

IN THE SUPREME COURT OF THE STATE OF NEVADA

NERY GUSTAVO FONSECA,
Petitioner,

-vs.-

EIGHTH JUDICIAL DISTRICT COURT,
Crystal Eller, District Court Judge,
Respondent,

THE CITY OF NORTH LAS VEGAS,
Real Parties In Interest.

Case No.: Electronically Filed
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Elizabeth A. Brown
Clerk of Supreme Court
NLVMC Case No.: CR000143-20

IN REGARDS TO A MATTER IN THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA IN AND FOR CLARK COUNTY

THE HONORABLE CRYSTAL ELLER PRESIDING

PETITION FOR WRIT OF MANDAMUS

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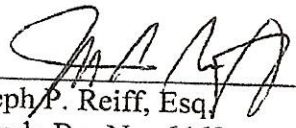
NOTICE OF FILING OF PETITION FOR WRIT OF MANDAMUS

To: The Eighth Judicial District Court Judge Crystal Eller:

To: The City of North Las Vegas:

YOU AND EACH OF YOU please take notice that the Petitioner, Nery Gustavo Fonseca, by and through his counsel Joseph P. Reiff, Esq., has filed a Petition for Writ of Mandamus in the Nevada Supreme Court.

Dated this 28th day of November 2021.



Joseph P. Reiff, Esq.
Nevada Bar No. 6469
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3001 E. Charleston Blvd., Suite A
Las Vegas, NV 89104
Attorney for Petitioner

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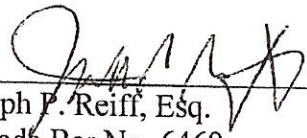
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NRAP 26.1 DISCLOSURE STATEMENT

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. There are no such persons and/or entities that are required to be disclosed that are associated with the Appellant's counsel. The undersigned, Joseph P. Reiff, Esq., is and was the sole counsel of record in the above-entitled action in both the North Las Vegas Municipal Court and Eighth Judicial District Court, and will be the only counsel appearing on this Petition.

Dated this 28th day of November 2021.



Joseph P. Reiff, Esq.
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Las Vegas, NV 89104
Attorney for Petitioner

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PETITION FOR WRIT OF MANDAMUS

Petitioner, NERY GUSTAVO FONSECA, respectfully submits his Petition for a Writ of Mandamus and requests that the Court GRANT a Writ of Mandamus compelling the Eighth Judicial District Court, the Honorable Crystal Eller, District Court Judge, to comply with the mandates of the Federal Courts and the Nevada Supreme Court in their interpretation of prior Constitutional precedent and to control the District Court's manifest abuse and/or capricious exercise of discretion.

I.

ROUTING STATEMENT

This case involves a question of first impression involving the United States and Nevada Constitutions and is therefore presumptively retained by the Supreme Court pursuant to NRAP 17(a)(11).

II.

RELIEF SOUGHT

The Petitioner, NERY GUSTAVO FONSECA, appearing by and through his counsel, Joseph P. Reiff, Esq., petitions this Court to issue a Writ of Mandamus pursuant to NRS 34.160 et seq., to compel the Eighth Judicial District Court Judge, Honorable Crystal Eller, to GRANT the Petitioner's Appeal in the above-entitled action.

III.

ISSUES PRESENTED

1. Was the District Court's denial of Mr. Fonseca's appeal based upon its holding that he misapplied the ruling in *Dettloff v. State* a manifest abuse of discretion?
2. Was the District Court's holding that Mr. Fonseca did not have a pre-arrest right to remain silent a manifest abuse and/or capricious exercise of discretion?

IV.

STATEMENT OF THE FACTS

On or about December 03, 2019, the Complainant, John Patino-Rios, herein Mr. Patino, alleged that Mr. Fonseca had committed a battery upon him. *Id.*, at 38-41. Detective Forsberg responded to the alleged incident and began an investigation. *Id.*, at 88-89. During the investigation, Det. Forsberg called Mr. Fonseca. *Id.*, at 90. Mr. Fonseca affirmatively advised Det. Forsberg that he was invoking his right to remain silent and his right to counsel. *Id.*

At trial, the Deputy City Attorney, during his opening statement, made reference to the fact that Mr. Fonseca had invoked his right to remain silent and to his right to counsel. *Id.*, at 29-30. Defense counsel objected to this reference. *Id.*, at 30. The Court sustained the objection, and the City Attorney retracted the

reference. *Id.* The Deputy City Attorney, during the direct examination of Det. Forsberg, elicited testimony multiple times about Mr. Fonseca invoking his right to remain silent and right to counsel. *Id.*, at 90-91. Further, Det. Forsberg testified that he established probable cause that Mr. Fonseca had committed the battery because he had invoked his right to remain silent and requested an attorney. *Id.*, at 91.

During cross-examination of Mr. Fonseca, the Deputy City Attorney again elicited testimony regarding Mr. Fonseca invoking his right to remain silent and right to counsel. *Id.*, at 107. Defense counsel objected, arguing that this line of questioning violated Mr. Fonseca's right to remain silent and right to counsel. *Id.*, 106-108. At first, the Court stated that, "if his answer -if the answer is based upon him exercising his right to remain silent at the time of the phone call, the Court certainly would take that into consideration." *Id.*, at 108. Defense Counsel continued to argue that the City's reference to Mr. Fonseca invoking his right to remain silent and right to counsel, was a violation of his rights because the City was using the information as evidence of his guilt. *Id.*, at 109. The Court then held that the City, "...can make the fact known that your client exercised his right to counsel on the record. Okay. But it's up to the Tier of Fact to determine whether that is even given any you know – you know any weight at all." *Id.* Ultimately, the Court overruled the objection, and the City was able to elicit

evidence that Mr. Fonseca invoked his right to remain silent and right to counsel as evidence that Mr. Fonseca was guilty of the battery. *Id.*, at 109-112.

During the City's closing argument, the Deputy City Attorney argued that Mr. Fonseca must be guilty because he refused to speak to the police by invoking his right to remain silent and right to counsel, inferring that a person who is not guilty would have talked to the police. *Id.*, at 119-120. The Deputy City Attorney argued that Mr. Fonseca refused to talk to the police, stating, "you can talk to my lawyer. Click." *Id.* Finally, in summing up the evidence, the City argued,

"He hit John Patino in the face with a metal baton. Edgar Medina saw it. Tried to break it up. And that's why he left the scene. *And that's why he didn't cooperate with the police and that's why he's guilty of one count of battery*, Your Honor."

Id. (emphasis added).

During the Court's summation of the evidence that it relied upon in making its decision, the Court considered evidence that Mr. Fonseca had invoked his prearrest right to remain silent and right to counsel. *Id.*, at 129. The Court stated,

"And that at – when – the detective stated that he started to ask him questions about whether he had, uh, attacked or hit Mr. Patino with any weapon at that moment. Uh. He stated that Mr. Fonseca stated, 'I'm not going to answer any more questions without – you know without speaking to my lawyer first... And that he terminated the phone call.'"

Id., at 128-130. The North Las Vegas Municipal Court Judge found Mr. Fonseca guilty of one count of misdemeanor battery. *Id.*, at 138.

On June 1, 2021, Mr. Fonseca filed his Appeal in the District Court. *Id.*, at 1-24. On appeal, Mr. Fonseca argued that his Constitutional right to retain counsel

and right to remain silent were violated when the Deputy City Attorney used evidence of his pre-arrest invocation to his right to retain counsel and right to remain silent as evidence of his guilt during its case in chief. *Id.* In arguing that his pre-arrest right to retain counsel was violated, Mr. Fonseca argued that *Dettloff v. Nevada*, 120 Nev. 588, 97 P.3d 586 (Nev. 2004), amongst other cases, controlled. *Id.*, 12-18. Mr. Fonseca also argued that cases such as *United States v. Okatan*, 728 F.3d 111 (2nd Cir. 2013) stand for the proposition that a defendant's pre-arrest right to remain silent cannot be used by the government in its case in chief as substantive evidence of guilt. *Id.*, 19-22.

On August 26, 2021, the Honorable Judge Crystal Eller heard oral argument by the parties. *Id.*, at 189-215 (generally). On September 28, 2021, the Court issued its minute order. *Id.*, at 216-217. In the Order, the Court held that Mr. Fonseca misapplied the holding in *Dettloff*, *supra.* *Id.*, at 231. The Court stated:

“Although correctly and fully cited, Appellant argues that *Dettloff*, *supra.*, prevents any reference, in Respondent's case-in-chief, to a defendant's retention of counsel as evidence of consciousness of guilt. However, Appellant misses a key qualifying clause: in and of itself. The full quote is: “We recognize Dettloff's right to hire counsel at any time and that the State may not refer in its case-in-chief to retention of counsel as, *in and of itself*, as evidence of consciousness of guilt.” *Id.*, at 599 (emphasis added). In other words, Respondent cannot use retention of counsel, in its case-in-chief, as the sole evidence of consciousness of guilt. This alone undermines Appellant's appeal, as he consistently ignores all other reasons for the detective to establish Probable Cause and the lower court rendering a ruling of guilty, focusing only on instances where retention of counsel are mentioned or referenced. *Dettloff* does not prevent retention of counsel from being a factor in finding guilt; it just cannot be evidence in and of itself, or the sole piece of evidence.”

Id.

The Court went on to analyze each of the four incidents Mr. Fonseca alleged violated his Constitutional rights. Id., at 231-234. In each of the incidents, the Court held that the actions of the City did not constitute a violation of Mr. Fonseca's Constitutional rights because the City was eliciting the information, not to prove guilt, but for a different permissible purpose. Id.

In resolving Mr. Fonseca's 5th Amendment claim, the Court held,

"It is fundamental criminal law that Miranda rights do not attach unless and until a defendant is in-custody/arrested and questioned on the subject matter of the crimes charged. Because Appellant's conversation with the Detective was on the phone, while Appellant was free to discontinue the questioning (which he ultimately did), there was no custodial interrogation to trigger his 5th Amendment rights. Further, any 5th Amendment privilege retained at trial was waived at trial was waived when Appellant took the stand to testify in his own defense."

Id., at 234-235.

V.

LEGAL ARGUMENT

I. THIS COURT SHOULD ISSUE A WRIT OF MANDAMUS TO CONTROL DISTRICT COURT JUDGE CRYSTAL ELLER'S MANIFEST ABUSE AND/OR CAPRICIOUS EXERCISE OF DISCRETION.

A. STANDARD FOR GRANTING MANDAMUS.

The decision to consider a writ of mandamus is within the court's complete discretion, and generally such a writ will not issue if the petitioner has a plain, speedy, and adequate remedy at law. NRS 34.170; *Brown v. Eighth Judicial Dist.*

Court of Nev., 415 P.3d 7, 9-10 (Nev. 2017); *Cote H. v. Eighth Judicial Dist. Court*, 124 Nev. 36, 39, 175 P.3d 906, 908 (2008). The court may issue a writ of mandamus where discretion has been manifestly abused or exercised arbitrarily or capriciously. NRS 34.160; *Andersen v. Eighth Judicial Dist. Court of Nev.*, 448 P.3d 1120, 1122 (Nev. 2019); *Redeker v. Eighth Judicial Dist. Court*, 122 Nev. 164, 167, 127 P.3d 520, 522 (2006), limited on other grounds by *Hidalgo v. Eighth Judicial Dist. Court*, 124 Nev. 330, 341, 184 P.3d 369, 377 (2008); *Brown v. Eighth Judicial Dist. Court of Nev.*, 415 P.3d 7, 9-10 (Nev. 2017); *Jones v. Eighth Judicial Dist. Court of State*, 330 P.3d 475, 480-81, 130 Nev. Adv. Op. 53 (Nev. 2014); *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 931-32, 267 P.3d 777, 779-80 (2011). A manifest abuse of discretion is a clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule. *Ibid.* A capricious exercise of discretion involves a decision that is contrary to the evidence or established rules of law. *Ibid.*

While the court generally does not consider a writ petition that seeks review of a district court decision made within the court's appellate jurisdiction, the court will do so where the petitioner demonstrates that the district court has exercised its discretion in an arbitrary or capricious manner or the petition presents a significant issue of statewide concern that would otherwise escape the court's review.

Andersen, 448 P.3d at 1122, citing *Amezcuca*, 130 Nev. at 47, 48, 319 P.3d at 603,

604 (internal quotation marks omitted); *Hildt v. Eighth Judicial District Court*, 483 P.3d 526 (Nev. 2021); see also *Redeker*, 122 Nev. at 167, 127 P.3d at 522; *Sparks v. Bare*, 132 Nev. Adv. Op. 43, 373 P.3d 864 (Nev. 2016).

B. APPLYING THIS STANDARD, MANDAMUS SHOULD ISSUE TO CONTROL THE DISTRICT COURT'S MANIFEST ABUSE AND/OR CAPRICIOUS EXERCISE OF DISCRETION.

1. The Nevada Supreme Court Should Exercise its Discretion and Review the District Court's Decision.

Mr. Fonseca is seeking review of the District Court's denial of his appeal from the North Las Vegas Municipal Court for the District Court's manifest abuse and/or capricious exercise of discretion. As such, he has no other plain, speedy and adequate remedy in the ordinary course of law. *Hildt v. Eighth Judicial Dist. Court of Nev.*, 483 P.3d 526, 529 (Nev. 2021); *Andersen*, 448 P.3d at 1122. See *Sellers v. Fourth Judicial Dist. Court*, 119 Nev. 256, 257, 71 P.3d 495, 496 (2003) (district court final appellate jurisdiction over cases arising in lower courts restricts a party's request for relief from the Nevada Supreme court to writ petitions).

Additionally, if this Court does not exercise its discretion, the District Court's abusive and/or capricious exercise of discretion will escape review. *Hildt*, 483 P.3d at 529; and see *Andersen*, 448 P.3d at 1122; *Sparks*, 132 Nev. Adv. Op. at ___, 373 P.3d at 866-867. Mr. Fonseca's Petition presents significant issues of statewide concern that would otherwise escape the court's review. *Andersen*, 448 P.3d at 1122, citing *Amezcu*, 130 Nev. at 47, 48, 319 P.3d at 603, 604 (internal

quotation marks omitted); *Hildt*, 483 P.3d at 529; see also *Redeker*, 122 Nev. at 167, 127 P.3d at 522 (explaining that this court may "exercise its discretion to grant mandamus relief where an important issue of law requires clarification"); *Sparks*, 132 Nev. Adv. Op. 43, 373 P.3d 864 (Nev. 2016).

Mr. Fonseca's Petition presents issues concerning a prosecutors' use of pretrial non-custodial invocation of the right to retain counsel and right to remain silent in their case in chief as evidence of consciousness of guilt. These issues implicate nearly every criminal case in Nevada and concern the Constitutional rights of every person accused of crime. Therefore, the Court should exercise its discretion, and review the District Court's denial of Mr. Fonseca's appeal. *Andersen*, 448 P.3d at 1122; *Amezcu*a, 130 Nev. at 47, 48, 319 P.3d at 603, 604; *Hildt*, 483 P.3d at 529; *Redeker*, 122 Nev. at 167, 127 P.3d at 522; *Sparks*, 132 Nev. Adv. Op. at ___, 373 P.3d at 866-867.

2. The District Court's Denial of Mr. Fonseca's Appeal Based Upon His "Misappling" the Holding in *Dettloff v. State* was a Manifest Abuse of Discretion.

On appeal, the Defense argued that the Nevada Supreme Court in *Dettloff v. State*, held that prosecutors may not use a defendant's invocation of his pretrial right to retain counsel as evidence of guilt in their case in chief. Appx., at 12-19, 181-183, 195-196. The City stated in their Brief, "The City agrees with Petitioner's references to numerous cases that state that the mere act of hiring an

attorney is not probative in the least of the guilt or innocence of defendants. *Id.*, at 156.

Despite the City agreeing that prosecutors cannot use a defendant's invocation of his pretrial right to counsel as evidence of guilt in their case in chief, the District Court held that *Dettloff*, was misapplied by the Defense. The District Court held,

"Although correctly and fully cited, Appellant argues that *Dettloff*, *supra.*, prevents any reference, in Respondent's case-in-chief, to a defendant's retention of counsel as evidence of consciousness of guilt. However, Appellant misses a key qualifying clause: in and of itself. The full quote is: "We recognize Dettloff's right to hire counsel at any time and that the State may not refer in its case-in-chief to retention of counsel as, *in and of itself*, as evidence of consciousness of guilt." *Id.*, at 599 (emphasis added). In other words, Respondent cannot use retention of counsel, in its case-in-chief, as the sole evidence of consciousness of guilt. This alone undermines Appellant's appeal, as he consistently ignores all other reasons for the detective to establish Probable Cause and the lower court rendering a ruling of guilty, focusing only on instances where retention of counsel are mentioned or referenced. *Dettloff does not prevent retention of counsel from being a factor in finding guilt; it just cannot be evidence in and of itself, or the sole piece of evidence.*"

Id., at 231 (emphasis added).

The District Court's ruling is a manifest abuse and/or capricious exercise of discretion. *Brown*, 415 P.3d at 9-10; *Jones*, 330 P.3d at 480-81, 130 Nev. Adv. Op. 53; *Armstrong*, 127 Nev. at 931-32, 267 P.3d at 779-80. The District Court's interpretation of *Detloff*, *supra.*, was clearly erroneous. In *Dettloff*, *supra.*, the Nevada Supreme Court held, "'We recognize Dettloff's right to hire counsel at any time and that the State may not refer in its case-in-chief to retention of counsel as, in and of itself, evidence of consciousness of guilt.'" *Dettloff*, 120 Nev. at ___, 97

P.3d at 599. In making this ruling, the Nevada Supreme Court cited the New Jersey Supreme Court case *State v. Marshall*, 586 A.2d 85, 148 (N.J. 1991). *Dettloff*, at 599 n.24. In *Marshall*, the New Jersey Supreme Court held “a prosecutor’s statement suggesting that retention of counsel is inconsistent with innocence impermissibly infringes on a defendant’s constitutional right to counsel.” *Marshall*, at 148. The Nevada Supreme Court, relying on *Marshall*, stated, “We note that the State committed misconduct in its closing rebuttal argument when it equated Dettloff’s retention of counsel with consciousness of guilt.” *Id.*

These statements make it clear that the District Court’s interpretation of *Dettloff* was clearly erroneous. Nowhere in *Dettloff*, supra., did the Nevada Supreme Court limit its ruling to mean “Respondent cannot use retention of counsel, in its case-in-chief, as the sole evidence of consciousness of guilt,” as the District Court held. Appx., at 231. Rather, *Dettloff*, supra., stands for the proposition that prosecutors may not “suggest,” “equate,” nor otherwise “refer” to a defendant’s invocation of his right to counsel in their case in chief “as evidence of guilt” regardless of what other evidence it may or may not have to prove guilt. *Dettloff*, at 599, n.24. This interpretation is in accordance with other courts’ interpretation of the rule. See *Bruno v. Rushen*, 721 F.2d 1193, 1195 (9th Cir. 1983) cert. denied, 469 U.S. 920 (1984) (holding that a prosecutor’s statement

“*suggesting*” that retention of counsel is inconsistent with innocence impermissibly infringes on a defendant’s constitutional right to counsel); *United States v. Daoud*, 741 F.2d 478, 481 (1st Cir. 1984) (same); and see cases cited in Mr. Fonseca’s Appendix at 13. Therefore, the Court should hold that the District Court’s interpretation of *Dettloff*, *supra.*, was a manifest abuse of discretion. *Brown*, 415 P.3d at 9-10; *Jones*, 330 P.3d at 480-81, 130 Nev. Adv. Op. 53; *Armstrong*, 127 Nev. at 931–32, 267 P.3d at 779–80.

The District Court also erroneously limited *Dettloff*’s holding to a prosecutor’s direct examination. Appx., at 231-234. In applying *Dettloff*, the District Court held, “that case [*Dettloff*] only applied to improper references made during Respondent’s case-in-chief, not its opening statements.” *Id.*, at 231. The District Court also failed to apply the rule to statements made by the City in closing arguments. *Id.*, at 234. The District Court held, “Although this is outside the purview of *Dettloff*, because it is in the closings and not Respondent’s case-in-chief, this is perhaps Appellant’s strongest example of a potential constitutional violation.” *Id.*, at 234. The District Court’s interpretation and application of *Dettloff*, was a manifest abuse of discretion. *Brown*, 415 P.3d at 9-10; *Jones*, 330 P.3d at 480-81, 130 Nev. Adv. Op. 53; *Armstrong*, 127 Nev. at 931–32, 267 P.3d at 779–80.

In *Dettloff*, the Nevada Supreme Court stated, “We note that the State committed misconduct in its closing rebuttal argument when it equated Dettloff’s retention of counsel with consciousness of guilt.” *Dettloff*, at 599 n.24. The statement by the Nevada Supreme Court makes it clear that prosecutors can violate the holding in *Dettloff*, during the prosecutor’s opening and closing arguments, and it is not limited to direct examination. *Dettloff*, 120 Nev. at ___, 97 P.3d at 599, n. 24. Therefore, the Court should hold that the District Court’s interpretation and application of *Dettloff* was a manifest abuse of discretion. *Brown*, 415 P.3d at 9-10; *Jones*, 330 P.3d at 480-81, 130 Nev. Adv. Op. 53; *Armstrong*, 127 Nev. at 931–32, 267 P.3d at 779–80.

Finally, the District Court’s holding that the City did not violate Mr. Fonseca’s constitutional rights by eliciting and/or referring to his retention of counsel as evidence of guilt was a capricious exercise of discretion. *Ibid.* On appeal, the Defense argued the City’s referencing of Mr. Fonseca’s invocation of his right to counsel violated the holding in *Dettloff* because the City was equating Mr. Fonseca’s invocation of his right to consciousness of guilt. *Id.*, at 13, 192-195. The Defense outlined four instances in which the City impermissibly suggested, referenced, equated, and/or inferred that Mr. Fonseca’s invocation of his right to counsel was evidence of his guilt. Appx., at 12-18. The Defense further argued that Mr. Fonseca was prejudiced by the City’s actions because the Municipal Court

Judge considered the City's references and/or inferences as evidence of Mr. Fonseca's guilt. *Id.*

First, the District Court held the City's referencing of Mr. Fonseca's invocation of the right to counsel during the City's opening statement as, "Respondent ... explaining the available evidence of the case (as a proper opening statement)." Appx., at 232. As argued above, this is clearly erroneous. Even though the District Court recognized that the City was "explaining" its evidence of guilt, i.e., Mr. Fonseca's invocation of his right to counsel, it still held that the City did not violate Mr. Fonseca's Sixth Amendment right to counsel. Appx., at 232. The District Court's finding is contrary to law and clearly erroneous because *Dettloff*, holds that prosecutors may not "suggest," "equate," nor otherwise "refer" to a defendant's invocation of his right to counsel "as evidence of guilt." *Dettloff*, at 599, n.24.

Second, the District Court found that the City's eliciting evidence of Mr. Fonseca's invocation of his right to counsel during direct examination of the Detective was for the purpose of challenging his credibility only. *Id.*, at 232-233. Far from eliciting credibility evidence, the City elicited a statement from the detective concerning Mr. Fonseca's invocation of his right to retain counsel and how the detective equated that evidence as establishing probable cause. Appx., at 14, 90-91. *Dettloff* teaches that this violates a defendant's Sixth Amendment

Constitutional right. *Dettloff*, at 599, n.24; and see *Bruno*, 721 F.2d at 1195, cert. denied, 469 U.S. 920 (1984); *Doaud*, 741 F.2d at 481.

Third, the District Court found that the City's eliciting evidence of Mr. Fonseca's invocation of his right to retain counsel during its cross examination of Mr. Fonseca was permissible "because Appellant provided prior testimony on the matter" and "was entitled to illicit [sic] testimony on whether or not [Appellant] provided information to the officer about the incident, alleged incidents, or about anything that happened that evening." *Id.*, at 233. The District Court's finding and ruling is clearly erroneous and contrary to law. First, there is no evidence in the record that Mr. Fonseca testified on direct examination by defense counsel about him invoking of his right to counsel. Appx., 95-105. Second, far from simply eliciting credibility evidence, the City specifically asked Mr. Fonseca, "And you also told the detective that you were not going to talk to him without consulting a lawyer. You told him to never call you again. And you hung up the phone on him. Correct?" Appx., at 107. This question does not elicit credibility evidence. *Dettloff*, at 599, n.24; *Bruno*, 721 F.2d at 1195; *Doaud*, 741 F.2d at 481 (same). Rather, it impermissibly suggests that because Mr. Fonseca invoked his right to counsel and right to remain silent, that Mr. Fonseca had a consciousness of guilt. *Ibid.* Therefore, the District Court's holding was a manifest abuse and/or

capricious exercise of discretion. *Brown*, 415 P.3d at 9-10; *Jones*, 330 P.3d at 480-81, 130 Nev. Adv. Op. 53; *Armstrong*, 127 Nev. at 931-32, 267 P.3d at 779-80.

Finally, the District Court found the City's reference to Mr. Fonseca invoking his right to counsel during the City's closing argument as permissible because,

"the context of this statement is a summary of the totality of the evidence against Appellant and his claims of being the victim. *Dettloff* requires Appellant's invocation to be, 'in and of itself,' evidence of consciousness of guilt. *Dettloff*, 120 Nev. at 599. [sic] Here, Respondent is arguing that Appellant is guilty because of ... [other evidence outlined by the District Court]. Thus, even if, Respondent was using Appellant's invocation as evidence of a consciousness of guilt, it was clearly not the only evidence of guilt. Consequently, *Dettloff* is not and could not be triggered."

Id., at 234.

The District Court's holding is contrary to law. *Dettloff*, 120 Nev. at ___, 97 P.3d at 599 n. 24. First, as argued above, *Dettloff*, *supra.*, did not hold that reference to a defendant's invocation of his right to counsel is a Constitutional violation only when it is the sole evidence of guilt. *Id.* Rather, the *Dettloff* Court held the prosecutor's reference to the defendant's invocation of his right to counsel was a Constitutional violation, but that *Dettloff* did not suffer any injury, "Because this allusion was brief and because the charge upon which Dettloff will remain convicted was clearly proved by his absence from the accident scene." *Dettloff*, 120 Nev. at ___, 97 P.3d at 599 n. 24. This conclusion is supported by the case authority cited by the *Dettloff* Court. There the Nevada Supreme Court cited to *Chapman v. California*, 386 U.S. 18, 23 (1967) (harmless error rule) and *Marshall*,

586 A.2d at 149, (holding a comment by the prosecutor was harmless beyond a reasonable doubt because the defendant testified that he had retained counsel and evidence of guilt was so persuasive that error could not have contributed significantly to the jury's determination of guilt). *Id.*

The facts in Mr. Fonseca's case are far different than those in *Dettloff*. Mr. Fonseca did not testify during direct examination that he invoked his right to counsel, nor did defense counsel comment on it, except to object. Further, the evidence against Mr. Fonseca was not so overwhelming that Mr. Fonseca was not prejudiced by the City's statements and arguments. The District Court found that the evidence supporting Mr. Fonseca's guilt was, "(1) inconsistencies and contradictions between other witnesses and Appellant; (2) the internal consistencies between all of the other witnesses, who were separated when giving their statements; (3) the injuries on the alleged aggressors; (3) [sic] Appellant's refusal to speak with the detective; and (4) [sic] Appellant's failure to make an indication that he was a victim in the subject altercation at the scene or anytime thereafter." Appx., at 234.

Unlike the violation in *Dettloff*, the City repeatedly relied upon evidence of Mr. Fonseca's invocation of his right to retain counsel and right to remain silent throughout every stage of trial to prove his guilt. One need only look to the Municipal Court's findings and decision to recognize the prejudice to Mr. Fonseca.

Appx., at 126-131. The District Court found that the Municipal Court relied upon six pieces of evidence. *Id.*, at 234. Of those six pieces of evidence relied upon, two pieces of evidence consisted of Constitutional violations, i.e., the violation of Mr. Fonseca's invocation of his right to retain counsel and the violation of Mr. Fonseca's right to remain silent. *Id.* Therefore, unlike in *Dettloff*, Mr. Fonseca was clearly prejudiced by the City's impermissible references to Mr. Fonseca's right to retain counsel because the Municipal Court Judge actually relied upon this evidence to find Mr. Fonseca guilty. See *Chapman v. State of California*, 386 U.S. 18, 24 (1967) (holding that prejudice is evident when there is a "reasonable possibility that the evidence complained of might have contributed to the conviction"), citing *Fahy v. State of Connecticut*, 375 U.S. 85, 86-87, 84 S.Ct. 229, 230 (1963). Therefore, this Court should issue the Writ of Mandamus reversing the District Court's order denying Mr. Fonseca's appeal and compelling the District Court to issue a new order granting the appeal, reversing Mr. Fonseca's conviction of one count of misdemeanor battery, and remanding the case back to the North Las Vegas Municipal Court. *Andersen*, 448 P.3d at 1122; *Amezcuca*, 130 Nev. at 47, 48, 319 P.3d at 603, 604; *Hildt*, 483 P.3d at 529; *Redeker*, 122 Nev. at 167, 127 P.3d at 522; *Sparks*, 132 Nev. Adv. Op. at ___, 373 P.3d at 866-867.

3. **The District Court's Denial of Mr. Fonseca's Right to Remain Silent Claim Was a Manifest Abuse and/or Capricious Exercise of Discretion.**

On appeal, Mr. Fonseca argued that his pre-arrest invocation of his right to remain silent was impermissibly used by the City during its case in chief as evidence of his guilt. Appx., at 19-22. During oral argument, Judge Eller asked counsel, "...we all agree that the Fifth Amendment right [to remain silent] exists whether you're in custody or not. It's just that you have to be Mirandized [sic] if you're in custody, correct?" Id., at 205-206. The City agreed that the Fifth Amendment right to remain silent attaches at all levels of police questioning. Id. The City argued, however, that Mr. Fonseca never invoked his right to remain silent when he spoke to the detective therefore the City was free to refer to Mr. Fonseca's subsequent silence as evidence of his guilt. Id. In resolving Mr. Fonseca's 5th Amendment claim, the Court held,

"It is fundamental criminal law that Miranda rights do not attach unless and until a defendant is in-custody/arrested and questioned on the subject matter of the crimes charged. Because Appellant's conversation with the Detective was on the phone, while Appellant was free to discontinue the questioning (which he ultimately did), there was no custodial interrogation to trigger his 5th Amendment rights. Further, any 5th Amendment privilege retained at trial was waived at trial when Appellant took the stand to testify in his own defense."

Id., at 234-235.

The District Court's holding is clearly erroneous for several reasons. First, the District Court's written decision is in conflict with the holding it made during oral

argument that the Fifth Amendment attaches at all levels of police questioning. *Id.*, at 205-206. Second, the District Court's holding is contrary to well established law. The Fifth Amendment right to remain silent attaches at any level of police questioning. See U.S. Const., Amend. V; *United States ex rel. Savory v. Lane*, 832 F.2d 1011, 1018 (7th Cir. 1987) ("The right to remain silent ... attaches before the institution of formal adversary proceedings"). While there is a split amongst the Federal Circuit Court of Appeals and State Supreme Courts, the majority, the First, Second, Fifth, Sixth, and Seventh Circuits prohibit the use of a defendant's pre-arrest invocation of the right to remain silent and subsequent silence as substantive evidence of guilt. See *Coppola v. Powell*, 878 F.2d 1562, 1568 (1st Cir. 1989); *United States v. Okatan*, 728 F.3d 111, 120 (2d Cir. 2013); *Ouska v. Cahill-Masching*, 246 F.3d 1036, 1049 (7th Cir. 2001); *Seymour v. Walker*, 224 F.3d 542, 560 (6th Cir. 2000); *United States v. Ashley*, 664 F.3d 602, 604-605 (2011). Therefore, this Court should find the District Court's decision was a manifest abuse and/or a capricious exercise of discretion.

The District Court also failed to resolve Mr. Fonseca's Nevada Constitutional claim on this issue. The Nevada Supreme Court has yet to rule whether the Nevada Constitution's right to remain silent prohibits a prosecutor from using a defendant's invocation of the right to remain silent and subsequent silence as substantive evidence of guilt. Nev. Const., Art. 1, Sec. 8 (1). Therefore, the

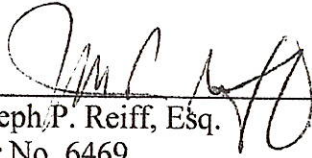
Nevada Supreme Court should resolve this issue; find that the District Court's failure to resolve this issue was a manifest abuse and/or capricious exercise of discretion; and issue the Writ of Mandamus.

VI.

CONCLUSION

WHEREFORE, the Nevada Supreme Court should order that the Writ of Mandamus issue reversing the District Court's order denying Mr. Fonseca's appeal and compelling the District Court to issue a new order granting the appeal, reversing Mr. Fonseca's conviction of one count of misdemeanor battery, and remanding the case back to the North Las Vegas Municipal Court. *Andersen*, 448 P.3d at 1122; *Amezcu*a, 130 Nev. at 47, 48, 319 P.3d at 603, 604; *Hildt*, 483 P.3d at 529; *Redeker*, 122 Nev. at 167, 127 P.3d at 522; *Sparks*, 373 P.3d at 866-867.

Dated this 28th day of November 2021.




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Attorney for Petitioner

VERIFICATION

I hereby verify that I am the attorney of record in above reference action in the lower courts and that the facts stated within this petition are within my knowledge and are true and correct to the best of my knowledge.

Dated this 28th day of November 2021.



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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition complies with the formatting requirements of [NRAP 32\(a\)\(4\)](#), the typeface requirements of [NRAP 32\(a\)\(5\)](#) and the type style requirements of [NRAP 32\(a\)\(6\)](#) because this brief has been prepared in a proportionally spaced typeface using Microsoft 365 Word in 14 point “Times New Roman.”

2. I further certify that this petition complies with the page- or type-volume limitations of [NRAP 21\(d\)](#) because, excluding the parts of the brief exempted by [NRAP 32\(a\)\(7\)\(C\)](#), it contains 5,271 words, which is less than 7000 word limit.

3. Finally, I hereby certify that I have read this petition, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular [NRAP 28\(e\)\(1\)](#), which requires every assertion in the petition regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying petition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 28th day of November 2021.



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CERTIFICATE OF SERVICE

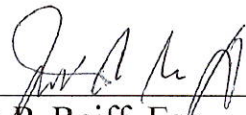
I hereby certify that I did serve a true and correct copy of the Petitioner's
Petition for Writ of Mandamus on the Respondent and Real Parties In Interest via
electronic mail to:

Micaela R. Moore, Esq.
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and

Crystal J. Eller
District Court Judge
Eight Judicial District Court
dept19lc@clarkcountycourts.us

Dated this 24 day of November 2021.



Joseph P. Reiff, Esq.