expressly and explicitly clear, and there can be no ambiguous meaning. The 2004 amendment specifically chose the words "not a party" to replace the prior wording that service could be made by "any citizen." If the drafter's had intended additional, or alternative, language to be in the rule, such as the *Sawyer* language, they would have done so. They did not.

Petitioner has misunderstood the statements made in Sawyer upon which he tries to rely. The expression and recommendation that "[s]omething as fundamental and decisive as service is best taken away from the parties or their counsel or

counsel's employees," was an opinion of the Court that went beyond that facts before the Court and thus is not binding in subsequent cases as legal precedent. The *Sawyer* case was determined by accepting Sawyer's affidavit as true. The subsequent discussion relating to the secretary's role was unnecessary to a determination of the question involved and therefore was dicta. Dicta does not set controlling precedent. *Argenta Consolidated Mining Company v. Jolley Urga Wirth Woodbury & Standish*, 125 Nev. 527, 536, 216 P.3d 779, 785 (2009). *See also, City of Oakland v. Desert Outdoor Advertising, Inc.*, 127 Nev. 533, 267 P.3d 481 (2011).

The rule change in 2004 was in part to conform to the Federal Rules of Civil Procedure. *See* Pet., ADD004. The relevant federal rule states service may be made by "[a]ny person who is at least 18 years old and not a party may serve a Summons and Complaint." FRCP 4(c)(2).

The Federal Rules were amended in 1983 to reduce the role of federal marshals in the service of process in most civil actions." *Madden v. Cleland,* 105 F.R.D. 520, 522 (N.D.Ga.1985). As amended, Rule 4 no longer includes restrictive language with respect to the classes of persons who are permitted to serve process. A summons and complaint now may be served by "any person who is not a party and is not less than 18 years of age." The Court in *Madden v. Cleland* declined to read limitations onto the clear wording of Fed.R.Civ.P. 4(c)(2)(A), and found that a party's attorney may serve a summons and complaint in accordance with the Federal

Rules, stating, "The phrase "any person who is not a party" in Fed.R.Civ.P. 4(c)(2)(A) does not prohibit service by a party's representative."

Other Federal Courts have found that "any person who is not a party" does not preclude service of process by an attorney or an employee of an attorney, as they are not a party to the case. *See, Trustees of Local Union No. 727 Pension Fund v. Perfect Parking, Inc.* 126 F.R.D. 48 USDC, N.D. Illinois, Eastern Division. March 31, 1989. Based upon the plain language of Rule 4, service of summons and complaint by an attorney for the Plaintiff has been held to be proper service. *See C.F.T.C. v. American Metal Exchange Corp.,* 693 F.Supp. 168, 186 (D.N.J.1988); *Jugolinija v. Blue Heaven Mills,* 115 F.R.D. 13, 15 (S.D. Ga.1986).

Furthermore, Courts have found that service by an employee of an attorney is proper within the meaning of FRCP 4(c)(2). *Commodity Futures Trading Com'n v. American Metals Exchange Corp.* 693 F.Supp. 168 USDC, D. New Jersey. July 18, 1988. In that case, Defendants were served by a senior financial investigator of the Office of Comptroller for the State of Florida. The pleadings in that case reveal that the Office of Comptroller represented the State of Florida. Thus, since that office was counsel for a party, State of Florida, the Court found that these Defendants were not served by a party, but rather were served by an employee of its counsel. The Court found such was proper.

Any person not a party" may serve process. A party is a person involved in the transaction or proceeding, who has the right to make claims and defenses, offer proof, and participate in all aspects of the action. Counsel for a party is not a party. Neither is an employee of counsel. The parties to an action are named in the caption. As there can be no ambiguity with the wording of NRCP 4, equally there is no confusion or need for clarification of the meaning of a "party." The exact and true wording and meaning of the statute is clear and leaves no room for interpretation.

VI. Conclusion

NRCP 4(c) was revised in 2004 to change who could serve process. The revised statute specified that service of process may be effected by "any person not a party", rather than "any citizen" as it had previously read. In so doing, it superseded the common law rule and specifically identified who cannot serve process.

The intent or thought of the committee or drafter is essentially irrelevant as it is the wording of the rule that becomes the law; not their thoughts or explanations as to what they intended the wording to mean or how they anticipated it would be interpreted. Mr. McGowen was personally served with process while physically present in the jurisdiction by a non-party. Service was proper under NRCP 4(c) and the District Court was correct in denying McGowen's Motion to Quash.

For such reasons as set forth above, the Writ requested by Petitioner should not issue.

Dated this 20 day of November, 2017.

WOODBURN AND WEDGE

By: _____

W. Chris Wicker, Esq. [NV Bar #1037]
Dane W. Anderson, Esq. [NV Bar #6883]
Attorneys for Steven B. Crystal, individually and as Trustee of the Barbara L. Crystal Decedent Trust

VII. ATTORNEY CERTIFICATE

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 Microsoft Word in Times New Roman, 14 point font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 3946 words; or does not exceed 30 pages.

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

AFFIRMATION

Pursuant to NRS 239B.030

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

Dated this 20 day of November, 2017.

WOODBURN AND WEDGE

By: _____

W. Chris Wicker, Esq. [NV Bar #1037]
Dane W. Anderson, Esq. [NV Bar #6883]
Attorneys for Steven B. Crystal, individually and as Trustee of the Barbara L. Crystal Decedent Trust

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Woodburn and Wedge and that on this date, I caused to be sent via eFlex, a true and correct copy of the ANSWER OF REAL PARTY IN INTEREST TO PETITIONER'S WRIT OF MANDAMUS to:

William E. Peterson
Janine C. Prupas
Carrie L. Parker
SNELL & WILMER L.L.P.
50 West Liberty Street, Suite 510
Reno, NV 89501

DATED this 20th day of November, 2017.

By: _____
An Employee of Woodburn and Wedge