IN THE SUPREME COURT OF THE STATE OF NEVADA

JESUS NAJERA Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE CRYSTAL ELLER, Respondents, STATE OF NEVADA, Real Party in Interest.	CASE NO: 83923

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Elizabeth A. Brown
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ANSWER TO PETITION FOR WRIT OF MANDAMUS

COMES NOW, the State of Nevada, Real Party in Interest, by STEVEN B. WOLFSON, District Attorney, through his Deputy, John Afshar, on behalf of the above-named respondents and submits this Answer to Petition for Writ of Mandamus and in obedience to this Court's order filed January 12, 2022, in the above-captioned case. This Answer is based on the following memorandum and all papers and pleadings on file herein.

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Dated this 28th day of January, 2022.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar # 001565

BY *<u>/s/ John Afshar</u>*
JOHN AFSHAR
Deputy District Attorney
Nevada Bar #014408
Office of the Clark County District Attorney

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On May 27, 2021, the Grand Jury indicted Petitioner Jesus Najera ("Najera") on two counts of Trafficking in Controlled Substance, one count of Conspiracy to Violate Uniform Controlled Substances Act, and one count of Possession of Controlled Substance. Petitioner's Appendix ("PA") 59-64.

Najera filed a pre-trial petition for writ of habeas corpus on July 4, 2021. PA 1. On July 20, 2021, the district court set a briefing schedule and ordered the State to respond by September 20, 2021, Najera to file any reply by October 20, 2021, and set a hearing date on November 19, 2021. PA 41. The State filed a Return on November 3, 2021. PA 42.

Najera filed a Motion to Strike State's Return As Untimely ("Motion") on November 8, 2021. PA 65-73. The Honorable J. Charles Thompson, District Court Judge, denied the Motion on November 23, 2021. PA 74-90. A written order denying the Motion was filed on January 17, 2022. Petitioner's Supplemental Appendix ("PSA") 3-4.

Najera filed a Writ of Mandamus in this Court on December 16, 2021. On January 12, 2022, this Court ordered the State to answer the Writ and address whether mandamus relief is proper. Order Directing Supplementation of Appendix with Written Order, Directing Answer, January 12, 2022 at 2. The State's Answer

follows.

SUMMARY OF THE ARGUMENT

This Court should refuse to entertain Najera's Petition because he has a plain, speedy, and adequate remedy at law by way of an appeal from a Judgment of Conviction if the matter proceeds to trial and Najera is convicted. Najera's asserted justification for this Court's "extraordinary intervention" is inadequate, as the rule asserted is inapplicable to the instant case, has been superseded if it ever were applicable, and there is no evidence that the issue is of statewide public importance even if the rule were applicable and still in effect. Najera also fails to demonstrate that he has been aggrieved by the district court's denial of his motion to strike, as his underlying habeas petition has not been ruled upon, and he fails to demonstrate that the district court is required to strike a late pre-trial habeas reply under the rule even if it were applicable.

ARGUMENT

I. THIS COURT SHOULD NOT ENTERTAIN NAJERA'S CHALLENGE TO THE DISTRICT COURT'S DENIAL OF HIS MOTION IN A MANDAMUS PETITION

This Court has explained that "[e]xtraordinary relief should be extraordinary." Walker v. Second Jud. Dist. Ct. in & for Cty. of Washoe, 476 P.3d 1194 (2020). Mandamus relief exists only where there is a "legal duty, and compels its performance where there is either no remedy at law or no adequate remedy." Id.

"The petitioner must show a legal right to have the act done which is sought by the writ; it must appear that the act which is to be enforced by the mandate is that which it is the plain legal duty of the respondent to perform, without discretion on his part either to do or refuse; [and] that the writ will be availing as a remedy, and that the petitioner has no other plain, speedy, and adequate remedy." Id. This Court further clarified:

> "Where a district court *is* entrusted with discretion on an issue, the petitioner's burden to demonstrate a clear legal right to a particular course of action by that court is substantial; we can issue traditional mandamus only where the lower court has manifestly abused that discretion or acted arbitrarily or capriciously. … traditional mandamus relief does not lie where a discretionary lower court decision "result[s] from a mere error in judgment"; instead, mandamus is available only where "the law is overridden or misapplied, or when the judgment exercised is manifestly unreasonable or the result of partiality, prejudice, bias or ill will. Were we to issue traditional mandamus to "correct" any and every lower court decision, we would substitute our judgment for the district court's, subverting its "right to decide according to its own view of the facts and law of a case which is still pending before it" and ignoring that there would almost always be "an adequate remedy for any wrongs which may be done or errors which may be committed, by appeal or writ of error.""

Id. at 1197. Where an alternative legal remedy exists, this Court does not entertain mandamus because it is preferable to review the lower Court's decision when the entire record is available, and restraining from premature intervention circumvents the "inconvenience and confusion which would result from allowing litigants to resort to the appellate courts for correction of errors in advance of opportunity on

the part of the lower court to correct its errors before final judgment and upon motion for new trial." Id.

Najera asserts that the district court was required to strike an untimely response to a pre-trial habeas petition under EDCR 2.25. Writ at 8-11. This assertion is incorrect for several reasons.

First. EDCR 2.25 is a *civil* rule of practice, which Najera attempted to apply without reason or explanation in a *criminal* matter. EDCR 2.25; PA 67-68. In his Motion below, Najera quoted EDCR 2.25 and several cases interpreting it, but provided no authority whatsoever that a civil rule has any bearing on a criminal matter or why the State would be required to comply with an apparently inapplicable rule. PA 67-68. Najera's Writ fares no better, baldly asserting that the State and Court were required to comply with a civil rule in a criminal matter without any explanation or authority demonstrating why. Writ at 11-12. Both In re Est. of Black, 132 Nev. 73, 367 P.3d 416, (2016), and Moseley v. Eighth Jud. Dist. Ct. ex rel. Cty. of Clark, 124 Nev. 654, 188 P.3d 1136 (2008), cited by Najera both below and in his Writ, are civil cases to which a civil rule would naturally apply. Najera has not supplied, and the State cannot locate, any case in which EDCR 2.25 has ever been applied to a criminal matter, nor is there any apparent reason why it should be. A party seeking review bears the responsibility "to cogently argue, and present relevant authority" to support his assertions. Edwards v. Emperor's Garden Restaurant, 122

Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006); Dept. of Motor Vehicles and Public Safety v. Rowland, 107 Nev. 475, 479, 814 P.2d 80, 83 (1991) (defendant's failure to present legal authority resulted in no reason for the district court to consider defendant's claim); Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (an arguing party must support his arguments with relevant authority and cogent argument; "issues not so presented need not be addressed"); Randall v. Salvation Army, 100 Nev. 466, 470-71, 686 P.2d 241, 244 (1984) (court may decline consideration of issues lacking citation to relevant legal authority); Holland Livestock v. B & C Enterprises, 92 Nev. 473, 533 P.2d 950 (1976) (issues lacking citation to relevant legal authority do not warrant review on the merits).

Second, if EDCR 2.25 *were* applicable to criminal procedure, it is a defunct rule. The Nevada Rules of Criminal Procedure "supersede and replace any local district court rules concerning criminal actions." Nev.R.Cr.P. 1. (adopted March 1, 2021.) The text of this rule appears to supplant not just local district court rules *of criminal procedure*, but any rules *concerning criminal actions*. Najera asserted that EDCR 2.25 required the district court to strike a response in a criminal pre-trial habeas petition and, if he were right, EDCR 2.25 was "supersede[d] and replace[d]" by the Nevada Rules of Criminal Procedure some nine months before he filed his Motion citing it as authority. Accordingly, if EDCR ever did apply to criminal actions, it does not now and did not at the time Najera filed his Motion. Najera did

not below, and does not here, proffer any other authority as to why the district court should have granted his Motion.

Third, if EDCR 2.25 were still in effect and were applicable to a criminal matter, Najera *still* fails to demonstrate that the district court was required to grant his Motion. EDCR 2.25 explains what form a "motion or stipulation to extend time" should take and what is required when one is filed. It does not require a district court to strike an untimely pleading – it does not address untimely pleadings at all. Even if the authority Najera cited explaining EDCR 2.25 were applicable, the only thing *that* authority requires is that a district court undertake a factual inquiry as to whether there is excusable neglect to permit an extension of time. Black, 132 Nev. at 78; Moseley, 124 Nev. at 668. The district court listened to arguments by counsel and "found excusable neglect in the State filing a late Return." PA 75-90; PSA at 3-4. Thus, the district court undertook the only action the rule required it to take. Najera does not supply, and the State has not found, any case which even hinted at the prospect that EDCR 2.25 requires a district court to strike an untimely pleading.

Mandamus relief is inappropriate because EDCR 2.25 is not applicable to criminal matters, it has been superseded and replaced if it is, and the district court undertook the only action required of it even if the rule were applicable. Under none of those circumstances is "extraordinary relief" warranted.

Najera fails to explain why an appeal from a judgment of conviction, if Najera

were convicted, is not a sufficient remedy. He recognizes that this could happen, but also claims without explanation that he "has no such remedy." Writ at 9-11. Najera also argues that this Court should entertain the writ because it's a matter of fundamental importance but fails to demonstrate that is so. Writ at 10. *At most*, Najera's Writ challenges whether the district court erred in applying a local rule to his case. "[M]andamus or prohibition is an extraordinary remedy, not a means for routine correction of error." State v. Eighth Jud. Dist. Ct. ex rel. Cty. of Clark, 121 Nev. 225, 227, 112 P.3d 1070, 1072 (2005). Mandamus is "not a substitute for an appeal" and should not "be a routine litigation practice." Archon Corp. v. Eighth Jud. Dist. Ct. in & for Cty. of Clark, 133 Nev. 816, 819, 407 P.3d 702, 706 (2017). There is nothing extraordinary about Najera's challenge, and accordingly this Court should not entertain it in mandamus.

II. EVEN IF EDCR 2.25 APPLIED, THE DISTRICT COURT REASONABLY ALLOWED THE FILING OF A LATE RETURN

Najera's brief complaint with the district court's decision is that 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." Writ at 12. He faults the district court for "ignore[ing] EDCR 2.25" and argues that the district court was "legally bound to strike the State's dilatory Return." Writ at 7.

For the reasons stated in Section I, *supra*, the district court *should have* ignored EDCR 2.25 because it is inapplicable or superseded. Najera's assertion that

the district court was required to strike the State's Return is unsupported by any authority, including the cases he cited interpreting EDCR 2.25. In fact, the cases cited by Najera support the district court's decision to allow the filing of a late return. Black held that the district court erred because the rules "must be liberally construed ... to promote and facilitate the administration of justice" and support "the basic underlying policy to have each case decided upon its merits." In re Est. of Black, 132 Nev. at 77–78 (citing EDCR 1.10 and Hotel Last Frontier Corp. v. Frontier Props., Inc., 79 Nev. 150, 155, 380 P.2d 293, 295 (1963).) Najera's habeas petition had not (and apparently *has not*) yet been ruled upon, but when it is it will presumably be ruled upon on the merits. Najera attempted to use EDCR 2.25 as a sword under the belief that if the district court struck the State's Return, it "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." Writ at 11. Najera intends to use EDCR 2.25 to *prevent* a matter from being heard on the merits in contravention of how the rules "must be … construed" and the "basic underlying policy" of the rules. Even assuming the rule were applicable, its misuse in such a manner should not be countenanced.

Moreover, Najera's belief as to the consequences of a struck return are also flawed – the district court is required to determine whether Najera's habeas petition has any merit even if the State elected not to file a return at all. Warden, Nevada

State Prison v. O'Brian, 93 Nev. 211, 212, 562 P.2d 484, 485 (1977) ("It has been held that default judgments in habeas corpus proceedings are not available as procedure to empty state prisons. … See Marshall v. Geer, 140 Colo. 305, 344 P.2d 440, 442 (1959), which held that the court 'should not blindly and arbitrarily release a prisoner, not entitled to release, because of a late return and answer or even because of total lack of a return or answer.'")(cleaned up); Housewright v. Powell, 101 Nev. 736, 737, 710 P.2d 73, 74 (1985) (citing the same in the post-conviction habeas context.)

Najera cited only an inapplicable, potentially defunct, rule to support a motion to strike (which the rule does not address, much less require) a Return under the mistaken belief that he could prevent a determination on the merits by using the rule in contravention of how it must be construed and public policy. The district court declined to strike the Return. The district court considered whether there was excusable neglect for the late filing of the Return and found that there was. It considered whether Najera was prejudiced by the late filing of the return, and found he was not. Nothing in those decisions violated any legal requirements or constituted an abuse of discretion. Accordingly, Najera's Writ should be denied.

CONCLUSION

Based on the foregoing, the State respectfully requests that Najera's Petition for Writ of Mandamus be DENIED.

Dated this 28th day of January, 2022.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ John Afshar*
JOHN AFSHAR
Deputy District Attorney
Nevada Bar #014408
Office of the Clark County District Attorney

AFFIDAVIT

I certify that the information provided in this mandamus petition is true and complete to the best of my knowledge, information and belief.

Dated this 28th day of January, 2022.

BY */s/ John Afshar*
JOHN AFSHAR
Deputy District Attorney
Nevada Bar #014408
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155
(702) 671-2750

CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this Answer to Mandamus Writ complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the type-volume limitations of NRAP 21(d) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 2,350 words and 191 lines of text.
3. **Finally, I hereby certify** that I have read this Answer to Mandamus Writ, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 28th day of January, 2022.

Respectfully submitted

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ John Afshar*
JOHN AFSHAR
Deputy District Attorney
Nevada Bar #014408
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on January 28, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
Nevada Attorney General

MICHAEL D. PARIENTE, ESQ.
JOHN GLENN WATKINS, ESQ.
Counsel for Petitioner

JOHN AFSHAR
Deputy District Attorney

I, further certify that on January 28, 2022, a copy was sent via email to District Court, Department 19's JEA for Judge Eller:

Melody Howard – JEA
HowardM@ClarkCountyCourts.us

BY */s/ J. Hall*
Employee, District Attorney's Office

JA//jh