PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy, Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

IN THE SUPREME COURT OF NEVADA

STATE OF NEVADA

Electronically Filed
Mar 01 2022 04:00 p.m.
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.: 83923

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

PETITIONER'S APPENDIX (PA)

MICHAEL D. PARIENTE, ESQ,
COUNSEL FOR PETITIONER
Nevada Bar Number 9469
JOHN GLENN WATKINS, ESQ,
OF COUNSEL
Nevada Bar Number 1574
3800 Howard Hughes Parkway #620
Las Vegas, Nevada 89169
Telephone: (702) 966-5310
Facsimile: (702) 953-7055
michael@parientelaw.com
johngwatkins@hotmail.com

STEVEN WOLFSON,
DISTRICT ATTORNEY
200 Lewis, Floor 3
Las Vegas, Nevada 89101
Telephone: (702) 671-3847
Facsimile: (702) 385-1687
motions@clarkcountyda.com

CRYSTAL ELLER
DISTRICT COURT JUDGE
200 S. Lewis Street.
Department 19
Las Vegas, Nevada 89101

Docket 83923 Document 2022-06615

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy, Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

"INDEX"

PET
THE PARIENTE LAW FIRM, P.C.
MICHAEL D. PARIENTE, ESQ.
Nevada Bar No. 9469
JOHN G. WATKINS, ESQ., OF COUNSEL
Nevada Bar No. 1574
3960 Howard Hughes Parkway, Suite 615
Las Vegas, Nevada 89169
(702) 966-5310
Attorney for Defendant

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA,
Plaintiff,
vs.
JESUS NAJERA,
Defendant.

Case No: **C-21-356361-1**
Dept No: **17**

(Hearing date requested)

PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW Defendant, JESUS NAJERA, by and through his attorneys of record, MICHAEL D. PARIENTE with JOHN G. WATKINS, of counsel, and moves this Honorable Court for an Order granting Mr. Najera's Petition for Writ of Habeas Corpus pursuant to NRS 34.724.

DATED this 4th day of July 2021.

/s/Michael D. Pariente

MICHAEL D. PARIENTE, ESQ.
Nevada Bar No.: 9469
JOHN G. WATKINS, ESQ., OF COUNSEL
3960 Howard Hughes Parkway, Suite 615
Las Vegas, Nevada 89169

(702) 966-5310
Attorneys for Defendant

I

Your Petitioner/Defendant is being held to answer charges in the action filed under Case Number C-20-351506-1 in the Eighth Judicial Court of the State of Nevada, in and for the County of Clark, such action resulting in the imprisonment and/or restraint (constructive custody) of his liberty by Sheriff Joseph Lombardo and/or other persons unknown.

II

Your Petitioner/Defendant's imprisonment and/or restraint of his liberty is illegal as follows:

A. COUNT 4, TRAFFICKING IN CONTROLLED SUBSTANCE IS IMPERMISSIBLE BECAUSE THE GRAND JURY WAS NOT TOLD THAT THAT LVMPD IMPROPERLY WEIGHED 81.23 POUNDS OF HEMP SPRAYED WITH THC OIL WHICH SHOULD NOT HAVE BEEN WEIGHED IN DETERMINING THE WEIGHT OF MARIJUANA IN VIOLATION OF NRS 453.096 AND *SESSIONS V. STATE*, 106 NEV. 186 (2017).

B. COUNT 5, TRAFFICKING IN CONTROLLED SUBSTANCE IS IMPERMISSIBLE BECAUSE THE STATE PRESENTED NO EVIDENCE TO THE GRAND JURY THAT THE THC CAME FROM MARIJUANA AS DEFINED IN SECTION 1 OF NRS 453.906.

C. COUNT 5, TRAFFICKING IN CONTROLLED SUBSTANCE, SHOULD BE DISMISSED BECAUSE THE STATE FAILED TO DEFINE IN ITS INSTRUCTIONS "CONCENTRATED CANNABIS" AND WRONGFULLY COMMINGLED THE ELEMENT OF "CONCENTRATED CANNABIS" WITH "THC," CHAPTER 453A.

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

D. THE GRAND JURY INSTRUCTIONS ARE INCORRECT AND DO NOT DEFINE THE ELEMENTS OF COUNT 8, POSSESSION OF A CONTROLLED SUBSTANCE, AND DO NOT DEFINE OR EXPLAIN THE UNIFORM CONTROLLED SUBSTANCE ACT.

E. COUNT 8, POSSESSION OF A CONTROLLED SUBSTANCE, IS IMPERMISSIBLE AND MUST BE DISMISSED BECAUSE THE STATE HAS NOT DEMONSTRATED, EVEN BY SLIGHT OR MARGINAL EVIDENCE, THAT THE ALLEGED CONTROLLED SUBSTANCE WAS IN THE PETITIONER'S POSSESSION.

F. THE PROSECUTOR FAILED TO EXPLAIN ANY ELEMENTS OF THE COUNTS TO THE GRAND JURY.

G. MS. KELLY BURNS'S NRS 50.320 DECLARATION WAS INADMISSIBLE AT THE GRAND JURY PROCEEDING BECAUSE BURNS'S DECLARATION FAILS TO ESTABLISH THAT BURNS'S ALLEGED JANUARY 28, 2020 EIGHTH JUDICIAL DISTRICT COURT QUALIFICATION AS AN EXPERT WITNESS IS FOR MARIJUANA.

H. THE STATE ASKED IMPERMISSIBLE LEADING QUESTIONS OF KEY WITNESSES BEFORE THE GRAND JURY.

I. THE DETECTIVE'S INCORRECT AND CONTRADICTORY TESTIMONY ABOUT THE MAXIMUM LIMIT OF "THC" LEVELS IN HEMP WAS CONFUSING TO THE GRAND JURY WHEREIN HE FIRST TESTIFIED IT WAS .3% AND THEN SUBSEQUENTLY TESTIFIED IT WAS .03%. THE STATE FAILED TO CORRECT THE EGREGIOUS ERROR AND ONCE AGAIN VIOLATED ITS DUTY UNDER NRS 172.095(2).

III

Your Petitioner/Defendant does hereby expressly waive the sixty (60) day rule for bringing the accused to trial.

IV

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

Your Petitioner/Defendant further consents that if the Petition is not decided within fifteen (15) days before the day set for trial, the Court may, without notice of hearing, continue the trial date indefinitely or to a date designated by the Court.

V

A previous Writ of Habeas Corpus has not been filed.

This Court has jurisdiction to hear the instant Petition for a Writ of Habeas Corpus. *See* NRS 172.155(2) and *Shelby v. Sixth Judicial District Court, ex rel. County of Pershing*, 82 Nev. 204, 414 P.2d 942 (1966). The Petition for Writ of Habeas Corpus is timely filed. JESUS NAJERA was arraigned on June 15, 2021. Twenty-one (21) day filing requirement in NRS 34.700 was interpreted to be triggered by the arraignment. *See Palmer v. Sheriff, White Pine County*, 93 Nev. 648, 572 P.2d 218 (1977).

WHEREFORE, your Petitioner/Defendant prays that the Writ of Habeas Corpus be issued.

VERIFICATION

STATE OF NEVADA)

: ss

COUNTY OF CLARK)

MICHAEL D. PARIENTE, ESQUIRE says: That your Declarant is the Attorney of Record for the Petitioner/Defendant JESUS NAJERA in the above entitled Writ and Defendant in the action as set forth herein, that Petitioner/Defendant

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

authorized the commencement of the instant Petition for Writ of Habeas Corpus.

Petitioner/Defendant JESUS NAJERA personally authorized his counsel, Michael D. Pariente, Esquire, to commence this action.

DATED this 4th day of July, 2021.

I declare under penalty of perjury that the foregoing is true and correct,

/s/ Michael D. Pariente

_____

MICHAEL D. PARIENTE, ESQ.
Petitioner/Defendant

NOTICE OF HEARING

TO: STATE OF NEVADA, Respondent/Plaintiff

TO: DISTRICT ATTORNEY, Attorney for Respondent/Plaintiff

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the undersigned will bring the above and foregoing Petition on for hearing before the Court on the ____ day of _____, 2021, at _____m. in Department XVII of said Court.

/s/ Michael D. Pariente

_____

MICHAEL D. PARIENTE, ESQ.
Nevada Bar No.: 9469
3960 Howard Hughes Pkwy, Suite 615
Las Vegas, Nevada 8916
(702) 966-5310
Petitioner/Defendant

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

MEMORANDUM OF POINTS AND AUTHORITIES

A. COUNT 4, TRAFFICKING IN CONTROLLED SUBSTANCE IS IMPERMISSIBLE BECAUSE THE GRAND JURY WAS NOT TOLD THAT THAT LVMPD IMPROPERLY WEIGHED 81.23 POUNDS OF HEMP SPRAYED WITH THC OIL WHICH SHOULD NOT HAVE BEEN WEIGHED IN DETERMINING THE WEIGHT OF MARIJUANA IN VIOLATION OF NRS 453.096 AND THE *SESSIONS V. STATE*, 106 NEV. 186 (2017). THE STATE'S IMPROPER WEIGHING VIOLATED *SESSIONS*, AND COUNT 4 MUST BE DISMISSED.

Under NRS 453.06, Hemp is not included in the definition of marijuana.

Marijuana is statutorily defined. See *Williams v. State,* 118 Nev. 536, 547, 50 P.3d. 1116 (2002)("… marijuana … is defined in NRS 453.096."). NRS 453.096 states,

NRS 453.096 "Marijuana" defined.

1. "Marijuana" means:

(a) All parts of any plant of the genus *Cannabis*, whether growing or not;

(b) The seeds thereof;

(c) The resin extracted from any part of the plant, including concentrated cannabis; and

(d) Every compound, manufacture, salt, derivative, mixture or preparation of the plant, its seeds or resin.

2. "Marijuana" does not include:

(a) Hemp, as defined in NRS 557.160, which is grown or cultivated pursuant to the provisions of chapter 557 of NRS or any commodity or product made using such hemp; or

(b) The mature stems of the plant, fiber produced from the stems, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture or preparation of the mature stems (except the resin extracted therefrom), fiber, oil or cake, or the sterilized seed of the plant which is incapable of germination. (emphasis added).

Those parts of the marijuana planted listed in section 2 of NRS 453.096 *are legal* in Nevada and *cannot* be the basis for a criminal charge involving marijuana.

The Nevada Supreme Court in *Sessions v. State,* 106 Nev. 186, 189, 789 P.2d 1242 (1990) held,

> As we read the statute, subsection 2 of the statute excludes stems from the definition of marihuana and serves to modify and limit the all-inclusive definition provided in subsection 1. Even if there is any doubt as to the relationship between NRS 453.096(1) and NRS 453.096(2), *that doubt must be resolved in favor of the accused. Dumaine v. State,* 103 Nev. 121, 125, 734 P.2d 1230, 1233 (1987); *Sheriff v. Hanks,* 91 Nev. 57, 60, 530 P.2d 1191, 1193 (1975). Therefore, the state's argument that "marihuana" includes stems, roots, dirt, etc. is incorrect.

Sessions v. State, 106 Nev. 186, 189, 789 P.2d 1242, 1243 (1990).

Here, there is no dispute that LVMPD weighed seized hemp that had allegedly been sprayed with THC. This inclusion of the hemp in the weighing is direct violation of NRS 453.096 and *Sessions, supra.*

B. <u>COUNT 5, TRAFFICKING IN CONTROLLED SUBSTANCE IS IMPERMISSIBLE BECAUSE THE STATE PRESENTED NO EVIDENCE TO THE GRAND JURY THAT THE THC CAME FROM MARIJUANA AS DEFINED IN SECTION 1 OF NRS 453.906.</u>[1]

<u>All</u> parts of the cannabis sativa plant contain THC including those listed in NRS 453.096(2). THC and it is metabolite can be present in an oil from sources other than section 1 of NRS 453.096.

1 NRS 453.096 was amended by the Nevada Legislature this year. However, the changes to do not apply to Najera since Najera's conduct was alleged to have been committed in prior to enactment of the new legislation.

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

The U.S. Ninth Circuit Court of Appeal held in *Hemp Industries Association v. Drug Enforcement Administration,* 333 F.3d 1082 (9th Cir. 2003) "…. the statute controlling marijuana has excluded the oil and sterilized seed of the plant Cannabis sativa L., commonly known as hemp, from the definition of marijuana. *Hemp Indus. Ass'n v. Drug Enf't Admin.,* 333 F.3d 1082, 1085 (9th Cir. 2003). The Court added, "Tetrahydrocannabinols ("THC") is the active ingredient in marijuana. Hemp seeds and oil typically contain minuscule trace amounts of THC, less than 2 parts per million in the seed and 5 parts per million in the oil. Enhanced analytical testing indicates that "a 'THC Free' status is not achievable in terms of a true zero." *Hemp Indus. Ass'n v. Drug Enf't Admin.*, 333 F.3d 1082, 1085 (9th Cir. 2003).

It is uncontroverted the State must prove that the THC and its metabolite in the seized jar of oil came from marijuana as defined in section 1 of NRS 453.096. Absent such proof, the THC and its metabolite cannot be a basis to charge Najera with Count 5, Trafficking the oil. It is undisputed that the defendants were engaged in a hemp growing operation in Pahrump.[2] There is no probable cause to support Count 5. Therefore Count 5 must be dismissed.

C. COUNT 5, TRAFFICKING IN CONTROLLED SUBSTANCE, SHOULD BE DISMISSED BECAUSE THE STATE FAILED TO DEFINE IN ITS INSTRUCTIONS "CONCENTRATED CANNABIS" AND

2 The State's discovery indicates that there was discussion of 4,000 pounds of hemp being transported from in a truck from Pahrump where they were grown. It is undisputed the co-defendants were growing massive amounts of hemp which is not illegal. Therefore Count 5 must be dismissed.

WRONGFULLY COMMINGLED THE ELEMENT OF "CONCENTRATED CANNABIS" WITH "THC," CHAPTER 453A.

a. The State's failure to instruct the Grand Jury on the meaning of "concentrated cannabis" violates NRS 172.095(2).

i. A grand jury uninformed on the law does not act as an informed body.

The grand jury is the bulwark between the accused and the accuser. *State v. Babayon,* 106 Nev. 155, 170, 787 P.2d 805 (1990). The record must indicate that the grand jury acted as an **informed** body throughout the entire course of the proceedings. *Id.*, 106 Nev. at 170. To be informed, the grand jury must know the facts and the law. The duty to make sure that the grand jury is informed of the law falls upon the district attorney.[3] NRS 172.095(2) mandates,

> Before seeking an indictment, or a series of a similar indictments, the district attorney **shall** inform the grand jurors of the **specific elements** of any public offense which they may consider as the basis of the indictment or indictments.

(emphasis added)

The prosecution failed to inform the grand jury on the law thereby failing to fulfill its legal obligations under NRS 172.095(2). Here, the prosecutor failed to

3 The prosecutor also has the duty to present the facts in compliance with NRS 172.135.

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

inform the Grand Jury of the specific elements of "concentrated cannabis." In fact, "concentrated cannabis" *doesn't even appear in Count 5 of the indictment.*

The Court in *Babayon*, *supra* stated,

> It is incumbent on prosecutors who make presentations before grand juries to be adequately informed of the facts and to **have conducted sufficient legal research to enable them to properly inform the grand jury on the law** and to assist it in its investigation.

106 Nev. at 170. (cites omitted.) (emphasis added.)

Here, the State failed to conduct sufficient research to properly inform the Grand Jury on the law. Had they done so, they would have added the element "concentrated cannabis" to Count 5 of the indictment and explained to the Grand Jury that "concentrated cannabis" is an element of Trafficking in a Controlled Substance under NRS 453.339(1)(a).

b. The State improperly commingled the element "concentrated cannabis" from NRS 453.339(1)(a) by substituting it with NRS 453A.155, the definition of THC. This does not charge a legal offense and fails to confer subject matter jurisdiction on the District Court (or any court).

To legally charge a public offense[4], there must be a formal accusation

4 This Court defined "legal" in *Gathrite v. Eighth Judicial District Court*, 135 Nev., Adv. Op. 54, 451 P.3d 891 (2019) as "required or permitted by law; not forbidden or discountenanced by law; good and effectual by law" or "[p]roper or sufficient to be recognized by law; cognizable in the courts", *citing Legal, Black's Law Dictionary* (4th ed. 1951). *Id*., 135 Nev., Adv. Op. 54 at 5. A legal charge is a violation of a public law. NRS 171.010. A public offense must be conduct "prohibited by some statute of this state." NRS 193.050(1). There is no statute making the commingling of NRS 453.339(1)(a) and NRS 453A.155 a public offense. Therefore, the charge filed against Najera in Count 5 of the Information is not a legal charge.

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

(indictment, information, or complaint) alleging the "elements" of the offense. *See, Post v. United States, infra; Albrecht v. United States, infra.* Each and every element of a public offense, not just some or most but all, must be alleged in the formal accusation to charge a legal offense. *Almendarez-Torres v. United States, infra; United States v. Cook, infra; Hamling v. United States, infra; Russell v. United States, infra and State v. Hancock, infra*. The "elements" of a statutory offense cannot be substituted with different "elements" from other statutes. An accusation which eliminates or substitutes the "elements" of the statutory offense by commingling separate and distinct statutes, here NRS 453.339(1)(a) and NRS NRS 453A.155, does not charge a crime and fails to confer subject matter jurisdiction on a court. *See, fn.3; fn.6* ;*fn.7* ; *fn.21*. *See also, State v. Cimpritz*[5]. ("The elements necessary to constitute the crime must be **gathered wholly from the statute** and the crime must be described within the terms of the statute.") *Id*., 110 N.E. 2d at 417-18. (emphasis added.)

The Indictment filed against Najera substituted Terahydrocannabinol (THC) for the felony "element" of "concentrated cannabis." As a result of the commingled "elements," the Indictment does not charge a legal offense in Count 5[6] and fails to

---

5 158 Ohio St. 490, 110 N.E. 2d 416 (1953)

6 **There is no statute criminalizing conduct by the commingling of NRS 453.339(1)(a) and NRS 453A.155 as alleged in Count 5 of the Indictment filed against Najera.** *See again,* NRS 193.050(1). ("No conduct constitutes a crime unless

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

confer subject matter jurisdiction on the district court.[7]

The State's commingling of NRS 453.339(1)(a) and NRS 453A.155 fails to charge a legal offense and fails to confer subject matter jurisdiction on this court. There is no statute creating an offense by commingling NRS 453.339(a)(a) and NRS 453A.155. Without such a statute, there is no crime. NRS 193.050(1).

A person can only be lawfully prosecuted ". . . by the laws of this state for a public offense . . . ." NRS 171.010. A public offense is an act in violation of a penal law. *Black's Law Dictionary* 975 (5th ed. 1979). Conduct not statutorily forbidden is not a crime. *See again*, NRS 193.050(1). Crimes are enacted and defined by the lawmakers, not prosecutors. The legal definition of a crime is the legislative description of what conduct is forbidden. The constituent parts of a penal definition are the "elements" of the offense. *See, Cordova v. State*,[8] ("[t]he phrase 'element of

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

---

prohibited by some statute of this state or by some ordinance or like enactment of a political subdivision of this state.").

7 A court cannot act without subject matter jurisdiction and, if it does, all its acts are void. *Rhode Island v. Massachusetts,* 37 U.S. 657, 718 (1938); *State Indus. System v. Sleeper*, 100 Nev. 267, 269, 679 P.2d 1273 (1984). Jurisdiction cannot be waived or created when none exist. *Vaile v. Dist. Ct*., 118 Nev. 262, 276, 44 P.3d 506 (2002). Jurisdiction cannot be conferred upon the court by actions of the parties and principles of estoppel and waiver do not apply. *Richardson v. United States*, 943 F.2d 1107, 1113 (9th Cir.) (1991); *State of Nevada v. Justice Court*, 112 Nev. 803, 806, 918 P.2d 401 (1996). *See also, fn.21.*

8. 116 Nev. 664, 668, 6 P.3d 481 (2000), *citing People v. Hansen* 855 P.2d 1022 (Cal. 1994).

the offense' signifies an essential component of the legal definition of the crime. . . .") There must be an indictment, information or complaint filed against the person charged.

A formal accusation is essential for every criminal case. *Post v. United States*.[9] ("Criminal proceedings cannot be said to be brought or instituted until a formal charge is openly made against the accused . . . ."); *Albrecht v. United States.*[10] ("A person may not be punished for a crime without a formal and sufficient accusation even if he voluntarily submits to the jurisdiction of the court.") To be sufficient, the formal accusation must charge a legal offense.

To charge a public offense, an indictment, information or complaint **must** allege every element of the offense. *See*, *Almendarez-Torres v. United States*.[11] ("An indictment **must** set forth each element of the crime that it charges." (emphasis added.); *United States v. Cook*.[12] (" . . . it is universally true that no indictment is sufficient if it does not accurately and clearly allege all the ingredients

9. 161 U.S. 583, 587 (1896)

10. 273 U.S. 1, 7 (1927)

11. 523 U.S. 224, 228 (1998)

12. 17 Wall. 168, 174 (1872)

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

of which the offense is composed.")[13] *See also*, *Hamling v. United States*,[14]; *Russell v. United States*[15]. The Court in *State v. Hancock*,[16] recognized, "[a]n indictment, standing alone, **must contain**: (1) **each and every element of the crime charged** . . . . " (emphasis added.) Therefore, a charging document which fails to allege each and every element of the offense and substitutes "elements" from other statutes *does not* charge a legal offense.

The failure to charge an offense and/or lack of jurisdiction can be raised any time. NRS 174.105(3) states,

> Lack of jurisdiction or the failure of the indictment, information or complaint to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.[17]

---

13. This constitutional requirement applies to informations as well. *See,* NRS 173.075.

14. 418 U.S. 87, 117 (1974)

15. 369 U.S. 749, 763 (1962)

16. 114 Nev. 161, 164, 955 P.2d 183 (1998)

17 A court lacks subject matter jurisdiction if the formal accusation filed against the defendant does not charge an offense. *See*, *Williams v. Municipal Judge*, 85 Nev. 425, 429, 456 P.3d 440 (1969) (" . . . without a formal and sufficient accusation . . . a court acquires no jurisdiction whatever . . . ."). The Court in *State v. Ohio*, 181 Ohio App. 3d 86, 907 N.E. 2d 1238 (2009) noted "[a] valid complaint is a necessary condition precedent for the trial court to obtain jurisdiction in a criminal case." *Id*., 907 N.E. 2d at 1241. The Court in *Ex Parte Alexander*, 80 Nev. 354, 358, 393 P.2d 615 (1964) stated "[w]e are compelled to hold that the failure of the indictment to allege that the crime was committed in the State of Nevada was fatal and that the court never acquired jurisdiction to try the case, and that its judgment was void." *Ex Parte Alexander* further stated, " . . . the failure being fatal to the sufficiency of the information could not be cured by evidence tending to show where the crime was committed." *Id.*, 80 Nev. at 358. *See also, State v. Cimpritz*, supra. (A judgment of

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

The Indictment filed against Najera does not charge a legal offense.

The State commingled two (2) separate and distinct statutes, NRS 453.339(1)(a) and NRS 453A.155, swapping out "concentrated cannabis" for "tetrahydrocannabinol" from both statutes to charge Najera. **Commingling "elements" and "definitions" from two (2) separate statutes does not charge a legal offense.** *Almendarez-Torres v. United States, supra; United States v. Cook, supra; Hamling v. United States, supra; Russell v. United States, supra and State v. Hancock, supra.* There can be no addition, deletion or substitution of "elements" for those "elements" comprising a NRS 453.339(1)(a) violation.[18] *See again, State v. Cimpirtz*. ("The elements necessary to constitute the crime must be **gathered wholly from the statute** and the crime must be described within the terms of the statute.") *Id*., 110 N.E. 2d at 417-18. (emphasis added.)

The elements for a felony Trafficking in Controlled Substance: Marijuana or Concentrated Cannabis (Category C Felony) under NRS 453.339(1)(a) are:

---

conviction based on an indictment which does not charge an offense is void for lack of subject matter jurisdiction.) *Id*., 110 N.E. 2d at 418.

18 The State's commingling is paramount to "legislating" a crime, an act in the sole province of the legislature. *See, Nevada Const. art. 4 § 1*; *Galloway v. Truesdell*, 83 Nev. 13, 422 P.2d 237 (1967) (" . . . legislative power is the power . . . to frame and enact laws, and to amend or repeal them." *Id*., 83 Nev. at 20. *See also, United States v. Davis*, 588 U.S. ____, 139 S. Ct. 2319 (2019). ("Only the people's elected representatives in the legislature are authorized to 'make an act a crime."') 139 S. Ct. at 2325.

NRS 453.339 Trafficking in controlled substances: Marijuana or concentrated cannabis.

1. Except as otherwise provided in NRS 453.011 to NRS 453.552, inclusive, a person who knowingly or intentionally sells, manufactures, delivers or brings into this State or who is knowingly or intentionally in actual or constructive possession of marijuana or **concentrated cannabis** shall be punished, if the quantity involved:

(a) Is 50 pounds or more, but less than 1,000 pounds, of marijuana or 1 pound or more, but less than 20 pounds, of **concentrated cannabis**, for a category C felony as provided in NRS 193.130 and by a fine of not more than $25,000.

(Boldness added.)

NRS 453A.155 which defines tetrahydrocannabinol is:

NRS 453A.155 "THC" defined. THC" means delta-9-tetrahydrocannabinol, which is the primary active ingredient in marijuana.

Had the State instructed the Grand Jury of the definitions of concentrated cannabis[19] and tetrahydrocannabinol and properly pled Count 5 as "concentrated cannabis; to wit, tetrahydrocannabinol)," this would be sufficient. Instead, the State never even listed the element "concentrated cannabis" in Count 5, much less defined it, and instead commingled, or substituted "tetrahydrocannabinol" without even defining it. **How was the Grand Jury to know tetrahydrocannabinol (THC) is listed as a form of "concentrated cannabis" when they were not given the definitions of either?**

---

19 NRS 453.042 "Concentrated cannabis" defined**.** "Concentrated cannabis" means the extracted or separated resin, whether crude or purified, containing THC or CBD from marijuana.

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

The State's commingling of the NRS 453.339(1)(a) and NRS 453A.155 does not charge a legal offense.[20] And the State failed to define "concentrated cannabis" and "tetrahydrocannabinol" violating its duty under NRS 179.095(2) because the district attorney "shall inform the grand jurors of the specific elements". The word "shall" is mandatory. The Court in *Goudge v. State*, 128 Nev. 548, 287 P.3d 301 (2012) stated,

> The use of the word "shall" in the statute divests the district court of judicial discretion. See NRS 0.025(1)(d); *see also Otak Nevada*, 127 Nev. at 598, 260 P.3d at 411. This court has explained that, when used in statute, the word "shall" imposes a duty on a party to act and prohibits judicial discretion and, consequently, mandates the result set forth by the statute. Id.; *see also Johanson v. Dist. Ct*., 124 Nev. 245, 249-50, 182 P.3d 94, 97 (2008) (explaining that " ' "shall" is mandatory and does not denote judicial discretion'" (quoting *Washoe Med. Ctr. V. Dist. Ct*., 122 Nev. 1298, 1303, 148 P.3d 790, 793 (2006))).

Id., 128 Nev. at 553.

Again, the prosecution didn't inform the Grand Jury on the law and fell short of its legal obligations under NRS 172.095(2). *See, Clay v. Eighth Jud. Dist. Ct*, 129 Nev., 445, 305 P.3d 898 (2013). (When an offense contains technical elements, it is not compliance with NRS 172.095(2) by merely submitting instructions to the grand

20 Since there is no statute commingling the "THC charge" filed against Najera, Count 5 as indicted is null and void. The nullity would render an acquittal or conviction meaningless and without any affect whatsoever. For example, if the jury returned a verdict of NOT GUILTY on Count 5, the State could (and would) argue that jeopardy did not attach. The State would be correct.

jury and asking them if they have any questions.) No one can reasonably dispute that "concentrated cannabis" and "tetrahydrocannabinol" are technical. The State did not fulfill its legal obligation under NRS 172.095(2).

The prosecutor never read the charges to the grand jury. The prosecutor never provided a copy of all the charging statutes to the grand jury. The prosecutor never explained the "elements" of the offense to the grand jury nor provided definitions for those elements. This conduct was condemned in *Clay*, *supra*. And this conduct is prohibited in NRS 172.095:

> **172.095. Charges to be given to grand jury by court; district attorney to inform grand jury of specific elements of public offense considered as basis of indictment**
>
> 1. The grand jury being impaneled and sworn, must be charged by the court. In doing so, the court shall:
> (a) Give the grand jurors **such information as is required by law** and any other information it deems proper regarding their duties and any charges for public offenses returned to the court or likely to come before the grand jury.
> (b) Inform the grand jurors of the provisions of NRS 172.245 and the penalties for its violation.
> (c) Give each regular and alternate grand juror a copy of the charges.
> (d) Inform the grand jurors that the failure of a person to exercise the right to testify as provided in NRS 172.241 must not be considered in their decision of whether or not to return an indictment.
>
> 2. Before seeking an indictment, or a series of similar indictments, **the district attorney *shall* inform the grand jurors of the specific elements** of any public offense which they may consider as the basis of the indictment or indictments.

Nev. Rev. Stat. Ann. § 172.095 (West)(boldness and emphasis added.)

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

Finally, the prosecutor didn't comply with NRS 172.095(1)(d) by failing to inform the grand jurors that the failure of Najera to exercise his right to testify must not be considered in their decision of whether or not to return an indictment.

D. THE GRAND JURY INSTRUCTIONS ARE INCORRECT AND DO NOT DEFINE THE ELEMENTS OF COUNT 8, POSSESSION OF A CONTROLLED SUBSTANCE, AND DO NOT DEFINE OR EXPLAIN THE UNIFORM CONTROLLED SUBSTANCE ACT.

The three pages of Instructions given to the Grand Jury, are replete with errors and material omissions of key definitions necessary for the Grand Jury to fulfill its duty.

The Grand Jury Instructions begin with an incorrect definition of Cocaine as a Schedule 1 controlled substance when in fact it is a Schedule 2 controlled substance.

Secondly, the Instructions tell the Grand Jury it is a felony for two or more persons to conspire to commit an offense which is a felony under the Uniform Controlled Substances Act but fail to define *what* is the Uniform Controlled Substances Act. In fact, no testimony was solicited from any of the witnesses who testified to *anything* about the Uniform Controlled Substances Act.

Third, as referenced in this Brief, the Instructions fail to define what is concentrated cannabis leaving the Grand Jury to guess as to its meaning.

Fourth, the Instructions fail to define "possession". Black's Law definition of possession has been adopted by the Nevada Supreme Court:

> The law, in general, recognizes two kinds of possession: actual possession and constructive possession. A person who knowingly has direct physical control

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

> over a thing, at a given time, is then in actual possession of it. A person, who, although not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it.

Palmer v. State, 112 Nev. 763, 768, 920 P.2d 112, 115 (1996).

Fifth, the Instructions cite the language of the statute "Possession of a Controlled Substance With Intent to Sell", yet none of the co-defendants are even charged with this offense!

E. <u>COUNT 8, POSSESSION OF A CONTROLLED SUBSTANCE, IS IMPERMISSIBLE AND MUST BE DISMISSED BECAUSE THE STATE HAS NOT DEMONSTRATED, EVEN BY SLIGHT OR MARGINAL EVIDENCE, THAT THE ALLEGED CONTROLLED SUBSTANCE WAS IN THE PETITIONER'S POSSESSION.</u>

i. Constructive Possession

To demonstrate that an accused was responsible for unlawful possession, the State must offer proof that the defendant exercised dominion and control over the contraband. *Glispey v. Sheriff, Carson City*, 89 Nev. 221, 223, 510 P.2d 623, 624 (1973) (citing *Doyle v. State*, 82 Nev. 242, 415 P.2d 323 (1966)). Where possession is alleged to be constructive, "possession may be imputed when the contraband is found in a location which is immediately and exclusively accessible to the accused and subject to [their] dominion and control." *Glispey*, 89 Nev. at 223, 510 P.2d at 624.

The *Glispey* case involved an area accessible to multiple individuals - a prison restroom. The restroom in question was used by three individuals; following the third

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

individual's exit, the restroom was subject to a "shake down" and a bag of marijuana was found concealed in a paper towel receptacle. *Id.* Glispey was the third and final individual to use the restroom prior to the discovery of the drugs, and thus was charged with possession of a controlled substance and attempting to provide the drugs to an inmate. *Id.* At her preliminary hearing, the other two women who had used the restroom prior to Glispey testified that they did not place the drugs in the paper towel holder. *Id.* Glispey was ordered to stand trial on both charges, and she challenged the possession charge for insufficient probable cause. *Id.*

The Nevada Supreme Court granted Glispey's appeal and dismissed the possession charge. In its holding, the Nevada Supreme Court focused on the lack of evidence to establish Glispey's constructive possession:

> In the instant case, it cannot be said that she constructively possessed the contraband. Defendant's access to the rest room was not exclusive nor did she maintain control over the location. Even if the accused did, in fact, place the marijuana in the paper towel receptacle, any subsequent intent to recover the marijuana would, from this record, be purely speculative, and could not sustain the requisite probable cause to hold her for trial for constructive possession.
> 89 Nev. at 224, 510 P.2d at 624.

To determine whether constructive possession may be imputed to an accused where the contraband in question is located in a shared space, courts may consider the totality of circumstances surrounding the alleged possession. For example, in *Miller v. Sheriff, Carson City*, 95 Nev. 255, 592 P.2d 952, a guard discovered an inmate "ducking down" in a restroom next to a trash can and heard a sound like "something

being thrown in a garbage can." 95 Nev. at 256, 592 P.2d at 953. The inmate was the only person in the restroom at the time. *Id.* A search of the trash can yielded a vitamin bottle with marijuana. *Id.* When the officer searched the inmate's locker, he found another vitamin bottle identical to the one discovered in the restroom's trash can. *Id.*

Based on the totality of circumstances in that case, the Nevada Supreme Court upheld the lower court's finding of probable cause:

> Although entry to and exit from the restroom was through a connecting door to one of the facility's dormitories which housed numerous inmates, here, the totality of the circumstances, including appellant's being alone in the restroom, his crouching and ducking, the contemporaneous noise heard by the officer, appellant's hasty exit from the restroom, the finding of the similar bottle unlike any other observed by the officer in his five years at the institution, in our view, satisfies the requisite probable cause test delineated in N.R.S. 171.206.
> *Id.*

Based on the foregoing, the Nevada Supreme Court found that "the magistrate was entitled to conclude" that there was a probable cause showing of constructive possession.

In this case, State failed to establish that the Petitioner possessed the alleged cocaine, either actually or constructively. There is no testimony indicating the alleged cocaine was found in the Petitioner's actual possession (on his person). Instead, Det. Snodgrass testified that the search of the apartment "recover[ed] items that you believed to be cocaine from Mr. Najera's residence…" *Ex. C* at 67. As this is not sufficient for actual possession, the State must rely on establishing evidence of

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

constructive possession- specifically that the Petitioner exercised dominion and control over an area immediately and exclusively accessible to him.

Here, the State's evidence suggests that the alleged cocaine was not found in an area that can be deemed as immediately and exclusively accessible to him. Indeed, no real evidence regarding the location, character, and circumstances of the alleged cocaine was presented at all, other than testimony that it was recovered "from [the Petitioner's] residence." No photographs were offered showing the alleged cocaine in situ, how it was discovered, etc. As such, the Petitioner is limited only to what evidence the State *did* present.

The State focused most of its attention on an area where the allegedly cocaine was presumably *not* found, but which presents elegant proof of "dominion and control over an area immediately and exclusively accessible to" the Petitioner: a safe located in what the State alleges was the Petitioner's closet. In itemizing and eliciting testimony regarding the multiple items found in this safe, the one item *not* discussed as being found in the safe was the alleged cocaine.

The totality of circumstances does not support an inference that Najera constructively possessed the alleged cocaine. The State did not provide any evidence as to the location of the alleged cocaine, even as the State went into painstaking detail as to the location and character of other items found within the safe the State is attributing to Najera. The State's failure to describe the location of the alleged cocaine fails to establish the requisite elements of a constructive possession theory-

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

specifically, the immediate and exclusive accessibility to the area containing the alleged cocaine (and again, the State never indicated where in the residence it was allegedly found, or if anyone else was present and had access to the area that would vitiate any claim of dominion and control).

As the State's evidence only shows that alleged cocaine was found "somewhere" in the residence, but not on Najera's person, the State must proceed on a constructive possession theory. With only evidence of the alleged presence of what it believes to be cocaine, and in contrast to the detail elicited about the location of every other item attributed to the Petitioner (what was found in the safe), the State failed to make even a slight or marginal showing required for a constructive possession theory.

The only "evidence" of possession presented to the Grand Jury of the alleged cocaine found in Najera's residence is as follows:

Q: Did in fact you recover items that you believed to be cocaine from Mr. Najera's residence?

Yes.

GJ, V-1, P. 67. ll. 2-4.

That's it! This is insufficient evidence for the Grand Jury to have found "possession." Once again, there was *no* evidence presented that Najera was the sole occupant of the home or that he didn't share the home with other persons.

Count 8 must be dismissed.

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

F. <u>THE PROSECUTOR FAILED TO EXPLAIN ANY ELEMENTS OF THE COUNTS TO THE GRAND JURY.</u>

The prosecutor talked in generalities about the indictment:

> Prosecutor: Just to go through the Indictment, Count 1 charges Eduardo Garcia with sale of controlled substance. The same charge for the same defendant is reflected in Count 2 and Count 3. Count 4 charges all three defendants with trafficking in a controlled substance and that is for marijuana, 50 pounds or more. Count 5 charges all three defendants with trafficking in a controlled substance. That is for THC between one pound or more and less than 20 pounds. Count 6 charges the three defendants with conspiracy to violate the uniform controlled substances act as reflected in Counts 4 and 5. And then Count 7 reflects a charge of unlawful production or processing of marijuana. That pertains to defendant Eduardo Fabian Garcia. A couple of housekeeping matters. I'm sorry, and Count 8 reflects a possession of controlled substance charging Jesus Najera with possession of cocaine. GJ, V-1, P. 6, ll. 4-21.

This is insufficient and does not comply with NRS 172.095. The prosecutor violated NRS 172.095(2): "Before seeking an indictment, or a series of similar indictments, the district attorney **shall** inform the grand jurors of the **specific elements** of any public offense which they may consider as the basis of the indictment or indictments." (Boldness added.) This was not done.

"When an offense contains technical elements, it is not compliance with NRS 172.095(2) by merely submitting instructions to the grand jury and asking them if they have any questions." *Clay v. Eighth Jud. Dist. Ct*, 129 Nev., 445, 305 P.3d 898 (2013). No one can reasonably dispute that terms such as "possession", "tetrahydrocannabinol", and "concentrated cannabis" are complicated and technical. The State did not fulfill its legal obligation under NRS 172.095(2).

G. <u>MS. KELLY BURNS'S NRS 50.320 DECLARATION WAS INADMISSIBLE AT THE GRAND JURY PROCEEDING BECAUSE BURNS'S DECLARATION FAILS TO ESTABLISH THAT BURNS'S ALLEGED JANUARY 28, 2020 EIGHTH JUDICIAL DISTRICT COURT QUALIFICATION AS AN EXPERT WITNESS IS FOR MARIJUANA.</u>

a. "Controlled substance" is a generic term which can mean any controlled substance such as heroin, cocaine, LSD, PCP, and a plethora of other controlled substances.

The State may offer its evidence by affidavit/declaration in lieu of oral testimony. NRS 50.320(2) states:

> An affidavit or declaration which is submitted to prove any fact set forth in subsection 1 must be admitted into evidence when submitted during any administrative proceeding, preliminary hearing or hearing before a grand jury. The court shall not sustain any objection to the admission of such an affidavit or declaration.

Subsection 1 of NRS 50.320 state in relevant part,

> 1. The affidavit or declaration of a chemist and any other person who has qualified in a court of record in this State to testify as an expert witness regarding the … identity or quantity of a controlled substance alleged to have been in the possession of a person, which is submitted to prove:
>
> (a) The quantity of the purported controlled substance; or
>
> (b) The …. presence or absence of a controlled substance, chemical, poison, organic solvent or another prohibited substance, as the case may be, is admissible in the manner provided in this section.

Two requirements must be met before the affidavit/declaration is admissible at the grand jury: (1) court of record qualification as an expert or other qualified person who has qualified in this State as an expert witness regarding the identity or quantity

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

of marijuana, and (2) the person's area of expertise must be marijuana testing. *See, generally, Valenti v. State, Dep't of Motor Vehicles*, 131 Nev. 875, 362 P.3d 83 (2015) (" ... Maloney's affidavit [sic], which indicated that she was a chemist but failed to state whether she had been qualified in a Nevada court of record, was inadmissible at Valenti's revocation hearing.") 362 P.3d 88. *Valenti* involved the absence of the first requirement in NRS 50.320(1) i.e. court of record qualification as an expert. Najera's case involves the absence of the second requirement in NRS 50.320(1) i.e. the person's area of expertise not shown to be marijuana testing.

The testing of marijuana using Gas Chromatography – Mass Spectrometry (GC/MS), Macroscopic Examination, Microscopic Examination, and Color test(s) are completely different than testing other drugs such cocaine, heroin, crystal methamphetamines, PCP, and other controlled substances. The declaration in this case violates *Valenti, supra,* because it doesn't state that Ms. Burns is an expert to testify regarding the identity of **marijuana**. Instead, her declaration says she's qualified as an expert witness to testify "regarding the identity of *a* controlled substance." (Italics added.) Which controlled substance? Her declaration doesn't specify marijuana. It would have been sufficient if she had stated she was qualified as an expert to testify "regarding the identity of marijuana" or "regarding the identity of *all* controlled substances." Instead, her declaration states "***a*** controlled substance" which means "not any particular or certain one of a class or group: a man; a chemical; a house." https://www.dictionary.com/browse/a

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

H. THE STATE ASKED IMPERMISSIBLE LEADING QUESTIONS OF KEY WITNESSES BEFORE THE GRAND JURY.

The State is not free to present evidence in any manner it desires such as leading questions. NRS 50.115(3)(a) provides that leading questions are generally impermissible on direct examination "without permission of the court." *Leonard v. State*, 117 Nev. 53, 70, 17 P.3d 397 (2001).

> "When we speak of substantial evidence we refer to something which has probative force. **Evidence in 'parrot fashion' by leading questions resolves itself into submitting to a court, indirectly by oath of a witness the data and information in the mind of the attorney.** Such information thus received could scarcely be elevated to the dignity of a factual foundation and be characterized as substantial evidence."
>
> Canepa v. Durham, 65 Nev. 428, 456 (dissent) (Nev. 1949). "It is sometimes discretionary to allow leading questions on the direct examination when it appears that the witness is unable to understand otherwise, as well as when he is hostile." *State v. Williams*, 31 Nev. 360, 367 (Nev. 1909).

(emphasis added)

The "leading question" prohibition applies to grand jury proceedings. NRS 172.136(2) mandates, "[t]he grand jury can receive none but legal evidence, and the best evidence in degree, to the exclusion of hearsay or secondary evidence." In the instant case, the prosecution used over 50 leading questions. The witnesses were not hostile or confused.

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

Q: So the warehouse would be the building reddish in color?

GJ T, V-1, P. 11, ll. 17-18.

Q: I'm going to zoom in on this. There looks to be a couple of vehicles at that warehouse, correct?

GJ T, V-1, P. 14, ll. 10-12.

Q: (702)280-4438, was that a phone number you ultimately associated with Mr. Najera?

GJ T, V-1, P. 16, ll. 5-6.

Q: Okay. (702)308-0688, what that number ultimately associated with Mr. Garcia?

GJ T, V-1, P. 11, ll. 8-9.

Q. (702)336-5100, was that a phone number associated with Mr. Madrigal?

GJ T, V-1, P. 11, ll. 11-12.

Q: Okay. Did that revolve around hemp?

GJ T, V-1, P. 16, ll. 24-25.

Q: The same hemp that was ultimately associated to Mr. Madrigal?

GJ T, V-1, P. 17, ll. 1-2.

Q: And Mr. Garcia did that multiple times?

GJ T, V-1, P. 20, ll. 1-2.

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

Q: And this time there was no business operating out of the warehouse, is that right?

GJ T, V-1, P. 20, ll. 13-14.

Q: Okay. And then could that have been March 7?

GJ T, V-1, P. 20, ll. 18-19.

Q: Okay. And that photo we saw, Grand Jury Exhibit 8, was that photo taken March 8th, or rather that video?

GJ T, V-1, P. 20, ll. 22-24.

Q. Okay. Was this sometime in March?

GJ T, V-1, P. 21, line 1.

Q. Sometime in March did you learn that Mr. Najera, the former Metro police officer, visited Mr. Garcia at Mr. Garcia's residence?

GJ T, V-1, P. 21, ll. 9-11.

Q. So at this point between the intel you received in February and then the follow-up surveillance and investigation that you did, did you and Detective Chaney then decide to introduce a confidential informant into this investigation?

GJ T, V-1, P. 21, ll. 20-24.

Q: In this specific case, did you utilize an individual named Jose Soto?

GJ T, V-1, P. 22, ll. 22-23.

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

Q: And this individual Mr. Soto was employed by Metro to see if he could purchase narcotics from this group?

GJ T, V-1, P. 23, line 25, P. 24, ll. 1-2.

Q: There are mechanisms for individuals to buy recreational marijuana?

GJ T, V-1, P. 24, ll. 6-7.

Q: As well as medical marijuana?

GJ T, V-1, P. 24, ll. 9-10.

Q: From a legal dispensary?

GJ T, V-1, P. 24, line 15.

Q: Okay. So in this case the information you had was marijuana was being sold outside the perimeters of a legal dispensary?

GJ T, V-1. P.24, ll. 17-19.

Q: Did those instances result in Mr. Soto purchasing from, and we'll have Mr. Soto testify, from Mr. Garcia items that were later submitted to the lab and resulted in a positive analysis as being marijuana?

GJ T, V-1. P.2, ll. 1-5.

Q: Okay. So specifically page 1, is this the result of the items you received from Mr. Soto after he purchased what ultimately tested positive as marijuana on April 8th?

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

GJ T, V-1. P.24, ll. 24-25, P.25, ll. 1-2.

Q: Okay. Looking at Page 2 of the same exhibit, is this the result of the final chemical analysis done on the items you recovered from Mr. Soto after deploying him as a confidential informant on April 13th?

GJ T, V-1. P.28, ll. 4-8.

Q: And then page 3 of the same exhibit, is this the final chemical analysis for items you recovered from Mr. Soto, his confidential informant buy, on April 22nd?

GJ T, V-1. P.28, ll. 10-13.

Q: Okay. And all three of these incidents resulted in you obtaining from Mr. Soto items that ultimately identified as marijuana?

GJ T, V-1. P.28, ll. 10-13.

Q: So you never made purchases with your own money?

GJ T, V-1. P.33. ll. 4-5.

Q: I want to draw your attention to March 26th of 2020. Is that when you were first introduced to Lalo?

GJ T, V-1. P.33. ll. 6-8.

Q: And that address would be at 2340 East Camaro, correct?

GJ T, V-1. P.33. ll. 11-12.

Q: And was it also at this time that he also told you that another

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

partner was a police officer?

GJ T, V-1. P.35. ll. 1-2.

Q: Okay. And did he tell you what chemical he was spraying it with? Was it THC?

GJ T, V-1. P.35. ll. 13-14.

Q: And at this time did he again show you larger storages of marijuana in the home?

GJ T, V-1. P.40. ll. 17-18.

Q: And it appeared to be marijuana to you?

GJ T, V-1. P.40. line 20.

Q: Did that purchase, was it set up for April 26, of 2020?

GJ T, V-1. P.42. ll. 23-24.

Q: Let me follow up with a little bit there. And then you set up this third buy for 250 pounds?

GJ T, V-1. P.46. ll. 22-23.

Q: Okay. And then you believe there were two separate two pound buys after that?

GJ T, V-1. P.51. ll. 1-2.

Q: Okay. And you responded specifically to that address while other detectives responded to different addresses related to this

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

investigation?

GJ T, V-1. P.55. ll. 8-10.

Q: Okay. And specifically were you tasked with the search and collection of evidence at 1445 Stone Lake Cove, apartment 4101, in Henderson?

GJ T, V-1. P.66. ll. 5-7.

Q: And at that time he was a Metropolitan police officer?

GJ T, V-1. P.66. ll. 17-18.

Q: So you were tasked with the search and recovery of evidence at Mr. Najera's residence?

GJ T, V-1. P.66. ll. 20-21.

Q: Okay. All the steps and procedures were followed?

GJ T, V-1. P.68. ll. 10-11.

Q: All right. So the preliminary field test corroborated what you believed the items you recovered were?

GJ T, V-1. P.68. ll. 16-18.

Q: And you think because his name is printed on the top and there's a signature on the bottom?

GJ T, V-1. P.71. ll. 1-3.

Q: And there is a vest or something in the trunk identifying or that

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

states police, right?

GJ T, V-1. P.71. ll. 9-10.

Q: Okay. And the last picture of that exhibit is a close-up of those turkey bags?

GJ T, V-1. P.71. ll. 12-13.

Q: Now was there a deal set up for after April 30th or about April 30th for which you believed Mr. Garcia would be spraying the hemp?

GJ T, V-2. P.13. ll. 13-15.

Q: Turning the page to 311. Mr. Garcia and Najera are discussing seeds in the product?

GJ T, V-2. P.27. ll. 23-24.

I. THE DETECTIVE'S INCORRECT AND CONTRADICTORY TESTIMONY ABOUT THE MAXIMUM LIMIT OF "THC" LEVELS IN HEMP WAS CONFUSING TO THE GRAND JURY WHEREIN HE FIRST TESTIFIED IT WAS .3% AND THEN SUBSEQUENTLY TESTIFIED IT WAS .03%. THE STATE FAILED TO CORRECT THE EGREGIOUS ERROR AND ONCE AGAIN VIOLATED ITS DUTY UNDER NRS 172.095(2).

When asked by a grand juror about the purchase of marijuana by confidential informant Jose Soto which was tested and found to be under the legal limit for THC, the detective gave confusing and conflicting answers rendering the grand jurors helplessly uninformed.

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

Grand Juror: Just real briefly explain to us what that threshold is for the lab to determine or conclude that *something is marijuana or isn't marijuana.* (Italics added.)

Detective: Okay. So legally in Nevada, it's the same as the federal standard, to be considered marijuana substance has to have over .3 percent THC.

GJ T., V-2, P. 11, ll. 18-23.

But the detective then contradicted himself, adding to the confusion of the juror who specifically asked him to explain what is or what isn't marijuana.

Detective: What makes something marijuana as we call it or an illegal substance is having a THC level above .03 percent.

GJ T., V-2, P. 12, ll. 2-4.

There is a huge difference between .3 percent and .03 percent. One is correct and the other is incorrect. Which is the correct number? The Grand Jury was left to guess – is it .3 percent or .03 percent? The prosecutor never corrected the detective nor properly informed the Grand Jury as to the correct limit leaving them uninformed and thus violated NRS 172.095(2).

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

CONCLUSION

This Court should grant Najera's Petition for Writ of Habeas Corpus and dismiss all the following counts in the Indictment against Count 4 – Trafficking in a Controlled Substance, Count 5 – Trafficking in a Controlled Substance, Count 6 – Conspiracy to Violate Uniform Controlled Substances, and Count 8, Possession of a Controlled Substance.

Respectfully submitted,

/s/ Michael D. Pariente

_____

THE PARIENTE LAW FIRM, P.C.
MICHAEL D. PARIENTE, ESQ.
Nevada Bar No. 9469
JOHN G. WATKINS, ESQ., OF COUNSEL
Nevada Bar No. 1574
3960 Howard Hughes Parkway, Suite 615
Las Vegas, Nevada 89169
(702) 966-5310
Attorney for Defendant

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 4th day of July, 2021, that I electronically filed the foregoing Petition with the Clerk of the Court by using the electronic filing system.

The following participants in this case are registered electronic filing system users and will be served electronically:

Tina Talim – Chief Deputy District Attorney
Tina.Talim@clarkcountyda.com
200 Lewis Avenue
Third Floor
Las Vegas, Nevada 89101

/s/Chris Barden

Chris Barden, an employee
of Pariente Law Firm, P.C.

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor | **COURT MINUTES** | **July 20, 2021**

C-21-356361-1 State of Nevada
vs
Jesus Najera

July 20, 2021 10:00 AM Defendant's Petition for Writ of Habeas Corpus

HEARD BY: Villani, Michael COURTROOM: RJC Courtroom 11A

COURT CLERK: Albrecht, Samantha

RECORDER: Santi, Kristine

REPORTER:

PARTIES PRESENT:

Michael D. Pariente	**Attorney for Defendant**
State of Nevada	**Plaintiff**
Tina Singh Talim	**Attorney for Plaintiff**

JOURNAL ENTRIES

Defendant not present.

Mr. Pariente requested Defendant's presence be waived. COURT SO ORDERED. COURT FURTHER ORDERED, Briefing Schedule SET as follows: State's Response due by 9/20/2021, Mr. Pariente's Reply due by 10/20/2021, and hearing SET.

BOND

11/19/2021 8:30 AM DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS

RET
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
TINA TALIM
Chief Deputy District Attorney
Nevada Bar #009286
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
State of Nevada

DISTRICT COURT
CLARK COUNTY, NEVADA

In the Matter of Application,

of

JESUS NAJERA,
#5339086

for a Writ of Habeas Corpus.

CASE NO: C-21-356361-1

DEPT NO: XIX

STATE'S RETURN TO WRIT OF HABEAS CORPUS

DATE OF HEARING: 11/23/2021
TIME OF HEARING: 11:00 A.M.

COMES NOW, JOE LOMBARDO, Sheriff of Clark County, Nevada, Respondent, through his counsel, STEVEN B. WOLFSON, Clark County District Attorney, through TINA TALIM, Chief Deputy District Attorney, in obedience to a writ of habeas corpus issued out of and under the seal of the above-entitled Court on the 4th day of July, 2021, and made returnable on the 23rd day of November, 2021, at the hour of 11:00 o'clock A.M., before the above-entitled Court, and states as follows:

A. Denies.

B. Denies.

C. Denies in part; admits in part. Respondent admits "concentrated cannabis was not defines in the instructions, but denies that dismissal of Count 5, Trafficking in Controlled Substance, is consequently warranted.

D. Denies in part; admits in part. Respondent admits the Grand Jury instructions do not define the elements of Count 8 nor define or explain the Uniform Controlled Substance Act, but denies the instructions are thusly incorrect.

E. Denies.

F. Admits.

G. Denies.

H. Denies in part; admits in part. Respondent admits to posing leading questions to key witnesses before the Grand Jury but denies that so doing is impermissible.

I. Denies in part; admits in part. Respondent admits the detective erred in his testimony but denies that the error was egregious or that the State's failure to correct it constitutes a violation of its duty under NRS 172.095.

F. The Petitioner is in the actual custody of JOE LOMBARDO, Clark County Sheriff, Respondent herein, pursuant to a Criminal Indictment, a copy of which is attached hereto as Exhibit 1 and incorporated by reference herein.

Wherefore, Respondent prays that the Writ of Habeas Corpus be discharged and the Petition be dismissed.

DATED this 3rd day of November, 2021.

Respectfully submitted,

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

BY ***/s/ Tina Talim***
TINA TALIM
Chief Deputy District Attorney
Nevada Bar #009286

POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S PRE-TRIAL WRIT OF HABEAS CORPUS

STATEMENT OF THE CASE

On November 18, 2020 the State commenced its presentation of evidence to the Grand Jury in the instant case. Due to the shutdown of the grand jury, caused by the Covid-19 pandemic, it was not until May 26, 2021 that the State continued and completed its presentation of evidence. On May 27, 2021 the Grand Jury returned an indictment charging: Defendant Eduardo Fabian Garcia with three (3) counts of Sale of Controlled Substance (Category B Felony) and one (1) count of Unlawful Production or Processing of Marijuana (Category E Felony); Defendants Eduardo Fabian Garcia, Jesus Najera, and Roberto Leon Madrigal with two (2) counts of Trafficking in Controlled Substance (Category C Felony) and one (1) count of Conspiracy to Violate Uniform Controlled Substances Act (Category C Felony); and Defendant Jesus Najera with one (1) count of Possession of Controlled Substance (Category E Felony).

Initial arraignment was set for June 10, 2021. Upon motion by defendants to continue the arraignment, it was continued to June 15, 2021. On July 4, 2021, defendant Jesus Najera filed a Petition for Writ of Habeas Corpus. On July 6, 2021, defendant Madrigal filed a Petition for Writ of Habeas Corpus, joining in Defendant Najera's Petition, raising additional arguments. Prior to the hearing date, parties stipulated, after defendant's Najera requested it, to extend the Writ argument. Parties agreed to extend the State's date to file the Return (September 20, 2021) and time for Defendants' Replies (October 20, 2021). The hearing was reset to November 19, 2021.

STATEMENT OF FACTS

In February 2020, detectives Aaron Hefner and Gary Chaney of Las Vegas Metropolitan Police Department's (LVMPD) Criminal Intelligence Section (CIS) received information that Defendants Jesus Najera, Eduardo Fabian Garcia, and Norberto Leon

Madrigal were engaged in an operation involving the spraying of hemp with tetrahydrocannabinol (THC) that Defendants would sell as marijuana. *Tr. of Grand Jury*, *The State of Nevada v. Najera, Garcia, and Madrigal,* No. C356361 at 17:15-17 (Nev. 8th Jud. Dist., 2020). Detective Aaron Hefner's testimony clarified that while hemp and marijuana come from the same plant, marijuana is the nickname given only to plants that contain a certain amount of THC from which users derive a sense of euphoria. *Id.* at 17:9-14. Under Nevada State law the addition of THC to hemp in excess of the 0.3% THC limit produces a substance that is chemically analyzed as marijuana. *Id.* at 17:21-25; *Id.* at 18:1-2. The information detectives received also alleged that Defendant Madrigal was either in the process of obtaining or had obtained licenses for marijuana dispensaries. *Id.* at 10:24-25; *Id* at 11:1. After launching an investigation into these allegations, detectives confirmed that Defendant Madrigal had two legitimate applications for marijuana dispensary licenses that had been processing for some years. *Id.* at 11:5-7. The investigation also revealed that Defendant Madrigal was associated with a warehouse located at 800 West Mesquite. *Id.* at 11:11-16. Detectives further learned that Defendants Najera and Garcia resided in apartment 4101 at 1445 Stone Lake Cove and at 2340 East Camaro and respectively. *Id.* at 13:12-14; *Id.* at 13:20-22.

Surveillance was established at the residence and warehouse of Defendants Garcia and Madrigal respectively. *Id.* at 14:1-3. On March 7, 2020, Defendant Garcia arrived at the warehouse in a flatbed truck that he and an unidentified individual loaded with multiple black trash bags removed from the warehouse. *Id.* at 19:12-18. On March 8, 2020, Defendants Najera, Garcia, and Madrigal contemporaneously arrived at the warehouse wherein they engaged in discourse for approximately an hour. *Id.* at 21:5-15. During the investigation detectives engaged the services of confidential informant Jose Soto. *Id.* at 23:8-24. Defendant Garcia provided Mr. Soto with a sample of THC sprayed hemp in the pair's first meeting. *Id.* at 37:5-8. However, this tested below the 0.3% statutory limit for THC and Mr. Soto later returned it to Defendant Garcia. *Id.* at 38:14-18. The Defendants consequently are not charged for providing this sample. *Tr. of Grand Jury*, *The State of Nevada v. Najera, Garcia, and Madrigal,* No. C356361 at 33:1-3 (Nev. 8th Jud. Dist., 2021). On April 8th, 13th, and 22nd of

2020, Jose Soto purchased items from Defendant Garcia that tested positive as being marijuana. *Tr. of Grand Jury*, *The State of Nevada v. Najera, Garcia, and Madrigal,* No. C356361 at 24:23-25 (Nev. 8th Jud. Dist., 2020); *Tr. of Grand Jury*, *The State of Nevada v. Najera, Garcia, and Madrigal,* No. C356361 at 25:1-5 (Nev. 8th Jud. Dist., 2020). An exam by LVMPD's forensic laboratory of Mr. Soto's April 8th purchase yielded a positive result for marijuana that weighed 62.82 grams. *Tr. of Grand Jury*, *The State of Nevada v. Najera, Garcia, and Madrigal,* No. C356361 at 33:16-23 (Nev. 8th Jud. Dist., 2021). Mr. Soto's April 13th purchase from Defendant Garcia tested positive for marijuana that weighed 946 grams. *Id.* at 34:5 Finally Mr. Soto's April 22nd purchase from Defendant Garcia tested positive for marijuana that weighed 1076 grams. *Id.* at 34:9-10.

Before every deployment Mr. Soto and his vehicle were searched to confirm the absence of any narcotics or undocumented funds. *Tr. of Grand Jury*, *The State of Nevada v. Najera, Garcia, and Madrigal,* No. C356361 at 25:9-20 (Nev. 8th Jud. Dist., 2020). Mr. Soto was also constantly surveilled during each trip to and from the buy location. *Id.* at 25:9-20. During these transactions Mr. Soto paid Defendant Garcia with LVMPD buy funds that were marked and photographed before each purchase. *Id.* at 26:4-13.

On April 30, 2020, a series of search warrants were executed throughout the valley. *Id.* at 55:7-14. The search of Defendant Garcia's residence produced bags of unsprayed hemp and 32 marijuana plants. *Tr. of Grand Jury*, *The State of Nevada v. Najera, Garcia, and Madrigal,* No. C356361 at 17:11-25 (Nev. 8th Jud. Dist., 2021). In addition to official documents the search of Defendant Najera's residence revealed ODV positive cocaine that weighed 1.1 grams. *Tr. of Grand Jury*, *The State of Nevada v. Najera, Garcia, and Madrigal,* No. C356361 at 68:13-15 (Nev. 8th Jud. Dist., 2020)*; Tr. of Grand Jury*, *The State of Nevada v. Najera, Garcia, and Madrigal,* No. C356361 at 72:18 (Nev. 8th Jud. Dist., 2020). Also recovered from Defendant Najera's residence was a safe containing documented LVMPD buy funds used by Mr. Soto to purchase narcotics from Defendant Garcia. *Tr. of Grand Jury*, *The State of Nevada v. Najera, Garcia, and Madrigal,* No. C356361 at 9:16-21 (Nev. 8th Jud. Dist., 2021). Pursuant to a search warrant officers recovered from Defendant Madrigal's warehouse bags of hemp

and sprayed marijuana and an apparent "science lab" containing a jar of THC oil, a gun for spraying, and turkey bags for packaging narcotics. *Tr. of Grand Jury*, *The State of Nevada v. Najera, Garcia, and Madrigal,* No. C356361 at 14:4-11 (Nev. 8th Jud. Dist., 2020).

After the execution of these search warrants, detectives secured a search warrant for the Defendants' phone numbers. *Tr. of Grand Jury*, *The State of Nevada v. Najera, Garcia, and Madrigal,* No. C356361 at 7:18-24 (Nev. 8th Jud. Dist., 2021). Phone records spanning an 18-month period reveal text messages in which Defendants discussed *inter alia* the first transaction with Jose Soto, a prospective sale of THC sprayed hemp to individuals in Kansas, and the purchase of THC oil from individual known as Eli. *Id.* at 27:11-4; *Id.* at 24:1-3; *Id.* at 25:3-10; *Id.* at 27:2-6. The text messages also reveal the Defendants' "frantic" attempts to purchase Everclear, which is the pure alcohol that the Defendants mixed with THC to spray on hemp and allowed to evaporate so the THC would better adhere to the hemp. *Id.* at 26:11; *Id.* at 26:5-7.

I. LEGAL STANDARD FOR DISCHARGE BY WRIT OF HABEAS CORPUS

In the instant case, the provisions of NRS 34.500 that permit Defendant's discharge by grant of Writ of Habeas Corpus are as follows:

> NRS 34.500 Grounds for Discharge in Certain Cases
>
> 3. When the **process is defective** in some **matter of substance** required by law, rendering it void.
>
> 7. When the petitioner has been committed or indicted on a criminal charge…**without reasonable or probable cause**.

Where the alleged defectiveness of the process is attributable to governmental misconduct, the dismissal of an indictment is not warranted unless a defendant can demonstrate "substantial prejudice" that exists only when there is a "…reasonable probability that the outcome would have been different absent the misconduct". *Lay v. State,* 110 Nev. 1189, 1198, 886 P.2d 448, 454 (1994). With respect to Grand Jury proceedings the outcome of which there must be reasonable probability is the Grand Jury's failure to indict any Defendant on any or all counts contained in the indictment.

As to a finding of probable cause to support an indictment, this has long been justified by the State's ability to substantiate it has presented "slight or even marginal" evidence.

Sheriff, Washoe Cty. v. Hodes, 96 Nev. 184, 186, 606 P.2d 178, 180 (1980).

ARGUMENT

Defendants alleges that his imprisonment and/or restraint is unlawful for two reasons: (1) the State's presentation of evidence contained substantive procedural errors; and (2) the indictment, either in whole or in part, is not supported by probable cause. Yet even if the State made all alleged procedural errors, which the State does not concede, the relevant inquiries in this case remain (1) whether any alleged procedural error was sufficient to allow for a reasonable probability that the Grand Jury would not have indicted on any or all of the counts charged absent the error; and (2) whether any count charged is unsupported by probable cause. The State contends that any procedural error related to the Grand Jury proceedings was harmless because there is nothing to substantiate the reasonable probability of a contrary outcome in the absence thereof and all counts charged are supported by probable cause.

I. NO ALLEGED PROCEDURAL ERROR INVADED THE INTEGRITY OF THE GRAND JURY

a. Errors and/or Deficits in Grand Jury Instructions Must be Substantive

Although Nevada is one of several jurisdictions in which the prosecutor is required to instruct the Grand Jury on the elements of a crime, the Nevada Supreme Court has never defined the requirements of NRS 172.095(2). *Clay v. Eighth Judicial Dist. Court of State*, 129 Nev. 445, 453, 305 P.3d 898, 904 (2013). However the New York test for a prosecutor's compliance with this statute has been found consistent with the Nevada Legislature's motivations for adopting NRS 172.095(2). *Id*. at 905. A prosecutor's Grand Jury instructions are thus substantively incomplete or incorrect only if the instructions affected the Grand Jury proceedings, where the effect must be compromising the integrity of the Grand Jury. *People v. Ramos*, 223 A.D.2d 495, 637 N.Y.S.2d 93, 93-94 (App. Div. 1st Dept. 1996). The Grand Jury's integrity is compromised only when it returns an indictment based on less than probable

cause". *Id*. Defendant's petition asserts that the Grand Jury could not have been familiar with the Uniform Controlled Substances Act (UCSA) or the phrase "concentrated cannabis". However, without substantiation that the specific Grand Jury to which the State presented its case lacked this understanding, this claim is purely speculative and provides no grounds for dismissal of the indictment.

Further Defendant Najera falsely asserts the Grand Jury instructions contain a commingling of the element "THC" with "concentrated cannabis". A proper reading of the proposed indictment confirms that the reality is instead an omission of "concentrated cannabis" prior to the specification of the form thereof that renders Defendants' in violation of NRS 453.339(1)(a) in the instant case. Thus, this omission falls under the examination of the indictment's sufficiency. The sufficiency of an indictment is to be determined under practical rather than technical considerations where the test is not whether the indictment could have been more definite and certain. *Laney v. State*, 86 Nev. 173, 178, 466 P.2d 666, 669 (1970) (citing *Clay v. United States*, 326 F.2d 196 (10th Cir. 1963)). Instead, the question is whether the indictment is so insufficient as to fail to provide the accused with the adequate notice of the charged offense(s) required to permit the defendant to properly mount a defense. *Id.* There is no basis for asserting this claim at this juncture and the aforementioned examination is properly reserved for trial.

b. Neither Detective's Misstatement nor the State's Failure to Correct it was Prejudicial

The transcripts of the Grand Jury's proceedings confirm that Detective Aaron Hefner referred to the statutory limit for THC in three separate instances during his cumulative testimony; only once did Hefner err by misstating the limit is ".03 percent". *Tr. of Grand Jury*, *The State of Nevada v. Najera, Garcia, and Madrigal,* No. C356361 at 12:4 (Nev. 8th Jud. Dist., 2021). Neither this error nor the State's failure to correct it is fatal to the Grand Jury proceedings. In a criminal trial the examination of an alleged misstatement of the law remains restricted to the question of whether the misstatement caused the defendant to suffer any prejudice. *Standen v. State*, 101 Nev. 725, 727, 710 P.2d 718, 719 (1985). If there remains

substantial evidence to support a verdict absent the alleged misstatement, no prejudice may be found and thus no verdict overturned. *Bolden v. State*, 97 Nev. 71, 624 P.2d 20 (1981); *Mercado v. State*, 100 Nev. 535, 539, 688 P.2d 305, 308 (1984). The application of this test is more than equitable in the instant case since the burden of proof in a Grand Jury is considerably lower than that in a criminal trial and a Grand Jury target enjoys fewer rights than a criminal defendant. Defendant's petition provides no evidence that the grand jury even considered this lone misstatement, let alone relied thereupon when deciding to indict Defendants. There is therefore no means of substantiating the allegation that Defendants were prejudiced by the misstatement or the State's failure to correct it. Further a review of the indictment confirms that no count contained therein bears the statutory limit for THC. With respect to Defendant's marijuana product the counts reference only a "controlled substance". Thus, contrary to Defendant's petition, grand jurors were never made to speculate on the accurate statutory limit for THC because grand jurors were never asked to determine whether the marijuana produced, processed and sold by Defendants constituted a controlled substance. Rather the grand jurors were asked, with respect to Counts 1-7, to determine whether under the premise that Defendants' product constituted a controlled substance, the State presented the slight or marginal evidence to substantiate that Defendant(s): (1) produced and/or processed the controlled substance; (2) trafficked the controlled substance; and (3) conspired to violate the UCSA. There are consequently no grounds to suggest that the posited speculation of grand jurors ever transpired, let alone prejudiced Defendants.

II. PROPER ADMISSION OF KELLY BURNS' NRS 50.320 DECLARATION

Defendant's petition misapprehends applicable precedent. First *Valenti v. State, Dep't of Motor Vehicles* necessitates the invalidation of the chemist's affidavit because admission of an affidavit that fails to specify the chemist is properly qualified as an expert would result in absurd results like the revocation of drivers' licenses based on a lay-person's affidavit, which belies the plain meaning of NRS 50.320. 131 Nev. 875, 877, 362 P.3d 83, 84 (2015). This holding clarifies that the Court's concern is permitting laypeople's affidavits to carry the same evidentiary value as those of experts. The failure to specify which controlled substance(s) for

which Kelly Burns is an expert would not arouse this fear. Second even a finding that failure to satisfy either of the two requirements identified in *Valenti* would not render its holding applicable to the instant case. The *Valenti* court extended its holding to all administrative proceedings wherein the accused enjoys the right to confront and examine his accusers. *Id.* While it is proper to extend this Confrontation Clause based right to the accused in administrative hearings who face the potential loss of life, liberty, and/or property similar to that which criminal defendants face at trial, this extension is inappropriate to Grand Jury targets. The Nevada Supreme Court considered and declined to expand the rights of Grand Jury targets to render them "…coextensive with those of criminal defendants". *Gordon v. Ponticello*, 110 Nev. 1015, 1019, 879 P.2d 741, 744 (1994). Finally, even the improper expansion of the rights of Grand Jury targets would not necessitate dismissal of the indictment because the absence of Kelly Burns' declaration would not sufficiently diminish the State's case to the extent that the counts charged become unsupported by probable cause.

III. NEITHER STATUTE NOR PRECEDENT PROSCRIBES THE STATE'S USE OF LEADING QUESTIONS BEFORE A GRAND JURY

Defendant contends without legal authority that the State may not pose leading questions before the Grand Jury. The United States Supreme Court emphatically distinguished Grand Jury proceedings from criminal trials when it pronounced the Grand Jury process "generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials". *United States v. Calandra*, 414 U.S. 338, 343 (1974). NRS 50.115(3)(a) provides:

> NRS 50.115 Mode and Order of Interrogation and Presentation
>
> 3. Except as provided in subsection 4:
> (a) Leading questions may not be used on the direct examination of a witness without the **permission of the court**.
> (b) Leading questions are permitted on cross-examination.

Congruent with statutory interpretation's goal of advancing legislative intent, the Nevada Supreme Court has repeatedly rejected statutory interpretation that "…renders language meaningless or superfluous". *Figueroa-Beltran v. United States*, 467 P.3d 615, 621 (Nev.

2020); *Williams v. State Dep't of Corr.*, 133 Nev. 594, 402 P.3d 1260, 1262 (2017); *Hobbs v. State*, 127 Nev. 234, 242, 251 P.3d 177, 179 (2011). Further the Court has demonstrated it will adhere to the plain meaning rule and enforce a statute "as written" when the language is "clear and unambiguous". *Sheriff v. Witzenburg*, 122 Nev. 1056, 1061, 145 P.3d 1002, 1005 (2006); *Hobbs* at 237. NRS 50.115(3)(a)'s inclusion of the phrases "direct examination" and "permission of the court" renders clear that the applicability of its provisions is restricted to trials because Grand Jury proceedings include no court nor any incidence of direct examination. To broaden this statute's applicability to Grand Jury proceedings is to deprive both phrases of any value, disregard clear legislative intent, and eradicate precedential force.

IV. ALL CHARGES ARE SUPPORTED BY PROBABLE CAUSE

a. Standard for Sustaining a Grand Jury Indictment

During Grand Jury proceedings, there must be evidence adduced that establishes probable cause to believe that an offense has been committed and that the defendant has committed it. *Robertson v. Sheriff*, 85 Nev. 681, 683, 462 P.2d 528 (1969). The Nevada Supreme Court has explicitly held that the "full and complete exploration of all facets of the case" should be reserved for trial. *Marcum v. Sheriff*, 85 Nev. 175, 178, 451 P.2d 845, 847 (1969); see also, *Id.* at 529.

b. Defendants' Product Constitutes Marijuana and State Has Satisfied Its Burden that Defendants Trafficked this Controlled Substance

NRS 557.160 provides:

> NRS 557.160 "Hemp" defined
>
> 1. "Hemp" means any plant of the genus Cannabis sativa L. and any part of such a plant, including, without limitation, the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts and salts of isomers, whether growing or not, with a **THC concentration** that does not exceed the maximum **THC concentration** established by the State Department of Agriculture for hemp.

2. "Hemp" does not include any commodity or product made using hemp.

NRS 453.096 provides:

NRS 453.096 "Marijuana" defined

1. **"Marijuana"** means:
(a) All parts of any plant of the genus Cannabis, whether growing or not;
(b) The seeds thereof;
(c) The resin extracted from any part of the plant, including concentrated cannabis;
(d) Every compound, manufacture, salt, derivative, mixture or preparation of the plant, its seeds or resin;
(e) Any commodity or product made using hemp which **exceeds the maximum THC concentration** established by the State Department of Agriculture for hemp; and
(f) Any product or commodity made from hemp which is manufactured or sold by a cannabis establishment **which violates any regulation** adopted by the Cannabis Compliance Board pursuant to paragraph (g) of subsection 1 of NRS 678A.450 relating to **THC concentration**.

2. **"Marijuana"** does **not** include:
(a) Hemp, as defined in NRS 557.160, which is grown or cultivated pursuant to the provisions of chapter 557 of NRS;
(b) The mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil or cake, or the sterilized seed of the plant which is incapable of germination; or
(c) Any commodity or product made using hemp, as defined in NRS 557.160, which does not exceed the maximum **THC concentration** established by the State Department of Agriculture for hemp.

THC is defined as the most active of the principal constituents of marijuana. T, J. E. Schmidt, M.D., *Attorneys' Dictionary of Medicine*, (Matthew Bender). This definition combined with the five (5) aggregate uses between NRS 453.096 and 557.160 of the phrase "THC concentration" is consistent with the legislative intent to more closely regulate an "intoxicating" substance with a high propensity for addiction. THC. ARTICLE FOR CLE CREDIT: THE BRAIN DISEASE OF ADDICTION, 26 Nevada Lawyer 24.

Sessions v. State dictates that ambiguity between NRS 453.096(1) and NRS 453.096(2) must be resolved in favor of the accused, 106 Nev. 186, 189, 789 P.2d 1242, 1243 (1990), as dictated by the rule of lenity. However most statutory provisions bear some element of ambiguity. The rule of lenity is therefore inapplicable unless there is a "grievous ambiguity or uncertainty in the language and structure of the Act," *Huddleston* v. *United States*, 415 U.S. 814, 831, 39 L. Ed. 2d 782, 94 S. Ct. 1262 (1974). Furthermore this "grievous ambiguity" must persist after the court has looked to every source from which the court can gain the requisite insight to resolve it, *United States* v. *Bass*, 404 U.S. 336, 347, 30 L. Ed. 2d 488, 92 S. Ct. 515 (1971) (quoting *United States* v. *Fisher*, 6 U.S. 358, 2 Cranch 358, 386, 2 L. Ed. 304 (1805)), such as legislative history, purpose and/or acquiesce. An examination of the statutory language reveals legislative purpose that invalidates the rule of lenity's application to the instant case.

While statutory language alone supports classifying Defendants' commodity as marijuana, there is additional support therefor. The State elicited Grand Jury testimony that confirms the Defendants' represented their product to be chemically equivalent to and/or stronger than marijuana. Specifically, Defendant Garcia told confidential informant Soto that his THC-sprayed hemp would be "even stronger than marijuana". *Tr. of Grand Jury*, *The State of Nevada v. Najera, Garcia, and Madrigal,* No. C356361 at 35:12 (Nev. 8th Jud. Dist., 2020). This representation is sufficient evidence to support the charge of trafficking in controlled substance because while a trial requires the State to prove beyond a reasonable doubt that the substance sold was in fact marijuana, a defendant's representation alone that he is selling marijuana is sufficient to satisfy the probable cause standard the State must satisfy before a grand jury. *Glosen v. Sheriff*, 85 Nev. 145, 451 P.2d 841 (1969).

c. Circumstantial Evidence Properly Established Trafficking in Controlled Substance and Conspiracy to Violate the UCSA

Convictions based on circumstantial evidence have been and are routinely upheld in Nevada. *See Gibson v. State*, 96 Nev. 48, 50 (1980); *Merryman v. State*, 95 Nev. 648, 649 (1979); *Dutton v. State*, 94 Nev. 567, 568 (1978); *Edwards v. State*, 90 Nev. 255, 258 (1974);

Goldsmith v. Sheriff, 85 Nev. 295, 304 (1969). Circumstantial evidence is therefore sufficient to satisfy the lower standard of probable cause. *Howard v. Sheriff*, 93 Nev. 30, 559 P.2d 827 (1977). The State elicited Grand Jury testimony of the following: (1) video depicting all Defendants arriving contemporaneously at the warehouse to engage in discussion and a survey of the land; (2) the proper search of the Mesquite warehouse led to the recovery of several bags of hemp, sprayed marijuana, and a production/processing set-up consisting of a jar of THC oil, a spray gun, and turkey bags for packaging narcotics; (3) Defendant Garcia was on the premises during the search of the Mesquite warehouse; (4) all Defendants participated in text message exchanges regarding their procurement of substances used in their illegal production of marijuana; and (5) recovery of a long-sleeved shirt and pair of shoes from Defendant Madrigal's residence that matched the shirt and shoes depicted in a photo of a hand spraying hemp. *Tr. of Grand Jury*, *The State of Nevada v. Najera, Garcia, and Madrigal,* No. C356361 at 21:5-15 (Nev. 8th Jud. Dist., 2020); *Tr. of Grand Jury*, *The State of Nevada v. Najera, Garcia, and Madrigal,* No. C356361 at 14:4-11 (Nev. 8th Jud. Dist., 2020); *Tr. of Grand Jury*, *The State of Nevada v. Najera, Garcia, and Madrigal,* No. C356361 at 13:5-9 (Nev. 8th Jud. Dist., 2021); *Tr. of Grand Jury*, *The State of Nevada v. Najera, Garcia, and Madrigal,* No. C356361 at 26:11 (Nev. 8th Jud. Dist., 2021); *Tr. of Grand Jury*, *The State of Nevada v. Najera, Garcia, and Madrigal,* No. C356361 at 19:7-21 (Nev. 8th Jud. Dist., 2021). Defendants' interactions with one another in conjunction with their synchronized arrival in and tour of the warehouse permits the reasonable inference that Defendants' possessed the controlled substances contained therein. The direct evidence of the controlled substances' quantity supports the charge of trafficking in controlled substance. Finally, the consideration of reasonably inferred possession with direct evidence of the controlled substances' quantity allows for the reasonable inference that Defendants were acting in concert consistent with their conspiracy to violate the UCSA.

d. Circumstantial Evidence Properly Established Constructive Possession

Defendant's petition reflects misapprehension of the *Glispey v. Sheriff, Carson City* holding resulting from an improperly truncated citation thereto. 89 Nev. 221, 510 P.2d 623

(1973). First, in instructing on simple possession *Glispey* provides "For instance, possession may be imputed when the contraband is found in a location which is immediately and exclusively accessible to the accused and subject to her dominion and control". *Id.* at 624. Again relying on the Nevada Supreme Court's reverence of the statutory interpretation canon that preserves linguistic value, inclusion of the phrase "for instance" in conjunction with the word "may" clarifies that this is a discretionary sentiment; the Court is identifying one of potentially numerous means by which possession may be imputed. Mandatory language is evident in the dictate "The accused has constructive possession only if she maintains control or a right to control the contraband". *Id.* It is this citation that restricts the determination of constructive possession. In the first part of the Grand Jury proceedings the State established Defendant Najera's "residence" was located at 1445 Stone Lake. *Tr. of Grand Jury*, *The State of Nevada v. Najera, Garcia, and Madrigal,* No. C356361 at 13:9-13 (Nev. 8th Jud. Dist., 2020). The State further established Defendant Najera's ownership of the residence by describing a safe located in the apartment that contained a US passport and driver's license in Defendant Najera's name. *Tr. of Grand Jury*, *The State of Nevada v. Najera, Garcia, and Madrigal,* No. C356361 at 70:1-2 (Nev. 8th Jud. Dist., 2021). This testimony coupled with the absence of any evidence to belie the contention constitutes circumstantial evidence that allows for the inference that Defendant Najera maintained control of his residence. The inference of Defendant Najera's control of his residence establishes he had constructive possession of the ODV positive cocaine because the State may present circumstantial evidence from which "…the jury may draw reasonable inferences." *Kinsey v. Sheriff*, 87 Nev. 361, 363, 487 P.2d 340, 341 (1971).

Second Defendant's argument ostensibly challenging the insubstantiality of evidence to support constructive possession is premised on authorities that are unanalogous to the instant case. *Glipsey* and *Miller v. Sheriff, Carson City* involve the disputed possession of narcotics recovered from a searched area that was designed to be and provably was accessible to multiple parties. 95 Nev. 255, 592 P.2d 952 (1979). The State's introduction of official documents in Defendant Najera's name was sufficient to allow for a reasonable inference that Defendant

Najera was the sole occupant of the residence. A sole occupant necessarily bears ownership of and/or dominion over his residence. A defendant's sole ownership of or dominion over a searched premises establishes a rebuttable presumption of the defendant's constructive possession of contraband recovered from said premises. *United States v. Kincaide*, 145 F.3d 771, 782 (6th Cir. 1998); *United States v. Molina*, 443 F.3d 824, 829 (11th Cir. 2006); *United States v. Bustamante*, 493 F.3d 879, 889 (7th Cir. 2007), citing *United States v. Kitchen*, 57 F.3d 516, 521 (7th Cir. 1995); *United States v. Brannon*, 218 F. App'x 533, 536 (7th Cir. 2007); *United States v. Wright*, 739 F.3d 1160, 1168 (8th Cir. 2014). The proper forum to rebut this presumption is a trial not a writ of *habeas corpus*.

Defendant Najera also claims that cocaine is a Schedule II offense. Defendant is incorrect. Under NRS 453.510 (1) and NRS 453.510 (8), free base cocaine (powder and crack) is a Schedule I controlled substance. Defendant is incorrect. Finally, Defendant's petition takes issue with the State's failure to disprove the possibility that Defendant Najera shared his residence with other persons. The State presented its theory of possession to the Grand Jury. The burden of refuting the State's theory or proving alternate theories of possession rests with the defense at trial because "the State need not negate all inferences which might explain away the criminal conduct but need only present enough evidence to support a reasonable inference that the accused committed the offense." *Kinsey* at 341; *Sheriff v. Milton*, 109 Nev. 412, 414, 851 P.2d 417, 418 (1993). Defendant's pre-trial petition constitutes a thinly veiled attempt to ask the Court to preliminarily adjudicate factual disputes that may arise during trial. Such a request is contrary to the provinces of a Grand Jury and a petition for writ of *habeas corpus*. Defendant may appeal a conviction under the relevant statutes if Defendant continues to contend that his conduct does not contravene the relevant statutes' provisions. Presently there is no basis for the Defendant's Petition because the State presented the slight or marginal evidence required to sustain every charge contained in the Grand Jury indictment.

//

//

//

CONCLUSION

Based upon the foregoing, the State respectfully requests that Defendant's petition be denied and the writ discharged.

DATED this 3rd day of November, 2021.

Respectfully submitted,

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

BY ***/s/ Tina Talim***
TINA TALIM
Chief Deputy District Attorney
Nevada Bar #009286

CERTIFICATE OF ELECTRONIC TRANSMISSION

I hereby certify that service of the above and foregoing was made this 3rd day of November, 2021, by electronic transmission to:

MICHAEL PARIENTE
michael@parientelaw.com

BY ***/s/ E. Del Padre***
E. DEL PADRE
Secretary for the District Attorney's Office

TT/ed/HIDTA

IND
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
TINA TALIM
Chief Deputy District Attorney
Nevada Bar #09286
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

JESUS NAJERA, #5339086
EDUARDO FABIAN GARCIA #1489589,
NORBERTO LEON MADRIGAL
#1950096

Defendant(s).

CASE NO: C-21-356361-1

DEPT NO: XVII

INDICTMENT

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

The Defendant(s) above named, JESUS NAJERA, EDUARDO FABIAN GARCIA, NORBERTO LEON MADRIGAL, accused by the Clark County Grand Jury of the crime(s) of SALE OF CONTROLLED SUBSTANCE (Category B Felony - NRS 453.321 - NOC 51090), TRAFFICKING IN CONTROLLED SUBSTANCE (Category C Felony - NRS 453.339.1a - NOC 60433), CONSPIRACY TO VIOLATE UNIFORM CONTROLLED SUBSTANCES ACT (Category C Felony - NRS 453.401 - NOC 51306), UNLAWFUL PRODUCTION OR PROCESSING OF MARIJUANA (Category E Felony - NRS 453.3393 - NOC 58403) and POSSESSION OF CONTROLLED SUBSTANCE (Category E Felony - NRS 453.336 - NOC 51127), committed at and within the County of Clark, State of Nevada, on or between April 8, 2020 and April 30, 2020, as follows:

//

COUNT 1 - SALE OF CONTROLLED SUBSTANCE

Defendant EDUARDO FABIAN GARCIA did on or about April 8, 2020, willfully, unlawfully, and feloniously sell to LVMPD C.I., a controlled substance, to wit: Marijuana.

COUNT 2 - SALE OF CONTROLLED SUBSTANCE

Defendant EDUARDO FABIAN GARCIA did on or about April 13, 2020, willfully, unlawfully, and feloniously sell to LVMPD C.I., a controlled substance, to wit: Marijuana.

COUNT 3 - SALE OF CONTROLLED SUBSTANCE

Defendant EDUARDO FABIAN GARCIA did on or about April 22, 2020, willfully, unlawfully, and feloniously sell to LVMPD C.I., a controlled substance, to wit: Marijuana.

COUNT 4 - TRAFFICKING IN CONTROLLED SUBSTANCE

Defendants JESUS NAJERA, EDUARDO FABIAN GARCIA and NORBERTO LEON MADRIGAL did on or about April 30, 2020 willfully, unlawfully, feloniously, and knowingly or intentionally possess, either actually or constructively, 50 pounds or more but less than 1,000 pounds, to wit: approximately 81.23 pounds of Marijuana, or any mixture of substance consisting of approximately 81.23 pounds containing the controlled substance Marijuana, the Defendant(s) being criminally liable under one or more of the following principles of criminal liability, to wit: (1) by directly committing this crime; and/or (2) by aiding or abetting in the commission of this crime, with the intent that this crime be committed, by counseling, encouraging, hiring, commanding, inducing and/or otherwise procuring the other to commit the crime; and/or (3) pursuant to a conspiracy to commit this crime, with the intent that this crime be committed, Defendants, JESUS NAJERA and/or EDUARDO FABIAN GARCIA and/or NORBERTO LEON MADRIGAL aiding or abetting and/or conspiring by Defendants, JESUS NAJERA and/or EDUARDO FABIAN GARCIA and/or acting in concert throughout.

COUNT 5 - TRAFFICKING IN CONTROLLED SUBSTANCE

Defendants JESUS NAJERA, EDUARDO FABIAN GARCIA and NORBERTO LEON MADRIGAL did on or about April 30, 2020, willfully, unlawfully, feloniously and knowingly or intentionally possess, either actually or constructively, 1 pound or more, but less

than 20 pounds, to wit: 2.25 pound(s) of Tetrahydrocannabinol, or any mixture of substance consisting of approximately 2.25 pound(s) containing the controlled substance Tetrahydrocannabinol, the Defendant(s) being criminally liable under one or more of the following principles of criminal liability, to wit: (1) by directly committing this crime; and/or (2) by aiding or abetting in the commission of this crime, with the intent that this crime be committed, by counseling, encouraging, hiring, commanding, inducing and/or otherwise procuring the other to commit the crime; and/or (3) pursuant to a conspiracy to commit this crime, with the intent that this crime be committed, Defendants, JESUS NAJERA and/or EDUARDO FABIAN GARCIA and/or NORBERTO LEON MADRIGAL aiding or abetting and/or conspiring by Defendants, JESUS NAJERA and/or EDUARDO FABIAN GARCIA and/or NORBERTO LEON MADRIGAL acting in concert throughout.

COUNT 6 - CONSPIRACY TO VIOLATE UNIFORM CONTROLLED SUBSTANCES ACT

Defendants JESUS NAJERA, EDUARDO FABIAN GARCIA and NORBERTO LEON MADRIGAL did on or about April 30, 2020 willfully, unlawfully, and feloniously conspire with each other to violate Uniform Controlled Substances Act, and in furtherance of said conspiracy, the defendants did commit the acts as set forth in Count 4 and 5, said acts being incorporated by this reference as though fully set forth herein.

COUNT 7 - UNLAWFUL PRODUCTION OR PROCESSING OF MARIJUANA

Defendant EDUARDO FABIAN GARCIA did on or about April 30, 2020, willfully, unlawfully, feloniously, and knowingly or intentionally manufacture, grow, plant, cultivate, harvest, dry, propagate and/or process Marijuana, involving more than 12 plants.

//

//

//

//

//

//

COUNT 8 - POSSESSION OF CONTROLLED SUBSTANCE

Defendant JESUS NAJERA did on or about April 30, 2020, willfully, unlawfully, feloniously, and knowingly or intentionally possess a controlled substance, to wit: Cocaine.

DATED this 26th day of May, 2021.

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

BY _____
TINA TALIM
Chief Deputy District Attorney
Nevada Bar #09286

ENDORSEMENT: A True Bill

_____
Foreperson, Clark County Grand Jury

Names of Witnesses and testifying before the Grand Jury:

Additional Witnesses known to the District Attorney at time of filing the Indictment:

CUSTODIAN OF RECORDS - CCDC

CUSTODIAN OF RECORDS - LVMPD COMMUNICATIONS

CUSTODIAN OF RECORDS - LVMPD RECORDS

19BGJ223A-C/20F08565A-B; 20CR002883/mcb-GJ
LVMPD EV# 200200027347
(TK7)

Names of Witnesses and testifying before the Grand Jury:

HEFNER, AARON – LVMPD

MORRIS, ERICK - LVMPD

SNODGRASS, THEODORE - LVMPD

SOTO, JOSE – C/O CCDA, 200 Lewis Avenue, LV, NV 89101

Additional Witnesses known to the District Attorney at time of filing the Indictment:

CUSTODIAN OF RECORDS - CCDC

CUSTODIAN OF RECORDS - LVMPD COMMUNICATIONS

CUSTODIAN OF RECORDS - LVMPD RECORDS

19BGJ223A-C/20F08565A-B; 20CR002883/mcb-GJ
LVMPD EV# 200200027347
(TK7)

PET
THE PARIENTE LAW FIRM, P.C.
MICHAEL D. PARIENTE, ESQ.
Nevada Bar No. 9469
JOHN G. WATKINS, ESQ., OF COUNSEL
Nevada Bar No. 1574
3960 Howard Hughes Parkway, Suite 615
Las Vegas, Nevada 89169
(702) 966-5310
Attorney for Defendant

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA,
Plaintiff,
vs.
JESUS NAJERA,
Defendant.

Case No: **C-21-356361-1**
Dept No: **17**

(Hearing date requested)

MOTION TO STRIKE STATE'S RETURN AS UNTIMELY

COMES NOW Defendant, JESUS NAJERA, by and through his attorneys of record, MICHAEL D. PARIENTE with JOHN G. WATKINS, of counsel, and moves this Honorable Court for an Order granting the instant motion because the State's Return was filed on November 3, 2021 – 44 days after the Court's deadline of September 20, 2021.

DATED this 8th day of November 2021.

Respectfully submitted,

MICHAEL D. PARIENTE, ESQ.

Nevada Bar No.: 9469
JOHN G. WATKINS, ESQ., OF COUNSEL
3960 Howard Hughes Parkway, Suite 615
Las Vegas, Nevada 89169
(702) 966-5310
Attorneys for Defendant

NOTICE OF HEARING

TO: STATE OF NEVADA, Respondent/Plaintiff

TO: DISTRICT ATTORNEY, Attorney for Respondent/Plaintiff

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the undersigned will bring the above and foregoing Petition on for hearing before the Court on the ____ day of _____, 2021, at _____m. in Department XVII of said Court.

Respectfully submitted,

THE PARIENTE LAW FIRM, P.C.
MICHAEL D. PARIENTE, ESQ.
Nevada Bar No. 9469
JOHN G. WATKINS, ESQ., OF COUNSEL
Nevada Bar No. 1574
3960 Howard Hughes Parkway, Suite 615
Las Vegas, Nevada 89169
(702) 966-5310
Attorney for Defendant

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

I

Only July 4, 2021, Najera filed his Petition for Writ of Habeas Corpus. On July 20, 2021, this Court entered an order requiring the State to respond to Mr. Najera's Petition for Writ of Habeas Corpus by September 20, 2021. *See Exhibit D-1.*

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) …" *State's Return*, p. 3, ln. 20.

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***. 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:

> **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.

The Nevada Supreme Court in *In re Est. of Black*, 132 Nev. 73, 367 P.3d 416 (2016) has 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. State Eng'r Ruling No. 5823,* 128 Nev. 232, 239, 277 P.3d 449, 454 (2012). The State has not sought an extension under EDCR 2.25, thus the State is not entitled to any relief under EDCR 2.25.

The State's return is 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 this Court's Order entered July 20, 2021. Since the State has not complied with EDCR 2.25, this Court must strike the State's dilatory Return.

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

CONCLUSION

This Court should not excuse the State's blatant disregard of EDCR 2.25 and strike their dilatory Return given the State filed their response over 6 weeks after it was due.

DATED this 8th day of November, 2021.

Respectfully submitted,

MICHAEL D. PARIENTE, ESQ.
Nevada Bar No.: 9469
JOHN G. WATKINS, ESQ., OF COUNSEL
3960 Howard Hughes Pkwy, Suite 615
Las Vegas, Nevada 89169
(702) 966-5310
Attorneys for Defendant

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

VERIFICATION

STATE OF NEVADA)

: ss

COUNTY OF CLARK)

MICHAEL D. PARIENTE, ESQUIRE says: That your Declarant is the Attorney of Record for the Petitioner/Defendant JESUS NAJERA in the above entitled Motion, that Petitioner/Defendant authorized the commencement of the instant Motion.

Petitioner/Defendant JESUS NAJERA personally authorized his counsel, Michael D. Pariente, Esquire, to commence this action.

DATED this 8th day of November, 2021.

I declare under penalty of perjury that the foregoing is true and correct,

MICHAEL D. PARIENTE, ESQ.
Petitioner/Defendant

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

EXHIBIT D-1

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor	**COURT MINUTES**	**July 20, 2021**

C-21-356361-1 State of Nevada
vs
Jesus Najera

July 20, 2021 10:00 AM **Defendant's Petition for Writ of Habeas Corpus**

HEARD BY: Villani, Michael **COURTROOM:** RJC Courtroom 11A

COURT CLERK: Albrecht, Samantha

RECORDER: Santi, Kristine

REPORTER:

PARTIES PRESENT:

Michael D. Pariente	**Attorney for Defendant**
State of Nevada	**Plaintiff**
Tina Singh Talim	**Attorney for Plaintiff**

JOURNAL ENTRIES

Defendant not present.

Mr. Pariente requested Defendant's presence be waived. COURT SO ORDERED. COURT FURTHER ORDERED, Briefing Schedule SET as follows: State's Response due by 9/20/2021, Mr. Pariente's Reply due by 10/20/2021, and hearing SET.

BOND

11/19/2021 8:30 AM DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS

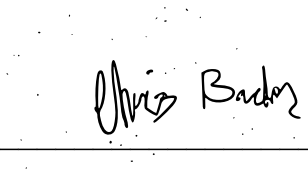
PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy., Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8th day of November, 2021, that I electronically filed the foregoing Motion with the Clerk of the Court by using the electronic filing system.

The following participants in this case are registered electronic filing system users and will be served electronically:

Tina Talim – Chief Deputy District Attorney
Tina.Talim@clarkcountyda.com
200 Lewis Avenue
Third Floor
Las Vegas, Nevada 89101



Chris Barden, an employee
of Pariente Law Firm, P.C.

Electronically Filed
12/7/2021 10:39 AM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA, Plaintiff, vs. JESUS NAJERA, EDUARADO FABIAN GARCIA and NORBERTO LEON MADRIGAL, Defendant.	)	CASE NO.: C-21-356361-1 C-21-356361-2 C-21-356361-3 DEPT. XIX

BEFORE THE HONORABLE J. CHARLES THOMPSON, DISTRICT COURT JUDGE

TUESDAY, NOVEMBER 23, 2021

RECORDER'S TRANSCRIPT OF HEARING RE:
ALL PENDING MOTIONS

APPEARANCES ON PAGE 2:

RECORDED BY: BRITTANY AMOROSO, COURT RECORDER

APPEARANCES:

For the Plaintiff:	TINA S. TALIM, ESQ. Chief Deputy District Attorney
For the Defendant Najera:	MICHAEL D. PARIENTE, ESQ. (Via Bluejeans)
For the Defendant Garcia:	MICHAEL V. CASTILLO, ESQ. (Via Bluejeans)
For the Defendant Madrigal:	THOMAS F. PITARO, ESQ. OSVALDO E. FUMO, ESQ. (Via Bluejeans)

Las Vegas, Nevada; Tuesday, November 23, 2021

[Hearing commenced at 12:48 p.m.]

THE COURT CLERK: 16 and 17. So I have C-21-356361-3, State of Nevada versus Norberto Madrigal, and then I have C-353 -- 356361, State of Nevada versus Eduardo Garcia, and I have C356361, State of Nevada versus Jesus Najera.

MS. TALIM: Good afternoon, Your Honor. Tina Talim for the State.

MR. PARIENTE: Good afternoon, Your Honor. Michael Pariente for Jesus Najera. He is present.

MR. CASTILLO: Good afternoon, Your Honor. Michael Castillo, 11531, for Mr. Becker's office on behalf of Eduardo Garcia who I see present via Bluejeans as well.

MS. TALIM: Your Honor, I believe Mr. Pitaro and Mr. Fumo are present representing Mr. Madrigal.

MR. PARIENTE: That's correct. They're online.

THE COURT RECORDER: Mr. Pitaro, it looks like you have your microphone muted.

MR. PITARO: Am I unmuted now?

THE COURT RECORDER: There you go.

MR. PARIENTE: Yes.

THE COURT: All right.

MR. PITARO: Okay. Thank you.

THE COURT: It's my understanding that the petitions on the

writ are going to be continued and that I was only to decide today the motion to strike.

MS. TALIM: That's my understanding as well, Your Honor.

MR. PARIENTE: That is our understanding for Mr. Najera, Your Honor.

MR. PITARO: And as to Madrigal.

MR. CASTILLO: And as to Mr. Garcia as well.

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.

MR. PITARO: Well, Your Honor, may I be heard? This is Tom Pitaro for. Mr. Madrigal.

THE COURT: I can't hear you.

MR. PITARO: Hold on.

THE COURT: I don't know what's wrong with your microphone but I cannot hear you, sir.

MR. PITARO: Let me see what I can -- Did it work now?

THE COURT: No -- I'm going to deny the motion strike.

MR. PARIENTE: Your Honor --

THE COURT: Now we need to reset the writ to the -- subsequent time?

MS. TALIM: Yes, Your Honor. Please.

MR. PARIENTE: Your Honor, I'm sorry. Your Honor, Michael Pariente for Mr. Najera. I, too, would like to make a record because I

am going to take this on a writ to the Nevada Supreme Court.

THE COURT: You can do that.

MR. PARIENTE: The State -- sorry, Your Honor.

THE COURT: -- but we need to reset the writs.

MR. PARIENTE: I know. I understand, Your Honor. We're asking to do that. If we do, we all want to make a record, Mr. Pitaro and I specifically. May we be heard?

THE COURT: Certainly.

MR. PARIENTE: Your Honor, the State did not comply with EDCR 2.25. The State was six weeks late. Also, the State filed their opposition -- their return, after our reply date was due.

The State had to comply with EDCR 2.25 because they -- because their request was made after the expiration of their deadline. In fact, EDCR 2.25(a) says 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. They didn't even comply with just filing a motion to ask for extending time. All they did was file the return.

And secondly, this cannot be considered excusable neglect. They filed their return six weeks after it was due. We gave the State plenty of time to file a return. They had 60 days and we were to have 30 days to do a reply. They're 44 days late on filing their return.

I believe that because they haven't even tried to comply to with EDCR 2.25, that this is not -- this -- that this motion should be granted. Additionally, they have not shown excusable neglect.

MR. PITARO: Your Honor, can you hear me now? This is Tom Pitaro.

THE COURT: Not really.

MR. PITARO: I don't know why, Judge, but I will yell. How's that? I get closer.

Your Honor, [indiscernible] want to make a record.

THE COURT: Can you hear?

MR. PITARO: Your Honor, of course this Court making a ruling based on what another judge said, that would give us the opportunity to address what the other judge [indiscernible] is. So on that -- that creates a problem on the Court's ruling and the [indiscernible].

But, let me just say this, as far as excusable neglect on this case, we had filed, all of us, the Defendants had filed a timely petition for writ of habeas corpus. After the time had expired for the State to respond under the local rule which we sited, the State requested additional time to file their return.

All the Defendants gave the State enough time to file. As a matter of fact as far as excusable neglect, it was in fact the State of Nevada that prepared the order for the judge to give them the additional time, which then gave them -- us additional time. Which then set down the time for the writ to be heard.

So, what happens in this case is, is that even though they prepared the order, even though they asked for the time, and they set the time, what happened here was they didn't respond. Now the problem with that is, well, they didn't respond. Maybe they forgot. Well,

if we've submitted an affidavit to respond, Mr. Fumo was going to be here to do it, but he had to go to another court. Our office called the District Attorney's office twice, after they blew the date of the stipulation and order of 9/20, September 20th. We called them and on or about October 20th and October 28th, asking -- and this was Ms. Talim -- asking is she going to respond and if she -- and the Grand Jury exhibit? We never got their reply, period, on that. It was only after that that we -- we in fact filed my motion to see what would've happened when I did it.

So what we have is our timely writ, because we would have been knocked off because of the 41 days, which is the mandatory against the Defendant. Then we have the State after blowing the time asking for a continuance, which we gave. No problem, Judge, we gave. They set the time frame up with what the times were. They prepared the order -- the stipulation, we signed it and submitted it. It was submitted to the Court. The Court signed it and set up the dates and I put those in the exhibits in my motion on this.

And what then happens is, that date comes and goes. And, you know, rather than -- then we called Mr. Fumo -- called twice, not once but twice and never get a response back. The only response we get back is after I filed my motion to do this. And then the Court -- and then State says, oh, well can we file a writ?

So, I guess our problem is this, Judge. It really is this. The Court's [indiscernible] there's no -- no harm, of course there's harm. Because our time -- our time for this writ was way back and then after we filed in -- in July. We would have had a hearing sometime in the end

of July if we didn't agree to these things that the State says.

There is in fact, the prejudice there. Then, interestingly, the writ after that on this case is supposed to be November 19th. Obviously, they never -- they didn't file their return until November 3rd, which wasn't even if Mr. Pariente filed that within the 30 day. So that date has come and gone and I think that this is now, in fact the 23rd.

Your Honor, these rules, these Eighth Judicial District Court rules as well as the local rules, are in fact there. We've sited case law showing you need excusable neglect, both Mr. Pariente and myself did. And there is no excusable neglect when you have a case like this. Unless you get -- what I know, we can always reset something when it's the Defendant. If I don't file a motion, if I don't respond, well you know, all of a sudden these rules become favorable. It is against me. Just -- what would just happen -- the case like before this? The State didn't respond to it and the Court just dismissed it.

Here, we have a whole history of trying to get them to respond and they didn't. And once we do it, once we file the motion we did, and then all of a sudden the Eighth Judicial District Court rules go out the window as well as the District Court rules were out the window. But that wasn't the case. It should be -- our motion should be granted as this.

And I would ask the Court -- before this Court, you as an individual -- you are the individual, make a ruling based on some [indiscernible] not in front of Judge Eller, that you read the points and authorities that Mr. Pariente filed. They are compelling. Read the points that I filed. I think they're compelling. And then the Court can in fact,

make a decision because quite recently, just blowing us off quite through that by saying oh, no harm, no foul to you guys, because the State didn't follow the rules just doesn't seem to cut it, Judge. Not in this case it doesn't.

But Mr. Pariente, myself, and Mr. Castillo, each and every one us bent over backwards to accommodate the State and this is what we get in return. You know, close your eyes, what do you see? Nothing. That's we get and now we get an adverse ruling in spite of the case law and in spite of the District Court rules that are supposed to apply to both sides in cases, Your Honor. So, that's why I'm asking to reconsider. If you'll just read the stuff before you make a ruling from the bench.

MS. TALIM: And Your Honor, if I may make a brief record, because not once, not twice, not three times, but now four times, Mr. Pitaro has said that the time for the -- the schedule for the State to respond was extended based on my request. That's absolutely not true. My return was prepared. It was not filed because Mr. Najera's counsel contacted me and said, hey these are complicated issues. Let's set this case out.

MR. PARIENTE: That's not true.

MS. TALIM: That's absolutely true.

MR. PARIENTE: And Your Honor, if I --

MS. TALIM: And that's happened.

THE COURT: Well wait a minute, I can only hear one of you at a time.

MS. TALIM: Mr. Pariente contacted me and said there are

complicated issues. Let's -- give this a little bit more time. So you have more time to file your return, I have more time to file my reply, and then we'll have the hearing at a later date.

I would point out, Your Honor, the Court has discretion in this case whether to deny or grant the Defendant's motion to strike. I'm asking the Court to exercise the same discretion that Judge Eller would exercise and to rule that, really in favor of allowing the substantive arguments to proceed. We're not done here. There are still substantive arguments to be had.

There is no prejudice to the Defendant. And I would point out again it's because this was a professional courtesy that I extended to Counsel by continuing it. Shame on me because my writ was prepared. And the Court knows my writ was prepared because the moment I got Mr. Fumo's motion to grant his petition, that next day my motion was -- my return was filed. My return is lengthy. There's no way I would have had time overnight to draft that pleading.

So, this was not calendared. The State did prepare the order, again as a courtesy as the State generally does when we set a hearing schedule. We did prepare the order. It wasn't on my calendar. It didn't appear on my calendar and because it wasn't on my calendar, there was neglect in me responding timely. But it was not intentional, it was not willful, it was certainly a malicious neglect, it was an excusable neglect. It simply did not make my calendar and I failed to respond in time.

I would note also, Your Honor, the hearing was originally set on the writ argument for November 19th. It's November 23rd. We

certainly could have had that argument today. We're 4 days out from when the hearing was initially set. So again, that goes back to there is no prejudice. The Defendants, none of them, none of them are barred from making the substantive arguments that they raised in their petition -- in their writ argument. They are not barred from making those same arguments in front of the Court on the substantive level. They've never been in custody. Certainly, nothing from a custodial standpoint has changed in so far as that there just is no prejudice to the defense.

So I am asking that the Court stand by it's ruling that -- and find that this was an excusable neglect. And I bet every attorney in this courtroom has had this happen to them during the course of their career where they have just blown a deadline and that's all this was, Your Honor. So it is an excusable neglect. I'm going to ask that the Court stand by it's ruling, deny the motion to strike, and set a date where we can all argue substantively on the petition and the arguments against.

MR. PARIENTE: Your Honor, I need to respond if I may.

THE COURT: Yes.

MR. PARIENTE: Your Honor, Michael Pariente again for Mr. Najera. The State is acting like they gave us some sort of courtesy. We filed -- Mr. Pitaro and myself, filed our writs of habeas corpus timely within the 21 days. In fact, I filed mine on July the 4th of this year.

What I did was at the first hearing, I contacted the State and I said these are complicated issues. I as a courtesy said you should have 60 days to do an opposition and we're going to ask for 30 days to do a reply. As the Court knows from many years of being on the bench,

typically what happens is we file a writ of habeas corpus. The Court will then set 30 days for the State to do their return, 2 weeks for us to do a reply. There are many complicated issues here, very technical issues.

So on the record in front of Judge -- it was Judge Villani, I said, Your Honor, I'd like to go ahead and just give the State 60 days just to make sure that they have enough time because these are complicated issues.

I as a courtesy requested that and that was agreed to. The State drafted the order, so I asked for them to have 60 days. So, what Ms. Talim is trying to suggest is that she did me a favor. I already filed my writ. I was doing them a favor by asking the Court to agree to 60 days and they couldn't even comply with that. So not only do we have the 60 days that were in there, we had the 30 days for us to do a reply. That's -- we're prejudiced because that date has come and gone. They didn't even try to comply with EDCR 2.25. They must file a motion requesting the extension of time they granted and there has to be a showing of excusable neglect.

So, if the Court is not inclined to reconsider it's ruling, I'm asking the Court to at least hold off on ruling on this rather than just granting it. I ask the Court to just hold off and let Judge Eller address this when we come back.

MS. TALIM: And Your Honor, I did file a supplement --

MR. PITARO: And Your Honor --

MR. TALIM: -- on November 4th in which I did outline procedurally what happened in this case, outlining my --

THE COURT: I saw the supplement.

MS. TALIM: Thank you, Judge. I just want to make sure that Mr. Pariente is aware that that was filed as well as the request to extend the time to November 3rd --

THE COURT: Well --

MS. TALIM: -- which would have been the day before that that was in there.

MR. PITARO: Your Honor, I do want to respond also. This is Tom Pitaro on behalf of Mr. Madrigal.

It's this, we filed our writ on July 6th. According to the Eighth Judicial District Court rules, the State has 10 days. That would have been to July 16th. The stipulation -- they had -- it wasn't filed at that time but we agreed to give them and we went along with the stipulation. After we went along with the stipulation, that wasn't complied with. And Ms. Talim, I think -- I'm sure she would not disagree because I believe she confirmed it with Ozzy Fumo and that is that she did get those messages from Ozzy. This was before we even filed it. Before I drafted this, I asked Ozzy that -- did you in fact -- I asked him how did he do? He told me that he had done it twice and that there had been no response.

So the idea that that's excusable neglect is -- that's a [indiscernible] from the 21 days from filing the writ under the 22. This Court had no problem knocking it up. If I don't file a writ in response or coming in, you know, when I'm giving those courtesies and well, you have no harm, no foul, quite truthfully. You have these rules in effect.

We followed up, we did everything. We gave not one courtesy, not two courtesies, three courtesies, four courtesies on this with the conversations with Mr. Fumo and nothing. And it's not until I filed this motion that all of a sudden, it's probably not -- there. We expect if the rules apply to us they apply to everyone, Judge. If Your Honor applies it to us, it applies to everyone.

And we sited case law, Mr. Pariente sited case law, we sited the rules, I even sited the code of ethics, the ethics of attorneys, not that I thought that she was -- or that, Talim was unethical, I don't. But it says in there if you're not going to file something, then you have to put in the record the reason why that I don't agree with the order.

But everything that you could possibly read through and that they blow off that there are no harm, no foul. They totally ignore us, your rules, the District Court rules, several state of the case law and maybe that's why we're a bit upset over this.

My answer was -- by the State was due July 16th not November 3rd. It wasn't due -- it was October the 3rd -- it was due 2 months before. We gave them the courtesies and this was the response we get. But that's my record on it, Your Honor.

And I do think that if Your Honor will allow it, you should read the points and authorities before you rule, because according to the case law, you have to make a specific finding. And I don't know how you can make a finding over [indiscernible] what we've said and put it on motions and reading the case law. And Judge Eller, this was -- I was supposed to be arguing this on the 19th and then I accept the 19th. That

gets bumped over to whatever today is -- the 23rd. You know, my hearing should have been in July. Now I'm in November. That's all.

And what the case shows us -- what the facts show, and that's why we filed this motion. This is one of the two times I've ever filed a motion like this. But this is so egregious that we had to do it to protect our client. And that's what these rules are out there to make the administration of justice run smooth but it goes both ways. There's not a one way street; there's a two-way street. And we're just asking the State to get on the other side or get in the right side of the street they're after. We're on our side of it; right? And they went on theirs. Thank you.

THE COURT: Well, I find no prejudice --

UNIDENTIFIED SPEAKER: Hello, Your Honor.

THE COURT: -- to the Defendant. I'm not -- I'm going to stick with my ruling. The motion to strikes are denied.

MS. TALIM: Thank you, Your Honor.

THE COURT: I'd like the State to prepare an appropriate order. We need to reset the writ. When do you want it?

MS. TALIM: Whenever --

MR. PARIENTE: Well, Your Honor, it's --

MS. TALIM: I'll defer to Defense, Your Honor.

MR. PARIENTE: Well, Your Honor, first of all, I don't want in any way be waiving my objections. So, I would prefer that we just -- I'd like the Court to just status check this for -- till after the New Year, because I don't want to ask for time for a new reply date, because then

I'll appear that I'm waiving any defenses. So, I'm just going to ask that we continue this for a status check to see where we are for after the New Year.

In the meantime, I am going to order a transcript to today's proceedings. I'm going to immediately file a writ of mandamus. As soon as I get the transcript, I'm going to file this with the Nevada Supreme Court and I believe Mr. Pitaro said he will join in that. So, I would like to just pass this for 60 days so I can proceed forthwith on those efforts.

THE COURT: You've got a trial date set in June.

MS. TALIM: Your Honor, I prefer to just move forward with the argument. It sounds like --

THE COURT: Well, why don't we set -- why don't we set it for argument in January?

MS. TALIM: Perfect.

MR. PITARO: Except, Your Honor, what you're missing is that I had an opportunity to reply. It has never been set. If we get 30 days to reply, we haven't even come to the 30 days yet and we're talking as if we -- we've already responded to a writ.

THE COURT: Well, you want --

MR. PITARO: We haven't because they didn't file in time when I filed a motion and we ask --

THE COURT: Why don't we have you file your -- your reply by January 1; would that be good?

MR. PITARO: Well -- I -- if whatever the Court says, but we're not waiving any right to [indiscernible].

THE COURT: We'll have you file it by January 1. We'll set this for argument to the latter part of January.

THE COURT CLERK: January --

MR. CASTILLO: And Your Honor --

THE COURT CLERK: -- 18th at 12 noon.

THE COURT: That'll be the order.

MR. CASTILLO: And Your Honor, on behalf of Eduardo Fabian Garcia, I just want to submit based upon the arguments submitted on -- this afternoon. And that day was January 1st?

THE COURT: January 1st to file -- make it January 2 to file the reply.

MS. TALIM: Thank you, Your Honor.

THE COURT CLERK: And January 18th at noon for the writ --

MS. TALIM: Thank you.

THE COURT CLERK: -- to be heard.

MR. PARIENTE: Thank you, Your Honor.

MR. CASTILLO: Thank you.

[Hearing concluded at 1:12 p.m.]

******

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Brittany Amoroso
Court Recorder/Transcriber

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy, Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

IN THE SUPREME COURT OF NEVADA

STATE OF NEVADA

Electronically Filed
Dec 16 2021 10:20 a.m.
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

MICHAEL D. PARIENTE, ESQ,
COUNSEL FOR PETITIONER
Nevada Bar Number 9469
JOHN GLENN WATKINS, ESQ,
OF COUNSEL
Nevada Bar Number 1574
3800 Howard Hughes Parkway #620
Las Vegas, Nevada 89169
Telephone: (702) 966-5310
Facsimile: (702) 953-7055
michael@parientelaw.com
johngwatkins@hotmail.com

STEVEN WOLFSON,
DISTRICT ATTORNEY
200 Lewis, Floor 3
Las Vegas, Nevada 89101
Telephone: (702) 671-3847
Facsimile: (702) 385-1687
motions@clarkcountyda.com

CRYSTAL ELLER
DISTRICT COURT JUDGE
200 S. Lewis Street.
Department 19
Las Vegas, Nevada 89101

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy, Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

PET

Michael D. Pariente
Bar No. 9469
The Pariente Law Firm, P.C.
John G. Watkins, Of Counsel
Bar No. 1574
3960 Howard Hughes Parkway
Suite 615
Las Vegas, NV 89169
(702) 966-5310
Attorneys for Petitioner

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.

MICHAEL D. PARIENTE, ESQ.
JOHN G. WATKINS, ESQ. OF COUNSEL
3960 Howard Hughes Parkway
Suite 615
Las Vegas, Nevada 89169
Attorneys for Petitioner

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy, Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy, Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

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:

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy, Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

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.*

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy, Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

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.

***

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy, Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

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:

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy, Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

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

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy, Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

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

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy, Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy, Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

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.*

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.

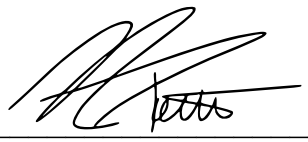
CONCLUSION

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.



MICHAEL D. PARIENTE, ESQ.

PARIENTE LAW FIRM, P.C.
3960 Howard Hughes Pkwy, Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

JOHN G. WATKINS, ESQ. OF COUNSEL
3960 Howard Hughes Parkway
Suite 615
Las Vegas, Nevada 89169
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:

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy, Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

[] 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 2,611 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

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy, Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

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

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy, Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy, Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

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 depositing for mailing in the U.S. mail with sufficient postage affixed thereto

_____ 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 15th day of December, 2021.

Chris Barden, Paralegal

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

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.

/ / /

/ / /

/ / /

/ / /

/ / /

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

IN THE SUPREME COURT OF NEVADA

STATE OF NEVADA

Electronically Filed
Jan 31 2022 12:06 p.m.
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.: 83923

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

REPLY TO STATE'S ANSWER TO PETITION FOR WRIT OF MANDAMUS

MICHAEL D. PARIENTE, ESQ,

Nevada Bar Number 9469
JOHN GLENN WATKINS, ESQ,
OF COUNSEL
Nevada Bar Number 1574
3800 Howard Hughes Parkway #620
Las Vegas, Nevada 89169
Telephone: (702) 966-5310
Facsimile: (702) 953-7055
michael@parientelaw.com

johngwatkins@hotmail.com

STEVEN WOLFSON,
DISTRICT ATTORNEY
200 Lewis, Floor 3
Las Vegas, Nevada 89101
Telephone: (702) 671-3847
Facsimile: (702) 385-1687
motions@clarkcountyda.com

CRYSTAL ELLER

DISTRICT COURT JUDGE
200 S. Lewis Street.
Department 19
Las Vegas, Nevada 89101

PARIENTE LAW FIRM. P.C.
3800 Howard Hughes Pkwy., Suite 620
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

REP
Michael D. Pariente
Bar No. 9469
The Pariente Law Firm, P.C.
John G. Watkins, Of Counsel
Bar No. 1574
3800 Howard Hughes Parkway
Suite 620
Las Vegas, NV 89169
(702) 966-5310
Attorneys for Petitioner

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

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

REPLY TO STATE'S ANSWER FOR PETITION FOR WRIT OF MANDAMUS

NOW COMES Defendant, JESUS NAJERA, through his attorney of

record, MICHAEL D. PARIENTE, ESQ. and JOHN G. WATKINS, ESQ., Of Counsel, and files the instant Reply to the State's Answer pursuant to this Court's Order dated January 12, 2022.

DATED this 30th day of January, 2022.

Respectfully submitted,

THE PARIENTE LAW FIRM, P.C.

MICHAEL D. PARIENTE, ESQ.
JOHN G. WATKINS, ESQ. OF COUNSEL
3800 Howard Hughes Parkway
Suite 620
Las Vegas, Nevada 89169
Attorneys for Petitioner

PARIENTE LAW FIRM. P.C.
3800 Howard Hughes Pkwy., Suite 620
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

PARIENTE LAW FIRM. P.C.
3800 Howard Hughes Pkwy., Suite 620
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

I.

LAW AND ARGUMENT

A.

The State ignores N.R.Cr.P. Rule 11 which *requires* the late filing party to seek permission of the district court *before* the date the brief is due.

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. Extensions of time are controlled by N.R.Cr.P. 11(1), which states:

> **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.)

It is uncontroverted that the State violated N.R.Cr.P. Rule 11(1). The State *never* requested an extension, either orally or written, at any time. The district court never required the State to comply with N.R.Cr.P. Rule 11(1). The sole basis for the district court's[1] denial of Najera's Motion to Strike the State's untimely Answer was the lack of prejudice. N.R.Cr.P. Rule 11 is not dependent on prejudice or the lack thereof.

The State violated Rule 11 – its Return was due September 20, 2021 but was filed November 3, 2021 *after* the State's deadline had passed. The State

1. Judge Thompson was sitting for Judge Eller and he made it clear that his decision was what Judge Eller instructed him on how to rule on Najera's Motion to Strike. Judge Thompson stated, "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, ls. 8-11.

PARIENTE LAW FIRM. P.C.
3800 Howard Hughes Pkwy., Suite 620
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

never sought permission to file its brief late required by Rule 11. There is nothing discretionary in Rule 11's specific language: "A request to extend must be made before the time period would have originally expired." *Id.*

Here, the State never even filed a request to extend the time period. It was required by N.R.Cr.P. Rule 11 to do so and this request would have had to be made *before* the State's deadline of September 20, 2021 to file its Return. No request to extend the time period was made and the State, without any authority to do so, filed its Return 44 days after it was due on November 3, 2021. Since the State violated N.R.Cr.P. Rule 11(1), the State's 44-day late filing cannot be condoned and his request for relief in this Court must be granted.

CONCLUSION

The State's return was 44 days late and the State never requested to extend the deadline to file its Return *before* its deadline of September 20, 2021. The State's abject failure to comply with N.R.Cr.P. Rule 11(1) warrants this Court's granting Najera's Petition.[2]

DATED this 30th day of January, 2022.

Respectfully submitted,

2. EDCR 2.25, EDCR Rule 3.50 (superseded by Nevada Rules of Criminal Procedure – March 25, 2021), and N.R.Cr.P. Rule 11(1) are substantially similar requirements for extensions of time.

PARIENTE LAW FIRM. P.C.
3800 Howard Hughes Pkwy., Suite 620
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

THE PARIENTE LAW FIRM, P.C.

MICHAEL D. PARIENTE, ESQ.
JOHN G. WATKINS, ESQ. OF COUNSEL
3800 Howard Hughes Parkway
Suite 620
Las Vegas, Nevada 89169
Attorneys for Petitioner

VERIFICATION

Under penalty of perjury, the undersigned declares that in the foregoing Reply and knows the contents thereof; that Reply 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 30th day of January, 2022.

Respectfully submitted,

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

PARIENTE LAW FIRM, P.C.
3800 Howard Hughes Pkwy., Suite 620
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

PARIENTE LAW FIRM. P.C.
3800 Howard Hughes Pkwy., Suite 620
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Reply 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 1,389 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 30th day of January, 2022.

Michael D. Pariente, Esquire

PARIENTE LAW FIRM. P.C.
3800 Howard Hughes Pkwy., Suite 620
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

PARIENTE LAW FIRM. P.C.
3800 Howard Hughes Pkwy., Suite 620
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

CERTIFICATE OF SERVICE

I, Christopher Barden, hereby certify and affirm that this document was filed electronically with the Court of Appeals on January 30, 2022. Electronic Service of the foregoing Petition for rehearing shall be made in accordance with the Master Service List as follows:

STEVEN WOLFSON,
DISTRICT ATTORNEY,

DEPARTMENT 19,
DISTRICT COURT JUDGE ,

DATED this 30th day of January, 2022.

Chris Barden, Paralegal

IN THE COURT OF APPEALS 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, DISTRICT JUDGE,
Respondents,
and
THE STATE OF NEVADA,
Real Party in Interest.

No. 83923-COA

ORDER DENYING PETITION

In this original petition for a writ of mandamus, Jesus Najera seeks an order directing the district court to strike the State's untimely return to Najera's pretrial petition for a writ of habeas corpus.

A writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office, trust, or station, NRS 34.160, or to control a manifest abuse or arbitrary or capricious exercise of discretion, *Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981). A writ of mandamus will not issue, however, if the petitioner has a plain, speedy, and adequate remedy in the ordinary course of law. NRS 34.170. Further, mandamus is an extraordinary remedy, and it is within the discretion of this court to determine if a petition will be considered. *See Poulos v. Eighth Judicial Dist. Court*, 98 Nev. 453, 455, 652 P.2d 1177, 1178 (1982); *see also State ex rel. Dep't of Transp. v. Thompson*, 99 Nev. 358, 360, 662 P.2d 1338, 1339 (1983). "Petitioner[ ] carr[ies] the burden of demonstrating that

extraordinary relief is warranted." *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004).

Najera has a plain, speedy, and adequate remedy in the ordinary course of law. If the district court grants his pretrial petition, the issue is moot. If the district court denies the petition and Najera is ultimately convicted, he may appeal the district court's denial of his motion to strike as an intermediate order. *See* NRS 177.045.

For these reasons, we conclude Najera has not met his burden of demonstrating that extraordinary relief is warranted, and we

ORDER the petition DENIED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. Crystal Eller, District Judge
The Pariente Law Firm, P.C.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk