

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

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NORBERTO MADRIGAL

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,

STATE OF NEVADA,

Real Party In Interest.

Electronically Filed  
May 26 2022 07:31 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

CASE NO: 84010

**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 Chief Deputy, TALEEN R. PANDUKHT, on behalf of the above-named Respondents and submits this Answer to Petition for Writ of Mandamus in obedience to this Court's Order filed March 11, 2022, in the above-captioned case. This Answer is based on the following memorandum and all papers and pleadings on file herein.

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Dated this 26<sup>th</sup> day of May, 2022.

Respectfully submitted,

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

BY /s/ Taleen R. Pandukht  
TALEEN R. 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 Norberto Madrigal (“Petitioner”) on three (3) counts of Sale of Controlled Substance, two (2) counts of Trafficking in Controlled Substance, one (1) count of Conspiracy to Violate Uniform Controlled Substances Act, one (1) count Unlawful Production or Processing of Marijuana, and one (1) count Possession of Controlled Substance. 1 Respondent’s Appendix, (RA) 2–4.

Petitioner filed a pre-trial Petition for Writ of Habeas Corpus on July 6, 2021. 1 PA 3. On July 30, 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 25. On October 28, 2021,

Petitioner filed a Motion for an Order Granting Defendant's Petition of Writ of Habeas Corpus ("Motion") based on the State's failure to file a timely return. 1 PA 30.

The State filed a Return on November 3, 2021. 1 PA 53. On November 4, 2021, the State filed a Supplement to Return to Petition for Writ of Habeas Corpus and Motion for an Order Granting Defendant's Petition of Writ of Habeas Corpus and Motion to Extend Time to File State's Return. 1 RA 7. On November 23, 2021, the district court heard Petitioner's Motion. 1 PA 78. The court denied the Motion and ordered Petitioner to file any reply by January 2, 2022. 1 PA 94. A written order denying the Motion was filed on March 29, 2022. 2 PA 3.

Petitioner filed a Petition for Writ of Mandamus in this Court on January 3, 2022. On March 11, 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, March 11, 2022. The State's Answer follows.

### **SUMMARY OF THE ARGUMENT**

Petitioner's complaints do not warrant review by this Court. First, Petitioner 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 Petitioner is ultimately convicted. Second, Petitioner fails to demonstrate that the district court acted

arbitrarily, capriciously, or manifestly abused its discretion when it denied his Motion and refused to strike the State’s Return. Petitioner argues that the district court was required to strike the State’s untimely Return pursuant to Eighth Judicial District Court Rule (“EDCR”) 2.25. However, this rule does not apply to criminal cases and even if it did, the district court’s decision was proper because it found that the State’s failing to file a timely return was the result of excusable neglect. Moreover, the district court’s decision was appropriate under the applicable rule, Nevada Rule of Criminal Practice (“N.R.Cr.P.”) 11. Accordingly, the Petition for Writ of Mandamus should be denied.

### **ARGUMENT**

#### **I. THIS COURT SHOULD NOT ENTERTAIN PETITIONER’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.

Here, Mandamus is not warranted as Petitioner 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 Petitioner is

ultimately convicted, he may appeal the district court's denial of his Motion as an intermediate order. *See* NRS 177.045. 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 for Writ of Mandamus ("Petition") at 10. Because Petitioner has a plain, speedy, and adequate remedy in the ordinary course of law, the Petition for Writ of Mandamus should be denied.

## **II. UNDER EITHER EDCR 2.25 OR N.R.Cr.P. 11, THE DISTRICT COURT REASONABLY ALLOWED THE FILING OF A LATE RETURN**

Petitioner asserts that the district court was required to strike the State's untimely Return pursuant to EDCR 2.25. Petition at 7. However, this rule is inapplicable to criminal cases and has been superseded by N.R.Cr.P. 11 if it ever were applicable. Moreover, under either N.R.Cr.P. 11 or EDCR 2.25, Petitioner fails to demonstrate that the district court's decision was arbitrary, capricious, or a manifest abuse of discretion.

### **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 attempts to apply without reason or explanation in a *criminal* matter. EDCR 2.25. In his Petition for Writ of Mandamus, Petitioner quotes EDCR 2.25 and several cases interpreting it,

but provides 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. 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.<sup>1</sup> 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 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);

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<sup>1</sup> Petitioner did not cite to Black or Moseley in his Motion for Order Granting Defendant’s Petition of Writ of Habeas Corpus. Instead, Petitioner cited to two (2) other equally as inapplicable civil cases, Walls v. Brewster, 112 Nev. 175 (1996) and Dickerson v. Downey Brand, LLP, 133 Nev. 1002 (2017). 1 PA 33.

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, even if EDCR 2.25 was previously 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.” N.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 asserts 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 eight (8) months before he filed his Motion. 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. 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. 2 PA 3. 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.<sup>2</sup>

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 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. Thus, as

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<sup>2</sup> The State notes that Petitioner did not cite to EDCR 2.25 in his underlying Motion, but rather cited to District Court Rule 13(3), EDCR 3.20(c), EDCR 3.40(c), and the Nevada Code of Professional Conduct Rule 3.4. 1 PA 30–52. Like EDCR 2.25, none of these rules requires a district court to strike an untimely return. See EDR 13(3), EDCR 3.20(c), EDCR 3.40(c), NRPC 3.4.

Petitioner has failed to demonstrate that the district court acted arbitrarily, capriciously, or manifestly abused its discretion when it denied his Motion, his Petition for Writ of Mandamus should be denied.

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

Petitioner also cannot demonstrate that the district court's decision was arbitrary, capricious or a manifest abuse of discretion under N.R.Cr.P. 11(1). N.R.Cr.P. 11(1) states:

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 N.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. 2 PA 3.

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 EDCR 2.25 as a sword under the belief that if the district court struck the State's Return, it would result in Petitioner's Petition for Writ of Habeas Corpus being granted "because the State's return would be properly struck leading

to the State confessing error.” Petition at 10. Petitioner intends to use 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.).

The district court considered whether there was excusable neglect for the late filing of the Return and found that there was. It considered whether Petitioner 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, Petitioner’s Petition for Writ of Mandamus should be denied.

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## **CONCLUSION**

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

Dated this 26<sup>th</sup> day of May, 2022.

Respectfully submitted,

STEVEN B. WOLFSON  
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Nevada Bar #001565

BY /s/ Taleen R. Pandukht  
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## **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 26<sup>th</sup> day of May, 2022.

BY */s/ Taleen R. Pandukht*

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TALEEN R. PANDUKHT  
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## **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 page and 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, contains 2,585 words and 220 lines of text, and does not exceed 15 pages.
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 26<sup>th</sup> day of May, 2022.

Respectfully submitted

STEVEN B. WOLFSON  
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BY */s/ Taleen R. Pandukht*

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## **CERTIFICATE OF SERVICE**

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on May 26, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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THOMAS F. PITARO, ESQ.  
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I, further certify that on May 26, 2022, a copy was sent via email to:  
District Court, Department 19's JEA for Judge Eller:

Melody Howard – JEA  
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BY /s/ E. Davis  
Employee, District Attorney's Office

TP/Megan Thompson/ed