

IN THE SUPREME COURT OF NEVADA
STATE OF NEVADA

JESUS NAJERA,

Petitioner,

vs.

THE EIGHTH JUDICIAL
DISTRICT COURT; THE
HONORABLE CRYSTAL
ELLER,

Respondents,

STATE OF NEVADA,

Real Party in Interest.

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S. Ct. No.: 83923

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

**PETITION FOR REVIEW BY THE SUPREME COURT PURSUANT TO
NRAP RULE 40B**

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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.: 83923-COA

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

**PETITION FOR REVIEW BY THE SUPREME COURT PURSUANT TO
NRAP RULE 40B**

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COMES NOW Petitioner JESUS NAJERA, through his counsel
MICHAEL D. PARIENTE, ESQUIRE. and JOHN G. WATKINS, ESQUIRE,
OF COUNSEL and files the instant “Petition for Review by the Supreme
Court pursuant to NRAP 40B” on the grounds that the Nevada Court of
Appeals’ erred in denying Najera’s Petition for Writ of Mandamus and thus
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 N.R.Cr.P. 11(1).

This is an issue of first impression because if the Nevada Court of
Appeals’ decision is allowed to stand, lawyers will never need to ask for leave
of court before filing their briefs late in blatant disregard for N.R.Cr.P. 11(1).
Additionally, Najera’s case has statewide importance because N.R.Cr.P. 11(1)
is a new rule and other courts across the State of Nevada may rule N.R.Cr.P.
11(1) a nullity due to the Nevada Court of Appeals’ decision to let stand the
District Court’s denial of Najera’s motion to strike the State’s Return filed 44

1 days after it was due. The State never sought leave of the district court to file
2
3 its brief before the deadline of when their Return was due. The district court
4 abused its discretion and the Nevada Court of Appeals' erred by not
5
6 considering the impact its decision would have on judicial economy. Here,
7
8 per the Nevada Court of Appeals' decision in the instant case, Najera would
9
10 appeal his conviction to argue the Motion to Strike the State's untimely 44 day
11
12 late filing of its Return should have been granted. This will be a waste of
13
14 judicial resources.

15 DATED this 1st day of March, 2022.

16 Respectfully submitted,

17 

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NRAP 26.1 DISCLOSURE STATEMENTS

The attorneys representing Petitioner Jesus Najera herein state, “there is no such corporation” referred to in NRAP 26.1.

QUESTION PRESENTED FOR REVIEW

1. ARE LAWYERS ALLOWED TO DISREGARD N.R.Cr.P 11(1)?

REASONS THE REVIEW IS WARRANTED

1. N.R.Cr.P. 11(1) REQUIRES ALL LAWYERS WHO DESIRE AN EXTENSION OF TIME TO DO AN ACT WHICH “MUST BE DONE AT OR WITHIN A SPECIFIED TIME” AND MUST MAKE THE REQUEST “BEFORE THE TIME PERIOD WOULD HAVE ORIGINALLY EXPIRED.”
 - a. The State completely ignored N.R.Cr.P. 11(1), never requesting an extension of time but merely filed its 44-day late Answer without court approval to do so.
2. ALLOWING THE NEVADA COURT OF APPEALS’ DECISION TO STAND SENDS THE WRONG MESSAGE TO PRACTICING LAWYERS AND WILL MAKE N.R.Cr.P. 11(1) A NULLITY ALLOWING LAWYERS ACROSS THE STATE TO IGNORE COURT ISSUED DEADLINES.

RULE 11. EXTENDING OR SHORTENING TIME

1. When an act must be done at or within a specified time, the court may extend or shorten the time period by its own discretion, or by oral or

written motion for good cause. **A request to extend *must* be made before the time period would have originally expired.**

(Boldness and italics added.)

This issue is one of first impression and of statewide public importance because allowing the district court's ruling to stand makes a mockery of Nevada Rules Criminal Procedure and permits a district court judge to ignore the plain meaning of the N.R.Cr.P. 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. It 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 EDCR 2.25.¹ Whether EDCR 2.25 or N.R.Cr.P. 11(1) control, both rules require the late filing party to request permission to file its late brief before the expiration of the deadline in question.

The plain language of N.R.Cr.P. 11(1) requires the dilatory party to seek permission for the extension of time *before* the deadline of when the brief is due.

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 N.R.Cr.P. 11(1) and the district court's order setting the deadlines entered July 20, 2021.

1. Writs of habeas corpus can be civil or criminal and is unclear when it becomes civil as opposed to criminal. See, *Mazzan v. State*, 109 Nev. 1067, 1070, 863 P.2d 1035, 1036 (1993) (“[H]abeas corpus is a proceeding which should be characterized as neither civil nor criminal for all purposes.”) *Id.*, (cites omitted.) Najera believed proceedings related to a habeas corpus proceeding such as a motion to strike the State's untimely filing of its answer to the habeas petition are characterized as civil in nature. Since the State did not object to Najera's application of EDCR Rule 2.25, apparently the State was of the same belief that the motion was civil in nature. Clearly, if the State believed the EDCR Rule 2.25 did not apply to Najera's Motion to Strike, it would have raised that concern with the lower court. Most importantly, the district court itself did not disagree with the use of EDCR 2.25. If this Court finds that proceedings related to writs of habeas corpus are criminal and not civil, then the newly enacted Nevada Rules of Criminal Procedure control.

Since the State did not comply with N.R.Cr.P. 11(1), the district court was legally bound to strike the State's dilatory Return.

Instead, the visiting district court judge sitting for Judge Crystal Eller adopted Judge Eller's position 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.

THE COURT: Well, I find no prejudice –

PA 88.

The district court's consideration of "prejudice" is irrelevant to N.R.Cr.P. 11(1) because this rule mandates the district court *cannot* grant an extension by the dilatory party when the request to extend the dilatory party's deadline is made after the deadline has passed.

I.

LAW AND ARGUMENT

A.

N.R.CR.P. 11(1) IS A STATEWIDE COURT RULE THAT LITIGANTS, NOR THE COURTS, ARE PERMITTED TO DISREGARD.

A. Mandamus was the appropriate remedy in the Court of Appeals:

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 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 district court need to comply with N.R.Cr.P. 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 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.

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

N.R.Cr.P. Rule 11(1) states in relevant part: "A request to extend *must* be made *before* the time period would have originally expired." (Italics added.)

"'Must' is mandatory, as distinguished from the permissive 'may.'" *In re Nev. State Eng'r Ruling No. 5823*, 128 Nev. 232, 239, 277 P.3d 449, 454 (2012). The State did not seek a timely extension under N.R.Cr.P. Rule 11(1), thus the State is not entitled to any relief under N.R.Cr.P. Rule 11(1). The district court's ruling never even applied N.R.Cr.P. Rule 11(1) 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 N.R.Cr.P. Rule 11(1) and the court ordered deadline entered July 20, 2021. Since the State did not comply with N.R.Cr.P. Rule 11(1), the district court order 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 1st day of March, 2022.

Respectfully submitted,

THE PARIENTE LAW FIRM, P.C.



MICHAEL D. PARIENTE, ESQ.
JOHN G. WATKINS, ESQ. OF COUNSEL
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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 1st day of March, 2022.

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:

☐ This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 with Times Roman 14 font style

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 2,733 words; or

☐ Monospaced, has 10.5 or fewer characters per inch, and contains

----- words or ----- lines of text, or

[] 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 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 28th day of February, 2022.



Michael D. Pariente, Esquire

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:

- ☐ personally delivering
- ☐ delivery via Las Vegas Messenger Service
- ☐ sending via Federal Express or other overnight delivery service
- ☒ X
- ☐ Electronic Service from the Nevada Supreme Court website.
- ☐ delivery via facsimile machine to fax no. [fax number]

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

Steven Wolfson.
District Attorney
Clark County District
Attorney's Office
200 Lewis Ave.
Las Vegas, NV 89101

Judge Crystal Eller
District Court Judge Dept. 19
200 Lewis Ave.
Las Vegas, NV 89101

DATED this 1st day of March, 2022.


Chris Barden, Paralegal