**IN THE SUPREME COURT OF NEVADA**
**STATE OF NEVADA**

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Elizabeth A. Brown
Clerk of Supreme Court

NORBERTO MADRIGAL,

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-21-356361-3

# PETITION FOR WRIT OF MANDAMUS

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CRYSTAL ELLER
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Docket 84010 Document 2022-00073

**PET**
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**IN THE SUPREME COURT OF NEVADA**
**STATE OF NEVADA**

| | |
|---|---|
| NORTBERTO MADRGIAL,<br>Petitioner,<br>vs.<br>THE HONORABLE CRYSTAL ELLER, EIGHTH JUDICIAL DISTRICT COURT JUDGE, DEPT. NO. 19,<br>Respondent,<br>STATE OF NEVADA,<br>Real Party in Interest. | S. Ct. No.:<br>DIST. CT. NO. C-21-356361-3 |

**PETITION FOR WRIT OF MANDAMUS**

COMES NOW Defendant, NORBERTO MADRIGAL, by and through his attorneys of record, THOMAS F. PITARO, ESQ. and EMILY K. STRAND, ESQ., of the law firm PITARO & FUMO, CHTD. 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 29th day of December, 2021.

Respectfully submitted,

**PITARO & FUMO, CHTD**

*/s/ Emily K. Strand, Esq.*
EMILY K. STRAND, ESQ.
Nevada Bar Number 15339
*Attorney for the Petitioner*

## NRAP 26.1 DISCLOSURE STATEMENTS

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

## ROUTING STATEMENT

Petitioner Norberto Madrigal ("Madrigal") 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]

The present case involves the issue of whether a District Court can override and ignore the plain language of the Eighth Judicial District Court Rules, 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 issue is one of first impression

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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…

and of statewide public importance because allowing the District Court's ruling to stand essentially nullifies the Eighth Judicial District Court Rules as they apply to District Court judges by allowing a District Court Judge to make a mockery of the court and ignore the plain meaning of the rules.

## STATEMENT OF THE CASE

On July 6, 2021, Madrigal, through counsel, filed a Petition for Writ of Habeas Corpus. Petitioner's Appendix (PA) 3-24. On July 20, 2021, following conversations between Mr. Madrigal's Counsel and the State, a Stipulation and Order was entered that set forth a briefing schedule requiring the State to respond to Mr. Madrigal's Petition for Writ of Habeas Corpus by September 20, 2021. PA 25-29. The State did not file its Return by that date. Counsel for Mr. Madrigal made multiple attempts to contact the State and did not receive a reply. PA 95-97. On October 28, 2021, Madrigal filed a Motion for an Order Granting the Writ of Habeas Corpus, based on the State's lack of response to the Writ. PA 30-52. Following that Motion, the State finally filed its Return, albeit 44 days late, on November 3, 2021 and a supplement on November 4, 2021. PA 53-77.

In its Return, the State admits their brief was due September 20, 2021. "In the instant case, the State admits it failed to file its Return by the date set." PA 76.

The State had two months to file its Return timely. They did not. Instead,

the State filed its Return on November 3, 2021 – ***nearly six weeks after it was due***. Madrigal 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:

> **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.
>
> (Emphasis 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. (emphasis 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 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 Madrigal's Motion, 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 81.

***

THE COURT: Well, I find no prejudice –

PA 92.

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. *(*Emphasis added).

## STATEMENT OF LAW AND ARGUMENT

### *A. Mandamus is appropriate because the District Court's decision is contrary to established rules of law.*

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. (citations 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 Madrigal has no such remedy. However, if this Court were to deem otherwise, there are exceptions to this general rule. In *Williams v. District Court*, the Court entertained the writ of mandamus even though there was an adequate remedy at law stating,

> Thus, we may consider writ petitions challenging the admission or exclusion of evidence when "**an important issue of law needs clarification and public policy is served by this court's invocation of its original jurisdiction**". *Sonia F. v. Dist. Ct., 125 Nev. 38*,----, 215 P.3d 705, 707 (2009) (quoting *Mineral County*, 117 Nev. at 243, 20 P.3d at 805), or when the issue is "***one of first impression and fundamental public importance***." *County of Clark v. Upchurch*, 114 Nev. 749, 753, 961 P.2d 754, 757 (1998). We may

> also consider whether resolution of the writ petition will mitigate or resolve related or future litigation. *Id*. ***Ultimately, however, our analysis turns on the promotion of judicial economy.*** *Smith v. District Court*, 113 Nev. 1343, 1345, 950 P.2d 280, 281 (1997) ("***The interests of judicial economy. . . will remain the primary standard by which this court exercises its discretion.***")
>
> *Id*., 127 Nev. at 525. (Emphasis 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. (citation 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. If this Court doesn't grant the instant petition for writ of mandamus and order the District Court to reverse its denial of the Madrigal's Motion to Grant His Petition for Writ of Habeas Corpus because the State's response was 44 days late, Madrigal could be convicted at trial. The conviction would be reversed on appeal because the Court would find Madrigal's Motion should have been 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 Madrigal's Motion to Grant the Writ of Habeas Corpus 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 had two months to file their return or ask for an additional extension. Not only did they not do so, they did not correct their error for another 44 days. The State ignored multiple attempts by Defense Counsel to meet and confer about their missed deadline. It was not until Counsel filed a Motion asking the

District Court to grant the Writ that the State bothered to take action on this case. 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 Madrigal's instant Petition for Writ of Mandamus should be granted ordering Judge Eller to strike the State's dilatory Return.

DATED this 29th day of December, 2021.

Respectfully submitted,

**PITARO & FUMO, CHTD**

*/s/ Emily K. Strand, Esq.*
EMILY K. STRAND, ESQ.
Nevada Bar Number 15339
*Attorney for the 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 29th day of December, 2021.

Respectfully submitted,

**PITARO & FUMO, CHTD**

*/s/ Emily K. Strand, Esq.*
EMILY K. STRAND, ESQ.
Nevada Bar Number 15339
*Attorney for the Petitioner*

## CERTIFICATE OF COMPLIANCE

I hereby certify I have read this brief and that this brief 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) as this brief has been prepared with the proportionally spaced typeface font, Times New Roman, in size 14 using Microsoft Office Word 2013. I further certify that with the page count of 16 pages, and word count of 2,997 this brief complies with the page or type volume limitation of NRAP 32(a)(7), excluding parts of the brief exempting NRAP 32(a)(7)(C).

I hereby certify that to the best of my knowledge, information, and belief, the brief is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, including NRAP 28(e), that every assertion in the briefs regarding matters in the record be supported by a reference to the page and volume number, if any, of the appendix where the matter relied on is to be found.

DATED this 29th day of December, 2021.

*/s/ Emily K. Strand, Esq.*
EMILY K. STRAND, ESQ.
Nevada Bar Number 15339
*Attorney for the Petitioner*

## CERTIFICATE OF SERVICE

Pursuant to NRAP 25 and NEFCR Rule 9, I hereby certify that on the 29th day of December, 2021 a true and correct copy of the foregoing **WRIT OF MANDAMUS** was served by the following method(s):

☐ VIA U.S. MAIL: by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail in Las Vegas, Nevada. I am "readily familiar" with the firm's practice of collection and processing correspondence by mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage fully prepaid in Las Vegas, Nevada in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing an affidavit.

☐ VIA FACSIMILE: by transmitting to a facsimile machine maintained by the attorney or the party who has filed a written consent for such manner of service.

☐ BY PERSONAL SERVICE: by personally hand-delivering or causing to be hand delivered by such designed individual whose particular duties include delivery of such on behalf of the firm, addressed to the individual(s) listed, signed by such individual or his/her representative accepting on his/her behalf. A receipt of copy signed and dated by such an individual confirming delivery of the document will be maintained with the document and is attached.

☒ BY E-MAIL: by transmitting a courtesy copy of the document in the format to be used for attachments to the electronic-mail address designated by the attorney or the party who has filed a written consent for such manner of service.

☒ BY ELECTRONIC MEANS: by electronically filing and serving with the court's vendor pursuant to NRAP 14(f).

**SERVICE LIST**

| Attorney of Record | Party Represented | Method of Service |
|---|---|---|
| District Attorney Steve Wolfson<br>Clark County District Attorney's Office<br>200 Lewis Avenue<br>Las Vegas, Nevada 89101 | State of Nevada | Email Service; Electronic Means |
| Judge Crystal Eller<br>District Court Dept. 19<br>200 Lewis Avenue<br>Las Vegas, Nevada 89101 | Self | Email Service; Electronic Means |

DATED this 29th day of December, 2021.

*/s/ Emily K. Strand, Esq.*
EMILY K. STRAND, ESQ.
Nevada Bar Number 15339
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