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IN THE SUPREME COURT OF NEVADA

STATE OF NEVADA

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Elizabeth A. Brown
Clerk of Supreme Court

JESUS NAJERA,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT; THE HONORABLE CRYSTAL ELLER,

Respondents,

STATE OF NEVADA,

Real Party in Interest.

S. Ct. No.:

DIST. CT. NO. C-21-356361-1

PETITION FOR WRIT OF MANDAMUS

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CRYSTAL ELLER
DISTRICT COURT JUDGE
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Docket 83923 Document 2021-35836

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IN THE SUPREME COURT OF NEVADA

STATE OF NEVADA

JESUS NAJERA, Petitioner, vs. THE HONORABLE CRYSTAL ELLER, EIGHTH JUDICIAL DISTRICT COURT JUDGE, DEPT. NO. 19, Respondent, STATE OF NEVADA, Real Party in Interest.	S. Ct. No.: DIST. CT. NO. C-21-356361-1

PETITION FOR WRIT OF MANDAMUS

COMES NOW Defendant, JESUS NAJERA, through his attorney of record, MICHAEL D. PARIENTE, ESQ. and JOHN G. WATKINS, ESQ., Of

Counsel, and files the instant Petition for Writ of Mandamus requesting this Court to reverse District Court Judge Chrystal Eller's Order allowing the State to file its Grand Jury Return 44 days after it was due without seeking leave of the District Court as required by EDCR 2.25.

DATED this 15th day of December, 2021.

Respectfully submitted,

THE PARIENTE LAW FIRM, P.C.

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NRAP 26.1 DISCLOSURE STATEMENTS

The attorneys representing Appellant Jesus Najera herein state, "there is no such corporation" referred to in NRAP 26.1.

ROUTING STATEMENT

Petitioner Jesus Najera ("Najera") believes his case is presumptively assigned to the Nevada Court of Appeals but should be decided by the Nevada Supreme Court pursuant to NRAP 17(a)(11) & (12).[1]

Najera involves the issue of whether a District Court can ignore the plain language of its own Eighth Judicial District Court rule, specifically EDCR 2.25, and allow the State to file a Return on a Writ of Habeas Corpus 44 days late without seeking leave to file it late and a determination of whether the delay was excusable neglect as mandated by EDCR 2.25. This

---

1. NRAP Rule 17 states in relevant part:

(a) Cases Retained by the Supreme Court. The Supreme Court shall hear and decide the following:

…….

(11) Matters raising as a principal issue a question of first impression involving the United States or Nevada Constitutions or common law; and

(12) Matters raising as a principal issue a question of statewide public importance…

issue is one of first impression and of statewide public importance because allowing the District Court's ruling to stand makes a mockery of Eighth Judicial District Court rules and permits a District Court judge to ignore the plain meaning of the EDCR rules.

STATEMENT OF THE CASE

On July 4, 2021, Najera filed his Petition for Writ of Habeas Corpus. Petitioner's Appendix (PA) 3-40. On July 20, 2021, the district court entered an Order requiring the State to respond to Mr. Najera's Petition for Writ of Habeas Corpus by September 20, 2021. PA 41. The State filed its Return, albeit 44 days late, on November 3, 2021. PA 42-64.

In its Return, the State admits their brief was due September 20, 2021. "Parties agreed to extend the State's date to file the Return (September 20, 2021) …" PA 44.

On November 8, 2021, Najera filed a Motion to Strike the State's Return as untimely. PA 65-73 The State had two months to file its Return timely. They did not. Instead, the State filed its Return on November 3, 2021 – ***over six weeks after it was due***. Najera argued the State's Return must be struck as it was filed in violation of Eighth Judicial District Court (EDCR) 2.25, Extending time, which reads as follows:

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Rule 2.25. Extending time.

(a) Every motion or stipulation to extend time shall inform the court of any previous extensions granted and state the reasons for the extension requested. ***A request for extension made after the expiration of the specified period shall not be granted unless the moving party, attorney or other person demonstrates that the failure to act was the result of excusable neglect.*** Immediately below the title of such motion or stipulation there shall also be included a statement indicating whether it is the first second, third, etc., requested extension.

(b) Ex parte motions for extension of time will not ordinarily be granted. When, however, a certificate of counsel shows good cause for the extension and a satisfactory explanation why the extension could not be obtained by stipulation or on notice, the court may grant, ex parte, an emergency extension for only such a limited period as may be necessary to enable the moving party to apply for a further extension by stipulation or upon notice, with the time for hearing shortened by the court.

(boldness and italics added).

The plain language of ECDR 2.25 requires the dilatory party to file a motion and overcome the delay by demonstrating excusable neglect.

This Court in *In re Est. of Black*, 132 Nev. 73, 367 P.3d 416 (2016) held EDCR 2.25 requires district courts must find excusable neglect in order to grant an extension after a deadline is missed. "Whether extending time is appropriate based on ***excusable neglect*** is a factual inquiry that the district court *must* undertake," *citing Moseley v. Eighth Judicial Dist. Court,* 124 Nev. 654, 668, 188 P.3d 1136, 1146 (2008). *Id*., 132 Nev. at 78. (boldness and italics added.) "'Must' is mandatory, as distinguished from the permissive 'may.'" *In re Nev.*

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State Eng'r Ruling No. 5823, 128 Nev. 232, 239, 277 P.3d 449, 454 (2012). The State did not seek an extension under EDCR 2.25, thus the State was not entitled to any relief under EDCR 2.25.

The State's return was 44 days late. The State never filed the required request for extension. The State was given 60 days to file its Return which became due on September 20, 2021. The State's delay and its improper attempt to file its dilatory Return is inexcusable and a blatant disregard of EDCR 2.25 and the District Court's Order entered July 20, 2021. Since the State did not comply with EDCR 2.25, the District Court was legally bound to strike the State's dilatory Return.

Instead, the visiting District Court judge sitting for Judge Chrystal Eller adopted Judge Eller's position and ignored EDCR 2.25 and denied Najera's Motion to Strike the State's Return, stating:

> THE COURT: Well, I can tell you that it's Judge Eller's position and which I'm going to adopt that excusable neglect in filing the motion late if there's no prejudice to the Defendants would justify her filing those late, so I'm going to deny the motion to strike."
>
> PA 77.

***

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THE COURT: Well, I find no prejudice –

PA 88.

The District Court's consideration of "prejudice" is irrelevant to EDCR 2.25 because that rule mandates the district court *cannot* grant an extension by the dilatory party in violation of a court's deadline without first demonstrating the failure to act was the result of excusable neglect. That was not done. Again, EDCR 2.25 explicitly states:

> A request for extension made after the expiration of the specified period *shall not be granted* unless the moving party, attorney or other person *demonstrates that the failure to act was the result of excusable neglect. (Italics added).*

I.

LAW AND ARGUMENT

A.

SINCE THE DISTRICT COURT IGNORED EDCR 2.25

a. EDCR 2.25 IS A DISTRICT COURT RULE THAT LITIGANTS, NOR THE COURTS, ARE PERMITTED TO DISREGARD.

A. Mandamus is appropriate:

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A writ of mandamus is available ". . . to control a manifest abuse or arbitrary or capricious exercise of discretion. . . ." *State v. Dist. Ct. (Armstrong)* (citing *Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. at 603-604), 127 Nev. at 931. An exercise of discretion is considered arbitrary if it is "founded on prejudice or preference rather than on reason" and capricious if it is "**contrary to the evidence or established rules of law**." *State v. Dist. Ct. (Armstrong)*, 127 Nev. at 931-932 (quoting definitions of Arbitrary and Capricious, *Blacks Law Dictionary* 119 (9th ed. 2009) (emphasis added). A manifest abuse of discretion is "[a] clearly erroneous interpretation of law or a clearly erroneous application of law or **rule**." *State v. Dist. Ct. (Armstrong)*, 127 Nev. at 931-932. (cites omitted. Emphasis added.) *See also*, *Walker v. Second Judicial Dist. Court,* 136 Nev. Adv. Op. 80, 476 P. 3d 1194, 1197 (2020) (stating that "mandamus is appropriate … where the law is overlooked.")

Generally, an extraordinary writ will not issue if the petitioner has a plain, speedy and/or adequate remedy in the ordinary course of the law, but Najera has no such remedy. However, if this Court were to deem otherwise, there are exceptions to this general rule. In *Williams v. District Court*, the

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Court entertained the writ of mandamus even though there was an adequate remedy at law stating,

> Thus, we may consider writ petitions challenging the admission or exclusion of evidence when "**an important issue of law needs clarification and public policy is served by this court's invocation of its original jurisdiction**". *Sonia F. v. Dist. Ct., 125 Nev. 38*,----, 215 P.3d 705, 707 (2009) (quoting *Mineral County*, 117 Nev. at 243, 20 P.3d at 805), or when the issue is "***one of first impression and fundamental public importance***." *County of Clark v. Upchurch*, 114 Nev. 749, 753, 961 P.2d 754, 757 (1998). We may also consider whether resolution of the writ petition will mitigate or resolve related or future litigation. *Id*. ***Ultimately, however, our analysis turns on the promotion of judicial economy.*** *Smith v. District Court*, 113 Nev. 1343, 1345, 950 P.2d 280, 281 (1997) ("***The interests of judicial economy. . . will remain the primary standard by which this court exercises its discretion.***")

Id., 127 Nev. at 525. (Boldness and italics added.)

See also, Hildt, supra, ("We will also exercise our discretion 'where the petition present[s] a significant issue of statewide concern that could otherwise escape our review.'") *Id.,* 137 Nev. Adv. Op. No. 12 at 4. (cite omitted).

This is an issue of first impression and fundamental public importance because it affects whether lawyers in the Eighth Judicial District Court need to comply with a court's rules. Additionally, the interests of judicial economy are front and center here. This is because if this Court doesn't grant the instant petition for writ of mandamus and order the District Court to

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reverse its denial of the Najera's Motion to Strike the State's Return to his Petition for Writ of Habeas Corpus because it is 44 days late, Najera could be convicted at trial, the conviction would be reversed on appeal because the Court would find the Motion to Strike should have been granted. This would result in Najera's Petition for Writ of Habeas Corpus being granted because the State's return would be properly struck leading to the State confessing error. "[W]e elect to treat respondents' failure to file their answering brief as a confession of error." NRAP 31(c); *Paso Builders, Inc. v. Hebard*, 83 Nev. 165, 426 P.2d 731 (1967); *Toiyabe Supply Co. v. Arcade*, 74 Nev. 314, 330 P.2d 121 (1958). *Kitchen Factors, Inc. v. Brown*, 91 Nev. 308, 308, 535 P.2d 677, 677 (1975).

B. Judge Eller's Order denying Najera's Motion to Strike is fundamental legal error:

This Court in *In re Est. of Black*, 132 Nev. 73, 367 P.3d 416 (2016) held EDCR 2.25 requires district courts must find excusable neglect in order to grant an extension after a deadline is missed. "Whether extending time is appropriate based on ***excusable neglect*** is a factual inquiry that the district court *must* undertake," *citing Moseley v. Eighth Judicial Dist. Court,* 124 Nev. 654, 668, 188 P.3d 1136, 1146 (2008). *Id*., 132 Nev. at 78. (boldness and italics added.) "'Must' is mandatory, as distinguished from the permissive 'may.'" *In re Nev.*

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State Eng'r Ruling No. 5823, 128 Nev. 232, 239, 277 P.3d 449, 454 (2012). The State did not seek an extension under EDCR 2.25, thus the State is not entitled to any relief under EDCR 2.25. The district court's ruling never even applied EDCR 2.25 to its analysis and its failure to do so was fundamental error warranting reversal.

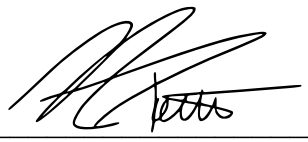
CONCLUSION

The State's return was 44 days late. The State never filed the required request for extension. The State was given 60 days to file its Return which became due on September 20, 2021. The State's delay and its improper attempt to file its dilatory Return is inexcusable and a blatant disregard of EDCR 2.25 and the court ordered deadline entered July 20, 2021. Since the State did not complied with EDCR 2.25, the District Court must be reversed, and Najera's instant Petition for Writ of Mandamus should be granted ordering Judge Eller to strike the State's dilatory Return.

DATED this 15th day of December, 2021.

Respectfully submitted,

THE PARIENTE LAW FIRM, P.C.



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Attorneys for Petitioner

VERIFICATION

Under penalty of perjury, the undersigned declares that in the foregoing Petition and knows the contents thereof; that Petition is true of the undersigned's own knowledge, except as to those matters stated on information and belief, and as to such matters the undersigned believes them to be true.

DATED this 15th day of December, 2021.

Respectfully submitted,

MICHAEL D. PARIENTE, ESQ.
Attorney for Petitioner
JOHN G. WATKINS, ESQ.

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:

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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 either:

[] Proportionally spaced, has a typeface of 14 points or more, and contains 2,611 words; or

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[] Does not exceed 51 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 it to be found. I understand that I may be

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subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rule of Appellant Procedure.

Dated this 15th day of December, 2021.

Michael D. Pariente, Esquire

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the law firm of THE PARIENTE LAW FIRM, P.C., and that on the date shown below, I caused service to be completed by:

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a true and correct copy of the attached document addressed to:

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District Attorney
Clark County District
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Las Vegas, NV 89101

Judge Crystal Eller
District Court Judge Dept. 19
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DATED this 15th day of December, 2021.

Chris Barden, Paralegal