IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTOPHER ANDERSEN,
Petitioner,
vs.
THE HONORABLE ROB BARE,
Judge of the Eighth Judicial District Court,
Respondent,
and
CITY OF LAS VEGAS,
Real Party in Interest.

Case No.: 75208
Dist. Ct. Case No.: C-16-319933-A

ANSWER OPPOSING ISSUANCE OF REQUESTED WRIT

COMES NOW, the City of Las Vegas, Real Party in Interest, by BRADFORD JERBIC, City Attorney, through Deputy City Attorney, STEPHEN RINI, and submits this Answer to Petition for Writ in obedience to this Court's Order filed March 15, 2018, in the above-captioned case. This Answer is based on the following memorandum and all papers and pleadings on file herein.

Respectfully submitted this 10 day of April, 2018.

ATTORNEY FOR REAL PARTY IN INTEREST CITY OF LAS VEGAS

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City Attorney
Nevada Bar #1056

By: _____
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MEMORANDUM OF POINTS AND AUTHORITIES

Question Raised

A. Does the amendment of NRS 202.360 by the Nevada Legislature in 2015, to include language that prohibits persons convicted of the misdemeanor crime of battery constituting domestic violence from possessing a firearm, elevate a petty offense to a serious offense for purposes of determining Petitioner's Constitutional right to a jury trial?

Statement of Facts and Procedural History

On April 24, 2014, Petitioner-Defendant Christopher Andersen ("Petitioner") was arrested on one count of misdemeanor battery constituting domestic violence. City of Las Vegas ("City"), Real Party in Interest, subsequently charged Petitioner with battery constituting domestic violence, and, as a result, case C1135328A was established in Las Vegas Municipal Court. Petitioner's case was randomly assigned to Department 1 of the Las Vegas Municipal Court before the Honorable Cynthia Leung ("Judge Leung").[1] Petitioner filed a Motion for Jury Trial, which was heard by Judge Leung on October 19, 2016.[2] Both parties submitted on the briefs as filed, and Judge Leung denied the Motion.[3]

On December 6, 2016, Petitioner pled "no contest" to one count of battery constituting domestic violence with the understanding between the parties that Petitioner would preserve for appeal the issue regarding Petitioner's right to a jury trial.[4]

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1 See Petitioner's Appendix pp. 46-50.
2 Id. at pp. 1-19.
3 Id. at pp. 25-30.
4 Id. at pp. 31-45.

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Petitioner filed a timely notice of appeal and, as a result, case C-16-319933-A was established in the Eighth Judicial District Court.[5] Petitioner, in District Court, Department 32, before the Honorable Judge Rob Bare ("Judge Bare"), filed an Opening Brief appealing the judgment from Las Vegas Municipal Court.[6] The Real Party in Interest-City of Las Vegas filed an Answering Brief.[7] On July 5, 2017, Judge Bare dismissed Petitioner's appeal and found that Petitioner was not entitled to a jury trial because he was charged with misdemeanor battery constituting domestic violence.[8] On August 1, 2017, Judge Bare entered an Order affirming Petitioner's conviction. Judge Bare found that Blanton v. North Las Vegas, 489 U.S. 538, 103 L. Ed. 2d 550 (1989) and Amezcua v. Eight Judicial District Court, 319 P. 3d 602 (2014) were the governing authorities when evaluating a demand for a jury trial and, also, that Petitioner was not entitled to a jury trial.[9]

Petitioner has now filed a "Second Amended Petition for Writ of Habeas Corpus or Alternatively Petition for Writ of Mandamus." This Court has ordered an Answer to the Petition and the City replies as follows:

ARGUMENT

I. Standard of Review: Writ of Habeas Corpus

Every person unlawfully committed, detained, confined or restrained of his or her liberty, under any pretense whatever, may prosecute a writ of habeas corpus to inquire into the cause of such imprisonment or restraint NRS 34.360.

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5 Id. at pp. 51.
6 Id. at pp. 52-60.
7 Id. at pp. 61-87.
8 Id. at pp. 104-105.
9 Id.

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In order to prevail on a Petition for Writ of Habeas Corpus, the Petitioner must show that extraordinary relief is warranted. Rugamas v. Eighth Jud. Dist. Ct. ex rel. Cty. of Clark, 129 Nev. 424, 430, 305 P.3d 887, 892 (2013); Hoover v. Freeman, No. 66136, 2014 WL 7159392 (Nev. 2014). "Ultimately, the decision to entertain an extraordinary writ petition lies within [the Court's] discretion." Rugamas, 129 Nev. at 430. The decision of the lower court will not be disturbed absent a showing of manifest error. *See, e.g.,* Sheriff, Douglas Cty. v. LaMotte, 100 Nev. 270, 272, 680 P.2d 333, 334 (1984) ("absent a showing of substantial error on the part of the district court in granting a writ of habeas corpus based on insufficient evidence, this court will not overturn the lower court's determination"); Berry v. State, 131 Nev. Adv. Op. 96, 363 P.3d 1148, 1156 (2015) ("we turn to the district court's denial of Berry's request for an evidentiary hearing, which we review for an abuse of discretion"); State v. Huebler, 128 Nev. 192, 197, 275 P.3d 91, 95 (2012); Barnhart v. State, 122 Nev. 301, 304, 130 P.3d 650, 652 (2006) ("the district court did not abuse its discretion by finding that the issue of the coercion defense was not properly before the court"). In summary, a Petitioner may only succeed by showing the error committed by the lower court was of such an egregious or substantial nature as to warrant extraordinary relief by judicial intervention.

II.

Standard of Review: Writ of Mandamus

This Court possesses both the discretion to entertain a petition for Writ of Mandamus[10] and the original jurisdiction to issue one.[11] While

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10 State ex. Rel. Dept. Transp. v. Thompson, 99 Nev. 358, 360, 662 P.2d 1338, 1339 (1983).

11 Nev. Const. art. 6, § 4.

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district courts retain final appellate jurisdiction in Justice and Municipal court cases,[12] this Court may entertain a Writ petition to review a district court's appellate decision under certain circumstances.[13] For example, this Court may issue a Writ of Mandamus to control a manifest abuse or an arbitrary or capricious exercise of discretion.[14]

Alternatively, this Court may "exercise its discretion to consider a petition for extraordinary relief."[15] For instance, this Court may grant relief to: compel a party to perform an act required by law "as a duty resulting from an office, trust or station";[16] "where circumstances reveal urgency or strong necessity";[17] or "where an important issue of law needs clarification and public policy is served."[18]

Generally, this Court will only issue a Writ of Mandamus if the petitioner has no other plain, speedy, and adequate remedy in the ordinary course of law.[19]

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12 Nev. Const. art. 6, § 6; City of Las Vegas v. Carver, 92 Nev. 198, 198, 547 P.2d 688, 688 (1976).

13 See State v. Eighth Judicial Dist. Court (Hedland), 116 Nev. 127, 134, 994 P.2d 692 (2000).

14 State v. Eighth Judicial Dist. Court (Armstrong), 127 Nev. __, __, 267 P.3d 777, 779-80 (2011)(citations omitted).

15 Clay v. Eighth Judicial Dist. Court, 305 P.3d 898, 902 (Nev. 2013), citing Schuster v. Eighth Judicial Dist. Court, 123 Nev. 187, 190, 160 P.3d 873, 875 (2007). See also Mineral Cnty. v. State, 117 Nev. 235, 243, 20 P.3d 800, 805 (2001).

16 Clay v. Eighth Judicial Dist. Court, 305 P.3d 898, 901 (Nev. 2013), quoting NRS § 34.160.

17 Mineral Cnty. v. State, 117 Nev. 235, 243, 20 P.3d 800, 805 (2001).

18 Id.

19 Id.

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III.

Misdemeanor, First-Offense Battery Constituting Domestic Violence Is a Petty Offense

The Amezcua case is the latest case in a long history of jurisprudence by both This Honorable Court and the United States Supreme Court under which it is clear that the Petitioner is not entitled to a jury trial.

The Sixth Amendment of the United States Constitution generally guarantees an individual the right to a jury trial. See also Duncan v. Louisiana, 391 U.S. 145, 149-150 (1968) (stating that this right is applicable to the States through the Fourteenth Amendment). However, it is well settled law that the sixth **amendment** right of trial by jury does not extend to every criminal proceeding. District of Columbia v. Clawans, 300 U.S. 617, 624, 57 S.Ct. 660, 661, 81 L.Ed. 843 (1937).

Consistent with this ruling, This Court held in State v. Smith, 99 Nev. 806, 672 P.2d 631 (1983) that where the maximum penalty is six months imprisonment or less, the offense is "petty" and therefore the right to jury trial does not attach. Id. at 811. In Smith, This Court noted that "despite the differences in languages of the constitutional provisions," neither Article 1, Section 3 of the Nevada Constitution, nor the Sixth Amendment of the United States Constitution, guarantee the right to trial by jury for first offense DUI or any "petty" offenses. Id. at 810.

A few years later, in Blanton v. North Las Vegas Mun. Court, 103 Nev. 623 (1987), several defendants charged with DUI petitioned to claim their right to jury trials in municipal courts. The defendants in Blanton argued that both Article 1, Section 3 of the Nevada Constitution, and the Sixth Amendment to the United States Constitution, guaranteed them the right to a jury trial. However, This Court found that the right to a jury trial

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is not absolute under either the United States Constitution nor the Nevada Constitution, holding that the right to a jury trial "does not extend to every criminal proceeding." See Id. at 629.

This Court identified "significant issues relating to serious financial, administrative and policy concerns" that would arise from misdemeanor trials, and concluded that such concerns should be addressed and "resolved by the legislature [,] after it has conducted appropriate hearings and investigations regarding the implications [...]" of these types of trials. Id. at 636. This Court further found that if such a drastic change was to be judicially mandated, "such a decision must come from the United States Supreme Court." Id at 637.

This decision was revisited shortly thereafter by the United States Supreme Court in Blanton v. North Las Vegas, 489 U.S. 538, 103 L Ed 2d 550 (1989) through *Writ of Certiorari*. In Blanton, a unanimous Supreme Court found that Nevada's DUI statute was not a serious crime such that the defendant was entitled to a jury trial:

> It has long been settled that "there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision." In determining whether a particular offense should be categorized as "petty," our early decisions focused on the nature of the offense... . In recent years, however, we have sought more "objective indication of the seriousness with which society regards the offense." "[w]e have found the most relevant such criteria in the severity of the maximum authorized penalty... . Following this approach, our decision in Baldwin established that a defendant is entitled to a jury trial whenever the offense for which he is charged carries a maximum authorized prison term of greater than six months. Blanton, 448 U.S. at 542, citations omitted.

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The Blanton court then went on to establish a guideline for evaluating the seriousness of an offense. It ruled that if the maximum jail time authorized by statute does not exceed six months, there is a presumption that the offense is petty. This presumption can be overcome, but only if "additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a 'serious' one." Id. at 543. Nevertheless, it is a rare case where "a legislature packs an offense it deems 'serious' with onerous penalties that nonetheless do not puncture the 6-month incarceration line." Id. In Blanton, the additional penalties of a driver's license suspension for 90 days, an alcohol abuse education course, a $1,000 fine and community service were insufficient to overcome the presumption. Id. at 544.

The United States Supreme Court went on to apply this test in United States v. Nachtigal, 507 U.S. 1, 122 L Ed 2d 374 (1993). In Nachtigal, the defendant was charged with a DUI in a national park. If convicted of a DUI, a defendant could be sentenced to up to six months in jail and a $5,000 fine. Moreover, a defendant could be placed on probation not to exceed five years. A person on such probation could be subject to as many as 21 conditions of probation. And, especially pertinent to the instant case, one such condition as set forth in 18 U.S.C. 3563(b)(8) is that a defendant "refrain from possessing a firearm, destructive device or other dangerous weapon."

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Nachtigal argued that the probation conditions meant that the crime of DUI in a national park was a serious offense. The United States Supreme Court held that the penalties Nachtigal faced were not sufficient to overcome the presumption, despite the fact that a defendant could as part of his probation be ordered to not possess a firearm. The United States Supreme Court stated:

> Because the maximum term of imprisonment is six months, DUI under 36 CFR 4.23(a)(1) is presumptively a petty offense to which **no jury trial right attaches**. ... Nor do we believe that the parole alternative renders the DUI offense serious. Like a monetary penalty, the liberty infringement caused by a term of probation is far less intrusive than incarceration. The discretionary probation conditions do not alter this conclusion; while they obviously entail a greater infringement on liberty than probation without attendant conditions, they do not approximate the severe loss of liberty caused by imprisonment for more than six months. Nachtigal, 507 U.S. at 4-5. Citations omitted. (Emphasis Added).

Given the Nachtigal ruling, it is clear that the United States Supreme Court does not consider the potential loss of the right to possess a firearm upon conviction a significant enough factor to overcome the Blanton presumption.

Furthermore, following the rationale laid out in the Nachtigal ruling, This Court recently ruled in Amezcua v. Eighth Judicial District Court, 319 P.3d 602 (2014), that collateral consequences, namely, those not explicitly authorized as penalties under the charging statute, are not relevant to a "seriousness" analysis.

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In Amezcua, the defendant was charged with first-offense battery constituting domestic violence. He filed a timely notice for jury trial, which was denied by the Justice Court hearing the case. Amezcua subsequently filed a petition for *writ of mandamus* in the appropriate District Court, which was denied. His conviction was affirmed on appeal by the District Court. Amezcua then filed a petition for *writ of mandamus* or *writ of habeas corpus* with This Honorable Court.

In denying the petition, This Court reiterated that the right to a jury trial only attaches to "serious" offenses, and that the penalties set forth for those offenses were the bar upon which the "seriousness" of the offense was to be measured:

> "[T]o determine whether the . . . right to a jury trial attaches to a particular offense, the court must examine 'objective indications of the seriousness with which society regards the offense.'" United States v. Nachtigal, 507 U.S. 1, 3, 113 S. Ct. 1072, 122 L. Ed. 2d 374 (1993) (quoting Blanton v. N. Las Vegas, 489 U.S. 538, 541, 109 S. Ct. 1289, 103 L. Ed. 2d 550 (1989)). The best objective indicator of the seriousness with which society regards an offense is the maximum penalty that the legislature has set for it. *Id.* Although a "penalty" may include things other than imprisonment, the focus for purposes of the right to a jury trial has been "'on the maximum authorized period of incarceration."' *Id.* (quoting Blanton, 489 U.S. at 542). Taking this approach, **the Supreme Court has held that an offense for which the period of incarceration is six months or less is presumptively a "petty" offense** and a jury trial is not constitutionally required. *Id.* We have reached the same conclusion. Blanton, 103 Nev. at 633-34, 748 P.2d at 500-01. **The presumption may be overcome "only by showing that the additional penalties, viewed together with the maximum prison term, are so severe that the legislature clearly determined that the offense is a 'serious' one."** Nachtigal, 507 U.S. at 3-4 (quoting Blanton, 489 U.S. at 543). Amezcua, 319 P.3d at 604. (Emphasis added)

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Amezcua argued that in addition to other consequences of his conviction, he could potentially lose his gun rights under 18 U.S.C.A. § 922(g)(9)[20], and that these consequences were sufficient "additional penalties" to reflect a legislative intent that the offense should be considered serious.

Citing to its previous rulings in Palmer v. State, 118 Nev. 823, 826, 59 P.3d 1192, 1194 (2002) and Nollette v. State, 18 Nev. 341, 344, 46 P.3d 87, 89 (2002), This Court found that Amezcua's potential loss of his gun rights was a collateral consequence of his conviction, and therefore not relevant to an analysis of the "seriousness" of an offense. *Id.* at 605. This Court noted that this was in contrast to direct consequences that have *automatic and immediate* effect on the nature or length of a defendant's punishment. See Palmer, 118 Nev. at 826 (emphasis added).

This Court noted that the analysis then was on the penalties in the Nevada Statute that proscribed the offense. See Amezcua, 319 P.3d at 605 (noting that the petitioner's analogy to a driver's license revocation failed because, unlike the additional penalties identified by the petitioner, the revocation considered was directly included in the ordinance). The only penalties that NRS 200.485(1) directly imposes, in addition to imprisonment of not less than 2 days, but not more than 6 months, is a community service requirement of not more than 120 hours and a fine of $1,000. Thus, This Court in Amezcua concluded: "There is nothing so severe in those penalties, considered together, as to clearly indicate a determination by the Nevada Legislature that this is a serious offense to

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20 "It shall be unlawful for any person...who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

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which the right to a jury trial attaches." Id. This Court added that there is further evidence that the Nevada Legislature did not view this as a "serious" offense. Specifically, in the Legislature's decision to afford the trial judge discretion to allow the defendant to serve the term of imprisonment intermittently.[21] Id. at 606. This Court then found that Amezcua had failed to overcome the Blanton presumption, and that the Nevada Legislature did not view the misdemeanor battery constituting domestic violence as a "serious" offense.

Thus, to the extent that Petitioner claims that the loss of the right to possess a firearm makes a conviction for battery constituting domestic violence a serious offense, the argument is entirely without merit.

Petitioner's reliance on the 2015 amendment to NRS 202.360, to illustrate that there is a clear intent of the Legislature to make battery constituting domestic violence a serious crime, is unsound because the Nevada Legislature was extremely careful to track federal law so as not to expand the "seriousness" of the crime.

NRS 202.360(1)(a) states:

1. A person shall not own or have in his or her possession or under his or her custody or control any firearm if the person:
   (a) Has been convicted in this State or any other state of a misdemeanor crime of domestic violence **as defined in 18 U.S.C. §921(a)(33)**. (Emphasis added)

The Nevada Legislature amended NRS 202.360 in 2015 to include persons convicted of first-offense battery constituting domestic violence

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21 Referencing NRS 200.485(1)(a): "... [A] person convicted of a battery which constitutes domestic violence ... is guilty of a misdemeanor and shall be sentenced to: imprisonment ... for not less than 2 days, but not more than 6 months; and perform not less than 48 hours , but not more than 120 hours, of community service."

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as prohibited persons. Petitioner asserts that because this amendment now exposes (or, stated more accurately, brings with it a collateral consequence) a person convicted of battery constituting battery domestic violence to up to six years in prison (if convicted of a new crime under NRS 202.360), it demonstrates "...a clear intent of the Legislature that...Domestic Violence...is a serious crime." See Petitioner's Second Amended Petition for Writ of Habeas Corpus or Alternatively Petition for Writ of Mandamus at 9, lines 10-13.

The mere fact that Nevada now provides a means for State agencies to prosecute individuals for possessing a firearm based on a conviction for first-offense battery constituting domestic violence through NRS 202.360 does not elevate NRS 200.485(1) into a serious offense. Simply stated, it is not something that is a direct consequence of a conviction under NRS 200.485(1), as it, by necessity, requires some future conduct on the part of the Petitioner or a government agency. See Nollette v. State, 118 Nev. 341, 344 (2002)(noting that collateral consequences are generally dependent on either the court's discretion, *the defendant's future conduct*, or the discretion of a government agency)(emphasis added).

The only difference between the state of the law when Amezcua was decided and the state of the law today is that NRS 202.360 provides a separate entity the jurisdiction to prosecute prohibited persons from possessing a firearm. Prior to 2015, a person convicted of a first-offense battery constituting domestic violence was already prohibited from possessing a firearm under 18 U.S.C. §922(g)(9). Of particular importance, the 2015 amendment did *not* expand the State's jurisdiction beyond what had been already enumerated by the United States Code when Amezuca was decided. In fact, NRS 202.360(1)(a) specifically limits the persons prohibited from possessing a firearm due to a conviction of the

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misdemeanor crime of battery constituting domestic violence exclusively to those domestic relationships defined in the federal code, and *not* as defined in NRS 33.018. This Court was obviously aware of that when it decided Amezcua.

Lastly, the Nachtigal court has already ruled that potential loss of a firearm *is not* severe enough of an "additional penalty" to overcome the Blanton presumption. Therefore, even if This Court were to find that NRS 202.360 creates new penalties for violations of NRS 200.485, under Nachtigal, such a finding would not be sufficient to show the requisite Legislative intent that misdemeanor battery constituting domestic violence was "serious" enough to warrant a right to a jury trial.

CONCLUSION

Given the jurisprudence of the United States Supreme Court and This Honorable Court regarding the designation of "petty" versus "serious" offenses, the Petitioner has not - and cannot - show that he is facing penalties beyond six months in jail which are so severe that the Nevada Legislature intended his offense to be considered serious. Therefore, Petitioner's argument that the Honorable Rob Bare, in District Court, Department 32, acted arbitrarily or capriciously in not granting Petitioner's appeal fails because he cannot show that he is being charged with a serious offense, a procedural necessity to invoke the right to a jury trial. Since Petitioner is not being charged with a serious offense, there is no manifest abuse on the part of the lower court; nor is there is any capricious exercise of discretion; and, finally, nor is there any abuse of discretion.

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For the foregoing reasons, the City of Las Vegas respectfully requests that This Court deny Petitioner's Writ of Habeas Corpus or Alternatively Petitioner's Writ of Mandamus.

Respectfully submitted this 10 day of April, 2018.

ATTORNEY FOR REAL PARTY IN INTEREST CITY OF LAS VEGAS

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STATE OF NEVADA

ss.

COUNTY OF CLARK

VERIFICATION

I declare under penalty of perjury that I have read the foregoing Answer Opposing Issuance of Requested Writ, that the information provided in this Answer is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this Answer.

STEPHEN RINI

SUBSCRIBED and SWORN to before me by STEPHEN RINI, this 10 day of April, 2018.

NOTARY PUBLIC, in and for said County and State

GUADALUPE GONZALEZ
Notary Public State of Nevada
No. 99-53801-1
My appt. exp. Apr. 23, 2019

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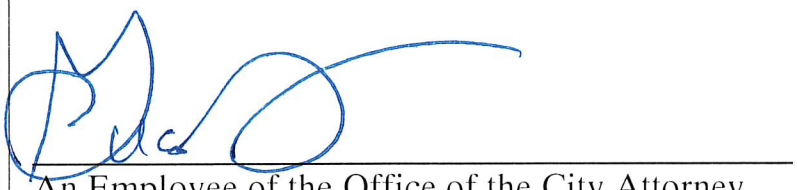
CERTIFICATE OF SERVICE

I HEREBY CERTIFY AND AFFIRM that this document was filed electronically with the Nevada Supreme Court on April 10, 2018.

I deposited in the United States Mail a true and correct copy of the foregoing addressed to:

Michael Pariente
3960 Howard Hughes Parkway #615
Las Vegas, NV 89169

Judge Rob Bare
District Court Judge Dept. 32
200 Lewis Ave.
Las Vegas, NV 89155
Respondent



An Employee of the Office of the City Attorney

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