

IN THE SUPREME COURT OF NEVADA
STATE OF NEVADA

JESUS NAJERA,

Petitioner,

vs.

THE EIGHTH JUDICIAL
DISTRICT COURT; THE
HONORABLE CRYSTAL
ELLER,

Respondents,

STATE OF NEVADA,

Real Party in Interest.

Electronically Filed
Dec 16 2021 10:21 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

S. Ct. No.:

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

PETITIONER'S APPENDIX (PA)

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DISTRICT COURT JUDGE

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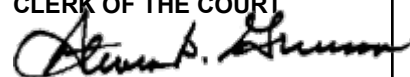
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PET

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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

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(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.**

- 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

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

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

2 Petitioner/Defendant JESUS NAJERA personally authorized his counsel,
3 Michael D. Pariente, Esquire, to commence this action.
4

5 DATED this 4th day of July, 2021.

6 I declare under penalty of perjury that the foregoing is true and correct,
7

8 */s/ Michael D. Pariente*

9 _____
10 MICHAEL D. PARIENTE, ESQ.
11 Petitioner/Defendant

12 **NOTICE OF HEARING**

13 TO: STATE OF NEVADA, Respondent/Plaintiff

14 TO: DISTRICT ATTORNEY, Attorney for Respondent/Plaintiff

15 YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the
16 undersigned will bring the above and foregoing Petition on for hearing before the
17 Court on the ____ day of _____, 2021, at ____ m. in Department XVII of said
18 Court.
19
20
21

22 */s/ Michael D. Pariente*

23 _____
24 MICHAEL D. PARIENTE, ESQ.
25 Nevada Bar No.: 9469
26 3960 Howard Hughes Pkwy, Suite 615
27 Las Vegas, Nevada 8916
28 (702) 966-5310
Petitioner/Defendant

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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. 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 453.906.¹

All 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.

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.

1 **WRONGFULLY COMMINGLED THE ELEMENT OF**
2 **“CONCENTRATED CANNABIS” WITH “THC,” CHAPTER 453A.**

3 a. The State’s failure to instruct the Grand Jury on the meaning of
4 “concentrated cannabis” violates NRS 172.095(2).
5

6 i. A grand jury uninformed on the law does not act as an informed
7 body.
8

9 The grand jury is the bulwark between the accused and the accuser. *State v.*
10 *Babayon*, 106 Nev. 155, 170, 787 P.2d 805 (1990). The record must indicate that the
11 grand jury acted as an **informed** body throughout the entire course of the proceedings.
12 *Id.*, 106 Nev. at 170. To be informed, the grand jury must know the facts and the law.
13 The duty to make sure that the grand jury is informed of the law falls upon the district
14 attorney.³ NRS 172.095(2) mandates,
15

16
17 Before seeking an indictment, or a series of a similar
18 indictments, the district attorney **shall** inform the
19 grand jurors of the **specific elements** of any public
20 offense which they may consider as the basis of the
21 indictment or indictments.

22 (emphasis added)

23 The prosecution failed to inform the grand jury on the law thereby failing to
24 fulfill its legal obligations under NRS 172.095(2). Here, the prosecutor failed to
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³ The prosecutor also has the duty to present the facts in compliance with
NRS 172.135.

1 inform the Grand Jury of the specific elements of “concentrated cannabis.” In fact,
2 “concentrated cannabis” *doesn’t even appear in Count 5 of the indictment.*

3 The Court in *Babayon, supra* stated,
4

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

9 106 Nev. at 170. (cites omitted.) (emphasis added.)

10 Here, the State failed to conduct sufficient research to properly inform the
11 Grand Jury on the law. Had they done so, they would have added the element
12 “concentrated cannabis” to Count 5 of the indictment and explained to the Grand Jury
13 that “concentrated cannabis” is an element of Trafficking in a Controlled Substance
14 under NRS 453.339(1)(a).
15

16 **b. The State improperly commingled the element “concentrated**
17 **cannabis” from NRS 453.339(1)(a) by substituting it with NRS**
18 **453A.155, the definition of THC. This does not charge a legal offense**
19 **and fails to confer subject matter jurisdiction on the District Court**
20 **(or any court).**

21 To legally charge a public offense⁴, there must be a formal accusation
22

23 ⁴ This Court defined “legal” in *Gathrite v. Eighth Judicial District Court*, 135 Nev.,
24 Adv. Op. 54, 451 P.3d 891 (2019) as “required or permitted by law; not forbidden or
25 discountenanced by law; good and effectual by law” or “[p]roper or sufficient to be
26 recognized by law; cognizable in the courts”, *citing Legal, Black’s Law Dictionary*
27 (4th ed. 1951). *Id.*, 135 Nev., Adv. Op. 54 at 5. A legal charge is a violation of a public
28 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.

(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 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 Tetrahydrocannabinol (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 5⁶ 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

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

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)

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

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.

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

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

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

11 (Boldness added.)

12 NRS 453A.155 which defines tetrahydrocannabinol is:

13 **NRS 453A.155** “THC” defined. THC” means delta-9-tetrahydrocannabinol,
14 which is the primary active ingredient in marijuana.

15 Had the State instructed the Grand Jury of the definitions of concentrated
16 cannabis¹⁹ and tetrahydrocannabinol and properly pled Count 5 as “concentrated
17 cannabis; to wit, tetrahydrocannabinol),” this would be sufficient. Instead, the State
18 never even listed the element “concentrated cannabis” in Count 5, much less
19 defined it, and instead commingled, or substituted “tetrahydrocannabinol” without
20 even defining it. **How was the Grand Jury to know tetrahydrocannabinol**
21 **(THC) is listed as a form of “concentrated cannabis” when they were not given**
22 **the definitions of either?**

23 _____
24 19 NRS 453.042 “Concentrated cannabis” defined. “Concentrated cannabis”
25 means the extracted or separated resin, whether crude or purified, containing THC or
26 CBD from marijuana.
27
28

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.)

1 Finally, the prosecutor didn't comply with NRS 172.095(1)(d) by failing to
2 inform the grand jurors that the failure of Najera to exercise his right to testify must
3 not be considered in their decision of whether or not to return an indictment.
4

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

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

12 The Grand Jury Instructions begin with an incorrect definition of Cocaine as a
13 Schedule 1 controlled substance when in fact it is a Schedule 2 controlled substance.
14

15 Secondly, the Instructions tell the Grand Jury it is a felony for two or more
16 persons to conspire to commit an offense which is a felony under the Uniform
17 Controlled Substances Act but fail to define *what* is the Uniform Controlled
18 Substances Act. In fact, no testimony was solicited from any of the witnesses who
19 testified to *anything* about the Uniform Controlled Substances Act.
20
21

22 Third, as referenced in this Brief, the Instructions fail to define what is
23 concentrated cannabis leaving the Grand Jury to guess as to its meaning.
24

25 Fourth, the Instructions fail to define "possession". Black's Law definition of
26 possession has been adopted by the Nevada Supreme Court:
27

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

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. 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.

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

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

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-

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.

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

3 The prosecutor talked in generalities about the indictment:

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

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

22 "When an offense contains technical elements, it is not compliance with NRS
23 172.095(2) by merely submitting instructions to the grand jury and asking them if they
24 have any questions." *Clay v. Eighth Jud. Dist. Ct.*, 129 Nev., 445, 305 P.3d 898
25 (2013). No one can reasonably dispute that terms such as "possession",
26 "tetrahydrocannabinol", and "concentrated cannabis" are complicated and technical.
27 The State did not fulfill its legal obligation under NRS 172.095(2).
28

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

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

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

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

17 Subsection 1 of NRS 50.320 state in relevant part,

18 1. The affidavit or declaration of a chemist and any other person who has
19 qualified in a court of record in this State to testify as an expert witness
20 regarding the ... identity or quantity of a controlled substance alleged to have
21 been in the possession of a person, which is submitted to prove:

22 (a) The quantity of the purported controlled substance; or

23 (b) The presence or absence of a controlled substance, chemical, poison,
24 organic solvent or another prohibited substance, as the case may be, is
25 admissible in the manner provided in this section.

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

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>

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

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

7
8
9 “When we speak of substantial evidence we refer to
10 something which has probative force. **Evidence in**
11 **‘parrot fashion’ by leading questions resolves it-**
12 **self into submitting to a court, indirectly by oath**
13 **of a witness the data and information in the mind**
14 **of the attorney.** Such information thus received could
 scarcely be elevated to the dignity of a factual found-
 ation and be characterized as substantial evidence.”

15 Canepa v. Durham, 65 Nev. 428, 456 (dissent) (Nev.
16 1949). “It is sometimes discretionary to allow lead-
17 ing questions on the direct examination when it appears
18 that the witness is unable to understand otherwise, as
19 well as when he is hostile.” *State v. Williams*, 31 Nev.
20 360, 367 (Nev. 1909).

21 (emphasis added)

22 The “leading question” prohibition applies to grand jury proceedings. NRS
23 172.136(2) mandates, “[t]he grand jury can receive none but legal evidence, and the
24 best evidence in degree, to the exclusion of hearsay or secondary evidence.” In the
25 instant case, the prosecution used over 50 leading questions. The witnesses were not
26 hostile or confused.

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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.

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

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

4
5 Q: Okay. And then could that have been March 7?

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

7
8 Q: Okay. And that photo we saw, Grand Jury Exhibit 8, was that photo
9 taken March 8th, or rather that video?

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

11
12 Q: Okay. Was this sometime in March?

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

14
15 Q: Sometime in March did you learn that Mr. Najera, the former Metro
16 police officer, visited Mr. Garcia at Mr. Garcia's residence?

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

18
19 Q: So at this point between the intel you received in February and then
20 the follow-up surveillance and investigation that you did, did you
21 and Detective Chaney then decide to introduce a confidential
22 informant into this investigation?

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

24
25
26 Q: In this specific case, did you utilize an individual named Jose Soto?

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

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

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

4
5 Q: There are mechanisms for individuals to buy recreational marijuana?

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

7
8 Q: As well as medical marijuana?

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

10
11 Q: From a legal dispensary?

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

13
14 Q: Okay. So in this case the information you had was marijuana was
15 being sold outside the perimeters of a legal dispensary?

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

17
18 Q: Did those instances result in Mr. Soto purchasing from, and we'll
19 have Mr. Soto testify, from Mr. Garcia items that were later
20 submitted to the lab and resulted in a positive analysis as being
21 marijuana?

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

23
24
25 Q: Okay. So specifically page 1, is this the result of the items you
26 received from Mr. Soto after he purchased what ultimately tested
27 positive as marijuana on April 8th?
28

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

2 Q: Okay. Looking at Page 2 of the same exhibit, is this the result of the
3 final chemical analysis done on the items you recovered from Mr.
4 Soto after deploying him as a confidential informant on April 13th?
5

6 GJ T, V-1. P.28, ll. 4-8.
7

8 Q: And then page 3 of the same exhibit, is this the final chemical
9 analysis for items you recovered from Mr. Soto, his confidential
10 informant buy, on April 22nd?
11

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

14 Q: Okay. And all three of these incidents resulted in you obtaining from
15 Mr. Soto items that ultimately identified as marijuana?
16

17 GJ T, V-1. P.28, ll. 10-13.
18

19 Q: So you never made purchases with your own money?
20

21 GJ T, V-1. P.33. ll. 4-5.
22

23 Q: I want to draw your attention to March 26th of 2020. Is that when
24 you were first introduced to Lalo?
25

26 GJ T, V-1. P.33. ll. 6-8.
27

28 Q: And that address would be at 2340 East Camaro, correct?
29

30 GJ T, V-1. P.33. ll. 11-12.
31

32 Q: And was it also at this time that he also told you that another
33

1 partner was a police officer?

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

3
4 Q: Okay. And did he tell you what chemical he was spraying it with?
5 Was it THC?

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

7
8 Q: And at this time did he again show you larger storages of marijuana
9 in the home?

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

11
12 Q: And it appeared to be marijuana to you?

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

14
15 Q: Did that purchase, was it set up for April 26, of 2020?

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

17
18 Q: Let me follow up with a little bit there. And then you set up this
19 third buy for 250 pounds?

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

21
22 Q: Okay. And then you believe there were two separate two pound buys
23 after that?

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

25
26 Q: Okay. And you responded specifically to that address while other
27 detectives responded to different addresses related to this
28

1 investigation?

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

3
4 Q: Okay. And specifically were you tasked with the search and
5 collection of evidence at 1445 Stone Lake Cove, apartment 4101, in
6 Henderson?

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

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

10
11 GJ T, V-1. P.66. ll. 17-18.

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

14
15 GJ T, V-1. P.66. ll. 20-21.

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

17
18 GJ T, V-1. P.68. ll. 10-11.

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

21
22 GJ T, V-1. P.68. ll. 16-18.

23
24 Q: And you think because his name is printed on the top and there's a
25 signature on the bottom?

26
27 GJ T, V-1. P.71. ll. 1-3.

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

1 states police, right?

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

3
4 Q: Okay. And the last picture of that exhibit is a close-up of those
5 turkey bags?

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

7
8 Q: Now was there a deal set up for after April 30th or about April 30th
9 for which you believed Mr. Garcia would be spraying the hemp?

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

11
12 Q: Turning the page to 311. Mr. Garcia and Najera are discussing
13 seeds in the product?

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

15
16 **I. THE DETECTIVE'S INCORRECT AND CONTRADICTORY**
17 **TESTIMONY ABOUT THE MAXIMUM LIMIT OF "THC"**
18 **LEVELS IN HEMP WAS CONFUSING TO THE GRAND**
19 **JURY WHEREIN HE FIRST TESTIFIED IT WAS .3% AND**
20 **THEN SUBSEQUENTLY TESTIFIED IT WAS .03%. THE**
21 **STATE FAILED TO CORRECT THE EGREGIOUS ERROR**
22 **AND ONCE AGAIN VIOLATED ITS DUTY UNDER NRS**
23 **172.095(2).**

24 When asked by a grand juror about the purchase of marijuana by
25 confidential informant Jose Soto which was tested and found to be under
26 the legal limit for THC, the detective gave confusing and conflicting
27 answers rendering the grand jurors helplessly uninformed.
28

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).

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

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(702) 966-5310

Attorney for Defendant

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

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Third Floor

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/s/Chris Barden

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

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

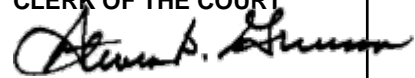
JOURNAL ENTRIES

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



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

7 **DISTRICT COURT**
8 **CLARK COUNTY, NEVADA**

9 In the Matter of Application,
10 of
11 JESUS NAJERA,
12 #5339086
13 for a Writ of Habeas Corpus.

CASE NO: C-21-356361-1
DEPT NO: XIX

14 **STATE'S RETURN TO WRIT OF HABEAS CORPUS**

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

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

23 A. Denies.
24 B. Denies.
25 C. Denies in part; admits in part. Respondent admits "concentrated cannabis
26 was not defines in the instructions, but denies that dismissal of Count 5, Trafficking in
27 Controlled Substance, is consequently warranted.
28

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

4 E. Denies.

5 F. Admits.

6 G. Denies.

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

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

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

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

17 DATED this 3rd day of November, 2021.

18 Respectfully submitted,

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

21 BY /s/ Tina Talim
22 TINA TALIM
23 Chief Deputy District Attorney
24 Nevada Bar #009286
25
26
27
28

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

3 **STATEMENT OF THE CASE**

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

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

23
24 **STATEMENT OF FACTS**

25
26 In February 2020, detectives Aaron Hefner and Gary Chaney of Las Vegas
27 Metropolitan Police Department's (LVMPD) Criminal Intelligence Section (CIS) received
28 information that Defendants Jesus Najera, Eduardo Fabian Garcia, and Norberto Leon

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

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

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

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

17 On April 30, 2020, a series of search warrants were executed throughout the valley. *Id.*
18 at 55:7-14. The search of Defendant Garcia's residence produced bags of unsprayed hemp and
19 32 marijuana plants. *Tr. of Grand Jury, The State of Nevada v. Najera, Garcia, and Madrigal*,
20 No. C356361 at 17:11-25 (Nev. 8th Jud. Dist., 2021). In addition to official documents the
21 search of Defendant Najera's residence revealed ODV positive cocaine that weighed 1.1
22 grams. *Tr. of Grand Jury, The State of Nevada v. Najera, Garcia, and Madrigal*, No. C356361
23 at 68:13-15 (Nev. 8th Jud. Dist., 2020); *Tr. of Grand Jury, The State of Nevada v. Najera,*
24 *Garcia, and Madrigal*, No. C356361 at 72:18 (Nev. 8th Jud. Dist., 2020). Also recovered from
25 Defendant Najera's residence was a safe containing documented LVMPD buy funds used by
26 Mr. Soto to purchase narcotics from Defendant Garcia. *Tr. of Grand Jury, The State of Nevada*
27 *v. Najera, Garcia, and Madrigal*, No. C356361 at 9:16-21 (Nev. 8th Jud. Dist., 2021). Pursuant
28 to a search warrant officers recovered from Defendant Madrigal's warehouse bags of hemp

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

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

14 **I. LEGAL STANDARD FOR DISCHARGE BY WRIT OF HABEAS CORPUS**

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

17 NRS 34.500 Grounds for Discharge in Certain Cases

18 3. When the **process is defective** in some **matter of substance** required by
19 law, rendering it void.

20 7. When the petitioner has been committed or indicted on a criminal
21 charge...**without reasonable or probable cause.**

22 Where the alleged defectiveness of the process is attributable to governmental
23 misconduct, the dismissal of an indictment is not warranted unless a defendant can
24 demonstrate “substantial prejudice” that exists only when there is a “...reasonable probability
25 that the outcome would have been different absent the misconduct”. *Lay v. State*, 110 Nev.
26 1189, 1198, 886 P.2d 448, 454 (1994). With respect to Grand Jury proceedings the outcome
27 of which there must be reasonable probability is the Grand Jury’s failure to indict any
28 Defendant on any or all counts contained in the indictment.

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

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

4 ARGUMENT

5
6 Defendants alleges that his imprisonment and/or restraint is unlawful for two reasons:
7 (1) the State's presentation of evidence contained substantive procedural errors; and (2) the
8 indictment, either in whole or in part, is not supported by probable cause. Yet even if the State
9 made all alleged procedural errors, which the State does not concede, the relevant inquiries in
10 this case remain (1) whether any alleged procedural error was sufficient to allow for a
11 reasonable probability that the Grand Jury would not have indicted on any or all of the counts
12 charged absent the error; and (2) whether any count charged is unsupported by probable cause.
13 The State contends that any procedural error related to the Grand Jury proceedings was
14 harmless because there is nothing to substantiate the reasonable probability of a contrary
15 outcome in the absence thereof and all counts charged are supported by probable cause.

16 **I. NO ALLEGED PROCEDURAL ERROR INVADED THE INTEGRITY OF** 17 **THE GRAND JURY**

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

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

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

6 Further Defendant Najera falsely asserts the Grand Jury instructions contain a
7 commingling of the element “THC” with “concentrated cannabis”. A proper reading of the
8 proposed indictment confirms that the reality is instead an omission of “concentrated
9 cannabis” prior to the specification of the form thereof that renders Defendants’ in violation
10 of NRS 453.339(1)(a) in the instant case. Thus, this omission falls under the examination of
11 the indictment’s sufficiency. The sufficiency of an indictment is to be determined under
12 practical rather than technical considerations where the test is not whether the indictment could
13 have been more definite and certain. *Laney v. State*, 86 Nev. 173, 178, 466 P.2d 666, 669
14 (1970) (citing *Clay v. United States*, 326 F.2d 196 (10th Cir. 1963)). Instead, the question is
15 whether the indictment is so insufficient as to fail to provide the accused with the adequate
16 notice of the charged offense(s) required to permit the defendant to properly mount a defense.
17 *Id.* There is no basis for asserting this claim at this juncture and the aforementioned
18 examination is properly reserved for trial.

19 **b. Neither Detective’s Misstatement nor the State’s Failure to Correct it was**
20 **Prejudicial**

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

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

21 **II. PROPER ADMISSION OF KELLY BURNS' NRS 50.320 DECLARATION**

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

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

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

16 Defendant contends without legal authority that the State may not pose leading
17 questions before the Grand Jury. The United States Supreme Court emphatically distinguished
18 Grand Jury proceedings from criminal trials when it pronounced the Grand Jury process
19 "generally is unrestrained by the technical procedural and evidentiary rules governing the
20 conduct of criminal trials". *United States v. Calandra*, 414 U.S. 338, 343 (1974). NRS
21 50.115(3)(a) provides:

22 NRS 50.115 Mode and Order of Interrogation and Presentation

23 3. Except as provided in subsection 4:

24 (a) Leading questions may not be used on the direct examination of a witness
25 without the **permission of the court**.

(b) Leading questions are permitted on cross-examination.

26 Congruent with statutory interpretation's goal of advancing legislative intent, the Nevada
27 Supreme Court has repeatedly rejected statutory interpretation that "...renders language
28 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.

1 *Sessions v. State* dictates that ambiguity between NRS 453.096(1) and NRS 453.096(2)
2 must be resolved in favor of the accused, 106 Nev. 186, 189, 789 P.2d 1242, 1243 (1990), as
3 dictated by the rule of lenity. However most statutory provisions bear some element of
4 ambiguity. The rule of lenity is therefore inapplicable unless there is a "grievous ambiguity or
5 uncertainty in the language and structure of the Act," *Huddleston v. United States*, 415 U.S.
6 814, 831, 39 L. Ed. 2d 782, 94 S. Ct. 1262 (1974). Furthermore this "grievous ambiguity"
7 must persist after the court has looked to every source from which the court can gain the
8 requisite insight to resolve it, *United States v. Bass*, 404 U.S. 336, 347, 30 L. Ed. 2d 488, 92
9 S. Ct. 515 (1971) (quoting *United States v. Fisher*, 6 U.S. 358, 2 Cranch 358, 386, 2 L. Ed.
10 304 (1805)), such as legislative history, purpose and/or acquiesce. An examination of the
11 statutory language reveals legislative purpose that invalidates the rule of lenity's application
12 to the instant case.

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

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

26 Convictions based on circumstantial evidence have been and are routinely upheld in
27 Nevada. *See Gibson v. State*, 96 Nev. 48, 50 (1980); *Merryman v. State*, 95 Nev. 648, 649
28 (1979); *Dutton v. State*, 94 Nev. 567, 568 (1978); *Edwards v. State*, 90 Nev. 255, 258 (1974);

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

26 **d. Circumstantial Evidence Properly Established Constructive Possession**

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

1 (1973). First, in instructing on simple possession *Glispey* provides “For instance,
2 possession may be imputed when the contraband is found in a location which is immediately
3 and exclusively accessible to the accused and subject to her dominion and control”. *Id.* at 624.
4 Again relying on the Nevada Supreme Court’s reverence of the statutory interpretation canon
5 that preserves linguistic value, inclusion of the phrase “for instance” in conjunction with the
6 word “may” clarifies that this is a discretionary sentiment; the Court is identifying one of
7 potentially numerous means by which possession may be imputed. Mandatory language is
8 evident in the dictate “The accused has constructive possession only if she maintains control
9 or a right to control the contraband”. *Id.* It is this citation that restricts the determination of
10 constructive possession. In the first part of the Grand Jury proceedings the State established
11 Defendant Najera’s “residence” was located at 1445 Stone Lake. *Tr. of Grand Jury, The State*
12 *of Nevada v. Najera, Garcia, and Madrigal*, No. C356361 at 13:9-13 (Nev. 8th Jud. Dist.,
13 2020). The State further established Defendant Najera’s ownership of the residence by
14 describing a safe located in the apartment that contained a US passport and driver’s license in
15 Defendant Najera’s name. *Tr. of Grand Jury, The State of Nevada v. Najera, Garcia, and*
16 *Madrigal*, No. C356361 at 70:1-2 (Nev. 8th Jud. Dist., 2021). This testimony coupled with the
17 absence of any evidence to belie the contention constitutes circumstantial evidence that allows
18 for the inference that Defendant Najera maintained control of his residence. The inference of
19 Defendant Najera’s control of his residence establishes he had constructive possession of the
20 ODV positive cocaine because the State may present circumstantial evidence from which
21 “...the jury may draw reasonable inferences.” *Kinsey v. Sheriff*, 87 Nev. 361, 363, 487 P.2d
22 340, 341 (1971).

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

1 Najera was the sole occupant of the residence. A sole occupant necessarily bears ownership of
2 and/or dominion over his residence. A defendant's sole ownership of or dominion over a
3 searched premises establishes a rebuttable presumption of the defendant's constructive
4 possession of contraband recovered from said premises. *United States v. Kincaide*, 145 F.3d
5 771, 782 (6th Cir. 1998); *United States v. Molina*, 443 F.3d 824, 829 (11th Cir. 2006); *United*
6 *States v. Bustamante*, 493 F.3d 879, 889 (7th Cir. 2007), citing *United States v. Kitchen*, 57
7 F.3d 516, 521 (7th Cir. 1995); *United States v. Brannon*, 218 F. App'x 533, 536 (7th Cir. 2007);
8 *United States v. Wright*, 739 F.3d 1160, 1168 (8th Cir. 2014). The proper forum to rebut this
9 presumption is a trial not a writ of *habeas corpus*.

10 Defendant Najera also claims that cocaine is a Schedule II offense. Defendant is
11 incorrect. Under NRS 453.510 (1) and NRS 453.510 (8), free base cocaine (powder and crack)
12 is a Schedule I controlled substance. Defendant is incorrect. Finally, Defendant's petition
13 takes issue with the State's failure to disprove the possibility that Defendant Najera shared his
14 residence with other persons. The State presented its theory of possession to the Grand Jury.
15 The burden of refuting the State's theory or proving alternate theories of possession rests with
16 the defense at trial because "the State need not negate all inferences which might explain away
17 the criminal conduct but need only present enough evidence to support a reasonable inference
18 that the accused committed the offense." *Kinsey* at 341; *Sheriff v. Milton*, 109 Nev. 412, 414,
19 851 P.2d 417, 418 (1993). Defendant's pre-trial petition constitutes a thinly veiled attempt to
20 ask the Court to preliminarily adjudicate factual disputes that may arise during trial. Such a
21 request is contrary to the provinces of a Grand Jury and a petition for writ of *habeas corpus*.
22 Defendant may appeal a conviction under the relevant statutes if Defendant continues to
23 contend that his conduct does not contravene the relevant statutes' provisions. Presently there
24 is no basis for the Defendant's Petition because the State presented the slight or marginal
25 evidence required to sustain every charge contained in the Grand Jury indictment.

26 //

27 //

28 //

1 **CONCLUSION**

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

4 DATED this 3rd day of November, 2021.

5 Respectfully submitted,

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

9 BY /s/ Tina Talim
10 TINA TALIM
11 Chief Deputy District Attorney
12 Nevada Bar #009286

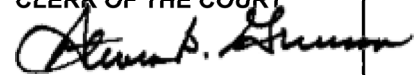
13 **CERTIFICATE OF ELECTRONIC TRANSMISSION**

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

16 MICHAEL PARIENTE
17 michael@parientelaw.com

18 BY /s/ E. Del Padre
19 E. DEL PADRE
20 Secretary for the District Attorney's Office
21
22
23
24
25
26
27

28 TT/ed/HIDTA



1 **IND**
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 TINA TALIM
6 Chief Deputy District Attorney
7 Nevada Bar #09286
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

12 THE STATE OF NEVADA,
13
14 Plaintiff,

15 -vs-

16 **JESUS NAJERA, #5339086**
17 EDUARDO FABIAN GARCIA #1489589,
18 NORBERTO LEON MADRIGAL
19 #1950096

20 Defendant(s).

CASE NO: C-21-356361-1

DEPT NO: XVII

INDICTMENT

21 STATE OF NEVADA }
22 COUNTY OF CLARK } ss.

23 The Defendant(s) above named, JESUS NAJERA, EDUARDO FABIAN GARCIA,
24 NORBERTO LEON MADRIGAL, accused by the Clark County Grand Jury of the crime(s)
25 of SALE OF CONTROLLED SUBSTANCE (Category B Felony - NRS 453.321 - NOC
26 51090), TRAFFICKING IN CONTROLLED SUBSTANCE (Category C Felony - NRS
27 453.339.1a - NOC 60433), CONSPIRACY TO VIOLATE UNIFORM CONTROLLED
28 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:

//

1 COUNT 1 - SALE OF CONTROLLED SUBSTANCE

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

4 COUNT 2 - SALE OF CONTROLLED SUBSTANCE

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

7 COUNT 3 - SALE OF CONTROLLED SUBSTANCE

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

10 COUNT 4 - TRAFFICKING IN CONTROLLED SUBSTANCE

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

25 COUNT 5 - TRAFFICKING IN CONTROLLED SUBSTANCE

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

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

12 COUNT 6 - CONSPIRACY TO VIOLATE UNIFORM CONTROLLED SUBSTANCES
13 ACT

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

19 COUNT 7 - UNLAWFUL PRODUCTION OR PROCESSING OF MARIJUANA

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

23 //

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1 COUNT 8 - POSSESSION OF CONTROLLED SUBSTANCE

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

4
5 DATED this 26th day of May, 2021.

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

9 BY

10 
11 TINA TALIM
12 Chief Deputy District Attorney
13 Nevada Bar #09286

14 ENDORSEMENT: A True Bill

15
16 
17 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

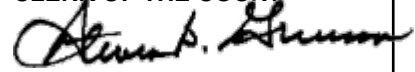
Additional Witnesses known to the District Attorney at time of filing the Indictment:

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

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.

1 (boldness and italics added).

2 The plain language of ECDR 2.25 requires the dilatory party to file a motion and
3 overcome the delay by demonstrating excusable neglect.
4

5 The Nevada Supreme Court in *In re Est. of Black*, 132 Nev. 73, 367 P.3d 416
6 (2016) has held EDCR 2.25 requires district courts must find excusable neglect in order
7 to grant an extension after a deadline is missed. “Whether extending time is appropriate
8 based on ***excusable neglect*** is a factual inquiry that the district court *must* undertake,”
9 *citing Moseley v. Eighth Judicial Dist. Court*, 124 Nev. 654, 668, 188 P.3d 1136, 1146
10 (2008). *Id.*, 132 Nev. at 78. (boldness and italics added.) “‘Must’ is mandatory, as
11 distinguished from the permissive ‘may.’” *In re Nev. State Eng’r Ruling No. 5823*, 128
12 Nev. 232, 239, 277 P.3d 449, 454 (2012). The State has not sought an extension under
13 EDCR 2.25, thus the State is not entitled to any relief under EDCR 2.25.
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17 The State’s return is 44 days late. The State never filed the required request for
18 extension. The State was given 60 days to file its Return which became due on
19 September 20, 2021. The State’s delay and its improper attempt to file its dilatory
20 Return is inexcusable and a blatant disregard of EDCR 2.25 and this Court’s Order
21 entered July 20, 2021. Since the State has not complied with EDCR 2.25, this Court
22 must strike the State’s dilatory Return.
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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

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

P A R I E N T E L A W F I R M . P . C .

3960 Howard Hughes Pkwy., Suite 615

Las Vegas, NV 89169

PHONE: (702) 966-5310 | FAX: (702) 953-7055

WWW.PARIENTELAW.COM

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EXHIBIT D-1

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

CERTIFICATE OF SERVICE

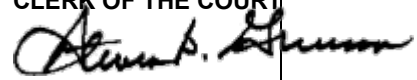
I HEREBY CERTIFY that on the 8th day of November, 2021, that I electronically filed the foregoing Motion with the Clerk of the Court by using the electronic filing system.

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.



RTRAN

DISTRICT COURT
CLARK COUNTY, NEVADA

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

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

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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)

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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

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

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

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

6 MR. PITARO: And as to Madrigal.

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

8 THE COURT: Well, I can tell you that it's Judge Eller's
9 position and which I'm going to adopt that excusable neglect in filing the
10 motion late if there's no prejudice to the Defendants would justify her
11 filing those late, so I'm going to deny the motion to strike.

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

14 THE COURT: I can't hear you.

15 MR. PITARO: Hold on.

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

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

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

20 MR. PARIENTE: Your Honor --

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

23 MS. TALIM: Yes, Your Honor. Please.

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

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

2 THE COURT: You can do that.

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

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

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

8 THE COURT: Certainly.

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

12 The State had to comply with EDCR 2.25 because they --
13 because their request was made after the expiration of their deadline. In
14 fact, EDCR 2.25(a) says a request for extension made after the
15 expiration of the specified period, shall not be granted unless the moving
16 party, attorney, or other person demonstrates that the failure to act was
17 the result of excusable neglect. They didn't even comply with just filing
18 a motion to ask for extending time. All they did was file the return.

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

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

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

3 THE COURT: Not really.

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

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

7 THE COURT: Can you hear?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19 MR. PARIENTE: That's not true.

20 MS. TALIM: That's absolutely true.

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

22 MS. TALIM: And that's happened.

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

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

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

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

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

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

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

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

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

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

17 THE COURT: Yes.

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

22 What I did was at the first hearing, I contacted the State and I
23 said these are complicated issues. I as a courtesy said you should have
24 60 days to do an opposition and we're going to ask for 30 days to do a
25 reply. As the Court knows from many years of being on the bench,

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

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

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

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

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

23 MR. PITARO: And Your Honor --

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

1 THE COURT: I saw the supplement.

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

5 THE COURT: Well --

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

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

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

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

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

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

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

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

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

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

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

12 THE COURT: Well, I find no prejudice --

13 UNIDENTIFIED SPEAKER: Hello, Your Honor.

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

16 MS. TALIM: Thank you, Your Honor.

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

19 MS. TALIM: Whenever --

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

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

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

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

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

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

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

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

14 MS. TALIM: Perfect.

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

19 THE COURT: Well, you want --

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

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

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

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

3 THE COURT CLERK: January --

4 MR. CASTILLO: And Your Honor --

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

6 THE COURT: That'll be the order.

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

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

12 MS. TALIM: Thank you, Your Honor.

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

14 MS. TALIM: Thank you.

15 THE COURT CLERK: -- to be heard.

16 MR. PARIENTE: Thank you, Your Honor.

17 MR. CASTILLO: Thank you.

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

19 *****

20
21 ATTEST: I do hereby certify that I have truly and correctly transcribed
22 the audio/video proceedings in the above-entitled case to the best of my
23 ability.

24 

25 Brittany Amoroso
Court Recorder/Transcriber