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, DISTRICT JUDGE,
Respondents,
and
THE STATE OF NEVADA,
Real Party In Interest.

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Elizabeth A. Brown
Clerk of Supreme Court

Case No. 83923

ANSWER TO PETITION FOR REVIEW

COMES NOW, Respondent, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through his Chief Deputy, TALEEN PANDUKHT, and submits this Answer to Petition for Review in obedience to this Court's Order Directing Answer to Petition for Review filed March 16, 2022, in the above-captioned case. This Answer is based on the following memorandum and all papers and pleadings on file herein.

Dated this 29th day of March, 2022.

Respectfully submitted,

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

BY */s/ Taleen Pandukht*
TALEEN PANDUKHT
Chief Deputy District Attorney
Nevada Bar #005734
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MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On May 27, 2021, the Grand Jury indicted Petitioner Jesus Najera ("Petitioner") on two (2) counts of Trafficking in Controlled Substance, one (1) count of Conspiracy to Violate Uniform Controlled Substances Act, and one (1) count of Possession of Controlled Substance. 1 Respondent's Appendix (RA) 1.

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

Petitioner filed a Motion to Strike State's Return As Untimely on November 8, 2021. 1 PA 65. The Honorable J. Charles Thompson, District Court Judge, denied the motion on November 23, 2021. 1 PA 77. A written order denying the motion was filed on January 17, 2022. 1 RA 7.

Petitioner filed a Writ of Mandamus in this Court on December 16, 2021. 1 PA 91. 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. On January 28, 2022, the State filed an Answer. 1 PA 107. On January 31, 2022, Petitioner filed

his Reply. 1 PA 121. On February 11, 2022, this Court issued a Notice of Transfer transferring the case to the Court of Appeals. Notice of Transfer to Court of Appeals, February 11, 2022. On February 23, 2022, the Court of Appeals filed an Order Denying Petition. 1 PA 131.

On March 1, 2022, Petitioner filed the instant Petition for Review. On March 16, 2022, this Court ordered the State to Answer the Petition. Order Directing Answer to Petition for Review, March 16, 2022. The State's Answer follows.

SUMMARY OF THE ARGUMENT

Petitioner's complaints do not warrant review by this Court. Petitioner fails to meet his burden of demonstrating that this is either a matter of statewide importance or that the Court of Appeals' decision conflicts with a decision by the Court of Appeals or a higher court. First, the Court of Appeals properly denied the Petition for Writ of Mandamus because Petitioner has a plain, speedy, and adequate remedy in the ordinary course of law. Second, Petitioner's claims also fail on the merits. Nothing in EDCR 2.25 or Nev.R.Cr.P. 11(1) requires a district court to strike an untimely return and Petitioner's attempt to avoid having his Petition heard on the merits should be rejected by this Court. Accordingly, as the Court of Appeals properly denied Petitioner's Petition for Writ of Mandamus and his underlying claims are also meritless, the instant Petition for Review should be denied.

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ARGUMENT

I. PETITIONER'S COMPLAINTS DO NOT WARRANT REVIEW

Petitioner's complaints do not warrant review by this Court. A judgment of the Court of Appeals is a final decision that may not be examined by this Court except on a petition for review. NRAP 40(B)(a). "Supreme Court review is not a matter of right but of judicial discretion." NRAP 40(B)(a). Under that rule, the Supreme Court considers certain factors when determining whether to review a Court of Appeals decision, including: "(1) Whether the question presented is one of first impression of general statewide significance; (2) Whether the decision of the Court of Appeals conflicts with a prior decision of the Court of Appeals, the Supreme Court, or the United States Supreme Court; or (3) Whether the case involves fundamental issues of statewide public importance." NRAP 40B(a). Appellants bear the burden of "succinctly stat[ing] the precise basis on which [they] seek[] review by the Supreme Court." NRAP 40B(d).

Here, Petitioner claims that this matter is one of statewide importance because Nev.R.Cr.P. 11(1) is a new rule and "other courts across the State of Nevada may rule N.R.Cr.P. 11(1) a nullity due to the Nevada Court of Appeals' decision." Petition at 5. First, Petitioner's claim that the Court of Appeals' decision will render Nev.R.Cr.P. 11(1) a nullity is hyperbolic. The Court of Appeals' denied the Petition for Writ of Mandamus because Petitioner has a plain, speedy, and adequate remedy

in the ordinary course of law. Thus, the Court of Appeals' decision did not even touch on the merits of Petitioner's argument and there is no reason to believe that other courts across the state would take this as a cue to disregard the Rules of Criminal Procedure. Accordingly, Petitioner's first argument for why this is a matter of statewide importance fails.

Moreover, as explained *infra*, Petitioner's claims lack merit. Nothing in Nev.R.Cr.P. Rule 11 or EDCR 2.25 requires a court to strike an untimely return. Not only does Petitioner fail to support his argument with any cogent authority, but it is also in clear contradiction to this Court's policy that cases be heard on their merits. As a cursory review of Nev.R.Cr.P. Rule 11 reveals Petitioner's claim to be meritless, it can hardly be said to be a matter of statewide importance.

Finally, Petitioner has failed to demonstrate that the Nevada Court of Appeals' decision conflicts with a prior decision of the Court of Appeals, the Nevada Supreme Court, or the United States Supreme Court. Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court."). The Court of Appeals properly denied Petitioner's Petition for Writ of Mandamus as Petitioner has a plain, speedy, and adequate remedy in the ordinary course of law. Accordingly, Petitioner has failed to demonstrate that review by this Court is warranted and his Petition for Review should be denied.

II. THE COURT OF APPEALS PROPERLY DENIED THE PETITION FOR WRIT OF MANDAMUS

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.

Here, the Court of Appeals properly held that Mandamus was not warranted as Petitioner has a plain, speedy, and adequate remedy in the ordinary course of law. The Court of Appeals stated in relevant part:

> 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.

1 PA 132. Petitioner fails to explain why an appeal from a judgment of conviction, if Petitioner were convicted, is not a sufficient remedy. Petitioner merely cites to the interests of "judicial economy," and baldly asserts that "the conviction would be reversed on appeal because the Court would find the Motion to Strike should have been granted." Petition at 12. Because Petitioner cannot show that the Court of

Appeals erred when it denied his Petition for Writ of Mandamus, the instant Petition for Review should be denied.

III. UNDER EITHER EDCR 2.25 OR Nev.R.Cr.P. 11, THE DISTRICT COURT REASONABLY ALLOWED THE FILING OF A LATE RETURN

Petitioner next argues that the district court erred when it denied his Motion to Strike the State's Return, which was filed forty-four (44) days late and failed to apply Nev.R.Cr.P. Rule 11(1) to its analysis. Petition at 12. Petitioner's argument that the district court must apply Nev.R.Cr.P. Rule 11(1) was neither presented to the district court, nor to the Court of Appeals, and so should not be considered for the first time by this Court. See Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal."). Even if this Court decides to consider Petitioner's newly raised argument, under either EDCR 2.25 or Nev.R.Cr.P. Rule 11(1), Petitioner's argument fails.

A. EDCR 2.25 is Inapplicable to Criminal Matters and Even if it Were, it Does Not Require the Court to Strike and Untimely Return

First, EDCR 2.25 is a *civil* rule of practice, which Petitioner attempted to apply without reason or explanation in a *criminal* matter. EDCR 2.25. In his Petition for Writ of Mandamus, Petitioner 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. 1 PA 101–102. 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 Petitioner, are civil cases to which a civil rule would naturally apply. Petitioner 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, 103 Nev. at 673, 748 P.2d at 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*. Petitioner 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 (9) months before he filed his Motion to Strike citing it as authority. Accordingly, if EDCR ever did apply to criminal actions, it does not now and did not at the time Petitioner filed his motion.

Third, if EDCR 2.25 were still in effect and were applicable to a criminal matter, Petitioner *still* fails to demonstrate that the district court was required to grant his Motion to Strike. 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 Petitioner 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, 67 P.3d at 416; Moseley, 124 Nev. at 668, 188 P.3d at 1136. The district court listened to arguments by counsel and found excusable neglect in the State filing a late Return. 1 PA 77. Thus, the district court undertook the only action the rule required it to take. Petitioner 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.

Finally, the cases cited by Petitioner in his Petition for Writ of Mandamus 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, 67 P.3d at 416 (citing EDCR 1.10 and Hotel Last Frontier Corp. v. Frontier Props., Inc., 79 Nev. 150, 155, 380 P.2d 293, 295 (1963).)

Mandamus relief was 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 was "extraordinary relief" warranted.

B. The District Court Was Not Required to Strike the State's Return Pursuant to Nev.R.Cr.P. 11(1)

As to Petitioner's newly raised argument that the district court was required to strike the State's Return as untimely under Nev.R.Cr.P. 11(1), this claim also fails. Nev.R.Cr.P. 11(1) states:

> 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.

Like EDCR 2.25, nowhere in Nev.R.Cr.P. 11(1) does it state that a district court must strike an untimely pleading. Rather, the rule permits the court to shorten or extend time by its own discretion or upon a finding of good cause, which the court essentially did here when it found that the State's filing a late Return was excusable neglect and that Petitioner did not suffer any prejudice. 1 PA 77. Petitioner's attempt to expand the rule is unsupported by the text itself or any authority cited by Petitioner and should therefore be rejected by this Court. Morrow v. Dist. Ct., 129 Nev. 110, 113, 294 P.3d 411, 414 (2013) ("When a rule is clear on its face, we will not look beyond the rule's plain language.").

Petitioner'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. Petitioner is attempting to use either EDCR 2.25 or Nev.R.Cr.P. Rule 11(1) 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." 1 PA 101. Petitioner intends to use either Nev.R.Cr.P. Rule 11 or EDCR 2.25 to *prevent* a matter from being heard on the merits in contravention to this Court's "basic underlying policy to have each case decided upon its merits." Black, 132 Nev. at 77–783, 67 P.3d at 416.

Moreover, Petitioner's belief as to the consequences of a struck return are also flawed – the district court is required to determine whether Petitioner'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.'"); Housewright v. Powell, 101 Nev. 736, 737, 710 P.2d 73, 74 (1985) (citing the same in the post-conviction habeas context.). Based on the foregoing, Petitioner has failed to meet his burden under NRAP 40B(a) to demonstrate that this case involves a matter of statewide public importance or that the decision of the Court of Appeals conflicts with a prior decision by the Court of Appeals or a higher Court. Accordingly, his Petition for Review should be denied.

CONCLUSION

Based upon the foregoing and the record before this Court, the State respectfully requests that Petitioner's Petition for Review be denied.

Dated this 29th day of March, 2022.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney

BY */s/ Taleen Pandukht*
TALEEN PANDUKHT
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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this petition for review or answer 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 it 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 petition complies with the type-volume limitations of NRAP 40, 40A and 40B because it is proportionately spaced, has a typeface of 14 points and contains 3,114 words and 262 lines of text.

Dated this 29th day of March, 2022.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on March 29, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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I, further certify that on March 29, 2022, a copy was sent via email to District Court, Department 19's JEA for Judge Eller:

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BY */s/ E. Davis*
Employee, District Attorney's Office

TP/Megan Thompson/ed