REP
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Elizabeth A. Brown
Clerk of Supreme Court

IN THE SUPREME COURT OF NEVADA
STATE OF NEVADA

ROMAN HILDT, Petitioner, vs. THE HONORABLE RICHARD F. SCOTTI, EIGHTH JUDICIAL DISTRICT COURT JUDGE Respondent, CITY OF HENDERSON, Real Party in Interest.	Nev. Supreme Ct. Case No: 79605 District Court Case No: C-19-339750A Dept. No: II Henderson Municipal No: 17CR012574 Dept. No. III

REQUEST TO ALLOW PETITIONER TO REPLY TO REAL PARTY OF INTEREST'S ANSWERING BRIEF

COMES NOW Petitioner, ROMAN HILDT, by and through his attorney of record, ADAM L. GILL, ESQ., AND MICHAEL N. AISEN, ESQ., and humbly begs the court that the petitioner be able to reply to the City's Answer filed on December 6, 2019.

///

Docket 79605 Document 2020-00313

DATED this __3rd__ day of January 2020

/s/ Michael N. Aisen

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MEMORANDUM OF POINTS AND AUTHORITIES

Respectfully, Petitioner maintains that Real Party in Interest City of Henderson's retroactivity analysis and jurisdiction analysis is improper and asks the Court to consider Petitioner's arguments before issuing a decision. Attached hereto and incorporated as "Exhibit A" is Petitioners Reply Brief.

CONCLUSION

For these reasons, Petitioner respectfully requests this Court grant his request and allow Petitioner to reply to City of Henderson's Answer filed on December 6, 2019.

DATED this __3rd__ day of January 2020.

/s/ Michael N. Aisen

ADAM L. GILL, ESQ.
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Supreme Court of the State of Nevada by using the EFlex Electronic Filing system. I certify that the following parties or their counsel of record received by electronic means:

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Aaron Ford, Attorney General
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Carson City, Nevada 89701

DATED this 3rd day January, 2020.

By: *Jasmine Torres*
An employee working for Aisen, Gill & Associates

EXHIBIT A

REP
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IN THE SUPREME COURT OF NEVADA
STATE OF NEVADA

ROMAN HILDT,

Petitioner,

vs.

THE HONORABLE RICHARD F. SCOTTI, EIGHTH JUDICIAL DISTRICT COURT JUDGE

Respondent,

CITY OF HENDERSON,

Real Party in Interest.

Nev. Supreme Ct. Case No: 79605
District Court Case No: C-19-339750A
Dept. No: II
Henderson Municipal No: 17CR012574
Dept. No. III

REPLY IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) OR ALTERNATIVELY PETITION FOR WRIT OF MANDAMUS

COMES NOW Petitioner, ROMAN HILDT, by and through his attorney of record, ADAM L. GILL, ESQ., AND MICHAEL N. AISEN, ESQ., and replies to the City's Answer filed on December 6, 2019.

///

DATED this __2nd__ day of January 2020

/s/ Michael N. Aisen
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MEMORANDUM OF POINTS AND AUTHORITIES

I. A Retroactivity Analysis is Inapplicable Because Petitioner's Conviction was not "Final" When Andersen was Issued

Respectfully, Petitioner maintains that Real Party in Interest City of Henderson's retroactivity analysis under *Teague* and its progeny is inapposite to the instant case because Petitioner's conviction was not "final" when *Andersen* was decided. Notably, Real Party in Interest does not dispute that Petitioner raised the same claims as those addressed in *Andersen* before both the Henderson Municipal Court and the Eighth Judicial District Court on direct appeal; the only question, therefore, is whether the ruling announced in *Andersen* is controlling on, and dispositive of, Petitioner's case. Real Party in Interest argues that *Andersen* does not control the instant case because application of the "rule" decided in *Andersen* is barred by principles of retroactivity. However, because the retroactivity analysis by Real Party in Interest is premised on Petitioner's conviction being final, which it is

not, there is no basis on which to preclude application of *Andersen* to Petitioner's case.

There is a "three-pronged test" to determine whether a conviction is "final" for purposes of retroactivity. "Twenty-one years ago, this Court adopted a three-pronged analysis for claims of retroactivity of new constitutional rules of criminal procedure. See *Linkletter v. Walker*, 381 U.S. 618 (1965)… Shortly after the decision in Linkletter, the Court held that the three-pronged analysis applied both to convictions that were final and to convictions pending on direct review." *Griffith v. Kentucky*, 479 U.S. 314, 321, 107 S. Ct. 708, 712 (1987) (citing to *Johnson v. New Jersey*, 384 U.S. 719, 732 (1966); *Stovall v. Denno*, 388 U.S. 293, 300 (1967)).

This three-pronged test consists of the following: first, the judgment of conviction has been rendered; second, the availability of appeal is exhausted; third, the time for filing a petition for certiorari has elapsed or a timely filed petition has been denied. *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6, 107 S. Ct. 708, 712 (1987) (citing *Linkletter v. Walker*, 381 U.S. 618, 622 n.5, 85 S. Ct. 1731, 1734 (1965) ("By final we mean where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before our decision in *Mapp* v. *Ohio*"). Only when all three conditions are met is application of the controlling decision potentially barred by principles of retroactivity. See *United States* v. *Johnson*, 457 U.S. 537 (1982).

A rule of law is not barred, and thus will apply "retroactively," if a conviction is not final. "But we fulfill our judicial responsibility by instructing the lower courts to apply the new rule retroactively to cases not yet final. Thus, it is the nature of judicial review that precludes us from '[simply] fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule.'" *Griffith v. Kentucky*, 479 U.S. 314, 323, 107 S. Ct. 708, 713 (1987) (citing *United States v. Johnson*, 457 U.S., at 546-547, 555).

In this case, when *Andersen* was decided, Petitioner's conviction was not yet final, and therefore the decision in *Andersen* is controlling. The first two prongs of the three-part test have been met, as a judgment of conviction had entered on or about April 22, 2019 and Petitioner's direct appeal remedies were exhausted when remittitur issued on September 5, 2019. However, pursuant to United States Supreme Court Rule 13, Petitioner thereafter had 90 days from the time of the District Court's judgment in which to file a Petition for Certiorari with the United States Supreme Court. Therefore, the third prong, "the time for a petition for certiorari [has] elapsed or a petition for certiorari finally denied" was not met. As a result, when *Andersen* was released on September 12, 2019, Petitioner's conviction was not final because it was still within the time frame in which Petitioner could have filed a Petition for Certiorari.

U.S. Supreme Court Rule 13(1) states, in its entirety:

> Rule 13. Review on Certiorari: Time for Petitioning
> 1. Unless otherwise provided by law, **a petition for a writ of certiorari to review a judgment in any case**, civil or criminal, **entered by a state court of last resort** or a United States court of appeals (including the United States Court of Appeals for the Armed Forces) **is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment**. A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review (emphasis added).

There are two possible applications of Rule 13, both of which result in Petitioner's conviction not being final when *Andersen* was issued. The first, noted through emphasis above, would begin the 90 day clock from the time the judgment of the state court of last resort is issued. In this instance, given Petitioner's case arose from a misdemeanor judgment of conviction in the Henderson Municipal Court, the final appellate review remains with the District Court. Real Party in Interest agrees as much in its Answering Brief ("The Nevada Constitution vests the district courts with final appellate jurisdiction in all cases arising in the municipal court") (Real Party in Interest's Answering Brief, 8). The District Court issued its Order of Affirmance on August 27, 2019. Thus, when *Andersen* was issued on September 12, 2019, only 16 days had passed, placing Petitioner's case well within the 90 day window.

Nevertheless, even if the District Court is not considered the "state court of last resort" for certiorari purposes, the second sentence of Rule 13 would then also apply. It states: "A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review." As applied to the instant case, if in fact the Nevada Supreme Court is the designated "state court of last resort" for purposes of Rule 13, Petitioner's case is subject to discretionary review by way of writ petition. "The decision to consider a petition for a writ of mandamus lies within this court's complete discretion." *City of Las Vegas v. Eighth Judicial Dist. Court of Nev.*, 405 P.3d 110, 112 (Nev. 2017); *Cote H. v. Eighth Judicial Dist. Court*, 124 Nev. 36, 39, 175 P.3d 906, 908 (2008).

As the instant writ complies with all applicable rules, and neither Respondent nor Real Party in Interest objected to the procedural availability of the instant Petition, it is presumptively properly filed. A Petition for Writ of Mandamus is, by its nature, a request that this Court exercise its discretionary review; therefore, the judgment of the lower state court (the District Court) is "subject to discretionary review by the state court of last resort," and a Petition for Certiorari is timely if filed within 90 days of this Court's decision on the instant Petition. As a result, depending on whether the commencement date begins with judgment from either the District Court or the Nevada Supreme Court, Petitioner's conviction would become final for

purposes of retroactivity on or about November 25, 2019 (90 days from the District Court judgment) or a time 90 days from the date this Court rules on the instant Petition. Regardless, Petitioner's conviction was not final when this Court issued *Andersen* on September 12, 2019.

Because Petitioner's conviction was not final when *Andersen* was decided, the law set forth in *Andersen* applies to this case and is not barred by principles of retroactivity. As applied to Petitioner's case, where the issue was properly preserved before the lower court, a writ of mandamus should issue to compel the District Court to apply *Andersen* and remand the case back to the lower court.

II. The Issue of Municipal Jurisdiction is Not Properly Before the Court and Should Not be Considered

The issue of Municipal Jurisdiction is not properly before this Court because it was not raised or considered by the lower court, nor was it raised by way of Appellant's Petition. Issues raised for the first time on appeal should not be considered, and Petitioner asks this Court to decline consideration of Real Party in Interest's fugitive argument. "Advisory mandamus on a legal issue not properly raised and resolved in district court does not promote sound judicial economy and administration, because the issue comes to us with neither a complete record nor full development of the supposed novel and important legal issue to be resolved." *Archon Corp. v. Eighth Judicial Dist. Court*, 407 P.3d 702, 709 (Nev. 2017).

It has long been held to be procedurally improper to raise issues for the first time that were not before the lower court, and they should not be considered. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981); *Archon Corp. v. Eighth Judicial Dist. Court*, 407 P.3d 702, 708 (Nev. 2017). See also, *Dermody v. City of Reno*, 113 Nev. 207, 210-11, 931 P.2d 1354, 1357 (1997) (providing that parties may not raise a new argument for the first time on appeal); *Pub. Emples. Benefits Program v. Las Vegas Metro. Police Dep't*, 124 Nev. 138, 150 n.32, 179 P.3d 542, 550 (2008).

These principles apply to petitions for extraordinary relief as well. The following excerpt, although lengthy, is highly illustrative.

> "A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). This rule is not absolute; nor is it so demanding that it outlaws citation of additional authority to support an argument incompletely or imperfectly presented in district court. But in the context of extraordinary writ relief, consideration of legal arguments not properly presented to and resolved by the district court will almost never be appropriate. See, *Califano v. Moynahan*, 596 F.2d 1320, 1322 (6th Cir. 1979) ("We decline to employ the extraordinary remedy of mandamus to require a district judge to do that which he was never asked to do in a proper way in the first place."); *United States v. U.S. Dist. Court for S. Dist of Cat*, 384 F.3d 1202, 1205 (9th Cir. 2004) ("[W]e will not find the district court's decision so egregiously wrong as to constitute clear error where the purported error was never brought to its attention."); *Ex parte Green*, 108 So. 3d 1010, 1013 (Ala. 2012) (refusing to hear an argument in a mandamus petition that was not raised in the district court).

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> Advisory mandamus is appropriate "when the issue presented is novel, of great public importance, and likely to recur." *United States v. Horn*, 29 F.3d 754, 769 (1st Cir. 1994). But it should issue only to address the rare question that is "likely of significant repetition prior to effective review,' so that our opinion would assist other jurists, parties, or lawyers." *In re Bushkin Assocs., Inc.*, 864 F.2d 241, 247 (1st Cir. 1989) (quoting *Nat'l Right to Work Legal Def. & Educ. Found, v. Richey*, 510 F.2d 1239, 1244, 167 U.S. App. D.C. 18 (D.C. Cir. 1975)). To efficiently and thoughtfully resolve such an important issue of law demands a well-developed district court record, including legal positions fully argued by the parties and a merits-based decision by the district court judge. See *Reno Hilton Resort Corp. v. Verderber*, 121 Nev. 1, 5-6, 106 P.3d 134, 136-37 (2005) (stressing the benefit of a fully developed district court record); *Dilliplaine v. Lehigh Valley Tr. Co.*, 457 Pa. 255, 322 A.2d 114, 116-17 (Pa. 1974) (noting that appellate consideration of arguments not presented to the district court makes the district court "merely a dress rehearsal," "erodes the finality of [district] court holdings," denies the district court the opportunity to avoid or correct its own error, and "encourages unnecessary appeals"). Entertaining an argument raised for the first time in this court also deprives the opposing party of the opportunity to "develop theories and arguments and conduct research on an issue that it otherwise would have had months or years to develop had the issue been raised in the [district] court." Robert J. Martineau, Considering New Issues on Appeal: The General Rule and the Gorilla Rule, 40 Vand. L. Rev. 1023, 1039 (1987). Advisory mandamus on a legal issue not properly raised and resolved in district court does not promote sound judicial economy and administration, because the issue comes to us with neither a complete record nor full development of the supposed novel and important legal issue to be resolved. *Archon Corp. v. Eighth Judicial Dist. Court*, 407 P.3d 702, 709 (Nev. 2017).

As noted above, the jurisdictional issue was neither raised nor addressed before the Henderson Municipal Court or the District Court in this case. It is raised for the first time in the Answering Brief filed by Real Party in Interest, and as such

was not properly raised for this Court's consideration. Other challenges that fully explore the argument and positions of the various parties on the merits are pending before the Municipal Courts as well as the Eighth Judicial District Court in light of *Andersen*. It would accomplish little to adjudicate the jurisdictional claim in this case, with no lower court record, when alternative cases that are fully articulating the jurisdictional component of *Andersen* are soon to be decided by the lower courts. Under the circumstances, Petitioner asks this Court not to consider the argument made in Real Party in Interest's Answering Brief as improperly raised for the first time.

CONCLUSION

For these reasons, Petitioner respectfully requests this Court grant his Petition and compel the Eighth Judicial District Court to vacate Petitioner's conviction and remand the case consistent with *Andersen*.

DATED this __2nd__ day of January 2020.

/s/ Michael N. Aisen
ADAM L. GILL, ESQ.
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Supreme Court of the State of Nevada by using the EFlex Electronic Filing system. I certify that the following parties or their counsel of record received by electronic means and by placing a copy in an envelope in the U.S. Mail, postage fully prepaid, addressed to:

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Aaron Ford, Attorney General
100 N. Carson Street
Carson City, Nevada 89701

DATED this 2nd day January, 2020.

By: *Jasmine Torres*
An employee working for Aisen, Gill & Associates

DECLARATION OF COUNSEL

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

MICHAEL N. AISEN, ESQ., being first duly sworn under oath, subject to the penalty for perjury pursuant to Nevada law, and in conformity with N.R.S. 53.045, hereby deposes and says:

1. I, MICHAEL N. AISEN, ESQ., am the attorney of record for the Defendant, ROMAN HILDT in the above-entitled matter.
2. I am an attorney duly licensed to practice before all Courts in the State of Nevada;
3. I make this Affidavit based upon facts within my own knowledge, save and except as to those matters alleged upon information and belief, and at to those matters, I believe them to be true.
4. I make this Reply in Support of Petition for Writ Habeas Corpus (Post-Conviction) or Alternatively for Writ of Mandamus.
5. I am more than eighteen (18) years of age and I am competent to testify as to the matters stated herein

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6. I have personal knowledge pertaining to the facts stated herein, or I have been informed of these facts and believe them to be true.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Michael N. Aisen
MICHAEL N. AISEN, ESQ.

Signed in conformity with N.R.S. 53.045 this
2nd day of January, 2020 in Las Vegas, Nevada.

CERTIFICATE OF COMPLIANCE

I, Michael N. Aisen, Esq., hereby certify that this petition for review by the Supreme Court pursuant to rule 40B 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: It has been prepared in a proportionally spaced typeface using Microsoft Office Word 2018 in 14 and Times New Roman font and contains 2,860 words.

DATED this 2nd day of January 2020.

/s/ Michael N. Aisen
MICHAEL N. AISEN, ESQ.
Nevada State Bar No. 11036